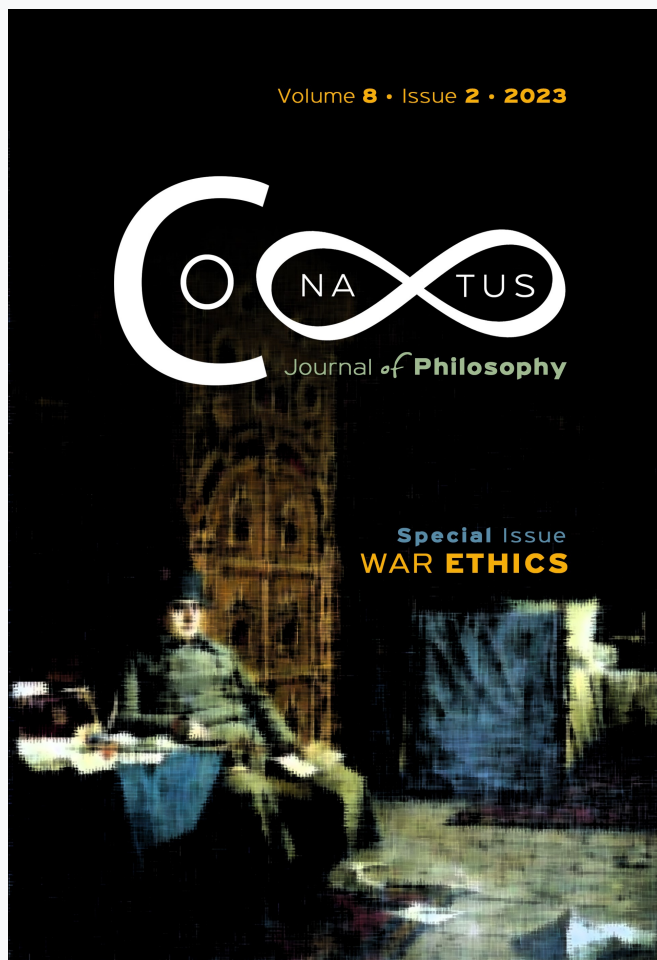


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# Führerprinzip or 'I Was Following Orders' in Jus in Bello Era

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## **Abstract**

*In June of 1945, the International Military Tribunal (ITM) formed in London, faced the problem of a non-yet existing legal armor for the Nazi crimes. Two new rules were widely accepted there. First, a new category of war crimes, the “crimes against humanity” was legally defined. Second, the ex-ante rejection of the defense line “I was following orders” or Führerprinzip (the principle of the duty to obey every order given by the military leader). In the first part of this paper, I will present in brief, the historical and legal context of the rejection of Führerprinzip as a defense line of the Nazi defendants in Nuremberg trials as also in Eichmann’s trial in Jerusalem, where the same legal context was enacted. Next, I will expose a short history of conscientious objection in war ethics and the International Law on Human Rights that supports it. This exposition reveals that objection to criminal orders has the status not only of a right, but also of a duty for the soldiers on either side of the war. In the third part, the Rawlsian view on conscientious objector will be exposed as the meeting point of a broadly Kantian conception of war ethics and the existing International Law frame. In the final part I will present some philosophical aspects of jus in bello theory, as also the critique of its importance, and its contribution to the reification of the moral importance of conscientious objection in wartime and the rejection of Führerprinzip.*

**Keywords:** *Führerprinzip; conscientious objection; jus in bello; Nuremberg trials; Eichmann; Rawls; Kant; Grotius; Vitoria*

## I. The Nazi case, the Nuremberg trials and Eichmann's lay Kantianism

In late June 1945, when the delegates of the victorious powers formed the International Military Tribunal (IMT) in London to adjudicate Nazi atrocities, the problem of a non-yet existing legal armor for such prosecutions emerged. The effort was to present a legislation based on preexisting laws and ethical codes of the countries where the crimes were committed. Although the crimes were obvious and widely accepted as horrible and unacceptable acts during the war, the danger of an accusation for an ex post facto legislation by the Tribunal, i.e., after the crimes were committed and so infringing the natural law, was obvious. Two new rules were widely accepted as prominent in the charter of the Tribunal. First, a new category of war crimes, the "crimes against humanity" was legally defined to serve the special criminal content of Nuremberg Trial. Second, the ex-ante rejection of the defense line "I was following orders" or Führerprinzip was accepted as a solid legal stance in International Law from then on.<sup>1</sup>

