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

Noorda, H.A.

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5

The Non-State Prisoner of War*

5.1 Introduction

In this chapter, I address the position of non-state combatants in wars between non-state actors and states and focus in particular on prisoner of war status. Prisoner of war status is conventionally assigned to combatants under the principles for wartime that separate *in bello* from *ad bellum* and allow combatants on both sides to use lethal force. Under this impartial set of principles, individual combatants are not held responsible for *ad bellum* matters, such as whether they wage an unjust war. Upon capture, combatants following the *in bello* principles of combat become prisoners of war regardless of their cause. Prisoner of war status grants combatants legal immunity for actions committed within the constraints of the *jus in bello* and gives an incentive to fight

* 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 have presented an earlier version of this chapter at the Interdisciplinary Workshop: Personal and Shared Intentions at the Max Planck Institute for Human Development in Berlin in 2012. I thank the members of the audience for their feedback. I am very grateful to Scott Shapiro for extensive feedback on an earlier version of this chapter.

within these constraints. Typically, this status is applied to state-combatants. However, I develop a framework for applying an impartial set of principles of war to non-state armies. In particular, I put forth criteria for assigning prisoner of war status to non-state combatants.

I build upon two strands of literature: just war theory, and theories on collective responsibility. It should be noted that although I position my argument in the tradition of just war theory, I do not argue that combatants are justified to kill. By contrast, I contend that they are immune from punishment for the purpose of regulating war. At times, I use just war theory's terms to express that combatants *may* kill enemy combatants, but I do not mean they are justified to kill enemy combatants (as in cases of self-defense under most domestic criminal law systems), are excused (like individuals under duress), or that they are denied responsibility (as insane individuals might be). On the contrary, the prosecution of such combatants by enemy forces should be barred; this gives combatants an incentive to fight within the constraints of *jus in bello*.¹³⁸

Just war theorists have attempted to include certain non-state actors as recognized actors in war. As we have seen, the main requirements of legitimate authority for non-state actors put forward by philosophers are the requirements of having a political objective and popular support. In Chapter 4, I extended these requirements by arguing that, in war, civilians should be distinguished from *active* members of collectives with a political

¹³⁸ Revisionists have questioned the permission to kill for an unjust cause because they do not believe that all combatants waging war in the advancement of an unjust aim are justified or excused from doing so (see Chapter 2). In this chapter, I do not argue that combatants are justified or excused from wrongdoing. By contrast, I argue they may in fact be responsible but are immune from punishment. Their prosecution should be barred for the purpose of regulating conflict.

objective and some popular support. In this chapter, I address an additional requirement for meeting the status of *privileged* combatancy—the requirement of being a member of a hierarchically organized collective. The laws of war require organizational structure for non-state collectives to be defined as parties in an armed conflict.¹³⁹ Some philosophers writing about war have recognized the importance of internal regulation of *in bello* rules by referring to the laws of war.¹⁴⁰ I build on this research by addressing the capability of non-state armies to regulate their own conduct in war as a requirement for non-state combatants to be assigned prisoner of war status. I argue that the requirements of having a political objective and being supported by (a part of) the population are necessary but not sufficient requirements for privileged combatant-status. Applying solely these criteria would imply that members of unorganized collectives should be assigned prisoner of war status, when they are not capable of regulating each other's conduct in war if there exists no command structure. This may contradict with the aim of the rules of war: regulating conflict. To support this claim, I mainly refer to the work of Scott Shapiro who offers an account of larger collectives with hierarchical authority structures, or what he calls 'massively shared agency.'¹⁴¹

¹³⁹ See Lubell 2010, 109; Limaj and others. IT-03-66-T. Judgment. 30 November 2005, par. 134 (setting out criteria for organized armed groups).

¹⁴⁰ See, e.g. Kutz 2005.

¹⁴¹ Shapiro 2002, 407; Shapiro 2014. (Shapiro draws on Michael Bratman's work on intentions and agency and extends Bratman's model by applying it to larger groups with authority structures). My focus on hierarchically organized collectives may be criticized by arguing that collectives may be horizontally organized as well. However, the purpose of this chapter is not to deny this. Instead, I address the function of prisoner of war status, which enforces *in bello* principles. As I argue in this chapter, having a hierarchical structure is a precondition for internal enforcement of *in bello* principles.

