

Oxford Handbooks Online

Noncombatant Immunity and War-Profiteering

Saba Bazargan

The Oxford Handbook of Ethics and War (*Forthcoming*)

Edited by Seth Lazar and Helen Frowe

Online Publication Date: Oct
2015

Subject: Philosophy, Social and Political Philosophy

DOI: 10.1093/oxfordhb/9780199943418.013.12

Abstract and Keywords

The principle of noncombatant immunity prohibits warring parties from intentionally targeting noncombatants. I explicate the moral version of this view and its criticisms by reductive individualists; they argue that certain civilians on the unjust side are morally liable to be lethally targeted to forestall substantial contributions to that war. I then argue that reductivists are mistaken in thinking that causally contributing to an unjust war is a necessary condition for moral liability. Certain noncontributing civilians—notably, war-profiteers—can be morally liable to be lethally targeted. Thus, the principle of noncombatant immunity is mistaken as a moral (though not necessarily as a legal) doctrine, not just because some civilians contribute substantially, but because some unjustly enriched civilians culpably fail to discharge their restitutionary duties to those whose victimization made the unjust enrichment possible. Consequently, the moral criterion for lethal liability in war is even broader than reductive individualists have argued.

Keywords: noncombatant immunity, war-profiteers, unjust enrichment, compensation, restitution

1. Background

1.1. Noncombatant Immunity and the Combatant's Privilege in International Law

In Article 155 of what came to be known as the 'Lieber Code', written in 1866, Francis Lieber wrote '[a]ll enemies in regular war are divided into two general classes—that is to say, into combatants and noncombatants'.¹ As a legal matter, this distinction does not map perfectly onto the distinction between members and nonmembers of an armed force. For example, armed forces typically include medics and religious personnel, yet they do not qualify as combatants. Likewise, the distinction between combatants and noncombatants does not map perfectly onto the distinction between those who take up arms in a war and those who do not. For example, unlawful combatants are sometimes characterized as 'civilians who take up arms without being authorized to do so by international law'.² On this view, 'just as guerrillas and militias are a subset of "combatant", unlawful combatants are a subset of "civilian"'.³

In international law, bearing the status of 'lawful combatant' (from here on, I refer to them simply as 'combatants') comes with considerable privileges. According to Article 43.2 of Additional Protocol I to the Geneva Convention, combatants 'have the right to participate directly in hostilities'. This means that it is legally permissible for them to engage in hostilities, and it is legally permissible to target them, provided that they have not surrendered, been captured, been injured, or shipwrecked.⁴ This has come to be known as the '*combatant's privilege*'. International and common law prohibits warring parties from intentionally targeting noncombatants.⁵ Civilians will almost always qualify as noncombatants. (Exceptions include cases in which a military leader is also the head of state.) But what is a civilian? Article 50.1 of Additional Protocol I defines civilians negatively. It states that any person who is not a

member of (1) the armed forces of a party to the conflict; (2) other volunteer corps, including organized resistance movements; (3) regular armed forces who profess allegiance to a government not recognized by the detaining power; or (4) a *levée en masse*, is a civilian. Under Additional Protocol I, 'making the civilian population or individual civilians the object of attack' constitutes a grave breach—a war crime of such seriousness as to entitle any state to exercise jurisdiction over any perpetrator.⁶ This legal doctrine forbidding the targeting of civilians is the *principle noncombatant immunity*. Killing civilians *collaterally* (i.e., as an unintended but foreseen side effect of targeting a military (or dual-use) installation) is acceptable if the civilian casualties are not disproportionate to the anticipated military advantage that the attack affords.

In international law, the legal permission to target combatants is based on their status, rather than on their conduct, in that it is not whether she poses a threat that makes a combatant a permissible target but rather the very fact that she qualifies as a combatant (although if a civilian participates directly in hostilities she *eo ipso* qualifies as a combatant). Many combatants—such as cooks, administrative personnel, grave-registration teams, musicians, lawyers, and the like—contribute to the war effort in ways that do not pose threats to anyone. Yet since they qualify as combatants, they 'may be attacked at any time until they surrender or are otherwise hors de combat, and not only when actually threatening the enemy'.⁷ This means that a combatant remains a combatant even when she is not actually fighting. A soldier bivouacked and sleeping retains her status as a combatant, which means she is a legitimate target.

As with the combatant's privilege, the basis of the principle of the noncombatant immunity lies not in the individual's conduct. What makes noncombatants illegitimate targets of attack is not the fact that they generally do not contribute substantially to the war being fought; influential journalists, lobbyists, and politicians advocating for the war, as well as scientists and engineers working on technologies likely to be used in weapons substantially furthering the war effort, are (for example) not legally targetable in spite of their contributory conduct.

1.2. The Orthodox and the Revisionist Views

So far, I have described, if only roughly, the legal versions of the combatant's privilege and the principle of noncombatant immunity. Many assume that the morality of war parallels international law, at least with respect to laws articulating the legal permission to target combatants and the legal prohibition against targeting not noncombatants. I call this assumption the '*orthodox view*'.

Among those who defend the orthodox view, the most influential is Michael Walzer. In his book *Just and Unjust Wars*, he argued that civilians cannot be permissibly targeted since they are *materially* innocent—which is to say that they are harmless. The presumption is that it is morally wrong to target materially innocent people but permissible to target those who are *not* materially innocent. Walzer argues that no active-duty combatants during wartime are materially non-innocent, since they are all 'currently engaged in the business of war'.⁸ Even those whose actual contribution to the war is small or nonexistent are not materially innocent; by virtue of their status as combatants, they have made themselves dangerous. Accordingly, all combatants are morally permissible targets of attack by other combatants. Although civilian journalists, lobbyists, politicians, scientists, and engineers might individually contribute substantially to a war, they are not themselves dangerous men or women; moreover, their contributions to the war do not fall under the aegis of a state's (or substate actor's) attempt to project violent force.

This argument in favour of the orthodox view has been subjected to withering criticism. Jeff McMahan is the most prolific of these critics. He has argued that material non-innocence is neither a necessary nor a sufficient condition for losing one's right not to be killed. Those who pose morally justified threats do not thereby lose their right not to be killed, no more than the victim of a culpable aggressor attempting murder loses her right not to be attacked once she engages in necessary and proportionate self-defence against the culpable aggressor. Correspondingly, combatants fighting in accordance with the rules of war in furtherance of morally just aims cannot be permissibly targeted, as a matter of morality. Although such combatants are not *materially* innocent, they are nonetheless *morally* innocent: they have done nothing to lose their right not to be killed. And it is an individual's moral innocence, rather than her material innocence that (partly) determines whether she is liable to be killed.

Combatants acting in furtherance of a war's unjust aims are, on the other hand, *morally liable to be killed*: they have forfeited their right not to be killed, so killing does not wrong them, provided that doing so is necessary to achieve a good of sufficient importance. Combatants participating in furtherance of an unjust aim are morally liable

to be killed because such a combatant (provided she is a full-fledged agent—e.g., she is not a child soldier) is responsible for her contribution to an end which (by hypothesis) violates the rights of others. Even if such a combatant limits her targets to military installations and personnel, she acts impermissibly because those who are only defending against an unjust aim retain their right not to be harmed. So the orthodox view is mistaken in its claim that all combatants are morally entitled to kill enemy combatants. On McMahan's '*revisionist view*', only combatants fighting against an unjust cause (or against a just cause pursued by unjust means) are entitled to target enemy combatants.⁹

There have been attempts, aside from Walzer's, to defend some version of the orthodox view.¹⁰ For instance, Thomas Hurka has argued that enlistees waive the right not to be killed. He writes: 'by voluntarily entering military service, soldiers on both sides freely took on the status of soldiers and thereby freely accepted that they may permissibly be killed in the course of war'.¹¹ This is because, he claims, 'the common conception of military status' includes the combatant's privilege—that is, an entitlement to target enemy combatants. One problem with this view, however, is that although it might accurately describe the intentions and expectations of *some* who voluntarily join the military, there is little reason to believe that this is true of *all* enlistees.¹² In any case, even if all combatants by virtue of enlisting waive their rights not to be killed, this would only mean that they do not wrong one another by attempting to kill one another. But they still contribute to the achievement of that unjust aim, which makes what they do morally impermissible, again suggesting that the combatant's privilege is mistaken at the level of morality.¹³

On the revisionist view, the moral basis of the prohibition against targeting *noncombatants*—that is, the principle of noncombatant immunity—is that everyone has by default a right not to be killed and an even more stringent right not to be killed intentionally. According to the revisionist view, noncombatants typically do nothing to forfeit that right. Whether an individual has done something to forfeit such a right depends on her degree of responsibility for the wrong which harming her helps avert. As Robert Holmes suggests, the degree of responsibility an individual bears for a war varies with the degree and kind of contribution that individual makes to the war, with 'initiators of wrongdoing (government leaders)' and 'agents of wrongdoing (military commanders and combat soldiers)' bearing the most responsibility and the paradigmatically innocent bearing the least.¹⁴ Because the typical civilian bears very little to no responsibility for the wrongs committed by her government, she is not morally liable to be targeted in order to avert those wrongs.

