The Battle of the Lexicons

JEFF MCMAHAN

1. DECISION BY FORCE

In his intricately and ingeniously argued account of the morality of war, Arthur Ripstein writes that "the fundamental moral and legal problem of war [is that] it is the condition in which force decides"[1] (I, ~~p. 14~~). Aggressive war is, he says, "definitively"—that is, always—wrong because it initiates that condition. Yet defensive war is "not even presumptively wrong" but is instead "the reflex of the antecedent right to independence"—that is, of the right of "each nation . . . not [to] have its system of public law subordinated to any other nation's system of public law"[2] (I, p. ~~25~~). National defense is justified because it involves "only resisting entry into a condition in which force decides" (I, p. ~~25~~).

AQ: /ED: Internal page references will need to be revised in proofs

As with all of the concepts that are the building blocks of Ripstein's arguments, the notion of decision by force lacks precise boundaries. David's acceptance of Goliath's proposal to settle the dispute between the Israelites and the Philistines through combat between their champions certainly seems an instance of decision by force, as the outcome was determined by superior force. But it does

Jeff McMahan, *The Battle of the Lexicons* In: *Rules for Wrongdoers*. Edited by: Arthur Ripstein, Oona A. Hathaway, Christopher Kutz, Jeff McMahan and Saira Mohamed, Oxford University Press (2021).
 DOI: 10.1093/oso/9780197553978.003.0006

not seem wrong in the way that the initiation of war by one of the assembled armies would have been.

I will return to the problem of vagueness in Ripstein's concepts, but let us first consider whether his understanding of the moral difference between aggressive and defensive war is tenable. It is, I believe, challenged by the following example.

> *Aggression*
> One state, Aggressor, is unaware that another state, Victim, has secret military resources that would enable it to prevail in a war of defense against Aggressor. Aggressor attacks Victim, intending to conquer and annex all of Victim's territory, which contains oilfields. If Victim fights in defense, it will be victorious. But Victim's government realizes that, because Aggressor's constitution and political and legal institutions are informed by a belligerent, expansionist ideology, Aggressor is almost certain to attack again unless Victim occupies its territory for a period to disarm it, install a different government, and impose a new constitution, as the United States did in Japan between 1945 and 1947.

According to Ripstein, Aggressor has initiated a condition in which force decides and it is permissible for Victim to begin a war of defense. But if initiating a condition in which force decides is prohibited, that must be because deciding by force is morally objectionable. If Victim chooses to fight in defense, it will then participate in a process of decision by force. Indeed, because of its superior military strength, *it*, and not Aggressor, will determine the outcome by force. But it could instead refuse to fight, thereby repudiating any effort to decide by force. In this way it would avert a war in one sense of that word—a war in which there are opposing belligerents—and bring about an immediate restoration of peace. If decision by force

is morally objectionable, it seems that Victim ought not to engage in it. It ought not to impose its favored outcome by force, even if that means that it will be the victim of force.

I therefore think that Ripstein is mistaken when he writes that "national defense justifies only resisting entry into a condition in which force decides." To engage in defensive war is not to resist entry into that condition; rather, it is precisely to enter actively into that condition.

One might argue, however, that even if defense does not avoid decision by force, it has a more positive justification in the preservation of a state's independence or sovereignty. Ripstein writes that defense

> is just the entitlement to stop aggression, to prevent an aggressor from initiating or continuing a condition in which force decides. Each nation is entitled to be independent of all the others, that is, to not have its system of public law subordinated to any other nation's system of public law. (I, p. ~~25~~)

This suggests that the right of defense and the wrongness of aggression are closely related, in that the right of defense is just the right to enforce "the antecedent right to independence," while aggression, or the initiation of decision by force, is wrong because it is a violation of that antecedent right.

But if aggression is wrong because it consists in the "subordination of [one] nation's legal order and procedures to another's," then it seems that Victim's war of defense against Aggressor must not include any *post bellum* restructuring of Aggressor's political and legal institutions, even if that is necessary to prevent Aggressor from initiating a new war of aggression following a brief period of recovery. The right to independence, understood as grounding an absolute prohibition of aggression, is thus problematic as a justification for defensive war,

at least when successful defense requires overriding the aggressor's legal order in certain ways.

Ripstein's claim that aggression initiates a condition in which force decides seems to entail that aggression makes settlement by force unavoidable. Whether or not Victim engages in defense, there will necessarily be a decision by force. His point may therefore be that, because decision by force is what is objectionable, defensive war adds nothing objectionable.

