FEATURE

Reduced Legal Equality of Combatants in War

Philipp Gisbertz-Astolfi

It is World War II. The German Wehrmacht just invaded Poland. A German soldier, *G*, and Polish soldier, *P*, are facing each other in battle. Surely, *P* has a moral right to kill *G* in self-defense and in defense of others. But does *G* also have a moral right to kill *P*? If so, this would imply that *P* has forfeited his right to life by defending his country, his family, and himself, which is at odds with basic moral intuitions and principles. Moral philosophy has discussed cases like this extensively in the last decades: On one side, traditionalists such as Michael Walzer argue for the moral equality—that is, the same moral status—of combatants on both sides of conflict because of the special moral circumstances of war. Hence, on the traditionalist view, both *G* and *P* would have equal rights to kill each other. On the other side, so-called revisionists such as Jeff McMahan question this moral equality, arguing that moral principles from everyday life must also apply in war. Thus, revisionists argue that, other things being equal, only *P* has a right to kill *G* and not vice versa.

This article does not primarily intend to give another opinion in this regard. Rather, for my purposes here, I start by assuming that the revisionists are correct: killing in an unjustified war is not justified in itself. But I think that our discussions in *general* moral philosophy tend to ignore a very important point that relativizes this result; namely, the *specific* morality of law. General moral philosophy teaches us that a German can accuse her great-grandfather of killing Polish soldiers who were merely defending themselves. A Pole, on the other hand, has no reason to blame her great-grandfather who killed German invaders. The

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German great-grandfather might object to the accusations by arguing that he thought he was on the just side of the war or that he was coerced to fight. This might excuse him, but there is no way that he can convince us that he did the right thing and had a right to kill Polish soldiers. In this sense, I argue that revisionism is correct. However, there are very good moral reasons for not following these judgments in law.

To some degree, Jeff McMahan acknowledges this difference by distinguishing the (deep) morality of war (what I will call general moral philosophy or general morality) from the laws of war. He admits that there might be good practical, especially prudential, reasons to have laws of war that accept a mutual right to kill, but he claims that these reasons do not change the revisionist moral evaluation.[1] McMahan mentions this distinction between the morality of war and other normative considerations regarding the laws of war more or less en passant and does not characterize the latter as essentially moral but it is a crucial point: there is a third level between general morality and the law, namely the morality of law. The morality of law considers an important question: what do the morally best laws of war look like? This is a question of moral philosophy—of a moral philosophy that can and does consider the specific aspects and challenges of legal regulation.

What this article seeks to defend is not a *moral* equality but a (reduced) *legal* equality of combatants *on moral grounds*; that is, it makes a *moral argument for legal immunity from prosecution for lawful combatants*. The argument will proceed in five stages: (1) a short recapitulation of the general moral discussion in just war theory; (2) an argument in favor of what I call the moral philosophy of law—that is, a specific morality of law; (3) a conceptual clarification of the reduced legal equality (RLE) that I argue for; (4) an in-depth examination of the specific moral characteristics of law and their impact on moral judgments about combatant rights in war; and, finally, (5) an analysis of the actual legal rules demonstrating that the RLE indeed matches the regulations of international law.

This last stage draws to a certain degree on the legal analysis in Adil Haque's *Law and Morality at War*.[2] There, Haque also defends a version of RLE. Nevertheless, my argument departs from Haque's in a crucial manner: Haque offers only a single reason for RLE. Here, in contrast, I present five interlocking arguments for it, no one of which, I assume, would be sufficient on its own to justify my thesis. In addition, Haque's argument is, in my opinion, flawed or at least incomplete. I will address this in more detail in the section "The Morality of the Laws of War."

Against the Moral Equality of Combatants

Let us start by taking a brief look at the debate among just war theorists between two key positions: traditionalism and revisionism. These positions are represented by Walzer and McMahan, respectively. Although many other thinkers have contributed importantly to this debate, for my purposes, it is enough to provide a basic understanding of the debate on the basis of the work of these two theorists, which I will then argue possesses a certain lack of differentiation.

Traditionalists such as Walzer claim that in war combatants of all warring parties have the same moral status.[3] Moral status is defined as the totality of an individual's rights and duties; it is not to be confused with moral value. Individuals can have a higher or lower moral value with regard to their actions and virtuousness, but this does not necessarily affect their rights and duties.[4] Hence, the claim that someone has the same moral status as another does not merely say that neither of them is to blame for their actions but that they both possess the same rights and duties.

In the case of combatants in war, Walzer holds that all combatants are moral equals having a right to kill enemy combatants and a duty not to kill civilians or noncombatants.[5] Walzer's argument is that war is an exceptional situation in which the general moral norms of everyday life in peacetime do not readily apply. As he puts it: "War is hell."[6] There is little doubt that war results in horrific scenarios not found in peacetime, and, as such, in some sense feels exceptional. But, if extraordinary situations—for instance, the classic ticking time bomb scenario—were simply to be solved by referring to their exceptional circumstances, moral philosophy would fail in one of its main tasks; namely, the analysis of general moral principles that can be transferred into specific action-guiding norms for every situation. Instead, it would devolve into a crude form of moral particularism. Thus, if moral philosophers aspire to identify universal truths, they should not readily accept that there are exceptional cases that cannot be analyzed by general moral principles. Rather, we should identify the specific and exceptional situational properties and derive the adequate moral norms for such situations from our universal moral principles.

Note that there is nevertheless a crucial difference between general moral principles and action-guiding norms. General principles that define, for instance, how one acquires and loses one's rights or what is necessary to be responsible or liable to attack can lead to very different norms in different situations. For example, although the same general moral principles apply, the norms of attack and

self-defense are different: in the latter case, you are allowed to kill another human being (if some other restrictions like broad proportionality apply), while in the former you are prohibited from doing so. Hence, moral norms ("Do not kill other people," for instance) can have situational exceptions or application conditions, but general moral principles cannot. Moral norms are the results of general moral principles applied to specific situations. Therefore, Walzer must provide reasons within the general moral framework if he wants to argue for a normative exception. Simply stating the exceptional character of war being hell does not suffice.

