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License to kill: is legitimate authority a requirement for just war?

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In traditional just war theory, legitimate authority is regarded as a necessary requirement for war to be just. This article challenges this requirement by arguing that a right to wage war can be derived from the right to self-defense and the justifiability of exercising political power to protect basic human rights. Arguments for the legitimate authority-requirement are then surveyed and rejected as insufficient to defend the principle's privileged status. It is argued that just war theory does not need the legitimate authority-requirement and may benefit from its removal.

Keywords: just war theory; legitimacy; authority; self-defense; human rights

We usually take it for granted that soldiers fighting in wars have the authority to fight delegated to them from someone else – a recognized, legitimate authority of some kind, usually a state – and that soldiers fight as agents of this authority. Soldiers on both sides in a war hold this right equally, establishing a 'moral equality' between them (Walzer 1992, 41). The basic rules of war are brought into play through such a delegation-mechanism. In practice as well as in international law, combatants are treated very differently depending on whether they are authorized to fight by a recognized government or not. As a consequence, actors who lack authorization are de-legitimized and may be labeled as criminals or 'illegal combatants'. The idea that war must be properly authorized is thus basic to contemporary moral and legal thinking about war.

The canonical view in just war theory as well as international law is that sovereign states have proper legitimate authority to wage war, and no one else. The question of who may legitimately initiate and fight wars was primary in the early historical writings on the justifiability of war. The centralization and effective monopolization of legitimate military force by the sovereign state in early modernity rendered this question much less

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relevant, since it became obvious that the authority to wage war belonged to the sovereign state and its duly constituted representatives. As a consequence, little focus was placed upon who could claim the right to fight wars for a long time. Political practice has challenged this complacency about authorization, however. Few contemporary wars conform to a simple states vs. state model. Instead, they tend to feature a bewildering array of different kinds of actors and organizations, many of whom do not conform to the conventional view. The recent increasing 'marketization' of military force through private military corporations (Pattison 2008, 143) adds to the proliferation.

As a consequence, the issue of who has the right to wage a certain war – for example states, resistance-movements, alliances like North Atlantic Treaty Organization (NATO) or institutions like the United Nations – has become contested. National liberation movements are commonly recognized as legitimate authorities in wars involving, for example, liberation from colonial rule. Such actors are regarded as 'infant sovereigns' or 'proto-governments' that represent genuine political communities, thus not really challenging the logic of the traditional legitimate authority-principle but rather widening its scope (Fabre 2008, 964) – entities that are sufficiently similar to (and perhaps ought to be recognized as) states or credibly aspire to become states count as legitimate authorities. Furthermore, many contemporary theorists would like to see legitimate authority conferred to (and sometimes reserved for) the international community and the legal-organizational extension of that community, the United Nations. Cosmopolitan theorists question whether all states by virtue of their sovereignty have the proper authority to wage war in an age of increasing recognition of universal human rights and global governance (Caney 2005, 205; Kaldor 2007).

The underlying assumption in this debate is that it is crucial to restrict the right to wage war to certain entities that possess certain distinct characteristics (sovereignty, representation of a political community, respect for human rights, etc.). These entities must 'earn' the right to wage war independently of whether the war itself can be considered just. This is the *Legitimate Authority Requirement* (LAR), for short. Almost without exception, contemporary proponents of just war theory accept the LAR and appear to take it for granted.

In this article, I suggest that this restrictive view is mistaken, or at least poorly supported. A strong case can be made that authorization is not as important as it is generally believed to justify war. This article has three closely related aims:

First, I outline some moral arguments against the LAR in its present form in the literature, and argue that legitimate authority is not a moral

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requirement for war to be just, although it may contribute to justice instrumentally, for example, by improving the chance that the war will achieve its just aims. I criticize and reject a view of war as necessarily tied to statehood, and argue that non-state actors of various types in fact do engage in war and that our moral framework for understanding war should apply to them as well.

Second, I scrutinize and reject various arguments used in the literature to support the LAR. These arguments are, in turn: that the LAR is necessary in order to promote peace and stability; that non-authorities have access to arbitration and redress from states, hence do not need to wage war; that just war is similar to law-enforcement and must be similarly restricted; that only those representing a political community have a right to wage war on behalf of it; that the LAR improves the chance that wars will be fought for just reasons (*jus ad bellum*); that the LAR is necessary to maintain the distinction between combatants and non-combatants and preserve non-combatant immunity; and finally, that the LAR is necessary to establish an effective chain of command, greatly improving the chances that wars will be fought with just means (*jus in bello*). My conclusion is that these arguments are insufficient to justify the LAR.[1]

Third, I consider the wider implications for just war theory if the LAR is rejected. I suggest that the just war-framework is basically sound and can be rehabilitated without the LAR. I also argue that the framework's relevance for contemporary conflicts will increase if we reformulate the theory in terms that do not depend on legitimate authority. By shifting focus away from authorization it will become harder for states and non-states alike to justify war by reference to their status alone, and harder for established authorities to de-legitimize their foreign and domestic enemies by reference to their lack of proper 'credentials'.

Just war theory and the legitimate authority-requirement

The focus of this article is just war theory and the role that the LAR has to play in it.[2] The LAR is without exception listed as one of the most important criteria in just war theory and given a prominent place in the various formulations available in the literature on the subject (cf. Johnson 1999, 2005; Hurka 2005; Orend 2006). Different proponents of just war

[1] This article owes some of its inspiration and arguments to Cécile Fabre's interesting piece 'Cosmopolitanism, just war theory and legitimate authority' (2008). Her conclusions are largely compatible with mine, although we reach them in different ways.

[2] A serious problem when discussing just war theory is that there is no obviously correct canonical formulation of it. A critique of one version may be less effective against another.

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theory formulate the LAR in slightly different ways, but I will focus here on the formulation by James Turner Johnson, which I think is both clear and representative. It states that:

> [t]he individual or body authorizing the use of force must be a duly constituted authority widely recognized as having the right to wage war. This generally refers to the representative of a sovereign political entity; states, today. Also, the authorization to use force implies the ability to control and cease the use of force (Johnson 2005, 38).[3]

In Johnson's overview of just war theory the LAR is listed along with *just cause* and *right intention* as 'deontological' criteria with moral priority over the other 'prudential' criteria (proportionality, reasonable hope of success, last resort, and aim of peace) (Johnson 1999, 31). The deontological requirements must always be satisfied before the other requirements can be considered, and only after having met the deontological requirements should war be judged in prudential, consequentialist terms. No matter how effective or beneficial, a war will be unjust if it does not have just cause and is not authorized by a proper authority with the right intentions.[4] These three requirements form the moral basis for just war. Importantly, the right to fight wars derives not from the justice of war itself but from some other source of legitimacy, traditionally *sovereignty* or similar widely recognized authority. This entails that an otherwise just war could still be unjust for the only reason that the war-fighting agent is not a widely recognized authority.

Brian Orend remarks that the legitimate authority-criterion has 'tended to fall by the wayside […] in contemporary just war theory' (2000, 192). In other words, the deontological prominence of the criterion is not matched by arguments and reasons for why it is important and why the right to wage war should be reserved for a certain kind of political entity, typically sovereign governments. In order to justify its deontological status, strong and persuasive reasons must be provided. This justification is logically prior to asking *who* should be a legitimate authority, which is the focus of most of the discussion of the principle, for example if and when non-state actors (sub-state as well as supra-state) could be seen as legitimate authorities and where the proper locus of authority is (cf. Held 2005). Depending on

[3] The purpose here is not to single out Johnson's theory in particular. I discuss it because it is clearly stated and representative of the broader literature on the subject.

