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The problem with the individualist approach to the principle of the immunity of non-combatants --Manuscript Draft--

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The problem with the individualist approach to the principle of the immunity of non-combatants

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Abstract

The world is littered with wars in which innocent individual human beings, helpless groups of persons and harmless institutions are casualties because they are directly or indirectly targeted and attacked. The nature or composition of such casualties calls for a revision of, or at least leads one to question, the dominant approach to the principle of non-combatant immunity. In just war theory, moral and political philosophers mostly approach the theorisation about the principle of the immunity of non-combatants from what may be termed the individualist approach. In this approach, combatants and non-combatants are conventionally conceived as individual human beings only or groups of persons. Consequently, the approach cannot show us how institutions cause or participate in war, and it cannot tell us how institutions should be treated in war, whether they should be treated as combatants or noncombatants, and when they should be treated as combatants or noncombatants. For this reason, the individualist approach is insufficient. However, in what may be referred to as the institutional approach, combatants and non-combatants can also be conceived as institutions rather than individuals or groups of persons. If this is this case, then arguments for and against the immunity of non-combatants can be proffered based on this institutional conception. This paper contends that we need to supplement the individualist approach with the institutional approach in order to be able to: (i) ascertain the causal, constitutive, contributory and participatory roles of certain institutions in a particular war; and (ii) determine whether they are legitimate targets of attack.

Keywords: Just War; *Jus in Bello*; Principle of Discrimination; Non-combatant Immunity; Individualist Approach; Institutional Approach.

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Keywords: Just War; Combatant; Institution; *Jus ad Bellum*; *Jus in Bello*; Non-combatant Immunity.

Introduction

In world history, it is apparent that wars are almost second nature to humans, societies and states. In recent times, some of the most war-torn countries in the world include Afghanistan, Cameroun, the Democratic Republic of Congo, Egypt, Ethiopia, Iraq, Libya, Mexico, Nigeria, Pakistan, Somalia, South Sudan, Sudan, Syria, Ukraine and Yemen (Sen Nag, 2018, s.p.). Historically and recently, there have been wars in which children, women, other civilians, primary schools, secondary schools, ambulances, clinics and hospitals are targeted and attacked. These victims were casualties because they were targeted and attacked directly or indirectly. Currently, our world is still littered with similar international humanitarian challenges. The aforementioned victims are targeted and attacked in wars in Yemen, Syria, Libya, Northern Nigeria and the so-called Islamic State that is now dissolved. This intractable international or global challenge, i.e. the nature or composition of the above casualties, calls for a revision of, or at least leads one to question, the dominant approach to the principle of non-combatant immunity.

Apparently, it is crucial that there is a clear and distinct definition of combatants and non-combatants. This task is as difficult and complex as the task of arguing for or against attacking non-combatants. To do this task, I will rely on the Geneva Conventions and their Additional Protocols which are:

international treaties that contain the most important rules limiting the barbarity of war. They protect people who do not take part in the fighting (civilians, medics, aid workers) and those who can no longer fight (wounded, sick and shipwrecked troops, prisoners of war) (ICRC, 2014, s.p.).

Article 3 of the First Geneva Convention, generally, attributes the status of combatants to members of the armed forces of a party to a conflict – nevertheless, some members such as medical personnel and chaplains are not attributed the status of combatant (ICRC, 1949a, s.p.). Furthermore, there are cases in which some members (who are neither medical personnel nor chaplains) of the armed forces of a party to a conflict can be non-combatants. For instance, during the Iraq War (the invasion of Iraq by the United States of America in 2003), off-duty American soldiers attending a parent-teacher association meeting in a school in New York were non-combatants.

The Geneva Conventions distinguish between lawful and unlawful combatants. Article 4 of the Third Geneva Convention and Article 43 of the First Protocol say lawful combatants are members of the regular armed forces of a State, and as such, they have the right to participate in hostilities (ICRC, 1949a, s.p.; 1949b, s.p.). Therefore, they may not be prosecuted for participating in hostilities except when they are guilty of violating international humanitarian law and the law of armed conflict. By virtue of this immunity, they are entitled to the status of prisoner of war (POW) when captured during their participation in hostilities. On the contrary, when any non-member of the regular armed forces of a state participates in hostilities; he/she is an unlawful combatant (*franc-tireur*), and as such, lacks the aforementioned immunity and is not entitled to the status of POW when captured (ICRC, 1977, s.p.).

