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

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In Defense of an Impartial Set of Principles of War*

2.1 Introduction

In this chapter, I defend a way of regulating armed conflicts between state and non-state collectives by developing a set of principles that allow actions of non-state combatants normally impermissible in times of peace. I define this as an ‘impartial set of principles,’ because I argue that the application of the *in bello* portion of this set of principles should be impartial towards the question of whether the cause of war is considered just or unjust. I position my theory of war in the tradition of just war theory and intend to contribute to regulating war and minimizing harm in times when peacetime laws are temporarily suspended. Restraining the destructive force of war has been the basis of the

* Part of this research was conducted while visiting the European University Institute and I would like to thank my host Nehal Bhuta and the faculty for a stimulating research environment. I presented previous drafts of this chapter at the 2010 32nd Flemish-Dutch Philosophy Conference at Radboud University Nijmegen, the 2011 Annual Meeting of the Netherlands Association for Philosophy of Law at the University of Amsterdam, the 2011 Winter Meeting of the Dutch Research School of Practical Philosophy, and the 2014 European University Institute’s Legal Theory Workshop. I would like to thank members of these audiences for their feedback.

laws of war from early on. Henri Dunant's book on the horrifying battlefield of Solferino in 1859 led to the establishment of the Red Cross and the development of the Geneva Conventions.³⁶ The purpose was to regulate war and to restrain its destructive consequences. Although most contemporary conflicts involve non-state actors, and such conflicts cause immense human suffering, there is a gap in the literature with respect to applying just war theory to such conflicts. I aim to fill this gap by developing guidelines for restraining the force of war in which non-state collectives are involved.

My argument unfolds as follows: Firstly, in section 2.2, I explain the just war theory as defended by Michael Walzer. Secondly, in section 2.3 I argue why I choose to apply this impartial set of principles to war. Thirdly, in section 2.4, I address recent criticisms to just war theory as articulated by revisionists such as Jeff McMahan and I refute the arguments of revisionists by setting out the need for a separate set of principles to regulate warfare.³⁷ Fourthly, in section 2.5, I discuss the alternative to treating non-state combatants under criminal law principles, or a mix of principles of war and crime. The outline in this chapter feeds into the argument made in the later chapters of this thesis where I propose ways to apply principles of war to conflicts with non-state actors.

³⁶ See, for the basis of the laws of war and the relationship with human rights, Luban 2016. I adhere to the purpose to minimize suffering in war, but I perceive aspects of the laws of war through a human rights lens that focuses on individuals' human dignity.

³⁷ Discussed with greater detail in Chapter 6 of this thesis regarding peacetime situations, I agree with the deontologists in relying on an approach based on individual responsibility. However, as will be examined below, war is a special situation in which such rules do not suffice.

2.2 Principles of Just War Theory

Just war theory is a philosophical tradition that supports the application of principles for the conduct in war impartial to the question of whether the cause of parties in war is considered *ad bellum* just or unjust. Positioning my theory in this tradition, I set out the main principles of just war theory as they have been defended, with variations, by scholars endorsing such an impartial set of principles of war. I mainly rely on Michael Walzer's book *Just and Unjust Wars*, as his work has been the most influential defense of just war theory in recent decades.³⁸ Walzer's intention was to provide a philosophical explanation of a traditional view, which is to a great extent codified in the laws of war.³⁹

The basic assumption of just war theory is that combatants fight in their nation's wars whether or not their wars are just and that combatants should not be held responsible, regardless of whether or not the war they fight is just. They should only be held responsible for whether they fight it justly, that is, in accordance with the requirements of *jus in bello*. Walzer arrives at this conclusion by arguing that "[...] war as an activity [...] has no equivalent in a settled society,"⁴⁰ and the role of the combatant cannot be likened to anything in peacetime. In such situations, when combatants attack each other, "[...] both can be said to act in self-defense."⁴¹ Therefore, Walzer argues that combatants on both

³⁸ Other scholars defending similar approaches include, Shue 2010, 511–30; Waldron 2016; Dill and Shue 2012, 311–33.

³⁹ This version of the theory has been referred to as the traditional version. However, as Gregory M. Reichberg notes, in history, *jus ad bellum* and *jus in bello* have not always been regarded as separate regimes. From Aquinas to Grotius, *in bello* principles were not applied symmetrically to both sides of the conflict, only the just side of the conflict enjoyed *in bello* privileges. See, Reichberg 2008, 193–213.