[4] There appears to be at least five different conceptualizations of the kind of authority required in the just war literature: legitimate authority, proper authority, right authority, competent authority, and sovereign authority. This lack of clarity contributes to the confusions surrounding the principle. In this paper, I will use the term legitimate authority as a matter of convenience, since this term appears to be the most common and least controversial.

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why we think legitimate authority is important, we could arrive at different conclusions about who (if anyone) should have competence to wage war and who should not.

Sometimes in the literature, the LAR is instead formulated in terms of legitimate procedure *within* the state as such, thus pre-supposing that the war-fighting entity is a state in the first place. It is a criterion specifying when a government can justifiably command its state's citizens and resources to wage war. For example, Orend himself formulates the LAR in this way:

> A *state* may go to war only if the decision is made by the appropriate authorities, according to the proper process, and made public, notably to its own *citizens* and to the enemy *state*(s) (Orend 2000, 49, italics added).

Clearly, a good polity should have strong mechanisms in place for controlling when the government can resort to force. However, the pressing issue here is not whether communities that fight wars should follow proper internal procedures but whether the right to fight wars should be restricted to certain types of recognized authorities in the first place. In fact, Orend implicitly accepts a LAR similar to Johnson's, claiming that it is 'obvious' that only legitimate public authorities and not 'private groups with their own vendettas' may authorize armed attacks against other political communities (2000, 214).

War and authority

As Orend's formulation of the LAR indicates, it is necessary to say something about what a 'war' is before focusing on the LAR itself, since just war theory is a theory about the justification of war and not all forms of possibly justifiable violence. Many people see 'war' as a certain type of political struggle which is qualitatively different from other states of large-scale organized violence (such as rebellion, sedition, insurrection, and rioting) and that the difference depends precisely on the issue of authorization of violence by a legitimate, duly-constituted government or government-like entity such as the UN Security Council. At the same time, it is apparent that there exists no strong consensus in the literature about when the term 'war' should be applied.[5] We must therefore be careful not to base our understanding of the justifiability of war on a narrow, controversial, and normatively partisan definition. In particular, I think we must be careful about pre-empting the question *who* may wage war.

[5] In fact, most just war theorists proceed without explicitly defining what a war is. Instead, the definition is implicit in the arguments offered for the different principles.

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According to a traditional political view, 'war' is a specific form of public violence exercised by and between entities or communities claiming sovereign authority and political independence. War, according to this view, is official violence on behalf of and mandated by the state toward another similarly constituted entity. War necessarily involves a struggle over the right to govern a people and/or a territory. Armed struggles involving other types of groups and actors are not wars but perhaps insurgencies, rebellions, uprisings, terrorism, and the like. Rousseau expresses this view clearly:

> […]war is a relation not between man and man but between *state and state*, and individuals are enemies only accidentally, not as men nor even as citizens but as soldiers; not as belonging to their country but as defenders of it (Rousseau: *The Social Contract* Book 1 p. 4, italics added).

In the contemporary literature, Orend suggests the following definition:

> War should be understood as an actual, intentional and widespread armed conflict between political communities […] defined as those entities which either are states or intend to become states (in order to allow for civil wars) (Orend 2006, 2).

This restrictive view has a number of disadvantages. The first and most obvious is that it does not make very good sense of contemporary language-use, for example the way war is discussed in the media. Nor does it correspond well to how the term is used in current conflict-research. Today we normally use the term 'war' to refer to a wide range of large-scale, organized armed conflicts involving many different types of actors and not just specifically legally constituted ones, or those who aim to become such actors. These wars may in turn be broken down into various types, but the point remains that we use the term 'war' for all of them. For example, in the Correlates of War-project Melvin Small and J. David Singer settled on the following overarching definition of war: *sustained combat, involving organized armed forces, resulting in a minimum of 1000 battle-related fatalities per year.* The armed forces should be able to provide 'effective resistance', either by preparing to fight or, if unprepared, spontaneously organizing in order to inflict significant casualties (Small and Singer 1982, 215). Interstate wars are then seen as a subclass of war, along with other categories such as extra-state, intra-state, and non-state wars (cf. Sarkees 2010). In the light of this, it is unclear why the normative problem of war should be restricted to this particular subclass of wars (interstate ones) instead of extended to all of them.

It is also too restrictive to say that war necessarily involves struggle over the right to rule over a certain territory and/or population, and that

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war-fighting necessarily contains a claim to authority. War can be waged for other purposes than to establish governance. In many contemporary wars a number of actors have little interest in governing anybody. They fight predatory wars for material gain, to monopolize trade in narcotics and attractive natural resources, to avenge historical wrongs, etc. (Kaldor 2007). Even though they have little or no interest in establishing a government or enforcing laws, we may think that they engage in war.

Furthermore, an unfortunate consequence of defining war in terms of statehood is that it means that *stateless* societies cannot fight wars, which seems odd considering that some such societies, for example North American native tribes and chiefdoms like the Comanche, have organized and participated in large-scale military conflicts with a significant degree of success, even against states.[6] Indeed, large-scale armed conflicts have been well documented between stateless societies throughout human history (Keeley 1996) and it is question-begging to exclude such conflicts from the definition of war (and the domain of just war theory) because those fighting did not have states or widely recognized authority to wage war. It also means that states (governments) may be able to deny that what they are doing toward stateless societies is actually war at all, and that the rules of war apply to such conflicts.

In relation to the LAR, the main weakness of the political definition is that it will make the principle *circular*. If the LAR only applies to states or similar entities in the first place because only legitimate authorities can fight wars, then why is it even listed as a requirement? An armed struggle involving one or more non-recognized actors would not be a war but some other activity such as police action in response to terrorism, hence the theory would by definition not apply to it. And if a conflict qualified as a war in this restrictive sense, it would automatically fulfill the LAR as well. If so, the LAR would not actually rule out *any* war as unjust, making it redundant.[7] However, in just war theory it is clear that the LAR serves to de-legitimize and prohibit private violence, that is it is not just a theory for and about states but a theory specifying that *only* states or similar recognized authorities have the right to wage war, and then only by observing due process. It is clear then that the LAR implies that non-recognized actors can wage war.

[6] The North American native tribes where sometimes treated as state-like entities by the established states, being granted the privilege of signing treaties and such. Maybe this indicates that they were 'widely recognized authorities' after all. Franscisco de Vitoria also argued that some rights and duties should be extended to American tribes in his On American Indians (de Vitoria 1991). I thank two anonymous reviewers for pointing this out to me.

[7] This is not a problem for Orend though, since his variant of the LAR already assumes that the relevant actor is a state, and that the LAR is a principle that applies internally to states. This avoids circularity at the cost of restricting the theory's range.

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Alternatively, we may think that there are many different types of wars but that just war theory is only concerned with a particular kind, that is *interstate* wars. Civil and intrastate wars may be wars, but they are not the subjects of just war theory, since this theory is a normative framework for governments co-existing in an 'anarchical society of states', to use Bull's famous term (Bull 1977). The purpose of the theory is to regulate the relations between members of international society, and only political units who are members of the society (or more generously, 'hang-arounds' who may become members of that society) may qualify as legitimate war-fighters on this view. Just war theory cannot accept non-authorities as competent war-fighters simply because it is a theory about a more restricted subject.

