Justification and Legitimacy at War: On the Sources of Moral Guidance for Soldiers*

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Attempts to simplify ethics in war by claiming exclusive legitimate authority for the law of armed conflict underestimate the moral complexities facing soldiers. Soldiers risk wrongdoing if they refuse moral guidance that can independently evaluate their legal permissions. State soldiers need to know when to object to a legal duty to fight; nonstate fighters need to know when to disregard legal prohibitions against fighting. And both might sometimes best discharge their moral duties by following a bespoke rule departing from noncombatant immunity in a principled way that has been designed for a particular conflict by an authoritative leadership.

I. MORALITY AND LAW AT PEACE

If the title of Adil Ahmad Haque's *Law and Morality at War* refers to a war between law and morality in the context of armed conflict, then it is a war that he thinks the law has already won. Moral philosophy helps interpret the law and justifies its claim to legitimate authority. It even suggests some amendments to improve it. But international law is generally all we need to distinguish right from wrong in conducting armed conflict. Whether seeking guidance as participants hoping to do the right thing or as observers hoping to recognize it when we see it, following the law of armed conflict (LOAC) directly and international law more generally

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offers the best chance of success. We should disregard other normative sources as direct guides, eschewing in particular any more immediate appeal to ordinary moral intuitions and principles.[1]

By arguing from reductive-individualist and cosmopolitan premises, Haque's account contributes in a novel and sophisticated way to a more widespread view that, in fact, the morality and law of war are generally at peace.[2] Michael Walzer, Michael Ignatieff, and Jeremy Waldron have each argued toward similar conclusions. Walzer acknowledged that modern just war theory is sourced in ideas with different histories and contrasting logics. But he finds in the central "War Convention" a moral *jus in bello* that chimes with contemporary international law in permitting soldiers to attack and be attacked, provided that they adhere to the demands of noncombatant immunity (NCI) and regardless of whether they have just cause.[3] Waldron answers revisionist critics of NCI by arguing that such a "deadly serious convention" cannot rightfully be breached, however much moral responsibility civilians may bear for the wrongs justifying resort to war.[4] And Ignatieff rejects apologetics for nonstate terrorism by arguing that there is no third choice in resisting political oppression: either adhere peacefully to international human rights (IHR) laws or resort to arms within the constraints of the LOAC. Like Haque, he maintains that the law of war is the only valid "moral frame of reference" in armed conflict.[5]

On Haque's account, the divergence that some revisionists trace between the LOAC and morality is largely illusory. He thinks that the assumption they share with Walzer, that the LOAC strongly permits killing in an unjust war, is based on a misunderstanding of the law. But whereas Walzer and Waldron emphasize the degree to which morality supports law, Haque draws on Joseph Raz to argue that existing law supports morality. The underlying morality is cosmopolitan, defined by duties that "reflect our moral status as human beings and only interstitially reflect our special relationships" (*LMW*, 9). The LOAC has "legitimate authority" due to the "service" it performs by offering combatants a better chance of discharging these duties than relying directly on moral intuitions and case-by-case judgments about individuals.

1. Adil Ahmad Haque, *Law and Morality at War* (Oxford: Oxford University Press, 2017), henceforth cited as *LMW*.

2. On premises, see *LMW*, 9.

3. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd ed. (New York: Basic, 2000), chap. 3.

4. Jeremy Waldron, "Civilians, Terrorism, and Deadly Serious Conventions," in *Torture, Terror and Trade-Offs: Philosophy for the Whitehouse* (Oxford: Oxford University Press: 2010), 80–110.

5. Michael Ignatieff, "Human Rights, the Laws of War, and Terrorism," *Social Research* 69 (2002): 1137–58, 1152–53.

I argue that this "service view" is overly optimistic and, in a certain sense, reductive. Neither the moral perspective of just war theory nor the law can claim preeminence as the sole means of satisfying moral duty, decisively defeating the other. Conflict between them therefore remains a possibility. On the account of the ethics of armed conflict that I offer instead, citizens facing the possibility of becoming combatants, and combatants facing war, have difficult judgments to make as they appeal to multiple sources for guidance and have to adjudicate between them when they clash—these include not only the law but also just war theory, as well as the decisions of existing or emerging political authorities. So even if the ethics and law of war are properly motivated entirely by the moral status and rights of individuals as universal ends (and "only interstitially [by] special relationships"; *LMW*, 9), I argue that the normative means of pursuing and respecting those ends bear the inescapable imprint of national institutions and particular political formations.

My argument has three parts. First, I argue that the law does, in fact, permit the morally impermissible to state soldiers. The tensions between morality and law are therefore sharper than Haque recognizes, and the legal guidance available to warriors is more heavily laden with moral risk. To minimize risk, state soldiers need just war theory for guidance in evaluating their legal permissions (Sec. II). On the other hand (Sec. III), nonstate forces need the same source in order to question the default legal prohibition on the use of force. And the ability of both to follow the law is conditioned by existing or emerging sources of political authority. Second, I argue (Secs. IV.*A* and IV.*B*) that framing the combatant's choice as a binary between following NCI and attempting the sort of highly individuated reasoning that Haque identifies with just war revisionism obscures an intermediate possibility. A bespoke principle of discrimination tailored to the contours of a specific conflict might sometimes track moral responsibility for wrongful threats and satisfy the requirements of the service view better than combatant/noncombatant discrimination. Again, political leadership is required to provide authoritative and concrete guidance about the liable and immune categories that the principle defines. And finally, I argue (Sec. IV.*C*) that where the illegal practices permitted by a bespoke principle are morally justifiable, they are then also likely to be morally obligatory. The tension that actors have to negotiate therefore isn't between a duty (NCI) and a mere permission, or between humanity and military necessity. Rather, it is between two opposing duties (humanitarianism in means vs. humanitarianism as an end). That such oppositions are possible means that we cannot presume that the law will always override morality when the two offer contradictory guidance.

All three problems point to the need for sources and practices of moral judgment that are in some sense independent of the law.

II. STATE-ON-STATE WARS: THE LICENSE TO KILL

Haque's argument for harmony between morality and the law takes aim at a belief widely shared by revisionists in just war theory (henceforth "revisionists") about the permissiveness of the LOAC. They maintain that there is a fundamental tension between what Jeff McMahan calls "deep morality" and the law, that is, between, on the one hand, what morality would demand if soldiers applied criteria of individual moral responsibility and liability directly when deciding whom to harm and, on the other, the permissions and constraints defined by the LOAC.[6]

From the first perspective, only those defending against aggression can claim moral justification for fighting and not those engaged in aggression. The war privilege claimed by soldiers fighting for an unjust cause (henceforth "unjust warriors") cannot, therefore, be grounded directly in defensive ethics or deeper moral principles such as the immunity of the innocent. And there is a similar tension in international law itself. The UN Charter outlaws war where it isn't a defense against wrongful war. But once a state has declared war or once an objective condition of "armed conflict" is recognized between two states, the LOAC permits just and unjust warriors alike to fight.[7] Revisionists argue that if it is justifiable for the law to permit killing by unjust warriors, then this must be due to the aggregate effects of doing so. It might reduce the destructive effects of wars overall, particularly on innocent people, by helping incentivize restraint by unjust warriors. So, whereas the deep morality of war is nonconsequentialist, the law of war is grounded at least partly in rule consequentialism.[8]

Haque rejects the need for such an account. The LOAC only provides what he calls a "weak permission" to unjust combatants at best. Consequently, relations between law and morality are much less strained than revisionists believe. This weak permission has two components. First, the LOAC doesn't prohibit unjust warriors from fighting in any

6. Jeff McMahan, "The Morality of War and the Law of War," in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 19–43; Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012), 12; Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014), 164–65.

