



## The Law vs. the Sword: Arthur Ripstein's Account of the Morality and Law of War

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REVIEW ESSAY



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# The Law vs. the Sword: Arthur Ripstein's Account of the Morality and Law of War

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CÉCILE FABREARTHUR RIPSTEIN, *RULES FOR WRONGDOERS - LAW, MORALITY, WAR*. NEW YORK: OXFORD UNIVERSITY PRESS, 2021, 228 PP., \$35 (HARDBACK), ISBN: 9780197553978

Suppose that state A wages war against state D. We want to know at least three things. First, does state A have a moral and legal justification for going to war? Second, what may and must those states' armed forces do, morally and legally, in the course of fighting their war? Third, if those states' leaders and ordinary soldiers act wrongly and/or illegally, ought they be punished and if so, by whom? In the parlance of just war theory, we want to know what moral and legal norms regulate the resort to war (*jus ad bellum*), belligerents' and soldiers' conduct in war (*jus in bello*), and their conduct after war (*jus post bellum*).

Arthur Ripstein's *Rules for Wrongdoers*, which is the published text of his Berkeley Tanner Lectures on Human Values, offers novel and interesting responses to those questions. It includes comments by Oona Hathaway, Christopher Kutz and

Jeff McMahan, and Ripstein's response to those comments.

The book's chief aim is to provide a solution to a deep and important puzzle about the morality and the law of war. The puzzle is this: According to the law of war and the moral norms which underpin it, states may not (morally and legally) initiate war against other states. They may resort to war only (a) to defend their territorial integrity and political independence against a military aggression, (b) to come to one another's assistance in the face of aggression, or (c) to prevent the commission of atrocities in other states. Failing that, they and their leadership commit the moral wrong and the legal crime of aggression. Once the war has started, soldiers from both sides are prohibited from employing a range of tactics. In particular, they are legally and morally prohibited from deliberately killing anyone who is not or is no longer participating in the war, such as soldiers who have surrendered and, crucially, innocent civilians. They are also

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morally and legally prohibited from using perfidious means. While they are liable to punishment for targeting innocent civilians, they are not liable to it for killing enemy soldiers, even if they commit such killings in the service of an unjust and unlawful war. Therein lies the puzzle: if military aggression is a crime, why not treat the acts of killing committed by aggressors against defending forces as acts of murder and, contrastingly, the acts of killing committed by defenders against invaders as justified homicide?

That question was memorably asked by Sir Hartley Shawcross, Britain's chief prosecutor at Nuremberg. Ripstein is not the first, of course, to have grappled with Shawcross' challenge. In fact, and at the risk of doing violence to chronology, there is a sense in which Western just war theory can be read as a long set of conflicting answers to this question. Broadly speaking, we can divide contemporary just war theory into two approaches. On the one hand, revisionist just war theory, of which Jeff McMahan is the leading figure, draws on medieval and early modern accounts of war developed by (*inter alia*) Francisco Suarez and Francisco de Vitoria. It argues that combatants whose war is unjust are not morally entitled to kill their enemy. All things considered, there may be good moral reasons for not punishing them, but the fact remains that the laws of war, in that respect at least, do not properly reflect the correct moral norms of war.<sup>1</sup>

On the other hand, contractarian just war theory, first discussed by Michael Walzer in his seminal *Just and Unjust Wars*, and more recently articulated by Yitzhak Benbaji and

Daniel Statman, conceives of the norms regulating war as the outcome of an agreement made by states. States ought to work towards maintaining peace. The best way to do that is for each state to renounce the use of force other than in defence of its territory and independence - hence the prohibition on aggression. Should any such state breach the prohibition and thereby license the victim of its attack to respond by force, the best way to keep hopes for peace alive is to minimise casualties on both sides while permitting belligerents to pursue their war ends. Each state, thus, agrees *ex ante* to a set of rules which apply equally to all, under the terms of which belligerents can target each other's combatants but not each other's innocent civilians, and submit to further prohibitions on means of war, such as the resort to perfidy or the deliberate targeting of innocent civilians.<sup>2</sup>