According to Walzer, such a reason can be found in the fact that many combatants are coerced or tricked into war.[7] From this point, he concludes that combatants are not responsible for the unjust war and cannot be blamed for it.[8] Here, as McMahan correctly suggests, Walzer conflates too many general moral principles at once. Having a right, being responsible, and being blameworthy are different matters. To conclude that because someone is coerced, she is neither to blame nor responsible for her actions and, thus, has a right to kill other people, is severely mistaken. Coercion and error are excusing, not justifying, reasons.[9] And only justifications grant rights and impose duties. Excuses do not alter one's moral status, that is, one's moral rights and duties. They merely alter moral value or the blameworthiness of an action. Walzer does not distinguish between these concepts clearly enough.[10]

If it were only for this conflation, I suppose there would not be such a broad debate about combatant rights. The revisionist critique is philosophically correct. But something seems intuitively wrong with its conclusions. Was every Wehrmacht soldier and were all American soldiers in Vietnam and Iraq simply murderers who are at best excused? Should they be punished if they were not coerced or manipulated? Let us take the case of U.S. soldiers in the Iraq War (2003–2011). I think there was enough public debate about the war to say that there was almost nobody who did not have the ability to know that this war *might* not be justified—at least did not have the ability to a degree that grants full moral excuse. And hardly anyone was coerced to fight in this war, at least in a morally relevant sense. Still, most people seem to believe that although we can blame these soldiers, our laws of war should not criminalize their behavior so long as they conducted themselves according to the principles of *jus in bello*.

The discussions in the ethics of war often seem to suggest that we can only choose between Walzer's conflation of law and morality and justification and

excuse, on the one hand, and McMahan's focus on general morality, which tends to ignore, or at least to render less relevant, the specific questions that a morality of law must answer, on the other.[11] In the following, I will offer a third option between conflating law and morality and ignoring the specific morality of law.

The Morality of Law

Law raises specific issues that moral philosophy should address. Let me offer some short examples to make this general claim more intelligible: (1) *A* is a police officer who, in the process of arresting *B*, employs excessive force against *B*. However, this turns out to be a case of mistaken identity: *A* mistakenly thought that *B* was person *Z*, the person who *A* intended to target. In this case, does *B* have a right to self-defense and, hence, to resist *A*? Or does the specific legal status of a police officer modify the general moral evaluation? (2) *C* commits several small crimes that impact *D*'s moral and legal rights. *C* is a diplomat from another country. Should she be prosecuted? Or are there reasons, perhaps due to the specific character of international law and politics, for granting criminal immunity to *C*? (3) *E* attacks *F*. *E* is legally under the age at which a person can be held guilty, but she is extraordinarily mature. She fulfills all the requirements of moral responsibility. Should she be held legally responsible?

It is not necessary for my argument that all these cases be wholly convincing examples of the following thesis; they simply ought to give it an intuitive plausibility. The thesis is that moral norms apply ceteris paribus, other things being equal, but law changes these "other things." It is an oft-neglected part of the specific moral philosophy of law to identify these changes and ask how they affect the normative application of our general moral principles.[12] The question "How should we regulate this case legally?" should not be reduced to a mere ceteris paribus application of general moral norms.

It is reasonable to assume that the best (or the best attainable) law does not simply restate general moral norms, but specifies their conditions and premises with regard to the specific character and functions of law. To be very clear: this does not mean that they are separate realms of morality. Law is simply an accumulation of specific conditions that change the outcomes of our moral reflections based on the same general moral principles. There can be morally better and worse laws, and it is a matter of moral philosophy to determine the appropriate guidelines for this evaluation. Because of the specific character of law as instituted, this morality of

law can alter the results of general morality by specifying its conditions.[13] This idea that law is more than a restatement of general moral judgments about moral rights and duties might be arguable for an ideal theory, but in the nonideal setting in which law operates, it cannot reasonably be argued against. Note that with the distinction between ideal and nonideal theory, I refer to the difference between utopian and realistic approaches.[14] A moral philosophy of law must analyze the specific features of legal regulation; for example, the functions that law fulfills, to answer the question of what the best legal regulation of a set of cases looks like.[15]

Reduced Legal Equality

If we accept the idea that there is a specific morality of law, then we must determine what the morally best legal regulation of conduct in war looks like. I argue that law should grant legal immunity to combatants who comply with the *in bello* rules of international humanitarian law (IHL). Let us call this the reduced legal equality of combatants.

Before developing the argument for this thesis, let me clarify what exactly is meant by combatants' RLE. In this phrase, the term "equality" refers to Michael Walzer's concept of the moral equality of soldiers. Similar to Walzer's notion, combatants' RLE involves an equality with regard to their rights and duties in war, especially the right to kill other combatants. It affirms some kind of equality in this regard between combatants of different warring parties, regardless of the justness of their side of the war. Unlike in Walzer, however, my use of the term equality does not refer to moral status. As argued above, the idea of the equal moral status of all combatants is not convincing and is rebutted by revisionism. My use of the term instead refers to a *legal* equality, not in the merely positivistic sense that our actual laws establish such equality, but in a specific moral sense: As explained above, there are moral reasons to have laws that differ from general morality and, as we will see, there are good moral reasons why international law does and should differ from the general moral evaluation of combatants' profound inequality. It is in this sense that RLE is legal: it is a moral demand for a (reduced) equality of legal rather than moral status.

Finally, this legal equality does not constitute comprehensive equal rights and duties; that is, completely equal status. In particular, it does not postulate an equal right to kill enemy combatants. It merely claims that in one specific *reduced* respect, combatants should indeed have an equal right; this is the right to immunity from

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prosecution for their conduct according to the *jus in bello* rules. This is not a right to kill; it does not say that killing in an unjust war is justified. It simply states that there are sound and even decisive moral reasons for international law of armed conflict to grant legal immunity for such conduct. But still, to return to my introductory example, the Polish soldier, *P*, is legally justified in killing in war while the German Wehrmacht soldier, *G*, is not; instead, *G* is merely not punished because of the immunity from prosecution. They are still not equals with regard to their legal rights.

RLE is not to be confused with stronger claims such as Henry Shue's argument against revisionism. My position aligns with Shue's in that I suggest that due to our nonideal international legal order, a kind of equality is the best legal regulation.[16] But he goes further by differentiating two levels of justification—the resort to and conduct in war—and arguing that unjust combatants are justified with regard to their conduct in, but not their resort to, war. They are partially justified because IHL is the best set of rules for the situation at hand, and, thus, it is morally right to follow them.[17]

I agree with Shue's conclusion that a law can be the morally best one despite allowing, or at least not preventing, morally unjustified individual actions. But the partial justification of combatants seems questionable to me. A moral obligation to follow the law can only apply where the law commands or prohibits specific actions. Where the law only *permits* an action, there is no reason to think that one might be morally obligated to execute this action. Therefore, even if we (wrongly) presume that the legal immunity I argue for is a kind of permission (like the legal right to kill), there is no way that this leads to a change in moral duties and rights. To clarify this, consider the following: I am legally allowed to lie to my wife, or even cheat on her, but it would be absurd to think that this releases me—even partially—from my moral duty not to do so. Hence, RLE does not entail a claim about individual moral justification of combatants, not even partially. It only concerns the morality of legal regulation.