But the claim that aggression makes decision by force inevitable is mistaken. Even if Victim's capitulation would mean that Aggressor had imposed its decision by force, Victim's options are not limited to capitulation and defense. There is a further option that may be able to prevent a decision by force. As Gandhi recognized, even when an aggressor has initiated the use of force, it remains possible for the victim to attempt to achieve a settlement by means of nonviolent resistance, resistance without the use of force. This can work in either or both of two ways: by appealing to the moral conscience of the aggressor, or by appealing to the consciences of third parties who may then pressure the aggressor to stop the aggression. Either way, when nonviolent resistance succeeds, it defeats the effort to decide by force and achieves a decision through moral pressure instead. Although it does not achieve a resolution through words or law, it is akin to settlement through discussion, in that it aims to enable the aggressor to understand the unjustifiability of the aggression.

Nonviolent resistance may always be attempted. It may have a lower probability of success in preventing the aggressor from achieving its unjust aims than engagement in defensive war, but that should not, on Ripstein's view, be a justification for attempting to decide by force. It therefore seems that if the options of a victim of aggression are defensive war, capitulation, and nonviolent resistance, Ripstein's Kantian view should reject defensive war and favor nonviolent resistance. A fully consistent rejection of decision by force entails a

commitment to pacifism. Because I believe that pacifism is mistaken, I think that any understanding of the morality of aggression and defense that entails it is mistaken as well.[3]

2. "THE PAST IS SETTLED"

As Ripstein explicitly notes, his claim that all wars of aggression are prohibited implies that various aims that classical just war theorists recognized as just causes for war cannot in fact justify the initiation of war. The examples he cites are ones about which most contemporary just war theorists, including revisionist just war theorists, generally agree with him: "punitive wars," "wars seeking the return of (or compensation for) something wrongly taken," and wars to compel a redistribution of unjust property holdings (I, ~~pp. 21–22~~). Ripstein also refers in several places to another such implication—namely, that

> the results of past wars cannot [permissibly] be reopened through force. . . . The prohibition on starting a war can only be effective if it is general, and so it applies even to the outcomes of past wars that came about through force and so may be (or thought to be) unjust on the merits. (I, pp. ~~5, 25~~)

This last implication of Ripstein's claim that wars of aggression are categorically prohibited can be challenged by consideration of a variant of the earlier case of *Aggression*.

> *Successful Aggression*
> Aggressor invades Victim with the aim of conquering and annexing its entire territory, which contains oilfields. Although Victim's conventional military forces are superior, Aggressor has weapons of mass destruction that it credibly threatens to

> use to destroy Victim's major cities unless Victim immediately surrenders. As a result of this threat, Victim's soldiers surrender their weapons and return to their homes. Shortly thereafter, as Aggressor consolidates the conquest and begins its repressive rule of the annexed territory, an earthquake destroys the facilities in which its weapons of mass destruction were stored. The citizens of Victim now have the ability, through the reinitiation of war, to expel the invader, recover their political independence, and reinstate their original legal order.

In this case, I believe that Suárez, whom Ripstein quotes, is correct: it makes no difference, morally, whether "the injustice is . . . about to take place; or whether it has already done so" (I, p. ~~21~~ n36). Suppose that Ripstein is right that the justification for wars of "national defense is nothing more than the entitlement of each legal order to be independent of, that is, not subject to, any other legal order" (II, p. ~~5~~). Given that it is thus permissible for the citizens of Victim to try to *preserve* their political and legal independence by means of defensive war in response to aggression, it should also be permissible for them to try to *recover* or restore their independence by reinitiation of war after their initial war of defense has ended in defeat. Their right of independence does not vanish at the end of Aggressor's successful war of conquest. The permissibility of reinitiating war is, of course, subject to some statute of limitations based on the ways in which conditions within a territory change over time. But in *Successful Aggression*, the resumption of war would occur shortly after the conclusion of the war of conquest.

If Ripstein were to find it intuitively compelling to suppose that the citizens of Victim could permissibly expel the initially successful conqueror from their territory by means of war, he might be tempted to say of this case that, during the period after Victim's soldiers were coerced to stop fighting, Aggressor has continued to be engaged in a

process whereby force decides. Although there is no active fighting, Aggressor rules in the territory that rightfully belongs to the people of Victim only through the threat of force. Because of this, Ripstein might claim, what might appear to be the initiation of a new war to expel the invader would in fact be only a continuation of the original war of defense after a brief intermission in the fighting.

Whether such a response is sustainable depends, on Ripstein's view, on the concept of war and, in particular, on the criterion inherent in that concept for determining when a war has ended. If the original war of aggression has ended when Victim's soldiers put down their weapons and return to civilian life in response to the threat to annihilate their cities, then their resumption of the use of force after the destruction of Aggressor's weapons of mass destruction constitutes a new and different war—a war of aggression. But Ripstein's understanding of war as a condition in which force decides may imply a different criterion for determining when wars end.

