

ROUTLEDGE HANDBOOK OF ETHICS AND WAR

Just war theory in the twenty-first century

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RETHINKING LEGITIMATE AUTHORITY

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1. Preliminaries

In its traditional form, the just war criterion of legitimate authority restricted the right to declare war to a state's legitimate representatives and the right to wage war to state agents. However, to an increasing degree, contemporary violent conflicts involve non-state actors. This has been reflected in the Geneva Convention's acknowledgement of 'armed conflict not of an international character'. Furthermore, in order to end a violent conflict involving non-state parties there is often some kind of recognition of non-state actors as legitimate negotiating partners and contract parties on the part of state actors or the international community. Former liberation movements and their leaders have in the past become internationally recognized as legitimate political forces and legitimate leaders. Such recognition has repeatedly given rise to the question of what makes it appropriate to consider particular violent non-state actors to be legitimate violent agents and others not. In just war theory, which has been both a source for international standards of war and an instance of critical reflection on those standards, there has been comparatively little debate on adjusting and reformulating the traditional criterion of legitimate authority accordingly.¹ This is why it will concern us in this article.

In recent debates surrounding the principle of legitimate authority, philosophers have invoked by and large four criteria for satisfying the principle. Some of these criteria reflect the traditional principle, while others already take the question of non-state agents in violent conflicts into account. The following criteria for legitimate authority have been put forward:

- 1 *Popular support and representation of a people.* This is assuming that it is morally desirable that the people on whose behalf or in whose name the violent conflict is carried out agree – in the majority – with this form of conflict resolution and its aims. It assumes that an agent that employs political violence has substantial support for this. With regard to war, Thompson says that it “cannot be waged on the whim of leaders,” but “leaders of the state or organization should be acting as agents of the people.”²
- 2 *Monopoly of violence and effective control over a people.* This criterion states that a violent agent must have the ability and willingness to “enforce obedience to the restrictions of just war theory.”³ And it guarantees that violence will not get out of control.⁴

- 3 *Adherence to international legal standards.* Janna Thompson argues that an agent must “recognise ... the restrictions of just war theory, the rights of other parties” as well as those “frameworks and institutions” that make agreements possible.⁵ This will ensure that enemies treat each other with respect and will increase the chances for settling the conflict.
- 4 *Predisposition to strive for a lasting peace.* Janna Thompson argues that an organization in order to count as a legitimate authority must be able and willing to negotiate a peace and to keep it.⁶ This clause prohibits agents to declare war on another country purely in order to profit from it financially, for instance. It also prevents wars that are not meant to settle a conflict, but to perpetuate it.

This chapter examines all four criteria for ascribing legitimate, in the sense of moral, authority to groups engaged in violent conflict – be it state or non-state agents such as terrorist actors, parties in civil wars or rebels in wars of independence. It will attempt to answer two intertwined questions:

- Are criteria (1) – (4) good criteria?
- Are there (always) good reasons to restrict the right to employ political violence to specific agents at all?

This article will show how of these four criteria only the first can be defended (part 1 and 2). It will also be illustrated that from a moral point of view non-state violent agents may perfectly well satisfy this criterion. In contrast, state actors may clearly fail in this regard. However, it will also become obvious that in exceptional circumstances agents are permitted to act without explicit approval from the people on whose behalf they employ violence. Finally, the article will argue that, in principle, *individuals* should be entitled to employ violence for political objectives (part 3).

It is important to remember, however, that establishing an agent’s *legitimate* use of violence is not the same as establishing that she is *justified* in employing violence. She is justified only if meeting a number of other criteria, too. If she does not have a just cause, for instance, she would be committing a moral wrong in engaging in a violent conflict, regardless of whether she has legitimate authority.

I will begin with discussing the first criterion, followed by a short comment on the remaining criteria. Finally, I will address the question of whether the right to employ political violence – and hence the possibility of having legitimate authority – should be granted to individuals, too.

2. Popular support and representation of a people

Early in 2003 then Spanish Prime Minister José María Aznar and his conservative government decided to join the U.S.’ and U.K.’s military engagement in Iraq. At that time numerous surveys confirmed what had already become visible in the form of public protests: the majority of Spaniards were opposed to that decision and saw no justification for their country’s involvement in that war.⁷ People took to the streets and marched against their government’s decision – yet to no avail.