The Morality of the Laws of War

Let me offer five arguments in favor of such legal equality.

First, it is a specific feature of law that it operates in general norms spanning different cases. Law generalizes cases differently than does morality, which can account for all individual specifics. The relation between the justice of a general norm and equity as a counterweight regarding each individual case has been

recognized since Aristotle.[18] Even general norms that are just bring about some injustice in particular cases. Likewise in war, many unjust combatants will be excused—or at least many of them will not be considered fully blameworthy—due to coercion, misinformation, emergency,[19] conflict of duties, norm collision, or faith in one's own state.[20] A legal rule granting a general assumption of excuse—although definitely not correct in all cases—could be a reasonable and just norm. Institutions cannot investigate every soldier's case, especially when many of them will be excused. Thus, law can accept that it does not treat every case justly. Although this conclusion cannot lead to an equal right to kill, it demonstrates that a general immunity or waiver of prosecution can be a reasonable answer to excuses in the most common cases. Compare this with our regulation of criminal responsibility mentioned above:

> *Criminal responsibility*: *E* attacks *F*. *E* is under the legal age at which she can be held criminally responsible, but she is extraordinarily mature. She fulfills all the requirements of moral responsibility.

Usually, underage children are morally excused. Additionally, we have good moral reasons to regulate the age of criminal responsibility through a general law that does not grant exceptions in order to grant legal certainty and predictability of legal decisions. Hence, there are moral reasons not to hold *E* legally responsible for her actions although it is conceivable that she is morally responsible.

It is not unusual for the law to grant people impunity for rights violations for which they are morally responsible and, hence, morally liable to punishment.[21] This is not so much an argument in favor of such regulation for unjust combatants, but it clearly demonstrates that the law can and should sometimes exempt perpetrators from punishment even though they engaged in criminal actions. Paradigmatic cases are those where many perpetrators will be excused.

Second, laws must be simple enough to be followed. Law has a guidance function; that is, it is supposed to give reasons to act accordingly.[22] Thus, law needs more or less simple and comprehensible rules to fulfill its guidance function.[23] This is especially true for penal law and complex and existential situations, such as war, where complicated regulations are hard to comply with. General morality is not that simple. Morality is essentially autonomous and, hence, it can be as complex as our thoughts and (moral) reasoning allow it to be. Law, on the other hand, is a heteronomous act. It must be simple and clear enough to be able to be communicated. Therefore, law cannot and should not simply

restate general morality because it would destroy the law's guidance function and undermine itself by becoming too complex.[24] Once a combatant is in a war, the simple and more or less obvious moral duty is not to do more harm than is absolutely necessary, which includes sparing at least those people who do not stand in the combatant's way. The moral duty not to kill enemy soldiers, on the other hand, requires a rather complex evaluation of the justness of a war that is often not easy to carry out.

Therefore, law's guidance function is best served if it gives clear reasons to act and, thus, does not demand that combatants evaluate the justness of the war.[25] IHL should be restricted to the *jus in bello*; hence, to not punishing unjust combatants for killing enemy combatants. One challenge to this conclusion would be if there were an international court that could make an impartial ruling on the justness of a war very early on.[26] Then, the legal rules would be clear enough to understand and follow.[27] But our real world is far from such a court becoming possible.[28] It is worth advocating for, but, as long as we do not have such an institution, the restriction of IHL to conduct in war is the morally second-best option.

Adil Haque offers a similar point, which he calls, with reference to Joseph Raz, the "service view of law."[29] On this account, law helps people to comply with their moral duties where they might not be able to do this themselves. Because in war our moral judgments can easily be wrong, we should provide a law that substitutes individual moral judgments. However, Haque's argument seems flawed to me in two respects. First, following Raz's legal theory, Haque reduces law to its service function. This obstructs his view of the other four arguments I present in favor of RLE in this article. These arguments are not merely about the service function, but about other specifics of law as well. And, second, it leads to an argumentative fallacy. According to the service view, law is legitimate if it helps actors to better align their behavior with objective moral reasons than if they were judging for themselves. On this basis, Haque concludes that "it is enough to show that killings in pursuit of an unjust cause are morally worse if they also violate the law than if they at least conform to the law."[30] But that is not enough for a moral philosophy of law. A large set of potential legal norms can be legitimate in this sense. What is not derived from this, however, is which legal regulation best helps us to comply with our moral obligations. The inference "*A* is worse than *B*, hence we should adopt *B*" is not valid because there might be an option *C* that is even better than *B*.

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Haque does not offer a conclusive argument in this regard. He provides reasons in support of the claim that killing just combatants is not as bad as killing civilians.[31] He also concludes that RLE can help combatants fulfill their most important obligation; that is, sparing civilians.[32] But even if this hierarchy of obligations is correct, Haque has only proven that RLE provides some service; namely, helping to fulfill the obligation not to kill civilians. In no way, however, has he shown that a different legal regime, for instance, one that completely bans all unjust killing, cannot provide an even better service. Such a conclusion needs more argumentation. In the end, Haque only proves that RLE is better than no regulation at all.[33] This is appropriate for a Razian analysis of legitimate legal authority, but *morally justifying* RLE requires more; namely, addressing the four other arguments presented in this article and the fact that the morally best option—that is, having an international court to predetermine just actions in war as described above—is not a realistic near-future scenario. The service view simply does not deal with the issue of the morally best law. It is a theory of legitimate legal authority.

Further, my guidance function argument gets by without claiming that the moral reasons not to kill just combatants are weaker than those not to kill civilians. All that is needed is the epistemic demand that when evaluating who is a just combatant, one must at the same time answer the complex question concerning the justness of a war. This is enough to prove that because the guidance function is best served if it gives clear reasons to act, especially in penal law, the complex evaluation of the justness of a war should not be legally required of combatants under threat of punishment.

Third, in a nonideal world, one must account for the fact that perfect justice is not attainable. Given this premise, law should provide the second-best outcome**.** Although this must not lead to a simple consequentialist weighing of suffering, it seems legitimate for the law to protect as many claims as possible. This is most apparent in the laws of war. As McMahan argues, a war without legal immunity for actions considered necessary for the military to take would become much bloodier, and more rights would be violated.[34] Combatants would fear victor's justice—that is, sanctions by the victorious side—and, therefore, continue to fight and use all means whatsoever to win the war, potentially to the bitter end. It seems reasonable to give incentives to end a lost war without further harm and to act in war in a way that grants at least noncombatants a realistic weight in comparison to military victory.

