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THE GUERRILLA STRIKES BACK: A COMMENT ON YVONNE CHIU

- Uwe Steinhoff -

In a recent article¹ Yvonne Chiu “contends that nonuniformed combat is impermissible and its practitioners cannot be accorded full combatant rights under the rules of engagement, because of the manner in which this tactic endangers and infringes on the rights of genuine noncombatants” (44). This formulation, of course, suggests that there is a justifiable manner of endangering and infringing on the rights of genuine noncombatants. One such justifiable way seems to be to kill them or to mutilate them in the course of an attack on legitimate military targets – for she nowhere complains about so-called “collateral damage.” Thus, she must think that actually *killing* non-combatants in the pursuit of one’s military tactics can be justifiable, while merely *making it more likely* that civilians *are killed by the enemy* is absolutely prohibited. Since, however, the usual assumption is that killing is worse than letting die, this seems to be a very strange position to take.² In the following I will argue that this suspicion is justified: Chiu’s condemnation of nonuniformed combat is unwarranted.

1. WHAT “PARTICIPATION IN THE FIGHTING”?

Chiu’s argument goes like this:

[...] when fighters do not wear uniforms, they implicitly force civilians to participate in the fighting.

¹ Chiu [2010]; all page numbers in brackets refer to this article.

² Steinhoff [2010a] p. 89. Jeff McMahan (personal communication) agrees with me on this. Yet, he adds (explicitly making clear that this would not tilt the balance against the guerrillas, thanks to the just mentioned distinction between killing and letting die) that there “is, however, one general difference between the risks that guerrillas create and those that regular combatants create, and this is that the guerrillas create additional risks to their own fellow civilians whereas regular combatants generally create risks for enemy civilians.” But this is not correct since guerrillas fighting in foreign territory (this is rare, but it happens) do not typically endanger their own citizens, while soldiers fighting in their own territory (which happens constantly) do. See also section (5) below.

Because of their similar appearances, a soldier cannot practically distinguish between his nonuniformed enemy and a civilian. This leads the soldier to view all persons as potential combatants – an entirely reasonable and expected response – even as he continues to pursue only the combatants, albeit with greater care and at greater risk to himself. But as a result, civilians are unwillingly drawn into the fighting, because they often find themselves in the vicinity of and mistaken for nonuniformed combatants. Whether or not they take up arms to defend themselves, civilians in this situation are unwittingly forced to become combatants, thus compromising the autonomy of those who have chosen to refrain from fighting.

This involuntary surrender of civilian immunity differs from government conscription into military service, because civilians in the former situation are unaware of their new status as combatants or their concomitant rights and responsibilities. (55)

A couple of comments are in order. First of all, leaving aside the question of what it means to “implicitly” force a person to do something, the fact of the matter is that the fighters do *not*, by not wearing uniforms, force civilians to participate in the fighting (I suspect the qualifier “implicitly” is an implicit concession of this fact). To *participate* in the fighting means more than just to be “in the vicinity of and mistaken for nonuniformed combatants” – if it didn’t, the civilians would not be *mistaken* for nonuniformed combatants (Chiu’s choice of words here is revealing); it means to shoot, to handle weapons, to provide ammunition etc.; it does not merely mean to look suspicious or to be shot at or to be killed by enemy forces. A lot of babies are killed by enemy forces; that does not, however, make them participants in the hostilities. It just makes them *victims* of the hostilities.

Hence, second, it is also wrong to claim that “whether or not they take up arms to defend themselves, civilians in this situation are unwittingly forced to become combatants.” What sense of “combatants” is used here? In international humanitarian law, a combatant is somebody who has a *legal right* to take part in the armed conflict.³ However, the civilians Chiu is talking about definitely do not have such a right under international humanitarian law. So they cannot be combatants in the legal sense. People can of course also be combatants in an everyday sense, that is, precisely in the sense that they do take part in the conflict by actually shooting etc. But the civilians Chiu mentions are not combatants in this sense ei-

³ See Article 43.2 of Protocol Additional I to the Geneva Conventions: “Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.”

ther (otherwise the whole problem would not even arise). Thus, if Chiu insists on describing them as combatants anyways, she is guilty of false labeling.

