Who May Fight Just Wars? Right Authority for States and Non-States

A Dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy at George Mason University

by

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DEDICATION

This work is dedicated to my wife Diane, to my parents, and to the memory of Dr. Frances Harbour, who encouraged me to pursue this topic and gave critical support and advice up to the end.
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This work would have been far inferior (if it would have existed at all) without the input of many different people over several years. Dr. Frances Harbour was my original dissertation committee chair; it was in her Ethics in IR class that the nucleus of this argument first took shape, and she strongly encouraged me to turn it into my dissertation and was a great support during the early "flailing around" phase of theory development. Dr. Char Miller agreed to step in as chair when Dr. Harbour passed away, and he and my other committee members have supported me despite imperfect circumstances and the difficulties of working remotely.

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# LIST OF ABBREVIATIONS

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<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>ASG</td>
<td>Abu Sayyaf Group</td>
</tr>
<tr>
<td>AFDL</td>
<td>Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre</td>
</tr>
<tr>
<td>AQ</td>
<td>Al-Qa’ida</td>
</tr>
<tr>
<td>FARDC</td>
<td>Armed Forces of the Democratic Republic of Congo</td>
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<tr>
<td>ARMM</td>
<td>Autonomous Region of Muslim Mindanao</td>
</tr>
<tr>
<td>AWOL</td>
<td>Away Without Official Leave</td>
</tr>
<tr>
<td>FAPC</td>
<td>Forces Armées du Peuple Congolais</td>
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<tr>
<td>FPR</td>
<td>Front Patriotique Rwandais</td>
</tr>
<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
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<tr>
<td>IO</td>
<td>International Organization</td>
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<tr>
<td>IR</td>
<td>International Relations</td>
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<tr>
<td>IZL</td>
<td>Irgun Zvai Leumi</td>
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<tr>
<td>ISIS</td>
<td>Islamic State of Iraq and Syria</td>
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<tr>
<td>JIA</td>
<td>Jemaah Islamiya</td>
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<td>JWT</td>
<td>Jewish Agency</td>
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<tr>
<td>KFR</td>
<td>Kidnapping for Ransom</td>
</tr>
<tr>
<td>LRA</td>
<td>Lord’s Resistance Army</td>
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<tr>
<td>MEC</td>
<td>Moral Equality of Combatants</td>
</tr>
<tr>
<td>MIM</td>
<td>Mindanao Independence Movement</td>
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<tr>
<td>MILF</td>
<td>Moro Islamic Liberation Front</td>
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<tr>
<td>MNLF</td>
<td>Moro National Liberation Front</td>
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<tr>
<td>MLC</td>
<td>Mouvement de Libération du Congo</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organization</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<tr>
<td>OIC</td>
<td>Organization of Islamic Conferences</td>
</tr>
<tr>
<td>PMC</td>
<td>Private Military Contractor</td>
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<tr>
<td>RCD</td>
<td>Rassemblement Congolais pour la Démocratie</td>
</tr>
<tr>
<td>RAF</td>
<td>Red Army Faction</td>
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<tr>
<td>R2P</td>
<td>Responsibility to Protect</td>
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<tr>
<td>R&amp;R</td>
<td>Rest and Recreation</td>
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<tr>
<td>RA</td>
<td>Right Authority</td>
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<tr>
<td>FAR</td>
<td>Rwandan Armed Forces</td>
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United Command of Michoacán Self-Defense Groups..........................CAM
United Nations..................................................................................UN
United Nations Mission in the Democratic Republic of Congo...............MONUC
United States..................................................................................US
ABSTRACT

WHO MAY FIGHT JUST WARS? RIGHT AUTHORITY FOR STATES AND NON-STATES

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George Mason University, 2014

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Just War Theory (JWT) attempts to hold war to a set of ethical standards, but its present state-centric viewpoint makes it unable to assess most wars involving non-state actors, which comprise the majority of modern conflicts. This dissertation proposes revisions to the Just War Theory principles of Discrimination and Right Authority, in order to generalize JWT to include non-state actors. Right Authority is disaggregated into three components: Competence, Standing, and Discipline. Under the Agency-Freedom Theory of Discrimination, personnel who are not immediate battlefield threats may nevertheless be targeted, regardless of their individual innocence, if one may predict that they will be threats in the future, based on salient features relevant to their freedom of choice including community membership. As such, threatening behavior by a community representative threatens to expose the entire group to reprisals. Therefore, an actor seeking Right Authority needs to gain Standing with respect to its community, that is, the
right to make war on their behalf. Furthermore, the actor must take care that its actions, including those that enable other actors, do not lead to harm to the community—it must enforce Discipline on itself and its associates. Both Standing and Discipline are on a sliding scale and can be gained or lost; hence, this framework is called the *Dynamic Legitimacy* theory of Right Authority. The theory will be illustrated with detailed case studies of the Moro insurgency of Mindanao, the Autodefensa movement in Mexico, and the conflict in the Congo.
CHAPTER ONE: INTRODUCTION

The doctrine of Just War Theory (JWT) is based first of all on the principle of Right Authority: that only certain actors have the right to make war, based on their legitimate position over others and responsibility for them. Originally, this principle referred to the Roman Emperor as the holder of authority; the conventional modern version of Right Authority (RA) restricts the right of war to sovereign states (or by some readings, only "legitimate" states such as liberal democracies, or perhaps only the UN Security Council). But according to this understanding, JWT would categorically deny legitimacy to actors such as resistance movements, private military contractors (PMCs), or other non-state actors engaged in conflict. Such a conclusion does not mesh well with our sense that some rebellions are justified and others are not, that some non-state actors behave justly and others do not.

Until recently, JWT theorists simply declared revolutions to be "different" from interstate war, and hence not relevant to the principle of Right Authority, but this claim is unsatisfying. Ought JWT to encompass all manner of wars, or does morality only matter when both combatants are sovereign states? Furthermore, today the majority of conflicts involve non-state actors. If JWT simply excludes non-state war from moral analysis, that would cripple JWT’s relevance in the real world.
Some more recent scholars have argued that non-state groups can indeed possess Right Authority, but with a few notable exceptions, their discussion of RA as a concept is cursory and unrigorous. This or that actor is simply claimed to possess RA, or not to possess RA, on the basis of vague claims of representation or fitness to join the international community or other explanations that do not seem fundamental to what the nature of war is about.

The lack of any systematic investigation of what RA is has left several lacunae in our understanding of Just War. Most significantly, we have no way to tell how an actor may gain Right Authority, or lose it again. State governments are simply assumed to have Right Authority; yet the United States were founded through an act of rebellion, where men who began as private citizens and (it might be assumed) lacked Right Authority somehow managed to end their rebellion as full-fledged Authorities. But when did they go from lacking RA to having it? Why?

If we cannot answer that question, we do not adequately understand what Right Authority is in the first place, and the principle of RA becomes little more than a gentlemen’s agreement to keep the revolutionary rabble out of the In Crowd of sovereign states. And that matters because the language of Right Authority is used to justify decisions whether to make war on insurgents, or ignore them, or tacitly support them, or ally with them openly, across the world. Whether an armed group is seen as a dangerous insurgent group subject to targeting under the War on Terror, or as a band of courageous freedom fighters worthy of outside support, often hinges on judgments of the group’s
Right Authority (whether or not that language is used). If so, we ought to ensure that our judgments are coherent and defensible, rather than being based on gut feelings.

**What is Just War Theory?**

Just War Theory (JWT) is a broad tradition in Western thought attempting to lay out rules for when war may be just (or by some readings, justified—which is to say, still essentially unjust but necessary, and conducted in as good a manner as we can reasonably expect it to be)¹. As we will discuss later, it has roots in Greek and Roman philosophy but is based on Catholic doctrine, having been developed by Church scholars for about a thousand years. While the modern JWT program in Political Theory is secular, for the most part it remains within the conceptual categories laid out by Scholastics such as Thomas Aquinas.

The fundamental claim is that a war may be considered morally licit if it is begun in the right way, and then fought in the right way. In formal terms, this is called *jus ad bellum* ("justice of war"), and *jus in bello* ("justice in war").² Within each category, several conditions are laid out which traditionally must be met for a war to be considered just. The conventional *jus ad bellum* requirements are often termed Right Authority, Just Cause, Right Intention, Expectation of Success, Last Resort, and Proportionality. In short, just wars can only be started by a proper authority (the definition of which is the topic of this dissertation); there must be a sufficiently important reason to justify fighting; the

¹ "Since there will not be a modern war without the killing of innocents… no modern war can ever be *just*. This does not, however, preclude the possibility that a modern war can be *justified*—namely as the lesser evil” Steinhoff (2007:57).

² Scholars in JWT tend to use Latin terminology, either to connect their work with the larger historical tradition of JWT, or (according to some critics) to cloak themselves in pretentious jargon (cf. Calhoun 2011).
authority must fight the war for the right reasons; the authority must believe that it has a
good chance of winning the war, no other means may be available short of war to
achieve the just end, and the war's expected benefits must outweigh its expected costs.

The conventional *jus in bello* requirements are often termed Necessity, Proportionality, and Discrimination (otherwise called Noncombatant Immunity). (Some theorists add or delete an item here and there, but the preceding list is commonly agreed upon.) In short, to attack a target in wartime the attack must be militarily necessary, the damage inflicted must be proportionate to the goal achieved, and one must discriminate between combatants and noncombatants. This last point becomes tricky, since noncombatants are often killed in wartime, and it would be almost impossible to fight a war without killing some noncombatants. To get around this, Thomas Aquinas formulated the Doctrine of Double Effect (DDE): to be permissible, the action you take must have both a good effect (e.g. killing enemy combatants) and a bad effect (e.g. killing civilians), the actor must not intend the bad effect either as a means or as an end (and by some readings, will act to minimize the bad effect), and the good effect must outweigh the bad effect by a sufficient margin. Thus, under this doctrine one may bomb military installations even if civilians are nearby, so long as the civilian casualties caused are not too great and it is not your intention to kill the civilians.

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3 Some scholars object to this requirement as essentially rewarding successful tyranny. See Harbour (2011).
4 I tend to prefer the term Discrimination, as it emphasizes that such a requirement not only sets apart those who are to be protected, but also designates those who may be attacked.
5 Needless to say, this doctrine has raised many hackles. See Øverland (2014) for an alternative proposal, which has its own pitfalls.
At present, these principles do not closely match what passes for international law on legal and illegal wars; there is no enforcement mechanism to deploy against actors who violate JWT principles, nor is there much agreement on their precise definition. Given that, it is fair to ask what the point is of going through the exercise at all. Two answers present themselves. First of all, one can claim that it is intrinsically important for you to know what the right thing is, whether or not other people agree or whether societal institutions will enforce your conclusions on yourself or others. This perspective can motivate all sorts of viewpoints, ranging from total pacifism in the face of war’s self-evident horrors, to a more “realistic” look at what is practical to demand from real people in difficult situations, which is the general attitude of the JWT tradition.

For that attitude, many pacifists have attacked JWT as effectively being the propaganda of warmongers, no more. In response, one can invoke the second answer—that an important part of politics is the practice of justification. How we justify our actions, the terms used, the moral claims made, has a certain constraining effect on our behavior. To be sure, there will always be violent actors who simply do not care about ethics in wartime; and there will be others who hypocritically ape the forms of justice while violating them at every opportunity. But even the effort needed to ape those forms will lessen the actual harms done (especially in the modern media environment), compared to no constraint at all; and for those who attach any real importance to acting justly, the effects of Just War Theory will be all the greater.⁶ A practical example is the

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⁶ “The just war is really an ethical and religious doctrine surfaced with an often thick veneer of legality. In perspective any war amounts to ‘self-vindication without due process of law.’ That everyone agrees with the abstract definition of a just war is irrelevant; the just war theory is simply too successful to
restrictive rules of engagement that American soldiers operated under in Iraq and Afghanistan; while they were sometimes violated, the rules were far tighter than anything the military might have enforced during World War II or Vietnam (cf. Walzer 2004:8-10).

**The Problem**

Our focus is on the principle of Right Authority. The JWT tradition claims that only particular actors have the right to make war, though the justification for such restrictions has varied over time. The medieval Scholastics claimed that only a Right Authority, someone with the duty to see to the welfare of a community, is able to transcend the self-interested passions that motivate unjust war; modern writers are more apt to uncritically accept the claim of statist political theory that only sovereign states have the right to make war, since they are assumed to have a monopoly on legitimate violence.

Such an attitude that uncritically restricts legitimate war to sovereign states is badly out of step with the modern world. Today's headlines are full of non-state actors making war, from the brutal ISIS to the Kurdish Peshmerga who oppose them. We intuitively feel that ISIS is wrong to make war and that the Peshmerga are justified in opposing them, even though they do not do so under the aegis of the Iraqi state. Yet conventional JWT gives us few ways to justify that claim, since the Peshmerga are not sovereign and would therefore be said to lack Right Authority.
True, one could argue that since the Kurds are *de facto* autonomous, they are "close enough" to a state to count as a Right Authority. But that begs the question; modern JWT simply does not define *how* an actor is judged to be a Right Authority, so we do not yet know whether autonomy is sufficient without sovereignty, or whether we should be looking for other criteria altogether. In the Mexican state of Michoacán, vigilante groups called *autodefensas* have taken up arms in the face of the state's failure to rein in the cartels, though they do not claim to rule a people or seek to displace the Mexican state. Do they have Right Authority or not, and on what grounds?

The question is muddled to some extent because almost everyone agrees that even individuals can be justified in carrying out violent self-defense. So some sorts of violence are called "self-defense" and permitted to nearly everyone, while at an ill-defined point, violence becomes "war" and is restricted to those with Right Authority (who also satisfy the other JWT requirements, of course). Assuming as many do that only the state has Right Authority assumes that we know what exactly "war" is, and that the dividing line between self-defense and war maps out exactly to the line between what violence an individual (or a group of individuals, or a family, or a community) may do, and what only the state may do.

Such an assumption may not be warranted. And our conceptual muddiness surrounding what war is, who may fight it, and on what grounds has practical consequences. The presumption that only the sovereign state may make war, when applied uncritically, ends up privileging tyrannical regimes against non-state groups that seek to oppose them. It also denies us the theoretical tools to judge between *multiple* non-
state groups who are in conflict with one another, in zones where conventional sovereignty simply does not exist. Looking over the decidedly mixed history of U.S. involvement (or non-involvement) with non-state armed groups, it is evident that having better standards with which to judge non-state groups and their right to make war would be a considerable advance.

Fundamentally, the problem boils down to a failure of JWT theory: we simply do not know what we mean when we talk about Right Authority, or why it matters.

**Objectives and Limitations**

What is needed is a theory of Right Authority that is built from first principles, and *generalized* so that it can produce a standard with which to judge *any* sort of actor: state, non-state, corporate, or even individuals. It would begin with a clear understanding of why RA is necessary, what might justify it, how one can gain RA and then lose it again. My dissertation aims to produce such a theory. In the process, a new principle of Discrimination will be developed, as it gets to the essence of what war is and why we are permitted to fight wars in the first place.

It is important to note, however, that this work will not investigate whether Right Authority is in any way dependent on possessing a Just Cause. That is, we will assume for convenience that if a Right Authority fights an unjust war, that war does not actually impair its status as a Right Authority. This may not be the case in practice, as attested by the fact that several Western militaries require their troops to disobey unjust orders. Regardless, the question would take us far out of scope.
Additionally, while this work is compatible with the claim by some JWT scholars that *jus ad bellum* and *jus in bello* are not fundamentally distinct, and that both sets of criteria ought to be operating all the time in war, to investigate the question in detail would again take us out of scope. The argument does motivate some details of our theory of Discrimination, but not in ways that require greater analysis.

**Theoretical Framework**

As will become evident, this dissertation is grounded in a deep skepticism of hard dichotomies between state and non-state, civilian and military, legitimate and illegitimate, and superior and subordinate. It is motivated instead by respect for the social, emergent character of group behavior, and the way that political authority and categories of enmity and threat can be formed and reformed over time. In that sense, this work can be said to be in the constructivist tradition, though I am hesitant to embrace the more florid aspects of constructivism. To say that all categories of human experience are socially constructed is essentially trivial; some social categories are approximately "natural" because there are very good physical or existential reasons for social groups to draw boundaries where they are drawn. Still, social interactions like wars and the unfolding of group identity and political authority are much more prone to social construction and emergent behavior than most. A theory of Right Authority that assumes fixed categories of legitimacy and authority is missing this fundamental truth of human behavior.

In particular, the present work takes inspiration from the writings of Charles Tilly (2003) on the dynamics of collective violence. He identifies two axes that can be used to
characterize violence over sliding scales: the degree of collective coordination displayed, and the *salience* of the violence—that is, the degree to which the violence is perceived to have a wider meaning that conveys a broader category of threat. The insight that our perception of threat is important for understanding the dynamics of violence is one that reoccurs throughout the literatures of self-defense and Discrimination, and I believe it to be of fundamental importance. In the course of this work, I will argue that the perception of threat ought to underlie our principle of Discrimination, which in turn will justify the importance and scope of our theory of Right Authority.

The JWT tradition has been marked by a tension between collectivist views that ground the right to make war in nations or states, and liberal or individualist views (such as those of Locke or Grotius) which hold that individuals, too, have a right to make war under the proper circumstances. I fall on the individualist side of the spectrum in a theoretical sense, first of all for the simple reason that our principle of Right Authority ought to be scalable. The ideal principle should be capable of evaluating any sort of actor—from a sovereign state, to a local community, to a corporation, all the way down to an individual. We might decide to place restrictive limits on the ability of individuals to make just war, but to exclude them from analysis by fiat seems difficult to justify, and not terribly useful in the modern world.

Second, I believe in an individual right to make war because political freedom is only made safe by the ability of oppressed peoples to fight for it, and because the form of political authority that can be found in a community is by no means set in stone. If you support a statist view of Right Authority, you implicitly ignore any other form of social
organization than the sovereign state, a relatively new form of political authority in historical terms. Throughout history, individuals and groups of people outside of the state have been compelled to take up arms for some reason or another, and any theory of Right Authority that ignores that is politically reactionary and ultimately doomed to obsolescence as societies change over time.

In a nutshell then, this work focuses on the dynamics of threat and legitimacy between individuals or groups of all kinds, whether they are in formal organizations such as states or more informal organizations such as families or insurgent groups.

**Plan of Dissertation**

The remainder of this dissertation will proceed as follows. **Chapter Two** will survey the current literature on Right Authority. A weakness of the current literature is that arguments for one side or the other are not grounded on a firm sense of what Right Authority *is*, how it is demonstrated, how it can be established, and how it can be lost. In particular, if an insurgency begins with a handful of men sitting around a table and ends with establishment of a new state, there has to be a moment according to any theory where the insurgency (if acting justly) transitions from not being a Right Authority, to becoming a Right Authority. When this moment might be, what justifies the transition, and what permits such an insurgency to even begin without Right Authority is unclear from the current literature.

To begin remedying this, the remainder of Chapter Two will survey the older literature on Right Authority going back to the Medieval Scholastics and further, seeking to inventory the concerns that underlie the requirement of RA. Ultimately, the chapter
will conclude by decomposing the principle of RA into three subcomponents: a 
requirement of Competence to make judgments about just war, a requirement of Standing 
to commit others to that war, and a requirement of Discipline to regulate the violence of 
your subordinates. (The latter two requirements are the main focus of my discussion of 
RA, which I call Dynamic Legitimacy theory.) While the state is generally well equipped 
to satisfy these requirements, the state's possession of RA is not inevitable; nor need RA 
be exclusive to the state, in theory.

To understand the Competence requirement to make proper judgments, we must first 
understand what is unique about war specifically that would demand such an elevated 
standard of judgment. That is the task of Chapter Three, which begins by surveying the 
literature on the JWT principle of Discrimination/Noncombatant Immunity—that you are 
allowed to harm soldiers, but forbidden to harm civilians. This principle is fraught with 
difficulties in the modern conflict environment where non-state actors do not wear 
uniforms, and hide among a civilian populace that might not be so neutral in the conflict 
as they appear.

A significant strand of the literature seeks to explain why we are allowed to kill 
enemy soldiers in the first place. Many scholars argue by analogy to self-defense by one 
individual against another, but I argue that this analogy is flawed. War has two 
characteristics not shared by self-defense per se. First, in war you are reacting not just to 
ongoing attack, but the expectation of future attack. Second, in war you use violence not 
only against your direct attacker, but also against others who contribute only indirectly. 
(For example, most soldiers are not combat troops, but still contribute vitally to the
overall threat.) As a result, it is impossible to analogize directly from self-defense to war, because war has more degrees of freedom. To attempt to generate rules of Noncombatant Immunity from principles of self-defense threatens to do violence to one or both of these concepts.

Consequently, the existing literature falls into two characteristic errors. A very few scholars claim a too-restrictive rule for whom to target (e.g. only combat troops); most scholars expand the rule to justify too-permissive targeting of civilians, by appealing to a broad claim of shared agent-responsibility or collective guilt (Steinhoff [2007] is a good example). Other scholars seeking to avoid those errors (such as McMahan) end up doing violence to the concept of self-defense itself, seeking to stretch it to cover cases it was not meant to apply to.

This paper instead argues that self-defense is a restricted case of the more general category of war—indeed, a degenerate case (in the mathematical sense); this analytical lens is called the continuum-of-violence framework. And this framework is able to justify, in a rigorous way, the different standards of judgment applied to war and self-defense. In self-defense, because the attack is evident and ongoing, you need a much lower standard of judgment to determine if a violent response is justified than in war generally, where the threat may still lie in the future. And because you are harming only your direct attacker, you do not need to justify harming people who are indirectly related to the threat, as you do in war. Thus, practically everyone is judged competent to employ self-defense. Conversely, to justify attacks during a war situation in which uncertainty and indirect involvement are present would require meeting a much higher standard of
judgment, which would have to be properly established for an actor to claim Right Authority.

Chapter Three then presents a theory (which I will call the *Agency-Freedom*\(^7\) theory of Discrimination) that identifies when you may and may not attack parties who are not presently threatening you but can be *predicted* to do so, by appealing to two concepts. Actors who willingly contribute to the threat in meaningful ways are culpable as individuals. Other actors who do not willingly participate in the threat—for example, conscript soldiers, or soldiers who are not even at the front lines—may nevertheless be vulnerable to attack because their agency is *override* by the social structure they are in (a hierarchical military, a close-knit terrorist group, an insular ethnic community).

However, Agency-Freedom theory also implies that we have a duty—wherever feasible—to break unwilling enemies free of the social structures that compel them, by destroying command-and-control capabilities for example. When this is done, the conscripts are returned to the full dignity of individuals, and can then be immune to attack unless they choose, as free individuals, to contribute to the threat on their own. This will be briefly illustrated in reference to the case of child soldiers in the Lord’s Resistance Army, a tragic problem that is particularly troublesome for guilt-based theories of Discrimination, which seem to fail in the face of compelled child soldiers. Furthermore, formal membership in a military or other group is not enough, by itself, to make one liable to attack. This will be briefly illustrated with a thought experiment focused on the United States military.

\(^7\) Cf. Pettit (2003), who discusses the differences between “option freedom” and “agency freedom” and reviews the literature on both topics.
The danger of predicting the behavior of individuals by reference to their groups is that this opens the door to war based on bigotry and stereotyping. Indeed, attributing the actions of a few individuals to the larger group they come from is an endemic worry; for example, a few Muslim terrorists cause the American people to hate and fear Islam as a whole. In effect, individual warfighters represent the communities they are associated with, like it or not. This concern, as Chapter Four will argue, is the very heart of the RA requirement of Standing—that you must have the right to act on behalf of those people you will drag into a war. An individual such as the Unabomber who never claimed or appeared to fight on behalf of others would not have a Standing requirement to satisfy; but others, claiming to act on behalf of an oppressed nation or race or umma, would.

The broad requirements of Standing will be worked out—to whom an actor is responsible, how it must demonstrate that it has Standing, and how it must uphold its duties to those it represents—particularly in the earliest stages of a conflict, when the community to be represented may not even know of the warfighting actor’s existence (as in the case of a handful of revolutionaries sitting around an apartment kitchen, planning the glorious uprising). Briefly, I argue that one can establish partial Standing that would consequently permit a restricted range of violent activities, whose extent would vary depending on the degree of Standing established.

Chapter Five will discuss the Discipline requirement—the duty to regulate the violence of subordinates. This requirement is straightforward for states with hierarchical armies, but less so when affiliations are looser. For example, the Moro insurgency of Mindanao nominally featured three prominent armed groups: the Moro National
Liberation Front (MNLF), the Moro Islamic Liberation Front (MILF), and the Abu Sayyaf Group (ASG). But on the ground, armed personnel may feel their greatest loyalty to small units of 10-20 men (often kin) called *alliances*, which might affiliate with one group today, another group tomorrow, balancing off a delicate web of social obligations owed to multiple local authorities (Ugarte 2008, 2009). They may consider the orders of a formal organization to be weighty, but not decisive. And when it suits them, such units may decide to go independent for a limited time, and practice indiscriminate banditry. In a situation where you have imperfect control of those associated with you, what are your obligations under JWT?

Nor is the problem only for non-state groups. Even formal militaries may have imperfect command and control over front-line groups, as anyone who has served as a military advisor in a developing nation can attest. Furthermore, as far as I can tell, there is at present no theory in International Relations describing what a state’s moral obligation is to control the behavior of its allies (including other states), though the beginnings of one might be found in Hakimi (2010). Ought the United States be blamed if our Afghan allies massacre civilians, for example? And would such a massacre create a deficiency in the US’s own Right Authority? At present, there is no way to tell. Chapter Five attempts to build the beginnings of a theory to answer that question.

For the theory to be fully general, it would have to be able to handle very different types of associations between an Actor and an Associate. The Actor might be a state allied with an Associate state of equal power; or the Associate might be considerably weaker and dependent on the Actor, or it might be considerably stronger and able to set
the terms of the relationship. Or, the Associate might be a non-state group dependent on Actor for patronage. For any given relationship, what duties might Actor have to control Associate's behavior? Chapter Five will argue that an actor incurs an obligation to regulate another if, and to the extent that, it has provided the other actor with significant resources that enable its behavior. A military that has armed, trained, and equipped an individual soldier would have a nearly absolute requirement to control his behavior; the United States, when it erroneously informed Saddam Hussein that it would not protect Kuwait from invasion, would have a significantly smaller but still positive duty to control Saddam. Thus, the claims of Dynamic Legitimacy theory are formulated in terms general enough to encompass any sort of relationship. Its claims regarding Discipline will be illustrated with reference to a hypothetical PMC.

The following three chapters will present case-studies, in which the theory of Right Authority to be presented will be applied to real-world conflicts that are far too messy for existing theories to make sense of. Chapter Six will examine the Moro insurgency of Mindanao, the Philippines. This case poses problems for conventional treatments of Right Authority; the Moro community places its allegiance in one of several competing armed groups that contest the authority of the state, and of each other. The influence and authority of each of these groups shifts over time in a dynamic process, which is ill-captured in previous theories of RA. Actors such as the Moro National Liberation Front that could be claimed to have Right Authority at once point end up losing it only a few years later, when they abuse their position over the Moro community to enrich

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8 How much smaller is impossible to tell at this point in the theory’s development. It is highly unlikely that the United States had a duty to go to war, however, or at least a duty grounded solely on this principle.
themselves. Loyalties then shift elsewhere, to the Moro Islamic Liberation Front, which might be said to gain Right Authority thereby.

**Chapter Seven** will analyze a brand-new case that is still ongoing and whose resolution is unpredictable, the Autodefensa movement in Michoacán, Mexico. The movement, a decentralized force of armed citizens, rose up against the depredations of the drug cartels in late 2012, and has since had tense relations with the Mexican state, which has variously and simultaneously treated the Autodefensas as potential allies and as dangerous vigilantes. The present theory of Right Authority will be applied to the movement, and in particular the requirement of Discipline will highlight problems in the early structure of the movement that ended up leading to its schism.

**Chapter Eight** will examine the protracted conflicts in the Congo. This case bedevils theories of Right Authority; the Congolese state is weak, fragile, and often predatory against its own citizens, yet seems to be preferable to the swarm of non-state groups that has ravaged the populace over the last twenty years. On the other hand, some non-state forces seem to have been far better at protecting the populace and establishing civil order than the formal institutions of the state; they can be analyzed despite not being formal states.

The international community's response in Congo, too, can be made subject to our analysis—an advantage of the Standing framework is that an external intervention can be made subject to the same set of requirements as any other kind of war. This represents a significant contribution to the literature, which has argued over the moral status of interventions and when they can be justified.
Chapter Nine will conclude, summing up the argument of the dissertation and reviewing its contributions to the literature.
CHAPTER TWO: RIGHT AUTHORITY, A LITERATURE REVIEW

The principle of Right Authority asserts that only particular kinds of actors have the right to go to war, according to Just War Theory. This principle has been understood in many different senses and justified in many different ways over the centuries; but at present, its conventional understanding (enshrined in international law) is that only sovereign states have the right to make war. Unfortunately, such a claim is difficult to support on theoretical or historical grounds. The modern democratic world was built on revolutions in the American colonies and France, in which the existing state regimes were violently pushed aside by non-state actors; embedded in our political DNA is the sense that the power of the state is not unconditional, nor is the war-making power of the individual unconditionally constrained. The conventional understanding of Right Authority has few resources to handle popular uprisings, since they are unlikely to begin in a conventionally legitimate fashion (Buchanan 2013).

Ironically, international law has shown more flexibility than the consensus view of Right Authority. Following the colonial era, liberation movements have been effectively given the same status in international law as states, both because they represent a political community, and because they defend “state values” (Fabre 2012:143). But with this reading, liberation movements become the exception that proves the rule—they aspire to be states and thus do not pose a threat to the greater state system (though they may
certainly give pause to particular state regimes). And international law has trouble saying precisely when a liberation movement gains the privileges of a state. Presumably the mere act of beginning a war of liberation is not enough—international law would not provide statist privileges to a small handful of revolutionaries sitting around a kitchen table. So when do they gain those privileges? How big does a movement have to become, and why?

For that matter, what could justify restricting the right to make war in the first place? If we take social-contract theory seriously, a state has no powers that do not ultimately belong to its people—including the right to make war. Therefore, under the right circumstances, individuals could regain their right and make war on their own behalf. A cosmopolitan theorist such as Fabre (2008, 2012) goes further and asserts that the right to make war is actually a human right, which individuals never lose. Yet most of us do have the sense that wars should not be started by just anyone. What justifies that feeling? And who ought to be able to start wars, and why?

Current theory gives little help to these questions. The conventional understanding of Right Authority has difficulty explaining why the authority to make war is given uniquely to states, how a state might lose Right Authority, and (just as importantly) how Right Authority is gained and sustained in the first place. Even revisionist accounts of Right Authority, which seek to extend its application to some non-state groups, have trouble specifying which groups make the cut and which do not, as well as the scope of such groups’ powers and when they are gained and lost.
In this chapter, we will survey current work on Right Authority and show that modern work contains no real sense of what Right Authority is, what it is grounded upon. The statist view of Right Authority cannot be defended on the grounds of political authority more generally, which has a theoretically shaky foundation. Existing views of non-state RA either are too vague or are too quick to jettison the concept of Right Authority when it proves inconvenient, throwing out the baby with the bathwater. To remedy this gap, we will go back to the early days of Right Authority in Christian thought, taking an inventory of the concerns underlying the concept’s formation without necessarily taking those concerns to be a self-evident proof of their present authoritativeness (cf. O’Driscoll 2013). Having done so, we will attempt to understand what we mean when we speak of Right Authority—a necessary first step when attempting to justify it, which is too-often neglected.

**Conventional Just War Theory**

After a long period of dormancy, Just War Theory was returned to the scholarly agenda in 1977 by Michael Walzer, and suddenly it became a hot topic in the academy. Ironically, most attention was focused on the principles of Just Cause, Proportionality, and Discrimination between combatants and noncombatants; Right Authority attracted less attention, perhaps (I speculate) because of the rise of the anti-colonial national liberation movements in the previous decades, and the American and French heritages of armed revolution. It was rather embarrassing for Just War Theory to seemingly forbid peoples from rising up against unjust governments; when that generation of theorists discussed revolutions at all, it was from the standpoint of outside powers who might or
might not intervene in the conflict.\textsuperscript{9} Non-state conflict or revolution was seen as somehow separate from “proper” state war, to be considered separately.

Walzer justified the Right Authority of states in particular because of the unique importance of the state—which he defines as a political association between a people and its government, in a particular territory. He views the state’s “deepest purpose” as the defense of its citizens’ lives, and perhaps just as importantly their sense of a common life together (1977:53; cf. Orend 2000, Copp 2002, Horton 2006, 2007). In particular, Walzer believes that human rights cannot be secured except through the social and political context of a strong state. It is the importance of the state in securing human flourishing, therefore, which grounds its near-exclusive right to make war. On the other hand, for Walzer this right is contingent on the state actually protecting its citizens; if it does not, then it has lost its legitimacy. Furthermore, if the state actively threatens its citizens, then the citizenry may rebel (cf. Orend 2000).

Walzer’s discussion of the role of the state was controversial and attracted its share of critics (e.g. Luban 1985). However, much of the subsequent discussion of states in wartime focused not on Right Authority as such, but on sovereignty and particularly on the question of when or if states were subject to humanitarian interventions. Right Authority itself saw little discussion or justification for decades. Thus Pattison (2008), in his discussion of the propriety of using Private Military Contractors (PMCs) in wartime, could make an argument grounded entirely in prudential concerns. He argues that restricting Right Authority to states has two major purposes. First, states claim an

\textsuperscript{9} See for example the debate between Walzer and Luban in Beitz \textit{et al.} (1985).
exclusive right to make war in order to reduce the frequency of war in general, and to allow for the regulation of its conduct. Second, restricting war to states facilitates “democratic control over the use of force” (2008:150).  

Both of these claims are arguable. It is true that the state’s increasing power did tend to reduce the violence within society, at least in early modern Europe (Tilly 2003:60, 63). At the same time, however, wars between states became progressively bloodier as states became better at mobilizing national populations into armies (Poggi 1978:109, Tilly 1992:202-3). Indeed, Walzer (1977:28) argues that state involvement in war makes it more of a crime, not less, since men are made to fight against their will. Worse, he argues, because soldiers’ lives are “nationalized” they can be more easily thrown away by the state (1977:35).  

Furthermore, does restricting war to states actually shut private actors out of the war business? Given what we know of the relationship between interest groups and the state (especially in democracies, by their nature), this proposition seems dubious. Instead, a statist principle of Right Authority may in fact empower those private actors powerful enough to influence (or co-opt entirely) the state, while excluding the less powerful (Tilly 2003:11).

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10 Pattison’s first explanation is closely tied to one of the key advantages of the state system—states can commit to binding the behavior of their subjects, and can consequently enter into credible agreements with other states (Spruyt 1994:28). As Nozick notes, when individuals are in the state of nature, there is no good way to settle disputes, “to end it and to have both parties know it is ended” (1974:11). Through subjection to a state, an individual is constrained by international norms and agreements, with the potential for making the world safer overall.  

11 The Comparative Politics subfield has a thriving literature on the role of interest groups in determining state policy. The grand master is of course Olson (1965, 1982), who discusses how collective-action problems allow powerful, narrow interests to exert disproportionate influence on government. See also Hirschman (1970), Keck/Sikkink (1998), Sabatier/Jenkins-Smith (1993), and Hall/Deardorff (2006), for starters.
This is painfully obvious in the case of large corporate actors. Perhaps the most glaring example can be found in the relationship between the oil company Shell and the state of Nigeria; Shell provides financing for a significant fraction of the state security services (the so-called “Shell police”), who are then placed at its disposal to protect its oil fields (Avant 2007). Here, we have powerful interests effectively laundering their use of coercion through ostensibly-legitimate states. More generally, whenever the means of coercion are concentrated in the hands of the state, powerful societal actors tend to brutally exploit the populace, secure in the support of the police (cf. Scott 1976:109). Indeed, in many societies that feature recurring violence, government figures will often deliberately weaken formal institutions and cultivate ostensibly non-state factions and armed groups to augment their effective power and influence (Reno 2005).\(^{12}\)

Similarly, rather than the monopoly of state coercion displacing criminal violence, the two may actually form a symbiosis, with criminals gaining power by serving as the agents of state violence (Tilly 2003:38-41). The case of the Bosnian War illustrates this principle clearly (Andreas 2004). The international community imposed an arms embargo on Bosnia, an act with such unequal effects for the combatants that it bordered on criminality itself, ostensibly in order to control the violence by the nonstate actors on both sides of the conflict. All this accomplished was to divert the arms trade into the hands of criminal groups, who provided materiel to all three sides. Indeed, the state of

\(^{12}\) One can observe a less violent species of this behavior in the United States, where figures in power have been surprisingly assiduous of late in setting up think tanks, advocacy groups, and media organizations to advocate for their preferred policy positions, and to preserve their influence once they leave office.
Bosnia only staved off complete collapse with the weapons gained from the criminal networks.

Given the foregoing, while one might acknowledge prudential reasons for avoiding nonstate war in general, one could also question whether states’ monopoly on force has any normative grounding. For example, Coates (1997) argues strenuously that Right Authority must be more than simple political sovereignty (though he believes that the right to make war should not rest in the hands of non-state actors, for the most part), taking his cue from Aquinas’s focus on war as a means to uphold the law:

The state’s right to war derives not from its de facto or ‘coercive’ sovereignty—that would be to accept the realist contention that international relations constitute a state of war—but from its membership of the international community to the common good of which the state is ordered and to the law of which is subject. (1997:126)

That a Right Authority must be “ordered” to the common good means that the use of force must be for the good of a public: “In the strict sense, the ‘private’ use of force, whether by individuals or by states, is never permissible” (1997:127).\(^{13}\) It is this claim, that force must be used on behalf of the community, that permits Coates to disqualify tyrants from possessing Right Authority and to invoke the community’s “right of resistance” (1997:129). Coates does not support an unbounded right of revolution, however; following Aquinas, he believes that rebellion is only permitted where the resulting disorder is less harmful than the continued rule of the tyrant. The result would be to dramatically limit the scope for rebellion, contra the enthusiasm with which some view revolutionary violence.

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\(^{13}\) But see Owens (2008) on the claimed distinction between public and private force.
Furthermore, Coates claims that “the right of resistance is enjoyed only by the community or by its agents or representatives” (1997:134). He does not, however, specify how a community without a legitimate government may designate agents or representatives, and he recognizes that the issue is problematic (1997:135-140).14

Coates’s claim that the private use of force is *never* permissible is seemingly in conflict with the idea of self-defense. But for Coates, self-defense is not actually a private manner; rather, the defender is essentially deputized as “a representative of the community and an upholder of the law” (1997:127).15 Coates does not address an obvious question here: If an individual may act as a representative of the community when engaging in self-defense (which presumably takes place in the heat of the moment, without formal authorization from that community), what would prevent the individual from representing the community in other instances of Just War as well? Or is self-defense somehow different?16

Coates’s argument is challenged by Steinhoff (2007), who disputes the claim that Right Authority is at all important, compared to other criteria such as Proportionality

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14 Similarly, Bellamy (2008) lists two possible avenues to justify non-state war. First, many authorities (but not all, apparently) believe that citizens have a right of rebellion against oppressive regimes (2008:33). Second, the preemptive authority of the state may have dissolved due to state failure, or its conquest by an outside power, leaving a non-state actor free to make war—provided that it can show that it is a Right Authority “that acts in accordance with the will of the people” (2008:34). Bellamy does not further address how this can be shown; nor does he suppose that a non-state actor might have the right to make war, even in the presence of an existing, nominally legitimate state.

15 Compare Walzer: “The victim of aggression fights in self-defense, but he isn’t only defending himself, for aggression is a crime against society as a whole. He fights in its name and not only in his own” (1977:59).

16 As it happens, I will soon argue that self-defense is indeed different, but not in the mode that Coates favors. The topic will be addressed in Chapter 3.
Aside from noting the Lockean argument that individuals too have the right of war against “unjust and unlawful force”, Steinhoff caustically points out that if we are worried about restricting unjust violence, then states are the last actors we would want to invest with Right Authority. And resorting to the international community as your arbiter is no help; after all, organizations comprising the “international community” represent not the citizens of the world, but states (and their oppressive political classes) in particular. If Coates argues that sovereign states may effectively judge their own causes under international law, then why not allow individuals to do the same?

Unfortunately, Steinhoff’s own treatment of Right Authority is thin and unsatisfying. The sole justifiable purpose of Right Authority, he says, is to ensure that public authorities make proper decisions about starting wars, rather than dragging their citizens into war unwillingly (2007:20). So far, so good, and indeed that will be a key argument of this dissertation. But Steinhoff does not adequately ground his claim, nor is his application of it consistent. He considers President George W. Bush to be an illegitimate authority because Bush did not consider alternatives to war. Even if that were true (and Steinhoff never provides evidence for the claim), Steinhoff does not show why such a breach of Last Resort would also impinge on Right Authority, since the office of the President has the legitimate power to start wars.

\[17\] In this, Steinhoff echoes Wilkins (1992). In his discussion of justified terrorism, Wilkins views the whole question of Right Authority as unimportant: “Here moral authority may be all that matters” (1992:72).
In contrast, Steinhoff waxes rhapsodic about the legitimacy of Hamas, claiming without justification that Hamas “does represent a considerable part of the [Palestinian] population” (2007:18), whereas the state of Israel has no right to exist as its crimes go back to its very founding.\(^{18}\) Nowhere does Steinhoff lay out principles that would distinguish between the legitimacy of Hamas, Israel, and George W. Bush. As a result, his discussion of Right Authority in particular (as opposed to other elements of his book)\(^{19}\) accomplishes little.

Meanwhile, some thinkers, aspiring to an era of peaceful world government (Kantian or otherwise), have argued that states themselves are no longer to be considered right authorities. States are too prone to pursue their narrow interests, they say, and the true Right Authority should now be vested in an international body—whether the UN Security Council, or some proposed league of democracies (e.g. Davenport 2011).\(^{20}\) For example, Lucas (2003) argues for a presumption against the legitimacy of unilateral war by states, as opposed to wars authorized by multinational bodies such as the UN Security Council, on the grounds that multilateral action is “inherently superior from a moral point of view” (2003:126).

\(^{18}\) That a democracy holding regular elections has less legitimacy than an armed organization that has violently retained power in Gaza after a single election in 2006 is perplexing—particularly in retrospect, since Hamas consolidated its power via armed clashes with members of the competing Fatah party throughout 2007 and beyond, turning Gaza into a dictatorship while being purged from the West Bank in turn.

\(^{19}\) Though even there, Steinhoff is inconsistent with his own claimed liberal principles, ultimately justifying terrorist attacks against Israeli civilians and even the 9/11 attack on the World Trade Center on the basis of the liberal right to punish aggressors (2007:123, 131-132). To call an individually innocent civilian an “aggressor” can only be justified by brutally reifying individuals into a collective mass, which the liberal project is supposed to oppose.

\(^{20}\) It is by no means clear that a world government will be any less partial than will its state members, given that partial interests have proven capable of capturing vast states as well as small ones (cf. Olson 1965, 1982). Still, the dream is slow to die.
In response, Brown (2011) objects that the superiority of multilateralism is hardly obvious. The UN and similar bodies often refuse to act because of the opposition of particular states on the Security Council rather than the justice or injustice of the matter at hand. Worse, majority decisions in the UN or elsewhere (such as the International Criminal Court) can be just as subject to state machinations, leading to immoral results; therefore, it would be wrong to demand that states submit to their judgment: “To defer to the state’s judgment [or that of a group of states] absolutely… is to equate the actual justice of a cause with another’s perception of it, forcing one to submit to another’s perception as truth” (2011:140). Yet that same argument could well be made not merely by one state against control by several, but by one individual against control by the state.

At this point, we seem to be at an impasse. So far it seems that most thinkers have assumed the exclusive Right Authority of the state as their starting point, without necessarily justifying that starting point. Partly, this is because little consensus exists on the whole topic. According to Bellamy, “The question of who has the right to authorize war remains a moot point today” (2008:22), given that no one agrees whether only the UN Security Council should authorize wars, or whether even non-state actors such as revolutionary groups may often make war. So how can we bring more clarity to the idea of Right Authority?

**Is the State Special? A Brief Survey of Political Legitimacy**

Up to this point, most scholars who addressed Right Authority at all tended to assume that only the state could hold Right Authority—following the view that since only the state could have political authority or sovereignty, which necessarily includes the right to
wage war, so too only the state could wage war in general. Yet grounding a statist view of Right Authority in political authority more generally proves to be a difficult move to sustain. When one surveys the literature in Political Theory about the precise meaning of, and possible justifications for, political authority, it is hard to identify a definition of political authority that a) is plausible, and b) applies only to the state.

For that matter, it is hard to justify why there should be such a thing as “political legitimacy” or “sovereignty” at all—in the sense of a sort of moral or ethical presumption that you ought to obey the law of "your" state, regardless of its specific content. This dissertation does not mean to address the problem of political authority in general, which would take us very far out of scope. But since we do intend to lay out some conditions where non-state war would be justified, it is worth briefly touching on the political-authority literature to show that the state as such is hard-pressed to justify a monopoly on its authority, in war or otherwise. As we will see, any justification of state legitimacy that is remotely plausible could potentially apply to non-state forms of rule as well, and other justifications would seem to apply more weakly to the state than to its non-state competitors.

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21 Cf. Copp (1999), who says that the idea of legitimacy implies that when a legitimate state makes law, it thus creates a pro tanto moral duty for citizens to obey that law, "provided that the law is morally innocent" (1999:20). Similarly, Gezelius (2009) provides a comprehensive survey of prior work in the study of "authority" as a concept, and proposes a precise framework of what "authority" means—that the giving of a command itself, within its normative or institutional context, provides a moral reason to follow it that is independent of its content. Notably, this view, meant to provide a framework for empirical research, does not demand (as some theories do) that those obedient to authority have a rational basis for being so.

22 See Somin (1999/2000) for a more thorough overview. The literature on secession is also relevant here, since a right to secede from an existing state presupposes that the (currently non-state) polity’s institutions satisfy the criteria for political authority, perhaps as well as or better than the existing state. See Philpot (1995), Wellman (1995), Somin (1999/2000), Glaser (2003), Moore (2006), Seymour (2007), Toft (2012), among others.
Scholars have attempted to ground political sovereignty in several different justifications. Liberal theorists such as Locke and Hobbes initially grounded the political authority of states in an act of consent (overt or “tacit”) by the populace, a popular position given that it “reconciles nicely the liberal conceptions of the person and the state” (Wellman 1995:150). But this justification is by no means exclusive to the state; a group of bandits, an oppressed minority group, or any other group of people could equally consent to be bound to each other without enacting that consent in the structures of a state. And in any event the consent theory of political obligation proved impossible to sustain, since most people have never actually consented to be ruled by their states, and “tacit” consent is not morally significant in the presence of coercion or hardship in exercising alternatives (Simmons 1979, Somin 1999/2000). Indeed, almost all states are founded through illegitimate violence, similar to an organized-crime family staging a coup, rather than through a morally significant act like public consent. Given that, either one must conclude (as Simmons does) that almost no state is legitimate, or else that states may create and maintain a status of legitimacy through ongoing behavior (Copp 1999).

As a result, theorists such as Rawls developed a theory of hypothetical consent, in which a state is granted legitimacy if it is so attractive that any right-thinking person could be expected to consent to it, even if no one actually does. This argument was fiercely critiqued by scholars such as Nozick (1974), Simmons (1979), and others. Nozick, for example, argues that “One cannot, whatever one's purposes, just act so as to give people benefits and then demand (or seize) payment. Nor can a group of persons do
this” (1974:95). Somin (1999/2000) notes that Rawls is cheating: by resorting to the “veil of ignorance,” Rawls simply declares divergent preferences to be morally irrelevant: “Because hypothetical contract theories exclude knowledge of preferences from consideration by the contractors, they are biased against actual consent theories” (1999/2000:780). Copp (1999) objects further that even if people would hypothetically consent to a state, that hypothetical by itself does not give the state the privilege to create laws that have moral force. And even if a state would not meet the test of hypothetical consent, it might still be legitimate anyway. Ultimately, “hypothetical consent” turns out to be not about consent at all, but about the services that the state provides. Consent, as such, becomes irrelevant in this model, which instead becomes a species of teleological justification for the state (Wellman 1995, Somin 1999/2000).

Theories of political obligation incurred from the state’s provision of goods (or as Klosko calls them, theories based on “gratitude”), or from tacit consent, likewise fail to specify a “fixed content” of what precisely is being obligated (Klosko 1998). If my state provides public libraries, does that obligate me to be conscripted into the military? There is no obvious link between the goods provided and the duties demanded. Klosko notes similarly with regard to theories of “tacit consent” that acts that are sometimes seen as endorsing state authority actually may mean far less. The act of voting, for example, is sometimes claimed to imply one’s acceptance of the political system in toto; but if you

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23 The Babylonian Talmud, however, lists a handful of cases in which you could do just that, under Jewish Rabbinic law; but these cases are carefully limited, and specifically enacted through a social process to protect the most vulnerable of society, not to empower would-be rulers. See Bava Metzia 76a, 101a.

24 Frost (2003:86) deploys a similar argument against the social contract itself. He notes that social-contract theories face an intractable ambiguity, since we cannot say for certain what the original authority is permitted to do, even before authority is transferred via the social contract or a “chain of authority-conferring acts”.
vote for the lesser of two evils, that does not mean that you are endorsing evil, rather than simply trying to minimize the harm done to you by a system you did not choose and cannot control (cf. Wellman 1995, Simmons 1979, Schumpeter 2008 [1950]:263-285).

Klosko (1998) instead favors a principle based on fairness (following HLA Hart), which is determinate in the sense that one is expected to submit to a similar level of burden or constraint as do others involved in a joint enterprise from which you gain certain “indispensable benefits,” for example the provision of national defense. By focusing on “indispensable benefits,” Klosko attempted to handle Simmons’s objection, since no one would (by hypothesis) ever choose not to receive such goods.

This framework too is problematic. For one thing, one’s obligations under a fairness doctrine are not so determinate as all that. In particular, national defense generally requires that someone be asked to die (cf. Baron 2009, 2010). Yet the one who dies is no longer receiving an indispensable benefit; much the contrary. So it is unclear how that person should be under an obligation to die, in exchange for benefits that he is (by definition) not receiving. Furthermore, out of the broad population, who in particular will be asked to die, and how can you make that determination or justify it? The principle of fairness cannot answer.

A fairness theory also fails to draw a clear line between those obligated and those not, when the public goods provided spill over national borders (Mapel 2005, cf. Abizadeh 2012). For example, if the national defense of the Cayman Islands is provided for by the

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25 Somin (1999/2000) makes a related argument when he says that almost all theories of consent are flawed and lack moral force unless they provide for dissenters to be able to freely exit the system.
United States military, why shouldn't Cayman residents be bound by American law just as Americans are?²⁶

Ultimately, a fairness justification is untenable from within the liberal viewpoint:

Liberalism's aversion to paternalism implies that each autonomous individual has a right to decide which self-regarding benefits to pursue. In order to steer clear of the paternalism that liberals find so odious, one must restrict the fairness principle to only those cases in which the benefits are freely accepted. But this move makes the fairness principle as irrelevant to political obligation as consent theory (Wellman 2001:738).

Some theorists, such as the later Rawls, turn instead to a Kantian-flavored duty to support just institutions. But even if there is such a duty, that need not imply that we are duty-bound to support states and only states. After all, there is no guarantee that the state (or worse, our own state exclusively) is the best exemplar of justice, and cannot possibly be outdone by other states or non-state institutions (Wellman 2001).

And even if we accept the validity of a claim to legitimacy on the basis of providing goods (“essential” or otherwise), whether from hypothetical consent or fairness or some other principle such as samaritanism (as does Wellman), it is not a foregone conclusion that a state will be better able to provide those goods than would a non-state group.²⁷

²⁶ Mapel addresses this problem and that of the “fixed content” of obligations by referencing the presence of a national legal system, which we will shortly address when discussing Copp (1999). He differs from Copp, however, in suggesting that no single justification can be sufficient for all of the many powers asserted by the state, and instead says that different principles could perhaps justify different individual powers, à la carte. But this, too, need not be exclusive to states.
²⁷ Wellman (2001), after surveying the flaws of previous theories of political obligation, settles on a hybrid theory that justifies the legitimacy of the state’s rule-making (but not citizens’ obligation to obey) because of the “important benefits” it provides, and citizens’ obligation because of the “moral force of samaritanism,” that is, the necessity for the state to coercively limit individuals’ rights in order for those around them to be protected (but only if such coercion is actually necessary). Wellman freely admits that his theory is contingent on the state actually being the best mechanism to secure the important goods in question; a different form of organization would be able to claim similar legitimacy if it did a better job. Renzo (2011) makes a stronger argument along these lines, claiming that anarchists who refuse to enter the
Failed states like Somalia were manifestly less able to provide goods than the panoply of non-state organizations that emerged in their wake (Powell/Ford/Nowrasteh 2008).\textsuperscript{28} While a teleological justification (if we accept its validity) might impose conditions on a non-state group’s ability to claim political authority, those conditions would be precisely the same as those a state must satisfy, and no more.\textsuperscript{29}

This is the case even with Copp’s (1999) “society-centered theory of moral justification,” a more focused justification of the state than out of mere goods provision. In short, he argues, we live in societies (similar to Walzer’s "communities"), which are usually coterminous with states (but not always). Societies, in order to function, need above all else to have a system of social order, which is maintained by the state’s provision of a functioning legal system, which Copp calls “a complex nonmoral historical and sociological fact about the territory and about the relationships among the people in the territory” (1999:8). Because of this, societies are usually best served by a state, since "a state is essentially the administrative apparatus of a legal system" (1999:38). To the extent that the state does indeed serve the interests of the community, it is thereby rendered legitimate.\textsuperscript{30}

Yet this argument, too, does not demonstrate the state’s exclusive claim to legitimacy. Copp’s assumption that only the state can provide law is unfounded. A single law can be

\begin{footnotes}
\item[28] For a discussion of the inadequacy of the typical theoretical models of sovereignty and statehood in the face of the proliferation of "complicated places" that defy neat categorization, see the eminent anthropologist Clifford Geertz (2004).
\item[29] Cf. Wellman (2001). This argument underpins much of Wellman’s (1995) argument for a right of secession.
\item[30] Copp (2009) calls his society-centered theory a contemporary version of natural-law theory.
\end{footnotes}
enforced in the absence of a unitary state, even (at the extreme) between avowed enemies who nevertheless wish to contain their mutual predations at a manageable level. Leeson (2009) provides an example in his study of the England-Scotland border during the 16th Century. Though residents of each side would raid and plunder the other constantly, their behavior was still mutually regulated through the *Leges Marchiarum*, or "Law of the Marches." Non-state law can also be found in Gypsy communities (Leeson 2013), the customary law (*xeer*) of Somali clans (Leonard/Samantar 2011), and, notably, religious courts such as the Jewish *Beit Din* and the Islamic *Sharia* court. These last may sometimes benefit from state cooperation in enforcing their decisions, but such cooperation is not always forthcoming, necessary, or desired (cf. Barzilai 2008).

