

The principle of discrimination or distinction

LARRY MAY (excerpt from his book *War Crimes and Just War* [2007])

The principle of discrimination (or distinction, as it is sometimes called in legal circles) requires that soldiers treat civilians differently from fellow soldiers, generally not attacking the former except in extreme situations. The Geneva Conventions call for a clear separation of people into two camps: those who are protected from assault, including army medical personnel, injured soldiers, prisoners of war, and civilians on the one hand, and soldiers actively engaged in hostilities on the other hand. Since the Middle Ages, it has been common to differentiate these people into two large groups, although there has not been wide agreement about which of the following groups were the most salient: civilians versus soldiers; noncombatants versus combatants; or the innocent versus the non-innocent (the guilty). In this chapter, I will argue that the principle of discrimination or distinction is most plausibly defended as an extension of the principle of humane treatment, and only on that basis is it to be seen as providing a nonutilitarian basis for deciding how to act during war.

As I explained in Chapter 5, the principle of discrimination is often defended as itself a basis for rough-grained treatment, where there is an absolute ban on certain forms of violence against civilians, noncombatants, or the innocent, but where these forms of violence can appropriately be used against soldiers, combatants, or the non-innocent (guilty). I argued that the principle of discrimination could not sustain such a rough-grained, as opposed to a fine-grained, approach if the main consideration was whether a member of one group has indeed done something to threaten the lives of members of the other group. For in that case, the naked soldier could not be shot, and a whole host of people who do not clearly fit into the category of civilians, noncombatants, or the innocent would have to be protected, at least in certain circumstances. The principle of discrimination, therefore, could not sustain a bright-line approach to determining who was protected and who was not.

One of the most important difficulties with the principle of discrimination, as it is normally understood, is that it attempts to draw a bright line about who can legitimately be assaulted or killed on the basis of what the members of the group have done in the past or are currently doing. I will continue my attempt to show what is wrong with such a strategy, and I will begin to develop an alternative model that is closely linked to the model I established in Chapter 4 for understanding the principle of humane treatment - namely, to focus on status rather than on what one has done or is currently doing. The status-based model I will develop is often criticized for various reasons, some of which have to do with standard worries about collective responsibility that I will attempt to rebut.

In the first section of this chapter, I will return to my critique of the standard approach to the principle of discrimination offered by Michael Walzer and others. In the second section, I will then set out a different way to justify the principle of discrimination (distinction) in terms of humane treatment. In the third section, I will articulate a test for the principle of discrimination and discuss an application of the newly conceptualized principle of discrimination by returning once again to the problem of the naked soldier. In the fourth section, I turn to four criticisms of my account of the principle of discrimination. And then, in the final section, I address the most significant metaphysical problem with my account by addressing an important point made by Noam Zohar.

I. FOCUSING ON STATUS RATHER THAN BEHAVIOR

The state of international law concerning how to treat combatants and noncombatants is controversial. I have been using the term "principle of discrimination," which is the term used in the Just War tradition. International lawyers tend to use the term "principle of distinction" to mark the requirement that combatants and noncombatants not be treated alike. The Institute of International Law adopted a resolution at its 1969 Edinburgh meeting concerning the principle of distinction.

The Resolution declared:

1. The obligation to respect the distinction between military objectives and non-military objectives as well as between persons participating in the hostilities and members of the civilian populations remains a fundamental principle of the international law in force. . . .
4. Existing international law prohibits all armed attacks on the civilian population as such. . . .
7. Existing international law prohibits the use of all weapons which, by their nature, affect indiscriminately both military objectives and nonmilitary objects, or both armed forces and civilian populations.

This extremely clear statement of the principle of distinction is not accepted by all States. In particular, the United States has said that it does not accept this statement of international law, despite the fact that a unanimous 1970 General Assembly Resolution embraced this formulation of the principle of distinction or discrimination.¹

In international law, rationales for the principle of distinction or discrimination, when given at all, are primarily drawn in terms of humanity rather than immunity linked to behavior. Leslie Green, one of the foremost authorities on the law of war, puts the principle of distinction or discrimination into the general context of "considerations of humanity."² Dieter Fleck's *Handbook* states the point in a similar way: "[T]he principle of distinction belongs to the oldest fundamental maxims of established customary rules of humanitarian law. . . . The ICJ has recently reaffirmed, in the Nicaragua judgment, the particular dignity of these minimum rules, qualifying them as general principles of law which flow from 'elementary considerations of humanity.'³ And Ingrid Detter puts the point even more starkly: "The protection of civilians is, from the humanitarian point of view, the most important task of any legislative effort on warfare as such persons include the weakest members of the community most in need of protection, such as women, children and the aged."⁴ Detter also mentions, but seemingly as a less important rationale, "that civilians must normally be assumed to have wished to abstain from involvement in the conflict."⁵ In the next section, I will develop a rationale for the principle of discrimination or distinction in terms of the principle of humane treatment and in keeping with the dominant understanding of contemporary international law as a replacement for the behavioral rationale given by Walzer and others that is largely drawn in terms of justice rather than humanity. In the remainder of the current section, I will sketch some of the problems with the behavioral alternative.

In the first chapters of this book, I highlighted the difference between (retributive) justice and humanity as a basis for the rules of war. Justice calls for giving to a person what is owed as his or her due based on what that person has done or is currently doing. On the other hand, humanity calls for giving a person the benefit of the doubt and generally calls for acting toward the person as a fellow human being deserving of respect no matter what he or she has done or is now doing. As Grotius said, it is sometimes better to do more than what is required by justice, because we display our true humanity by doing so, especially when we are dealing with those who are our enemies. Wartime situations are obviously situations where it would be appropriate to appeal to the principle of humanity.

