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Thinking war in the 21st century: Introducing non-state actors in Just war theory

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Introduction

1.1 Introduction

One of the leading challenges of this decade is the fight against the Islamic State (IS). In an effort to establish an Islamic state, IS has committed such atrocities that include the killing and otherwise harming of civilians. The fight against IS raises a number of questions regarding the treatment of IS fighters by responding states: Chiefly, should IS fighters be treated as combatants, criminals or as something in-between?¹ If members of IS should be treated under the principles of war, may states counter-attack IS on the territory of another state? How should we distinguish IS combatants from civilians? Should IS combatants be assigned combatant privileges, including prisoner of war status? Finally, how should states respond to individuals suspected of contributing to IS without actively taking part in combat? The 2014 Syrian Civil War involving IS and rebel groups exemplifies 21st century armed conflicts in which non-state actors take part. Recent conflicts involving non-state actors include the (counter) attacks in the aftermath of the September 11, 2001 attacks, the Arab Spring that began in 2010, and the 2014 uprisings in Ukraine.

¹ I use the term ‘combatants’ in a broad sense, including individuals that are part of a non-state army.

The harm involved in wars with non-state actors calls for a theory of regulating such conflicts.² Scholars addressing philosophy of war have developed principles for regulating wars between states, aiming to limit its harmful consequences, but have not considered how to effectively limit contemporary wars by adapting these principles to conflicts in which non-state actors participate. The majority of contemporary conflicts involve non-state actors and the harm and destruction caused by such conflicts is enormous, therefore, there is a pressing need for a theory of war with non-state actors.

My central aim is to fill this gap in the literature by developing a theory of war applicable to non-state actors. In the pursuance of this aim I accept the main principles of just war theory, including the equal treatment of combatants and the separation between *in bello* principles and *ad bellum* principles, to emphasize the intention beneath these principles: limiting the harmful consequences of war.³ I develop a theory for treating wars with non-state actors under the approach of just war theory.

Under what conditions should non-state actors be treated as parties under principles of war similar to state parties?⁴ Addressing this question from a philosophical perspective provides a source of critical reflection on the rules of war. I argue that active individual members of hierarchically organized collectives with a political aim who receive some level of popular support

² Although the term ‘war’ may seem antiquated, it is still used in law, philosophy and everyday language. Here, the term ‘war’ refers both to use of force between states and also to conflicts in which non-state actors are involved.

³ Scholarship on the importance of limiting the destructiveness of war by applying just war theory includes: Shue 2010; Waldron 2016.

⁴ I mainly use the term, ‘principles of war’ instead of ‘laws of war’, because I refer to a system of principles not necessarily codified as law: the just war theory. The most influential version of this theory can be found in Walzer 2006. I discuss Walzer’s theory in Chapter 2.

should be considered as combatants and be assigned similar rights, duties, and obligations under the principles of war. With this view, I concentrate on the requirements of active membership and hierarchical organization. My notion of active membership is meant to exclude individuals who appear to fight but who do not identify with a particular non-state collective and individuals who may identify with a particular non-state collective while not engaging in fighting. Moreover, I argue for the inclusion of hierarchical structure in the requirements for parties in war because in hierarchically structured collectives, individual participants are subject to their superiors who can enforce principles of war. This is crucial in light of the overall aim of these principles: minimizing harm by regulating combat. In employing the principles of war to hierarchically organized non-state actors with a political objective and various degrees of popular support, I address the following themes: applying *in bello* and *ad bellum* principles independently of each other, sovereignty of states, the discrimination principle, and privileged combatant status. Additionally, I address individuals not meeting the requirements of combatancy (as I will stipulate in my thesis) and argue they should be treated as civilians subject to the principles of criminal law if committing crimes.

I embed my theory of war with non-state actors in the tradition of just war theory and treat non-state combatants similarly to state combatants because I believe regulating conflicts with non-state actors under just war theory may contribute to constraining the use of force in such conflicts. Thus, I do not argue that non-state violence is essentially criminal or terrorist violence and that no such violence is permissible or desirable. On the contrary, I apply the principles of war to non-state collectives meeting the requirements I specify in this thesis, because I believe that regulating conflicts with non-state actors contributes to constraining the use of force. It is not desirable to categorize all non-state collectives under other principles than the principles of

war, such as the criminal law system, because such principles require taking side in conflicts, which is not always possible or advantageous, and such principles do not adequately limit harm and killing in all situations.

Furthermore, at times it may be desirable to allow for certain forms of non-state violence to occur. For instance, non-state collectives have played important roles in the liberation struggles of many former colonies. Many of such non-state collectives used violence, which was at first dismissed as terrorism or crime. Later, such actions came to be seen as legitimate means of resistance contributing to liberation of such collectives. The African National Congress's (ANC) attacks in their struggle against apartheid are an example of non-state violence as widely-accepted use of political dissent. During their struggle against apartheid, the ANC was dismissed as a terrorist organization, while later being accepted as a political party.⁵ Their resistance contributed to the overthrowing of apartheid and some of their violent actions are now considered as legitimate uses of political violence. I assume that in such cases it is not evidently unjust for certain non-state collectives to use lethal force in self-defense. In general, states have the right to defend themselves with lethal force against aggression, but, as I argue, if meeting the *ad bellum* requirements non-state collectives may use lethal force in self-defense as well. I will not address the application of the *ad bellum* principles to non-state collectives, instead, I will assume that some non-state collectives meet these principles. With this view, I will focus on the application of *in bello* principles to state responses towards non-state collectives outside their territory. If in some cases it is not evidently unjust for certain non-state

⁵ Virginia Held mentions this example to show that, "it is possible for yesterday's terrorists to become tomorrow's statesmen." See, Held 2005, 176.

collectives to use lethal force in self-defense, it is worth noting the application of the principles of war to armed conflicts with such actors.