The outcome of this legislative work done in London, is obvious in Nuremberg code whose 10 articles were enumerated at the final judgment of the Medical Case Trial. The code was grounded on Hippocrates medical ethics, the earlier European code of Tomas Percival, an English physician in 1803, the earliest American code of William Beaumont a physician in 1833, and the text of *An Introduction to the Study of Experimental Medicine*, written by the French physiologist Claude Bernard in 1865. Except from these European codes, the earlier German legislation was also appealed to, mainly the directive by the Prussian Ministry of Medical affairs issued on December 1900 related especially with human experimentation.<sup>2</sup> According to this directive many medical war crimes committed by Nazi doctors in concentration camps were clearly illegal acts for the German law, so the defense line in Nuremberg trials grounded on the ignorance of the doctors of any relative to human experimentation German legislation, and so their obligation to follow orders, proved pretentious. The most significant preexisting legal document though, was a Circular of the Reich Minister of Interior, namely "Guidelines on Innovative Therapy and Scientific Experimentation" existing from 1931. It is a kind of paradox to think that at that time there

<sup>1</sup> Anthony C. Grayling, *Among the Dead Cities: Was the Allied Bombing of Civilians in WWII a Necessity or a Crime?* (London, Berlin, and New York: Bloomsbury Academic, 2014), 229-231.

<sup>2</sup> Michael A. Grodin, "Historical Origins of the Nuremberg Code," in *The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation*, eds. George J. Annas and Michael Grodin, 121-144 (New York: Oxford University Press, 1992).

did not exist other such progressive instrument in any other country, whose articles are still considered to be much stricter and more precise in guiding medical practice in human experimentation than the Nuremberg Code itself, or even the much later in the 20<sup>th</sup> century introduced, Declaration of Helsinki.<sup>3</sup>

The same concern for preexistent laws that would empower the Tribunal's decisions on Medical Case Trial would be present in the empowerment of the *ex-ante* rejection on the defense line "I was following orders" or *Führerprinzip* in battlefield or genocide operations of killing army squads. Conformity and obedience were supposed to be the great virtues of German nation but in the case of war crimes it seems that Charles Percy Snow's well-known quote that in "the long and gloomy history of man, you find that more hideous crimes have been committed in the name of obedience than have ever been committed in the name of rebellion," proved right. In the Nazi regime *Führerprinzip* was widely accepted. But there was a legal precedent in Germany including laws which were allowing a kind of conscientious objection against war crimes. As Anthony Clifford Grayling in *Among the Dead Cities* as also Hannah Arendt in *Eichmann in Jerusalem*<sup>4</sup> note, in every German soldier's military pay book there was explicitly stated that no soldier was obliged to obey illegal orders. And there were several cases where German soldiers at the Eastern Front refused to participate in mass executions of civilians, without any penalty. Those facts proved the legal precedence of the right not to obey criminal orders and so the avoidance of the post ex facto legislation accusation. Therefore, during the Nuremberg Trials, *Führerprinzip* was totally devaluated as a defense line and the defendants were personally responsible for any crime against the innocent civilians and the prisoners.<sup>5</sup> This trial established the obligation of the combatants *not* to obey criminal orders even with the risk of punishment, being the responsible agents of criminal acts and not just the executing organs of state's war activity.

It is interesting that in Eichmann's trial in Jerusalem, years later in 1961, the same legal context was enacted, so the defendant had to

<sup>3</sup> Sharon Perley, Sev S. Fluss, Zbigniew Bankowski, and Françoise Simon, "The Nuremberg Code: An International Overview," in *The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation*, eds. George J. Annas and Michael Grodin, 149-173 (New York: Oxford University Press, 1992), 151.

<sup>4</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1992); Grayling, 229-231.