This narrow view of the theory's purpose would be unfortunate since so few of today's armed conflicts conform to the interstate-mold, meaning that just war theory's relevance to the contemporary world would be severely restricted. It would also make it unclear if the theory applies to cases where states fight against non-state entities like the Taliban. If just war theory is a norm-system for a society of states, why would states be bound by it when dealing with non-members? And what about wars that involve supra-state entities like the UN Security Council and regional security organizations like NATO? It seems like we would need different theories to provide ethical guidelines for wars that involve both supra- and sub-state units, and the question becomes why just war theory could not fill these roles as well (perhaps with minor adjustments.) In the interest of theoretical parsimony and clarity of judgment it is much more attractive to have one theoretical framework that can be applied to all wars.

In conclusion, war may be qualitatively different from rioting, gang violence and the like, but where to draw the line is quite difficult and trying to fix the concept of war by reference to the state or claims to statehood is both likely to exclude many contemporary wars and to make the LAR redundant. I suggest that the LAR actually assumes a broad definition of war, like the one used in the Correlates of War-project, since it is needed to make the LAR meaningful – there would actually be wars that the LAR could de-legitimize. The rest of the article thus assumes that the term war and just war theory apply to such a wide range of conflicts.

War and self-defense

At the other end of the spectrum from Rousseau and Orend we find theorists who argue that even *single individuals* may 'wage war'. The best-known proponent is John Locke who defines war in terms of violence and force, a 'state of enmity and destruction' rather than connecting the

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term to the state. Locke speaks of war in terms of a 'sedate settled Design', indicating a degree of deliberate organization and purpose as well as a permanent state rather than a sudden outburst of violence. The examples Locke uses demonstrate that war in this sense can exist between individuals, such as when one individual seeks to enslave another or steal his property (Locke, *Second Treatise on Government* 1690, Book 1, Ch. 3, §16–17). Inspired by Locke, Cécile Fabre argues that if an individual (somehow) fulfills all other requirements for *jus ad bellum* and *jus in bello*, it would be strange to deny him or her the right to fight on the grounds that he or she is not a recognized authority. It seems illogical to say that a collective fulfilling certain organizational criteria can have a right to wage war but that its members individually lack that right (Fabre 2008, 971). For Locke, the right to wage war is ultimately an individual right.

Hugo Grotius also applies the term 'war' not only to public but also private and 'mixed' wars, arguing that private wars may be justifiably waged in accordance with the law of nature. Private wars have many similarities with public wars, and the issue of legitimacy is irrelevant for the definition of war as such. Instead, it is the use of force as such which is the central issue in war (Grotius, *On the Laws of War and Peace*, Book 1, Ch. 3, §1). With the establishment of public authorities and courts private wars would normally be impermissible but he also thinks that 'when the law prohibits any one from redressing his own wrongs, it can only be understood to apply to circumstances where a legal remedy exists' (Grotius, *On the Laws of War and Peace*, Book 1, Ch. 3, §2), indicating that the right to wage war is not strictly reserved for public authorities. Private wars may be justifiable, according to this reading.

Today we would probably think it odd to say that a 'state of war' exists between a mugger and his victim, and that exercising the individual right to self-defense means 'waging war' against an aggressor, and I am not suggesting that we adopt this way of speaking about interpersonal violence. The relevance of these views, rather, is that they highlight the strong connection (or continuum) between the morality of war and the morality of self-defense. The challenge to the LAR is this: if it can be justifiable to use lethal force to defend yourself and others against unjustified armed attack, it should be possible to justify large-scale collective self-defense up to and including the scale of war as well, regardless of authorization or legal status, assuming that the defenders are not themselves guilty of unjust occupation or similar transgression. When we regard legitimate authority as a deontological requirement, however, defensive wars could be unjust if they are fought by the wrong type of actor, lacking proper authorization, such as individuals or self-organized collectives of individuals. And this is unreasonable.

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Jeff MacMahan (2004) asks us to imagine how one person may have a right to use lethal force in self-defense against an unjust attack; then how two persons may use force in self-defense jointly against the same common threat; then three persons and so on, defending against an expanding range of threats they commonly face with greater and greater degree of co-ordination and preparation. We end up with a spectrum of cases ranging from individual self-defense to a situation that, as the number of individuals defending themselves and each other increases, is indistinguishable from war – except for the fact that no one has authorized the group to defend itself, except the individuals constituting the group. At least in some cases then, war can be imagined as morally continuous with individual self-defense and it seems impossible to establish a point where individuals would require approval by some widely recognized authority for defensive action to be justified.

Importantly, the right to self-defense appears to be independent of the *number* of attackers as well as their form of political *organization*. A person does not forfeit the right to defend herself against unjust, violent attack because the attackers are numerous, wear uniforms and happen to be organized in hierarchical units commanded by a recognized authority. We can imagine an unfortunate case where a single individual is the victim of an armed attack by a state or state-like entity, which would then grant the individual a right to fight back against the aggressors with all necessary means. Consequently, if several individuals are jointly victims of unjust armed attack by a state (including 'their own'), they have the right to jointly wage a war of self-defense, and to organize in any form they want to effectuate that defense as long as it does not violate the basic rights of anyone else. In theory, millions of people could band together and jointly defend themselves in a more or less spontaneous and improvised fashion, without constituting an 'authority' or claiming to do so.

The LAR, however, means that at some point a group of individuals must be denied the right to jointly defend themselves because they do not constitute a recognized authority. Perhaps *individuals* in such a group would retain the right to defend themselves but the *group* as such would not, since they are not a proper authority with the right to delegate the right to fight to its members. A cut-off point must be established between individuals defending themselves together (which would presumably still be justified) and groups waging unjust war because they fail to live up to the LAR. Unless such a cut-off point can be established it seems illogical to insist upon legitimate authority in cases of self-defense unless one is also willing to deny or restrict the right of individuals to defend themselves in the first place, singly or jointly. This shifts the burden of

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proof to defenders of the LAR to show *why* there should be such a cut-off point, and *where* it should be.[8]

Interestingly, there is a legal precedent for the view that the people can have a direct right to wage war regardless of authorization. In international law, an exception to the regular requirements imposed on other military forces (authorization by a state or party recognized as subject to international law, subordination to a responsible commander, visible emblems, etc.) is the right of the civilian population to spontaneously defend against an invading force, forming a *levée en masse* – a cross between rebellion and voluntary conscription, one might say. Civilians have a right to fight in such cases and should be treated neither as criminals nor as non-combatants, as long as they bear arms openly and respect the laws of war. This is an old principle of customary international law that predates the Hague-regulations, which specify:

> The inhabitants of a territory which has not yet been occupied who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had the time to form themselves into armed units (so-called *levée en masse*) shall be combatants. They shall carry arms openly and respect the laws and customs of war in their military operations (Art. 2 HagueReg: Art 4A No 6 GC III).

As legal combatants, civilians are entitled to treatment as prisoners of war in accordance with the Geneva Conventions if wounded or taken prisoner. However, the right is limited to the invasion-phase itself at the point of invasion (on the approach of the enemy), in order to forestall an occupation, and the right to *levée en masse* ends once an area has been occupied, or when a defensive battle with organized regular, and duly authorized, forces can ensue. In already occupied territory, however, civilians can only be recognized as combatants if they are part of an organized resistance movement, which then substitutes for the legitimate authority. Otherwise, the occupying power may treat them as criminals.[9]

The principle seems to directly contradict the LAR, since it grants war-fighting powers to actors who do not qualify as recognized authorities – it is the act of *defending your homeland* against foreign invasion that makes it just for you to fight, not the fact that you have been authorized by anyone to do so. Its status as international law also indicates widespread

[8] Strikingly, the early Christian just war theorists *did* reject the idea that individuals have a right to defend themselves, and that only sovereigns had a right to use force at all since they were defending others and not themselves (Bellamy 2006).