The introductory chapter is as follows: in section 1.2, I explain my methodological choices. Particularly, I explain why I approach the question of applying the principles of war to non-state actors from a philosophical perspective. In section 1.3, I embed the main philosophical grounding of my thesis in just war theory.⁶ The aim is to describe the most widely accepted version of this theory which is for a major part codified as international laws. In chapter 2, I criticize and amend this theory to include non-state actors. In addition, I explain my reasons for choosing additional theories as philosophical groundings of my analyses and recommendations regarding the application of the principles of war to non-state actors. In section 1.4, I set out how my thesis is embedded in, and contributes to existing literature in the field of philosophy of war on non-state actors. In section 1.5, I offer an explanation for choosing these specific examples to illustrate my argument. In the last section of this introductory chapter, section 1.6, I sketch out the arguments presented in the six main chapters of my thesis.

1.2 Research Approach: Why We Need a Philosophical Theory of War for Non-State Actors

In the past, various kinds of non-state actors have participated in armed conflicts, for example: indigenous populations in the

⁶ I use the term just war theory to refer to the vast body of literature devoted to the tradition of thought on just war.

Colonial wars of the 19th century, guerilla movements in Latin-America since the 1950's (including the FARC), the Irish Republican Army in the 1970's and 1980's, and the African National Congress between 1961 and 1990. The drafters of the laws of war, including the Additional Protocols to the Geneva Conventions, chose to define such actors negatively by lumping terrorists, insurgents, rebels and other non-state actors together as irregular fighters. In addition, they outline a very limited set of rules for their lawful treatment.⁷ They do not leave much room for addressing non-state combatants as more than a target in warfare.⁸

However, some scholars propose to subsume non-state actors under the laws of war. Accommodating non-state actors as such is a difficult task from an internal perspective to the laws of war because they are mainly developed by states, and bear the mark of state-interests.⁹ An internal perspective on the laws of war reveals answers to legal questions deriving from internal sources, including the laws of war and case law. Often, such attempts result in labeling non-state combatants as so-called “unlawful combatants”; individuals who are neither privileged combatants

⁷ Under international law, many irregular or non-state fighters do not qualify for privileged combatancy and the related rights and protections. See, Scheipers 2013 (arguing that the laws of war—from the Lieber Code to the Additional Protocols to the Geneva Conventions—were drafted as a response to challenges posed by irregular fighters). I use the term non-state actor and set out criteria for such actors to be treated under principles of war.

⁸ The Additional Protocols to the Geneva Conventions limit lawful combatancy to a very restricted group of fighters. See on the treatment of non-state combatants under the laws of war Cassese 2008, part B.

⁹ States tend to develop and support laws and legal practices in their own interests. An example of this is Israel opting out of the 1977 protocols to the Geneva Conventions concerning national liberation movements.

nor civilians with due process rights.¹⁰ I believe bringing the laws of war in line with the trend of including non-state actors as participants in war requires a reassessment of armed conflicts regulation from a perspective external to the laws of war as the current framework of legal rules regarding warfare is developed mainly by states.

I address the abovementioned questions on the basis of philosophical concepts, rather than by referring merely to descriptions or interpretations of the existing law. Such research projects conducted by legal scholars are readily available and although I draw upon this research, I do not address the interpretation of the laws of war as articulated in, for example, the Geneva Conventions.¹¹ In particular, I intend to contribute to the development of a theory of war that accounts for the 21st century perception on war and apply this normative framework to non-state actors participating in armed conflicts. In order to achieve this, I adapt the principles of just war to the ever-changing face of conflicts by setting out criteria for treating non-state collectives under the principles of war. Additionally, I address the question of how to respond to individuals who appear to be associated with non-state parties in wars, but who do not qualify for combatant status. In the next section I address the main philosophical framework I apply, which is just war theory.

¹⁰ See on “unlawful combatancy”, Brooks 2004 (on the rights of detainees in the aftermath of the 9/11 terrorist attacks). Yoram Dinstein has argued that “unlawful combatancy” is a category of the laws of armed conflict. See Dinstein 2004, 30. For an opposing viewpoint see, *e.g.*, Schmitt 2004, 17.

¹¹ For an analysis of the application of positive laws of war to non-state actors see *e.g.*, Lubell 2010 (I have reviewed this book for the *Journal of Conflict & Security Law*. See, Noorda 2011); Osiel 2009; Eckes 2009; Dinstein 2005.

1.3 Theoretical Groundings

Just war theory stands at the crossroads of ethics and political philosophy and forms the departure point of my argument.¹² I deviate from the state-centered principles of just war theory and adapt these principles to apply this normative framework to non-state actors participating in armed conflicts. In this section I shed light on the just war theory as a tradition of thought, explain why I take the normative perspective of just war theory as a point of departure, and explain my choice in theories that help me adapt principles of war to conflicts with non-state collectives.