Revisionists and contractarians have occupied much of the terrain. Ripstein rejects the revisionists' claim that, in principle, combatants who fight for an unjust cause are accountable, not merely morally, but also in law, for killing their opponents. Moreover, he also rejects the view that the rules of war - "rules for wrongdoers," as he puts it - are best defended, morally speaking, as the outcome of an agreement between states. Instead, he presents a unified and novel account of the morality and law of war: wars other than wars of national defence and wars to stop atrocities such as genocide and mass enslavement are morally wrong and appropriately deemed unlawful; the moral norms and the laws which regulate combatants' conduct in war apply equally

to all sides, irrespective of the moral and legal status of their cause. As he puts it,

*far from being in tension, [those ideas] have a common normative source, in the distinction between peace and war. War is the condition in which might makes right; peace is the condition in which right disciplines the use of might. Aggression, perfidy and targeting civilians all occupy the wrong side of Cicero's distinction between two ways of settling a dispute: first, by discussion, second, by physical force (94).<sup>3</sup>*

I am equally doubtful about the success of contractarian just war theory. But I am and always have been a revisionist. In what follows, I raise three concerns with Ripstein's overall arguments. My first concern pertains to his claim that the only permissible wars are wars of national defence and military interventions against atrocities. My second concern pertains to his argument for the symmetrical application of the rules of war. My third concern pertains to his account of post-war punishment for wrongs committed in war.

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Suppose that state A invades state D in order to seize control of the oil fields that are located on the latter's territory. Under the terms of the UN Charter, it commits the crime of aggression, and State D is legally entitled to defend itself by force. It is also morally justified in doing so. In the language of *jus ad bellum*, Aggressor lacks, while Defender has, a just cause for war. On Ripstein's account, Aggressor is using force rather than law to press its claim. It is not morally entitled to do that. Just as individuals do not have the standing privately to enforce their rights against one another by

initiating violence, politically independent nations do not have the standing so to act vis-à-vis one another. And just as individuals have the right to defend themselves from someone who unwarrantedly uses force rather than law against them, Defender has the right to use force to defend its territorial integrity and political independence from Aggressor's attempt to settle their conflict by violent means. It is also morally entitled to invite other states to come to its defence. This, incidentally, also explains why other states may go to war against Aggressor if authorized to do so by the United Nations' Security Council in response to Aggressor's decision to settle its dispute with Defender by force. Finally, the prohibition on substituting force for law also explains why a state may intervene militarily in the internal affairs of another state as a means to protect the latter from committing atrocities against its population. As Ripstein explains, a state which carries out genocide, or institutionalises mass slavery, is "[reducing] a class of human beings to mere things with respect to whom everything is determined by force" and lacks a claim not to be opposed by force and is liable to have force used against it (182).<sup>4</sup>

These are the only legitimate moral and legal grounds for war. Ripstein thus sides against Grotius, who conceived of war as a mechanism for dispute resolution, and with Kant, who sought to subordinate force to law. Some of Ripstein's phrasings suggest that he opposes the use of force as a means to resolve disputes. As McMahan notes in his response, if the rationale for condemning (morally and legally) the initiation of war is that it substitutes force for

law, it seems that, by that token, Defender ought not to resist but, instead, ought to submit to Aggressor. For in resorting to force to oppose force, Defender would be actively contributing to a state of affairs where force prevails. Far from defending war, Ripstein would and should embrace pacifism (141-42).

Yet he is no pacifist: On a close reading of the text, what does the work is not a general prohibition on using force but, rather, a general prohibition on undermining a legal order. Force, then, is justified, but *only* as a means to defend that order. That is why he rejects the view, to be found in the pre-modern just war tradition, that political communities are morally entitled to resort to war as a means (a) to punish wrongdoers, (b) to recover something that was wrongfully taken from them, such as territory, and (c) to bring about a fairer distribution of resources. Were Aggressor to wage any such war, it would subject Defender to its own understanding of what its legal and moral rights are, in violation of the deeper prohibition on disrupting the "condition of peace between independent states, neither one of which is the superior or the subordinate of the other" (69).<sup>5</sup>

I wholly share Ripstein's view that punitive wars are morally wrong and that punitive military aggression is appropriately regarded as a war crime, though not on the grounds he adduces. The problem with punitive wars is not that states lack the standing to punish other states and their members for this particular wrong. (*Pace* Ripstein, they do have such standing.) The reason, rather, is that punishment is morally

justified, in general, only if the defendant meets the conditions of *actus reus* and *mens rea*. Whether he does so must be established through fair and transparent procedures involving amongst other things, the properly constrained collection of the relevant evidence. War is decidedly not the right kind of procedure.<sup>6</sup>

