

## Spare Not a Naked Soldier – a Response to Daniel Restrepo

Maciej Zajac

Daniel Restrepo's article entitled "In Defense of Mercy", published recently in the Journal of Military Ethics, proposes a radical change in approach to the so-called Naked Soldier cases: Naked Soldiers are to be spared and are, in fact, already protected by the spirit, if not by the letter, of the Laws of Armed Conflict. Accepting Restrepo's conclusions would not only oblige us to add a new category of protected non-combatants to the laws of war; it would also carry broad implications for the conduct of war in general. If Restrepo is right, many successful tactics by which wars are currently fought would have to be considered morally unacceptable, or at least morally suspect. This includes, by the author's explicit assertion, the general use of snipers, and, tacitly, most long-distance fires and ambushes, that is, the tactics forming the basis of, respectively, air warfare and guerilla warfare – the two most prevalent kinds of warfare practiced today.

These revolutionary implications are clearly entailed by the author's propositions. These propositions, however, rest upon very problematic assumptions about: the relationship between vulnerability and liability to harm; the character of long-term, complex actions, such as participation in war; the value of the contributions made by individual soldiers towards the general war effort, and thus the moral responsibility such contributions entail; and the amount of moral care due to an enemy one is morally justified in fighting. Additionally, Restrepo offers no solutions for overcoming practical difficulties involved in the implementation of his ideas – a crucial part of any effort to rewrite the Laws of Armed Conflict, which have to be practically applicable. He also does not explicitly acknowledge the sheer scope of consequences engendered by his proposal, and thus fails to address many of the resulting problems. Last but not least, the author views his propositions as part of the project to interpret just war theory in a way so restrictive as to bring its practical recommendations in line with those of contingent pacifism. This project is based on fundamental misrepresentation of just war theory's basic tenets, and the author does not cite a single just war theorist supportive of this agenda.

I will begin by discussing Restrepo's definition of the term "Naked Soldier". Then I will proceed by examining different possible grounds for granting Naked Soldiers' *hors de combat* status, as proposed by Restrepo: their vulnerability, doubt as to their eventual return to combat, their purported present and future harmlessness, and their temporal distance from future combat. I will show all of these to be insufficient, and in most cases inapplicable to the situation of Naked Soldiers. Finally I will critique the explicitly stated foundations of the author's intellectual project, demonstrating these to be inadequate for such an ambitious task.

### Defining a "Naked Soldier"

Let us start with Restrepo's conception of a Naked Soldier. Though the author does not provide a definition of the term *sensu stricto*, he does offer a four-paragraph-long section titled "Who is the naked soldier?" that enables his reader to grasp the meaning of the term. An earlier "Introduction" opens with a passage from Seth Lazar identifying a set of combatants who are "distinctly defenceless and vulnerable" (2020, 1). Restrepo then explains that the term "Naked Soldier", coined by Michael Walzer in his descriptions of several historical soldiers refusing to attack bathing enemy troops (1977, 138-144), "is ultimately a metaphor (...) it indicates the particular vulnerability and defenselessness that characterize a soldier at that time" (2020, 2).

This vulnerability is to be contrasted with “the presumed readiness of other combatants”, who, “while they are not invulnerable (...) should know that a counter-strike is coming (...) this presumed knowledge makes them ‘fair game’: they could seek cover, call in reinforcements, retreat, or even surrender” (2020, 3). On the other hand, “unaware of any threat, the Naked Soldier is significantly different from other combatants; he is at a disadvantage in terms of attacking, seeking cover or help, and even surrendering or retreating. It is for this reason that I am concerned that killing him, at least in most circumstances, is morally wrong (..)” (2020, 4).

Thus, according to Restrepo, a Naked Soldier is a combatant 1) extremely vulnerable to attack because of a false sense of security and 2) presently undertaking an activity of no military value. The truth of this conjunction makes killing such a combatant morally impermissible. Yet both conditions forming the conjunction are upon analysis problematic, and the resulting normative prescription is ambiguous, or at least it functions ambiguously within the text. Turning to the latter problem first: does Restrepo believe that Naked Soldiers should be spared even if they cannot be captured? I believe he does, otherwise he would merely be asserting an uncontroversial point that combatants should capture, rather than kill, the enemies who are wholly in their power and who may be captured without undue risk<sup>1</sup>. Yet if it is so, why does Restrepo describe the dilemma as giving relevance to the “question of whether they [Naked Soldiers] should be spared *or* offered a chance to surrender” (2020, 2)? This ambiguity may have the effect of channeling a reader’s intuition that enemy soldiers should be captured rather than killed if practicable into supporting the belief that Naked Soldiers should be spared if they cannot be captured.