Just war theory has evolved over many centuries, beginning with the writings of Ancient Greek and Roman thinkers, and still remains a topic of debate among philosophers, legal scholars, theologians, and historians. Scholars in this tradition attempt to provide a consistent account of war. Some versions of the theory are concerned more with moral principles while other versions strive rather to influence the practice of war and its regulation by considering the military and political context in which wars are waged. I do not aim to provide a comprehensive history of the theory of just war, but I refer back to older versions of the theory when it is relevant to contemporary debate.¹³ In this introductory chapter, I reflect on the most influential version of the theory at this time, which is the just war theory as articulated by Michael Walzer. This iteration of just war theory was developed in tandem with the laws of war and provides constraints for limiting harm

¹² I analyze Western theories of just war, but I would like to note the vast literature on non-Western perspectives on war as well, including literature on Islamic just war theory. See e.g. Al-Dawoody 2011 (I have reviewed this book for the *Journal of Military Ethics*. See, Noorda 2012).

¹³ For further insights on historical just war theory, see, in particular, Reichberg, Syse and Begby 2006; Neff 2005; La Croix 1988; Kalmanovitz 2016; Cox 2016; Schwartz 2016.

and destruction in warfare. The core premise of this version suggests that principles of war allow acts that are impermissible under peacetime regulations while providing a point of departure for regulating war. The principles of war apply only to situations of war, and trump other bodies of rules and principles during times of war. In situations of peace, other principles and rules are applicable, such as those codified in domestic criminal law systems.

Central to the principles of just war theory is the distinction between the principles that govern the resort to war, *jus ad bellum*, which are relevant mainly to leaders, and those that govern the conduct of war, *jus in bello*, which are relevant mainly to combatants.¹⁴ Traditionally, there are six cumulative principles of *jus ad bellum*: just cause, legitimate authority, right intention, last resort, proportionality, and probability of success. These will be discussed in detail in chapter 2. Additionally, there are three cumulative principles of *jus in bello*: discrimination, proportionality, and necessity.¹⁵ All principles of *jus ad bellum* should be met for a war to be permissible, and all principles of *jus in bello* should be met for an act of war to be permissible. I assume that restraining war is tenable if we set constraints on war, involving the permission of some forms of force. In other words, in order to constrain war, distinctions should be made between just and unjust wars, and between just and unjust actions within war. Just war theory provides a basis for discussing such distinctions. It starts from the premise that it is sometimes permissible for a collective to wage war, and that some conduct within war is

¹⁴ The distinction between *jus ad bellum* and *jus in bello* is the main target of critique of revisionist thinkers, including Jeff McMahan, as detailed in Chapter 2.

¹⁵ The *in bello* and *ad bellum* principles can be traced back to Augustine and adapted by other scholars over time. See, Reichberg, Syse, and Begby 2006, 70-85.

permissible. By setting distinctions between what is permissible and what is impermissible, just war theorists aim to limit wars, to minimize harm and destruction in warfare, and to create possibilities of returning to a situation of peace. I accept this lens of just war theory and explore principles relating to wars with non-state actors.¹⁶

I also accept the thesis that *jus in bello* should be assessed independent from *jus ad bellum*. The independency of *jus in bello* from *jus ad bellum* implies that for a war to be just (this is the *jus ad bellum* part of the theory) not all conduct in that war should necessarily be just, and for a combatant to act justly (this is the *jus in bello* part of the theory) the war should not necessarily meet the *ad bellum* requirements of just war. This implies that combatants are treated equally to each other under principles of *in bello*. The aim of addressing these sets of principles seperately is to limit harm and destruction involved in warfare.

My reasons for applying just war theory to armed conflicts is based on the expected consequences of its application in the sense that I apply a system of principles that aims to effectively limit the consequences of war.¹⁷ Situations of war require applying principles of war to combatants, while situations of peace require the application of principles of criminal law systems to individuals who commit crimes. The latter should include rights normally assigned to subjects under the rule of law such as due process rights. Regarding the chief difference between rules of peace and rules of war, the war paradigm usually separates *in bello* from *ad*

¹⁶ Originally, the focus of the laws of war was to constrain suffering, but this does not imply that human rights thinking should not be at work in war. By contrast, Chapter 3 of this thesis views sovereignty of states through a human rights lens.

¹⁷ The theory itself involves deontological aspects, including, for example, the requirement of just cause. For a war to meet the requirement of just cause, the duty not to commit aggression must be violated.

bellum, assigning the same rights to individuals on both sides of a conflict (this is known as the principle of ‘moral equality of combatants’), while rules of peace intend to punish wrongdoers. Under the framework of war, combatants are equal to each other notwithstanding the question of whether the war they are fighting is just or unjust. Distinguishing between the principles that govern the resort to war, *jus ad bellum*, and those that govern the conduct of war, *jus in bello*, is a way to regulate conflicts and prevent excessive uses of force. On the one hand, the distinction between *ad bellum* and *in bello* principles assures that meeting the requirements of the resort to war does not mean that the principles that govern the conduct of war may be violated. On the other hand, it guarantees that an impermissible attack does not allow violating the *in bello* principles when defending against the invader.¹⁸ By treating *in bello* independently from *ad bellum* matters, I attempt to contribute to limiting the harm and destruction of warfare.¹⁹

However, applying principles of war should be a last resort. The application of principles of criminal law should have priority over the application of principles of war.²⁰ In peacetime, I emphasize the importance of a predominately deontological

¹⁸ This is in line with international criminal law, see, Van der Wilt 2009, 529-539. Van der Wilt refers to the *Kordic* case, in which the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia holds that an unlawful attack does not provide a license to commit war crimes against the invaders.