What is problematic about this response, however, is that it treats matters of substance as if they can be resolved by determining the extensions of certain concepts. Whether it is permissible for those who initially fought defensively against Aggressor to take up arms again to expel the invaders by force cannot be determined by an analysis of concepts or the criteria for the individuation of wars. On occasion the law might indeed appeal to reasoning of this sort. When the United States invaded Iraq in 2003, some legal writers argued that this was not a war of aggression but was instead a continuation of the Gulf War of 1990–1991, which had never ended but had only been suspended by a lengthy ceasefire that Iraq had then violated. But while this claim may have been of some legal significance, it would have been preposterous as a moral argument for the permissibility of the invasion in 2003.

There is a parallel between this way of reasoning about the permissibility of expelling the invaders and the way traditional just war

theory reasons about the permissibility of certain acts of killing. According to traditional just war theory, all combatants in a war are legitimate targets for combatants on the opposing side. Suppose that one group of people (the "aggressors") unjustly attacks another group of people (the "defenders") and that the defenders fight back. People from each group kill members of the other. According to traditional just war theory, if the conflict counts as a war, the killing of a defender by an aggressor is permissible; but if the conflict is not a war, the killing is simply an instance of murder. This is absurd. Whether a killing is permissible or impermissible cannot be determined by whether the conflict in which it occurs comes within the scope of the ordinary concept of "war."

(The possibilities of argument by redescription are many. Another way to argue for the permissibility of a war to expel Aggressor from what was once Victim's territory is to claim that after the conquest and annexation, Victim, the state, no longer exists. In that case, those who fought in Victim's defensive war against Aggressor are now under Aggressor's rule. Their resort to war therefore cannot constitute aggression. It is neither an external violation of Aggressor's independence nor an attempt to subordinate Aggressor's legal order to an alien legal order. Again, however, such an argument would be little more than an evasion of the relevant matters of substance.)

3. HUMANITARIAN INTERVENTION

In his discussion of the range of just causes for war accepted by the classical just war theorists, Ripstein notes that some of these theorists "thought that protection of the innocent was a ground of war" (I, p. 22 n38). The view that one state may initiate a war to protect innocent people in another state from their own government is now increasingly common in discussions of the ethics of war. Yet humanitarian

intervention seems, on Ripstein's view, to be prohibited along with punitive, corrective, and redistributive wars, on the ground that it initiates a condition in which force decides. Of course, the government that might be the target of humanitarian intervention has already initiated such a condition vis-à-vis some set of its own citizens. But intervention by another state to defend those citizens would not be a defense of the independence of a legal order but would instead, according to Ripstein, be the subordination of one state's legal order to that of another. And that, he says, is prohibited.

It is, however, highly counterintuitive to suppose that all instances of humanitarian intervention are prohibited. Instances of humanitarian intervention to protect innocent people from grave, extensive, and wrongful harms by their government seem therefore to be counterexamples to Ripstein's view. His response to this challenge is of the sort discussed in the previous section. It is to adjust the extension of certain concepts—in this case the concept of law—to evade the counterexamples. What he says is that "if a regime descends into complete barbarism—institutional slavery, genocide, or crimes against humanity in which force replaces law—there is no legal order left, and other nations can [permissibly] intervene to prevent these atrocities" (I, p. ~~26~~).

This is conceptual gerrymandering. There have been numerous recognizable legal orders in the past—systems of law with defined offenses, trials, and specified forms of judicial punishment—that tolerated, and indeed legally regulated, practices of institutional slavery. The Athenian court that tried and unjustly condemned Socrates was a part of such a legal order. There were also both federal and state systems of law that constrained the action of Americans, including those in the Southern states, throughout the period in which there was institutional slavery in the United States.

More generally, one cannot determine whether or when humanitarian intervention is justified by consulting the concept of law,

identifying the criterion for determining the conditions in which law is absent, applying that criterion to the country in which the government is persecuting some members of the population, and only then, if there is no law, considering whether intervention would be necessary, proportionate, and so on. Among other things, there simply is no sharp distinction between the presence and the absence of a legal order, between law and "barbarism." Law functions to varying degrees in different societies to constrain the action of individual citizens and governments. Even when there is genocide, as arguably there has been recently in Myanmar, and the law has therefore been egregiously failing in one extremely important way, the legal system—including constitutional, criminal, tort, contract, tax, and other areas of law—may continue to regulate most areas of life efficiently and effectively. It is not true that in such conditions there is no legal order.

