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

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**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].

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# 7

## Implications: The case of the Islamic State

### 7.1 Introduction

To explain my argument's implications for a conflict with a non-state actor, and to illustrate how the principles of war apply, I discuss one of the pre-eminent examples thereof: the Islamic State (IS), also known as the Islamic State of Iraq and the Levant (ISIL), the Islamic State of Iraq and Syria (ISIS), or Daesh.<sup>208</sup> I began this thesis by offering a range of questions regarding the application of principles of war to non-state actors. The aim of this chapter is to address these questions by applying my framework to the case of IS.<sup>209</sup> I address the questions raised in my

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<sup>208</sup> One could categorize 'IS' under the same heading as 'states,' but this may leave attacks such as those committed in Paris out of the picture. Treating IS as a non-state actor, not bound to a particular territory, allows space for responding to such force from a war perspective. Moreover, states have not yet recognized IS as a sovereign state.

<sup>209</sup> Recently, scholars have debated whether the war against IS is a just war. McMahan argues that the war in Syria is a just war for humanitarian reasons. James Pattison argues against this view. He holds that "Bombing ISIS is likely to kill civilians rather than protect them [...]". Moreover, he argues that the war is not justified on other grounds, as the threat of violence to individuals in Europe, Pattison suggests, is not posed directly by forces occupying cities across Iraq and

introduction that pertain to the particular non-state actor IS. Should IS fighters be treated as combatants, as criminals, or something in between? If members of IS should be treated under the principles of war, may states counter-attack IS on the territory of another state? How does one distinguish IS combatants from civilians? Should IS combatants be assigned certain combatant privileges, including prisoner of war status? And how should states respond to individuals suspected of contributing to IS without actively taking part in combat? Subsequent to addressing these questions, I discuss the theoretical implications of exposing just war theory to issues of non-state actors in the conclusion of this thesis.

In the previous chapters, I illustrated my argument by utilizing several conflicts of states with non-state actors, including terrorists, revolutionaries, and individuals rising up against foreign power. I selected my examples from a broad range of incidents in which non-state actors are deemed at the fault line between war and peace. For instance, the case of Nada illustrated the impact of measures imposed on supposed terrorists under the crime paradigm, and the case of Osama Bin Laden exemplified the issue of sovereignty of states when killing individuals on the soil of another state. Essentially, the function of this chapter is to express the implications of my argument in its entirety.

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Syria. In addition, Walzer holds that the success condition is not met, because the alliance is lacking an agreed upon end. In a similar vein, Finlay points to the complexity of the debate by arguing that, in fact, several wars are waged in the region. See, the following blog posts: McMahan November 30, 2015; Pattison December 4, 2015; Walzer December 3, 2015; Finlay February 16, 2016. I focus on applying principles of war to the case of IS, primarily addressing principles of *in bello*.

I begin by summarizing the main facts of this case as well as the main characteristics of IS as a non-state actor.<sup>210</sup> IS is a non-state actor engaged in armed conflict in Iraq and Syria, and operates in other areas including Lebanon, Libya, North and West Africa, and South and Southeast Asia.<sup>211</sup> Since 2014 the Syrian city Raqqa has been considered the *de facto* capital of IS.<sup>212</sup> IS's main aim is to found an Islamic state that complies with a particular interpretation of Islam.<sup>213</sup> Pursuing this goal, IS has committed deeds generally regarded as crimes (of war), including the beheading and burning of combatants, journalists, aid workers, and the killing and otherwise harming of civilians.<sup>214</sup>

I argue that non-state combatants who violate *in bello* principles and commit war crimes should be prosecuted. However, if a conflict with a non-state actor is perceived as war, non-state combatants should be treated in a similar way as state combatants and thus not be prosecuted for killing an opposing combatant if following rules of combat. That is, the application of the principles of war should bar the prosecution of IS combatants unless they violate *in bello* principles and commit crimes. In my interpretation, just war theory asserts that, under specific conditions, state armies and non-state armies must be treated alike. As I argue, this still implies that most IS combatants should be prosecuted for committing crimes, because the great majority

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<sup>210</sup> I based my arguments on facts described by news-articles read up until the moment of writing, February 2016.