[9] The levée-principle is very rarely invoked in practice, but is still commonly repeated in military manuals. The spontaneous defense of Warsaw during the German invasion in 1939 may serve as a historical example.

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consensus that legitimate authority should *not* be a strict requirement in such cases. But perhaps the significance should not be exaggerated – perhaps it just means that we should think of the *levée* as a stop-gap measure and temporary exception when a legitimate authority (a government) exists but there simply is not enough time or resources to organize a defense against an invasion. Outlawing spontaneous defense against military attacks would only benefit an aggressor.

War and protection of others

Elaborating on the argument from self-defense, it is generally recognized that as individuals we have a right (and possibly an obligation) to assist others who are victims of unjust aggression. Just like in the case of self-defense, it appears that groups of individuals have a right to jointly assist other groups who are defending themselves against unjust attack. Arguably, public authorization is not necessary for such joint assistance to be justifiable either, since there is no right not to be attacked when you are in the process of committing acts of aggression against others. An aggressor waives the right to immunity against attack when he or she attacks others (cf. MacMahan 2005) – which is similar to Locke's idea about deliberately entering a 'state of war'. If there is no right not to be attacked in such cases, anyone could in principle help defend a victim of aggression, although justifiability in such cases is perhaps less clear-cut than in the case of self-defense since the victim may not wish to be defended by someone else. In individual or collective self-defense, the individuals themselves 'authorize' violence on their own behalf without intermediaries, but this is more problematic in cases where individuals or groups help defend and protect others.[10]

If some kind of authorization is required in cases of intervention, the question becomes: authorization by whom? Presumably, it is the victims of aggression who can authorize intervention on their own behalf. Building upon the argument from self-defense above, a single individual could authorize someone else to intervene on his or her behalf, and a number of individuals might jointly authorize intervention on their own behalf. Due process and proper authorization would have little relevance in such cases – it is unlikely that there are any established procedures in place. Again, it seems difficult to establish some kind of cut-off point

[10] As the history of military interventions demonstrate it is very difficult for 'outsiders' to correctly judge the character of internal conflicts in many cases, leading to interventions that protect people who do not deserve protection and vice versa. This makes authorization seem more important in cases of intervention than in spontaneous self-defense.

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where legitimate authority would be necessary to justify intervention on one's own behalf. So even if we demand authorization in cases of external assistance, the right to authorize cannot be restricted to legitimate authorities. Ideally, a recognized authority (such as the UN) will organize such assistance to others but if it fails to do so, the right to help victims arguably reverts back to the citizens themselves. A historical example of this might be the Swedish Volunteer Corps joining the defense of Finland during the Winter War 1939–40. When the Swedish state did not actively intervene on Finland's behalf, the right to wage war against the Soviet aggression can be said to have reverted to the citizens who in fact organized a private army to fight in the war, albeit under Finnish command and with plenty of support (although not 'authorization') from the Swedish government.

It should be pointed out that authorization by the victims of aggression cannot be an absolute requirement. It may not be feasible in an emergency situation or in cases where the means of communication have been cut off. Members of a group who are under attack may not even realize it because of restricted information. A group may also lack proper representatives authorized to give explicit consent to intervention, or the claimed representatives may not actually represent the interests and views of the group. This demonstrates, I think, that even in cases of intervention authorization should not be seen as an *absolute* requirement and that even when a group consents to intervention this in itself cannot make an intervention justified.

War in the absence of political institutions

The third case where the LAR makes little sense is when war or war-like methods are necessary to *establish political institutions* in the first place. This may be the case in a so-called failed state where there simply are no functioning institutions in place to authorize a war, or in cases of secession where the seceding state(s) lack proper channels for authorization.

Allen Buchanan argues that 'an entity that exercises political power is morally justified in doing so only if it meets a minimal standard of justice, understood as the protection of basic human rights' (Buchanan 2007, 146). To wield political power, in Buchanan's terminology, is 'to (make a credible) attempt to exercise supremacy, within a jurisdiction, in the making, application, and enforcement of laws' (Buchanan 2007, 146). This minimal standard of justice is based on a credible commitment to *protection of basic rights* and not consent or representation. An actor who credibly promotes basic human rights by exercising political power can legitimately do so, provided that no morally superior alternatives are available that promote basic rights even more.

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If this is correct, entities may sometimes legitimately wield political power even if they do not fulfill widely recognized criteria of legitimacy such as democratic representation or due process, and even if the individuals over whom they wield power do not constitute a political community of some kind, such as a nation, or owe each other special obligations. However, this does not mean that authorization lacks normative power, only that it cannot be the *baseline* requirement. When political power can be effectively exercised by recognized authorities and on the basis of legitimate procedures this is certainly to be preferred. The crucial point is that lack of recognition does not *rule out* the justifiable exercise of political power, for example, in a situation where the institutions of society themselves are in shambles and have to be rebuilt from scratch.

Why would we want such a relaxed understanding of justified political power? The reasons that are most relevant for our discussion are twofold: first, recognition, consent, or representation of a community cannot justify exercise of political power that is deeply immoral, for example violate basic human rights. The fact that someone has been authorized by someone else to violate basic human rights cannot serve as justification for such violations. Once we qualify the right to exercise authoritative power in this way, it is only a short leap to suggest that the exercise of political power can (sometimes) be justifiable when it promotes justice regardless of authorization. Hence, the exercise of political power for the sake of protecting basic rights in ways that do not themselves (avoidably) violate any basic rights can be morally justified, when there are no credible alternatives. Since there is no right not to be coerced into respecting basic rights, as long as the coercion itself does not violate basic rights, authorization is not necessary to justify such exercise of political power.

The second reason, which is particularly relevant when it comes to wars, is that we need a conception of just political power that does not require the prior existence of a genuine political community or the feasibility of stable governance because political power may be necessary to build a political community or create stable governance in the first place (Buchanan 2007, 147). It would arguably be absurd to require, for example, democratic legitimacy *before* a people can justifiably attempt to overthrow a tyrannical ruler with force in order to create the institutions necessary for democracy. Also, in the case of wars, it will typically be contested what the 'genuine' political community actually is, and democratic institutions (if they even exist) may be impossible to maintain or at least severely disrupted. In short, the exercise of political power may sometimes be justifiable to create or re-create the kind of community that the legitimate authority-principle assumes already exists.

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If correct, this means that it cannot be said that any particular kind of entity, by virtue of its form of organization, popularity or legal pedigree, *automatically* qualifies as a legitimate war-fighter. This applies in particular to the sovereign state, which cannot be assumed to have the right to wage war if it so chooses, but it applies with equal force to international organizations such as the United Nations. Furthermore, any sub- or supra-state political entity can, in principle, justifiably fight a war as long as it is credibly committed to basic human rights, does not violate basic human rights of innocents and there are no other options for protecting human rights effectively. In principle, mercenary groups, corporations, churches, motorcycle gangs or indeed political science departments can have a right to 'wage war', conduct humanitarian interventions and such.

This is wildly counter-intuitive to most people. In response, it should be emphasized that the demanding requirements of just war will most likely rule out that such 'war-fighters' can qualify. Nevertheless there is a possibility that they *may* qualify. We need a good reason why, for example, corporations should not be allowed to fight wars provided that they can abide by all the other requirements of just warfare. It is to the search for such a reason that I now turn. Why should we embrace the LAR?