The Geneva Conventions generally attribute the status of non-combatants to the civilian population. This is because normally civilians do not engage in active combat although they may provide non-combat support for members of the organised armed forces who are engaged in active combat. There are cases in which civilians engage in active combat. For instance, in the on-going war between Boko Haram (an Islamist terrorist group) and the Nigerian military in the Northeast of Nigeria, Boko Haram deploys young women as suicide bombers. These young women are civilians because they are not members of the organised armed force of Boko Haram. But by engaging in suicide bombing, they are combatants. Nevertheless, these are exceptions rather than the norm. In other words, non-combatants are usually non-members of the organised armed forces of a group that is at war, as well as others who are not directly participating in hostilities or those who do not have a continuous combat function.

In view of the attributes of combatants in the penultimate paragraph, “non-combatant” refers to anyone who does not possess such attributes. However, a combatant becomes non-combatant and vice versa when one acquires the attributes of the other. For instance, a combatant ceases to be a combatant and becomes a non-combatant when there is a cessation in his/her direct participation in hostilities due to: becoming an “out of combat” - *hors de combat* (this could be due to becoming a POW, or being wounded, and so forth); laying down of arms; and so forth. Whereas, a non-combatant ceases to be a non-combatant and becomes a combatant when he/she directly participates in hostilities.

The above definitions are helpful in three ways. Firstly, the definitions sufficiently portray who a combatant is and who a non-combatant is. Secondly, the definitions show that while combatants are mostly soldiers, they can also be civilians. Thirdly, the definitions show that while non-combatants are mainly civilians, they can also be soldiers. Nevertheless, the definitions are problematic in the sense that they narrowly view combatants and non-combatants as individuals only or groups of persons, thereby failing to appreciate that institutions too can be combatants and non-combatants.

In just war theory, moral and political philosophers mostly approach the theorisation about the principle of the immunity of non-combatants from what may be termed the individualist approach because many of them think that “it is individuals—and not [...institutions], such as states—who are the proper focus of moral evaluation” (Frowe, n.d.b, s.p.). Combatants and non-combatants are conventionally conceived as individual human beings only or groups of persons. In contrast to the individualist approach, I contend that combatants and non-combatants can also be conceived as institutions rather than individuals or groups of persons. If this is the case, then arguments for and against the immunity of non-combatants can be proffered based on this institutional conception. This is what may be referred to as the institutional approach. In the light of ethics of war discourse, my new approach can show us how institutions cause or participate in war, and it can tell us how institutions should be treated in war, whether they should be treated as combatants or non-combatants, and when they should be treated as combatants or non-combatants.

To get insights into the individualist and institutional approaches, let us look at Thomas Pogge’s assertion that there are two distinct ways of analysing the social affairs or occurrences of our world (2010, 14-15). On the one hand, we can see the social affairs or occurrences “interactionally: as actions, and effects of actions performed by individual and collective agents” (ibid.). On the other hand, we can see the social affairs or occurrences “institutionally: as effects of how our social world is structured and organised—of our laws and conventions, practices and social institutions” (ibid.). Moreover, these two distinct ways of social analysis “entail different descriptions and explanations of social phenomena, and they also lead to two distinct kinds of moral analysis or moral diagnostics” (ibid.) referred to as, in the first way, interactional moral analysis, and in the second way, institutional moral analysis (ibid.).

On the one hand, when we do interactional moral analysis, our focus is on the morality, immorality or amorality of the actions and omissions of certain individuals or groups of persons in the light of a given event, occurrence or situation. Given our focus, harmful incidents are traced to the actions or omissions of individuals or groups of persons. Consequently, we make counterfactual assertions, or hypothesise, about whether the harmful incidents would have occurred if particular individuals or certain groups of persons had not acted the way they did, or had not failed to act (ibid.). Then we analyse our hypothetical scenarios, hypothesis or counterfactual assertions to ascertain whether any individual agents or groups of persons ought not to have acted the way they did or ought to have acted when they failed to act. “This will involve us in examining whether any such agents could have foreseen that their conduct would lead to the regrettable event and could also reasonably have averted the harm without causing substantial costs to themselves or to third parties” (Pogge, 2010, 15). Based on this analysis, we can determine whether any of the causally relevant individuals or groups of persons is fully or only partially, and to what extent, responsible for the harmful incidents (ibid.).