7. Yitzhak Benbaji, "The Moral Power of Soldiers to Undertake the Duty of Obedience," *Ethics* 122 (2011): 43–73, 43–44; David Luban, "Just War Theory and the Laws of War as Identical Twins," *Ethics and International Affairs* 31 (2017): 433–40, 438. On conditions for recognizing undeclared noninternational wars, see Luban, "Just War Theory," 435.

8. McMahan, "Morality of War"; see also Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004): 693–733, 729–33.

fashion that hasn't been defined as unlawful.[9] And second, it grants protections: (unjust) warriors who attack (just) enemy combatants intentionally and harm noncombatants collaterally within the limits of proportionality are immune from prosecution by foreign states. Missing from a weak permission but present in a strong one is a positive legal justification for attempting to harm one's enemies (*LMW*, 27). Haque maintains that unjust warriors therefore do not have a privilege right to kill, nor, therefore, do they have a liberty right. Moreover, they have no claim right: unjust warriors have no claim against others that they not prevent them from fighting (*LMW*, 25).

Let's assume that Haque's reading of the LOAC on its own terms is correct. I think, nevertheless, that his interpretation of the unjust warrior's legal rights misses something important by failing to take account of the significance of states in the wider legal architecture. Taken as a whole, the architecture consists not only of the LOAC and the international *jus ad bellum* (chiefly sourced in the UN Charter) but also of sovereign states and national law. States play three roles: first, they help construct the architecture through treaties and conventional law, as well as by maintaining common practices recognized as customary law; second, they give life to some of its components by incorporating them within domestic law;[10] and third, they exercise legal powers that are independent of international law but that complement it. This last function is directly relevant to the war privilege.

Individuals serving in state forces are not only permitted to fight but also usually under a legal obligation to do so.[11] The obligation arises from the state's power to oblige subjects legally to follow orders to fight within the limits of the LOAC. This is true whether its subjects are career soldiers, volunteers for a particular war, or conscripts. In the first two cases, states contract with individuals; in the third, they impose duties with or without consent. Whichever way it arises, the obligation is binding as a matter of domestic law even when governments initiate wars that are unjustified under international law. Therefore, unjust warriors typically are legally obliged to fight when their countries engage in unjust wars. And I presume that obligation implies permission. We may say that such soldiers are permitted to kill insofar as they have a single privilege: a liberty to fight but not a legal liberty not to fight.[12]

9. On Raz and weak permissions, see *LMW*, 32–34, 191.

10. Gary Solis, *The Law of Armed Conflict* (Cambridge: Cambridge University Press, 2010), 15, 85–87.

11. For some early modern legal texts obligating soldiers to obey orders, see ibid., 342 n. 12.

12. Leif Wenar, "The Nature of Rights," *Philosophy and Public Affairs* 33 (2005): 223–52; David Rodin, *War and Self-Defense* (Oxford: Oxford University Press 2002), 19–20.

Haque is right, of course, to say that combatants cannot claim as of right that their enemies not impede them in fulfilling their role, which would be absurd. But that doesn't preclude the possibility of claim rights against others being bundled with the combatant privilege. For instance, combatants presumably have claim rights against their own civilians not to thwart them in serving the state. Moreover, civilians' immunity from attack is contingent on nonparticipation in hostilities against combatants: this too might be interpreted as a claim right of combatants against "enemy" civilians. And crucially, combatants have claims against neutral parties. Neutral states are prohibited from interfering in a conflict in various ways, while combatants have claim rights to search neutral vessels outside neutral waters.

Unjust warriors therefore usually have "strong" legal permissions to fight and kill. Even so, however, it might be replied that this doesn't contradict Haque: so far as international law is concerned, unjust warriors still aren't strongly permitted to fight. But this underplays the role of the state in completing a normative picture only partially sketched out by international law.[13] One way to explain this is by argument from historical and institutional depth. International law emerged in and through the modern, sovereign state. But while it curbed some of the early modern state's rights, it hasn't eclipsed the state entirely as a source of legal obligations. And where international law hasn't specifically prohibited the exercise of other powers and privileges, they may be presumed to continue.[14] So, just as the essentials of modern *jus in bello* were composed on the basis of established customs of war at an earlier stage than the highly restrictive contemporary *jus ad bellum*, the soldier's obligation to serve the sovereign state preceded the creation of the legal *jus in bello*. As such, it is as much a part of the customs of war as anything else. As Oona Hathaway and Scott Shapiro put it, "The soldier's license to kill is an ancient right. Indeed, it is of such antiquity that it is almost impossible to find an explicit statement of it before Grotius. . . . What in ordinary life was murder for which he could be tried and hung was now simply the performance of his *soldierly duty*—one for which he was immune regardless of whether the war in which he fought was just. As long as he followed the rules."[15] The war privilege, on this description, combines two incidents, an immunity and a duty. As such, as Gary Solis writes, "The combat-

13. On the relationship between international and national law, see *LMW*, 53.

14. This is implicit in the "*Lotus* principle—that states are permitted to do what international law does not prohibit [which] clearly refers to weak permissions rather than strong permissions" (ibid., 32).

15. Oona Hathaway and Scott Shapiro, *The Internationalists and Their Plan to Outlaw War* (London: Allen Lane, 2017), 62, 77 (emphasis added). Hobbes writes, "He that inrowleth himselfe a Souldier, or taketh imprest mony, . . . is obliged, not only to go to the battell, but also not to run from it, without his Captaines leave." Quoted in Luciano

ant's privilege has always been an important *customary* element of the law of war."[16]

If recruiting soldiers and imposing "soldierly duty" is customary, accepted practice for states, then it could explain why soldiers are widely thought to have a war privilege under the LOAC: this is because the LOAC is built around those parts of state practice that it hasn't prohibited or replaced. If the practice hasn't been prohibited, then it is implicitly permitted under international law. The net result is that even if it is true that the international LOAC doesn't strongly permit unjust warriors to kill directly, it cannot be denied that unjust warriors are strongly permitted to kill under the law of war. This is because international law weakly permits states to strongly permit soldiers to fight. And, in this sense, international law does permit unjust warriors in a strong sense to fight indirectly (see *LMW*, 33–34).

Let me consider some objections to this view:

Objection 1.—First, the weak permission that sovereign states enjoy differs in one crucial respect from the one Haque attributes to unjust warriors. Whereas states are not prohibited from enlisting their citizens, persons in government are not immune from prosecution under international law for fighting unjust wars. It might therefore be objected that the "crime of aggression" includes levying soldiers for the purposes of unjust war. For instance, according to the Rome Statute of the International Criminal Court, "'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations" (art. 8(1)). Conscription of additional forces might be construed as part of the crime insofar as it is "preparation" for aggressive war, or part of its "execution" if reinforcing an army fighting one.

However, it is also true that while international law prohibits states from initiating aggressive wars, it does not prohibit them from maintaining regular armed forces in peacetime. And when they do so, they permissibly place soldiers under a legal obligation to serve in combat later. The basic principle, therefore, still stands: governments are prohibited from exploiting their armed forces for aggressive purposes, but they retain the ability to privilege soldiers even when it's in violation of the legal *jus ad bellum*. This they do by (1) exercising their power to obligate soldiers to obey orders that are lawful under the LOAC and (2) creating a de facto state of belligerence by declaration or action. These are the

Venezia, *Hobbes on Legal Authority and Political Obligation* (Houndsmills, UK: Palgrave Macmillan, 2015), 118.

16. Solis, *Law of Armed Conflict*, 41–42 (emphasis added).

components of what I have elsewhere called the "Lesser Authority" of the state: its ability to create a legal state of war and the jural relations that constitute it with or without just cause. Whereas "Legitimate Authority" may be required for just war, Lesser Authority is seen in sharper relief when it is exercised by initiating unjust war (where there are no substantive moral grounds for the rights claimed by its combatants).[17]

Objection 2.—Another objection might cite conscientious objection and human rights. If individuals have a right protected by IHR laws to refuse service in wars they believe to be unjust, then it might contradict the state's right to obligate them in the same wars. One would cancel out the other.