⁴⁰ Walzer 2006a, 127.

⁴¹ Walzer 2006a, 128.

sides of a conflict hold the same *jus in bello* rights and obligations which give them equal rights to kill enemy combatants. As such, they are ‘morally equal’ to each other.⁴² This is the basis for just war theory and current international law. These systems reflect the independence of *jus in bello* from *jus ad bellum*, the former consisting of six main principles, and the latter consisting of three main principles.

The first *ad bellum* principle of just war theory to be discussed is the principle of *legitimate authority*. This principle limits the application of the principles of war to wars initiated by those who are authorized to do so. According to most scholars in this tradition, governments of nation states are the main authorities to initiate war, excluding non-state actors such as rebellious groups, revolutionaries, and criminals from initiating war.⁴³ Some argue that only democracies—those who rule justly—are legitimate authorities to initiate war.⁴⁴ Such viewpoints are contingent upon the idea that the legitimacy of political leaders rests on their acting for the best interests of the community. In this thesis, I adopt a formal and impartial criterion for identifying legitimate authorities in war and include non-state collectives

⁴² See, Walzer 2006a, 34-41. I discuss moral equality of combatants and the independence of *jus in bello* from *jus ad bellum* together, but the two theses are not identical; there are reasons for denying moral equality that differ from the independence thesis. For example, *in bello* rights and obligations may be asymmetric because they depend on something else than the *ad bellum* status, such as the capabilities of combatants. See, Rodin 2008, 44. (Rodin distinguishes the two theses in order to argue that combatants fighting for an unjust goal should have no or less privileges than combatants fighting for a just goal).

⁴³ Walzer addresses non-state actors in *Just and Unjust Wars* but primarily refers to such actors when writing about impermissible tactics including killing civilians. See, Walzer 2006a, 107, 179-180; 203.

⁴⁴ See, e.g., Coady 2007 (arguing that democracy is a pre-condition for legitimate authority to declare war); Uniacke 2014, 62-74, 73 (Uniacke argues that the legitimacy of political leaders depends on their acting for the community).

under the header of legitimate authorities. I gather that legitimate authority refers to leaders having the power to command an army rather than to a legitimate leader who acts for the good of their country. I adopt a formal an impartial criterion because I believe that applying this criterion would contribute to regulating warfare.

The second principle of *jus ad bellum* is the principle that wars should have a *just cause* that justifies the destructive and tragic consequences of war. Previous versions of the theory allowed wars to be waged for restitution and punishment, but most recent theories of just war and the laws of war allow only one just cause for war, specifically, defense against aggression.⁴⁵ As such, defensive response to aggression is permitted while aggression itself is outlawed.

The third *jus ad bellum* principle requires that a war be fought with a *right intention*. This ensures that a just cause, self-defense, is not used as a cover to wage war for another purpose, such as commerce related reasons. The principle aims to exclude wars with just causes waged with the intention to achieve impermissible ends.⁴⁶

Legitimate authorities with the right intention to use force against aggression should not resort to war as a first means. Thus, the fourth *jus ad bellum* principle is the principle of *last resort*, which implies that (reasonable) peaceful means of achieving a cause should first be exhausted before resorting to war is justified.⁴⁷ It entails a commitment to peace and the process of peacemaking over war ie. war being so destructive that averting

⁴⁵ Defense against aggression has been interpreted as defense of others as well, including humanitarian intervention and interventions based on the concept of 'responsibility to protect', see, Walzer 2006a, Chapter 6.

⁴⁶ Walzer 2006a, 268. (on continuing to fight beyond the point where war could be concluded justly).

⁴⁷ Walzer 2006a, 80-81. (Walzer defines last resort as "sufficient threat").

harm and killing should be preferred. This principle is aimed at avoiding unnecessary destruction.

The fifth principle is the principle of *proportionality*. This principle requires considering whether war is proportionate for achieving a certain just cause. In other words, it ensures that the expected and relevant good effects of a war outweigh the expected and relevant bad effects of a war.⁴⁸

The last principle of *jus ad bellum* I discuss is the principle of *probability of success*. This concept prevents the initiation of wars that do not have a probable chance of success.⁴⁹ It would be wrong to expose people to the risks of war without having a chance to achieve the just cause for which the war is initiated. War is too destructive to be waged without a probable chance of winning. I adhere to an adopted version of this stipulation for non-state collectives requiring non-state collectives to meet the prerequisite of having some degree of popular support.⁵⁰ Popular support is needed for the probable chance of success.