<sup>211</sup> Many Islamic groups have pledged allegiance to IS. Boko Haram operating in North and West Africa, and a splinter group of Pakistan's Taliban are examples of groups that have pledged allegiance to IS. See, among other sources, Fadel November 18, 2014, *NPR*.

<sup>212</sup> Hisham. January 14, 2016. *New York Times*.

<sup>213</sup> For an overview of the various lines of thought in Islamic thinking on the institution of an Islamic state, see, Al-Dawoody 2015, 101-117.

<sup>214</sup> See, for example, "Islamic State militants kill two Iraq journalists." 14 October 2014. *BBC*.

do not follow *in bello* principles. However, it makes sense to separately address the question of whether or not a non-state combatant complies with the rules because this may help enforce such rules. On top of that, a number of other non-state actors have demonstrated willingness to comply with (some) *in bello* principles.<sup>215</sup>

It is important to note that, although I have developed a just war theory for conflicts in which non-state actors are involved, I do not argue that responding with force is the most preferable approach to non-state violence. In other words, I do not argue that states *should* treat members of non-state collectives meeting the requirements in this thesis under principles of war, instead of treating them under, for example, principles of criminal law. Rather, I argue that such members *may* be treated as combatants by opposing forces if meeting these requirements. As maintained in Chapter 1, applying principles of war should be a last resort and the application of principles of criminal law should have priority over the application of principles of war. Similarly in cases of wars between states, it is preferable not to resort to war against non-state collectives if other options are available.<sup>216</sup> The principles I put forward in this PhD thesis aim to limit harm involved in responding to non-state combatants. Although I argue that members of IS may be treated as non-state combatants, this

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<sup>215</sup> Concentrating on IS shifts our focus away from non-state combatants who are more likely to comply with the rules. As I mentioned in Chapter 5, a number of non-state collectives have signed the ‘Deed of Commitment’ of the non-governmental organization Geneva Call, which mainly improves the protection of civilians in war. Additionally, some non-state actors try to avoid killing civilians by warning civilians. For example, the Italian Red Brigades and the Basque separatist collective ETA warned by calling before attacking.

<sup>216</sup> I discussed the requirement of last resort in Chapters 1 and 2, but do not go into detail about when other resorts are exhausted in this thesis. I assume there are situations in which other measures are exhausted and mainly focus on the application of *in bello* principles to such conflicts.

does not mean it is the most preferable approach. Even in the case of highly dangerous individuals, such as supposed IS members, other measures should be exhausted before resorting to a war in self-defense against them.

In this chapter, I explain the case of IS by applying the requirements non-state actors should meet under the war paradigm held in this thesis. I will proceed as follows: in section 7.2 I apply the sovereignty principle this thesis outlines to the case of IS by focusing on the sovereignty of Iraq and Syria. I subsequently discuss in section 7.3 the requirements of political objective and popular support with regard to IS as a non-state collective. If my description of the case is correct, I conclude that IS may be considered as a non-state collective under the principles of war. In section 7.4 I focus on the rights of individual IS combatants under the principles of war and discuss the organizational structure of IS and the implications for privileges, including prisoner of war status. In section 7.5, I address discrimination between IS combatants and civilians. Finally, in section 7.6, I address the treatment of civilians associated with IS who do not meet the requirements of combatant status under criminal law systems.

## 7.2 Counter-Attacking IS on the Territory of Another State

American-led forces have launched air strikes on IS in both Syria and Iraq, raising the question if the sovereignty of Iraq and Syria has been obstructed by the use of force against IS.<sup>217</sup> As addressed

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<sup>217</sup> The Netherlands has joined American forces. See, “Kabinet Akkoord met Bombardementen op IS in Syrië.” January 29, 2016. *NRC*.

in Chapter 3, the principle of sovereign equality dictates that states have the primary right to prevent individuals on their territory from committing violent actions that include attacks on other states. Therefore, using armed force against IS on the territory of Iraq and Syria is not only regarded as disrespectful to the sovereignty of those states but can also constitute an act of aggression against those states. Using armed force can even constitute an armed attack if the response to the non-state actor, in this case IS, does not meet certain requirements. In other words, it brings into question whether such interventions respect the principle of sovereign equality.<sup>218</sup> Exercising the sovereignty principle will result in varying outcomes depending on the states where the principle is applied. Regarding the case of IS in Iraq, such attacks do not disrespect the state's sovereignty, because the American-led intervention in Iraq, which started on June 15, 2014 was at the invitation of the Iraqi government, and explicitly in response to attacks conducted by IS. As a consequence, they are in line with the sovereignty principle. The Iraqi government invited troops on its territory and, thus, expressly consented to the use of force on its territory.