This is doubtful, however. Insofar as a right of conscientious objection is recognized—for instance, under the European Convention on Human Rights (ECHR)[18]—it qualifies the duty to fight in a limited way rather than negating it. First, the right is as an exemption from a legal obligation. Therefore, those who have not discovered reasons to doubt the justice of their war or who have not (yet, successfully) made a case for exemption are still legally obliged to obey lawful orders. Their immunity under the LOAC continues in the meantime to be backed by a duty permissibly imposed under national law. Second, crucially, whereas the right to object to armed conflict in general is thought to be a proper application of freedom of conscience, a right of "selective conscientious objection" is rarely recognized. In a recent British case, for instance, where the appellant cited concerns "confined to Afghanistan rather than military conflict in general," it weakened his case because, as Rosalind English writes, it "put him in the position of a political, rather than conscientious—or moral—opponent of the system which he was resisting." Such a claim was unlikely to benefit from case law surrounding ECHR article 9.[19] Objectors are more likely to be recognized when they oppose war per se rather than one particular war. And even states recognizing

17. See Christopher Finlay, "Legitimate and Non-state Political Violence," *Journal of Political Philosophy* 18 (2010): 287–312, 301–2; and *Terrorism and the Right to Resist: A Theory of Just Revolutionary War* (Cambridge: Cambridge University Press, 2015), chap. 6. On "legitimate authority" as a "permissive" criterion, see Jonathan Parry, "Legitimate Authority and the Ethics of War: A Map of the Terrain," *Ethics and International Affairs* 31 (2017): 169–89.

18. According to the "Guide on Article 9 of the ECHR" (updated May 2018), the European Court of Human Rights "has ruled that the safeguards of Article 9 apply, in principle, to opposition to *military* service, when it is motivated by a serious, insuperable conflict between compulsory service in the army and an individual's conscience or his or her sincere and deeply-held religious or other convictions" (sec. 2, para. 58); https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf.

19. See Rosalind English, "The Limits of Conscientious Objection," *Guardian*, December 13, 2011, https://www.theguardian.com/law/2011/dec/13/conscientious-objection-soldier-afghanistan.

selective objection limit it to conscripts and exclude professional soldiers (e.g., Australia).[20]

Conscientious objection draws attention to an important additional point about punishment and permissibility. As Haque emphasizes, (unjust) combatants are immune from punishment by foreign states for lawful acts in wartime. This points to the weak permissibility of those acts under international law. But it's also generally true that (unjust) combatants are liable to punishment by their own states if they fail to commit lawful acts of violence when ordered to do so. Immunity from punishment doesn't necessarily indicate a strong legal permission, as Haque says, but legal liability to punishment does reflect the existence of a legal duty—and a legal duty implies a strong permission to perform that duty.[21]

Objection 3.—The objection here is the suggestion that early modern interpreters of the customary law of nations agree with Haque's analysis. If successful, it could raise doubts about my claim that soldiers have generally been granted belligerent rights within the wider architecture of the law of war. Haque, for instance, cites a passage from Emer de Vattel in support of treating the permissions bestowed on unjust combatants as mere immunities, not justifications (*LMW*, 26).

I think, however, that Haque and the early modern theorists are making different claims. Haque distinguishes between two sorts of legal right, strong and weak. But Grotius, for instance, follows Cicero in distinguishing law ("the standard of what is permissible (*licere*)" and "not liable to punishment") from morality ("the standard of right (*fas esse*)" which is ascribed "to nature").[22] Grotius directly contrasts lawlike moral principles which cannot, for various reasons, be positivized in international law with principles that can be. So his distinction seems closer to McMahan's juxtaposition of "deep morality" to the "law of war" than to Haque's contrast between two types of legal permission. What Grotius sought to emphasize was that laws permit fighting but don't negate unjust warriors' underlying culpability from a purely natural, moral point of view.[23]

20. United Nations publications: *Conscientious Objection to Military Service* (New York: United Nations Human Rights, Office of the High Commissioner, 2012), 58, http://www.ohchr.org/Documents/Publications/ConscientiousObjection_en.pdf. Hugo Grotius is the only significant early modern natural law theorist to recognize limited cases of selective conscientious objection; see Leroy Walters, "A Historical Perspective on Selective Conscientious Objection," in *War in the Twentieth Century: Sources in Theological Ethics*, ed. Richard B. Miller (Louisville, KY: Westminster/Knox, 2004), 224.

21. For relevant codes in the United Kingdom, see the Army Act (1955) and the Armed Forces Act (2006), sec. 12.

22. Hugo Grotius, *The Law of War and Peace*, trans. Francis Kelsey (Indianapolis: Bobbs-Merrill, 1925), 642–43.

23. See ibid., 644, on the impossibility of "decid[ing] regarding the justice of a war between two peoples" and, hence, the moral status of opposing combatants.

The passage that Haque cites from Vattel reflects a similar analysis of the relationship between the law of nature and the law of nations to Grotius's. The symmetrical permissions afforded to opponents fighting under the "voluntary law of nations" do not render the acts of an unjust side morally righteous: the legal permission "*does not, to him who takes up arms in an unjust cause, give any real right that is capable of justifying his conduct and acquitting his conscience, but merely entitles him to the benefit of the external effects of the law, and to impunity among mankind.*"[24] As with Grotius, Vattel's point speaks to a distinction between natural morality and positive law rather than to Haque's distinction between two possibilities of construing positive law. But additionally, Vattel's point is directed not at combatants but at sovereigns. He continues, two sentences later, "The sovereign, therefore, whose arms are not sanctioned by justice, is not the less unjust, or less guilty of violating the sacred law of nature, although that law itself (with a view to avoid aggravating the evils of human society by an attempt to prevent them) requires that he be allowed to enjoy the same external rights as justly belong to his enemy."[25] By contrast, the effects of natural and voluntary law on combatants in unjust wars are quite different owing to their political obligations and the legally binding duty of subjects enlisted for military service. "No person," Vattel writes, "is naturally exempt from taking up arms in defence of the state, - the obligation of every member of society being the same. Those alone are exempted, who are incapable of carrying arms, or supporting the fatigues of war."[26] He rejects vehemently the right claimed by ecclesiastics to exemption from military service.[27] Once enlisted—whether voluntarily or by conscription—the soldier "is to take an oath to serve faithfully, and not desert the service. This is no more than what they are already obliged to . . . as subjects."[28]

Most importantly, Vattel rejects selective conscientious objection too. Once war is declared, neither the private citizen facing conscription nor the serving soldier can refuse to fight, regardless of their opinions:

> On all occasions susceptible of doubt, the whole nation, the individuals, and especially the military, are to submit their judgement to those who hold the reins of government, - to the sovereign: this they are bound to do, by the essential principles of political society and of government. What would be the consequence, if, at every step of the sovereign, the subjects were at liberty to weigh the justice of his

24. Emer de Vattel, *The Law of Nations*, ed. Béla Kaposy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), 592; *LMW*, 26.

25. Vattel, *Law of Nations*, 592.

26. Ibid., 472–74.

27. Ibid., 474–75.

28. Ibid., 479.

> reasons, and refuse to march to a war which might to them appear unjust? It often happens that prudence will not permit a sovereign to disclose all his reasons. It is the duty of subjects to suppose them just and wise, until clear and absolute evidence tells them the contrary.

Such conclusive proof, Vattel thinks, is "nearly impossible" even *post bellum*. But even if it was discovered, combatants are "innocent" of wrongdoing and the crime is wholly the sovereign's. The only duty arising for combatants is to return anything they had acquired personally during the war.[29]

Vattel's analysis of the "voluntary law of nations" therefore supports the claim that combatants enjoy not only immunity but also a positive privilege to fight grounded in national sovereignty and law even in unjust wars.