While principles of *ad bellum* are directed towards those higher in the hierarchy, principles of *in bello*—which I will now describe—should be met by combatants in the conduct of war. *Jus in bello* consists of three main principles. The first principle of *jus in bello* is the principle of *discrimination*. The principle of discrimination holds that it is permissible to attack combatants but impermissible to intentionally attack non-combatants. Sometimes, an unintentional attack of non-combatants is deemed permissible under just war theory. Most just war theorists adhere to the doctrine of double effect, arguing that only the direct and intentional harming or killing of non-combatants is prohibited and that combatants should take due care to avoid civilian

⁴⁸ Walzer 2006a, 119-120.

⁴⁹ Walzer 2006a, 107, 123-124.

⁵⁰ See, Chapter 4.

casualties.⁵¹ In this way, the understanding of just war implies the principle of non-combatant immunity.⁵² Scholars holding this view argue that non-combatants are immune because they do not pose a mortal threat to others; in other words, non-combatants are presumed to be innocent.⁵³ The mortal threat combatants pose to one another in war is the main reason it has been put forward by just war theorists for defending equality of combatants. The question purports to what degree combatants are to blame for participating in an unjust war and in what sense non-combatants are innocent. In the context of war, Walzer, among other scholars, refers to someone as non-innocent if that person is ‘armed and dangerous’, while he describes someone as innocent if that person is ‘unarmed and non-dangerous’.⁵⁴ On his account, combatants may be attacked because they are armed and dangerous, while civilians may not be attacked because they are not armed and not dangerous. As I will point out in this chapter, I do not support the discrimination principle on the basis of this distinction between innocence and non-innocence. By contrast, I distinguish between combatants and non-combatants irrespective of whether they are innocent or non-innocent in a substantive or moral sense. Contrastly, in order to determine the status of an individual in warfare, I look at the active role an individual plays in warfare and not at the moral innocence or non-innocence of such individuals. I further detail my argument in 2.4.

⁵¹ See, the doctrine of double effect and the additional principle of due care as described by Michael Walzer. The distinction between the intended results and the unintended side-effects of one’s actions has a long pedigree in moral philosophy, beginning in the Catholic doctrine of double effect. Walzer 2006a, Chapter 9. J.M. Dubik argues that Walzer’s doctrine puts combatants at risk. See, Dubik 1982, 354 – 371.

⁵² For critiques on the principle of non-combatant immunity, see, among other works, McMahan 2009; Fabre 2009; 2012; Rodin 2008; Frowe 2014.

⁵³ Walzer 2006a, 135-145.

⁵⁴ Walzer 2006a, 145.

The second principle within the realm of *jus in bello* is the principle of *proportionality*. It holds that the expected positive effects of an *act of war* in combat must be sufficiently important to justify the harms it would inflict.⁵⁵ Under this principle, harming non-combatants may be seen as permissible if the harms are proportionate to the ultimate objective of the attack. This principle should be distinguished from *ad bellum* proportionality, which focuses on the proportionality of the use of force involved in defending against aggression.

The third principle of *jus in bello* is necessity. This principle is meant to limit unnecessary harm and destruction in warfare. Usually, it does not constrain the harming of combatants. It may be interpreted as allowing harming non-combatants if it is the least harmful means in the pursuit of one's military objectives. In this thesis, I mainly focus on the principle of discrimination.

I position my argument in the tradition of just war theory, meaning I adhere to its core theses, including the separation of *jus ad bellum* and *jus in bello* and non-combatant immunity. In the next section, I give arguments for the application of this impartial set of principles to war.