The situation concerning operations against IS in Syria differs from the situation in Iraq. The Syrian government never formally requested the US to assist in fighting IS forces and the Syrian government did not explicitly consent to use of force on its territory. However, under present circumstances, the Syrian government appears to be unable or unwilling to prevent IS attacks against other states from its territory. Therefore, counter-attacking IS in (parts of) Syria seemingly beyond the control of the Syrian government should not be regarded as impeding the

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<sup>218</sup> I do not address the question of whether the threat of force posed by IS towards the US meets a standard that gives the US a right to defend. Rather I assume this is the case and address the question of whether the US may respond in self-defense on the territory of other states.

sovereign equality of Syria; the state has been unable or unwilling to prevent IS to launch attacks from its territory. However, it is dubious if the attacks are exclusively directed towards IS and do not target other areas, objects or individuals. This issue is relevant to the discrimination principle, which I will address in section 7.5. First, I attend to the preliminary issue of whether or not IS should be treated under the principles of war.

### 7.3 IS Political Objective and Popular Support

The status of IS as a non-state actor under the principles of war should be determined by, among other things, whether IS has a political objective and enjoys popular support. Addressing this is crucial for determining whether IS holds the authority to use force in self-defense under the principles of war and, thus, whether states may respond with warlike measures to the actions of this collective. The requirements of having a political objective and some degree of popular support are decisive for determining whether principles of war may be applied. Ultimately, it enables distinguishing between non-state actors involved in war from criminal groups and civilians. In this section, I assess whether IS meets this requirement; in the next section I discuss the requirement of being hierarchically organized.

In regards to the requirement of popular support, IS does indeed seem to enjoy some level of popular support at least among some parts of the population for their war in the advancement of establishing an Islamic state. More particularly, IS seems to enjoy popular support within the territories under its control. Support



for IS is growing, particularly in Sunni areas.<sup>219</sup> In addition, IS appears to attract support from at least some factions of Muslims across the world.<sup>220</sup> I endorsed the argument that popular support is needed to wage war in the growth of a political aim. It is likely that IS meets this requirement.

Second, IS's objective is to found an Islamic state or *caliphate*: a state ruled by one single political and religious leader consistent with a radical interpretation of Islamic law. In the territories under its control, IS enforces a harsh interpretation of Islamic law.<sup>221</sup> In Chapter 4, I argued that to demarcate the scope of war so that it does not encompass ordinary criminal violence, non-state collectives should meet the requirement of having a political objective. I defined political objective broadly: including just and unjust political aims. Some argue that only individuals participating in collectives waging war to further a just political objective should be categorized as combatants. This excludes individuals fighting unjust wars, for example, individuals fighting for IS. In contrast, I interpret the political objective as a formal requirement, because it gives combatants incentive to discriminate between targets of attack. Such an approach is agnostic toward the content of the political objectives and thus includes both non-state actors with just *and* unjust political objectives under the principles of war.<sup>222</sup> IS's objective to establish an Islamic state is a political objective that, in concomitance with other requirements set out here, qualifies its combatants for treatment under the principles of war. The purpose of including IS

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<sup>219</sup> Barnard and Arango. June 3, 2015. *New York Times*.

<sup>220</sup> For information on popular support from citizens of territories under IS control, see: Welsford. 2014. *Institute for Islamic Strategic Affairs*.

<sup>221</sup> "What is Islamic State?." September 26, 2014. *BBC*.

<sup>222</sup> The political objective of a particular non-state actor may still be an unjust cause under principles of *ad bellum*, however, this should not exclude non-state combatants fighting for this aim from being treated under principles of *in bello*.

under the principles of war is to provide us with a means to regulate the conduct of IS combatants, to prevent them from excessive uses of violence, and to minimize the destructive consequences of war.

