I have two main questions:

1. Is the problematic interesting?
2. Does my use of the concept of authority make sense? I could have described the various powers involved in less "grandiouse" terms, but I wanted to connect to classical just war thinking as well as to questions of political authority.

Does Who Matter? Legal Authority and the Use of Military Violence

Pål Wrangle

1 Introduction

This project asks "what are the requirements for an entity to have the authority to use military violence?". That question essentially concerns legitimacy, or in other words the sources of authority. It will be answered in an inductive way, but looking at the various types of authority to use military violence that currently exist, and how they have been legitimized -- implicitly or explicitly -- in legal or pseudo-legal texts (Geneva Conventions, UNGA resolutions, etc) and in the deliberations that preceded the adoption of these texts.

Before that review can be made, I need to ask which entities do have authority in this sense and what that authority amounts to. That question requires a description of the current legal situation. As explained in the article, I make the empirical finding that international law actually recognizes different authorities for different causes and different contexts, and that there appears to be no consistent, overarching conception of authority (and -- as appears at this stage of the enquiry -- even less of legitimacy).

But before I can make that examination, I have to ask what authority to use military violence means under international law, that is, I have to undertake an analysis of the meaning of authority in that context and its several potential legal and other normative consequences. The current text focuses on this latter set of questions, which constitutes the first, but perhaps most difficult part of the project.

1.1 A few terminological notes

The notes in this subsection were included in the article mainly for the benefit of non-lawyers. They interrupt the flow of the argument, so I have put them in italics.

A few terminological notes are necessary. First, in contemporary international law the term "war" has by and large been replaced by other terms. However, in contemporary international ethics, the term "war" is still used.

Second, in international law, "use of force" generally refers to the "strategic level" (jus ad bellum) whereas international humanitarian law (IHL) uses a number of terms like "hostilities," "acts of hostility,"
"attacks," “military operations,” and the like to describe various types of events and actions at the “tactical level” (jus in bello). The jus ad bellum regulation concerns the question when a state may use force (for self-defence or under UN Security Council authorization), whereas the jus in bello regulates the means and methods of warfare and the treatment of those who are not participating in the hostilities, for instance the prohibition of attacks in civilians. Since my argument implicitly transcends the distinction between jus ad bellum and jus in bello, I will often use terms such as “military measures” or “military violence” that do not prejudice whether a certain authority applies to the one level or the other.

Third, I take the term "norm" to cover both legal norms and other types of norms. While my focus is on legal norms, moral norms could also be analyzed in the same fashion; in fact, international lawyers are used to dealing with "soft law"—norms of dubious legal quality that nevertheless play a role in international intercourse. Thus, throughout the article, I take "normative consequences" to include legal ones.

Fourth, the noun "authority" can refer both to a particular capacity (like the capacity to decide on the use of military violence) or to a subject with a particular capacity (like “the tax authorities”). This point will be developed more fully below, but whenever needed, I will insert the adjective "proper" to distinguish an authority that has the particular capacity that is the focus of this inquiry, namely, the normative capacity to use or decide on military violence. For the purposes of this article, and in contrast to some just war theorists, "proper" does not mean "legitimate." It only means that the particular normative system in question—international law—has determined that a particular subject or type of subject may resort to military violence. Whether that authority is legitimate is a separate question and should be discussed as such.

2 Just War Theory, International Law, and Authority

As is well known, classical just war doctrine claimed that there were three requirements for a war to be just (jus ad bellum): first, there needed to be a just cause; second, there had to be right intention; and third, the war had to be pursued by a proper authority, which had to be a legitimate authority. The third requirement in particular had a profound political impact on the development of the state system.3 As Bartelson explains, “Although the question of legitimate authority has been of marginal concern in the recent revival of just war theory, it was an absolutely crucial concern to medieval and early-modern scholarship.” Bartelson, “Double Binds,” p. 88.