Clearly, the Spanish government had the formal authority to enter that war. But, while they had been elected into that role, they just as clearly acted contrary to the will of their constituency. Some might think that the Spanish government did not act wrongly, because their public role entitled them to that decision. And in a formal sense (ignoring that the invasion was not sanctioned by any international authority and ignoring that there was no just cause), that might

be true. However, whether or not an agent is entitled to enter a war, or more generally employ political violence, is also a moral question. And from a moral point of view, formal authority may not be decisive.

A government's decision to go to war has an immense impact on their citizens. Taxes will be spent on the war effort and other areas of public spending will suffer cuts. Citizen soldiers will be sent to war zones; they will risk and sometimes lose their lives. These are practical implications of a decision to go to war and they deliver prudential reasons for not making that decision without seeking authorization by (a large part of) those who are paying for it. But there is more to it: when going to war, a country's armed forces kill in a people's or nation's name. It cannot be morally right that my country's armed forces kill people in my name when I have not consented to it. Not that every citizen could ever consent to everything his government does or decides. But because going to war is a decision that has serious consequences for many people's lives and because it is a morally important decision, it should only be made if there is widespread support for it among a country's population.

Let me briefly focus on a different scenario for a moment. In 1961 *Umkhonto we Sizwe (MK)*, African National Congress' (ANC) military wing, published a manifesto declaring the employment of violent means against South Africa's Apartheid regime.⁸ All MK members were also members of the ANC. MK subsequently launched violent – and sometimes terrorist – attacks to support ANC's struggle against Apartheid. This struggle had overwhelming support from Black South Africans and there was growing support for using violent means too. While MK clearly had no formal authority, given that it had not undergone an established and formalized procedure, it is probably fair to say that it employed violent means in the interest and according to the will of the people represented by the ANC.

At this stage someone might argue that what was wrong with Aznar's decision in contrast to MK's decision was that the invasion of Iraq was not justified – it lacked a just cause – but the ANC's struggle against Apartheid was, overall, justified – it clearly had a just cause. However, while I agree with this judgment, I do not think it gives us any insight into the nature of legitimate authority. Rather, it seems to collapse the criterion of legitimate authority into the criterion of just cause. The decisive difference is that the political community on whose behalf Aznar's government decided to go to war did not support that decision, while MK enjoyed substantial support from the community whose interests it defended.

Does it make a difference that the Spanish government was an elected and democratically authorized agent, while MK was not? These examples suggest that it would be arbitrary to restrict the right to employ political violence to state agents for formal reasons. Especially, when we agree that non-state violence aimed at overthrowing dictatorial and oppressive regimes is sometimes justified. Instead, the right to employ violence on behalf or in the name of a political community should lie with agents that legitimately represent their community's interests and political will. This condition can be satisfied by non-state agents, as the MK example shows, while state agents that have been democratically elected and formally authorized can fail in this regard, as the Spanish example shows.

But when does a non-state agent legitimately represent the interests of a community? Lionel McPherson argued that

[a] nonstate group may have representative authority: the group not only would take itself to act on behalf of a people but also would be acting on the people's behalf given credible measures of approval by that people. Such measures, for example, mass demonstrations, general strikes, and polling, might lie outside formal political procedures.⁹

There might be situations, however, in which a people or a political community are unable to express such approval. This may be the case in highly oppressive regimes. How important is the criterion of representative authority that McPherson suggests? Is it always wrong when an agent – state or non-state, military, terrorist or guerrilla – employs violence on behalf of a political community which does not agree with such violent endeavours?

In order to answer this question, it is important to distinguish two scenarios. In the first scenario, violence is employed (by a state agent or a non-state agent) with the aim of fighting against severe political injustice, such as the political oppression of ethnic, cultural or religious groups. In the second scenario, violence is employed (by a state agent or a non-state agent) to face and eventually stop crimes against humanity against the violent agent's own community or another community.