Promoting peace

The historically most important and obvious reason for wanting to restrict the right to fight war to properly constituted and recognized authorities is to make the world safer and more peaceful. Plausibly, the restriction of the right to fight wars to a limited number of authorities will minimize harm, even if these authorities are oppressive, and that a situation where many different actors and organization are morally and legally permitted to use force will entail more harm, wrongful killing and the destruction of communities and property. In the interest of peace 'private' warfare has to be outlawed and only 'public' warfare justified. An early advocate of this view was Cicero, who argued that to limit the incidence of civil wars, war must be formally declared by the proper authorities and only soldiers serving the state allowed to fight (Bellamy 2006, 20). Thomas also famously argued that '[t]he natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority' (*Summa Theologica* part II Question 40).

For the medieval just war theorists, legitimate authority was usually seen as the most important criterion for exactly this reason, since the question of who could authorize lethal force was a major source of strife at that time. The fact that many actors at different levels claimed such a

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right contributed to social fragmentation and a high level of violence in society (Johnson 1999, 46). Thus, restricting the authority to wage war was key to limiting warfare in Europe (Bellamy 2006, 34). In the contemporary context, it is argued that this is no less of a problem due to the proliferation of non-state actors claiming the right to use violence for various nationalist, ideological, or religious purposes. For example, Coates argues that '[t]o insist on the public monopoly of the use of force remains a fundamental step in any process of pacification, and securing that monopoly is a precondition of civilized society' (Coates 1997, 125).

However, it is clear that this argument must have limits – pacification does not require complete monopolization of force, and monopolization does not override basic rights. Virtually all societies recognize a right for individuals to defend themselves, with lethal force if necessary, suggesting that the monopoly is conditional. A peaceful society is compatible with substantial rights for individuals to defend themselves, and when the monopoly fails to protect, a more basic right to self-defense is brought into play. If there are emergency-exceptions to the state-monopoly on legitimate force domestically, it makes little sense to restrict it because aggressors happen to be foreign rather than domestic. Furthermore, if it is correct that a right to war can be derived from the individual right to defend against unjust attack, as suggested by Locke *et al*., an individual may have a right to defend herself against attack even if it leads to negative external effects in society as a whole, such as greater instability. We do not normally think it just to (greatly) restrict a person's right to self-defense because it can reduce overall crime-rate in society.

At this point it is important to note that the right to self-defense is also moderated by the principle of proportionality, which could in principle render a war unjust even if it has a just cause such as self-defense. But even this argument has limits. If actor A defends him or herself against actor B's aggression, and this has negative consequences for actors C and D, one may plausibly argue that it is B that is primarily responsible for those consequences and not A (cf. Hurka 2005), which would limit which negative consequences would count against proportionality. The peace-argument for the LAR does not seem to take this complication into account, in effect arguing that even if A's defensive actions are justified as such they should still be restricted because of potential negative consequences for others, even if B is primarily responsible for them. And this seems unreasonable.

It is likely that the monopolization of military force by the sovereign state has reduced the incidence of war-like violence (although perhaps not the scale of such violence, as 20th-century history shows). But it seems likely that the effective monopolization of force by a supra-national

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authority like an idealized future UN would be even more effective in reducing violence. By similar logic, even the effective monopolization by a single very powerful state may be more conducive to peace and stability than allowing many states to decide for themselves when to wage war. So even if we conditionally accept this argument it is a double-edged sword for the traditional view that states or communities aiming to become states have the right to wage war.

Furthermore, we must also recognize that the LAR in the context that we are currently investigating is part of the just war-framework, hence can only in practice reduce the incidence of one particular kind of war, namely those that already fulfill all the other just war criteria (just cause, last resort, proportionality, etc.). Wars that fail to fulfill the other criteria of what constitutes a just war – surely the vast majority of all actual wars – are *already* unjustifiable according to the framework. The only thing that the LAR can accomplish is to declare wars unjust that fulfill all the other criteria because the war-fighting party is not a recognized authority, and that surely cannot be a particularly worthwhile objective. It may be useful to remind ourselves that the purpose of just war theory is not to reduce the incidence of all wars but of unjust ones.

Possibility of arbitration

Thomas' main argument for the LAR focuses on the dispute-settlement capacity of the state. On a common formulation of the criterion, only authorities with no superior may justly wage war (Johnson 1999, 31). Actors with effective superiors will have recourse to effective arbitration and need not resort to war to protect their rights. According to Thomas, a private citizen does not need to wage war since he can seek 'redress of his rights from the tribunal of his superiors' (Thomas quoted in Caney 2005, 206). When there is a legal framework and an effective monopoly on legitimate force in place, citizens have a duty to go through the legal channels and rely on this framework for arbitration. And when there is an institutional framework in place to protect peoples' rights, it is the task of these institutions to wage war on their behalf as well, if need be, since no more recourse to arbitration is possible.

In spite of its popularity in the literature, this argument is flawed (as the quote by Grotius above has already indicated). It is an open question whether the legal channels (when they exist) actually *do* provide a possibility of arbitration and redress for citizens. The argument assumes that the legal channels are responsive to citizens' rights, needs and entitlements and capable of effectively protecting them, and judging from historical as well as present experience it cannot be taken for granted that the legal

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authorities actually provide redress for injured parties. When they fail, it is hard to see why the argument would provide any reason for insisting on legitimate authority. This is of course particularly true in cases where the primary violator of citizens' rights is the government itself, an all-too-common case. To argue that victims should seek redress from their oppressors seems cynical at best.

On the other hand, if it is true that there exists a possibility of effective arbitration and that a superior authority can effectively protect rights, then going to war cannot be the *last resort* (cf. Fabre 2008, 972). Hence, the last-resort-criterion already prohibits war if its morally significant benefits could have been achieved by non-violent means, such as diplomacy or legal arbitration. In such cases, insisting on legitimate authority would be redundant since war would be ruled out as unjust anyway. Correspondingly, if there are peaceful means of settling conflicts, just war theory obliges us to seek out and use those means first.

War-fighting as law enforcement

War can be seen as a special case of law-enforcement and punishment of law-breakers (Fabre 2008, 971). Hence only public authorities can claim competence to wage war in the first place, just like they are the only ones who can claim the right to enforce the law. The right to make and enforce laws belongs to the community as a whole, and hence only legitimate representatives of the community have the right to wage war on its behalf. A legitimate authority is entrusted with keeping the peace and protecting the innocent that justifies its use of lethal force for the common good. Since the approved government is authorized to use force to maintain peace and justice in society, they must also be authorized to fight wars against foreign aggression in pursuit of the same objectives. And just like law enforcement is ultimately the duty of the proper government (with minor exceptions like citizen's arrests, etc.), war is also the proper duty of the government. For the same reason that we must prevent vigilante justice and restrict the powers of law enforcement to duly constituted authorities, we must restrict the right to wage war to the legitimate law-enforcer in a community.[11]

[11] An interesting, and in my view counter-intuitive, consequence of this view of war-as-law-enforcement is that it implies that you can only have authority to wars in a territory where you have jurisdiction. It makes it very doubtful whether anyone could have authority to fight any other kind of war or pursue any other type of war-objective, such as humanitarian intervention or assisting another state which is the victim of aggression, or punishing and disarming an aggressive state. In other words it would not cover some just causes that are generally accepted

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It seems like this argument concedes too much to legality. It simply assumes that the legally constituted government is able and willing to enforce the law and protect rights in a society in an appropriate manner, and it will prohibit anyone from challenging this authority by force. It thus suffers from the same vulnerability as the argument from arbitration, discussed above. If proper law enforcement and protection is available, it is obvious that we should let the responsible authorities fight wars on behalf of society, for the same reason that we should preferentially let the police catch thieves – they are hopefully best suited for the job. But if the authorities cannot or would not enforce the law, or the laws that are enforced violate basic human rights, there is no valid reason to insist that only the authorities have the right to wage war in defense of such rights.