Focusing on what one has done is generally better than focusing on who one is, especially when we are talking about punishment. For punishment should normally reflect what one has under one's control, which is typically one's behavior, and not things out of one's control, such as one's status. There is a great

likelihood of abuse when punishment is pegged to status. For this reason, U.S. Supreme Court cases have held that a person could not be punished merely for his or her status - for instance, merely for being drunk, for being homeless, or for just standing on a street corner.⁶ In the liberal tradition that has developed since John Stuart Mill, punishment has been seen as apt only when a person does something harmful to another person that violates a law.⁷ Wartime situations, though, are different from normal situations, especially because there are reasons to think that people are not going to act rationally toward one another.

In wartime, as I have suggested before, there is the problem of the heightened emotions of the participants to worry about. In wartime, commanders on both sides go to great lengths to make their troops think of the troops on the other side as their enemies. Enemies tend to hate one another, even to seek vengeance against one another, making it very hard for individuals to be rational and to see what other individuals owe to one another. The emotional elements, especially anger and even rage, that are often standard fare in war make it imperative that narrow or natural justice not be the only basis for deciding how the "enemy" is to be treated. It is for good reason that Grotius argued, over three hundred years ago, for the priority of our "humanitarian instincts. "

Also, in wartime it is not at all clear what individuals deserve, given that States rather than individuals typically wage wars. If individuals do not start wars, but are merely doing their patriotic duty by aiding their States in waging war, in what sense do they deserve ill treatment by enemy States? And even if they do, on some theory, deserve ill treatment, shouldn't it matter what their status was - namely, that they were merely followers of the leadership of a State or cogs in a war machine that was not of their own making? As I will explore in later chapters, especially Chapter 12, it might make sense to punish the leaders of a State based on what they deserve. But it might also make sense to relieve from punishment the soldiers who followed the orders of these leaders, even if the soldiers in some sense also deserve to be punished. Here we would let status override behavior.

In the Just War tradition, it is common to say that there is a rough moral equality of soldiers in wartime, in that each can kill and each can defend his or her life by trying to kill the enemy soldier. I have argued against this view in various respects in earlier chapters. Nonetheless, I think there is a grain of truth in this view: that soldiers all share the same status and for this reason generally should not be treated according to what is deserved based on their behavior. Soldiers rarely engage in behavior that has not been commanded, or at least sanctioned, by higher-ups. For this reason, it is usually a mistake to treat soldiers as if they were acting entirely on their own when they commit harms against others.

The principle of discrimination has been grounded in the behavioral rather than the status-based moral equality of soldiers. Walzer famously argues that all soldiers have "allowed themselves to be made into dangerous men," thereby losing their immunity from being attacked and killed.⁸ This position seemingly links the loss of immunity to what the soldier has done, either by enlisting or allowing himself or herself to be drafted, I argued in Chapter 5 that it was insufficient to link loss of immunity to something as passive as allowing oneself to be drafted, especially because for many young men and women there were few reasonable alternatives at the time. But it seems to me that Walzer's argument is more at home with the status-based, rather than the behavioral, grounding of the moral equality of soldiers. For allowing oneself to be made into a dangerous person, except in unusual circumstances, is little different from having that status thrust upon one.

It is true that in some cases men and women could willingly resist allowing themselves to be made into dangerous men and women by not acceding to the draft. But it is hard to see why such a fairly minor form of behavior would carry with it such dire consequences. It is different, of course, if one decides to enlist, but even in that case one wonders what reasonable options the person had. Was enlistment due to overriding concerns about supporting a family or even overriding concerns of patriotism? If so, one can

again raise the question of whether the "behavior" is sufficient to warrant the losing of such an important immunity, perhaps our most important immunity. For it takes little imagination to understand that the loss of immunity from being attacked and killed is perhaps the most important moral immunity a person has. It would seem to take a major behavioral argument to warrant the claim that one has by one's behavior lost that immunity. Let us next examine a status-based argument instead.

II. HUMANE TREATMENT AND DISCRIMINATION

I will here construct a rationale for the principle of discrimination, or distinction, that is based on the status considerations of the principle of humanity and the discussion in Chapter 4 of the principle of humane treatment. Such a rationale will not result in a bright line between civilians and soldiers, because it will turn out that some soldiers, such as the naked soldier, are as much in need of protection (or more so) because of their status as many civilians are. Nonetheless, we will be able to get a strong rationale for the prohibition on indiscriminate killing in war, and thus we will be able to provide a rationale for the principle of distinction or discrimination that will mesh with the most important of the principles of humanitarian law: the principle of humane treatment.

Let us begin with Ingrid Detter's observation quoted at the beginning of the previous section. She says that the key consideration is that civilians during war are vulnerable and in need of protection. Of course, as Detter herself says, this is not necessarily true of everyone who is a civilian. The group of civilians "includes" those who are among the weakest, but it also includes others.⁹ For some civilians may indeed have the means to protect themselves and may be as strong and effectively armed as members of the military. But typically, civilians are in a vulnerable position vis-a-vis armed soldiers. This is especially true of those who are very young, very weak, or very old. We need not endorse Detter's claim that all women fit into this category because many women function quite well as soldiers, and, even when not being soldiers, many women can defend themselves quite well. But Detter provides us with a good start by talking about the status of being vulnerable as the key to the principle of discrimination or distinction.