I now turn to the requirement of being hierarchically organized, which includes questions about privileged combatant-status.

## 7.4 IS Prisoners of War

Applying an impartial set of principles of war to the case of IS implies applying the principle of equality of state combatants to IS combatants. This means IS combatants on one side of conflict and state combatants on the other side of conflict should be treated equally, even if their cause for war is unjust. In other words, combatants on both sides of the conflict may be targeted and killed and enjoy privileges in combat, including prisoner of war status, as long as they adhere to the *in bello* principles of war. The question of whether IS is a non-state actor that should be treated under such principles of war depends on their organizational structure.

Most IS combatants do not seem to be fighting according to rules of combat. Therefore, it may seem counterintuitive to treat IS under the principles of war. I argue that IS combatants should not be categorically treated as criminals because IS seems to have an organizational structure in which principles of *in bello* can be enforced. I argue for including the hierarchical structure requirement because individual participants in hierarchically organized collectives are subject to their superiors, who can, in principal, enforce *jus in bello*. By accepting the authority of the military commander, the subordinate combatants commit to meshing their plans with the commander. The military

commander may order her subordinate to act and she may punish her subordinate. Thus, superiors can punish subordinate combatants for not adhering to the rules of combat during hostilities and can be held accountable for not doing so. In this way, organized collectives should function as structures to enforce *in bello* principles and minimize the harm involved in waging war. Therefore, all combatants in hierarchically organized collectives following the rules of combat should become prisoners of war if captured by the enemy forces, despite the justice of the cause for which they are fighting.

Although my knowledge of IS is limited to regular news sources, the group appears to be hierarchically organized. IS leader Abu Bakr al-Baghdadi is the commander in chief, or caliph. He has a cabinet of advisors, deputy leaders, and governors. Beneath the leaders are councils on military matters, legal matters, finance, leadership, foreign fighters, security, and intelligence. In addition, a special council has the task of making sure all decisions are aligned with IS's interpretation of Islamic law.<sup>223</sup> As such, IS appears to have a command structure in which principles of war could potentially be effectively enforced. However, it is not very likely that superiors within the hierarchical structure of IS would enforce *in bello* principles because there is no evidence they have done so in the past. IS superiors who do not enforce rules of combat should be held liable for not doing so by (international) tribunals. In this way, my approach distributes accountability according to the command structure of IS similarly to the way superiors in state armies would be held accountable for actions of their subordinates.<sup>224</sup>

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<sup>223</sup> Thompson and Shubert. January 14, 2015. *CNN*; Schmitt and Hubard. July 20, 2015. *New York Times*.

<sup>224</sup> Analogously, in the case of the Bosnian War, the International Tribunal for Yugoslavia held Naser Orić liable for not enforcing the rules

It might sound counterintuitive to categorize IS under the principles of war. However, non-state actors do not have to actually enforce *in bello* principles to be categorized as parties in war. A party in war should have an organizational structure in which *in bello* principles can be enforced. I do not argue that IS meets all *ad bellum* criteria, because IS's aim to found an Islamic state might not be a just cause for waging war, still, they should be subjected to principles of war if they meet the criteria of being a hierarchically organized collective with a political objective and some popular support. If IS meets these criteria, IS's leaders waging war in the advancement of an unjust cause should be held accountable for not meeting requirements of *ad bellum*, but IS combatants should not be prosecuted for killing other combatants if adhering to *jus in bello*.

That non-state combatants participating in such non-state actors should be assigned prisoner of war status depends on whether, as individuals, they have complied with *in bello* principles. Similar to wars with states, this should be a matter of *jus in bello* and not a matter of *jus ad bellum* as detailed in this thesis. If non-state combatants have complied with the principles of *in bello*, they should be assigned prisoner of war status when captured during hostilities, and they should be released and repatriated at the close of hostilities. If non-state combatants have not complied with *in bello* principles, they should be prosecuted for their actions, just as state-combatants should be prosecuted for their actions if not complying with *in bello* principles. Meaning, IS may meet the requirements for being a party in war, while IS's combatants violating principles of *in bello* such as killing civilians, do not enjoy prisoner of war status but should instead be considered as war criminals. However, the question remains

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of war. Prosecutor versus Naser Oric. ICTY-03-68-T. Judgment of the Trial Chamber. 30 June 2006.

whether a particular individual suspected of fighting for IS is indeed an IS combatant and how to discriminate between such combatants and civilians. I now turn to this issue by applying the principle of discrimination to the case of IS.