On the other hand, when we do institutional moral analysis, our focus is on the morality, immorality or amorality of the existing features of certain institutions or even the institutions themselves *qua* institutions in the light of a given event, occurrence or situation. Given our focus, we trace harmful incidents to the existing features of certain institutions or the institutions themselves *qua* institutions (ibid.). Consequently, we make counterfactual assertions, or hypothesise, about whether the harmful incidents would have occurred if particular existing features of certain institutions were different or if the institutions themselves *qua* institutions were differently shaped or formed (ibid.). Then we analyse our hypothetical scenarios, hypothesis or counterfactual assertions to ascertain whether any existing features of certain institutions ought to have been different or whether certain institutions ought to have been differently shaped or formed. Based on this analysis, we can determine whether any of the causally relevant features of the institutions or the institutions themselves *qua* institutions are fully or only partially, and to what extent, responsible for the harmful incidents (ibid.).

I aver that there is a third way of analysing the social affairs or occurrences of our world. In this third way, we engage in a moral analysis in which we combine interactional moral analysis and institutional moral analysis (let us call it synthetic moral analysis). The best moral analysis is

the one that combines both interactional moral analysis and institutional moral analysis because wars involve both individuals and institutions. No wars involve either only individuals or only institutions. In wars, “everything exists in relation to other things” (Bray, 2008, 302). In other words, synthetic moral analysis is the best moral analysis.

However, synthetic moral analysis is only the best moral analysis “generally”, i.e. when we are “generally” concerned with both individuals (and collectives) and institutions. When we are “specifically” concerned with only individuals (and collectives) or only institutions, then interactional moral analysis or institutional moral analysis may be the best moral analysis depending on the moral harms we are concerned with tracing. Simply put, what makes an approach to non-combatant immunity institutional is that it is concerned with institutions, both as perpetrators of hostilities and as victims of hostilities. What makes an approach to non-combatant immunity individualist is that it is concerned with individuals, both as perpetrators of hostilities and as victims of hostilities. My aim is neither to argue that the individualist approach is totally wrong nor to argue that the institutional approach is the only appropriate approach. Rather, my aim is to argue that the former is insufficient and needs to be supplemented with the latter.

This discussion is divided into five sections. The first section is this introductory section. The second section discusses the prominence of the individualist approach. The third section discusses the problem with the individualist approach. Then the fourth section discusses the grounds for the institutional approach. While the sixth section (the conclusion) discusses the practical benefits of supplementing the individualist approach with the institutional approach.

The prominence of the individualist approach

Since the days of Thomas Aquinas, the goal of just war theory or philosophical investigation on war has been to seek a middle-of-the-road solution to the problem posed by two different sets of theorists (Ramsey, 1961). On the one hand, there are proponents (realists) of the non-applicability of moral principles to war. On the other hand, there are those (pacifists) who argue that no war can be morally justified (*ibid.*). Realists and pacifists belong to opposing sides in view of what they think the relationship between war and morality is. On the one hand, realists

think there is no relationship between war and morality. They think that wars are an amoral entity; wars are neither moral nor immoral. Hence, wars neither require any moral justification nor require any moral appraisal. On the other hand, pacifists think that there is a relationship between wars and morality. They think that wars are immoral. Hence, wars deserve moral condemnation.

Assuming that opposed to the realists, we have accepted that moral principles apply to war, and opposed to the pacifists, we have accepted that some wars can be morally justified; then we have just war at the middle of the spectrum. In other words, we would be agreed that there is such thing as a just war. However, for a war to be just, traditionally it has to meet the conditions of *jus ad bellum* and *jus in bello*, and recently, also the demand of *jus post bellum*.

Traditionally, just war theorists divide their enquiry into reflection on the resort to war—*jus ad bellum*—and conduct in war—*jus in bello*. More recently, they have added an account of permissible action post-war, or *jus post bellum* (Lazar, 2016, 2.4).

Furthermore, there are other suggestions such as a separate focus on war exit *sui generis* which is referred to as *jus ex bello* and *jus terminatio* (Moellendorf, 2008; Rodin, 2008; Lazar, 2016).

In a nutshell:

when we refer to *ad bellum* justice, we mean to evaluate the permissibility of the war as a whole. This is particularly salient when deciding to launch the war. But it is also crucial for the decision to continue fighting. *Jus ex bello*, then, fits within *jus ad bellum*. The *jus in bello* denotes the permissibility of particular actions that compose the war, short of the war as a whole (Lazar, 2016, 2.4).