Being vulnerable is indeed a status not a behavioral characteristic, although there is a bit of a blending of these categories in some cases. Robert Goodin gives the following gloss on the dictionary definition of "vulnerable":

"According to the Oxford English Dictionary, something is "vulnerable" if it "may be wounded," either literally or figuratively; it is "susceptible of injury, not proof against weapon, criticism, etc." . . . Conceptually, "vulnerability" is essentially a matter of being under a threat of harm; therefore, protecting the vulnerable is primarily a matter of forestalling threatened harms."¹⁰

While it may be that some people who are vulnerable have done something to place themselves in this position, there are many others who are merely born into this position or placed there by the commissions or omissions of others. Vulnerability may in some cases be connected to what one has done, but there is no necessary connection between one's behavior and one's vulnerability.

During war, civilians are generally vulnerable to attack and soldiers are generally not vulnerable because they have the means to fend off attacks. This is the starting insight that leads to the principle of discrimination or distinction. But it turns out that not all members of these groups are similarly situated, even if we focus on their status rather than what they have done. It is for this reason that I earlier proposed a fine-grained rather than a rough-grained way of understanding this principle. For if the key consideration is whether one is vulnerable to attack or other forms of harm, it will rarely turn out that all the members of a large group, all the time, are actually vulnerable. But protecting those who are vulnerable may indeed be the underlying rationale for having a principle of discrimination or distinction.

Humane treatment enters the picture because compassion and minimizing suffering are ideas cognate to that of protecting the vulnerable. Compassion involves suffering with the other and makes one especially prone to help the vulnerable because they are so clearly prone to suffer. And, of course, minimal suffering is also very closely related to protecting the vulnerable, for the main thing that the vulnerable need to be protected from is being made to suffer, whether such suffering is deserved or not. Acting compassionately, like protecting the vulnerable, also seems to call for disregarding the behavior of the individual so helped and focusing on the status of the individual, especially the status that calls forth a response on our part as fellow humans.

Our earlier discussion of the principle of humanity is therefore also implicated for it is the status not the just deserts that count the most in determining how people should be treated according to the principle of discrimination or distinction. As Goodin indicates, a focus on vulnerability shifts the discussion from what the vulnerable person has done to whether there is anyone who can help.¹¹ If there is a focus on behavior at all, it is not one that looks back to what the vulnerable person did, but one that looks ahead to what others can do to alleviate the vulnerability, or at least to minimize its effects. The chief behavioral factor is what those who are not vulnerable, and who could exploit this vulnerability, are capable of doing to protect those who are vulnerable.

It is, strictly speaking, not a matter of (retributive) justice that the vulnerable be protected, but rather a matter of compassion and mercy, the hallmark characteristics of the principle of humane treatment. For it is largely irrelevant what the vulnerable have done in the past. What matters is their current predicament and what it will take to protect them from the ravages of that predicament. Here, "predicament" is a kind of "status." Being vulnerable is not quite in the same category as being human. Being human is never connected at all to what the person who is human did in the past. But being vulnerable is not such a pure status category. There are often things that one could have done, or did, in the past that affect a person's status as vulnerable. Vulnerability is sometimes within the ambit of one's control, whereas humanity is utterly beyond our control by our behavior. But the important point is that for both cases of vulnerability and humanity protective treatment may be called for that would not be warranted by (retributive) justice, despite the differences between these two status categories.

The principle of distinction, or discrimination, can be defended initially by reference to status not behavior. Civilians clearly have not done anything to warrant attacks or to warrant immunity from attacks. Soldiers sometimes appear to warrant attack, but a closer look makes one wonder what the normal soldier has done that makes him or her lose one of the most important of immunities. Status is not to be seen as a basis for rough-grained distinctions because it also turns out that some soldiers are highly vulnerable and cannot at the moment defend themselves, such as when they are naked in the bath. And some civilians - even women, children, or the aged - are not vulnerable because they have the capability not only to defend themselves, but also to defend themselves better than some soldiers in certain situations. Because of these facts, the principle of discrimination will have to be a fine-grained basis for distinction. By that, I mean that it will be a good place to begin, but it will also not be sufficient for deciding how to treat people. A closer look at context and circumstance is necessary in order to decide whether the rough-grained categories are indeed a definitive guide to action in a particular case.

The principle of discrimination or distinction is nonetheless an important principle in wartime. On my construal of this principle, it sets a framework for deciding on what is likely to be humane treatment for two large topics: how soldiers should act toward civilians, where normally they should not attack them; and how soldiers should act toward "enemy" soldiers, where it is normally acceptable to attack them, as long as the force used is not disproportionate (another category we will discuss in detail in Chapter 10). But there will be many exceptions, and so there is no bright line that can be drawn here. Rather, the principle of distinction or discrimination is a "rule of thumb" that may be used in situations where there is no other information available, other than that the person one confronts is a civilian or a soldier or where there is

insufficient time to get more information, due to an emergency, even though such information does exist. But if more information is available and there is no emergency, the principle of distinction or discrimination is only a rough-grained marker of appropriate action.

In the next section, I will present a test for the principle of discrimination or distinction and then apply the test to the hard case we discussed in Chapter 5: the question of whether it is justifiable to kill a naked soldier taking a bath. We will confront the practical question of how soldiers are to regard civilians as well as "enemy" soldiers in times of war. Unfortunately, the answer will not end up being the easy one that we mentioned at the beginning of Chapter 5, where we can state the rules in two or three bold-faced lines of type on the back of an index card, as was done for American soldiers entering the first Gulf War. With the exception of true emergency situations, it will not be possible to state an easy rule at all, but only a rule of thumb that helps in beginning to think about a very difficult topic.