<sup>5</sup> On this cf. David Whetham, "Military Ethics Education – What Is It, How Should It Be Done, and Why Is It Important?" *Conatus – Journal of Philosophy* 8, no. 2 (2023): 759-774, especially 763f.

prove that he did not commit any crimes and not that he just executed orders. As Arendt reported, the defendant repeatedly referred that “he did not only obeyed orders, he also obeyed the law.”<sup>6</sup> He probably believed that this distinction could be important for his defense but the court did not pay any attention to it. The funniest statement in this trial was that Eichmann believed that he had lived all his life according to Kant’s moral duties and especially according to Kant’s definition of duty. He even spelled rightly the formula of categorical imperative, although later on he admitted that “from the moment he was charged with carrying out the Final Solution he had ceased to live according to Kantian principles” changing, according to Arendt the Kantian formulation in “Act as if the principle of your actions were the same as that of the legislator or of the law” or as Hans Frank’s well known in the Nazi regime formulation of the categorical imperative in the Third Reich: “Act in such a way that the Fuhrer, if he knew your action, would approve it.”<sup>7</sup> We will keep this lay Kantianism understanding of Kantian duty in mind, which is still present even in contemporary philosophical interpretations of Kantianism based on its alleged extreme formalism, while we will discuss later on the philosophical aspects of “I followed orders” in the third part of this paper, where the Kantian and Rawlsian legal and moral roots of conscientious objection will be investigated.

## II. Conscientious objection and the International Law on Human Rights

The history of conscientious objection to military orders is long and it is considered in bibliography to start with the supposedly first objector, Maximilianus, the son of a Roman army veteran who in the year 295 was called up to the Roman army at the age of 21, and openly denied this calling in terms of his religious beliefs. He was executed and canonized then by the catholic church as Saint Maximilian.<sup>8</sup> Usually conscientious objection emerged in states where compulsory military service existed and not where it was voluntary. In most cases it was recognized where there was no need to oblige pacifist religious minorities to serve in the army. An early recognition in 1575, led to Mennonites’ exemption from their army obligations during the Dutch wars of independence.<sup>9</sup> The conscientious objection context though,

<sup>6</sup> Ibid., 135.

<sup>7</sup> Ibid., 136.

<sup>8</sup> Peter Brock, *Pacifism in Europe to 1914* (Princeton, NJ: Princeton University Press, 1972), 13.

<sup>9</sup> United Nations, *Human Rights and Conscientious Objection to Military Service* (New York:

as it is shaped today, was constructed mainly during the great wars based on the universal conscription into national armies, starting from the Napoleon wars which followed the French Revolution and much more during the World Wars of the 20<sup>th</sup> century. 16,000 persons in UK and 4000 in USA refused to serve during the First World War.<sup>10</sup> From this period already there were different approaches from different states on that matter, ranging from imprisonment of objectors to the acceptance of an alternative service or even accepting the absolute refusal of any kind of service. The problem raised even greater during the second big war with the much wider conscription all over the world and one can say concluded in its present state after the wide adoption of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, that rendered conscientious objection a human rights issue.

According to the *Universal Declaration of Human Rights*, article 18: “Everyone has the right to freedom of thought, conscience and religion.”<sup>11</sup> That means that one can claim his freedom not to obey orders that come in direct opposition to his religious beliefs or personal values. A soldier has the right to object in genocide or even the humiliation and torture of a single person of the opposite side if he considers it to be against his personal or common morality’s values. The above rights (Freedom of thought, conscience and religion) according to *European Convention on Human Rights*, article 9, 2 may be subjected to certain limitations:

Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.<sup>12</sup>

According to the *Charter of Fundamental Rights of the European Union*, article 10, 2: “The right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right.”<sup>13</sup>

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UN Publications, 2012), 2.

<sup>10</sup> Ibid., 4.

<sup>11</sup> Ibid., 7.

<sup>12</sup> Ibid., 8.

<sup>13</sup> Ibid.

According to the *Ibero-American Convention on Young People's Rights*, article 12 (Right to conscientious objection)

1. Youth have the right to make conscientious objection towards obligatory military service. 2. The States Parties undertake to promote the pertinent legal measures to guarantee the exercise of this right and advance in the progressive elimination of the obligatory military service.<sup>14</sup>

However all the above Conventions and charters remain *soft instruments* in the international context of a not yet existent compulsory International Law. They are *proposing* and not *ordering* to the law makers of the different countries whose legislating bodies can selectively respect the spirit of the internationally molded new stance on old matters, as that of the obligation or not of a soldier to obey any order of his superiors. Nevertheless, the moral status of the International Law is high and if one state disrespects its principles, this state is considered to be a pariah of the international community and so possibly subjected to several restrictions and penalties by other countries. It is obvious that the modern International Law resolutely recognizes the right to conscientious objection.