I first take a closer look at some present non-state actors in warfare and their organizational structure in section 5.2. In this section I recall the example of the Bosnian War and describe another example to illustrate my argument for assigning prisoner of war status to non-state combatants. Secondly, in section 5.3, I analyze hierarchically organized collectives in order to understand enforcement structures and what it means for the responsibility of individuals to be part of a hierarchical organizational structure. Finally, in section 5.4, I explore the implications of hierarchical authority structures within collectives and illustrate why non-state actors ought to be hierarchically organized to regard their members as privileged combatants.

5.2 Conflicts with Non-State Actors in Practice

Non-state actors play important roles in contemporary conflicts and some non-state actors are viewed as parties to wars. I give examples of three categories of non-state actors who may be considered as potential parties in armed conflicts: first, hierarchically organized non-state armies; second, non-state groups that are on the way to becoming hierarchically organized; and, third, unorganized non-state actors.

Bosnian Muslims who resisted against the Serbian forces during the Bosnian war between 1992 and 1995 are an example of the first category. According to the International Criminal Tribunal for the former Yugoslavia, the Bosnian Muslims were hierarchically organized after steps were taken to coordinate the

defense among them.¹⁴² This group was regarded as hierarchically organized for the period that they were commanded by Naser Oric, who was later prosecuted for committing war crimes. However, like many non-state collectives, the Bosnian Muslims who resisted against the Serbian forces in the Bosnian war were not always hierarchically organized during the conflict.

The Free Syrian Army is an example of the second category: collectives that seek to establish hierarchical organizational structure similar to a state army. The later fired and replaced military chief of the Free Syrian Army, Salim Idriss, said in 2013 he tried to unify the army by establishing a military chain of command. However, he had difficulties doing this. In Idriss's own words:

At the beginning of the revolution, they had to fight against a checkpoint. They had to fight against a small group of the army. Now they have to liberate an air base. Now they have to liberate a military school. Small units can't do that alone, and now it is very important for them to be unified. But unifying them in a manner to work like a regular army is still difficult.¹⁴³

A variety of groups worked under the umbrella of the Free Syrian Army and the question remained whether or not it could become a hierarchically organized military force. The Free Syrian Army, as many non-state armies, was not a fully hierarchically organized army.

Examples of the third category of non-hierarchically organized armies include resistance movements against foreign occupying powers, and, additionally, most uprisings by people

¹⁴² See, Prosecutor versus Naser Oric. ICTY-03-68-T. Judgment of the Trial Chamber. 30 June 2006. par. 137.

¹⁴³ Enders. May 7, 2013. *McClatchyDC*.

against their own government (like the Arab Spring and the February 2014 uprisings in Ukraine).¹⁴⁴

In this chapter, I focus on the first category: hierarchically organized non-state armies. Some non-state actors have (or at least aim to have) some degree of hierarchical structure while other non-state actors remain unorganized. What implications should the organizational structure of non-state parties to conflicts have on the status of individuals participating in such conflicts? I argue that some degree of hierarchy within the army is a necessary condition for receiving privileged combatant-status because in such structures supervisors can enforce *in bello* principles. In the next section, I develop a conceptual framework to identify hierarchically organized collectives, mainly analyzing hierarchically organized collectives outside the specific context of war. An analysis of authority structures within collectives helps understanding the difference between hierarchically organized armies and unorganized armies. This will be relevant for establishing moral and legal responsibility of individual combatants in war. Subsequently, I apply this general conceptual framework to the case of non-state armies and individual combatants taking part in such armies in section 5.4.

