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The Criminalization of Aggression and Soldiers' Rights

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Abstract

This article identifies the core wrong of criminal aggression to be the entailed legally unjustified killing and human violence and not the violation of sovereignty or states' rights. Its key contribution is to elaborate two implications of that normative account of the crime. First, soldiers have a right to refuse to fight in criminal wars, and they must be recognized as refugees when they flee punishment for engaging in such refusal. Second, those killed or harmed by an aggressor force are the core victims of the crime. As such, they, and not the attacked state, have the primary claim to participation as victims at the International Criminal Court and to the reparations that follow. Those who adhere to the orthodox notion of aggression as a crime against the attacked state miss both of these implications. Soldiers seeking asylum when they refuse to fight in aggressive wars are denied on the grounds that, if they were to fight, they would be far removed from the macro wrong against the state and so should have no difficulty 'washing their hands of guilt'. This is misguided. Although there are good reasons for the leadership element that protects them from criminal liability for aggression, soldiers perpetrate directly the constituent wrongs of the criminal action, and the reasons not to punish them for doing so are not reasons to deny them the right to disobey. Similarly, adherents to the traditional account would grant states the right to participate as victims and claim reparations in aggression prosecutions. This too is a mistake. The victims of the wrong that renders aggressive war criminally condemnable are soldiers killed or harmed fighting an aggressor force and collaterally killed or harmed civilians. These are the class members eligible for participation and reparations at the International Criminal Court.

1 Introduction

On a common view, aggression is a crime perpetrated against states.[1] In a recent article, I debunk that position.[2] It is true that whether a war is criminally aggressive

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1 For an indicative list of those holding this view, see note 9 below.

2 Dannenbaum, 'Why Have We Criminalized Aggressive War?', 126 *Yale Law Journal* (2017) 1242.

is determined in part by whether it involves a particular form of interstate wrong. However, that is not why such wars are criminal. Aggressive war, alone among sovereignty violations, is a crime because, as a grave and manifestly illegal use of armed force, it necessarily entails the infliction (or at least immediate threat) of legally unjustified killing and human violence.[3] To locate the wrong of aggression in this violation of human beings is not a moral claim untethered from the law that we have. It is the normative account that offers the most coherent explanation of the crime, its origins and its position in contemporary international law. As such, it has significant doctrinal implications.[4]

Most obviously, this 'unjustified killing account' of aggression informs how the International Criminal Court (ICC) ought to interpret the margins of the crime.[5] But it also has further-reaching connotations, including for rights that are contingent on the meaning of the crime. This article elaborates two such implications. First, soldiers have a right to refuse to fight in illegal wars. Second, contrary to recent practice in *jus ad bellum* reparations and academic commentary on the ICC, combatants injured or killed fighting against an aggressor force are among aggression's core victims and must be recognized as such by the Court for the purposes of participation and reparations.

After making the positive case for the status of these rights in existing law, the article defends them against four potentially significant objections: the contention that offering reparations to combatants killed in an illegal war would undermine the independence of the *jus ad bellum* and the *jus in bello*; the alternative claim that reparations should extend to combatants on both sides; the objection that a *jus ad bellum* right to disobey would be, and ought to be, non-justiciable; and the worry that granting a *jus ad bellum* right to disobey would undermine military functioning in lawful wars.

The next section lays the foundation for the argument on soldiers' rights by summarizing the key reasons for preferring the unjustified killing account of aggression. The aim is to establish the plausibility of the unjustified killing account as the premise for the argument that follows.[6]

2 Why Aggressive War Is a Crime

Under the amended Rome Statute, the crime of aggression involves an illegal act by one state that violates the 'sovereignty, territorial integrity or political independence of another State' or is otherwise 'inconsistent with' the UN Charter.[7] Harm to human beings is not explicitly listed as an element of the crime.[8] Perhaps unsurprisingly, then, a common view of aggression today, as in the pre-Kampala era, is that it is fundamentally

[3] See notes 15–22 below and accompanying text.

[4] I explain the concept of a 'normative account' of this kind in greater detail in Dannenbaum, *supra* note 2, at 1249–1254.

[5] *Ibid.*, at 1301–1306.

[6] For a more detailed argument supporting the premise, see *ibid.*, at 1263–1301.

[7] Rome Statute of the International Criminal Court (Rome Statute) 1998, 2187 UNTS 90, Art. 8bis(2).

[8] International Criminal Court, Elements of Crimes, UN Doc. ICC-PIDS-LT-03-002/11_Eng (2011), at 43.

a crime against states.[9] This is a mistake. Aggressive war is criminally wrongful not because it violates states' rights but, rather, because it entails killing and maiming in a context that does not warrant the infliction of such profound human harms. To be clear, the interstate element of the crime is important. It specifies a form of legally unjustified killing that is otherwise anomalously non-criminal at both the international and national levels: the killing of combatants and proportionate collateral civilians through a manifestly illegal use of international force.[10] However, the core criminal wrong is the human violence, not the interstate breach.[11] Five reasons explain why this is so.