But the claim that civilians are not liable to be killed (whereas noncombatants are) is a statistical claim in that only typically will noncombatants be less responsible than combatants. Although the aforementioned influential journalist, lobbyist, politician, scientist, or engineer, are civilians, they make (by hypothesis) substantial contributions to the unjust war their government is fighting; on the revisionist view, they would be morally liable to be targeted if doing so is necessary to save any number of innocent lives. So noncombatants do *not* enjoy blanket immunity from intentional attack on the revisionist view. Rather, only those who are not responsible for substantial contributions to the war are immune (in the sense that they are not morally liable to be killed).

This does not mean that influential pro-war lobbyists, politicians and the like can be targeted at whim in war—rather, on the revisionist view, they can be targeted only if doing so is the least harmful way of saving (any number of) innocent lives. So targeting influential pro-war pundits on the opposing side is likely to be unjust, if only because their violent deaths are more likely to aid their cause than avert further harm. But those scientists and engineers contributing to an unjust war (and who are in a position to recognize that what they are doing is wrong) would indeed be morally liable to be killed *if* their contributions wrongfully endanger innocents and *if* killing the contributors is necessary to avert that threat.¹⁵ McMahan has defended this sort of view.¹⁶ Cecile Fabre similarly suggests that although contributing civilians are morally immune from intentional attack, this is only for highly contingent reasons—namely, that most wars include both just and unjust aims and that civilians typically cannot know which aims their contributions are promoting.¹⁷

1.3. Challenges to the Revisionist View

The revisionist view faces a number of challenges. According to the revisionist, culpability is not a necessary condition for liability to a lethal harm. This view might strike some as draconian; if an individual contributes to a wrongful threat nonculpably, then she cannot be liable to lethal harms. If this criticism is correct, then many combatants fighting in furtherance of an unjust cause will qualify as morally innocent. This is because the indoctrination, manipulation, and coercion of these young and consequently cognitively underdeveloped

combatants by their culture, state, and military might serve as partially excusing conditions combining to substantially diminish their culpability for what they do.¹⁸ Some have pointed out that a significant portion of combatants—such as those who occupy highly subsidiary support roles, as well those involved in actual combat but who are ineffective as fighters—might contribute no more to the war effort than the typical civilian does.¹⁹ If those combatants are nonetheless liable to be attacked, then the threshold of contributory responsibility is so low that the typical civilian will be liable as well. If we raise the threshold of contributory responsibility so that the typical civilian is *nonliable*, then the highly subsidiary and the ineffective combatants will be nonliable as well. The former option has the absurd consequence of rendering the typical civilian liable to be targeted. The latter option invites a version of pacifism, insofar as it is pragmatically impossible to conduct a war requiring us to discriminate between liable and nonliable combatants, if their liability is grounded in their individual conduct.²⁰ This problem has been dubbed the ‘*responsibility dilemma*’.²¹

In an attempt to diffuse the dilemma, McMahan argues that the constraint against killing intentionally is not violated when we reasonably although mistakenly believe that the target is liable to be killed.²² If this is correct, the weight assigned to the deaths of nonliable combatants is discounted substantially, thereby averting the pacifism horn of the responsibility dilemma. To diffuse the ‘total war’ horn of the dilemma, McMahan argues that when civilians causally contribute to unjust wars fought by their governments, they typically do so through tax payments serving a plurality of worthy aims that justify these payments, thereby precluding liability to defensive action.²³ Bradley Strawser, in defence of the revisionist view, suggests an emendation: abandoning the binary ‘combatant or noncombatant’ distinction, in favour of a conflict-sensitive rubric that tracks differing levels of liability based on what he calls their ‘reasonable perceived liability’. He writes that ‘[t]he distinctions could range from 1st, 2nd and 3rd-degree combatants and the like (or more, as needed) and similar degrees for non-combatants’.²⁴ I have argued that supplementing the revisionist view with an account of complicitous liability provides a basis for thinking that nearly all combatants—including ineffective and highly subsidiary ones—bear complicitous liability.²⁵

Others have maintained that we cannot justify intentional killing in war by appealing to the liability of combatants. For example, Janina Dill and Henry Shue argue that even if combatants are liable to some harms due to their individual contributions to an unjust cause, most of them do not contribute enough to make *lethal* attack necessary and proportionate.²⁶ Since a liability-based justification is unavailable, a war is morally justified only if it is the lesser evil relative to refraining from waging the war. And since the enemy combatants are not liable to be killed, the calculation determining whether the war is a lesser evil must weigh the deaths of enemy combatants as heavily or nearly as heavily as the deaths of enemy civilians.²⁷ Dill denies, however, that this restrictive view of war should be enshrined in international law since, on her view, it is not to the role of international law to vouchsafe the moral acceptability of war.²⁸ Nonetheless, if wars are only morally justified as the lesser evil, then a version of contingent pacifism is likely correct: given how wars are actually fought, it is practically impossible for any wars to be just. Larry May is the most prominent supporter of this view.²⁹

Although I think the revisionist view is largely correct, it is critically incomplete. Implicit in this picture of the morality of war is the presumption that causation is a necessary basis for liability to lethal harms. Accordingly, the discussion of liability in war has focused on *what sort* of causal contributions serve as a basis for liability to be killed and *how great* that contribution must be to entail such liability. In these discussions, the possibility that civilians can be liable to be killed without having causally contributed to the war fought by their government has been met with scepticism, partly because it has been assumed that such arguments would have to rely on accounts of vicarious or collective responsibility. Some have defended this sort of expansive view of responsibility. In particular, Virginia Held³⁰ and Igor Primoratz³¹ have argued that civilians in a democracy who support their government’s unjust war can, at least in principle, be liable to be attacked, even if their causal contributions to the war are minimal or nil.

But I will argue for a noncausal basis of liability to lethal harms, one that does not rely on any notions of vicarious or collective responsibility. Specifically, I will argue that certain kinds of *war-profitteers*—those who buy or sell in substantial quantities resources wrongfully misappropriated from a civilian population through armed force—will sometimes be morally liable to be killed even if they have done nothing to contribute to that war. Such a war-profitteer can be liable on the grounds that she has failed in her duty of restitution toward the relevant civilians insofar as she is under a duty to return to the civilians the wrongfully misappropriated resources (or its equivalent value). A failure to discharge a duty of restitution does not usually render an unjust beneficiary liable to lethal corrective force because (1) there are usually alternative corrective mechanisms available, (2) harming her will

not prevent the wrong that made the unjust beneficiary's enrichment possible, and (3) her failure does not result in or contribute to lethal harms. But I will argue that when these conditions do not obtain, a culpable failure to discharge a restitutionary duty can indeed render a person liable to lethal harm. And these conditions often fail to obtain in war.

So, in one sense, the revisionist view is not revisionist enough: we ought to abandon the notion that causally contributing to war is a necessary condition for moral liability to lethal harm. Victor Tadros has argued in favour of a position like this. On his view, noncombatants are made liable if they benefit from the unjust activity of combatants—activity for which the noncombatants are intended beneficiaries.³² Restricting our defensive violence solely to unjust combatants increases the chances that such combatants will be harmed, in comparison to a case in which we achieve our defensive goal by dispersing the defensive violence so that it is not concentrated solely on combatants. In deciding how to disperse a fixed amount of necessary defensive violence, it is unfair to 'rule out' the intended beneficiaries of those whose unjust acts necessitated the resort to violence. In such a case, 'Fairness determines the distribution of liability, and fairness militates against a strict causation requirement on liability'.³³ Still, Tadros explicitly denies that noncombatants are liable to be killed—only that they are liable to sublethal harms.