III. THE NAKED SOLDIER RETURNS

Except when there is no other information available, the test involved in the principle of distinction or discrimination is not an easy one. When there is an emergency and there is no other information available, it is appropriate for soldiers to use this simple rule: Attack "enemy" soldiers not civilians. But in all other cases, surely the vast majority of cases, there will be no simple test. One needs to begin by figuring out whether the person one is confronting is a civilian or a soldier. But then one needs to proceed to determine whether the civilian poses a threat at the moment or the soldier is not a threat. Such judgments will not be easy to make and will not necessarily follow any easy-to-learn rules. Indeed, even the naked soldier may have a gun ready-to-hand, and the child with a gun in his hand pointed at me may turn out to be holding a realistic-looking water gun.

The reason why the test is so hard to formulate, at least for the majority of cases, is that the status of civilian or soldier does not yet tell us whether the person in question is actually a danger to us or a vulnerable person who needs our compassion. Humanitarian instincts require more from us than a sense of justice, but there are certainly limits to what is required even as a matter of humaneness. It is generally not required that a person jeopardize his or her own security. So it will matter whether a given civilian is armed, or even whether the civilian can defend herself or himself, obviating the need for the soldier to risk his or her own well-being to protect this civilian. And it will also matter if it turns out that the "enemy" soldier I am confronting has himself or herself been rendered vulnerable, due to being naked in the bath or being wounded in a way that makes him or her no longer a threat to my security and instead in need of my compassion and protection.¹²

Consider again the naked soldier taking a bath. I argued in Chapter 5 that such a soldier is surely no threat to the opposing soldier who spies the naked soldier several hundred yards away through his binoculars. Not only is the naked soldier no longer a threat to me, this soldier is arguably in such a vulnerable position that if anything I owe that soldier protection. For a naked soldier in the bath, just as is true for nearly everyone who is naked in the bath, is supremely vulnerable because he does not even have the normal protection of clothing and is surely not in a position to keep his guard up looking for possible attacks. And if I can see him but he cannot see me, then it seems truly inhumane to suggest, as Walzer reluctantly does, that it is morally right to kill this soldier. Indeed, Walzer argues counterintuitively that while it would be kind not to kill this soldier, it involves "doing less than is permitted."¹³

Despite what Walzer says, it is not mere kindness not to kill the naked soldier who is taking a bath. Compassion is different from simple kindness. Kindness involves what is literally optional for us to do. Compassion falls below what is required as a matter of justice, but it still can be in the domain of what is required as a matter of our common humanity. Grotius makes a very interesting point in this respect. He distinguishes, as we saw earlier, between two different senses of what is permitted. There is what is

strictly permitted as a matter of justice, but there is also what is permitted when we consider humanitarian concerns. Here the requirements may not look as steep, but according to Grotius we are in the domain of truly "better"¹⁴ moral considerations than are typically involved when we only consider formal justice. By acting in this better way, we will be acting in a more honorable way than if we merely act according to what is permitted as a matter of strict justice. ¹⁵ Indeed, Walzer seems to confuse things by talking as if there are duties to kill opposing soldiers that override all other moral considerations. This only begins to make sense if the moral landscape contains strict justice-based duties or weak humanity-based considerations of kindness.

We should not lose sight of the connection between humaneness and honor. There is nothing honorable about killing a naked soldier who is taking a bath. Indeed, as Walzer recognized, most soldiers would find it repulsive and dishonorable to engage in this killing despite the fact that they would generally see killing on the battlefield as an honorable activity. As I have explained, retaining a sense of honor, especially while on the battlefield, is a crucial part of the moral landscape for soldiers. For without a heightened sense of honor, the soldier is merely a paid killer. And the sense of shame that is felt when a soldier acts dishonorably could act as a deterrent against the killing of the naked soldier, if the soldier has been properly socialized by the rules of war. ¹⁶

Humane treatment is a requirement of all of us as fellow humans. As I argued in Chapter 3, the minimal natural law basis for *jus gentium* involves a kind of respect for the equality of persons. We owe each other respect, but not as a matter of what we have done or what the other person has done or is doing. We owe certain treatment to one another not because it is deserved in this behavioral way but because it is deserved in a status-based way. In this sense, there is a larger sense of justice that dovetails with the principle of humanity. For one could say that what is owed as a matter of status is so owed because of what a person has not done - namely, one has not done anything other than exist in a certain category of persons; and because of not having behaved in a way to have removed one's immunity, one is deserving of being treated only as a fellow human.

There is a kind of wide, as opposed to narrow, justice that can encompass many of the considerations of humane treatment I have been discussing in the last few chapters. For what someone deserves is not merely based on what one has done but on what one has refrained from doing. Against a baseline consideration that we should all be immune from being attacked or killed, it makes sense to say that justice and humanity are related. I am not fully happy with this characterization, but if people want to hook all that is morally required to what is demanded by justice, then I suppose I can live with this characterization, as long as we are in agreement that this is not the kind of strict justice, but rather the kind of equitable treatment, that the Greeks first discussed.

