



UvA-DARE (Digital Academic Repository)

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

Noorda, H.A.

Publication date

2016

Document Version

Final published version

[Link to publication](#)

Citation for published version (APA):

Noorda, H. A. (2016). *Thinking war in the 21st century: Introducing non-state actors in Just war theory*. [Thesis, fully internal, Universiteit van Amsterdam].

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

4

Discriminating between Non-State Combatants and Civilians*

4.1 Introduction

It is difficult for states to identify non-state combatants when they do not wear uniforms or other insignia. As many scholars have argued, current practices of targeting non-state combatants, who do not display insignia, raise concerns regarding the status of targeted individuals and the accuracy of such attacks.¹¹¹ Thus, the

* Part of this research was conducted while visiting UC Berkeley Law. My host Christopher Kutz and other members of the faculty provided a wonderful research environment and inspiring supervision. I presented an earlier version of this chapter at the Ethics and the New War Conference at the Dutch Military Academy Breda in 2013, and the Hokkaido University Center for Applied Ethics and Philosophy Conference in 2014. I thank the participants in these conferences for their insightful feedback and gratefully acknowledge the financial support provided by Hokkaido University. I am particularly thankful to Nancy Sherman for helpful discussions.

¹¹¹ See for similar critiques in the debate on targeted killings, among other sources, Waldron 2015 (Waldron offers a critique of normalizing the use of death lists); Finkelstein, Ohlin and Altman eds. 2012 (a selection of work on targeted killing, including chapters in which such

pressing question remains: how does one discriminate between non-state combatants and civilians? As of yet, this question has not been addressed in the philosophy of war.¹¹² However, the consequences of non-uniformed warfare on civilian populations is enormous when one considers the likelihood that states may counter-attack non-uniformed combatants and the difficulties that follow in protecting civilians in such conflicts. In this chapter, I address these concerns by setting guidelines for governing the treatment of combatants who do not wear a uniform or a distinctive sign.

I argue that the application of the discrimination principle in conflicts with non-state combatants who do not distinguish themselves by wearing a visible uniform or a distinctive sign should mirror *active group formation*. That is, members of such a group should actively identify themselves with other members of the group and share group practices. The concept of active group formation has been used in other contexts, including debates on multiculturalism and gender studies. My aim in this chapter is to introduce this concept into the debate on irregular warfare and apply it as a criterion for discriminating between non-state combatants and civilians. Taking active group formation as a point of departure, I claim that an individual expressing her identification with the collective on the Internet for instance, and sharing its group practice (ie. fighting), should be considered as a combatant in that collective.

To set out guidelines for effectively identifying individual participants in non-state parties in wars, this chapter will proceed

practicis are criticized); May 2013, 47-63 (mainly criticizing the accuracy of drone attacks).

¹¹² Christopher Kutz argues that the uniform should not be a prerequisite for treating combatants under principles of war, but he does not set out criteria for how to discriminate between non-uniformed combatants and civilians. See, Kutz 2005.

by the following steps. In section 4.2, I argue that authority to wage war should be attributed to non-state actors if they have a political aim (in order to exclude ordinary criminal violence). Subsequently, to limit the harm and damage caused by war, I adopt the discrimination principle as described under just war theory, which intends to limit the consequences of war. Then, in section 4.3, I describe the status of non-uniformed non-state combatants under current international legal rules and focus on participants in *levees en masse* and insurrections. Current laws of war address certain non-uniformed non-state actors taking part in armed conflicts: participants in uprisings against their own government (insurrections), and participants in uprisings against foreign powers (*levees en masse*). Individuals joining uprisings against foreign rule can become privileged combatants under the laws of war provided that they meet specific requirements. I argue in line with this approach, however, I argue that this concept should not be applied outside the context of a *levee en masse* because it lacks clarity in identifying participants under most other contexts. I will take steps for identifying non-state combatants in other contexts than uprisings against foreign rule. In section 4.4, I explore two possible ways to identify participants in such groups: ascription and inscription. Under the first method, outsiders to a group attribute certain characteristics, beliefs, and practices to individuals who share a specific attribute. Under the second method, members of the group actively identify themselves as a group with shared practices. Employing this distinction helps me apply the principle of discrimination to non-state groups. In section 4.5, I assess the current rules of war through this analytical distinction and claim that the principle of discrimination should reflect the latter approach (inscription), because ascription by others does not necessarily reflect inscription by the individuals and sharing attributes with members of a particular collective does not necessarily constitute membership of that collective from the perspective of the group

members. The active formation of the collective should be mirrored in the requirements of combatant-status for individual participants in non-state collectives. The aim of restricting combatant status to individuals who manifest identification with a particular non-state collective and fight for that collective is to effectively apply the discrimination principle. Identifying individuals taking part in war is crucial for the application of the laws of war because it enables the discrimination principle, and is a basis for assigning combatant privileges, including prisoner of war status, as discussed in Chapter 5.