5.3 Hierarchically Organized Collectives

State-armies are examples of hierarchically organized collectives. Most state-armies have a strong chain of command. Usually, their uniforms and insignias display different ranks and roles within the hierarchy. Each state-combatant is subordinate to the person who is commanding her. In this section, I intend to set out a

¹⁴⁴ See, for example, Prosecutor versus Naser Oric. ICTY-03-68-T. Judgment of the Trial Chamber. 30 June 2006.

conceptual framework that identifies hierarchically organized collectives. This framework aims to address why participation in a non-state collective with a hierarchical organizational structure is a necessary requirement for prisoner of war status in light of enforcing compliance with *in bello* rules and minimizing harm involved in warfare. To develop a general conceptual framework for hierarchically organized collectives, I mainly focus on 1) responsibility of participants in hierarchically organized collectives for actions committed in war, and 2) enforcement structures within such collectives. In the next section, I employ the general conceptual framework to the case of non-state armies. This analysis will be useful in the next section where I argue that certain combatants are responsible but should be assigned prisoner of war status nonetheless.

Scott Shapiro's account of "massively shared agency" with authority structures helps us to understand hierarchically organized armies because his model covers large-scale collectives involving authority structures.¹⁴⁵ Shapiro starts by explaining authority structures for a two-person-model. I ground my argument on this approach because I believe it convincingly shows how both individuals share the necessary commitments in a horizontally organized two-person group. Subsequently, I follow Shapiro by detailing authority structures within larger collectives by generalizing and relaxing the requirements. Shapiro represents authority structures between two people engaging in a joint activity as follows: if two people engage in a joint intentional

¹⁴⁵ Shapiro 2002, 407; Shapiro 2014. Other models of joint activity do not include collectives with authority structures. See, for example, Bratman 1999. It is often the case that superiors use the threat of coercion in order to facilitate cooperation. This can be true of e.g. the captain of the sailing boat, and the military commander. They can misuse their position and coerce their subordinates, but often they use their position to facilitate cooperation. See, Shapiro 2002, 410-411.

activity, the superior has authority over the subordinate if and only if it is common knowledge between the superior and the subordinate that both intend the orders of the superior to be reasons for the subordinate to adopt the content of the order as a plan and to “mesh” the plans of the subordinate with the superior’s orders.¹⁴⁶ In an authority relation, both the superior and the subordinate have intentions about how certain orders of the superior are to give the subordinate reasons for action. For example, if two people are planning to sail around the world, by accepting the authority of the captain to give orders, the other person on the sailboat commits to harmonizing his sub-plans with the captain. In this case, the superior has a tool for achieving this mesh of sub-plans that the subordinate does not have. For example, in order for the superior to enforce her orders, she may punish her subordinate. Alternatively, the two can deliberate with one another until consistency between their plans is reached, but in such a horizontal relationship their plans may be reached less quickly than in a vertical relationship.¹⁴⁷ In this way Shapiro develops a theory of shared agency compatible with authority relations. In shared activities with authority relations, a superior can satisfy her commitment to meshing plans not only by discussing and negotiating, but also by ordering her subordinates and thus by imposing plans on her subordinates. This model focuses on cases of authority relations between two persons. I now describe authority relations within larger collectives.

Modifications are needed to apply the model of shared agency to armies involving authority relations between more than

¹⁴⁶ Shapiro 2002, 407. Following Michael Bratman, Shapiro uses the term “meshing” plans to describe the activity of bringing plans in harmony with the plans of someone else, and the term “interlocking intentions” to describe that each agent has intentions in favor of the efficacy of the intentions of the other.

¹⁴⁷ Shapiro 2002, 426-428.

two persons and to describe how authority structures within such larger collectives operate with active participation in a non-state collective. Shapiro models authority structures within larger collectives by generalizing and relaxing the requirements of the two-person model. I follow this approach in which the two person-model excludes collectives in which not all individuals share the necessary commitments. Shapiro proposes three modifications to the two-person model: Firstly, for the larger group with authority structure, he requires that most of the members share the group's intentions.¹⁴⁸ Universal commitment or mutual responsiveness from all members can only be required for small groups because in larger groups some members will not (fully) commit to the joint activity. Larger groups often have participants who are not (fully) committed to the joint task because they do not agree with certain specifics, or, for example, they are lazy, uninformed, indifferent, or they have other reasons for participating. Therefore, Shapiro argues that it is sufficient if most participants are committed to bringing about a joint activity.