In concluding, after the above discussed Nuremberg trial and Eichmann's trial later, and the wide acceptance of the international legislation on Human Rights, the objection to criminal orders became not only a *right* but also a *duty* of the soldiers on either side of the war, considered right or wrong according to the *jus ad bello's* principles. But isn't that supererogatory and somehow superfluous? If the International Law remains still deprived of proportionate executive power and possession of institutions that could protect the objecting soldier from his state's even lethal punishment, how possible is it for a single person to become a saint, and sacrifice his life to obey his conscience and his belief in the International Law? How strong is the historical moment's pressure when there is a mass support in unpunished murder like that in Nazi regime? As Arendt comments

the law of Hitler's land demanded that the voice of conscience tells everybody: 'Thou shalt kill,' (instead of the common conscience's order 'Thou shalt not kill') although the organizers of the massacres knew full well that murder is against the normal desires and inclinations of most people.<sup>15</sup>

<sup>14</sup> *Ibid.*, 9.

<sup>15</sup> Arendt, 150.

One must stand up no matter the cost, to condemn evil regimes' orders sometimes in danger even of the capital punishment. There existed such persons throughout the west civilization history, defending their moral values without considering the personal cost as Saint Maximilian in Roman Empire or Franz Jägerstätter in Nazi Austria who was executed as a conscientious objector<sup>16</sup> or the pacifist novelist Vera Brittain<sup>17</sup> who openly condemned during the second big war the mass bombing by the Allies of big German cities as a moral and strategic failure.<sup>18</sup>

### III. Conscientious objection in Kant and Rawls

It is interesting to examine the views of Immanuel Kant and John Rawls on conscientious objection in trying to ground philosophically its contemporary status in human rights context. Rawls, who has openly accepted the Kantian roots of his philosophy, has expressed his view literally on conscientious objection, contrasting it to civil disobedience, in his major work *A Theory of Justice*, while Kant's view on conscientious objection, can be extracted from his stance on civil disobedience and his famous distinction between *the private and public uses of reason*.

In 1793, Kant although well known for his admiration for the French revolution, in his essay "On the common saying: 'That may be correct in theory, but it is of no use in practice,'"<sup>19</sup> he essentially denies the right of revolution.<sup>20</sup> There are diverse interpretations of this essay, but Lewis Beck insists that here Kant's denial of the right of revolution is as firm and clear as his express sympathy for the French Revolution. One explanation for that could be Kant's alleged extreme formalism: There is a contradiction in the conception of a constitution having within it a positive law permitting the abrogation of the constitution.<sup>21</sup> The revolutionist does not appeal to the terms of the consti-

<sup>16</sup> Franz Jägerstätter, an Austrian conscientious objector during the second Big War who was imprisoned and finally executed, refusing to wear the Nazi army uniform. His history inspired the scenario of Terrence Malick's film *The Hidden Life*, 2019.

<sup>17</sup> Vera Brittain, *Seed of Chaos: What Mass Bombing Really Means* (London: New Vision Press, 1944).

<sup>18</sup> *Ibid.*, 11.

<sup>19</sup> Immanuel Kant, "On the Common Saying: That May be Correct in Theory, but It Is of no Use in Practice," in *Immanuel Kant Practical Philosophy*, ed. and trans. Mary J. Gregor, 273-310 (Cambridge: Cambridge University Press, 1999).

<sup>20</sup> Lewis W. Beck, "Kant and the Right of Revolution," *Journal of the History of Ideas* 32, no. 3 (1971): 411-422.