¹⁹ As apposed to systems that limit unjust harm and destruction, including criminal law systems, and revisionist theories of war as defended by, among other scholars, Jeff McMahan. I reflect on this revisionist approach in more detail in Chapter 2.

²⁰ On giving deontological principles priority over consequentialist ones, See, Van Hees and Braham 2014, 95-105 (they argue that the deontological framework be applied before applying the consequentialist framework, because this forces policy makers to consider deontic policies).

approach, as ideally reflected by criminal law, that respects individual liberty and autonomy.²¹ Working in this framework, I begin from the notion that a person should be treated based on what she did, not who she is or what group she belongs to. In peacetime, this means that states should not interfere with individual liberty based on who a person is or what she has not yet done. Instead, states may justifiably interfere with individual liberty if a person has committed a crime. This predominantly deontological framework directed towards individuals, holds priority over the application of principles of war directed towards collectives. For wartime situations, my assessment accentuates an approach that is largely consequentialist and directed towards collectives.

My theory presupposes the assumption that war is a fact and the dreadfulness of war demands constraints for limiting harm and destruction. The principles I present in this thesis aim to regulate present-day warfare by demarcating *permissible* and *impermissible* uses of force. My focus on the consequences of just war theory to limit the harm and destruction of warfare does not translate to peacetime morality, because along with many just war theorists, I treat war as an enterprise distinct from enterprises in peacetime.²²

To employ the just war theory to wars with non-state collectives, it is necessary to overcome hurdles related to the application of certain principles of the theory. Not all principles can be applied to wars in which non-state actors participate without revising certain aspects of those principles. In embarking on this task of revising principles of war, I rely on contemporary

²¹ My approach is not purely deontological, but I do start from individual responsibility.

²² See, e.g., Shue 2008, 87–111; Shue 2010, 511–530; Dill and Shue 2012, 311–333; Waldron 2016 (these scholars all emphasize the destructiveness of war).

theories of war and theories of collective responsibility. Relying on contemporary theories of war, I argue that for non-state collectives to meet the requirement of legitimate authority they need to fulfill the requirement of having a political aim. However, they should not be required to have a *just* political aim. Non-state collectives should be treated under principles of war that regard combatants as privileged until they violate *in bello* principles even if pursuing an unjust political cause. I argue for separating the implementation of principles of *in bello* from the *ad bellum* cause of war, because I adhere to the view that war is distinct from other situations in that it is not viable to ground the regulation of conduct within war on decisions about the justness of a political aim of a collective force. I come to this conclusion by analyzing the debate between theorists of just war, such as Michael Walzer, and revisionist thinkers, such as Jeff McMahan. Just war theorists hold that war is a distinct enterprise to which a different set of principles should be applicable, while revisionists hold that we should judge killing in war by the same principles that govern killing between individuals in everyday life. I argue in favor of a separate set of principles for collectives in wartime that allows defending that collective or other collectives against the violence of enemy collectives and that separates *in bello* principles from *ad bellum* principles. I do not delve into all the details of the just war versus revisionist debate, but limit myself to the arguments relevant to the purpose of this thesis, which is to justify the application of the principles of war to armed conflicts in which non-state actors participate.

In addition, by undertaking the task of including non-state actors as actors in war, I take into account the principle of sovereign equality. Sovereign equality is the prohibition of states from dominating one another when states are assumed to be equal to one another. For the most part, legal scholars have addressed sovereignty of states in wars in which non-state actors participate. I endorse the claim made by legal scholars that sovereign equality

can be respected by allowing self-defense against non-state actors to occur if the state consented to the use of force on its territory or if that state is incapable of controlling or unwilling to control the non-state actor. My aim is to position this approach in the philosophical debate on war in order to show how states can deal with non-state actors without disrespecting the current understanding of the principle of sovereignty.

The *in bello* principle of discrimination might create a hurdle when applying the just war principles to non-state collectives. I address the question of how to discriminate between non-state combatants and civilians by relying on philosophical notions that derive from theories of collective responsibility. I rely on what has been termed ‘processes of inscription and ascription’ and the concepts of ‘active and passive grouping.’ The concept of active grouping was first proposed by Jean Paul Sartre and further developed by, among other scholars, Iris Marion Young, Larry May and Roland Pierik.²³ It has been applied in the context of figuring women as a social collective and also in the context of conceptualizing cultural groups. It helps to demarcate between individuals who identify themselves as members of a certain group and individuals categorized by others as members of a certain group. I use this concept of active group formation to question the regulation of conflicts with non-state actors. I claim that this analytical distinction between categorization by others and self-identification is a helpful tool for the purpose of discriminating between combatants and civilians in the context of wars with non-state collectives. This application of the principles of war to non-state combatants (who are often more difficult to recognize as combatants than state combatants) risks categorizing civilians as combatants and non-state combatants as civilians. The tool of active group formation is useful for understanding how

²³ Sartre 1976; May 1987; Young 1994; Pierik 2004.

to detect and prevent such misinterpretations. Distinguishing such concepts is important because ascription by others does not necessarily reflect inscription by the individuals themselves and attributing combatant-status to individuals who share a specific attribute, that does not necessarily constitute a collective from the perspective of the group members, is not a sufficient basis for properly applying the discrimination principle. The concept of active group formation helps to apply the discrimination principle by limiting combatant status to individuals constituting their own group.