Third, Chiu's claim that the civilians in this situation involuntarily *surrender* their immunity⁴ is wrong if it is to be understood as a claim about international humanitarian law.⁵ They most definitely remain immune. This is just the logical consequence of their not becoming combatants in either the legal or the colloquial sense of the term.

The claim is also wrong as a moral one. People do not lose their right not to be killed only because others are unable to tell them from threats. If the police officer shoots an innocent person because he mistook the person's cell phone for a gun, then the officer has certainly violated the right of the innocent person – whether excusably or not. Besides, if Chiu in all seriousness thinks that the civilians she is talking about have lost their immunity from attack merely due to the fact that others cannot tell them from real combatants, namely from the guerilla fighters, then it is not clear why the soldier should continue “to pursue only the combatants, albeit with greater care and at greater risk to himself.” After all, according to her logic *everybody* in the situation is now a combatant (which, incidentally, makes her statements inconsistent); and if the “involuntary combatants” no longer have immunity, then the soldier is obviously free to kill them. However, this would make Chiu's position virtually and uncomfortably indistinguishable from that of the “Christian” theologian Paul Ramsey, who advanced a similar argument to give American soldiers in Vietnam *carte blanche* to mow down and carpet bomb civilians in “guerrilla territory.”⁶

I also do not see how such a view concerning the “involuntary surrender of civilian immunity” squares with Chiu's proclamation that “the right to civilian immunity can only be surrendered by becoming a soldier under very limited circumstances that preclude nonuniformed combat” (50) or with a statement like this: “The right to not be attacked is forfeited through an intentional exchange. It is

⁴ This remark of hers is not a mere lapse. She repeats it several times, also notably in the summary of her argument: “Nonuniformed combat morally infringes on civilians' rights by forcing them to participate in the fighting and thus unwillingly give up fundamental rights to immunity.” (44)

⁵ Chiu (personal communication) states, however, that she did not want to make a claim about international law here.

⁶ See Ramsey [2002], esp. Ch. 18. I have criticized Ramsey's views in Steinhoff [2010a] p. 84-97. If Chiu really wants to maintain the position I just objected to, my criticism of Ramsey applies to her too.

the only way a civilian can give up his immunity [...]" (52) Again she contradicts herself.⁷

Thus, the assumptions on which Chiu's argument relies – and therefore the argument itself – are mistaken.

2. WHAT "CONSCRIPTION"?

Connected with her inappropriate and misleading use of the term "participation in the fighting" is Chiu's inappropriate and misleading use of the term "conscription." She claims:

The coercion of civilians exacted by nonuniformed combat differs substantively from conscription, and is not acceptable as a lesser form of conscription. [...] This form of unofficial conscription fails to meet standards of transparency, one of the requirements of a well-ordered society, because the conscripted civilians are unaware of what has happened to them. (44)

Thus, this "unofficial conscription" *differs* from conscription (why, then, call it "conscription" in the first place?); yet, she nevertheless claims the civilians are "essentially conscripted" (56) due to the fact that the guerilla forces do not wear uniforms and therefore make it more likely for the civilians to be killed by the enemy. However, the fact of the matter is that this is not conscription at all, and therefore one should not call it such.

Imagine, for example, that the guerillas in some region in Indonesia have perfected a tactic where they very convincingly disguise themselves as orangutans. Therefore, on Chiu's logic, because "of their similar appearances, a soldier cannot practically distinguish between his nonuniformed enemy and a [orangutan]" (55). Indeed, uniformed combatants, "even if they try to continue treating [orangutans] with special care, will be forced to assume that [orangutans] might be nonuniformed enemy combatants and start treating them as such."⁸ (56) Have