First, states' rights cannot make sense of the crime. Banning the use of non-defensive force and criminalizing aggression granted states legal protection from the harm of armed attack, but these moves also restricted states' sovereign authority to use force to vindicate any of their other rights.[12] One might argue that that exchange could be explained with reference to the greater significance to sovereignty of the former protection. But even when evaluated exclusively with reference to the sovereign rights at the crux of today's *jus ad bellum* – political independence and territorial integrity – aggressive war is not an exceptionally egregious violation. A leader that manipulates foreign election results or holds onto foreign territory not taken through illegal force thereby infringes political independence or territorial integrity more severely and effectively than is even intended (let alone achieved) by potentially criminal uses of force like illegal aerial bombardments that do not seek to overthrow a government or take territory.[13] And, yet, the former, lacking 'armed force', are plainly not international crimes, whereas the latter are, or at least can be.[14]

[9] P.W. Kahn, *Sacred Violence* (2008), at 54–55; D. Luban, *Legal Modernism* (1994), at 335–341; M. Walzer, *Just and Unjust Wars* (1977), at 58–61; G. Werle, *Principles of International Criminal Law* (2005), at 395, n. 1170; O. Solera, *Defining the Crime of Aggression* (2007), at 427; Creegan, 'Justified Uses of Force and the Crime of Aggression', 10 *Journal of International Criminal Justice* (*JICJ*) (2012) 59, at 62; Stahn, 'The "End", the "Beginning of the End" or the "End of the Beginning"?', 23 *Leiden Journal of International Law* (*LJIL*) (2010) 875, at 877; Pobjie, 'Victims of the Crime of Aggression', in C. Kreß and S. Barriga (eds), *The Crime of Aggression: A Commentary* (2016) 816, at 816–17, 821–22, 825–26; Aryeh Neier *et al.*, 'Regarding the Crime of Aggression', Letter to Foreign Ministers, 10 May 2010, available at www.opensocietyfoundations.org/sites/default/files/icc-aggression-letter-20100511.pdf.

[10] See notes 21–22 below.

[11] Taking loosely related positions, see Mégret, 'What Is the Specific Evil of Aggression?', in Kreß and Barriga, *supra* note 9, 1398; Ohlin, 'The Crime of Bootstrapping', in Kreß and Barriga, *supra* note 9, 1454.

[12] O. Hathaway and S. Shapiro, *The Internationalists* (2017), chs 1–4; S.C. Neff, *War and the Law of Nations* (2005), at 225–239.

[13] On electoral manipulation, see, e.g., G.A. Res. 52/119, 23 February 1998; G.A. Res. 36/103, 9 December 1981; GA Res. 2625 (XXV), 24 October 1970; B. Egan, 'International Law and Stability in Cyberspace' 35 *Berkeley Journal of International Law* (2017) 169, 175. On the issue of holding foreign territory not taken through an illegal aggression, consider *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, 10 October 2002, ICJ Reports (2002) 303; Eritrea-Ethiopia Claims Commission, *Partial Award: Jus ad Bellum – Ethiopia's Claims 1–8*, 19 December 2005, reprinted in (2005) 16 *UNRIAA* 457, at 464–467. Note also the language of Rome Statute, *supra* note 7, Art. 8bis(2)(a).

[14] See Rome Statute, *supra* note 7, Art. 8bis(2)(b), (d). A proposal to limit criminal aggression to uses of force seeking to take territory or overthrow a government was rejected. Proposal Submitted by Germany: Definition of the Crime of Aggression, UN Doc. PCNICC/1999/DP.13, 30 July 1999.

Second, unjustified killing can explain the crime. What distinguishes aggression from any other sovereignty violation – what makes it uniquely criminal among violations such as those identified above – is that it alone involves legally unjustified killing and human violence or at least its immediate threat.[15] Stated most simply, a criminal aggression is a manifestly illegal international use of armed force.[16] Indeed, even uses of armed force that do not violate the sovereignty, territorial integrity or political independence of another state can qualify as criminally aggressive if they are '*otherwise* inconsistent with' the UN Charter, as would be a military campaign against a UN-authorized force on a state's own territory.[17]

Recognizing that illegal international armed force (and not sovereignty) is the keystone of the crime matters because inherent in armed force is the immediate threat, and typically infliction, of violence and killing. Since the crime of aggression includes only the gravest cases of armed force, a strong argument can be made that this threat must be consummated in actual human violence in order for the aggression to be criminal.[18] Notably in this respect, Nazi Germany's relatively bloodless invasions of Austria and Bohemia and Moravia were not prosecuted at the International Military Tribunal (IMT), which distinguished them explicitly from the wars of aggression that were criminal under its Charter.[19]

Human violence is not only significant in distinguishing aggression from non-criminal sovereignty violations. Equally important is the fact that if aggression were not a crime, the non-criminality of killing combatants and 'proportionate' civilians in an illegal war would be anomalous among other forms of legally unjustified intentional killing, which are almost invariably criminal in some other form, whether as crimes against humanity, war crimes or simply domestic murder.[20] To be sure, the differentiation across such crimes matters. It reflects different presumptions of legitimacy and thresholds of criminality applicable to different actors in different contexts. Indeed, the interstate element of aggression is important precisely because it identifies a form

[15] On sovereignty violations other than the use of force (including violations of the principle of non-intervention), see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Reports (1986) 14, paras 202–212 (including intervention in a state's 'choice of a political, economic, social and cultural system' and 'foreign policy').

[16] Elements of Crime, *supra* note 8, at 43 (elements 3–6).

[17] *Ibid.* (element 3) (emphasis added); Rome Statute, *supra* note 7, Art. 8bis(2) (emphasis added). See Dannenbaum, *supra* note 2, at 1275–1278; Institut de Droit International, *Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in Which United Nations Forces May Be Engaged* (1971), para. 7.