This is not the only occasion on which the author introduces ambiguity. When defining the Naked Soldier ostensibly, he includes the original set of cases put forward by Michael Walzer (1977, 138-144), but also three cases discussed by Seth Lazar (2015, 117). This inserts needless confusion into the article: all four cases discussed by Walzer involve soldiers who are in position to kill the enemy, but not to take him prisoner. The enemy’s ignorance of the danger he is in and immersion in a “peculiarly human activity” (1977, 141) are the only factors that give the shooters pause; yet in the Lazar cases, it is not so. The Highway of Death airstrikes may be regarded (invalidly, in my opinion) as a Principle of Necessity violation; the killing of Lee Rigby was indubitably a case of perfidy; and shooting a wounded, unarmed enemy who does not try to escape breaches the Laws’ of Armed Conflict prohibition against attacking enemies rendered *hors a combat*. Unlike Walzer’s, Lazar’s examples fail to isolate the features peculiar to Naked Soldier cases from other morally relevant factors, and thus are flawed as examples pertaining to the problem being discussed. The danger of a reader transferring intuitions pertaining to other aspects of these cases is thus high, and Restrepo does little to reduce it.

### **Vulnerability, innocence, and the chasm between them**

Returning to Restrepo’s definition of a “Naked Soldier”: the first condition of acquiring this status is the Naked Soldier’s lack of awareness that he is presently vulnerable to an attack. The Naked Soldier’s belief that he is safe is *ex hypothesi* false, advantageous for the attacker and disadvantageous for the Naked Soldier himself. It is also a private mental state, which a sniper observing him from afar will usually discern from his behavior, but cannot have certain or direct access to<sup>2</sup>. Thus a possibility arises that a given Naked Soldier does not hold such a belief at all – perhaps he is just being reckless with his life, or suicidal, or trying to inspire his comrades by exposing himself to danger, as the officers of many armies tended to do throughout WWII. As

such cases are certainly possible (though they may be rare) not everyone who appears to be a Naked Soldier is one in reality<sup>3</sup>.

Yet even if a Naked Soldier is genuinely unaware of his own vulnerability, a question arises whether his mistaken belief is justified (in the epistemological sense), and if so, why. If it is not justified, then the most likely reason is his own incompetence: perhaps he is confused about his location on the battlefield, or did not calculate the distance to the enemy lines very well, or slept through his sergeant's lecture on counter-sniper precautions; the forms his incompetence could take are countless. The incompetence needs not to be his own; perhaps he was misled by comrades or superiors, and he is now to die because of it. But countless soldiers have died and will continue to die of their own or others incompetence. In fact, most soldiers who are killed are killed because of some avoidable error. Why would the specific kind of incompetence that leads one to expose oneself to long-distance fire be considered grounds for mercy, while all other kinds of incompetence are mercilessly exploited in war? If his gun jammed, he would be dead; why then is he to be immune when his judgment fails him? Sparing enemies because they make mistakes advantageous to oneself is a sure way of failing in warfare. It may be good sportsmanship, but war is not a sport; in its just form it is a struggle on behalf of a just cause, and disadvantaging this cause in the name of being a good sport does not signal generosity, but inability to comprehend the stakes and their moral import.

Yet perhaps the Naked Soldier's belief is justified; he is in a well-protected area that can only be accessed by a clever ruse, a cutting-edge and yet uncommon technology, a daring approach or an unimaginably arduous effort<sup>4</sup>. The probability of him being killed in this place and time is thus so low it is reasonable for him to drop his guard. Yet if this is a case, then his opponent has risked much, or labored much, or accomplished much precisely to gain the advantage of surprise over him; why is he to be denied this advantage? Should Hannibal, after crossing the Arno marshes, have announced his position to the Romans, ruining the purpose of a daring enterprise that has cost him many man and his own eye? Getting the enemy to acquire justified yet false beliefs about the place and time when he is to be threatened has always been the utmost goal of military strategy, and one of the most celebrated ways of gaining military advantage, as well as of sparing the lives of one's own soldiers – a moral duty of every commander (Strawser 2010). Considering this specific way of getting the upper hand immoral is thus unfounded in any morally relevant reason.

This analysis does not have to be limited to the specific kind of epistemic-driven vulnerability Restrepo focuses on. It may be extended to the general concept of vulnerability. It may also be reduced, ultimately, to a trivial observation that every soldier who gets killed is entirely and hopelessly vulnerable at the moment of his death. Thus vulnerability itself cannot give rise to immunity unless one is prepared to renounce intentional killing as means of waging war. No just war theorist is prepared to do this, and neither is Restrepo, who after all distinguishes between acceptable and unacceptable killing, acknowledging the former kind to be possible in a rather wide array of scenarios.