Categorizing members of certain non-state actors as combatants who may be killed in warfare requires thinking about their privileges. I address this topic by relying on theories of collective responsibility. I argue that non-state combatants should be treated similarly to state combatants implying they may be targeted and killed in warfare and are permitted to fight and to be assigned prisoner of war status when captured. A possible objection to this view may be that most members of contemporary non-state collectives do not comply with the *in bello* principles. I address this concern by proposing the requirement of organizational structure as a precondition for privileged combatant status, which helps ensuring conformity to the rules of combat. I argue that individuals should be members of hierarchically organized collectives to qualify for combatant status because such structures may help ensuring conformity to principles of war. In addition, I argue that if such collectives do not enforce *in bello* principles, those who are responsible for not enforcing such principles should be punished. The work of Scott Shapiro, which I draw from, offers an account of larger collectives with hierarchical authority structures, or what he terms

‘massively shared agency’.²⁴ Shapiro’s concept of massively shared agency is useful for the application of prisoner of war status to non-state combatants because it shows how organizational structures may help to ensure conformity to the principles of combat.

Many violent individuals and individuals associated with groups that use force do not meet the requirements of combatancy. I argue that individuals not qualifying for combatant status should rather be subjected to the principles of criminal law, rather than subjecting them to the principles of war. This implies that they should be protected from targeted killing, illegitimate imprisonment, and other illegitimate constraints. I address the concern of targeted killing in relation to the just war principle of discrimination. Illegitimate imprisonments, such as preventive imprisonment, have been widely discussed in the literature on ‘terrorism’ and I do not discuss this topic in this thesis.²⁵ I focus on other preventive constraints such as travel bans and asset freezes. Such constraints are often seen as acceptable alternatives to imprisoning or killing, while the impact of such constraints on the target can be enormous. I explore these new practices of controlling individuals without sending them to prison and call for guidelines on setting appropriate limitations on the future use of such methods.

²⁴ Shapiro 2002; Shapiro 2014. (Shapiro draws on Michael Bratman’s work on intentions and agency and extends Bratman’s model by applying it to larger groups with authority structures. Bratman limits his theory to activities where neither participant has normative power over the other, while many activities involve some form of authority of one person over the other, such as in the context of war). See, Bratman 1998, 94, 110. Margaret Gilbert offers an alternative theory. She provides a theory of shared agency involving authority, but she does not analyze how authority can arise in the face of alienation. See, Gilbert 2006.

²⁵ For a critique on preventive detention, see, *e.g.*, Walen 2010.

I now turn to addressing the question of how my PhD thesis is embedded in, and contributes to existing literature in the field of philosophy of war.

1.4 A Theoretical Gap

Most theories of war limit the concept of ‘war’ and the application of the principles of *jus ad bellum* and *jus in bello* to conflicts among nation states and exclude those who fight for non-state actors from combatant status.²⁶ Many scholars address the topic of non-state actors in armed conflict, when describing certain tactics, such as killing civilians and hiding of non-state actors among civilian populations. Michael Walzer, for example, addresses terrorists largely as those who attack civilians, and guerillas as those who invite their enemies to kill civilians.²⁷ I regard intentional killing of civilians as impermissible in war, however, considering all violence by all kinds of non-state actors as impermissible tactics does not help demarcating between permissible and impermissible uses of force by non-state actors.

Those who do apply the principles of war to non-state actors often consider non-state actors as asymmetrical parties in war. That is, they do not assign the same privileges to non-state parties and their combatants in war as they do to state-parties and those who wage war in the name of the state. This risks justifying

²⁶ From the time of Augustine, scholars have maintained that legitimate authorities can initiate a just war. ‘Legitimate authority’ is interpreted as a public authority, such as a state. See, Reichberg, Syse, and Begby 2006, 70-85. For a recent version of just war theory that takes the state as its starting point, see Walzer 2006a.

²⁷ Walzer 2006a, 179-180 (arguing that guerilla fighters invite others to attack civilians by hiding among them); Walzer 2006a, 203 (arguing that terrorists attack civilians); See, also Walzer 2002, 5-10.

practices in which (1) the killing of civilians is accepted and 2) non-state combatants are categorized as somewhere in between combatants and criminals. From my point of view, both implications are highly problematic. Nicholas Fotion, for example, argues that states counter-attacking non-state actors do not have to meet the just war principle of discrimination, while non-state actors should adhere to all principles of just war. Fotion argues that the principle of discrimination does not apply to states counter-attacking non-state actors, because the principle of discrimination is too difficult to uphold for state forces when responding to non-state attacks. He offers an example of non-state actors hiding amid civilians, such as members of Al-Qaeda. Civilian casualties as a result of such an approach are, according to Fotion, the fault of the non-state actor who chose to fight in the presence of civilians.²⁸ This is an odd position to take, because it absolves the responsibility of states for collateral damage of such conflicts and is not in line with the aim of the laws of war to protect civilians. In contrast, I argue for the discrimination principle to be applied to conflicts with non-state actors and I take a first step in analyzing how state forces should uphold this principle when responding to non-state force.