2.3 Justifying the Application of an Impartial Set of Principles to War

The horrors of war form the point of departure of my argument. I take into account the reality of war and argue that war differs from almost all peacetime conflicts as war involves disagreement over opposing viewpoints between collectives originating in complex historical contexts. Such conflicts are very hard to settle

⁵⁵ Walzer 2006a, 129-131.

under peace time laws. If other solutions to conflict including negotiations, arbitrations, and legal judgments are unsuccessful, war often occurs as a last resort to settle disputes between collectives.⁵⁶ In such situations, it is often not possible to agree even on the conditions of criteria for deciding whether a war is waged in self-defense or not and what information should be provided to citizens of countries engaged in war.⁵⁷ I take this disagreement between opposing parties into account as follows: I put forward guidelines for limiting war under which individual combatants should not be held responsible for waging war in the advancement of an objective that might be unjust. Under the principles I put forward the destructive conduct of individual combatants should be regulated regardless of whether they are fighting for an unjust objective or not. This is just war theory's impartial approach. I argue for allowing combatants on both sides to fight notwithstanding the *jus ad bellum* status of the war and holding combatants on both sides to the same *jus in bello* obligations, such as refraining from targeting non-combatants. Under such impartial principles of warfare, combatants on both sides of a conflict are treated equally and combatants on both sides are restrained in their violent actions regardless whether they fight for a just or unjust cause. My objective is to contribute

⁵⁶ Wars are waged for different purposes and the requirements for a just cause for war changes over time. Gabriella Blum asserts that, in the past, wars were mainly waged for the acquisition of territory while the wars of today are waged to reach political and economic goals, such as bringing political change and gaining economic growth. The spread of democracy and human rights are considered justified causes for war and have become measures of what 'victory' means in the wars of the 21st century. Blum 2013, 391-421.

⁵⁷ I do not mean that combatants on both sides are not convinced by the just cause of their war. Many, if not most combatants, will probably be convinced that their war is a just one.

to arranging such principles for regulating armed conflicts in which non-state collectives are involved.

The implementation of an impartial set of principles of war serves to minimize death and destruction when war is unavoidable. The distinction between *ad bellum* and *in bello* principles assures that meeting the requirements of the resort to war does not imply those principles governing the conduct of war may be violated. It guarantees, for instance, that an impermissible attack does not justify violating *in bello* principles when defending against aggression. It suggests that even in clear cases of self-defense against aggression, combatants fighting for the defending party should adhere to *in bello* principles. In other words, a party legitimately defending itself against aggression may not violate the discrimination principle by attacking civilians or civilian objects when responding to aggression. Essentially, the implementation of an impartial set of principles of war intends to encourage combatants not to commit war crimes. The prospect of being treated as a combatant under principles of war motivates fighters to comply with *in bello* principles and prevents the use of excessive and unnecessary force, as I will detail in Chapter 5.

As of late, challenges have emerged counter to just war theory, particularly regarding its principles that support impartiality, including equal treatment of combatants under principles of *jus in bello* and non-combatant immunity. This, as argued in the next section, undermines the regulating effect of the laws of war which attempts to minimize harm and destruction. In the next section, I explain and rebut such arguments against an impartial set of principles of war.

2.3 The Revisionist Alternative

The recent ‘revisionist’ challenge to just war theory criticizes its impartiality towards *ad bellum* matters and reduces the principles of war to moral rules that guide killings between individuals in peacetime. Revisionists have raised the following questions: Why should combatants waging defensive wars have the same rights as combatants waging aggressive wars? Why should combatants fighting aggressive wars be immune from attacks by combatants who fight defensive wars? As such, they question the core premise of just war theory that separates the *jus ad bellum* from the *jus in bello*, mainly targeting the principle of non-combatant immunity and moral equality of combatants.⁵⁸ Revisionists thus argue that individual combatants and civilians, can be held accountable for contributing to wars with an unjust cause. I will now analyze their criticisms on the just war theory.⁵⁹

Moral equality of combatants has been the major target of revisionists. Revisionists attack the traditional perspective. They claim that combatants do not hold the same *jus in bello* rights and obligations and do not have equal rights to kill enemy combatants

⁵⁸ See, among other sources, Rodin 2002; McMahan 2009; Fabre 2009, 36-63; Fabre 2012; Frowe 2014 (I have reviewed this book for *Ethical Theory and Moral Practice*, see Noorda 2016).