Even more importantly, vulnerability is not synonymous with innocence either in the moral sense or in the etymological sense of being incapable of harming another. A may be extremely vulnerable to the actions of B while at the same time being a mortal threat to C (McMahan 2008, 100-101; Umbrello & Wood, 2021). This is in fact precisely the case of the Taliban fighters, to whose situation of vulnerability Restrepo most probably alludes when stating that his position has implications for the moral status of drone warfare (2020, 2). The Taliban are being bombed by unreachable, invisible drones while at the same time killing and terrorizing the local population. Even in the XXI century, warfare can still be a series of

exercises in self-defense engaged in by helpless conscripts fighting for a dubious cause; yet quite often it is now a concerted effort in other-defense undertaken by volunteers who could safely go home if they wished so. From the latter perspective the chasm between the enemies' and one's own vulnerability on one hand, and the enemies' capacity for visiting harm on the local population is something to be expected, especially if one is a professional soldier serving in a well-led and well-equipped force.

Restrepo acknowledges this fact when he writes that "killing the enemy is done in defense of themselves or others" (2020, 3) Yet the other-defense component is dropped several pages later when Restrepo writes that "killing [combatants] is permitted because it is a form of self-defense. But someone in one of those positions does not usually need to be defended against. The convention makes it so and it might even be rationalized that, hypothetically, those spared enemy combatants can come back and kill the merciful soldier or his comrades." (2020, 7). Why other-defense changes its status in this passage from acknowledged, legitimate reason for targeting enemy combatants to mere post-factum "rationalization" of a convention that should be retired Restrepo does not tell his readers.

In summary, vulnerability cannot ground Naked Soldier's immunity from being targeted, nor can it contribute to it being grounded by a conjunction of various features of his position. While a layman may mistake vulnerability for innocence or harmlessness, it is neither of these. While in ordinary circumstances someone's vulnerability alone may be a reason for extending our kindness towards this person, this is not so in case of a combatant, who, even when extremely vulnerable may simultaneously present an extreme threat to others.

### **Non-contributive actions as inherent in long-term, complex enterprises**

This brings us to the second condition for the Naked Soldier status: that a combatant be engaged in an activity of no military value and thus purportedly non-threatening, either to his potential killer or to any persons the killer might protect in a supposed act of other-defense. This condition is necessary if the term "Naked Soldier" is to be at all different from the term "vulnerable combatant" – as demonstrated, vulnerability is on its own wholly insufficient to establish immunity from attack. Here, a few objections are also to be raised. One of these regards the exact character of such activity, the other the extent of its causal contribution to war.

Starting with the non-threatening, non-military actions a Naked Soldier is surprised while performing, these can be divided into two kinds. The first kind comprises acts of physical self-care, such as eating, sleeping, washing oneself or otherwise tending to requirements of physiology, hygiene and health; the other Walzer's "peculiarly human" activities of writing home, socializing, reading, prayer or contemplation – all the ways in which an individual could be just himself, instead of being a soldier, amidst a lull in the fighting. Given that every soldier is, besides being a person, also a highly valuable military asset, at least the first of the two kinds of action is never militarily irrelevant. To the contrary, these actions being performed are a necessary prerequisite for a soldier being ready for combat at a later time. Sleeping, eating, exercising and washing himself a soldier is doing – from a military point of view – the same thing as when he is cleaning his gun: he is maintaining a military asset. If soldiers did not wash themselves or eat enough to maintain their strength, they would be ordered to do this by their superiors<sup>5</sup>. This would not be a case with reading books or writing home, and that is why the latter category of free-time activities is different, although not entirely. Sure, commanders would not pick activities for their subordinates when allowing them a week's rest from combat; but they understand such rest and psychological self-care is an integral process of keeping the

unit battle ready, and when they allow their soldiers free time, they are not doing it out of the goodness of their hearts, but out of recognition that as human beings, they need it to remain effective later on.

This is not to deny the proposition that a man in uniform is never just a military asset; he is also a human being, and this humanity is clearly visible in the actions of Naked Soldiers. But just war theorists, unlike pacifists, maintain that a man, even a fundamentally good and extremely valuable human being, may be killed if he or she is engaged in an effort to wage an unjust war. The fact that in some phases of his engagement he will appear to his enemy, or to an outside observer, more like a civilian than a soldier does not change that.

Indeed, the particular, short-term actions performed by Naked Soldiers are necessary component actions of the long-term activity of warfighting they are engaged in. His bath, or his cigarette break, is just one of many predictable and repeatable stages of a Naked Soldier's engagement in a war. As there can be no waging war without sleeping, sleeping is an integral part of waging war, as integral as keeping the night's watch, or building shelter for oneself. Restrepo has to deny this and so posits that the traditional view of soldier's liability for attack "assumes that any member of the collective [of uniformed enemy personnel] is constantly a threat" (2020, 3). But nobody assumes of any other person that he will be a constant threat in this literal sense: a quasi-robotic foe constantly under arms, tirelessly striving to do harm. We all know all humans sleep, eat and rest; when we speak of them remaining a threat while they do so, we mean that they are a reliably recurrent threat. Unlike a drunk who started a fight in a pub, a soldier does not change his disposition to harm enemy combatants after getting a good night's sleep. His enemy has every right to assume he will fight again in the morning; in this sense a Naked Soldier, even if he is not a threat this present moment, is a future threat, not a potential one. Him becoming a threat is a question of time, not a subject of doubt, as Restrepo suggests (2020, 5).