[18] Rome Statute, *supra* note 7, Art. 8bis(1); Assembly of States Parties (ASP), Resolution RC/Res.6, 11 June 2010, Annex III, paras 6–7.

[19] Judgment, *Göring and Others*, 1 October 1946, reprinted in *Trial of the Major War Criminals before the International Military Tribunal* (1948), vol. 22, at 427. Charter of the International Military Tribunal 1945, 82 UNTS 279. See also GA Res. 3314 (XXIX), 14 December 1974, para. 5(2).

[20] For this reason, Mégret suggests that the criminalization of aggression overcomes the 'humanitarian laundering' of the *jus in bello*, rediscovering 'hidden deaths' little different from 'murder'. Mégret, *supra* note 11, at 1420–1423. For Ohlin, aggression resolves what would otherwise be an 'intolerable' and 'absurd' paradox. Ohlin, *supra* note 11, at 1455, 1458, 1462.

of such killing and human violence – that inflicted on combatants and 'proportionate' civilians – that is appropriately governed by its own presumptions of legitimacy and thresholds of criminality.[21] However, the basic point is consistent: killing without the justification of responding to illegal human violence or its immediate threat is generally criminal in one form or another. Aggression is part of that reality.

The third reason to prefer the unjustified killing account is that it is more coherent with the broader project of international criminal justice. Specifically, reframing aggression as filling a gap in the criminal law protection of the human right to life – the gap in which soldiers and collateral civilians could otherwise be killed with neither legal justification nor criminal law consequence – makes sense of aggression's position in a regime that is at the heart of international law's 'humanization'.[22] The notion that aggression is a crime against sovereignty instead isolates aggression as the inexplicably odd crime out, rendering international criminal law confused in its normative message.[23] To be clear, the premise here is not that international criminal law is derivative of human rights law. The two regimes differ significantly in scope and in the targets of their regulation. Rather, the premise is that both regimes are often understood to be part of a broadly shared project to protect human beings from severe wrongs when unmodified state regulation would otherwise fail them.[24] The unjustified killing account makes sense of aggression's role in that project.[25]

The fourth and fifth claims go to the history of the ban on force and its criminalization, debunking the notion that 'individuals have never been considered victims' of aggression.[26] In fact, the public reasons given in the campaign to restrict *jus ad bellum* rights in the early 20th century focused precisely on the infliction of death without justification, recognizing that the proposed reform was, at the time, thought to limit states' rights rather than provide for their most essential protection.[27] Moreover, the Nuremberg prosecutors argued that the Kellogg-Briand ban on war entailed the

[21] See, e.g., notes 72–80 below.

[22] See Human Rights Committee, Draft General Comment 36 (2017), para. 71, available at www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf; Mégret, *supra* note 11, at 1428, 1440, 1444; Schabas, 'Aggression and International Human Rights Law', in Kreß and Barriga, *supra* note 9, 351, at 360. Linking going to war to the right to life, see Human Rights Committee, General Comment 6 (1982), UN Doc. HRI/GEN/1/Rev.6 (2003), at 127–128, para. 2. On criminal sanctions as part of protecting the human right to life, see ECtHR, *Osman v. United Kingdom*, Appl. no. 87/1997/871/1083, Judgment of 28 October 1998, para. 115 (all ECtHR decisions are available online at http://hudoc.echr.coe.int/); Human Rights Committee, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 8. On humanization, see T. Meron, *The Humanization of International Law* (2006).

[23] Luban, *supra* note 9, at 335–337, 341; see also Pobjie, *supra* note 9, at 825–826.

[24] See, e.g., R.G. Teitel, *Humanity's Law* (2011); A. Cassese *et al.*, *International Criminal Law* (3rd edn, 2013), at 5–6; Pobjie, *supra* note 9, at 820; Schabas, *supra* note 22, at 357, 366.

[25] Compare notes 22, 24 above. Also seeking to reconcile the criminalization of aggression and human rights, but via the right to peace, see Schabas, *supra* note 22, at 366.

[26] Pobjie, *supra* note 9, at 822. To recognize that human victims have a long-standing significance here is not to deny that the history is multi-faceted on this issue. Compare Mégret, *supra* note 11, at 1414–1419.

[27] See, e.g., S. Levinson, *Outlawry of War* (1921), at 12, 14–16, 18, 21–22. On Levinson's prominence in that discourse, see Hathaway and Shapiro, *supra* note 12, ch. 5.

criminality of aggression because it meant that there was 'nothing to justify the killing', which was, as a result, nothing other than 'murder'.[28] The judges in Tokyo affirmed that an illegal war by definition 'involves unlawful killings … at all places in the theater of war and at all times throughout the period of the war'.[29] Although less directly affirming of this thesis and more ambiguous in its legacy, the IMT at Nuremberg famously described aggression as an '*accumulated* evil', indicating that the constituent micro harms of an illegal war, and not simply the macro sovereignty violation, are what underpin its criminal wrongfulness.[30]

In short, there are good reasons relating to its scope, its place in the law, and its history to understand aggression to be a crime of killing and inflicting human violence without justification and not to be a crime against sovereignty. The question is what follows for the legal relationship between soldiers and the crime.