It is certainly very plausible to say that the authorities primarily responsible for making and enforcing laws in a society also have a responsibility to defend it against external aggressors (indeed, it would be illogical to say that law and order should only be protected against internal but not external threats). But the issue here is not whether properly constituted and recognized authorities are legitimate war-fighters (they clearly are, if the war is otherwise just) but whether you need to be a properly constituted authority in the first place to fight a just war. In other words, the issue is whether such authorities are the *only* ones who should be granted the competence to fight. This may be the case when fighting a war at the same time involves a claim to a right to exercise political authority over a community. However, we can imagine several cases of justified war that does not directly involve a claim to have the right to rule or enforce laws: a people can spontaneously organize resistance or defense of their homeland without claiming a right to constitute a government and without claiming any law enforcement powers; it could also authorize others to help in the defense without granting those people any law enforcement powers. Consequently, external actors may assist a people defending itself against aggression without claiming a right to rule over it (or rule anybody, for that matter). If this is correct, an external actor may fight a war on behalf of the population of another country, even if it would be illegitimate for that party to rule the country intervened in. This is similar to assisting a victim of assault in the street, without

in the just war-literature. The only way to pursue other than purely defensive objectives in one's own territory is by agreement with the legitimate authorities in other states, such as in an alliance. Alternatively, only a supra-national legal authority such as the UN has the right to authorize any kind of war that is not purely defensive. This would arguably correspond well with the intentions of the UN Charter but would require rather extensive modifications to the just war-framework (which would not necessarily be a bad thing, of course).

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claiming any right to make laws or enforce them with regard to neither the attacker nor the victim.

Furthermore, a resistance movement of some kind could fight to liberate a country from oppressive rule without claiming that it should rule the country and enforce laws there after the war is won. For example, it may support the creation of a new democratically elected government after the war. Following from the argument from institutional weakness above, it may be necessary and justifiable for an entity that does not qualify as a proper form of government to fight a war in order to protect basic rights if there are no realistic alternatives. In this sense, having the right to fight may be independent of having the right to rule or enforce the law.

Representing a political community

According to a common formulation in the literature, the right to commit a community to war is not derived from *de facto* sovereignty but from the moral authority of a political community that the sovereign state is the representative and protector of (Thompson 2002). Michael Walzer[12] argues that the basis for a state's right to resort to war is that it provides an arena for a political community to protect and promote its freedom and way of life. If a non-state entity can provide a similar arena for a political community it can also possess the right to wage war to protect it, under some circumstances. Hence, it is the 'match' between the entity and the political community which gives the former a right to fight wars on behalf of the community (Walzer 1992, 61). This means that the right to fight a war belongs primarily to the community as such and that it is only delegated to the government or state, hence a community should possess the right to wage war against its own state if it considers it illegitimate. And if a state contains *several* communities (as often seems to be the case, depending on how 'community' is defined) it could be argued that the state may have the right to wage war on the behalf of one or a part of them, but not all. Non-represented communities can have the right to wage wars of liberation against such states.

Virginia Held discusses whether non-state groups can qualify as legitimate authorities, assuming that their aims can be seen as justifiable (Held 2005). She argues that groups that are supported by the people they claim to represent should be seen as legitimate representatives, and the question of legitimacy must be determined by evaluating such claims. And in a similar discussion of non-state agents and authority, Andrew Valls (2000)

[12] Interstingly, Walzer has very little to say about the LAR itself in *Just and Unjust Wars* (1992).

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has argued that, for example, 'terrorist organizations' could be construed as legitimate authorities on the same ground as states, that is, that they represent the interests and rights of its people. If a terrorist organization can make a plausible claim to represent and to be acting on behalf of a community, and if the community widely regards the terrorist organization as acting on its behalf, it should logically be regarded as a legitimate authority. Consequently, Valls argues that states do not automatically have a right to wage war by virtue of their statehood, and that legitimate authority must be contingent upon whether they properly represent the rights and interests of their people.

Focusing on representation shifts the moral question of who has the right to fight to the question *which communities* have the right to authorize someone to fight on its behalf. This means that we must determine what should count as a *just political community* in the first place before we can say anything about the justice of war, along with the related questions who has the right to form such a community and what happens when different political communities claim the allegiance of the same people and over the same territory. Walzer appeals to the ideal of communities as direct and indirect bearers of rights. However, when the cause of war is disagreement about the delimitation of political community itself (as in most civil wars), the very notion of representation becomes deeply problematic. And while the requirement of consent and representation is intuitively appealing when thinking about the relation between an actor claiming authority and a political community, it is much more problematic to think of *communities themselves* as existing by virtue of representation. Clearly, almost no political community can claim to have been created through a process of direct delegation by its members. Thus, it seems like basing the right to wage war on representing a community opens a Pandora's box of other problems relating to the issue of community as such.[13]

Even if these problems can be solved, it does not address the more basic issue of whether you actually have to represent *anyone at all* in order to justifiably wage war. I suggest that this is not necessary. In cases of large-scale self-defense against aggression and assistance to the victims of aggression the representation-issue seems moot, as it is not the fact that the victims are *represented* by the aiding party, or themselves, that justifies the intervention or defensive action on their behalf but protection of the victims' basic rights. And if it can be justifiable to fight wars to protect the rights of others even

[13] It can also be pointed out that most international organizations, in particular the UN, would be in serious trouble if legitimacy was contingent upon representation – many UN member states do not qualify as democracies, and hence the UN and the UN Security Council are not legitimate authorities according to this view.

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when they have not expressed their consent – perhaps because the victims have no possibility of consenting due to severe repression – then representation cannot be a deciding factor in determining who may or may not fight wars. The alternative would be to grant anyone with the ability to sufficiently repress a community a *carte blanche* against foreign intervention, because the community has no chance of consenting to assistance.

As suggested above it also seems clear that under some circumstances it may be just to wage war in order to help build a community, such as in a 'failed state' where the weakness of community is a major cause of human rights violations in the first place. Clearly, some societies are so weak that there is little 'way of life' to speak of. Other communities repress human rights of women, children and various minorities. Representing an unjust community can hardly justify fighting wars on its behalf.

Authority and *jus ad bellum*

Plausibly, reserving the right to fight wars to widely recognized authorities *increases the likelihood that wars will be just* according to the other criteria of *jus ad bellum*. Why would this be true? Three primary reasons come to mind. The first reason is cognitive – the recognized authority is in the best position to judge the presence or absence of just cause (and all the other criteria of *jus ad bellum*, presumably) – states possess superior intelligence-gathering and intelligence-judging capabilities compared with other political actors (Syse and Ingegerd 2005). The second reason could be that governments have a unique responsibility for the welfare of their citizens, and this special responsibility makes it more likely that it will take all morally relevant interests into account than non-government actors. Governments are held accountable to the public for their actions, meaning that they will probably 'pick their fights' cautiously and in a way that they can publically justify. The third reason is that the legal regulation of warfare is dependent on recognized authorities. By restricting who may wage war, the legal and political regulation of warfare becomes possible through such important instruments as the UN Charter and the Geneva Conventions. This legal and political framework is an important tool for reducing the frequency and horrors of war, as well as strengthening respect for other important just war-principles, in particular just cause (Pattison 2008, 150). I will consider these reasons in turn below.