The thing that matters is whether there is a significant risk to the soldier if he or she would act to protect someone rather than to attack him or her. And part of making that determination is whether a given soldier, or civilian for that matter, is indeed a threat to the soldier. The test amounts to discovering whether the person one is confronting does, in fact, pose a threat. Part, but only part, of the test is to look at the status of the person one confronts. Then one must assess additional information to see if the person one confronts fits into an exception class, such as that of a child who seems to be concealing a weapon. This test is often very hard to use, because it turns on an appreciation of a nearly complete set of facts. We need a showing that our compassion will be met with significant loss of our own security before it is not the case that we are required to act compassionately, even toward our enemies.

Of course, there are two types of enemy that could be threatened by the naked soldier. We have been discussing the enemy soldier who spies the naked soldier at a great distance. To that enemy, the naked soldier hardly poses much of a threat at all. But it could be argued that the naked soldier nonetheless poses a threat to the enemy State. For the naked soldier will soon end his bath and resume his role as a

danger to the enemy State. Perhaps this is why he can be killed. I will take up this larger issue in the next section, where I discuss a collectivist view of soldiers and the threats they pose. Suffice it to say that "at the moment" it is also not clear that the naked soldier is actually a threat to the enemy State. More information is needed here as well, and the information is of the same sort - namely, whether that soldier will later play a major role in attacking the enemy State and how likely this is.

In addition, we need to examine closely whether a soldier is himself or herself in a vulnerable position that calls for our compassion. For in such situations, there may be competing motivations, as the case of the naked soldier makes clear: the motivation to attack due to a worry about the threat posed and a motivation to protect due to a worry about the vulnerability exposed. The case of the naked soldier taking a bath is a good example of the conflict just mentioned. This soldier is still a soldier - that is, someone whose job it is to try to attack or kill soldiers from the enemy camp. There is thus a motivation, as Walzer well argued, to attack or kill this soldier. But there is another motivation: to protect the naked soldier because of his clearly vulnerable position.

The question that arises is which motivation is stronger, and should be stronger, in the naked soldier case. As I said above, this is not immediately evident. Additional facts would be useful here, such as whether the naked soldier has his gun ready-to-hand or whether he could not conceivably mount an attack against us. If we have no additional facts, it is not at all clear that Walzer is right to say that the naked soldier can, indeed must, be killed. At the very least, Walzer should admit that there are competing motivations that have strong moral support. As I indicated above, it is surely at least permissible for the naked soldier's life to be spared. It will take quite a bit of information in order to justify killing the naked soldier. And there will not be many, if any, situations where there is the kind of emergency where we can straightforwardly justify killing the naked soldier without knowing whether he poses any threat at all to those who come across him. The competing motivations in the case of the naked soldier cannot be so easily resolved, and this is a telling example of why the principle of discrimination needs to be seen as much more nuanced than is often thought.

In the following sections, I will take up various objections to my proposal to weaken the strictures of the principle of discrimination or distinction so as to allow for many different contexts and circumstances. I then end by discussing a very serious conceptual and normative objection to the way that both Walzer and I have been proceeding, that is, working within the individualist perspective and not giving due consideration to the collectivist way that people have understood wars for centuries: as primarily battles between collectivities that are called States. Responding to the last objection allows me to return to metaphysical issues that I began to address in Chapter 5, but that I sidelined temporarily as I tried to work out an alternative normative basis for the principle of discrimination or distinction connected to the principle of humane treatment and generally to the principle of humanity with which I began this book.

IV. OBJECTIONS

One of the most significant objections raised to my proposal is that I have rendered effective fighting in war all but impermissible by reconfiguring the principle of discrimination. For, it would be claimed, I have put such a strict limitation on who counts as a true combatant that even fully justified defending soldiers must wait until they see not only the whites of the eyes of the enemy but also that the enemy is about to fire upon them before they can justifiably attack the enemy. In many cases, that will be too late to be able to stop an aggressing army from overrunning innocent armies or States. This is even clearer in the case of aerial bombardment. Defending soldiers often cannot see the source of these potential attacks and thus cannot figure out if these targets are themselves vulnerable, because the attacking soldiers are in airplanes too high to be spotted or in ships far out to sea. If such potentially vulnerable soldiers and their weaponry cannot be targeted, then it will be very difficult to wage effective war, even in defense of one's homeland. And even among those advancing armies, it will be very difficult to figure out which soldiers can

be justifiably attacked, for the collectivity of the social group has been pierced and can no longer be treated as an undifferentiated unit.

This is quite a serious objection. One of the main points of the principle of discrimination or distinction was to separate two groups of individuals, the group that can be attacked, without worrying about what each individual member is doing at the moment, and the group that can never be attacked, again regardless of what is happening at the moment. Such a strategy of collective identity has not only simplicity in its favor; it also is a strategy that takes out of the hands of the soldiers the need to engage in fine-grained calculation that is quite likely to be mistaken. Advancing armies must be treated indiscriminately if successful defense is likely to occur. And civilian populations also must be treated indiscriminately if the inhumanity of war is to be kept within acceptable limits. For, as soon as such collective identification is disrupted and what is substituted for it is a highly individualized basis of treatment, we will find that soldiers are left in the very difficult position where they are more likely than not to make tragic mistakes. If combatants are to be treated all alike, and noncombatants are to be treated all alike as well, then all the soldier needs to do is to figure out which camp a given individual falls into. And while there will be difficult cases, the vast majority of cases will be clear-cut, and the soldier, who often has to make split-second life-or-death judgments, will be better served.