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Haque calls this the humanitarian view and criticizes it for its consequentialist nature.[35] But as far as I can tell, McMahan's argument is not consequentialist. If it is true that a war without legal immunity for unjust combatants would become bloodier, it follows that more rights of innocent people would be violated. It is completely acceptable from a deontological standpoint that law strives to reduce such rights violations—albeit, as we will see in a moment, not by permitting wrongful acts.

Of course, one might object that the premise that the fear of victor's justice would make war bloodier is to some degree speculative. It is not possible to have empirical data regarding the effects of different legal regulations of war.[36] But, as Victor Tadros argues, even if the above scenario is true, it seems questionable to permit wrongful acts just because their prohibition would provide bad incentives.[37] I think this critique is correct. We should not (or only as a last resort) legally allow wrongful actions merely to reduce the incentives to commit even worse crimes. Yet, Tadros's objection (just as Haque's critique) does not apply to RLE. Granting legal permission and simply not criminally prosecuting wrongdoings are very different issues. Permission to some degree implies approval. Immunity, however, neither implies permission nor indicates approval. Rather, it removes the fear of victor's justice and the incentive to continue a lost war—and it is acceptable from a deontological point of view.

Fourth, the law can even make prima facie unjust judgments if doing so is necessary to uphold legal certainty, peace, and concord. Consider the statute of limitations. Most modern legal systems entail limitation periods for many civil as well as criminal proceedings. This is not because material justness is presupposed after a certain amount of time; instead, we accept that the law has more functions than only providing material justice in the sense of protecting and enforcing moral rights. In this case, the law has the function of upholding legal certainty. Hence, a good law does not focus on justice only in a very narrow sense but rather accepts a shortfall of material justice if this serves the institutional functions of the law and procedural justice.

In our case, it would make the establishment of peace almost impossible if the victorious party prosecuted enemy soldiers who did nothing but fight for their state. This would be such an immense injustice from the point of view of the defeated that a real and lasting peace would no longer be an option for them. This is similar to reasons why we consider peace treaties binding although they are usually made under duress, which otherwise would render an agreement

void or give the defeated party the right to annul the treaty.[38] And, also, our idea of diplomatic immunity—problematic as it may sometimes be—arises from considerations about the stability of international peace. Law and peace are closely interconnected,[39] and upholding the rule of law and peace sometimes outweighs material principles of justice.

To be clear: neither the statute of limitations nor diplomatic immunity grants rights or reduces duties not to violate someone else's rights. A diplomat acts wrongly if she commits a crime, and a broken contract remains broken although not enforced by legal action for a long time. But the respective violated rights are not or are no longer legally enforceable. As we will see, the so-called right to kill is nothing more than such unenforceability; namely, immunity from legal prosecution.

Finally, the specifics of international law, though not law in general, add a further significant argument for the restriction of legal prosecution of unjust combatants. States (or state representatives) have two good reasons to agree upon an international law that implies RLE. First, such an international legal regulation fosters the loyalty of soldiers. Second, it is a state's duty to protect the rights of its citizens, including its soldiers' rights against partial victor's justice when a just war is lost. Hence, as long as there remains no impartial adjudication regarding the justness of a war, there should not be any criminal prosecution of lawful combatants.

Let me elaborate on the first of these arguments—that states should encourage loyalty by agreeing upon RLE—by offering an analogy. Although misled loyalty does not justify an action that was based on it, it might well lead to conflicting reasons and values in assessing the norms constituting the institution. Consider *Friendship*.

> *Friendship*: A and B are close friends. A gets in a fight with *C*. It is not possible for *B* to clearly determine who is right and who is wrong. *B* can either do nothing, help *A*, or help *C*. There is no way to end this fight without taking someone's side.

The institutional norms of friendship give *B* an agent-relative reason to take *A*'s side. An agent-relative reason is a reason that applies to this agent alone but not to others.[40] Those who are not in a special relationship with *A*, for instance those who are not friends with *A*, do not have a reason to take *A*'s side. Being *A*'s friend seems to make it appropriate for *B* to take *A*'s side—although with several restrictions because of *B*'s uncertainty.[41] We might even consider it virtuous in such a situation to be loyal to a friend. A combatant fighting loyally for her own

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state does not act entirely differently. Thus, we might have reasons to have institutional rules that foster loyalty.

One objection to this is drawn from reductive individualism and cosmopolitanism: the fact that *A* and *B* consider it valuable that they help each other obviously does not create the right to act against *C*. Founding a state does not alter the rights of and duties to people outside the state, and, hence, does not justify moral partiality.[42] But what if everyone had agent-relative reasons to consent to institutions that create obligations of loyalty? Consider a slightly altered case:

> *Friendship 2*: *A* and *B*, as well as *C* and *D*, are close friends. *A* gets into a fight with *C*. It is not possible for *B* or *D* to clearly determine who is right and who is wrong.

In this case, both *A* and *C* have an interest in their friends being loyal to them. Now, if we imagine the four of them meeting beforehand and discussing the norms that should guide their actions, they might consensually accept that the relative obligation of friendship has some impact on their external relationships.

Yitzhak Benbaji similarly argues that soldiers would consent to a war convention that implies an equal right to kill.[43] However, I cannot see how people would reasonably agree that the friends in my example consent to lose their right not to be attacked if they are on the justified side of the conflict. After all, *B* and *D* are only entitled to help their friends because they do not know which side is justified, and this gives them a reason to trust their friends. Hence, they presume that their friends are on the justified side—and they all acknowledge the rule that this presumption is acceptable. But, at the same time, they must presume that the other side is unjust. A and C do not consent to lose their right not to be attacked. They merely consent that loyalty can (under very specific circumstances) be an excuse for violating someone's rights. Therefore, loyalty in Friendship 2 is not a justification, but it might be an excuse and indeed a desirable motive in a situation of uncertainty. We all want our friends to be loyal, and we all can and should accept moral norms and values that account for this.

If we imagine state representatives coming together to discuss the best legal norms that should guide international relations in our nonideal world, the situation is analogous: All states have a strong interest in their soldiers being loyal to them.[44] It might be reasonable for them to accept a universal international legal rule that protects all soldiers as long as they engage in a more-or-less civilized war (as far as something like this exists).[45] In such a precontractual situation, states are in a kind of prisoner's dilemma, which is why it is very hard to create

an ideal international or global world order. If there were enough trust, it would be rational to choose as much cooperation as possible to build a lasting peace. But because states do not know how other states will act, it is rational to choose a nonideal outcome and make sure that their soldiers will be loyal because this is the Nash equilibrium of this situation.