Horton (2006, 2007) presents an argument for “associative political obligations,” in which he starts with the idea that in complex societies, our need for “reasonable expectations arising from broad and impersonal patterns of behavior” (2006:432) is capable of creating obligations even without any sort of free consent. He further notes that most people view their associative memberships as an important part of their identity (cf. Copp 2002), and (crucially) they include in that identity the sense of being under moral or political obligations to their associates—for example, one’s duties to one’s parents. Just as the identity of *father* or *sister* or *son* is ethically binding without being chosen, says Horton, so too can political identities be.

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31 Not surprisingly, he structures his argument as a sustained answer to Simmons (1996).
32 Renzo (2012) modifies this point to reformulate the associative argument, incorporating a quasi-voluntary component: identities can be rejected, but would need to be in order for individuals to escape their corresponding obligations. Even then, some identities simply go too deeply to be rejected in an uncomplicated way.
This argument would seem to apply more forcefully to non-state associations such as the family or clan than to the state, so Horton (2007) attempts to argue that the state has distinctive value over and above these other forms of association, which is capable of justifying moral duties of obedience:

We see our government, at least in many contexts, as acting in our name, and our relation to it as involving an ethically significant connection: our government’s actions can commit us, both prospectively and retrospectively, as well as merely having consequences for us (2007:4).

The state (or as Horton calls it, the polity) provides the “generic good” of a social order, which grounds stable expectations and a level of trust among its members that permits the “broad and impersonal patterns of behavior” noted above (cf. Copp 1999, Mapel 2005). The need for such stability also minimally justifies the state’s use of coercion to secure it, even if such coercion is illiberal or undemocratic. However, this is insufficient to ground an obligation to “our” state in particular. To do that, Horton argues that

our self-understanding, and the way that others understand us, is shaped and constrained in fundamental respects by the various social contexts and practices, including our membership of particular social groups, which constitute the fabric of our lives (2007:10).

But again, even if one grants this argument, it is by no means clear that only the state can generate such obligations. Horton constantly refers to the family as his chief example of associative relationships with binding value; and the unique role of the "polity" in his view—that it provides social order—is not an exclusive preserve of states

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33 Copp (2002:387) notes that “every country… must compete for the allegiance of its citizens” with other social groups such as the family, or non-state organizations.
(cf. Song 2012). This is demonstrated by the examples of non-state law that we noted previously, for law is nothing if not a framework of social order. And a Somali clan, for example, can claim to speak for its members in a much more powerful sense than the nominal Somali state ever could.

In sum, it appears that arguments for the legitimacy of political authority have a hard time justifying the privileged position of *states*. Some non-state groups or institutions are sometimes able to meet the criteria listed, by any number of theories, to claim legitimacy. Likewise, many states do not meet those criteria, failed states most notably. That being that case, we ought to at least consider the possibility that non-state actors might be able to claim the right to fight a justified war.

**Non-State Right Authority**

What might ground a right of non-state actors to make war? And what kinds of actors would possess this right? Arguments range all over the map, from the claim that only non-state groups that are conceptually similar to states may fight wars, to the claim that mercenary groups may fight wars themselves, to the startling claim of long pedigree that even individuals may make war.

We begin with individuals. Nozick (1974) raises the anarchist objection that an action cannot be moral for the state if it is immoral for individuals. As such, goes this argument, there can be no principled basis for a presumed monopoly of force by states. For Nozick, the chief limitation on an actor’s ability to use force (whether that actor is an

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34 We will consider mercenary groups and PMCs at greater length in Chapter Five.

35 Nor would Nozick be sympathetic to the idea (first discussed in Augustine; see below) that Right Authority is necessary in order to relieve subordinate soldiers of the responsibility for determining Just Cause, stating baldly, “It is a soldier's responsibility to determine if his side's cause is just” (1974:100).
individual or a collective) is whether the actor knows with sufficient certainty that the
target of that force deserves it, due to the application of some “procedure of justice”
(1974:97-106). In a similar vein, French (2001) argues strenuously that individuals must
be able, in the right circumstances, to take vengeance for evil deeds:

Personal and vicarious moral anger can be and ought to be placated by hostile
responsive action taken against its cause. Wrongful actions require hostile
responses. That is the basic form of the rule of retaliation, the principle of positive
retribution. That, despite its seeming lack of fit with the body of moral principles
upheld in our culture, is actually one of the primary foundations of morality

French agrees with Nozick that the primary concern motivating the Authority
requirement of a lone avenger is whether or not the moral facts are known with
certainty—that is, whether you know that your target deserves to be harmed. Perfect
knowledge of an offender’s crime is sufficient authorization for vengeance, by this
reading. Conversely, if an avenger uses unreliable means of judgment to condemn a
purported offender who, nevertheless, had indeed committed the offense in question, then
while the offender deserves the harm suffered, the avenger still has committed a moral
impermissibility—by acting without authority.

Secondarily, the avenger has to be acting from the right motive:

The only avengers who will have moral authority will be those whose motives in
seeking vengeance are dominated by the intention to safeguard the right, to ensure
that wrongful actions are met with appropriate hostile responses, meaning that
conditions of desert and fit or proportionality will have been met (2001:172).

While his discussion is not about Just War per se, French does note the claim of JL
Austin that an Authority condition must be satisfied to permit individual vengeance, in
that the avengers must be operating under an existing social convention that permits their action. For example, in some societies only family members are permitted to take revenge for harms done; in others, anyone may (2001:112). However, French himself argues for an “agent-based morality of inner strength” in which a man of strong moral will may define his own concept of wrongful action to be avenged, and therefore “self-certify” his act of vengeance (2001:136-141).

Most claims in the literature are not so drastic. The recent literature of non-state Right Authority was kicked off in a widely cited article by Held (2005). She disputes the claim that a) “terrorism” is carried out only by non-state groups, and b) terrorism consists of attacks against civilians—and therefore rejects the claim that all groups called “terrorists” are by definition illegitimate. She writes that “some groups using terrorism do seem to be able to represent the popular will” (2005:185), and that just as legitimate states can sometimes use unjust means without losing their legitimacy, so might some terrorist groups. She notes however that it is hard to tell who actually represents the people, particularly when there are multiple armed groups claiming to act for the same populace.

Miller (2005) warns against Held’s focus on popular support, noting that the appearance of support may simply reflect fear by the populace of retaliation by the terrorists; and conversely, the lack of such support may simply reflect the populace’s fear of the regime.36 Instead, Miller prefers to place more emphasis than Held on a group’s “aptness for international recognition” (2005:199) that is, its ability to represent its

36 This argument echoes that of Leites and Wolf (1970). They further note that fear often has just as much a role in perceived support for a state as for a revolutionary group, which should give pause to theorists who ground state-based Right Authority in popular support.
people to the international community—acknowledging meanwhile that such recognition may simply reflect the group’s brute strength rather than any claim of proper behavior.

An edited volume by Brough/Lango/van der Linden (2007) broke some new ground. Lango argued that the principles of JWT need to be expressed in a generalized form. The article focused mostly on Just Cause; Lango argued that distinction between *jus ad bellum* and *jus in bello* is artificial, and obscures the truth that any sort of armed conflict proceeds over multiple stages such as discrete campaigns or even battles. Therefore, the justice of each stage ought to be analyzed on its own, since the point of JWT is to make judgments about future conflict, not just retrospective judgments (2007:76). He illustrated his point by considering major turning points in the Korean War and the atomic bombing of Japan with regard to Just Cause; continuing the war at some points seems more justifiable than at others.

Lango’s discussion of Right Authority is brief, but he does suggest that a generalized form of RA would make each level of leadership within an organization responsible for the actions of its subordinates, and for judging the justice of each new phase of action—to the extent of making individual soldiers responsible for such judgments as well, with respect to their own actions (2007:91). This is similar to the view of Harbour (2003:74), who notes that even within a nominally unified organization, there can be functionally distinct subgroups or power centers, such that the organization as a whole may be less responsible for a given action than particular subcomponents are.

In their edited volume, Heintze and Steele (2009) examine how the principle of Right Authority can be applied to modern non-state warfare, being motivated especially by the
complexities of the Iraq and Afghanistan wars. They note that the definition of Right Authority has changed quite a bit over its history, “[having] typically been the purview of whatever conception of legitimate [political] authority has prevailed at a given time” (2009:10). Following Orend’s riff off of Walzer, they argue that “war should be understood not in the classical sense of international war between sovereign states, but rather as armed conflict between political communities,” and that “war is ultimately about governance—a violent means of deciding who gets what, when, and how” (2009:11).  

In the volume, O’Driscoll (2009) concludes that even if JWT can perhaps conceive of non-state revolutionary groups as the representatives of their territorial political community, the existing theory lacks the resources to address the Right Authority of non-territorial organizations such as Al-Qaida (cf. Erskine 2001, Williams 2008). Therefore, JWT needs to incorporate new approaches that can address the issue. Such approaches may in fact be available within the JWT tradition itself; Lang (2009) notes that Grotius’s first treatment of Just War, the Mare Liberum, was written to justify the conflicts of the Dutch East India Company (the VOC), a non-state actor—and was furthermore influenced by the multipolar political structures of the Dutch Republic, hardly a unitary sovereign (cf. Prokhovnik 2001). Thus, the tradition does not simply accept one conception of authority, but can interrogate claims of authority on their own merits—

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37 Using this definition, the authors exclude “nonpolitical” violence such as gang violence and criminal activity. Their criteria for what counts as “political” violence is vague, however, and I am not convinced that gang violence (for example) should be excluded from the category of “war”. Feuding gangs are most assuredly trying to determine “who gets what” in a process of collective action; furthermore, gangs typically arise in situations where there is a void in legitimate governance, and they seek to fill that void, after a fashion (cf. Sobel/Osoba 2009). Chapter 3 will introduce new criteria for separating “war” as such from individual-level self-defense.
especially (argues Lang) on whether “judgments are made about whether or not violence can be used on the basis of a set of rules drawn from substantive law” (2008:68).  

Sjoberg (2009), in the same volume, offers a feminist critique of JWT. Though the tradition assumes that actors make decisions about war “rationally and autonomously” (2009:154), she argues that this does not reflect reality, wherein people are often under preexisting obligations they did not choose.

Given this, feminist theories have developed an understanding of political actors as relationally autonomous rather than reactively autonomous. This means that, when considering just war criteria, actors rely at least in part on the choices and actions of other actors.

This, along with the frequent feminist critique of the public/private distinction in IR (cf. Lu 2006), indicates that a feminist JWT would focus more on the role of empathy and care for others. Practically speaking, what this means for Right Authority is that “power-with” becomes more important than “power-over”, and the institutional status of authority becomes less important than the process itself: “who is included, who is consulted, and how opponents are treated” (2009:163).

For state governments, this would mean taking the complaints and concerns of unsatisfied minority populations seriously; for revolutionary and terrorist groups, this would mean first trying to work through established structures of government to achieve their goals before resorting to military conflict (ibid.).

Onuf (2009), in the concluding chapter, muses about what would make non-state actors authoritative. He favors an approach viewing such actors as authoritative when

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38 Note that Lang does not want to broaden the rights of non-state actors to claim the authority to use force, but rather to advocate for the subordination of states to international organizations akin to the UN.  
they “discharge specific, technically defined functions, because governments choose not to perform these functions... or cannot” (2009:246). I believe that this approach is in error; first, it assumes that political authority is generated through the provision of services (a claim which we challenged earlier this chapter), and second, it unnecessarily conflates political authority in general with Right Authority over questions of violent conflict in particular. There might be considerable overlap between these things in practice, but a private citizen cannot “earn” the right to start a war on behalf of the United States by opening up free health-care clinics, for example. These activities are in two separate domains.

At this point, there seems to be a growing consensus that something ought to justify the Right Authority of some non-states, but no clear idea of what that would be. Indeed, some scholars argued that RA was simply inapplicable to non-state actors. Fotion (2006) attempts to update JWT for the modern world of terror threats, in which traditional requirements for public declarations of war and the like seem less applicable. He proposes to divide JWT into two separate domains, one for states and one for non-state actors. Thus states and non-states would be held to different standards. With regard to Right Authority in particular, Fotion says that a non-state group does not hold Right Authority since its leader is not “a leader of a government in being or even a leader of a government about to be in being” (2006:58). Rather than saying that they therefore may not fight wars, Fotion holds that non-state groups in fact have no requirement to satisfy:

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41 Needless to say, Fotion here has presumed the identification of Right Authority with statehood without asking what might ground such an identification.
The state involved in the conflict still has to satisfy this principle, but not the non-state group. That is, just because its opposition does not possess a figure or group that can act as a legitimate authority is no reason to exempt that nation that has such a figure or group from its duties to authorize that war legitimately (2006:58).

A more developed discussion that reaches a similar conclusion is that of Allen Buchanan (2013). Buchanan is perhaps the most prominent scholar to squarely consider the Just-War problem of revolutions. He notes that revolutions face a number of hard problems, having to do with the nature of the collective-action problem at work. Chiefly, in the situation in which a revolution is most obviously justified—where the regime is a "Resolute Severe Tyranny"—the revolutionary leadership faces the most severe difficulties in winning, running afoul of the principle of Expectation of Success. Given the harsh consequences for the people if the revolution fails, Buchanan surmises that the revolutionary leadership would be likely to use morally objectionable means such as conscription and propaganda to impel the populace to follow it and oppose the enemy regime. Thus, the initial act of launching a revolution would probably be unjustified; still, once it is in process, it could very well be justified for others to continue the revolution, or for outsiders to intervene, and they would not be considered accomplices in the initial wrong of launching the revolution.

Buchanan further argues that the repressive conditions of a tyranny make it impossible for a revolutionary leadership to gain true, uncoerced legitimacy. With regard to consent theory, either their supporters will be repressed, or once the revolutionaries gain more power they will impose their control by force (cf. Leites/Wolf 1970). With regard to social-benefits theories, the revolutionaries will simply be unable to provide
them until they win. And Buchanan claims that legitimacy as such is *unnecessary* to allow one victim of tyranny to coerce similar victims of tyranny in order to rebel (provided that the coercion in question follows the mode of normal state conscription in wartime). Thus, Buchanan concludes that the criterion of Right Authority may simply be inapplicable to revolutionaries, similarly to Fotion (2006).

Buchanan’s discussion is welcome, and an advance on what came before. However, some of his claims are based on unnecessarily binary thinking. It is simply not true that revolutionaries may *never* provide social benefits to their people; indeed, the provision of such benefits is often an important part of revolutionary strategy (Migdal 1974, Grynkewich 2008). But it is true that benefit provision, or any other method of gaining legitimacy more generally, will probably not be done in the full manner of an uncontested state. Still, that is why a theory of revolution ought to consider a principle of *partial* Right Authority, as this work will do in Chapter Four, rather than simply giving revolutionaries a pass.

A few authors have attempted to develop a better theory of non-state RA. Finlay (2010) argues, in a vein that this dissertation will develop more fully, that non-state groups must gain authority through the “input and authorization by the intended beneficiaries of non-state violence” (2010:288). He begins by discussing individual self-defense and distinguishes them from rights of *assistance* to others, borrowing from Rodin. Finlay’s analysis differs from Rodin’s in that he concludes that victims often have the right to *refuse* outside assistance, if they so choose, arising from the value of their autonomy and free agency. Only if the victim’s agency has been negated, through
incapacitation of some kind or through lack of opportunity to deliberate over the assistance, may an intervener proceed without consulting the victim. For interveners to ignore a competent victim’s wishes would be to commit an injustice on account of their lack of authorization.

Turning to group warfare, Finlay argues that the function of Right Authority, which he calls the “Lesser Moral Authority,” is specifically to give the holder the right to invoke the “war convention”—that is, for states to claim the Moral Equality of Combatants and thus the right to kill enemy soldiers, even in the absence of a Just Cause.42 Non-state groups, he says, lack access to the war convention since there is no prudential reason to allow “cop killing” in the absence of a Just Cause. Instead, they must satisfy the “Greater Moral Authority”—meeting all of the other jus ad bellum criteria in full. Furthermore, by analogy to individual-level assistance, for a non-state group to claim a Just Cause such as national self-determination, the group must have the authorization of the community for which they claim to act. This is especially so given the indeterminacy of violence; the community may well prefer nonviolent means instead of running the risk that violence will spiral out of control.

We should note here that Finlay is using “authority” in two different senses—first and most fundamentally, to justify recourse to the Moral Equality of Combatants and therefore the right to kill one’s enemies irrespective of their justness. It seems that this is the sense most closely connected to the Just War principle of Right Authority. Finlay’s second sense, that a group must have authorization from its community, is properly

42 We will discuss the Moral Equality of Combatants and related topics in Chapter 3.
associated in his reading with Just Cause and not Right Authority per se. This is easy to show; a non-state group with full communal authorization would still be denied the right to attack its enemies if, for example, it violated the principle of Last Resort and therefore lost the Greater Moral Authority.43

Scheid (2012), working from within the Christian tradition of Just War, employs the case of the African National Congress’s struggle in South Africa to argue that JWT needs to be broadened in order to accommodate revolutionary struggle. In particular, she examines Right Authority, Last Resort, and Proportionality, and argues that in a revolutionary context, the three are tightly linked. When discussing revolutionaries,

Legitimate authority (1) encourages the already emerging political participation of all for the sake of the common good, (2) enjoys the support of the broader population, and (3) controls and limits violence in the face of a regime that uses violence with impunity to maintain power. (2012:157)

In other words, a revolutionary group earns legitimacy by striving to increase popular participation, if not necessarily democratic participation per se. The third requirement derives from Scheid’s argument that the purpose of revolutionary violence is to uphold social order by penalizing unjustified violence on the part of the regime, and through measured retaliation encouraging the oppressive regime to enter into negotiations. Violence must consequently be carefully controlled, lest it undermine social order instead. A revolutionary group that truly represents its community’s interests and acts in a

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43 By contrast, this dissertation will argue that Right Authority is connected directly to the issue of authorization, and is totally separate from the question of whom one may kill. The theory of Discrimination laid out in Chapter 3 does not rely at all on the Moral Equality of Combatants (though it will allow many unjust combatants to defend themselves anyway). More to the point, the theories of Discrimination and Right Authority both apply equally to states, non-states, and even individuals. While states will often have an easier time satisfying the requirements, this is not out of conventional privilege.
restrained manner would thus satisfy Aquinas’s requirements for just revolution. (We will discuss a similar concept in Chapter Five.)

In short, both Scheid and Finlay are arguing that non-state groups can gain Right Authority by enjoying public support and by disciplining their conduct in war. Public support is what gives them the right to fight a war that will impact others beyond themselves. This insight will become crucial in Chapter Four.

On the other hand, some scholars do not believe that Right Authority is necessary at all, for non-state actors or states. Fabre (2008, 2012) launches a frontal attack against the concept of Right Authority, on cosmopolitan grounds. She argues (drawing support from Vitoria and Grotius) that restricting the right to make war to the state only makes sense for wars fought to defend corporate rights, such as territorial integrity or sovereignty. If a war is fought to defend human rights, such as to prevent gross political abuses or religious repression, then on cosmopolitan grounds all people ought to be able to fight to defend such rights.44 “By extension, the right to wage a war in defence of one’s human

44 Interestingly, considering that Fabre intends to extend the right to fight wars broadly indeed, she has a rather narrow definition of what war is for her purposes. She follows a broad consensus in the literature when she says that war is fought for “political ends—typically, control of the state’s institutions and policies” (2012:132). But she then argues (2012:133) that Timothy McVeigh’s terrorist attack in Oklahoma City was not a “proper” war, but rather a “one-off” because of two factors: the low number of victims (!), and the fact that no one else emulated him. The Nazi genocide of German Jews too does not meet her definition, “precisely because [the Nazis] were largely unopposed in their enterprise by their victims” (ibid.). However, the Rwandan genocide Fabre does call a war, since it was in the context of a larger political struggle (as we will note in Chapter 8).

I am not sure what work these distinctions do for Fabre. Are there moral privileges that a violent actor can claim in “wartime” that do not hold elsewhere, such as in bello rights on the battlefield? If so, did the Hutus gain such rights versus the Tutsis because of the political context? And did the Nazis gain such rights versus Polish or French Jews because their imprisonment and slaughter began during World War II proper, or because they fought back more often? If not that, then what difference does it make for Fabre whether a conflict is a “war” or not?

In Chapter 3, I will argue that for our purposes, the act of Tim McVeigh was indeed a “war,” as were each of her other examples (unjustified wars, to be sure)—and it does not matter at all for my definition whether a war’s targets fight back or not. (This may not actually be in conflict with Fabre, simply because I
rights should also be conceived of as a human right” (2008:969, 2012:145). And with respect to people’s possession of human rights, their membership in one political community versus another ought to be morally irrelevant—and therefore their political membership should not constrain their ability to defend their rights. Thus, unorganized groups of people or even individuals ought to have the right to make war to defend their fundamental human rights (2012:144).

Similarly, Reitberger (2013) argues in a Lockean vein from the universality of self-defense:

The challenge to the [Legitimate Authority Requirement] 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. (2013:72)

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45 Stilz (2014) objects that the defense of human rights is not enough to grant the right to make war, since on her reading “war is about defending legitimate political communities” (2014:311). She does not believe, first of all, that Fabre’s cosmopolitan account can justify using violence to defend political communities, since they do not seem sufficiently valuable on cosmopolitan grounds to kill over; and second, Stilz does not believe that the mere fact that the state possesses the right of war implies that individuals have that same right. State institutions, in her view, are *sui generis* because of their “unique capacity to do things that no individual could—or should—do” (2014:325). Chief among them is to make authoritative decisions about who owes what specific duties to whom, decisions that simply cannot be made without such institutions—otherwise, general moral principles would lack specific force. In a Kantian vein, Stilz argues that institutions “are themselves partly *constitutive* of what justice requires” (2014:329).

46 To be sure, Fabre notes, the availability of effective legal recourse to individuals would make war illegitimate because of the principle of Last Resort (cf. 2012:150). All the other Just War requirements would likewise apply.
Arguing further, Reitberger notes that in some cases it is impossible for a warfighter to be politically legitimated—particularly when a third party is suffering atrocities and needs rescue, or when “war-like methods are necessary to establish political institutions in the first place” as with a revolution or a failed state (2013:76). Citing Allen Buchanan’s discussion of permissible secession, Reitberger argues that it is far more important that a given actor show respect for basic rights than that it be authorized by any given community. “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” (2013:78).

Fabre considers the issue that we will discuss at length in Chapter Four, that a lone warfighter might bring about harms to those in his community; but while she acknowledges that this objection has some force, she says that it “ultimately proves too much. For if it applies to the view that individuals alone can have the right to wage war, then it must also apply to the view that a government can have that right” (2008:973). Furthermore, requiring the warfighter to secure the consent of those affected “seems impossibly demanding, in so far as it would deem unjust wars of which we surely would want to say that they are, or were, just wars“ (2008:973). Reitberger goes further:

…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. (2013:79)

47 Fabre’s objection is addressed, I claim, by Chapter Four.
He ultimately concludes that Right Authority does no work in itself that is not already handled by the other Just War requirements such as Proportionality or Last Resort. Where it had utility in the Middle Ages, because of the sheer number of people claiming the right to make war, today RA is ill-suited to a world in which most conflicts involve non-state actors who we nevertheless feel may be acting justly. Reitberger thus recommends that Right Authority be dropped from Just War Theory entirely.

Fabre doesn’t go quite that far. She ultimately concludes that we can insist on consent from the populace, but only in those cases where the justice of the war in question is unclear. Where the justice of war is obvious, no consent is necessary (2012:152). Insurgents, too, would need to secure consent, unless conditions make the giving of such success impossible (cf. Buchanan 2013). In that case, insurgents can “take matters into their own hands” provided that there are grounds to believe that their fellows would consent if they could, and that the insurgents “put in place institutional mechanisms whereby those for whose sake they fight can hold them into account once the war is over” (2012:155).48

While I agree with many of Reitberger’s and Fabre’s arguments, I believe that Right Authority needs to be reformulated, not discarded. To see why, we must review the early literature on Right Authority to determine whether the principle is indeed redundant, or whether it addresses a moral concern that the other JWT principles do not adequately cover. Once that is done, we will have to rebuild the principle of Right Authority so that

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48 I consider these conditions to be too binary and hence too permissive, because they do not consider that war is a gradual process of many stages and settings. As such, revolutionary groups can and ought to be held to account well before their victory. My own account of this issue is developed in Chapter Four.
it can permit biker gangs and political science departments to intervene in just wars when appropriate, as Reitberger desires—but also so that it restricts the behavior of such groups and others (including states) when making war, even an otherwise just war, would be to commit a moral wrong.

A wrong against whom? Reitberger himself provides a hint with his mention of negative externalities, but he is too quick to dismiss this concern. Partly, he makes the common error of conflating self-defense with war generally, which I will analyze at great length in Chapter Three. For now, it is enough to say that just because we do not restrict self-defense for fear of externalities, does not mean that we may not restrict the right to make war for that reason. Externalities arising from war are different from those arising from self-defense—because a person can be unwillingly implicated in someone else’s war, in a manner impossible with someone else’s self-defense (as I will define the two categories of action). For that reason, the concept underpinning Right Authority still has a role to play, even once we dispense with the claim that only states may make war.

For now, let us survey the development of Right Authority as a concept from its beginnings in the West.

**The Western tradition of Just War Theory**

The roots of the Western tradition of Just War lie with Greece and Rome.49 The term “just war” itself was coined by Aristotle, who applied it to wars fought by Hellenes againsts barbarian outsiders. Aristotle and the other Greek thinkers did not distinguish truly

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49 Except where otherwise noted, my discussion of Classical and Medieval JWT is taken from Russell (1975).
moral wars from merely useful ones; the first to do so were the Romans, particularly Cicero. As we are focusing primarily on Right Authority, the key aspect of Roman thought for our purposes is the importance the Romans gave to the role of authority in war—it took formal authorization from the Senate (or later, the Emperor alone) to render a war licit. The role of authority was reinforced by the way that Roman property rights were applied to warfare; property could be justly taken in war only if the war was waged by the *Imperator*, since he could strip the property rights of Rome’s enemies in a (nominally) legal fashion.

With the rise of Christianity within the Empire, Church leaders had to reconcile the manifest pacifism of Christian teaching with the pressing need to defend Rome from attack—both to avoid charges of disloyalty arising because Christians were unwilling to serve in the army, and to secure the tranquility of Roman society itself. By the Third and Fourth centuries of the Common Era, Rome was under serious threat of social breakdown. Visigoth armies sacked Rome itself several times, and most notably for our purposes in 410 CE, leaving in their wake much death and destruction. The traumatic experience left a deep impression on Church authorities, who strove to find a way to permit believing Christians to participate in war.

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50 It is worth noting that Right Authority is not a universal feature of just-war principles across cultures. Just-war ethics of classical Hinduism, for example, ignore Right Authority entirely and do not readily distinguish between war, private violence, or the suppression of sedition, or even between war and peace for that matter (Brekke 2005). Brekke attributes this in part to the Hindu warrior’s dharmic focus on battle for its own sake; and in part because Indian rulers’ power was based on webs of personal relationships and zones of overlapping authority, rather than sharply defined territories with a single legitimate ruler. Similar discussions of amorphous zones of authority are discussed in Herbst (2002) and Scott (2009). On the other hand, and unsurprisingly, classical Confucianism seems to include something similar to the “Roman Emperor” view of Right Authority (Twiss/Chan 2012).
Eusebius of Caesarea, advisor to Constantine, signaled a change in the Christian attitude toward war when he assigned the divine mission of keeping peace in the world to the Roman Empire. With that move, Roman political institutions were acting to further God’s plan in the world, and therefore acted on behalf of the Divine authority. This line of thought was developed by Ambrose of Milan, the mentor of Augustine, though Ambrose did not systematically discuss Right Authority per se. That would wait for Augustine himself.

Augustine, attempting to reconcile the older tradition of pacifism with the current demands for military service, had to justify war in terms that were consonant with Christian teaching. His solution rested primarily on an argument of Right Authority. In his theory of the Divine ordering of the world, political hierarchies mirrored Heavenly ones, and the Emperor was God’s agent in administering justice and securing societal tranquility, just as Joshua had fought wars commanded by God directly. As such, the Emperor had the obligation to defend the right against evil—if necessary, with the sword. This obligation meant that the Emperor would fight wars without sinful malice or hatred, where private violence would inevitably entail hatred and the loss of Christian love (even self-defense, which Augustine forbade).

Since the ultimate source of Right Authority was God Himself, actions were permitted in wartime that would ordinarily have been wrongful. Thus (Augustine argued), the Israelites could conquer the territory of the Amorites, which was outside of the Promised Land (their rightful possession), because God had commanded them to. By
analogy, the Emperor or other Right Authority fighting a just war could plunder wealth, use deceitful tactics in battle, and even harm innocents to some degree if necessary.

Most crucially, Imperial soldiers could submit to the Emperor’s authority and wage wars on his behalf, argued Augustine, and not worry that they might be harming innocents: it was the responsibility of the ruler to wage just wars, and if a war were unjust that would be to the discredit of the ruler himself, not his soldiers. They were thus absolved from responsibility: “…he who acted on someone else’s orders, like a sword aiding its user, is not himself a killer” (Augustine 1994:10). On the other hand, waging a private war gave you no such protection. It was only the sovereign who had the special duty to defend the right, not his subjects. Not only did a private war offer no absolution of guilt from shedding innocent blood, it constituted a usurpation of the authority of the sovereign as the Divinely-appointed judge and magistrate over society.51

After Augustine, much of the subsequent commentary on just war was motivated by profoundly practical concerns—in particular, whether the Pope had ultimate authority over war or whether lay monarchs or even feudal lords had independent authority, and also whether churchmen were allowed to fight in war. Nominally the Church ought to have excluded itself and its members from war, since theirs was a spiritual calling, and indeed thinkers like Aquinas would periodically return to that doctrinaire position.

51 This argument has obvious political utility for the ruler (cf. Walzer 2004:3-4). To fully understand its significance, we need to consider it in the larger context of Augustine’s argument about hierarchies and inequality. To mollify believers who objected to unequal division of wealth and power, and the larger problem of theodicy (why good things happen to bad people, and vice versa), Augustine argued that God deliberately distributed wealth and power randomly, to demonstrate that these things were essentially worthless to the believer. Furthermore, while the Heavenly society of angels was organized in hierarchies based on virtue which were meant to be mirrored on Earth, it remained the case that some rulers were unfit for their position. True, the ideal is that the ruler must be virtuous, Augustine says; regardless, it is the duty of the believer to submit to God when He chooses to appoint a ruler of little virtue. Indeed, the believer is told to obey unjust rulers as if they were indeed virtuous.
Regardless, it was often the case that in the war-torn post-Roman society of power
vacuums and pirate raids, the Church was simply the political actor best able to organize
the public defense. In addition, frequent heresies made it tempting for the Church to rely
on violence to suppress them. Thus Pope Gregory the Great organized military alliances
against pirate raids and also marshaled holy wars against the Donatists and other heretics.
By the 12th Century, the Church had declared preeminence over feudal monarchs, and
claimed the right for the pope to authorize war directly, expressed in the crusade against
foreign enemies and the holy war against European heretics or political rivals.

At about this point, a new group of interpreters would weigh in on questions of Right
Authority—the canon lawyers of Italy. The canon lawyers drew heavily on ancient
Roman law, which had two categories of violence which would prove influential.
*Incontinenti* was the use of force to repulse an immediate attack, and was generally
considered acceptable even for private persons (Augustine notwithstanding); by contrast,
using violence *ex intervallo* (after an interval) was beyond the prerogatives of private
persons and required Right Authority—such violence could be just only if it were a tool
of judicial punishment, and thus properly belonged to those with judicial authority. Azo
of Bologna, for example, considered violent self-defense acceptable, but progressively
less so as the possibility of judicial intervention grew. Odofredus similarly advised
wronged parties to seek redress in a court of law before asserting their rights violently.
These scholars were attempting to ameliorate the feudal world of social chaos, in which
petty lords frequently warred on each other over slight pretexts and caused great suffering
thereby. Azo, for example, noted that “lack of princely control over the use of weapons endangered peace and gave rise to acts of malice” (Russell 1975:46).

At the same time, the rise of city-states and strong monarchies motivated canon scholars like Odofreus to resurrect another class of war justification, defense of the patria. Civilian writers (often in the employ of kings) took the concept of patria and ran with it, with arguments from Andrew of Isernia, Jean de Blanot and others that a vassal’s first obligation was not to his feudal overlord but to the king, who was the guardian of the public good.

Around 1140, Gratian published his massive work, commonly called the Decretum. A comprehensive work of canon law, the Decretum is significant for our purposes because it included the most complete work to date on the characteristics of a just war. Building on the work of the Romanists, Canonists like Isadore of Seville, and most especially inspired by Augustine, Gratian argued that war must be initiated by an authoritative edict, and even then must be fought to right a legal wrong. In this, and in his lengthy discussions of the different categories of legal injuria that could justify war, Gratian continued the line of thinking in which just war was a quasi-judicial procedure; the proper authority for waging war was a public official with imperium, such as a prince or the pope, who had a duty to uphold the public good and (following Augustine) could be relied upon to fight without the sinful passions of hatred or revenge that would motivate persons without authority.

Still, Gratian’s discussion of authority had difficulties. In different places, he seems to include actors “from the Emperor or king down to the most lowly vassal” (Russell
1975:71), without any clear rule distinguishing between proper and improper authorities, and therefore distinguishing the proper realm for private defense versus public judicial punishment (i.e. warfare). Gratian did, however, link the concept of just war to the Church’s divinely-granted authority to fight holy wars, covertly legitimating aggressive war to extend the dominion of Christianity, and staking the Church’s claim to be a legitimate wartime authority in its own right.

Following the *Decretum*, an entire school of commentators called the Decretists emerged to explicate its rulings. Among them, Rufinus further developed a concept of *ordinaria potestas* (sufficient authority); while not grounding such *potestas* in any given institution, Rufinus implicitly reiterated the view that just war was a judicial procedure for the redress of legal wrongs, and therefore that a right authority was acting as a judge in his own case. The anonymous *Summa Parisiensis* was perhaps the first to argue that the proper authority to wage wars was the prince. Hugoccio, “the most brilliant of the Decretists” (Russell 1975:89), similarly argued that those avenging their own injuries committed a sin unless operating under judicial authority, but that city-states were permitted to defend themselves.

Importantly, the emerging consensus among the Decretists distinguished between proper war, which required right authority, and defending oneself from immediate attack (as Rufinus called it, *continuata rixa*), which could be done by anyone. The old Christian principle of total pacifism was simply not viable in those dangerous times, when even churches needed to defend themselves against brigandage. The main danger to be averted

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52 Not that any of the Decretists ever defined who qualified as a “prince,” which was prudent “in view of the shifting complexity of twelfth-century politics” (Russell 1975:102).
was that petty lords would seek to begin wars without proper jurisdiction. Hence initiating violence required authority, and defending against it did not. The culmination of this line of thought was in Hostiensis, who held that only actors without a judicial superior, or with the merum imperium such as kings or the pope, could fight full wars.

This viewpoint did not adequately deal with current political realities, in which wars between lesser feudal princes were common. In response, William of Rennes allowed even princes with a superior to make war against a subordinate if he were unable to submit his just grievance to proper judgment, or if his adversary refused to submit to that judgment. At around 1250, Pope Innocent IV expanded on this distinction in a long and subtle discussion of the right to spoils in war, in which he held that fighting war outside of your own jurisdiction required the authority of a prince without a superior, but that even without such authority you could repel an immediate attack incontinenti (which was not considered “war” at all); and you could also declare a sort of quasi-war against your rebellious subjects without the approval of your prince, since you were merely exercising your own jurisdiction (cf. Johnson 2008).

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53 In particular, nobles were in the frequent habit of engaging in feud against each other, gathering retainers and raiding the lands of rivals. In brief, to force an opposing noble to concede on some point of rights or inheritance, feuding nobles would attack their rivals’ peasants until some accommodation was reached (Firnhaber-Baker 2010).

54 “To be successful the just war needed manpower, so the just war theories depended in practice on the two factors of authority and spoils. Authority compelled obedience, and the lure of property made such obedience attractive” (Russell 1975:211). It is worth noting that modern discussions of JWT have no similar link to an enforcement mechanism worth speaking of.

55 In many of these writings, and in those of Innocent IV in particular, the problem of obedience was viewed as the other side of the coin from the problem of authority. Subordinates were required to obey the Right Authority when the cause was just, but if the cause was unjust subordinates were given leeway to refuse service. The problem of obedience is of great importance to JWT, but is far out of scope for the current discussion.
Worth noting is that many of these scholars, particularly Hostiensis, employed the trope of war-as-judgment to argue for the Church’s competence to maintain the peace (i.e. oversee wars) in cases where feudal justice was lacking. For example, Pope Alexander III and the Third Lateran Council of 1179 excommunicated the “routiers” (unemployed mercenaries and bandits) because of their depredations, and granted secular princes who made war on them privileges akin to those given to crusaders. More fundamentally, the Church’s claimed jurisdiction was used to limit the scope of wars, through the ecclesiastical courtroom, the Truce of God, the Peace of God, and the Bishop’s Peace (cf. Johnson 2003). (Additionally, in the theory of Hostiensis only the pope could call for crusade.)

By the time of Thomas Aquinas, the feudal system was giving ground to the emerging strong monarchies and city-states, which led to a renewed emphasis on the patria and the political community. Building on the arguments of Augustine and even more strongly on the Aristotelianism that had influenced him, Aquinas made a teleological argument for the primacy of Right Authority. Rather than simply arguing from the lack of a superior, Aquinas argued that political communities were natural to man and that permission to go to war was premised on the ruler’s special duty to promote the common welfare of the community, and punish evil. War was thus a tool of the preeminent magistrate, to be used to vindicate justice in society.

Private parties had no right to act as a magistrate by making war themselves. Following the tradition of the earlier medieval authorities, Aquinas forbids an individual
from declaring war “because he can seek for redress of his rights from the tribunal of his superior” (in Johnson 2003:9). Aquinas adds another wrinkle when he writes that

it is not the business of a private individual to summon together the people, which has to be done in wartime. And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them (ibid.).

Here, the objection is not merely that the private warrior oversteps his authority, but that his actions affect the entire community, not just himself. He has no right to force others to participate in his war, since he is not the one with responsibility for their welfare. Self-defense alone does not permit a private person to make a war involving others; conversely, even a private person would be allowed to violently defend others under his care (Johnson 2003).

The upshot was that by Aquinas, there were now fully fleshed-out theories in support of the Right Authority of secular authorities. Before too long, the conflict between temporal and spiritual authorities came into sharp focus:

Canonists and theologians had prepared both sides well for the clash between the French king and the pope. By 1300 the just war theory became lost in a flurry of statute law. What with Augustine had started out as a problem of morality and scriptural exegesis ended up as a tool of statecraft in the hands of secular monarchs. The just war of Cicero's Rome reappeared when similarly favorable conditions allowed it to do so. The just war had become the bellum legale, a war waged in defense of legality rather than morality (Russell:1975:302).

The struggle only became more bitter over time, and theories of Right Authority shifted accordingly. In the fifteenth century, the papacy and the Holy Roman Empire fought a bitter conflict over which would be preeminent. Consequently, the Pope needed
some justification to be able to raise armies and make war against the emperors (Johnson 2003). By the time of Aquinas, the canonists had concluded that the Pope could only wage war during a crusade; otherwise, the temporal authorities had jurisdiction. To get around this, supporters of the papacy hit upon a loophole: the Pope would simply excommunicate the emperors and their supporters, and then effectively fight a “crusade” against them. This idea became codified as the “Two Swords” doctrine. Before too long, the same idea was turned against the supporters of the Reformation. Not surprisingly, Martin Luther argued in response that religious authorities had no authority over temporal matters, and vice versa—a position entirely in line with the canonists’ views on papal authority in wartime (Johnson 2003). 56 This view won out after religious conflict was discredited in the Thirty Years War, and since then no pope has claimed the right to call for crusade.

A new strand was introduced by Hugo Grotius, in his Rights of War and Peace. Writing during the Thirty Years War, Grotius sought to strip from the theory of just war its religious trappings, which were employed by both sides to turn the conflict into an endless crusade. Therefore, he defined “sovereignty” as not the right to rule, in any religious sense, but instead as the practical control over territories featuring their own laws and traditions (Johnson 2008). The right to make war thus needed a different foundation than religious concepts of a properly ordered society. For Grotius, this was natural-law theory. He argued that in the state of nature, anyone had the right to make

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56 Luther also conceived of Right Authority as arising out of a government’s duty to uphold justice and order in society, as did Aquinas and many others (Johnson 2003). See Hoag (2006) for more on the “war as punishment” theme from Augustine all the way to Bentham.
war in order to punish evil. It was only within a society that one had to defer to the sovereign.

Decades later, John Locke (1980 [1690]) made similar arguments, adding that if the sovereign violated the rights of his subjects, they in turn had the right to return to the state of nature and make war against him. He famously wrote that in the state of nature, people have the right of self-defense. Moreover, they have the right to make war against a murderer, who has “declared war against all mankind” (1980:11), whether or not they were defending their own lives in particular by doing so. (And it could not be otherwise, since the rights of the state are only those that its members have transferred to it.) Even when within a civil society, people retain the right of self-defense, since according to Locke’s reading persons are temporarily returned to the state of nature when they are unjustly attacked, and thus may “make war” on their attackers. And finally, people subject to an unjust regime have a right of revolution which they may use to overthrow their oppressor:

[God] alone, it is true, is judge of the right. But every man is judge for himself, as in all other cases, so in this, whether another hath put himself into a state of war with him, and whether he should appeal to the Supreme Judge, as Jephta did (1980:123).

This argument about the state of nature was compatible with self-interested motives. Grotius’ early work (such as the Mare Liberum) was being sponsored by the Dutch East India Company (the VOC), which hoped to influence the peace negotiations that would produce the Twelve Years’ Truce in order to preserve its freedom of action in the Indies; to further that goal, it was necessary to have a principled argument for sea captains’ right
to make war when beyond the reach of their European authorities. Likewise, Grotius’ writing of *De Jure Belli ac Pacis* was closely related to his legal involvement in several piracy cases against Dutch privateers, whom Grotius defended (van Ittersum 2010a, 2010b). It is no surprise then that Grotius argued for a private right of war while away from society. Similarly, Locke was writing in defense of the English Parliament against the growing absolutism of King Charles II (which would culminate in his overthrow in the Glorious Revolution of 1688), and needed some grounds to justify the ultimate authority of popular representation.

As it happened, when the work of Grotius and his successors (especially Pufendorf) coalesced into the beginnings of international law, the authority to make war was assumed as a matter of course to belong to the state alone (Fabre 2012). It is perhaps unsurprising that the right of rebellion was deemphasized once abstract principles became translated into international law, which was nothing but an agreement between the very states who wished to forestall their own overthrow. By the time of Rousseau’s *Social Contract*, he could say (in the course of justifying his opposition to slavery) that

> since the state of war cannot arise from simple personal relations but only from property relations, private war or war between one man and another can exist neither in the state of nature, where there is no stable property, nor in the social state, where everything is under the authority of the laws…. War is then not a relationship between one man and another, but a relationship between one State and another…. Finally, any State can only have other States, and not men, as enemies, inasmuch as it is impossible to fix a true relation between things of different natures” (1997:46).

This exquisite example of bad Continental metaphysics would be characteristic of philosophical discussions of Right Authority for centuries. For example, Kant assumed as
a matter of course that war naturally lies in the domain of states (cf. Orend 1999). The discussion would only shift again in the modern era, as discussed.

**Summing Up**

It is unsurprising that many of the arguments for a given criterion of Right Authority originate in manifestly political motives. That does not necessarily impugn the concept of Right Authority itself, but it should give us pause before we uncritically accept any given thinker’s definition of the term, ancient or modern. Still, looking over the history of Right Authority, we can perceive some recurring themes:

1. Authority to make war is said to derive from one’s *responsibility* to care for subordinates.
2. It is also connected with the responsibility to promote the good, and *punish* wrongdoing.
3. The authority must be *competent* (in several senses) to judge the Justice of a Cause.
4. It is undesirable for private actors to start wider conflicts than they have a right to.
5. Similarly, they have obligations to their sovereign and must defer to his authority.
6. In particular, they must not *draw* the general community into their own conflicts.
7. On the other hand, private actors perhaps have a right to use violence in self-defense or while in the state of nature…
8. …Or if the nominal authority acts wrongfully, or shirks its duty to punish injustice.

This list suffers from a depressing vagueness, but we can already see that the concept of Right Authority actually consists of three interrelated concepts: a claimed authority’s *competence* to make war, the authority’s *standing* to force subordinates to participate, and
the corresponding *obligation* (or lack of same) on the part of subordinates to participate, and to defer to its authority. The last two reciprocal concepts are crucial here, and they are also precisely the areas in which contemporary political theory is on the shakiest ground (e.g. Baron 2009, 2010, Lefkowitz 2010). To put it baldly, modern thinkers have trouble justifying the claim that the state (or anyone else) can demand that its citizens die in war.

And more generally, even now that we have inventoried the contents of Right Authority, we still do not really have a firm theoretical foundation explaining why these things would be necessary requirements before one may fight a war, rather than being good things to address along with many other such good things. Is it possible to lay out a firm principle for why Right Authority takes the form that it does? And if so, can that principle apply equally to states and non-states, and thereby give us the means to judge the fitness of *any* actor to make war? These questions will be our theme in the chapters to come.

This dissertation will lightly touch on Competence in Chapter Three, mostly as it relates to questions of who can justifiably be attacked in wartime; beyond that, the subject is addressed masterfully by Amoureax and Steele (2014), in an important article that deserves attention.\(^\text{57}\) We will analyze Standing in much more depth in Chapter Four;

\(^{57}\) Drawing on discussions in Aristotle and Hannah Arendt, the authors note that implicit in many of the JWT criteria is the claim that leaders must possess the capability to make practical judgments in the radically uncertain environment of war, in which the strategic interaction of adversaries renders simple cost-benefit analysis next to useless. Lack of such *competence* would throw the justice of a war into question, because it would throw its successful prosecution into doubt. The authors cite in this regard a major debacle during the 2003 invasion of Iraq, in which Coalition forces came across a vast Iraqi army stockpile of weapons and explosives at al-QaQaa, thirty miles south of Baghdad. The Coalition left the
in the view to be developed there, Standing is at the heart of the traditional view restricting the right of making war to particular kinds of actors. The obligation of subordinates to obey a Right Authority goes far beyond our scope, but instead in Chapter Five we will discuss the reciprocal of that obligation—the Right Authority’s requirement to exert discipline over its subordinates, and itself. Perhaps with a clearer concept of what we mean by a Right Authority, scholars will find it easier to determine why, when and if citizens are obliged to fight and die for their polity.

To better understand why we might need Right Authority in the case of war, where we do not need such authority to engage in self-defense, we need to investigate how war is different from self-defense. That is the task of next chapter.

materiel in place, and did not even post a guard over it; when the insurgency ramped up, the materiel vanished almost immediately and would later be used against Coalition troops.

The authors do make some questionable claims. While noting that one cannot simply blame all civilian casualties on the enemy's choice of tactics, they veer to the opposite extreme and claim that "A competent agent takes into account these civilian casualties regardless of the intent of the enemy" (Amoureax/Steele 2014:79). If this advice were followed without exception, an unjust enemy could render itself immune to retaliation simply by using enough innocent people as human shields—and we have seen many terror groups try to do just that. At a certain point, even competent authorities who are trying to minimize harm to civilians must accept that their enemy is making that impossible, and place the responsibility where it is due.
CHAPTER THREE: SELF-DEFENSE, WAR, AND DISCRIMINATION

We tend to believe that those who fight wars are under special obligations for proper conduct—not least, the claimed requirement of Right Authority. To understand what might justify these special obligations, we must first have a theory of what factors define “war” as such, and what makes it different from other types of violence (such as individual self-defense) that may not require such elevated standards. The area within scholarly debates over Just War Theory that most closely engages with this question is the literature discussing the principle of Discrimination (also called Noncombatant Immunity): the broadly accepted requirement that warfighters avoid harming noncombatants. The converse of that requirement, conventionally understood, is that combatants on either side are fair game for attack.

Immediately we are presented with several ambiguities. How exactly do you define “combatant,” and on what grounds? We generally act as though uniformed soldiers are viewed as combatants and therefore liable to attack, and civilians are generally viewed as noncombatants. But this assumption is problematic in several respects.

First, not all “combatants” actually fight in combat. Many soldiers are not on the front line, or serve in support positions such as repairing vehicles, or cooking food. Yet soldiers seem to be subject to attack even before they have reached the battlefield, or
even if they serve in support positions and never fire their weapons at all. Why? If as individuals they pose no threat of harm, what gives their adversaries license to kill them?

Second, it seems that some putative noncombatants ought to be at least as liable to attack as, say, support soldiers are. Political leaders, for one, bear much more actual responsibility for unjust war than the soldiers they command (cf. Aloyo 2013). Civilian workers in a munitions factory are another classic case for when noncombatants might be subject to attack. Similarly, scientists involved in military research, or private contractors who perform support functions in war zones, seem to be more involved in the course of the war than a “typical” civilian might be. Can any of these people be attacked? If so, on what grounds?

Third, if you assume that one side in a war fights justly, why should its soldiers be subject to attack? After all, they have done nothing wrong; so what would give the (by hypothesis) unjust soldiers the right to kill them? Even if you assume that neither side in a war is truly just, that should only compound the question: what right does either side have to kill the other?

Fourth, even on an unjust side, many or most soldiers will have done nothing wrong, as individuals. Their offense comes (if at all) from their association with an unjust state or its army, or their resisting the attack of the just warfighters. But are these offenses sufficient for them to be condemned to violent death?

Fifth, if you assume that some classes of civilians are subject to attack, where do you draw the line, and on what grounds? There are temptations to extend the list of permissible targets far beyond what the principle of Discrimination should countenance.
A standard pacifist objection to war holds that since unjustified civilian casualties are inevitable in any war, no war can be truly justified. In response, some scholars seek to rebut this claim by arguing that civilian citizens of the unjust state are indeed subject to justified attack to a limited degree, perhaps out of some sense of collective responsibility. The net effect is to enervate the force of the Discrimination principle. How then can you properly discriminate between permitted and forbidden targets, if the combatant/noncombatant distinction is no longer sufficient?

In the modern literature, theories that try to satisfactorily answer one of these questions tend to produce problematic answers to the others. While the Legalist or Contractarian views of the Moral Equality of Combatants can explain why one can kill soldiers but not civilians, to do so we are forced to lump together just and unjust combatants. On the other hand, more recent attempts to ground Discrimination on a principle of self-defense, in order to distinguish between just and unjust combatants, fail to adequately explain why soldiers who are nevertheless innocent as individuals might be killed anyway—because self-defense is something very different from war, and to confuse the two is to commit an analytical blunder. Appeals to a collectivist or associative principle such as the duties one owes to compatriots likewise come up short, because they simply cannot justify killing some innocent people (soldiers) while at the same time prohibiting the killing of other innocent people (civilians).

Scholars of a pacifist bent, or those who are concerned about defending the principle of Discrimination from encroachment, have attempted to tightly restrict the kind of enemy that you can legitimately attack. Of these, some have gone so far as to argue that
you may *only* attack enemy soldiers who pose a direct threat, while other personnel engaged in activities such as food provision are off limits (e.g. Nagel 1985). This approach suffers from misplaced moral squeamishness; an army runs on its stomach, as has been widely noted, and it is difficult to separate the highly artificial (and coercive) process of army provisioning from the general operations of the army as a whole (Fabre 2009). On the other hand, some scholars seek to justify war through some broad principle of collective guilt—and some of them explicitly justify terror attacks against civilians. Thus, we need a new principle that can do the work necessary without being morally heinous.

This dissertation adds a sixth question as well: the conventional understanding of Discrimination is tailored specifically to interstate warfare, in which soldiers are clearly identified by uniforms and are sharply distinct from civilian populations. But what happens when we are engaged in irregular warfare against non-uniformed enemies? It seems obvious that armed gunmen may be attacked, but what about unarmed civilians who serve support roles? Are they more akin to a prototypical civilian, or to a soldier serving in a support role in a formal military? The present literature on Discrimination says little about the question, given that too much justificatory work is being done by state-specific features such as uniforms and the like. How can we generalize Discrimination to better address the realities of modern war?

**Literature Review of Discrimination**

We begin with an early strand of the modern literature, which seeks to ground Discrimination in an analogy with individual self-defense. Just as an individual who is
threatened with death has the right to use lethal force against his attacker, so too do soldiers have the right to use force against enemy soldiers. The modern literature for this approach was largely kicked off by Fullinwider (1975), who argued that self-defense only allows one to attack someone who is a proximate threat. In war, the proximate threat is executed by armies, which is the basis for allowing soldiers and only soldiers to be killed in battle. Guilty civilians might perhaps be subject to being killed (though Fullinwider doubts that claim); but if so, that would be under the rubric of punishment, not self-defense—and the attacker would need to precisely discriminate between those deserving of punishment and those who are not, as a court of law is expected to (1985:96). The practical impossibility of doing so in a war situation compels us to rely on self-defense as our justifying principle, and not punishment.

Fullinwider’s discussion raises several difficulties, which have spawned a vast literature as scholars engage with the problem. First of all, it seems arbitrary to say that a soldier may be killed in self-defense, but not the political leader who orders him to commit aggression (Alexander 1985). Indeed, killing the political leader may in some cases be far more effective at removing the threat than killing the front-line soldier, and it seems that the political leader bears more direct responsibility for the threat in the first place (cf. Aloyo 2013).

Second, Fullinwider’s argument does not explain why every soldier might be attacked, even those who are not in combat roles—unless one uncritically accepts the “domestic analogy,” in which the entire army is lumped together as a single machine of which its individual members are merely cogs. But those who are committed to ethical
individualism might argue that you ought only harm soldiers who are directly attacking you, not the soldiers providing them with support or materiel (cf. Nagel 1985). On the other hand, those other soldiers are still enabling the threat; but does this enabling suffice to make them vulnerable to self-defense specifically?

Third, if you ground Discrimination in self-defense, what does that say about the right of aggressor soldiers to fight back against just defenders who are assaulting them? On the one hand, as individuals these soldiers are certainly being attacked, perhaps without deserving it; on the other hand, as a collective the soldiers have arguably forfeited any right to defend themselves, since they committed aggression in the first place. So which wins out—the innocence of the individual or the culpability of the collective?