In the first scenario, independently of whether or not violence is employed to combat an injustice against one's own or a different political community or group, it seems to be crucial that the group or community on whose behalf violence is used does actually approve of such interference. Christopher Finlay has argued that "Non-state groups considering recourse to violence should therefore consult with those they claim to represent and should seek wide endorsement in order to legitimate their programmes for action."¹⁰ Yet, clearly, this must be just as valid for state groups using violence on behalf of others. Not only should state agents consult those who they are meant to represent – their citizens – it seems that state agents too would need to consult those to whom assistance is provided.

Finlay goes on to say that there may be circumstances in which the explicit preferences of a community may be disregarded. He argues that "there may be some cases of political oppression so severe that the capacity of victims to deliberate on their situation and make decisions about those who might represent their interests is diminished or eliminated." He thinks that in such circumstances, it is acceptable if a non-state entity acts without the explicit consent of the victims of the oppression if they promote the victims' *true* interests.¹¹ Again, if this applies to non-state agents, there is no reason why it would not apply to state agents too. But what kinds of circumstances does Finlay have in mind?

This question takes us to the second scenario, where violent means are employed to stop or prevent crimes against humanity. In a situation where a community or people is facing such severe crimes the victim's capacity to deliberate and consent to political measures taken by others is likely to be severely limited in the way Finlay described. And indeed, it seems that this capacity or lack thereof must play a role in deciding whether agents employing violence on behalf of the victims of those crimes act legitimately.

I have argued elsewhere that an agent must have what I called *moral authority*: an agent fighting a political injustice with violent means usually has moral authority to employ violence for this end if she has explicit approval of the people on whose behalf she acts. However, no such approval is required if the injustice she fights is extremely severe, for instance, if it consists of genocide or a crime against humanity as specified in international law.¹² I think it is important to distinguish between two cases. In one case the political community or the victims of the injustice are in a position to express their political will and it is therefore possible for any agent acting on their behalf – be it a non-state agent or a state agent – to act according to a people's or community's explicit will. But there are situations where this is not possible because, as Finlay describes, the victims have no opportunity to express their political will or they have been grossly manipulated into forming a will that does not reflect their interests. Hence, it seems that under some circumstances a people's or political community's expressed will may be ignored. Or else, the lack of an expressed will may not be a reason for refraining from employing violence on their behalf.

But can we always draw a clear line between these two cases? Can we really always know what the victims' or political community's *true* interests are? What about a community that does not wish to be defended against a looming genocidal attack, but prefers dying peacefully to defending themselves or being defended by violent means? Would anyone – a domestic or international state or non-state agent – be permitted to intervene on their behalf? Is it acceptable to defend people against their will?

While in struggles of independence, and more generally for political objectives to do with a community's right to self-determination, violent interference without consent would clearly be patronizing in an unacceptable way, this is not necessarily so for extreme situations such as genocide, ethnic cleansing, etc. In these situations, no consent from those on whose behalf violence is employed is required, because a violent agent will be justified in assuming that it is not in any individual's reasonable interest to be killed, maimed, banished, etc.¹³

To sum up: in exceptional circumstances, when a humanitarian disaster is looming or when a people's or political community's ability to deliberate upon and express their political will is severely restricted the criterion of legitimate representation permits acts without the victims' approval and in disregard of a community's manipulated will. In those situations, an agent may employ violent means on their behalf without their explicit or implicit consent. But do violent agents still need to satisfy the remaining three criteria? In the following I will show that *in order to have legitimate authority* they need not have effective control over a people, comply with legal and moral standards of violent conflict or strive for a lasting peace.

3. Redundant criteria

The three remaining criteria for legitimate authority are, as the title of the section already suggests, either redundant or lack justification.

Janna Thompson in her 2005 article "Terrorism, Morality and Right Authority" has argued that a violent agent must be "able and willing to enforce obedience to the restrictions of just war theory."¹⁴ According to Thompson, this will prevent violence from getting out of control. She argues that "[i]f violence is uncontrolled ... then making and keeping the peace becomes extremely difficult." Along similar lines, but with a stronger pro-state bias, Coates has defended the public monopoly of violence as "a fundamental step in any process of pacification."¹⁵