Secondly, Shapiro argues that not everyone has to know the content of everyone else's intentions. It would not be feasible for members of larger groups with authority structures to meet this requirement. Therefore, Shapiro requires that the content of the intentions of the participants are accessible in some way. Public accessibility would suffice.¹⁴⁹

Thirdly, participants in a joint activity with an authority structure do not need to desire for successful group action. In large-scale activities, there are often participants who contribute to the group effort but are not committed to the success of the

¹⁴⁸ Shapiro 2002, 412.

¹⁴⁹ Shapiro 2002, 412. Similarly, Kutz argues that individuals are accountable for their actions if they conceive their actions as a means to the collective end and as long as information to the collective end is available. Kutz 2000, 157

group's overall goal. Therefore, Shapiro requires participants in such groups only to share a plan.¹⁵⁰ Participants need to "be committed to acting on the shared plan and engage in the joint activity because of that commitment."¹⁵¹ The commitment to a shared plan does not require that each participant intend that the group engage in the joint activity. Following Christopher Kutz, Shapiro calls this intention a "participatory intention." Kutz argues that individuals are at times alienated from the collective goal they contribute to. Some cases of collective action "involve individuals who see themselves as acting in concert, contributing to a collective end though they disavow that end."¹⁵² Including such individuals with participatory intentions as participants in a joint activity implies that each participant engages in the joint activity for different reasons. Thus, for example, a combatant might be interested in joining the army and contributing to group action solely for money's sake instead of envisioning the specific *jus ad bellum* cause of that war to be successfully completed. Such an active combatant identifies herself with the other combatants of the army she takes part in and has adopted shared practices of the army, but does not necessarily share the political objective of the army. Combatants may be alienated from the collective's aim but not from the other combatants. As Kutz argues, such individuals are responsible for the collective outcome they contribute to if they play a role in the collective and adhere to internal procedures.¹⁵³ Their participation needs to be voluntary

¹⁵⁰ Shapiro, 2014, 277-282.

¹⁵¹ Shapiro 2014, 279.

¹⁵² Kutz 2000, 102. Shapiro's account of shared activity is slightly less committed than Christopher Kutz' account of shared activity. According to Shapiro, participants intentionally contribute by knowing that following the plan will lead to contributing to the outcome. Here, I will not focus on the difference between these approaches, I instead focus on a concept that is used by both Shapiro and Kutz: participatory intention.

¹⁵³ Kutz 2000, 155-165.

to a certain extent, and they need to have access to information as described above.¹⁵⁴ As I argue in more detail below, combatants are morally responsible for the war they contribute to. However, this does not always imply that combatants should be held legally accountable. To the contrary, as I argue in 5.4, most combatants following rules of combat should not be held legally accountable, but should become prisoners of war (to be released at once after the end of hostilities) if captured by enemy forces.

Finally, for the larger group with authority structure, Shapiro allows for an impersonal authority relation, because authority is often tied to a position of power instead of to a particular person. In many cases, a reliance on personal authority causes instability when subjects have to agree on a new authority. The authority relation should therefore be impersonal. The idea is that the superior has authority by virtue of her role, while the subordinate is subject to that authority by virtue of her role. These roles are determined by certain qualifications. To illustrate, Shapiro gives the example of a group of friends intending to sail to a certain destination. These friends might have a rule that confers superior status on the person with the most experience in sailing.¹⁵⁵ Similarly, an army might have a rule that confers commander status on the combatant with a certain education and training. Thus, authority is determined by the qualification of, for example, a certain education or training and not by a person committing himself to the authority of a particular other person.

¹⁵⁴ One could argue about the extent to which participants voluntarily choose contributing to a collective end, however, this is not the focus of this chapter. Instead, I address a more general question about shared agency applied in the context of war: whether combatants who are responsible for contributing to war should be assigned prisoner of war status.

¹⁵⁵ Shapiro 2002, 412.