Furthermore, taking a middle road between approaching members of non-state collectives as civilians and approaching them as combatants may amount to state forces targeting and attacking non-state combatants with lethal force, while not assigning them combatant privileges. According to this view, a non-state combatant is not allowed to counter-attack and is not assigned prisoner of war status upon capture. Tamar Meisels holds this view, among other scholars. She argues that alleged terrorists should be categorized as what she terms ‘unjust combatants.’ This implies that such individuals may be killed or

²⁸ Fotion 2007, 142-144.

taken captive. However, she holds that alleged terrorists do not enjoy combatant privileges such as prisoner of war status because they do not adhere to the legal rule of wearing a uniform or a distinctive sign. As claimed by Meisels, states are still required to adhere to the *in bello* rule of discrimination between such unprivileged combatants and civilians, however, the difficulty of applying this principle when responding to non-state actors justifies imprisoning and attacking individuals belonging to such groups while denying them any privileges in war.²⁹

Michael Gross articulates a parallel argument for categorizing certain individuals as combatants while not assigning such individuals combat privileges. Gross maintains that *jus ad bellum* and *jus in bello* are interrelated insofar as unjust ways of fighting, such as not adhering to the discrimination principle, can undermine the *jus ad bellum* requirements of war. In other words, combatants who do not adhere to the *in bello* principles of war are not waging a just war. Therefore, the moral equality of combatants does not apply to wars between combatants and non-state combatants not following the principles of combat. As a result, non-combatants may be targeted and attacked, but Gross holds that they should not be assigned combatant privileges.³⁰ I contend that taking a middle road between regarding members of non-state actors as combatants and civilians is problematic, because, as I detail in chapter 2, it allows states to pick and choose between principles of war and criminal law. It neither gives non-state combatants the right to defend themselves or to be assigned prisoner of war status upon capture, nor civilians the rights not to be incarcerated (indefinitely) without trial and to be released if found innocent of crime. These combatants find themselves in a normative vacuum without any legal protection whatsoever. By

²⁹ Meisels 2004, 297-326.

³⁰ Gross 2010.

contrast, my aim in this PhD thesis is to present a theory of regulating conflicts with non-state actors as parties in war similar to state parties in war.

Recent discussions in the field of the philosophy of war have not yet explicitly (or only very partially) addressed the question of applying just war theory to non-state combatants participating in non-state collectives. Philosophers have begun to develop an account of the philosophy of war with non-state actors, focusing mainly on legitimate authority. Virginia Held, for example, concentrates on legitimate authority for liberation movements. She argues that terrorism should be thought of as similar to war. Terrorism, for Held, can be used for both justifiable objectives and unjustifiable ones. As she writes: “It is a use of political violence not necessarily more unjustifiable than the means of war.”³¹ As such, she extends justifiable use of force to certain non-state collectives but she does not deal with *in bello* principles and the question of how to apply such principles to non-state collectives.

Larry May argues in a similar direction. He explains the difficulties of sanctioning non-state collectives using illegitimate violence while arguing that so-called terrorists should not be treated as outlaws but should be given the benefit of either prisoner of war status or full due process rights.³² As such, May also claims that non-state actors can, under certain circumstances, meet the legitimate authority requirement, but he does not explain how the principles of war apply to such actors.

Christopher Kutz and Christopher Finlay both deal with the question of applying *in bello* principles to non-state collectives by

³¹ Held 2005, 175-193, 181.

³² May 2008, 315.

distinguishing non-state combatants from civilians.³³ They focus on non-state combatants and argue for extending combatant privileges to some non-state combatants pursuing *just* political objectives, provided that they observe *in bello* constraints and obtain a level of support from the population. I do not agree that assigning combatant privileges should depend on whether a non-state combatant is part of a collective with a *just* political aim as Kutz and Finlay argue, rather, in line with the aim of regulating conflicts, I argue that the application of the principles of war to combatants should be impartial towards the specific aim of the non-state actor. My theory extends the aforementioned views and builds on and corrects their views on privileged combatant status.

I expand on the research of philosophers who have begun to develop an account of the philosophy of war with non-state actors and develop a framework that applies just war theory to state-combatants and non-state combatants alike. This implies that my framework of principles, similar to just war theory, applies *in bello* principles independently from the political aim for which a collective is fighting. Additionally, I argue that individuals, who do not qualify for combatant status, should be treated under principles of crime if they have in fact committed crimes.