I argue, on the other hand, that certain noncontributing civilians are indeed morally liable to be lethally targeted in war. Thus, the principle of noncombatant immunity is mistaken at the level of morality, not just because some civilians contribute substantially, and not just because civilians are in the intended beneficiaries of their military's unjust acts, but also because some unjustly enriched civilians culpably fail to discharge their restitutionary duties to those whose victimization made the unjust enrichment possible—or so I will argue.

2. On War-Profitteering in General

The term 'war-profitteer' is a vague pejorative. The American government tends to regard war-profitteers as subcontractors who defraud the government in the course of providing goods or services supporting a war. But my use of the term is broader than this; it is inspired by Brigadier General Smedley D. Butler's famed tract 'War Is a Racket'.³⁴ On my usage, a war-profitteer is someone who derives substantial monetary benefits from an unjust war by either (1) selling goods and services supporting the war (this includes defence contractors, private security contractors, and risk-management companies), (2) trading in resources misappropriated in the course of that war, or (3) selling services or goods aimed at postwar reconstruction. I will call (1) 'support-related' war-profitteers, (2) 'resource-related' war-profitteers, and (3) 'reconstruction-related' war-profitteers. These are not clean divisions; some services fall under more than one category. For example, London-based Erinys and Nour USA was granted \$80 million and \$136 million, respectively, to secure Iraq's oil pipelines during the US-led war in Iraq—a service that can be categorized under both support-related and resource-related profiteering.

Note that it is possible to seek and gain substantial monetary benefits from an unjust war without doing so wrongly and thereby without qualifying as a war-profitteer. For example, the unpopularity of the Vietnam War led many potential conscripts to enrol in universities in an effort to avoid the draft; even if this served as a financial boon to certain private universities, those who benefited did not qualify as war-profitteers because they did not derive these benefits wrongly. Of course, this requires an account of what qualifies as a wrongful benefit. (I provide part of such an account in subsequent sections.)

I have distinguished war-profitteers along one dimension: the sort of goods or services they provide (support-based, resource-based, or reconstruction-based). I will also distinguish war-profitteers along another dimension: whether they contribute to the war. One can contribute to a war by aiding materially in the war effort (e.g., by manufacturing armaments) or providing an incentive to wage the war (e.g., by lobbying the government in favour of the war). Consequently, all three types of war-profitteers can be contributory, even if they provide goods or services only *after* hostilities have ended (as is often the case with resource-based and reconstruction-based war-profitteers), provided that, prior to the war, they incentivize the decision to wage the war.

But not all war-profitteers contribute to the war. Although support-based war-profitteers will almost always be contributory, resource-based and reconstruction-based war-profitteers might not be if they were simply unwilling or unable to effectively lobby the government in favour of the war. This is most obvious in cases where the corporation did not exist at the outset of the war (as was the case with Nour USA, which was formed only after the US-led war in Iraq was under way). I will call war-profitteers who derive substantial benefits from a war without

actually contributing to the war 'opportunistic' (rather than 'contributory') war-profitteers.

If the revisionist view is correct, and hence the principle of noncombatant immunity is mistaken, contributory war-profitteers can be morally liable to be killed when doing so is necessary to save the lives of any number of innocents. In what follows, though, I will motivate the even more controversial view that certain *opportunistic* war-profitteers—specifically, resource-based war-profitteers—can be liable to be killed, even though, by definition, they are not contributing to an unjust war (or at least not contributing to a degree any greater than the average civilian does).

3. Examples of Resource-Based War-Profitteers

Resource-based war-profitteers derive monetary benefits from an unjust war by gaining access to resources misappropriated in the course of that war. There are several ways to categorize resource-based war-profitteers. We can distinguish resource-based war-profitteers who benefit by wrongly *selling* resources from those who benefit by wrongly *buying* resources.

Recall that a resource-based war-profitteer is someone who trades in resources misappropriated in the course of an unjust war. A resource-based war-profitteering exporter sells misappropriated resources, thereby earning a profit. The resources are misappropriated in the sense that some or all of their value belongs to civilians who were wrongly dispossessed of the resources or the land from which it was extracted. Suppose, for example, an unjustly aggressing country gains a foothold in the country it is aggressing against; the former now has effective control over resource-rich land properly belonging to the latter. The aggressing country then grants a corporation access to that resource-rich land for development. If a fair portion of the profits derived from the corporation's activities are not transferred to the people of the country to whom the land and resources properly belong, then they are deprived of that to which they have a proper claim. The corporation thereby misappropriates the country's resources and sells them at a profit, which qualifies the corporation as a resource-based war-profitteering exporter.

Of course, what counts as a 'fair share' is debatable. I will pass the buck by simply stating that failing to pay a fair share—*whatever it is*—constitutes a misappropriation of the relevant resources. I am assuming, though, that the relevant territory and the resources in it rightfully belong to at least some of the people of the country in which the territory is located; consequently, even the most ardent libertarian would admit that the 'fair share' is something greater than zero.

But suppose that the people to whom the resource-rich territory properly belongs lacked the means or inclination to develop it in the way necessary to extract its resources. It might seem, then, that they are deprived of nothing if the territory is developed without their consent. Or, more precisely, it might seem that what they are deprived of is limited to whatever value the use of the territory had for the people using it. Suppose they were using it as a park; the corporation, without the people's consent, destroys the park by converting it into a mine, thereby depriving the people of the park. The corporation consequently owes the people a park or its equivalent value in compensation. What it does not owe, one might argue, is a percentage of the value of the resources extracted from the mine; this is because those resources were effectively out of the people's reach in any case. I will respond to this argument in the next section. Until then, I will assume that those who own the territory in which natural resources are located thereby also own the natural resources; consequently, they must be compensated for the extraction or use of those resources.

Historical examples of resource-based war-profitteering exporters abound. For instance, the CIA in 1964 led an invasion of Guatemala, subsequently deposing its democratically elected leader by recruiting, training, and arming 480 mercenary soldiers commanded by an exiled right-wing Guatemalan Army officer. The resulting military junta annulled former President Jacobo Arbenz Guzmán's agrarian reform legislation and new Labour Code, which had threatened American corporate interests—specifically that of the United Fruit Company. Following the coup, the United Fruit Company could cultivate and export its products without properly compensating its workers or the country's people. It thereby qualified as resource-based war-profitteering exporter.

A resource-based war-profitteering *importer* purchases rather than sells misappropriated resources in a war. Suppose an armed group (such as a substate insurgency) unjustly gains effective control over territory with natural resources. It then develops those resources and sells them on the international market in order to finance

arms purchases. In doing so, the group is able to sell the resources at below-market cost by failing to properly compensate the workers extracting the resources or the people living on the acquired territory to whom the resources properly belong. Now suppose that a foreign state or corporation agrees to purchase the resources at below-market cost even though it is common knowledge that the reason why the resources are available at such low cost is that they were procured without adequate compensation. The buyer consequently qualifies as a resource-based war-profitteering *importer* insofar as it is knowingly purchased wrongfully acquired goods and benefitted from doing so.

For example, the Forces Démocratiques de Libération du Rwanda (FDLR)—a Rwandan Hutu rebel group in the east of the Democratic Republic of the Congo opposed to Tutsi influence in the region—has been engaged in armed conflicts since its formation in 2000. The group, through its control of mining fields such as those in the North Kivu province, has been able to smuggle out and sell minerals (such as coltan and cassiterite) to international buyers. In 2008, a United Nations expert panel argued that ‘targeting companies complicit in systematically trading materials with FDLR and promoting due diligence within the international minerals supply chain represent effective ways of cutting off the financial support of FDLR’. These international buyers qualify as resource-based war-profitteering importers.