The function of the hierarchical structure is to unify the collective. In order for participants to be part of the same collective and for them to follow the same plans, they accept a hierarchical authority structure. Disputes between the members can be resolved and orders enforced within the hierarchical authority structure in the following way: either one participant will have the authority to resolve the dispute or to enforce the order, a third agent will have authority to resolve the dispute or to enforce the order, or someone will have the authority to allocate authority to another in order to resolve the dispute.¹⁵⁶ The purpose of hierarchy is to hold the collective together. Hierarchical authority structures are not necessary for the unification of the system, if one is willing to negotiate until consensus is reached, but if a collective wants stability, it needs a hierarchical authority structure. It must be sufficiently stable so to demonstrate that all members are participants in the same collective, and for them to follow the same plans.¹⁵⁷

This framework explains hierarchically organized collectives. For the purposes of this chapter, it is particularly useful to focus on the following aspects of this model: participatory intention, and the methods used to unify the collective by resolving disputes and enforcing orders within such collectives. Firstly, regarding moral responsibility, the framework shows that the leader of the hierarchically organized collective is not the only one morally responsible for the actions of the collective; subordinates can be morally responsible for contributing to the collective act as well. Such individuals are morally responsible for the collective outcome while not necessarily striving to achieve the collective goal. In other words, individual participants may be less committed to the collective goal while remaining morally

¹⁵⁶ Shapiro 2002, 420.

¹⁵⁷ Shapiro 2002, 420.

responsible to the outcomes of collective action. Having said that, it does not necessarily imply legal accountability, as I explain in the next section.

Secondly, regarding the rule enforcement and dispute resolution, the framework explains that disputes can be resolved and orders can be enforced in an efficient way within collectives with a hierarchical order. This will be useful for evaluations and recommendations made in the next section of this chapter, in which I apply the general framework of hierarchically organized collectives to non-state armies. I explain the difference between hierarchically organized armies and unorganized armies, and the implications this might have for prisoner of war status of individuals participating in such armies.

5.4 Organizational Structure of Non-State Collectives and Prisoner of War-Status

Under the laws of war and just war theory, individual participants in state armies can become prisoners of war instead of prisoners under criminal law when following *in bello* rules of combat.¹⁵⁸ This means they are not prosecuted for killing enemy combatants or for contributions made to reach the aim of the war. It also means they are released and repatriated at the suspension of hostilities. In this chapter, I claim that this privileged combatant status should

¹⁵⁸ International law and most versions of just war theory give limited room for non-state actors to become prisoners of war instead of prisoners under criminal law. Here, I provide a philosophical basis for applying the requirement of hierarchical organizational structure for combatants to be categorized as such.

be granted to participants in hierarchically organized non-state armies with a political objective and support from (a part) of the population. Firstly, I argue that combatants (commanders as well as lower rank combatants) can be morally responsible for their contributions to collective actions, despite most combatants functioning as Walzer terms “human instruments” of the political entity to which their actions contribute.¹⁵⁹ Secondly, I argue that certain combatants—although they might be responsible for their actions and the actions of the collective—should nonetheless *not* be held legally accountable. If participating in a hierarchically organized collective, a combatant should be assigned prisoners of war status upon capture when adhering to the principles of combat. This duality of moral responsibility and legal accountability is in accordance with the principles of war as set out in Chapter 2 of this thesis.

5.4.1 Individual Responsibility for Collective Actions

As argued above, individual members in a collective not intending the ultimate political aim of the collective in which they are participating are morally responsible for the outcomes of the collective actions if they have voluntarily contributed and had access to information about the collective’s aims. According to the principle of participatory intention, individual combatants might be morally responsible for the outcomes of the collective action if they accept a shared plan by assuming certain roles, adopting plans and practices that contribute to this plan, and revising their own plans so that they do not conflict with their superior. The subordinates themselves need not care about reaching the collective goal; the interest of combatants can lie in, for example,

¹⁵⁹ Walzer 2006a 36.

earning money. Nor do they have to know how the plan will be achieved. The subordinates only have to do what they are told.