⁷ McMahan (personal communication) has pointed out to me that Chiu seems to use the term "immunity" in two senses, one factual and one normative. In the normative sense, immunity means the right not to be targeted; in the factual sense it means actually not being targeted. Clearly, in the second quote in this paragraph she uses it in the second sense, and in the third quote in the first sense. However, this does not undermine my claim that she contradicts herself: it is quite obvious that in the first quote she uses "immunity" in the first sense (and McMahan agrees that this is the "natural reading") – otherwise her argument about "surrendering rights" would not even get off the ground. Moreover, she also explicitly says, as already quoted, that nonuniformed combat "morally infringes on civilians' rights by forcing them to participate in the fighting and thus unwillingly give up fundamental rights to immunity." (44) The second quote and this quote definitely do contradict each other.

⁸ Obviously, I have substituted "orangutans" for "civilians" here.

the orangutans now been conscripted? Of course not. According to Merriam-Webster, conscription is “compulsory enrollment of persons especially for military service” – but service is an *activity*. Being shot at is not; it is a “passivity.” Just as babies and civilians do not become combatants just because someone shoots at them, babies, civilians and orangutans are also not conscripted by someone merely making it more likely that they are shot at. They do not *serve* in the military or militia.

A final note on this issue: Let us assume for a second that Chiu is right in claiming that the civilians are “essentially conscripted” – why are they “unaware of what has happened” to them? Chiu seems to think that the nonuniformed fighters themselves are perfectly aware of what is happening to the civilians; indeed, she seems to think they make it happen on purpose. So why do the civilians themselves not notice it? It will, after all, hardly escape their attention that they are often shot at by the enemy. Maybe all she means is that the guerrillas will not point out to the civilians what will happen to them due to the adoption of guerrilla tactics.⁹ But first, pointing that out will hardly be necessary (since it is obvious); second, they might point it out; and third, soldiers usually also do not point out to enemy civilians or to their own civilians, for that matter (see section 5), what will happen to them as a consequence of the soldiers’ warfare. Thus, Chiu’s claim about the lack of “transparency” is either wrong or irrelevant.

3. WHAT “COERCION”?

As we just saw, Chiu thinks that the civilians are “coerced.” That is somewhat astonishing, since in trying to refute a counter-argument to her position she also writes:

In the situation at hand, the ability of a state to conscript officially (in the strong sense) does not inevitably make it acceptable for the state to conscript unofficially (in the weak sense) by having its soldiers not wear uniforms.

To understand this, killing and coercion must be distinguished. Barbara Herman writes:

Although many violent acts are coercive [...], it will not do to claim that killing is a limiting case of coercion. A coercive act aims at the control of a person’s will; killing does not (at least not of the will of the person killed). In killing, someone is prevented from doing anything at all, but he is not made to do something against

⁹ This has been suggested to me by McMahan (personal communication).

his will. There is a significant difference between threatening pain or twisting your arm (or even threatening to kill) to keep you from joining the opposition party and killing you to achieve the same result. The coercive act looks to alter what will happen by controlling what an agent wills. In killing, the victim is not prevented from *doing* something—the killing prevents something from happening. Killing (and noncoercive violence in general) poses a moral problem that needs to be kept separate from that of coercion. (71)¹⁰

Obviously, however, the nonuniformed guerillas do not *alter* the will of the civilians at all. They do not twist the arms of the civilians to make them more willing to be shot at. They do not tell them: “Either you draw the fire on you, or we will kill you.” All they do is to make it more likely that the civilians are shot at – this involves no acting upon the will. *Official* conscription, however, does: “Either you serve in the military or we will send you to jail.” Thus, Chiu gets it wrong. If she is against coercion, she should object to official conscription and congratulate the guerillas for their respect for human autonomy.¹¹

It is true, of course, that the guerilla might *act against* the will of the civilians by not wearing uniforms – but, first, this is not *coercion*, and second, the counter-insurgents *definitely* act against the will of the civilians by actually killing them. Thus, shouldn't Chiu be criticizing *them* instead?