<sup>21</sup> *Ibid.*, 413.



tution for justification of his efforts to overturn the constitution; he may appeal to the constitution for reform, he appeals to the natural, not positive, law to criticize the constitution which he rejects. Another explanation may be traced in Kant's theory of government, in which the most basic principle is the doctrine of separation of powers. The head of the government can do no wrong in the sense that nothing he does is punishable. Even if he is considered to act contrary to the law, the citizens must not disobey but they can only exercise the right to publicly ask for reform. Another, historical explanation, may be that his older enthusiasm for the revolution, may be compatible with his denial of the right of revolution, if for him then "Revolution" meant "Restoration." Another yet explanation offered by Beck requires that we abandon the moralistic or legalistic standpoint and move towards the standpoint of Kant's teleological conception of history.<sup>22</sup> Kant cannot argue on a utilitarian justification of the revolution. The republican constitution is with respect to the law the one which is the original basis of every form of civil constitution. Revolution creates an interval that is a return to the state of nature and maybe a worst constitution will come out of it than by gradual reform. Finally, the last explanation can appeal to perfect and imperfect duties distinction. The right to revolt looks forward the aim of a better world and the progress of mankind. This is an imperfect obligation, which is not strict and leaves room for its fulfillment. On the other hand, the duty to obey the established law is strict or perfect and cannot be omitted. We have here the same conflict of duties as in the case of lying to a murderer where Kant famously denies the right to lie to save the life of an innocent man. Beck concludes that "some inconsistency remains here because Kantian ethics is not adequate to resolve the painful problems of conflicting duties."<sup>23</sup>

A better understanding of Kant's possible stance can be found in his famous distinction between public and private use of reason found in his essay *An Answer to the Question: What is Enlightenment?* (1784).<sup>24</sup> His contra use of the terms "public" and "private" against their current meanings is widely discussed. On one side, he considers private use the use of reason of a public servant while exercising his duties which in no case can be against the law. On the other side, he considers as public use, the use of reason in expressing individual opinion by writing news-

<sup>22</sup> Ibid., 417.

<sup>23</sup> Ibid., 422.

<sup>24</sup> Immanuel Kant, "An Answer to the Question: What is Enlightenment?" in *Practical Philosophy (The Cambridge Edition of the Works of Immanuel Kant)*, ed. and trans. Mary J. Gregor, 11-22 (Cambridge: Cambridge University Press, 1999).

papers articles or books or by participating in public conversations and in this case, he can have an opinion against a law he considers flawed. The first use, if it turns against the positive law, equates to revolutionary attitude while the second contributes to the gradual reform of society to a perfectly constituted state. It seems that Kantian framework, leaves no room for civil disobedience. The inconsistencies that the conflict between moral and positive law produces seem unresolvable. We can only look towards a future reconciliation of them by gradual reform. And this reform demands our public involvement. Finally, to respect the laws of society does not mean to obey uncritically. You can always talk by your public use of reason to demand for changes.

We cannot of course foresee what Kant's opinion would be like today. As Howard Caygill underlines, we cannot face Kant's work as

an intellectual project independent of circumstances – a work without a world [...] if we step behind the monument and reconsider its constituent parts, the sheer heterogeneity of Kant's writings is striking. And if we look beyond the philosophical letter to the publication details of the individual texts – who they were published by, and for whom – we begin to gain a complex appreciation of the internal diversity of Kant's work, one moreover which allows us to situate his authorship within the changing structures of the intellectual life.<sup>25</sup>

Kant faces civil obedience in the context of his Theory of Justice not in that of his Theory of Virtue. In his *Metaphysics of Morals*, he claims that

the sovereign has only rights against his subjects and no duties (that he can be coerced to fulfill) – Moreover, even if the organ of the sovereign, the ruler, proceeds contrary to law, for example, if he goes against the law of equality in assigning the burdens of the state in matters of taxation, recruiting and so forth, subjects may indeed oppose this injustice by *complaints* (*gravamina*) but not by *resistance*.<sup>26</sup>

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<sup>25</sup> Howard Caygill, *A Kant Dictionary* (Cambridge, MA: Blackwell Publishing 1995), 7-8.

<sup>26</sup> Immanuel Kant, "The Metaphysics of Morals," in *Practical Philosophy (The Cambridge Edition of the Works of Immanuel Kant)*, ed. and trans. Mary J. Gregor, 353-604 (Cambridge: Cambridge University Press, 1999), 6:319. Italics by me.