My response to this objection has two parts. The first is more clearly to indicate when rough-grained distinctions can still be made. In emergency situations, such as in the contemplated imminent attack, where one can literally see the whites of the eyes of the attackers, I certainly do not advocate that soldiers wait before firing. Also, I do not mean to restrict the idea of dangerousness so that soldiers can only attack when their own personal safety is threatened. For as I said, threats can also be made to the State that the soldier serves. There is no attempt on my part to render the waging of war impossible. But I am suggesting that concern for the normative underpinnings of the rules of war, specifically for the principle of discrimination, should indeed make wars harder to fight.

The second part of my response is that it is not clear to me that soldiers will be better off with the simplicity of the rough-grained distinction between civilians and soldiers. In Vietnam, many civilians posed as much danger for American soldiers as enemy "soldiers" did. The slightly better group category was that of combatants, a category into which apparently even some children fit. But then the ease of identification fades away as advantages of the group identity model. In addition, there is the problem of whether there is indeed a category of combatants at all that allows for meaningful discrimination in war. Think of what Averroes argued: that all able-bodied enemy men should be treated as legitimate targets of attack, because they could take up arms and threaten the lives of soldiers. This position is highly problematical, and my proposal does not countenance such rough-grained discriminations. Only those who are a real threat and not in a vulnerable position can legitimately be attacked, and identifying this group will require fine-grained discriminations, for it will not include all able-bodied men.

A second objection maintains that I have missed the point of the principle of discrimination, or distinction. This principle, at least as reasonably interpreted, only prohibits indiscriminate attacks - that is, attacks that pay no attention to who is being singled out for attack. According to this view, the idea is to make soldiers stop and think before they shoot, but because these are situations where the soldiers' own lives are often on the line, we cannot expect that they will stop for very long. For this to be a workable principle, discrimination or distinction can only be expected between large classes or groups, where the border between groups is rough-grained rather than fine-grained. My proposal, on the other hand, calls for such fine-grained discrimination that soldiers will either have to stop and think for so long that they render themselves vulnerable to attack or simply give up and ignore the distinctions altogether, surely a worse alternative, even if one is motivated by humanistic instincts.

My response is that I have tried to show that the traditional large groups in question are actually not that easily identifiable, at least not in a way that is morally significant. If we use the traditional category of soldier, what are we to do about the frequency of guerrillas and other irregular fighters who are just as dangerous, if not more dangerous, to soldiers of a modern army operating in a large, hostile city? If, instead, we shift to the slightly more helpful category of combatants, there are many problems in discerning who is part of the necessary support of the war effort and who is not. Not only do children and others who would normally fit into the noncombatant camp sometimes fit into the combatant camp, but so do munitions workers, for instance. Thus, if one sees a crowd of civilians, it will not be easy to pick out from that crowd those who are, and those who are not, noncombatants, as we have increasingly seen in the streets of the Middle East. Soldiers will still have to make fine-grained decisions according to the traditional view of the principle of discrimination or distinction, at least if those discriminations are to be morally justifiable ones. Even the traditional view will also have to make some fine-grained determinations, and so the pocket card technique for understanding distinctions will often be misleading.

A third objection is to ask why we should not merely be pragmatists (or even realists) about social groups. If there is some rough utility in using a particular distinction, then use it; otherwise, throw it out. And it does seem that there is such utility in the traditional way of understanding the principle of discrimination: that soldiers are caused to stop and think before they shoot their guns. A pragmatic way to approach collective identity is to give up any hope of discerning a natural kind that corresponds to any social group. Rather, look only for those categorizations that allow us to do various things we think are worth doing. Distinguishing between those who participate in a war and those who do not seems to be an eminently reasonable thing to do, especially if one is in a position where one might be attacked and is deciding how to defend oneself. As long as people can identify members of a group and the use of that group in making decisions has some utility, why not do so?

In general, I agree that talk of social groups is both omnipresent and quite useful. The problem I have tried to identify is that some talk of social groups is more misleading than useful. The distinction between civilians and soldiers is one such distinction. As I said in Chapter 5, one of the main problems is that the group of soldiers is drawn from the group of civilians, and after leaving military life soldiers return to civilian life. There are two problems. First, conceptually, can a clear set of criteria identify who is a soldier or combatant and who is a civilian or noncombatant given that these two groups are so intermingled with each other? Second, normatively, even if we can draw a clear distinction between these groups, should we use this distinction in our moral assessments? Based on the arguments advanced in several chapters, from both conceptual and normative perspectives, we should abandon the easy distinction between soldiers and civilians and be content with the distinction between those soldiers or combatants who are, and those who are not, a threat and are not themselves vulnerable.

I do not dispute that people talk as if they can make the conceptual distinction between soldier and civilian and that many also think that this is a morally relevant distinction. And I also do not dispute that something important might be lost if this version of the principle of discrimination or distinction were to be abandoned. My contention is that we can save some of what the principle of discrimination is best able to do: make soldiers stop and think before they act and, further, not to attack those who are not a threat to these soldiers. As it turns out, however, the people who are such a threat are not clearly so in very many cases. If this were acknowledged, then soldiers would not feel justified in shooting very often, just as is now true of police officers in the United States. Indeed, police in the United States and elsewhere are able to conduct most of their business by other than lethal means, so that when they do fire a gun they need to fill out special paperwork to justify it. Soldiers should also be inspired to try less lethal means than shooting. In general, the world would then be a safer place. Of course, this assumes - what I might not assume otherwise - that there are going to be some cases in which shooting is justified. The principle of discrimination was correctly envisioned to place limits on what tactics are justified in war. If we embrace

my way to characterize the principle of discrimination, this objective will be met, with the added benefit that we will have less violence in the world.