I shall return to the difficult question of states' standing to punish wrongdoers for the misdeeds they commit in war presently. For now, let me rehearse some doubts about Ripstein's rejection of remedial and redistributive wars. A remedial war aims to recover that which was wrongfully taken - say, territory. Assume for the sake of argument that Russia wrongfully and illegally annexed Crimea in 2014. Were Ukraine to wage war against Russia now, in 2021, so as to regain Crimea, it would be waging a remedial war - by Ripstein's light, unjustly and appropriately illegally so, since it would "appoint itself as the proper authority" to adjudicate its conflict with Russia.<sup>7</sup> War ended when the invasion ended and at the point at which Ukraine chose to stop fighting. Russia and Ukraine are now in a condition of peace, in which each state is politically independent of the other; they must treat one another as such and regard the past as settled.

Consider next redistributive wars and return to the dispute over oil fields. It may be that although Defender has legitimate control over the territory under which those oilfields are located, its refusal to grant Aggressor exploitation rights and to share in the proceeds of oil sales is so detrimental to Aggressor as to be wrongful. Even so, Aggressor may not use force to press its claim, for

the same reasons, *mutatis mutandis*, as deployed against remedial wars.

I reject Ripstein's condemnation of remedial wars. Indeed, I agree with McMahan that, if Ukraine would have been permitted to continue to fight in 2014 for the sake of its territorial integrity and political independence under certain conditions, then in principle, so long as those conditions obtain now, it is entitled to resume fighting to those same ends. Granted, the passage of time may make it impermissible all things considered for Ukraine to do so. But that is compatible with the claim that the recovery of Crimea is a just cause for war (143-45).

Furthermore, and admittedly against much of contemporary just war theory, I believe that the wrongful appropriation or withholding of resources is a just cause for war. Suppose that as a result of Defender's holding on to what it has, a large majority of Aggressor's citizens live some way below the internationally agreed poverty threshold - indeed die of it. Assume further that human beings, wherever they are in the world, have rights against the affluent not to be deprived of, and indeed to be provided with, the basic necessities of life. Defender is derelict in its basic duty not to act in such a way as to deprive Aggressor's population of those resources, as well as in its basic duty to assist them. True, it does not use force to substitute its interpretation of what its rights are for Aggressor's own interpretation thereof; it thus does not undermine the latter's political independence. However, political independence, understood as the entitlement "not to have [one's] system of public law subordinated to any other nation's system of

public law" (40), does provide Aggressor with a justification for resorting to force in such cases. For political independence matters not just in so far as it instantiates the deeper principle that individuals, as rational and moral agents, owe it to one another to treat one another as ends in themselves and not to subordinate one another to the brute power of their will: it matters also in so far as it is a precondition for citizens' ability together to frame, revise and implement their conception of a good (political) life. Put differently, it is a precondition for political self-determination. That is why it is worth defending by force when it is unwarrantedly threatened by force.

Now, political independence is not the only precondition for self-determination. So is some level of individual well-being and general material development. Citizens who live in severe deprivation are less likely to exercise their political rights; a community which has to expand most of its resources on meeting the basic needs of most of its population has fewer means to engage in collective projects and is especially vulnerable to exploitative practices on the part of affluent states.

If so, political independence without the material means to conduct policies of one's choosing lacks worth. To the extent that severe deprivation is an obstacle to political self-determination, Defender's dereliction of duty thus undermines the worth of Aggressor's political independence. To affirm that the defence of political independence is a just cause for war while access to basic material resources is not, is to fail to do justice to the value of political self-determination



- to the value, in other words, which makes political independence worth having in the first instance.<sup>8</sup>

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Suppose, on the contrary, that the defence of political independence and territorial rights against an ongoing kinetic aggression and the prevention of atrocities are the only morally justified and lawful grounds for war. My second concern is with Ripstein's claim that, once the war has started, its rules, both moral or legal, apply symmetrically to both sides. Remember Shawcross' challenge, and replace "war" and "soldiers" with "gang violence" and "gang members": the fact that gang members lack a justification for seeking control of, say, a neighborhood entails that their acts of killing in pursuit of their wrongful and illegal ends are acts of murder, and will be punished as such in domestic jurisdictions. Why, then, treat war violence differently?