Victor Tadros objects to arguments like this, maintaining that such a rule would not best serve the interests of the states because they want to prevent unjust wars: If unjustified fighting were punishable, unjust combatants would be more likely to restrain from force than just combatants because unjust combatants are more likely not to think that their side is justified.[46] I am not convinced that this is true. First, the main question for soldiers would not be whether their side is just but whether their side is likely to win the war to avoid victor's justice. I will come back to this argument shortly. Second, each state wants its soldiers to be loyal, and, facing a nonideal world, each state most certainly does not want to rely on its soldiers being convinced by its causes for war. The dominant and rational strategy in a prisoner's dilemma is, after all, still noncooperative if one cannot expect the others to cooperate: it is not the ideal outcome but the rational choice when cooperation cannot be expected. Thus, it is not at all clear that rational state representatives would not accept such a rule. In fact, they have a kind of universal agent-relative reason to facilitate and ensure loyalty, and I think, therefore, that they should accept such a rule—and consensually establish an obligation to loyalty in some legal manner, although not as a justification for unjust combatants but as an excuse or as a bar to criminal prosecution.

As I mentioned, there is a second closely related reason why the specifics of international law and politics weigh in favor of the legal equality of combatants: Every state must protect its citizens from unjust harm. That is why the impartiality of judges is a crucial part of the rule of law within states. Without impartial judges, rights would not be secure. However, in our nonideal world, there is no impartial judge for most cases at the international level. So, let us imagine what would happen in this world without the protection of combatants.

> *Victor's justice*: State *X* and state *Y* wage war against each other. *X* wins the war. Soldier *A* was a soldier of state *Y*. After the war, she is prosecuted by the victorious state, *X*. Judge *B* must decide whether *A* killed unjustly; that is, without a just cause for war.

In this case, *B* cannot decide impartially.[47] She must either convict *A* or pass a judgment that says that *Y*'s war was just. The latter would imply that *X*'s war against *Y* was unjust. *B*'s judgment is obviously not impartial in this regard. A

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representative of *Y* must argue that *X* (and its representatives) should not be allowed to judge the justness of its own war. There is no way to have an impartial judge who determines the justness of a war short of turning to (not-yet-existing) international courts, which must be much stronger and take away much more sovereignty than the existing institutions. Without such an institution, criminally prosecuting lawful combatants would be a severe breach of the rule of law and the impartiality of judges.

In our nonideal world, such a court is a rather ambitious and utopian idea. It is indeed the best realistic scenario that states agree not to legally judge the justness of a war with regard to normal combatants who comply with the basic rules of decent conduct in war.[48] A state that acted differently would not sufficiently protect its citizens because its protection would depend on winning a war. States cannot appoint impartial judges with regard to their war. Hence, if they insist on the right to punish enemy soldiers, they deny their own citizens the secure protection of the rule of law —and that would cause a state to suffer from a severe lack of legitimacy.

Now, all this would be true for economic sanctions and other measures, but it is especially true in war because war expresses the highest distrust and denial of the other state's sovereignty. States that fight in a war are no longer in any decent relationship with one another. They cannot trust each other. The severity of legal prosecution is much harder in war cases, too. War is therefore different from cases of economic sanctions or spying and a valid, although surely to some degree contingent, special case. Contingency and gradual differences matter, especially in nonideal scenarios. Only naïve ideal world theories cannot account for the importance of degree. Structural similarities should not conceal crucial differences in degree.

Taken together, these arguments give nonideal reasons to have a law that grants some kind of RLE to combatants and fighters; reduced in the sense that this law only prohibits the legal prosecution of combatants and fighters as long as they fight according to some relatively simple, clear, and actionable rules of conduct in war. Differentiation according to the justness of the cause of the belligerent party for which combatants fight should not be included in this set of norms because of the discussed nature of international law.

Reduced Legal Equality and the Law

As we have seen, RLE is the morally best legal regulation for conduct in war. Moreover, as I want to show in this last section, it is the logic underpinning

modern international law. However, this logic has been forgotten or only been tacitly assumed by scholars of international law without being explicitly elaborated and defended. Hence, this article is not inventing RLE. It merely gives structure and moral argumentation to an important principle that needs to be brought back to mind. It offers a reconstructive moral argument for the existing regulation in IHL from a revisionist standpoint.

It is crucial for the discourse in moral philosophy to recognize that international law has never granted an equal right to kill, but only immunity from criminal prosecution. If this is the case, then the debate about moral equality has missed a central point and needs to be revised. Moreover, without leaning too much on an argument from authority, it gives some credibility (although surely no proof) to the moral claim for RLE that it has indeed been an underlying principle of international law ever since.

I cannot provide a full historical defense of this claim here, but I think it will become sufficiently clear by considering both the most important historical theory and the current law of armed conflict. Thus, I will first analyze the most prominent theory of early international law, that developed by Hugo Grotius, and afterward, show that RLE is also a reasonable (and, in my opinion, the best) interpretation of contemporary IHL. For this last purpose, I will draw on Haque's excellent analysis in *Law and Morality at War*.

Hugo Grotius, the father of modern international law, explicitly argued for RLE. While today he is held to be a proponent of traditionalism and the moral equality of combatants,[49] this is due to a prevalent misinterpretation of the framework informing his work. Thus, it seems expedient to give a brief explanation of this framework to make the following analysis more comprehensible.

Grotius's book *De jure belli ac pacis* (On the Rights of War and Peace) spans a number of different, although interconnected, areas, including moral and juridical thinking. These areas are strictly distinguished by Grotius. In the first chapter of *De jure belli ac pacis*, he makes this explicit by distinguishing natural law from positive or instituted law.[50] Natural law is the "Dictate of Right Reason, indicating that any act, from its agreement or disagreement with the rational nature [of man], has in it a moral turpitude or a moral necessity."[51] This natural law is more moral than legal in nature. It entails moral rights and duties and, hence, it is Grotius's theory of justice.