It is probable that in the historical context of the years after the French revolution and his fear of Restoration, what he meant by *resistance* was an armed violent resistance which he loathed and in the present context we can suppose that he would probably list conscientious objection by just refusing to obey with no use of violence under *complaints*. Maybe we can have a glimpse of his possible contemporary view on conscientious objection in the work of John Rawls.

Rawlsian liberalism seems not to adopt the fear that revolution and civil disobedience could reverse mankind's labor towards the kingdom of ends, a fear that made the "old Jacobine" refute revolution. The opposite has proved to be true in 20<sup>th</sup> century as the multiple disobedience movements against racism and discriminating laws as also anti-war conscientious objection, had a great influence in law making and finally have proved to be tools of improvement of society and not obstacles to political and ethical progress. Rawls' stance on conscientious objection seems to consider those new historical facts.

In *A Theory of Justice*, he first exposes the definition of civil disobedience as a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government. It seems here that the publicity condition coincides with the Kantian demand of gradual progress using public reason. Civil disobedience

is an act guided and justified by political principles, that is, by the principles of justice which regulate the constitution and social institutions generally [...] cannot be grounded solely on group or self-interest. Instead, one invokes the commonly shared conception of justice that underlies the political order [...] Not only is it addressed to public principles, it is done in public. Civil disobedience is nonviolent [...] It expresses disobedience to law within the limits of fidelity to law.<sup>27</sup> [On the other hand,] conscientious refusal is noncompliant with a more or less direct legal injunction or administrative order [...] is not a form of address appealing to the sense of justice of the majority.<sup>28</sup>

Such acts have been the early Christians denial to perform certain pagan acts, the refusal of the Jehovah's Witnesses to salute the flag, the

<sup>27</sup> John Rawls, *A Theory of Justice* (Cambridge, MA: The Belknap Press of Harvard University Press, 1999), 321-322.

<sup>28</sup> *Ibid.*, 323.

pacifist denial to serve in war, or even Thoreau's refusal to pay a tax on the grounds that it would make him an agent of grave injustice to another. Conscientious refusal may have other grounds than political principles; religious beliefs or personal moral reasons or even a certain community's ethos can supervene. It needs not appeal to commonly shared conception of justice but to deep personal beliefs. But how an act like that can be justified in a well-ordered republican state? Here Rawls uses the Kantian teleological conception of history towards an anti-Kantian conclusion on conscientious objection. He believes that the case of a pacifist's conscientious objection against military service for example, pacifism must be treated with respect and not merely tolerated because it accords reasonably well with the principles of justice. Conscientious objector believes that "both the law of nations and the principles of justice for his own society uphold him in this claim."<sup>29</sup> Because "there is a common abhorrence of war and the use of force, and a belief in the equal status of men as moral persons."<sup>30</sup>

The post legal positivism era with the adoption of the Dworkinian interpretivism in the modern legal system, demands the laws to be interpreted under the scope of the best political and moral principles. Kant's extreme formalism (according to Beck) against civil disobedience because of the fear of restoration do not serve society's interests and the dream of peace which remains utopic in a world with criminal wars around, especially those haunting the public interest today in Ukraine and Middle East, with war crimes occurring live on TV by almost all parts. Conscientious objection is a tool of society's self-evaluation and sometimes is the only way to keep the citizens alert to the wrongs that governments are prone to commit and have repeatedly committed in the recent past and so it's a right and a duty in the contemporary blood-stained international environment.

#### IV. Führerprinzip and conscientious objection in *jus in bello* era

The *jus in bello* theory is described as the thesis of total or partial interdependency of the means of war against the reasons of war. There are two central elements that are developed mainly after the Middle Ages by Francisco de Vitoria (1483-1546) of the school of Salamanca, and the Dutch humanist Hugo Grotius (1583-1645). First is the principle of *discrimination* (between combatants and innocents or civilians) and second the principle of *proportionality* of means (instead of the war

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<sup>29</sup> *Ibid.*, 334.

<sup>30</sup> *Ibid.*, 325.

itself being a proportionate means to a certain cause according to *jus ad bellum*). The right and duty to disobey criminal orders to certain actions as means of war or to refuse to participate in certain wars (selective consciousness objection), is examined in the more recent context of *jus in bello* while general pacifism or absolute denial to serve in the army, in their total disapproval of any war activity, may be considered as part of the *jus ad bellum* problematics on right or wrong reasons of war. We are going in this part to examine how the *jus in bello* philosophical theory affected the right to disobedience in wartime.