We encounter similar examples of responsibility for collective actions in everyday life. We have all participated in collective actions for opportunistic reasons at one point or another. For example, I was raised in an environmentally cognizant family, and was aware of the ecological consequences of human actions, such as, for example, serving food in take-away cartons and plastic wrappings. In spite of this awareness, I took a summer job at a fast food chain during my time as a high school student. I did not share the object of polluting the environment by serving food in this way, however, my possibilities for summer jobs were limited, so I took the job. From the opportunistic employee's point of view, I might have collaborated only with some of my colleagues and I might have claimed not to share the ultimate object of my work. Although my view contradicted with contributing to the collective aim, in moral terms, my awareness of being a participant in a collective that serves food in environmentally unfriendly packaging undermined my opportunistic view of not sharing the collective aim of the company. As stipulated, to be responsible for contributing to the collective aim, my decision to work for the fast food company had to be voluntary to a certain extent, and I should have had access to information about the company's aims. I did not need to know everyone else's intentions; it is sufficient that the company's intentions were accessible. Certainly, the consequences of joining the army are on a different level, but combatants may similarly disapprove of the ultimate object of their actions. Still, they are, like any individuals with a participatory intention, responsible for their actions. Combatants who join an army but who do not necessarily agree with the *jus ad bellum* cause of war or disavow the actions of other combatants may be morally responsible if they have a participatory intention as contributors to the joint activity of waging war.

Both state combatants and non-state combatants may join an army while disavowing the actions of other combatants or the *jus ad bellum* cause of war. It is unlikely that all combatants joining armies committed to the same goals. A non-state army, for example, might not be able to find enough dedicated people to join their forces. Some non-state armies rely on combatants who are willing to do what was demanded in exchange for payment. The same goes for state armies. State armies often include combatants who joined the forces for financial or other reasons. Such alienated individuals might nonetheless be morally responsible for their actions if their decision to join the army was voluntary and the *jus ad bellum* cause of war was accessible to them.

A notable example in the context of war is the World War II case of Adolf Eichmann. Eichmann, charged with facilitating and managing the logistics of mass deportation of Jews during World War II, was morally responsible for his actions because he contributed to the collective aim by playing a role and adhering to procedures. Even if he would not have intended the collective action in which he participated (which he claimed himself), he should have nonetheless be held morally responsible. Ultimately, he had access to information about the authorities' aims. In addition, his contribution to the collective aim was more or less voluntary—he could have refused cooperation.¹⁶⁰ In Nazi hunter Simon Wiesenthal's words: "We know that one doesn't need to be fanatical, sadistic, or mentally ill to murder millions; that it is enough to be a loyal follower eager to do one's duty."¹⁶¹ Thus, while Eichmann claimed not to have intended the action of the collective, he was nonetheless morally responsible because he had access to information about the aims of the collective, he more or

¹⁶⁰ This is in line with Hannah Arendt's claim that by not refusing cooperation, Eichmann implicitly and directly supported the Nazi authority's aim. Arendt 2003, 46 (original work published in 1964).

¹⁶¹ Wiesenthal 1989.

less voluntary participated in the collective, and contributed to its actions.

Finally, individual members of a collective not intending the action of the collective in which they are participating can nonetheless be morally responsible for collective actions if they, 1) contribute to the collective action, 2) their participation is voluntary to some extent, and 3) they have access to information about the aims of the collective. This is applicable in times of peace as well as in times of war. However, in the case of individual participants in armed conflict, a difference should be made between being morally responsible and being held legally accountable for war actions in order to comply with an impartial set of principles for war, as detailed in Chapter 2. Although combatants who disavow the actions of other combatants or the *jus ad bellum* cause of war might be morally responsible for such actions, I argue that some combatants can nonetheless become prisoners of war. In certain cases, combatants may be morally responsible for the collective's actions, but should not be held legally accountable for such actions; they are prisoners of war instead of prisoners under criminal law.¹⁶² I argue that individual non-state combatants responsible for contributing to a collective action such as waging an unjust war could become prisoners of war when being part of a hierarchically organized collective and fighting according to the *in bello* rules of combat.