3 The Right to Refuse to Fight

On the traditional account, 'the acts of individuals that make up war are conceptually and normatively distinct from the State aggression'.[31] Because the criminal wrong on that account is inflicted on an enemy state, only those that combine a significant level of control over the state with the intention to shape state action can be said to perpetrate that wrong.[32] The actions of lower-level soldiers 'are not themselves criminal' because they are too far removed from that macro wrong.[33] Thus, Michael Walzer writes of soldiers having an 'equal [moral] *right* to kill enemy combatants' irrespective of the *jus ad bellum* status of their war.[34] They are, he argues, responsible only for what falls within 'their own sphere of activity', namely, the conduct of hostilities, not the violation of sovereignty.[35] Whatever the plausibility of this dissociation of the soldier from the macro wrong inflicted via the enterprise of which he is part, if the criminal wrong of aggression is its unjustified killing, this argument from normative remoteness breaks down.[36] For, on the unjustified killing account, soldiers perpetrate directly the constituent wrongs of the criminal action. Recognizing this has implications both for their right to refuse to fight and for how we should understand their lack of criminal liability when they do fight.

[28] Closing Statement by H. Shawcross, chief prosecutor for Great Britain, *Göring and Others*, 26 July 1946, reprinted in *Trial of the Major War Criminals before the International Military Tribunal* (1947), vol. 19, at 433; see also Judgment, *Araki and Others*, 4 November 1948, reprinted in J. Pritchard and S. Zaide (eds), *The Tokyo War Crimes Trial* (1981), vol. 22, at 48452.

[29] *Araki and Others*, *supra* note 28, at 48452–48453, 49576.

[30] *Göring and Others*, *supra* note 19, at 427.

[31] L. May, *Aggression and Crimes against Peace* (2008), at 16.

[32] *Ibid.*, at 254.

[33] *Ibid.*, at 229.

[34] Walzer, *supra* note 9, at 41 (emphasis added).

[35] *Ibid.*, at 39; see also Nagel, 'War and Massacre', 1 *Philosophy and Public Affairs* (1972) 123, at 138–140.

[36] On the plausibility of the dissociation argument, cf. Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, § 191.

A *The Soldier's Limited Right to Disobey in Existing Jurisprudence*

Soldiers have a right to disobey orders that violate the *jus in bello* and a claim to refugee status if that right is denied domestically.[37] This right obtains even when complying with the order would not have rendered the soldier criminally liable for the ensuing violation.[38] However, few states recognize an analogous right to *jus ad bellum* disobedience; soldiers risk domestic criminal punishment when they refuse to fight in criminal wars of aggression.[39] They find no relief from that threat in prevailing interpretations of international law.[40] One domestic obstacle to disobedience protection is judicial reluctance to answer *jus ad bellum* questions,[41] but courts have also reasoned that since there is no criminal law duty to refuse to fight in criminal war, there is no right to such refusal.[42] Indeed, courts have denied disobedience protection even when the war's criminality is not in question, as in Germany following the Nuremberg verdict.[43] Lacking legal affirmation of their refusal, the vast majority of the 8,000 Nazi soldiers who survived the war with desertion convictions lived the rest of their lives as convicted felons.[44] Perhaps it is unsurprising that soldiers find little succour in their home states' courts when they refuse to fight in illegal wars. But prevailing understandings of international refugee law and international human rights law offer no more protection in this regard.

[37] Domestically, see, e.g., US Department of the Army, *Your Conduct in Combat under the Law of War*, Doc. FM 27-2 (1984), at 25; UK Ministry of Defence, *Manual of Service Law*, Doc. JSP 830 v2.0, 31 January 2011, vol. 1, ch. 7, at 7-1-40–7-1-41; sources cited in note 38 below. On refugee status, see UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status* (*UNHCR Handbook*), UN Doc. HCR/1P/4/ENG/Rev. 3 (1979; reissued 2011), para. 171; Council Directive (EU) 2011/95 (Directive on Refugees), OJ 2011 L 337, at 9.

[38] M. Osiel, *Obeying Orders* (1999), at 242; Luban, 'Knowing When Not to Fight', in H. Frowe and S. Lazar (eds), *Oxford Handbook of the Ethics of War* (2018). E.g., *United States v. New*, 55 MJ 95, at 100 (CAAF 2001); US Department of Defense, *Manual for Courts-Martial United States* (2008), at IV-19, para. 14(c)(2)(a)(i). On refugee law, see *Key v. Minister of Citizenship and Immigration [Canada]*, [2008] FC 838, paras 14–29 (citing key cases).

[39] Osiel, *supra* note 38, at 85. To take just one example of the codified consequence of refusal, see Uniform Code of Military Justice, 10 USC § 885(c) (2006), Art. 85. On rare allowances for selective conscientious objection and for conscientious objection for professional soldiers, see respectively L. Hammer, *The International Human Right to Freedom of Conscience* (2001), at 210–214; B. Horeman and M. Stolwijk, *Refusing to Bear Arms* (1998; updated 2005), available at www.wri-irg.org/co/rtba/index.html. For a rare recognition of a *jus ad bellum* right to refuse, see notes 88–93 below.

[40] See notes 46–65 below. Some human rights regimes recognize a right to conscientious objection, but it is limited to pacifists. ECtHR, *Bayatyan v. Armenia*, Appl. no. 23459/03, Judgment of 7 July 2011; Human Rights Committee, *Yoon and Choi v. Korea*, Communication no. 1321–1322/2004, UN Doc. CCPR/C/88/D/1321–1322/2004, 3 November 2006. Rejecting even that limited right, see IACtHR, *Case of Vera et al. v. Chile*, Judgment (Merits), 10 March 2005, paras 88–100.