Nor is it obvious that humanitarian intervention necessarily involves the subordination of one legal order to another. One state might intervene militarily in another just to stop an atrocity and rescue the victims and then withdraw entirely, leaving the state in which the intervention occurred with its legal order exactly as it was. Or, even if such an intervention were to constitute the momentary imposition of one legal order on another, it is hard to believe that this alone makes the intervention categorically prohibited, even though it would be a necessary and proportionate means of preventing a large number of innocent members of a persecuted group from being tortured and murdered.

There is another way in which Ripstein's view of humanitarian intervention is counterintuitive. Suppose a state persecutes the members of some ethnic group, some of whose members engage in various forms of nonviolent resistance against the state. The state responds by abducting and torturing resisters both to get information from them and to deter others from joining them. This practice might or might

not rise to the level of a crime against humanity. If it did, Ripstein might say that "there is no legal order left," so that intervention to rescue the victims could be justified. But, as I have said, even if the state's practice of torture constitutes a crime against humanity, that does not entail that there is no legal order in the state. But let us assume that the practice does not rise to the level of a crime against humanity. Next suppose that a neighboring state sends a large commando team into the state that is guilty of torture to rescue the victims and destroy the various facilities in which the torture is being done. In doing this, the commandos must, in self-defense, kill soldiers assigned to guard the facilities, as well as some of the agents of torture. Suppose that the number of soldiers the commandos must kill is roughly equivalent to the number of detainees they are able to rescue.

This is, on Ripstein's account, an instance of aggressive war. What is counterintuitive about his view is not just that it implies that the intervening state's action is categorically prohibited; it is also that it implies that the soldiers who fight in defense against the aggression—those who seek to protect the torturers and to enable the practice of torture to continue—act permissibly. Indeed, the defensive action of those who kill invading commandos is, on Ripstein's account, "not even presumptively wrong." It is just "the reflex of the [state's] antecedent right to independence." This is because rights of independence and defense are possessed by all states (or at least all states that have a legal order) irrespective of whether they are engaged in domestic wrongdoing.

In his arguments about aggression and defense, Ripstein seeks to provide a Kantian moral foundation for "the express prohibition of aggressive war" in international law (I, p. ~~19~~). One might quibble here about whether customary international law already permits wars of humanitarian intervention that fail to satisfy his demanding condition of permissibility that there be an absence of law in the target state. But there is a deeper challenge to this justificatory

project. Ripstein writes that "morality does not allow you to make an agreement permitting aggressive war" (I, p. ~~11~~). Yet the explanation he gives for the moral impermissibility of aggressive war is that it initiates a condition in which force decides, and involves the subordination of one legal order by another. Suppose that statutory international law and international criminal law were altered through the appropriate deliberative procedures to permit humanitarian intervention in certain conditions that explicitly include the presence of a functioning legal order in the target state. This would be, as Ripstein often expresses it, to "bring force under law"—in particular, to bring "uses of force among nations under law"[4] (I, p. ~~25~~). Since the use of force would, in the right conditions, be authorized by law, the permitted instances of humanitarian intervention would not create a condition in which force decides—or, more precisely, in which force rather than law decides. They would instead be authorized instances of the enforcement of law. (Of course, even a successful, legally authorized humanitarian intervention constitutes a decision by force in an obvious sense. But it is the same sense in which the enforcement of domestic criminal law through the arrest and incarceration of an offender is a decision by force.) Nor would these instances of humanitarian intervention involve the subordination of one national legal order to another. Rather, the authorization by international law of the use of force against the state guilty of crimes against its own people would—assuming that that state is subject to the applicable part of international law—be consistent with that state's domestic legal order.

Morality thus does not antecedently prohibit making "an agreement permitting aggressive war." If an agreement permitting certain forms of aggressive war were in fact to be made and were to have the authority of law, both of Ripstein's reasons for claiming that aggression is morally impermissible would simply not apply to aggressive wars of these types. His reasons for claiming that aggression is

always morally wrong do not *support* the legal prohibition of aggression; rather, they *presuppose* it. It is therefore entirely morally coherent to suppose that the law could permissibly—and with positive justification—be rewritten to permit not only defensive war against aggression but also certain wars of humanitarian intervention, as well as the initiation of a new war by a recently defeated nation to expel an unjust conqueror.

4. "PART OF THE WAR"

I have thus far discussed Ripstein's understanding of *ius ad bellum*. I turn now to his views about *ius in bello*. I will begin by examining his understanding of the requirement of discrimination, which is developed in his second lecture. I will then return to the general account of the principles of *ius in bello* presented in his first lecture.