⁵⁹ Critique on the revisionist approach has been voiced by, among other scholars, Ryan 2008, 131-152 (arguing that states have a right to conscript their citizens); Kutz 2008, 76 (arguing that combatants do not always know whether a war is waged in self-defense or not); Coady 2008 (like Kutz, Coady points to epistemic uncertainties for combatants as well); Shue 2010, 516 (arguing that just war theory intends to provide a way to regulate war and minimize harm in times where peacetime laws are temporarily suspended); Mertens and ten Bras 2011, 64-74 (arguing for non-combatant immunity as codified by contemporary law, for the reason that opposing parties do not agree who is on the just side of war). I build on this critique and apply an impartial set of principles of war to conflicts with non-state actors.

and become prisoners of war upon capture. The argument of these critics expresses that the conventional explanation of why combatants are justified targets in war is not aligned with the standards of peacetime morality and individual self-defense. In the words of one of the most prominent defenders of asymmetric warfare, Jeff McMahan:

[Just war theory] treats the question whether the Attacker is morally culpable, morally innocent, or indeed morally justified in what he does as irrelevant. This, I believe, accounts for its appeal to theorists of the just war, since this enables it to support the view embodied in the laws of war that soldiers on each side in a war are permitted to kill soldiers on the other side, irrespective of which side's cause is just. Treating these considerations as irrelevant is, however, wholly implausible outside the context of war. Suppose, for example, that a police officer begins shooting at a murderer to prevent his committing a further murder. The murderer is engaged in causing harm in a way that is both unjustified and unexcused. He is a Culpable Attacker [...]. The police officer's action is, by contrast, clearly justified, assuming that there is no less harmful means of preventing the murder.⁶⁰

Just actors have not committed any unjustified acts and are thus not morally liable to attack while actors who have committed unjustified acts are liable. Thus, as posing a threat to harm cannot be sufficient for becoming a justified target in war, revisionists argue that just combatants are not legitimate targets of attack while unjust combatants can be legitimately targeted. On these grounds and contrary to just war theory, supporters of the revisionist approach reject the moral equality of combatants. If we follow this line of thought, the impartiality claim that as

⁶⁰ McMahan 1994, 257.

long as *jus in bello* principles are respected all combatants have an equal right to kill despite the cause they are fighting does not hold any longer. On a revisionist account of war, only combatants on the just side have a right to kill. War is reduced to a conflict that takes place in the domestic context governed by principles that apply asymmetrically, as criminal law principles between individuals in times of peace.

The idea of asymmetric privileges in warfare may be appealing from a moral point of view, but I do not support the revisionist account on the philosophy of war. It holds undesirable consequences regarding the regulation of conflicts for the following reasons: Firstly, revisionists remove groups and collectives from the circumstance of war. According to them, war is an aggregation of combats between individuals instead of a single war between collectives. This view misrepresents the character of warfare and does not contribute effectively to regulate conflicts waged in the cultivation of collective objectives. Wars are customarily waged in pursuit of collective objectives. Individual combatants usually fight within hierarchical state or non-state collectives, following plans that are largely senseless outside the context of these collective aims. In such hierarchical collectives, superiors can enforce *jus in bello* on their subjects. If combatants violate *in bello* principles, those who are more hierarchically powerful may punish them or their superiors may themselves be punished for not enforcing rules of combat.⁶¹ On the other hand, in combats between individuals there exists no hierarchical structure to enforce rules of combat. I do not want to lose sight of the collectivity of warfare and, therefore view war as a collective activity in which individual combatants fight for collective aims differing from the collective aims of the opposing party.

⁶¹ Discussed in more detail in Chapter 5.

Second, revisionist accounts of war focus on minimizing harm committed by combatants of the unjust side. By contrast, the aim of an impartial set of principles of war is to minimize all harm involved in waging war; principles of war should restrain parties on both sides of a conflict.⁶² My argument for minimizing harm on both sides of conflict—instead of solely minimizing use of force by combatants waging war in the advancement of an unjust aim—is to limit the consequences of warfare as much as possible. If the principles of war did not restrict the just side in using force and allowed just combatants to violate *jus in bello*, including the discrimination principle, then civilians on the unjust side would be vulnerable to lethal attacks. This view on warfare does not regard civilians of the opposing side as human beings requiring protection from the consequences of war and instead increases suffering and death. The focus should be on minimizing harm on both sides of conflicts. Most importantly, civilians should be shielded from the consequences of warfare.⁶³ Thus, with respect to assessing the conduct of parties engaged in warfare, I endorse an approach that refuses to answer the question of which side of the war is right. In doing so, I give priority to minimizing casualties as the main purpose of the laws of war.