Francisco de Vitoria is known for his debate with the Spanish Crown on the treatment of the native Americans in the colonies of the New World. Although he agrees at first with Aquinas in considering just war a response to some fault, he reaches far more, suggesting an *ethical dilemma* if we think the possibility of *justice on both sides*, creating so the starting point of *jus in bello*.<sup>31</sup> There can be a just cause and a believed just cause based on what he calls in his major work *De Indis*, the *invincible ignorance*:

There is no inconsistency [...] in holding the war to be a just war on both sides, seeing that on one side there is right and on the other side there is invincible ignorance [...] The rights of war which may be invoked against men who are really guilty and lawless differ from those which may be invoked against the innocent and the ignorant.<sup>32</sup>

The core novelty in war theory introduced by Vitoria is of a war being just on both sides because the primarily wrong side is subjected to *invincible ignorance* and so we must accept the *noncombatant immunity* as also the *moral equality of combatants*.<sup>33</sup> So, noncombatants as innocents are not supposed to the wrongness of the war in which they are involved and killing them is morally wrong, a war crime as it will be called later.

The moral equality of combatants will be again addressed later, by Hugo Grotius. Grotius seems to both support and reject this notion.<sup>34</sup>

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<sup>31</sup> Nicholas Rengger, "The *jus in bello* in Historical and Philosophical Perspective," in *War: Essays in Political Philosophy*, eds. Larry May and Emily Crookston, 30-46 (Cambridge: Cambridge University Press, 2008), 38.

<sup>32</sup> Francisco de Vitoria, *De Indis*, in *Vitoria Political Writings*, eds. Anthony Pagden and Jeremy Lawrance, 231-292 (Cambridge: Cambridge University Press, 1992), section III, 7.

<sup>33</sup> *Ibid.*, 39.

<sup>34</sup> Hugo Grotius, *De jure belli ac pacis libri tres*, Volume 2: *On The Law of War and Peace*, ed.

To understand that we must focus on the tension between justice and peace in the context of war ethics. It seems that from the aspect of justice the combatants who clearly know that their cause is unjust are not even allowed to fight according to the natural law. But he thinks that a moral obligation not to punish arises from what he calls a “law of nations” meaning the law that states agree on. This tension between justice and peace parallel to the one between natural law and “law of nations” finally, for Grotius, promotes the latter. And why is this?

Grotius does not allow the law of nations to command what the natural law forbids but only allows unjust acts to go unpunished. This permission accords with the natural law [...] He says that even those who are responsible, in accordance with the natural law and mercy, may be pardoned. For Grotius, pardons and mercy are a part of the natural law, for they lead to peace and less bitterness during war.<sup>35</sup>

So, we must consider both sides (right or wrong) equally morally responsible for atrocities and so equally obliged to object in criminal orders. Natural law somehow tells us what is right according to justice while at the same time prescribes the pursue of peace by agreements.<sup>36</sup> The equality of combatants is a step in this direction of agreement even if only the one side is right.<sup>37</sup>

In the same line of the moral equality of both sides Michael Walzer considers combatants on both sides to be *victims*.<sup>38</sup> Common people have entered the war because of patriotism or persuasion by the government and they are not considered responsible for the war. They have been driven to the war as a flock of coerced innocents or *ignorant* ala Vitoria. So, as victims, all combatants are equal in their right to protect themselves. That is for Walzer, exactly what most people believe. This

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James Brown Scott, trans. Francis W. Kelsey (Oxford: Clarendon Press; London: Humphrey Milford, 1925).

<sup>35</sup> Steve Viner, “The Moral Foundations of the *jus ad bellum* / *jus in bello* Distinction,” in *Routledge Handbook of Ethics and War: Just War Theory in the Twenty-First Century*, eds. Fritz Allhoff, Nicholas G. Evans and Adam Henschke, 49-62 (New York and London: Routledge, 2013), 53.

<sup>36</sup> This tension between seeking justice or peace by the war as a tension between *jus ad bellum* and *jus in bello* is thoroughly discussed in Jovan Babic, “Ethics of War and Ethics in War,” *Conatus – Journal of Philosophy* 4, no. 1 (2019): 9-30.