After the end of the cold war, proper authority returned as an issue. It was now generally recognized that there are situations (such as Rwanda in 1994) in which military violence can legitimately be used to protect individuals (as opposed to states).4 The crucial remaining debate centered on who had the right to decide when there is a just cause: an individual state, a group of states, or the United Nations in some form? /---/

In the meantime, the concept of jus in bello had become separated from jus ad bellum and

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3 As Bartelson explains, “Although the question of legitimate authority has been of marginal concern in the recent revival of just war theory, it was an absolutely crucial concern to medieval and early-modern scholarship.” Bartelson, “Double Binds,” p. 88.

4 In fact, there has been a lively discussion on right authority for humanitarian intervention; Should it be by states or the United Nations? /---/ See The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (Ottawa: International Development Research Centre, 2001), pp. 32–37. The last section is titled “The Question of Authority.”
developed on its own.\(^5\) /brief historical sketch up until ... the elaboration of the four Geneva Conventions in 1949 and their additional protocols in 1977./ Even if the UN Charter outlawed the resort to war, wars continued to exist in real life, and the humanitarian costs had to be dealt with. From the 1990s onward, international efforts were increasingly focused on how to increase the protection of civilians in non-international armed conflicts (civil wars), not least through efforts to incentivize nonstate armed groups (like rebels) to comply with IHL.

In spite of these developments over the last century and beyond, there is currently little comprehensive debate in international law on proper authority as such, and even less of legitimacy. /---/ Few scholars have asked whether nonstate groups could actually, under some circumstances, be covered by the international law regime on the *ad bellum* right to resort to force, or otherwise have a right to resort to military measures (such as a right to rebel).\(^6\) And, even more fundamentally, there is little to no scholarly discussion on the relationship between conceptions of political authority and the various legal powers that different types of actors can exercise in a war.

### 3 The Meaning of “Authority” in the Context of War

In my analysis of what authority to use of military violence means under international law I will ask the following questions, in sequence: Is authority a useful term to talk about the right to use military violence? If so, what would a useful abstract concept of authority look like? What would be covered by authority in the context of armed struggle (subject matter, or scope [I am not sure which term is better]). What are the potential legal consequences of authority in that context?

#### 3.1 Why authority?

The first question is whether it is fruitful to use the concept of authority in order to discuss these issues. The legal power of various actors to use military violence could also be discussed in ”smaller” terms, like ”rights”. In fact, the term authority is rarely used in IHL or in normative thinking about the use of military violence, except for by a few JWT writers who explicitly want to do away with this requirement.

”Authority” directs us to certain lines of thinking, which it might be useful to tap into. Control of violence is often connected to political power (Hobbes, Weber, Schmitt, etc). If I claim that actor X has the authority to use violence, then that suggests that we think about the political implications of that authority. I have a sense that international law is authorizing a number of different subjects to make decisions that we would ordinarily think should be left to public authorities answerable to electorates (directly or indirectly) – non-state armed groups to PMCs (private military companies) and to humanitarian NGOs.

The fact that the authors of the classical doctrines of just war were quite preoccupied with proper authority suggests that it is an important topic, in particular if we think that we are now in a similar situation, where violence is being used by many types of actors and where the right to use violence is being distributed far beyond the nation-state: to international organizations, non-state armed groups and private military companies.

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3.2 Abstract definition

3.2.1 Basic consideration

How should authority be defined? There is no authoritative definition under international law. Hence, I am free to adopt any definition that I like. However, the definition has to serve the overarching purpose of the inquiry, namely to ask what international law says about who may use military violence, and how that relates to conceptions of legitimacy. The definition therefore has to have interesting meanings relevant to that discussion. Further, even though this is neither a philological investigation, nor a conceptual history, it should be grounded in established usage, in order to connect to existing debates. Another requirement is that the definition must be connected to law, i.e., have legal consequences (see below).

Since this is an enquiry into norms – legal and politico-philosophical norms -- authority must be distinguished from both political power and from legitimacy. Power, in a sociological sense, as the ability to influence, is not directly relevant. "Power" could also have a legal meaning, close to "authority," but for reasons of clarity I will avoid using the term in that sense.

Authority is often connected to legitimacy, as in the expression "legitimate authority". In traditional just war theory, the capacity to use military force was only bestowed on those who were legitimate. However, in present international law, I will argue in the book, authority is not conditioned on legitimacy in the same sense. Therefore, my concept of authority will not include "legitimacy." In other words, being "legitimate" is a possible but not a necessary attribute of an actor with authority.