Objection 4.—Couldn't unjust warriors have conflicting obligations between a national-law duty to fight and a duty under the international-law *jus ad bellum* to object? And, if so, wouldn't the latter trump the former?

One way to resolve an ostensible conflict could be for the service conception of legitimate authority to adjudicate between them. Soldiers should obey the state when deferring to its authority appears to be the most reliable way to satisfy their basic duties. But if the state appears unreliable, they should object. Haque writes, for instance, that "soldiers should not defer to their superiors if ordered to commit acts that are clearly immoral, or if important new information or circumstances arise that their superiors did not anticipate, or if they know that their superiors issued their orders arbitrarily or in bad faith" (*LMW*, 54). If Haque's comment refers only to orders concerning conduct *in bello*, then it seems right. It is consistent with the service approach to the LOAC: if the law has authority in the relevant sense, then the point is that soldiers shouldn't second-guess its applicability to particular cases. But if he meant this comment to encompass the compatibility between state orders (general or particular) and the *jus ad bellum*, then things are more complicated.

From the perspective of just war theory, certainly, revisionists would agree that soldiers doubtful about a war ought not to fight. But it is less clear that the law requires it. If such a legal duty exists, then it could be either national or international in source. It's highly doubtful that it could be national: it would be surprising to find many cases where domestic law obliged soldiers to resist orders by their own government to serve in unjust wars. But it is also doubtful that such an obligation exists

29. Ibid., 588. For arguments along similar lines to Vattel's, both earlier and later, see Christopher Finlay, "Bastards, Brothers, and Unjust Warriors: Ethics and Enmity in Just War Cinema," *Review of International Studies* 43 (2017): 73–94, 82–83.

in international law. There is nothing in the LOAC to suggest that soldiers are obliged to refuse to fight in what they believe to be unjust wars, provided that they are not ordered to employ unlawful methods. And the legal chief source of *jus ad bellum*, the UN Charter, is addressed to states, not individuals.

National law and international law therefore seem to be partly aligned and yet partly in tension. They are aligned insofar as national law renders combat by soldiers strongly permissible legally once they have enlisted and received orders. This fills out the permissive lacuna in the LOAC, complementing its prohibitive clauses. But they are in tension insofar as the legal permission (duty) that the state can impose on soldiers is at odds with its duty under the UN Charter not to prosecute nondefensive wars. And yet, in spite of violating moral duties by fighting in unjust wars (*ad bellum*), soldiers have no legal obligation to refuse. The law provides no direct guidance in such cases, and so soldiers wishing to avoid committing such serious wrongs must fall back on the resources of moral argument stemming directly from just war theory.

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Haque writes that the LOAC "is prohibitive, not permissive, and applies alongside other applicable moral and legal norms" (*LMW*, 55). The most important are IHR laws and, presumably, the moral and legal *jus ad bellum*. However, the authority of the state as a source of law is an important part of the picture too. And since this authority predated the LOAC historically, it is unsurprising that the devisers of international law have seen no reason to add anything specifically to permit soldiers to fight. The necessary permissions have existed for much longer than the LOAC has. There is something to be said, therefore, for differentiating between the international LOAC as such and the law of war more widely: the latter consists of both international law and the customs and laws of war at the level of the state.[30] So McMahan's dichotomy between the morality and the law of war still captures the right normative contrast.

With regard to tensions between deep morality and law, Seth Lazar has argued that a positive permission to fight is unnecessary for the purposes of the humanitarian view on combatant equality: only immunity is needed to incentivize restraint by unjust warriors.[31] I agree. But on the basis of the argument of this section, I disagree with Haque's reply that no legal amendment is needed to achieve this position (*LMW*, 25). Eliminating the permission to fight would require international law to remove the state's power to place soldiers under a legal obligation to fight.

30. The *US Department of Defense Law of War Manual*, 8, para. 1.3.1.2, defines "law of war" (and LOAC) as wider in sense than IHL. On my suggestion, "law of war" has a wider sense even than LOAC/IHL.

31. See Seth Lazar, "The Morality and Law of War," in *Routledge Companion to the Philosophy of Law*, ed. Andrei Marmor (London: Routledge, 2012), 376.

On my interpretation, without such an innovation, the tension between morality and law is even greater than revisionist philosophers suggest: the soldier is generally caught between two opposing duties (to obey and fight; not to fight) rather than between a permission (to fight) and a duty (not to fight).

III. NONSTATE-ON-STATE WARS: KILLING WITHOUT A LICENSE

So states are permitted (i.e., not prohibited) under international law to recruit soldiers and organize armies. The importance of this feature of state authority in legitimizing regular soldiers is thrown into relief by cases where war is not morally justified. The state identifies them as "combatants" and exercises a Hohfeldian power to equip them with the normative incidents customarily identified with the role: privileges, liberties, claims, and (partly through international law) immunities.[32] This power is what renders their actions a form of "legitimate violence."[33]

In combination with the LOAC, state-derived legitimacy puts individual soldiers in a comparatively confident position as regards normative guidance in their relations with enemies. But what about those fighting for nonstate forces? Wars involving nonstate parties have become increasingly frequent. In fact, as Sandesh Sivakumaran remarks, "The vast majority of armed conflicts that are fought today are not of an international character."[34] In principle, this statement should exclude civil wars between nonstate sides and imperial colonists, alien occupiers, or racist regimes, which are defined as "international" under Additional Protocol 1 (1977), article 1(4). But, as Sivakumaran says, "not a single state has acknowledged, nor will they acknowledge, being involved in a war of national liberation since that would be tantamount to accepting that they were colonial powers, alien occupiers, or racist regimes."[35]

International status is therefore likely to be contested, and nonstate forces of all kinds can expect to be regarded, at best, as participants in noninternational armed conflict and, at worst, as "terrorist" criminals.

32. Soldiers are immune from prosecution in their home state, too, for lawful warfare. As Haque argues, this isn't the result of the LOAC. Presumably it is therefore a matter of national law.

33. Max Weber, *The Vocation Lectures*, trans. Rodney Livingstone, ed. David Owen and Tracy B. Strong (Indianapolis: Hackett, 2004), 33.

34. Sandesh Sivakumaran, *The Law of Non-international Armed Conflict* (Oxford: Oxford University Press, 2012), 1; Pablo Kalmanovitz, "Sovereignty, Pluralism, and Regular War: Wolff and Vattel's Enlightenment Critique of Just War," *Political Theory* 46 (2018): 218–41, 233.

35. Sivakumaran, *Law of Non-international Armed Conflict*, 220; Noelle Higgins, "The Regulation of Armed Non-state Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements," *Human Rights Brief* 17 (2009): 12–18, 16.

Similar problems are therefore likely to arise for nonstate forces (henceforth "rebels") fighting against state soldiers in all such cases. They face at least two difficulties. First, even if they have a strong moral justification for fighting from a just war perspective, they cannot rely on the legal protections and permissions that the law of war grants regular combatants. Even in the best case, whereas international law grants at least weak permissions and protections to soldiers serving in unjust wars on behalf of states, it grants no such immunities to rebels in noninternational armed conflicts (*LMW*, 6 n. 5, 26 n. 27; see also 7). The lack of both (1) the (weak) permission granted in the LOAC and (2) a strong permission (duty) issuing from a state leaves rebels with an unmodified prohibition in national law, at home and abroad, against all killing. They can therefore be prosecuted by their own state or by others even for morally justified, discriminate acts of war.