Just as in his first lecture Ripstein aims to explain the moral foundations of the current legal prohibition of aggressive war, so in his second he attempts to explain the moral foundation of the distinction in the contemporary law of armed conflict between civilians, who are illegitimate targets of intentional attack, and combatants, who are not illegitimate targets. What he says is that "targeting civilians is wrong because it makes unlimited war its principle" (II, p. ~~2~~). But this is not true of targeting "those against whom defensive force can be used. . . . Force used against [them] does not presuppose a principle of total war"[5] (II, p. ~~13~~). What I understand Ripstein to be saying here is that, if war can be permissible at all, it must be permissible to use force in defense against at least some of those who themselves use force; but if civilians as well as combatants were permissible targets, everyone would be a permissible target, and total war would therefore be permissible. Because total war is impermissible, civilians cannot be permissible targets.

Yet no one who writes about the ethics of war accepts that *all* civilians are permissible targets. What most contemporary revisionist just war theorists argue is that *some* civilians make themselves legitimate targets while *some* combatants—those who fight for just aims by permissible means ("just combatants")—are not legitimate targets. Because this view preserves the fundamental distinction between legitimate and illegitimate targets, it does not presuppose or imply "a principle of total war." So Ripstein's view has no advantage over the revisionist view in this respect.

His view seems to be that the distinction between legitimate and illegitimate targets coincides with that between those who are "part of the war" and those who are not. What the criterion is for determining whether a person is a part of the war is rather elusive, but it seems to be related to the justification for the war. Ripstein says, for example, that if punishment of the guilty could be a justification for war, those who deserve punishment would be a part of the war. Similarly, if recovery of what has been wrongly taken could be a justification for war, those who wrongly retain what has been wrongly taken would be part of the war. But since the only justification for war is defense, or stopping an aggressive attack, those who are part of the war are only those who are part of the attack, participants in the aggression—that is, unjust combatants.

This leaves some uncertainty, at least in my mind, about the status of just combatants. Are they part of the war? Although Ripstein repeatedly denies that the law of *ius in bello* introduces novel permissions, it does not make it illegal for unjust combatants to attack just combatants. Since just combatants may be engaged in nothing more than morally and legally justified self- and other-defense, and since attacking and killing those who are engaged in justified defensive action is morally wrong, if other things are equal, it does seem that, in failing to prohibit unjust combatants from attacking just combatants, the law of *ius in bello* grants a novel *legal* permission to unjust combatants.

Of course, on Ripstein's view, every act of war done by an unjust combatant is *morally* wrong in one way, in that it involves participation in a prohibited activity: aggression. So unjust combatants do wrong if they kill just combatants and they do wrong if they kill civilians. But Ripstein's view seems to be that, while both of these acts are wrong because they are acts of participation in aggression, the killing of a civilian involves an additional wrong: namely, attacking a person who is not part of the war. This suggests that just combatants are part of the war and that attacking them involves no wrong other than that of participation in aggression.

I think this is mistaken. The intentional killing of a just combatant is not wrong only for the same reason that it is wrong for an unjust combatant to blow up an unoccupied military building. It is wrong for basically the same reason that it is wrong for an unjust combatant intentionally to kill a civilian. It is the intentional killing of a person who has done nothing to make it justifiable to kill him. It therefore wrongs him. Suppose a wrongdoer is about to kill his uncle, from whom he will then inherit a fortune. A third party attempts to defend the uncle, but the wrongdoer kills them both. The killing of the third party is seriously wrong in much the same way that the killing of the uncle is. There seems to be only one potentially relevant difference. This is that the killing of the uncle uses him as a means of obtaining his fortune, whereas killing the third party does not use him as a means but simply eliminates him as a threatened obstacle. This difference between "opportunistic" and "eliminative" agency is sometimes morally significant.[6] It seems, however, to have little significance in this case, especially given that the elimination of the obstacle is itself a means rather than a side effect of the wrongdoer's being able to carry out the opportunistic killing. Assuming that just combatants engage in nothing more than the defense of their compatriots against wrongful aggression, they are morally analogous to the third party in this case.

Some killings of civilians in war are, moreover, eliminative or defensive rather than opportunistic. In these cases, civilians make causal contributions to a threat, so that killing them does not use them as a means of eliminating the threat but eliminates their contributions to the threat. Cases in which this is true challenge what seems to be Ripstein's criterion for distinguishing between those who are and those who are not part of the war. He writes that "civilians . . . are not part of the attack, and so the use of force against them cannot be a way of stopping the attack" (II, p. 15). This is one way of saying that the use of force against civilians in war cannot be eliminative or defensive but must instead be opportunistic. But here is an example in which force used against civilians is "a way of stopping the attack," or preventing it from continuing.