For two reasons. First, Ripstein claims, war is distinctively immoral, for it is "the condition in which force decides; that is why it is wrong to start a war, and why conduct in war must be restrained" (168). However, this does not help us distinguish between war and gang violence. A gang which regards a particular street corner as part of its territory and kills members of rival gangs to drive them away is entering a condition in which force decides, in clear breach of Cicero's and Kant's injunctions that we should resolve our disputes with words and laws. If initiating war is distinctively immoral, and if this is why soldiers who kill as a means unlawfully and unjustly to secure their leadership's control of a territory are not like gang members

who kill as a means unlawfully and unjustly to secure their boss' control of a street corner, it cannot be for the reason Ripstein gives us.

Ripstein's second response to Shawcross' challenge consists in reframing the *jus in bello*. Contrary to what is sometimes affirmed, it does not grant soldiers permissions to do what they normally would not be entitled to do, such as killing one another. Rather, it imposes on them prohibitions such as not targetting innocent civilians, or resorting to perfidious tactics. Those prohibitions are in force irrespective of the moral and legal status of their war. To buttress his argument, Ripstein invites us to reflect on the rules of driving, the rules of parenting, and the rules of military occupation (31-35). I am entitled to drive, or to parent a child, or to take charge of another political community, only if I comply with certain requirements: holding a driving licence and ensuring that my car is road-worthy; begetting the child or having adopted her; fulfilling whatever conditions there are on the right to govern. Suppose, though, that I drive without a licence, kidnap a child, or install my armies on my neighboring state's territory without warrant. I must still comply with the rules of the road, feed and bathe the child, and rule for the benefit of the occupied population - in just the same way as I would if I were entitled to drive, to parent, and to conduct a military occupation. The moral and legal rules of *ad vehendum*, *ad parentem* and *ad occupationem* parallel the *jus ad bellum*, while the rules of *in vehende*, *in parente* and *in occupatione* parallel the *jus in bello*.

Now, revisionists do not deny that Defender's armed forces must abide

by various *in bello* rules which also apply to Aggressor's side. In particular, even though they include in the category of legitimate targets more categories of civilians than Ripstein is willing to allow, they condemn as war crimes many instances of the deliberate targeting of civilians - even when those are carried out in pursuit of a just cause. Revisionists can also and often condemn perfidy. Finally, as McMahan points out, they can hold soldiers who fight on the unjust and unlawful side under a duty to abide by the principle of necessity (158). Revisionists thus do not deny that it is possible to abide by the rules of *jus ad bellum* and yet breach those of *jus in bello*, and vice versa. What they do deny, however, is that the armed forces of a state which breach the *jus ad bellum* can be deemed to respect moral (as distinct from legal) *jus in bello* when killing Defender's soldiers while pursuing their *ex hypothesi* unjust ends. Crucially, so does Ripstein: he too says that combatants who kill enemy combatants in pursuit of a war of aggression commit a serious wrong (83). By implication, combatants who kill enemy combatants in pursuit of a just cause do not commit a serious wrong. If so, it is not true that the rules of war apply symmetrically to both sides.

The analogies with driving, parenting and military occupation do not help Ripstein here. Neither Kutz nor McMahan find the analogy with driving and parenting convincing (121-22, 158-60). Rather than enter the fray, let me say something about the analogy with military occupation, which they do not discuss. As Ripstein points out, whether a military occupation comes about as a result of an unlawful war of aggression or

a lawful war of national defence, the provisions of the law of military occupation, as set out in the 1907 Hague Regulations (s. III, arts. 42-56) and the 1949 Fourth Geneva Convention (s.III, arts. 47-78) are the same.

Revisionists are likely to insist that, whatever the law says, the fact that Aggressor comes to occupy Defender's territory as a result or (*a fortiori*) as part of its unjust war implies that, pending countervailing considerations, it is under a moral duty to leave. Given that it ought to leave, it is morally prohibited from taxing or requisitioning resources from the occupied population to defray the costs of its occupation (a point with which Ripstein himself agrees [33]). It is also morally prohibited from enforcing its own laws on that population and from killing insurgents who forcibly resist its rule. However, so long as Defender's occupation of Aggressor's territory is morally justified, it is morally permitted so to act, within appropriate limits. Suppose that, unless Defender occupies Aggressor and exercises over its territory the right to rule, the latter will resume its war of aggression or its campaign of atrocities against its own civilians at the first opportunity. Subject to Defender meeting the same conditions as constrain the resort to force (such as necessity and proportionality), Aggressor's combatants and those of its civilians who share responsibility for those wrongs have no claim not to have their political independence undermined, nor do they have a claim that Defender not avail itself of the resources it needs to ensure that the occupation is effective at thwarting Aggressor's threat. The harms of occupation as incurred by