Fullinwider’s argument does not clarify this issue; but other scholars would indeed say that both sides can defend themselves against each other. The chief representative of this view is Walzer (1977), the foremost modern exponent of the “Legalist” model of Just War Theory. Walzer argues strongly for what he calls the Moral Equality of Combatants (or MEC): the idea that while states’ behavior may be just or unjust with regard to the war as a whole (i.e. jus ad bellum), their uniformed soldiers have an equal and equivalent right to kill each other in combat, grounded in their mutual right of self-defense. He bases this claim on the argument that soldiers of both sides amount to coerced victims of their states, and that their individuality is effaced by conventional agreement, in accordance with the “law of war,” in order to distinguish between combatants and civilians and thereby protect their communities from harm. Civilians, on the other hand, are largely
inviolate (unless one state faces a “supreme emergency,” a topic which this dissertation will ignore).

The Moral Equality of Combatants has advantages as a guide to wartime behavior. It draws a pleasing bright line between uniformed soldiers who may be killed in wartime, and civilians who may not be (no matter how guilty they may be as individuals). And it offers an explanation for why individually innocent soldiers or noncombat troops may still be attacked, since the mere fact of being in the military indicates that these soldiers are the designated sacrifices of their states, as it were. But MEC is grounded on a state-centric paradigm, assuming that the right of soldiers to kill and die derives from the awesome power of the state apparatus that forces them into harm’s way. This logic hardly applies to non-state fighters such as insurgents, and Walzer (1977) barely discusses the morality of non-state war at all (except in his discussion of guerrillas, where he focuses mainly on *jus in bello* and whether it is permissible for you to attack state soldiers while you do not wear a uniform).

A hazard of writing such a pathbreaking work is that Walzer had a giant bullseye painted on his back, and generations of scholars have since proven their chops by dissecting his argument and showing its weaknesses. As with many other parts of his Legalist model, Walzer’s claim of MEC relies too much on the “domestic analogy” that considers nations to be similar to individuals, with rights of privacy and freedom from “paternalism” (cf. Rodin 2002:164).

Ultimately, Walzer’s view is unsatisfying. For the MEC to be palatable we would have to accept that the soldiers of unjust states have a right to attack their just foes that is
disconnected from the justice of their cause in general. We would also have to accept that all members of a military are equally exposed to attack, from the infantryman to the mess cook, without regard to their actual guilt or innocence. As a result, more recent scholarship has attempted to move beyond the collectivist underpinnings of MEC to something more sensitive to individual desert.

The most serious recent move to challenge the Legalist paradigm came from Jeff McMahan (2004, 2006, 2009, *et al.*), who proposed his own “liability” theory of Discrimination.\(^{58}\) McMahan argues that war must not be reified as a collective action; if it is to be just, a war must consist of the just actions of its many individual participants. Therefore, he believes that wartime violence must be directly derived from principles of individual self-defense, not (as with Fullinwider) from mere analogy to them: “…justified warfare just *is* the collective exercise of individual rights of self-and other-defense in a coordinated manner against a common threat” (2006:30; see also 2004:75-80, 2009:156).

McMahan argued that *jus ad bellum* and *jus in bello* are not in fact independent of each other, but that a soldier fighting for an unjust cause (*unjust combatant*) has no right to attack one fighting for a just cause (*just combatant*).\(^{59}\) He made the obvious point that not all types of defensive force are permissible: if you fight back against a villainous attacker, the attacker is not then entitled to “defend” himself against your own defense. Walzer accepted this point (1977:128) but argued that an unjust combatant is forced to

\(^{58}\) McMahan (2012) likes the designation Neo-Classical, which was coined by Leveringhaus, but he does not seem to use it much himself in later writings.

\(^{59}\) The position that *jus ad bellum* and *jus in bello* are in fact interdependent has some similarities with the argument of Lango (2004) that warfighters face many junctions within a larger conflict where the justice of the war must be reevaluated, and where they must decide whether or not to continue fighting. We will revisit this point below.
participate due to necessity. McMahan views this argument not as justification, but at best as an excuse for behavior that is *prima facie* wrong:

If, however, unjust combatants are at best merely excused for fighting, while just combatants are justified, two of the central tenets of traditional just war theory must be rejected. It is false that unjust combatants do no wrong to fight provided they respect the rules of engagement. And it is false, a fortiori, that *jus in bello* is independent of *jus ad bellum*. (2006:25)

McMahan acknowledges the argument that one might be obliged to fight on behalf of a legitimate institution even for an unjust cause, if the institution’s value is worth defending. But this is a contingent argument; and there are “some types of act that are so seriously objectionable that they cannot become permissible even if they are demanded by institutions that are both just and important” (2006:26; see also 2009:72-73).

Furthermore, if your cause is unjust, then any costly actions you take will fail by *definition* to meet the standard of Proportionality, since the aim to be achieved is not morally valuable (quite the opposite). The upshot, according to McMahan, is that “[f]or unjust combatants, therefore, there are, with few exceptions, *no* legitimate targets of belligerent action” (2006:30).

As a result, he rejects the MEC wholesale: soldiers who fight a just war do not have a *prima facie* liability to attack, while soldiers fighting an unjust war are *prima facie* liable to attack (due to their *culpability* or perhaps *agent-responsibility*), about which more

\[60\] Steinhoff (2008) challenges McMahan’s claim that most just soldiers would be immune to attack. Whether or not their cause is just, he argues, just soldiers will still threaten to kill innocent civilians as collateral damage (or as Steinhoff calls it, “concomitant slaughter”), and therefore even unjust combatants would be permitted to fight back in defense of these innocent civilians. As he puts it, “[i]nnocent civilians are no less innocent when they are citizens of the country engaged in an unjust war.” (That this statement contradicts Steinhoff’s own earlier arguments on collective responsibility in democracies [2007:68, 131] does not seem to trouble him.)
below). However, soldiers are liable not because of their membership in a larger army that does wrong; rather, says McMahan, they become liable to attack because of actions that they take (or threaten to take) as individuals, and because of their choice to take those actions. (Even civilians may render themselves liable by taking unjustified action, though McMahan acknowledges (2006) that there is practical value in a rule against targeting civilians anyway.)

The importance of individual actions is a crucial and often-repeated point for McMahan; its importance lies in McMahan’s stated goal to discourage soldiers from uncritically fighting for unjust causes (as they would do if they benefited from the presumption of MEC). If just soldiers are not liable to attack, then soldiers opposing them would risk doing moral wrong if they resist; as a result, hopes McMahan, such soldiers would be moved to question their own participation. And if furthermore their own liability to attack is contingent on their choice to participate in wrongdoing, they will have a strong incentive to drop out and thereby be protected from justified violence (e.g. McMahan 2013).

But what would ground a soldier’s liability to attack? At first (e.g. 1994), McMahan argued that one needed to be culpable of wrongdoing in order to be liable to attack.\(^6\) That is, one needed to be morally blameworthy for directly participating in wrongdoing. This argument proved unable to justify the Discrimination principle, because it could not

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\(^6\) The modern literature on Discrimination hangs a great deal on subtle distinctions of praise and blame. Frequent use is made of the difference between culpability (being fully at fault in a moral sense) and responsibility (having contributed to a wrong even if there are mitigating factors, so that you are assigned a measure of responsibility without blame), and similarly between just actions, justified actions, and excused ones, or a right versus a permission. I suspect that much of this discussion departs from what is useful in the real world, and certainly in the messy world of combat.
explain why *all* soldiers could be attacked. It is not obvious that all soldiers in an army are culpable (Lazar 2010). First of all, not all soldiers commit wrongdoing, or engage in combat against just opponents; even those who serve in support roles for wrongdoers may have lessened culpability thereby, since they might have justifiable reasons for providing that support. Second, many soldiers are excusably ignorant of the wrongfulness of their cause. They rely on the judgment of their political leaders, and are therefore not culpable for participating in a war that proves to be unjust. Third, many soldiers are coerced into their position—whether directly through a draft or even the threat of being murdered, or indirectly through the weight of social or civic obligation. As a result, only a small fraction of soldiers in an unjust side’s army are likely to be truly culpable for the wrongdoing of their side.

In response, McMahan and other scholars such as Coady have shifted their position. Now, they argue only that a person must be *agent-responsible* for wrongdoing in order to be attacked (e.g. McMahan 2009:34; cf. Lazar 2009, 2010). McMahan defines “responsibility,” in his sense, as follows:

> If a morally responsible agent – that is, an agent with the capacity for autonomous deliberation and action – creates an unjust threat through voluntary action that is wrongful but fully excused, she is to some extent responsible for that threat even though she is not blamable (2006:33).

One consequence of this argument is that an attacker who is not acting out of free will, such as someone who is drugged or brainwashed or subject to a mind-control ray, is *not* considered to be responsible and is therefore not liable to attack, regardless of the threat being posed: “For a Non-Responsible Threat is morally indistinguishable from an
innocent bystander” (2006:32, cf. 2013 et al.). Nor is it necessary for a legitimate target to pose the threat; the man who brainwashed the Non-Responsible Threat, for example, would be a more preferable target for attack than the Non-Responsible Threat if it becomes necessary to kill one or the other. This, even though the brainwasher is not a combatant himself.

McMahan believes that the principle of agent-responsibility is sufficient to ground a criterion of Discrimination:

[V]irtually all unjust combatants are legitimate targets because virtually all are moral agents, and because even those who are in rear areas or are asleep and are therefore not presently attacking nevertheless pose a threat by virtue of their participation in a continuing attack that has many phases coordinated over time” (2006:33).

McMahan concludes that non-culpable moral responsibility for an unjust threat is sufficient to qualify someone as a legitimate target under Discrimination; still, issues of culpability and excuse come back into play when considering whether an attack is proportionate (2006:34). This is his saving grace; without that stipulation, agent-responsibility is such a broad criterion that it would seem to allow attacks on many classes of civilians. McMahan acknowledges this, but reiterates that since liability is no longer all-or-nothing but is rather on a sliding scale, most civilians’ liability would be so low as to make any attack disproportionate anyway (2009:18-23, 156, 213). Similarly, it would be difficult to know that a given civilian is liable (as Fullinwider [1975, 1985] argued earlier), so a convention against attacking civilians would still be appropriate—
but it would be a convention only. In principle, responsible civilians could be attacked, just as responsible soldiers could be (McMahan 2006).

McMahan's liability theory of Discrimination has several attractive features to which I am sympathetic. His stated goal is to place the moral onus on soldiers who fight for the unjust side, to encourage them to refuse to participate—a worthy project, in an age when unthinking obedience to state authority has been exploited to allow political leaders across the world to murder innocents. A soldier's liability to attack (or a civilian's, for that matter) is a function of his own choice to participate, which seems at first blush to be appropriate.

However, the closer one looks at liability theory, the more issues arise. Remember that no one doubts that one soldier (by hypothesis, fighting for a just cause on the macro and micro level) can defend himself from the direct attack of another; additionally, the argument of MEC is challenged fairly easily by McMahan and others. What needs justifying by McMahan is a soldier's dispensation to attack opposing forces who do not pose an immediate threat, including support troops whose contribution to the threat is relatively small and at several removes, or even civilians contributing to the war effort (cf. Lazar 2010, Fabre 2009). McMahan argues that the category of “self-defense” can extend to encompass the entire situation of war, including attacking an enemy soldier who is asleep, since that soldier is participating in a “continuing attack that has many

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62 This view has some superficial parallels with that of Mavrodes (1985), who argued that the principle of Discrimination is grounded in a mutually-upheld convention and nothing more. But Mavrodes believes that if one side breaks the convention, then the other side may no longer be bound by it altogether, whether or not a civilian target is culpable. Indeed, Mavrodes says that refusing to attack innocents if doing so would actually help you win a just war, once the convention has already been broken, may be choosing the worse of two evils (1985:87). McMahan would not agree.
phases coordinated over time.” However, this claim is only tenable if the permission to engage in self-defense is not dependent on issues such as the immediacy of the threat, which would make self-defense sufficiently different from war as to be incommensurable. We need therefore to briefly survey the literature on self-defense itself.

Self-Defense

The recent literature on self-defense—and whether it is justified even against a non-culpable attacker—was largely kicked off by Judith Jarvis Thomson (1991), who addressed Nozick’s example of an Innocent Threat in a scenario known as “Falling Man.” Briefly, if someone is falling from a great height directly over you and will kill you on impact—unless you vaporize him with your trusty ray gun first—are you permitted to kill him and defend your own life even though the man is clearly innocent? Thomson said yes. She argued that since the Innocent Threat is infringing on your right to live, he himself gives up his own right against whatever proportionate harm is necessary to stop the attack.

Other scholars objected to this view. McMahan (1994) in particular noted that it is strange to say that an actor without agency is capable of infringing rights, which are moral constraints. “Neither a falling boulder nor a charging tiger can be subject to a moral constraint; thus neither can violate a right” (1994:276). The Falling Man in this case has no more agency than a boulder, and a Non-Responsible Attacker in general has no more agency than a tiger; thus, McMahan argues, in neither case can our right to use force be based on an infringement of rights. Furthermore, since the kind of defensive
force allowed is limited by necessity, its exact nature is dependent on the options available to the defender—a skilled martial artist who could stop an attack with his fists would not be allowed to shoot his assailant. Thus, Thomson’s rights-based theory does not actually specify what right the attacker is giving up.

This argument stimulated a great deal of work as scholars attempted to argue more plausible underpinnings for the principle of self-defense, and then demonstrate how their favored model works better to explain our intuitions. These underpinnings generally fall into two broad categories: either there is something about the attacker that renders him liable to defensive force, or there is some overriding reason that permits the defender to use force whether or not the attacker is entirely liable.

However, scholars who seek to justify the killing of Innocent Attackers (usually in support of larger claims about just war) have been forced into more and more complicated arguments about the nature of rights and rights violations. The three most common accounts to explain liability (culpability, moral responsibility, and accounts of liability grounded on the evidence available to the attacker) all have problems (Quong 2012). Culpability and Moral Responsibility both run into problems with partial liability, since such a possibility leads to threshold effects where some people escape harm despite having done wrong, and others only slightly more liable become subject to being killed. Culpability also cannot explain cases of mistaken beliefs where it seems that an attacker

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64 Rodin (2011) argues that both types of justification are actually related, at a deep level, because they rely on similar underlying principles of proportionality. However, his formulation differs from that of Lazar (2009); Rodin calls the second category of justifications the lesser-evil justification, which seems unnecessarily consequentialist and would exclude (without justification) Lazar’s argument about associative duties overriding some rights.
ought to be liable to some harm even though he is not morally culpable, since he justifiably (but wrongly) believes that he is being threatened by the defender. The Moral Responsibility view would seem to allow a degree of self-defense that seems too expansive; for example, McMahan would permit a pedestrian to destroy an out-of-control vehicle in self-defense, even when that vehicle is an ambulance. And the evidence-relative account would seem to suggest that a group of Duped Soldiers, who genuinely believe that their (innocent) targets are threats, would be just as immune to attack as their targets are.

Quong (2009) argues that the Moral Responsibility account is wrong, because it presumes that it is always impermissible to kill one innocent person in order to save others. He notes the famous Trolley Problem, in which many people believe that you may direct a runaway trolley towards one person in order to save five. In the case of self-defense, Quong asserts an agent-relative permission to prefer your own life, in a case where you must choose between yourself and an Innocent Attacker and you have not forfeited your own permission to engage in self-defense (cf. Miller 2009). Therefore, under his theory, one would often be permitted to use violence against Innocent Attackers and Threats. However, if the threat is indeed Innocent, you might become liable to attack in turn in spite of being justified. Quong (2012) proposes his moral status account in which you can potentially become liable to attack if you behave as if a) your target is liable to the harm you impose, or b) your target is not entitled to the moral claims typical of people. If you act in this manner, you are taking a moral risk; if you turn out to be
wrong, and your target does in fact have moral claims against harm, then he would be permitted to defend himself against you.

Hanna (2012) argues strongly that Quong’s argument fails to adequately explain the case of a Non-Responsible Threat. He presents the case of the Falling Man (Reversed), in which you are the person falling from a great height, and the person beneath you will kill you with his pointy knees if you land on him—unless you vaporize him before impact with your ray gun. Intuitively, it should seem that you would not be permitted to kill the man beneath you; yet formally speaking, this situation is precisely the same as that of the original Falling Man case. Hanna concludes that the traditional view ought to be rejected: if you ought not kill the man on the ground, you ought not be able to kill the Falling Man either. Current theories are unable to distinguish between the two cases.65 (Hanna implies in his final paragraphs, but does not explicitly argue, that self-defense ought to be grounded only in the moral culpability or responsibility of the aggressor.)

Miller (2009) notes similarly that both the Falling Man and Stationary Man pose innocent passive threats to each other; however, similarly to Quong, he concludes that each may justifiably kill the other. Miller calls cases of self-defense in which both actors are morally symmetrical (and as a result, where comparing their rights is not sufficient to choose between them) Interpersonal Lottery Conflicts; and in such cases Miller invokes the idea of a Partial Preference—if you cannot retreat from having to choose between him or you, you are permitted to prefer your own life so long as your right of self-defense has not been forfeited through wrongdoing. This approach would seem to support

65 By contrast, the approach I mean to lay out can distinguish between the two cases—in the specific case where the Falling Man is not merely falling, but was pushed by a villain. See below.
something akin to the Moral Equality of Combatants in cases where neither combatant has actually forfeited his rights. However, Miller cautions against too readily applying his theory to wartime, since it is still unclear why we may use force to defend collectives.

That both Hanna and Miller could examine the exact same case and come to opposite conclusions illustrates a fundamental weakness in the literature. Almost universally among the theorists of self-defense or Discrimination, the procedure they follow seems to be the following: First, they begin with a set of intuitions about what outcome they want to see in a given case—that is, which people ought to be allowed to be attacked, and which people ought to be protected. These intuitions themselves often have no explicit justification, but it is apparent that most theorists have at least one eye on the implications their theories have for what behavior is justified in wartime.

Second, the scholars then cobble together a theoretical model that dooms the proper offenders and saves the proper innocents. Typically, the scholars involved are not wedded to their theoretical bases, and will readily change them if it seems that the model fails to generate the proper results when applied to more and more outlandish edge cases. (The clearest example is how McMahan steadily moved away from a model based on culpability to one based on moral responsibility for posing a threat.) However, they are wedded to the underlying intuitions that drove the model's shape—whether some civilians are subject to attack, for example.

The better scholars made these intuitions explicit; McMahan desperately wants to base liability to attack on each individual's actions, so as to encourage soldiers on the wrong side to refuse their orders. Others are less willing to do so; Steinhoff (2007) begins
with a well-crafted model based on Lockean rights, but quickly jettisons its strictures when they get in the way of his unexpressed goals (starting around page 123), replacing them with a methodological mush shot through with inconsistencies.

Outside of political theory, this procedure would be called "curve fitting" and is one of the worst sins of research. The models derived from this procedure may or may not reflect some actual moral truth, but they are subordinated to the outcomes that their authors desire, and therefore it is doubtful that the principles elucidated are strong enough for us to rely on as a guide for behavior in uncertain situations. This is particularly objectionable when the model in question assumes some sort of impersonal vantage point from which we may pass judgments upon the actors involved. What is the basis for such a vantage point? What truths is it based on?

The intuitions of the scholars involved are not necessarily a sound basis; they are not universally shared even among the tiny group of scholars who concern themselves with trying to justify some (but not too much) killing in war. Outside of that group, there is no consensus whatsoever. Absolute pacifists would argue that even the purest self-defense cannot be justified; those on the pointy end of the spear will often conclude, “Better him than me,” regardless of particulars. And throughout most of human history, noncombatants were not a protected class but a victim class, subject to arbitrary enslavement, rapine and murder by the victors. Our intuitions about fine-grained cases and the difference between a Threat and an Obstructor, or a permission and an excuse, seem to be too weak and inconsistent to justify telling a man in combat when he can and cannot use violence to defend his life.
Frowe (2010) objects that many of these theories rely for their distinctions between the attacker’s guilt or innocence on information that is simply not available to the defender—such as the mental state or ultimate intentions of the attacker. As a result, the theories are unable to serve as a guide to action: “How can these accounts tell Victim what he is permitted to do when he has less than perfect knowledge?” (2010:250)

Frowe therefore argues that whether an attacker is liable to defensive harm, in the abstract, is a very different question than whether the defender is permitted to inflict harm. That is, it may be just to inflict harm even if the harm itself is unjust (because undeserved). In Frowe’s argument, a defender can justifiably inflict harm if he reasonably believes first that otherwise, the attacker will kill him, and second, that he himself is innocent and does not deserve to be harmed. Whether or not the attacker’s behavior is justified or excused will surely matter to his culpability, but not to whether he can be harmed in self-defense.

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66 That is, in Frowe’s terminology, the scholars in question are moral objectivists, who care about the world as it “really” is and not as it appears to agents. For example, Gardner and Tanguay-Renaud (2011) oppose agent-relative justifications for self-defense, arguing that in order for the whole concept of self-defense to have value, it must be justified in an agent-neutral sense. “What is needed, in other words, is a distinction between D [defender] and E [attacker] such that not only D, but everyone else as well, has a reason to favor D over E…” (2011:113). In contrast, Frowe calls herself a moral subjectivist.

67 Cf. Miller (2009), who particularly criticizes Rodin’s fault-based forfeiture theory for running aground in this fashion, saying that “it would involve the impossible task of determining in advance whether [attackers] are morally culpable or innocent before acting in self-defense” (2009:142).

68 Frowe notes the point of Ferzan that defensive violence always takes place in the presence of uncertainty over whether the violence is actually necessary; she objects, however, to Ferzan’s attempt to have the defender guess at the attacker’s culpability, since this too is a guess made under uncertainty.

69 This does not mean that to Frowe, culpability is irrelevant for practical purposes. “On my account of defensive killing... the difference between the culpable and the innocent [attackers] emerges not in what Victim is permitted to do to each of them, but in what each of them is permitted to do to Victim” (2010:264). One could perhaps use Frowe’s logic here to ground a variant of the Moral Equality of Combatants, in a case where neither side is culpable and yet both must fight, in a similar fashion as with Miller (2009). My own model (to be discussed below) goes almost but not quite so far, because it places a duty on even a nonculpable unjust combatant to escape the conflict wherever feasible.
On the other hand, to justifiably harm people who will not immediately harm the defender, the defender must meet a higher standard. For example, bombing a munitions factory and its surroundings, by Frowe’s reckoning, requires stronger justifications specifically because the civilians caught in the bombing are not about to harm the bomber pilot. This is an important point. Frowe is highlighting that self-defense, as such, takes place from a much different vantage point than do “normal” decisions whether or not to use violence in wartime. “Defence is by its nature urgent: it does not allow for the deliberation or investigation that we ought to require in other parts of morality” (2010:257). Therefore, for a moral framework of self-defense to be useful as a guide to action, it must be subject to a lower epistemic standard than we might otherwise require for justified violence: “the highest possible standard compatible with performing defensive action” (2010:259).

On a similar note, in Lazar’s (2012) analysis of the role of Necessity in self-defense (in which he attempts to ground an entire theory of justified self-defense solely on his proposed principle of Necessity), he notes:

The epistemic situation of combatants in war is quite different from that of individual self-defenders in domestic society. Self-defenders respond to immediate threats to themselves or those around them. They have firsthand information about the provenance of those threats and the options for averting them. There is a direct causal link between their defensive action and the removal of the threat. By contrast, combatants do not respond to immediate threats, but to macro-threats posed by adversary states, as well as micro-threats to their fellow citizens’ lives. They do not initially have firsthand information about these macro-

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70 Cf. the statement of Supreme Court Justice Oliver Wendell Holmes in *Brown v. United States* (1921) that “detached reflection cannot be demanded in the presence of an uplifted knife.”
and micro-threats, and what information they have is generally either unreliable or ambiguous. (2012:27)

For the purposes of this chapter, the important part of Lazar’s argument here is that he grounds a different moral standard for collective conflict (chiefly war) in the different degree of uncertainty faced by the combatants, and in the lack of causal immediacy when comparing the future threat and the present violent response. As he says elsewhere (2010:211):

Uncertainty is not a contingent feature of war; it is endemic, and radical. To say that we ought to kill only those who are liable to that fate is like saying that we ought to abort only fetuses that would otherwise grow up to be bad people.

(Interestingly, those features of a war situation do not actually depend on the defender being a collective actor, as we shall see below.)

Kaufman (2007b) argues that it was precisely this uncertainty that led medieval Church scholars to distinguish sharply between incontinenti (immediate self-defense) and private war, as we saw in the previous chapter. In an environment of constant private feud, they wished to ensure as much as possible that the resort to war, with all of its uncertainties and injustices, would be decided upon with impartial judgment, not private partiality; they therefore made war (and the resolution of disputes generally) the province of the least biased actor available, the sovereign. Self-defense was the special exception, precisely because the attack was immediate and the defender simply could not wait for impartial justice. Rodin (2011:106) concurs: “[S]elf-defense is a morally risky activity, for three principal reasons. First, we must act quickly, with little time for reflection. Second, our own interests are at stake, so we are unlikely to be properly impartial. Third, determining liability is a complex matter, and we frequently lack
clear through to Locke and Montesquieu and Blackstone, and into our modern legal systems.

But, Kaufman argues (2007a, 2007b), the Imminence standard that the law applies to self-defense is not an integral feature of defensive force, which after all must already satisfy the Last Resort criterion. It is a political constraint, applied to private citizens in a domestic setting and only then. Police are permitted to use force without waiting for an imminent attack, as are soldiers, because they have the responsibility of executing upon the impartial judgments that their superiors have made. And more generally, anyone who is truly in a state of nature—without the ability to turn to a justice system for redress—is able to judge his own case thereby, and when justified to use force without waiting for the Imminence standard to be met.

One need not agree with Kaufman that the Imminence criterion is purely a political imposition to recognize that individual self-defense is a different animal than the broader activity of war. War, with a higher level of uncertainty, requires a higher standard of judgment to be justified—as we will explore shortly.

**What's the Point?**

The objection of Frowe—that many theories of Discrimination do not actually help combatants make decisions, because the theories rely on information combatants do not actually have—touches a fundamental question. Namely, what exactly is the point of having a theory of Discrimination?

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sufficient information to draw confident conclusions. When we inflict defensive harms, then, we run a substantial risk of wrongdoing. In a just society, by contrast, redress can remedy each of these problems: we have the time, the epistemic tools, and the impartiality to properly establish liability.”
At first, the principle of Discrimination was employed by the Church to directly regulate warfare. Those warriors who wantonly attacked civilians were threatened with excommunication, and even (as in the case of the routiers that we discussed in Chapter Two) subjected to an effective Crusade. This was at a time when the Church had significant political power and enormous influence; Church endorsement or its lack could make or break kings (cf. Hall 1997). But Discrimination was a bright-line rule: women, children, the aged, and Churchmen were to be inviolate. The hair-splitting that characterizes modern theories of Discrimination and self-defense was nowhere in evidence. Nor could such hair-splitting have made a good basis for a principle meant to have such weighty political consequences.

Later, the concept of civilian immunity was enshrined in international law, such as it is. Practically speaking, the effect of this move was minimal. In most Western professionalized armies, protecting civilians seems to be a part of the professional ethics of soldiering, but that seems not to mean much in the heat of battle. Professionalized soldiers in the West do typically refrain from murdering civilians outside of combat, and some effort is made on the strategic level to keep civilian casualties in combat down to a “tolerable” level, but that likely has more to do with the modern media environment than with the impact of international law or Just War principles per se (cf. Walzer 2004:11). (The terror bombing of World War II should make that obvious.) When the chips are down, most soldiers who see a threat of any kind will respond to it with force, and not be excessively concerned about whether or not the threat was “culpable” or acted with free
will. This is particularly the case in the modern era of irregular warfare, when a soldier’s enemies may not wear uniforms.

Moreover, the highly refined theories of Discrimination that we see are irrelevant to the rare occasions when international courts of justice punish war-crimes offenders. Such tribunals tend to be called into being only in response to large-scale massacres of civilians—provided, of course, that the events were considered to be newsworthy in the West, that the international community did not sympathize with the perpetrators\textsuperscript{72}, the perpetrators are not too powerful to risk antagonizing (as with Russia’s murderousness in Chechenya), and when there is some sort of political benefit to holding the trials.\textsuperscript{73} Sometimes, military courts punish their own soldiers for smaller-scale atrocities; but again, they do not concern themselves with the sorts of theories of Discrimination that we have reviewed.

One could say that all this theorizing is nothing more than an intellectual game, like ten-dimensional mathematics or counting how many angels dance on the head of a pin. Yet clearly the theorists do not think so. McMahan hopes that his theory will lead soldiers on the wrong side to refuse their orders and submit to their opponents. Steinhoff hopes that his own theory will cleanse the moral stain of terrorism from the actions of “freedom fighters” like Hamas, granting them a measure of political legitimacy. These are significant practical effects that cut against the grain of modern political currents. What could bring about such a change in how things are?

\textsuperscript{72} See the case of the Congo, to be discussed in Chapter Eight. The Tutsi Rwandan forces engaged in large-scale massacres of the Hutu in refugee camps, and they were given a free pass by an international community still smarting over their inaction when the Hutus had previously massacred the Tutsi.

\textsuperscript{73} Nor would we necessarily want such trials to be more common, at least until there are significant safeguards against the institutionalizing of “victors’ justice” on the one hand, or “lawfare” on the other.
As we noted in the Introduction, Walzer (2004:8-12) argues that Just War Theory’s major contribution is that it provides a moral vocabulary for people to use when justifying their behavior in war. This may not seem like much, but its effects are subtle and far-reaching. If you acknowledge a certain standard of behavior, even if for hypocritical reasons, you will tend to adjust your behavior to better match with the standard—at least in small and not-very-costly ways, and at least for the sake of appearances. More than that, however, arguments of Just War are now being made by military personnel themselves (at least in the United States), anxious to set the profession of arms apart from mere butchery. And we have seen how the United States, for one, has become more careful about civilian casualties in battle than at any time in its history.74 (Indeed, a recurring complaint by soldiers in Iraq and Afghanistan was that their rules of engagement were too restrictive, exposing them to excessive risk of attack.)

So if a new theory of JWT were to be accepted into this discourse, it could very well have far-reaching impacts on the conduct of war—at least among those nations that care about such things. But Frowe’s point remains valid. Most of the theories of Discrimination we have discussed are unlikely to spread beyond academia, because they turn on distinctions that are impractically subtle, or are based on premises that few would accept, and are in any event unsuitable as a guideline for fighters in battle.

(One of those premises, I claim, is the idea that just war is the exclusive preserve of sovereign states and their militaries. Even sovereign states make use of non-state forces

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74 The United States does remain far too cavalier about civilian deaths due to bad intelligence, or to policies such as economic embargoes that are somehow “different” from deaths in wartime (cf. Aloyo 2013).
as their allies and proxies, as we will discuss in Chapter Five; and the very history of
democracy is that of revolution and non-state violence. Given that, the claim that only
states may make war becomes less and less defensible, particularly as a way to
distinguish combatants from non-combatants.)

In that case, given the limits of what a moral theory might accomplish in the real
world, what ought a theory of Discrimination be trying to do? McMahan is on the right
track here, I think; our goal ought to be to encourage unjust warriors to retreat from
battle, and conversely to reassure just warriors that their participation can be justified
(within the proper limits). Therefore, I claim that a principle of Discrimination ought to
be a guide for practical behavior for those who want to do the right thing. It should
instruct (by hypothesis) just warriors about when they are justified in initiating violence,
and instruct unjust warriors about the extent of their responsibilities not to fight—using
arguments and justifications that are likely to be accepted by most moral people facing
the moral tragedy of combat. So, like Frowe, on this question I am a subjectivist; a theory
of Discrimination should be based on knowledge available to the combatants.

That said, what principle should such a theory be built on?

Self-Defense or War?

If there is a unifying thread between many of the broad theories of self-defense we
considered earlier, it is this: because their authors seek to justify the killing of
nonculpable soldiers in war from within the framework of self-defense, they are forced to
broaden the scope of acceptable targets of self-defense far beyond what our intuitions are
willing to accept. But a straight equivalence between self-defense and combat in war
cannot be drawn. "Self-defense" in the purest sense has a number of features that “war” may not necessarily have.

First, in self-defense one is *responding* to an *ongoing* attack. To see this, imagine that a thug named Bluto has made it clear that he means to kill you, and is now eating a hearty meal in a diner while regaling the other patrons with all the vicious tortures he means to inflict on you as soon as he is done eating. As he eats his meal, you walk through the door and shoot him at point-blank range.

Similarly, imagine that Bluto has already attempted to kill you, has failed, and is now turning to head home for the day while proclaiming that he will be back tomorrow to finish the job. As he walks away, you shoot him in the back.

While killing Bluto in either of these ways may be defensible (and indeed, I will argue shortly that it can be entirely legitimate to kill Bluto in these cases), it does not match with our intuitive sense of what the term "self-defense" encompasses. Why not? Because in neither case is the attack ongoing or imminent (cf. Kaufman 2007b). Killing Bluto does not *interrupt* an active attempt to harm, though it does *prevent* a foreseeable attempt to harm in the future.

Second, in self-defense one is responding to the *particular* agent (or agents) engaged in directly attacking you, and not to those who might be contributing indirectly to the threat. Suppose that our friend Bluto is shooting at you, and his ally Big Al is passing him more ammunition whenever he runs out. Unable to take a shot at Bluto, you instead shoot

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75 Dipert (2006) uses a similar hypothetical when constructing his argument for preventative attack, which has considerable parallels to the discussion of expected threat to follow.
Big Al. This act may perhaps be defensible, but it strains the boundaries of "self-defense" to apply that term to Big Al's death.

Even worse would be if it were not Big Al who was helping Bluto, but Tiny Tim, a small child whom Bluto has enslaved. It may be the case that you can still shoot Tiny Tim—we will consider this question in detail—but now we are definitely far from the realm of self-defense as such. If the enslaved (or brainwashed) child were attacking you directly, this would perhaps fall in the broad realm of the Innocent Attacker; but even if you believe that an Innocent Attacker can be killed, current theory has a very hard time dealing with an Innocent Assistant.

Yet while "self-defense" seems to exclude such behaviors, war embraces them. In war, we may shoot from ambush at enemy soldiers, even soldiers who might not be engaged in threatening behavior at the time (cf. Steinhoff 2007:98). We might (depending on which view one holds) even bomb munitions factories, though their workers are nominally civilians and in any event will never pose a direct threat to you or anyone else. In this sense, war is fundamentally—I claim, definitionally—more permissive than self-defense, and it is a gross category error to try to explain the one from the other.76

This is the key flaw shared by many of the theories of self-defense we have considered up to now. They explicitly seek to explain, not self-defense per se, but the fundamental problem of war itself: that we may attack people who are not directly

76 Steinhoff (2007:77-79) argues that war cannot be compared to self-defense for another reason. In self-defense, defensive force is your literal last resort to protect your life; but in many wars, the attacked party can more easily protect its life simply by surrendering unconditionally. Vicious murderers such as the Nazis or ISIS to the contrary, most modern-day invaders would be satisfied with total cooperation and would spare the lives of the conquered. Thus, if our concern is merely with saving lives, then war is rarely the true Last Resort. (What this shows, for Steinhoff, is that rights against lesser harms such as rape, mutilation, enslavement, or despoilment are worthy of defending with war.)
attacking us. Yet they seek to do so by including the permissions of war in a theory of self-defense, without recognizing or dealing with the fundamental differences between self-defense and war. As a result, they are forced to allow "self-defense" in situations that strike us as inappropriate.

As an example of the kind of category errors at work, note that many works addressing the ethics of self-defense (e.g. Quong [2012], McMahan [2009, 2011], etc.) will consider the case of a Tactical Bomber who is attacking an area where civilians are present. While this is certainly a problem that shows up in wartime, it is very far removed from anything one might justify in self-defense per se. The effort made to justify the Tactical Bomber from within a system of self-defense has resulted in much analytical violence on the part of the scholars in question. In the worst case, such theories inadvertently provide support for effacing the principle of Discrimination altogether and permitting expanded attacks against civilians (cf. Zohar 2004). Avoiding such perverse outcomes demands that we clearly understand the difference between self-defense and war, and avoid conflating them.

Though in truth, I have been too absolute in the preceding paragraphs. War and self-defense are not really so fundamentally different as all that. In the theory I seek to construct, war and self-defense remain related to each other. The difference is that, while previous theories sought to conceive of war as an example of self-defense, where self-defense was the higher-level category, my theory reverses that hierarchy. That is, self-
defense is a special, even degenerate case (in the mathematical sense of “degenerate”)\textsuperscript{77} of the larger phenomenon of war. Therefore, specific kinds of logical inferences may be drawn from war to self-defense, but not necessarily from self-defense to war. The approach of much of the literature is precisely backward.

**War as a Class**

So what then are the general characteristics of war? By way of illustration, let us consider a principle found repeatedly in the Babylonian Talmud, an ancient compendium of Jewish law and tradition: “If one is coming to kill you, get up early and kill him” (e.g. *Berakhot* 58a). At first glance, this seems to be a statement permitting self-defense; yet its meaning is more expansive. In particular, the term "get up early" (hashkem in Hebrew) is precise: you are not merely permitted to retaliate, but to preempt. And in cases where this principle was applied, the degree of preemption could be drastic. For example, in the cited text, one rabbi became aware that a man planned to falsely denounce him as a traitor to the occupying government, and killed him before he could do so.

What does it mean to preemptively attack someone who would otherwise attack you? It means that you have made a judgment about future probabilities, and decided that an attack is likely enough to merit preemption (Dipert 2006). Alarming as this may sound in the context of the self-defense debate, the idea of waging war on someone based on the

\textsuperscript{77} A degenerate example of a larger class is one in which one or more of the relevant descriptive variables have been set at zero, so that the degenerate example is distinct qualitatively and not just as a matter of degree. For example, a circle can be viewed as a degenerate sphere (with a depth of zero); a line can be viewed as a degenerate rectangle. What I mean by this in the present discussion is that the class of war includes all of the relevant moral variables found in self-defense, but where “self-defense” assumes by definition that the attack is ongoing and specific, the category “war” allows for a greater range of situations of which self-defense is but a single example.
expectation of a future attack is not all that novel in IR. Going back as far as Walzer (1977:74-85), the literature has recognized a distinction between preventive war and preemptive war, with the former being widely considered illegitimate and the latter being arguably legitimate.

In both a preventative and preemptive war, the attacker believes that his target will be a threat in the future. The difference is the degree of certainty attached to that judgment.78 In a situation of preventative war, the target may well be gaining in power and might well be behaving in threatening ways, but there is still considerable uncertainty over whether future behavior will in fact be violent. That is not the case in a situation of preemptive war; there, whether or not the target has yet used violence, nevertheless the preemptive

78 I am using the terms “preemption” and “prevention” in a somewhat idiosyncratic manner, so that the dividing line between the two terms falls where such an attack is no longer permissible. A more typical definition (Dipert 2006:33) follows:

“By a ‘preventive war’ I mean an attack on a nation that has not itself attacked, but is reasonably believed that it will do so sometime in the indefinite or non-immediate future. Preemptive war is a case of initiating an attack in response to the reasonable perception of an imminent attack. I will use Walzer’s term ‘anticipatory war’ to cover cases of both preemption and prevention.”

Scholars such as Bellamy (2008) express the difference between preemption and prevention in terms of the imminence of an attack. I believe this is a mistaken proxy for the certainty that war will be inevitable. To be sure, given how many intervening factors could make a war more or less likely, imminence may well be the most reliable indicator; but (for example) given that pre-WW1 Germany had already resolved by 1911 to fight a major war once the Kiel Canal was completed, which it was in 1914 (Copeland 2000:64), one could plausibly argue that the certainty threshold could have been met in 1911 regardless of the three years remaining on the timetable. See Walzer (1977:81), Nozick (1974:127-128).

McMahan (2013a) also discusses when a preventative attack could be justified; his account too depends on there being a critical threshold of expectation of future attack. McMahan is including in “preventative” war cases of war that I would rather call “preemptive.” The difference between our views appears to be a quibble over terminology only.
defender judges that future violence is practically certain (cf. McMahan 2013b). All that remains to determine is the terms of the engagement.

Less widely acknowledged (though Lango’s [2004] work is an exception) is that similar judgments are made even within wars—even within particular battles. In a war, long stretches of time may pass between one battle and the next; commanders may seek out the next clash, or they may seek to delay confrontation. There is always the possibility of a peace treaty being signed that would make future violence needless. Thus, to justify further aggressive behavior within a war or even between lulls in a single battle, one must have judged that the danger of future attack is still sufficiently high.

In short, the category of war encompasses a variety of situations in which you make judgments in situations where you have a greater or lesser certainty of facing enemy attack. These situations can be distinguished from each other by the degree of certainty involved, along a sliding scale of sorts (cf. Dipert 2006). At one extreme, there is no reason at all to believe than your adversary will ever harm you. Moving toward the other end of the scale, first you are doubtful about the danger you face, then you believe a threat to be possible, then probable, than inevitable. And then, at the other extreme, you face an attack that is actually ongoing.

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79 That is, the salience of the target’s threatening behavior is sufficiently high. Here and in much of this chapter, I am taking inspiration from Tilly’s (2003:13) two dimensions of violent conflict: salience of short-run damage, and (as will be evident in the following pages) the extent of coordination among violent actors.

80 Fotion (2006:56), by contrast, assumes that attacking an enemy who is certain to attack you can still be considered preventative, if the attack is far enough in the future; he requires a defender to wait until the aggression will come “any moment now.” Walzer (1977:85) argues differently, saying that if a state is being sufficiently threatening (beyond mere saber-rattling) it has already committed aggression against its target, even in the absence of a physical attack. See also Orend (2000).
How does one tell the difference between possible conflict and inevitable conflict? The specifics go beyond the scope of this dissertation; still, it is evident that the task of predicting future behavior requires a certain capacity for judgment—the very type, I claim, that is considered necessary in order under the principle of Competence for an actor to claim Right Authority. The larger the causal gap between the current situation and future violence, the greater capacities for judgment would be necessary for responsible warmaking—until at some point the uncertainties compound and the line between preemption and prevention is crossed, and no actor may responsibly justify making war.

**The Distinctive Character of Self-Defense**

This understanding of war as a sliding scale, with varying levels of certainty in one’s prediction of threat, explains a critical difference between the broader category of war and the particular case of self-defense. Someone contemplating self-defense would also need to make a judgment, in a trivial sense. But the task is of a much easier character—in self-defense, the attack to be dealt with is not hypothetical but actual, so there is no need to predict an attack that is already taking place. At the same time, because the attack is ongoing, the defender is under time pressure and stress; it would be unreasonable to impose a high standard for determining whether or not to defend oneself (cf. Frowe 2010). Therefore, while someone contemplating a typical war would have to exhibit a high capacity for judgment for it to be legitimate, almost anyone of sound mind is and ought to be allowed to engage in self-defense. Self-defense remains a subclass of war, but

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81 Refer to the discussion of Competence at the end of Chapter Two.
the difference in degree has become a difference in kind. And both the restricted permission to engage in war and the expanded right to engage in self-defense are justified by reference to the same criteria: the level of reasonable certainty about the target's future behavior. Thus, we can speak of a continuum of violence that encompasses all kinds of war, including self-defense.

To be clear, in our first case where Bluto promises to harm you and you shoot him immediately, Bluto's future behavior is in no doubt: given the opportunity, he would indeed attack you. While shooting him is not an act of self-defense as such, because the attack has not yet taken place, it may still be justifiable—according to the expanded criteria of war. You have, in fact, fought a "war" between individuals, made permissible by the elevated standard of judgment brought to bear on your prediction of Bluto’s future behavior.² The idea that an individual may fight a "war" as such will be fully discussed in the next chapter. For now, the important point is that the justifying factor that permits one to make war, and therefore to harm non-culpable opponents, operates for individuals just as well as for collectives.

Our discussion of the first characteristic of war, that it relies to a greater or lesser extent on predictions of future behavior, is a necessary underpinning for the discussion of the second characteristic: the role of groups and group affiliation.

The Role of Expectation and Threat in McMahan

McMahan relies on the analogy with self-defense to justify his use of “responsibility” rather than “culpability” to ground a person’s liability to defensive force. In fact, because

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² The idea that an individual may fight a “war” as such will be fully discussed in the next chapter. For now, the important point is that the justifying factor that permits one to make war, and therefore to harm non-culpable opponents, operates for individuals just as well as for collectives.
McMahan seeks to inappropriately apply the special permissions of self-defense to the situation of war, he is forced to broaden the very definition of “self-defense” far beyond what we normally believe it to mean. Self-defense usually is applied to the specific situation of a direct and immediate attacker (whether that attacker is morally responsible for his attack or not). As a result, we are assumed to have the right to use force against even people with little or no moral responsibility for their attack, since we lack the means to determine the moral culpability of our attacker in the face of immediate threat. To apply that expanded permission not only to a direct and immediate attacker, but even to actors such as support soldiers or civilians working in a munitions factory, seems indefensible. McMahan is trying to have it both ways: on the one hand, he seeks to argue that people can only be attacked based on things they have done and choices they have made, but on the other hand, he argues that “responsibility” can be incurred even under highly questionable circumstances, such as under considerable duress.

As a result, McMahan runs into situations where he must argue that men may be killed on very slim bases indeed. For example, he argues that even soldiers under duress are liable to attack, because they are responsible for their choice to succumb to that duress (provided that there remains any choice whatsoever, and the duress is not overwhelming) (e.g. 2013). This seems reasonable when discussing combat troops, who pose a direct threat and are therefore committing serious wrongs which they ought to resist committing, but what about support troops or civilians involved in war production? If the duress is quite strong but not total, and the harm being committed (contributing to a wrongful threat) is not as serious as if they were actually killing people themselves, it
seems odd to say that killing men under such duress nevertheless is justified because they are liable.

This needs unpacking. What does it mean that a target is "liable"? The term is taken from legal terminology, and indeed McMahan repeatedly cites the example of a civil court case, where a judge assigns financial liability in case of harm, to illustrate his meaning (e.g. 2011). The harm has been done, and the judge must assign responsibility for it to one or the other party, regardless of each party’s moral culpability for the harm; even small differences in responsibility would be enough to justify one party receiving the liability. So too, McMahan says, in a situation of “forced-choice” life-or-death conflict, at least one or the other party will end up liable to harm, even on slim bases. Yet here, McMahan does not necessarily argue that a "liable" target ought to be killed in the way that a liable court defendant ought to be fined; he understands that many who are "responsible" in his sense are nevertheless not culpable and do not deserve their fates in the strongest sense.

Indeed, he cites a "conscientious driver" as one of his go-to cases, who took all precautions when driving and nevertheless inadvertently posed a threat to an innocent pedestrian. McMahan argues that despite all of his precautions, the driver chose to drive a car, which carries a certain element of inevitable riskiness to others. On the strength of that choice, says McMahan, the driver bears slightly more responsibility for the forced-

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83 Here, McMahan is falling prey to a bit of parochialism. While the American legal system (and I assume other Western systems as well) assigns responsibility for any case of damage to one party or the other, regardless of the magnitude of the culpable party’s contribution to that harm, that is not the only way to do things. In the halakhic legal system of Rabbinic Judaism, certain classes of behavior are prohibited, yet do not result in liability for the offender. This is called *patur aval asur* (“absolved from liability, yet forbidden”). In general, one can recognize that sometimes, bad situations happen and no one can be blamed for it; cf. Miller (2009), Lazar (2010).
choice situation than does the pedestrian, which for McMahan is enough to be decisive; the driver would be "liable" to defensive harm from the pedestrian, even though he has no culpability at all.

This seems absurd on the face of it. Driving may be slightly riskier than walking, but the actual likelihood of causing harm while in a vehicle, during any particular trip, is vanishingly small—and grows much smaller if the driver is indeed conscientious (cf. Lazar 2009); and in any event, there is nothing morally objectionable in driving a car (Rodin 2011). In his treatment of this case, we see McMahan impaled on the horns of a dilemma. He desperately wants to avoid calling the driver innocent, since he does not believe that an Innocent Attacker may be subject to defensive force (cf. McMahan 1994). Yet it is clear that the driver does not intend to hurt anyone, and has in fact taken steps to minimize the harm he does or to avoid it entirely (cf. Steinhoff 2007:52). As a result, McMahan is forced to ascribe some sort of moral importance to the act of driving in the first place, so as to make the driver “responsible” in his sense and therefore subject to attack.

Yet if liability can be incurred on such slim grounds, then it seems that almost anyone can become liable for almost any reason. Indeed, Lazar (2009) objects to McMahan’s expansive definition of “responsibility,” arguing that it cannot adequately distinguish between the unjust attacker and the just defender—who, after all, must have done something at some point that contributed to the life-or-death situation he finds himself in, even if the thing done was entirely justified. If the moral difference between the Pedestrian and the Driver is so small, that slim margin is simply insufficient to be used to
justify killing the Driver in particular. Lazar (2010) concludes that McMahan’s theory opens the floodgates to total war, since it could easily apply to most civilians, especially in democracies.

This is why McMahan relies so heavily on the principles of Proportionality and Necessity to limit who may actually be killed—because otherwise, many classes of civilians would also be liable and therefore subject to attack, and the principle of Discrimination would be exploded (2006). However, Lazar (2010) notes that if consistently applied, these limitations would apply equally to even many types of soldiers on the unjust side, who contribute little or nothing to the actual threat (cf. Zohar 2004). Lazar (2014) further notes that there are in fact situations in which attacks on civilians meet the Necessity standard; in many wars, belligerents have found it impossible to win unless they deliberately attack the enemy’s civilians. Therefore McMahan is caught between his desire to ground liability in one’s responsibility for the threat, his need to render most or all soldiers liable, and his need to exclude most or all civilians; his resulting position is internally inconsistent.

So what then is the function of "liability"? It is to ensure, for McMahan, that only the army of the (by hypothesis) unjust side may be targeted. He could simply resort to a collectivist theory of responsibility to accomplish this, but (as noted) McMahan objects that one's liability to be killed ought to be a result of his own actions, and not his mere

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84 He notes (among several other cases) the U.S. counterinsurgency in the Philippines, the British counterinsurgency against the Boers, and the Italian counterinsurgency in Libya.
85 Along with soldiers on the just side who are individually committing wrongs.
86 We will shortly examine some such theories, and reject them.
membership in a group (e.g. 2011, 2013). Yet here he needs to do a little fudging, since he now faces Fullinwider’s objection at one remove: whether you seek to punish the guilty or merely use force against the “responsible,” you are still grounding your use of force on information that is nearly impossible to get in wartime. When you bomb a vehicle depot, you have no way of knowing that your specific victims are responsible or not.

To get around this, McMahan resorts to an argument of statistical likelihood: if you know that most of your targets are indeed responsible, in the sense that they are under insufficient duress to fully excuse their participation in the unjust threat, then you may justify harm to any truly non-liable victims by resorting to the Doctrine of Double Effect—that is, you didn’t intend to do harm to them specifically, and they were just in the wrong place at the wrong time, making the harm done to them necessary for the sake of a more important goal.

At this point, however, one wonders what the point is of having an argument grounded on individual liability in the first place. Most of the actual work here seems to be done by Necessity: you can kill people who are merely responsible without being

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87 Victor Tadros attempts to split the difference, and presents a theory in which individual citizens of an unjust state can acquire a duty to suffer harm even if they do not have a responsibility of any kind for the harm, if they have a) contributed to the capability of an unjust state (even if only by working at a job, and thereby contributing to the economy!), or b) benefited from that state. McMahan (2012) challenges the scope of this claim, since in a globalized economy it would essentially allow anyone to be attacked for supporting nearly any state.

88 As noted in the Introduction, the Doctrine of Double Effect (DDE) was first codified by Aquinas, and has been a mainstay of JWT ever since. It is the key concept that (in the minds of most JWT adherents) permits war to be justified, even given the inevitability of civilian deaths. For others, the concept is highly objectionable. Steinhoff, arguing from a liberal perspective, is skeptical of DDE because with it, the Proportionality constraint ends up being no constraint at all. In the event, it simply becomes another name for military necessity and therefore permits any harm that a general cares to inflict (2007:36). Øverland (2014) presents his moral obstacles theory (which does not hinge on the mindset of the attacker) as an alternative to DDE.
culpable because (and only because) of the Necessity of doing so, and even innocents may be killed under the Doctrine of Double Effect if it is Necessary to do so (provided, of course, that the proportion of those responsible to those innocent does not drop below some unspecified threshold, so that you expect most casualties to be among the responsible). And Necessity is an argument about future expectations: it is necessary to go beyond the normal principles of justice and punishment only because we expect our targets to do more harm in the future, which needs to be averted now.

In fact, McMahan's resort to the Doctrine of Double Effect to justify attacking a military unit which is mostly made up of responsible soldiers is really an argument about expectations and probabilities derived from an individual’s membership in a group, no matter how loudly McMahan protests otherwise. This can be seen in the following example:

Suppose there is a military unit known for its atrocities, the Death Brigade. Most of its members are responsible for their actions, in McMahan's sense; many could even be culpable in the stronger sense. If we were presented with a squad of ten Death Brigade soldiers, we could reasonably expect most of them to be liable targets, and McMahan would approve if we fired artillery shells at them (e.g. 2011). This is so even if we know that one or two of the soldiers were not, in fact, morally responsible, thanks to the Doctrine of Double Effect; our targets are the ones who are responsible, and the poor innocents happen to be standing in the way.

But suppose that we face, not a squad of soldiers, but a single soldier from the Death Brigade—who is not presenting an immediate threat that would be subject to self-
defensive force. Furthermore, at the moment his behavior is nondescript, telling us nothing about whether he is morally responsible for being there or not. Assume that attacking him is Proportionate and Necessary. We can no longer assume that some predictable fraction of our target is liable to attack; either the one soldier is liable and may be attacked, or he is not and may not be. Lacking information about him specifically, except that he is indeed a soldier of the Death Brigade, what do we do?

Note that McMahan never presents the case of a single target in the way that we have done. This case is problematic for his theory in the following way. To decide whether to attack the soldier or not, we need to infer his moral status from the available information—that he is a member of a military unit that is predominantly liable to attack. This works in both directions; to say that he is non-liable would be as much an inference as to say that he is liable, and would have far less supporting evidence. But suddenly his own individual moral status has become irrelevant, because it is unknowable. All the work is being done by his group membership—precisely the outcome that McMahan wanted to avoid.

Facing this dilemma, one might be tempted to say that we cannot decide one way or the other, out of a principled stand on the importance of individual action as a basis for liability. Because we do not wish to resort to group membership as a basis for liability, we will refrain from attack, not because we think the soldier non-liable, but because we lack grounds to declare him liable.

All well and good; but remember that his death would be both Proportionate and Necessary, and furthermore the balance of probability has it that he is indeed liable. And
it seems that this case should actually be *less* problematic than the case of a squad of ten, since in that case it is certain (McMahan assumes by hypothesis) that at least one of the targeted soldiers is in fact non-liable. If we can resort to the Doctrine of Double Effect in that case, where the death of at least one innocent seems certain, it seems ridiculous to say that we may not attack a single soldier, who is most likely liable himself. So in the end, it seems that the soldier's membership in a group is decisive; once we have judged the proportion of the group's members who we expect to be liable, we use that information as a *salient* cue to guide our own judgment about the soldier as an individual—*unless*, and this is crucial, we have additional information about that individual, beyond his group membership, to help us judge further.