Weapons Providers

Combatants of a state fighting a war of aggression have been pursued into their own territory by combatants of the state fighting in defense. One hundred such unjust combatants are fighting a strategically highly important battle there against a comparable number of just combatants. The battle has been fought at a distance with medium-range artillery. The just combatants see that they have destroyed all the unjust combatants' weapons. The unjust combatants are wholly disarmed. As the armed just combatants approach to take the unjust combatants prisoner, they see ten civilians coming from a nearby town, each bringing ten guns from their homes to leave where the unjust combatants can get them. If these civilians are able to leave the guns for the unjust combatants, the battle will continue at close range. The only way to prevent the civilians from leaving the guns is to kill them with artillery fire. If the civilians are killed, the battle will be over; if they are not killed, it will continue.

Perhaps one could say that, precisely because killing these ten people would be defensive, they must be part of the attack and so cannot be civilians. One might suppose that this is consistent with the rule of international law that civilians who participate directly in hostilities forfeit their civilian immunity. But the ten civilians who bring guns will not themselves fire them. They will not participate directly in hostilities any more than civilians involved in the manufacture and delivery of weapons to the military. They remain civilians.

There are, moreover, many other ways in which people who count, by any reckoning, as civilians intentionally contribute causally to their side's war, so that attacking them contributes to "stopping the attack." These include scientists employed by universities who design new weapons in an effort to make their side's military more effective, civilian military strategists who advise the government or the military, civilian translators of intercepted military communications, civilian propagandists whose writing produces continuing popular support for a war that would otherwise end for lack of this support, and so on.

According to Ripstein, it is not just all civilians who are not part of the war. This is true also of soldiers who attempt to surrender, prisoners of war, medics, military chaplains, and negotiators. But persons in these categories can also be and sometimes are "part of the attack" in such a way that the use of force against them is a way of stopping the attack. Here are two examples.

> *Medics*
>
> A battle between aggressing unjust combatants and defending just combatants has raged all day. When night falls, every aggressor has been injured in a way that will incapacitate him for at least several days. The defending soldiers cannot reach the aggressors' camp to take them prisoner until the following

morning. Medics are approaching the camp and, unless they are killed, will over the course of the night treat the aggressor combatants and, in most cases, restore their ability to fight.

Again, if the medics are killed, the battle will be over; if they are not killed, it will continue in the morning, just as it would have if the defending soldiers had not succeeded in incapacitating the aggressors. Stopping the medics is necessary for stopping the battle.

Tactical Surrender

Aggressing unjust combatants are engaged in battle with a unit of defending just combatants in a remote jungle area. They know that if they continue to fight, they are very likely to be defeated. If, however, they surrender, the defending soldiers will then have to take them prisoner and take them through the jungle as they return to their base. The aggressors know, too, that they would be an encumbrance to the defending soldiers, slowing them down and depleting their resources, thereby weakening them and making them more vulnerable to an ambush that they know another of their units is preparing. They thus know that their surrendering will make it likelier that their side will kill the defenders than if they continue to fight against them. They therefore decide to surrender for entirely tactical reasons. Their unit has, however, been infiltrated by a spy who sneaks away and alerts the defending soldiers to the aggressors' plan.

I think that in this case it is permissible for the defending soldiers to refuse to accept the aggressors' surrender and to continue to fight against them. I agree with Ripstein, though, that if the aggressors were to expose themselves to fire in the course of attempting to surrender, it would be wrong for the defending soldiers to exploit their vulnerability by attacking them then.

I do not claim that it is obviously permissible for just combatants to kill the civilians, medics, and unjust combatants who attempt to surrender in these cases. These cases raise difficult moral issues. What I do claim is that these issues cannot be adequately resolved by debating whether these people come within the scope of the concept "part of the war."

5. THE PRINCIPLES OF *IUS IN BELLO*

I believe that some civilians, such as an academic physicist who would otherwise produce an atom bomb for the Nazis, act in ways that make them legitimate targets in war. And I believe that just combatants who fight by permissible means are not legitimate targets. I therefore disagree with Ripstein's understanding of the *ius in bello* requirement of discrimination as a simple prohibition of any intentional attack against civilians or members of other protected groups (prisoners of war, medics, and a few others). Because of this, and for other reasons I will explain, I believe that his general understanding of the principles of i*us in bello* is mistaken—both morally and as a matter of law.

According to Ripstein, the principles of *ius in bello* are *prohibitions* that govern the activity of fighting in a war. They apply to all those who participate in that activity, whether their participation is permissible or not. On this understanding, the violation of an *in bello* prohibition by unjust combatants, whose mere participation in war is itself wrong, "is an additional wrong, the wrongfulness of which does not depend on the injustice of the cause for which they fight" (II, ~~p. 1~~).

