



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.

8

Conclusion

Historically, states were seen as the main authorities to wage war under just war theory. Most scholars in the tradition have argued that, for a war to be *ad bellum* just, a *legitimate* or *right authority* should wage it. Often, just war theorists have argued that this implies that states have the right to wage war while non-state collectives or individuals do not. International law corresponds by and large with just war theory and gives combatant rights primarily to those fighting for states. I positioned my theory in the just war tradition, which sets out principles for conduct in war (*in bello*) independent from the principles for resorting to war (*ad bellum*). Just war theory characteristically argues that combatants should be treated as equals, regardless of whether they are fighting a just or unjust war. This approach has, as of yet, been limited to wars between states. I have opened this approach to addressing issues of non-state actors involved in warfare. Most importantly, I have argued that, under certain conditions, the principles of just war theory should be equally applied to state and non-state combatants. I contrasted my approach with alternative approaches to wars with non-state actors, reflected on my reasons for endorsing just war theory, and addressed what opening just war theory to undertaking issues of non-state actors involved in warfare implies for the theoretical framework of this theory.

One of the most prominent forms of conflict today are ones which involve non-state actors. The topic of war with non-state

actors has been approached mainly from perspectives that do not hold to the core principles of just war theory. It has been approached from a revisionist perspective excluding members of supposed unjust collectives from being treated under principles of war; and from a hybrid perspective treating such excluded individual members of supposed unjust non-state collectives as in-between combatant and civilian. Both these approaches have been widely discussed and criticized in the literature. As I emphasize in Chapter 2, applying these frameworks to wars with non-state collectives fails to give sufficient reason to discriminate between targets of attack and may withhold members of non-state actors rights under the principles of war and criminal law. I argued against the first approach applied by scholars who extend justifiable use of force to non-state actors with supposed *just* political aims (e.g. Kutz Finlay), because it leaves the conduct of combatants waging unjust wars unregulated. Alongside the principles of war that mainly regulate conflicts between states, I argued that the application of *in bello* principles to non-state combatants should be separated from questions regarding the justness of the aim of their war.

Additionally, my arguments contrast with the second approach defended by scholars who position non-state combatants in-between civilians and combatants by arguing they can be attacked in a similar way as combatants, yet without assigning them similar combat privileges (e.g. Fotion, Meisels, Gross). They assume that all non-state collectives pursue unjust objectives and use this as grounds for treating members of such collectives neither as civilians nor combatants. This view on war with non-state actors is problematic because non-state combatants risk finding themselves in a normative vacuum without any legal protection whatsoever. They are neither given the right to defend themselves or assigned prisoner of war status upon capture, nor the rights customarily granted to suspects under criminal law. I addressed these concerns and claimed that such individuals

should either be regarded as combatants or as non-combatants. I established conditions for applying just war theory to conflicts with non-state actors, and did so by explaining under which conditions principles of war or criminal laws should be applied to individuals associated with such non-state actors.

Throughout this thesis, I supported the main principles of just war theory, especially the separation of *in bello* principles and *ad bellum* principles, and the concomitant principle of equality of combatants. The chief reason I embed my theory in the just war tradition is because I support the idea that applying the core principles of this theory will most likely limit harm to all parties involved in conflict. I agree with a theoretical path that, as of yet, has not been taken by the literature on conflicts with non-state actors. This method revolves around the idea that non-state combatants should be treated similarly to state combatants. Scholars who have defended the approach of extending justifiable use of force to certain non-state collectives have not set out specific conditions for treating such collectives as parties under principles of war nor addressed the application of *in bello* principles to the members of such collectives (e.g. Held, May). To fill this gap, I developed a theory for war with non-state actors by providing under which conditions non-state combatants should be treated similarly to state-combatants.

I argued that an individual associated with a non-state actor should be either considered as a combatant *or* as a civilian, closing the door to a legal treatment in which they are ascribed a hybrid, in-between status. If an individual is considered a combatant, she should be assigned similar rights, duties, and obligations as state combatants under principles of war. Alternatively, if an individual is considered a civilian, she should be protected from war and be assigned due process rights if suspected of crime. The several chapters of this thesis established how the status of either combatant or civilian should be determined. My approach extensively analyzes the various factors relevant to this

determination, concerning both the non-state collective and the role of the individual therein and stipulates their rights as civilians or combatants respectively.

As just war theory does not give much guidance in furnishing conditions for applying principles of war to members of non-state collectives, I relied on sources outside the philosophical literature on war: literature based on, among other topics, group formation and collective responsibility. By using concepts developed in this literature, I presented an account in which principles of war be applied to a specific category of individuals: combatants fighting for and manifesting their identification with a supported and hierarchically organized non-state collective that wages war in the furtherance of a political aim. Such individuals should be considered as active members of the armed forces of that non-state collective and should be treated similar to state-combatants. This implies that individuals meeting these standards should be assigned similar rights, duties, and obligations as state-combatants under principles of war. This encompasses the right to fight and to receive prisoner of war status when captured, as well as the right to be released as soon as the hostilities have ceased. The application of principles of war to conflicts with non-state actors raises a number of concerns regarding sovereignty of states where such non-state actors are located (Chapter 3), the application of the discrimination principle (Chapter 4), prisoner of war status (Chapter 5), and the rights towards and protections of individuals associated with non-state actors while not fighting for them (Chapter 6). By providing conditions in order to apply an impartial set of war principles to non-state actors, I built on and added to the tradition of just war theory.

To expound the implications of my argument for the tradition of just war theory, I will reflect on contemporary just war theory as proposed by Michael Walzer, and later developed and revised by other scholars. By comparing my theory with

Walzer's just war theory and more recent scholarship on war, I will now draw together my most crucial principles developed and defended here by summarizing their rationales.