If that is the case, what work is liability actually doing? It seems that the only people (on the unjust side) that a principle of liability uniquely protects are soldiers or civilians who are under total and overwhelming coercion, such that McMahan would say that they do not have a real choice to participate and are therefore not responsible (i.e. “Non-Responsible Threats”). Yet who exactly would be under such coercion? Perhaps child soldiers, or men who have been brainwashed or driven insane. But such combatants are even more dangerous to their opponents for the lack of choice that they have. And just soldiers who respect McMahan's theory would be powerless to resist such an enslaved enemy, even to the point of direct attack when fighting back becomes true self-defense, since McMahan does not believe that one can kill an Innocent Attacker even in a situation of self-defense.
McMahan may have meant liability theory to distinguish between the soldiers of the just and unjust side, encouraging the latter to refuse service; but as it is formulated, liability as such does little work to restrict targets on the unjust side beyond what is actually done by Proportionality, Necessity, and our judgments of future or present probabilities. Where liability does do unique work, it is to prohibit defense against those who are unable to say no due to overwhelming coercion—and thus, to prohibit defense against the sort of leader to use such overwhelming coercion.

In that case, is there a theory that better justifies using force against members of groups?

**War Against Groups, A Literature Review**

Suppose you are at war with Nazi Germany. You are scouting deep behind the enemy lines, and as you creep through the brush you see in the distance a lone German soldier walking down a road. Suppose that while there is no chance at all for him to discover you, or to pose a direct threat to any other soldier any time soon, killing him would have some proportionate military benefit. You decide to kill him. This seems to be conventional behavior in wartime, yet in no sense did you just practice self-defense, nor did you even make war (in the sense discussed above) on the enemy soldier as an individual. So what permits you to kill him?

Suppose for the sake of argument that our German soldier is even passing out teddy bears to small children. Nevertheless, we imagine that attacking him would be justified if doing so had sufficient military value, based solely on his position as a soldier. Why?
To say that the soldier is liable to attack because of his status as a combatant amounts to begging the question. In what substantive way is he *really* a combatant? Taken as an individual, he seems totally innocuous. Furthermore, *taken as an individual*, we have no reason to *predict* that he will become an unjust aggressor in the future. So then why can he be attacked? Just because he wears a uniform? What is it about wearing the uniform—or, properly, being a member of the military—that makes attacking him legitimate?

We saw previously that McMahan attempted to justify such an attack because the German soldier is agent-responsible for presenting a future threat. Yet, as Lazar (2009) argues, this move is not sustainable. Agent-responsibility in such a case is simply not a strong enough justification to permit someone to be killed. And this justification fails altogether if the German soldier faced overwhelming coercion and thus had no responsibility whatsoever for being in the army. Thus, it seems that we would need some other justification to allow the killing of individually innocent soldiers.

Zohar (1993) warns that conduct in war simply *cannot* be explained with the same moral system that we use for individual ethics, and particularly not the framework of self-defense. In particular, war is a clash of *nations*, and in such a circumstance a soldier's moral status as an individual can be simply overridden. War has its own rules, and while those rules seek to contain the destruction to specific groups of people such as soldiers, following them will still lead to the deaths of soldiers who do not deserve to die (cf. Kutz 2005). To ignore this, Zohar says, would end up harming both individual and collective
ethics. Zohar (2004) expands his argument against the recruitment of self-defense principles in order to justify killing in war; briefly, in order to justify killing support soldiers and the like, a theory based on self-defense would need to stretch far beyond its normal scope and permit violence against “Innocent Obstructors” as well as Innocent Attackers. As a consequence, however, such a theory would also permit violence against nearly all civilians, who are often related closely enough to the conflict as to meet the definition of an Obstructor (cf. Lazar 2014). Thus, any theory based on individual self-defense that can justify violence against support soldiers must inevitably justify terrorism against most civilians. Zohar instead believes that war should be justified by a collective principle, not an individual one.

While his argument that war must be governed by different rules than individual self-defense seems unassailable, Zohar does not provide an adequate justification for what that different rule would be grounded on. As I argue repeatedly in this dissertation, a proper theory of Just War must be able to apply to any type of actor, whether an individual, a revolutionary army, a multinational corporation, or a state. And if we accept the need for a different standard in wartime than in peacetime, we absolutely need a way to tell the moment when the peacetime standard becomes inapplicable—when an individual actor (whether part of a collective or not) can switch his frame of reference from self-defense to war.

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89 Zohar does not, however, believe that wartime rules are grounded in convention only: “...it is worth emphasizing that if noncombatant immunity is only a convention, it seems difficult to sustain the moral fervor of the condemnation directed at terrorists. Whatever good effects the convention has, it must first of all be grounded in our moral sense and convictions” (2004:736).
90 See Øverland (2014), who does this explicitly.
91 See also Alexander (1985:101).
Now, I hope to show that one can actually integrate both individual and collective conflict into the same framework. But Zohar's larger point is well taken. In trying to make all killing in war "good," scholars arguing from self-defense are trying to efface the fundamentally tragic nature of war. Put simply, good people die, and they die in circumstances where their killers could have done nothing else. To call such killings "justified" on an individual basis simply because such victims are associated, in some way, with a larger body of people is to say too much. In war, the importance of the individual is drowned out by the sound of marching regiments. But we still need to understand how that process works, when it applies, and (more importantly) when it does not.

Lazar's (2013) own approach is to argue (in a vein redolent of Augustine and Aquinas) that while nothing can justify the killing of innocent soldiers, defenders may nevertheless be forced to override those soldier’s rights because of their “associative duties” to related others who must be defended from harm—family members, friends, compatriots:

We have duties to protect our associates, grounded in the value of these special relationships. Our armed forces are the executors of those duties. When they fight, those duties may clash with the rights that they must violate to win the war. In some cases, the associative duties to protect can override those rights, thus rendering some acts of killing all things considered justified (2013:5).

There are reasons to be skeptical of this approach on the face of it. For one thing, it seems odd to say that I am permitted to harm someone for the sake of others, when I cannot do so for my own sake. One might imagine that Alice and Bob are both aggressed upon by a conscript army of individually innocent soldiers. If I understand Lazar
correctly, neither Alice nor Bob would be permitted to harm the soldiers in order to engage in self-defense, because to do so would be to commit a wrong; yet Alice may harm the soldiers to defend Bob, while Bob may harm them to defend Alice (but only if Alice and Bob are sufficiently associated as to generate duties to each other!). But if I am forbidden to defend myself, by what right may someone else defend me?

More generally, this argument would say that a lone individual finding himself under attack by the conscript army would have no recourse—except to find someone else to defend him. If no one else is there, all he may do is die quietly. This is to make permissible defense dependent on a morally irrelevant factor—the presence of associates. Moreover, this seems to violate the dignity of individuals as beings with moral worth. Is the value of my life dependent on having my friends around? (Further objections can be found in McMahan [2013b].)

Appealing to “associative duties” is not the only strategy used to justify war against innocents. Steinhoff states that the death of innocents (even an Innocent Attacker in a self-defense situation) can be justified only as a clash between their rights against harm and your right to attack and punish an aggressor, which takes precedence when there are other weighty factors in play (2007:46-48). As he puts it later,

Since there will not be a modern war without the killing of innocents… no modern war can ever be just. This does not, however, preclude the possibility that a modern war can be justified—namely as the lesser evil (2007:57).

He argues that war can only be justified with reference to a justifying emergency—“a danger which is present and not otherwise avoidable, but not a present attack” (2007:99; compare Dipert 2006). However, we should note that Steinhoff’s language is deliberately
vague; his “justifying emergency” need not consist of a future attack, to be averted by anticipating the would-be attacker and him only. He later argues that “[s]ometimes a grave present danger… cannot be averted from oneself or another by any other way than by an attack on civilians or non-combatants” (2007:100), including those who are truly innocent. By refusing to establish a firm basis for his “justifying emergency,” Steinhoff is here laying the groundwork for his later repellent justification of terrorism against civilians (e.g. 2007:123, 130-132), precisely as Zohar predicted.

I acknowledge that there may be (vanishingly rare) circumstances so grave that one’s only alternative is to consciously attack innocents. But Steinhoff is deliberately effacing the difference between “normal” war, in which you attack other combatants who may fully deserve their fates, and the intentional attack of true innocents. The latter is generally called “murder,” which might rarely be excused but can never be endorsed. In my view, the justification for “normal” war must not be so expansive as Steinhoff makes it. Walzer thought similarly, which is why he coined the term *supreme emergency* to refer to those highly unusual circumstances in which the normal rules of war must be set aside, in his opinion—such as when facing the genocide of an entire people. For Steinhoff, *every* war is now a supreme emergency, which cannot be correct. I do not have the right to save my own life by murdering an innocent bystander, even if that is the only way to do so. I might perhaps have a permission to save a million people that way, but hardly one person. For anyone who agrees with that claim, the right to attack first in war must be set on a foundation that still places some targets out of bounds. Steinhoff emphatically refuses to do this.
Some have tried to return to a more collectivist argument, saying that our German soldier is guilty because of his membership in the larger collective. Wilkins (1992:21-22) cites the work of Karl Jaspers on Germany’s guilt for World War II. Jaspers distinguishes between four kinds of guilt: criminal, political, moral, and what he called metaphysical. Political guilt may imply a demand for reparations from the political entity, but need not translate into the moral guilt of its members. Metaphysical guilt, meanwhile, is a psychological feeling arising from not having gone above and beyond the call of duty to save fellow human beings; consequently, Jasper holds that it cannot be used as the basis for any sort of punishment. Wilkins is not so sure; he refers to the work of Joel Feinberg to call metaphysical guilt “collective but not distributive.” That is, while no one person can be held responsible, the entirety of the German people can be. This is certainly true with political guilt, Wilkins says; consequently, he believes that “terrorism on the part of the Jews would have been a morally justifiable response, meeting terrorism with terrorism” (1992:26).

True, Wilkins caveats this by saying that terrorism should only be carried out when all other options have failed, and only if necessary for collective self-defense—and that terrorism must first be directed against those who actually are responsible for the harm being done. But, if that should fail to “awaken the conscience and the voice of the ‘silent majority’,,” then the entirety of the (individually innocent) broad populace becomes “tainted” with moral complicity (1992:30). That is, civilians’ failure to object to the crimes being done by their political leadership would render them liable to terrorist attack, in Wilkins’s view (cf. Lazar 2014).
The most common arguments for a principle of collective guilt are rebutted thoroughly by Bellamy (2008:44-46). I will only say further that if one admits to a principle of collective guilt, then we might as well dispense with Discrimination altogether and go back to slaughtering all men of military age among our unjust enemy, and taking the women and children as slaves. I have no intention to justify this, and so will dismiss collective guilt from further discussion.

So far, the arguments we have examined conspicuously fail to show where the Discrimination line should be drawn between combatants and non-combatants. Perhaps a second look at the Moral Equality of Combatants is in order? Rising to the challenge is Benbaji (2011 et al.), who tries mightily to rescue the MEC and the “war convention” viewpoint of Mavrodes, Walzer and others from the critiques of McMahan and his followers. The latter group had objected that MEC is impossible, because no one can choose to give up his right against unjustified attack. Benbaji argues to the contrary with his “contractarian” approach, saying that the role of a soldier is shaped by well-understood social norms and international law. By enlisting as a soldier, you agree to abide by these norms—including, crucially, accepting that you give up your right against unjustified attack from other soldiers. Previous versions of this argument had been attacked by McMahan as being insufficient to ground a loss of rights; now, Benbaji adds that agreeing to the war convention gains its moral power “if and only if the symmetrical rules that define soldiery codify a fair and mutually beneficial contract among states of the kind that Rawls refers to as ‘decent’ ” (2011:45). He argues that the war convention is indeed “decent” because given the present international system of states, the most
effective way to promote justice is to create a framework for states to practice self-help—which requires giving their soldiers certain permissions and rights vis-à-vis each other. Furthermore, a soldier need not actually consent to such a war convention, so long as its provisions are sufficiently advantageous as to invoke “hypothetical consent” in the Rawlsian sense.\footnote{For objections to hypothetical consent as a concept, see Somin (1999/2000) among many others, as discussed in Chapter Two.}

Benbaji’s argument is vulnerable to many objections, the most fundamental being that many would object that the war convention is not actually “decent” at all. Aside from that, he would seem to exclude non-state actors from consideration altogether. They, apparently, would not benefit from the war convention and would not be justified in attacking otherwise innocent soldiers. At the same time, it is not clear that in Benbaji’s scheme, state soldiers would be justified in attacking non-state forces either. The argument of Kutz (2005) may be relevant here; he would extend the “essentially political permission to do violence” (2005:173) to nonstate fighters representing a political community that possesses “internal ordering” and can therefore decide to make war as a community.

Other scholars have resisted Zohar's warning against combining the principles governing individual and collective violence, in part because they seek to defend the dignity of individuals, but in part because Zohar's specific argument smacks a bit too much of Romantic nationalist metaphysics (cf. Fletcher 2002). Pattison (2013) in particular notes that in the modern era, the proliferation of insurgent groups, “new wars” (cf. Kaldor 2007), and Private Military Contractors shows that appealing to a reified
collective actor such as the state does a poor job of capturing the reality of modern war. He therefore prefers his own Individual-Centric Approach, wherein only the justifiability of an individual’s contribution to the war is grounds for assessing liability, and not the justice of the war more generally. PMCs, at least, must judge whether their contribution to the war will be just—but this “individual jus ad bellum” is different from the jus ad bellum of the war as a whole (though jus in bello is the same). That is, even when the war as a whole is unjust, individuals could be Uninvolved Soldiers or Tangential Soldiers (those pursuing other aims than the main war effort) and therefore immune from just attack.\footnote{Pattison acknowledges that since the Individual-Centric Approach claims that many combatants on the unjust side nevertheless make permissible contributions, war will inevitably result in the death of moral innocents. He is not as troubled by this as McMahan, however; he believes the killing of innocents to be defensible where it will bring about “highly beneficial consequences” (2013:47).} This argument has similarities with the one that will be developed below, but Pattison runs afoul of the same weaknesses in McMahan’s argument from liability: the Innocent Attacker still presents a problem.

By contrast, the argument I seek to lay out does not depend on any prior claims about the nature of communities, or states, or political power (or, for that matter, on any claims about collective guilt or responsibility), to defend the targeting of otherwise-innocent individuals in the right circumstances. In explaining our moral intuition that we are indeed permitted to kill the poor German soldier, I will appeal to general principles that apply to any sort of collective—state or non-state, political or corporate, voluntary or involuntary, even down to the level of two associated individuals.

Pointing in the right direction is the argument of Finlay (2013). He notes that for an armed group to fight with uniforms or without them, or more broadly to distinguish itself
from the civilian population or not to do so (or more broadly still, to expose the civilian population to greater risk through means such as placing artillery units in hospitals and the like), is a strategic choice made by the group’s political leadership. The line between “combatant” and “noncombatant” is drawn by the armed group itself, and is not based on any “natural” division between soldier and civilian. This is particularly the case, Finlay notes, with insurgent groups whose members seek to hide within the civilian populace, or to recruit nominal civilians as “weekend warriors.”

In choosing to mark out a subset of the community as “combatants” (for example by having them wear uniforms), a group’s leaders signal to their opponents how they should apply the principle of Discrimination—in order to direct harm towards the combatants and away from the rest of the community, the “civilians.” The trouble is that exposing combatants to greater risk may well make it impossible for the community to achieve its goals. Therefore, some actors choose to blur the distinction between combatants and noncombatants, thereby protecting the combatants and shifting some of the harm of war onto the larger community. The upshot, according to Finlay, is that how to practically apply the principle of Discrimination will depend on the actions of the armed group being targeted. By their choices, the group can expose more of “its” civilian community to attack by enmeshing its own activities with those of the community. And while this ought to be done with proper consultation, it often is not—meaning that the armed group can

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94 This action is only legitimate, Finlay says, if the community at large is consulted and agrees to shoulder the harm for the greater good—which will depend on the nature of the “just peace” being sought, and the difference in likelihood of success between different distributions of harm.
choose to expose others to attack without their consent. Indeed, the use of human shields is the extreme case.

**A Thought Experiment**

Let us argue for a moment by contradiction. Suppose that after all is said and done, we are not allowed to kill sufficiently coerced soldiers who attack us. They are morally excused from their actions since they are not acting with moral agency, and therefore to kill them instead would be to commit a wrong. Moral people unable to kill the villainous coercer personally would be obliged not to defend themselves against coerced attackers and to submit to their own death rather than compound the original wrong with another one. What would be the outcome of such a rule?

The consequences would be bleak. Such a principle would create a powerful degree of moral hazard: if moral people took it seriously, evil tyrants would have a new incentive to build entire armies out of slaves rather than willing followers, specifically so that moral people would be helpless before them. (If this argument seems farfetched, consider the known cases of using children as conscripts or human shields, one of which we will discuss later in the chapter.) Before too long the world would be dominated by slave armies ruled by the most vicious and evil people on the planet, simply because moral people would be forbidden to resist them (cf. Quong 2009, Steinhoff 2007:59).

Even if you say that Innocent Attackers may indeed be killed, but Innocent Assistants may not be, that only places the problem at one remove. The vast majority of all uniformed soldiers are noncombat troops. Our slaver-tyrant would simply make sure that his noncombat troops were all slaves, giving the army near-immunity from disruption.
Military experts know that actual battles are merely the final stage of a long process of preparation, supply, and maneuver. As the saying goes, amateurs study tactics; professionals study logistics. To grant the evil tyrant a free hand with his logistics and maneuver would be to place moral actors at a crippling disadvantage, and would yet again encourage enslavement.

I view this as unacceptable. As a result, I view it as morally necessary that even Innocent Assistants could be subject to attack, when such an attack is properly justified. Any alternative would lead to a moral horror.95

That being the case, how then could I justify harming Innocent Assistants, while not allowing for over-broad license to attack civilians and thereby vitiating the principle of Discrimination?

The nature of the problem points to the outlines of the solution, in my view. Recall that the danger is that evil people may coerce others into becoming Innocent Attackers-Assistants (hereafter “Aggressors”). We are less concerned with people who spontaneously become Innocent Aggressors due to happenstance, such as falling off of a building onto a pedestrian below. Not only is such a circumstance vanishingly rare, but to exclude such spontaneous aggressors from attack is unlikely to produce more Innocent Aggressors—specifically because there is no malicious will orchestrating the innocent aggression.

95 This may seem to be a rule-utilitarian argument, and indeed could be formulated as one without difficulty. Still, I view it as based on deontology. The deontological principles involved are two: first, evil actors ought never to gain moral privileges due to their acts of evil; and second, deliberately harming innocent people ought always to be dangerous. To deny defenders the right of self-defense against conscripts would violate both of these principles.
In short, we need only be able to target Innocent Aggressors in the case where they are being coerced, and because they are being coerced. That is, the coercion itself is the problem to be addressed. And it is that coercion that must be the basis for a bright-line rule of Discrimination.

**War Against Groups—the Theory**

My argument (which I will call the *Agency-Freedom Theory* of Discrimination) takes inspiration from Zohar in that it is fundamentally tragic: in some circumstances, individuals are subject to a *loss of their autonomy* so complete that they become mere tools in the hands of the other individual or larger collective social structure that controls them (as disciplined soldiers are). This is not an argument about collective guilt; such individuals' moral status as individuals becomes beside the point. Rather, the basis for our permission to attack such instrumentalized individuals is built from the same consideration we saw previously: because such people are not autonomous, we can predict their future behavior without any reference to their free choice as individuals. All that matters is the behavior of the larger structure in which they are enmeshed.97

Consider the situation of a soldier in an army. At all times, the soldier is subject to the commands of those above him in the hierarchy—indeed, it is the very point of military hierarchies to turn their soldiers into compliant bodies, tools of their commanders. The soldier cannot readily avoid commands; doing so would expose him to punishment, even execution. He might decide to go AWOL, but deserting is incredibly risky and depends

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96 Following Pettit (2003), as stated above.
97 “A war of self-defense does not seek to right the moral equation. It responds rather to fear. It seeks not revenge but safety” (Fletcher 2002:8).
on having the opportunity to do so safely. Even if our soldier doesn't want to kill anyone, even if he is a conscript soldier who never even wanted to wear a uniform in the first place, he is forced to participate in the war.⁹⁸

This is all familiar ground, being the basis of Walzer's argument for the Moral Equality of Combatants since (in the view he laid out) all soldiers are “victims” (1977:36). We need not go so far as to claim moral equality between combatants, however. As McMahan and his adherents have powerfully argued, even where a blameless soldier fighting for the wrong side has a certain dispensation to defend himself from attack, that dispensation is hardly equivalent to the right of soldiers for a just cause to prosecute that cause violently. Still, the status of a soldier as an unwilling victim is important for another reason—it means that his future behavior is, to a greater or lesser degree, not determined by his own free will, but by the imperatives of the hierarchy he must serve.

Someone facing the choice of attacking or not attacking this soldier is therefore in an unpalatable situation. Even if the blameless soldier himself is not a direct threat, he may still become vulnerable to attack because of being deprived of his freedom of agency. Even if the soldier is not now a threat—even if he is not now aiding in the threat either—it remains true that the army could choose to make him a threat at any time. For example, suppose that a combat infantryman is away from the battlefield, enjoying some R&R. As he is now, he is not participating in any way in the activities of the army. But as soon as his R&R is up, he will be right back in the fight—not necessarily because he wants to be,

⁹⁸ Cf. Walzer: “Soldiers died by the thousands at Verdun and the Somme simply because they were available, their lives nationalized, as it were, by the modern state” (1977:35).
but because he has to be. That is, his future behavior is predictable without making any reference at all to his own individual desires.

Or, suppose we have a Nazi German soldier who has been assigned to march in parades in Frankfurt, while his comrades are busily dying on the Eastern Front. His own contribution to the Nazi injustice is negligible; it is hard to say that his presence in a parade would be unjust enough to make him liable to attack. Still, at any time the Wehrmacht high command may decide to reassign him to the battlefield. Because of that, he would be a valid target for attack (provided that Proportionality and Necessity are satisfied, of course).

By contrast, suppose that the German soldier were not stationed in Frankfurt, but in an isolated research outpost in the Arctic Circle. Getting him there in the first place was arduous, and so would be getting him back to the battlefront in Europe. Therefore, it is far less likely that this particular soldier would be recalled, even if the Wehrmacht needed more troops: there are many other soldiers more readily available.

As a result, even though the soldier in the Arctic is subject to the commands of his superiors, it is far less likely that he personally will ever pose a direct threat, or assist in a meaningful way those who do. This is where the role of prediction is decisive, rather than the mere fact of membership in a collective or being subject to a hierarchy. In order for

\[99\] One might argue that, even if the high command never reassigns the soldier, the fact that the soldier is available to be reassigned is itself a meaningful factor in the calculations of the high command—he is an asset held in reserve, allowing forward units to operate just a bit more freely. Therefore, even without acting, our soldier could be said to contribute to the unjust threat. McMahan (2012), for one, makes an argument along these lines. I am skeptical of this line of reasoning, because the actual contribution made by our poor reserve soldier is ill-defined and not large in any event. If this is enough to condemn someone to death, then anything that significantly helps the combat troops should work as well, including putting on a USO show.

\[100\] The Nazis believed in some eccentric theories of geology, which they sought to validate for their supposed military applications.
an innocent individual to be subject to attack according to the theory I am laying out, it is not enough that he is subservient to the Wehrmacht. This subservience must also translate into a sufficient likelihood of future unjust threat. Barring such a likelihood the soldier would be immune from attack, for all that he wears a uniform.\(^{101}\)

Similarly, a uniformed reporter for the U.S. Armed Forces Gazette would at least have a claim to immunity from attack. Assume for our purposes that reporting for a military newspaper is not sufficiently unjust for him to become liable as an individual, even if the army as a whole were fighting unjustly. It is unlikely that the military would ever assign one of its journalists to a combat position or a critical support position—at least, not without a drastic worsening of its situation, which would be grounds for reassessment. Barring such reassessment, our military journalist should be *prima facie* immune from attack.

What about the Discrimination status of an unwilling combatant’s superior? We can make two points. First, the true source of the threat posed by the combatant is that superior, whether or not he himself is a combatant; it is his will that directs the combatant in a threatening way, or a non-threatening way, as he chooses. Thus, he would be liable to attack, at least as much as the combatant would be (cf. Aloyo 2013).\(^{102}\) Second, we have said that the unwilling combatant ought to be broken free of the coercive structures

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\(^{101}\) As Harbour (2003) notes, organizations often are internally differentiated, and actions can sometimes be more easily attributed to particular sub-units of the organization than to the organization as a whole.

\(^{102}\) It seems that this argument would apply with much less force to the superior of a soldier who willingly participates, assuming that the superior is not committing other wrongs anyway.
imprisoning him. In this case, the structure is personified in the combatant's superior. As a result, he becomes a more preferable target than is the combatant; more than that, just combatants are under some degree of obligation to target the superior of an unwilling combatant first.

Turning to the other side of the coin, what is the Discrimination status of a just combatant, *vis-à-vis* an unwilling combatant? It seems obvious at first blush that a *non*-coerced combatant ought not to be able to fight back, since he is doing wrong; he always has the option to simply withdraw, and therefore the obligation to do so. Yet in the real world, things are not always so simple. Even supposing that your enemy’s cause is nominally just, if you simply submit to his will there is precious little to stop him from harming your own civilians (Steinhoff 2007:95). Sacking enemy populations is a time-honored practice. Unless a voluntary fighter has some assurances that his enemy will in fact treat noncombatants properly, it seems to me that he can justify the minimum amount of violence (and *only* that) necessary to defend his people from harm.

Unwilling combatants have an additional factor at work: to refuse to fight carries considerable risk. Furthermore, they are not culpable for the wrongs they do, since they are coerced; as a result, it seems that they should still be permitted to defend themselves. While they too would have a duty to escape from combat if possible, it may not be possible; and in that case, it seems that they may defend their moral worth from the tragedy of being treated like a cog in a larger machine, by asserting their right to self-

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103 Whether this constitutes a claim-right the combatant has on us, or some sort of duty we have to him or perhaps to the world more generally, I will leave to others to determine.
defense even against a Justified Attacker (cf. Steinhoff 2007:86). But going beyond that to commit atrocities against noncombatants would be totally wrongful, and forbidden even at the cost of your own life.

**Summary of Agency-Freedom Theory**

Summing up, in the framework I am laying out for *Agency-Freedom Theory*, two things are necessary before an otherwise innocent person may be attacked. First, he needs to be subject to a *loss of autonomy* so severe that his own free will may be disregarded in predicting his future behavior. Second, the *circumstances* must be such that this loss of autonomy makes him sufficiently *likely* to be used to contribute to an unjust threat.

This is not the same as the principle of Necessity. If an innocent soldier is not going to pose a threat one way or the other, he would not be subject to attack even if Necessity compelled such an attack (unless other principles such as the Doctrine of Double Effect were called into play). In short, the Agency-Freedom theory of Discrimination and the principle of Necessity remain independent.

An implication of this framework is that not all soldiers are subject to attack, Walzer *et al.* notwithstanding. The mere fact of wearing a uniform is not enough to turn one into

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104 Here, I argue with McMahan who believes that a Justified Attacker does not lose his right against attack (2009:14, 38). In the present framework, rights become less important.

105 Here, I follow a famous passage in the Babylonian Talmud, Tractate *Sanhedrin* 74a, which rules that murdering an innocent is forbidden even when you are being threatened with death by a third party.

106 Again, this argument is different from the one frequently made by McMahan (e.g. 2009:187, 199) that because an “overwhelming majority” of unjust combatants are indeed morally culpable, a just combatant may presume that all of them are. I am skeptical of this approach; it comes far too close to “Kill them all, God will know his own” for my liking. In the present argument, you are not attempting to ascribe moral culpability to the target; indeed, it would still be possible to attack him if you *know* with certainty that he is morally innocent, so long as he is being forced to assist in the unjust threat. The converse is sometimes also true—even moral culpability may not be enough to permit an attack (as opposed to a more formal judicial procedure), if the target is not likely to participate in future harms.
a victim unless circumstances warrant it. But the implications go well beyond soldiers. According to this model, some people who are not in uniform may nevertheless be exposed to attack.

**Nonuniformed Members**

For example, consider factory employees of a defense contractor that exclusively manufactures weapons for the unjust army. Under most theories of complicity, they would be considered culpable and therefore liable to attack due to their collaboration with the unjust army, despite being out of uniform—a debatable conclusion, perhaps, but not a new one. Still, the workers are working voluntarily, at least. But now suppose that the defense contractor is using drafted labor from the populace—or worse, slave labor, as did firms in Nazi Germany. According to Agency-Freedom theory, these unwilling workers would *also* be exposed to attack, because their individual guilt or innocence has been rendered immaterial. Attacking slaves would be tragic. It ought to be avoided if possible. But it may still be done.

On the other hand, let's consider a collective on a much smaller scale than a state. In the phenomenon of *feud* or *vendetta*, two families may engage in protracted cycles of killing and reprisal until a reconciliation is made. Gould (1999, 2000) has done in-depth studies of feuds on the island of Corsica, using 19th-century French legal records as a data source. He finds that not all murders led to full-blown family feuds—only when the original murder was committed by *more than one member of a family*, or when the original murderer was sheltered by other members of the family, was it likely that
reprisals would target people other than the murderer alone. That is, only when it is evident that the offending family has acted as a group is it likely to be subject to feud.\textsuperscript{107}

Furthermore, the subsequent patterns of killing and reprisal followed a distinctive logic, which is difficult to summarize here. Briefly, the choice of who would perform the next killing (in particular, how distantly related he was to the original victim) was made to signal the cohesion of the family in the face of threat—its ability to defend itself as a group, and not as disconnected individuals.\textsuperscript{108} The more distantly related the assailant was to the original victim, the higher degree of cohesion he thus demonstrated. Similarly, the selection of the next victim would be calibrated to punish the cohesion of the opposing family, with more distant relatives being targeted if the family acted cohesively. Each family sought both to demonstrate its own commitment to mutual defense, and to dissuade opponents from doing the same.

Members of a feuding family would be impelled to do violence by social pressure from their family and from the surrounding society, and from their own sense of honor, shared family identity, and solidarity with the victims. But it was not a foregone conclusion that a man (or woman—many of the murderers were women) would indeed stand with the family. He could refuse to participate, or even flee into the surrounding mountains and hide. Indeed, the uncertainty behind the strength of a family's cohesion is what drove the pattern of conflict.\textsuperscript{109}

\textsuperscript{107} Cf. Fletcher (2002:50): “[W]ar is a collective activity. A single assassin, acting alone, cannot effectuate the kind of attack that will signal entry into a state of war.” [Emphasis added.]

\textsuperscript{108} Cf. French’s (2001:90-97) discussion of honor as a motivator for vengeance.

\textsuperscript{109} In this, one can draw parallels with the famous bargaining approach to war first laid out by Fearon (1994) and developed since then by many scholars, e.g. Schultz (2001), Salehyan (2009). For an explicit discussion of honor in IR, see O’Neill (1999).
The framework for collective war we are developing in Agency-Freedom theory is consistent with the observed pattern in Corsican feuds where first close relatives are targeted, then more distant ones. At first, it is far less predictable that a distant relative would become involved in the feud, because the family has not yet demonstrated the extent of its cohesion. On the other hand, a close relative is quite likely to become involved, and therefore it would be easier to establish his liability to attack.

**The Importance of Cohesion**

This excursion into the role of cohesion in family-level wars is meant to show three things. First of all, the two necessary elements of group war—loss of autonomy and predicted participation in the unjust threat—are not categorical, but move on a sliding scale. Where a soldier or other group member is pressured to participate but not required to, or if he is expected to obey but still might refuse or escape, there still remains a degree of autonomy that brings individual choice back into the equation. If enough autonomy is retained, the individual's membership in the group would not be enough by itself to render him subject to attack. (His subsequent actions may well do so, but that falls in the realm of culpability, not loss of autonomy.) This once again highlights the importance of *judgment* in determining who may be killed and who may not.

Second, an individual may be impelled to fight by more causes than military hierarchies. Social relationships, communal norms, internalized rules of honor or ideology or religion, all of these could dictate one’s behavior to a greater or lesser degree. Under the right circumstances, the presence of any of these factors or others could
provide justification for attacking an otherwise innocent target, because of the target’s expected future behavior.

Third, the framework under discussion is formulated in a general enough manner to coherently deal with any level of conflict—from interstate war to family feud, or gang warfare, or conflicts involving corporations. Each case will require a degree of specificity in order to account for the unique configurations of group cohesion and the loss of autonomy felt by group members, but the broad framework remains coherent. Again, the case of the family shows that institutional hierarchies are not the only factors leading to a loss of autonomy. Social expectations, including those based on shared identity or group solidarity, can do work as well.

This framework fills in the missing piece in theories of Discrimination: how to explain why and when a clear innocent may still be a legitimate target, and—crucially—when such an innocent is no longer a legitimate target. We will see an example of how that works in practice in the following illustrations.

**Illustration: Child Soldiers**

Child soldiers are recurring features of violent conflict in the most destabilized parts of the world. Between 2004 and 2007, child soldiers were employed in conflicts in at least 21 countries (Beber/Blattman 2013), as well as in violent criminal enterprises not typically categorized as armed actors, such as Mexican or Colombian narco-cartels. New reports of child recruitment continue to transpire. This is so despite children’s inferiority as fighters, on average; they tend to take longer to train, are less accurate shooters, and have less strength and stamina than do adults. The most attractive feature of child
soldiers, on the evidence of survey research from Uganda and other conflict zones (Beber/Blattman 2013), appears to be that they are easily coerced, easily misled and indoctrinated, and cheaper to field.

A notorious example is the Lord’s Resistance Army, which has forcibly abducted some 60,000 to 80,000 youth since 1984 (Beber/Blattman 2013). Small bands of guerrillas would attack isolated villages and homesteads and seize children, sometimes returning them after only a few days but usually holding them for far longer. Children who were not murdered as an example to others would be indoctrinated with mystical beliefs about Joseph Kony and promises of great wealth to be gained once the Ugandan government has been overthrown. Those who distinguished themselves in training would be given weapons and sent into the field to commit atrocities.

The children develop distorted moral sensibilities and can become extremely dangerous fighters. Often they are dosed with drugs before battle, further muddling their ability to make moral judgments. Still, the majority of LRA child soldiers eventually escape the group, typically after several months or years. And when child soldiers are separated from their units, they can be rehabilitated (with difficulty). The task is made difficult by the crushing guilt felt by some, or the surrender to amorality by others. In a few cases, child soldiers themselves become officers and warlords. Still, in general, the threat posed by LRA child soldiers is particularly sensitive to the strength of their disciplinary environment.

Child soldiers seem a durable part of the modern conflict landscape, and play a role in each of our featured case studies discussed later—from the murderous sicarios and
sicarias of the Mexican cartels, to the teenaged kidnappers of Abu Sayyaf, to the young conscripts of Congolese non-state actors or even the Congolese army. Yet those theories of Noncombatant Immunity based on assigning different degrees of moral culpability or responsibility fail to justify employing violence against children, no matter how dangerous they are. Children are not usually considered to be morally responsible actors—especially if they are kidnapped and forcibly indoctrinated. Such child soldiers are practically pure examples of Innocent Attackers, with all of the attendant difficulties for justifying violence against them.

On the other hand, theories such as Walzer’s or Lazar’s that permit unjust attackers to be harmed without restriction (subject to the situational principles such as Necessity) seem distasteful when applied to children. Avoiding harm to children is one of our most deeply felt moral impulses, and it is repugnant to apply a principle that does not preserve some possibility of protection from attack. This is particularly the case since many child soldiers eventually escape their commanders-cum-captors, when given the opportunity.

Let us see then whether Agency-Freedom theory fits our moral intuitions when faced with the horror of child soldiers.

Under the theory, what are the issues in play if you are considering attacking a force of child soldiers? First of all is the question of predicting future behavior of the unit as a whole. In this case, the prediction is quite straightforward; child soldiers are nearly as deadly as adults, and in some cases even deadlier when they behave recklessly in battle.

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110 I do not say, if they are attacking you. Self-defense is a human right. While killing children is traumatic and adult soldiers under attack by children are caught in a terrible situation, such soldiers are not compelled to allow their own destruction at the hands of dangerous fighters that perpetrate horrible bloodshed when allowed to.
If the opposing unit appears to pose a threat, you can be sure that it will be carried through.

Second is the question of predicting the behavior of the child soldiers as individuals. Here again—*so long as the command hierarchy continues to function*—individual child soldiers are all but certain to participate in the attack. This judgment will depend on the specific strategies used to counter the threat; practitioners are developing best practices for how to destabilize unit cohesion and weaken child-soldier morale (e.g. Brigety/Stohl 2007). These best practices cannot be relied on with certainty; but once a given child soldier has been isolated from the unit and demoralized, there will come a point where the coercive control of the unit hierarchy is broken. At that point, the child can no longer be attacked unless you predict that he, *as an individual*, is still a sufficient danger. But you may not rely on your judgment of the unit as a whole to justify assaulting the individual, once he has been broken free of it.

This discussion seems depressingly cold-blooded. It goes against some of our deepest-felt instincts to kill children, which is part of what makes the phenomenon of child soldiers so horrible. But the present theory of Agency-Freedom has an advantage over other theories of Discrimination, in that it points to a theoretically clear point at which someone previously liable to attack becomes safe again: when the grip of the larger structures that compel him becomes loosened. This carries with it a moral imperative missing from other theories. According to Walzer or McMahan or Lazar we cannot simply make enemy soldiers safe by stripping them of their uniforms in the middle of battle; but in the present theory we can restore to soldiers the dignity of
individuals, at which point we are forbidden from causing harm unless warranted by their *individual* actions—even if Necessity and Proportionality would permit doing so. And it would seem to me that we therefore *must* try to free them.

In other words, especially when fighting children who are less morally responsible than adults, the just warrior has a duty (of uncertain strength) to first attempt to break the cohesiveness of the enemy group, rather than simply obliterating it.

**Thought Experiment: American Military Personnel**

We have discussed how Agency-Freedom theory could play out with a non-state actor. But what about a conventional, hierarchical state military?

Let us suppose, for the sake of argument, that a particular non-state actor is fighting a just war against the United States. Call this actor Blackflag, and suppose that it is significantly weaker than the United States, such that the threat it faces from the military is quite high. Which classes of Americans is Blackflag allowed to attack, given that other JWT criteria are satisfied?

(I should stop here and emphasize that this is a hypothetical only. While the discussion to follow clearly has parallels in real-world events, I want to make clear that no modern terror group at war with the United States has yet fought a just war, in my opinion. Therefore, even if in certain limited circumstances such adversaries might be permitted to engage in self-defense, they would be forbidden to fight a war in the larger sense I am developing in this work. Nor do I speculate about what would constitute a just war, or what actions of the United States might justify a war. That is beyond my scope. I choose the United States as my case only for verisimilitude.)
The United States military is, of course, the most natural target for Blackflag's attacks. The military’s whole purpose is to destroy the enemies of the United States, and the US means to use it in that capacity. Still, as I argued above, simply wearing a US uniform would not be enough to render military personnel liable to attack. For example, if the theaters of war are entirely land-locked, specialized crews from the Navy (minesweepers, say, or submariners) probably contribute nothing to the specific threat that the US poses to Blackflag. They may contribute to the broader maintenance of American power, but that by itself would not be sufficient justification for overriding the individual moral worth of such specialized personnel, and harming them even when they do not contribute to the present threat.

One might argue that even if such specialized personnel do not contribute to the threat themselves, troop strength is fungible—the US is free to deploy forces against Blackflag precisely because it has these other forces available to fulfill critical tasks in other theaters. Destroy these forces, and the US would be forced to pull troops from the front line to replace them. In that sense, goes the argument, all soldiers no matter what their specific duty still work to enable the threat. But this argument relies on a long chain of indirect contribution. Remember that we are considering overriding the dignity and moral worth of these personnel, as individuals, and killing them for the sake of their contribution to the larger unjust effort. For such a morally costly decision, we would need weighty reasons. The argument from indirect contribution of this kind is not weighty enough, I argue. (It becomes even less plausible to speak of interchangeability with
specialized personnel who are not easily replaced. A line infantryman cannot easily be retrained to be a sonar operator.)

Less specialized personnel might contribute to the threat to a limited degree; we have seen how some Navy personnel were retasked for land operations during the wars in Afghanistan and Iraq. But unless such retasking has actually begun, it would seem again that such personnel are exempt from attack, because their availability to contribute to the threat has not been sufficiently demonstrated. The general principle here is that when a given individual is unlikely to become implicated in the threat in the full measure necessary to justify attack, that individual is immune from being considered only as a cog in the machine, and must be treated as an individual with moral dignity. This might mean discriminating even between particular combat units, if one unit is permanently assigned to a different part of the globe than Blackflag operates in. For example, the US Sixth Army is presently assigned to US Southern Command, and from public records it does not appear to have been deployed to either Iraq or Afghanistan throughout our long wars in the region.

Of course, units that are presently not in combat but are generally expected to participate would still be open to attack. And if the US military indicates that it will reallocate previously uninvolved units so that they pose a threat, that action may render exposed to attack not only those particular units, but also those of a similar class, that is, a similar "causal distance" away from the immediate threat (cf. Finlay 2013). For example, since the military chose to deploy Navy personnel in a land war, similar types of Navy units would become subject to attack even if they themselves have not yet been retasked.
In short, the mere fact of wearing a uniform is not sufficiently important to render an otherwise-innocent soldier subject to attack. That soldier must be sufficiently likely to become a participant in the threat, as directed by the organization or social structure to which he is bound. Doctrines such as the MEC that allow all soldiers to be attacked are too permissive in their targeting rules.

**Practical Implications**

Agency-Freedom theory improves on previous theories of Discrimination in two ways. First of all, it proposes a more fine-grained targeting rule that justifies attacks on some soldiers while declaring others to be exempt—*without* straining to apply individual-level rules of self-defense that are inappropriate to the situation of war. Second, even among targets that are *equally* subject to attack, the Agency-Freedom theory has clear implications for deciding whom to target first. If there exist personnel in the opposing group who are individually innocent, yet are enmeshed in the group so that their autonomy is negligible, one is permitted to attack them when it makes military sense to do so. But doing so remains a moral tragedy. This fact would demand, as a *moral matter*, that you make every reasonable attempt to first *degrade the cohesion* of the opposing group. That is, your goal ought to be to damage the group's power to deny agency to its members, and therefore to cut the innocent targets loose—restoring to them their full dignity as moral agents, and removing the need to include them as targets.

For example, rather than launching a frontal assault on an enemy force that would cost many lives, one might try other methods such as killing their officers, or jamming their communications gear, or inciting mutiny among the ranks. If successful, these
methods would allow enemy soldiers to once again exercise choice in whether or not they become an unjust threat. They may choose to pose a threat anyway, in which case they can be killed without many qualms, but at least they have that choice. And those who choose against becoming unjust threats will be saved from just attack by that choice. (But only if they are truly severed from the control of their group, I hasten to add. If disruption of command-and-control is ephemeral, then the soldiers will shortly return to their earlier status as mere tools; in that case, it would be appropriate to attack them even during the brief time they have been cut off from control.)

This claim goes beyond statements that degrading enemy cohesion would be preferred on utilitarian or Proportionality grounds—that is, a claim that disrupting the enemy group would be more effective. While that is sometimes true, it is not always. We would nevertheless have to assign a moral value to disrupting the group's cohesion, specifically in order to right the injustice done to their innocent members and to return to them the protections afforded to human dignity, even when it seems less efficient to do so.

How much value to assign is an open question; it is obvious that a military ought not sacrifice overwhelming numbers of its own soldiers in order to save enemy combatants who are in any event liable to attack. Still, it is intuitively satisfying to (for example) launch assassination attempts against Saddam Hussein so that a full-scale war would become unnecessary, even when the attempts fail. Previous theories of Discrimination, I claim, do not fully explain this intuition as Agency-Freedom theory does.
Conclusion: Group Stereotyping and Right Authority

This framework brings us face to face with one of the ugliest aspects of warfare: group stereotyping, and consequent out-group hostility. Recall from our discussion of the continuum of violence that we make war on people not only because of present aggression, but also because of a reasonable prediction of causally imminent aggression. The role of prediction and judgment acquires a special bite when we apply it to our present discussion about groups. That is, if I predict that a certain group means me ill, and I judge that certain members of the group are compelled to participate in its unjust aggression regardless of their personal choices, then I might conclude that I may attack those group members at will—regardless of their individual guilt or innocence.

Here is the great danger of the war mindset, and the reason why proper judgment is so important for a Right Authority. It is a commonplace for people to be judged as hostile simply because they possess a salient feature that is associated with hostility. These judgments are often used to justify gross abuses of innocent people. For example, suppose that a Muslim terrorist explodes bombs at the New York Marathon. He then justifies his act by referencing statements in the Qur'an and other religious literature. Some Americans find it easy and tempting to conclude that Islam itself is threatening (i.e. salient), and that therefore all Muslims everywhere are the enemy and must be crushed.

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111 By salient I mean here any feature of your relationships with others that might lead an observer to judge you to be implicated in their wrongdoing or threatening behavior, or judge the others to be implicated in your own. For example, the fact that a murderer is left-handed would lead few people to attribute malice or loss of agency to other left-handed people; but the fact that he is a member of the Red Army Faction would certainly lead people to suspect willing or unwilling collusion on the part of other RAF members, and therefore to target RAF members with violence. Cf. Tilly (2003).
(If you are so inclined, you can observe this sentiment in the real world by Googling the phrase "nuke Mecca").

Obviously, such a conclusion would be out of line with the principle of Discrimination outlined by the present theory. Most Muslims are neither participants in aggression, collaborators with it, or unwilling thralls of those who are. But as a description of how war is actually fought in the real world, this hypothetical is depressingly familiar. And many insurgents depend on precisely this process to achieve victory: they inflame the enemy populace with some atrocity, and their opponents respond in ways that antagonize the insurgents' home community, which drives more people to join the insurgents (Byman 2007, Lazar 2014). In brief, this tendency—when we attribute to groups the threatening intentions of apparently representative individuals—is one of the most common means by which violent actions by individuals or small groups can drag an unwilling populace into war.\(^{112}\)

The risk posed to a community when an individual member uses violence has moral implications. It should not be too controversial to say that the perceived relationships between people sharing some salient collective affiliation (whether membership in a political community, religious community, corporation, street gang, or whatever) create a duty of care on the part of group members to restrain themselves—they are not to fight wars (as opposed to engaging in self-defense) if doing so would involve the group as a

\(^{112}\) It should be evident by now that my conception of groups and social structures is not at all essentialist or primordialist. Though I am leery of some of the associations that the term “constructivism” carries, it is clear that the perception of threat from a certain type of person can actually create a group identity for people, who then are forced to view themselves as having a shared fate (cf. Fearon/Laitin 2000). That process is nothing if not constructivist.
whole unjustifiably. Before our Muslim terrorist places his bombs, he ought to consider the effect of his actions on the Muslim community as a whole.

It is this consideration, I argue, that is the very essence and substance of what I will call the *Standing* component of the principle of Right Authority.¹¹³ That is, we demand that only legitimate representatives of a group involve that group in a war, for fear that violent actors may embroil a community in a war it never needed or wanted—perhaps by spuriously claiming to fight on its behalf, as al-Qa’ida or ISIS claims to do for the Muslim *umma* in general. Justifying this argument about the nature of Right Authority, and teasing out its implications for what would qualify as Standing, is the task of the next chapter.

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¹¹³ Cf. Walzer: “War affects more people than domestic crime and punishment, and it is the rights of those people that force us to limit its purposes” (1977:116)
CHAPTER FOUR: STANDING

When a handful of revolutionaries sit around a table in their apartment and plan a war, they (presumably) do not have Right Authority. When they have overthrown the regime and set up a popular government in its place, they do. Somewhere in between those points, there has to be a particular moment where they gained Right Authority (or else our whole idea of Right Authority needs to be revised). When was that moment? And what gave them the right to begin a war in the first place, when they were sitting around the table without Right Authority?

When we reviewed the existing literature on Right Authority, we noted that a recurring feature of the discussion was how vague it was conceptually. Few scholars seriously tried to specify what precisely Right Authority is, or how an actor is supposed to gain it or lose it; more often, scholars such as Held or Steinhoff or Pattison made assertions that certain types of actors ought to have (or not to have) Right Authority, based on inconsistent criteria. The state of the literature is unsatisfying.

In part, the literature on Right Authority is so muddled because it typically refers back to the larger discussions on political legitimacy and sovereignty, sometimes taking for granted that only sovereigns have Right Authority. These topics themselves suffer from a great deal of controversy and muddled definitions, as we saw in Chapter Two.
(indeed, some scholars doubt that political legitimacy, as such, even exists), as a result, the discussion of Right Authority becomes more confused and not less by bringing in these other concepts.

Yet it seems at first glance that political legitimacy ought to be integral to any discussion of Right Authority. After all, isn't the point of Right Authority that other people believe that you can legitimately make decisions on their behalf? And isn't that precisely what Right Authority is?

Perhaps, but perhaps not. To determine the role of political authority as a concept in deciding which actors have Right Authority, we need to gain more clarity about what precisely we mean by Standing. That is the task of this chapter.

**Different Kinds of Standing**

At the end of last chapter, I introduced the claim that the essence of the Standing requirement was to prevent a situation where an actor drags other people into a war they don't authorize. This is so because the nature of war leads each side to preemptively attack people that it *thinks* will be a threat, often based only on shared membership in a political or ethnic community. Therefore, when a community is brought into a war, we might suppose that the community ought to have been able to endorse the war in advance, in some way.

In the real world, communities rarely have the opportunity. Let's consider five ideal types for how war decisions might play out.

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115 Unless otherwise noted, I use the term "community" to refer to all of the people affected by the war by virtue of their sharing a *salient* social feature that motivates the other side to attack them, as discussed in the previous chapter.
Pure Consent: In this case, all members of the community provide their explicit, voluntary endorsement of the struggle. They agree with every aspect of the war, from the goal, the choice of enemy, the grand strategy, the choice of whom amongst themselves to expose to enemy attack (cf. Finlay 2013), and even the operational and tactical decisions made over the course of a campaign or battle.

This is the most perfect case for how consent might authorize a war. It is also extremely unlikely. If it is unlikely for everyone to agree with all aspects of a “normal” social contract, it is even less likely for everyone to agree with all aspects of a war—because the stakes are so high and the conflict of interest between the individual and the group is so severe. Furthermore, the costs of disunity in a war are fatal (that is, we are faced with a severe collective-action problem); therefore, when there is disagreement, it cannot be allowed to interfere with the prosecution of the war until the disagreement reaches some critical threshold. Thus, a wartime leader needs to somehow gain the authority to make decisions on others' behalf, even in the face of a certain degree of disagreement (cf. Locke 1980:53).

Communal Authorization: In this case, the community responds to the collective-action problem of war by gathering together and designating some figure as the wartime leader. The mechanism of investing a leader with this role could take many forms: a

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116 Though the Comanche of the American Southwest may be something of an exception (or perhaps they fall better under Lone Operator below). In their heyday, they lacked formal political structures of any kind; instead, anyone was free to present himself as a “war chief” and organize a raiding party of volunteers on the strength of his prestige. Even then, the war chief’s authority largely ended once the fighting was over (Benson 1991). Turchin (2009) notes the high effectiveness of the Comanche in battle, despite their anarchic social structure.

117 Whether Right Authority represents a right held by the authority in question, the waiving of a right of non-involvement by the people, or some sort of non-rights-based power is unclear at this point. I doubt
democratic vote (in a state or otherwise), the deliberation of sage elders, trial by combat, or reading chicken entrails. The important part is that the method used needs to be accepted as legitimate and binding by the people of the community, based on their existing political beliefs.\textsuperscript{118}

(Practically speaking, for most developed nations this would require a democratic vote; but we must not confuse contingent political fashions with eternal requirements. The important part here is the acceptance of the leader's legitimacy by the people he leads, for whatever reason, \textit{not} that they personally prefer that leader to all others. If you believe sincerely in the divine right of kings, for example, you would reject as fundamentally illegitimate and blasphemous any attempt to shunt your king aside by mob action, even if you would prefer someone else to be king. As a result, you would not grant a usurper the right to make wartime decisions for you.)

\textit{Lone Operator}: A single member of a community, or perhaps a small group of associates, decides to make war on an enemy. At no time do they present themselves as acting on behalf of the community at large, or representing them; instead, they might present themselves as fighting on their own behalf, or perhaps as acting from historical necessity, or in some other way making their communal identity irrelevant so that their activities do not lead to increased danger for the community. (For example, the

\footnote{Cf. Frost (2003:86). He prefers to think of authority as existing within a particular embedded social context, which is constituted more through ongoing practice than through any formal act of authorization \textit{per se}. Since all practices are social, he says, one cannot judge the validity of an action divorced from its context. Note also that Weber (1919) discusses several possible bases for political authority—formal-legal, but also traditional, religious, or charismatic.}
Unabomber's assassination campaign against technologists did not lead to increased scrutiny of white males or mathematics professors.)

**Inciters**: A single person or a small group of people decide to anoint themselves as representatives of the community and begin a war, bringing the entire group under suspicion from their enemies and provoking wider reprisals by the enemy against the community as a whole—which the inciters hope will drive the community into their camp and force their participation. This, sadly, has been a preferred tactic of non-state insurgents for nearly a century (cf. Hoffman 2006).

**Social Movement**: An oppressed community, whose communal authorities are either too weak and frightened to act in their defense or perhaps are collaborating with the enemy, goes on for some time in an intolerable position. Suddenly a lone hero emerges and strikes a blow for the community. Like wildfire his message spreads, and soon others flock to his banner despite the danger of reprisals, allowing the hero to speak with unquestioned communal authority. Once the authority's position is without doubt, he is forced on occasion to deal with traitors to the community as any wartime leader must, sometimes by killing them.

**Communal Takeover**: A vicious organization of murderers decide to gain control of their community and then use its resources to fuel its war. They systematically assassinate and intimidate moderate communal leaders, inserting their personnel into key institutional positions and making it impossible for dissenters to act. Soon, they have enforced their will on the community, and begin recruiting its young people for the war.
It seems clear to me, at any rate, that any theory of Right Authority ought to be able to discriminate cleanly between *Social Movement* and *Communal Takeover*, and to explain why and how our lone hero can *gain* authority (as our intuitions would suggest he can). More controversial, perhaps, is the idea of a *Lone Operator*—that smaller groups of people such as ideological cells, mercenary groups, and the like might be able to detach themselves from their communities and claim the right to make war alone.¹¹⁹ Such a move cuts against the agenda that some have tried to advance, strengthening the conventional norm of Right Authority against the encroaching power of PMCs and other non-state groups (see Chapter Five). Others might object to such *Lone Operators* on the basis of the Just War criterion of Expectation of Success, given that they are unlikely to accomplish their aims (at least when they are fighting against states, and not similarly small groups).