This, of course, begs the question why authority should need to be not only legal but also legitimate. Perhaps it is because legitimacy is a good in itself, because it may be useful in order to produce other goods or because it is necessary to have some form of criterion for authority. The underlying notion for my asking this question is the normative hunch that only those entities that have some form of legitimacy should have the power to use military violence. I will get back to that issue in the book, but not in this paper.

3.2.2 Features of a definition

In this text, I speak of authority in a legal sense, but I do so under the assumption that politico-philosophical conceptions may influence legal ones (and certainly did so when classical just war doctrine morphed into proto-international law during the 16th and 17th centuries).

There are different meanings of authority in law, but for the present purpose the following dictionary definitions are relevant: "legal permission granted to a person to perform a specified act,"8 a right to command or to act,"9 or "a permission, a right coupled with the power to do an act or order others to act."10 Based on these proposals, I will tentatively define authority as "the legal permission granted to an actor to perform or authorize an act." In the next section I will try to determine what "an act" might mean for the present purposes. (Hence, as I will explain in the book,

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what is authoritative in the sense of being persuasive in terms of intellectual or other similar capacity is not a part of the definition, in spite of the fact that such elements could justify and explain why we need the need for authority in general, or for why a certain entity has authority (Raz.).

Current political philosophy and political theory can help us test and perhaps develop this tentative definition. In the well-respected Stanford Encyclopedia of Philosophy, Tom Christiano distinguishes between three senses of authority: (1) a right to rule; (2) a capacity to impose duties on others and (3) justified coercion. This is quite helpful, since it shows that authority does not have to refer only to a right to rule, which may be the common notion but one that is not always relevant to the exercise of violence.

It follows from above that authority may entail consequences not only for those who use military violence (under the rule of the authority) but also, and arguably more importantly, for those who are the targets of this violence. Do they have a duty to suffer the consequences? Do they have a right to resist? Can third parties intervene to protect them? As Tom Christiano notes, "we must distinguish a duty that is owed to the authority and a duty that is merely the result of the authoritative command" (meaning 2). For example, a prisoner of war camp or a justified military occupation "gives the authorities justification for coercion." To go further, "political authorities . . . in . . . some cases do not purport to create . . . duties at all." Hence, authority is not only a capacity to impose duties on those who may have obligations to comply--like citizens to a government or soldiers to a commander--but also the right to issue commands and enforce them upon people who have no such obligations, like enemy citizens under occupation, prisoners of war, or enemy combatants and civilians, who may have to tolerate the orders and belligerent acts of a party to an armed conflict (cf meaning 3). As I will explain below, this is exactly what happens when a dispute has turned into an armed conflict. Under IHL, combatants of belligerent Y have no legal basis to complain against belligerent X for being targeted, and the civilians of belligerent Y may have to accept proportional and necessary collateral damage.

Consequently, the right to use military violence is an authority to impose obligations on at least two different constituencies: those who are expected to obey by executing the violence (or by funding it, as taxpayers), and those who are expected to suffer it. The former obligations are regulated by the internal or domestic legal code of the actor concerned, while the latter are a matter for international law. Hence, under international law, a body exercises some form of authority even over those who must suffer the consequences of its inflicted military violence. The actor executing that violence has a right to expect that the opposing side accepts the consequences without any legal claims (civil or criminal) against it.

But there is yet another important aspect of authority. One dictionary defines authority as "permission, a right coupled with the power to do an act or order others to act. Often one person gives another authority to act, as an employer to an employee..." This connects well to an observation made by Christiano: "[P]olitical authorities do not only create duties in others [and in] some cases do not purport to create such duties at all." For example, "[t]he Security Council

12 Ibid.
13 Ibid., p. 6.
14 Citation temporarily lost.
15 Stanford Encyclopedia of Philosophy, Authority 6
exercises its executive authority primarily by authorizing actions and not by carrying them out by itself or by requiring them."

It is now time to return to the tentative definition: "the legal permission granted to an actor to perform or authorize an act." After our brief expose of current politico-philosophical usage of "authority", this definition still stands, provided that it is understood that "authority" does not necessarily entail an obligation to obey on the part of those who have been subjected to the authority, but could merely consist of an obligation to tolerate the acts of the authority.