³³ Finlay 2010, 287–312. Finlay specifically focuses on the popular support requirement in situations of armed conflict with non-state actors. He argues that popular support is needed in order to evaluate the justifiability of such non-state violence. Kutz 2005, 148-180 (Kutz’ argument “opens conceptual space for denying the privilege [of combat] to some otherwise lawful [non-uniformed] combatants waging clearly unjust wars [...]”); Finlay 2015 (focusing on revolutionary wars and arguing that the use of force in defence of a population should be supported by that population and that non-state collectives with an unjust political objective should not be considered as parties in war). My view differs from the approaches held by Kutz and Finlay because I do not support the interdependency of *jus in bello* from *jus ad bellum*, as I argue in Chapter 2.

1.5 Use of Examples

My knowledge of war and the examples that illustrate my argument mainly derive from newspaper articles, legal cases, and secondary sources. My aim is to present a normative argument illustrated with relatively accepted accounts of such examples.

I will mainly refer to real life cases instead of to hypothetical cases. Hypothetical cases may help isolate certain questions about war from the wider context of particular wars and to think about general principles to be applied in war. This aids in thinking abstractly about the principles of war without considering the wider context, however, it is often difficult to consider philosophy's relevance when considering only such artificial cases. Ultimately, I want my work to clarify our thinking about the principles of war and to adapt the principles to the conflicts of this century. It is unlikely that hypothetical cases are useful in this respect. To make transferring general philosophical principles to conflicts in real life easier, I will mainly refer to real-life cases.

Nevertheless, invoking real-life instances of war might shift the focus to the wider and often controversial and politicized context of such conflicts. When examining the sovereignty of states in cases of counter-attacks by states on non-state actors located on the territory of another state, for example, the most obvious real-life illustrations are the targeted killings against supposed members of Al-Qaeda or IS. But once I include such examples, readers may shift their focus to the controversial and politicized context of the so-called 'war on terror' and to whether targeting and killing was justifiable or desirable in the particular case of, for instance, Osama Bin Laden. Such questions are, naturally, important but I seek to answer a more general question about the philosophy of war. I address under what conditions non-state actors should be treated as parties under principles of war; of which the question of sovereignty in the case of extraterritorial

targeted killings is part because I seek to clarify our reasoning on the regulation of conflicts with non-state actors. I refer to real-life cases and deliberately step away from the particular and often politicized contexts of such cases.

Regarding the particular real life cases I examine in this PhD thesis: I articulate and defend an account of armed conflict between collectives in which the individual is part of a collective. I do so by starting with the non-state collective. One of the tasks of my thesis is in detailing the requirements such collectives should meet to be treated under the war paradigm. I illustrate my argument with several cases of conflicts with non-state actors. I refer to terrorists, revolutionaries, and groups rising up against foreign powers, lumped together as non-state actors.³⁴ I select my examples from a broad range of incidents in which non-state actors are deemed at the interface of war and peace. My examples illustrate my argument in order to better understand such instances of war.

I shortly explain the criteria for selecting the cases I use in my thesis. Firstly, my examples involve non-state actors.³⁵ Non-state actors do not fight in the name of the state such as state-armies. It is a term that includes all actors alternative to states. For the purpose of this thesis, it is sufficient to define states by the criteria of international law for sovereign states. International law defines sovereign states as having a permanent population, defined territory, a government, and the capacity to enter into relations with other sovereign states. Non-state actors do not meet all such requirements. Although I use this negative term, I do not choose a negative approach to non-state actors in war. Rather, I

³⁴ This is a non-exhaustive list of non-state actors.

³⁵ I use the terms non-state collective and non-state actor interchangeably.

detail conditions for treating non-state actors under principles of war.

Secondly, the examples I use in this thesis refer to non-state actors who are sometimes (at least partly) regarded as parties in wars. Examples include groups targeted in warfare by state-armies, or individuals using lethal force against the troops of an invading power. Referring to such examples is useful because they illustrate my arguments regarding what conditions such non-state actors should be treated under principles of war.

Thirdly I include, primarily, examples of non-state actors wherein many would argue they use force for achieving unjust aims. Often such groups appear to wage aggressive wars. Above all, I refer to cases that exemplify non-state collectives often categorized as terrorist organizations or criminal groups, such as IS, rather than to cases illustrative of widely accepted non-state collectives using lethal force, such as the ANC and their resistance against the apartheid-regime. Referring to supposed ‘unjust’ non-state actors supports my argument in applying just war theory which applies *in bello* principles equally to both non-state combatants fighting in wars with an unjust aim and to non-state combatants fighting in wars with a just aim. Many non-state collectives, such as IS, do not comply with the *ad bellum* principles. Adhering to a set of principles supporting the distinction between *ad bellum* and *in bello* implies that this should not affect whether non-state combatants should be treated under the principles of war.

1.6 Sketch of the Argument

The central task of this thesis is the application of just war theory to non-state actors, notwithstanding the political cause for which they are fighting. In *Chapter 2*, I defend the core principles of just

war theory, the separation of *jus in bello* and *jus as bellum* and non-combatant immunity, against the revisionist approach, which aims to minimize unjust harm instead of minimizing the overall harm involved in waging war. I argue that state and non-state actors meeting requirements as set out in this thesis should be allowed to defend themselves with lethal force against aggression. In other words, I do not restrict the right to self-defense to (just) nation states. This implies that wars may be waged between states and non-state actors. In such a conflict, non-state actors may use force in self-defense against aggression, and the opposing party may respond with force to non-state actors committing attacks against them.