Unlike natural law, positive law is indeed law in a fully legal sense. Human positive law—as opposed to divine positive law such as the Ten Commandments—is

subdivided into civil law and the law of nations, the latter of which concerns us here. The law of nations is defined as "that law which has received obligatory force from the will of all nations, or of many."[52] Therefore, it has no necessary and inherent moral quality, although Grotius provides sound reasons for the regulations of the law of nations. Grotius also emphasizes this distinction in his preliminary remarks to *De jure belli ac pacis*:

> For what cannot be deduced from certain principles by solid reasoning, and yet is seen and observed everywhere, must have its origin from the will and consent of all. I have, therefore, taken pains to distinguish Natural Law from the Law of Nations, as well as both from the Civil Law.[53]

Within this framework, the assessment of the rights and duties of combatants differs significantly. According to natural law, only combatants with a just cause have the right to defend their lives or pursue their just goals. An unjust combatant has no right in war.[54] Thus, Grotius advocates the moral inequality of combatants. However, in the law of nations Grotius accepts some kind of equality between combatants. His own words are fairly explicit on the matter and worth quoting. The following is a passage where Grotius comments on Virgil's statement that after the declaration of war, it is *lawful* to destroy an enemy soldier. Grotius thinks it necessary and appropriate to interpret Virgil in a specific way to make sense of this assertion:

> A war declared between two nations . . . has certain peculiar and appropriate effects, which do not follow from the nature of war itself. . . . But Virgil said *licebit*, it will be lawful; let us see what that implies. For sometimes that is said to be lawful which is every way right and pious. . . . In other cases a thing is said to be lawful, not which is agreeable to piety and duty, but which is not liable to punishment. . . . This use of the word *licere*, to be lawful, is less proper. . . . In this latter sense, it is lawful to harm an enemy, both in person and in property; and this, not only for him who is making a just war and who harms the enemy in the way which is allowed by Natural Law, as we have explained; but on both sides, and without distinction: so that he cannot for this reason be punished.[55]

It is clear from this passage that Grotius only accepts combatants' twofold reduced equality, reduced namely both to the law of nations instead of natural law and to an understanding of lawful that only means "not liable to punishment." This is exactly the definition of RLE.

Grotius even offers a reason why the law of nations should embody RLE: There is no impartial judge for these cases. A judge from one of the warring parties is not impartial, and any other judge (for Grotius this means another nation that could mediate the conflict) would not be willing to get in the middle of the conflict.[56] Hence, there is no possible impartial legal solution to the question of which party's cause was just: the law of nations cannot and should not grant the victor the legal right to decide in this manner. As seen above, similar reasons still apply today: without an impartial global court of justice with the competence to adjudicate these matters, it is neither imaginable nor desirable that states agree on any other solution than RLE.

Grotius was convinced that RLE was not an invention of his time but a component of the law of nations since Roman times. He cites many Roman authors to prove this point. And he emphasized that "when these writers speak of the right of war, they do not mean a right free from all blame but such an impunity as I have mentioned."[57] It should be obvious from these quotations that the idea that Grotius was an advocate of the moral equality of combatants is based on a misreading of his theory. Grotius argued for RLE, and he was convinced that this is the consensus of the great thinkers before him and of his time.[58]

I will not historically analyze this latter claim here. Instead, to prove that RLE has been the underlying evaluation and principle of the international law of armed conflict, I want to illustrate that RLE is also a very good interpretation of international law today. The key norm of the international law of armed conflict for our purposes is Article 43, section 2, of the First Additional Protocol to the Geneva Conventions: "Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities."[59]

This is the crucial wording that leads to the doubtful assumption that IHL grants unjust combatants a proper right to kill.[60] But in what sense does IHL conceptualize this right? According to the Hohfeldian analysis of rights,[61] this right can be either a liberty right or a claim right. We speak of a liberty right or privilege if one does not have a duty to act differently:

A has a privilege to φ if and only if *A* has no duty not to φ.

By contrast, we only speak of a claim right in cases where we have duties to each other:

A has a claim to *B*'s φ-ing if and only if *B* has a duty to *A* to φ.

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Hence, a claim right imposes duties of noninterference. The right to participate in hostilities and to kill other combatants within the boundaries of IHL cannot be such a claim right because no one has a duty of noninterference.[62] Combatant *B* cannot claim that enemy combatant *A* must not interfere with *B* killing *A*. If the right to kill is a right in this Hohfeldian sense, then surely it is a privilege; that is, combatants have no duty not to kill enemy combatants. That is why we often speak of the "combatant's privilege."

But do combatants have the privilege to kill? This would imply that noncombatants have a duty not to kill. So, imagine the following case: State *X* unjustly attacks state *Y*. *A* is a civilian of state *Y*, directly participating in the hostilities. Does *A* infringe upon her duty? IHL does not say so, and there is no reason to think it implies such a regulation. She may have infringed upon and violated a domestic duty, but there is no prohibition against fighting for civilians in IHL. Therefore, it would be pointless to grant a liberty right to combatants that is not actually a privilege because everyone has that liberty. The right to directly participate in hostilities can be neither a liberty right nor a privilege.[63]

Hohfeld distinguishes two further kinds of rights; namely, powers and immunities. Obviously, the right in question is not a power (in other words, the competence to alter rights). It is in some sense an immunity. Immunity in the Hohfeldian sense means that someone else cannot alter your claim and liberty rights:

> *B* has an immunity if and only if *A* lacks the ability to alter *B*'s rights.

In our case, the "right to kill" means that the enemy state (and every other state except the combatant's own state) is not allowed to prosecute a combatant for her lawful actions according to IHL. In this limited sense, the state is not allowed to alter her first-order rights. However, these first-order rights are not Hohfeldian rights regarding killing in war. Immunity from criminal prosecution is, after all, not a right to act criminally, but only a claim against the state not to punish. Thus, combatants do not have the right to kill.

However, there is one obvious counterargument to this interpretation; namely, the fact that neither in academic scholarship nor in legal praxis is there widespread doubt about the right to directly participate in hostilities and the privilege to kill. This seems to be a problem for our interpretation, but it can be solved. This problem stems from a combination of misleading wording, which can be traced back to the discussions of Virgil seen in Grotius, and the practical irrelevance of this

difference. IHL does not need to distinguish precisely between a right proper and an immunity, and so it does not.[64] But philosophical discourse about the moral justification of IHL should.

From the moral perspective, it is crucial to understand that there is no legal equality with regard to rights in war, but only a reduced equality of immunity from criminal prosecution. Hence, there is neither any need for traditionalist defenses of moral equality nor any need to criticize and alter the existing law in this regard as long as we can understand the valid moral reasons for RLE. This does not, however, rule out the finding that an ideal global system might differ from the real world in that there would at least be a neutral court or other global institutions that would decide upon the *jus ad bellum*. However, as long as we live in our nonideal world, which is also comprised of sovereign states, we should recognize that RLE is indeed the morally best law available.