But the present theory implies in a straightforward way that such groups could indeed claim to fight on their own behalf, so long as they meet the Competence standard (for example, to evince proper judgment in war; see Chapters Two and Three), and so long as they do not thereby endanger other people over whom they lack Standing. (That would be the difference between *Lone Operator* and *Inciters*.) And I claim axiomatically that all people have the right to freely choose to fight a war for any Just Cause, no matter what

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¹¹⁹ It is possible that individuals may be able to fight for fewer kinds of Just Causes than a larger collective may, since by one account an individual cannot claim the right to defend a collective good (Stilz 2014, Fabre 2014). I personally am inclined to the view that if a collective can kill for some reason, an individual ought also to be able to kill for that reason (subject to the Right Authority criteria of course). But as this dissertation does not consider Just Cause, discussing the issue further would take us out of scope.
the risks to themselves or the likelihood of military success. To say otherwise would be to make it impossible for moral people to resist evil once it has become sufficiently powerful, and would deny the dignity of individuals as free-willed moral actors capable of sacrificing their lives for a just cause they believe in (cf. Harbour 2011). If this contradicts the traditional understanding of the JWT principle of Expectation of Success, then so be it.

Still, the hero of our Social Movement case is quite clearly getting the rest of his community involved. In this, it seems that Inciters and Social Movement are broadly similar at first glance. There are subtle differences, however, and it is on these differences that our theory must turn. Any theory of Standing (even one that will not countenance Lone Operator) ought to explain why Social Movement is legitimate, where Inciters and Communal Takeover both are not. Without already possessing the endorsement of the community, what justification can the hero claim for striking his blow in the first place when the rest of the community has avoided action?

(A question that this dissertation will not consider in any detail is when a would-be Right Authority is obligated to defer to existing authorities, and similarly whether and at what point members of the community would be obligated to fight at the direction of the Right Authority. That gets into the larger concerns of political obligation and military conscription, which are very far out of scope. For now, I am content to note the position of very long standing put forth by Pope Innocent IV that when sovereign authorities are unable or unwilling to deal with an immediate problem, local authorities have the

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120 Provided, of course, that such volunteers do not cause illegitimate risk to others—which is the whole point of this chapter (and indeed, this entire dissertation).
responsibility and hence the ability to defend those under their care. And I believe that
the requirements to be laid out below for gaining Right Authority are sufficiently
rigorous that anyone who satisfies them will *probably* meet any conceivable standard for
superseding existing authorities.\(^{121}\) Also worth repeating is that while sometimes this
chapter will use language specific to large-scale insurgencies against a state military for
the sake of concreteness, the theory is meant to be general enough to include all sorts of
wars fought between all sorts of actors, from states all the way down to individuals, and
all sorts of communities, from humanity as a whole all the way down to a family or group
of close comrades.)

**War Without the Need for Endorsement**

One claim seems to be self-evident as a boundary condition. An actor may act
without endorsement if the situation for the community is *already* so bad that open war
will not make it any worse.\(^{122}\) That is, there is no need to gain the endorsement of the
community because your actions are not actually causing additional harm. (Let us call
this case *Catastrophe*.) Nor does this justification necessarily require that the Catastrophe
be actually in progress—only that it is certain or practically certain to occur. For
example, suppose that a time traveler were to arrive in Berlin in 1939; knowing that the
Nazi regime will eventually murder most of the Jewish population, the time traveler
launches an insurgency against the regime, claiming to act on behalf of the Jews. The

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\(^{121}\) One could also question the conventional wisdom that sovereignty may *only* rest with a Hobbesian
unitary sovereign; Spinoza, for one, argued for a more polycentric view of sovereignty that was influenced
by his experiences in the United Provinces of Holland, which did not feature a unitary sovereign but rather
a meshwork of interdependent power centers (Prokhovnik 2001).

\(^{122}\) Cf. Goodwin (2001:47), who finds that the most successful revolutions tend to occur in states where
the regime is already arbitrarily persecuting the populace.
German Jews are aghast, desperate as they are to keep their heads down and ride out their already-precarious position, and they do everything they could to distance themselves from the insurgency. Nevertheless, our time-traveling insurgent would be justified in ignoring their protests.

This is related to existing arguments about international intervention when a community faces an existential emergency (cf. Walzer 1977:106-108 et al.); but the implications of this particular formulation can be extended beyond what people usually think of as an emergency. It is not the emergency *per se* that permits action in the present theory, but rather that the action will not make things worse.

For practical purposes, the tendency of wartime opponents to use disproportionate retaliation will usually restrict the scope of this rule to cases of obvious * Catastrophe*, simply because it is difficult indeed to predict how much worse things could get once a war begins (cf. Arendt 1970). Still, if we could make sure through some means that the community would not be harmed any further by our actions, even if it is not currently in crisis, that would seem to render communal endorsement unnecessary.

This is the justification for allowing individuals or small groups to fight wars on their own behalf, and not as representatives of any larger community (*Lone Operator*). Since their actions are not attributed to anyone else, they do not make matters worse for any associated community and they need not justify themselves to anyone else either.

Furthermore, once we are willing to countenance a single Lone Operator making war, in theory any number of actors could independently arise and make war on a shared unjust enemy if there were such a crisis situation, without needing to coordinate with each other
(subject to the other requirements of Right Authority and Just War Theory generally, of course).

To be sure, if the Lone Operators' actions end up having repercussions for a larger community, they would then lose their license to act without Standing and would have to justify themselves to the community. Since most wars do tend to expand and cause harm beyond the original intention, individuals would need to exercise tremendous care in claiming the right to go to war—more care than most bellicose individuals are apt to show, unfortunately. From a consequentialist perspective it may make sense to limit the scope for individual action, in general; but it remains the case that individuals have the right to make war, when they take care not to implicate others in that war and otherwise satisfy the requirements of JWT. Denying such a right would be counter to the liberal program of individual rights, which claims that the rights of the state are those assigned to it by its citizens and nothing more.\footnote{Furthermore, I claim that there is a critical political value in having individuals retain a right of war. As a general rule, democracy and political freedom have flourished the most when weapons and military capabilities were widely dispersed among the populace, as with the hoplites of Athens and with the armed militiamen of the American colonies. When military power is centralized under a strong state, the death of democracy is practically inevitable in the long run. See Finer (1999).}

But what of cases where the community is suffering clear and sufficient harms that satisfy Just Cause (say, its children are subject to random selection for gladiator games for the ruling class’s amusement), yet if true war were to begin, matters would still become worse? Given that this is by far the most common case in the real world, it is vitally important that we can determine a guiding principle that can cleanly cut between Social Movement on the one hand, and Inciters or Communal Takeover on the other.

To do that, we need to discuss how one can gain Standing.
**Acquiring Standing as a Dynamic Process**

We have three different types of circumstances where an actor might claim the right to make war. The first two are when wartime Standing is explicitly conferred by the community (*Communal Authorization*) on the one hand, and when the war would not cause additional harm to the community on the other (*Catastrophe* or *Lone Operator*). The first case simply involves explicit consent or some other form of political authority. Trying to justify the concept of political authority itself is far beyond the scope of this work, so I will simply note that *Communal Authorization* does in fact rely on the existence of some form of justified political authority and leave it at that. In the second circumstance, since no additional harm is done to the community, no justification should be required. These are both fairly straightforward. The complicated part is trying to define the third circumstance—where your struggle is on behalf of a wider community that has not yet given its approval (*Social Movement*).

Let us begin by arguing from contradiction again. Suppose that it were absolutely forbidden to drag a wider community into a struggle without its authorization. What would be the result? One could say that would-be warfighters (assume that they are insurgents for convenience) would have to first convince their compatriots to give their support, before they could begin their war. Yet to do so, the insurgents would have to build an organization in order to promulgate their views, and to prepare for the hoped-for war—even if they are ostensibly peaceful and would not begin the war without the

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124 Of course, in war the means have a tendency to overwhelm the ends (Arendt 1970); should a conflict threaten to spill over and affect the community, it would immediately need further justification of the type we presently discuss.
necessary support. But the enemy side would quite reasonably see such an organization as being *prima facie* threatening; whether or not Just War Theory would allow them to, the enemy is likely to strike at the “peaceful” organization, which after all is agitating for war. As a result, the community is at risk of being involved in the conflict regardless. By this logic, then, the mere act of creating a “peaceful” organization devoted to radical views would be forbidden without communal authorization, since it does raise the risk to the community—dictators often treat nonviolent organizations as threats to be crushed with violence. But how then are you supposed to get communal authorization without having the chance to argue your case?  

This result is unacceptable, in that it effectively shuts down communal debate and offers no remedy if the official authority is divided, or co-opted by the enemy. Our conundrum highlights one of the weak points in conventional JWT: it relies on static analysis of particular points in time, neglecting the truth that conflict is dynamic and takes place as a series of connected stages over time (cf. Lango 2004). A static analysis of almost any small band of revolutionaries would seem to disqualify them on RA grounds, yet the same band might appear legitimate a few years later, once the community is solidly behind them and their capacity to meet the other RA requirements has been built.

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125 Indeed, this Catch-22 applies equally to some of the other Right Authority requirements, such as the duty to control subordinates (which we will discuss next chapter). To have the capacity to fulfill your obligations, it seems you must either already have the full weight of the community behind you, or else you must have *already* launched your struggle and built that capacity over time—which would mean that in its initial phases, the struggle was fought without having satisfied the requirements in question (cf. Buchanan 2013). The analysis to follow, which suggests the possibility of *partial* Standing, will also apply to these other requirements of Right Authority, with the conspicuous exception of the capacity for judgment: either you can judge the necessity and prudence of a war or you cannot. Fudging that requirement would be criminal.
(cf. Buchanan 2013). Oaks must grow from acorns. How can we recognize, and justify, the acorns?

It seems then that there ought to be some way to justify exposing the community to some small level of risk even without their authorization. What principle could justify such a risk? And then, if you accept that principle and launch your war without communal authorization, at what point do you need to have true authorization again? What would justify the dividing line between “can act without authorization” and “must secure authorization”?

I do not believe that such a dichotomous dividing line can be identified, or justified. To say that “9” is allowed without restriction, while “10” is utterly forbidden, must always be arbitrary when we are dealing with a social process as messy and analog as war. I believe that the foregoing discussion points instead to a vision of Right Authority that is *dynamic* and a *continuous variable*, as opposed to being *static* and *categorical*. In short, an actor that does not *yet* have the approval of the community may nevertheless be permitted to begin a conflict, by acting in ways that establish a *partial* and *provisional* Standing.

To the extent possible, the actor lacking communal approval must set up structures and patterns of interaction with the community that work to *build* such approval—for example, propaganda efforts, contacts with the formal leadership, availability to the community in order to answer complaints against its conduct, and so on. By doing so, the
actor commits to acting in a legitimate manner and demonstrates that it takes its responsibilities to the community seriously.\footnote{126}{Contrast with Held (2005:187), who writes that “judgments about the legitimacy of existing governments depend in part on what is thought to be their ability to continue to represent those governed.”}

As its efforts result in increasing popular support, the group would likewise have a partial right to make war in increasing measure. In the early stages, such a war would have to hew relatively closely to the “self-defense” side of the conflict spectrum. Targets would have to self-evidently deserve being targeted as individuals, the harms being redressed would have to be ongoing or quite recent, and the general tenor of the communications with the enemy side (either explicit or implicit—that is, conveyed by the group’s actual behavior) would have to be conciliatory: “We act in order to right particular wrongs. We are not your enemies altogether. If these wrongs are addressed, our conflict will end. Nor is our struggle that of our people as a whole, and therefore you ought not involve them.” Moreover, such communication would have to be sincere. The group does not have the approval of the community for a general conflict; therefore, even if the armed group wishes for such a conflict, it ought to seek to limit the community’s exposure to justifiable retaliation (cf. Finlay 2013), and furthermore it ought to terminate hostilities if the enemy side does indeed address the immediate wrong.\footnote{127}{Also useful could be the more conciliatory model of security discussed by Avant (2007), followed by some NGOs or corporations in conflict zones specifically because they lack the authority claimed by states to engage in more dichotomous conflict.} (Afterward, the group could return to seeking expanded Standing from the community if it seeks other grounds for conflict, but it would have to make that case.)

An Aside on Self-Defense
This initial permission to make restricted war derives most of its force from the value of self-defense, since the group’s behavior only goes beyond self-and-other-defense in limited ways. But if so, the permission to make restricted war assumes that self-defense in the proper circumstances is always permissible and requires no further justification beyond itself. One might ask: if the risk of endangering the community can curtail one’s permission to begin a war, might it also curtail one’s right to engage in self-defense? For example, suppose that you are a member of a minority community that is only barely tolerated by the majority, and you are attacked by someone from the majority community. You know that if you kill your attacker, the other community will inevitably launch pogroms or lynchings, leading to the deaths of many of your compatriots. Must you then allow yourself to be murdered without fighting back?

I claim that the answer is no. It might be an act of heroic self-sacrifice to forbear from defending yourself, but it is not obligatory. Self-defense is a fundamental human right, requiring no further justification beyond the facts of the immediate case. Furthermore, engaging in self-defense does not create a reasonable belief in the minds of your opponents that your entire community is a threat. Acts of war, recall, are visited on many members of the opposing community regardless of what they happen to be doing at the time; thus, making war on an enemy creates a reasonable fear on the part of enemy individuals that they may be at risk of undeserved harm. But no such reasonable fear is at work here—the person you killed attacked you first, and you in turn engaged in self-defense, not a more expanded class of war. Thus, members of the other community are

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(formally speaking) perfectly safe from you, and have no reasonable grounds for thinking otherwise. If they then commit murders, that is their moral problem, not yours.

**Back to Gaining (And Losing) Standing**

If the enemy does not seek conciliation during a restricted war fought under partial Standing, and the warfighting group gains support over time, its right to make war would likewise strengthen. Targets could be selected from a wider range of enemy forces, relations with the enemy could become more overtly threatening, and the community (or, ideally, particular subgroups within the community) could be expected to bear more risk.

Still, so long as the group’s communal support is partial, its permission to make war would be severely circumscribed compared to what it would be if the group truly had communal authorization. And such partial Standing would only be maintained if the group continued to act in ways that were respectful of the community’s opinion: reaching out with propaganda and persuasion, seeking feedback from the community and providing means of redress for complaints, and in a more general sense continually acting to build its legitimacy, and its *capacity* to uphold the requirements of Right Authority (whether of communal sanction or controlling subordinates or whatever), even if those requirements are not upheld in their totality. Should the group begin to neglect its duties, then its Standing to fight wars would immediately be diminished.  

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129 It is true that in a charged context, some events can assume a significance far beyond what the bare facts of the case would seem to suggest; that is, they can become a *focal symbol* of further action (cf. Schelling 1957, O’Neill 1999). In such a case, it might be possible to predict that a justified act of self-defense could very well spark a wider conflict with the oppressive community. I still claim that such concerns ought not restrict one’s right of self-defense as a matter of morality, though they might as a matter of prudence.

130 The foregoing prescription has parallels with the discussion of Scheid (2012).
The same would apply, incidentally, if a group actually secures communal endorsement but then acts in a way to damage its legitimacy by neglecting its duties. A group with formal endorsement would, however, have somewhat more leeway to work with—that is, after all, what such endorsement means. Sometimes leadership must act in *prima facie* undesirable ways for the sake of the larger goals, and this is understood. If, however, such undesirable activity reaches a certain threshold or seems sufficiently unrelated to the community’s goals in the conflict, the leadership would lose its authorization to make war even if the formal institutions of power are still under its control.131

This framework thus addresses the question of how one can *lose* Right Authority, for example with failed states or tyrannies, that is neglected by much of the literature. While there is some discussion in JWT about when a state can be considered a “failed state” or a “rogue state,” this is generally for the purpose of justifying armed interventions by third parties. To date I have seen no other discussion of when an otherwise sovereign state may be deemed to have lost Right Authority, and thus the justified right to make war. While the present discussion is rather abstract (probably unavoidable, given the messy nature of social processes like legitimacy), it suggests straightforward principles for when a state or other recognized authority can be said to have lost its communal endorsement. This is a clear advance on the existing literature.

**Conclusion**

131 The application of this claim to formal state governments should be self-evident.
An actor contemplating war must consider its ill effects on the broader community. If no additional harm will be caused by conflict—either because the actor is sufficiently disassociated from others that no broader retaliation is likely, or because conditions are already \textit{that bad}—then the actor need not seek Standing over others. On the other hand, if war will indeed cause harm, then the actor must either be formally endorsed by the community, or else earn the right to operate under \textit{partial} Standing by working, to the extent it is able to do so, to secure the backing of the community.

This framework is comprehensive enough to encompass the activity of all sorts of actors, from sovereign states to mercenary groups, from corporations to insurgents, from local militias to even individuals in conflict with criminal groups and seeking to avoid retaliation against their families. It explains how Standing can be gained by those who initially lack it, and just as importantly, how it can be lost by those who initially possess it. It also explains the circumstances under which Standing is simply not an issue. In all these ways, the framework represents a significant advance over the state of the literature.

Having said all that, there is another concern beyond an armed group’s relationship to the larger community and the risks it invites from the enemy. That is the risk that the group itself poses to everyone around it. Put bluntly, the track record of non-state armed conflict is remarkably poor; of the small handful of rebellions that actually succeed in their aims, most of them cause far more misery for their populaces than was suffered under the previous regime (the Soviet Union being only the most tragic example of “betraying the revolution”). If a group gains the power it seeks, what assurances do we have that it will use that power well?
Additionally, what of a Right Authority’s associates? It is broadly assumed that subordinates in a formal military hierarchy need to be disciplined by the leadership; but what of irregular groups without such a hierarchy? What about when a sovereign state props up insurgents as its proxies? Or what about if two non-state groups are allies? Or even two states? Would a Right Authority have to discipline the actions of these sorts of actors, which are not under its direct control?

I argue that the requirement to control the violence of your subordinates is more general than the literature assumes, and can encompass any sort of enabling relationship between two actors—who would indeed each have an obligation to discipline the other. Explicating these responsibilities will be the task of the next chapter.


CHAPTER FIVE: DISCIPLINE

Looking at the history of rebellions, revolutions, and non-state wars, one is tempted to wonder why insurgents ever get the support of their communities in the first place. Most non-state-versus-state wars end decisively in favor of the state (Goodwin 2001, Byman 2007, et al.). Of the ones that do not, most of them drag on for years or decades, causing terrible suffering for everyone involved. Conflicts between multiple non-state actors rarely turn out better. And then, of the small handful of insurgencies that actually succeed in capturing the state, many of them turn out to be even worse than the regime that they replaced. The Bolshevik overthrow of Kerensky, Castro’s overthrow of Batista, or Khomeini’s overthrow of the Shah are illustrative but hardly exhaustive. Once in power, armed groups have an alarming habit of acting counter to their professed goals. This is the problem of "betraying the revolution."

This concern is not unique to revolutions. At the smallest scale, street gangs or vigilante groups are often formed because members of their community are left unprotected by the formal authorities (e.g. Sobel/Osoba 2009). But as they gain power and as their membership feels free to exploit others, such groups end up victimizing their own community most of all. Similarly, political powers such as the Italian city-states or weak modern states often hire mercenaries or Private Military Contractors (PMCs) in order to buttress their military power in the face of threats; but as Machiavelli discussed
in *The Prince*, sometimes the contracted groups turn on their employer, plundering assets or even overthrowing the government entirely. And even formal state governments sometimes claim to use force to achieve a benign goal, but then pursue other, more malign goals that victimize their populaces.

More generally, when a community grants authority to a warfighting actor, there is a great risk that the actor will use its power—immediately or in the future—to harm its own community for private gain or for malign ideological purposes. Warfighting actors may claim to represent a particular community, but in reality may cause terrible harm to the very people they ostensibly represent—undermining the stated purpose of the war itself.

Closely related, I believe, is an idea implicit in much of the Right Authority literature that a Right Authority should exert disciplinary control over its subordinates. As we noted in Chapter Two, a Right Authority was typically expected to enforce rules of conduct on its personnel, in order to uphold the requirements of justice in war. Indeed, this concern is at the heart of some critiques of state use of Private Military Contractors: according to this argument, states ought not to use PMCs specifically because they are unable to properly discipline the PMCs’ behavior, frustrating Right Intention (Pattison 2008, 2010). Unclear in the literature, however, is whether uncontrolled subordinates represent a deficiency in the nominal superior’s claim to Right Authority, so that the presence of undisciplined subordinates would actually impair their superior’s Right Authority altogether.
I believe that the answer can be “yes”—that is, the presence or absence of Discipline is a crucial component in one’s claim to Right Authority. The importance of Discipline can be shown when one considers that this issue has serious implications for the Just War principle of Expectation of Success. Though the literature on Expectation of Success has not generally considered the problem of “betraying the revolution” in that light, often focusing instead on the specific issue of achieving victory over the enemy,\textsuperscript{132} the logic is straightforward. If a war is fought in order to better the situation of a community, yet the armed actor in question is free of restraint so that it poses a danger of harming the community itself, the true Expectation of Success is reduced accordingly. As a result, to satisfy the Expectation of Success an actor ought to reduce the possibility that it will harm its own community.\textsuperscript{133}

But what would lead us to link Discipline to Right Authority specifically, as opposed to assigning the problem to Expectation of Success and having done with it? Simply put, the problem of disciplining subordinates is a problem of authority. Any theory of legitimate power, no matter what it is based on, assumes that power will be used according to some set of principles that distinguish it from illegitimate power. Unless power is and can be disciplined (whether by institutional means, by ideological means, or by raw counterforce), its legitimacy is made suspect. An Authority’s followers need

\textsuperscript{132} An exception is Harbour (2011).
\textsuperscript{133} One might suggest, in a mode similar to Pattison (2008), that failure to do so could also represent a breach of Right Intention; but following up on this suggestion would take me far out of scope.
assurances that it will not turn on them, and that is what a principle of Discipline would demand.\textsuperscript{134}

However, the modern literature on Just War Theory contains almost no discussion of a Right Authority’s obligation to control its subordinates, and none at all of any obligation to control \textit{itself}. What little there is mostly puts the question in terms of Right Intention, as with the discussion of PMCs noted above and explored more below. It seems that the whole question has dropped off the radar. Partly this lack is due, perhaps, to the widespread assumption that only states may be Right Authorities; and states presumably are able to control their forces adequately (though this is hardly the case in real life, as we shall see below). Partly it is due, I claim, to a lack of clarity around the whole concept of such disciplinary control.

First, what exactly do we mean by "subordinates," when we say that an Authority must control its subordinates? It is one thing to say that in a perfectly hierarchical military, the leadership at the top is responsible for everyone below it. But even in sovereign states, command discipline is not always perfect; soldiers often operate far from HQ, free from oversight. In more corrupt societies, military units can often work for selfish gain in defiance of official rules or even military objectives; in the Bosnian war, for example, it was common for fighters on opposing sides to sell each other arms and

\textsuperscript{134} While some might argue that the requirement of disciplinary control is meant to prevent atrocities of all kinds, or at least hold the authorities responsible for them, I am not sure yet that such a wide scope can be defended within the rubric of Right Authority \textit{per se}. As I understand it, Right Authority is primarily concerned with one’s relationship to one's own community. Duties not to harm outsiders can be morally compelling, but are perhaps better assigned to other conceptual categories. Regardless, any set of Discipline requirements capable of regulating atrocities against outsiders must surely presuppose the more basic methods of discipline needed to prevent harm to your own people. Therefore, without claiming that a Right Authority has \textit{no} duties to outsiders at all, I will focus here on the Authority’s duties not to harm those for whom it claims to act.
ammunition (Andreas 2004, Kaldor 2007). For practical purposes, such units are outside of the military hierarchy and relate to it not as subordinates in a hierarchy, but perhaps as allies or sometime-allies.

In non-state warfare, the prevalence of nonhierarchical relationships is particularly striking. Different armed groups claiming to represent the same community may coordinate with each other to greater or lesser degrees, in a relationship that can be marked by diverging goals or even open conflict. (Students of such conflicts will note that often, the most bitter struggle is waged not against the nominal enemy, but against other groups that claim to represent the same community.\(^{135}\) Or, as in the case of the Moros of Mindanao, small groups of fighters called *alliances* may freely shift their allegiance between several armed factions as their interests change, leaving it uncertain precisely who ought to be disciplining them, if anyone at all (cf. Ugarte 2008, 2009). If so, of what do the responsibilities of a Right Authority consist?

Once we broaden our view and start thinking not just in terms of hierarchical subordinates but also less tightly controlled actors, a whole new class of problems opens up. For example, what happens when two actors are broadly comparable in power—as with two allied armed groups, or indeed two allied states? Is one of them responsible for disciplining the other, and if so, which one? Or must each discipline the other? If one

\(^{135}\) The acrimonious relationship between the Jewish Agency and the Irgun Zvai Leumi during the struggle against the British Mandate in Palestine is a case in point; the two organizations were sometimes allies, sometimes deadly enemies, and the JA turned over IZL members to the British on more than one occasion. The JA leadership and particularly David Ben-Gurion felt justified in doing so because the IZL would not recognize their claimed authority as the legitimate representatives of the Jewish community; the IZL also used terrorist tactics calculated to provoke British reprisals against the whole populace (Hoffman 2006).
actor acts in an undisciplined manner, does that damage the Right Authority of the other actor for failing to stop it?

Asking the question in this way lays bare an interesting lacuna in the literature. As far as I can tell, there have been very few attempts (if any) to construct a theory of the moral obligations within alliances between states—whether between broad equals, or between a subordinate and preeminent power, or between states tied together in a federation. Would one state in such an association be required to discipline another, or not? Recently there has been some work on related topics in the fields of complicity and command responsibility as they relate to international law. However, this literature has not linked up with that of JWT, being mainly concerned with the state of international law instead of ethics as such.

This chapter will begin to fill the gap. I will argue that both the asserted requirement to control subordinates under Right Authority, and the implicit requirement to prevent “betraying the revolution” under Expectation of Success, can be assimilated within a single principle. That principle (the requirement of Discipline) can be justified in a straightforward manner within our present theoretical framework. That is, a Right Authority is required to take steps to protect its community from harm caused by itself, or by its subordinates, now or in the foreseeable future. The requirement of Discipline is thus a simple extension of the idea that a Right Authority may not expose its community to harm without consent, endorsement, or some other sufficient, morally compelling justification. Harms a community might incur in the course of the struggle might be

\[\text{136} \quad \text{Or, speaking more generally, alignments between states (cf. Wilkins 2012).}\]

\[\text{137} \quad \text{A good introduction to the state of the literature is Hakimi (2010).}\]
judged a cost worth paying; but when it is forces of the Right Authority itself that cause harm, then the very purpose and justification of the conflict has been compromised. The revolution has been betrayed. This outcome is so terrible that the Right Authority must prevent it from coming about, by binding its own future behavior and the behavior of its subordinates.

The present chapter will lay out in broad strokes a framework for evaluating the disciplinary responsibilities of a Right Authority vis-à-vis itself and other actors outside of its command structure. As with earlier chapters, I will sketch a generalizable model that can describe all sorts of relationships between actors, ranging from perfect hierarchies, to state sponsorship of insurgent groups, to loose alliances between states or nonstate actors. The key argument here is that both the duty of a Right Authority to discipline itself and its subordinates and its (potentially less rigorous) duty to discipline its more-loosely-affiliated allies derive from the same source: the degree to which the Right Authority’s own actions have enabled the actor in question to harm the Right Authority’s community. And with respect to betraying the revolution, I claim that a Right Authority must take steps to prevent the divergence of its goals from the community’s, now or in the foreseeable future.

**Private Military Contractors, A Brief Literature Review**

One place in which a well-specified Discipline doctrine would be helpful is in the controversy in the literature about state use of Private Military Contractors (PMCs).

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138 A nice feature of our claim that a Right Authority must discipline itself as well as its subordinates is that we thereby avoid getting tied up in knots over definitions—namely, who counts as the RA itself and who as its subordinates?
Several arguments have been made claiming that since PMCs work for selfish motives, that their interests will diverge from their employers' enough so that they cannot be trusted to carry out their employers' Right Intention, particularly to avoid atrocities. As such, runs the argument, PMCs ought not to be used at all. Yet if the argument in the preceding section holds, the mere fact that an Authority has imperfect control over a subordinate does not necessarily rule out the subordinate’s use. A Right Authority contemplating the use of PMCs would have to make the same determination as it does with any other subordinate: can it adequately discipline the PMC's behavior, regardless of means? If so, then PMCs may be used; if not, not.

Pattison (2008, 2010) argues, for example, that state reliance on PMCs can frustrate the Right Intention of the state, since PMCs may operate from other intentions that lead them to act contrary to the wishes of their employer. Furthermore, since PMCs’ conduct on the battlefield is imperfectly regulated by the state (if at all), use of PMCs works against the international regulation of *jus in bello* and will lead to avoidable atrocities, given that PMCs themselves may have strong interests in violating *jus in bello* for their own protection or for financial gain (cf. Singer 2003). Pattison argued therefore that states should be restricted from using PMCs in combat.\(^{139}\) Even as his views have evolved on the desirability of PMCs (see for example Baker/Pattison 2012), his recent qualified endorsement is dependent on the PMCs being subject to effective control by the state.

\(^{139}\) Fabre (2010:552) is unconvinced by the argument of the special moral riskiness of PMCs: “In the light of the long list of exactions committed against civilian populations by regular forces, precisely on the grounds that their cause was just, the suggestion that armed forces are more likely to abide by the laws of war than mercenaries seems somewhat optimistic.”
Hedahl (2009) goes so far as to argue that the use of PMCs in combat is corrosive to the very “profession of arms” itself, since mercenaries often have less oversight than do the regular soldiers they fight alongside (not to mention better pay). This is unacceptable, since (to Hedahl) the profession of arms ought to be uniquely under state control: “It is the possibility… to become a lawful combatant that sets the soldier apart” (2009:27).

That is, the claim of Walzer (1977:37) and others that a soldier is not responsible for \textit{jus ad bellum} is dependent on soldiering being a profession under the control of the state:

If we can see even the slightest hint of dignity in Rommel fighting the worst of wars in the best of ways, it is due solely to the possible nobility of the military profession itself. The profession of arms exists for the protection of the state and, in its noblest times, the protection of the rights of other innocents as well. Without the military profession, soldiers engaged in immoral wars would be no better than thugs and murderers. (2009:27)

Mercenaries, on the other hand, may choose whether or not to fight in a particular war. “They would, therefore, become much like a soldier who joins a revolution, morally culpable for not merely the crimes of \textit{jus in bello} but \textit{jus ad bellum} as well” (2009:29).

Furthermore, the mere existence of PMCs offer soldiers the option of joining them instead of the military, granting them the same ability to choose their wars and thus exposing them to the same moral liability even if they actually enlist in the military.\footnote{Hedahl sees this as a problematic outcome, which would be surprising to Fabre (2010), who views such voluntary choice of which wars to fight to be an unmitigated good.}

The only solution Hedahl sees as feasible to this claimed problem of too much responsibility for one’s wars is to bring PMCs entirely within the military chain of command, so as to remove their ability to pick and choose which wars to fight.
The critical literature assumes that states have few ways to adequately discipline PMCs. This assumption seems to be premature. Petersohn (2011) shows that in the case of PMCs in Iraq and Afghanistan, while initially PMCs fell outside of the normal channels of command-and-control and criminal justice, over time the military adapted and is applying more effective control. (Still, the military’s learning seems to be ad-hoc, and the level of coordination with PMCs does not yet seem to have reached an acceptable point.)

Furthermore, there are some avenues available even if the state is unable to monitor the PMC’s performance directly. Akcinaroglu and Radziszewski (2013) show with a statistical analysis of conflicts with PMCs that if a state hires multiple PMCs, they are considerably more likely to fight effectively and bring the conflict to an end. This is consistent with their hypothesis that competing PMCs will monitor each other’s performance, hoping to get more lucrative contracts if the incumbents slack off. So the claimed inability of states to monitor their contractors cannot be taken as given, but remains an empirical question for each case.

Another weakness of much of the PMC literature is that it contrasts the ostensibly uncontrollable PMC with an idealized picture of perfect military discipline, of the type that is most frequently found in developed Western states. For much of the world, however, the claimed contrast between private and public is nowhere near as sharp. First of all, many military units are free of effective control by their governments, as we will see (for example) in our case studies of the Congo in Chapter Eight. In many weak states, military units pose a threat to the very governments they ostensibly serve, using their
uniforms to present a front of legitimacy in order to ease their way toward personal power and wealth. In such situations, often a PMC is a more reliable agent for a government than its military, not less (Fredland 2004, Fabre 2010).

Second, in some parts of the world, formal military units actually hire themselves out to private employers or local government officials, sometimes openly and with the permission of their governments, sometimes secretly and corruptly.\textsuperscript{141} Military units may be seeking to fill gaps in their operational budgets, or simply to amass wealth and political pull. Regardless, if critics of PMCs were to be consistent in their criticism, one would be forced to conclude that most militaries in most of the world are unfit to carry out the Right Intention of their governments (assuming such Right Intention exists in the first place). The attacks on PMCs often rely on a claimed distinction between “public” and “private” violence that is difficult to sustain in practice (Owens 2008).

Unclear from this discussion is who should be blamed and to what extent if the state does not satisfactorily discipline its PMCs. Does the misbehavior of a PMC reflect only on itself, leaving the employer blameless except for negligence of some kind? Or is the employer responsible for the behavior of the PMC in a deeper sense, so that the state’s failure to discipline its subordinates actually diminishes its own Right Authority?

As we saw with other key concepts in JWT, it is unclear from this discussion what precisely underlies the claimed duty to discipline the subordinates of a Right Authority. The concept is left vague and unspecified. And as long as it remains so, it is a hopeless task to try to determine whether PMCs (or any other type of nonstate armed group) are

\textsuperscript{141} Jaskoski (2013) lays out a comparative study of four such cases: Ecuador, Peru, Indonesia, and Nigeria. The phenomenon is more widespread than these cases alone.
acceptable actors or anathema, and furthermore whether their use would jeopardize the Right Authority of the employer. In fact, the problem does not stop with PMCs. As noted in the introduction, many of the same problems of discipline and control occur with interstate alliances; when the United States puts together a "coalition of the willing," for example, no one doubts that the US is the preeminent actor setting the agenda; but if one of the member states were to commit atrocities, do those atrocities impact the moral status of the subordinate state alone? Or does it reflect back on the United States?

What we need is a clear principle determining what responsibilities a Right Authority has with regard to other actors it associates with. Therefore, our first task is to explain what we mean by Discipline, what duties a principle of Discipline would impose, and what would be the grounds for such a duty. At first glance, it seems that the duty of Discipline would apply specifically to the Right Authority’s duty to oversee another actor with which it is somehow associated. But what sort of association will do? And what sort of behavior needs disciplining, in a morally obligatory sense as opposed to a mere prudential one? To answer that, we must determine what are the grounds for the duty of Discipline.

**Why Discipline? A Brief Literature Review**

In the medieval literature on Just War Theory, a recurring theme is that controlling the behavior of subordinates is one of the key duties of a Right Authority. The modern literature seems to have neglected this aspect, except for the ongoing discussion of PMCs, which we shall examine later. Otherwise, to find relevant discussions we must turn to the international-law literatures on *command responsibility*, the *Responsibility to*
Protect, and the discussion of the ethics of complicity. This review will be fragmentary; rather than surveying the entire literature, we will instead note a few key articles that illustrate the main arguments in the field, which will justify the claims to come about the nature of the Discipline principle.

In international law, there are three elements that establish command responsibility between a superior and a subordinate who is committing crimes: a hierarchical relationship between them, knowledge on the part of the superior that the subordinate is committing the crime, and a failure to take reasonable measures to prevent the crime (Sivakumaran 2012). Sivakumaran argues that this can be extended even to irregular organizations, not merely formal ones, or even for de facto and not de jure superiors. “Nonetheless, they must be part of the command structure in addition to exercising effective control over the relevant individuals” (2012: 1136). He notes that some organizations do not have hierarchical structures, making it somewhat more difficult to determine where command responsibility lies; he holds that in more loosely organized groups, the key question for what obligations a superior is subject to is whether, and to what extent, he is able to control behavior and punish offenders. In short, whatever the organizational structure may be, a leader with authority is required to do whatever he is able to in order to prevent or punish misdeeds. If the leader lacks the power to deal with the problem, he is normally expected to refer the matter to the competent authorities; Sivakumaran notes that in irregular groups this can be more difficult, but asserts that all such groups can be assumed to have some disciplinary procedure that can enforce justice—without one, the group would ultimately fall apart.
Hakimi (2010) discusses the scope of the “Responsibility to Protect” (R2P), a principle that had been advanced by some international organizations and states (and which was used to justify international intervention in Libya in 2011). This principle claims that a state is obligated to protect its populace from atrocities, and if it does not or cannot, then the obligation passes to the international community as a whole. Hakimi notes that R2P does a poor job of specifying who exactly would be required to act in that circumstance, or what action would be required; she attempts to rectify that by surveying the international case law and developing a general framework of state bystander responsibility. An important consideration is that the international community’s interest in preventing atrocities is balanced by its interest in minimizing a state’s opportunities to interfere with other states; hence, R2P needs a limiting principle to prevent unrestrained vigilantism. Hakimi argues that “whether a state must protect someone from third-party harm depends on the state’s relationship with the third party and on the kind of harm caused” (2010:354). This is true even when the perpetrators are not the direct agents of the state, though Hakimi notes that

Control usually indicates that a state has the capacity to prevent the agent from acting badly. But control in the agency context is not exclusively or even primarily about the state’s capacity to control its agents. Rather, it reflects a normative judgement about the nature of the agency relationship: a state acts through its agents so should control them in order to ensure that they act properly on its behalf. Indeed, a state’s control over its agents is so desirable that the state is strictly responsible for their misconduct. The state is responsible regardless of whether, on the facts, it had the capacity to control a particular, misbehaving agent (2010:356).
For example, Serbia was declared by the International Court of Justice to have lacked responsibility for the genocide of the Bosnian Serbs, but they were still ruled to be in breach of the Responsibility to Protect—because even if the Bosnian Serbs were not under the state’s total control, the state of Serbia had nurtured and empowered them to serve its ends; thus, they ought to have exerted control to prevent atrocities. The same principle applies to a lesser degree when the relationship is less than total “control”; states may be obligated to influence private actors, IOs, or NGOs who are performing public functions under a grant of authority, for example.

In general, notes Hakimi, states are not required to restrain external actors, with a crucial exception: “a state may have to restrain external actors if it substantially enables them to violate rights” (2010:366). The initial act of enabling, in other words, trumps the other interests that generally limit the state’s obligations.

Hakimi acknowledges that some states will simply lack the capacity to influence those actors (external or internal) that it should, and this will mitigate their responsibilities to some extent; but she argues that part of the R2P is precisely an obligation to develop that capacity, and not merely to use one’s weakness as an excuse. She further argues in passing that existing doctrine of command responsibility ought to be modified in a similar fashion, to include not merely hierarchical authorities but also those in positions of incomplete control or influence.

Gaskarth (2011) discusses the typical understanding of complicity. He notes that the common-law definition of complicity requires knowledge of the crime being committed.

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142 The ruling seems bizarrely anodyne, given that the Bosnian Serb forces were created by Serbia specifically to carry out atrocities as a strategy of war (Kaldor 2007).
(or perhaps only knowledge of criminal intent in general), and intent to assist the criminal as a *facilitator* or to encourage the crime’s commission as a *solicitor*. This can sometimes be interpreted broadly in case law, so that in some cases an authority figure’s mere presence at a crime can be construed as endorsement and hence complicity, even in the absence of positive action. Likewise, someone who *ought* to have had knowledge of wrongdoing but deliberately kept himself ignorant can at least be viewed as morally reckless, if not fully culpable. Conversely, the “merchant’s defense” holds that routine, lawful behavior should not place someone in excessive danger of complicity, as for example a kitchenware store who sells a knife that is then used in a murder. (Gaskarth’s article was written to argue that the British government was complicit by moral standards, if not under international law, with the United States’s torture of terror suspects.)

Lepora and Goodin (2011) contribute a subtle discussion of the gradations within “complicity” as a concept, employing a close study of the injustices committed in the UN refugee camps outside of Rwanda from 1994 to 1996. In that case, Hutu civilians in the camps were ruthlessly exploited by the Hutu leadership of the Rwandan Armed Forces (FAR) and other groups. Food and medical supplies meant for civilians were systematically diverted by the armed groups and sold on the black market, or else used to reward and punish civilians for their compliance. Civilians were used as a pool of coercible recruits, as human shields, and as a cash cow given the dozens of UN or NGO agencies seeking to provide humanitarian aid.
In this circumstance, any group providing aid to the refugees in any way was likely to bear some responsibility for strengthening the FAR and other bad actors. The question Lepora and Goodin pose is, how much? They argue that we can distinguish between degrees of responsibility, given that some groups were more centrally involved with abuses than others. They appeal to a) the doctrine of *mens rea* (guilty mind), b) whether a given act is merely *causally related* to wrongdoing or actually *constitutes* it, and c) whether the actor involved is a *plan-maker* or a *plan-taker* to lay out a typology with six different moral gradations of involvement between X (the actor) and Y (the principal wrongdoer). So for example, the NGOs operating in the refugee camps were arguably *complicit* with the FAR, since they continued bringing in resources under circumstances where much of it was guaranteed to be expropriated, and did not even condemn the FAR’s actions. They were also complicit through the act of setting up the refugee camps in the first place, since they did not distinguish between civilians and militia—and indeed placed FAR commanders in positions of authority over the camps, cementing their power over the refugees.

In the reviewed literature, we have a number of conceptually similar concepts trying to address when an actor has a special responsibility for things other actors do—beyond the responsibility a total bystander might have. R2P addresses state actors, in the context

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The typology includes: *Cooperation* (adopting Y’s unjust plan as your own, acting interdependently with Y to achieve it, and acting in ways that partially constitute the wrongdoing), *Collaboration* (complying with Y’s plan without adopting it as your own, and not acting to be even partially constitutive of the primary wrongdoing), *Collusion* (secret Cooperation or Collaboration to trick others and for mutual benefit of X and Y), *Connivance* (turning a blind eye to Y in ways that will assist the wrongdoing by omission), *Condoning* (forgiving the wrongdoing of Y), and *Complicity* (not acting to constitute the wrongdoing or to contribute in any of the other above ways, but contributing to the injustice in some other, more general sense).
of international law; command responsibility addresses individuals in a command hierarchy; complicity seems to apply at any level, from individuals and NGOs all the way up to states (seeing as Gaskarth applies the concept to the United Kingdom). Many of the principles invoked seem to apply in each of these contexts, such as the claim that contributing to an agent's action raises your own level of responsibility, suggesting a pleasing generality that could be useful in our own discussion.

In particular, Hakimi (2010), Gaskarth (2011), and Lepora and Goodin (2011) all emphasize that an actor may be responsible for greater wrongs, or may incur greater obligations, if it has contributed material aid to the actor actually committing the harm. In addition, command responsibility requires that a superior take reasonable measures to prevent harm done by subordinates (Sivakumaran 2012); presumably this would be true a fortiori when the harm done is to one’s own community, and not only to people in general. On the other hand, command responsibility requires that the offenders be part of a hierarchy. It is not immediately clear what aspect of hierarchy is doing the work here; is it that the superior has the capacity to discipline his forces? Is it that the subordinate represents the superior in some fashion? Is it that the subordinate is misusing organizational resources provided by the superior?

What we still need to determine is which of these principles are appropriate to apply within a criterion of Right Authority. As we have noted, we are subject to many different sorts of ethical requirements from a multitude of contexts, but only some of them are specific to Right Authority—which I argue chiefly concerns an authority’s relationship with its own community, and not those outside of it. Only certain kinds of misdeeds
would put an actor's Right Authority at risk; others may be blameworthy, but would not necessarily threaten a Right Authority's status. How do we know the difference with regard to a principle of Discipline, and what would such a principle demand specifically?

To go further, we need to clarify what would ground the principle of Discipline—and therefore the precise content of a Right Authority’s obligation.

**What Grounds the Principle of Discipline?**

We can think of four ways with which to ground a Right Authority’s duty to discipline another actor who threatens the community. First, the duty of Discipline might be simply one manifestation of a broader duty for a Right Authority to defend the community from threats in general—whether from its enemies or from anyone else, including its own subordinates. But this explanation seems insufficient. From this standpoint, the fact that the threat emerges from an associate of the Right Authority is of secondary importance. It is unlikely therefore that this duty would motivate a particular requirement of Discipline *per se*, separate from a general duty to protect the community.

Second, a Right Authority might have a special duty to act when it has a particular ability to control the actor in question, so that not doing so seems more like culpable negligence (cf. Hakimi 2010). The US Army is in a unique position to discipline the behavior of its own troops, for example. Perhaps; but again, this seems to be a more

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144 Setting aside the case where an actor is behaving improperly because the so-called Right Authority actually directed it to do so. That issue gets more to *corporate* responsibility, rather than a Right Authority’s responsibility for others who may not be subordinate to it at all. For a not-very-recent discussion of corporate responsibility, see French (1984), May (1987), and Wilkins (1992); for later work, see Erskine (2003) and Skerker (2014).

generalized duty than one specifically referring to your own allies. For example, we might suppose that if a Right Authority had clear control over territory, it would be duty-bound to suppress banditry in that territory, even if it has no particular relationship with the bandits. Capability may well invoke obligation, but the obligation would be of a different character than that of Discipline, since the bandits in question are not necessarily associated with the Right Authority. Additionally, we imagine that a Right Authority who lacks the capability to discipline its own forces would be called upon to develop that capability, which suggests that the duty of Discipline is prior to the capability to carry it out (cf. Hakimi 2010).

Third, a Right Authority might be obliged to act when a predatory actor claims to act under color of its authority, for example if uniformed soldiers steal from the populace. We must be careful, however, to distinguish between actual uniformed soldiers, and those who perfidiously wear the uniform even though they do not actually belong to the Right Authority's forces. In both cases the Right Authority would be impelled to act, but the rationale is somewhat different. The perfidious predator's behavior constitutes a direct threat to the trust that the community has in the Right Authority, and hence a challenge to that authority itself. If the Authority does not respond, its own claim to legitimacy is weakened. Still, this seems to be a threat on the level of credibility and power politics, not necessarily one of morality. If a relatively weak Right Authority is unable to suppress perfidious predation, we might consider its failure to be proof of its powerlessness but not necessarily a moral failing.
With a true member of the organization, matters are different, which leads us to the fourth possible basis for a requirement of Discipline—in my view, the correct one. Specifically, over and above the prudential concerns noted with regard to perfidious predators, a Right Authority may be required to discipline its forces and allies specifically because it helped enable their activities in the first place, and therefore it has incurred a measure of responsibility for their behavior (cf. Hakimi 2010, Lepora/Goodin 2011). In the case of a uniformed soldier, for example, the Authority created the combat organization that magnified the soldier's skill, organizational resources, and ability to threaten his victims.

Especially in light of the similar concepts in the R2P and complicity literatures, this seems to be a promising avenue of attack. But how precisely would enabling generate an obligation? I argue that the obligation arises from the deeper requirement that a Right Authority act for the benefit of its community, or at least not so as to harm it. This goes back to an actor’s legitimation by its community—whatever form that legitimacy might take, a fundamental assumption behind any act of legitimation is that the power being granted legitimacy will use its power in beneficial ways. We may assume, therefore, that an act that is clearly harmful to the community is a grave threat to the actor’s Right Authority, and would need explicit endorsement to be justified. Thus, when a Right Authority acts in the course of its normal powers, none of those actions may foreseeably harm the community. In this context, if the Authority acts to enable another actor or even itself, it must take steps to ensure that the actor's subsequent behavior—or that subset of it which is made possible by the enabling—will serve the community and not harm it.
This one principle can explain both why a Right Authority would be responsible to control its direct subordinates (who are empowered by the training, organization, and materiel with which the Authority has provided them) and why the Authority would have a duty to control its external allies (who are enabled to some degree by the fact of the alliance or cooperation, to say nothing of direct transfers of resources). In both cases, the Right Authority has by its actions strengthened another actor, who might then pose a risk of harm to the community. To the extent that the specific harm was enabled by the specific actions of the Right Authority, the Authority would be responsible for the harm at one remove. Thus, the duty of Discipline would come into play.

When the enabling is relatively minor, such as providing aid to an independent group, the required Discipline may similarly be limited. Aid might need to be conditional on good behavior, with monitoring mechanisms built in, as with the Iranian Revolutionary Guard’s close supervision of Hizbullah (Byman/Kreps 2010). Or, the provision of aid itself may be structured in order to enforce compliance, especially with weapons or other goods that cannot be readily controlled after transfer (cf. Leeson 2007a). In theory, the principle can be applied to generate smaller and smaller duties from smaller and smaller grants of resources, to the point that even providing information to another actor about your future behavior might generate some small measure of duty to control that actor, scaled by the importance of the information in question.

For example, when the United States told Saddam Hussein that it would not protect Kuwait from invasion, what was transmitted was not tangible assistance of any kind; but it was vitally important information about the consequences Saddam might face from
making war, which was directly relevant to his decision to invade. In the event, the
information proved to be incorrect, but it still contributed materially to the sequence of
events leading to the Gulf War. If Iraqi control over Kuwait would have harmed the
American community, then the principle of Discipline would have required the United
States to be more judicious with its communications first of all, and then to take measures
of uncertain scope to control the damage. (Whether it would have demanded a full-blown
war is unlikely, though other moral principles might well have done some work in turn.
The present theory remains vague in the strength of its implications.)

By the same token, if an American soldier was trained by the United States, equipped
by the United States, and embedded into a command structure that increased his
destructive potential by the United States, and then induces the rest of his squad to blow
up an American bank and loot the wreckage, it would be the duty of the United States to
discipline him and his squad—not only because of the general expectation of upholding
basic law and morality, but because of the special duty incurred under the principle of
Discipline on account of the way that the US enabled him in the first place.

This framework should also encompass the inverse case—where a subordinate actor
must consider what obligations it has to discipline a superior actor, or if that is not
possible, whether the subordinate should refuse to cooperate entirely so as not to
empower the superior.\textsuperscript{146} If we have justified a Discipline requirement by emphasizing

\textsuperscript{146} This question has parallels with whether one may participate in an unjust war, or ought to abstain
from it or even to oppose it. Bazargan (2011) considers the case of a war which pursues both just and unjust
aims, such as a state seeking to halt genocidal massacres in a bordering state and also to annex the territory
in question; without the chance to annex territory, the state would rather not intervene at all. Such a war,
which would “make things better overall relative to the absence of such a war” even though some of the
aims are unjust, Bazargan calls a “narrowly unjust war” (2011:518). While the state in question should not
the assistance that a Right Authority has provided the counterparty, and if our larger theory permits us to evaluate any sort of actor as a Right Authority, then it should not matter whether you are empowering a less-powerful subordinate or a more-powerful superior—your obligation ought to be the same. Where the superior is acting to harm the subordinate’s community, it may well be that the subordinate will have to withhold assistance, or at least make sure that such assistance is not directed toward the harmful actions.

However, discussing the obligations of subordinates forces us to consider the problem of coercion or other mitigating factors, to which our subordinate Right Authority (or even a superior Right Authority) may be subject. This connects to several discussions in the literature, such as when soldiers may be obligated to fight for unjust causes, or when a government may be forced into a situation of “dirty hands.” The problem is vast, and will not be solved here. I am inclined to think that for a Right Authority to enable actors that do harm to its community would be a breach of Discipline in any event; however, such a breach might perhaps be excused by the mitigating factors, potentially leaving one’s

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fight for an unjust goal, an individual soldier or civilian often has no way to influence the policy of the state to encourage just behavior; to him, the war aims are “unalterable facts about the world” (2011:523). Instead, he is faced with a binary choice: support the narrowly unjust war as is, or withhold support. Given that the war would indeed make things better overall, Bazargan argues that individuals may indeed support the war in its entirety. “Broadly unjust” wars, on the other hand, may not be supported. Bazargan’s argument turns on two factors: that the “narrowly unjust war” will make the overall situation better, and that the individual is unable to change state policy. I am not entirely sure that the latter factor should be relevant. One could reformulate the argument for more generality by saying that one should work to the best of his ability (whatever that may be) to make the war aims entirely just, and may also support the resulting war even if it does remain “narrowly unjust”.

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Right Authority intact (if perhaps left on shakier ground). It is, after all, the function of a Right Authority to make hard decisions.¹⁴⁷

It is worth noting that in the present theory, actual instances of harm will not necessarily invalidate a Right Authority. Nor will their absence necessarily validate a Right Authority. When we judge an actor's performance in upholding Discipline, as with all the other requirements, we do so continuously in a dynamic process over time, using the present situation to make predictions about the future. Thus, if the Right Authority has put in place strong mechanisms to discipline its forces, and some of those forces misbehave anyway, the Authority's status can still be validated if the actors in question are punished appropriately or otherwise dealt with so that others are less tempted to follow their example. On the other hand, if the Right Authority has completely ignored the requirement of Discipline and has no protective mechanisms in place, even if there have been no problems so far, its status is on shaky ground—since there is nothing to discourage subordinates from behaving badly, should they choose to.

**Reciprocal Obligations of Discipline**

If a subordinate is responsible for disciplining its superior, just as a superior is responsible for disciplining the subordinate, then it seems that each party in a relationship has a potential obligation to discipline the other—provided that each is actually providing support or empowerment to the other. Properly speaking, it does not matter whether one party is more powerful than the other, or even whether both parties are similar in power.

¹⁴⁷ I am not sure if there is a practical difference between saying that Discipline is breached excusably, and saying that one’s excuses mean that Discipline was never breached. Still, it seems correct to me to acknowledge that harm is being done to your community, and that you have enabled that harm, even if you had reasons to do so.
Nor should it matter whether the relationship between them is that of a formal hierarchy, a less formal subordination, or even an arm’s-length relationship of equals, as in an alliance between states.

We can see the great advantage of grounding Discipline in one actor’s enabling another: it permits us to express the principle in general terms, applicable to any sort of actors in any sort of relationship with each other. Thus, as with our treatment of Standing in Chapter Four, we have laid out the broad strokes of a truly general theory that does not rely on any sort of assumptions about the nature of a “proper” actor or, in this case, a “proper” subordinate relationship. We can encompass any sort of relationship, be it political, geopolitical, social, or commercial, into our broad criterion of enabling. That allows us to do what few other theories have done, which is lay out principles for how members of an alliance are required to discipline each other.