Both authors emphasize how control over violence is important – or even necessary – for making peace possible. They are probably right. However, there is no reason why the capacity to achieve peace should be a necessary condition for an agent's legitimate authority to employ violent means. Just war theory attends to this problem by incorporating the criterion of prospect of success. This criterion is meant to avert the employment of violence in lost causes. It demands that a war be waged only if it is likely to succeed, that is if it is likely to achieve its intended goal. If it is improbable that violent measures will help secure this goal, then it is morally wrong to resort to such measures. Given that the criterion of prospect of success is already part of just war theory, there is no need to incorporate its central ideas into another criterion as well. Hence, "legitimate authority" should not require that an agent is only justified in resorting to violence if he has some prospect of bringing the violent conflict to a successful end, as Thompson and Coates suggest.¹⁶

Janna Thompson has furthermore argued that an agent in order to be a legitimate authority for employing political violence must "recognise ... the restrictions of just war theory, the rights of other parties" as well as those "frameworks and institutions" that make agreements possible. A violent party, in her view, should be respecting the existence of other nations and peoples.¹⁷ As with the previously discussed criterion, she thinks that an agent should meet this

criterion if there is to be a reasonable chance that a conflict can be settled. Yet, for the same reason as above, her suggestion would already be covered by the condition of prospect of success and there would be no need for another criterion.

She also says that the agent should recognize the restrictions of just war theory. Yet this is a bit dubious because it is either a circular argument or because it makes the criterion of legitimate authority redundant. On the first interpretation, Thompson makes the satisfaction of one criterion from just war theory – legitimate authority – dependent on the satisfaction of *all* criteria – including the one that we are talking about. This would mean that an agent has legitimate authority if she has legitimate authority and a just cause, right intention, her means are proportionate, etc. This cannot be right.

On the second interpretation, she makes the satisfaction of one criterion from just war theory dependent on the satisfaction of *all other* criteria from just war theory – excluding the one that we are talking about. In the latter case, our criterion would be redundant because it would merely affirm the compliance with standards that are already covered by other components of just war such as non-combatant immunity, proportionality, or the prohibition of *mala en se* weapons. As to the question of international institutions: if adherence to international law is required for an agent in order to have legitimate authority then this begs the question against international law which may sometimes be at odds with morality. These realms should be kept separate.

Similarly, an agent's predisposition to strive for a lasting peace is usually covered by the criterion of just cause and right intention. "Right intention" specifies that the agent fight the war for the sake of the just cause, i.e. with the intention to ensure just cause. If an agent declares war purely in order to profit from it, he would be in breach of this condition. The same is true for an agent who does not aim at settling, but at perpetuating a conflict.

At this stage one might object that in my replies to Thompson I presuppose just war theory in a question-begging way. The just war tradition, one might argue, is a very heterogeneous tradition of thought under whose label philosophers have defended and defeated a range of ideas that are not always compatible. There is a lot of debate surrounding the relationship between these components, most prominently the debate surrounding the interdependence of "just cause", "non-combatant immunity" and "proportionality", with a distinctive new view put forward by Jeff McMahan.¹⁸

However, while it is true that just war theory is not a unified "theory", we should not forget that there is an overlapping consensus regarding which of its components are essential. And there is a division of labour between its different components. The question of legitimate authority is a specific question about who is the right agent to declare and conduct a war (or a violent conflict), assuming that only agents that qualify in some way or another should be allowed to do so. The disagreement discussed in this article this far is about how to spell out this qualification. The question of what qualifies an agent for legitimate authority is independent from the question of whether or not that agent has a just cause to resort to violence, whether she has the right intention, whether she will be likely to succeed, and so on. However, in the following part I will look into the question of whether or not there is a need for such a qualification at all.

4. Individual violent agents

Having established that a legitimate agent represents the will of a people or political community and that – in principle – both state and non-state agents can satisfy a criterion of legitimate

or moral authority, the last question we have to ask is whether an individual person can ever have legitimate authority to enter and lead a violent political struggle. Cécile Fabre has, in fact, argued that this should be possible. She argues that, from a cosmopolitan point of view, individuals are the basic units of moral concern, not political communities. She holds that

the right to protect oneself from violations of one's human rights by others is a *human* right, in the sense that it is a right to a freedom ... which we need in order to lead a minimally flourishing life. By extension, the right to wage a war in defence of one's human rights should also be conceived of as human rights.¹⁹

Fabre basically argues that an individual person is morally entitled to go to war – in the sense of having legitimate authority to go to war. Before I discuss her main point – with which I agree – I should say two things about her argument.