4. FIAT JUSTITIA, PEREAT MUNDUS?

Chiu's conclusion is: “Not wearing a uniform or its equivalent in preparation for or during combat should always be illegal, with no exceptions for extenuating circumstances.” (75) This conclusion about the appropriate law seems to be based on her moral judgment that “nonuniformed combat is morally unacceptable.” (77)

However, even if her argument so far had been correct – which, as we saw, is not the case – it would not support her conclusion. After all, as she herself summarizes her argument, she “has argued that nonuniformed combatants infringe on the rights of civilians by forcing them into a moral position that they did not choose or accept.” (64) Yet, she realizes: “Obviously, infringement on one's

¹⁰ Chiu quotes here Herman [1993], p. 119.

¹¹ As an aside: Chiu's view that coercion “is worse than simply killing the agent” (72) defies law and common sense. For Herman, as we just saw, threatening to kill a person if he or she does not do a certain thing is coercion. Thus, if this were really worse than killing the person right away, police officers should not first threaten an armed criminal by saying, “Drop your gun or we will open fire!” but without further ado blow his brains out right away – out of exuberant respect for his autonomy, of course.

moral standing is permissible in some cases, such as killings in self-defense against innocent attackers.”¹² (64)

In trying to answer to this objection, she refers to a position taken by Christopher Kutz, who places much emphasis on the importance of “political units,”¹³ and she claims: “Giving nonuniformed combatants the full benefits of uniformed combatants, even provided that they meet a particular threshold of political formation, says in effect that collective goods take precedence.” (66)

But, of course, guerrillas can defend not just “collective goods” such as national or ethnic self-determination, but also *the freedom, the physical integrity and the lives of individuals*, a fact Chiu never considers. Consider this situation: A maniacal dictator sends his uniformed soldiers into the jungle in order to exterminate all members of the Eloy there, a very nice ethnic group. If the guerrillas lose, all civilians will be killed anyway. The guerrillas can, however, heighten their chances of repelling the uniformed genocidal forces by engaging in non-uniformed combat, so that it is not that easy for the *génocidaires* to first neutralize the armed resistance in order to then commit the genocide “in peace.” With regard to this situation it is, I submit, quite simply and obviously absurd to claim, as Chiu does (and, in particular, to sell that claim as stemming from a concern for the safety of the civilians), that the guerrillas are not justified in engaging in non-uniformed combat.¹⁴ It is also absurd to claim, as Chiu does (73-5), that the civilians themselves are not entitled to consent to the guerillas’ not wearing uniforms.

¹² In a footnote pertaining to the sentence just quoted, she mentions McMahan [1994]. However, McMahan argues in that article that killing an innocent aggressor is *not* justified. Chiu is also mistaken in claiming that “the conclusion is generally accepted – killing B in self-defense, innocence notwithstanding, infringes on B’s rights, but the action is both regrettable and permissible.” (64) Actually, the majority position – which is also accepted in virtually all Western jurisdictions – is that harming an innocent aggressor in proportionate and necessary self-defense does *not* infringe on his rights. In the philosophical literature this position has been paradigmatically stated by Judith Jarvis Thomson [1991]. For an attempt to improve on Thomson’s explanation on why the innocent aggressor may be killed, see Steinhoff [2007] p. 81-89. My explanation implies – contrary to Thomson’s – that the innocent attacker may defend himself against the justified defense of his potential victim. Thus, we have a symmetrical defense situation here.

¹³ See Kutz [2005].

¹⁴ The obviousness of this absurdity also suffices as objection to Chiu’s attempt to enlist Rawls for her purposes (73-75). Quite frankly, I find her discussion of what Rawls’s non-ideal theory might or might not imply for the case at issue both irrelevant and arbitrary. Besides, Rawls has not developed any non-ideal *theory*. He has just offered, as an afterthought to his ideal theory, a lot of *stipulations* about non-ideal circumstances. The reason for this is that his ideal theory implies, *pace* A.J. Simmons, pretty much nothing useful about non-ideal circumstances. For more on this see Steinhoff [2011].