Another target of the revisionists is the principle of discrimination in the *jus in bello* dimension of just war theory. This principle dictates that combatants may be killed while non-

⁶² I do not argue that reciprocity should be a precondition for applying principles of war. If the principles of war depended on reciprocity, then one side's disregard of *in bello* principles appears to grant permission to the other side for acting similarly against such principles. This is undesirable in light of the aims of the principles of war. See, on reciprocity, Osiel 2009 (arguing that in conflicts in which one side does not expect the other to comply with *jus in bello*, notably conflicts between states and non-state actors, the other side is not very likely to comply either).

⁶³ In Chapter 4 I will argue who should belong to this category.

combatants protected, implying the principle of non-combatant immunity. Revisionists criticize the argument that combatants may be targeted because of their non-innocence and non-combatants may not be targeted because of their innocence. By their view, combatants fighting for a just aim may be armed and dangerous while having done nothing to make themselves liable, whereas combatants fighting for unjust aims have made themselves liable to being a target and to being killed in warfare by attacking combatants with a just cause for war.⁶⁴ This drastically alters the discrimination principle and implies a rejection of non-combatant immunity wherein non-combatants are similarly contributing to wars with an unjust cause.⁶⁵ In contrast, although I recognize that being a combatant does not necessarily imply that one is culpable and being a non-combatant does not necessarily imply innocence, I support the discrimination principle

⁶⁴ See, among other sources, McMahan 2009, 14; Fabre 2012, 54-81; Frowe 2014, Chapters 6, 7.

⁶⁵ Although the revisionist approach would imply undoing non-combatant immunity, most revisionists try to avoid drawing this conclusion by giving reasons for why it will nonetheless usually be impermissible to kill non-combatants. However, these revisionist defenses of non-combatant immunity do away with the doctrine of *jus ad bellum*, focusing on individual combatants, while attempting to incorporate non-combatant immunity. I do not agree with such views for reasons I have set out above. See, McMahan 2009, 213; Fabre 2009, 55 (McMahan and Fabre uphold the principle of non-combatant immunity by arguing that non-combatants usually do not pass a certain threshold of responsibility. On their account, non-combatants who choose to contribute to an unjust war should not be rendered liable in being killed because the degree of responsibility for contributing to an unjust war attached to such non-combatants is too low. See, also, Frowe 2014, Chapters 6, 7 (Frowe defends some form of the principle of non-combatant immunity based upon contingent features of the particular situation of a non-combatant, because most liable non-combatants are difficult to identify and attacking them without causing collateral harm is often impossible.)

and the principle of non-combatant immunity. I will now explain on what grounds I support these principles.

The revisionist critique shows us that the combatant/non-combatant distinction does not necessarily coincide with the non-innocent/innocent divide. Non-combatants may be non-innocent while combatants may be innocent. I agree that non-innocence might not be the best justification for killing in war. The question then remains: how should combatants and non-combatants be defined if they do not coincide with the concepts of innocence and non-innocence? I offer an alternative approach based on what I term ‘active membership.’⁶⁶ Contrary to revisionist accounts of war, I endorse treating combatants equally under *in bello* principles of warfare. To determine the status of an individual in warfare, I point out whether or not an individual is a combatant of a non-state collective based on the criterion of active membership to armed forces of that particular collective. In this way, I argue for a distinction between combatants and non-combatants instead of between non-innocent and innocent persons.

While revisionist approaches are similar to criminal law systems and require individual culpability, I argue for an approach based on membership. For example, I hold the view that an army may target members of the enemy’s armed forces and may capture and detain members of the armed forces until the end of hostilities.⁶⁷ I believe being a lawful target for attack or detention has nothing to do with guilt or innocence; the categorization of people in war rather coincides with membership

⁶⁶ I will explain active membership in Chapter 4.

⁶⁷ Under current international law combatant-status depends on membership of an army. Exceptions to the membership-based approach of the laws of war are the legal categories of ‘*levee en masse*’ and ‘direct participation in hostilities’. I address *levees en masse* in Chapters 4 and 5.

to a particular group.⁶⁸ Combatants should not be judged by the cause for which they are fighting. Combatants injure and kill, and may be injured and killed themselves, because they are combatants.⁶⁹ Impartial principles of warfare permit combatants to fight in war while protecting civilians against it. This does not necessarily imply that civilians are morally innocent. Some combatants are innocent while some non-combatants are non-innocent, but, in most cases, this should not influence their status in warfare as combatants or non-combatants. I reflect and weigh out both situations.