## 7.5 Discriminating Between IS Combatants and Civilians

Most IS combatants do not show their membership with IS by wearing a uniform or a distinctive sign. In addition, both IS combatants and civilians may carry arms. How should one discriminate between such non-state combatants and civilians? In this section, I assume that some members of IS should be treated under the principles of war and use the case of IS as an example to illustrate my argument on applying the discrimination principle in wars where combatants do not wear a uniform. The issues that arise when applying principles of war to the case of IS touch to the core of applying the discrimination principle to conflicts with non-state actors. In addition to identifying IS as a party in war, we need to identify individuals as members of this collective in order to be able to discriminate between non-state combatants fighting for IS and civilians. To discriminate between IS combatants and civilians, I require that IS combatants actively identify themselves with each other and share IS's group practices. In this section, I apply the concept of active group formation as set out in Chapter 4 to IS combatants and explain how this concept helps developing criteria for discriminating between combatants and civilians.

To regard an individual as an active member of IS, she should meet the following requirements: 1) share the practice of fighting with IS, and 2) identify with IS members. The first requirement will be met by those fighting for IS. Individuals who merely identify with IS but who do not share their practices of

fighting, should not be considered combatants. An example is the case of Tareena Shakil, a British woman who travelled to Syria to join IS as a so-called “jihadi-bride.” According to an official who leads counterterrorism investigations in the U.K., Shakil’s tweets on the Internet showed that she had clear intentions to join IS when she left the U.K.<sup>225</sup> her tweets might prove her identification with IS, but it shows no evidence of Shakil sharing the practice of fighting with IS combatants. Supposed “jihadi-brides” who do not share the practice of fighting may be in violation of criminal law, but they should not be regarded as combatants. By contrast, individuals travelling to Syria to join the armed forces may meet the requirement of sharing practices with IS once they take up arms. The requirement of sharing the practice of fighting does not, however, distinguish armed civilians from combatants.

The second requirement, identifying with fellow IS members, includes members who joined the army to contribute to founding an Islamic State as well as members who joined for financial reasons. As I detailed in Chapter 5, I do not require all members of an active group formation to be committed to the political objectives of that group. In smaller groups all members may be committed to the objectives of the collective, but this should not be required for being an active member of a larger collective. IS is a larger collective. Some participants 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. Combatants who are not identifying with IS’s ultimate political objective to found an Islamic State may be seen as active members if they identify with IS members and share their practices. Thus, combatants who joined IS for financial reasons while not sharing the objective to establish an Islamic State should be categorized as IS combatants. When IS took over

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<sup>225</sup> Stack, January 29, 2016. *New York Times*.

Raqqa, some civilians remained because they were too poor to leave. They are now suffering under a harsh regime, in which almost every day, people are executed, whipped in the streets, accused of violating Sharia law, or of being spies. IS gives people the choice to escape this situation and to earn a good salary by fighting for them.<sup>226</sup> Such individuals may not have joined IS because they share IS's ultimate objective to found an Islamic State, but they may meet the identification requirement because they identify with IS members.

The identification requirement prevents attributing warlike characteristics, beliefs, and practices to individuals who share a specific attribute with IS, such as carrying weapons in conflict zones. Identifying individuals by such features should not be a ground for distinguishing them from civilians. Features such as carrying weapons may distinguish individuals from other individuals not carrying weapons, but such features are not constitutive of being an IS combatant. Carrying weapons is not necessarily a marker for belonging to a collective that shares the political objective to establish an Islamic state by waging war. Particularly, this is not the case in a conflict zone in which civilians might need to protect themselves against violence. Even if being armed for the purpose of self-defense is not allowed under domestic laws, such individuals should be treated rather as civilians than as combatants. Identification with IS by IS combatants may go hand-in-hand with categorization by others based on particular attributes such as carrying a weapon, but armed individuals do not necessarily identify themselves with IS.