The principle of Discipline that we have outlined here also suggests an answer to the difficulties raised earlier in the chapter with regard to PMCs. From our perspective, rather than bearing some sort of stigma because of its “private” nature, a PMC might best be characterized as an ally of the employer state, carrying the same moral risks and opportunities as any other independent ally. The Right Authority would be under an obligation to properly discipline the PMC’s behavior, and its own authority would suffer if such discipline is not upheld. By the same token, the PMC itself would also be evaluated as a Right Authority, and would have disciplinary responsibilities toward its employer—to ensure that its assistance does not enable the client to harm the PMC’s own community. This seems to be a more promising avenue of approach than trying to
summarily ban certain classes of warfighters—especially PMCs, which are becoming an increasingly important part of the war ecosystem.

**Self-Discipline**

As much as a Right Authority is duty-bound to discipline others, it is just as duty-bound to discipline *itself*. Though the discussions cited above have neglected this aspect of Discipline, it flows naturally from our premises—as we can see when we consider the range of dangers a community might face from armed warfighters.

Armed actors always pose the implicit risk of using violence against the very people they claim to defend. Types of such violence include:

1. *Undisciplined opportunism by individuals or small groups*, for example, looting, rapine, or casual murder by individual fighters of the Right Authority when they think they can get away with it. This becomes a problem for the Authority because the individual in question was empowered by the Authority, claims to act under the Authority's flag, and gains a measure of protection and compliance because of it. And as we discussed in the previous section, because such personnel were enabled by the Right Authority, the requirement of Discipline would apply. Here, the answer seems to be for the Authority to construct rigid oversight structures in order to effectively control the behavior of the individuals under arms.

   However, such a move is not entirely without risks; it runs smack into the second kind of violence against the community:

2. *Systematic predation by the armed group against its populace*. This is the typical modus operandi for all armed groups, non-state or state as well (states are typically more
polite about it, and call it taxation). During the American Revolution, the Continental
government was soon reduced to "paying" for expropriated goods with near-worthless
paper notes; in modern diaspora Tamil communities in Canada, the Tamil Tigers
exploited their access to community bank records and the like to extort "donations" from
their community (Wayland 2004). Bosnian armed groups in Sarajevo expropriated
around a third of all humanitarian aid entering the city (Andreas 2004). Drawing a line
here requires a bit of a judgment call, given that we generally believe that a community
ought to financially support armed forces acting in its defense; but it is not difficult to tell
when an armed group has gone beyond raising funds for the struggle and is instead
exploiting the populace to feed its own wealth and power.

Sadly, this kind of predation is made easier the more powerful and better organized
the group is, relative to the ability of the community at large to defend itself. While a
group need not be hierarchically centralized in order to predate its community,
centralized control will tend to make the group more effective, for good or ill.

3. Conflict over control, goals, ideology, or all of the above. This type of threat is
often the most dangerous. To paraphrase C.S. Lewis, one's greed might eventually be
sated, but one's ideological convictions may demand endless coercion of the community
to bring members into compliance with one's vision. And even if the armed group and
the community begin with the same set of goals, cultural drift or factional struggles
within the armed group can lead to far less desirable goals coming to the fore. For
example, the 1979 Iranian revolution was carried off by an ad-hoc coalition of labor
unions, communists, liberals, and Islamist followers of Ayatollah Khomeini; however,
once the Shah was overthrown Khomeini's forces carried out a purge that left them in sole control over the new government, and once in control they turned Iran into an oppressive theocracy.

Speaking more generally, communities face the danger that their chosen Right Authority may, at once or over time, pursue undesirable goals that harm the community. To defend against this danger, the Right Authority is obliged to discipline itself, much as it would do for an ally or subordinate, and enable the community to restrain its behavior. That this requirement flows from the principle of Discipline is straightforward: if a Right Authority is duty-bound to discipline its allies and subordinates, to prevent them from harming the community as a result of the Authority’s enabling actions, then a fortiori the Authority must prevent itself from harming the community as well. Furthermore, a failure to do so would be a deficiency in the Authority’s appearance of Right Intention. Again, the concern is not whether such harm actually comes about, but whether (based on institutional analysis of the Right Authority’s relationship with the community) one may predict in the present that future harm is sufficiently likely.

**Requirements of Self-Discipline**

As noted, the problem of “betraying the revolution” occurs when an armed group, having gained power on behalf of a community, changes its behavior and predates upon or coerces that community. This can either be because the original group members lied about their intentions from the outset, or because once the group gains power, it attracts new members whose motives are malign (cf. Weinstein 2006), or else the original members are seduced by the lure of power, which is functionally the same thing.
problem is endemic among armed groups everywhere. Vigilante groups become gangs or warlord armies, revolutionaries become totalitarians, and democracies become ruled by military juntas with alarming frequency.

Given that, what is a would-be Right Authority to do? Most important, the group needs a plan to “safeguard the revolution,” that is, to prevent the group from becoming predatory or uncontrollable. First you need to discipline your followers to prevent the encroachment of undesirable goals (especially difficult in decentralized armies). This goes beyond the previous discussion of disciplining one’s subordinates, since here the danger to be addressed is ideological drift or “mission creep”. For example, during the Chechen insurgency against Russia, the formerly nationalist goals of the Chechen forces were soon partially supplanted by an Islamist agenda, promulgated by the insubordinate military commander Shamil Basayev. Due in part to the decentralized nature of the Chechen military, Basayev’s forces were able to launch hostage-taking operations in Russia and to unilaterally invade neighboring Dagestan, which provoked a savage reaction from the Russians against Chechnya as a whole.

Ideologically, the danger exists that the ends and means of the organization may shift in unjust directions. Therefore, some means needs to be put in place to ensure justice of ideology, so that unjust means of war or rule are not adopted out of convenience or power-seeking. Still, this means of indoctrination must be robust enough to resist capture by “evil” ideologues.¹⁴⁸

¹⁴⁸ I speculate that the most effective way to do this is with a carefully written document that has the infallible status of a constitution or divine prophecy, so that unauthorized modifications of it are illegitimate on their face, and would be restrained by communal action.
On that topic, the Discipline principle may have implications for the kind of ideology that can be permissibly advocated. In particular, ideologies that include a broad endorsement of “the ends justify the means” such as Stalinist or Trotskyite Communism (cf. Trotsky/Dewey/Novack 1973) or modern “transcendent” terrorism (cf. Hoffman 2006) may well be forbidden as a matter of course according to this reading, since they admit to no justified restraint whatsoever on the warfighting group.\(^{149}\)

A non-state group must develop a governance structure that can address all of these issues. But how can it do so in the early days of its formation, when a group lacks a strong internal organization? For that matter, how might an individual satisfy the Discipline requirement for himself (that is, ensure that he personally is not a threat to his own community), if he should want to make individual war?

Remember that the present model is meant to be generalizable, so that it can handle anything from sovereign states to a handful of revolutionaries sitting around a table and planning their struggle. As we discussed with regard to Standing, I claim that groups without the capability to truly Discipline themselves in the fullest sense may still earn a sort of partial Right Authority, by doing everything in their power to meet the full requirements in a dynamic, continuous process of legitimation and evaluation. So then, how exactly can partial Discipline be established and demonstrated?

I think the best way to provide Discipline in the early days is to outsource it. When designing a warfighting organization, our group must from the very beginning develop

\(^{149}\) Except perhaps when the group is deviating from its internal ideology—but even then, rationalization is powerful indeed, and before long the pigs are eating all the milk and apples (cf. *Animal Farm*).
ways to hold itself accountable to the community at large—particularly since it would lack strong structures of internal discipline. It seems that an armed group in its infancy should first submit itself to the jurisdiction of some communally-recognized body of justice, or a standard of justice that can be popularly administered. Failure to do so would be a grave demerit of its presumption to Right Authority. The fundamental principle that I believe we ought to follow is this: no actor can be trusted to restrain itself. To be trusted, an actor should formally submit itself to the judgment of outside powers. Thus a state regime or revolutionary group should be subject to a body of law that it does not create or administer (perhaps enacted by a popular legislature, or existing communal traditions, or common law, or whatever), or else it will simply rewrite the law as it goes in order to exempt itself from restraint. An individual should declare himself subject to some code of justice which can be legitimately enforced upon him by others, rather than simply declaring by fiat that he is a law unto himself; so too, state agents ought to be subject to a law that they do not administer.

150 An Islamist group, for example, might submit itself to jurists trained in a recognized school of Shari’ah jurisprudence, rather than setting up their own ad-hoc courts of self-interested laymen. A movement of secessionist Texans might declare themselves accountable to local courts instead of Federal ones.

151 Importantly, the mere existence of a legislature is not enough to ensure a true check on the armed forces—as the many “hybrid authoritarian” regimes attest (e.g. Diamond 2002, Levitsky/Way 2002, Schatz 2009). The legislature must have real power. For example, the institutional authority that the United States Congress has over budgeting (“the power of the purse”) is a much-attenuated echo of the former situation in which legislatures actually oversaw tax collection (Herb 2003). In the present American system where the IRS and the Treasury are part of the Executive branch, and the Federal Reserve is more closely tied to the Executive than to Congress, it would be relatively simple from a mechanical standpoint for the Executive to simply ignore Congress altogether if it chose to, as we have seen recently. For a Right Authority to truly protect against betraying the revolution, it ought to grant the community far more effective control over its activities.

152 On that topic, it is unfortunate that the U.S. Justice Department is formally attached to the Executive branch, and not for example the Judicial branch. This form of organization allows an unscrupulous Executive to violate the law with near-impunity, particularly if Congress is under his party's control or narrowly divided. Examples of such abuse are too numerous to list.
Admittedly, this may be difficult to square with the imperatives for secrecy that communities under threat must deal with; still, even on an informal basis, an armed group must develop links with larger community structures and submit (at least in part) to their moral authority. Claiming that you are not subject to conventional prohibitions against murder or rape or theft because you act in defense of the community would be to grossly violate the obligation of Discipline.

Next, when possible, the group should develop appropriate mechanisms for internal discipline and military justice. Wherever possible, it seems, these mechanisms should have some degree of communal oversight to keep them honest, or else the community’s right to administer its own justice should be recognized, in cases where the Right Authority has failed to discipline its own forces adequately. That is, structures of internal discipline ought to supplement the discipline of the community, and not supplant it.

As with the earlier discussion of Standing, as a group becomes more firmly established and powerful, its duties would correspondingly grow. Here, however, a group’s duty would not change as much over time, simply because a group should always be capable of restraining its own behavior to avoid harming its community—if by no other means than submitting to existing authorities. What would change is the precise content of the duty enforced by the Discipline principle. For example, a handful of revolutionaries would hardly need a JAG corps, where a large-scale military would.

Having laid out in general terms what the Discipline requirement consists of, let us see how it would look in practice, with a hypothetical PMC.
Illustration: Mercenaries

The disciplinary obligations of a mercenary group or PMC (for convenience, we will use the latter term to include the former) are dependent on how we resolve a certain ambiguity: what exactly constitutes a PMC’s "community"? Is it the PMC's owners and employees, in which case the PMC would only be required to discipline its behavior to protect its own personnel and nothing more? Or does the PMC's community also include its client, so that the PMC would have a disciplinary obligation to protect against behavior damaging to the client and its interests as well? Or, going further, could it also include the community of the client—the citizens of a state, for example—so that the PMC would be forbidden to advance the interests of the client against the client’s own community?

For example, suppose for the sake of argument that the actions of Blackwater personnel towards Iraqi citizens were excessively violent. Suppose further that we are setting aside any other moral obligations Blackwater might have, instead focusing strictly on obligations under the Discipline principle. Do we say that Blackwater's main obligation is to protect its own troops from being harmed by each other or by the corporate officers, and therefore the procedures in place are sufficient since they evidently permit the troops to defend themselves? Or do we say that Blackwater also has an obligation to avoid harming the interests of the United States, and that since antagonizing the populace does harm to those interests, Blackwater is obligated to tighten its own procedures and discipline its troops against indiscriminate behavior? Or could we even say that Blackwater has an obligation to protect the American people (as opposed to
the American state alone), so that if it judged the war in Iraq to be harmful to the people’s interests, it would be forced to withdraw altogether?

This dissertation will not take a position on this question. There are plausible arguments in either direction, depending on whether you believe that a PMC is fighting a war on its own behalf for the sake of the payment it will receive, or whether it is subordinating itself to the command and the war aims of its employer, formally speaking. I am not sure the distinction is morally relevant, and in any event the PMC will have moral duties outside of those found in the Right Authority principle that would tend to constrain its behavior. Still, we can briefly explore the possibilities with respect to Right Authority, to see what conclusions can be drawn.

In any case, a PMC (and any other armed group) must protect its own soldiers from being harmed by their own comrades, to the extent that such harm was enabled by the PMC’s training or other resources, and from ill-treatment or exploitation by their commanders or employers. To address the first requirement, institutions of justice must be set up that have sufficient autonomy from the chain of command to produce true verdicts in the event of wrongdoing, and with sharp enough teeth to deter bad behavior (whether such discipline is provided by PMC personnel acting as military police, or by subjecting the PMC to formal military justice, or external state law, or private investigators, or insurance companies, or whatever).

The requirement to protect against exploitation has a few moving parts. By hypothesis, let us assume that a PMC employee signed up voluntarily under a particular contract with particular terms of compensation, and can resign his position under
conditions provided in the contract. Let us assume further that if the contract is fulfilled to the letter, it is *prima facie* just regardless of the terms (setting aside issues such as true consent versus "structural" coercion, whether someone can consent to being treated unfairly, and so on). Further, let us assume that the rights of the company owners to the profit from the PMC's activities are clear and uncontested.

Even with these assumptions, once a PMC has deployed to its theater of operations, there are strong incentives for management and employees both to violate their contracts. First, the PMC could simply withhold pay from employees. Second, the PMC could coerce behavior from its employees that is outside of the scope of their contracts. For example, the PMC could commit its employees to a conflict of larger scope than their contracts provided for.\(^{153}\)

On the other side of the coin, the employees could defraud the management by withholding profits, shirking their duties, or accepting “side payments” (as economists put it) in return for compromising their mission—whether by being bribed directly, or by seeking out plunder or other illicit gains in ways that harm the larger conduct of the campaign. Furthermore, the employees could also use their superior power to simply take over the PMC management and expel or kill the former owners and managers.\(^{154}\)

To protect against these dangers, the PMC would have to put in place an institutional structure that can better align the diverging incentives of workers and management.

Specifics will vary, but some inspiration can be drawn from the work of Peter Leeson

\(^{153}\) On this point, many PMCs hire their armed personnel for short-term contracts to ensure maximum flexibility on both sides (Singer 2003).

\(^{154}\) As with the requirement to prevent harm from comrades or superiors, these same issues apply to state armies as well, not just PMCs. Arguing that PMCs are inherently less reliable than state armies will come to a surprise to many a democratic government that found itself facing a military coup.
(2007a, 2007b) and David Skarbek (2008, 2010), who investigate pirate ships, predatory villages, and prison gangs.

If we assume that PMCs must further discipline themselves to avoid harming their employer’s community, meanwhile, matters will differ depending on whether the employer’s own institutions are sound. If they are, then the PMC might simply subordinate itself to its employer’s chain of command. If the employer’s institutions are malign, the PMC may have to decide whether its very participation in war will end up harming the employer’s community (cf. Pattison 2013). It might be possible to invite in outside observers, perhaps from NGOs or from the community itself, to ensure that the PMC’s actions are not harmful; but whether such oversight would be effective in preventing abuses is questionable. Refusing employment by a bad boss may be the only acceptable option.

Turning to a Right Authority’s obligation to discipline its associates, the PMC and its employer both have obligations to discipline the other, so as to prevent each from harming the other’s community now or in future as a result of the material assistance each has provided the other. (This is distinct from any potential requirement that the PMC itself discipline its own behavior, if conceptually similar.) The force of this obligation seems to be quite strong in both directions; the employer is (presumably) benefiting considerably from the PMC’s operations in theater, and the more extensive the PMC’s operations, the more it would tend to enable the employer and the stronger the PMC’s disciplinary obligation grows. Likewise, the PMC would not be in theater were it not for its contract, and the pay and resources it receives from the employer are (by definition)
enough to enable its entire range of activity. Hence, the employer would be obligated to discipline the PMC. (For the United States’s spotty but improving record with such discipline, see Petersohn 2011.)

The precise content of the PMC’s obligation to discipline its employer would depend on the definition of its community, as discussed above. If the PMC need only protect its own members, it would have to ensure that the employer does not have a free hand to withhold payment, suddenly break the contract, or otherwise betray the PMC and expose them to harm. (Mercenaries have been on the receiving end of treachery as often as they were the instigators of it, as can be seen as far back as Xenophon's *Anabasis.*) This may imply that the compensation packages that firms such as Executive Outcomes have negotiated with their employers, in which they were promised exclusive control of lucrative natural resources, served to address their disciplinary obligation: whether or not the packages represented untrammeled greed, they also were a source of payment that was not subject to the whims of the employer country.\footnote{Interestingly, there is some empirical evidence that providing a PMC with resource concessions gives it strong incentives to succeed on the battlefield and maintain public order, such that conflicts are ended more rapidly than if no PMC had been brought in (Akcinaroglu/Radziszewski 2013).}

On the other hand, if the community that needs protecting includes that of the employer as well, matters become more complicated. The PMC would have to ensure that its support for the employer does not enable that employer to practice tyranny against its own community. Since many PMCs are hired by employer states specifically to wage
counterinsurgencies in ungoverned parts of their territory, this claim would have wide-ranging consequences in the real world.\footnote{156 The argument here has some similarities with Pattison's (2013, cf. Baker/Pattison 2012) argument that PMCs must only fight in support of just wars; but since the present discussion focuses on Discipline in particular, my claims are consequently more narrow.}

How far does such an obligation go? If an employer state hires a PMC to fight its just wars so that it can redeploy its military home and engage in a brutal crackdown against the citizenry, is that the responsibility of the PMC? I would argue yes, because it is the PMC's presence that enables the state to free up its forces. But what if the magnitude of the employer's oppression is relatively small? What if, for example, the state imposes regressive taxes in order to pay for a PMC's fee, placing a burden on the citizenry? The question is important, but cannot be answered definitively here.

In general, however, consistent application of the “enabling” test generates a series of requirements that a Right Authority would have to satisfy under the Discipline criterion. Additionally, the same criterion can readily apply to both the PMC and to its employer state. The Discipline criterion thus represents a substantial advance over the current state of JWT theory.

**Conclusion**

In this chapter, I have argued that inherent in the concept of Right Authority is a criterion of Discipline—that a Right Authority needs to ensure that its own actions do not and will not pose a threat to its community, and that other actors that it has enabled will not thereby become threats either. This follows in a straightforward manner from the claim we made with regard to Standing: an authority's actions should not harm its
community without special endorsement. And when the authority is causing harm to the community directly, in ways not necessary to the prosecution of the war, we may assume as a matter of course that such harm is counter to the interests of the community, and thus would not be endorsed in any event. As such, a Right Authority would be obligated to prevent such harm from coming about as a result of its own actions (which include actions that enable other actors).

This has far-reaching implications, particularly with regard to the claim that a Right Authority ought to discipline itself; especially when we are dealing with a nascent or partial Right Authority, the best way to fulfill its obligations may well be for it to place itself under the jurisdiction of an outside regulator, such as the community as a whole. We should be skeptical of a would-be Right Authority that claims the right to act without oversight, however pure its motives. We should also, I claim, reject legitimating ideologies claim that "the end justifies the means," since they deny the very possibility of limits on its actions. (This latter claim is sure to raise some hackles, and the Discipline criterion would be far-reaching enough without it, but I believe that the claim about unacceptable ideologies follows from the initial premise nevertheless.)

The principles of Discipline laid out in this chapter, as with the other components of Right Authority discussed previously, are formulated in general terms. As a result, they can readily address any relationship where one actor enables another—whether in a hierarchical relationship of superior to subordinate, or subordinate to superior, or between independent actors of similar power such as sovereign states in an alliance. This shows how powerful a theory can become when it is expressed in general terms, flowing from
fundamental premises without ad-hoc stipulations designed to fit it into the particulars of a single class of cases (that is, sovereign states).

It should be even more evident at this stage that Right Authority simply cannot be viewed as a dichotomous variable (either you have it or you don't). The standard I have argued for flows in an uncomplicated way from fairly basic premises; a Right Authority ought not to cause harm to its community through its actions, including when it enables other actors. Yet very few actual authorities meet the standard in its entirety. Still, many come close, and some come far closer than others. Viewing the concept of Right Authority as a sliding scale better accommodates the behavior of real humans seeking and using power; it also deploys a useful and much-needed corrective to the idea that a Right Authority may act with impunity under the color of sovereign right or any other justification. For very few actors have gone to the lengths necessary to establish Right Authority in its fullest measure—and therefore, their right to act in wartime should be viewed as partial, contingent, and subject to challenge.

We can see here just how the criterion of Right Authority changes form as soon as we conceive of it as a dynamic process. An embryonic group would be judged from its stated intentions; as soon as it gains any amount of power, it is judged again and continuously from its progress toward complete Right Authority. This same judgment would be applied to existing authorities; a state's glorious history of participatory democracy means little if it engages in repression today, or even if it is moving quickly enough in that direction. Right Authority is something that must be carefully sought out, energetically upheld, and scrupulously maintained.
In short, once we introduce the concept of a partial and dynamic Right Authority, our attention is inexorably drawn to the ways in which Right Authority can be gained, or lost. Thus, we gain a powerful tool of moral critique to use against status quo powers that seek to excuse their current misdeeds by referencing a halcyon past. Especially in the modern age where proxy warfare and endless support for insurgencies seem to be the order of the day, it is important to reiterate that a Right Authority cannot be cavalier with its choice of allies—nor can it be careless with how its actions harm the community it is supposed to defend.
CHAPTER SIX: CASE STUDY—THE MOROS OF MINDANAO

The case of the long-running Moro insurgency of Mindanao, in the Philippines, is hardly the cleanest one for theories of Right Authority. It is messy, involving a slew of different actors shifting fluidly between cooperation and bitter enmity, some of whom act illegitimately and cause tremendous suffering to innocents. But it is just this messiness that makes the Mindanao case useful: it shows that Dynamic Legitimacy theory is the only one that even comes close to providing an analytical vocabulary capable of interpreting the situation.

Historical Overview

The Moros had been members of independent Muslim sultanates for hundreds of years. They were able to fight off Spanish conquest from the mid-1500s until the late 19th century, when the Spanish used steam-powered warships to finally conquer much of the Moro islands (Chalk 1997, Rabasa et al. 2007). The Spanish despised the Moros, thanks to their own bitter struggle with the Muslim Moors of Andalusia, and strove mightily to enforce Catholicism and to transplant good Catholics from the more cooperative southern islands in order to overwhelm the locals. The process was accelerated once Spain turned the Philippines over to the United States, which finally crushed Moro resistance in 1913 and thereafter encouraged settlement by Christians from...
the other islands (Rabasa et al. 2007). The Public Land Act of 1936, for example, allowed Christians to buy up to 144 hectares of formerly public land, whereas “non-Christians” could only buy up to 4 hectares (Montiel/de Guzman/Macapagal 2012).

Colonization went even more rapidly after Philippine independence in 1946. The Catholic state offered free land holdings on Mindanao to settlers from the other islands (particularly to demobilized Huk communist insurgents). The land in question was typically taken from land worked by Moro tenant farmers, which had been held in trust by the local Moro noblemen (Tan 2000, Rabasa et al. 2007). As a result, bitter conflicts arose between the indigenous Moro tribes and the Christian settlers, to the point of armed violence between local militias.

The violence was exacerbated by the deeply corrupt nature of the Philippine state, in which oligarchs and political officials fight over the distribution of political patronage, and often create armed gangs with which to attack their rivals (Dunham-Scott 2012). The Mindanao island is terribly poor; Moros believe that their poverty is maintained by the corruption of local officials and the central government that backs them up, which systematically works against Moro interests to plunder the natural wealth of the island (Rabasa et al. 2007).

Poor governance, loss of territory, fears that the Moro ethnoreligious community (“Bangsamoro”) was under threat, and feelings of grievance against an interloping colonial government led ultimately to the formation of the Mindanao Independence Movement (MIM) in 1969, which initially planned for a nonviolent campaign (such is the

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157 Nevertheless, the Moros are proud of their claimed heritage as the “only unconquered peoples in all the history of the Philippines” (Dunham-Scott 2012:73).
claim, at any rate). These plans were thwarted by Ferdinand Marcos’s unwillingness to make any concessions whatsoever, and the overt support by the Philippine army for local Christian militias in their campaign to “purge” Islam from the islands (Chalk 1997).

Other, more Islamist organizations soon emerged such as the Union of Islamic Forces and Organizations (UIFO) and the Ansar al-Islam (which received funding from states in the Middle East, notably Libya). These groups cooperated with the MIM in several ways including shared training bases in Malaysia, and in 1971 MIM and the other organizations merged to become the Moro National Liberation Front (MNLF), an umbrella group that was more overtly Islamic, but which retained a predominantly communist orientation (Tan 2000). The MNLF received crucial support from the Organization of Islamic Conferences (OIC), Libya, and Indonesia (which was retaliating for Philippine support for armed groups in Indonesia).

The MNLF demanded independence for Mindanao, arguing that this was the only way to solve the “Bangsamoro question.” Over time, they fought an effective insurgency against the Philippine government. In 1975, following offers by Arab states to broker peace talks, Marcos began negotiating with the MNLF. In 1976, the two sides signed the Tripoli Agreement under the auspices of the OIC; it called for a ceasefire and the creation of an autonomous Muslim region comprising all of the southern Philippines, but not Moro independence.

The agreement failed due to opposition by Christian inhabitants who objected to their inclusion in a Muslim zone, and due to Marcos failing to implement the agreement. Additionally, more radical elements within the MNLF rejected the agreement and
demanded full independence, breaking off in 1977 to form the Moro Islamic Liberation Front (MILF) (Chalk 1997). More overtly Islamist in character, led by imams trained at Egypt’s Al-Azhar University, they objected to the MNLF’s leftist tenor and demanded a Muslim republic that would institute *Shari’a* law.

In 1987, President Corazon Aquino signed the Organic Act for ARMM (that is, “Autonomous Region of Muslim Mindanao”), which proposed to implement the Tripoli Agreement on a province-by-province basis after a vote, to take into account the objections of the Christian population. In the following plebiscite, the predominantly Muslim provinces of Maguindanao, Lanao del Sur, Sulu and Tawi-Tawi voted for autonomy; the other nine provinces (majority Christian) rejected it. Thus, the ARMM autonomous region (originally to have been created in 1990) included only 65% of the Moro population. Both MNLF and MILF rejected the ARMM Act, unsurprisingly (Chalk 1997).

In 1993, the Philippine government and the MNLF signed an accord to create the ARMM autonomous region in Mindanao, an agreement backed by Indonesia (the long-time patron of MNLF); but the government insisted that its constitution required a popular referendum before the agreement could be ratified. Such a referendum would have been disastrous for the Moros, since Catholics now outnumbered Muslims in much of Mindanao. On the other hand, the MNLF’s patrons Indonesia and the OIC favored continued negotiations, forcing the MNLF to remain in the peace process. The impasse weakened the MNLF, which lost popular support; additionally, many of its military

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158 Though the timeline of MILF’s founding is somewhat obscure; some sources describe it as arising in parallel with the MNLF, drawing from different bases of support (Montiel/de Guzman/Macapagal 2012).
commands surrendered to the government following a reconciliation offer (Tan 2000). Furthermore, even among fighters nominally loyal to the MNLF, control was not absolute. “Renegade” MNLF commands opposed to the peace process launched a wave of bombing attacks across cities in the south in 1993 and 1994 (Tan 2000).

At about this time, the Abu Sayyaf Group (ASG) emerged, founded by veterans of the Afghanistan *jihad* against the Soviets (Chalk 1997, cf. Ugarte 2008)\(^{159}\) and supported by money from the Al-Qaida network (Dunham-Scott 2012). More radical than the MILF, the ASG called for the eradication of the Christian communities on Mindanao and engaged in terrorist attacks against civilians, including beheadings of women and children.\(^{160}\) ASG also cooperated with Al-Qaida in exchange for continued financial support, supporting AQ’s creation of a training and logistical hub in the Philippines, which has built links to other Islamic groups in Malaysia, Thailand, and Aceh (Chalk 2010), such as Jemaah Islamiya (O’Brien 2012). ASG became known both for spectacular mass-casualty attacks such as the 1995 raid on Ipil in which over a hundred civilians were killed, and for highly lucrative kidnapping-for-ransom (KFR) operations which provided them with considerable funds, which could then be used to recruit new members.

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\(^{159}\) O’Brien (2012) dates the actual founding of ASG back to the 1980s, when Abdurajak Janjalani formed al-Harakatul al-Islamiyyah (AHAI), or the “Islamic Movement,” as an Islamic proselytizing movement. Janjalani would go on to serve in the MNLF until his break with them in 1991, and led the ASG until his death in 1998 in a gunfight with Philippine police.

\(^{160}\) This in contrast to the MILF, which had more recently downplayed terrorist methods in favor of traditional guerrilla warfare. In 2003, MILF renounced terrorism entirely, hoping to avoid being embroiled in the Global War on Terror thanks to its historical linkages with Jemaah Islamiya and other groups, which dated from the Afghanistan *jihad*. MILF’s relationship with JI did not end, however, and JI personnel continued to use MILF training camps and vice versa. Apparently this is on the strength of relationships with local MILF commanders, and may or may not reflect the official policy of MILF leadership (Rabasa *et al.* 2007).
ASG has operational links with particular MILF commanders on the ground, apparently on the strength of personal relationships (O’Brien 2012). Abu Sayyaf also benefited from MNLF disunity, drawing support from disaffected local commanders. Eyewitnesses report tactical coordination between the ASG and elements of the MNLF, with ASG units taking refuge in MNLF bases while fleeing from the government (Chalk 2010).

Faced with its declining strength, the MNLF signed a true peace agreement in August 1996, the Draft Final Agreement (called the Davao Consensus). It established a council under its control that would oversee local development in Mindanao (including in Christian areas), and anticipated a final referendum over Muslim autonomy to be held in 1999 (Chalk 1997). MILF denounced the agreement (not least because they had been excluded from the negotiations) and declared that it was taking over the Moro campaign to form an Islamic state, since the MNLF had betrayed the community’s goal of true independence and not just limited autonomy. The Christian communities also protested the agreement, opposing any concessions to the Moros whatsoever (Tan 2000).

**Taking Stock of the Situation in 1996**

At this point, we have three main actors to deal with: the MNLF, the MILF, and the ASG. These are different groups, sometimes competing, sometimes cooperating, all of whom claim to speak for the Moro nation. So who has Right Authority at this moment in time, and why?

This case complicates traditional JWT conceptions of Right Authority in several ways. One might be tempted to describe the non-state groups as competing for the
allegiance of a clearly-defined nation. The Moros have a strong sense of their own identity as a polity, drawing from their centuries-long history as an independent Muslim sultanate. But things are not that simple. The “Moro nation” is in fact composed of at least thirteen different tribes, who speak different languages and have deep rivalries with each other even as they consider themselves part of the same national group (Rabasa et al. 2007).

MNLF draws most of its support from the Tausug tribe, the poorest tribal group in Mindanao, while MILF is supported by the Maguindanao, Maranao, and Irano tribes (Tan 2000, Chalk 2010, Rabasa et al. 2007, Dunham-Scott 2012), as well as the Yakans on Basilan (Abuza 2005). Abu Sayyaf, meanwhile, draws its personnel almost exclusively from the Tausug, in Jolo and Basilan. They attract recruits through their deep social networks with large amounts of money, raised from their kidnaping activities. Given the preceding, can any of these groups truly claim to represent all of the Moros, or can they only speak for particular tribes?

Existing theory is contradictory and inconclusive. Miller’s (2005) discussion would place emphasis on MNLF’s role as the official interlocutor of the Philippine government, recognized and supported by international actors. But such a theoretical move does not sit easily with the observed tendency of states to negotiate with the weaker of multiple insurgent groups, as part of a divide-and-conquer strategy (Cunningham 2011). Sjoberg’s (2009) or Scheid’s (2012) discussions would seem to privilege the MNLF as well, particularly on account of its willingness to negotiate and compromise, but have trouble dealing with the MNLF’s declining popular support and the corresponding rise of the
MILF. Meanwhile, arguments such as Fotion’s (2006) or Reitberger’s (2013) which claim that no one needs Right Authority at all would fail to consider the complexities of the present case—one actor’s refusal to end hostilities leads to the continuation of counterinsurgency operations by the state, which harms innocents in the same community who may never have supported the fighting in the first place.

Let us see what Dynamic Legitimacy theory can tell us.

Standing

When discussing Standing, we must ask several questions of each actor:

1. Does the Warfighter’s activity go beyond immediate self-defense?

2. If so, does the Warfighter’s activity increase the danger to others who are associated with it by sharing some salient social feature (that is, they are members of a community), such that those others might suffer retaliation?

3. Is the Warfighter generally accepted as an Authority by members of the community, for reasons generally acknowledged as legitimate?

4. If not, is the Warfighter actively attempting to build such Authority through engagement with the community?

5. Is the scope of the Warfighter’s violence, or its endangerment of the community, commensurate with the extent of its partial Authority?

Beginning with the MNLF, from their inception until the 1996 agreement, it seems evident first of all that they needed to have Standing (and Right Authority generally); the MNLF was prosecuting a long-running war for independence that went well beyond self-defense, and implicated the Moro peoples in general regardless of tribe. Certainly in the
beginning of their campaign it seems evident that the MNLF did indeed possess Standing to some degree—though the tribal differences complicate the picture. The Tausug tribe seems to have supported the MNLF steadfastly (while sometimes supporting the ASG as well); the other tribes were at times more supportive of the MILF. Can a group drawing from the Tausug tribe really claim to represent the Yakan or Sama tribes, even when they are all part of the Bangsamoro? And when does one level of identification become more salient than another?

Still, there does seem to be an initial presumption that the MNLF was able to speak for the Bangsamoro as a whole—perhaps because its goals would benefit the whole people if attained, perhaps because of their institutional recognition from external parties, perhaps simply because of its history as spokesmen for the Moro community, or something else entirely.¹⁶¹ (This presumption may have been put into question by MNLF’s precipitous decline in strength, however.)

Another serious difference in goals between MNLF and MILF is that the MNLF was Leftist, where MILF was Islamist. Conceivably, those Moros wishing for a more Islamic government would oppose any sort of MNLF authority over them, because for MNLF to achieve its goal would go against their preferred form of governance. The logic here is appealing, being closely related to the “boundary problem” for democratic polities: at

¹⁶¹ None of these is conclusive, but the present theory is able to tolerate more ambiguity on this question than are competing theories of Right Authority, simply because it views Authority as a social process that could have any number of possible bases, rather than being a formally defined property dependent on a particular chain of reasoning.
what point does disagreement within a polity become a divide between separate polities?\textsuperscript{162} At the moment, we will have to leave this question unresolved.

MILF, similarly, seems to have a certain level of Standing over their constituent tribal groups. In contrast to the MNLF, however, in 1996 MILF lacked external recognition either from outside states or from regional players like the Organization of Islamic Conferences. Instead, MILF drew much of its support from transnational jihadist groups such as Jemaah Islamiya, consequently engaging in terrorist campaigns. The additional risk this posed to the Philippine government, and the subsequent anti-terrorist activity these activities provoked, had ramifications for the level of suffering felt by the Moros. This would seem to weigh against MILF’s provisional Standing, if not for its constituent tribes than certainly for the Moros as a whole.

Oddly enough, Abu Sayyaf might well have had a plausible claim to Standing—but only as \textit{Lone Individuals}, not as true representatives of their people. This is so because the Tausug tribe’s situation is so miserable that its members gladly assist Abu Sayyaf kidnapping operations, in exchange for the lucrative profits therefrom.\textsuperscript{163} Furthermore, recent work by Ugarte (2008, 2009) argues that the best way to understand organizations like Abu Sayyaf is not as a single unified structure, but as fluid social networks that assemble on an ad-hoc basis for particular operations and then disperse again.

In these networks, the true unit of analysis is small groups of armed men, perhaps between 12 and 20 men strong, which Ugarte calls \textit{alliances} (following anthropologist

\textsuperscript{162} Cf. Abizadeh (2012).
\textsuperscript{163} “By mid-June 2001 the Abu Sayyaf were reportedly offering each new recruit (who was usually 15 to 20 years old) a high-powered rifle and monthly salary of P50,000” (Ugarte 2008:135).
Thomas Kiefer). Alliances might form around a kin-group nucleus and include the kin group’s local allies; then, several alliances might come together for larger-scale activities before returning home.\(^{164}\) An alliance might be affiliated with a single organization, but can also cooperate opportunistically with the MNLF, or Abu Sayyaf, or MILF, or all three at the same time, or the government, or else become a “lost command” and simply engage in banditry. Furthermore, local social ties and cross-cutting obligations might foster cooperation between seemingly antithetical groups such as the MNLF and Abu Sayyaf.

It is worth repeating that this analysis is irrespective of Just Cause or the other elements of Just War Theory. Abu Sayyaf in particular would make the world a better place if its members jumped off of a tall mountain. Still, that is not our purpose here. Provided that Abu Sayyaf’s activities do not cause more harm to their communities than good—which seems to have been the case during its early phase—then it would not need to demonstrate any larger Standing to satisfy the requirement of Right Authority.

However, Abu Sayyaf did not claim to represent only its members or the one tribe, but the Moro people in general. This claim cannot be sustained on the basis of their Standing.

**Discipline**

When assessing an actor on the basis of Discipline, we must ask the following questions:

\(^{164}\) Such alliances were critically important in the Philippines’s pre-colonial history as a series of weak sultanates, in which the absence of strong political institutions forced people to organize in close networks of allies for mutual defense; given the persistence of weak governance (Ugarte 2008, cf. Rabasa *et al.* 2007), alliances and violent feuds remain a durable part of the social landscape.
1. Does the Warfighter contribute to the power or capability of other actors, including its own personnel?

2. To a commensurate degree, are there structures in place to uphold Discipline (that is, to prevent the actors from harming the community)?

3. Are these structures durable in the face of institutional drift or active malice on the part of powerful actors?

4. Are there structures to prevent the illegitimate shifting of goals or ideology on the part of the Warfighter?

On these counts, the MNLF comes off less well even at this early stage. Several of its military commands defected to other groups in dissatisfaction over the various peace agreements, or else cooperated with MILF or Abu Sayyaf. This bodes ill for the MNLF’s ability to control its forces (and matters only became worse in the period after the ARMM agreement, as we shall see).

MILF does relatively better—in part because its leadership had observed the institutional weakness of the MNLF and took steps to avoid the same thing happening to them (Abuza 2005). While MILF often blamed terror attacks on uncontrollable “lost commands,” the consensus view is that this was a rhetorical tactic only, and that MILF’s command structures are fairly effective. And in contrast to Abu Sayyaf, MILF seems to have avoided harming its own civilians.

Abu Sayyaf is more worrisome. Its leadership was concentrated entirely in the person of its leader, Abdurajak Janjalani, who provided the strategic and tactical direction. Furthermore, ASG’s reliance on the alliance system meant that even Janjalani was unable
to enforce a disciplined command structure (Ugarte 2008). And while at first ASG seems not to have harmed Tausugs, there were no institutional reasons why that should be so, other than the need to attract new recruits. Indeed, when Janjalani was shot and killed in 1998, ASG mutated into something far more dangerous and less predictable.

**Post-1996**

MNLF stewardship of the Autonomous Region of Muslim Mindanao proved disastrous. The ARMM, already the most poverty-stricken region in the Philippines, became even more impoverished; World Bank poverty rates in the ARMM increased dramatically from 62.5% to 73.9% in just the first three years of MNLF governance (Rabasa et al. 2007). In part, this was because MNLF leaders used their new control over government contracts and development aid to enrich themselves considerably, at the expense of the residents of the ARMM (Abuza 2005).

As a result, the MNLF lost much of its support and the MILF has gained accordingly (Dunham-Scott 2012). By the late 1990s, MILF had become the main Moro rebel movement, and its armed wing outnumbered that of the MNLF (Tan 2000). The 2005 election within the ARMM demonstrated the decline in MNLF authority; in that election, the existing governor of the ARMM, Hussin (an MNLF leader), was voted out in favor of Datu Zaldy Ampatuan, a close ally of Philippine president Gloria Arroyo (Rabasa et al. 2007). Still, the continued support for the MNLF by its international patrons gave the group institutional stature that its competitors could not at first match (Tan 2000).

Starting in 1997, MILF began sporadic negotiations with the government, leading to an agreement in principle to recognize MILF in 1998 (Rabasa et al. 2007). But the talks
produced no final peace agreement; the Philippine government rejected any talk of Moro independence, and the MILF refused to settle for anything less (Chalk 2010). The talks broke down entirely in 2000, when the Philippine government of Joseph Estrada decided that MILF was taking advantage of the process to gain development funding and territory (Abuza 2005). Estrada ordered a sustained military offensive that only halted with his subsequent ouster and replacement by Gloria Arroyo. In 2001, MILF and the government announced a new Tripoli Agreement in which MILF for the first time alluded to “new formulas” short of full independence that would satisfy the Moro community.

The new peace process broke down in 2003 over the issue of “lost commands” that provided support for Jemaah Islamiya and Abu Sayyaf. Still, both sides eventually restarted negotiations. Abuza (2005) reported based on numerous interviews of MILF personnel that the leadership had realized that they would never win full independence, and instead decided to augment their grassroots support in order to win a popular referendum. In 2008, a Memorandum of Agreement was signed by the government and MILF, creating a Bangsamoro Juridical Entity stretching beyond the territory of the ARMM, that would be granted considerable autonomy (Montiel/de Guzman/Macapagal 2012). Importantly, the MNLF-supporting Tausug tribe mostly opposed the agreement, fearing that it would lessen the power of the ARMM and grant ascendency to the MILF. However, the agreement was voided by the Philippine Supreme Court on the basis that government negotiators had exceeded their authority. As a result, MILF walked away from the table and fighting restarted in earnest (Hicken 2009).
Abuza (2005) reported that MILF had a well-developed system of centralized command-and-control, in which orders from the top would be promulgated slowly throughout the dispersed forces but would eventually be considered authoritative. The leadership was nevertheless cognizant of the possibility for factionalism, and its negotiations with the government were made more delicate by the need to keep certain recalcitrant commanders in the fold. A particular concern was MILF’s ambivalent relationship with JI, and the growing influence of JI within some of the younger MILF cadres, many of whom were educated in radical universities in Saudi Arabia; the leadership feared that the organization was being radicalized in the direction of transnational jihad, and took considerable steps to counter such radicalization—including “reeducation” when necessary.

The leadership is also concerned with improving its geographic and ethnic mix. Abuza noted leadership changes made to appeal more to the Tausug tribe (which has traditionally been loyal to the MNLF). Furthermore, wary of the resentment that the MNLF leadership earned by enriching themselves through the ARMM, the MILF Central Committee has taken steps to investigate reports of corruption among its commanders.

After a few years of inconclusive fighting, MILF and the Philippine government signed a preliminary peace deal on October 7, 2012, under the auspices of Malaysia and the OIC. It provided for the creation of an autonomous political agency called Bangsamoro, encompassing territory beyond that of the original ARMM, with the power to raise revenue and administer a Sharia-based justice system. The Philippine government retained control of the currency, foreign policy, and citizenship issues. A further
agreement was signed in July 2013, clarifying the division of revenues from natural resources in Bangsamoro.

Abu Sayyaf, meanwhile, has gone through several periods in which kidnapping-for-ransom (KFR) has overshadowed its terrorist activities (O’Brien 2012). The greatest impetus to such shifts has been the removal of outside funding from Al-Qaida or others, and leadership vacuums in which ASG splits into disorganized factions. And when they have shifted back to terror attacks (for example in the period of 2003-2005), they have been far more indiscriminate than in the previous periods, attacking all sorts of targets including Muslims. As a result, ASG has lost most of its remaining popular support, as former sympathizers now fear that they too could be harmed (Dunham-Scott 2012). Recruitment has suffered as well, so that ASG now attracts recruits almost entirely with financial inducements, with cash raised from its KFR activities. (Cf. Weinstein 2006.) In poverty-stricken areas of Basilan, Sulu, and Tawi-Tawi, large numbers of teenagers join ASG in exchange for recruitment bonuses, marijuana, and guns; many of them cycle out of the group after a few kidnapping operations, flush with cash. Some families even volunteer their sons in exchange for monthly payments in cash and rice (O’Brien 2012). As a result, in recent years there is a persistent core of around 300-500 ASG members with a great deal of turnover.

**Taking Stock of Post-1996**

With the planned establishment of the Bangsamoro region and the consequent deprecation of the ARMM, the MNLF seems to have lost much of the basis for its Standing—except perhaps over the Tausugs, who still support them. Even so, their
performance on the Discipline criterion has grown worse. Even before assuming power, the MNLF suffered defections from those who felt that it was betraying the Moro people. Once in power, its corruption alienated many of its remaining supporters. The organization is perceived to be factionalized and incapable of unified action, and corrupt commanders are able to exploit their regions without interference from a central command (Abuza 2005).

At the moment, it seems that the MNLF’s remaining authority comes almost entirely from the institutional power it wields as a partner of the Philippine government, and the money and armed forces that it commands thereby. This is not enough for it to claim Standing for a generalized struggle against the government. Just as well that the MNLF is not presently engaged in insurgency operations, and instead is mostly fighting Abu Sayyaf (a fight that unambiguously improves the position of the populace, and therefore carries no requirement of Standing).

On that subject, Abu Sayyaf’s increasing lack of discrimination in targeting has vitiated any right it had to fight as Lone Operators. Even though the organization (such as it is) is made up of volunteers, still the danger ASG poses to the larger community invokes a requirement for Standing—which ASG manifestly does not possess. Discipline, needless to say, is nowhere in evidence.

MILF, on the other hand, has only grown in stature. With the recent peace agreements, brokered by state neighbors and international organizations, MILF can claim institutional recognition; with its growing numbers and apparent widespread popular support, it can claim to possess communal authority. Furthermore, its command structure
appears robust enough, and the leadership’s concern with ideological drift conscientious enough, to satisfy the requirement of Discipline.

However, one can ask whether MILF would have Standing over the Tausug tribe, given its present fidelity to MNLF. Even now that the Bangsamoro region is planned to include the Tausug, given that they prefer the old ARMM it is questionable whether they will consider it a legitimate institution. More so than before, it is worth questioning whether the Tausug and the other major tribes can be lumped together into the same polity, for purposes of Right Authority, or whether they should be disaggregated in spite of their shared identity as Moro.

**Conclusion**

The Moro insurgency of Mindanao displays important dynamics of Right Authority, many of which are not adequately dealt with in other, more static theories. Actors can gain legitimacy or lose it, can exert proper control over their forces or fail to, can fight for expansive causes or limited material goals. While Dynamic Legitimacy theory speaks of tendencies and seemings and general guidelines (as all present theories do), I claim that it still provides a much more expressive vocabulary with which to speak of the dynamics of Right Authority in Mindanao than does any other theory in the literature.

Additionally, the case of Abu Sayyaf in particular shows the utility of dividing the larger category of Right Authority into Competence, Standing, and Discipline. In its early stage, ASG arguably did not need to satisfy a requirement of Standing; however, its structural weaknesses raised problems with Discipline. Those problems eventually flowered into total indiscriminateness in targeting, which then reimposed a requirement
of Standing that ASG did not meet. If we were just to lump the subcomponents of Right Authority together, these dynamics would be obscured from view.

Discipline will play an important role in our next case study as well, the Autodefensas of Michoacán, Mexico. In this case, we will see the pitfalls of a popular movement with weak leadership structures—and the utility of Dynamic Legitimacy theory in analyzing its performance as a Right Authority.
CHAPTER SEVEN: CASE STUDY—THE AUTODEFENSAS OF MEXICO

The case of the Mexican “Autodefensas” is still developing, and features many details that are uncertain or constantly in flux. Traditional news sources are incomplete and only capture highlights of the situation; much more material is found on websites and Facebook pages, with the most comprehensive English-language source found thus far being a partisan Mexican blog called *Borderland Beat*.\(^{165}\) This presents some serious problems for including this case in a scholarly work; on the other hand, this dissertation does not claim to be a work of history, and the issues of Right Authority raised by the Autodefensas are important and unique enough to merit discussion. Therefore, let us stipulate that our theoretical discussion concerns a (possibly factual) narrative of events laid out in these pages, which may or may not correspond to actual events in Michoacán or elsewhere in Mexico. Furthermore, though events are ongoing and the situation on the ground shifts rapidly, this dissertation will discuss events happening no later than September 12, 2014.

Emergence of the Autodefensas

The Mexican state of Michoacán, like others, has been under a considerable degree of control by drug cartels for several decades; the situation grew much worse beginning

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\(^{165}\) The blog’s main purpose is to promulgate anonymous and semi-anonymous reporting on the state of the Mexican drug war, made necessary by the hazards posed to reporters by drug cartels and by corrupt government and military personnel as well (several “narco-bloggers” have been murdered already). One amusing note is that the comments section often features heated back-and-forth between commenters who claim to be members of opposing drug cartels.
around 2001, when Los Zetas\textsuperscript{166} arrived to seize control violently from the existing Valencia drug cartel (Villamil 2014). The resulting conflict led to a great deal of bloodshed and a breakdown in public order, as in a short time control shifted from the Zetas to the Familia Michoacana, a new group led by a university professor that used strategies of social penetration to quickly subvert government officials and assassinate others. When La Familia fragmented in 2010, it was succeeded by Los Caballeros Templarios (“The Knights Templar”), which claimed a quasi-religious mandate to destroy opposing drug groups and to dominate the area.

The Templars’ presence soon became unbearable for the populace. Going beyond drug trafficking, they also violently extorted huge sums of money from local lime and avocado growers and other small businesses in Michoacán, in some cases seizing avocado groves outright (de Córdoba 2014b), as well as kidnapping for ransom and casually murdering and raping at whim. Local officials cooperated with the cartel, stood aside impotently, or were viciously murdered, as was Ygnacio Lopez Mendoza (mayor of Santa Ana Maya) in November of 2013. The Templars had demanded that Mendoza’s government turn over 10% of tax revenues (Fausset/Sanchez 2013), an apparently widespread practice (de Córdoba 2014b). Efforts by the Federal government to control the situation by sending in army units had little effect.

\textsuperscript{166} Formerly an elite Mexican special-forces unit that became the hired guns of the Gulf Cartel, before breaking from them and going independent. The Zetas are known for their ruthlessness and use of torture and beheadings.
The small town of Cheran was apparently the first in which “autodefensas” (that is, self-defense groups) emerged in 2011. Though the groups called themselves Community Police in a nod to existing legal frameworks for indigenous self-policing, the Cheran action has nevertheless been identified as the start of the moment (DD 2013).

They evicted their corrupt local mayor, and with him all of the Templars in the town. The impact of this move was limited at first; but in 2013, a group of lime and avocado growers in Tierra Caliente organized a large armed force from local residents, which first took public action on February 24th in the town of La Ruana, violently expelling the Templars from town. Before long, Autodefensa groups fielded a force of some 10,000 armed men and advanced into ten municipalities in fierce fighting against the Templars, organizing themselves under umbrella groups such as the Comando Unido de Autodefensas de Michoacán (United Command of Michoacan Self-Defense Groups, or CAM) (Villamil 2014).

In many cases, autodefensa groups were invited in by the local community to break Templar control. Usually, extortion and kidnapping disappear once the autodefensas gain control of a territory, and they take measures to return land seized by the Templars to its former owners, as in the town of Tancitaro (cf. de Córdoba 2014b). However, in some cases men have been identified as criminals with very little due process, and seized or shot (Grillo 2013). Some reports indicate that locals feel caught up in the fight and forced to take sides (Shoichet 2014). In the main, however, it appears that the autodefensas are welcomed by the communities. In every new town, the groups put out a call for

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167 The last straw was apparently that illegal loggers were paying the Templars bribes, to allow them to completely denude the forests around Cheran.
volunteers to form new units and to set up defensive barricades, in part to allow veteran members to return to their jobs and businesses (cf. ValorxTruth 2013, Grillo 2013).

The forces lacked a single leader and a single unified command structure, but several leaders of the Autodefensa movement stood out—among them Dr. Jose Manuel Mireles Valverde, Hipolito Mora Chavez, and “Papa Smurf” Estanislao Beltran (Un Vato 2014). In Youtube videos posted online of autodefensa vehicle columns advancing into new towns, vehicles can be seen bearing large decals of their local autodefensa organizations, or a large white dove or several. Most did not initially see themselves as a revolutionary force and wished for the state to provide order in the abstract, but the populace and the autodefensas both feared what could happen if they laid down their arms. No one trusts the government to be able to control the violence if the autodefensas stand down. “They [the Templars] could still come back” is a common refrain (de Córdoba 2014b).

The Mexican government reacted to the Autodefensas with alarm. Typical was the statement of Rep. Francisco Arroyo, president of the lower house of Congress, that “A state that allows citizens to arm themselves to take justice into their own hands is a failed state” (Grillo 2013). President Peña Nieto promised to crack down against vigilantism strictly. Some officials accused autodefensa groups of working for a competing drug group, the Jalisco New Generation cartel, a charge that the autodefensas denied (cf. DD 2013). At the same time, local police and officials generally turned a blind eye to the

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168 Dr. Mireles is a surgeon who had once been active in politics, holding minor posts in the Mexican political party PRI and then unsuccessfully running for the Senate as a PRD candidate.

169 Examples can be found here [http://www.youtube.com/watch?v=TlZrKvlsj24] and here [http://www.youtube.com/watch?v=qHivTO6CvY], among many others that can be searched for without difficulty. Many can be seen embedded within articles on Borderland Beat.
Autodefensas’ activities, and the governor of Guerrero proposed in 2013 to create a legal framework for them to operate under (Grillo 2013).

An additional factor is that firearms ownership in Mexico is nominally tightly controlled. Buying weapons legally is extremely slow and burdensome (only one legal gun store exists in all of Mexico, run by the military); the vast majority of weapons in Mexico (owned by the populace or the cartels) are illegal (Booth 2010). Previously, unobtrusive weapons ownership in rural areas was winked at by law-enforcement; now, some Autodefensa leaders such as Luis Antonio Torres (known as “El Americano”) reported that the groups are arming themselves with military-grade weapons seized from the Templarios170 or else smuggled in from the United States, which raises further alarms for the Mexican government (DD 2014a).

Though major government figures warned in November 2013 that they would not allow the Autodefensa groups to advance further, the groups took control of a further 4 municipalities on November 26, bringing the total number of communities under their control to 54 (ValorxTruth 2013). Over the next month, the autodefensas advanced further, closing in on the large town of Apatzingán which is thought to be the headquarters of the Knights Templar.171

In the beginning of January 2014, the autodefensas entered Parácuaro (which is on the approach to Apatzingán), setting off a series of fierce clashes involving shootouts, burned vehicles and shops, and roadblocks. Police forces were apparently not in

\[\text{170} \text{ Who themselves likely obtained their weapons from corrupt Mexican military or police, or from international smuggling networks.}\]

\[\text{171} \text{ The town’s mayor, Uriel Mendoza, was a nephew of the notorious Templar leader “El Chayo.” Mendoza would be arrested by the state in April, and charged with extorting money on behalf of the Templars (Martinez 2014i).}\]
evidence, and the mayor demanded federal intervention to eject the autodefensas (ValorxTruth 2014a). At around the same time, Dr. Mireles, perhaps the most charismatic leader of the movement, was injured in a plane crash as he flew from one area of the front line to another, and was subsequently taken into Federal custody. Initial indications that Mireles might be prosecuted for vigilantism were met with popular outrage, and he was released after a time (cf. Martinez 2014a).