Combatants may be morally innocent because they have been conscripted or forced to join the army for financial reasons.⁷⁰ In addition, combatants are usually young and not well informed about the war they are fighting. However, in my view, restraining excessive violence should be the principal reason for supporting non-combatant immunity. To regulate war and prevent or minimize death and injury of whole populations, we should—as aforementioned—endorse a principle impartial towards moral innocence of individuals for the ultimate aim of their war. Even if an individual is forced to join an army, she should be treated as a combatant, irrespective of her responsibility for contributing to an unjust war. She should, as all other combatants, be restrained by *in bello* principles.

⁶⁸ George I. Mavrodes argues for a similar approach, see, Mavrodes 1975, 117-131 (arguing for non-combatant immunity as a useful convention rather than as a reflection of the individual's moral status).

⁶⁹ It is important to note I do not argue that a combatant should not be encouraged to discover whether the aims of the war she is asked to fight are in line with her personal opinions and to act accordingly, which would mean: to fight or to refrain from fighting.

⁷⁰ Often, this is not a convincing argument for endorsing non-combatant immunity for non-state combatants, because non-state combatants often fight voluntarily. However, in Chapter 7 I describe a case in which non-state combatants joined the army for financial reasons as well.

Many civilians play a role in wars and some are not morally innocent because they, for instance, supply combatants engaged in warfare. Combatants are dependent on civilians in various ways. Civilians may have designed or manufactured weapons, prepared food for combatants, worked as drivers for military personnel, healed injured combatants, voted for the government that started the war, or paid taxes. Thus, many civilians are not fully innocent, and actually contribute to war. By revisionist standards, this may be an argument for undermining non-combatant immunity.⁷¹ This broadens the category of subjects for lethal attack to individuals who do not actively participate in war by fighting and are not subject to a superior in the hierarchical structure of an army. I do not support the view that civilians contributing to war by other means than fighting should be considered as targets, instead, I claim that, those contributing to war by fighting as part of an army may be targeted.⁷² In the context of wars with non-state actors, the case of Salim Hamdan, Osama Bin Laden's driver, comes to mind. In my view, Hamdan should not be categorized as a combatant, if he was merely a driver not engaged as a combatant.⁷³ If anything, he should be subject to criminal law, not to the laws of war. Military necessity might allow for assault on certain non-combatants, for example a driver, under certain circumstances, but in general non-

⁷¹ Walzer, too, argues that those who produce the means to fight can be attacked as a last resort. See, Walzer 2006a, 146.

⁷² In Chapter 5, I provide guidelines for thinking about the application of the principle of discrimination to non-state collectives.

⁷³ Hamdan was charged by a military tribunal with "conspiracy and providing material support for terrorism". The process of this military tribunal was challenged in a case that went to the US Supreme Court, see *Hamdan versus Rumsfeld*. 126 S.Ct. 2749. *United States Supreme Court*. June 29, 2006. (in this case the US Supreme Court invalidated the system set up by President Bush to prosecute accused war criminals at Guantanamo Bay).

combatants should be protected from war. Whether and under what circumstances military necessity requires attacking certain non-combatants and which non-combatants may be attacked are questions that will not be addressed here. I focus on the general distinction between combatants and non-combatants, arguing mainly against the opposing thesis defended by revisionists that non-combatant immunity should not be supported.

In sum, to contrast the revisionist approach, I claim that an impartial set of principles should be applied to regulate warfare. An impartial set of principles should apply the same principles to combatants of both parties in conflicts whether they fight for a just or unjust cause, uphold the distinction between *jus in bello* and *jus ad bellum*, and protect non-combatants. I endorse this framework in order to restrain excessive forms of violence in warfare. I will now construct a first step towards applying this framework to conflicts with non-state actors by discussing an alternative way of dealing with non-state actors.

2.4 The Application of Impartial Principles of War to Conflicts With Non-State Actors

I have defended an impartial set of principles of war by endorsing non-combatant immunity and the equal application of *jus in bello* to combatants engaged in conflict. In other words, I champion the underlying claims of just war theory. However, just war theory is mainly based on nation-states as parties in war. The idea that a nation state may order its army to use force in self-defense against aggression is widely accepted and codified by law. In such wars, combatants on both sides – the just side and the unjust side in war – may kill and be killed. I argue that, non-state combatants

should be treated similarly to state-combatants if meeting requirements as set out here.⁷⁴ My approach to wars in which non-state actors are engaged differs from perspectives on war combining the laws of war with criminal law principles.