4.2 Distinguishing Between Acts of War and Other Forms of Violence

To maintain the separation between criminal law and the laws of war, we need to distinguish between civilians and combatants. Not everyone may be attacked during a conflict and not every individual may earn the privilege of combat and prisoner of war status. This would eliminate the differentiation between combatants and civilians. To be able to assign privileged combatant status we need to distinguish between the following categories: war and ordinary criminal violence, criminal and combatant. A combatant in war has certain privileges (such as prisoner of war status) and is allowed to harm and kill an enemy combatant. A criminal has rights under criminal law, including due process rights but is usually not allowed to harm or kill anyone. This differentiation should also be reflected by the requirements for privileged combatants of non-state collectives.

To distinguish between civilians and combatants, we must assign the authority to wage war to certain collectives and we need to assign combatant status to certain individuals in war. The first is an *ad bellum* requirement of just war theory; the latter

concerns the *in bello* requirement of discrimination of this theory. I first discuss authority for non-state actors in war. Second, I discuss the *in bello* requirement of discrimination.

4.2.1 Non-State Actors as Parties in War

In this section, I separate those who have authority to initiate war from those who do not. In just war theory as I describe it in Chapter 2, states are considered to be the main legitimate authorities in war. In recent debates about the principle of legitimate authority, philosophers have contributed to setting out requirements for non-state actors initiating war. Requirements of legitimate authority for non-state actors are the requirements of popular support and political objective.¹¹³ Here, I focus on the requirement of having a political objective.¹¹⁴

¹¹³ Kutz 2005 (Kutz argues that non-state actors should meet the requirement of having, 1) a just political aim, 2) organizational structure and 3) popular support to be included under the principles of war); Finlay 2015 (Finlay focuses on revolutionary wars and argues that the use of force in defense 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); May 2008, 304 (May sets out criteria for legitimate authority for non-state actors, including the requirement of being supported by a population). From an alternative perspective, non-state actors should comply with the *in bello* principles to be categorized as parties in war. By contrast, analogous to the principles applicable to states, I believe that complying with the principles of combat should not be a constitutive requirement for non-state actors. However, once a war between a state and a non-state actor has started, the principles of combat are applicable to non-state combatants.

¹¹⁴ I agree with Finlay, Kutz and May, among other scholars, that some popular support is needed to wage war in the furtherance of a political aim. Without popular support, a non-state actor would not be very likely to meet the probability of success requirement. In this chapter, I concentrate on the *jus ad bellum* requirement of political aim because it

To distinguish between the paradigms of crime and war, privileged combatant status has been ascribed to individuals that are part of a non-state collective with a political aim. I defend this view because it may help demarcating the scope of war so that it does not include ordinary criminal violence. International law does not explicitly impose this requirement on states. The United Nation Charter limits legitimate warfare to self-defense against aggression. Subsequently, aggression is defined as invasion of territory, attack on another state's armed forces, occupation, and other forms of infringements of sovereignty. Thus, under international law, a political objective is not explicitly required for wars between states but the requirement helps to distinguish between crime and war in which non-state actors are involved.

I define the requirement of political objectives in morally neutral terms including non-state collectives with just *and* unjust political objectives. Most scholars defending similar approaches argue that only non-state collectives with just political objectives should be considered as parties in war, excluding wars waged by non-state actors in the establishment of, for example, a non-democratic state.¹¹⁵ They hold the view that the treatment of combatants under war depends on their fighting for a just cause of war. In contrast, I understand the need to have a political objective as a formal requirement here, that includes non-state actors with just and unjust political objectives under the principles of war. Like wars with brutal dictators who aim to expand their unjust rule to other territories should fall under the principles of war, so too should wars of brutal non-state actors with unjust political objectives be governed by the principles of war. The purpose of including such non-state actors under the

helps to provide a distinction between war and ordinary criminal violence.

¹¹⁵ See, for example, Kutz 2005; Finlay 2015, Chapter 2.

principles of war is to govern their activities in warfare and to minimize harmful consequences of the wars such actors are waging. Of course, as heads of states may not breach *ad bellum* requirements, similarly heads of non-state collectives may not be allowed to breach *jus ad bellum* requirements. Non-state collectives do breach *jus ad bellum* by waging war in the advancement of an unjust cause, but non-state combatants of such collectives should not be excluded treatment under principles of war for that reason.