Moreover, in this situation it is not even clear that the guerillas actually do infringe upon the rights of the civilians. An idea of Jeff McMahan's might help to make this clearer:

Suppose that at the time a decision has to be made about whether to fight a war in defense of a group of noncombatants, all those noncombatants are expected beneficiaries of the war, even if the war will be fought in a way that will expose them to new risks. They all have reason, at that time, to want the war to be fought. Yet they know that the strategy will later require acts that will convert some of them from expected beneficiaries into expected or actual victims. They also know that if it were a constraint on the implementation of the strategy that no individual act of war could be done unless all those noncombatants it would expose to risk would be expected beneficiaries of it, it would be impossible to implement the strategy. They therefore know that if their luck is bad, they will have no right to expect the strategy to be abandoned. The strategy can be justified in this way even to those who turn out to be its actual victims. And this explains why what is relevant to the justification of the strategy is whether those whom it will expose to risk are expected beneficiaries when it is adopted, rather than later during its implementation.¹⁵

Or, in a nutshell:

In just wars of humanitarian intervention, it is not unfair for just combatants to act in certain ways that impose some of the risks and burdens of their action on its expected civilian beneficiaries.¹⁶

There is no reason to suppose that this is different in guerrilla wars fought against a genocidal campaign. Moreover, it very well might still not be different when something less than survival is at stake. Chiu herself raises the following point:

What about cases in which civilians implicitly or explicitly consent to rebel use of nonuniformed combat—that is, they willingly forfeit their rights to immunity without taking on combatant privileges? This might happen if they feel their lives are currently so oppressive and worthless that they are willing to accept the dangers and heavy casualties to themselves from nonuniformed combat in the hopes that it will secure them better lives in the long run.

¹⁵ McMahan [2010] p. 363.

¹⁶ *Ibidem*, p. 370.

When civilians forfeit their immunity, however, they automatically become combatants and, in this case, nonuniformed ones. With immunity comes responsibility, not just privilege. By agreeing to be put into harm's way as a civilian decoy with an understanding of the battlefield effects (increased difficulty for opponents in telling civilians and soldiers apart), these individuals are reneging on their responsibilities to refrain from influencing the battle's outcome; so even if they surrender their privilege to kill enemy soldiers, they are no longer civilians. (73)

Indeed, giving the oppressive situation they are living in, the civilians might consent to risk their lives in order to escape their situation. How the second paragraph of this quote is to refute this argument, however, is unclear. First of all, under international law civilians cannot simply forfeit immunity by saying that they want to waive their immunity. Of course, they can take up arms and *thereby* would forfeit their immunity, but this is precisely what they are, *ex hypothesi*, not doing here. Thus, international humanitarian law is not applicable to this situation of waiving one's rights and hence Chiu must be referring to the *moral* rights of (innocent) civilians.

But then it has to be said that Chiu is not doing any more here than making an entirely unsubstantiated claim. The right of the civilians that the guerrillas do not fight without wearing uniforms is, I suppose, meant to be a claim-right the civilians hold against the guerrillas (if it is not supposed to be that, I do not know what it is). So they waive this right by telling them: "It is ok, we do not insist on our rights that you do not wear uniforms, go ahead and fight without uniforms." But this certainly does not imply, contrary to Chiu's suggestion, that then they also lose their right not to be killed or attacked by third parties. In other words, it does not imply that they lose or waive their immunity. Besides, it is not even true that by losing one's immunity one "automatically" becomes a combatant. It is flatly wrong, notably, under international humanitarian law (a civilian who takes up arms, even in self-defense, thereby loses his immunity, but he does *not* become a combatant in the legal sense, for he does not acquire the *right* to fight¹⁷) and obviously wrong in the colloquial sense of "combatant" too. (As an aside: I am not aware of any clause in international humanitarian law that obliges civilians "to refrain from influencing the battle's outcome." International humanitarian law only obliges them to refrain from influencing the battle's outcome *by taking up arms*. Nor are civilians under a *moral* obligation not to influence the battle's out-

¹⁷ See Detter [2003] p. 140.

come – for example by shouting, “They are coming,” thereby foiling the genocidal enemy’s surprise attack.)