3.3 Which authority – scope/subject matter
It is now time to discuss the "act".

3.3.1 Military violence
In this context, the "act" should be understood as the use of force (the modern term) or the waging of war (the older term). I will use the terms "military violence" (MV), "military measures" or "military means". As I will argue in more detail in the book, the important thing is not whether a certain act is judged under the jus ad bellum (the UN Charter) or the jus in bello (IHL). In fact, the distinction between the two branches of norms has to some extent been destroyed. Hence, the focus should be on the actual violence. (Discussion on violence omitted.)

As mentioned, the violence has to be military. In legal terms, this distinguishes violence that is typically the subject of IHL from violence that is the subject of international human rights law and of domestic administrative and criminal law. In other terms, this could be considered the distinction between violence used in war and violence used in peace. There is certainly a connection between these types of violence, since classical political theory assumed that both types could only be exercised by the sovereign. Nevertheless, a delimitation has to be made. (I have yet to determine whether that limitation is significant or just convenient; I tend to think that it is significant.)

3.3.2 The authorization and the performance of the military violence.
Recall that my conception of authority covers both "to perform" and "to authorize" military violence. (Note: I am not sure whether I should make a sharper distinction between these two modes of authority.) It may very well be the case that there are certain requirements for the body that authorizes the war and other requirements for the body that executes it. (Of course, those two sets of requirements can be fulfilled by the same entity.) Hence, there is a distinction between the units that have a recognized right to use military violence independently under some circumstances, and the units that do not have the capacity to employ military violence independently but may do so under the authority of another actor. This duality between authorization and execution applies both to military violence used by states--perhaps under the authority of the Security Council--and to military violence used by certain nonstate units (militias, private military companies), which may sometimes use such violence under the authority of a state.

In a sense, this dichotomy corresponds to the distinction between jus ad bellum and jus in bello. The authority to authorize the use of force (governed by jus ad bellum)--including to self-authorize--is distinguished from the authority to carry out the armed force (which is also governed by jus in bello). From the particular perspective of this article, the important thing is not whether a certain act is judged under the jus ad bellum or the jus in bello; rather, what is important is that the
requirement of proper authority regulates aspects of how military violence is being used.16

3.3.3 The actor
(I have omitted a discussion on the relevance of personality and subjectivity. Further, I have not yet determined what relevance recognition has. Provisionally, I think that I should focus on the intrinsic features of the various actors rather than on external recognition as a potential source of legitimacy.)

3.3.4 To summarize
To summarize so far, in the context of military measures, I will take "authority" to mean "the legal permission granted to an actor to perform or authorize military violence." Understood in this way, there is "authority" for different actors to do different things. And, as will be developed in the next section, they produce different normative outcomes. I will show: (i) that there is a range of possible consequences that may follow from having a certain type of authority (that is, the concept of authority can be disaggregated); and (ii) that there is a range of different kinds of actors that might be differently able to trigger these various consequences (that is, authority as an attribute of an actor can be also disaggregated).17 In the article I lay out in some detail the various capacities (authority-fragments) of different types actors – states, international organizations, national liberation movements, other armed groups and private military companies. In the book I will probably also cover criminal organizations. Here I will consider only (i), and just briefly.

3.4 Consequences
Hence, authority is a kind of normative power, namely the possibility for a certain entity to make decisions that bind another entity in some way or the other, by imposing obligations or burdens that must be tolerated. From a legal perspective, it is the possible consequences of actions by actors with or without the required authority that count. To say that an authority is "proper" or "not proper" is meaningless without some account of the consequences of being "proper" or "not proper." Does the lack of proper authority mean that an actor may be subjected to a penalty, a tort claim, a loss of privileges, or countermeasures by some other actors? For the issues dealt with in this article, the consequences are often quite complex, and for reasons of space I will review them only to a limited extent. However, in general, the reader can assume that if an act is undertaken under proper (legal) authority, the balance of legal consequences for that actor will be more favorable than if that authority had not been at hand.