[41] Declining to hear an appeal on political question grounds, see, e.g., *Mora v. McNamara*, 128 US App. DC 297, 387 F.2d 862 (1967), cert. denied, 389 US 934, 88 SCt 282; see also O'Keefe, 'United Kingdom', in Kreß and Barriga, *supra* note 9, 938.

[42] *United States v. Huet-Vaughn*, 43 MJ 105, at 114–115 (1995); *R v. Lyons*, [2011] EWCA Crim 2808, at 24, 36. Quoting the reasoning from the rejection of Flight Lieutenant Malcolm Kendall-Smith's effort to avoid court martial on these grounds, see 'RAF Doctor Jailed Over Iraq Refusal', *Guardian* (13 April 2006); 'RAF Doctor Must Face Iraq Court Martial', *Daily Mail* (22 March 2006).

[43] Süddeutsche Juristen-Zeitung, *In re Garbe*, Jahrg. 2, No. 6, June 1947, cols. 323–330; Lauterpacht, 'The Limits of the Operation of the Law of War', 30 *British Yearbook of International Law* (1953) 206, at 240–241, n. 2.

[44] Belated political absolution was granted over half a century later. Moore, 'Nazi Deserter Hails Long-Awaited Triumph', *BBC News* (8 September 2009); Gesetz zur Änderung des Gesetzes zur Aufhebung nationalsozialistischer Unrechtsurteile in der Strafrechtspflege vom 23, Doc. BGBl. I S. 2714, July 2002.

In its influential interpretation of the Refugee Convention, the UN High Commissioner for Refugees' (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status* addresses directly the issue of soldiers fleeing bad orders.[45] In paragraph 171, it provides that where 'the type of military action … is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could … in itself be regarded as persecution'.[46] On a leading view, illegal military action is, by definition, 'condemned by the international community' for these purposes.[47] Hence, the refugee law protection for those who disobey orders to violate the *jus in bello*. As noted above, this applies whether or not the disobedient soldier would have been personally criminally liable for the violation were he to have obeyed. In a particularly interesting formulation, Canadian courts have focused instead on whether he would have been able to 'wash his hands of guilt'.[48] Similarly, the English and Welsh courts have asked whether the soldier would have been 'associated with' the wrong.[49]

Aggressive wars fit the illegal military action standard.[50] Indeed, the European Union's (EU) binding directive is explicit in granting refugee eligibility to those facing prosecution for refusing to 'commit[] a crime against peace'.[51] However, if one understands the criminal wrong of aggression to be its violation of sovereignty, the entailed refugee protection is potentially extremely narrow. Faced with the asylum claim of an American soldier who had refused to fight in Iraq, a Canadian Federal Court reasoned as follows:

> 142. [I]t is only those with the power to plan, prepare, initiate and wage a war of aggression who are culpable for crimes against peace. …
> 158. [T]he ordinary foot-soldier … cannot be held criminally responsible merely for fighting in support of an illegal war. …
> 159. … the legality of a specific military action could potentially be relevant to the refugee claim of an individual who was involved at the policy-making level in the conflict in question, and who sought to avoid involvement in the commission of a crime against peace. However, the illegality of a particular military action will not make mere foot soldiers participating in the conflict complicit in crimes against peace.
> 160. As a result, there is no merit to the applicants' contention that had Mr. Hinzman participated in the war in Iraq, he would have been complicit in a crime against peace, and should thus be afforded [refugee protection].[52]

Another Canadian decision emphasized that for lower-level troops 'the focus of the inquiry should be on the law of *jus in bello*'.[53] These decisions were later upheld on the

45 Convention Relating to the Status of Refugees 1951, 189 UNTS 150; UNHCR, *supra* note 37.
46 UNHCR, *supra* note 37, para. 171.
47 E.g., J. Hathaway, *The Law of Refugee Status* (1991), at 180–181; *Lebedev v. Minister. of Citizenship and Immigration [Canada]*, [2007] FC 728, paras 42, 45; *Key v. Minister*, *supra* note 38, para. 21; *Krotov v. Home Secretary*, [2004] EWCA (Civ) 69, paras 26, 29, 39, 51, per Lord Justice Potter.
48 *Key v. Minister*, *supra* note 38, para. 279 (citing *Zolfagharkhani v. Minister of Employment and Immigration [Canada]*, [1993] 3 FC 540).
49 *Krotov v. Home Secretary*, *supra* note 47, para. 117
50 Hathaway, *supra* note 47, at 180–181.
51 Directive on Refugees, *supra* note 37, at 9, Arts 9(2)(e), 12(2)(a).
52 *Hinzman v. Minister of Citizenship and Immigration [Canada]*, [2006] FC 420, paras 141, 158–160.
53 *Hughey v. Minister of Citizenship and Immigration [Canada]*, [2006] FC 421, para. 153; *Colby v. Minister of Citizenship and Immigration [Canada]*, [2008] FC 805, paras 11, 15.

prior ground that the asylum seekers had failed to exhaust domestic remedies.[54] However, given that the USA recognizes no right to disobey on *jus ad bellum* grounds, this failed to take seriously the soldiers' claim that protection for that disobedience falls within paragraph 171's ambit. Similarly dismissive of that substantive claim, the German Federal Office for Migration and Refugees rejected the asylum application of another American Iraq deserter because he had failed to show that he would have been forced to take part in an illegal act.[55]