5.4.2 Prisoner of War Status

Prisoners of war are individuals taken by opposing armed forces during hostilities. Prisoners of war are immune from punishment for actions that are crimes under domestic criminal law but

¹⁶² Combatants violating *in bello* principles should still be prosecuted for their crimes.

constitute lawful actions of war, and at the close of hostilities they are released and repatriated. If combatants adhere to the *in bello* rules of conflict such as the discrimination principle, they can claim prisoners of war status upon capture under international law. As such, prisoner of war status is a means to uphold *jus in bello*, namely, to assign a combatant prisoner of war status upon capture is a means to reward her for adhering to the rules of combat. Not assigning a combatant such status and prosecuting her as a criminal ‘punishes’ her for not adhering to the rules. The preventive effect of the threat of being punished under criminal law thus serves to enforce *in bello* principles.¹⁶³ This performs the aim of minimizing the destructive consequences of warfare. Therefore, I argue for assigning prisoner of war status to non-state combatants following *in bello* principles.¹⁶⁴

¹⁶³ Other non codified means of enforcing *jus in bello* are, for example, offering the perspective of a better future relationship with the enemy of which the treatment of prisoners could be a part. See, for example, the reasons of the non-state actor the Kurdistan Workers Party to sign Geneva Call’s Deed of Commitment for the Protection of Children from the Effects of Armed Conflict. In the words of the commander of the Kurdistan Workers Party, Delal Amed: “We [...] hope that [signing and implementing the Deed of Commitment] will make a positive contribution to the ongoing talks between the Turkish State and Abdullah Öcalan of the PKK movement.” See, Geneva Call, Deed of Commitment. Accessed: May 3, 2016. <http://www.genevacall.org/how-we-work/deed-of-commitment/>. As of Spring 2014, Öcalan is captured by the Turkish government.

¹⁶⁴ The term non-state actors mainly reminds us of groups that are not likely to follow the laws of war, including groups I refer to in this thesis such as IS. Therefore, assigning prisoner of war status to such actors seems undesirable. However, a number of non-state actors have demonstrated willingness to comply with (some) *in bello* principles. The work of the non-governmental organization Geneva Call exemplifies that. Geneva Call promotes respect by armed non-state actors for the laws of war, focusing on improving respect for the discrimination principle. Non-state actors, including the Kurdistan Workers Party, have signed their ‘Deed of Commitment’, improving the protection of civilians

In some situations solely the opposing party provides reasons for complying with *jus in bello*, in other situations enforcement takes place within the collective itself. I first reflect on the former situation, before explaining why it should be preferable to enforce *jus in bello* within the collective as well. First of all, upon capture, the opposing (non-) state collective may prosecute individuals who do not follow *in bello* rules during combat, while those who do follow rules should be assigned prisoner of war status. The potential of prosecution for not following the principles of combat may have an impact on combatants' behavior during warfare. As such, enforcing *jus in bello* by assigning prisoner of war status to individual combatants who follow behave in accordance with the rules may limit the harmful consequences of war. The potential of being prosecuted for murder may prevent individuals from failing to obey the rules.

Secondly, individual combatants participating in a hierarchically organized collective are subject to an internal structure of law enforcement. The hierarchical structure of such a collective allows for the effective enforcement of *jus in bello* during hostilities. Ideally, combatants who are part of a hierarchical structure follow the orders of their superior and are punished if they do not adhere to *jus in bello*. In such an authority relation, both the superior and the subordinate have intentions concerning certain orders and how such orders give the subordinate cause for action. In larger groups, such as most armies, the superior has authority by virtue of a certain role while the subordinate is subject to that authority. By accepting the authority of the

by, for example, banning mines and protecting children in war. See, Geneva Call, Deed of Commitment. Accessed: May 3, 2016. <http://www.genevacall.org/how-we-work/deed-of-commitment/>. In addition, not all non-state actors deliberately disregard the principles of war. For example, some non-state actors try to protect civilians from their attacks by warning them.

military commander, subordinates commit to meshing their plans with those of the commander. The military commander does so by ordering her subordinates to act as she intends. To enforce her orders she may punish her subordinates. Thus, superiors can punish subordinate combatants for not adhering to the rules of combat during hostilities. Subsequently, superiors who do not enforce rules of combat may be held liable for not doing so by an (international) court or tribunal. In this way organized collectives may function as structures for enforcing *in bello* principles, with the aim to minimize harm and destruction involved in waging war.