First, unlike Fabre, I do not think it is helpful to speak of an individual waging war, merely because I think we should reserve the term “war” for large-scale collective endeavors.²⁰ But clearly, her argument does not depend on it. Second, Cécile Fabre argues that we should drop the criterion of legitimate authority, *because* it unjustifiably restricts the right to go to war to state agents. This seems to draw the wrong conclusion drawn from a correct antecedent. Why not simply adjust the criterion of legitimate authority so that it does not apply to state agents only? In fact, authors have argued for a non-state criterion of legitimate authority.²¹

However, I agree with Fabre in that there should be no principled reason for excluding individual agents from employing violence to protect their basic rights. In fact they should generally not be excluded from employing violence for a just cause, be it their own or other individuals', groups', or communities' rights.

Let me look at a number of possible objections to this claim. One may argue that clearly we would not want just any person to take up arms whenever she feels that her basic human rights have been violated. And indeed, this would be undesirable. But that a person is justified in doing so does not at all follow from what I have previously said. That an individual agent is in principle a legitimate authority for employing political violence does not mean that she is justified in doing so whenever she thinks there have been rights violations. If we look at just war theory, there are a number of other criteria that agents need to satisfy before being allowed to resort to violence. An agent must have a just cause and that cause must be weighty enough to justify the employment of violent means. An agent should furthermore only resort to violence if other – less harmful – means for resolving the conflict in question have failed. Presumably, in a democracy, there are others ways of claiming one's rights.

Furthermore, one may claim that an individual will never succeed in something like overthrowing the government, ending oppression, etc. However, this objection can be rebutted in a similar way to the previous one. In just war theory the prospect of success plays a role in justifying resort to violent means. If a violent campaign is not likely to succeed, it cannot be fully justified. It has been argued that this criterion is not independent, but should form part of proportionality considerations.²² But regardless of whether or not “prospect of success” is independent as a criterion, it plays a decisive role in determining whether a violent effort is justified. One may object that this criterion will *as a matter of fact* render nearly all individual agents unjustified in resorting to violent means. But this does not mean that *in principle* they should be excluded as legitimate agents for resorting to violence.

Along different lines, focusing on the relation between the cause defended and the means employed one might wonder: what if an individual agent kills several people, just because she has suffered from a (comparatively minor) injustice? Surely we should not allow that one person may kill several others whenever she has suffered from rights violations.

This last worry is one about proportionality. It says that it cannot be right to cause a substantial injustice or moral wrong in response to a comparatively lesser injustice or moral wrong. And clearly, because this should not be allowed for, both traditional and non-traditional just war theories include the criterion of proportionality. According to this criterion, the positive results or moral benefits of resorting to a strategy of political violence must outweigh the negative results or moral costs. Furthermore, in the course of a single violent act, an agent must employ no more violence than necessary to achieve her objectives.²³

If we have a proportionality criterion, we can rebut the last objection to the claim that individuals have legitimate authority to employ violence for political objectives. An individual agent resorting to violent means in reaction to a minor injustice would be unjustified in doing so if she violates the proportionality requirement. But if her violence is proportionate then the fact that she is an individual agent as such should not make her violent act or campaign unjust. In sum, none of the three objections above show that *in principle* the resort to violence should be permissible for group agents only, and not for individuals.

5. Last question

In the article I have tried to show four things: (1) that a principle of representation (in the sense of acting on the basis of a community's or people's explicit or implicit will) is the most plausible interpretation of the criterion of legitimate authority, (2) that non-state violent agents may have this kind of legitimate authority, (3) that in exceptional circumstances violent agents do not require explicit approval from the people on whose behalf they act, and (4) that – in principle – individuals are entitled to employ violence for political objectives.

This article started with observations about international law and it may be a good idea to conclude it in the same way. One might wonder whether one of the conclusions from the discussion in this article, namely that individuals are in principle legitimate agents for employing political violence, should have any bearing on national or international law. In fact, one might be worried about “legalizing” individual agent's employment of political violence. Without doubt, ethical debates have always informed national and international legislation and will continue to do so. A strong moral consensus in a society can trigger revisions of existing legislation or incorporation of new laws. The question of whether or not this is desirable for the conclusions drawn in this article is a challenging question, but unfortunately not one that has a short answer. And it is not a question that can be answered by ethical deliberation alone.