On its face, such reasoning would seem to fly in the face of the general rule that the disobedient soldier's eligibility for refugee protection hinges not on her potential criminal liability had she obeyed but, rather, on her potential association with the underlying wrong. To avoid that contradiction, the reasoning in these *jus ad bellum* cases might be understood (on orthodox terms) to hold that lower-level troops are not only not liable for, but also untainted by, the criminal wrong of aggression (the violation of sovereignty) because they are so far removed from it. The rationale, from that point of view, is that a non-leader participant in a criminal war should be unburdened by that contribution because her actions are 'normatively distinct' from the macro wrong at the heart of the crime.[56] On this reading, when the Canadian Federal Court held that Jeremy Hinzman would not have been 'complicit in crimes against peace', it meant not just that he would not have been criminally complicit but also that he ought to have been untainted by his participation and thus fully capable of 'washing his hands of guilt' from the legal point of view.[57]

Existing interpretations of international human rights law similarly provide such soldiers no right to disobey.[58] The most direct basis for such protection might be via the principle, articulated in the Declaration on Human Rights Defenders, that 'no one shall be subjected to punishment or adverse action of any kind for refusing' to participate 'in violating human rights and fundamental freedoms'.[59] On the understanding that the *jus in bello* defines the scope of relevant human rights in armed conflict, soldiers that refuse to violate that law might be deemed eligible for human rights disobedience protection on that basis.[60] However, on the orthodox account, aggression is the rare international crime that does 'not implicate human rights violations'.[61] Consistent with that view, there remains no recognized human right not to fight in a criminal war.[62]

[54] *Hinzman v. Minister of Citizenship and Immigration and Hughey v. Minister of Citizenship and Immigration [Canada]*, [2007] FCA 171, paras 39–62, leave to appeal refused, [2007] SCCA No. 321.

[55] Bundesamt für Migration und Flüchtlinge [Federal Office for Migration and Refugees], Kein Asyl für US-Deserteur [No Asylum for US Deserter], Press Release, 4 April 2011.

[56] Cf. notes 31, 48 above and accompanying text.

[57] Cf. note 52 above and accompanying text.

[58] See note 40 above.

[59] GA Res. 53/144, 8 March 1999, Art. 10; see also Council of Europe, *Ensuring Protection-European Union Guidelines on Human Rights Defenders* (2008).

[60] See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, para. 25.

[61] Iverson, 'Contrasting the Normative and Historical Foundations of Transitional Justice and Jus Post Bellum', in C. Stahn, J.S. Easterday and J. Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (2014) 80, at 96; Neier *et al.*, *supra* note 9; Amnesty International, International Criminal Court: Amnesty International's Call for Pledges by States at the 13th Session of the Assembly of States Parties, 29 October 2014, at 5, n. 18. Cf. note 22 above.

[62] Cf. notes 84–87 below.

B *The Right to Disobey and the Unjustified Killing Account*

If the criminal wrong of aggression is the unjustified infliction of human violence, things look very different. On that account, far from making permissible contributions to an enterprise that is wrongful only at the interstate level, soldiers perpetrate directly the wrongs that are at the crux of aggression's criminality. Understood in this way, the law channels not traditional just war theory's assertion of the moral equality of the killing on either side of an aggressive war but, rather, the revisionist rejection of that moral claim.[63] This changes how we ought to think about human rights and refugee protection in this realm. From the legal point of view, on this account, soldiers are right to judge that fighting in such wars would entail a normative burden that cannot be easily washed away.[64] And if the crime of aggression is best understood as filling a normative gap in the criminal law protection of the right to life, then those who refuse to fight such wars should also be understood and protected as 'human rights defenders'.[65]

In one sense, this is straightforward; shifting from the traditional to the unjustified killing account changes the answer to the derivative interpretive question of whether there is a right to refuse to fight in a criminal war. However, there is a complication. Criminal liability for aggression attaches exclusively to those with the capacity to control or influence state policy.[66] If, from the legal point of view, soldiers are too intimately involved to wash their hands of the criminal wrong of aggression, one might ask why they are not criminally liable for fighting.[67] As an account of *lex lata*, the unjustified killing account must have an answer.

The leadership element of the crime is best understood from this perspective as being rooted in a blanket and absolute *jus ad bellum* immunity for soldiers rather than as an endorsement of the violence they inflict in such a war. Three reasons combine to underpin this immunity.

First, given its narrow focus on the gravest wrongdoing, international criminal punishment is properly restricted to highly culpable individuals.[68] The typical subordinate's uncertainty regarding the legality of the war and the understandable pull of associative sympathies are such that most participating soldiers do not surpass that threshold.[69] Soldiers are the agents of wrongdoing when they kill in an illegal war, but very few are sufficiently culpable to warrant international punishment and the logistics of identifying those few would overwhelm any criminal justice system.[70]

63 On the dispute in just war theory, see generally D. Rodin and H. Shue, *Just and Unjust Warriors* (2008). Perhaps the most influential traditional and revisionist works on this are Walzer, *supra* note 9, and J. McMahan, *Killing in War* (2009), respectively.