More important still, let us suppose that the civilians would really all become combatants by consenting to the guerrillas’ not wearing uniforms. The question then arises: So what? They are now all “combatants,” they all have lost immunity, and they now can be shot at. So there are no civilians left whose rights they are infringing upon. Chiu’s argument then does not even get off the ground.

But what, one might object, if there are still some civilians who have not waived their rights that the guerrillas do not fight without uniform? Wouldn’t their rights be infringed by those civilians who did waive those rights? The answer is a resounding “No.” If they have a right that the guerrillas do not *fight* without uniform, then *this* right is for obvious logical and conceptual reasons not infringed upon by the other civilians’ *waiving certain rights*. It is *only* infringed upon by the guerrillas fighting without wearing a uniform.

This brings us back to the question: can such an infringement be justified? Of course it can (and, to remind the reader, at the moment I am only assuming that it is a rights infringement for the sake of argument). Consider an analogous situation. Innocent people have a right not to be punished. However, there is no penal system that would not produce judicial errors. Thus, the implementation of a penal system has the known side-effect of endangering innocent people. However, the judicial system, if it is a good one, will *on the whole* make the lives of those subjected to it safer and freer (although there are some innocent people whose lives it will make miserable and who would have been better off without it). (This argument follows the logic of the one provided by McMahan above.) Suppose, now, that some citizens do not waive their rights not to be innocently punished and do not consent to the implementation of a penal system. Does this make the implementation of a penal system unjustified? Intuitively, it clearly does not. Indeed, the objection (by innocent people) to a penal system that does *ex ante* heighten the chances of innocent people leading a safer and freer life seems to be quite simply irrational. However, if someone did insist on his irrational objection to the implementation of such a penal system, and if he did have a right not to be endangered by a penal system he objects to, then all this would intuitively suggest is that under such circumstances his right could be justifiably infringed. After all, it is simply unacceptable and unfair for a small group of people to block measures that are *ex ante* good for the whole population only because there is a risk that they themselves (a risk everybody else shares) might actually not benefit. Whoever disagrees would also have to declare public transportation absolutely prohibited: af-

ter all, some people who have not waived their right of not being endangered by buses might actually get hit by them.

Thus, even if Chiu had established (which she hasn't) that civilians have a right that guerillas do not endanger them by not wearing uniforms, this would not be sufficient to show that guerillas are morally absolutely prohibited from not wearing uniforms. Insisting on such a prohibition in the genocide case, for example, seems to defeat the purpose – instead of protecting civilians, it only gets them killed. But even with regard to defense against “mere” oppression, an absolute prohibition on nonuniformed combat does not always protect the interests of civilians, but instead often harms them.

5. CHIU'S BLIND SPOT: “COLLATERAL DAMAGE”

In any case, there is no general right of innocent people not to be endangered anyway. You do not violate or infringe upon pedestrians' rights by driving a car although you certainly endanger them thereby. There is, however, a general right of innocent people *not to be killed*. This is a right that the counter-insurgency forces violate by killing innocent civilians, whether “collaterally” or not.

It is disconcerting that Chiu has nothing to say about “collateral damage.” Let us recall the essence of her argument again: “This article has argued that non-uniformed combatants infringe on the rights of civilians by forcing them into a moral position that they did not choose or accept.” (64) I have pointed out that this “moral position,” on her account, is their loss of immunity; and I have also pointed out that the civilians do *not* lose their immunity in the way Chiu describes – in fact, her description of this loss contradicts certain statements of her own.