The argument that recognized authorities display cognitive superiority in terms of judging the justice of wars appears to be inconclusive. Military history provides plenty of evidence that recognized authorities frequently misjudge the appropriateness and prospects of war in general and that misperceptions of information are common. That a government has access to

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a lot of information is certainly no guarantee that this information will be processed in a rational manner – the opposite may be the case, since a government has to handle so much information that it is impossible for anyone to rationally process all of it in a comprehensive way.

The second argument states that legitimate governments are held accountable in a way that non-authorities are not and that this improves the likelihood that only just wars will be fought. However, recalling that democratic states have maintained, and fought wars to maintain, colonial empires in the not-so-distant past, being held accountable seems like a rather unreliable mechanism for promoting justice. If the citizens accept or fail to perceive injustice, care little about foreign policy or can be easily deceived by the government, restraint is likely to fail. So it is difficult to see why this should be a compelling reason to insist on legitimate authority, even if we restrict legitimate authority to democratic states which the traditional view does not. In the case of non-democratic states, the argument is even less compelling since it is easy to imagine how dominant interest-groups who exercise controlling influence over governments may benefit from unjust wars.

Furthermore, it is unclear why an authority's responsibilities toward a *particular community* would necessarily make it take all *universally* morally relevant reasons into account, which surely should be the focus of just war theory. Political accountability is 'inward-looking' in the sense that governments are typically held accountable for how well they protect a particular community and its constituents, or various dominant interest groups in that society. That inward-looking accountability will improve universal justice seems like a foregone conclusion. It all seems to depend, again, on whether the principals (e.g. citizens) prioritize universal justice highly enough to hold their agents (governments) accountable with regard to it, and what the interest of dominant groups in a society might be. Being held accountable to chauvinistic interest-groups is unlikely to promote justice.

The regulation-argument suggested by Pattison seems more promising. However, a skeptic may wonder how effective this legal framework actually is in restraining and regulating the use of force. The argument that we need the LAR in order to be able to legally and politically regulate warfare assumes that wars actually *are* effectively regulated by such laws. It seems like an empirically open question how much restraint, for example, the Geneva Conventions provides in present-day conflicts. Perhaps the restraint is significant sometimes but not significant in other conflicts, as 20th-century history seems to indicate, legal restraint being a 'fair-weather-project' as it were. The sensitivity of public opinion and the role of the media arguably play a much bigger role in restraining warfare than laws and regulations. Compliance with the legal framework may be

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a simple matter of expedience such that actors will only comply with the framework when opportunity costs are low and compliance is relatively safe. Citizens and their leaders frequently value other goods (welfare, security, etc.) quite a bit higher than they value compliance with international law, and they will sometimes disregard international laws and regulation when compliance is costly in terms of more highly values goods. A high level of observed compliance with international law could be explained by the fact that its demands frequently coincide with the power-adjusted self-interest of states, leaders, and citizens. Rather than reducing the frequency and horrors of war in any significant way, it is the mutually self-interested restraint on international violence that helps produce the laws of war in the first place (Goldsmith 2005, 9–13).[14]

It is also not entirely clear why restricting the range of agents who may fight wars to legitimate authorities is necessary to establish effective legal and political regulation of force. *Current* regulation focuses heavily upon states and intergovernmental organizations, and it is plausible that this focus simplifies the enforcement of the rules that govern warfare. But that the rule-governed framework would become more legally complex with a less restrictive view of who may use military force hardly seems like a compelling argument. Rather, one may argue that the current legal framework is in dire need of revision due to the proliferation of non-state actors in current wars. That private military firms are poorly regulated in contemporary international law, their personnel operating in a legal vacuum providing governments with a means of conducting military operations by proxy with less restraint than regular forces (Pattison 2008, 152) perhaps says more about the deficiencies of international law than the necessity of restricting the type of actors who may use military force. Since private military firms are, as an empirical fact, ubiquitous in contemporary conflicts, it seems like a better idea to make the legal and political framework less dependent on the assumption that those fighting wars are only states and state-agents.[15]

Authority and the chain of command

Johnson argues that '[t]he authorization to use force implies the ability to control and cease that use: that is, well-constituted and efficient chain

[14] This is not to suggest that international law and the laws of war are pointless or ineffective (they may have a coordinating role, for example), only that their *restraining* (and justice-enhancing) effect may be a lot smaller than the regulation-argument assumes.

[15] Indeed, progress toward 'individualization' of international law is already well under way, for example, through the creation of the International Criminal Court.

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of command' (Johnson 1999, 28). Only a duly constituted authority has the proper control over armed forces to control and restrain violence in accordance with *jus in bello* principles. In other words, authorization is critical for controlling the forces involved in war as well as the means used to fight.

However, states that fulfill the LAR have frequently failed miserably when it comes to moral restraint on military force so in any case, being a legitimate authority is not a reliable safe-guard. As an empirical matter, it is easy to find examples of duly constituted governments who pay little attention to *jus in bello* and resistance movements and other 'irregular' parties to wars who care much more about protecting the civilian population than the government does.[16] The chain of command is also a double-edged sword, since it has frequently been used to systematically violate *jus in bello*-principles as well, or has indirectly promoted such violations. Insisting on chain of command would also have the odd consequence that a war-fighting party that loses its cohesion would lose its right to wage war.

I think the point should be granted that a proper chain of command *does* increase the likelihood that a war will be justly fought according to *jus in bello* – but only if the commanding authority is committed to respecting the laws of war. However, the important issue here seems to be not *authority* as such but effective command. It is conceivable that a wide range of political entities can establish an effective chain of command and fight in a disciplined manner, and it is not obvious why one would want to decide beforehand that only widely recognized authorities such as states can establish and maintain such command. It is perhaps true that states are more *likely* to effectively command and control the military forces at their disposal, but if an entity of some other kind, such as a private military firm or a volunteer force, can maintain control over its forces and is capable of fighting a just war, there is no reason to insist on the LAR on those grounds. Arguably, any form of effective large-scale warfare requires chain of command, so almost any party capable of fighting a war in the first place should be able to control and restrain its forces.

Authority and non-combatant immunity

According to the received view, it is the fact that soldiers are the agents of a legitimate authority that both grants them the right to kill other soldiers and makes them liable to attack. This seems to be the essence of Rousseau's argument, quoted above – individuals in war are enemies by virtue of being defenders of their states, respectively. Their violence toward each

[16] The civil wars in Syria and Libya may serve as cases in point.

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other is not personal, and we do not hold them responsible for the destruction they cause as long as they respect the laws of war. The flip-side of this is the fact that soldiers must accept a significant risk of death and great bodily harm, what is sometimes called 'unlimited liability', as servants and protectors of their state and its people. This delegation from an authority and unlimited liability is the basis of the moral equality of soldiers. Innocent civilians, on the other hand, have accepted no such unlimited liability. Attacking a civilian is personal, similar to aggravated assault. One example of this view is when Johnson discusses what is wrong with terrorism. He argues that what makes terrorism a crime against humanity is that it strikes at the defenseless and not the 'combatant forces of a social unit' (Johnson 1984, 60), thus indicating that is what role actors play in the social unit that decides whether they are legitimate targets or not. Arguably then, proper authorization plays a pivotal role in the combatant/non-combatant distinction.