Restrepo's comparison of killing a Naked Soldier to bombing a recruitment center is rather puzzling, as a recruitment center may be an object of perfectly legal attack as a crucial part of military infrastructure run by military personnel for an exclusively military purpose. Yet even a comparison to some actual atrocity far down the slippery slope, such as targeting all men of military age as potential draftees, would still fail: the Naked Soldier does not indicate his willingness to abandon his combatant status by lighting a cigarette or taking a shower, any more than a driver abandons an effort to reach his destination by stopping at a red light. Both of these simple actions must be expected in the person undertaking a complex action – functioning as a soldier requires bathing, driving across town requires stopping at red lights. Thus a Naked Soldier is not being killed "lest he be a threat tomorrow" (2020, 5); he is being killed because he definitely will be a threat within an hour.

What is the source of this conviction? By putting on a uniform and becoming a subject to all the formal and informal laws, regulations and incentive systems of their armed forces soldiers declare a certain intention, especially in wartime – they will follow all legal orders. We know from the experience of all the previous wars that a great majority of them will indeed do so<sup>6</sup>.

The civilian life equivalent of this aggressive participation by mere presence is a situation in which A is approached by B and five other men and asked by B for his wallet. B himself would be unable to scare A into compliance, but A has to assume that he is facing six opponents and duly gives his wallet up. It does not matter if the other five men wanted nothing to do with the situation, and would have refused if B asked them to help him rob A. If they did not indicate this in any easily discernible way, they just participated in an armed robbery

through their silence. The only difference between these men and inactive troops participating in an unjust war is that the stakes in war are incomparably higher, and that the five men in my story did not put on T-shirts stating “we help B rob people when he tells us to do so, and are subject to serious formal and informal sanctions if we refuse him such assistance”<sup>7</sup>. Wearing a uniform is thus a serious indicator of intention, and absent any other signals of equal strength, we need to take them at their word.

More importantly, military commanders do. They allocate resources, plan moves and they sometimes retreat or even surrender based on the understanding that such and such quantity of enemy troops is present and will fight if ordered to do so. If the presupposition that these enemy troops will follow their orders to fight was not justified and rational, military commanders would not make it, since they would be handicapping themselves if they did. A military force may thus be effective without firing a shot, through its mere presence or existence. Not only naked soldiers, but even soldiers following Jeff McMahan’s instructions on conscientious objection through purposefully making themselves ineffective in combat (2009, 133-135) are still militarily useful by drawing enemy fire, attention, troops and other resources away from other targets by their mere presence. A unit may consist solely of persons planning to resist their orders at the moment of combat, but unless the other side knows it, they still enable their own side by making the enemy think the force they are facing is of greater size, and having to adjust accordingly.

Every uniformed combatant may consequently be expected to make a contribution to the war effort. Yet Restrepo seems to believe that the value of eliminating such a contribution to the overall outcome of the war is usually not proportionate to the great indubitable value of a life being preserved. Such a belief is at least strongly indicated in his comments on Sartre’s soldier and a farm thought experiment (2020, 8), and generally seems to permeate the article (2020, 13). It is true that no single death ends a war, but this is trivially true of every single attack, whether it targets a soldier, a tank or a plane. The fact that these contributions constitute only a tiny fraction of the war effort does not make them meaningless – all contributions are like this. Any war is a combination of single lethal actions that would individually be senseless, but collectively bring a meaningful effect – such as the attrition of the enemy army, the breakdown of its morale or a collapse of political support for war.

Regardless of the exact size of his present and future contribution to the war effort, a Naked Soldier has no claim to having his own life (or any other good or interest) weighed against any amount of risk or other bad consequence that sparing him would generate (or could be reasonably expected to generate), let alone to have people accept “risk to one’s life” should for the purpose of “showing mercy on the battlefield when possible” (2020, 12). That is certainly true if one adopts the revisionist stance about the moral power of combatants to fight in a war, and allows that killing in war is generally only permissible for just combatants (McMahan 2009, Fabre 2012). If revisionism is true, then a Naked Soldier can be targeted only if he is an unjust aggressor – and if he is an unjust aggressor, he has no right to have his interest taken into account while the risks and harms caused by his aggression are being distributed. Even a small gain in the safety of the Defenders will justify killing him<sup>8</sup>. And it seems to me that Restrepo should agree with the truth of revisionism if he is to remain consistent in his generally very restrictive views on *in bello* permissibility<sup>9</sup>. This is not to say that assuming a Walzerian stance of combatants being morally equal would naturally lead to accepting the claims of Naked Soldiers to consideration. As evidenced by Walzer’s own position, this does not follow either. If combatants of both sides forfeit their right not to be killed by assuming

combatant status, then neither may make such claims against the other – the rights that would grant such claims have been forfeited *ex hypothesi*.