Ripstein elucidates this claim by exploring analogies with other activities that are governed by rules that apply equally to those who engage in these activities permissibly and those whose engaging in them is prohibited. He discusses two such analogous activities—driving and

parenting—but for the sake of brevity I will consider only the analogy with driving.

Ripstein notes that there are rules that determine who may and who may not permissibly drive. For it to be permissible for one to drive at all, for example, one must have a valid driver's license. But there are also rules governing what one may permissibly do while driving. These apply to both licensed and unlicensed drivers. That is, they "can be . . . obeyed or violated by those who drive in violation" of the rules that determine who may permissibly drive (I, p. 16). There is, for example, a rule that prohibits driving through a red traffic light. This rule can be obeyed or violated by an unlicensed driver. If the unlicensed driver drives through a red light, she is guilty of a wrong that is distinct from and additional to the wrong of driving without a license.

Ripstein says that the principles of *ius in bello* are relevantly like the rules governing the activity of driving. They apply to both just and unjust combatants and can be obeyed or violated by both. The most important and widely discussed principles of *ius in bello* are discrimination, necessity, and proportionality, though Ripstein has an extensive discussion of a less prominent principle: the prohibition of perfidy. I think that what Ripstein says about the principles of *ius in bello* generally is true of the prohibition of perfidy. Both just and unjust combatants can refrain from engaging in perfidy, and unjust combatants who do engage in it are guilty of a further, distinct wrong in addition to the wrong of pursuing unjust aims by means of force.

There is also a sense in which unjust combatants can either obey or violate the requirement of necessity. This requirement is ordinarily understood as a moral constraint on the pursuit of aims that are sufficiently good, or important, to justify causing some harm as a means or side effect of achieving them. The constraint is that one must not cause more harm than is necessary in achieving the aim.[7] But even action intended to achieve aims that are unjust is governed

by a requirement of necessity. If one causes more harm than however much is unavoidable in achieving an unjust aim, one is guilty of a further wrong—one that may have additional victims—in addition to that involved in pursuing and achieving an aim that is unjust. It is, for example, wrong to attack a just combatant as a means of achieving an unjust aim; but it is an additional wrong to cause that combatant more harm than is necessary to achieve the unjust aim. This is reflected in the prohibition in the law of armed conflict of the use of weapons that cause "unnecessary suffering" or "superfluous injury."

But, while it is thus possible for unjust combatants either to obey or violate the *in bello* prohibitions of perfidy and unnecessary harming, it is not possible, except perhaps in rare instances, for unjust combatants to obey the *in bello* principles of discrimination and proportionality, properly understood. Consider first the requirement of discrimination. The arguments in section 4 explain why I add the phrase "properly understood." It is of course possible for unjust combatants always to obey a rule that forbids intentional attacks against civilians. But I have argued that that is a mistaken understanding of what is forbidden by the requirement of discrimination. The requirement of discrimination is the requirement that one not intentionally attack those who are not legitimate targets. I have argued briefly here and at length elsewhere that just combatants who fight by permissible means are not legitimate targets.[8] If this is right, unjust combatants cannot fight an unjust war in obedience to, or in conformity with, the requirement of discrimination. They cannot fight a war of aggression without intentionally attacking just combatants who are engaged in permissible self- and other-defense.

This reveals the defect in Ripstein's analogy between fighting in a war and driving. According to this analogy, an unjust combatant's intentionally killing a civilian in the course of a war of aggression is relevantly like an unlicensed driver's going through a red light. Just as the driver is guilty of two distinct wrongs—driving without a license

and an egregious violation of the driving code—so the unjust combatant is guilty of two wrongs: participating in aggression and violating the requirement of discrimination (understood as the prohibition of attacks against civilians and members of other protected groups). But an unjust combatant who kills a just combatant is, according to Ripstein's analogy, relevantly like an unlicensed driver who flawlessly executes a three-point turn: he is guilty of participating in a prohibited activity—aggressive war—but his killing the just combatant is in conformity with the rules that govern that activity. It is not an additional wrong.

But killing a just combatant is an additional wrong, wholly unlike an unlicensed driver's perfectly executed turn, even though it is an unavoidable wrong for those who fight without a just cause and who thus have no legitimate targets. Because combatants who fight in wars of unjust aggression cannot fight in conformity with the requirement of discrimination, they are entirely unlike an unlicensed driver who could, in principle, drive in closer conformity with the rules that govern the activity of driving than any licensed driver.

Just as combatants cannot fight a war of unjust aggression in obedience to the *in bello* requirement of discrimination, so they cannot in general fight in conformity with the *in bello* requirement of proportionality. Ripstein does not discuss proportionality at length in his lectures, but his few references to it are consistent with the way it is understood in the law of armed conflict, which is as the prohibition of any "attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[9] Ripstein thus writes that "the requirement that any side effects of military action be proportional to their military advantage" applies "to both sides in any armed conflict" and can be obeyed or violated by both (I, p. 2).