Sometimes the government of a country colludes with foreign states or corporations in the misappropriation of the country’s resources during an internal armed conflict in order to procure funds in furtherance of defeating the insurgency. If the government is illegitimate, and if it defrauds its people by entering into a deal that denies them their fair share of the resource’s value, and if the foreign state or corporation agrees to the deal without subsequently transferring a fair share of the resource’s value to the people, then it qualifies as a resource-based war-profitteer. The group in question has, after all, obtained access to goods without the consent of the persons to whom the goods belong and without compensating them for the conversion of the goods’ value. For example, in 2000, during the Second Liberian Civil War, Charles Taylor’s regime officially collected only \$6.6 million in taxes from the \$186 million in sales of timber. China and French logging interests were the main importers (46 per cent and 18 per cent, respectively). Much of the untaxed funds were used to finance Charles Taylor’s side of the war against rebel groups. The Chinese and French logging interests qualify as resource-based war-profitteering importers.

We might be inclined to think that unscrupulous private parties who want to benefit from an unjust war will *always* lobby in favour of the war, thereby contributing positively to the decision to wage that war. But this overstates both the influence and instrumental rationality of war-profitteers. Sometimes they are simply not in a position to lobby the government. At other times, attempts to influence decision-making in favour of the war are ineffective. And, in still other cases, they simply fail to recognize that the candidate war will in fact benefit them. Suppose an unjustly aggressing warlord gains control of a lawful government’s alluvial diamond mines, which he intends to mine using forced labour. But flight from local violence has deprived him of enough manpower to run the mines. The warlord failed to foresee this eventuality. Unexpectedly, though, a third-party conglomerate (hitherto unknown by the warlord) expresses interest in leasing access to the mine. The warlord consents. In this case, the third party derives financial benefit from the wrong of wresting control of the diamond mine from the proper authorities, without (ex hypothesi) causing or contributing to that wrong. After all, by the time the third party leases the mine, it is already handily in the warlord’s control. In this case, the third-party conglomerate qualifies as a purely opportunistic rather than a contributory resource-based war-profitteering exporter.

In what follows, I argue that opportunistic resource-based war-profitteers (whether importers or exporters) can bear substantial liability even though they do not contribute to the unjust war from which they benefit.

4. Duties of Redress

Wrongful appropriation of goods can generate duties of redress. If someone wrongfully commits theft and subsequently transfers the property (or converts it to an equivalent value which is transferred) to a third party who knows the property was stolen, the third party thereby acquires a (defeasible) duty to return to the victim the property (or its equivalent value if it has been irretrievably converted, damaged, or lost). The third party has such a duty even if she did not contribute to or cause the theft in the first place. In this case, the wrong for which the third party is responsible is not the theft; as I stipulated, she did not cause or contribute to that wrong. Rather, the

Noncombatant Immunity and War-Profitteering

wrong for which the third party is responsible is the wrong of failing to return to the victim the goods (or its value) that she currently has in her possession.

Now consider a case not of theft, but of *unjust enrichment*. Suppose that Thief steals Victim's car, just to see if she could get away with it. Now in possession of an unwanted car, Thief, on a whim, gives it to Beneficiary as a gift. Beneficiary knows that the car was stolen; she in no way encouraged or otherwise contributed to the theft. Beneficiary then rents the car to others (who are nonculpably ignorant that the car was stolen) as part of a car-rental business, thereby deriving profit from its use. In such a case, Beneficiary is *unjustly enriched* by her wrongful use of the car. She has a duty to return not only the car but the profits that she derived from its wrongful use.

There are several reasons for thinking that the unjustly enriched beneficiary is morally required to disgorge the wrongfully obtained benefits, provided that she knew how it was obtained. The relevant cardinal principle in tort and criminal law in general, and in the law of restitution specifically, is that the defendant should not benefit from her wrongdoing.³⁵ There are, of course, pragmatic reasons for this: we have an interest in ensuring that the expected utility for wrongdoing remains negative. But there are, in addition, moral reasons of interpersonal fairness for requiring the unjust beneficiary to transfer the enriched benefits: deriving gains from flouting moral norms makes those who abide by them comparatively worse off, which is unfair. Suppose that I commit a murder, and I benefit from it by subsequently publishing a book about my heinous deeds. This makes nonmurderers comparatively worse off, which is unfair.

But one might point out that this shows, at best, that Beneficiary should disgorge the profits she made by wrongly using Victim's car—and not that it should be transferred to Victim specifically. After all, Beneficiary has not deprived Victim of anything other than the car (given that Victim was not going to rent out the car herself). It seems, then, that Beneficiary owes Victim only the car, or its value, and not the profit derived from it. But, interestingly, this is not borne out in tort law. According to the so-called '*user principle*',³⁶ the plaintiff is owed the amount that the defendant *would* have been willing to pay for the use of the plaintiff's property. So, for example, where a trespasser has taken a shortcut across a plaintiff's land, she will be required to pay damages assessed by reference to the fee that she should have had to pay to obtain the plaintiff's permission to use the land. Indeed, where a defendant has wrongfully interfered with the plaintiff's property, damages should go to the plaintiff even if it is clear that the plaintiff would not have bargained with the defendant for use of the property.³⁷ In such a case, instead of saying that the unjust beneficiary is liable to restore a benefit to the victim, she is instead liable to transfer the value of a benefit to the victim. That is, the unjust beneficiary has a *restitutionary* (rather than restorative) duty.

If the user principle is correct as a matter of morality, then this suggests that resource-based war-profiteers have a restitutionary duty to those whose resources were misappropriated by developing and exporting the resources without properly compensating those to whom the resources belong or by acquiring such resources through their purchase. This duty is discharged by transferring to the victims a share of the wrongfully derived profits—specifically, the amount that they should have paid *ex ante*.

This restitutionary duty can serve as grounds for liability. Specifically, the opportunistic resource-based war-profiteer is liable to certain harms necessary to force her to transfer the unjustly derived benefits to the victims if she culpably fails to discharge that duty. But what harms are these? In the context of domestic tort law, the harms to which such an individual is liable are highly circumscribed. She might be liable to fines, but she will not be liable to physical harms, such as maiming and killing, even if imposing such harms is necessary to force her to disgorge her wrongly derived benefits. And whatever harms she is indeed liable to suffer in the context of civil society are subject to the constraint of due process, in that the victim cannot take it upon herself to force her wrongdoer to discharge her restorative duty. Rather, the victim must proceed by way of the courts. But outside the context of civil society, the harms to which an individual becomes liable are more substantial and are free of due-process constraints. Consider this example:

Food. In a failed state stricken with famine, and without a functioning criminal justice system or police force, Thief steals Victim's supply of food, which rightfully belongs to Victim (in virtue of having produced it). Without it, Victim will likely die. Thief mistakenly drops the parcels of food while driving away. A third party, Beneficiary, witnesses these events unfold from afar. He takes the food, despite knowing that it belongs to Victim.

Clearly, Beneficiary is obligated to return the food to Victim, even if Beneficiary needs the food to survive. By culpably ignoring this obligation he makes herself liable to proportionate harm necessary to force him to return the food. Now suppose that the only way to force Beneficiary to do so is to kill him. It seems to me that killing Beneficiary would *not* violate his right. That is, Beneficiary is liable to be killed if necessary to force him to return the food to Victim. This is because Beneficiary's culpable failure to return the food is particularly egregious, considering that Victim not only has a right to the food, but also needs it to live.

It is important to recognize that although Beneficiary had no control (we can assume) over Thief's actions, he does indeed have control over whether he returns the food he has wrongfully procured. In this sense, Beneficiary can avert his own culpable wrongdoing, which is a condition that any plausible moral principle must satisfy. Now consider an analogous case of unjust enrichment:

Well. In a failed state stricken with famine and without a functioning criminal justice system or police force, Thief culpably invades Victim's farmland and takes over her well, which properly belongs to Victim. In doing so, Thief badly injures Victim. Thief had planned on using the well himself, but finds he has no use for it. So he instead leases the well to Beneficiary, who knows how the well was obtained. Beneficiary uses the well to water her crops; she consequently derives a substantial profit. Victim, who is penniless, needs resources equivalent to a substantial proportion of those profits to survive the injuries she sustained in the initial attack.

In this case, it seems that Beneficiary has a restitutionary duty to Victim in that Beneficiary is obligated to transfer to Victim (in accordance with the moral version of the user principle) the earnings derived from the well's use equivalent to the market value of renting out the well for that period of time. (Any additional gains made from the well's illicit use would be transferred to Victim or disgorged.)