In international law, “*jus ad bellum* refers to the conditions under which States may resort to war or to the use of armed force in general” (ICRC, 2015, 8). It “defines the legitimate reasons a State may engage in war and focuses on certain criteria that render a war *just*” (Nabulsi, 2011, s.p.) (emphasis in original). On the one hand, Article 2 (section 4) of the United Nations (UN) Charter declares that “All members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations” (UN, 1945, 3). In view of this declaration, the USA and its coalition countries (the Coalition Forces)

violated *jus ad bellum* in 2003 when they invaded Iraq because they had no valid and sound moral justification and no approval from the Security Council. On the other hand, Article 51 of the UN Charter declares that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations” (UN, 1945, 10 – 11). In view of this declaration, Iraq respected *jus ad bellum* when it attempted to resist the Coalition Forces because it acted based on self-defence.

In international (humanitarian) law, “*jus in bello* regulates the conduct of parties engaged in an armed conflict” (ICRC, 2015, 8). It:

regulate[s] how wars are fought, without prejudice to the reasons of how or why they had begun.... So a party engaged in a war that could easily be defined as unjust... would still have to adhere to certain rules during the prosecution of the war, as would the side committed to righting the initial injustice (Nabulsi, 2011, s.p.).

Using the war in Yemen as an example, Saudi Arabia is violating *jus in bello* because it indiscriminately attacks non-combatants even children. Whether the warring Yemini factions themselves respect *jus in bello* and to what extent they respect or fail to respect *jus in bello* is another serious moral matter.

My concern in this discussion is neither with *jus ad bellum*, nor with *jus post bellum*, and I am not concerned with *jus ex bello* or *jus terminatio*; I am rather concerned with *jus in bello*. *Jus in bello* is characterised by three distinct but complementary principles, namely the principles of discrimination, proportionality and necessity. The principle of discrimination says “belligerents must always distinguish between military objectives and civilians, and intentionally attack only military objectives” (Lazar, 2016, 2.5). The principle of proportionality says “foreseen but unintended harms must be proportionate to the military advantage achieved” (ibid.). While the principle of necessity says “the least harmful means feasible must be used” (ibid.).

Rephrased in terms of the immunity of non-combatants, the three principles of *jus in bello* offer us the following insights. The principle of discrimination says “targeting non-combatants is impermissible” (ibid.). The principle of proportionality says “collaterally harming non-

combatants (that is, harming them foreseeably, but unintendedly) is permissible only if the harms are proportionate to the goals the attack is intended to achieve” (ibid.). While the principle of necessity says “collaterally harming non-combatants is permissible only if, in the pursuit of one’s military objectives, the least harmful means feasible are chosen” (ibid.).

The principles of *jus in bello* categorically “divide the possible victims of war into two classes: combatants and non-combatants” (Lazar, 2016, 4.1). On the one hand, the principles “place no constraints on killing combatants” (ibid.). On the other hand, except in cases of “‘supreme emergencies,’ rare circumstances in which intentionally killing non-combatants is necessary to avert an unconscionable threat” (ibid.), the principles say “non-combatants may be killed only unintendedly and, even then, only if the harm they suffer is necessary and proportionate to the intended goals of the attack” (ibid.).

In this discussion, I will neither be concerned directly with the principle of proportionality nor directly with the principle of necessity. I will only be indirectly concerned with them to the extent that they complement the principle of discrimination which is my concern in the discussion. My specific concern with *jus in bello* in general and the principle of discrimination in particular is the immunity of non-combatants. The immunity of non-combatants is based on different *desiderata* and there have been many reasons given to argue for each *desideratum*. These arguments include mitigation of suffering, (cruelty, minimising pain, and proportionality), the greater prize (the monopoly of force), military ineffectiveness, protection of the prize, accumulation of honour, human rights, the interests of peace, Christian charity, innocence, moral damage, and so forth (Stroble, 1996).

Essentially, the principle of the immunity of non-combatants says that “civilians may not be targeted in war, but all combatants, whatever they are fighting for, are morally permitted to target one another, even when doing so foreseeably harms some civilians (so long as it does not do so excessively)” (Lazar, 2016, 1). In a nutshell:

The principle of non-combatant immunity holds that it is impermissible to target non-combatants in war. The principle is thought to hold universally; it covers all non-combatants in all conflicts. Most just war theorists argue that this is because

non-combatants are not liable to defensive killing, by which they mean that non-combatants have done nothing to lose their rights against intentional attack. Intentionally killing them will therefore wrong them. But of course, just war theorists usually allow that it is permissible to target combatants during war. The traditional explanation of why combatants have lost their rights against intentional attack is that, unlike non-combatants, combatants threaten (Frowe, n.d.a, s.p.).