For the rebel, therefore, far from distinguishing clearly between permissible and impermissible actions, the law of war presents only a field of prohibitions. It might be replied that the LOAC still gives general guidance insofar as rebels might choose to commit only those actions that would be permissible for state soldiers. But even this sort of indirect effect is vitiated by a second difficulty, which is that, before reaching to the LOAC for guidance, the rebel first needs a judgment about the political context in which she operates. For state forces, the legal condition of war (just or unjust) begins as soon as a state declares it, and so do the permissions it entails. But the rebel has no state to rely on to exercise this power. She must therefore call on other sources of guidance to determine whether she is operating in conditions that morally justify claiming those permissions. Her jural relations with opposing soldiers depend on the answer to one ostensibly simple question: is she engaged in a (just) "war"? If she belongs to a side that satisfies conditions necessary to justify morally the range of actions permitted by the LOAC to regular soldiers, then she can claim the bundle of normative incidents identified with "combatant" status; if not, then she can't.

Let's test this: imagine it is Syria in March 2011, and peaceful protests face violence from state forces. While many flee, some stand their ground and engage the soldiers. Peaceful resistance becomes incipient armed rebellion with fighters initially operating on their own initiative or in small, relatively uncoordinated groups. Someone joining the fight accepts Haque's advice to do only those things not prohibited by the LOAC. Will this provide her with sufficient guidance to give the law legitimate authority over her actions?

I will suggest in Section IV that even the prohibitions of the LOAC may be hard to translate for these purposes. But let's assume for the sake of argument that they are clear. This would still leave the rebel wondering what she is permitted to do. If she is engaged in an "armed conflict"

or "war" in one sense or another, then she might interpret the law's guidance on things like proportionality and distinction as implicitly permissive, just as a regular combatant might. So she might do a variety of things that would exceed the right of self- and other-defense as it is commonly framed in peacetime domestic, criminal law. She wouldn't await attack before attacking but could rather designate the members of opposing forces "enemy combatants" and seek them out for military engagement regardless of whether they pose an immediate threat to anyone. In doing so, she could sometimes proceed even if civilians are likely to be harmed, provided that harms aren't disproportionate to her "military" objective, and so on. But in what circumstances—at what point in the development of de facto fighting from uncoordinated skirmishes to fully fledged rebellion—may she assume that these actions are permissible?

Outside a state of war, violence is often thought to be justified against only imminent or ongoing attack. But exceptions are possible that suggest that the imminence condition is more of a rule of thumb than an essential precondition.[36] It commonly serves as such because cases satisfying the imminence condition are also likely to satisfy deeper conditions for justified defensive killing. According to a leading family of accounts, defensive killing can be justified in two ways, one based on liability, the other as a lesser evil. In cases of the first kind, killing is justified if, first, the target is responsible for the threat defended against in a way that renders them liable to be killed and, second, killing is instrumental in degrading or defeating it.[37] In cases of lesser evil justification, the target conceivably might not be liable to any harm, or might be liable to a degree of harm less serious than killing. Either way, killing could be justified only if it was necessary as a lesser evil than not resisting the threat it helps defeat. Where the target is liable to some lesser quantity of harm, then the harm it is necessary to inflict defensively in excess of that quantity must be a lesser evil compared with the evil defended against.[38]

If these are the underlying conditions for justified defensive killing, then individuals acting in an uncoordinated way against enemy forces organized on a national scale are likely to have problems justifying some kinds of offensive force that the LOAC permits to their opponents. There are at least three potentially problematic types of cases. The first is where enemy combatants are not currently threatening anyone but might do so

36. Rodin, *War and Self-Defense*, 41, interprets the imminence condition as internal to the right of self-defense. For hypothetical exceptions, see Jeff McMahan, "War as Self-Defence," *Ethics and International Affairs* 18 (2004): 75–80, 76.

37. See, e.g., Jeff McMahan, *Killing in War* (Oxford: Clarendon, 2009); and Frowe, *Defensive Killing*. McMahan sees instrumentality as internal to liability (*Killing in War*, 8).

38. Jeff McMahan, "What Rights May Be Defended by Means of War?," in *The Morality of Defensive War*, ed. Cécile Fabre and Seth Lazar (Oxford: Oxford University Press, 2014), 133–35.

in the future. A second type occurs where many individual combatants contribute to a large-scale, collectively organized threat in ways that are relatively small or indirect and which are hard to evaluate, both for the agents themselves and for others observing them. As Victor Tadros writes, "Combatants in the same unit as the combatants who directly pose threats support their missions with navigational and tactical advice, they encourage combatants to pose these threats, they help to load weapons and identify targets, and so on. Combatants beyond the unit also contribute—without them the war would not have occurred, they secure the territory from which further advances can be made, they divert threats away from the unit, they provide intelligence, they provide a disciplinary hierarchy which makes the war machine more effective, and so on."[39] A third type is that of overdetermination, where each combatant is likely to be replaced swiftly by another held in reserve if eliminated. These cases all fall within the range of legitimate targets defined by the LOAC, so state forces may regard them as unproblematic. But the factors defining them can affect the ability of rebels to justify attack.

In the absence of a strong legal permission backed by state authority, the rebel only has moral argument to rely on to justify attacking these types of targets. But it is doubtful that targets in the first type of case can be regarded as liable to harm based on moral responsibility for a wrongful threat since they currently pose none. If rebels attack, it will be because of what their uniforms indicate they might do rather than for anything they are actively doing. In the second and third cases, individual moral liability to defensive killing may be hard for rebels to judge, and the relatively marginal or indirect ways in which some individuals are linked to coordinated threats might also entail lower degrees of moral responsibility and, hence, liability. This is likely to mean that permissions to kill frequently lean more heavily on a combined justification, taking account of both liability and lesser evil. So, for instance, in the second case, some targets might not be individually liable to suffer harms as severe as being killed, but killing them as a necessary part of a strategy for defeating their side as a whole might nevertheless be less bad than letting their side kill other, entirely innocent people.[40] In the third case, overdetermination might not necessarily diminish individual liability, but just like in cases of the second kind, the ability to justify killing one person depends on the ability to kill (and to justify killing) a much larger number of individuals. This is because eliminating only one or a small number of participants will typically do little or nothing to degrade

39. Victor Tadros, "Causal Contributions and Liability," *Ethics* 128 (2018): 402–31, 402–3.

40. See Saba Bazargan, "Killing Minimally Responsible Threats," *Ethics* 125 (2014): 114–36.

the threat they contribute to. Defeating the threat requires eliminating a large number. Killing will therefore be instrumental in defeating it only if it is part of a larger-scale, coordinated strategy.[41]

A rebel knowingly acting in concert with large numbers of fellow fighters, all coordinated strategically by leaders capable of directing them, might therefore be able to justify a wider range of attacks approximating to those permitted by the LOAC to state forces. But if she lacks grounds for believing that her fighting contributes to a wider war in this sense, just as our Syrian rebel might early in the revolt, she will be limited to fighting within a somewhat narrower range of possible cases. Rather than simply following the contours of the laws of war, she is bound to rely more directly on sublegal moral intuitions, principles, and judgments for guidance and adopt a more restrictive approach to violence.

So, the LOAC might guide nonstate actors if we agree that it applies permissively as well as prohibitively. But it provides that service only under certain objective conditions, and it is necessary to judge whether they obtain before claiming for rebels the permissions that the law grants to state combatants. Judgments are likely to be contested. As David Armitage writes, when it comes to specifying the status of internal conflicts, "attempts at precision are as doomed as they are illusory for the simple reason that civil war is an essentially contested concept. . . . Being precise, in the sense of using clear definitions, turns out to be inescapably political. The elements of those definitions as much as their application are always matters for principled dispute. This seems to be especially true of civil war—an essentially contested concept about the elements of contestation."[42] Quite how—or indeed whether—this problem might be remedied through law is hard to see. But unless it can, the moral reasoning characteristic of just war theory will have an independent role to play, providing would-be combatants with guidance in making the moral and political judgments that logically precede a moral claim to belligerent status. The ability of rebels (and third parties judging them) to apply the LOAC in the service of morals is itself dependent on this prior analysis, because without it they have no basis on which to claim that its permissions cover their actions.