In general, a restitutionary duty can be overridden or outweighed when the party owing the funds needs it for something much more important than what the party to whom the funds are owed will use it for. But in *Well*, not only is Victim's life at stake, but it is at stake *as a result of* the well's appropriation, which was used as a means to enrich Beneficiary. So the user principle, in combination with (1) the fact that Beneficiary does not need the profits much more than Victim does and (2) the fact that Beneficiary knows that the well was wrongfully appropriated, gives us reason to think that Beneficiary has a restitutionary duty to Victim, even though she did not cause or contribute to Victim's harm.

The upshot is that culpable unjust enrichment can, in certain circumstances, ground duties of restitution. What counts as unjust enrichment, though, depends on how the beneficiary was enriched. Suppose Thief uses the car she stole from Victim by renting it out to unwitting third parties, thereby deriving \$500 in profits. As I have noted, she is unjustly enriched and thereby owes Victim at least \$500. But suppose Thief invests \$500 in a stock the value of which subsequently increases. Does Thief now owe Victim, in addition to the \$500, the increased value of the stock? As a legal matter, in most Anglo-American jurisdictions the answer would be 'no', since those dividends did not arise 'directly' from the wrongful use of the victim's car (this describes the so-called '*direct use*' standard). Instead, Thief would owe only the \$500 in benefits she obtains from the car's use. Virgo Graham contends that such a limiting principle is necessary to prevent 'over-protection of the claimant'.³⁸ But there is another oft-noted consideration in favour of the 'direct use' standard: as the 'dirty' profits derived from renting the car are alloyed with 'clean' money and together used in economic activity yielding returns, which is itself used in further investments, it becomes hard to determine in a principled way how much should be disgorged. And as the economic benefits ramify through the economy (including the benefits derived by those who innocently rented the car), it becomes difficult to force disgorgement without harming third-party innocents.

The problem with the direct use standard, though, is that it is unclear what counts as 'direct use'. Fortunately, I need not address this issue here, since on any existing interpretation of the standard, the profits derived from wrongfully and culpably developing and selling what rightfully belongs to others—such as the resources extracted from one's land—falls within the scope of 'direct use'.

5. Failures of the Duty to Redress

What happens if the unjust beneficiary fails to discharge her restitutionary duty? Suppose she is in a position to recognize that she has such a duty, and she is able to discharge this duty but culpably fails to recognize the moral

importance of doing so.

In certain cases, a culpable failure to discharge a restitutionary duty can make an individual liable to harms exceeding the amount that she owes, if such harms are necessary to force restitution. To motivate this view, return to *Well* example. Recall that Thief badly injures Victim in the course of wrongly appropriating Victim's well, which Thief leases to Beneficiary, who knows that it properly belongs to Victim. I claimed that, under the user principle, Beneficiary owes Victim the unjustly derived proceeds she gains by her wrongful use of the well.

Suppose, though, that Beneficiary refuses to discharge her duty of restitution; she refuses to hand over the proceeds, even though she can easily do so. Suppose further that the only way to force her to disgorge the wrongfully derived benefits is by imposing a cost on her substantially greater than the value of those benefits. Specifically, as a result of her refusal to comply, the only way to gain access to the wrongfully derived benefits from the use of the well is to kill Beneficiary.

It seems to me that, under these circumstances, she is morally liable to be killed if necessary to force her to disgorge the wrongfully derived proceeds. At first, this might seem draconian; Beneficiary is neither the one who forced the well from Victim, nor was she a cause of Victim's injury. More generally, a fiscal duty of redress is typically not so strong as to invite lethal liability in the event that the duty is culpably ignored. But when discharging the duty is necessary to save a life endangered by the very act enabling the beneficiary's unjust enrichment, it seems that the duty to redress is made substantially stronger. The victim already has claim to what the beneficiary unjustly appropriated—the issue here is whether the victim's need *enhances* that claim. We might say that, in general, the greater the legitimate need that the victim has for what the beneficiary unjustly appropriated, the stronger the beneficiary's duty to transfer the benefits. But for those who find this claim too expansive, we can attenuate it by adding the caveat that the victim's legitimate need enhances the strength of the duty to discharge the benefit *only if* the victim's need is a result of wrongful acts enabling the beneficiary's unjust enrichment.

If this is right, Beneficiary's duty can be characterized as a stringent duty to engage in *life-saving* restitution to Victim. *This* is why culpably failing to discharge the duty can make Beneficiary liable to be killed if necessary to force her to do what she culpably chooses not to do. To be clear, the duty to save Victim's life is *not* a duty of beneficence; arguably, a duty of beneficence to save another's life is typically not strong enough to make culpable violators liable to be killed. There might be a 'ceiling' on the harms to which one is liable resulting from violations of the duty of beneficence owed to another individual in need. But there is no analogous ceiling for restitutionary duties.

The duty of beneficence is usually cast as an agent-neutral utilitarian duty to make things go better or best. Critics of consequentialist theories of normative ethics fear that an unrestricted version of this duty might take over our lives by requiring us to forego all unnecessary benefits that, when transferred to others, will do more good impersonally measured. In order to limit the scope of this duty, some have argued that there is a protected sphere of conduct in which we are permitted to act in ways that do not promote what is impersonally best. Put in the jargon of normative theory, we have an agent-centred prerogative to pursue our own projects even if doing so precludes doing what makes things go best. Samuel Scheffler called this the '*liberation strategy*' for limiting the demands of consequentialism.³⁹ Now, if this strategy circumscribes the scope of impersonal utilitarian demands, then it stands to reason that it circumscribes their stringency as well—which means that there are limits to the harms we are liable to suffer for violating the duties of beneficence that survive the liberation strategy. Tadros argues that at least some of our impersonal utilitarian duties are enforceable, in that a failure to abide by them makes it permissible for others to force us to act accordingly. That is to say, we have no right not to be forced to comply with some duties of beneficence, which means we are liable to be so used.⁴⁰ But if the stringency of the impersonal utilitarian duty is circumscribed, then the degree of harm to which we are liable in furtherance of enforcing that duty is limited as well.

But the liberation strategy cannot similarly circumscribe the stringency of *restitutionary* duties. This is because incurring such duties is relevantly within our control. The purpose of the liberation strategy is to prevent the moral demands of the impersonal standpoint from enjoining us to do what would make things go best overall. But there is already a mechanism in place to prevent restitutionary duties from similarly 'taking over' our lives: we can simply refrain from unjustly enriching ourselves. (If we are unable to do so—if it is prohibitively difficult to rejected or disgorge such benefits—then there is no restitutionary duty.) So there is no basis for thinking that the liberation

strategy imposes a ceiling on the stringency of our duties of redress, whereas there *is* a reason for thinking that it imposes a ceiling on the stringency of our duties of restitution.

Absent a principled reason for imposing a ceiling on the stringency of restitutionary duties, there is no reason to think that a culpable failure to discharge such a duty cannot ground lethal liability in certain circumstances. It is important to stress, though, that the claim is *not* that unjustly enriched persons are, in general, morally liable to be killed as a means of forcing them to discharge their restitutionary duties; this would typically violate the constraint of proportionality. But, in the case at hand, killing Beneficiary as a necessary means of forcing her to discharge her duty does not violate the constraint of proportionality because Victim is not only owed the funds, but also needs them to survive because of the harms imposed on her in the course of enabling Beneficiary's unjust enrichment.

What I have claimed, then, is this: if (1) an unjustly enriched individual has restitutionary duties, (2) fulfilling these duties will save the life of the individual to whom it is owed, (3) discharging the duty will not cost the unjust beneficiary significantly more than what refraining from discharging the duty will cost the individual to whom it is owed, (4) the beneficiary culpably refrains from discharging her duties herself, (5) there are no effective judicial institutions to defer to as a means of enforcing the claim against the unjust beneficiary, and (6) there is no way to force the unjust beneficiary to discharge her restitutionary duties other than by killing her, *then* the unjust beneficiary is morally liable to be killed.