Most state armies and some non-state armies have internal structures to enforce *in bello* principles. An example of a non-state army with an internal structure to enforce *in bello* principles is the group of Bosnian Muslims that took steps to coordinate the defense against the Serbs.¹⁶⁵ In addition to a form of specific deterrence, which may influence combatants by the prospect of being treated as a prisoner of war, the Bosnian Muslims were supposed to be part of a hierarchically organized collective and subject to an internal structure of law enforcement. Superiors of hierarchically organized collectives can in theory—and should—enforce *in bello* principles within their collective during hostilities.¹⁶⁶ If there is a hierarchical structure in which the subordinate combatants follow the orders of their superior, and punishment takes place if not adhering to such orders, enforcement should take place during combat as well.¹⁶⁷

¹⁶⁵ Prosecutor versus Naser Oric. ICTY-03-68-T. Judgment of the Trial Chamber. 30 June 2006, par. 137.

¹⁶⁶ Deliberating, negotiating, and battling can result in adhering to the rules of combat too, but these are presumably less efficient ways of establishing rule conform behavior in war.

¹⁶⁷ Many superiors do in fact not enforce *in bello* rules and should be prosecuted for not doing so. In the case of the Bosnian War, the

Therefore, I prefer endorsing a principle that assigns prisoner of war status to members of hierarchical organized armies because this may contribute to enforcing *jus in bello* by participating collectives. This view may help the aim of the laws of war: to regulate war and to minimize harm.

In sum, individual combatants may be morally responsible for their actions and for contributing to collective actions in conflicts. However, if one is an active member to a hierarchically organized collective and follows the rules of combat, they should be immune from punishment for crimes constituting lawful actions of war and should be released at the suspension of hostilities.¹⁶⁸

5.5 Conclusion

In this chapter, I added the requirement of being part of a collective with a hierarchical structure to the requirements of assigning prisoner of war status. Individual participants in

International Tribunal for Yugoslavia prosecuted Naser Orić for not enforcing *jus in bello*. ICTY, *Prosecutor versus Naser Orić*. ICTY-03-68-T. *Judgment of the Trial Chamber*. 30 June 2006, par. 329 (on what is expected from a superior in combat).

¹⁶⁸ In Chapter 4, I argued for including participants in *levees en masse* under the rules of war. Such individuals are not part of a hierarchically organized collective, but the specific context of a *levee en masse* may call for assigning combat privileges. In this specific situation civilians fight to protect themselves and fellow citizens by taking up arms against a foreign troop. As the aim of the rules of warfare is to regulate conflict to protect civilians, it makes sense to make an exception to the rule and to assign prisoner of war status to such unorganized groups of civilians. I do not delve into this topic here, but I would like to note that I hold the view that, in some specific situations such as a *levee en masse*, individual participants in unorganized collectives may be assigned prisoner of war status under current international legal rules.

hierarchically organized collectives are subject to their superiors who should enforce *in bello* principles. To my mind, individual non-state combatants should be treated as equal to state combatants before the law if they are active members of a hierarchically organized collective with a political aim and some degree of popular support. This is in line with applying an impartial set of principles of war to (non-) state actors, as I defended in Chapter 1 and 2.

I hold the view that, whether combatants should be assigned prisoner of war status should not depend on *jus ad bellum* questions of responsibility. Instead, it should be contingent on questions of responsibility of combatants for their unlawful conduct within a war. In other words, only those who follow *in bello* principles should be assigned prisoner of war status. The function of prisoner of war status is to prevent combatants from committing crimes of war during hostilities. In the same way of applying this status to state-combatants, employing this status to non-state combatants participating in hierarchically organized collectives should prevent them from committing crimes of war as well.