As mentioned in the introductory section, combatants and non-combatants are conventionally conceived as individual human beings only or groups of persons. It is largely based on this individualist conception that the arguments for and against the immunity of non-combatants have been proffered. For instance, it is this individualist conception that pervades Michael Walzer's arguments in his classic, *Just and Unjust Wars: Argument with Historical Illustrations* (1977). Walzer argues that *ceteris paribus*, no one is permitted to harm individuals because of certain fundamental human rights such as the right to life and the right to liberty which individuals have (1977, 135). Nevertheless, he adds a *caveat* to the above claim. He says, in wars individuals are usually deprived of their lives and liberties, but this is morally permissible if and only if an individual, "through some act of his [or her] own ... surrendered or lost his [or her] rights" (ibid.).

According to Walzer, combatants, "simply by fighting...have lost their title to life and liberty" (2006, 136). Combatants are legitimate targets of attack because "merely by posing a threat to me, a person alienates himself [or herself] from me, and from our common humanity, and so himself [or herself] becomes a legitimate target of lethal force" (Walzer, 2006, 142). Furthermore, by joining the armed forces a combatant has "allowed himself [or herself] to be made into a dangerous man [or woman]," and consequently has forfeited his/her rights to life and liberty (Walzer, 2006, 145). On the contrary, non-combatants, according to Walzer, are "men and women with rights, and... they cannot be used for some military purpose, even if it is a legitimate purpose" (2006, 137).

In spite of Walzer's individualist arguments as presented above, one may still argue that he is an institutionalist because ultimately he says war is not a relationship between individuals, but between political entities (Walzer, 2006, 35). Note that the above assertion by Walzer applies to just war theory at the *general* level. In this sense, he is an institutionalist, albeit at the *general* level of just war theory. Nevertheless, at the *specific* level of non-combatant immunity, his arguments are individualist. In this sense, he is an individualist, albeit at the *specific* level of non-combatant immunity. It is not a contradiction to say that Walzer is simultaneously an institutionalist at the general level of just war theory and an individualist at the specific level of non-combatant immunity. Being an institutionalist at the general level of just war theory and being an individualist at the specific level of non-combatant immunity are not mutually exclusive.

The problem with the individualist approach

The dichotomy between the individualist approach and the institutional approach to the principle of immunity of non-combatants is clearly manifest if we look at a statement made by a notable representative of the proponents of the individualist approach, Helen Frowe. The position of the proponents of the individualist approach can be summed up in her statement. She says:

in my work on just war theory, I adopt a reductive individualist approach to war. This approach is reductionist because it holds that the moral rules of war are reducible to the moral rules of ordinary life. It is individualist because it holds that it is individuals—and not [...institutions], such as states—who are the proper focus of moral evaluation (Frowe, n.d.b, s.p.).

Frowe is concerned about moral individualism, i.e. the ultimate unit of concern are human individuals. Therefore, I think she will say it is permissible to attack institutions. However, apparently her assertion is reductionistic. Although she is not concerned with methodological individualism, the sole focus on the individualist approach is reductionistic because it is tantamount to methodological individualism which says “social phenomena must be explained by showing how they result from individual actions, which in turn must be explained through reference to the intentional states that motivated the individual actors” (Heath, 2005,

introduction). Therefore, the individualist approach cannot show us how institutions cause or participate in war, and it cannot tell us how institutions should be treated in war, whether they should be treated as combatants or non-combatants, and when they should be treated as combatants or non-combatants. It is for this reason that the individualist approach is insufficient.

Frowe's assertion is wrong to the extent that it totally negates the role of institutions in war and consequently fails to see that institutions can also be combatants and non-combatants. Solely focusing on the individualist approach as the right approach while negating the institutional approach is simultaneously reductionistic and insufficient. As mentioned in the introductory section, no wars involve only individuals. Wars involve both individuals and institutions. We cannot ignore the involvement of institutions in conflicts if we want to enhance research works in the areas of ethics and political violence, particularly war crimes and crimes against humanity. To effectively deal with the ethics of war, we must consider the involvement of institutions in wars.

Essentially, ethics of war is an attempt to set moral standards for war. In our world today, there is need to set standards of behaviour in certain essential aspects of life, especially war. Otherwise, contemporary wars might degenerate into a Hobbesian state of nature where it is the war of all against all. As Thomas Hobbes says:

to this war of every man against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice, have there no place (1651, 79).