By concentrating on individuals who are part of collectives, I exclude violence by solitary individuals motivated by a person's individual political beliefs. While I distinguish political from criminal, I recognize that the distinction between criminal activities and political activities is not always clear-cut. Criminal activities may become entangled with the political in certain cases and groups whose rationale is primarily political may be involved in ordinary criminal activities, for example, to finance their operations.¹¹⁶ Nevertheless, I argue that the broad distinction is explicit enough for most cases. The criterion political aim excludes individuals taking part in criminal groups, like drug-trafficking, who fight for power over territory and popular support in order to secure their supply even if they do not strive to gain territory or popular support for political ends but instead for the sake of trading drugs. Although the distinction between political and criminal aims is not well defined, I adhere to this analytical distinction. I hold that parties in a war meet a formal requirement of political aim.

The next section will highlight the discrimination principle's relevance and outline the current legal criteria for separating

¹¹⁶ C.A.J. Coady makes this point in Coady 2004, 37-58 (distinguishing between political action and criminal activities to separate terrorism from other forms of criminal violence).

combatants from civilians in wars with state-armies and certain liberation movements.

4.2.2 Discriminating between Combatants and Civilians

Along with identifying collectives as parties in war, we need to identify individual members of such collectives. Individual members of non-state collectives with a political objective should be regarded as combatants. In conflict situations, we might want to discriminate between such individuals and civilians, so to assign combatant privileges. Discriminating between combatants and civilians serves to limit the field of battle to certain individuals, areas, and objects. The discrimination principle appears straightforward, but it is hard to apply in practice particularly in wars in which non-state actors participate. Non-state actors do not always identify themselves by wearing a uniform or other insignia.

Before delving into distinguishing civilians from non-state combatants, I briefly outline the legal criteria for discriminating combatants from civilians in wars with state-armies and certain liberation movements. Under laws of war, in conflicts between state armies, the discrimination principle allows combatants to be attacked and to receive prisoner of war-status when adhering to *in bello* principles of combat, while civilians should be protected. To make this discrimination possible, members of state-armies distinguish themselves by wearing a uniform or a distinctive sign.

Under laws of war, the discrimination principle applies in conflicts with irregular armies as well, although additional requirements are made explicit by laws of war for discriminating between such armies and civilians. Irregular combatants, whether they be members of militia, volunteer corps, or organized resistance belonging to a party to a conflict, may be considered

lawful combatants under laws of war if they fulfill the following conditions:

- a) that of being commanded by a person responsible for his subordinates;
- b) that of having a fixed distinctive sign recognizable at a distance;
- c) that of carrying arms openly;
- d) that of conducting their operations in accordance with the laws and customs of war.¹¹⁷

Thus, distinctive dress codes among members of armies makes visible their identification and rank in the military chain of command. This allows for an easier differentiation between civilians and combatants.¹¹⁸ As a general rule, all combatants wearing a uniform can be targeted and killed and should be assigned prisoner of war-status upon capture if not violating *in bello* principles. The remaining challenge is to identify participants in non-state collectives who do not meet the requirement of having a distinctive sign.

In the next part, I describe the legal categories of non-state collectives in armed conflicts. In particular, I highlight the legal category of *levee en masse*, and, correspondingly, reason alongside this concept in order to identify certain individuals as subordinates to authorities with a political aim in the light of the *in bello* principle of discrimination.

¹¹⁷ Geneva Convention III Relative to the Treatment of Prisoners of War. August 12, 1949, Article 4(A). (Non-state combatants meeting these criteria qualify for prisoner of war status under the Geneva Conventions).

¹¹⁸ Originally, uniforms served the purpose of distinguishing between enemy combatants and combatants of the own forces.

4.3 Non-Uniformed Combatants under the Laws of War: *Levees en Masse* and Insurrections

Codified laws of war define two categories of groups taking part in armed conflicts of which the members do not wear uniforms: *levees en masse* and insurrections. In this section I describe both categories and aim to provide background information for the analysis and recommendations made in section 4.5.

A *levee en masse*, or mass uprising, takes place against foreign troops occupying or invading a country. The term *levee en masse* became an international legal term in 1874 at the Brussels Conference.¹¹⁹ It refers to circumstances in which a population does not have time to organize itself and spontaneously takes up arms to resist the invasion or occupation. Under the laws of war, a *levee en masse* must be distinguished from an insurrection by a people against its own government.

A *levee en masse* lacks the organizational structure common for regular armies and, as a consequence, participants usually do not wear a uniform or a distinctive sign. Civilians who form a *levee en masse* are not required by laws of war to meet these standards. Those who join a *levee en masse* are entitled to certain combatant privileges, such as prisoner of war-status and the right to fight the enemy if additional requirements are met. Laws of war provide additional requirements for such privileges: *levees en masse* may be undertaken against foreign troops only when and

¹¹⁹ See, Project of an International Declaration concerning the Laws and Customs of War. Brussels, August 27, 1874. Article 10. Accessed: May 3, 2016.