64 Cf. note 52 above and accompanying text.

65 Cf. note 22 above and accompanying text.

66 Rome Statute, *supra* note 7, Arts 8bis(2)(b, d); 25(3bis).

67 Cf. Rodin, 'Superior Law: Human Rights and the Law of War' (forthcoming).

68 May, *supra* note 31, at 248; Rome Statute, *supra* note 7, Art. 17(1)(d).

69 McMahan, *supra* note 63, at 110–115.

70 *Ibid.*, at 191; Cohn, 'The Problem of War Crimes Today', 26 *Transactions of the Grotius Society* (1941) 125, at 144; Lichtenberg, 'How to Judge Soldiers Whose Cause Is Unjust', in Rodin and Shue, *supra* note 63, 112, at 125.

The second reason to grant immunity to those who fight in illegal wars is also a (not entirely successful) reason against protecting disobedience. As such, it is addressed separately in section 4.D below. By way of brief preview, the core claim is that imposing a duty, or possibly even protecting a right, to disobey on *jus ad bellum* grounds would undermine military functioning in lawful wars, with dangerous consequences for global security.

Third, in light of that context, guaranteeing soldiers immunity from punishment for aggression arguably helps to frame a set of incentives maximally conducive to *jus in bello* compliance, thus mitigating the horrors of war.[71] The *ad bellum* and *in bello* regimes could be applied cumulatively to soldiers (as they are in the case of leaders).[72] However, since most soldiers lack *ad bellum* clarity and since there are institutional dangers associated with holding them liable on that level, sharpening their *in bello* incentives serves the latter's humanitarian end, with minimal cost to the former.[73] If those fighting an aggressive war assume (incorrectly) their war to be lawful, the threat of *jus ad bellum* punishment would anyway not deter them, but if they fight despite assuming their war to be potentially illegal, the prospect of *jus ad bellum* punishment for even perfect *in bello* compliance would weaken their reasons to comply with the latter regime, to surrender or to accept defeat.[74] Relatedly, broad *ad bellum* immunity paves the way for peace by resolving the fate of prisoners of war and protecting against inappropriate mass punishments on either side (by an aggressor acting as if it were *ad bellum* compliant or by the other side failing to excuse non-culpable soldiers).[75]

In short, *jus in bello* symmetry assumes a state of war and seeks to tailor incentives so as to minimize suffering given that situation.[76] Combining this with a narrow scope of *jus ad bellum* criminal liability ensures that those with immediate control over compliance with the *jus in bello*, but typically low culpability for their wrongful *jus ad bellum* acts, have a maximally stark incentive to exercise that control responsibly. Together, these reasons explain why soldiers are not criminally liable for aggression despite the roots of the latter's criminality in unjustified killing.

However, instrumental immunities of this kind do not entail that those shielded are untainted by the underlying wrong from the legal point of view.[77] And the question of whether there ought to be a right to disobey orders to fight in an aggressive war is different in at least three respects from the question of whether international criminal law ought to impose a duty to disobey such orders. First, whereas the imposition of a duty would run

71 Lauterpacht, *supra* note 43, at 212, 224, 233; Dill and Shue, 'Limiting the Killing in War', 26 *Ethics and International Affairs* (2012) 311, at 319, 324.

72 Kutz, 'The Difference Uniforms Make', 33 *Philosophy and Public Affairs* (2005) 148, at 167–168.

73 Making related points, see Kreß, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression', 20(4) *European Journal of International Law* (*EJIL*) (2009) 1129, at 1134; N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), at 152.

74 Lauterpacht, *supra* note 43, at 212, 231; Dill and Shue, *supra* note 71, at 323; Walzer, *supra* note 9, at 151; McMahan, *supra* note 63, at 190–191.

75 Cf. Dill and Shue, *supra* note 71, at 323.

76 *Ibid.*, at 323

77 The *jus in bello* rules applicable to lower-level troops 'need not be in the business of blessing what they do not prohibit'. Dill and Shue, *supra* note 71, at 319; see also Shue, 'Laws of War, Morality, and International Politics', 26 *LJIL* (2013) 271, at 283. On immunities and taint, see *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, para. 52; ECtHR, *Al-Adsani v. United Kingdom*, Appl. no. 35763/97, Judgment of 21 November 2001, paras 48, 59, 61; *Case Concerning the Arrest Warrant of 11 April 2000 (DRC v. Belgium)*, Judgment, 14 February 2002, ICJ Reports (2002) 3, para. 60.

into the practical difficulty of identifying the minority of soldiers culpable for aggression's wrongful violence, those that claim a right to disobey orders to fight in a criminal war identify themselves. Second, there is a distinction between the first-personal question of whether an individual can be expected to wash his or her hands of guilt for participation in what the law must recognize to be a wrongful act and the third-personal question of whether the individual exceeds the high-culpability threshold past which international legal condemnation for that participation becomes appropriate.[78] The test for disobedience protection in refugee law trades on precisely that distinction.[79] Finally, the threat to military functioning in a lawful war of imposing an obligation on all troops to refuse to fight in clearly criminal wars is far more insidious than is that of providing an individual right to disobey, which ought to attract only those sufficiently confident that the war is illegal to risk punishment if they are wrong. This final point is discussed further in section 4.D below.