In another example, Coates worries that abandoning the LAR will lead to a relaxation of other just war-criteria as well due to a 'romantic' assessment of 'revolutionary' warfare (Coates 1997, 124). This is particularly troublesome when it comes to non-combatant immunity, since when you are fighting against a 'system of oppression' all representatives of that system (combatant or non-combatant alike) become potentially legitimate targets since they are guilty of 'structural violence' (Coates 1997, 132). Hence, if we weaken or remove the LAR we would simultaneously undermine the combatant/non-combatant distinction, the argument goes. Coates is surely correct when he argues that widening the category of people who counts as combatants in a 'revolutionary' war beyond soldiers and military personnel is dangerous and should be resisted. The question is what role the LAR actually has to play here. Is it really legitimate authority as such that serves to distinguish between combatants and non-combatants, as Coates' argument implies?

I suggest that this argument is mistaken. It can be justifiable to use force against aggressors regardless of their authorization or lack of it. An individual's or collective's right to defense does not depend on the legal or political status of the attacker. Enemy combatants are not 'liable to attack' (MacMahan 2005) because they are servants of the state and fight in an 'official' capacity but because of the unjust aggression they commit and the danger they pose. G.E.M. Anscombe argued in a similar way that what separates permissible from impermissible targets in war is the issue of innocence (culpability). A person is liable to attack if non-innocent in a relevant sense, that is, engaged in an unjust proceeding such as aggression toward others (Anscombe 1981). In war you can clearly be justified in attacking armed insurgents, guerillas, or civilian suicide-bombers even if

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they lack any kind of legitimate authorization, do not wear identifiable uniforms or have formally accepted any risk of 'unlimited liability'. Likewise, soldiers who are authorized to fight are not liable to attack when they are wounded, are trying to surrender, or when they are on leave in civilian society, which indicates that it is not authorization as such that makes it morally justifiable to attack and kill them. A focus on *unjust threat* rather than authorization makes much better sense of these intuitions. The reason civilians are not liable to attack is that they do not expose anyone to unjust threat or aggression, not that they lack authorization to use violence.

Also, it can plausible be argued that there exists no moral right to attack soldiers fighting a just war. Soldiers fighting justly are armed, dangerous, and authorized to use violence by a recognized authority, but so are police officers, and we do not normally think it justifiable for criminals to attack police officers while pursuing a crime. On the contrary, most legal systems treat it as a particularly serious offence to use violence against the police exactly because of their public status and because they serve an important role in protecting others. Thus, it can be argued that soldiers fighting a just war are not liable to attack and should logically enjoy equal immunity as non-combatants do. The idea of moral symmetry is thus unsustainable.[17]

One may agree with this but argue that a soldier, being commanded to fight by a legitimate authority, is not culpable in Anscombe's sense when committing violence on behalf of the state. A soldier has a primary professional obligation as an agent of the state to subordinate his or her personal judgment about what constitutes a just war, and is only responsible for fighting in accordance with the principles stipulated by *jus in bello*. This is unlike a criminal committing a crime, since a criminal presumably has no morally valid reason to commit crimes whereas a soldier may have a morally valid reason to serve his or her country. However, I think it is more correct to say that this is an *excuse* rather than something that establishes moral symmetry between soldiers. A soldier fighting an unjust war has no *right* to use violence against anyone. That we grant soldiers moral symmetry is thus a matter of convenience in recognition of the fact that soldiers fighting for the unjust side may often be excused for fighting in an unjust war (typically due to coercion or ignorance). It does not establish a basis for the combatant/non-combatant distinction as such. Hence, the LAR gains no support from this argument either.

[17] This view obviously has far-reaching implications for just war theory well beyond the LAR itself, as suggested by MacMahan (2005).

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Conclusions – just war theory without the LAR?

It seems like there are no compelling reasons to think that the LAR deserves its prominent status in just war-thinking. None of the arguments discussed in this essay have demonstrated that legitimate authority is a necessary (as opposed to simply instrumental) component for justice in war. Just war theory needs to be modified accordingly and the LAR demoted from its deontological status. This does not mean that authorization according to proper, recognized procedures is unimportant to the justifiability of war. A war may be unjustifiable because the consequences of bypassing the established procedures are so negative as to outweigh the possible benefits of going to war, hence making the war disproportionate. Lack of proper authorization may also undermine popular support for the war, diminishing its likelihood of success. Authorization by, for example, the UN Security Council may be crucial for a war's credibility. In other words, dropping the LAR does not mean that it is not a concern *at all*.

One anticipated reaction to this view is that the LAR is so pivotal for just war theory that we have to abandon the whole framework along with the LAR. While it is true that the LAR has been *historically* very important for the theory's development and that medieval theorists believed it to be the most important principle, it is important to recognize the usefulness of the just war framework without the LAR. All the other *jus ad bellum*-principles can function separately without reference to the LAR, and as I argued above I think the same is true for the *jus in bello*-principles such as the combatant/non-combatant distinction. There is then no compelling reason to reject all of just war theory because the LAR is misguided. Rather, I suggest that it is the basic moral soundness of the rest of the just war-framework that provides the best reason to reject the LAR. The principles of just cause, last resort, proportionality and right intention are well supported by our intuitions regarding justifiability of interpersonal violence in general, suggesting that they can continue to serve well (or even better) as an ethical framework for war without the LAR.[18] On the other hand, the LAR is not well supported and actually clashes with many basic intuitions about the use of force. Just war theory would benefit from its removal.

A reasonable concern is that dropping the LAR would be dangerous and contribute to 'promiscuity' in terms of the justifiability of war, and perhaps further destabilize fragile regions. Coates and many others express concern that relaxing the LAR would lead to relaxation of other

[18] One point where I think just war theory needs some modification, if we abandon the LAR, is the just cause-principle. In particular, it cannot be automatically assumed that states have a just cause to defend themselves against attack.

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just war-criteria as well. If correct, this is indeed a valid concern. In response though, one may claim that it is unlikely that a number of wars would suddenly qualify as just simply because of a relaxation of the LAR. In fact, the opposite is likely to be true, if not in theory then in practice: emphasizing the monopoly-right of the legitimate authorities (in practice: states) to decide on the just recourse to war actually weakens the restraining effect of the other just war criteria. The emphasis on legitimate authority implies that in times of crisis we should defer judgment to those who properly should make such decisions. However, if no one has a *unique* right to wage war, there is no one to defer judgment to either. Sovereign authorities can no longer appeal to their unique status and must face the full burden of proof for justification of war.

In historical hindsight, it seems clear that the focus in just war theory on sovereigns as the only legitimate war-fighters simply reflected the realities of power in mid- to late-medieval times, as the sovereign state did, as a matter of fact, grow progressively stronger. For the sovereigns, the idea that only they had the moral authority to wage war had obvious attraction and helps explain the theory's popularity (being on the 'winning side', as it were). With the general weakening of sovereign privilege due to globalization and emerging cosmopolitan norms it is only logical that just war theory follows suit.

A similar point can be made about various non-state actors, who cannot derive a right to wage war from political recognition by, or representation of, a community, as, for example, Held and Valls seem to suggest about terrorist organizations. If representation is only relevant in a derivative and instrumental sense, we cannot argue that organizations like Hamas or the Taliban have the right to fight wars because they have support from, represent or constitute part of a legitimate political community. Contrary to what Coates suggests, this is likely to make it *more* difficult – not less – to justify 'revolutionary warfare'.

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