In wars, if we only set moral standards for individuals but not for institutions then wars will remain vicious cycles. The problem is not that the idea of the institutional approach does not exist in the theorising about war, but the problem is that the idea has not been extended, or applied, to the principle of the immunity of non-combatants. Moreover, as Seth Lazar (2016) explains, in contemporary moral and political philosophy, moral philosophers in general and political philosophers in particular theorise about war from two different approaches. One approach is the institutional approach and the other approach is the individualist approach.

On the institutional approach, the general aim of moral and political philosophers is to determine which institutions should regulate war and what such institutions ought to be, while the particular aim is to determine which laws should govern war and what such laws ought to be. Having determined such laws, moral and political philosophers will then argue that individuals and groups have the moral obligations to obey such laws. But on the individualist approach, eliminating the mediatory role of institutions, moral and political philosophers concentrate on the grounds on which individuals and groups can be morally justified to carry out certain actions in war. Having determined such grounds, moral and political philosophers will then argue that individuals and groups ought to act in accordance with the dictates of their conscience or moral reason (ibid.).

In summary, the individualist approach needs to be supplemented with the institutional approach. This conclusion is based on the premises that:

- (a) neither the individualist approach nor the institutional approach is at once necessary and sufficient;
- (b) neither the individualist approach nor the institutional approach is at once unnecessary and insufficient;
- (c) neither the individualist approach nor the institutional approach is unnecessary but sufficient;
- (d) the individualist approach and the institutional approach are each necessary but each insufficient, and;
- (e) the individualist approach and the institutional approach are jointly necessary and jointly sufficient (Abumere, 2015, 217).

Summarising the above premises in a syllogistic manner, the individualist approach alone is necessary but insufficient because it can only help us to analyse the roles and victimhood of individuals. The institutional approach alone is necessary but insufficient because it can only help us to analyse the roles and victimhood of institutions. A supplementation of the individualist approach with the institutional approach is at once necessary and sufficient to analyse the roles and victimhood of both individuals and institutions. My aim is not only to show that my argument is formally valid, but more importantly to show that my argument is sound and historically true as illustrated by the Iraq War, the War in Yemen, the war in

Northeastern Nigeria and so forth. I will offer an explanation of this matter in the remainder of this section.

Arguendo, on the one hand, let us assume there are wars that involve only individual persons or groups of persons – let us call these wars ahistorical cases. On the other hand, let us assume there are wars that involve only institutions – let us call these wars ahistorical cases too. To analyse ahistorical cases involving only individual persons or groups of persons, we only need the individualist approach because the institutional approach will be redundant here given the absence of institutions in these cases. On the other hand, to analyse ahistorical cases involving only institutions, we only need the institutional approach because the individualist approach will be redundant here because of the absence of individual persons or groups of persons in these cases. However, ahistorical cases are just what they are, *ahistorical*. I am concerned with wars that have happened, wars that are happening, wars that will happen, and wars that may or might happen – not wars that never happened and will never happen due to their impossibility.

In view of the insufficiency of the individualist approach as explained in this section, we will fail to have a robust analysis of cases of non-combatant immunity if we jettison the institutional approach and remain with only the individualist approach. Here, to reiterate my contention, neither the individualist approach nor the institutional approach is at once necessary and sufficient to analyse cases of non-combatant immunity. The above contention is based on the premise that although the individualist approach and the institutional approach are individually necessary, they are individually insufficient in analysing cases of non-combatant immunity.

If there were wars that involved only individual persons or groups of persons on the one hand or only institutions on the other hand, then either the individualist approach or the institutional approach would be sufficient. Such wars are not known in human history. Imagine ancient wars such as the Peloponnesian War, medieval wars such as the Crusade, modern wars such as the Napoleonic Wars, contemporary wars such as the two World Wars, recent wars such as the Iraq War, and current wars such as the wars in Afghanistan, Libya, Syria and Yemen. In all these wars, although we can separate the roles and victimhood of individuals and institutions, the important point is that both individuals and institutions were or are involved in the wars.

The grounds for the institutional approach

In the preceding section, I discussed the problem with the individualist approach and averred that the individualist approach needs to be supplemented with the institutional approach. In this current section, I will continue the discussion in the preceding section by discussing the grounds for the institutional approach. My contention that the institutional approach is vital to the theorising about the principle of the immunity of non-combatants is based on two related grounds. The first ground is levels of analysis and the second ground is sub-levels of analysis; the second ground is derived from the first ground.