<http://web.ics.purdue.edu/~wggray/Teaching/His300/Handouts/Brussels-1874.html>.

where they invade the country, civilians taking part in a *levee en masse* must carry their weapons openly and respect the laws and customs of war, and once the territory has become occupied, resisters can be punished by the occupying authority.¹²⁰

A recent example of a legitimate uprising under laws of war was the armed reaction of Bosnian Muslim civilians to Serbian militias taking over the town of Srebrenica.¹²¹ The response of the Bosnian Muslims in Srebrenica was recognized as a *levee en masse* by the International Criminal Tribunal for the former Yugoslavia (ICTY). In 1991-1992, the state of Yugoslavia fell apart and Bosnia's 1992 declaration of independence from Yugoslavia was followed by a war that lasted for over three years. The population of Bosnia-Herzegovina consisted of three ethnic groups: Serbian, Croatian, and Muslim. Croats and Serbs expanded their territory at the expense of the Bosnian state. These developments were accompanied by ethnic cleansing of the non-Serbian population in areas that were under control of the Serbs. At that time, there was practically no military organization by Bosnian Muslims. The conflict escalated when on April 18, 1992, the Serbs occupied the Bosnian town of Srebrenica. The Bosnian Muslims' resistance, despite its degree of organization, inflicted losses on the Serbian side. On May 8, 1992, the leader of Srebrenica's Democratic Party (SDS) was killed and the Serbian forces withdrew from the town. The ICTY Trial Chamber held that:

¹²⁰ Geneva Convention III Relative to the Treatment of Prisoners of War. August 12, 1949, Article 4(A)(6).

¹²¹ Cassese 2009, 867.

the situation in Srebrenica may be characterized as a *levee en masse* at the time of the Serb takeover and immediately thereafter in April and early May 1992 [...].¹²²

The court decreed the day that the first decisive steps were taken to coordinate defense among Bosnian Muslims as the end of the *levee en masse*.¹²³ Thus, the *levee en masse* covers the concise period of time in which no one commands the civilian resistance and provides fighting individuals with the possibility to claim combatant privileges under certain circumstances, all the while, not displaying insignia.

Another category of non-state collectives recognized by laws of war are participants in internal insurrections. Laws of war define internal insurrection as the uprising of a people against their own government. Individuals engaged in internal insurrections are not considered parties in a conflict under laws of war. Additional Protocol II to the Geneva Conventions excludes individuals participating in insurrections, leaving such fighters to be regulated by Common Article 3 only. Common Article 3 requires a humane treatment for those who are *hors de combat*, meaning that persons no longer participating in hostilities are entitled to a minimum of basic protections. Other parts of the Geneva Conventions, such as prisoner of war protections, do not apply. Thus, those fighting in internal insurrections simply act in violation of domestic law and enjoy the limited Common Article 3 protections. When captured, such fighters do not become prisoners of war but, instead, prisoners of the government, and thus may be prosecuted for their actions.

¹²² Prosecutor versus Naser Oric. ICTY-03-68-T. Judgment of the Trial Chamber. 30 June 2006, par. 136.

¹²³ Prosecutor versus Naser Oric. ICTY-03-68-T. Judgment of the Trial Chamber. 30 June 2006, par. 133, footnote 322. In Chapter 5 I further discuss this case in light of whether non-state combatants should be assigned prisoner of war status.

A recent example of an internal insurrection points to the uprising in Libya. In 2011 the Arab Spring began in Tunisia, followed by protests in the rest of the region. The rebels were composed primarily of civilians. What seemed to begin as nonviolent protests soon amounted to a violent conflict costing many lives.¹²⁴ As codified laws of war leaves such conflicts to be regulated by Common Article 3, individuals taking part in such an uprising are entitled to a minimum of basic protections under laws of war. Thus, while groups of individuals taking part in uprisings against foreign troops invading their country can become privileged combatants, groups of individuals taking part in uprisings against the own government cannot.