One of the conditions that I've claimed must be satisfied in order for an unjust beneficiary to be liable to be killed as a necessary means of enforcing a life-saving restitutionary duty is that the beneficiary must be *culpable*. To be culpable in the relevant sense, she must not only fail to discharge her restitutionary duty, but she must also be in a position to recognize that (1) there is a significant chance that she has appropriated resources rightfully belonging to someone else, (2) appropriating resources rightfully belonging to someone else is wrongful, (3) she owes the wronged persons restitution for having misappropriated their resources, (4) there are means by which to discharge this duty, and (5) in the course of dispossessing the wronged persons of their resources, they were harmed in such a way as to put them in dire need of life-saving assistance.

Of course, in tort law, defendants of civil suits found liable to substantial monetary restitution, and who culpably refuse to pay, cannot be permissibly killed even if this is necessary to force them to pay what they owe. But this is because it has probably never been the case that killing a defendant is necessary to save the plaintiff's life. There are several reasons why this is so. In a well-functioning civil society, there will almost always typically be other means by which the plaintiff can obtain life-saving medical treatment. And, second, even if there aren't such alternative means, it is hard to envision a case in which killing the unjustly enriched defendant would be useful in saving the plaintiff's life. It is no surprise, then, that civil law does not countenance killing as a means of enforcing culpable violations of civil suits—the circumstances in which doing so would be morally permissible are so unlikely to obtain that permitting lethal enforcement is more likely to be abused than it is to prevent injustice. But we shouldn't make the mistake of concluding from the fact that there is no lethal enforcement in civil law that there is, *in principle*, a low ceiling on the harms to which an unjust beneficiary is liable to suffer when she culpably refuses to discharge life-saving benefits to the individual harmed in the course of enabling the beneficiary's unjust enrichment. Outside a well-functioning civil society, as in the cases described in our examples—and in the context of war—circumstances arise in which killing an unjust beneficiary is the only way to save the life of the victim.

6. The Liability of War-Profiters

If what I've argued is correct, resource-based war-profiters can owe redress to those civilians whose resources were misappropriated, even if the profiteer did not contribute to the act that dispossessed the civilians of their resources. That is, *opportunistic* resource-based war-profiters can owe redress to those civilians whose resources were misappropriated. If, in the course of dispossessing them of their land or resources, the civilians' lives are endangered (by way of injury, starvation, disease, dehydration, etc.), and if discharging the restitutionary duty will avert that loss of life, then the restitutionary duty owed to them is especially stringent. This is, again, because the stringency of a restitutionary duty is determined in part by the severity of the harms that discharging that duty will avert; or, more conservatively, it is determined in part by the severity of the harms imposed on the victims in the course of enabling the beneficiary's unjust enrichment.

One way for a resource-based war-profiters to avoid such duties is to simply cease any profitable association with

the corporations or groups through which the profiteer derives her benefits. To the extent that the profiteer has already wrongly derived such benefits, she can discharge her duty of redress through individual financial donations to charities and humanitarian organizations focussed on alleviating the suffering of the victims in the wronged country. If no such charity operates in the relevant region, there might still be other ways to discharge a duty of redress, perhaps by contributing the unjustly derived profits to politically oriented efforts aimed at stopping the war (or unjust operations in the war).

It is important to note that it is not enough for the profiteer to benefit just *any* civilian unjustly victimized by their government; the profiteers have duties of redress to those civilians specifically who were harmed in the course of wrongly appropriating their resources—resources by which the profiteers were enriched. Alleviating the suffering of *other* civilians in the country (or, for that matter, the famine-stricken elsewhere in the world) does nothing to satisfy the duty of redress that a profiteer owes to those whose suffering enabled the profiteer's enrichment, any more than donating to Oxfam would satisfy a duty of redress I have to an individual whose car I illicitly used as part of a rental business.

If there is nothing a resource-based war-profitteer (who has since ceased the activity by which was unjustly enriched) can do to discharge her duties to the relevant victimized civilians, the profiteer is still morally required to disgorge her earnings. This is because there are *two* injustices associated with unjust enrichment. First (in accordance with the cardinal principle that wrongdoers should not benefit from their wrongdoing), it is wrong for the unjustly enriched party to keep and thereby benefit from what she has wrongly derived. Second (in accordance with the user principle), the victim is owed at least part of what the unjustly enriched party wrongly derived from the misappropriation of the victim's resources. So, even if it is prohibitively difficult to address the second wrong, the profiteer can still address the first by disgorging her wrongly obtained benefits.

Resource-based war-profitteers are typically culpable for their wrongful misappropriation of resources and their failure to engage in restitution. Any worldly adult of reasonable intelligence is at least in a position to recognize (even if she fails to do so) that resources appropriated from a zone of armed conflict are unlikely to have been rightfully appropriated. If the territory is under dispute, then any putative claim of ownership by those in control of the territory (including the government) ought to be treated sceptically. Consequently, the profiteer is in a position to recognize that there is a significant chance that she is not entitled to the benefits of selling or purchasing those resources. If it is at all clear who was dispossessed of the resources, and there are means (such as charities) by which to transfer some of those benefits to the rightful party, and the profiteer fails to avail herself of these means, then she is a *culpable* opportunistic resource-based war-profitteer—that is, she culpably fails to discharge her life-saving restitutionary duty. Indeed, even if it is not at all clear who was dispossessed of the resources that the profiteer has appropriated, it is still clear that they do not belong to the profiteer—a failure to disgorge the resources (or its converted value) is itself a culpable failure.

If the resource-based war-profitteer has an opportunity to fulfil her duties of redress to the innocents who were harmed in the course of dispossessing them of their land and yet fails to do so, then the profiteer can be forced to discharge her life-saving duty by killing her, if that is the least harmful means by which to save those lives.

At first, this might seem implausible. Culpably failing to discharge a duty of redress is typically not worth a human life. And even if killing the profiteer will save the lives of innocents who were harmed in the course of dispossessing them of resources that enriched the profiteer, it seems as if this benefit cannot be included in the 'benefits column' of the proportionality calculation determining the degree of harm to which the profiteer is liable because she is not responsible for the harms that those civilians face. After all, by hypothesis, the *opportunistic* resource-based war-profitteer has contributed neither to the harms nor to the actual theft of the resources. So it seems that the amount of harm that can be permissibly imposed upon such a profiteer to force her to discharge her restitutionary duties is small.

But this is an illusion. Suppose the resource-based war-profitteer can discharge her restitutionary duty by writing a cheque to the relevant aid agencies; doing so will save the lives of some of the innocents who were harmed in the course of dispossessing them of the resources that the profiteer has since sold or purchased. If the resource-based war-profitteer has a moral obligation to write that cheque, thereby saving those lives, then the consequences of a failure to do so can indeed be included in the proportionality calculation determining the degree of harm that can be permissibly imposed on the profiteer. This is because the profiteer is obligated to save those lives by

donating the funds. She is so obligated because the benefits she has garnered were unjustly derived from the victimization of those innocents; she consequently owes them restitution that, if so happens, will save lives. If this is right, the profiteer can indeed be preventively killed if doing so is necessary to achieve the good that she was obligated to do and had culpably failed to do. Of course, killing the profiteer won't result in her giving to charity. But if killing her is an effective means to saving the relevant lives of civilians, then killing the profiteer is a means of forcing her to discharge a duty she culpably failed to fulfil on her own—a duty to engage in life-saving restitution. This is, again, consonant with Tadros's account of the relation between duties and liability; he argues that a person's failure to act in accordance with an enforceable duty makes her liable to harms necessary to force her to do what she was obligated to do or to avert the harm that she was obligated to avert.⁴¹

It might be pointed out that once civilians have been killed in the course of dispossessing them of resource-rich territory used to enrich war-profitteers, there is nothing such a profiteer can do to help such civilians; they are, after all, already dead. The profiteer would have, at best, a restitutionary duty to the families of the victims. But since this is not a life-saving restitutionary duty, it cannot be enforced through lethal means. However, the majority of civilian deaths due to warfare come from postcombat conditions, rather than from the use of armaments. Neta Crawford has concluded that 'although it is difficult to estimate the number of those killed indirectly by war with confidence, it is safe to say that indirect deaths outnumber direct deaths'.⁴² And, based on data on armed conflicts between 2004 and 2007, the Geneva Declaration Secretariat suggests that, 'a reasonable average estimate would be a ratio of four indirect deaths to one direct death in contemporary conflicts'.⁴³ Regardless of what the exact figures are, it is clear that the excess morbidity and mortality among civilians resulting from armed conflicts are often, if not usually, the indirect rather than the direct result of combat. This means that even *after* civilians have been dispossessed, through armed conflict, of land and resources, many of them will die preventable deaths from disease, starvation, injuries, and dehydration. Insofar as these deaths are caused in part by the armed conflict dispossessing the civilians of their land and resources, and if aid agencies can prevent at least some of these deaths, then the resource-based war-profitteers unjustly enriched by those resources have a restitutionary duty to transfer the wrongly derived benefits to those aid agencies, thereby saving the lives of those innocents. Consequently, the restitutionary duties of resource-based war-profitteers will not be limited to redressing the families of those wrongly killed in the course of the armed conflict that forcibly dispossessed the victims of their land and resources; in addition, and more importantly, their restitutionary duty will be to *save the lives* of those who will die from the effects of the armed conflict that forcibly dispossessed them of their land and resources.