### **War Presentism, and how not to avoid it**

I have demonstrated the difference between what Restrepo calls “the logic of eliminating tomorrow’s threats” (2020, 5), and the logic of eliminating people who are engaged in long-term, complex efforts to become and remain a mortal threat, and who in virtue of being human necessarily spend some time throughout this effort on self-care activities or activities of no military value. Equating the two is impossible once one understands that activities such as soldiering or warmaking can nowadays be undertaken almost exclusively as complex, multi-year efforts, and the scope of influence on the course of war a combatant exerts merely by existing, a soldier-in-being, to transform a famous phrase. Alas, Restrepo ignores these two crucial issues, classifying combatants as idle/non-idle, or threatening/non-threatening based on whether they conduct specific military activities within a very narrow time window.

Because neither vulnerability nor the purported harmlessness of Naked Soldiers may serve as the basis for granting them *hors de combat* status, it seems like most of the work needs to be done by the temporal distance separating this combatants from fighting. This puts Restrepo on the horns of an unenviable dilemma. He either has to bite a bullet and support a most peculiar doctrine that I will dub “War Presentism”, or he has to agree that temporal distance from the moment of assuming fighting does not matter morally once one became a combatant – and so declared that he would fight at some future time if ordered to do so. Let me explain.

If the fact that a Naked Soldier will present a threat after he finishes a shower, a nap, a meal or a stroll in a forest is not enough to make him liable for attack, than simple fairness dictates that no combatant who would be threatening only after a similar amount of time should be targeted. Let us assume that undressing to bathe, bathing outdoors and dressing up again takes a typical combatant thirty minutes. That would entail that no combatant should be attacked unless it is less than thirty minutes away from becoming a threat to the other side,. Let me call this purported rule a doctrine of War Presentism.

The immunity from attack inherent in War Presentism would cover all units moving towards the front, resting and replenishing (even if in the immediate rear area), a large part of reserves, all units that temporarily run out of ammunition etc. Moreover, there are classes of targetable contributors to the war effort who are always separated by much more than thirty minutes from any direct contribution to war. It may take days for the ammunition the personnel of a logistical depot handles to reach the frontlines; it may take months for an offensive the general staff officers are planning to materialize. If we were to take War Presentism seriously, that is, if we were to use to same standard for temporal distance between any given combatant’s capacity for direct action and targetability, we would have to assume that neither the logisticians or the general staff officers are targetable.

All in all, the consequence of the universal acceptance of War Presentism would be a reversal to war as it was practiced between Greek city states in the early period of their history; limited to a specific battlefield, at which both sides arrived unmolested and at which they fought each other head on. The desirability of such an arrangement aside, how could sticking to this rules be enforced, and what casualties would they generate given the immense deadliness of contemporary armaments? The answer is, these rules could not be enforced, since a breaching party would always secure for themselves an immediate, very material advantage (such as that

bestowed by long distance fires). And if by some miracle they were respected, war would always lead to a swift and bloody defeat of a smaller party, strategically sound offensives against vulnerable rear areas or application of long-distance targeting no longer being allowed.

War Presentism is thus singularly unattractive. It would be quite unfair to postulate that Restrepo is a partisan of such an absurd doctrine<sup>10</sup> – to the contrary, he may be interpreted to explicitly reject it when stating that troops marching towards battle are an example of combatants that are obviously targetable, and the opposite of Naked Soldiers (2020, 3). Yet by rejecting War Presentism, Restrepo has to reject temporal distance as a morally relevant factor<sup>11</sup>.

We have already demonstrated that Naked Soldier's vulnerability is not up to this task, nor is the unfairness or bad sportsmanship of them being targeted, nor doubts about whether they will actually return to combat. What can ground this new and problematic kind of immunity then? An arbitrary separation of this class by features that should not count morally, such as the relative ease with which enemies can view each other as fellow humans in these situations, will not do.

Perhaps the author has some other basis for Naked Soldiers' immunity in mind, or some other broader reason to argue for this immunity even if it lacks such a basis. I believe a clue may be found in the section in which the author – laudably – transparently accounts for his philosophical motivations. Yet before I discuss these motivations, allow me a few quick remarks about the practical difficulties of making Naked Soldiers legally immune from attack, regardless of any justification for such a move.

### **Difficulties with Application – Irresolvable?**

Applying Restrepo's recommendations would meet with many practical difficulties having to do with the length of time for which this activity needs to be undertaken to bestow temporary immunity from attack, the length of time for which such immunity is so bestowed, and the relationship between the two. How would the re-entry of Naked Soldiers into combat be regulated, to provide just one example? Would the Restrepo-ized Laws of Armed Conflict allow them to return to combat at will and immediately? If so, they could unfairly ambush their foes, making them into Naked Soldiers in turn, and creating a vicious circle of assumptions and re-assumptions of that status. If not, how would the transition look like? Would it involve Naked Soldiers first retreating from the engagement area? How could they do so, if by definition they do not know the area they are in is an arena of combat?<sup>12</sup>

These and related practical issues are serious, yet remain unaddressed by Restrepo and are probably irresolvable, since Naked Soldiers, being unaware of their status, cannot, unlike prisoners of war, the gravely wounded or the shipwrecked act accordingly with their condition, a cooperation that is the very condition of the status of being *hors de combat* being granted<sup>13</sup>. Neither is their status a semi-permanent one, as in case of the aforementioned groups, allowing any change in status to usually be gradual and obvious to all participants in a given scenario.

