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THINK 19 - Rules of War

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Counterbalancing Asymmetric Warfare: The Case for Extending War Rights to Non-State Combatants in Non-International Armed Conflicts (NIACs)

In non-international armed conflicts (NIACs), international law exclusively grants war rights to state-affiliated belligerents, leaving non-state fighters with neither "combatant's privilege" nor "benevolent quarantine" protections.[1] Such asymmetric warfare not only violates the principle of moral equivalence, but also permits states to abuse prisoners of war and enables aggression in instances of contested statehood. To prevent such consequences, the Geneva Conventions should thus be amended to extend war rights to non-state fighters engaged in legitimate armed conflict. While proponents of the status quo may deem such a revision too vague to be interpreted as law, the proposed amendment allays concerns about administrability by employing objective criteria. Specifically, this paper argues for war rights to be granted only for non-state fighters who 1) distinguish themselves as part of an established group with a designated combat function, 2) operate on territory where the state is unable to enforce its domestic laws, and 3) launch protracted, armed attacks on the state.

In status quo, all "armed conflicts" on a state's territory between the state's "armed forces" and non-state "armed groups" exercising sufficient "control of [state] territory…to carry out sustained and concerted military operations" are classified as NIACs.[2] Such conflicts are

[1] Allen S. Weiner, "Just War Theory & the Conduct of Asymmetric Warfare," Daedalus, Vol. 146, No. 1 (Winter 2017), 59.

[2] International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, (June 8, 1977).

governed by Protocol II and Common Article III of the Geneva Conventions, only mandating the "humane treatment" of wounded and surrendered non-state soldiers.[3] Moreover, neither the Geneva Conventions nor customary international law[4] classify non-state fighters as "combatants," depriving them of war rights: the "combatant's privilege" to kill enemy combatants without prosecution and the "benevolent quarantine" protections for prisoners of war under the Third Geneva Convention.[5] In contrast, international law automatically grants these war rights to all state-affiliated belligerents.

This asymmetric conferral of war rights is ethically unjust, as it unequivocally violates the principle of moral equivalence. In particular, both "combatant's privilege" and prisoner of war protections are granted on the premise that combatants in war are moral equals. As Michael Walzer specifies in his moral framework, "combatant's privilege" is derived from a notion of mutual consent: by consenting to be killed in battle, soldiers claim the unique right to likewise kill enemy combatants.[6] By denying this right to non-state combatants, international law therefore violates such mutuality, legally permitting state-affiliated soldiers to kill without consequence and leaving non-state combatants subject to undue retribution. Further, protections for prisoners of war are granted on the principle of distinction—the notion that captured soldiers are sufficiently removed from the "business of war" to assume civilian status.[7] In principle, these protections are extended to all prisoners of war regardless of their affiliation. However, in practice, international law withholds these rights from non-state fighters, legalizing the mistreatment of such prisoners of war and blurring the application of distinction. Therefore, from

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[3] Weiner, "Just War Theory & the Conduct of Asymmetric Warfare," 60.
[4] Weiner, Lecture, 5/2/2022.
[5] Weiner, "Just War Theory & the Conduct of Asymmetric Warfare," 60.
[6] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2015), 40.
[7] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 53.

an ethical standpoint, non-state "combatants" should be given war rights to balance the moral asymmetry codified in the Geneva Conventions.

Moreover, when applied in the modern geopolitical landscape, giving war rights only to state-affiliated combatants leads to the abuse of captured fighters. Without a law affirming the war rights of non-state fighters, states easily skirt jus in bello laws when holding and sentencing prisoners of war. This abusive behavior is exemplified in the United States' treatment of captured Taliban and Al Qaeda belligerents held at Guantánamo Bay.[8] Using the legal basis that these non-state fighters had no claim to war rights, the United States charged these combatants—even those who strictly engaged in conventional armed combat—with criminal offenses such as "murder by an unprivileged belligerent."[9] On the same rationale, the United States denied these combatants prisoner of war status, subjecting them to indefinite detention and denying them procedural protections guaranteeing impartiality in trials.[10] This effect is particularly dangerous, as states in non-international conflicts have inherent incentives to abuse captured fighters, such as stoking nationalism, gathering intelligence, and enacting vengeance.[11] Denying war rights to non-state fighters thus legally licenses states—including oppressive regimes—to act on those incentives and abuse prisoners of war without consequence.