So far, I have argued that if killing an opportunistic resource-based war-profitteer who has culpably failed to discharge life-saving restitutionary duties to the relevant victims is the only available way of saving the lives of any number of those victims, then the opportunistic resource-based war-profitteer is morally liable to be killed as a way of enforcing her restitutionary duty. But in what circumstances would killing an opportunistic resource-based war-profitteer save the lives the innocents who were harmed in the course of armed conflicts that dispossessed them of their land and resources? Recall that an opportunistic resource-based war-profitteer contributes neither to that specific military operation nor to the war in general (or, more carefully, she does not contribute to a degree greater than the typical civilian does). It is indeed difficult to envision how targeting opportunistic resource-based war-profitteering importers would help save the lives of the relevant victims. These profiteers will typically reside in foreign countries—often countries that are not party to the conflict in question. Targeting nationals of a foreign country on their own soil is likely to antagonize the foreign government, possibly expanding the conflict. So, although opportunistic resource-based war-profitteering importers who have culpably failed to discharge their life-saving restitutionary duties would be liable to be killed if killing them were effective in saving the lives of the relevant innocents, it is (fortunately for the profiteers) unlikely that this condition will obtain in any given conflict.

But the situation is crucially different for opportunistic resource-based war-profitteering *exporters*. These profiteers often reside or do business in the very country where civilians were or are in the process of being forcibly dispossessed of their land and resources. (Indeed, as the various instances outlined earlier illustrate, these profiteers often share the same nationality or allegiance as the group that victimized the civilians.) This means that targeting opportunistic resource-based war-profitteering exporters is not pragmatically problematic in the same way that targeting opportunistic resource-based war-profitteering importers tends to be because it typically will not require violating the sovereignty of a third-party country. If the lives of opportunistic resource-based war-profitteering exporters are threatened, this might very well coerce them into pressuring the unjustly warring party to cease or at least diminish the scope or intensity of its campaign. This is not an unreasonable presumption given

that resource-based war-profitteering exporters tend to be among the social and economic elite, with more political influence than the average civilian. (Recall from Section 2 that the profiteers in question are those who are in leadership positions in the corporation in question. What counts as a leadership position, of course, need to be examined; for purposes here, I leave the category vague.) Targeting these profiteers in a context where it is made clear *why* they are being targeted can motivate them to use this influence to yoke the military conduct of the unjustly warring party. This, in turn, is likely to save lives, thereby enforcing the restitutionary life-saving duty of the resource-based war-profitteering exporter.

But recall that the resource-based war-profitteer has a life-saving restitutionary duty not towards just anyone, or even just towards the victims of the war, but rather towards the specific civilians whose land or resources were wrested from them and who as a result are in need of life-saving assistance. The resource-based war-profitteer is *not* liable to be killed to save just anyone, but instead to save *them* specifically. But, generally, the longer a war lasts, the greater the rate of morbidity and mortality of those who were not killed during the war—which will likely include at least some of those civilians displaced, injured, diseased, or starving as a result of the military operations that dispossessed them of the resources from which the resource-based war-profitteers are unjustly enriched. So if killing a resource-based war-profitteer helps bring an end to the conflict, then that killing is likely to enforce the restitutionary life-saving duty of the resource-based war-profitteering exporter, even though that duty is towards specific civilians.

There are two empirical presumptions that I am making here: (1) that killing the opportunistic resource-based war-profitteering exporter will help save lives and (2) that it will help save the lives of the civilians to whom the profiteer has a life-saving restitutionary duty. It is hard to know how certain we must be of these empirical facts in order to be justified in thinking that a profiteer is indeed liable to be killed. But this is a problem that plagues every aspect of war that involves killing; indeed, the epistemic challenges are even more pronounced in cases where we must decide whether collaterally killing innocent civilians is justified by the predicted benefits of destroying a military target. And despite the epistemic challenges, we accept, at least in principle, that collateral innocent deaths can be morally permissible. Likewise, despite the epistemic challenges, I think we should accept, at least in principle, that opportunistic resource-based war-profitteers are sometimes liable to be killed in war.

The upshot is that there have been and will be circumstances in which not only contributory but also opportunistic resource-based war-profitteering importers will be morally liable to be killed by combatants fighting in furtherance of a just cause, even if the profiteers have not contributed to any unjust aims. Of course, when resource-based war-profitteers—such as the controlling interests in a corporation buying or selling misappropriated resources—are unjustly enriched, the benefits derived will likely ‘trickle down’ to subordinates as well as to other groups and individuals with whom the profiteer does business. This might seem to suggest that they, too, owe restitutionary duties. But as I noted in Section 4, the wronged victims’ claim to the unjust benefits diminishes as these benefits are dispersed throughout the economy. There are three reasons for this. First (which I noted earlier), as these benefits become increasingly mixed with legitimate economic activity, disgorging the former will also thereby unjustly threaten the latter, which provides a *prima facie* reason to forgo forced restitution in those cases. Second, like ripples in a pond, the benefits from a profiteer’s unjust enrichment tend to diminish as they pass from one individual to the next. So, even if downstream beneficiaries owe restitution, the amount that they will be required to transfer will accordingly shrink. And third, downstream beneficiaries of the profiteer’s unjust enrichment are less likely to be in a position to identify the causal history of these benefits—specifically, that they were derived from an unjust armed conflict in which innocents were dispossessed of their land and resources. Consequently, these downstream beneficiaries will not bear the culpability necessary to enforce their restitutionary duties through violent means.

7. The Law of War and the Morality of War

As mentioned in Section 1, advocates of the revisionist view deny that the principle of noncombatant immunity is correct, at least at the level of morality. Civilians who contribute substantially to an unjust war, who are in a position to recognize that they are making such a contribution, and who can refrain from doing so at no great cost to themselves are morally liable to be targeted if doing so is necessary to save any number of morally innocent lives. Contributory war-profitteers can, then, be morally liable to be killed, on this view. Their status as civilians does not insulate them against liability, given their conduct. I have pushed this argument further by arguing that culpably contributing to an unjust war is not a necessary condition for liability to be lethally targeted. An unjust beneficiary,

Noncombatant Immunity and War-Profiteering

by culpably failing to discharge a life-saving restitutionary duty, can be liable to be lethally targeted if doing so is necessary to save the lives of those whose victimization enabled the beneficiary's wrongful enrichment. This is further reason to think that the principle of noncombatant immunity is mistaken—at least at the level of morality.

But this does not mean that there should be no *legal* prohibition against targeting noncombatants. The fact that it can be, in principle, morally permissible to target civilians does not mean that such conduct should be made legal. Normally, the fact that a type of conduct is morally permissible suggests that it ought to be legally permissible as well. But this is not always the case (and not merely due to the existence of *malum prohibitum* laws and statutes). Sometimes legally permitting morally permissible behaviour has bad consequences. There are several reasons for thinking that this is likely to be true if we legally permit targeting certain types of civilians, such as opportunistic resource-based war-profiteers.⁴⁴

As mentioned earlier, there is an epistemic challenge in determining, on any given occasion, whether the candidate resource-based war-profiteer is morally liable to be killed. The epistemic difficulty of making a reliable determination combined with the natural inclination to err on the side of self-interest by killing likely means that legally permitting such targeting will result in the intentional killing of many civilians who should not be intentionally killed. (Indeed, for similar sorts of reasons, it seems to me that collaterally killing civilians should be illegal as well, despite that it is sometimes morally permissible. But such a law would be tantamount to outlawing warfare, which is presumably unenforceable.)