The fact that most legal writings speak of the privilege to kill nevertheless points to a very important critique of IHL: law has an accountability and a symbolic function, and, hence, law fails in one of its purposes if it does not properly express public condemnation of serious wrongdoings and if it does not respect victims' rights by acknowledging their violation.[65] Therefore, although RLE is the best realistic legal regulation at the moment, it should be made clearer in IHL that it does not entail a permission to kill and that unjust combatants still violate the rights of their victims. Grotius had to make quite some effort to interpret Virgil's statement as a defense of RLE instead of as a right to kill. However, four hundred years later, RLE should not remain a matter of interpretation. IHL should be much clearer in order to fulfill its symbolic function and maybe even develop a practice of accountability other than criminal punishment.

Conclusion

Although revisionists are correct to criticize traditionalism and especially the idea of the moral equality of combatants, they do not comprehensively discuss the problem at hand when focusing on the general morality of war. Equality between combatants is to some degree morally demanded, not by general morality but by the moral specifics of law. The specific character of (international) law changes the morally significant features of the situation.

These features are, in particular, the fact that law operates according to general norms that aggregate cases and situations in a different way than does general

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morality; the necessity of simple and practicable norms with regard to the guidance function of the law; the need for the law to provide the second-best, or at least an acceptable, outcome if an ideal state of affairs cannot be reached; the law's function to guarantee certainty and peace; the lack of impartial judges in the international arena; and finally, the desire of all states to promote the value soldiers place on loyalty. However, these morally specific features of law do not lead to the moral equality of combatants. Rather, they argue in favor of combatants' reduced legal equality. This equality is a moral demand that the law should grant combatants equal legal rights in one, and only one, regard, regardless of the justness of their side of the war; namely, the immunity from foreign prosecution for conduct lawful under the *jus in bello* rules of IHL. RLE has been the correct interpretation of international law throughout history, and it is still the best interpretation of IHL today.

NOTES

[1] Jeff McMahan, *Killing in War* (New York: Oxford University Press, 2009), pp. 104–10.
[2] Adil Ahmad Haque, *Law and Morality at War* (Oxford: Oxford University Press, 2017).
[3] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 5th ed. (New York: Basic Books, 2015), pp. 34–37.
[4] See John Rawls, *A Theory of Justice*, rev. ed. (1971; Cambridge, Mass.: Harvard University Press, 1999), sec. 80.
[5] Walzer, *Just and Unjust Wars*, pp. 135–36.
[6] Ibid., p. 22.
[7] Ibid., p. 35.
[8] Ibid., p. 36.
[9] McMahan, *Killing in War*, pp. 110–15; and Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114, no. 4 (July 2004), pp. 693–733.
[10] This is particularly evident in *Just and Unjust Wars* (p. 142), where Walzer argues for the right to life with regard to a person's value.
[11] Additionally, McMahan argues for the divergence of law and morality, whereas I argue for a morality of law that differs from general moral norms but is part of the same morality and deduced from the same moral principles. See Jeff McMahan, "Laws of War," in Samantha Besson and John Tasioulas, eds., *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 493–510, at p. 505.
[12] For a similar approach, although with a stricter separation of moral rights and the moral justification of law, see Allen Buchanan, *The Heart of Human Rights* (Oxford: Oxford University Press, 2013).
[13] This idea, although not often discussed in just war theory, is nothing innovative or new. It can be found in the writings of Locke, Kant, Mill, Rawls, and many other thinkers; for instance, in Mill's harm principle for politics and law in contrast to his utilitarian general moral philosophy (see John Stuart Mill, "On Liberty," in John Stuart Mill, *The Collected Works of John Stuart Mill*, ed. John M. Robson, vol. 18, *Essays on Politics and Society*, part 1 [Toronto: University of Toronto Press, 1977], p. 223); or in Kant's restriction of law to external actions in contrast to his focus on the good will in ethics (see Immanuel Kant, "Metaphysics of Morals," in Immanuel Kant, *Practical Philosophy*, trans. Mary J. Gregor [Cambridge, U.K.: Cambridge University Press, 1996], 6:231).
[14] For an analysis of the different uses of these terms, see Laura Valentini, "Ideal vs. Non-ideal Theory: A Conceptual Map," *Philosophy Compass* 7, no. 9 (September 2012), pp. 654–64.
[15] Note that with regard to torture, McMahan uses a similar approach and quite similar arguments; see Jeff McMahan, "Torture in Principle and in Practice," *Public Affairs Quarterly* 22, no. 2 (April 2008), pp. 111–28, at pp. 124–25.
[16] Shue does not have RLE in mind but rather full legal equality; that is, a mutual legal right to kill.