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<sup>226</sup> A fighter starts out earning about \$200 a month, receives additional money for wives, children, slaves, and provisions, raising his monthly income to more than \$500. In addition, the Islamic State will provide a fighter with a house within two months. See, Hisham. January 14, 2016. *New York Times* (on motives for citizens of Raqqa to join IS in Syria).

To the contrary, many armed individuals may, in fact, carry arms to defend themselves against IS.

Unfortunately, there is no way to articulate identification with a collective in legal criteria other than by ascription. Members of armies may make their identification with a collective visible in several ways ranging from wearing a uniform or insignia, to posting their views on the Internet. Based on such expressions, outsiders may ascribe membership of a particular group to those individuals. The November 2015 Paris attacks is an example. On the evening of 13 November 2015, a series of attacks occurred in Paris killing 130 people and injuring 368. One of the perpetrators was Abdelhamid Abaaoud. As one of the perpetrators of the Paris attacks, he met the requirement of sharing practices with IS members. In addition, Abaaoud met the requirement of identifying with IS members because he expressed his identification with fellow IS members by, taking part in IS's propaganda films and posting his views on the Internet.<sup>227</sup>

By contrast, individuals who identify with IS while not being engaged in fighting should not be regarded as combatants. Examples include the aforementioned case of Shakil who travelled to Syria to marry an IS combatant, and individuals who attempt to convince others to join IS forces while not joining the forces themselves. Such individuals may be prosecuted for crimes if having committed criminal offences, but they should not be regarded as combatants. In the next section, I address civilians associated with IS who do not meet combatancy requirements.

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<sup>227</sup> Higgins and De Freytas-Tamura. November 9, 2015. *New York Times*.



## 7.6 Civilians Associated with IS

A day after the Paris attacks, on November 13, President Hollande declared a state of emergency. The state of emergency in France expanded the powers of the state, allowing the police to conduct raids of homes without judicial review at any time, and placed hundreds of individuals under house-arrest without having evidence of wrongdoing and without the prior authorization of a judge. These individuals needed to check-in with a police station three times a day.<sup>228</sup> The purpose of these measures was to prevent targeted individuals from participating in or contributing to acts of violence.

The state of emergency in France has been criticized because it had limited effects in terms of fighting against terrorism, while at the same time, greatly restricted individual liberty and autonomy of subjected individuals.<sup>229</sup> I take up these concerns by proposing limits to such constraints based on the framework I offered in Chapter 6. I focus on preventive constraints on individuals suspected of being associated with IS that can lead to restrictions on liberty similar to imprisonment and disrespect for the target's autonomy. I consider constraints that have been imposed on individuals suspected of being associated with IS by focusing on house arrests and I apply the guidelines developed for setting appropriate limitations on the use of such constraints.

Individuals suspected of being associated with IS who do not meet the requirements of being an IS combatant should not be treated as combatants. Such individuals include, e.g., those sympathizing with IS while not being involved in fighting, those contributing by other means than fighting including by providing

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<sup>228</sup> See Rubin. February 17, 2016. *New York Times*. In the Netherlands, similar measures have been proposed.

<sup>229</sup> See Breeden. February 3, 2016. *New York Times*.

IS with food, shelter, funds, and munitions, and those storing, carrying or using arms while not identifying with IS. They should be protected from the consequences of war and, if suspected of participating in criminal activities, be subjected to a mainly deontological framework ideally reflected by criminal law systems and not by a framework that (partly) applies principles of war.

The state of emergency in France treats individuals as somewhere in-between combatants and civilians. This approach has often been seen as acceptable in the fight against terrorism, subjecting individuals to (preventive) sanctions, (preventive) imprisonment, or targeted killings without assigning them proper legal protections. I contend that regarding members of non-state actors as in-between the categories of combatants and civilians is problematic because it neither gives non-state combatants the right to wage war or to be assigned prisoner of war status upon capture, nor does it provide civilians with proper legal protections.