In addition, there are widespread cross-cultural social mores against targeting civilians. Although as a moral doctrine this blanket prohibition is too crude (precisely because there are some civilians who are indeed morally liable), the widespread agreement has been hard-won and has almost certainly done more good than ill. A legal permission to target certain civilians might have a corrosive effect on this valuable social more by weakening it beyond what would be morally prescribed. It is not hard to imagine events unfolding in this way: a legal permission to target resource-based war-profiteers results not only in such profiteers being targeted, but their subordinates as well, and eventually *anyone* who is or is perceived to benefit from a war. Such an outcome would be morally catastrophic; it is better, then, to be risk-averse. We should keep intact the mores against intentionally killing civilians by legally prohibiting all such killings, even though, in principle, certain civilians are morally liable to be killed. In the meantime, resource-based war-profiteers can count themselves fortunate that they cannot be legally targeted even though they are morally liable.

But, of course, these are just armchair predictions. It might turn out that legally permitting combatants to target resource-based war-profiteers will *prevent* bloodshed. Wars are often funded on profits from trading in resources and commodities dispossessed from others. An 'open season' on such profiteers might cause them to think twice before buying or selling such resources, thereby starving a group of funds otherwise needed to wage war.

Ultimately, the point here is not to argue for or against weakening the legal prohibition on intentionally targeting noncombatants, but rather to point out that whether the principle of noncombatant immunity is correct at the level of morality *under-determines* whether an exceptionless version of the principle should be enshrined in law. That question cannot be settled without the help of historians and social-psychologists.

Notes:

(1) Lieber, Francis, 'Avalon Project—General Orders No. 100: The Lieber Code', Avalon Project—General Orders No. 100: The Lieber Code, http://avalon.law.yale.edu/19th_century/lieber.asp.

(2) Expert opinion, 'On Whether Israel's Targeted Killings of Palestinian Terrorists Is Consonant with International Humanitarian Law' (2006), www.hamoked.org/Document.aspx?dID=7901.

(3) Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2010), 208.

(4) Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 2nd ed. (Cambridge: Cambridge University Press, 2010), 34.

(5) See 'Rule 1' of the ICRC's volume on Customary International Humanitarian Law.

Noncombatant Immunity and War-Profiteering

- (6) Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 51.3, 8 June 1977.
- (7) Marco Sassòli and Olson M. Laura, 'The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts', *International Review of the Red Cross* 90 (2008), 605.
- (8) Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd ed. (New York City: Basic Books, 2000), 43.
- (9) For a comprehensive treatment of McMahan's revisionist view, see Jeff McMahan, *Killing in War* (New York: Oxford University Press, 2009).
- (10) For an attempt to provide a collectivist defence of the view that combatants on all sides in a war have an equal permission to kill, see, e.g., Christopher Kutz, 'The Difference Uniforms Make: Collective Violence in Criminal Law and War', *Philosophy & Public Affairs* 33 (2005), 148–180. Also see Jeff McMahan, 'Collectivist Defenses of the Moral Equality of Combatants', *Journal of Military Ethics* 2007, 50–59.
- (11) Thomas Hurka, 'Liability and Just Cause', *Ethics & International Affairs* 21 (2007), 210.
- (12) McMahan makes this point in Jeff McMahan, 'The Morality of War and the Law of War', in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 25.
- (13) McMahan, 'The Morality of War and the Law of War', 26.
- (14) Robert L. Holmes, *On War and Morality* (Princeton, NJ: Princeton University Press, 1989), 187.
- (15) For an actual examination of these empirical assertions, see Seth Lazar, 'Necessity and Non-Combatant Immunity', *Review of International Studies* 40 (2013), 53–76.
- (16) Jeff McMahan, 'Pacifism and Moral Theory', *Diametros* 23 (2010), 44–68.
- (17) Cecile Fabre, 'Guns, Food, and Liability to Attack in War', *Ethics* 120 (2010).
- (18) This was McMahan's early view. See Jeff McMahan, 'Innocence, Self-Defense and Killing in War', *Journal of Political Philosophy* 2 (1994), 193–221. See also Robert L. Holmes, 'Pacifism & Wartime Innocence—A Response', *Social Theory and Practice* 20 (1994), 200.
- (19) See Holmes, *On War and Morality*, 187. Also see Mark Vorobej, 'Pacifism & Wartime Innocence', *Social Theory & Practice* 20 (1994), 181–182.
- (20) Larry May presses this point. See Larry May, 'Contingent Pacifism and the Moral Risks of Participating in War', *Public Affairs Quarterly* 25 (2011), 104. Noam Zohar does as well, although by arguing that the basis of liability is the collective rather than individual conduct of combatants. See Noam Zohar, 'Collective War and Individualistic Ethics', *Political Theory* 21 (1993), 631–633. See also Henry Shue, 'Laws of War, Morality, and International Politics: Compliance, Stringency, and Limits', *Leiden Journal of International Law* 26 (2013), 277.
- (21) Seth Lazar, 'The Responsibility Dilemma For Killing in War—A Review Essay', *Philosophy & Public Affairs* 38 (2010), 180–213.
- (22) Jeff McMahan, 'Who Is Morally Liable to be Killed in War?', *Analysis* 71 (2011), 557–558.
- (23) *Idem*, 550.
- (24) Bradley J. Strawser, 'Walking the Tightrope of Just War', *Analysis* 71 (2011), 541.
- (25) Saba Bazargan, 'Complicitous Liability in War', *Philosophical Studies* 165 (2012), 177–195.
- (26) Janina Dill and Henry Shue, 'Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption', *Ethics & International Affairs* 26 (2012), 311–333.

Noncombatant Immunity and War-Profitteering

- (27) Lazar explores this possibility in detail, in Lazar, 'The Responsibility Dilemma For Killing in War—A Review Essay'.
- (28) Janina Dill, 'Should International Law Ensure the Moral Acceptability of War?', *Leiden Journal of International Law* 26 (2013), 253–270.
- (29) Larry May, *Aggression & Crimes Against Peace* (New York City: Cambridge University Press, 2008), 25–45. Larry May, 'Contingent Pacifism and the Moral Risks of Participating in War', 95–112.
- (30) Virginia Held, *How Terrorism Is Wrong* (New York: Oxford University Press, 2008), 20.
- (31) Igor Primoratz, 'Michael Walzer's Just War Theory: Some Issues of Responsibility', *Ethical Theory and Moral Practice* 5 (2002), 221–243.
- (32) Victor Tadros, 'Orwell's Battle with Britain: Vicarious Liability for Unjust Aggression', *Philosophy & Public Affairs* 42 (2014), 42–77.
- (33) *Idem*, 45.
- (34) Smedley D. Butler, *War Is a Racket: The Antiwar Classic by America's Most Decorated Soldier* (Port Townsend, WA: Feral House, 2003).
- (35) See Graham Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford: Oxford University Press, 2006), 431, 460, 538, 551.
- (36) *Idem*, 459.
- (37) See, in particular, *Strand Electric and Engineering Co Ltd v. Brisford Entertainment Ltd* [1952] 2 QB 246; *Penarth Dock Engineering Co Ltd v. Pounds* [1963] 1 Lloyd S Rep 259 and *Gondal v. Dillon Newspapers Ltd* [2001] RLR 221. [430].
- (38) Virgo, *The Principles of the Law of Restitution*, 534–535.
- (39) Samuel Scheffler, *The Rejection of Consequentialism* (Oxford: Oxford University Press, 1982).
- (40) Victor Tadros, 'Duty and Liability', *Utilitas* (2012), 259–277.
- (41) *Ibid.*
- (42) Neta Crawford, *Accountability for Killing: Moral Responsibility for Collateral Damage in America's Post-9/11 Wars* (New York: Oxford University Press, 2013), 151.
- (43) Geneva Declaration Secretariat 2011, 32.
- (44) For a more in-depth discussion of the relation between the morality and the law of war, see, e.g., McMahan, 'The Morality of War and the Law of War', in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, edited by David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 19–43. See also Henry Shue, 'Do We Need a "Morality of War"'? (2008), 87–111.

Saba Bazargan

Saba Bazargan, Department of Philosophy, University of California, San Diego