<sup>37</sup> *Ibid.*

<sup>38</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2000), 30.

conception comes out of respect for individual rights and the rejection of the carnage. The *immunity thesis* and the *moral equality of combatants* introduced by Vitoria we have already seen, keep war slaughter in certain limits, where the rights don't exist, and peace seems impossible.<sup>39</sup> This equality renders all the soldiers moral responsible for objecting criminal orders even if they are fighting on the right side of the war.

Nevertheless, the separateness of *jus in bello* from the *jus ad bellum* and the moral equality of the combatants have received a strong criticism grounded on individual rights. In his paper "The Ethics of Killing in War"<sup>40</sup> Jeff McMahan creates a strong link between individual right to defense and criticism. His position has a strong individualistic and interpersonal element according to which every case of killing is subjected to interpersonal evaluation of the opponent's liability to be killed. The state is out of the calculation, there are only those liable to kill and those not liable to kill and each combatant is personally responsible for his acts from his participation in a right or wrong war to his special acts in certain circumstances. According to McMahan the *jus ad bellum* determinations penetrate *jus in bello* judgments concluding in the rejection of moral equality of combatants. Viner claims that in concluding so criticism fails to see war as a special human activity e.g., a violent game like American football with its own violence-accepting rules and tries to impose the rules and laws of everyday disputes in the community to the battlefield. But even if we insist in an analogy of international laws of war with national legal systems that regulate peacetime citizens' activities, as Viner denotes:

Legal systems are morally required in part because they are necessary for peace, and a legal system is only maintained if it has enough fidelity to its laws. Its existence relies on such fidelity. Similarly, a concept of war that promotes peace is only maintained if there is enough fidelity to it, and as a result, it needs rules that people are willing to support [...]. People support these rules, which creates the required fidelity to this concept of war, because of the reasons related to peace stated above and because, following Walzer, they are rules that are deeply rooted in the experience of war.<sup>41</sup>

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<sup>39</sup> Viner, 54.

<sup>40</sup> Jeff McMahan and David Rodin, "The Ethics of Killing in War," *Ethics: An International Journal of Social, Political, and Legal Philosophy* 114, no. 4 (2004): 693-733.

<sup>41</sup> Viner, 56.

However demanding may this individualistic position of criticism be, as if any soldier had his own war against the opponents, this position performs the transition of the injustice from the general to specific and turns the responsibility from the state's level to that of the global one. Like the utopia of the Kantian "world of ends" the utopia of the personal responsibility in war "renders the citizens of a state in agents of a noumenal universe."<sup>42</sup> We can conclude here that the criticism's view, even more than the separateness (of *jus in bello* from the *jus ad bellum*) and the moral equality (of combatants) view, stands for the personal responsibility and the right of conscientious objection in war activities, as the autonomous agent-combatant decides for himself and chooses his acts in every case.

## V. Conclusion

The delegitimization of Führerprinzip or "I was following orders" is a fact in modern International Law. The right to conscientious objection is reified through the Nuremberg trial and the several Conventions on Human Rights. Much more than a right it has become a duty, as the international courts recognize the personal responsibility of the soldier even if he has been ordered by superiors to commit criminal acts. John Rawls supports in his theory the conscientious refusal considering it as a tool of society's self-evaluation keeping the citizens alert to the wrongs that governments are prone to commit. War is a special activity and may be faced in its peculiarity: "war cannot be morally justified, [...] just war theory cannot give the justification for it."<sup>43</sup> The *jus in bello* theory seems to support the need to resist criminal war carnage as it focuses on the means instead of the reasons of war. In seeking peace instead of justice which seems unattainable in the extremely complex and usually irrational environment of a war blast, *jus in bello* principles attempt to regulate the chaos, eliminate the slaughter, and keep the hope of peace alive. Peace is also justice's demand. And the refusal to obey criminal orders or the conscientious objection of the combatants, together with their moral equality and the separateness of means from reasons of war are tools which are building this future peace.

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<sup>42</sup> Konstantinos Papageorgiou, *War and Justice* (Athens: Polis, 2019).

<sup>43</sup> Babic, 28.



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