Notes

- 1 The exceptions being, J. Angelo Corlett, *Terrorism: A Philosophical Analysis*. Philosophical Studies Series 101, Dordrecht; London: Kluwer Academic, 2003; Anthony Joseph Coates, *The Ethics of War*, Manchester: Manchester University Press, 1997; Virginia Held, “Legitimate Authority in Non-state Groups Using Violence,” *Journal of Social Philosophy* 36:2, 2005, pp. 175–193; Cécile Fabre, “Cosmopolitanism, Just War Theory and Legitimate Authority,” *International Affairs*, 84:5, 2008, pp. 963–976; Christopher J. Finlay, “Legitimacy and Non-State Political Violence,” *Journal of Political Philosophy*, 18:3, 2010, pp. 287–312, Anne Schwenkenbecher, *Terrorism: A Philosophical Inquiry*, Basingstoke, Hampshire: Palgrave Macmillan, 2012; Uwe Steinhoff, *On the Ethics of War and Terrorism*. New York: Oxford University Press, 2007; Janna Thompson, “Terrorism, Morality and

- Right Authority," in G. Meggle (ed.), *Ethics of Terrorism and Counter-Terrorism*, Frankfurt am Main: Ontos, 2005, pp. 151–160.
- 2 J. Thompson, "Terrorism," p. 155. Similar views are defended by C. J. Finlay, "Legitimacy and Non-State Political Violence"; V. Held, "Legitimate Authority"; Lionel K. McPherson, "Is Terrorism Distinctively Wrong?"
 - 3 J. Thompson, "Terrorism," p. 155
 - 4 A.J. Coates, *The Ethics of War*, p. 124, p. 140
 - 5 J. Thompson, "Terrorism," p. 155
 - 6 Ibid.
 - 7 See for instance the results of a survey by the daily newspaper EL PAÍS, 2 February 2003. Online. Available at: http://elpais.com/diario/2003/02/02/espana/1044140401_850215.html (accessed 26 March 2013).
 - 8 Manifesto of Umkhonto we Sizwe. Leaflet issued by the Command of Umkhonto we Sizwe, 16 December 1961. Online. Available at: <http://www.anc.org.za/show.php?id=77&t=Umkhonto%20we%20Sizwe> (accessed 26 March 2013).
 - 9 McPherson, L.K., "Is Terrorism Distinctively Wrong?," p. 542. See also discussion in A. Schwenkenbecher, *Terrorism*, p. 87f.
 - 10 C.J. Finlay, "Legitimacy and Non-State Political Violence," p. 309.
 - 11 Ibid., p. 310.
 - 12 A. Schwenkenbecher, *Terrorism*, p. 83 and Rome Statute of the International Criminal Court, part 2, articles 6 and 7.
 - 13 A similar conclusion is drawn by L.K. McPherson, "Is Terrorism Distinctively Wrong?" and C.J. Finlay, "Legitimacy and Non-State Political Violence."
 - 14 J. Thompson, "Terrorism," p. 155.
 - 15 A.J. Coates, *The Ethics of War*, p. 124.
 - 16 See also discussion in Schwenkenbecher, *Terrorism*, p. 96ff.
 - 17 J. Thompson, "Terrorism," pp. 155, 156.
 - 18 J. McMahan, *Killing in War*, Oxford: Clarendon Press, 2009.
 - 19 Cécile Fabre, "Cosmopolitanism, Just War Theory and Legitimate Authority," *International Affairs*, 84:5, 2008, pp. 969.
 - 20 See, e.g., Orend, Brian, "War", *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Edward N. Zalta (ed.); <http://plato.stanford.edu/archives/fall2008/entries/war> (accessed 3 May 2013).
 - 21 J.A. Corlett, *Terrorism: A Philosophical Analysis*; Finlay "Legitimacy and Non-State Political Violence"; V. Held, "Legitimate Authority"; A. Schwenkenbecher, *Terrorism*; Thompson "Terrorism."
 - 22 A. Schwenkenbecher, *Terrorism*, pp. 96–98; Steinhoff, *On the Ethics of War and Terrorism*, p. 30.
 - 23 Ibid.

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