However, let me now describe a way that you can indeed force civilians into a moral position they did not choose or accept. There is a war going on, and General Bigshot plays a very important role in it, so important, in fact, that an attack that would also kill 100 innocent bystanders alongside him would still be proportionate and justified. Bigshot goes through the city. By doing so he forces all the civilian passersby into a moral position they did not choose or accept: they are now, due to his presence, to which they did not consent, justifiably “killable.”¹⁸ Indeed, when President Bigmouth declared the war, Bigshot was just reading (in uniform) in his favorite diner in the desert, with not more than 100 people present. Thus, Bigmouth forced the 100 people in the diner into a moral position they did not consent to. Tank division A drives by the houses of some civilians, Regiment B gets provisions in a village, Battalion C looks for cover in a forest that civilians use

¹⁸ Justifiably, not justly! See Steinhoff [2007] p. 50-51, 57-58.

to search for wood and mushrooms etc. – all these military units force civilians into a moral position they did not choose or accept: they make their lives disposable in the course of a justified military attack on these units.

Modern war cannot be waged without forcing some (indeed large numbers of) civilians into a moral position they did not choose or accept – there will always be “collateral damage,” and some of it will be, would be or would have been *justified*. Thus, unless Chiu embraces contingent pacifism (which she clearly doesn’t), her pointing the finger at the nonuniformed guerillas but not the uniformed soldiers and the politicians declaring war reveals a double standard. She cannot consistently deem it morally acceptable that uniformed soldiers make many civilians non-immune to being killed while condemning nonuniformed combatants for doing exactly the same.

6. PRO-STATE BIAS

What I referred to as to the “blind spot” and the double standard in Chiu’s argument is, in my view, at least partly attributable to her unabashed pro-state bias. Therefore, it is useful to have a closer look at what she has to say about the special role of the state. The most revealing passage in her article in this regard is the following, which merits being quoted at length:

[...] only through the constitution of a political state can soldiers derive the right to legitimately kill each other as representatives of their states, rather than as individual, criminal murderers. Political entities have a mediating role in warfare, meaning that the state can allow its citizens to legitimately perform acts that would otherwise be disallowed under domestic governance, notably, engage in war and kill other people. It does not, however, trump all other goods. Someone who is not a recognized citizen of a state or other governing body is in a state of nature with respect to other individuals in the world. This has ramifications for what duties others owe to him. For example, stateless individuals or citizens who fight outside the authority of their state’s recognized military could not possess the right to kill soldiers, or the right to be treated in accordance with established international military conventions for POWs. The government may very well choose to treat such a person like other soldiers anyway, but for reasons other than duties imposed by this battlefield exchange – for example, promoting pragmatic self-interest, fostering good public relations, straightforward compassion, or recognition of his personhood. (67)

Chiu means “legitimate” as “morally legitimate” here and “rights” as “moral rights.”¹⁹ However, that makes her averments truly remarkable. First, if my mother allows me to kill an innocent person and promises me not to punish me under motherly governance if I do, then that still does not give me the moral right to kill the innocent person. Indeed, even if the mother of the innocent person told me that she, too, would not punish me for killing her son or daughter, this would also not confer on me the moral right to kill that innocent person. States are in this respect not better off than mothers – unlike, perhaps, gods, they cannot just make the rights of innocent persons disappear by decree. If Chiu – implausibly – thinks otherwise, she would at least have to adduce an argument for her position, which she does not.²⁰

Second, it is inconsistent to claim that stateless individuals are “in a state of nature with respect to other individuals in the world” and to simultaneously say that those stateless individuals may not kill soldiers who unjustly pursue them. If they are in the state of nature, *by definition* they have such a right (indeed, in the state of nature *every* individual has a right to wage *war* – after all, in social contract theory states can only have rights that individuals have transferred to them²¹). Third, if her claim that “citizens who fight outside the authority of their state’s recognized military could not possess [...] the right to be treated in accordance with established international military conventions for POWs” is supposed to be a claim about international humanitarian law, it is wrong. Of course guerrilla fighters fighting against the recognized forces of their state can have protection as POWs, in particular if this conflict is recognized as an “internationalized” one.²² If it is supposed to be a moral claim, one suggesting that they *ought* not get such protection, then it is hardly more plausible than her idea that states can simply dissolve the rights of innocent persons not to be killed.