However, most non-state actors are located in the territory of one or more states. This raises questions concerning the sovereignty of states where the non-state actor is located. States may want to defend themselves against attacks by non-state actors on their territory, but targeting a non-state actor may violate the sovereignty of the state where that non-state actor is located. This requires analyzing the possibility of counter-attacking without violating the sovereign equality of the state.

In *Chapter 3*, I address the question of how to comply with the sovereignty principle while using force in self-defense against non-state actors. I defend the view that this could be achieved by taking into consideration that, on the one hand, the non-state actor is an actor and a target in war and, on the other hand, the state where the non-state actor is located is a sovereign state that should be allowed to exercise control over its own territory.

The next issue I discuss is the application of the discrimination principle. I defend non-combatant immunity even in conflicts with non-state actors. The discrimination principle in the *jus in bello* dimension of war dictates that combatants may be killed and non-combatants should be protected. This implies the principle of non-combatant immunity stating that non-combatants are not legitimate targets in war. This principle forms one of the

cornerstones of a symmetric treatment of combatants under the *jus in bello* principles of war. Applying the discrimination principle may be seen as particularly problematic in the case of conflicts with non-state actors. Often participants in such conflicts are difficult to identify and, for example, individuals participating in groups engaged in national liberation and self-determination do not always wear a uniform or a distinctive sign. As contemporary armed conflicts involve non-state actors to an increasing degree, it is worth looking at the question of what makes it appropriate to consider members of particular non-state actors as combatants and how to discriminate between such combatants and civilians.

In *Chapter 4*, I address the question of how to apply the discrimination principle in wars with non-state actors. In order to exclude ordinary criminal violence, I first propose the requirements of political aim and popular support for ascribing legitimate authority to non-state actors. In addition, I propose to distinguish between individuals who are members of such a non-state actor and civilians who are not. One of the claims in my thesis holds that individual participants should be identified based on the manifestation of certain shared beliefs and practices adopted by the group members themselves. I defend the view that the active formation of the collective by the members themselves should be included in the requirements of combatant-status for individual participants in non-state collectives. The aim of restricting combatant status to individuals who actively constitute their own group allows for the effective application of the discrimination principle and serves as a basis for assigning combatant privileges.

Accommodating certain non-state actors in the war paradigm raises the question of assigning combatant privileges to non-state combatants engaged in warfare. The question of whether non-state combatants should be assigned certain privileges is a crucial issue in applying the laws of war to non-state actors. In particular, the privilege of not being prosecuted for

waging war when following the *in bello* principles of war and being assigned prisoner of war status is key when accommodating non-state actors under the war paradigm.

In *Chapter 5*, I examine the question of which combatants should be assigned the privilege of prisoner of war status when captured during hostilities. I propose that non-state combatants can be equal to state-combatants before the law if they have a political objective, popular support, and if they are – like state-combatants – members of a hierarchically organized collective. I argue for including the requirement of hierarchical structure to the requirements of legitimate authorities in war because individual participants in hierarchical structures are subject to their superiors who can enforce principles of war. Enforcing *in bello* principles is pivotal in light of principles of war's aim, which is minimizing harm by regulating combat. Assigning prisoner of war status, instead of treating combatants as prisoners of the state, should not depend on which side's cause is just. I argue that as long as combatants are part of a collective with a political aim, popular support, and a hierarchical structure in which *jus in bello* principles can be enforced, all combatants in that army following the principles of combat should become prisoners of war if captured by the enemy forces, notwithstanding the political cause of their fighting.

Not all individuals meet the proposed requirements of being an active member of a hierarchically organized collective with a political objective and support from (a part of) the population. Such individuals should be dealt with under principles of criminal law and assigned due process rights, as I argue in *Chapter 6*. Some argue that applying regular criminal law to certain dangerous individuals prevents governments from effectively dealing with security issues. Although applying criminal law to such individuals certainly makes it harder for governments to respond to such threats, I believe it is crucial in guaranteeing that the state does not illegitimately infringe on the free lives of

individuals. More particularly, I claim that preventive sanctions against supposed terrorists, such as individuals related to Al Qaeda, should be subject to proper safeguards. I address the application of preventive constraints to individuals who support non-state armies, but are not combatants. More particularly, I address state reactions that are less violent than killing or imprisonment imposed on individuals suspected of terrorism. I address two examples of constraints that are imposed on such individuals: travel bans and asset freezes. One of the main arguments of my thesis shows that such constraints can lead to restrictions on liberty similar to imprisonment. Imposing such constraints preventively may disrespect the target's autonomy and I argue that some forms of such measures require similar safeguards as detaining someone in a prison cell.

In *Chapter 7*, I illustrate the theoretical framework by describing the case of IS and by applying the principles of war as presented in this thesis to this case. This helps me to indicate some of the practical implications of my theoretical framework for a real life situation of conflict. In embarking on this task, I touch upon the main topics addressed in this PhD thesis: the application of just war theory to non-state actors, sovereignty of states, the discrimination principle, privileged combatant status, and the principles that should apply to those who are suspected of supporting IS without actively being engaged in warfare.

Finally, I summarize and explain the theoretical implications of my argument for just war theory in the *Concluding Chapter*.