Furthermore, conferring war rights based on "statehood" is not only unreliable, but also justifies aggressive behavior. For example, in civil wars like those initiated by the Arab Spring, control of the "state" government was perpetually disputed and at times indiscernible, wavering between groups.[12] Per current international law, war rights would vacillate in these cases,

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[8] Weiner, "Just War Theory & the Conduct of Asymmetric Warfare," 61.
[9] Weiner, "Just War Theory & the Conduct of Asymmetric Warfare," 61.
[10] Weiner, "Just War Theory & the Conduct of Asymmetric Warfare," 60.
[11] Sagan, Lecture, 4/25/2022.
[12] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 90.

awarded to the armed group temporarily in power, if any. However, by asymmetrically awarding war rights on an inconsistent basis, this approach not only allows the dominant group to flout prisoner of war laws, but also fuels a self-reinforcing cycle of violence against captured fighters when the balance of power reverses. Moreover, when control of the state is indiscernible between groups, this law is inapplicable at best and contradictory at worst—implying that war rights should not be conferred upon any armed group since none of them are affiliated with a "state." This approach is problematic even when governments are well established, as it undermines the rights of fighters whose affiliated statehood is contested. Consequently, countries like China and Israel could legally sidestep jus in bello laws against combatants from Taiwan and Palestine respectively by pointing to their lack of international recognition as sovereign states.

Given these ethical and practical considerations, the conferral of war rights to non-state combatants should be codified into international law as a new treaty, serving as an addendum to Protocol II of the Geneva Conventions. However, acknowledging that not all non-state fighters can claim moral equivalence with traditional combatants, this proposal aims to avoid extending war rights to non-state actors like terrorists and guerrillas. To satisfy these objectives while addressing anticipated concerns of this revision's administrability as an international statute, this proposal argues for war rights only to be given to non-state fighters fulfilling the following three criteria.

The first criterion concerns the non-state group and its fighters, only conferring war rights to those who "distinguish themselves as part of an established group with a designated combat function." By only granting war rights to combatants who distinguish themselves, this criterion upholds the principle of distinction by denying war rights to guerrilla fighters who, per Walzer's

framework,[13] forsake their claim to such rights by hiding among the civilian population. The requirement for non-state fighters to be part of an "established group" organized for "combat" ensures that war rights are not extended to individual actors like criminals or mass shooters, preventing this provision from undermining a state's sovereignty or domestic jurisdiction. Further, the specification of "combat function" likewise preserves the principle of distinction by granting combatant's privilege only to soldiers who have implicitly consented to risk their lives by joining that "group." This criterion is also administrable, as it can be positively determined whether fighters are in an "established group" whose main purpose is "combat" and have "distinguished" themselves as such.

The second criterion regards the territory on which the conflict takes place, only granting war rights when non-state fighters "operate on territory where the state is unable to enforce its domestic laws." In particular, a state may be unable to "enforce its laws" in terms of failing to fulfill its service obligations to its people, or by lacking the authority to administer punishment for violations of its "domestic laws." Though these two definitions of failing to "enforce domestic laws" may be broadly interpreted, they encapsulate objective criteria regarding the state's responsibilities, such as preserving public health, maintaining law and order, and ensuring national security. By either definition, when a state fails to uphold its social contract with its people and cedes its jurisdiction on its territory, that territory becomes open to dispute by another group who can instead provide such functions and win the people's popular support.[14] Therefore, only non-state groups fighting on such contested territory have a degree of legitimacy, and by extension, a claim to war rights. This criterion also affirms that armed groups operating on

[13] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 179.

[14] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 135.

undisputed state territory are fully subject to domestic law,[15] denying war rights to actors like members of organized crime and domestic terrorists.

The third and final criterion addresses the nature of the conflict itself, only qualifying non-state combatants as those who "launch protracted, armed attacks on the state." As war rights grant soldiers the ability to kill without legal consequence, it is extremely important that a high threshold of violence and intensity in the conflict is met before awarding war rights. This criterion incorporates this high standard into the proposed revision, requiring attacks to be both "armed" in nature and "protracted" in duration. The "armed" specification disqualifies violent but unarmed protests from being classified as "warfare," while the "protracted" specification denies war rights to armed dissidents involved in singular incidents, like those involved in the U.S. Capitol insurrection. Furthermore, the specification that such attacks are "on the state" affirms that war rights are only to be given in conflicts between armed groups, effectively denying war rights to terrorists who target individual civilians instead of state combatants. This criterion is also reasonably administrable, as it is determinable whether attacks from the non-state group are objectively "protracted," "armed," and "against the state."

[15] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 178..

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