IV. IDENTIFYING LEGITIMATE TARGETS: STATE ON NONSTATE, NONSTATE ON STATE

So far, I have argued that combatants depend on normative sources additional to the LOAC itself in order to justify being guided by it. I now

41. See Tadros, "Causal Contributions," 422, 430.

42. David Armitage, *Civil War: A History in Ideas* (New Haven, CT: Yale University Press, 2017), 226.

want to argue that the content of the LOAC isn't always the best guide for combatants seeking to discharge their most important moral duties. There may sometimes be grounds to question its central prohibition.

The LOAC is built around a principle according to which enemy combatants are legitimate targets for intentional attack while noncombatants are immune. Haque's argument that combatants should always adhere to NCI is supported by a service view of law's legitimate authority: they should always prefer the law in cases where it conflicts with "their own moral judgement" provided that in doing so "combatants will better conform to the moral reasons that apply to them" (*LMW*, 45–46). These moral reasons have to do with avoiding intentional or disproportionate harm to those with the strongest moral claim to immunity: "The point of relying on IHL is to allow combatants to bypass individualized assessments of intrinsically morally relevant facts when the moral stakes are high but directly relevant evidence is weak. . . . Combatants should not *trust* the reasonableness of their beliefs regarding the moral liability of civilians, which are susceptible to distortion by non-rational factors. Combatants would better avoid killing morally protected civilians by following IHL than by following their own judgement" (*LMW*, 47). I argue (Secs. IV.*A* and IV.*B*) that this analysis depends on a false binary. Between following NCI and following one's own case-by-case judgments lies the further possibility of following a bespoke, context-specific rule under the guidance of authoritative leadership. In some cases, I maintain, this rule might help combatants conform better to moral reasons applying to them as regards targets. Moreover, as I argue in Section IV.*C*, it may also help them conform better to moral reasons arising from the ends of just war. If the former argument is true, the service view overestimates the risks of deviating from NCI. On the latter argument, it underestimates the risks of always adhering to it.

A. NCI and Alternative Rules

Three thoughts point toward probable exceptions to the legal principle of NCI. The first is that there is a more credible rival to following NCI than making individually focused, case-by-case judgments about moral liability.[43] NCI serves its purposes if it permits opposing forces to target those whose elimination is likely to be effective in defeating a threat and who are likely to be morally responsible for it, while avoiding the epistemic risks of having to judge each individual case on its own particular

43. According to Jonathan Parry and Daniel Viehoff ("Instrumental Authority and Its Challenges: The Case of the Laws of War," in this issue), Haque's binary reflects a "narrow" instrumentalist approach to the LOAC's authority. They defend a "wide" account that would permit individuals to defer to a third source of guidance that offered better prospects than deferring to the LOAC. In this regard, their argument runs in parallel with mine, although the alternatives we consider differ.

merits. But it is surely possible that, in some cases, an alternative, bespoke rule could serve the same purposes by specifying a different category of legitimate targets based on the same deeper criteria. If the rule satisfied conditions of epistemic and substantive justification better than individuated judgments, then it might satisfy the service-based requirements that, according to Haque, favor NCI: to help soldiers conform "better . . . to their moral obligations indirectly—by following the [alternative rule]—than directly—by attempting to apply deep moral principles under adverse conditions" (*LMW*, 135).

As a partial support for this idea, the second thought is that sometimes there are reasons to doubt that following NCI as the enemy defines it is justified. Just war theorists have spent relatively little time on the normative issues raised by the different ways in which belligerents specify the content of their own combatant and noncombatant categories. These include the question of how many combatants to recruit, by what means (e.g., voluntary or coercive), and how (far) to distance them physically and distinguish them visually from noncombatants.[44] There can be various problems with a belligerent's decisions. For one, they might violate principles of domestic justice. If combatants are known to have been duped and coerced, it diminishes (even if it doesn't wholly eliminate) the weight that the principle of combatant liability ought to be given.[45] Similarly, it is also likely that the weight given to NCI could be diminished by the knowledge that, at the same time, those with greatest agency in causing wrongful threats had manipulated it in order to claim protection. These considerations might not often negate the salience of NCI entirely, but they could contribute to the effect of other factors.

A second problem is when belligerents fail to signal the distinction clearly. Deploying nonuniformed guerrillas among civilians can pose this difficulty. A state might try to fight them discriminately by using functional criteria to interpret NCI—treating those performing combat functions as liable to attack—though it may be impossible to do so confidently.[46] A third problem arises if the enemy belligerent hasn't, in fact, made a functional division. Combatant/noncombatant distinction relies on a division of labor creating two mutually exclusive categories, but sometimes combatant responsibilities are widely distributed, encompassing civilians. This is a feature, for instance, of cyber warfare and drone warfare: of the latter, Laura Dickinson writes, "Each twenty-four-hour combat air patrol of the US armed Predator and Reaper drones . . . re-

44. Christopher Finlay, "Fairness and Liability in the Just War: Combatants, Noncombatants, and Lawful Irregulars," *Political Studies* 61 (2013): 142–60.

45. See McMahan, *Killing in War*, sec. 4.1, on liability and the effects of ignorance and duress as excuses.

46. See Jens David Ohlin, "The Combatant's Privilege in Asymmetric and Covert Conflicts," *Yale Journal of International Law* 40 (2015): 337–93, 346.

quires at least 350 people, many of whom are contractors."[47] Or individuals might step in and out of the combatant role intermittently, for example, when drone operators living far from the theater of war "kill in the morning and enjoy dinner with their children later in the evening."[48]

A fourth way of rendering NCI problematic occurs when there is an ostensible distinction, but it is doubtful that it tracks underlying moral criteria of liability to attack, which point toward a different distinction. A belligerent might gerrymander NCI by identifying some military functions as "civilian" and claiming immunity for them. Nonstate groups might do so by distinguishing "political" and "military" wings. In Northern Ireland, for instance, Sinn Féin's claim to be a separate organization from the Provisional IRA was persistently challenged by claims that "political" figures like Martin McGuinness and Gerry Adams were paramilitary commanders.[49] A state might do so by using civilian contractors to perform de facto military functions without redesignating them. In recent decades, states have increasingly outsourced functions previously carried out by armed forces to private contractors: in Afghanistan and Iraq, contractors employed by the United States sometimes exceeded the number of military personnel and at one point reached 260,000.[50] In the absence of formal designation as "combatants," the question whether they are liable to attack under the LOAC depends on whether particular individuals are taking "direct part in hostilities." But precisely how to define participation legally is contested: some restrict it to direct acts of violence, but others think that the range encompasses activities like loading aircraft with bombs, "providing co-ordinates for an attack," "acting as guards or intelligence agents," "providing logistical support," and others.[51] Alongside the growth in cyberwar, drones, and automated

47. Massimo Durante, "Violence, Just Cyber War, and Information," *Philosophy and Technology* 28 (2015): 369–85, 374; Laura Dickinson, "Drones, Automated Weapons, and Private Military Contractors," in *New Technologies for Human Rights Law and Practice*, ed. Molly K. Land and Jay D. Aronson (Cambridge: Cambridge University Press, 2018), 95, 100. On problems assigning responsibility for war crimes involving private parties, see Dickinson, "Drones," 117–22.

48. Aroop Mukharji, "Drone Operators: Soldiers or Civilians?," *Atlantic*, March 28, 2013, https://www.theatlantic.com/international/archive/2013/03/drone-operators-soldiers-or-civilians/274447/.