This would not be the case with Naked Soldiers. Imagine being a sniper and getting a clear view of the enemy trench. There are two soldiers there – one is cleaning his rifle; the other is taking a shower. If it is not acceptable to kill his comrade taking the shower, is it acceptable to kill the man cleaning the rifle? If yes, does it become unacceptable once he puts away the rifle and picks up a cigarette? Inacceptable again if, while smoking, he surveys the no man's land, thus serving temporarily as an enemy observer? What if he read a book on military strategy – is this for work, or for pleasure, and how can one tell? Is it acceptable to kill the other man



once he finishes showering? Such dazzling status swings are uncommon with the gravely wounded or even with prisoners of war.

Yet it is a third difference from all actually accepted categories of being rendered *hors de combat* that seems the most crucial – they all entail a combatant being placed in a thoroughly unenviable state that no combatant committed to his cause would voluntarily assume. It is never advantageous for any combatant to become a prisoner, gravely wounded, or shipwrecked – though it is usually preferable to dying. However, it would obviously be advantageous for a combatant to assume the status of a Naked Soldier. For existing categories of *hors de combat* status, the legal protections entailed come at a great expense. Becoming a Naked Soldier entails no such costs<sup>14</sup>.

### **Pacifist Ius in Bello – a Misguided Project**

I have so far offered nothing but criticism of Restrepo’s ideas. Yet there is great merit to a singular feature of his article. Unlike many other proponents of introducing novel restrictions into military ethics, he locates his article within a broader philosophical project, openly and clearly stating its assumptions, motivations and goals (2020, 8-12). It is hard to overstate how helpful this is for a reader, and honest towards a potential critic, who gains an opportunity to directly address the underlying commitments, instead of having to guess what they are and risking misinterpretation of the text in the process. And while one does not have to know these intellectual motivations to engage critically with Restrepo’s proposal, I think it is helpful to learn them for reasons that will become clear in a moment.

The intellectual project in question attempts “reconciling just war and pacifism” by “making war difficult to legitimately engage in” (2020, 8-9). Restrepo states that “there are indeed few just wars and that is by design. The just war tradition and international laws regulating war are meant to minimize, if not prevent, wars” (9). This streams from the fact that “the only acceptable just cause for war is self- or other-defense, which includes humanitarian interventions. If all nation-states adhered to this, there would be no wars since the licit causes of war are responding to an aggressor, who, by this definition, wages an unjust war” (11).

The author thinks that these generally accepted precepts of just war theory show that its ultimate goal is bringing an end to war as a phenomenon, just as in the case of pacifism. This is indeed true, at least as far as long-term goals are concerned. Yet desiring a world without war, or even stating that a war can never be justly *initiated*<sup>15</sup>, has nothing to do with making *engagement* in war difficult. “Self- and other defense” constitutes engagement in war as much as unjust aggression does.

This point may seem nitpicky until one realizes what move Restrepo is preparing to make. “The concern for making wars difficult to legitimately engage in, I argue, extends to making killing in war difficult to legitimately justify”, he writes. I believe that this very bold proposition, which, as I will argue, constitutes a *non sequitur*, originates precisely in mistaking *engagement* in war (all warfighting) with the initiation of war (*aggressive, unjust* warfighting). Making aggressor troops subject to more restrictive *ius in bello* is certainly an idea worth discussing (Rodin 2007). But Restrepo does not restrict its reach to unjust combatants, in effect positing that there is generally something morally good about legally restricting just defenders’ ability to engage uniformed unjust aggressors, and that the justification for this idea can be found in just war theory.

By the author’s own tacit admission, this project of “just war pacifism” has not been popular with just war theorists – the only authorities he quotes to support it are Czech statesman

Edvard Benes and a political philosopher James Sterba, whose work has hardly focused on the issues of war and peace. It is also Sterba whom he credits with a stunning pronouncement that “only two twentieth century conflicts (...) can plausibly pass the requirements of the just war tradition: India’s intervention against Pakistan and Tanzania’s conflict with Uganda” (8-9). This is actually a significant mischaracterization of Sterba’s view expressed in the quoted source – Sterba was clearly referring to post-WWII *foreign military interventions*, not to wars of national defense or wars of national liberation.