Firstly (the first ground—levels of analysis), there are different actors, agents and factors involved in causing war or in participating in war. In spite of the complex and multiple nature of the causes of war and participants in war, it is still possible to understand which role different actors, agents or factors play. We can lump all the actors, agents or factors together and deal with them merely as complex factors or see them only as multiple agents. However, this will not allow us to ascertain properly the causal or participatory roles played by different actors, agents or factors. We can reduce all the factors to merely and only individualist on the one hand or to merely and only institutional on the other hand. This too will not allow us to ascertain properly the causal or participatory roles played by different actors, agents or factors. Therefore, combatants and non-combatants should be analysed on different levels. Hence the vitality of the institutional approach.

Secondly (the second ground—sub-levels of analysis), causes of war and participants in war can be seen as individualist or institutional, and then there are different analytic sub-levels at which we can deal with the individualist and institutional causes of war and participants in war. There are two sub-levels of individualist combatants and non-combatants, and two sub-levels of institutional combatants and noncombatants. On the first individualist sub-level, we have individual persons. While on the second individualist sub-level, we have groups of persons. On the first institutional sub-level, we have sets of practices, rules, regulations, etc. that cause, aid, or engender war and/or the participation in war. While on the second institutional sub-level, we have bodies that are responsible for the sets of practices, rules, regulations, etc. that cause, aid, or engender war and/or the participation in war. These bodies include: newspapers, television stations and radio stations that serve as war mongers or propaganda machines; defence

headquarters and ministries of defence that plan the strategies of war; treasuries and ministries of finance that fund wars; parliaments and presidencies that authorise or sanction wars; and so forth.

Obviously, the first institutional sub-level—sets of practices, rules, regulations, etc. that cause, aid, or engender war and/or the participation in war—is neither physical human beings nor physical structures that directly or indirectly participate in war. I will use the institution of “veto power” in the Security Council and the practice of “might makes right” in international politics to illustrate my point. For instance, on 20th December, 2019 “Russia, backed by China ... cast its 14th U.N. Security Council veto since the start of the Syrian conflict in 2011 to block cross-border aid deliveries from Turkey and Iraq to millions of Syrian civilians” (Nichols, 2019, s. p.). On their part, the USA and the United Kingdom (UK) invaded Iraq in 2003 based on “might makes right” regardless of the condemnation from the international community. In effect, like the Athenians said to the Melians in the Peloponnesian War, the USA and UK were saying to Iraq, “right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must” (Thucydides, 1972, Book Five).

Although the sets of practices, rules, regulations, etc. cause, aid, or engender war and/or the participation in war, they are *merely*, and *only*, a set of practices, rules, regulations, etc. They are neither combatants nor non-combatants. Hence, the question of their combat status does not even arise. To deal with them, relevant national, sub-regional, regional and global actors will need to embark on institutional reforms using laws, policies, sanctions, socialisation, etc. at the national, sub-regional, regional and global levels.

However, the second institutional sub-level is physical structures that directly or indirectly cause war or participate in war. For instance, in the context of the Iraq War these institutions include the American government (in the form of the White House, the Congress, the State Department, the Pentagon, etc.), the British government in the form of No. 10 Downing Street, the House of Commons, etc.), Fox News, and so forth. Furthermore, the physical structures

(newspapers, television stations and radio stations that serve as war mongers or propaganda machines; defence headquarters and ministries of defence that plan the strategies of war; treasuries and ministries of finance that fund wars; parliaments and presidencies that authorise or sanction wars; and so forth) are directly and/or indirectly responsible for the first institutional sub-level. In other words, the second institutional sub-level does not only directly or indirectly cause war or participate in war, it is also directly or indirectly responsible for the sets of practices, rules, regulations, etc. that cause war, aid war, or engender the participation in war.

As physical structures controlled by physical persons, the question of the combat status of the second institutional sub-level arises, and the physical structures can be classified as combatants or non-combatants. The important question is; given their direct and indirect roles in wars, are these physical structures—whether combatants (direct or indirect) or non-combatants—legitimate targets of attack? In other words, is attacking these physical structures morally justifiable? It might be counter-productive to legislate a categorical imperative for what we ought to do or ought not to do in relation to the physical structures during wars because such legislation might lead to unintended consequences. In different contexts and cases, different spatio-temporal circumstances will determine whether it is morally permissible or not morally permissible to attack the physical structures. I intend the robust approach in this paper to serve as the groundwork and springboard for those who are concerned with determining whether it is morally permissible or not morally permissible to attack the physical structures.