An alternative solution to the war and crime paradigm is a varied approach to non-state violence. Relying on a blend of criminal law enforcement and the laws of war, some scholars argue that violent individuals may be attacked by war measures while not entitling them to combat and prisoner of war status when captured.⁷⁵ This view situates individuals in a grey area between combatants and criminals. These individuals neither have the rights that protect them against lethal attacks as civilians nor do they enjoy *in bello* rights under the laws of war based on their participation in a certain collective as state-combatants do.⁷⁶ Blending the war paradigm with the crime paradigm and mixing the methods of both results in wars in which a powerful collective may target individuals without giving these

⁷⁴ War should always be a last resort to settle what is right or wrong. Often it might be better to treat groups asymmetrically to states by treating them under the crime paradigm, but there are situations in which this is not possible or not desirable. I am mainly concerned with these latter cases. I am not interested in the question of when all other resorts are exhausted. I propose, instead, to provide for a starting point in identifying potential legitimate authorities in war and develop a framework for the application of principles of war to such actors.

⁷⁵ Scholars who defend this view are, among others, Meisels 2004; Fotion 2007; Gross 2010.

⁷⁶ This view on war has been defended by scholars who view non-state combatants as “irresponsible, dangerous groups with an ambiguous enemy status.” Non-state combatants lack restraint in warfare, do not reciprocate, and do not distinguish themselves from civilians. Therefore, they are deemed to be legitimate targets, but lack the protection offered by the laws of war. See, Kessler and Werner 2008, 2, 3 (arguing that, by making recourse to a semantic of risk, the extrajudicial killing of individuals in the ‘war on terror’ becomes a form of risk management that takes place beyond established mechanisms of accountability.).

individuals any rights. I reject this confusion of the war and crime paradigm. Instead, I contend that either the laws of war, or the laws of crime, should be applied. Blending the crime paradigm with the war paradigm often culminates in targeting civilians without giving them combatant rights, and in penalizing individual combatants for *ad bellum* matters.

Under just war theory, states may use their power in self-defense by ordering their armed forces to wage war against the armed forces of another state. Applying these principles of war to non-state actors may be problematic because this conception of war is based on the view that states are the principal actors in war. In subsequent chapters, I aim to tackle the problems posed by the application of the principles of war to non-state actors by proposing how these principles can be adapted while still observing their endeavor to minimize harm. I focus on the principle of sovereign equality, the principle of discrimination, privileged combatant status, and how to respond to individuals not meeting the requirements of privileged combatants. In addition, the laws of crime are sometimes seen as inadequate in dealing with violent individuals, such as supposed terrorists. I tackle the issue of applying due process rights to individuals suspected of contributing to war or terrorism but not qualifying for being treated as a combatant.

2.5 Conclusion

As detailed in this chapter, I uphold the position that separates *in bello* principles of war from *ad bellum* principles of war. In my view, combatants on both sides of a conflict should be treated as equal to each other and may use lethal force, while non-combatants should be protected. This is what I have termed an ‘impartial set of principles of war.’ Conversely, revisionists claim

that all conflicts should be treated under a set of principles that do not allow the unjust side to use force. However, I believe revisionists do not pay sufficient attention to the importance of regulating conflicts by discriminating between combatants and civilians. The effective regulation of war demands protecting civilians and the application of an impartial set of principles treating combatants on both sides of the conflict equally.

As I have set out in this chapter, applying a set of principles that treats combatants fighting for an unjust aim as legally unequal to combatants fighting for a just aim may result in unregulated warfare. Such a set of principles treats war as a collection of individual combats, instead of as a collective enterprise in which the hierarchical structures of armies may enforce principles of combat. It also does not discriminate between combatants and civilians and may allow the just side in war to harm and kill without restraints.

In the next chapters, I offer guidelines for symmetrically applying an impartial set of principles to armed conflicts with non-state actors. In doing so, I approximate an answer for under what conditions non-state actors should be treated as parties within principles of war similar to state parties. Applying the principles of war to non-state actors will certainly raise difficult questions but it is essential for regulating conflicts in which non-state actors are involved. While in this thesis I focus mainly on problems that may arise when applying the discrimination principle and prisoner of war status to conflicts with non-state actors, I will first address another topic concerning the rights of states in wars with non-state actors: the topic of sovereignty.