49. MI5 reports that Sinn Féin and the IRA remain subject to unified direction by the Provisional Army Council; "Paramilitary Groups in Northern Ireland," 4, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/469548/Paramilitary_Groups_in_Northern_Ireland_-_20_Oct_2015.pdf.

50. Dickinson, "Drones," 95. Haque suggests legitimate ways of assigning "service and support functions" that don't entail moral liability to attack to "civilian employees" (*LMW*, 88).

51. Louise Doswald-Beck, "Private Military Companies under International Humanitarian Law," in *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007), 128.

weapons, the use of private contractors exacerbates moral and legal ambiguity surrounding responsibility and liability.[52] The opportunities for belligerents to organize their forces in such a way as to render fighting by the standards of the LOAC difficult for their enemies are therefore likely to increase.[53]

If these examples show how de facto combatants might be concealed by redesignation or by nontheater deployments, others point toward wider distributions of moral liability among civilians. Revisionists frequently highlight the contributions that civilians can make to injustices, including international aggression, arguing that even when different in kind from military contributions, they can have comparable moral significance.[54] An important change in both theory and practice that reinforces this possibility is the shift from viewing national defense as paradigmatic of just war to focusing increasingly on humanitarian defense of individuals from basic rights violations. Where just cause for war is defined by international aggression, it is plausible to think that combatants will be the chief perpetrators. But the kind of violence that justifies intervention frequently relies on more direct contributions from civilians.

Consider, for instance, the Rwandan genocide in 1994. Tutsis were killed by Hutu soldiers acting alongside civilian militias. But in addition, killers used census and travel data supplied by the government to locate victims. This establishes a clear causal contribution and, on the assumption that the officials who assisted knew or had reason to suspect what they were contributing to, moral complicity. Higher concentrations of killings in Rwanda compared with Darfur have been attributed specifically to this information supply.[55] Given these facts, it is surely conceivable that targeting some individuals from the relevant departments, along with town mayors, prefects, and others who helped coordinate the massacre, could have been morally discriminate. And because the scale of killing in Rwanda depended directly on their contributions, it is also conceivable that it could have affected outcomes.

Whether targeting individuals other than direct perpetrators of physical violence is necessary for success depends on, among other things, the nature of the military forces available. A UN task force might not need to resort to such measures. But, by contrast, rebels defending the victims from within the state might. Nonstate forces sometimes have

52. Dickinson, "Drones," 95, emphasizes the combined effects of these developments.

53. See Michael Gross, *Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict* (New York: Cambridge University Press, 2010).

54. See, e.g., Frowe, *Defensive Killing,* chap. 6.

55. Donald Bloxham, "Organized Mass Murder: Structure, Participation, and Motivation in Comparative Perspective," *Holocaust and Genocide Studies* 22 (2008): 203–45, 223–24.

to consider different strategic alternatives from those available to state forces when faced with regime violence.[56]

The paradigm case of this kind, of course, is that of German rule in Europe during World War II. In France, for instance, occupiers relied heavily on the French civil service, not only for routine management but also for repression and genocide. As Mark Mazower writes, "Bureaucrats [served] as instruments of repression, notably in round-ups of Jews and political opponents."[57] Just as in Rwanda, civilian participation was directly causal in determining scale. Without the collaboration of the French police, for instance, "targeted mass deportations were virtually impossible to achieve."[58] In light of this, it is unsurprising that armed resistance took aim not only at soldiers but also at judicial, administrative, and police targets. Olivier Wieviorka, for instance, recounts a series of assassinations in 1943 and 1944 encompassing directors in the German employment office, an SS General, a public prosecutor who had sought the death penalty against a resister, and a police superintendent.[59] This list clearly disregards NCI, strictly speaking, but in a context where wrongful violence was coordinated and executed by professional groups falling well outside the category of combatants, it doesn't necessarily appear unprincipled. Some of these actions might not have been morally justified. Nonetheless, each seems like a prima facie justifiable type of case.

A variety of factors might therefore diminish the weight that official designations of combatant and noncombatant should be given in deliberating about how to fight. In fact, if attacking targets engaged in the sorts of human rights–violating projects indicated above is necessary to mitigate their results, failing to do so might even be wrongful, as I'll argue in Section IV.*C*. The third thought, then, is that, in certain circumstances, it might be necessary for a belligerent resisting a large-scale threat to basic rights to devise a targeting rule that deviates from NCI and to instruct its combatants to follow it. The alternative principle of discrimination would specify categories of enemy citizen—some combatants, some not—that are liable to attack. They would be identified on the basis of belonging to professions, for instance, or government departments that contribute to the wrongful violence that just war seeks to defeat. To avoid the moral risks of individualized, ad hoc moral judgment, targeting should be coordinated by a rule carefully specified by the political and military leadership and justified as part of a coherent strategy

56. On pressure to do so, see Gross, *Moral Dilemmas*; and Fabre, *Cosmopolitan War*, chaps. 4 and 7.

57. Mark Mazower, *Hitler's Empire: Nazi Rule in Occupied Europe* (London: Penguin, 2009), 433–34.

58. Ibid., 438.

59. Olivier Wieviorka, *The French Resistance*, trans. Jane Marie Todd (Cambridge, MA: Belknap Press of Harvard University Press, 2016), 308.

for defeating the wrongful threats. Acts of resistance should be integrated "into an overall military strategy" that lends legitimacy and avoids "anarchical development," along lines that the Free French leadership sought to follow in World War II.[60]

B. Objections

Even when they follow NCI, combatants depend on their political and military leaders for guidance on whether to fight and how. Guidance includes rules of engagement specifying how the LOAC is to be applied in each particular conflict. The guidance offered by NCI is therefore already mediated rather than direct. So the thought that the leaders of a just war might offer guidance with reference to a bespoke rule doesn't take us so far from the practices legitimized by the law of war. In light of this, it seems less worrying than the idea of individuals judging targets alone, case by case. I'll offer a further argument in Section IV.*C* to support the claim that following a bespoke rule might, in fact, sometimes be less morally risky than adhering to NCI. But first, let's consider some further objections to the idea.

Objection 1.—It might be objected, first, that noncombatants never make nonsuperfluous contributions to military harms great enough to render them liable to attack: "only those *combatants*," Haque says, "who pursue *unjust war aims* by directly, indirectly, or jointly posing unjust threats are morally liable to defensive killing" (*LMW*, 90; emphasis added). But I think that this places too much emphasis on military harming. As Donald Bloxham writes of the historiography of genocide, "Our attention is commanded by the perpetrators who we feel best embody the overall perpetrator process—or . . . we extrapolate from characteristics of the former to the latter."[61] A similar problem, I suspect, affects our thinking about liability. If the objective of just war is to defeat a human rights–violating regime, then it won't chiefly be directed toward military threats. Defense is also needed against what might be an extensive, complex institutional arrangement or organization dedicated to inflicting harms comparable to those of military violence but partly through nonmilitary agents.

Objection 2.—Second, even if some noncombatants are liable, it might be objected that if combatants deviate from NCI, then innocent people will frequently be targeted erroneously. But, by way of reply, even if some individuals are thus objectively wronged, the fact that harm arises from applying an alternative rule rigorously might mitigate the injustice.[62] Provided that the rule had legitimate authority of the sort Haque

60. Ibid., 251.
61. Bloxham, "Organized Mass Murder," 204.
62. On judging target status and probabilities, see *LMW*, chap. 6.

claims for NCI—offering combatants a better chance of responding to moral reasons that apply to them on the whole—then following it is justifiable as the best way of respecting persons. The approach I am suggesting is along the lines of what Walzer says about the "political code" that nineteenth-century revolutionaries followed in selecting targets for assassination. He maintains that it lacked the legitimacy of NCI but recognizes that following some rule—especially one that tracks putatively significant features of individuals' moral performance—is less bad (epistemically if not objectively) than following no rule.[63] My argument is that sometimes it might be objectively as well as epistemically less bad and even justifiable.