One of the measures imposed on suspected individuals are house arrests. House arrests may lead to a form of partial 'exprosonment' as described in Chapter 6 of this thesis. Under the state of emergency in France, some individuals subjected to house arrests were even forced to quit their jobs. They had to check in with the authorities three times a day and thus could not leave their house to go to work.<sup>230</sup>

This imperils the free and autonomous life of targeted individuals, as they are not able to live their daily lives and to participate in society. Therefore, such measures should generate legal protections. Such a relatively comprehensive form of 'exprosonment' employed on individuals for a relatively short time could be applied as a last resort, but not for longer than investigations reasonably require. Such constraints should be subject to court oversight. A house arrest may be justifiably

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<sup>230</sup> See Breeden. February 3, 2016. *New York Times*.

imposed temporarily to prevent the targeted person from committing crimes during investigations. House arrests should be based on individual assessments of risk to rule-out group constraints that are imposed on categories of persons. I argued that the fact-finding stage should be subject to protections, including post-targeting notice, transparency regarding the criteria for being targeted, an opportunity to challenge the application of the constraint, and regular assessments of individual risk to guarantee that the constraint remains proportionate to the security need.

## 7.7 Conclusion

In this chapter, I applied my framework to the case of IS. If I rely on a correct description of this case, we can conclude that IS is a non-state actor that can be treated under the principles of war because they meet the requirements of having a political objective, enjoying popular support, and are relatively hierarchically organized. This means that IS has the potential to wage wars and be the subject of the use of force by other parties. Of course, this does not imply that IS is waging an *ad bellum just* war, because they might not meet the *ad bellum* requirement of having a just cause for war. Similar to government officials of states who initiated unjust wars, those ranked higher in the hierarchy of IS should be prosecuted for not adhering to *ad bellum* principles.

I do not delve into the details regarding requirements of *jus ad bellum*, such as e.g. just cause, I instead focus on issues characteristic of wars with non-state actors, including the issue of counter-attacking on the territory of another state and on issues regarding the application of *jus in bello* to IS combatants.

With respect to the use of force by states defending themselves against this non-state actor, I argued that, provided

that other requirements of self-defense are met and my description of the case is correct, IS may be counter-attacked on the territory of Syria and Iraq. As described in news articles, Iraq consented to the use of force on its territory and Syria is unwilling or unable to control IS.

Regarding individual members of IS, I have set a first step in distinguishing IS combatants from civilians by arguing that IS combatants who meet the requirement of manifesting identification with IS members and sharing their fighting practices can be regarded as combatants. I expressed concerns over an alternative approach of identifying IS combatants based on overlapping features between IS combatants and other individuals, including carrying weapons. I presented requirements for avoiding such pitfalls. I outlined these requirements to serve the purpose of governing the treatment of non-combatants in warfare and protecting civilians from the harmful consequences of it.

In addition, I expressed concerns in viewing individuals suspected of association with IS, who do not meet combatancy requirements, as somewhere in between combatants and civilians by neither assigning them combat privileges nor providing them with safeguards under criminal law. I focused here on house arrests imposed on individuals after the Paris attacks. I argued that imposing such constraints on individuals associated with IS who do not meet the requirements of combatancy should generate legal protections under criminal law.

Categorizing IS as a party in war, and identifying those who are active members of the armed forces of IS as combatants implies that the principles of war bar the prosecution of IS combatants unless they kill in violation of the principles of war. Combatants charged with murder or other crimes under criminal law may raise the defense of combatant immunity, which enjoins prosecution under criminal law irrespective of such wrongdoing. However, the principles of war bar the prosecution only of

combatants who use force without also violating *in bello* principles of war. Under *in bello* principles of war, some killing is permitted while other killings are not. Killing of combatants in warfare is, in general, permitted, while killing of civilians is, in general, not permitted. IS combatants who have killed civilians or otherwise violated the principles of war should be prosecuted for such crimes, because the principles of war do not bar the prosecution of combatants violating the principles of war. Non-state combatants violating principles of war are not immune from punishment. Thus, IS combatants involved in, for example, the killing of journalists, aid workers, civilians, and prisoners of war, should be prosecuted for such crimes.