Perhaps in response to the march on Apatzingán, or to the larger specter of losing control in the face of armed vigilantes, the Federal government sent troops into Michoacan to disarm the autodefensas. At Antúnez, soldiers trying to enter town were blocked by a human chain of village residents and autodefensa members; the soldiers fired into the crowd, killing at least two people (Archibold 2014).

The response to the shooting was so furious that the government backed off and sought a more formalized solution, together with autodefensa leaders eager to avoid a confrontation while still retaining their arms. In mid-month, government officials began meeting with the Citizen Council of Self-Defense and Estanslao Beltran, who claimed that the autodefensas now numbered 25,000 active forces and 140,000 available on short notice (Martinez 2014b).

On January 27th, 2014, the Mexican government and CAM signed an agreement to formalize the Autodefensa groups under the framework of the Rural Defense Corps, a long-disused militia structure subordinated to the military. The Autodefensas would not have to turn in their weapons, but would have to register them and provide a list of their members to the government (de Córdoba 2014a, ValorxTruth 2014c).
As time passed, some warning signs emerged of tensions within the loosely organized movement (DD 2014b). In January a new autodefensa group emerged in Pueblo, calling themselves the Common Front For Peaceful Civil Resistance (FCRCP), funded in part by expatriates living in the United States, and trained by existing autodefensa groups in Michoacán (ValorxTruth 2014b). They announced that they would prevent the swearing-in of a mayor who had been elected under suspicious circumstances. This goes well beyond the counter-cartel program of the original autodefensas and into the realm of political revolution, which most of the autodefensas wish to avoid—despite their deep frustration with the Mexican regime.

Additionally, as new groups form and advance beyond the initial birthplace of the movement, conflict between different leaders grew. New leaders such as “Commander Cinco” resented the high profile of figures such as Hipolito Mora (DD 2014a, Martinez 2014c). And statements to the media by Dr. Mireles, discounting the importance of the January 27th agreement with the government and calling it “theater,” led the AUC to announce that Beltran was now its sole coordinator and spokesman (DD 2014c).

**Taking Stock of the Autodefensas**

Perhaps the most critical question regarding the activity of the autodefensas—whether they have a political obligation to the State of Mexico that forbids their independent action—is beyond the scope of this work.\(^{172}\) For the moment, let us assume

\(^{172}\) Though I will say that the academic literature on secession gives reasons to suggest that the autodefensas’ activities are legitimate, even if they remain Mexican citizens for all other purposes than securing public order against the cartels; if circumstances permit one to secede entirely from a state, one ought to be able \textit{a fortiori} to “secede” \textit{partially} in similar circumstances, that is, to assume responsibility
that no political obligation overrides their ability to claim Right Authority. On the Standing criteria, the autodefensas clearly are going beyond immediate self-defense, so we need to assess whether their activities increase the risk for their communities. That judgment will depend on several factors: how powerful and vicious the *Caballeros Templarios* actually are in the face of determined resistance, how ineffectual the government was in previously defending public order, and how great the danger is of the autodefensas becoming as bad as the forces they are fighting.

At first glance, it seems that most communities are not put at greater risk, and indeed enjoy greater social order when the autodefensas come. Further, it seems that most communities are freely participating in the autodefensas. On the other hand, we must take seriously the claims by some that people feel trapped between bad options. (Unfortunately, we cannot follow that line of questioning too far without again going out of scope; it takes us into the subject of forced conscription, which ties back directly into political authority.)

The autodefensas seem to be operating on broadly democratic (or at the least, popular or polyarchic) organizing principles, recruiting community committees in each town and village. In communities with long traditions of indigenous governance or popular peasant authority, this has served to bolster their claim to authority; whether the autodefensas enjoy the same authority in urban cities, where populaces have more fidelity to formal state institutions, is less clear. What is evident is that the state enjoys very little trust by

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for some functions formerly performed by the state. See Philpott (1995), Wellman (1995), and Somin (1999-2000), among others.
the people, creating openings for actors such as the autodefensas to step forward against the cartels.

More worrying is the autodefensas’ showing with regard to the Discipline requirements. The greatest danger of a popular movement like this one is that in the absence of strong disciplinary structures, armed groups can quickly and easily fragment into factions, each of which can change its behavior to become more politically radical, or more predatory, or to settle scores among neighbors, or to throw in with cartels or whomever (as we shall see).\textsuperscript{173} Granted, it is an open question whether the United Command or other institutionalized groups can be held responsible for the actions of less centralized, spontaneous groups that emerge; but it remains true that their decision to take up arms makes it easier for others to follow their example, which must factor into the initial calculations about whether beginning a conflict is justified.

Perhaps this consideration was a factor in the autodefensas’ agreement to affiliate with the State of Mexico, through the Rural Defense Corps. Aside from more prosaic concerns (like avoiding a violent confrontation with the state!), such affiliation can usefully distinguish between those groups who are part of the “real” movement, and those who are not playing by the rules and are therefore not truly part of the movement. Whether this was intentional, affiliating with the state may have been necessary in this case for the groups to preserve their Right Authority, precisely because of the Discipline problems inherent in a popular movement.

\textsuperscript{173} It is worth noting, however, that a recent report by the State Commission on Human Rights indicated that they had received no complaints in Michoacán regarding autodefensa behavior, compared to 22 for the Mexican militarily (DD 2014d).
All things considered, it appears that the Autodefensa movement did possess a high degree of Right Authority in its fight against the Knights Templar—but that authority was contingent on the good behavior of its members and its cooperation with the Mexican government. If autodefensa groups went beyond their mandate and attempted a full-blown revolution, or if a serious rift persisted in the movement (which, as we will soon see, it did), it would call for a reassessment of their Right Authority (not to mention the other requirements of JWT, such as Just Cause).

**Autodefensas, Phase Two**

On February 24th, Mireles returned to Michoacán, mostly recovered from injuries sustained in the January plane crash. He held a private meeting with leaders of the autodefensas of his hometown of Tepalcatepec, and a statement apparently issued by the group indicated that they mean to disassociate with Beltran or remove him from his spokesman role, which he apparently secured without a public vote or other procedure (Martinez 2014d). The statement faulted Beltran, and the new faction of autodefensa leaders with which he associates (such as Luis Antonio “El Americano” Torres), for pursuing “other agendas” and allowing former cartel leaders to join, leading to reported human-rights abuses. Beltran dismissed the statement and called it false. The conflict seemed to cool down briefly, as on March 6th, autodefensa leaders including Mireles, Beltran, and Mora met jointly with state Commissioner of Security Alfredo Castillo and announced a plan to purge cartel infiltrators from Autodefensa ranks, as well as announcing more details about cooperation with government forces (Martinez 2014e).
A serious crisis erupted on March 10, when *ElAmericano* accused Mora of murdering two of his allies, and mobilized his followers to besiege Mora’s ranch. Mora was extracted by Federal troops, who immediately arrested him and turned him over to Michoacán authorities (Martinez 2014f). Mora’s supporters in turn accused *ElAmericano* of collaborating with the cartels. Other movement leaders such as Beltran and Mireles condemned the “personal feud” while at the same time accusing the government of imprisoning many autodefensa members in bad faith, and Mora specifically because he had pressured the government to keep its promises to legalize the *Autodefensa* movement within the National Guard (DD 2014e).

On April 3, Commissioner Castillo announced that the autodefensas would be disarmed over the next few weeks, with a deadline of May 10 for autodefensas to voluntarily submit. Reports began to proliferate of groups of autodefensas being suddenly arrested. In early April, the Michoacán State Human Rights Commission found that one arrested autodefensas leader, Enrique Hernández Saucedo, and several associates had likely been tortured by police answering to Castillo, who wanted them to confess to the murder of a former mayor and ended up charging them with terrorism (Martinez 2014g). Then, on April 5, CAM appointed Dr. Mireles as their sole spokesman, replacing Beltran; Mireles accused a small faction within the Autodefensas of collaborating with Castillo to disarm and disrupt the movement, and stated that the autodefensas would refuse to disarm (Martinez 2014h).

At about the same time, “fake autodefensas” began to appear, at least some of which were *Templarios*, and others part of the Jalisco New Generation cartel. In several cases,
shootouts erupted between the false autodefensas and CAM forces and government troops who were cooperating to root them out (Martinez 2014i).

As the May 10 deadline loomed, meetings between government officials (including Castillo) and CAM representatives (including Mireles) led to more clarity. The Autodefensas units would be given the opportunity to subordinate themselves to SEDENA (the Mexican department of defense), and be renamed as Rural Defenzas (or, as it turned out, Fuerza Rural), or to subordinate themselves with one of the state agencies, in which case they would become Guardias Rurales (Martinez 2014k). Uniforms, weapons and training would be made available, but the new units would lose their operational autonomy and be subject to state control. As part of the process, autodefensas who had previously been arrested for carrying weapons would be released.

On May 7, the Autodefensa leadership came to an apparently decisive rupture (Martinez 2014l). Early in the day, Mireles released a video addressed to Mexican president Peña Nieto announcing his intention of spreading the self-defense movement across Mexico, and listing several public figures and activists who supported him. Within hours, Beltran issued a communication, signed primarily by leaders of the Buena Vista autodefensas, removing Mireles from his role as spokesman again. Mexican national media immediately publicized the document, portraying Beltran and his ally “Commander Cinco” as the unquestioned leaders of the Autodefensa movement. Mireles and his supporters rejected the removal as having no formal validity, as it represented only 1 out of 36 communities, and accused Commissioner Castillo of being behind the move.
Each faction accused the other of being a tool of the cartels, with much of the animosity stemming from a clash on April 27, in which a fake Templario checkpoint with apparent ties to Beltran was attacked by autodefensas associated with Mireles, and Federal troops from different units intervened on either side and nearly shot at each other (ValorxTruth 2014d). In the next few days, as autodefensas units were being integrated into Federal jurisdiction, Castillo claimed (apparently spuriously) that Mireles was being investigated for manslaughter for five deaths during that episode.

On May 16, Hipolito Mora was released from prison, for lack of evidence connecting him to the deaths of the two allies of El Americano. An hour before his release, he had a personal meeting with Castillo; upon release, he made a statement that he would register his weapons and work with the state Rurales (Martinez 2014m).

On June 27, 2014, Mireles and some 100 other autodefensas were suddenly arrested by the Mexican military in Acalpican, and charged with violating the Law of Firearms and Explosives (BBC News 2014). Mireles had his head and mustache forcibly shaved and was denied visits by the Human Rights Commission and a delegation of doctors seeking to monitor Mireles’s diabetes; upon visiting the prison where he was held, the delegation had their cameras and phones seized (Martinez 2014n). Mireles apparently remains in custody at the time of this writing, despite a popular protest campaign seeking his release and a judicial investigation into claims that Mireles was tortured (Martinez 2014o, 2014p).

On August 27, Luis Antonio “El Americano” Torres was removed from his position in the Fuerza Rural, after videos surfaced showing him consulting with the infamous “La
Tuta”, leader of the Caballeros Templarios cartel; in another video, La Tuta complained that El Americano owed him a great deal of money (Martinez/Pepe 2014). Supporters of Mireles had repeatedly accused Torres of turning his autodefensa group into a new cartel, called H3, with the cooperation of Castillo. At about the same time, it transpired that the sister of “Papa Smurf” Beltran was married to José de Jesús “El Chango” Mendez Vargas, leader of the La Familia Michoacana cartel who had been arrested in 2011. Other leaders of Beltran’s autodefensa faction, who were now officers in the Fuerza Rurales, were also accused by the residents of Buenavista of having links to cartels (Martinez 2014q).

**Taking Stock, Phase Two**

The concerns raised above under Discipline—that a decentralized organization is prone to factionalism and leadership conflicts—have come to fruition. The Mexican government has clearly gained the cooperation of “Papa Smurf” Beltran’s faction, while putting Dr. Mireles and his faction on ice. Whether one views this outcome as good or bad (and that view will have much to do with one’s evaluation of the Mexican state itself, and its intentions for the autodefensa groups), it is evident that the Autodefensa movement lacked the cohesion to follow a unified policy. The CAM council ended up serving less as an effective governing body than as a site for leadership struggles. Also worrying are the persistent claims that cartel members have been infiltrating and co-opting parts of the movement, which the movement as a whole seems to have been unable to prevent.
Does this mean that the movement lacked Right Authority? Or, better, that the partial Standing that it demonstrated has been lost through its failure to exert better discipline? It is hard to say. Those autodefensas who have submitted to the government (and who have not collaborated with the cartels, or otherwise acted independently) ought to be judged with reference to the government’s own Right Authority, it seems to me. Those who have refused to affiliate are in a tenuous situation. They seem to have a fair measure of public support on the one hand, but on the other hand the risks their activity poses to their communities have grown considerably now that they are contravening explicit state policy.

One thing is clear. The leadership struggles brought about by the decentralized nature of the Autodefensa movement have greatly harmed the movement’s ability to pursue its initial goals. Personnel have found themselves fighting each other instead of the cartels. Even if there is enough Standing remaining to enable some activity on the part of individual units, the movement as a whole has clearly been left on a shakier foundation. The dynamics of the Autodefensa campaign should stand as a stark warning to other would-be popular movements—decentralized movements can be extremely effective in the short term, but as time passes, failure to develop a more effective coordinating structure will allow the growth of greater and greater hazards.

**Conclusion**

This case demonstrates once again the importance of considering Discipline separately from Standing, rather than lumping them both together under the

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174 Which is not necessarily a favorable judgment.
undifferentiated term Right Authority. The *Autodefensa* movement seems to have had sufficient Standing at the beginning; the crippling flaw of the movement was on the Discipline side, and the predictable leadership split ended up having ramifications for Standing as well. Other theories that do not carefully distinguish the components of Right Authority from each other would have been unable to predict the tribulations of the *Autodefensa* movement, nor could they have said what the movement should have done to shore up its Right Authority. Dynamic Legitimacy theory represents a clear advance in our understanding of Right Authority in the real world.

Thus far, we have dealt with cases in which the principal actors had sufficient Standing, for the most part. In the chapter to follow, we will look at a case of such societal turmoil that almost nobody has true Standing: the endless war in the Congo.
CHAPTER EIGHT: CASE STUDY—THE CONGO

The Congo wars present a challenging case. The Congolese state is too weak to defend its own borders, while being strong enough to prey on its own populace. Weak governance and informal chains of command mean that often, military units are a greater threat to the populace than they are to the myriad rebel groups they ostensibly defend against. Conversely, a corrupt and exploitative civil service means that the military is sometimes the closest thing the citizenry has to a just arbiter.

Meanwhile, efforts by the international community to ameliorate the violence have in many ways made it worse. The UN and international NGOs advocate for policies that are trendy to Western elites and disastrous on the ground. The consequences of these policies for the Congo are serious enough that they may invoke issues of Right Authority, though the NGOs in question are not belligerents per se. And by the standards of Right Authority, their behavior has been problematic.

Finally, in the tumultuous environment of the Congo, it may sometimes be the case that non-state actors working from blatantly mercenary motives may in fact do the best job at securing Right Authority. Acting out of enlightened self-interest as “stationary bandits,” groups like the Forces Armées du Peuple Congolais (FAPC) actually spent more effort on good governance and responsive relations with the citizenry than did the
nominally legitimate authorities we tend to look to first—the sovereign state and the United Nations. All in all, the Congo case turns many of our expectations on their heads.

The endless wars and cycles of state failure and exploitation that the Congo suffered and still suffers raise difficult questions for students of Just War. In an environment where sheer survival depends on acquiescence to warlords, where corrupt Big Men are tolerated and even welcomed for the sake of the tenuous stability they bring (since they murder and loot their captive populaces slightly less than the last armed strongman)—where people take up arms as a living for lack of other employment, and where no lines exist to separate war from business or politics—what is the point of talking about Right Authority? Does the concept have any meaning at all when society has broken down? Do the neat theoretical dividing lines of scholars still help us understand what is going on?

I have stated in Chapter Four that legitimacy depends on the beliefs and attitudes of the people granting it; for example, some people believe sincerely in divine right of kings, and so will ascribe legitimacy to such a king that is every bit as real as democratic legitimacy for us. Still, in the Congo case we have communities who are led in the course of illegitimate violence to rely on Big Man patrons, whose qualifications are their skill at wielding the very violence that perpetuates the conflict. True, patrons are expected to treat their subjects well in exchange for their support. But even so, how "real" is this form of legitimacy? Is it strictly an accommodation to otherwise total chaos? And even if so, does that make it unfit to be a guide to Right Authority, or must we reconcile ourselves to a grim reality in some way? And if we do, what use is Right Authority in the first place?
This chapter will not provide a definitive answer to that question. However, it will show that Dynamic Legitimacy theory is capable of addressing the issue in a more useful way than conventional theories of Right Authority, which lack the analytical vocabulary to grapple with the cases in any useful sense. Dynamic Legitimacy theory, built as it is on the effects that a Right Authority’s actions have on their community, can judge between actors in a more compelling way than any contending theory can.

**Historical Background**

The history of the conflict in the Congo is deeply entangled with the legacy of Belgian colonialism, with the century-old ethnic conflict between Hutu and Tutsi, and with long decades of personalist dictatorship and exploitation. Truly understanding the conflict is impossible without understanding the complicated dynamics of the region, and while this case study is not meant to be a history of the Congo’s wars, we will still profit from a brief overview.

The Congo River basin, in the heart of Africa, was explored and conquered by European powers relatively late in the nineteenth century, owing mainly to the sheer inaccessibility of the terrain; but in time, exploring parties managed to penetrate far enough to make colonization viable. The area that would become the modern state of Congo was ruled beginning in 1885 by the Belgian king Leopold II through his private corporation, the Congo Free State, which was chiefly interested in exploiting the region's vast natural resources. Leopold's rule was brutal enough that the Belgian state removed the Congo from his control in 1908, annexing it to Belgium itself.
The Congolese landscape was harsh and impenetrable without strenuous development. “In the absence of road structures or railways, in 1890, journeys of a few miles could take weeks and cost the lives of thousands of porters” (Schouten 2013:565). As part of their efforts to exploit the natural resources of the territory, Belgium constructed roads and railways to better access the interior, and installed extensive infrastructure for resource extraction. The industrialization of the Congo accelerated with World War II, as its natural resources would prove vital to the war effort. At independence, the Congo was Africa’s second-most industrialized country (Schouten 2013).

However, Congo’s material infrastructure and especially its machinery of government rested almost entirely on the specialized expertise of the Belgian functionaries running it. Native Congolese had largely been kept out of leadership positions and therefore had little experience with the nuts and bolts of keeping a state running. When the first native president Patrice Lumumba was assassinated in January of 1961, a period of chaos ensued in which much of the Congo’s infrastructure began to crumble—particularly its transportation sector, so crucial for the projection of rule.

The long period of political unrest after Belgium’s exit finally ended in 1965, when Joseph-Desiré Mobuto took power in a coup (Young 2006). Mobutu faced a difficult situation. The Congolese apparatus of rule had been nearly dismantled by the Belgians’ exit (Schouten 2013). The state's ability to project its power beyond the political center was severely limited by few and bad roads and porous borders, making tax collection a chancy business—tax revenue during the 1970s and 1980s was only between 6 and 11
percent of official GDP (not including the large informal sector), of which only a quarter at most were from income taxes (Atzili 2006/2007). Furthermore the population of Zaire (as Mobutu soon renamed the Congo) was made up of several antagonistic tribes and ethnic groups, many of which had been under only indirect colonial rule through their customary chiefs. So even assuming that Mobutu ever intended to build a functioning state, his task would have been Herculean.\(^{175}\)

In the beginning, Mobutu took some steps consistent with that goal. He set up a single political party, the *Mouvement Populaire de la Revolution* (MPR), intended to be the vehicle for instilling the official nationalism in the citizenry. However, he apparently soon decided that a well-functioning state bureaucracy and military would be more of a threat to himself than would dysfunctional ones, and so set out to systematically disrupt both (Atzili 2006/2007). Civil servants’ salaries were reduced to near-zero, while at the same time the bureaucracy was expanded beyond reason,\(^ {176}\) with multiple regulatory organs claiming jurisdiction over nearly every part of daily life; the Zairian state became huge, duplicative, disorganized, uncoordinated, and ineffective (Schouten 2013).

This had terrible consequences for both Zairian state capacity and for the ability of citizens and businesses to function legally without being crushed by oppressive taxation and overregulation. Most Zairians were forced to interact with the informal sector, that is, to pay bribes solicited by chronically underpaid bureaucrats in exchange for escape from the legal regime to some degree. The bureaucrats, in turn, were unable to live off of their

\(^{175}\) For the recurring challenges in African states generally, see the literature review of “state failure” in sub-Saharan Africa by Di John (2010).

\(^{176}\) Nobody knows just how many employees the state has. In the 1990s, it was estimated that the Congolese bureaucracy alone employed roughly one million people, for a country of some forty million inhabitants at the time (Schouten 2013).
meager salaries and instead used their positions to reap revenues from the citizenry. In time, pervasive networks of patronage developed that would extend from top to bottom of Zairian society. “In the face of the human over-presence of the state, ‘être branché’ – to be connected – has become the main tactic of survival, while wads of money are the central material lubricant for social relations” (Schouten 2013:570).

The plight of the military was far worse, and had long-lasting effects that fed directly into the continuing chaos of the Congo. Mobutu diverted the bulk of the military's funding to the Presidential Guard, which was recruited from his home province of Equator and would be loyal to him personally (Atzili 2006/2007). The rest of the military received little if any pay; instead, soldiers were told that “civil azali bilanga ya militaire” (“the civilian is the cornfield of the military”)—that is, soldiers should make a living through extorting, exploiting, and looting the very populace that the state was nominally meant to defend. Indeed, by the 1990s Mobutu was encouraging his soldiers to engage in kidnapping-for-ransom (Atzili 2006/2007, cf. Laudati 2013). Thus, for much of Zaire's population the military became an even greater threat than were Zaire's various enemies.

Furthermore, the combat effectiveness of the Zairian military was chronically poor. Incursions from hostile states could not be repelled, nor could rebel movements easily be defeated. This reached the point that during the Katanga rebellions of the 1970s, Mobutu had to rely on troops brought in from Morocco and France to restore order (Atzili 2006/2007). Zaire's military weakness left Mobutu unable to effectively control his borders, forcing him to bargain with encroaching armed forces rather than to drive them away. Partly as a result, partly for the sake of smuggling revenue, Mobutu ended up
providing safe harbor and other support for insurgent groups fighting against practically all of Zaire’s neighbors, including Rwanda, Uganda, Angola, and Burundi (Atzili 2006/2007).

By the 1980s, the Zairian state had eroded to such an extent that Mobutu’s regime was kept afloat only through massive Western aid, provided in the context of the Cold War (Young 2006). Mobutu had nationalized Zaire’s infrastructure in the 1970s (changing his name to Mobutu Sese Seko in the process) and redistributed key companies among members of his elite coalition; they in turn had no experience with running public companies, and instead enriched themselves by systematically selling off the national infrastructure piece by piece (Schouten 2013). What remained of the physical infrastructure was simply rusting away.

Meanwhile, trouble was brewing in Congo’s neighbors Rwanda and Burundi. Unlike the Congo, both Rwanda and Burundi had been semi-consolidated kingdoms in the time before colonialism; the Tutsi aristocratic class ruled over the Hutu agricultural class, and over time both groups hardened into ethnic categories (Young 2006). The European colonialist powers saw in the Tutsis a higher race, light-skinned and cultured, and treated them as subordinate partners in the colonial project. The Tutsis embraced this viewpoint, adopting European theories of racial superiority to present themselves as recent arrivals to the area, destined by their superior racial stock to rule over the inferior Hutu.

As the end of the colonial period loomed, the Hutu began a political awakening. Flipping the Tutsi narrative on its head, the Hutu argued that the Tutsi were foreign interlopers, who needed to be overthrown from their positions of power for the Hutu to
flourish. As soon as Belgium left, conflict between the two sides grew more intense. The first violent clashes between Hutu and Tutsi in Rwanda occurred in 1959 (Young 2006); setting a precedent that would be often repeated, Hutu attacks on Tutsi were answered by crushing violence from the Tutsi-dominated military, with death tolls in the hundreds of thousands. Repeated violent crises over the next decades in both Rwanda and Burundi led Hutu and Tutsi refugees to flee across the region; many Tutsis crossed into the Congo and settled in the Kivu provinces, where they coexisted uneasily with the “Rwandaphone”[177] tribes already present.

In 1990, Rwanda was invaded by the Front Patriotique Rwandais (FPR), a Tutsi armed force operating from Uganda (where many of its members had previously fought in the guerrilla army of new Ugandan leader Yowery Museveni) (Young 2006). This further enflamed the ethnic tensions in Rwanda, and when Rwandan president Juvénal Habyarimana formed a coalition government with the FPR in 1993, many Hutus saw it as a betrayal. The Hutu militant group Interahamwe emphatically opposed the new government, seeing it as a further step along the Tutsi plan to annihilate the Hutus. Such fears were only confirmed when the Hutu president of Burundi was assassinated by the Tutsi military, followed by large-scale massacres of both sides and the displacement of 350,000 Hutu refugees into Rwanda. The slogan “Hutu power” became more and more

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[177] “Rwandaphone” is a politically loaded term applied to anyone who speaks the Kinyarwanda language; some of these communities are recent escapees from the violence in Rwanda and Burundi, but others such as the Banyarwanda date back over a century (Lemarchand 2013, Atzili 2006/2007). To a “Bantu” Congolese, the distinction may not matter much, as even the older communities are seen as the sinister agents of an ancient Rwandan plot to conquer the Congo and plunder its wealth (Huening 2013). In an ironic case of mutual interaction, the ethnic violence that this viewpoint endorses has indeed pushed Rwandaphones to seek armed support from Rwanda, either via direct military intervention or material support for local militias.
prevalent, with persistent armed clashes keeping the animosity between the Rwandan Hutu and Tutsi at a simmer.

Zaire, meanwhile, was lurching toward crisis (Young 2006). The end of the Cold War had meant the end of lavish Western subsidies for the Mobutu regime, and to make matters worse commodities prices plunged in the early 1990s, sharply cutting income from Zaire’s natural resources. Tax revenues plummeted to about 5% of nominal GDP in 1995 (Atzili 2006/2007). The Zairian state, already reduced to a decrepit shell, began falling apart entirely. President Mobutu found himself unable even to stop his inner circle from siphoning off his own, previously-skimmed wealth. Furthermore, he faced growing pressure from the citizenry for democratization.

Mobutu responded with some limited moves toward ceding power, such as setting up a transitional parliament. More cynically, Mobutu chose to head off the pressure by fomenting local conflicts among ethnic groups. This he did with a policy called géopolitique, which replaced his previous practice of selecting provincial governors from outside the province. Instead, new officials would be selected from a province’s “autochthon” (that is, “native”) population (Huening 2013; cf. Atzili 2006/2007). Almost immediately, this move sparked “incendiary discourses” between the so-called autochthons of a given province and the “non-natives” or immigrants who had suddenly become direct political competitors (usually the so-called “Rwandaphones,” only some of whom actually were from Rwanda), and the opposition to Mobutu fragmented for a time. Unfortunately, the longer-term effect of this move was to heighten anti-Rwandaphone sentiment in the Kivus.
When Habyarimana was assassinated in 1994, the enraged Hutu interim government launched the Rwandan genocide, the details of which need no rehearsal here. For our purposes, the main importance of the genocide was that hundreds of thousands of refugees spilled over into Zaire—particularly after the Tutsi FPR and its leader, Paul Kagame, gained control of Rwanda. Hutu populations and military units (including those of the Interahamwe) occupied refugee camps inside the border, and Mobutu chose to throw his support to the Hutus (Young 2006, Atzili 2006/2007, cf. Lepora/Goodin 2011). Rwanda saw the Hutu populations as a persistent threat, especially with the Interahamwe’s stated goal to return to Rwanda and annihilate the Tutsis there. For Mobutu to give them aid was seen as intolerable.

At last, in 1996 the Rwandan Tutsi armed forces led an invasion of Zaire, allied with an insurgent group that Rwanda and Uganda had helped to form, the Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre (AFDL). The initial purpose of the invasions was to crush the Hutu forces in the refugee camps (and to commit a genocide of their own against the Hutu). Additionally, Rwanda sought to punish Mobutu for his support of the Hutus. But the invasion went far more successfully than anyone had planned for. The Zairian military, already known to be ineffective, dissolved entirely in the face of the onslaught; by 1997, Mobutu had been overthrown and replaced by Laurent Kabila of the AFDL, who renamed Zaire as the Democratic Republic of Congo.

\[^{178}\text{The Rwandan forces murdered hundreds of thousands of Hutu during their campaign, which was shamefully ignored by the international community—perhaps because the Hutu genocide two years previous had turned many public figures into unthinking Tutsi partisans (Young 2006, Lemarchand 2013).}\]
Kabila faced a political quandary. He was backed by Rwanda, yet the Congolese populace hated and feared the Rwandans. Further, Kabila’s forces had a tenuous grasp on the country. To establish his political bona fides with the “Bantu” Congolese, Kabila abruptly turned against his Rwandan patrons, instituting several anti-Tutsi policies.

Rwanda promptly launched a second invasion of the Congo along with Uganda, this time backing a new insurgent group called the Rassemblement Congolais pour la Démocratie (RCD).\(^{179}\)

This invasion was less successful, due to the intervention of Angola, Chad, Namibia, Sudan, and Zimbabwe in support of Kabila; but even with his allies Kabila was unable to repel the invaders, and ended up losing all control of the eastern provinces (Young 2006, Atzili 2006/2007). The RCD developed problems of its own, splitting into competing factions, the RCD-ML (Mouvement de Libération) and the RCD-Goma. Meanwhile, Uganda decided to back yet another insurgent group, the Mouvement de Libération du Congo (MLC), which took control of much of Congo’s northeast.\(^{180}\) The armed groups and the states backing them soon took the opportunity to plunder Congo’s vast natural resources, forming extensive smuggling networks and taking what they could not trade for.\(^{181}\) In the middle of all the upheaval, local communities found themselves undefended

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\(^{179}\) Loosely translated into English as the Congolese Rally for Democracy.

\(^{180}\) In large part, Uganda was using Congolese soil as a battlefield in its fight against Sudan, which in turn was employing the Lord’s Resistance Army and other groups as a proxy against Uganda, as well as dragging Chad and Libya into the conflict. See Prunier (2004).

\(^{181}\) For example, in 1996 and 1997, 12% of Uganda’s GDP was made up of exports of gold—despite Uganda not possessing a single gold mine! The gold was, of course, mined in the Kivus and smuggled across the border into Uganda, where it enriched the political/military/commercial elites (Raemaekers 2013). Uganda in particular took advantage of its occupation to set up durable trans-border trade networks into Congo, with Ugandan officials who plundered considerable wealth eventually settling down as integral members of “militarized shadow networks” of commerce that blurred the (notional) line between public and private (Vlassenroot/Perrot/Cuvelier 2012).
by the Congolese government—particularly the Rwandaphone communities, who were the most persecuted. In response, many communities mobilized “Mai Mai” militias to defend themselves against the other armed groups.

The civil war raged on even when Kabila was assassinated in 2001 and replaced by his son Joseph Kabila; atrocities against civilians were common, and millions were displaced. During the period of 1998 to 2003, some 3.3 million people died, mostly from malnutrition and disease arising from internal displacement and wholesale plundering (Lemarchand 2013). Congo was far too weak to regain control of its lost territories; in the middle of civil war and external invasion, military spending in 2003 was only 1.4% of official GDP (Atzili 2006/2007). However, Joseph Kabila moved with unexpected skill to reconcile with many of his neighbors, seeking an end to the war that he had little chance of winning.

In 2002, the United Nations organized a peace conference in Praetoria which nominally ended the civil war in 2003. The Congolese government agreed to a power-sharing agreement with both RCD factions, the MLC, and (to a much lesser extent) the local Mai Mai groups; leaders of these groups were given posts of varying importance in the transitional government, which would hold free elections by 2005. The armed forces of Rwanda and Uganda exited the country; however, little provision was made to enforce public order in the areas they had vacated, leaving a dangerous power vacuum that has yet to be filled more than a decade later. Instead, the Congo has been wracked by continuing cycles of unrest, rebellion, and atrocities by armed groups and the state military as well. Raemaekers (2013) estimates that over two dozen militia groups were
active in the Congo as of his writing; the level of violence then was higher than it was in 2003.

**Difficulties for Right Authority**

In short, in Congo the official regime acts from a precarious situation that is partly sustained by its own practices of rule, and partly fueled by its weakness in the face of foreign meddling and insurgent violence. The insurgents, meanwhile, vary between those making opportunistic power-grabs, those advancing the interests of foreign powers, and those who are genuinely defending their communities against ethnic persecution or simple looting on the part of government troops or rival militias. Any evaluation of a given actor's legitimacy should be sensitive to the enormous challenges that this chaotic context imposes. At the same time, due attention should be paid to the ways in which a given actor's behavior cannot be defended by extenuating circumstances, and in fact makes things worse.

In such challenging circumstances, who needs to possess Right Authority, and how would it be established? We will consider three classes of actors. First will be the Congolese state and military, which for all of its evident demerits often represents the main candidate for legitimate governance. Second (perhaps surprisingly), we will consider the diplomatic and reconstruction activities of the United Nations and other international NGOs; while they are not (usually) warfighters, we will make the case that many of their activities are sufficiently disruptive to the populace that they ought to have developed Standing *vis-à-vis* the Congolese populace. And finally, we will consider what
happens when a mercenary warlord has incentives to provide good governance, even though most theories of Right Authority would disqualify such actors out of hand.

Congo state

The state of the Congo, and particularly its military, strains the traditional theories of the state to the breaking point. While maintaining a tenuous sort of legitimacy for its majority “Bantu” Congolese citizens, the state has little legitimacy if any for Rwandaphone Congolese, which it treats with suspicion at best and raw antipathy at worst (Mushi 2013). The state furthermore lacks anything resembling a monopoly of force, since much of the country is under the control of local militias and even its own army cannot be relied on to follow orders. Partly because of the regime’s strategy to reward its elite coalition, and partly because of the difficulties of the political environment, the Congolese state is corrupt and predatory, such that the “informal economy” is pervasive and insurgent movements are common.

The military, meanwhile, has little cohesion, in part because of the process of rebel integration—which has turned into a unending inducement to further violence. Further, the state’s combat operations work to the detriment of affected populations nearly as often as to their benefit. The Congolese military, the Armed Forces of the Democratic Republic of Congo (FARDC), is profoundly undisciplined, with many units preying upon the populace and others paying lip service to Kinshasa while de facto ruling their surroundings as warlords.

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182 Assuming that such a Weberian monopoly of force is necessary to be a legitimate state in the first place, which is not a given.
Contested Authority

The Congolese state faces significant obstacles to exerting its power over the countryside, and the military. Chief among them is the sheer difficulty of movement, a crucial weakness for any state (cf. Scott 2009). The wars fought from 1997 onward destroyed much of the remaining infrastructure of the Congo. “As of 2012, Congo – two-thirds the size of Western Europe – only has around 3000 km of paved roads” (Schouten 2013:569). Vehicles have nearly disappeared from the country; most people instead travel by walking on the crumbling major roads, alongside bicycles laden with goods (Young 2006, Schouten 2013). The bad infrastructure hampers state efforts to assert control and levy taxes. “[F]or a Ministry of Mining official, a visit to a single mining site to levy taxes can take up to five days on foot through the jungle” (Schouten 2013:568).

The breakdown of institutions in the regions wracked by fighting created a vicious cycle wherein political power ultimately rests on the “capacity to mobilise coercion” (Verweijen 2013:72). Military units are always key actors in political conflicts, across every level of society from national politics down to local disputes—and even interpersonal disputes between individuals, in which a hired gun is always useful. In addition, the military is the most capable actor simply in terms of its organizational capacity—it has a large labor force with national reach and communications abilities, making it an attractive business partner. As a result, military units are able to exploit their positions to gain considerable wealth and economic power.183

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183 In many ways, the discussion by Ahram and King (2012) of the warlord as an arbitrageur between formal and informal authority is relevant here.
A consequence of the need for coercive muscle is that social and economic relationships have been reconfigured around Big-Man patronage networks, which might sometimes coincide with official hierarchies but usually cut across them or ignore them entirely (Verweijen 2013). This is especially true in the military itself, where a place in the official hierarchy is less a source of power than it is one of many lucrative prizes to be contested: “As their functioning is based upon the convertibility of economic resources into political ones and vice versa, the Big Man logics that shape these networks generate a drive for the accumulation of wealth and control over income-generating opportunities. This leads to the use of access to office as a political resource, creating pervasive insecurity of tenure” (Verweijen 2013:72).

These factors play pervasive roles in the efforts by Kinshasa to reintegrate rebel organizations into its military, FARDC. Ostensibly, the reintegration of the rebel forces under the 2003 peace process was meant to be accomplished through a procedure called brassage, in which former rebel units would be intermixed with soldiers from other units, to weaken existing loyalties. Some new brigades acquiesced to the brassage process without much difficulty, and it has been reasonably successful there; however, many brigades simply refused to participate, and refused further to leave their home regions (Baaz/Verweijen 2013).

One example of the complexities of the integration process is the case of the 85th Brigade of FARDC, operating in Walikale (Garrett/Sergiou/Vlassenroot 2009). This is a non-integrated brigade made up of the former members of a local Mai-Mai group. Though the 85th nominally took orders from Kinshasa, in many ways they constituted an
independent power center of their own, due to their connections with local patronage networks and most importantly to their extra-legal control over the cassiterite mines at Bisie and elsewhere (which the brigade took forcibly from the control of RCD-Goma). With revenue from cassiterite mining, they financed their own operations, and additionally co-opted much of the state apparatus in Walikale—the government Administrator of Walikale was furnished with a cut of the mining proceeds, for example, in exchange for a formal agreement to have the 85th provide security services in the province. The story is repeated up and down the bureaucracy, so that in many ways the 85th Brigade exerted more control over Walikale than Kinshasa did, even as it benefited from its status as an official FARDC unit (cf. Ahram/King 2012).

As of 2009, Kinshasa was treading lightly with the 85th. The brassage process is incomplete and the unit is still made up of Mai-Mai personnel drawn from the area, allowing a parallel command structure to supplant the “official” military hierarchy; further, the 85th has blatantly ignored orders to redeploy outside of its home province. Still, Kinshasa furnishes the brigade with arms and logistical aid, and acquiesces to the unit’s insubordination. The brigade may be of questionable loyalty and may be setting up an alternative governance structure that will be hard to undo, but it still provides better security in Walikale than could be found in its absence. The unit is relatively disciplined, with a comparatively decent human-rights record toward the populace, and—most crucially—the 85th Brigade does invaluable work in balancing against the power of RCD-Goma, a much more dangerous threat. As a result, Kinshasa tolerates the parallel governance of the 85th in exchange for its nominal loyalty.
The government’s ability to discipline these parallel governance networks is constrained. The central government is broke and has limited logistical resources with which to support its units, and therefore continues to expect that deployed military units be “self-financing” and to use their coercive abilities for personal gain. Enlisted men in FARDC remain among the poorest segments in Congolese society, rendering such abuses a critical strategy for their own survival (Verweijen 2013, Laudati 2013).

As a result, FARDC units remain deeply implicated in informal forms of rule. Those units resisting brassage also remained fertile ground for future rebellions. The FARDC units composed of the former RCD-Goma in particular remained poorly integrated during the brassage process. As a result, when a Tutsi faction of RCD-Goma broke away in 2006 and established a new rebel group, the Congrès National pour la Défense du Peuple (CNDP) under the leadership of General Laurent Nkunda, they very quickly became one of the most powerful armed forces in the Congo, winning several battlefield victories over FARDC. Negotiating from a weak position, in 2007 Kinshasa began a less-extensive program called mixage to reintegrate the CNDP rebels into FARDC—without, however, redeploying them out of their home region, or integrating the units beyond the battalion level (Baaz/Vereweijen 2013). Furthermore, rebel units were rewarded with powerful and lucrative positions in areas rich with natural resources or important trade routes, and permitted to keep their weapons caches and systems of parallel taxation in their home regions.

It is unlikely that Kinshasa could have successfully integrated the rebels more thoroughly at the time; but not only did the ex-CNDP units remain a persistent threat,
their privileged treatment led to resentment by other Congolese soldiers (former Mai Mai personnel in particular), many of whom deserted (Baaz/Vereweijen 2013). Fortunately, in 2009 Nkunda’s deputy Bosco Ntaganda declared that he was assuming command of the CNDP instead of Nkunda. The organizations fragmented, allowing Nkunda to be arrested without difficulty when he fled to Rwanda; however, when the Congolese government attempted in 2012 to institute military reforms that would threaten the power of CNDP’s informal patronage networks, Ntaganda and his organization launched the M23 rebellion, which lasted for the next year and a half.

Insurgent groups are prone to spring up whenever Kinshasa tries to take a firmer hand with its military, thanks in part to the ease with which foreign powers can influence the security situation. The CNDP, for example, rested on a small clique of Congolese Tutsi army officers, who benefited from backing by Rwanda. Immediately thereafter, the Patriotes Résistants Congolais (PARECO) was formed by Hutu politicians as a counterweight, building on the formerly decentralized network of Hutu militia groups and briefly allying themselves with the Congolese government against the CNDP, while maintaining their separate interests (Stearns 2013).

Uniquely among African states undergoing reintegration processes with rebel forces, Congo has been lenient with former rebels who then take up arms again. Army units know that they could often switch sides without lasting consequences, as the government will usually be forced to negotiate with them. One result is that Congolese units are unwilling to fight very hard against rebels who could easily be back in the military once the fighting is over. “Logically, the propensity to excel in fighting sharply diminishes
when there is a real chance that today’s enemy is tomorrow’s commander” (Baaz/Verweijen 2013:576). Congolese units also tend to violate operational security regularly, as soldiers tip off their former comrades in the bush of impending attacks.

Kinshasa’s lenient policy with armed groups seeking reconciliation has predictable side effects. Many armed groups such as the Mai Mai militias readily admit during interviews that they resort to violence in order to negotiate advantageous terms of demobilization (Laudati 2013).

**FARDC’s Relationship with the Populace**

In the conflict zones, FARDC units despoil the civilian populace as much as the insurgents do, and sometimes more (Laudati 2013). Civilians are forced to contribute regular payments of staples such as flour, fish, or meat; in South Kivu, women taking food or firewood to the marketplace were routinely robbed of half their load by the military. Often, women who had been despoiled of cassava by FARDC personnel were then forced at gunpoint to grind it into flour and bake cakes for the soldiers. Goats are a particular target of expropriation (by all armed parties, not just FARDC). It has become a matter of prudence to keep an extra couple of goats on hand so that looters will have something easy to steal, and will not be angered enough to rape or injure family members. The predation of FARDC units is so significant that in some cases, ex-combatants feel impelled to “return to the bush” (Laudati 2013:38), that is, to remobilize their insurgent militias to prevent their families from being stripped bare of their livestock. In the worst-affected regions, the non-state armed groups are preferred to FARDC by the populace.
Still, in most regions in the Congo, FARDC personnel are the most likely to provide true justice to aggrieved people (Verweijen 2013). The civilian and police authorities are incredibly corrupt, often partisan, or simply ineffectual. Thus, private actors often come to FARDC for redress and conflict resolution, rather than the other way around necessarily. Civilians engage in “forum-shopping” to find the authority most likely to favor them. (That said, soldiers themselves manipulate disputes to their advantage and “shop” to usurp jurisdiction, for the sake of the fees they can reap.) And the better a given unit is at providing security, the more people see its business activities as legitimate. Similarly, the more robust the civilian authorities are in a jurisdiction, the less space is given to FARDC to throw its weight around. And even with the dysfunctional state, in much of the country the populace lives in peace. Outside of the conflict zones in the east, the pervasive informal economy allows for a modus vivendi in which social order is maintained and commerce can continue (Young 2006).

**Taking Stock of the Congolese State**

The Congolese regime’s performance on our requirements for Right Authority is spotty, to say the least. While the majority populace supports the principle of a state regime (while wishing that the real one were less corrupt), state functionaries have little legitimacy and rule by naked coercion more often than not. Let us go through the main questions that the Dynamic Legitimacy theory poses.

We begin by assessing Standing. First, whether the Congolese state's activities go beyond immediate self-defense is ambiguous. How we answer that question depends on how heavily we lean on the "domestic analogy" in which defense of a state (which is not
to say "defense of its people") is considered equivalent to individual self-defense. The Congolese state is certainly defending its own power over society, and in many cases the populace suffers less under Congolese rule than it does under the rule of the various insurgencies, warlords, and freebooters who seek to supplant it. On the other hand, there are some cases in which Congolese rule proves more disruptive than its lack, making it hard to argue in those cases that FARDC is acting in self-defense of the people. And in any event, I am not inclined to give much weight to the domestic analogy; in my view, if Congolese people or troops are not being fired upon, immediate self-defense does not apply. Thus, applying a global judgment to the entire Congo war complex is inadvisable; the judgment will vary from situation to situation.

The second question is whether Congo's activities that go beyond immediate self-defense lead to additional threat for an associated community. This, too, is hard to answer. A few exceptions aside (one of which we will discuss later), most of the insurgent groups are extremely harmful to the populace, and Congo's choice to oppose them is unlikely to cause more harm to the populace than they already suffer. On the other hand, some of the practices of rule enacted by the Congo serve to perpetuate the conflict by empowering warlords and Big Man networks, rather than seeking to put in place just governance. How important would such practices be to Right Authority, when they are not strictly speaking a part of the war itself?

The third question is whether the Congolese regime has communal legitimacy. Here, they fare less well. While the populace wishes for a unified, stable central government in the abstract, the regime they have in the concrete is widely viewed as corrupt and partial
to the interests of elite factions. The bureaucracy is viewed as unfair and unjust, an obstacle to be bought off rather than a resource for a better society. For that reason, FARDC is viewed with rather more approval since its officers sometimes take the place of the justice system in arbitrating disputes, being seen as relatively more fair. Still, FARDC too often perpetrates abuses on the citizenry, for which they are criticized.

Nor is the Congo trying to improve its relations with the people. Congolese elites have been notably uninterested in improved democratic governance (as we will shortly discuss in more depth when assessing the UN intervention). Democratic elections, when they happen, are less about the popular will and more about jockeying between elite factions; and the corrupt bureaucracy and the larger practices of abusive rule show no signs of changing.

Interestingly, if one views the Congo's hesitancy to wage all-out war on the various insurgencies in the light of Dynamic Legitimacy theory, they could be said to be acting more or less commensurate with their limited Right Authority—for all that the real reason for their limited activity is likely the weakness and insubordination of FARDC. The various murky factors noted earlier make it hard to say whether even this limited scope of warfighting is justified, unfortunately.

Turning to the Discipline criteria, the Congolese regime is in a tenuous position—but Dynamic Legitimacy theory acknowledges the difficulties it faces, rather than judging it as if FARDC were a true hierarchical military. Even so, the regime falls short. Granted that many FARDC units often are de facto independent of Kinshasa's control, and would be evaluated from the standpoint of an ally, rather than a true subordinate unit; still,
Kinshasa often provides logistical support, and crucial legitimacy (in the form of military rank) for unit commanders, even when they are unable to ensure that the unit remains disciplined. Mutiny among FARDC is quite common and often goes unpunished; worse, from the standpoint of the theory, is that even loyal FARDC troops often predate upon the very populace they are supposed to defend, grossly violating the requirements of Discipline. They have few alternatives, precisely because the Kinshasa regime does not pay them enough to survive without predation.

All in all, the Congolese state comes off very poorly. Still, it is hard to conclude from this exercise that Kinshasa has no Right Authority altogether—mostly because the major alternatives to its rule are far worse. Kinshasa’s acquiescence to rebellious military units owes much to its weakness and simple inability to impose its will; its strategies of power owe more to Herbst (2002) than to Hobbes, realistically acknowledging the limits of the state’s ability in the face of independent power centers. The corruption of state institutions is a persistent bad equilibrium, rubble left over from Belgian rule and Mobutu’s subsequent kleptocracy. We can note with some sympathy the difficulties involved in reforming such a regime, even as we reiterate that regime actions help perpetuate the bad situation.

Ultimately, the Congolese state is a sort of “moral patient” (cf. Navari 2003) that lacks much in the way of Right Authority, but nevertheless has some limited rights to impose order. Still, when the state perpetuates systems of harm against the populace where it is capable of restructuring those systems to be more humane, it is committing a wrong.
The United Nations, and the Broad International Intervention

The United Nations (and tangentially, the many NGOs operating in the Congo) is our next actor to be evaluated. While it may seem odd to evaluate a peacekeeping operation through the lens of Just War Theory, in this case such an evaluation is called for, for two reasons. First of all, the UN operation has pushed the borders of what force a "peacekeeper" operation can use, engaging in search-and-destroy missions against a small number of hostile militias in ways that went beyond simple self-defense. Thus, in limited ways, the peacekeeping mission is indeed waging war as we understand it, and we therefore have grounds to assess whether it has the right to do so.

Second, the involvement of the UN, other international organizations, and NGOs in state-building work and Congo's serial reconciliation processes has reshaped the incentives of the warring parties in the Congo, to the point that some kinds of atrocities are actually rewarded (as we shall see below). As such, it is possible that this might trigger the "inviting retaliation" criterion that we had established as requiring Standing for a given actor, or the Discipline requirement likewise. Granted, NGOs are not actual combatants, and so a theory based on JWT might be inappropriate to apply to them; but if their actions cause innocents to be hurt, maybe such a theory has a measure of relevance after all. The matter deserves study.

Assessing the behavior of the UN reveals some disturbing patterns that complicate the assumed legitimacy of international intervention. While in some ways the protracted Congo intervention has improved the situation, in a few critical respects the UN and the great powers acting through it have made things worse. And the problems arise from
several recurring dynamics that are intimately connected with the nature of an international intervention.

Deployed personnel often had little understanding of the complex local situations they enmeshed themselves in, not speaking the local languages and finding themselves dependent on self-interested sources of “official” information. This was true to an even greater extent for the governmental elites back in the intervention force's home countries. As a result, there was a lethal penchant for complicated causal relationships to be boiled down into one-dimensional "narratives" that could be easily digested back home. Furthermore, because intervening states had few strategic interests in the Congo, they typically did not care to invest the proper resources or attention in the situation, leading deployed personnel to emphasize lurid topics like sexual violence against women in order to attract the attention of their superiors or (for NGOs) of civilian donors.

As a consequence, UN policies were often misconceived, more responsive to elite assumptions than the situation on the ground, slow to adapt in the face of repeated failures, and mostly ineffective at protecting the populace. In several instances, the focus on sensational topics like the exploitation of “conflict minerals” or sexual violence against women actually encouraged such abuses to spread.

Under Dynamic Legitimacy theory, such consequences would not automatically invalidate the Right Authority of the UN intervention. They would, however, invoke the need for the UN to gain the legitimization of the populaces affected by their policies. It does not appear that this was adequately done.
The UN Security Council created the United Nations Mission in the Democratic Republic of Congo (Mission de l'Organisation des Nations Unies en République démocratique du Congo, or MONUC) shortly after the signing of the Lusaka accord in 1999. Originally consisting of 90 military personnel meant to liaise with the signatories, the mission was expanded later that year to 500 observers and 5,037 soldiers to monitor the ceasefire implementation (Tull 2009). In late 2002, MONUC’s size was expanded and their mission redefined to include supporting, “on a voluntary basis,” the disarmament and reintegration of armed groups. Tull judges MONUC’s activities during its first three years (its “first phase”) as “limited but effective” (2009:217). Its mission was clearly defined in scope, and MONUC was able to oversee the eventual exit of foreign armies.

After the signing of the Praetoria Accord in 2002, the second phase of MONUC’s mission began. Now, they were tasked with supporting the transitional government in Kinshasa, primarily by providing physical security for government officials (Tull 2009). The UN Security Council consequently directed MONUC to deploy a tenth of its force, roughly 1,000 troops, in the capital. However, MONUC was mostly unresponsive to violence against civilians in the outlying areas of eastern Congo—violence which was triggered by the Praetoria Accord itself, which had mandated that Uganda and Rwanda withdraw their forces from the Congo without making provision for anything to replace them. The exit of Uganda’s forces created a power vacuum that led to more violence than before, as new militias formed to fight over the spoils. Matters grew worse for the populace after Uganda was forced to end its support for the UPC in 2003, expanding the
power vacuum and encouraging even more armed groups to form (Raeymaekers 2013).

Some of the new militias were organized around ethnic lines, both to claim representative rights to their territory and to secure positions in the reorganized FARDC during the peace negotiations, held under UN auspices.

For many militia leaders, this strategy paid off. Leaders of armed groups were either given officer’s commissions in FARDC or charged as war criminals, seemingly at random (Raeymaekers 2013). The unpredictability of the UN’s response to organized violence encouraged new militias to form constantly, each hoping to get a piece of the pie.

MONUC was hardly up to the job of protecting the populace, lacking a clear mandate for vigorous action to enforce public order, and lacking the manpower to police the entire eastern Congo. As a result, the lack of order led to vicious fighting between militias. Indeed, in the year following the Pretoria Accord the total number of Internally Displaced Persons in the Congo rose more than 20% to 3.4 million people, fueled entirely by violence in the east (Tull 2009).

The first major crisis erupted in Bunia, a town in Ituri district, where ethnic militias battled in May 2003 to fill the power vacuum left after the Ugandan military withdrew. Four hundred civilians were massacred, and the MONUC force of 700 soldiers present in the town did nothing to save them. Consequently, the European Union decided on its own initiative to deploy 1,400 peacekeepers to the area (Operation Artemis).

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184 "In absolute terms, MONUC is one of the biggest missions ever deployed by the UN, but in relative terms it has been one of the smallest, be it in relation to the size of the DRC (one peacekeeper per 139 sq km), or its population (one soldier per 3,500 Congolese). Moreover, MONUC reached the peak of its troop levels of some 19,000 soldiers only in 2006, seven years after its inception” (Tull 2009:223).
Stinging from MONUC’s failure to act, the Security Council gave MONUC a Chapter VII mandate in Ituri and North and South Kivu in order to protect the civilian population. Still, when in the next year renegade general Laurent Nkunda (who would later command the CNDP) occupied the city of Bukavu (the capital of South Kivu) and committed murders and abuses against the populace, MONUC again failed to act, citing insufficient personnel strength. The Security Council then broadened their mandate to encompass all of Congo, while deploying only 5,900 additional peacekeepers—less than half of the reinforcements that MONUC had requested (Tull 2009).