In sum, under current laws of war, privileged combatant-status is assigned to members of groups resisting a foreign occupying power (excluding internal insurrections) if they carry their weapons openly, and if they respect the laws and customs of war. *Levee en masse* participants are neither required to be commanded by a person responsible for her subordinates nor required to wear a fixed distinctive sign to receive combatant status. Given that *levees en masse* are spontaneous, unorganized movements acting under emergency conditions to defend a nation, it is understandable participants do not have time to obtain uniforms. However, these relaxed requirements to qualify as a privileged combatant weakens the ability to distinguish between civilians and combatants. The only distinguishing characteristic between a civilian and a combatant, between those who can be lawfully attacked and assigned prisoner of war-status, and those protected to become prisoner of the government, is the open carrying of arms. As discussed in more detail in section 4.5, these

¹²⁴ On October 20, rebels imprisoned and killed the Lybian ruler Muammar Gaddafi. See, "As Tide Turns, Rebels' Dream Of 'Free Libya' Dims". March 16, 2011. *NPR*.

requirements may provide sufficient clarity in the context of uprisings against a foreign power, but lack clarity in other contexts, because they do not effectively distinguish between combatants and civilians in all contexts. The requirement of the open carrying of arms in and of itself does not effectively identify individual participants in a non-state collective. Before examining in more detail the distinction between civilians and participants in non-state collectives, I discuss two approaches to collectives and argue that current laws of war follow an approach that cannot be applied to collectives outside *levees en masse*.

4.4 Two Approaches to Identifying Group Members: Ascription and Inscription

The question of how to distinguish between civilians and members of non-state collectives can be addressed in different ways. I outline two ways of approaching this question. Under the first approach, outsiders to a group attribute certain characteristics, beliefs, and practices to individuals who share a specific attribute. This has been termed a process of ‘ascription’ resulting in passively formed groups. An alternative approach is to look at how individuals actively identify themselves as members of a particular group and how they share group practices. Under the latter approach, the members themselves constitute their collective identity. This is what has been termed a process of ‘inscription’; a process resulting in actively formed groups.¹²⁵ I

¹²⁵ This distinction between inscription and ascription is based on Jean-Paul Sartre’s work on group formation. Sartre distinguishes several levels of group formation. For the purpose of this chapter, an important

explore both processes in order to find a way to effectively distinguish between civilians and members of non-state collectives that are parties in wars.

First, I explore the process of inscription, which results in active group formations. For example, children in the playground who decide to play soccer form a team around a collective objective: winning the game. The American Philosophical Association (APA) members who call themselves the ‘Committee on the Status of Women’ are also formed around a collective objective, one that assesses and reports on the status of women in the profession. The same applies to individuals part of non-state collectives participating in war. In such collectives, identification with the collective and its members plays an important role in conforming to collective goals and values. Members of active group formations often identify themselves as group members. They identify with their fellow group members, individual members of the group adopt shared group practices, and being a member of the particular group forms a part of their identity. This is the process of inscription.¹²⁶

Sometimes individual members make their identification with a group visible to the outside by wearing a uniform or a

distinction rests between active group formations and passive group formations as formed by processes of inscription and ascription. Sartre 1976. For a similar view on group formation, see May 1987. Iris Marion Young applies the concept of ascription to women. See, Young 1994, 713-738. Roland Pierik distinguishes processes of ascription and inscription in the context of cultural differences. See Pierik 2004, 523-544.

¹²⁶ I do not require all members of an active group formation to be committed to the objective of the collective. In smaller groups all members may be committed to the objective of the collective, but it is not required for attaining an active membership to a collective. In larger active group formations there are often participants who share the group’s practices and identify themselves with fellow group members but are not committed to the success of the group’s ultimate aim. In Chapter 5, I discuss alienated members of active group formations.

distinctive sign. However, wearing a uniform or a distinctive sign should not be a necessary or sufficient requirement for active group membership. By wearing a uniform or a distinctive sign combatants are identifiable as members of an army in the same way soccer players who wear jerseys are identifiable as members of a team or individuals wearing a white coat in a hospital are identifiable as medical personnel. Uniforms, emblems, or ribbons of non-state combatants (sometimes functioning as a means to hide their identity from others) have a similar effect. However, in circumstances where individuals do not have time to organize themselves and spontaneously form a collective, as is the case in *levees en masse*, they may not distinguish themselves as members of a collective by a distinctive dress. In addition, there may be circumstances in which individuals hide their membership to a collective by deliberately wearing civilian clothing. Such individuals may make their identification with a particular group visible in another way, for instance, by publically expressing their thoughts to others on the Internet.

Although external features may indicate active group membership, we should be aware it does not always imply sharing practices with the members of the collective and identifying with them. Individuals not wearing a uniform may be active members of a particular group formation (in this context: an army) and individuals who share certain features with a collective may not be part of that collective. In state-armies, most uniformed combatants identify with the army and share the practice of fighting. By wearing a particular uniform, state-combatants distinguish themselves from civilians, from enemy combatants, and from members of the military who do not fight. Some non-state actors are similarly organized but this is not always the case. Individuals who share particular features do not have to form an active group formation. They may not adopt shared group practices or identify with other individuals with whom they resemble. Group membership does not only depend on ascriptions

by others based on certain features that are visible from outside. Thus, when setting out legal criteria one must be aware that outer features are not sufficient criteria for ascribing active group membership. By contrast, active group formation requires that group members identify themselves as such and share certain practices. In other words, processes of inscription form active group formations.