V. INDIVIDUALISM AND COLLECTIVISM

In the debates about how to conceive the principle of discrimination or distinction, Noam Zohar has addressed one of the most difficult metaphysical problems in the way we see that principle:

"The reality of international confrontations is not adequately described by reduction to individualistic terms. We are not only individuals confronting each other but also a nation confronting another nation." 17

According to Zohar, we cannot justify killing in war "on a direct analogy to private self-defense. Where the basic analogy to self-defense does function is on the collective level, justifying self-defensive war itself despite its necessary cost in innocent lives." 18

Zohar claims that war can only be understood if one appreciates the "dual reality" involved: what goes on at the individual level and what goes on at the national level. 19 Individual soldiers can rarely claim to be justified in killing in war on the individual level alone. Only by reference to collective self-defense can the individual be seen as justified in killing in most wartime situations. In this view, the principle of discrimination or distinction does not make sense unless one recognizes the reality of collectivities, such as States and armies. As Zohar says, "[I]f the individual and the collective are both taken seriously as facets of human existence, then the dual reality properly yields a dual morality." 20 And from this dual moral perspective, the best way to see the principle of discrimination or distinction is as prohibiting one State from "the pursuit of military advantage through killing noncombatants," not as somehow establishing an individual's absolute immunity from attack by another individual. 21

I agree with Zohar that individual self-defense will not get us very far in justifying the attacks on combatants. Jeffrey Murphy has played out the individualistic position and come to the conclusion that combatants can be understood only as "all those of whom it is reasonable to believe that they are engaged in an attempt at your destruction." 22 I have tried to show that such a characterization will mean that even fewer enemy soldiers than one would normally think are justifiably subject to attack by opposing soldiers. Unless we talk of the self-defense of the State and somehow are able to translate that into individual terms, we are locked into what Zohar describes as a clash of perspectives. 23 The strategy preferred by Zohar is to see the combatants as "those marked by participating in the collective war effort." 24 But as I have argued, mere participation will not easily allow for the kind of rough-grained basis for distinguishing the groups of those who can be attacked and those who cannot. And in any event, appeals to the national self-defense do not clearly give us an individual basis for killing. In the end, despite Zohar's admonitions, I am willing to settle for what he calls the "moral vertigo" that arises when one views war as a matter of "aggregate individual confrontations" involving the violent use of force. 25

There is here an important insight that might bear fruit nonetheless. Perhaps soldiers can be seen as complicit in the evil or dangerousness of the State or of the State's leaders. States or State leaders would not be dangerous if they had no followers who were willing to try to implement their dangerous plans or if there were no others who provided what support they were forced to provide. But if we are going to base the principle of discrimination or distinction on complicity, then there is a problem about what to do about munitions workers and other ancillary support workers for the army. In many ways, these people — as well as the farmers who grow wheat and the bakers who bake bread for the army mess — are also to be treated as possible targets because they are surely as complicit in the sense that without them the leaders could not wage war. As a preliminary, and clearly incomplete, test, we might adopt a variation of the "but-for" test used in tort law. We could determine whether the work of a given person was causally necessary for the war effort by asking whether the war effort could be waged without her or his participation. But then, on grounds of complicity, we wouldn't have an easy way to hold all and only soldiers as a group accountable

for the dangerousness of war. We will have to let many civilians be targets of attack, and, as we did in my version of the principle of discrimination or distinction, we will still have to restrict the targeting of many subcategories of soldiers.

Leaders formulate dangerous plans, and soldiers implement these plans. And because both are dangerous, then those who are defending themselves can legitimately attack both of these kinds of dangerous individuals. In this vein, one might begin with the most obviously guilty people the leaders of a State waging a war by the use of immoral tactics, and then see if one can eventually move to, perhaps only some of, the soldiers. The leaders of a State are often more at fault or guilty than are the soldiers of the State's armies, in that it is the leaders who have formulated the policies and the plans to initiate war and to implement those policies that create increased danger. It is for this reason, I believe, that State leaders are the ones who should primarily be tried for war crimes. I pursue this point in Chapter 12.

Whatever evil intent there might be to destroy the other's State is probably best laid at the doorstep of these world leaders. If anyone is ultimately an aggressor, or guilty rather than innocent, then it is much more likely that such a person is the State leader who has the guilty intent rather than a soldier whose normal intent is only to follow orders. State leaders who start wars and order the employment of immoral tactics toward their neighbors seem to have lost immunity from attack,²⁶ a position that can be extended to some, but not all, members of the group of soldiers who act in the service of the culpable leaders who have instituted these policies.

Despite all of these reservations, the principle of discrimination is indeed worth preserving, on conceptual and moral grounds. For one of its main functions is to force soldiers to think before they shoot. And this will nearly always mean that soldiers will shoot less, nearly always a good thing in itself. While it may be that no more than a few wars are truly justified, it is nonetheless true that during war minimizing death and suffering is still prized. But can a war be waged successfully if soldiers must wait to fire to see if they are about to be fired upon? In some cases, the answer is "Perhaps not." But in many cases, we can construct a distinction between those who are truly threatening to others and those who are not and treat those who are current threats as having lost their immunity from assault. Those who sit with their fingers ready to press the button launching cruise missiles are surely threats as much as those who sit in a tank with its turret pointed at a town.