[17] Henry Shue, "Laws of War, Morality, and International Politics: Compliance, Stringency, and Limits," *Leiden Journal of International Law* 26, no. 2 (June 2013), pp. 271–92, at pp. 283–84.
[18] Aristotle, *Nicomachean Ethics*, trans. and ed. Roger Crisp (Cambridge, U.K.: Cambridge University Press, 2000), book 5, ch. 14.
[19] Shue, "Laws of War, Morality, and International Politics," p. 273.
[20] See Jeff McMahan, "The Morality of War and the Law of War," in David Rodin and Henry Shue, eds. *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford: Oxford University Press, 2008), pp. 19–43, at pp. 27–28.
[21] See Haque, *Law and Morality at War*, pp. 27–28.
[22] Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979), p. 30.
[23] Of course, the details of many legal regulations are highly complex and not at all simple. However, the guidance function requires law to be sufficiently clear so that nonlawyers can understand the legally given reasons to act.
[24] See Jeremy Waldron, "Deep Morality and the Law of War," in Seth Lazar and Helen Frowe, eds., *The Oxford Handbook of Ethics of War* (Oxford: Oxford University Press, 2018), pp. 80–98, at pp. 86–87.
[25] See Shue, "Laws of War, Morality, and International Politics," p. 275.
[26] Jeff McMahan, "The Prevention of Unjust Wars," in Yitzhak Benbaji and Naomi Sussmann, eds., *Reading Walzer* (Abingdon, U.K.: Routledge, 2014), pp. 233–55, at pp. 241–43; and McMahan, "Laws of War," pp. 508–9.
[27] For a skeptical response to this solution, see Janina Dill and Henry Shue, "Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption," *Ethics & International Affairs* 26, no. 3 (Fall 2012), pp. 311–33, at p. 318.
[28] Yithzak Benbaji, "Against a Cosmopolitan Institutionalization of Just War," in Benbaji and Sussmann, *Reading Walzer*, pp. 256–76, at pp. 263–64.
[29] Haque, *Law and Morality at War*, pp. 43–44.
[30] Ibid., p. 49.
[31] Ibid., pp. 49, 56–83. See also Seth Lazar, *Sparing Civilians* (Oxford: Oxford University Press, 2016).
[32] Haque, *Law and Morality at War*, p. 49.
[33] This seems particularly clear to me in Haque, *Law and Morality at War*, pp. 48–49.
[34] McMahan, "The Morality of War and the Law of War," p. 30. See also Shue, "Laws of War, Morality, and International Politics," p. 273.
[35] Haque, *Law and Morality at War*, pp. 38–43.
[36] However, there is at least some empirical evidence from public opinion. See Scott Sagan and Benjamin A. Valentino, "Just War and Unjust Soldiers: American Public Opinion on the Moral Equality of Combatants," *Ethics & International Affairs* 33, no. 4 (Winter 2019), pp. 411–44.
[37] Victor Tadros, *To Do, to Die, to Reason Why: Individual Ethics in War* (Oxford: Oxford University Press, 2020), pp. 288–89.
[38] See Daniel Schwartz, "The Justice of Peace Treaties," *Journal of Political Philosophy* 20, no. 3 (September 2012), pp. 273–92, at pp. 280–81.
[39] This interconnectedness is an undeniable and prevalent feature in the conceptual history of peace. See Philipp Gisbertz, "The Concepts of 'War' and 'Peace' in the Context of Transnational Terrorism," *Archiv für Rechts-und Sozialphilosophie* 104, no. 1 (March 2018), pp. 315, at pp. 8, 12.
[40] Derek Parfit, *On What Matters*, vol. 1 (Oxford: Oxford University Press, 2011), p. 40.
[41] The question of special obligations and their relation to universal rights and duties is subject to a broad discussion in moral philosophy that I cannot discuss in any detail here. For a general overview, see Diane Jeske, "Special Obligations," in Stanford Encyclopedia of Philosophy Archive, ed. Edward N. Zalta (Fall 2019), plato.stanford.edu/archives/fall2019/entries/special-obligations/.
[42] See Mark Bernstein, "Friends without Favoritism," *Journal of Value Inquiry* 41, no. 1 (March 2007), pp. 59–76; and Paul Gomberg, "Patriotism Is like Racism," *Ethics* 101, no. 1 (October 1990), pp. 144–50.
[43] Yitzhak Benbaji, "A Defense of the Traditional War Convention," *Ethics* 118, no. 3 (April 2008), pp. 464–95, at pp. 489–93.
[44] Because such collective language (for example, that states have interests) is accepted in our everyday language, I adopt it here to keep the idea as simple as possible. This does not mean that the argument requires a collectivist standpoint. In fact, it is meant to be given from a reductive-individualist standpoint, but it should be comprehensible regardless of one's thoughts on joint action and collective agency.
[45] See with a focus slightly more on individual soldiers, Benbaji, "A Defense of the Traditional War Convention," pp. 489–93.
[46] Tadros, *To Do, to Die, to Reason Why*, p. 290.

[47] McMahan, "The Ethics of Killing in War," p. 731.
[48] Shue, "Laws of War, Morality, and International Politics," p. 281.
[49] See, for example, Helen Frowe, *The Ethics of War and Peace: An Introduction*, 2nd ed. (Abingdon, U.K.: Routledge, 2016), p. 123.
[50] Hugo Grotius, *On the Rights of War and Peace*, trans. William Whewell (Cambridge, U.K.: Cambridge University Press, 1853), bk. 1, ch. 1, sec. 13.
[51] Ibid., bk. 1, ch. 1, sec. 10.1.
[52] Ibid., bk. 1, ch. 1, sec. 14.1.
[53] Ibid., preliminary remarks, secs. 40–41.
[54] Ibid., bk. 3, ch. 1, secs. 2, 4.3.
[55] Ibid., bk. 3, ch. 4, secs. 1–3.
[56] Ibid., bk. 3, ch. 4, sec. 4.
[57] Ibid., bk. 3, ch. 4, sec. 5.2.
[58] See, for instance, more or less identical to Grotius's argument: Emer de Vattel, *Law of Nations*, ed. and intro. Béla Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), bk. 3, sec. 192, oll.libertyfund.org/titles/2246.
[59] Article 43, "Armed Forces," sec. 2, "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977," International Committee of the Red Cross, ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=AF64638EB5530E58C12563CD0051DB93.
[60] See David Rodin, "Morality and Law in War," in Hew Strachan and Sibylle Scheipers, eds., *The Changing Character of War* (Oxford: Oxford University Press, 2011), pp. 446–65, at p. 455; Frowe, *Ethics of War and Peace*, p. 123; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed. (Cambridge, U.K.: Cambridge University Press, 2010), p. 33; and "Commentary of 1987 on the Protocol Additional to the Geneva Conventions of 12 August 1949: section 'Armed Forces'," pp. 514–15, ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=0CDB7170225811A0C12563CD00433725.
[61] Leif Wenar, "Rights," in Stanford Encyclopedia of Philosophy Archive, ed. Edward N. Zalta (Spring 2021), sec. 2.1, plato.stanford.edu/archives/spr2020/entries/rights/.
[62] Haque, *Law and Morality at War*, p. 25.
[63] Ibid., p. 24.
[64] For instance, rights and immunities are rather crudely conflated in Robert K. Goldman and Brian D. Tittemore, "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights under International Humanitarian and Human Rights Law" (Task Force Papers, American Society of International Law, December 2002), p. 2, www.pegc.us/archive/Journals/goldman.pdf: "This privilege is in essence a *license to kill* . . . . A lawful combatant possessing this privilege must be given prisoner of war status upon capture and *immunity from criminal prosecution* under the domestic law of his captor for his hostile acts that do not violate the laws and customs of war" (emphasis added).
[65] Tadros, *To Do, to Die, to Reason Why*, pp. 282–83.

Abstract: The focus on the moral rights of combatants in the ethics of war ignores a very important point: although morally unjust combatants cannot be considered moral equals to just combatants, especially with regard to the right to kill, there are sound moral reasons why the laws of war should accept a kind of equality between them, a concept referred to as "reduced legal equality." Reduced legal equality is not about equal moral rights but about granting legal immunity to combatants for their conduct in accordance with the laws of war. This article shows that reduced legal equality of combatants is not only the morally best legal regulation in our nonideal international world but also the correct interpretation of international law.

Keywords: just war theory, moral equality of combatants, armed conflict, philosophy of law, moral philosophy, international humanitarian law