Contrary to self-categorizing active group formations, passive group formations are categorized by others based on processes of ascription, or, “the attribution by outsiders of certain characteristics, beliefs, and practices to individuals who share a specific attribute.”¹²⁷ Therefore, passive group formations do not have a sense of unity themselves but are categorized as such by outsiders. Although we identify ourselves with our pursued objectives, we do not necessarily identify with others pursuing the same goals or exercising the same activities. I identify myself, for example, as a radio enthusiast, because I listen to the radio when I wake up in the morning. However, I do not necessarily identify with the other radio listeners nor do I adopt practices of other radio listeners, except for listening to the radio. Such a unity is not a clear single group but an amorphous category. Identifying a common identity is not possible because such unity is formed passively. Some collectives to which I belong I do not consider as part of my identity, as in waiting in line at the grocery store, but every once and while I take part. There is a unity in radio listeners and in people who line up to pay for groceries, but it is a passive unity. That a person is a radio listener or is lining up to buy groceries does not predict who she is, what she does, or how she takes up her position among other people. Radio listeners or people queuing cannot be treated as “substances in which some

¹²⁷ Pierik 2004, 525.

specific attributes inhere.”¹²⁸ The objects oriented around the actions of the members of such groups unite the members of these kinds of groups passively. The people waiting in a line to buy groceries follow the rules of waiting, but they relate to one another minimally, and they have nothing necessarily common. They are a group only to the extent that they intend to buy groceries at that location. As Marion Young points out, women are similarly passively united. The unity of women derives from the way they:

[...] pursue their own individual ends with respect to the same objects conditioned by a continuous material environment, in response to structures that have been created by the unintended collective result of past actions.¹²⁹

As such, women do not form an active group formation like the APA ‘Committee on the Status of Women’ formed around actively shared objectives with the APA ‘Committee on the Status of Women’. Both collectives, women in general and the APA Committee, consist of women, but the former is passive while the latter is an active group formation.

In the next section, I distinguish between inscription and ascription to members of non-state parties in wars and explain how this may help discriminate between combatants and civilians.

4.5 Discriminating Between Civilians and Non-State Combatants

Those who join a *levee en masse* may claim privileged combatant-status under laws of war when meeting the requirements of

¹²⁸ Young 1994, 733.

¹²⁹ Young 1994, 724.

resisting foreign troops, carrying their weapons openly, and respecting the laws and customs of war.¹³⁰ The status of participants in *levees en masse* is determined by looking at both the individual participating in the *levee en masse* and at the situation in which the conflict occurs. For an individual to be categorized as a participant in a *levee en masse*, the requirements of carrying weapons openly and respecting the laws of war need to be met. In the context of a *levee en masse*, this may reflect active group formation, as described in section 4.4 of this chapter. However, as I argue, the definition of individuals participating in a *levee en masse* lacks clarity when applied outside the context of resistance against a foreign power. Outside the specific context of a *levee en masse* the definition does not effectively distinguish between active members of the collective and non-members. This may be problematic with regard to the principle of discrimination, as detailed below. I first focus on the application of the discrimination principle to non-state collectives in cases of uprisings against an occupying power. Secondly, I focus on the application of the discrimination principle to non-state collectives outside the context of resistance against an occupying power.

Under current laws of war, the context in which a *levee en masse* operates is in the occupation by a foreign power resulting in an international armed conflict. History reveals many examples of civilians resisting against occupying powers. The term originates from the French Revolutionary wars in which France had to defend itself against invading powers. In defense against invading powers during those wars, all French were called to defend their country. Another example of a *levee en masse* was the resistance of Dutch civilians against Spanish occupying powers during the Eighty Years War. On December 11, 1572, the Spanish army

¹³⁰ Geneva Convention III Relative to the Treatment of Prisoners of War. August 12, 1949, Article 4(A)(6).

brought the Dutch city Haarlem under siege. Haarlem's military was weak, but civilians both male and female, helped to defend the city.¹³¹ Both cases illustrate how civilians who resist a foreign occupying or invading power may temporarily act as combatants. In such contexts, the open carrying of arms is sufficient for identifying civilians participating in hostilities. It is likely, under those conditions, that fighting civilians or civilians carrying arms identify with the collective aim to defend their territory.