Hence, "authority" means that a particular act by a person or entity with this designation has different normative (including legal) consequences than if a similar act were performed by a person without such authority. /---/ The decision to invade Iraq in 2003 would have been judged differently if it had been made by the Security Council rather than by a group of individual states. Properly organized armed groups may be considered parties to a non-international armed conflicts – with a corresponding authority to target their adversaries – but drug cartels will not. This may seem very formalistic, but the reason for this stems from a concern for order--a concern shared by the classical just war writers.18 /---/

In an armed conflict, a number of different aspects of authority may be exercised. If an actor does

16 In fact, the distinction between the two branches of norms has to some extent imploded. See Robert D. Sloane, "The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War," Yale Journal of International Law 34 (2009), pp. 47–112.
17 I thank Jonathan Parry for suggesting the distinction between the two ways of disaggregating authority.
not have the legal capacity to use military measures, then doing so will be unjust or illegal no matter the cause. This is the most direct consequence of the just war requirement of proper authority. However, the current essay being an enquiry into law, it is the legal consequences of such illegality that are in focus. Under constitutional law, "proper authority" may refer to the domestic power to commit the country to war. Under international law, by contrast, the situation is considerably more difficult. A state is in general a proper authority, so legality will hinge on whether the other conditions (such as just cause – usually self-defence) are fulfilled. For nonstate armed groups, by contrast, international law neither prohibits nor endorses the resort to force (although there are other legal consequences of an armed group’s resort to military violence that in my view merit the use of "authority" in that context; see below).

A second type of authority is the legal ability to request and justify intervention by external actors in a conflict, such as a sovereign state’s ability to call on other sovereign states for assistance if it has been subjected to an armed attack (collective self-defense).

A third type is the authority to create a state of war or armed conflict. When a conflict reaches the threshold of war or armed conflict, whether the cause is just or unjust, the application of IHL is triggered. A state of armed conflict entails a number of important legal consequences. Foremost, the parties to the conflict must respect the Geneva Conventions and other rules of IHL, but, even more importantly, as the e contrario flip-side of these regulations, they may use military violence against their adversaries. For sure, international law does not prohibit the prosecution of rebels for the act of rebellion, but – as I explain in the article – the trend is against such prosecutions, and this trend is supported by Article 6(5) of the Second Additional Protocol to the Geneva Conventions.

Fourth, there is the authority to negotiate the end of a war. This is usually not taken to be a part of the authority to go to war in JWT, and it certainly does not follow automatically from an authority to use military violence, but it is nevertheless often the result of an armed conflict, and one worth exploring.

### 3.4.1 Different positions

So far I have argued that authority should usefully be understood as "the legal permission granted to an actor to perform or authorize military violence." I have also explained that different types of authority lead to different normative consequences, and I have briefly outlined these consequences under international law. /--/

A priori, a number of different positions are possible. An actor might have no authority under international law to use and authorize military violence under any circumstances (which pertains to many actors, like holding companies or philatelic societies); it might have the authority to use military violence under all circumstances (which does not apply to any actor at present); or it might have the authority to use military violence under some circumstances (which is what applies today to states and several other kinds of actors). Hence, authority is conditional: it may

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19 The right to immunize soldiers from personal responsibility is clear when they fight for a government that is held to represent a recognized state, so the question of constitutional authority has some relevance to international law. However, from an international law point of view, this is a matter of representation (who represents the state?), not of identity (which entity?).

20 The same could be said about the law of neutrality, to the extent that it is still being applied.

21 Just to be clear, if such actors are transformed into nonstate armed groups that correspond to certain prerequisites of chain of command, they may use military violence under this analysis. However, that would require a change of identity of sorts.
depend on the cause, and it may bring varying consequences. /---/

As already indicated, this is followed by a review of the various scopes of authority of different actors. Thereafter, I will review ... the 1907 Hague Regulations (articles 1 and 2), the 1949 Geneva Conventions (in particular on common article 3), the 1977 Additional Protocols (both Protocol 2 and articles 1(4) and 43-45 of Protocol 1) as well as some subsequent documents, yet to be determined, including possibly some military manuals. #This review will concern views on why the one or the other actor has been given a combatant privilege or not. Based on this review, I will discuss the relation between authority and legitimacy.