There is a reason for this section’s lack of grounding in literature, entirely uncharacteristic of the rest of the article. Just war theorists cannot support such a program, because it contradicts the basic tenet of just war theory – that armed resistance to unjust violence is good and a victim’s fundamental right. This assertion can be found in most overviews of just war theory, whether revisionist (Fabre 2012, 54-71; Orend 2013, 34-39, 47-48) or non-revisionist (Walzer 1977, 51, 67-72). Michael Walzer states the just war theory’s case best when he says that victims of aggression “are always morally justified in fighting; and in most cases, given the harsh choice, fighting is a morally preferred response” (51). To put this fundamental difference between pacifism and just war theory in yet another way, pacifism contains a presumption against war, while just war theory contains a presumption against injustice (understood as violation of individual and collective rights) (Braun 2020, 2). Just war theorists lament unnecessary wars, yet they also lament the lack of necessary ones – the paradigmatic case being the lack of clearly needed and relatively easily achievable intervention to stop the Rwandan genocide in 1994.

Given all this, it is easy to see why Restrepo’s proposition that “making killing in war difficult to legitimately justify” is good in itself is a *non sequitur*. Introducing rules that would stop just warriors – persons defending themselves and/or others from violence – from killing liable opponents is equal to stripping them of their right to self-defense, and thus aiding and abetting the injustice they fight against.

One might say that while the intellectual commitment driving the article is thus mistaken, or at the very least incompatible with just war theory, little depends on this. After all, Naked Soldiers may deserve protection for other reasons, and what motivates one to postulate such protections should hardly matter. Yet Restrepo’s pacifist commitments are clearly felt throughout his article – and equally clearly irreconcilable with the philosophical commitments and moral values of just war theory. Take his only attempt to discuss a practical consequence of his proposal for commonly used tactics, his short take on the use of snipers. Restrepo writes that he has “trouble producing any moral justification for snipers beyond expediency and possible utilitarian benefit of an overall greater outcome” (2020, 11). But this expediency (that is, the lowering of risk to attacking combatants) and “overall greater outcome” (a contribution to the war effort) are of paramount importance and great value, at least for just war theorists. Winning a just war is a great good, and so is sparing just combatants.

Ignoring this and considering all wars to be morally ambiguous, possibly mutually unjust affairs akin to World War I (from which most of the Naked Soldiers examples are taken) may bend a reader’s intuition toward Restrepo. If all wars’ were like this (as they are when viewed through pacifist lens), then killing Naked Soldiers would indeed be wrong, futile and wasteful of human life – yet so would be all other wartime killing. A grim reality of mutually unjust conflict could be made less lethal by rules much simpler, and much broader, than the one Restrepo proposes – by the “do as little as you can and keep yourself out of harm’s way” maxim, adhered to by the unhappy conscripts of many such wars.

## Conclusion

A proposal to make the so-called Naked Soldiers a new category of combatants rendered *hors de combat*, and so protected by the laws of war, or at least by the precepts military ethics, at first glance seems ethically appealing. No morally sensitive person wants wars to be deadlier than they have to be; no ethically-minded individual frowns on the tendency towards mercy and compassion.

Yet showing mercy to Naked Soldiers, even though virtuously motivated, is a moral mistake, and for several reasons. All combatants become Naked Soldiers regularly and predictably without stopping to pose a mortal threat to their enemies. Vulnerability to an attack does not entail innocence or harmlessness. The cost of leaving enemies to fight another day is great indeed, both in terms of risk to oneself and fellow combatants, but more importantly in terms of risk to the people one fights to protect and the harm done to the cause one is fighting for. Accruing such cost onto himself in the name of mercy would be supererogatory if a combatant showing mercy would bear the burden of additional risks alone; transferring it upon others, especially without their consent, is morally impermissible (Zajac 2020, 15-17).

This is not to say that all other attempts aimed at limiting violence against active enemy combatants are to be rejected, or that they are to be rejected on the grounds of just war theory, or even that just war theorists are to ignore arguments for pacifist conclusions. Far from it. The same volume of the *Journal of Military Ethics* carrying Restrepo's article included an excellent attempt by Nathan Wood to do just that (2020). Simultaneously, James Pattison has provided fellow just war theorists with much food for thought regarding the truth of contingent pacifism thesis in the contemporary world (2020). Far from rejecting such appeals out of hand, just war theorists should engage with such attempts and allow themselves to be convinced, if the argument merits this. Yet military ethics cannot be an attempt to restrict the scope of military actions for such restriction's sake, not if the fundamental tenet of just war theory – that victims of violence have a right to resist it – is true.

Perhaps a sufficiently strong argument for sparing Naked Soldiers could be put forward. If it is possible, such an argument would need to be based in the moral significance of some distinguishing feature possessed by Naked Soldiers, yet not possessed by other combatants. A full and convincing account of such immunity's implementation would have to be provided, along with an honest picture of the practical consequences it would entail. Daniel Restrepo's article, however, provides neither of these.