Aggressor's innocent citizens are justified, again subject to Defender's meeting the aforementioned conditions, as collateral harms of a just course of action. None of those points apply to Aggressor's occupation of Defender's territory.<sup>9</sup>

Similarly, then, even if both Aggressor and Defender, during the war, are subject to the prohibitions on (e.g.) deliberately targetting civilians or resorting to perfidious means, the fact remains that Defender's combatants are morally permitted to kill Aggressor's combatants but that the converse does not hold. To put the point in general terms, the *jus in bello* does not only set out what combatants may not do: it also consists in setting out what they may do once the war has started. Indeed, much of the law of war identifies what constitutes a legitimate target. At the bar of the *jus in bello* so construed, then, combatants who fight for an unjust cause continue to be held under a general prohibition on killing another person, whereas combatants who fight for a just cause are exempt from it and may kill some persons - to wit, enemy combatants who, by dint of participating in an unjust war of aggression, subject them to a wrongful threat of harm. To reiterate, *pace* Ripstein, the rules of war do not, *in toto*, apply to all combatants symmetrically.

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So far, I have dissented from Ripstein's restrictive account of the *ad bellum* requirement of the just cause, and expressed reservations about his argument for the symmetrical application of the rules of the *jus in bello*. In this final section, I turn to his account of the *post bellum*

punishment of Aggressor's leaders and soldiers.

Ripstein's view on punishment for wrongful acts in war unfolds over the Lectures and his reply to Oona Hathaway and Christopher Kutz, who challenge his relative silence, in the Lectures, on international institutions such as the International Criminal Court in punishing war criminals (see 111–15 and 131–32 respectively).

According to the law of war and the moral norms which underpin them, the *ad bellum* crime of aggression and breaches of *in bello* rules such as the principle of non-combatant immunity are regarded as criminal acts, and appropriately so. Belligerents' leaders and armed forces, including ordinary soldiers, are liable to being punished for breaches of the *jus in bello*. Defender or, indeed, any other state, as well as international criminal tribunals, may punish Aggressor's leaders and ordinary soldiers for those breaches. However, no state, including Defender, has the right to punish Aggressor's leaders for the crime of aggression: only international criminal tribunals have the right to do so. Furthermore, no state, not even Defender, has the right to punish ordinary soldiers for participating in an unjust and unlawful war.

It is not entirely clear whether Ripstein thinks that international tribunals have the right to punish ordinary soldiers as well as leaders for breaches of the *jus in bellum*. On the one hand, when he states that international criminal tribunals may rightfully punish Aggressor's leaders for the crime of aggression, he notes that "the aggressor's individual combatants do not violate [the prohibition from moving from a condition of peace to one of war],

and the prohibition of aggressive war does not prohibit individual combatants from accepting the judgement of their national legal institutions" (101 n34). On a plausible interpretation, that sentence, when combined with the claim that international tribunals have the right to punish Aggressor's leaders, seems to imply that, by contrast, they may not punish its ordinary combatants. On the other hand, Ripstein also seems to concede that it might be possible to offer a sound normative defense of international tribunals' right to punish ordinary combatants for their wrongful participation in an unjust war and concomitant acts of killing in that war (207).<sup>10</sup> In what follows, I assume that he is genuinely open to that possibility, and focus on his argument for withholding from states, including Defender, the right to punish either leaders or ordinary soldiers from such breaches.

In his own words, "A nation being attacked, and those coming to its aid, may enforce the prohibition on aggression by stopping the aggression, but, as nations, they may not punish the aggressor" (208).

I take this point to apply to Aggressor's leaders. With respect to both its leaders and ordinary soldiers, Ripstein holds that:

*Part of what it is for nations to be independent of each other is for each to be entitled to defend itself if attacked, and to not need to defer to any other nation about whether it is under attack ... In deciding whether to defend itself, and in defending itself, it must have some officials who are charged with determining whether there are grounds for war, and others with acting on that determination: it can only defend itself through an institutional structure within which combatants take the word of their superiors about the grounds of war. ... No other state can demand of any*

*individual combatant that that [sic] person disregard the word of their superiors about the grounds of war. Since no nation can demand such a response, no nation can punish them for the fact of participation in an unjust war* (209).