States do not have the magical moral powers Chiu seems to ascribe to them; and state soldiers do not occupy the moral high ground relative to non-state

¹⁹ Chiu has confirmed this to me in a personal communication.

²⁰ Chiu states (personal communication) that she agrees that the state is not a god, but that it is not your mother either. Indeed. However, if even our mothers, who have normally done much more for us than our states and whom we hold much dearer, cannot sign away our rights or our duties to other people, Chiu would have to explain why she thinks, as she appears to do, that states can. Again, she does not offer such an explanation. Incidentally, there are some points of contact between Chiu’s view of the state and the role Yitzhak Benbaji accords to it in the context of war and “the war convention.” See Benbaji [2008; 2009]. For a criticism of Benbaji’s position that to a large extent might also apply to Chiu’s, see Steinhoff [2010b].

²¹ See Steinhoff [2007] p. 18-20.

²² See Detter [2003] p. 141-148.

groups. Her pro-state and anti-rebel bias is misplaced and not backed up by any argument.

CONCLUSION

Chiu does not manage to show that nonuniformed combat is morally absolutely prohibited. Her argument that by fighting without uniforms nonuniformed guerrillas coerce civilians into participating in the armed conflict and thus into surrendering their immunity (their right not to be attacked) fails: there is no coercion, there is no participation, and there is no surrendering of immunity. Even if, however, this argument of hers were correct so far, it would still not show that such “coercion” would amount to a rights infringement. Moreover, even if it did amount to such a rights infringement, there are examples that clearly show that such an infringement, if it exists at all, is sometimes perfectly justified. Finally, if she were right (which she is not) that forcing civilians into a moral position that they have not accepted or chosen is absolutely wrong, she would have to embrace pacifism, for uniformed soldiers also routinely force civilians into a position they have not accepted or chosen, namely by making it justifiable to kill them “collaterally” in the course of an attack on a legitimate military target. She does not embrace pacifism, however. Thus, her stern criticism of nonuniformed guerrillas does not cohere with her lenient attitude towards soldiers.²³

References

- Benbaji [2008] – Y. Benbaji, *A Defense of the Traditional War Convention*, “Ethics” (118) 2008.
- Benbaji [2009] – Y. Benbaji, *The War Convention and the Moral Division of Labour*, “The Philosophical Quarterly” (59) 2009.
- Chiu [2010] – Y. Chiu, *Uniform Exceptions and Rights Violations*, “Social Theory and Practice” (36) 2010.
- Detter [2003] – I. Detter, *The Law of War*, Cambridge University Press, Cambridge 2003.
- Herman [1993] – B. Herman, *The Practice of Moral Judgment*, Harvard University Press, Cambridge 1993.
- Kutz [2005] – C. Kutz, *The Difference Uniforms Make: Collective Violence in Criminal Law and War*, “Philosophy and Public Affairs” (33) 2005.
- McMahan [1994] – J. McMahan, *Self-Defense and the Problem of the Innocent Attacker*, “Ethics” (104) 1994.
- McMahan [2010] – J. McMahan, *The Just Distribution of Harm Between Combatants and Non-combatants*, “Philosophy and Public Affairs” (38) 2010.

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- Ramsey [2002] – P. Ramsey, *The Just War: Force and Political Responsibility*, Rowman & Littlefield, Lanham 2002.
- Steinhoff [2007] – U. Steinhoff, *On the Ethics of War and Terrorism*, Oxford University Press, Oxford 2007.
- Steinhoff [2010a] – U. Steinhoff, *In Defence of Guerrillas*, “Diametros” (23) 2010.
- Steinhoff [2010b] – U. Steinhoff, *Benbaji on Killing in War and ‘the War Convention’: A Critique*, “The Philosophical Quarterly” (60) 2010.
- Steinhoff [2011] – U. Steinhoff, *The Uselessness of Rawls’s ‘Ideal Theory’*, unpublished ms.
- Thomson [1991] – J.J. Thomson, *Self-Defense*, “Philosophy and Public Affairs” (20) 1991.