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<sup>1</sup> These two conditions are far from identical: a helicopter gunship may have an enemy wholly in their power, but landing to capture him may still present a mortal danger to the crew, making the action entirely infeasible.

<sup>2</sup> While Restrepo himself does not use the term “belief” to describe a Naked Soldier’s mental state, he speaks of him being “unaware” of the threat (2020, 3), in contrast to other combatants who have “presumed knowledge” that “a counterstrike is coming” (2020, 3). The author does speak of two mental states, knowledge and awareness, interchangeably in this context. As knowledge entails belief, and as Restrepo defines a Naked Soldier as one lacking such “presumed knowledge”, I think it is not problematic to speak of awareness of danger, knowledge of danger or belief danger is present in describing Restrepo’s definition of this key term.

<sup>3</sup> If Naked Soldiers were to gain a legally protected status, individual combatants would have an incentive to pretend they are unaware of the presence of the enemy, thus providing themselves legal cover for a safe retreat. The discernibility of such mental states as being aware of one’s vulnerability or believing or knowing that one is vulnerable would thus be lower than they presently are in a legal environment advocated by Restrepo.

<sup>4</sup> This is not the situation of most combatants targeted by long-distance fires or ambushes. Consequently, by limiting the status of Naked Soldiers to those combatants who are justifiably unaware – in the epistemic sense – of their own vulnerability would allow the author to greatly reduce the scope of protections he advocates for, perhaps even to a level that might be practically contemplated without reimagining war as we know it. Alas, he does not do so.

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<sup>5</sup> For example the British naval personnel in the late Age of Sail were subject to corporal punishment if they did not eat their daily portion of fruit and vegetables, making themselves vulnerable to scurvy.

<sup>6</sup> A common but mistaken presupposition that most soldiers are unlikely, or were historically unlikely, to engage in deadly combat may be rooted in the literature stemming from the (in)famous claims by SLA Marshall, by now thoroughly debunked as entirely baseless (Engen 2008, 125-27).

<sup>7</sup> This thought experiment is based on Alan Wertheimer's "Polite Thugs" (2003, 166).

<sup>8</sup> This is not to say that the Naked Soldier deserves to be killed, merely that he is liable to be killed. Per Jeff McMahan's definition, "liability is essentially a matter of justice in the distribution of harm when some harm is unavoidable. The person or persons who are liable are those whom it is most just, or least unjust, to harm in the circumstances. If the harm does not go to them, it will inevitably go to others" (2016, 191). While the intuition that the Naked Soldier does not deserve to be killed may be the origin of Restrepo's argument, and may well be in contact with truth in most cases, it is not pertinent here.

<sup>9</sup> This is not the only instance of Restrepo being at odds with revisionist intuitions. On first glance his article could be taken to posit overtly restrictive standards for behavior in war. But that is only true as far as direct combat is concerned. By arguing that combatants are harmless unless directly threatening others, Restrepo implies that it is permissible for them to serve in a multitude of non-combat roles, even if their war is unjust.

<sup>10</sup> I am thankful to an anonymous Reviewer for pointing this out.

<sup>11</sup> It must be noticed that it is not merely that bestowing such an immunity upon Naked Soldiers would be inconsistent, or unfair to other groups separated from the battlefield by equal temporal distance. These would be valid objections, yet not unsurmountable – after all, Laws of Armed Conflict treat combatants stranded at a desert differently than combatants stranded at sea, although the situation of both is practically the same, and we all learned to live with this inconsistency.

<sup>12</sup> One way out of this dilemma would be stating that once a Naked Soldier becomes aware of a threat, he immediately loses his status and becomes targetable again. But this is a deeply unsatisfactory solution. A sniper can easily make his target aware of the threat by narrowly missing him the first time and then gunning him down with a second shot as the naked man tries to wade ashore. Any protection granted by the requirement to fire a warning shot is meager at best, and in practice illusory here.

<sup>13</sup> Combatants who lost consciousness are also unaware of their status, but in their case there is obviously no danger of them acting in ways not befitting it.

<sup>14</sup> This is not necessarily to say that the status of Naked Soldier could or would be perfidiously used – one can unfairly benefit from certain protections without engaging in perfidy *per se*. Yet either perfidiously assuming the status of Naked Soldier is possible, or Restrepo has to grant that the status should not be bestowed on combatants unaware of a threat because of military incompetence. Imagine a company setting up camp for the night in a warzone, but failing to establish a picket line around the place when they will sleep to warn the sleeping colleagues on an approaching danger in clear violation of all basic military principles and regulations. Are the careless sleeping men naked soldiers? If not, then judgments of competence do play a role in establishing their status. If they do gain the status, I say they perfidiously take advantage of its protection to gain 2 extra hours of sleep, instead of standing watch.

<sup>15</sup> To be fair, believing this does not commit Restrepo to rejecting humanitarian intervention in principle – after all, it is the atrocities that trigger such interventions that are justly regarded as the initiation of the ensuing conflict.