Objection 3.—A third objection might cite choice as a factor supporting strict adherence to NCI. If someone becomes a target for reasons they can do nothing about, then it is worse, ceteris paribus, than if they knowingly place themselves (or remain) in harm's way. Civilians might be thought to have less choice in the matter than combatants. One response to this objection is to insist that the implementation of targeting decisions be preceded by warnings. If members of a target category are informed about the likelihood of attack (and its justification), it has three morally significant effects. First, it can help dispel uncertainty in their minds about the significance of their contributions to wrongful violence. Second, it may encourage defection, degrading the threat. And third, it reduces the salience of choice as an objection by affording opportunities to reconsider.[64]

Objection 4.—Finally, a fourth objection is that following an alternative rule will precipitate a race to the bottom, undermining compliance with rules as such. While I think that this may be true in some cases, it's not likely to be true in all cases. It is probably best to comply with NCI if the enemy does too, even where some of the other conditions for considering an alternative are present. Otherwise, it could provoke indiscriminate war by the enemy and prove self-defeating. Resorting to warfare guided by a rule that deviates dramatically from NCI is therefore more likely to be justifiable in cases where enemies are already unrestrained, whether on the battlefield or in the perpetration of other crimes.

C. Not Killing Wrongfully and Other Moral Duties

I now want to argue that, in cases where following an alternative to NCI is justifiable, it is also likely to be a duty. There is therefore an even deeper indeterminacy regarding where the law applies: those seeking guidance must adjudicate between the demands of the law and those of just war theory.

63. Walzer, *Just and Unjust Wars*, 197–204.
64. Finlay, *Terrorism*, 224–25.

Haque's view is premised on the assumption that just war—or, at least, justified war—is possible, which situates it within the wider family of just war theories. This family squabbles over many things, but it is currently unified by five assumptions underpinning the belief that in some sense "just war" is possible. These assumptions are as follows:

1. Killing is (prima facie) wrong.
2. Letting others be killed or suffer comparable rights violations is wrong.
3. Wrongful threats to fundamental rights are a persistent feature of history and likely to remain so.
4. The best or only means of defeating such wrongs sometimes involve killing.
5. The prima facie wrongfulness of the killing needed to defeat such wrongs is sometimes less than that of permitting the wrongs against others to proceed unresisted.

If you don't accept (5), then I presume that there can be no question of anyone justifiably killing in war. And if you disagree with (1), then you don't need a theory of just war. But within a just war framework, I presume that these assumptions underpin the moral commitments that a conscientious individual needs guidance in relation to.[65]

If so, consider what happens in a case satisfying the conditions implicit in (5). By hypothesis, then, the wrongfulness of not defending against threats by whatever means necessary is greater than any prima facie wrongfulness attaching the killings it may require. So if someone failed to fight when needed and able to do so, using those means necessary for success, they would be guilty of a significant, net wrong. This must mean that if the necessary means require fighting according to a bespoke alternative to NCI, then doing so would be morally obligatory and refusing to do so would be a greater wrong than doing so. In this case, a direct clash between duties occurs: law (NCI) pulls one way while moral duties arising from the *jus ad bellum* pull the other way.[66]

If this analysis is correct, then the LOAC won't always take moral precedence over ostensible alternatives by default. It might have done so if normative conflicts were cashed out in terms of duties versus permissions. But if they arise between opposing duties, then we can't be sure

65. For a fuller account, see Christopher Finlay, *Is Just War Possible?* (Cambridge: Polity, 2018).

66. Some might prefer to reformulate (2) thus: "(2') People have a right to defend themselves from severe wrongs." If they can also waive their defensive rights, then my arguments about conflicting duties—not to kill, to protect others—would seem to be moot. One reply is that, even if I decide to waive my rights, I might still be under an obligation to save others if the substance of (2) is also correct. And so even if we started from a more egoistical account based on (2'), we'd still default to the altruistic account above.

that the law should always win out over moral reasons that are at odds with the law: whether it does so depends on which duty is more compelling in the circumstances.[67] An authoritative judgment capable of obligating combatants in a particular just war generally would require, first, careful attention to the details of the case and, second, an ability to persuade enough combatants to accept the decision for a sufficient expectation of success. For this reason, judgment will most likely need to be informed by an authoritative leadership of some sort.[68]

V. CONCLUSION

Haque's analysis is exemplary in showing how the methods characteristic of recent revisionist, cosmopolitan ethics can help understand and improve the law. But I am inclined to resist his conclusions about the relationship between morality and war in two important respects.

First, moral theory—which, in this field, means just war theory—cannot be expected to perform an entirely subservient role in relation to the LOAC. It remains important as a direct guide to action in at least some dimensions of the ethics of war. This is partly due to the potential for moral conflict in which the reasons for following the law aren't sufficient to prevail against those militating against doing so. The relevant reasons are defined by moral duties that soldiers ought to make the utmost efforts to satisfy as far as possible. Soldiers risk three sorts of moral wrongdoing in addition to the wrongful killings whose avoidance motivates adherence to NCI. First, they risk killing in unjust wars. If soldiers refuse the service of just war theory and rely solely on the state to indicate when to fight, then they have no means of minimizing this danger. The opposing risk, second, is that, by adopting just war theory as an additional source of guidance, combatants may be led to consider cases for illegal action: the use of terror bombing, for instance, or some sort of morally rather than legally targeted killing.[69] So just war theory, too, poses a risk. But then there is also a third risk, which is that if they were to reject just war theory for the sake of avoiding the second risk, soldiers would also fail to discharge urgent moral duties to win in wars for "deadly serious causes."[70] This would arise if the only way of winning them was by means of morally justifiable but legally prohibited tactics such as

67. See McMahan, "Morality of War," 37–39.

68. On rival leaders, see Allen Buchanan, "The Ethics of Revolution and Its Implications for the Ethics of Intervention," *Philosophy and Public Affairs* 41 (2013): 291–323, 293, 298–99.

69. See, e.g., Walzer's theory of Supreme Emergency in *Just and Unjust Wars*.

70. Christopher J. Finlay, "The Deadly Serious Causes of Legitimate Armed Resistance: Between the Wrongs of Terrorism and the Crimes of War," *Criminal Law and Philosophy* 12 (2018): 271–87.

those discussed in Section IV. These multiple risks and the ever-present potential for conflict between morality and law mean that the sources of moral guidance remain irreducibly plural. Citizens, soldiers, and combatants must take both the law and the moral perspective of just war theory into account and, in doing so, must frequently supplement these sources with guidance—where available and reliable—from those political authorities that may apply to them.

Second, my conclusions sit uncomfortably in some ways with Haque's statement of the "*cosmopolitan*" assumption that "the moral norms governing violence in war generally reflect our moral status as human beings and only interstitially reflect our special relationships" (*LMW*, 9). My analysis of the ways in which specific loci of actual or emerging political authority are called upon to fill normative lacunae both within the LOAC and between law and morality suggests that some caveats to the cosmopolitan assumption are in order. Insofar as the existing international legal order depends on states—or state-like entities—to specify the meaning of the LOAC, efforts to comply with the law of war have an unavoidably particularistic bent. This puts soldiers' normative guidance under the law in tension with the moral pull of cosmopolitan commitments. The "moral norms governing violence in war" necessarily reflect an admixture of both cosmopolitan concerns with human beings as ends and the currently highly particularistic institutional-political frameworks through which individuals seek to discharge duties toward them. To put it another way, the interstices between cosmopolitan norms are rather wide. The resulting picture of norms in war is therefore more heterogeneous than Haque's twin commitments to cosmopolitan morality and the authority of the LOAC as a means of following it suggest.