It is true that the sum total of the acts of many people that do not appear to be threatening, such as the acts of the munitions workers and farmers, together constitute a collective threat when organized by the leaders of a State into a war machine. We can even look at the naked soldier taking a bath as playing a role in the State's collective war effort. It is true that States are the ones who are most dearly threatening in times of war. But I do not accept the view that soldiers are automatically to be treated as extensions of, or even dearly complicit in, what States do.

In times of war, many soldiers are as vulnerable as civilians are. And it is the State and its leaders that have created this vulnerability. It then seems odd, indeed, to say that most soldiers can legitimately be maimed or killed. Yes, it is true that wars can only be fought when States enlist individuals to act in violent ways. But why should those who are so enlisted be the ones who pay the price for what the State has planned and is trying to execute? We do not punish a State effectively by killing the soldiers of that State, because soldiers are so easily replaceable. And similarly, we do not reward a State by sparing its soldiers or its civilians from death. These individuals should be spared or killed for reasons that have to do with them as individuals, for they are not automatically to be seen as extensions of the State. Rather, most civilians, and some soldiers, are rendered highly vulnerable by war and by the actions of States during war. A properly understood principle of discrimination or distinction will deal with this reality.

In this chapter, I have tried to set out a more nuanced understanding of the principle of discrimination or distinction than that which is normally advocated in either the Just War tradition or the contemporary international law literature. What I have advocated is that the distinction between soldier and civilian, or between combatant and noncombatant, be used as a beginning for determining whether someone can legitimately be attacked or killed. According to this initial group categorization, civilians cannot be subject to such attacks during wartime, whereas soldiers can be. But such a determination provides only an initial framework for decision. If there is time and there is more information available, then there must be a more fine-grained determination of whether the civilian or the soldier is currently a threat or in a vulnerable position. Only in situations of emergency and inability to gather more information does the traditional principle of discrimination or distinction operate alone to justify violent action.

In the next two chapters, I will consider the other two most important traditional principles in the jus in bello tradition and in the contemporary international law of war: the principle of necessity and the principle of proportionality. In both cases, I will argue that these principles are justified because, and to the extent that, they connect with the principle of humane treatment. As in the case of the principle of discrimination or distinction, the principles of proportionality and necessity have been incorrectly thought to stand on their own merits as limitations on what can legitimately be done during wartime. I will also develop in more detail the discussion I began in Chapter 7 on how properly to understand the relation between the principles of proportionality and necessity and end with a general discussion of how these principles, along with the principle of discrimination, should connect together into a unified normative account of international humanitarian law.

Notes

- 1 See Leslie C. Green, *The Contemporary Law of Armed Conflict*, 2nd ed., New York: Juris Publishing, and Manchester University Press, 2000, PP.47-49.
- 2 Ibid., p. 53.
- 3 Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflict*, Oxford: Oxford University Press, 1995, p. 120.
- 4 Ingrid Detter, *The Law of War*, 2nd ed., Cambridge: Cambridge University Press, 2000, P.317.
- 5 Ibid.
- 6 See Wayne R. LaFave and Austin W. Scott, Jr., *Criminal Law*, 2nd ed., St. Paul, MN: West Publishing, 1986, pp. 195-200.
- 7 John Stuart Mill, *On Liberty* (1863).
- 8 Michael Walzer, *Just and Unjust Wars*, New York: Basic Books, 2000, p. 145.
- 9 Ingrid Detter, *The Law of War*, p.317.
- 10 Robert Goodin, *Protecting the Vulnerable*, Chicago: University of Chicago Press, 1985, p. 110.
- 11 Ibid., p. 126.

12 In the final section of this chapter, I address the objection that it is not individual security, but group security, that is the key. But I would reject the idea that this opens the door for jus ad bellum considerations.

13 Michael Walzer, *Just and Unjust Wars*, p. 143.

14 Hugo Grotius, *De jure Belli ac Pacis*, p. 716.

15 Ibid., p. 641.

16 I am grateful to Mark Drumbl here.

17 Noam Zohar, "Collective War and Individualistic Ethics: Against the Conscriptio of Self-Defense," *Political Theory*, vol. 21, no. 4 (1993), p. 616.

18 Ibid., P 615.

19 Soran Reader argues that "although states are of course real, when it comes to violent action, there must be particular concrete, embodied individual moral agents, some of whom are responsible for the violent action." See his intriguing paper "Cosmopolitanism, War and Criminal Justice," scheduled at the Mini-conference on Global Justice at the A.P.A. Pacific Division Meetings in Pasadena, California, on March 27, 2004.

20 Noam Zohar, "Collective War and Individualistic Ethics," p. 618.

21 Ibid., p. 611.

22 Jeffrey Murphy, "The Killing of the Innocent," in *War, Morality, and the Military Profession*, edited by Malham Wakin, Boulder, CO: Westview Press, 1979, p. 351.

23 On this point, see David Rodin, *War and Self Defense*, Oxford: Clarendon Press, 2002

24 Noam Zohar, "Collective War and Individualistic Ethics," p.618.

25 Ibid., P.615.

26 On this point, see Jeff McMahan, "Realism, Morality, and War," in *The Ethics of War and Peace*, edited by Terry Nardin, Princeton, NJ: Princeton University Press, 1996, pp. 88-91. McMahan says, "The case in which it is most obviously permissible to attack a non-innocent noncombatant in war is that in which the assassination of a political leader who bears moral responsibility for his country's unjust aggression would be sufficient to stop that aggression, thereby eliminating the need to kill a large number of the country's soldiers" (p. 90).