Thus, in the context of resistance against a foreign occupying power, the open carrying of arms by civilians might reflect active membership to a resistance movement that has the aim to defend the country. The Bosnian Muslims who participated in the *levee en masse* can be identified by their active membership to a collective with the objective of defending Bosnia against the Serbs. It is likely that individual civilians who carried weapons identified themselves with others who fought to defend Bosnia against the Serbian forces. Such individuals ought to be categorized as combatants. In the context of resistance against an occupying power, the open carrying of arms might sufficiently reflect this requirement of active group formation. A situation in which a foreign power occupies a people might be enough in order to assume that all civilians carrying weapons are fighting against the occupying power. For those responding to such violence, civilians carrying arms openly during resistance against an occupation may be targets. The use of force against them is feasible because the open carrying of arms reflects active group membership in the context of resistance against a foreign power. Formulating legal criteria for active group formation requires relying on processes of ascription. However, as I argue here, it is

¹³¹ The story goes that Kenau Simonsdochter Hasselaer fought against the Spanish occupying power. Some versions of the story depict Kenau as the leader of an army in which 300 women participated.

of great importance that such processes of ascription reflect active group formation as much as is possible. I argue that the legal criteria for *levee en masse* meet this requirement because this particular situation calls for civilians to take up arms to defend against invaders of their country.

In other contexts, the requirement of open carrying of arms might not reflect active group formation. Not all kinds of civilian resistance should be viewed as war, and not all persons carrying arms openly should be considered as combatants. The open carrying of arms should not be the only distinguishing characteristic between combatants who can be lawfully attacked and assigned prisoner of war-status and civilians who should be protected and become a prisoner of the government. The requirement of carrying weapons openly outside the context of occupation is insufficient for reflecting active membership of a non-state collective waging war. It does not effectively distinguish between war, crime, and permitted carrying of arms. Someone who carries a weapon does not necessarily identify with a non-state collective that fights for a political objective. The question remains whether or not a person carrying a weapon should be targeted and killed, or treated as a civilian.

In wars with non-state collectives, attributing certain characteristics, beliefs, and practices to individuals who share a specific attribute might result in killing civilians and other wisely treating civilians as combatants under principles of war. Under this approach, supposed non-state combatants may be identified by specific attributes, such as carrying a weapon, committing violence against civilians, their ethnicity or religion.¹³² Identifying such individuals by these features would be problematic, because identifying individuals by their violent deeds or by the open carrying of arms does not distinguish them from criminals or

¹³² Addressed in more detail in Chapter 7.

civilians who lawfully carry arms or use force. By the same token, identifying participants in such conflicts by other features they may share with civilians does not identify them as combatants. Belonging to a specific ethnicity may of course distinguish individuals from people not belonging to that ethnicity, but such features do not distinguish them from civilians. Such features may be markers for an active membership to an ethnic group, but they are not necessarily markers for identifying with a collective that shares the political objective to wage a particular war or to resist a regime.

I focus on the distinction between combatants and civilians, as I am especially concerned with discriminating between war and crime, and thus between combatants and criminals. The open carrying of arms or the violent deeds of individuals should not imply that an individual is a combatant in every context. This approach is not sufficient for identifying participants in non-state parties in war. I argue we cannot assume that individuals carrying arms are part of a non-state party to war instead of criminals. Those responding to violence of terrorist organizations may face the problem of misidentification. They should note that the carrying of arms outside the specific case of *levee en masse*, such as terrorism, not be taken as an indication that the individual is a member of a collective with a political objective as described above. If, for example, a collective with a political objective operates within the Netherlands targeting the government, The Netherlands could be faced with a practical dilemma over the treatment of individuals using violence. Suppose, for example, that Dutch combatants confront an enemy civilian dressed as a civilian, but carrying her weapons openly. If the civilian were a criminal, The Netherlands would be allowed to deny her prisoner of war status and try her as a common

criminal.¹³³ If the civilian were part of an enemy collective, The Netherlands would be allowed to target and kill her, or to accord her prisoner of war status.¹³⁴ Identifying participants in non-state parties in war by studying the attribution of certain characteristics (such as the characteristic of open carrying of arms) outside the specific case of *leveys en masse* is often problematic. This approach is likely to occur in situations in which civilians are not effectively distinguished from combatants.¹³⁵

Active group formation can be considered as a departure point in thinking about the discrimination principle in combat situations. The concept of active group formation helps to distinguish between (non-)state combatants and civilians. The civilian category should not only include civilians carrying arms but also those who might otherwise be associated with war. These include: aid workers, army cooks, munition workers, civilians who paid taxes to finance the war while not engaging in combat, and civilians who voted for a war-aimed government. In Chapter 2, I argued that a distinction should be drawn between combatants and civilians. The concept of active group formation is instrumental to this distinction. A munitions worker, for example, may contribute to war by producing arms but does not necessarily identify herself with the army or its destructive practices.¹³⁶ She is

¹³³ See my work on criminals at the interface of war and peace: Noorda 2015, as rewritten into Chapter 7 of this thesis.