The argument is interesting and puzzling. It is interesting, in so far as it anchors the prohibition on states' punishing ordinary soldiers in the moral imperative of respecting states' political independence from one another. By contrast, contemporary just war theorists who agree with Ripstein that soldiers may not be punished for the crime of aggression invoke essentially pragmatic considerations such as the costs of punishment or the need to incentivise soldiers not to fight without restraints.<sup>11</sup>

Yet the argument is puzzling for two reasons. First, it is in tension with Ripstein's account of states' jurisdiction over breaches of the *jus in bello*. To see this, consider that some officials - say, state A's political and military leadership - must ascertain whether the facts are such that D has provided A with such a cause for war. Now, for the kind of conflicts Ripstein has in mind, there is hardly any margin for honest error. Either D's regime carries out atrocities, or it does not. Either its tanks and jet fighters are invading A's or some other state's territory and airspace *en masse*, or they are not. In both cases, the evidence is more or less incontrovertible. If Ripstein were willing to grant that the recovery of stolen territory or a fairer distribution of resources are just causes for war, he would be on stronger grounds, precisely because appropriately verdictive judgements about the facts of the matter in such cases are harder to reach. He would also be on

stronger grounds, for the same reason, if he conceded that the likelihood of future attacks is a just cause for a preventive war - yet he denies that it is (187).

Thus, unless D actually invades A or some other state, or actually commits atrocities against its or some other populations, A's leaders manifestly commit the wrong of aggression by ordering their armed forces into war. Moreover, as we saw above, Ripstein explicitly states that combatants "who fight without a just cause commit serious wrongs" (83, 209), even though they do not commit the international crime of aggression (87). At the very least, they commit the wrong of killing enemy combatants (who *ex hypothesi* rightly fight in defence of their country) in pursuit of that aggression. Moreover, given that they commit such wrongs in pursuit of an aggression, it seems that they manifestly commit the wrong of participating in and contributing to such a campaign - notwithstanding Ripstein's insistence that they do not commit the crime of aggression itself.

I use the words "manifest" and "manifestly" advisedly. Just war theorists, Ripstein included, who believe that soldiers ought to surrender their individual judgement to that of their leaders make an exception for manifestly wrongful judgements with respect to the means and tactics of war, once the war has started. Thus, in response to Kutz's observation that the political independence argument seems to protect soldiers from punishment for *in bello* crimes so long as those leaders deem those tactics permitted (131), Ripstein counters that "within limits, combatants can accept their nation's rules of engagements, and

refuse only manifestly illegal orders" (211).

However, if states (and not only international criminal tribunals) have the right to punish leaders for manifestly erring in their assessment of what the *jus in bello* mandates and ordinary soldiers for deferring to those manifestly wrongful judgements, it is hard to see why they lack the right to punish leaders and ordinary soldiers for, respectively, manifestly erring and for deferring to manifestly wrongful judgements with respect to causes for war. To be sure, there may be very good reasons as to why, all things considered, ordinary soldiers ought not to be punished - that is to say, subjected to hard treatment - for participating in, and killing enemy soldiers as part of, an unjust aggression. Indeed, there may well be very good reasons as to why, all things considered, they ought not to be punished for at least some *in bello* crimes, and why their leaders too ought not to be punished for either kind of crimes. My point is the more narrow one that if states have the right to punish leaders for manifest *in bello* wrongdoings, then it is hard to see why they lack the right to punish them for manifest *ad bellum* wrongdoings; if states may demand of ordinary soldiers that they disregard their leaders' manifestly wrongful orders to breach the *jus in bello*, it is hard to see why it may not demand of them that they disregard their leaders' manifestly wrongful orders to breach the *jus in bellum*.<sup>12</sup> The correct cut is not between *ad bellum* and *in bello* crimes: it is between non-manifest and manifest breaches of either set of norms.