In view of the first ground (levels of analysis) and the second ground (sub-levels of analysis), it is only when we supplement the individualist approach with the institutional approach that we are able to do fully the following:

- (i) ascertain the causal, constitutive, contributory and participatory roles of certain individuals, groups of persons and institutions in a particular war;
- (ii) determine who are combatants and non-combatants in the war, that is, determine the combat status of individuals, groups of persons and institutions in the war, and;
- (iii) determine whether they are legitimate targets of attack, that is, whether attacking them can be morally justified.

Conclusion

I concluded the discussion in the preceding section by iterating three *theoretical* reasons for supplementing the individualist approach with the institutional approach. I shall conclude the entire discussion by explaining what the three theoretical reasons translate to in terms of *practical* benefits. This paper—by showing that combatants and non-combatants are not only individuals and groups of persons, but can also be institutions—alerts us that in order to minimise the casualties and damages of wars we should not merely or only look at the roles of individuals and groups of persons. We should also look at the causal, constitutive, contributory and participatory roles institutions play in war. This is the essence of the distinction between the individualist conception of combatants and non-combatants on the one side and the institutional conception of combatants and non-combatants on the other side. Moreover, it is the essence of the distinction between the individualist approach to the principle of the immunity of non-combatants and the institutional approach to the principle of the immunity of non-combatants. After all, the actions or omissions of individual persons are not as powerful as those of institutions are. This is true in time of peace, and it is even truer in time of war.

This paper—by supplementing the individualist approach with the institutional approach—uses the strength of the institutional approach to compensate for the weakness of the individualist approach and uses the strength of the individualist approach to compensate for the weakness of the institutional approach. In turn, the determination of the combat status of individuals, groups of persons and institutions becomes tractable. Consequently, arguing, campaigning and standing for the protection of certain individuals, groups of persons and institutions in times of war become more theoretically plausible, more practically possible and more morally reasonable. This is apt given that there is no singular approach—whether individualist or institutional—that is at once necessary and sufficient to deal with the complexity of the principle of the immunity of non-combatants.

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01 May, 2020.

The Editor,
South African Journal of Philosophy.

Dear Editor,

Response to Reviewer's Comments and Suggestions

The reviewer divided his/her comments into general comments and specific comments. Firstly, in response to the “**General Comments**” (and suggestions), I removed the section on formal logic from the manuscript. This made my argument easy to follow. Secondly, in response to the “**Specific Comments**” (and suggestions), I made the following changes to my manuscript.

1. Having already removed the section on formal logic, I explained why it is very important that my argument is not only logically valid, but also (and more importantly) it must be logically sound and historically true. I illustrated my point with specific wars in ancient era, medieval era, modern era and contemporary era.
2. I provided textual and historical evidence for, and illustrations of, my empirical claims. Using the Iraq War, the war in Syria, the war in Yemen, the war in Northeastern Nigeria, etc. I illustrated my claims about wars. In addition, I used the American government, the British government and Fox News to illustrate how one institutional sub-level cause or engender war. While I used “veto power” and “might makes right” to illustrate how the other sub-level of institutional sub-level cause or engender war.
3. I explained the “relationship” between realists and pacifists and explained why their different views are opposing views. Then I extended my discussion on jus ad bellum and jus in bello beyond what I had discussed in the manuscript. In addition to Seth Lazar, I brought on board some other authorities on the subject matter. At the same time, I provided illustrations for jus ad bellum and jus in bello.
4. Having stated that generally the status of non-combatant is attributed to civilians, I explained why this is the case. In addition, I explained why generally the status of combatant is attributed to soldiers. I illustrated how civilians too can be combatants and how soldiers too can be non-combatants.
5. Crucially, I explained the problem my new approach will be solving in the light of ethics of war discourse.
6. On p. 2, third line of the second paragraph, I revised the sentence starting with “therefore” in order for it to fit properly into the paragraph. Then I introduced what Geneva

Conventions are, and provided citations (in-text references) for the references to the Geneva Conventions.

7. Finally, I edited - removing repetitive sentences in some paragraphs, correcting a few grammatical errors and correcting bibliographical errors.

I am very grateful for the comments and suggestions I received from the reviewer. I genuinely believe that his/her comments and suggestions have made my paper a better paper. It will be an honour to publish the paper in your prestigious journal.

Sincerely with many thanks,

A handwritten signature in black ink, appearing to read 'F. Aragbonfoh Abumere', enclosed within a circular scribble.

Frank Aragbonfoh Abumere