Just war theorists, including Walzer, for the most part considered the topic of state sovereignty with respect to responding to mass atrocities that allow or require states to intervene on the territory of other states for humanitarian reasons. However, with respect to wars with non-state actors, the topic of sovereignty of states has been left largely unmentioned by philosophers writing about war. Philosophers who did touch on this topic have argued for addressing individuals more directly by holding them responsible for *ad bellum* matters. This so-called revisionist account on war implies an allowance for overriding sovereignty of states by dismissing its normative relevance and taking individuals as the primary focus of concern (e.g. Fabre). I believe it is objectionable to override the sovereignty of states and hold that states may counter-attack non-state actors on the territory of another state if that state consented to the use of force or if that state is incapable of or unwilling to control the non-state actor. I supported this approach to self-defense against attacks by non-state actors in my thesis and positioned it in the philosophical debate on war that has been held by philosophers focusing primarily on individuals (revisionists) and by philosophers focusing primarily on states (e.g. Walzer).

Although most versions of just war theory require combatants to wear a uniform or other insignia, non-state combatants in particular do not always meet this demand. Among other scholars, Kutz has argued for applying the laws of war to non-uniformed combatants, but he has not set out criteria for discriminating between such combatants and civilians. I addressed this question of how one should distinguish combatants from civilians if combatants do not wear a uniform or other insignia. International law recognizes non-uniformed combatants who are recognizable at a distance and carry arms openly, and I

called upon these criteria in constructing my argument. Additionally, I relied on philosophical notions of processes of group formation in order to exclude practices of ascription as a basis for identifying combatants. I argued that the uniform should be regarded as one of various ways of making identification with a collective visible to outsiders. Other ways include wearing a distinctive sign, or even communicating views in support of a non-state collective on the Internet. However, this should not be regarded as sufficient for identifying an individual as combatant under the principles of war. It is necessary that the combatant has adopted a shared practice of fighting as well. Thus, a combatant should express her identification with the members of a party and share the practice of fighting to be categorized as an active member of a non-state collective. The requirement of sharing the practice of fighting is needed to distinguish between civilians and combatants, as some individuals might identify with a collective without being involved in combat. It is also required in order to distinguish when some individuals are involved in violent activities while not being part of a non-state collective engaged in war. My interpretation of the principle of discrimination serves the purpose of governing the treatment of non-state combatants who do not wear a uniform and aims protecting civilians in wars with non-uniformed non-state actors.

International law defines non-state armies as hierarchically organized collectives and Walzer, in the case of liberation movements for example, supports this requirement. I have offered arguments in defense of this requirement for the inclusion of non-state collectives as parties in war based on theories of larger group formation with authority structures, because—as such theories show—within authority structures superiors can enforce *in bello* principles. I did not argue for restricting the application of principles of war to liberation movements and other supposedly *just* non-state collectives as other scholars do (e.g. Kutz, Finlay), but instead I pushed for an

extension of the principles of war's reach to include other types of non-state collectives, as well. I maintain that non-state combatants should be part of a hierarchically organized collective. If so, they should be treated under principles of war and receive prisoner of war status. Assigning prisoner of war status should not depend on whether a combatant is an innocent person with respect to *ad bellum* matters, but, among other criteria, on whether she is part of a hierarchically organized non-state collective with a political aim and some popular support. Applying prisoner of war status based on being part of a hierarchical structure in which *in bello* rules can be enforced is meant to regulate conflict, which should, as I argue, be the main aim of the application of a set of principles of war.

I have defended the view that individuals should either be treated under principles of war or under principles that are normally applied in peacetime, including criminal laws. I do not want to justify practices in which individuals are neither provided with combatant privileges nor with the rights and protections of suspects under criminal law. I argued for categorizing active members of organized collectives with a political aim and some popular support as privileged combatants if following principles of combat. In addition, I urged for assigning criminal law protections to civilians who are associated with non-state actors and, in addition, outlined some of such protections. While preventive imprisonment has been widely discussed by scholars writing about philosophy of war and human rights (see, e.g., Walen), other preventive constraints are often seen as acceptable alternatives. I argued that constraints that deprive individuals of their liberty without using the prison cell may similarly infringe on the individual liberty and autonomy of the target and should be subject to similar guarantees. In particular, I addressed preventive constraints on suspected terrorists that lead to restrictions on liberty, including asset freezes and travel bans, and set out guarantees for the use of such restrictions. These

guarantees serve to protect the autonomy of individuals subject to preventive constraints.

Granted that I primarily focused on theoretical innovation, the theory offered here is meant as a step towards the incorporation of non-state actors into a legal framework. I acknowledge this raises a number of issues which I left unaddressed, including conditions for the scale, seriousness, or timeframe of such conflicts. Also not discussed in this thesis are the implications of my argument for the distinction between combatants and civilians. Categorizing non-uniformed combatants under principles of war risks a further blurring of this distinction. Additionally, I did not address the desirability of assigning non-state combatants the privilege to fight and to receive prisoner of war status in detail. On top of that, I acknowledge that one may still have doubts over favoring individual liberty and autonomy over security issues as I set out guidelines for applying preventive deprivations of liberty in practice while not developing a legal framework for dealing with such measures. My research should be seen as as progress toward addressing these issues.

The main question I addressed in this thesis was under what conditions non-state actors should be treated under the principles of war. Active individual members of organized collectives with a political aim and receiving some level of popular support should be considered similar to state-combatants and assigned similar rights, duties, and obligations under the principles of war. By developing a theory for the regulation of conflicts with such actors, my work aims to bring the principles of war in accord with the reality of current conflicts involving non-state actors.