Second, by the light of the argument from political independence,

Defender has the right to punish Aggressor's leaders and ordinary soldiers for some of the deeds which they commit as part of their war of aggression. Generally, states have the right to punish wrongdoers for violating their domestic laws on their territory. In particular, they have the right to punish agents who enter their territory without warrant; they also have the right to punish agents who kill their own citizens unwarrantedly. Although one need not appeal to the principle of political independence to endorse that claim, accepting the principle clearly implies acceding to states' right to punish in those cases. The right to political independence, you recall, is construed, negatively by Ripstein, as a right "not to have its system of public law subordinated to any other nation's system of public law" (40). Positively, it includes a right to defend one's legal order by force. Those two claims together support the thought that the right to political independence also includes a right to enforce one's laws on one's territory, not merely against one's own citizens but against members of other states. To deny that it does is tantamount to acceding to a state of affairs in which states let outsiders, *de facto*, ride roughshod over their legal system. This cannot be right. If so, then those of Aggressor's leaders and ordinary soldiers who are present on Defender's territory as part of invading forces are committing a wrong; so do they when they instigate or commit the killing of

Defender's own soldiers as a means to conduct their aggression. It seems arbitrary on the one hand to say that in peacetime Defender has the right to punish those very same individuals if they cross the border into Defender's territory illegally (assuming *arguendo* that Defender's immigration laws are morally justified) and kill Defender's nationals who seek to block their progress, but that it lacks the right so to punish them if they do so under the cloak of Aggressor's *ex hypothesi* wrongful declaration of war.

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*Rules for Wrongdoers* is a rich and subtle account of the morality and laws of war. There is more to it than I have been able to discuss within the scope of this essay. In particular, I said little about perfidy (which occupies a good deal of the book), and nothing about wars involving non-state actors. These issues are well-covered by Ripstein's commentators in the volume. But as prospects for interstate wars loom large again, it pays to revisit what one might call, for lack of a better label, the "fundamentals" of just war theory: when and why states, and their members, are morally permitted to use military force when resolving their disputes, and what punishment, if any, they may impose on one another once the war is over. While I disagree with much of Ripstein's account, there is no doubt that it is an important contribution to contemporary just war theory.

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## Notes

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1 See, e.g., McMahan, *Killing in War*. Other revisionist works include, *inter alia* and in chronological order, Rodin, *War and Self-Defense*; Fabre, *Cosmopolitan War*; Frowe, *Defensive Killing*; Draper, *War and Individual Rights*; Tadros, *To Do, to Die*.

2 See Walzer, *Just and Unjust Wars*, esp. 37, 44–6; Benbaji and Statman, *War by Agreement*. As Benbaji and Statman note, Walzer is not a full-blown contractarian (3). But there are clear whiffs of contractarianism throughout *Just and Unjust Wars*.

3 See Cicero, *On Duties*, 14–15. It should be noted that wars of national defence include both wars of self-defence and wars in defence of other states' territorial integrity and political independence.

4 Ripstein makes the point about UNSC authorization (196) in response to Oona Hathaway's challenge that he is insufficiently sensitive to key provisions of the international legal order, not least the Charter of the United Nations (109). The claim that national defence is a just cause for war is not as straightforward as many assume. For extensive discussions, see Fabre and Lazar, *Morality of Defensive War*; Renzo, "Political Self-Determination."

5 See 39–40 for Ripstein's argument about the defence of a legal order as a just cause for war. I am grateful to Ripstein for his

help with reconstructing his argument on this point and, more generally, for his comments on an earlier draft of this essay.

6 For Ripstein's views on punitive wars, see 91–2. For a powerful critique of such wars along lines similar to mine, see e.g., Luban, "War as Punishment." Ripstein need not deny that these are good reasons for rejecting punitive wars.

7 For the point in general terms, see 71. See also 80.

8 I defend redistributive wars, along those and other lines, in Fabre, *Cosmopolitan War*, ch. 3. See also Luban, "Just War and Human Rights." For discussion, see Tadros, "Resource Wars." The distinction between political independence and its worth echoes, *mutatis mutandis*, John Rawls' distinction between liberty and its worth. See Rawls, *Theory of Justice*, 179.

9 I develop a revisionist account of the ethics of military occupation along those lines in Fabre, *Cosmopolitan Peace*, 63–88.

10 See also 92, where Ripstein avers that "nobody can punish a combatant who fights without a just cause," and 82–94 and 206–211 for more textual evidence in support of my reconstruction.

11 See Haque, *Law and Morality at War*.

12 For a longer argument, see Fabre, *Cosmopolitan Peace*, ch. 7.

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