In October 2004, the “third phase” of MONUC began, focused on facilitating the new elections on national and local levels. MONUC’s duties now expanded to handle voter registration, logistical support of the elections themselves, and training Congolese police to provide security. The Western powers behind the Congo intervention saw the proper end-state of the conflict to be free democratic elections, and as a result the 2003 peace deal had declared that elections would be held in 2005 as the culmination of the peace process. Unfortunately, this posed a direct threat to one of the most powerful belligerents in the war, the RCD-Goma. The RCD-Goma controlled nearly a quarter of the country militarily, but had very poor popular support—indeed, when the elections were eventually held only 4% of national posts when to RCD-Goma candidates. As a result of this gross mismatch between present power and expected future power, RCD-Goma’s officers (including their leader, Laurent Nkunda) and their sponsor Rwanda decided in 2004 to launch the CNDP rebellion (which kicked off in 2006). The CNDP only
dissolved in 2009, partly as a result of a short-lived détente between Congo and Rwanda which led the latter to withdraw its support from the rebellion (Stearns 2013).

In February 2005, nine UN peacekeepers were killed in Ituri, leading the MONUC force to launch aggressive military action against some of the militias. MONUC issued an ultimatum that all fighters in Ituri had to hand in their arms by the beginning of April (at which point many would be reintegrated into FARDC). This represented a new and more “muscular” model for international peacekeeping, which for a brief time was cited hopefully by international elites as the harbinger for a more active UN role in “peace-making” and not mere peacekeeping. MONUC did not follow up with a broad policy of aggressive action against all the militias, however, leading the populace to accuse it of inconstancy and favoritism (Tull 2009).

After the 2006 elections, MONUC was charged in its “fourth phase” with strengthening state institutions, improving the security environment, and protecting civilians. However, in this effort MONUC and the UN would fall short—primarily because the international community focused exclusively on the official ceasefire agreement and did not understand the dynamics of the armed groups in the Kivus, nor that Congo and her neighbors were using the armed groups to fight proxy wars with each other (Tull 2009). Indeed, the conventional focus on an “elite-based transition process” (Tull 2009:227) focused on the transitional government in Kinshasa actually encouraged more violence by actors seeking to improve their bargaining position. As they did in other peace processes in sub-Saharan Africa, international stakeholders had pressured the Congolese government to integrate former insurgent units into FARDC (Baaz/Verweijen
2013). We have previously noted that Congo, unlike other states that have tried military integration, has elected to keep an “open-doors” policy so that armed units can repeatedly take up arms and negotiate better inducements to return to FARDC.

Given the setbacks in the reintegration process, it has often been more convenient for the international community to celebrate nominal successes and act as if the goals of integration have already been achieved than to truly address remaining problems. International donors have continued to support the military integration process, and MONUSCO has carried out several joint operations with “newly integrated troops who were not retrained and not redeployed” (Baaz/Verweijen 2013:580), thus tacitly endorsing the poor implementation of military integration.

Attempts to judicially punish powerful war criminals, meanwhile, have often led to more violence, as the criminals in question conclude that there is more to be gained from fighting than from submitting to the political order that wishes to imprison them. One such case is that of Laurent Nkunda, the powerful general of RCD-Goma; he was offered a senior military post in FARDC as part of the 2003 peace accord, but refused for fear that he would be arrested by the International Criminal Court, which had already begun an investigation against him for massacring civilians. Nkunda would then go on to lead the CNDP rebellion in 2006. Similar dynamics were at work with his successor, Bosco Ntaganda, in 2012; though the Kabila government had reached a rapprochement with Ntaganda and given him a powerful army post, international pressure led Kabila to indict him for war crimes; once his indictment was promulgated, Ntaganda and his allies responded by launching the M23 rebellion (Raeymaekers 2013).
“Dangerous Tales” and Bad Policy

The most fundamental problem with the international intervention is aptly illustrated by Autesserre (2012), who notes the international community’s convergence on three simplistic “narratives” to explain what is going on in the Congo. “These narratives focus on a primary cause of violence, the illegal exploitation of natural resources; a main consequence, sexual abuse against women and girls; and a central solution, reconstructing state authority” (2012:204). These narratives, out of all the teeming complexity of actual conflict processes on the ground, were selected and highlighted to suit the purposes of NGO fundraising and advocacy, and so that front-line UN personnel can get the attention of the Security Council and other elites who are simply uninterested in the Congo—unless they are confronted with such salacious and easily-digested sound bites designed to attract their notice.

Each of the three chosen narratives is objectionable, and has done tremendous harm. Blaming the violence on “conflict minerals” ignores that the bulk of insurgent revenue does not come from minerals at all, but from larger-scale looting operations, extortion of tolls at roadblocks (the most important source of revenue for many groups), “taxes” on property and practically anything else imaginable (including having a house with a corrugated tin roof!), forced cultivation of timber, hemp, and coffee, and expropriation of foodstuffs and livestock, particularly goats (Laudati 2013).

As numerous staff members have explained to me, fundraising and advocacy efforts succeed best when they put forward a simple narrative, and the story is most likely to resonate with its target audience if it includes well-defined ‘good’ and ‘evil’ individuals, or clear-cut perpetrators and victims” (Autesserre 2012:207).
Thus, the main policy work trying to stem the violence is directed toward the wrong target. Furthermore, it has harmed the very populations meant to be protected. When in 2011 the Congolese government banned mining operations and the export of minerals in North and South Kivu, the consequence was to devastate the main livelihood of hundreds of thousands of artisan miners, while the armed groups who were the targets of the ban simply continued their operations and even grew stronger because of the ban (Autesserre 2012, Raemaekers 2013, Laudati 2013).

The focus on the mined resources in particular is particularly myopic, since the trafficked minerals are merely the final product of the forced exploitation by armed actors of human labor, investment capital, trade routes, and cooperative customs inspectors (cf. Laudati 2013). To attempt to restrict the trade in minerals without addressing the larger system of exploitation is a futile and harmful exercise.

Identifying sexual violence against women as the most important consequence of the fighting, meanwhile, has had perverse effects of its own. First of all, international resources are devoted disproportionately to deal with sexual violence against women—often to the near-exclusion of other relief purposes¹⁸⁶ (including sexual violence against men, incidentally). Refugee women facing shortages of food or requiring medical attention have learned that if they claim to have been raped, they will often get help much more easily. Other affected populations facing equally dire circumstances lose out.

¹⁸⁶ The police mission of the European Union has only one unit deployed outside of the capital, and this unit focuses exclusively on the fight against sexual abuse, instead of on the fight against all illegal activities. During off-the-record interviews, Congolese and foreign aid workers regularly complained that they cannot draw the attention of the media or donors to horrific events that have no sexual dimension” (Autesserre 2012:216).
More alarmingly, combatants have learned that employing rape as a weapon of war is an effective way to be noticed. Armed groups often threaten to use rape in order to win concessions during negotiations, or to force military units to halt their operations. One especially horrific case where such a threat was carried out was the August 2010 mass rapes in Luvungi, in which a small militia called the Mai Mai Sheka gang-raped 387 civilians over three days. “According to several sources, Sheka ordered his soldiers to systematically rape women, instead of just looting and beating people as they usually do, because he wanted to draw attention to his armed group and to be invited to the negotiating table” (Autesserre 2012:217). And for this, Sheka was rewarded; as he predicted, media coverage led international elites to demand that his group be included in the then-current negotiations, in order to “halt” the very sexual violence that they had inadvertently encouraged.

And finally, the focus on state-building as the ultimate solution to the Congo’s long-running war has a certain logic, given the role of the weak military in permitting recurring rebellions, and that much of the violence has been exacerbated by cross-border meddling by other states. Unfortunately, the international focus on state capacity owes more to Western diplomats’ increased comfort with state-to-state relationships, and their belief that all of the “usual” solutions such as reconciliation and general elections had not worked because Congo was a “failed state,” than any penetrating analysis of circumstances on the ground (Autesserre 2012). And the Western focus on the state-building objective neglects the crucial role of the Congolese state itself in continuing the violence.
The state from its very inception as a colonial governing apparatus has been a structure of predation, and only became worse under Mobutu and the chaos that followed him. And this legacy continues to bear fruit. “State officials, including members of the army, the police, and the administration, continue to be responsible for the largest part of all human rights violations” (Autesserre 2012: 219). Government officials and military commanders use their posts to extract wealth from the populace by any means available. Common soldiers likewise use their privileges in FARDC and their capacity for organized violence to predate upon the populace, sometimes more brutally than do the armed groups they are meant to suppress, as we discussed previously.

Now, this by itself does not necessarily preclude state-building as a strategy. Indeed, if it would include efforts at professionalization of the military and the justice system, state-building would thus mitigate some of the government’s abuses. Unfortunately, while the MONUC mission originally included a Security Sector Reform (SSR) component, elites in Kinshasa were totally uninterested in cooperating with it (Tull 2009). Other governance reforms have similarly been non-starters (not entirely surprising, given the precarious environment in which the regime is operating and its need not to jeopardize the elite coalition holding it together). And instead of reassessing their focus on state capacity, the international community has instead decided to select less important projects whose nominal success is more easily measurable, and for which it is easier to claim credit:

[D]espite their failure to promote accountability and respect for human rights, interveners preferred to implement any kind of state reconstruction project possible rather than no project at all. The international efforts thus focused on
material reconstruction. Using funding from a number of bilateral and multilateral donors, UN agencies have built roads and administrative buildings, and have transported police and military forces to their new areas of deployment (Autesserre 2012: 219).

A side effect has been to make the predatory Congolese state more effective in its predation on a wider group of victims, actually worsening the populace’s living conditions.

**Taking Stock of the UN and International NGOs**

Some will object to my application of a theory of Just War to actors like the UN or other IOs and NGOs who are trying to build peace. The peacekeeping efforts of MONUC seem to be unobjectionable, and even the more aggressive operations carried out against militias in Ituri were done to protect its own force from attack, which seems hard to criticize. However, it remains the case that the UN intervened in the conflict in ways that led to tremendous harm for the populace, on whose behalf the UN was ostensibly intervening in the first place. By changing the conduct of the war, the UN incurred an obligation to satisfy the same sorts of requirements toward their claimed beneficiaries that any other actor involved in the war would have to satisfy, for all that they themselves were largely nonviolent.\(^{187}\)

We can see this most clearly in the UN’s push for democratic elections, which led directly to the CNDP rebellion because of RCD-Goma’s lack of popular support. This is

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\(^{187}\) One might ask if Dynamic Legitimacy theory applies even to nonviolent actors who impose harmful policies in a war situation, whether the same might be true even of, say, governments who impose harmful policies on their populaces in peacetime. I am open to the idea, but the extrapolation is not straightforward because war is uniquely destructive and prone to go out of control in different ways than peacetime policies do. The question would merit further work.
not to say that elections were necessarily a bad thing. But whether the international push for democratization was merely out of misplaced idealism or truly represented the best out of a bad set of options, it remains evident that the move carried considerable risk for affected populations, and indeed led to fighting worse than that which the 2003 agreement had halted. To gain the Standing necessary to institute such a risky policy, the UN force should have gained the endorsement of the affected populace. However, due in part to the ambiguity of the Security Council’s directive to keep the peace by “all means necessary,” and MONUC’s unwillingness to consistently use force to defend civilians, all parties involved viewed the UN mission critically:

The rebels accuse MONUC of fighting against them, the Congolese army accuses it of not fighting enough with it, and the people accuse it of no longer protecting them…. MONUC would have deflected much criticism had it pursued a more evenhanded approach. Using violent means in some cases but not in others, its military actions appeared incoherent. Contrary to [combat operations carried out in] Ituri it had no intention to conduct or stomach for robust operations in the Kivus and in Kinshasa (Tull 2009:224-225).

As a result, it seems unlikely that the UN possessed sufficient Standing with the Congolese people to justify its insistence on democratic elections, no matter how beneficial they might have been in the long run. The UN certainly has done little to build its standing with the populace; the attitude of IOs generally seems to have been that the value of their presence ought to be self-evident and requires little justification, no matter what errors they commit.

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188 This inconsistency could even be seen within a single military clash. In the recent M23 rebellion, UN helicopter gunships were apparently observed attacking M23 positions during the latter’s 2012 advance on Goma, but when the M23 continued their advance, UN ground forces stood down and did not resist them.
Given their lack of Standing, the UN ought to have been pursuing policies with limited scope for harming the populace. As noted, the policies pursued had in fact caused great harm, whether we consider the fallout from the 2006 elections, or the disruption of local economies caused by the ban on conflict minerals. The UN has not been acting with due humility and care for its position vis-à-vis the Congolese people.

Similar judgments can be made of the actions of the various NGOs working in the Congo. Of particular note is their reliance on the “dangerous tales” of conflict minerals, sexual violence against women, and state reconstruction (Autesserre 2012), promulgated in cooperation with front-line UN personnel in order to get the attention of their superiors. Admittedly, these narratives did little harm by themselves—the harmful policies which resulted from them were instituted by other, more powerful actors. Still, some measure of responsibility must attach to those who encouraged the narratives initially.

It is hard to blame the front-line personnel for doing what they could to solve urgent problems. But the need to construct these narratives in the first place points to a number of pathologies with the international community’s involvement in the Congo, which have implications for its Right Authority to intervene. First of all is that evidently, the intervention effort does not have the resources it needs to do much good (given that its personnel feel the need to attract more resources by sensational means). If the

189 Though perhaps the problem is not so much the resources available (at least to NGOs), but how they are used. Lemarchand (2013:420) writes scathingly: “Human and environmental disasters attract NGOs like filings in a magnetic field, and the latter in turn drastically reshape the contours of the social landscape. What is coming into view in Goma and Bukavu is a landscape dominated by ‘NGOpoles’, where the comfortable headquarters of hundreds of NGOs coexist,
beneficial effects of the intervention are so inadequate, it becomes correspondingly harder to show that the intervention’s benefits outweigh the possible harm instigated against affected populations. (If the population does suffer on balance because of the intervention, that would invoke the need for the international community to achieve Standing vis-à-vis the affected populations, as we have noted several times before.)

Second, attempting to boil down the complex processes of civil wars into bite-size narratives is fraught with peril. This is a critique not so much of the top-level elites, but of the lower-ranking field staff who are enabling them by creating the narratives in the first place. To highlight a single cause, a single effect, and a single solution to the Congolese conflict is to dramatically increase your risk of misunderstanding what is truly going on by excluding other vital factors from your analysis. Therefore, the likelihood that poor decisions are being made about intervention policy is increased.

The problem is exacerbated when personnel do not have reliable contextual knowledge of the conflicts they are trying to ameliorate. Autesserre (2012) reports that most newly-hired field staff are not regional experts and benefit from only a few days of country briefings before hitting the ground. Once there, they usually do not speak the local languages and must often rely on “official” sources of information, often provided (needless to say) by self-interested actors such as the Congolese government. In such an environment of low information, it is far too tempting to use easy narratives as a conceptual crutch with which to understand what is going on around you. Thus, single-

cheek by jowl, with peripheral slums bursting at the seams with ceaseless flows of internally displaced peoples (IDPs). The result has been to sow the seeds of further tensions.”
variable narratives distort the perceptions of the very people who ought to be responsible for developing deeper knowledge.

Third, if top-level decisionmakers are so uninterested in the effectiveness of their personnel, that raises grave problems for the Right Authority criteria of Competence, which we have not much discussed aside from a brief mention in Chapter Two and noting the importance of judgment in Chapter Three. Briefly, if elite decisionmakers at the UN and elsewhere are uninformed, uninvolved, and prone to making decisions on whether to use deadly force (or to institute ostensibly nonviolent policies with deadly results) based on media fads, one must wonder whether such leaders are evincing sufficient judgment to be considered Competent, in the sense we mean here for Right Authority. If we assume that a trustworthy decisionmaking process needs to be in place for Right Authority to be validated (cf. French 2001, Nozick 1974), then the Right Authority of the international effort would be in grave peril—because even if the intervening parties manage through blind luck to put the right policies in place in spite of their disconnectedness from what is actually going on, blind luck ought not be relied on when deciding on whether to start wars.

These three pathologies are strictly speaking procedural; that is, they would apply even if by some miracle the international community’s intervention managed to avoid all the concrete pitfalls of these flawed processes. In practice, however, they assuredly have not.

Summing up, it seems evident that even assuming that the international involvement in the Congo has been beneficial on net, harm has been caused to the Congolese in the
process. Under Dynamic Legitimacy theory, the requirement of Standing would thereby be invoked, and the interveners would need to be endorsed by the Congolese people in some fashion. Perhaps the cooperation of the Congolese regime would have been enough, were that regime itself an actor with Standing—but as discussed previously, the Congolese state has a crippled form of Standing if anything, given its tendency toward predation and authoritarian rule. Thus, the people themselves should have had the opportunity to endorse international action. This opportunity was never given them. Thus, in the terms of the theory, the Right Authority of the UN and of many of the NGOs active in the Congo must be seen as impaired.

It is worth reemphasizing that harmful or mistaken policies, by themselves, do not necessarily invalidate an actor’s Right Authority (setting aside the concerns about judgment noted above). The world is complex, especially during wars; good people sometimes make the wrong call, and it is unreasonable to expect perfection. But what such harmful policies do make necessary is for the affected population to grant the actor the Standing needed to allow it to make such weighty decisions on their behalf. Without such Standing, policies that are ill-conceived and harmful in practice cannot simply be written off as the mistakes of the well-meaning; lack of Standing renders such malpractice unjustified and malignant, the arrogation of life-and-death decisions over a people that never granted you that right.

A more appropriate focus on the need for affected populations to grant Standing to interveners—if the intervention carries a sufficient risk of making things worse—might encourage policymakers to be less cavalier about playing the white knight without
bothering to understand the situation on the ground. To be sure, it seems that the situation in the Congo is presently inching closer to normality as the recurring rebellions are slowly tamped down, and international organizations have certainly played an important role in the strengthening of the Congolese state, which may eventually underwrite peaceful life for its citizens.

But there is no doubt that interventions by the international community have also done great harm, harm for which they were never authorized by the Congolese people. Different actors believe that external powers contemplating an armed intervention do not need the permission of affected populaces in order to claim Right Authority, taking their moral authorization instead from resolutions of the Security Council or other international organizations, or from their innate moral certitude that allows them to “go it alone.” The case of the Congo does not prove the point one way or another. It does show, however, that innocents suffered because the intervening actors did not act from a deep understanding of the conflict dynamics—an understanding they would likely have gained if they were in closer contact to the people they claimed to act for, as Dynamic Legitimacy theory demands of them.

FAPC

Thus far, our evaluation of Right Authority in the Congo is depressing. “Official” authority is often self-serving and used as a shield for greater and lesser forms of abuse

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190 The same might be said about the recent NATO intervention in Libya; given the chaos that now exists on the ground, the only way to excuse Western leaders for their handling of the situation would be if the present chaos would have happened even without the intervention.
191 Or even nominally nonviolent interventions with potentially dangerous effects, such as aid programs that change the incentives of violent actors and reward their violence.
and exploitation, while in other cases providing a tenuous sort of security for the populace. The self-anointed saviors from the international community suffer from a crippling disjunction between the effectiveness of the personnel on the ground, and the interests (and attention) of the states or NGOs that placed them there.

Let us now consider a very different kind of actor—the *Forces Armées du Peuple Congolais* (FAPC), an armed group that controlled the Ituri regions of Aru, Ariwata, and northern Mahagi between 2003 and 2005, which was profiled in a much-cited article by Titeca (2011). The FAPC and its leader, Commander Jérôme Kakwavu, were blatantly mercenary in their behavior and motives—Jérôme in particular was an unlikely standard-bearer for good governance, having a long history of war crimes during his serial stints with the Zairian army, the ADFL, the RCD-12, the RCD-ML, the UPC, and any other armed group that offered him rich enough rewards. He was asked to organize the FAPC by Uganda, in order to safeguard Ugandan elites’ cross-border economic interests.¹⁹² Whatever their motives, however, the FAPC established a zone of relative peace, security, and economic stability that drew traders from across Congo, creating “an African ‘Monaco’ as it were” (Titeca 2011:52) with the support of the local community.

During its operation, the FAPC was made up of between 2000 and 3000 armed men. These were not locals for the most part; the officers were typically Rwandaphone mercenaries who had worked with Commander Jérôme in his earlier activities. The sole

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¹⁹² Uganda had been made to withdraw its military forces from Ituri in 2003 as part of the peace process, but still had lucrative business interests there that it desired to retain through armed proxies—which nonetheless were not always reliable, forcing Uganda to switch its patronage back and forth between them. “[O]f the ten armed groups active in Ituri in May 2003, every single one of them had been supported (that is, armed, trained and/or politically supported) by Uganda at some stage of its existence” (Titeca 2011:48).
goal of the FAPC was to make money. Its control over the nearby gold mines alone
generated over a million dollars a month in revenue (the gold was exported largely
through Ugandan business networks). But Jérôme had larger goals in mind. The FAPC
took control of the customs points as well in order to tax regional trade (cf. Laudati
2013). Having gained an interest in encouraging trade that could be taxed, Jérôme now
had reason to foster order in Aru and Ariwata:

The FAPC was never a rebel group which sought to overthrow incumbents, nor
did it organize its activities to do so. Its only political aim was to pacify the area –
something that Commander Jérôme did on several occasions. The movement also
produced T-shirts and calendars carrying this message (they displayed a picture of
Commander Jérôme with “pacificateur” written next to it) (Titeca 2011:49).

Jérôme imposed ruthless discipline on the area, including on his own soldiers; on
several occasions, he personally executed soldiers who had committed crimes in the main
trading zones of Aru and Ariwata, and ordered lesser punishments such as whipping for
their comrades who had pleaded for mercy. As a result, his forces were terrified of him
and generally behaved well toward the populace. The FAPC also used means such as
torture to enforce commercial agreements in the area; this was not resented for the most
part, since the trading community believed that punishment was being meted out
relatively fairly. Equally important, the FAPC’s taxes on cross-border traders were
considerably lower and less opaque than the official Congolese tax system, and lower
than the de facto taxes imposed by rival armed groups. As a result, it became known that
the FAPC-controlled zone was a good place to live and do business, and refugees and
commerce flowed into Aru and Ariwata from neighboring areas.
The FAPC’s tax system was developed in close collaboration with the local branch of the *Fédération des Entreprises du Congo* (FEC), a national business association, and relied heavily on the “pre-financing system” in which traders purchased the right to cross the border in advance, without needing their cargo to be inspected. The FAPC thus received a predictable, stable income based on its friendly relationship with the local trading community, over and above its active involvement in all sorts of smuggling ventures. Competing armed groups in the region often used widespread violence and looting against their communities, and the FAPC too was predatory and violent in areas outside of its trading core (such as during fighting over the Mongbwala gold mines, in which an entire hospital was pillaged by the FAPC). But inside its “core” area the FAPC received far more revenue when it could provide security and encourage commerce.¹⁹³

The FAPC, far from dislodging the state, selectively invested in weak local state institutions (indeed, the total number of state functionaries in the region increased during the FAPC’s tenure)—albeit for its own purposes, to facilitate its collection of taxes and the growth of trade. The FAPC also contributed heavily to the local university, built a football field, created a local development fund, and unilaterally installed prominent traders in government posts and military positions to increase local support for its rule.¹⁹⁴ As a result, sentiment very much favored their presence. “An expression that was used several times in interviews was that the area had become *une républiquett*é (a small

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¹⁹³ In this, the FAPC provides a textbook example of a “stationary bandit” (Olson 2000), both in comparison to other actors and also to its own behavior—in regions where its grip on a territory was less secure.

¹⁹⁴ A similar dynamic was at work with the RCD-ML, to a lesser extent. The connections it developed with local business communities and Church allowed the RCD-ML to cut its links with Uganda and participate in the 2003 peace deal (Raemaekers 2013).
republic), which controlled its own resources and therefore had greater input in its own
development” (Titeca 2011:60).

The rule of the FAPC came to an end in 2005. As noted previously, in February, nine
UN peacekeepers were killed in Ituri, leading the MONUC force to launch aggressive
military action against some of the militias. At last, MONUC issued an ultimatum that all
fighters in Ituri had to hand in their arms by the beginning of April (at which point many
would be reintegrated into FARDC). Jérôme cooperated with the UN, with the FAPC
beginning its integration process in March. Jérôme himself became an army general,
based in Kinshasa. Of his followers, some joined FARDC, others returned to civilian life,
and a small group of leaders fled to Sudan and Uganda.

**Taking Stock of the FAPC**

After that brief overview of the FAPC, what can we say about the group’s possession
to Right Authority? As strange as it may seem to grant Right Authority to a band of
apolitical mercenaries, the exercise seems relatively favorable to them. Let us go down
the list.

The FAPC’s activities certainly went beyond immediate self-defense, necessitating
that they establish their Right Authority. Beyond that, however, it seems evident (if
refugee flows and commercial activity are any indication) that the FAPC did not increase
the risks felt by the communities under its control—much the contrary. As such, it might
be the case that the FAPC had no need to establish Standing over the community at all, in
the sense used here. (The FAPC did carry out abuses in areas outside of its core trading
zone, but as I mention in Chapter Five, I do not believe that war crimes are best dealt with under the rubric of Right Authority necessarily.)

Even so, the FAPC went to great lengths to cultivate the endorsement of the populace, through favorable tax policy, relatively good physical security and order, and engagement with the local trading elites and broader community. This was all done in the name of profit, to be sure; nevertheless, it was done. And apparently, the populace of Aru and Ariwata believed that they had more influence over the FAPC’s governing regime than over the official state government apparatus. Thus it seems that the FAPC had a credible claim to possessing Standing with respect to the local community.

On the Discipline criteria, FAPC performs reasonably well. While there does not seem to have been a formalized system of self-discipline, discipline came from two directions. First, Commander Jérôme’s enforcement of good behavior was ruthless; where his troops committed widespread abuses, it is because Jérôme himself permitted them. Second, while an armed group such as FAPC is always prone to leadership disputes and defections so that relying on a single man to keep order is hazardous, in this case Jérôme’s authority was backed up by the armed forces of Uganda, which was committed to securing his position. On one occasion in May 2003, FAPC personnel did in fact mutiny, and a Ugandan military unit crossed the border in order to put the mutiny down (a service for which Jérôme apparently paid them well).

Whether the FAPC could have sustained its posture of benign despotism if Jérôme had been removed is an open question, given the lack of strong institutions; still, so long as the military situation remained secure, financial incentives pointed toward continued
good relations with the community. If the FAPC had suffered a reversal of fortune and its hold on territory became weaker, however, then its posture would likely have become more predatory as a result even if Jérôme remained. On the other hand, the FAPC’s investment in the state taxing apparatus would tend to strengthen the incentives for good behavior on the margin. On net, the criterion of institutionalized Discipline is probably a wash.\textsuperscript{195}

It seems then that an openly profit-driven armed band, acting to further the interests of a foreign power and staffed by known war criminals, performed better on the criteria of Right Authority that Dynamic Legitimacy theory lays out than did more “legitimate” actors such as the Congolese state or the United Nations. This was because the armed group’s desire for tax revenue led it to be sensitive to the actual needs of the populace to a much greater degree than nominally altruistic organizations which suffered from divergent incentives, or official state structures whose mechanisms of rule often involved victimizing their own citizens.

**Conclusion**

The long-running war in the Congo is a hard case for theories of Right Authority, because it seems at first glance that no one actually possesses Right Authority—at least not in an uncomplicated way. The nominal Congolese state lacks sovereignty over much of its territory, and in any event practices a predatory form of rule involving tacit acceptance of abuses by its nominal subordinates. Still, in some cases the military may be

\textsuperscript{195} To be sure, the FAPC predated on the populace outside of its “core” region; but again, my reading of Right Authority does not encompass atrocities generally, but an actor’s relationship with its own community.
the closest thing the populace has to just government; and in any event, if there is to be a hope of restoring stability to the Congo (if not necessarily a just peace), it seems that the existing state will have to play a role. In that sense, we may ascribe to the Congolese state a sort of crippled Right Authority, as a "moral patient" unable to fulfill many of its duties. Meanwhile, the efforts of the international community to stem the bloodshed may or may not have been effective, but they certainly imposed a great deal of risk on the Congolese populace. International interveners, insulated from the costs of their policies, may have been too cavalier with the policy choices they made, and the incentive structures they created for the combatants and for the civilian populace. Given the consequences for the populace, this case provides support for the claim that one may incur duties of Standing even if one is not, strictly speaking, a belligerent. External powers seeking to play the white knight ought to place more importance on securing the endorsement of the affected local populaces on whose behalf they claim to act, particularly if the policies they seek to put in place expose the locals to greater risk.

Ironically, in a setting of such turmoil, there are times when the actors who evince the most Standing are the most mercenary. When actors such as the FAPC are able to become "stationary bandits" and gain stronger incentives to provide stability than they have to carry out destructive pillage, they can govern more effectively and with more input from the populace than can the nominal sovereign state. Unfortunately, such outcomes are not the norm; but they remind us that we cannot prejudge the Right Authority of actors based on ascribed qualities such as the special status of statehood, the assumed virtues of international organizations, or the assumed moral turpitude of
mercenaries. For Dynamic Legitimacy theory, what matters is what people do and how others regard their actions.

The tragedy of the Congo sharply illustrates several key points about Right Authority. First of all, a proper understanding of Discipline is crucial—and in particular, the theory we employ must be able to handle other forms of relationship than the strict military hierarchies of a developed Western state. The Congolese state had only tenuous control over much of its military; some units were subordinate only in the most nominal sense, and behaved as warlords ruling territory for themselves. In order to tell which lapses of control should be viewed as demerits to Congo's claim to Right Authority, and which are merely the inescapable consequences of a weak state, it is important to distinguish the cases in which the state is responsible for the behavior of its troops from those in which the troops constitute de facto independent powers, which might be allies of convenience to the state at best.

Dynamic Legitimacy’s theory of Discipline is able to accommodate, in a general sense, both hierarchical subordinates and independent allies based on the degree of enabling that the Right Authority provides. The theory also implies different levels of responsibility on the part of the Right Authority for the behavior of its associates. To my knowledge, no other theory of Right Authority even attempts to make such distinctions; other theories simply demand perfect control on the part of the Right Authority, divorcing those theories from the messy realities of modern war.

Second, the efforts of the international community in the Congo suggest that one might be subject to the requirements of Right Authority even without using violence. The
UN shifted the incentives of the combatants in ways that caused profound harm to the populace. Similarly, the international NGO community encouraged policies that proved to be terribly damaging to civilian welfare. This work does not claim that the international community's policies were wrong in the aggregate (though it does not claim that they were right either). But it does claim that the UN and the other intervening actors did not gain the Standing they needed to justify such dangerous policies. Given the cost in blood paid by the Congo, it does not seem unreasonable to argue that those who push for risky policies should gain the approval of affected communities first. Intervening powers ought to spend more effort gaining Standing from the populations they seek to “rescue.”

This is not, in itself, a new argument—others such as Finlay (2010) have argued that third-party interventions should be contingent on the wishes of the affected populace, when they are capable of expressing such wishes. Still, I claim that the current argument is an advance because it is based on a straightforward application of the Right Authority principle of Standing, rather than an ad-hoc claim based on intuition.

Our case highlights some of the deficiencies with other theories of Right Authority. Theories that identify Right Authority with formal sovereignty or statehood would assume as a matter of course that the Congolese state is a Right Authority, neglecting the practical weakness of the state; statist theories that do acknowledge state weakness would still grant Congo some measure of Right Authority, without reference to the predation against civilians that FARDC and government officials in general carry out.
Theories requiring full-blown democratic legitimation, on the other hand, appear too exacting. Democracy has been as much a spur to greater conflict as it has been a spur to proper governance; additionally, much of Congolese society is run along a logic of client-patron networks, which confers a sort of legitimacy that is not captured by democratic theory. There are many forms of legitimacy, and a theory of Right Authority should recognize that.

Meanwhile, few scholars pay much attention to Discipline, or have a strong justification for when the requirement is invoked. Where similar ideas mostly come into play is in the literature on mercenaries, where their main use is to critique the Right Authority's subordinates, not the Right Authority itself.

Another point brought home by the Congo case is the close relationship between Right Authority in the field of war, and political authority—an area we have steadfastly avoided so far. While no consensus has been reached by scholars on what is required to establish political authority, or if political authority per se even exists,\textsuperscript{196} it seems self-evident that a certain amount of trust must hold between a people and its government, where the people believe that the government will not act to harm it. Without trust, what may seem to be public-spirited cooperation with the legitimate regime may in fact be the resigned compliance of the abuse victim. This can be seen in how the Congolese state institutions act to plunder the populace in ways large and small, while the FAPC during its short existence governed well enough that it attracted civilians into its area of control.

\textsuperscript{196} As before, cf. Bittner (2010), Coakley (2010).
The Congo case highlights the importance of the Discipline criteria in determining Right Authority. And Discipline may have further importance, I speculate, for establishing political authority (whatever else might be involved in that process). One may cautiously suggest that whether or not it proves sufficient to establish political authority, an acceptable level of Discipline in our present sense seems necessary—because only a Disciplined body will gain the trust of its populace that it will not work to harm the public. Pursuing this line of inquiry would take us far beyond the scope of the present work, but it seems evident to me that most theories of political authority neglect the danger posed by the ruler to the ruled.
CHAPTER NINE: CONCLUSION

This dissertation sought to engage in a fundamental question that cuts to the core of Just War Theory, and yet has only rarely been squarely asked: *what is Right Authority, and how can it be gained, or lost?* This effort was motivated chiefly by the growing mismatch between conventional, statist JWT—which assumes that only sovereign states, or possibly associations of states such as the UN Security Council, may possess Right Authority—and the circumstances of war in the real world, in which many or most warfighting actors are non-state actors of one type or another. To hold fast to the statist JWT theory would be to condemn JWT itself to irrelevance, as it would no longer be able to grapple seriously with war as it now exists.

This dissertation sought first to analyze the classical concerns underlying the history of Right Authority as a concept, and then to reconstruct Right Authority from first principles in such a way that one could evaluate the rightness of *any* sort of actor, from sovereign states to irregular guerrillas all the way down to lone individuals. It was argued that Right Authority properly understood is a general heading that encompasses three more specific principles of evaluation: an actor’s *Competence* to make war, its *Standing* to act on others’ behalf, and its *Discipline* of self and others. These principles were discussed in a new theory of Right Authority, *Dynamic Legitimacy* theory. In the process, a new JWT principle of Discrimination also was proposed, *Agency-Freedom* theory,
since the justification of the Standing criteria hinged crucially on the definition and borders of a group that is liable to attack.

The decomposition of Right Authority into its three components was done in **Chapter Two**. The category of *Competence* deals with the necessary capabilities and judgment that an actor needed in order to credibly claim that its decision to make war was just. The category of *Standing* addresses the actor’s right to begin a war that would affect other people. And the category of *Discipline* addresses the actor’s ability to regulate the violence it enables, whether from itself or from its associates. With that as its starting point, the dissertation could then attempt to break each concept down into its fundamental elements and reformulate them.

**Chapter Three** began by asking what war is, a step that is absolutely necessary to any discussion of the ethics of war, but one that is often assumed away in vague terms. Surveying the literature on Discrimination (or Noncombatant Immunity), the area that deals most with questions of who is (or is not) involved in fighting a war, the Chapter noted several incompatible positions in the literature. Some scholars argue that a just war can only be a collection of just acts of self-defense; yet to do so, they have to expand their definition of “self-defense” beyond all recognition. Others, noting the flaws in the first approach, instead argue for a collectivist model that seems far too permissive in who one is allowed to attack, disregarding the individual altogether in favor of the collective as the salient identifier.

Seeking an alternative that was built up from first principles, the chapter identified a logical error underpinning much of the literature on Discrimination—the assumption that
war and self-defense are strictly analogous. The chapter argued that this is not so. War in fact comprises a class of interactions featuring different levels of salience (i.e. threat of future harm) and direct or indirect involvement of others. Self-defense is a degenerate case of the larger class of war in which the attack is immediate and ongoing, and in which the subject of defensive harm is the attacker and no one else. As a result, the relatively permissive standards for allowing defensive harm are not at all comparable to the analogous standards permitting other forms of war. Because in war we justify harm on the basis of predictions about the future, and especially because we use such predictions to justify harming individual innocents such as conscripts, the standard of judgment that a warfighter must employ is far higher than that of a self-defender. Thus, easy analogies from self-defense to war or vice versa cannot be sustained without careful justification. On the other hand, arguing as this chapter does from the expectation of future harm on an individual basis allows for a more discriminating model than the collectivists advocate, preserving the dignity of individuals as moral beings.

By reexamining what distinguishes war in general from self-defense in particular, Chapter Three derived new principles of Discrimination that are ultimately more humane than can be found in any position within the previous literature, and which can serve as practical guidelines on the battlefield. Nonculpable individuals can nevertheless be targeted if they are enmeshed in non-voluntary social structures, such that you can predict with certainty that they will pose a threat in the future, and that their free will does nothing to make such a threat less likely. Conversely, even uniformed military personnel may be immune from attack if they are not actually posing a present or future threat.
Furthermore, if otherwise-innocent individuals do pose an involuntary threat of this kind, just warriors are duty-bound to attempt to break them free from their constraints (for example by killing their officers), thereby returning them to the full dignity of humans possessing free will. Nothing in the existing literature comes close to a dynamic principle of Discrimination such as this one. The principle was illustrated by a brief application to the child soldiers of the Lord’s Resistance Army, as well as in a thought experiment discussing the armed forces of the United States.

**Chapter Four** built on the insight that innocent actors can be targeted because of their group affiliation, if it creates the reasonable perception of threat, to establish the concept of Standing on a firm theoretical foundation. The chapter developed a model for how an actor of any type can achieve the Standing needed to begin a war that will implicate a larger community. The requirement for doing so was justified by the potential additional harm that the community would suffer, if an actor begins its war. By justifying the need for Standing in this way, we also justify acts of war or intervention by an actor without Standing in the case of humanitarian catastrophe or other extreme atrocities where the situation cannot be made worse, as well as justifying an individual right to make war without claiming Standing in cases where the individual is not associated with a larger group. In this way, the Lockean right to make war even as individuals is reconciled with the duties of care we are subject to in society, as well as with our moral obligation to halt atrocities when necessary.

Additionally, the chapter discussed how an actor without Standing can claim *partial* Standing, by acting to the best of its ability to uphold its duties to the community, and
how partial Standing would result in circumscribed rights to go beyond self-defense into a partial sort of war. The same model explains how actors already possessing Standing may lose it through wrongful behavior vis-à-vis their community—chiefly by disregarding the bases of its communal legitimacy, or willfully acting to harm its community. And when an actor loses its Standing, the scope of its permitted behavior would consequently narrow; once it has lost Standing entirely, it would be permitted to only engage in self-defense, and do nothing that goes beyond it.

**Chapter Five** discussed the requirement of Discipline—that an actor claiming Right Authority must be able to regulate the violence arising from itself or its allies. The requirement was grounded on similar bases as the requirement of Standing—that the would-be Right Authority should seek to benefit its community, not to harm them. In this case, the Right Authority must see to it that its subordinates, its allies, and even its own forces are disciplined so that they do not threaten their own community. The greater the degree that an actor has been enabled by the Right Authority, the greater the Authority’s obligation to control the actor’s behavior.

In this way, the framework is able to handle all sorts of associations between actors: not merely where soldiers are in a hierarchical chain of command and are thus subject to orders, but also when relations are looser, such as when a state empowers an irregular insurgent force to fight its proxy wars. Moreover, the framework can also handle when two actors are in a co-equal alliance without formal hierarchy at all, such as an alliance between two states. To my knowledge, there has been only a few halting attempts to formulate an ethics of state alliances, and this framework represents a significant advance.
on those attempts. The framework can even be applied to the case of an individual soldier serving in an unjust military, directing such individuals to examine the degree to which their participation helps enable the wrongs committed, and requiring them to withdraw their participation (if possible!) when such enabling becomes too much to justify.

The next three chapters took the framework we have developed and applied it to detailed case studies. **Chapter Six** examined the case of the Moro insurgency in Mindanao, the Philippines. This case poses problems for conventional treatments of Right Authority; the Moro community does not feel that the formal state institutions are legitimate or have their best interests in mind, and thus follow one of several different insurgent movements. Nor are those allegiances stable; the Moro National Liberation Front (MNLF) saw its support erode in favor of the Moro Islamic Liberation Front when it began to disregard the welfare of its community. The theory of Right Authority laid out here generated clear evaluations of the justifiability of each of the major actors despite their fluidity and complicated dynamics, in ways that other theories of RA simply are unable to do. Furthermore, the theory highlighted the problematic behaviors of MNLF that led to it eventually losing much of its legitimacy with the Moro populace, demonstrating that the moral concerns identified by the theory have applicability in the real world.

**Chapter Seven** analyzed the recent and continuing case of the Autodefensas of Mexico, a popular movement to combat the pervasive strength of the drug cartels. This case has received little attention in the media, which the present work hopes to correct to some degree. In the analysis of Chapter Seven, the movement’s initial legitimacy was
judged to be quite high; however, concerns were raised about its performance on the Discipline criteria, because of the movement’s decentralized structure and the ease with which new agendas and power struggles could emerge within particular units. These concerns proved to be well-founded, as the Mexican government was able to fragment the movement, co-opting one faction and exploiting internal rivalries to weaken the other one until its leader could be safely arrested. This case demonstrates the clear importance of the requirement of Discipline, and the incompleteness of any theory of Right Authority that does not include Discipline as a concern.

Chapter Eight surveyed the chaotic and bloody struggles in Congo, which have defied conventional analysis. The state is weak and often predatory, the military is difficult to control and prone to mutiny, and the efforts of well-intentioned outsiders to help sometimes do more harm than good. Existing theories of Right Authority simply lack the vocabulary to make sense of the turmoil. This chapter analyzed Congo’s state and military, finding that what limited claims they had to Right Authority derived mostly from the lack of real alternatives, and that their rights to make war are severely compromised due to their pervasive corruption and predatory practices against their own populace. The involvement in the region by the UN and international NGOs fared little better; neglect by decisionmakers and the subsequent reliance on sensationalist narratives by field workers has done tremendous harm to the populace, with little effort made by the interveners to secure communal endorsement for their activities. Meanwhile, in cases such as the FAPC armed group, non-state actors with purely mercenary motives could build more legitimacy and more effective governance within their territories than could
the formal authorities, posing a conundrum to conventional theories of Right Authority. The theory laid out in this dissertation, on the other hand, has the vocabulary and the analytical framework to make some sense of these maelstroms of violence, showing once again that an advance has been made on the existing literature.

In short, the objectives for this dissertation have been accomplished. A model of Right Authority has been developed that is fully general, applying equally to all types of actors from individuals, to corporations, to states, to insurgencies. The model is grounded on first principles arising from the tragic nature of war itself, and the requirement not to cause harm to others without their approval has been extended into a coherent set of requirements for an actor to claim Right Authority; furthermore, the model appears to correspond well to conflict dynamics in the real world, in settings where existing models are inadequate.

**Theoretical Implications**

The present work engages with the existing literature in many ways. First of all, the proposed continuum-of-violence framework in which “self-defense” is a single case of the larger class of “war” restates in an analytically precise fashion the objections of scholars such as Lazar and Frowe to the work of McMahan and his colleagues, who argue on the one hand that every instance of violence in war ought to be a permissible instance of self-defense, and on the other hand that “self-defense” can include such cases as a bomber pilot attacking a weapons factory. The continuum of violence places the focus on the key point distinguishing self-defense from war in the usual sense—the role of perceived versus actual threat, and the consequent role of judgment in justifying violence.
in war. Theories of Discrimination ought to take this point into account, and McMahan’s liability theory fails to do so at crucial points in his argument. Whether or not scholars accept the Agency-Freedom theory of Discrimination that this dissertation lays out, the continuum-of-violence framework ought to inform whatever theories they do prefer.

Second, the Agency-Freedom theory of Discrimination challenges existing theories of Discrimination and highlights their weaknesses. It does not depend on the guilt or innocence, or agent-responsibility or lack of same, of the targets—which is information that most soldiers simply would not have. Nor does it justify killing innocent soldiers on the basis of an unduly harsh judgment of collective responsibility, or agent-responsibility, or any of the other ways in which scholars have sought to minimize the innocence of such targets. Agency-Freedom theory does, however, justify the killing of Innocent Aggressors specifically because of the compulsion they are under, which makes their own free will irrelevant. Thus, the theory returns the focus to the right of the Defender to preserve his own life from unjust harm, rather than placing the Defender in the position of judge, jury, and executioner as liability theory does. It also implies that the ideal target of wartime violence should be those coercive people or structures that force innocents to fight unjustly.

Third, the Dynamic Legitimacy theory of Right Authority represents a goad to the rest of the literature, which has generally been content to base its different views of Right Authority on idiosyncratic intuitions, or on appeals to authority, rather than grounding a theory of RA on a firm basis of first principles. As a result, what little scholarship there is on RA is noncumulative; there is little analytical purchase for developing deeper insights
on the back of existing work. Exceptions are the work of Fabre (2008), who essentially rejects RA due to cosmopolitanism, and Reitberger (2013), who does the same due to Lockean liberalism. However, they paradoxically ascribe to individuals the right to disregard their impact on the welfare of other individuals associated with them, even when the stakes are literally life and death. I believe Dynamic Legitimacy theory acknowledges their arguments without discarding the insight from JWT that war affects more people than just the warfighters. As such, it represents a true theory of RA (rather than of the needlessness of RA) with a consistent theoretical basis.

More importantly, this is the first theory that asks how RA can be gained or lost over time, in a dynamic process—and the process it describes successfully detaches Right Authority from the albatross of statist political theory. The present theory, building from a single parsimonious claim about the relationship between self-defense and war, and the single axiomatic assumption that we may not invite harm onto others without authorization, simultaneously addresses the rights of individuals to act, the rights of communities not to be dragged into war improperly, and how Standing may be gained or lost over time. It does so without making any broad claims about the nature of political authority, state sovereignty, or the ethical value or lack of same of political communities. As such, the model is freely applicable to any form of human organization, whether individuals, small groups, states, galactic empires, or anything in between.

Furthermore, Dynamic Legitimacy theory reconciles the Grotian/Lockean claim that individuals have a right to make war with the claim of the JWT literature that a war may only be fought by those with Right Authority. Until now, JWT has had an uneasy
relationship with the heritage of revolution found in the history of modern democracy. Recent work by Scheid (2012) and Buchanan (2013) to the contrary, most scholars of Right Authority have not attempted to justify revolutions within an RA framework without jettisoning the whole concept (e.g. Fotion 2006), or by resorting to analogies between revolutionary organizations and sovereign states (e.g. Kutz 2005), which fail when the non-state organization is not territorial (O’Driscoll 2009). Dynamic Legitimacy theory preserves and clarifies the concerns motivating the original requirement of Right Authority, while extending its application to include non-state actors.

Additionally, Dynamic Legitimacy theory and Agency-Freedom theory represent an attempt to view the different criteria of JWT not as disconnected nice-sounding principles accumulated in a checklist, but as an interconnected complex of consequences arising from deeper fundamentals. Agency-Freedom theory ends up using concepts from Discrimination as a motivator for Right Authority; Dynamic Legitimacy theory builds directly on that motivator, and also ties in and strengthens the JWT principle of Right Intention via the criterion of Discipline (rather than simply having the Right Intention and hoping for the best, Discipline requires that you take steps to safeguard that intention in the real world). To my knowledge, no other theory attempts to unify the JWT principles without relying on Christian theology to do it. With luck, this would be only the first step in a larger program to interrogate the foundations of ethics in war.

My hope is that enough scholars are scandalized by the argument made in this dissertation for it to produce good work in response, in which scholars spend more time probing the underpinnings of RA and integrating the debate into other literatures in JWT.
and political theory generally. That is, if any of the arguments I make are wrong, I hope that they are “usefully wrong.”

**Relation to Conceptual Framework**

By seeking a theory that does not rely on assumed dichotomies between state and non-state, or superior and subordinate, we have been forced to drill down to basic fundamentals about conflict which are often taken for granted by existing theories. Not being able to lean on state sovereignty as our justification for Right Authority, Dynamic Legitimacy theory has instead focused on the perception of threat that arises in a constructivist, interactionist process from the conflicts between groups of people. The result has been a theory of Right Authority with much more analytical purchase when applied to actual cases, many of which are simply too messy for theories assuming statism.

Recognizing that political legitimacy is a complex and undefinable thing, Dynamic Legitimacy has not attempted to define exactly what kinds of legitimacy “count”. Rather than being a drawback, this has permitted the theory to conceive of partial legitimacy and partial Standing, and to situate such partial Standing along the continuum of violence, tying RA all the more closely to Discrimination.

In short, by embracing the constructivist claim that social categories are not fixed but can change or be manipulated, and by incorporating Tilly’s (2003) discussion of the role of salience in processes of violence, the present work has formulated new theories of both Discrimination and Right Authority so that the one relates closely to the other. This should demonstrate, I believe, that a close engagement with the subjects of Comparative
Politics, approached in a spirit of constructivist flexibility, can bring new richness to more areas of International Relations theory than might be expected at first glance.

**Future Work**

Many avenues exist for future work. First of all, the claimed distinction between "self-defense" and "war," in the sense that I use the term, runs counter to the sense of much of the literature on self-defense and Non-Combatant Immunity. Other scholars will want to challenge the continuum-of-violence framework and see if it holds up; if it does, much of the existing work in the subject will be superseded. For that reason, more work will be necessary to hammer out the details of the framework and justify it.

Next, the argument that a warfighter can achieve partial Standing needs to be clarified. I had argued that an actor may secure Standing to act for a community through any accepted method (and in particular need not employ democratic legitimation specifically), which depends on the beliefs of the community over what constitutes legitimate leadership and modes of conflict. While I believe that this viewpoint more accurately reflects real human behavior than a focus on democratic authorization or any other single mode of authority, it doesn't help us understand which intermediate steps on the road to Standing would permit which forms of warfare by the partial Right Authority. It is possible that more clarity will be hard to come by on account of the fundamental indeterminacy of intersubjective authority, as with much else in political philosophy, and all we can hope for is to improve our moral intuitions on the topic. Still, the matter at stake (when you can kill someone without individual culpability) is of supreme importance, and merits additional work if only to confirm the extent of the fuzziness.
My discussion of Discipline is based on the idea that if one actor enables another actor, the first actor bears a certain level of responsibility for the enabled actions of the second. I did not speculate, however, on whether this amounts to actual agent-responsibility (or even culpability) and would therefore be relevant to the literature on Discrimination. Enabling as I have discussed it is a far lower threshold to cross than that of deliberate assistance, and need not have intent behind it; as a result, I suspect that responsibility for enabling would not necessarily imply actual liability to attack. Hence, enabling will certainly damage the Right Authority of an actor, but may or may not involve true culpability. This question would benefit from more discussion.

I made a bold claim that certain forms of political or military organization are inherently suspect from a Discipline standpoint, because they lack built-in restraints on their ability to harm their own community. The implications of such a claim are immense, given the unbridled power of many states today, including nominal democracies (as the recent debate over the role of the National Security Administration has highlighted). I do not mean by this claim to strip Right Authority from all actors everywhere; still, I do not see how would-be Right Authorities can ignore the danger that they themselves pose to the community, especially given the dismal record of most non-state armed groups (and not a few states, either!). How this is to be reconciled in practice must be addressed in future work.

Note that I’ve bracketed the discussion of whether one might be obligated to fight and die for a Right Authority (state or non-state), for the simple reason that the political-authority literature has a very hard time answering that question (Baron 2009, 2010).
However, this omission may potentially indicate a weakness in the model. Classical discussions of Right Authority viewed the obligation of soldiers to fight for the Right Authority as the reciprocal of their absolution from murder. This concern was grounded in Christian theology and the Church fathers’ understandings of the proper scope of war and violence, and thus may not be applicable outside of that specific context; however, given that the framework for Discrimination laid out here makes express provision for the killing of innocents, more discussion is warranted about the precise moral status of such killing, and the moral obligations incurred by just warriors who find themselves killing such innocents.

Finally, the present work ought to inspire a greater focus on examining the underpinnings of JWT and tying together all of its principles (as this work does with Discrimination, Right Authority, and to a lesser extent Right Intention)—in order to make JWT more relevant to a world in which states and non-states make war on each other, authority is contested, hierarchies are dissolving, and political relationships are becoming more "complex." If we seek to have a moral grammar with which to critique the modern practice of war, it ought to be able to easily address actors of all kinds, whether they are sovereign states or ethnic communities or even lone individuals. Many scholars have been poking around the edges of that problem since at least Held (2005). I hope that this work will provide a push in that direction.

**Relation to Practice**
Does this work have anything to say about the practice of war? Humility is in order given the monstrous costs of error, but two points can be made even at this early stage. First, concerns about Discipline need to take a more prominent place in the calculations of warfighters or those who would aid them. The Autodefensa movement of Michoacán seems to have founndered on the flaws of leaderless war, much as the Chechens did before them, and the MNLF did little better in Mindanao. The efforts of the US to support "moderate" Syrian rebel groups against Bashar al-Assad keep failing, as the groups are routed from the field or defect to ISIS or al-Nusra Front. Generally, a better sense of responsibility for unintended consequences would probably be a good thing for those with the temerity to make war.

Second, international interventions ought to at least try to gain the support of the populaces they seek to protect. This is for practical reasons as much as theoretical; the failure of the UN to take the populace seriously in the Congo led to policies inspired by trendy fads more than by the needs of the people on the ground. Developing closer relationships and lines of communication to affected populaces would prevent much needless tragedy.

In general, we need to remember that a truly successful system of morality does not merely ask for things that are nice to do. It indicates what kinds of things tend to work over time in our relationships with each other, and what kinds of behavior are dangerous. Ignoring such a moral system carries risks, and often those who bear the risks are those least able to.
**Final Thoughts**

Conventional Just War Theory has assumed for over a hundred years that only the sovereign state has the right to make war. This claim has progressively estranged JWT from engaging the real world, in which violence by non-state groups is increasingly important in shaping the future. Nor do we believe that all such violence is illegitimate; but JWT has only recently tried to reconcile itself with the idea of a just revolution, rather than simply declaring such revolutions as somehow different. The present work has demonstrated that war by states *and* non-state groups can be justified in a general framework, derived from basic principles about the nature of war itself and the way that perceptions of threat lead to very real harm.

In a world of evolving political structures, such a framework is invaluable. The sovereign state may be the best form of government for centuries to come, but then again it may not be. If we are to experiment with new forms of society, then the members of society need rules to regulate their violence that apply equally well to any form of organization. It is my hope that a generalized Just War Theory will encourage the wars we fight to be a bit more responsible, a bit more responsive, and a bit more prudent with regard to their outcomes. And that is true whether wars are fought by sovereign states or idealistic revolutionaries—who have had the least ethical guidance up to now, even though they probably needed it the most. This dissertation is an attempt to give it to them.
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