The problem is that this understanding of proportionality is morally incoherent. Proportionality in *ius in bello* is a condition of

justification for harming innocent people as a side effect of military action. An act that harms innocent people as a side effect can be justified *only* if the harms are *offset* by good effects. The harms are then "proportionate" in relation to those good effects. But military advantage is in itself not a good effect. In itself it has no value. Whatever value it might have is *instrumental* in relation to the value of what it is advantageous for. But military advantage for combatants fighting in an unjust war of aggression is instrumental to the achievement of ends that are impartially *bad*. And the achievement of ends that are bad cannot offset and render proportionate bad side effects, such as the killing of innocent civilians. One cannot coherently claim that an act of aggressive war that kills innocent civilians as a side effect is proportionate, and therefore satisfies one condition of justification, because the killings are morally offset by the act's being highly advantageous in the military conquest of the civilians' state.[10]

Any coherent account of the *in bello* proportionality requirement must weigh the harms that an act of war causes to innocent people as a side effect against the act's impartially good effects. Because both the intended effects and the side effects of acts of war by unjust combatants are generally impartially bad, it is only very rarely that acts of war by unjust combatants can satisfy a coherent requirement of proportionality. So, just as it makes no sense to suppose that unjust combatants could fight a war in perfect conformity with the requirement of discrimination, it also makes no sense to suppose that they could fight a war in consistent obedience to the requirement of proportionality. Some of the principles of *ius in bello*, therefore, at least when properly understood, are not at all analogous to the rules that govern the activity of driving. There are no rules of the road that cannot be obeyed by an unlicensed driver. It is precisely because unjust combatants have no moral justification for fighting, so that there are no legitimate targets of their attacks and no impartially good effects of their acts of war, that they cannot obey certain of the principles

of *ius in bello*. The wrongness of their unavoidable violations of the requirements of discrimination and proportionality is thus not distinct from, or additional to, the wrongness of their participation in unjust wars; it is, rather, an essential part of the explanation of why their participation in unjust wars is impermissible. Contrary to what Ripstein says, "the wrongfulness of" unjust combatants' violations of the *in bello* requirements of discrimination and proportionality *does* "depend on the injustice of the cause for which they fight."

NOTES

1. The sentence continues "and so, the condition in which might makes right." But no sensible person since Dante has supposed that victory in war determines or even provides evidence that the victor is morally or legally in the right. I therefore find it puzzling that Ripstein repeatedly suggests that those who believe that aggressive war can sometimes be permissible thereby embrace the "right of the stronger."
2. I assume that, here and elsewhere, his term "nation" refers to states as well as to national groups.
3. For my reasons for rejecting pacifism, see my "Pacifism and Moral Theory," *Diametros*, no. 23 (March 2010): 44–68.
4. See also I, pp. ~~1, 27, 40~~.
5. Because Ripstein often uses "can" to mean "may" or "can permissibly," it is unclear whether he means for "those against whom defensive force can be used" to include soldiers fighting in a just war of defense. In my view, although force used against them can be defensive, such force may not, or cannot permissibly, be used against them.
6. This distinction was introduced into the philosophical literature by Warren Quinn in his "Actions, Intentions, and Consequences: The Doctrine of Double Effect," *Philosophy & Public Affairs* 18, no. 4 (Autumn 1989): 344.
7. This is a crude and simplistic statement of the requirement of necessity. For discussions of some of the complexities in the notion of necessity, see Seth Lazar, "Necessity in Self-Defense and War," *Philosophy & Public Affairs* 40, no. 1 (Winter 2012): 3–44; and Jeff McMahan, "The Limits of Self-Defense," in *The Ethics of Self-Defense*, ed. Christian Coons and Michael Weber (New York: Oxford University Press, 2016), 185–210.
8. Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009).

9. Protocol Additional to the Geneva Conventions, of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 51, ¶ 5, June 8, 1977, 1125 U.N.T.S. 4.
10. For further discussion, see Jeff McMahan, "War Crimes and Immoral Action in War," in *The Constitution of the Criminal Law*, ed. R. A. Duff, Lindsay Farmer, S. E. Marshall, and Victor Tadros (Oxford: Oxford University Press, 2013): 151–184, esp. sec. VII; and Jeff McMahan, "Necessity and Proportionality in Morality and Law," in *Necessity and Proportionality in International Peace and Security Law*, ed. Claus Kreß and Robert Lawless (New York: Oxford University Press, 2020), sec. V.