¹³⁴ See Chapter 5 of this thesis.

¹³⁵ Moreover, the responding party is likely to pick and choose between criminal laws and the laws of war. Selecting only the best from these alternatives may result in a regime under which individuals are targeted and killed without gaining any combatant privileges, or detained without the protections of the criminal law system. The principle of discrimination is essential for the protection of populations. Such distinctions ought not be ignored or exchanged for strategic advantages.

¹³⁶ In the next chapter, I mark the distinction between being morally responsible for contributing to a certain collective outcome and being a target in warfare and qualifying for prisoner of war status.

not an active member of the army and should be considered as a civilian. The same holds true for those who finance an army by, for example, paying taxes in countries participating in wars. Individuals financing wars may be responsible for contributing to such wars, but this does not imply that they should be categorized as combatants and subsequently targeted and killed. Although I pay taxes, which may help finance wars, I do not identify myself with the army of the Netherlands and I do not share their practices. As such, I am a civilian and I should be protected from being targeted and killed during warfare.¹³⁷ Similarly, individuals financing a non-state collective's war, sympathizing with a non-state collective, or distributing propaganda in support of a non-state collective should not be regarded as combatants as long as they do not identify themselves with the collective's army and share the practice of fighting.

In contrast, a combatant forced to fight (or fighting for remuneration) does share in the army practices and she may identify with her fellow combatants. Such a combatant may not share the political objective of the collective, but she is nonetheless targetable in warfare, because she is an active member to a participating (non)-state collective in war. In addition, individuals committing attacks in the name of a non-state collective, for example, those who committed attacks on the Paris based magazine *Charlie Hebdo*, may be regarded as active members of IS. I will further discuss this case in Chapter 7. Here, I have set out requirements for discriminating between non-state combatants and civilians: sharing and identifying in fighting activity with group members.

For the most part, I have criticized identification of non-state combatants based on processes of ascription. How does one

¹³⁷ See, for an opposing viewpoint, Frowe 2014, 209-213 (approaching this issue from a revisionist perspective).

suggest identifying such combatants if they do not wear uniforms or insignia? I suggest that the criteria for the identification of combatants should reflect active group formation as clearly as possible. An individual who identifies herself with members of an army may make this visible in several ways, not only by wearing a uniform or a distinctive sign, but also by expressing her thoughts on the Internet. For example, IS supporters may not always wear a uniform but post videos and memes to share with fellow supporters of this non-state collective. This makes their identification with IS visible to outsiders, similarly to the way a uniform expresses membership of a state-army to outsiders. Individuals who externalize their membership may be considered as combatants if also sharing the practice of fighting with the armed forces of that non-state collective.

I argue for applying the principle of discrimination to wars with non-state collectives wherein combatants do not display uniforms. Non-state combatants should meet two criteria to be categorized as combatants: 1) identifying with the members of a collective, who are fighting for a political objective and being supported by (a part of) the population, and 2) sharing their fighting practices with the members of that collective. The identification requirement should be interpreted broadly, met by wearing a distinctive sign or by expressing identification in some other way, like sharing information via the Internet.

4.6 Conclusion

As contemporary armed conflicts involve non-state actors to an increasing degree, it is worth looking at the application of the discrimination principle in this context. I examined the application of the discrimination principle to individual participants in non-state parties in war and argued for the need to

recognize alternative criteria of parties in war as employed by the laws of war in the context of uprisings against foreign rule (this is the legal category of *leves en masse*). I described two approaches: identifying individual participants to non-state collectives based on attribution of certain characteristics (passive group formation), and identifying individual participants based on their own identification with collective members and shared practices adopted by the group members (active group formation). Based on this analytical distinction, I explained how the legal category of *levee en masse* may demonstrate the latter approach, but risks failing to effectively discriminate between combatants and civilians when applied to conflicts with collectives such as IS. Therefore, I argued that outside the context of uprisings against a foreign occupying power, combatant-status ought not be ascribed to participants in non-state collectives solely based on features such as carrying arms. Instead, active group formation should be used as a springboard to think about the application of the principle of discrimination. I argued that, to identify an individual as a combatant, she must share the practice of fighting and identify herself with other members of the army she is deemed to be fighting for. Identification with other members of the army may become visible by, for example, a distinctive dress or sign, or by views shared with others on the Internet. Maintaining the discrimination principle in wars with non-state collectives serves the purpose of limiting the field of battle by protecting civilians and civilian areas and objects from harm and destruction. In the next chapter, I discuss whether non-state combatants categorized as active members of non-state collectives with a political aim and some degree of popular support should be assigned combatant privileges.