C *A Path Forward*

Since the current approach to *jus ad bellum* disobedience rights is contingent on the traditional account of the wrong of aggression, correcting our understanding of that wrong opens interpretive space to recognize a right to refuse in refugee law, domestic law and even human rights law.[80] This does not mean that such a right can always be protected. However, it does entail that countervailing imperatives, such as those discussed below, must be subject to careful scrutiny to determine if restricting the right on those grounds is truly necessary and proportionate.

There are some limited and isolated precedential foundations on which such a right might be built. In 1995, a Canadian Federal Court overturned an initial determination against the asylum claim of a Yemeni soldier who fled participation in the invasion and occupation of Kuwait.[81] It reasoned as follows:

> [T]he Refugee Division misapplied the guidance afforded by paragraph 171 of the UNHCR Handbook, when it ruled that Iraq's invasion of Kuwait was not 'condemned by the international community as contrary to basic rules of human conduct' notwithstanding, as it found, that the invasion and occupation of Kuwait was condemned by the United Nations and the annexation of that country by Iraq was declared by that body to be 'null and void'.[82]

The Court did not assess directly the legality of the invasion; however, the referenced United Nations (UN) condemnation was based on assessments that Iraq's actions violated both the *jus ad bellum* and the *jus in bello*.[83] To the extent that the applicant's refugee status was rooted in part in the *jus ad bellum*, one could understand this as an implicit recognition that it would not have been tenable to insist that he could have 'washed his hands of guilt' and fought.

78 Cf. Cohen, 'Casting the First Stone', 58 *Royal Institute of Philosophy Supplement* (2006) 113; T.M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (2008), at 175–176.

79 See note 48 above.

80 Advocating movement in this direction in refugee law, but on different grounds, see Bailliet, 'Assessing Jus ad Bellum and Jus in Bello within the Refugee Status Determination Process', 20 *Georgetown Immigration Law Journal* (2006) 337, at 338. On human rights law, see sources cited in notes 59–62 above.

81 *Al-Maisri v. Minister of Employment and Immigration [Canada]*, [1995] FCJ No. 642.

82 *Ibid.* On para. 171, see note 46 above and accompanying text.

83 *Ibid.*

The early struggle for a right to conscientious objection in international human rights law also adopted a germane posture. Most promisingly, in 1985, the UN Sub-Commission on Discrimination and Protection of Minorities recommended developing a conscience-based right to refuse to participate with 'some degree of probability' in 'wars of aggression', reasoning in part that this followed from aggression's criminality at Nuremberg.[84] However, despite wide distribution of the report,[85] the effort petered out in favour of a focus on the rights of pacifist objectors.[86] Recognizing the intimacy of the soldier's association with the core wrong of aggression, the unjustified killing account would weigh in favour of reviving the original proposal.[87]

Finally, in 2005, the Bundesverwaltungsgericht (German Federal Administrative Court) overturned the conviction of Major Florian Pfaff, who had refused to participate in a project supporting Operation Iraqi Freedom.[88] Grounding its holding in the German constitutional right to freedom of conscience,[89] the Court protected the soldier's disobedience in part because of his 'objectively serious *legal* reservations' to the intervention in Iraq.[90] It examined the UN Security Council resolutions pursuant to which the coalition claimed to be acting, evaluated the viability of a self-defence claim under the UN Charter standard and considered the ban on aggression, concluding that 'the soldier was right in his considerable doubts about the legality of the war' and affirming that this raised 'serious doubts ... as to whether the supporting actions by Germany were legally permissible'.[91] Although refraining from holding explicitly that the invasion of Iraq was in fact illegal, the Court found Major Pfaff's legal assessment to be 'not only sincere, but objectively reasonable'.[92]

Burdened with its Nazi legacy, Germany has placed unusually sharp legal focus on aggression.[93] Politically, it is difficult to imagine imminent replication of the

[84] Eide and Mubanga-Chipoya, The Question of Conscientious Objection to Military Service, UN Doc. E/CN.4/Sub.2/1983/30, 27 June 1983, paras 5, 28, 37, 46–47, 145; Kessler, 'The Invention of a Human Right', 44 *Columbia Human Rights Law Review* (2013) 753, at 773–774

[85] *Ibid.*, at 775.

[86] *Ibid.*, at 777–789. For some of the key cases, see note 40 above.

[87] More recently, in a draft declaration on the human right to peace, the Human Rights Council's Advisory Committee declared states' duty to prevent soldiers from 'taking part in wars of aggression'. Human Rights Council, Report of the Human Rights Council Advisory Committee on the Right of Peoples to Peace, UN Doc. A/HRC/20/31, 16 April 2012, para. 5(2).

[88] Bundesverwaltungsgericht, *Deutschland v. N*, Case no. 2 WD 12.04, 120 Deutsches Verwaltungsblatt 1455, 21 June 2005, available at www.bverwg.de/; Baudisch, 'Germany v. N. Decision No. 2 WD 12.04', 100 *American Journal of International Law* (*AJIL*) (2006) 911.

[89] Grundgesetz für die Bundesrepublik Deutschland (German Basic Law), 23 May 1949 (amended 23 December 2014), Art. 4.

[90] Baudisch, *supra* note 88, at 912 (emphasis added).

[91] *Ibid.*, at 914.

[92] *Ibid.*, at 915; see generally 914–916.

[93] See Grundgesetz, *supra* note 89, Art. 26; Strafgesetzbuch [Penal Code], 13 November 1998, reprinted in 1 Bundesgesetzblatt 3322, paras 80, 80a (German); International Criminal Court, Botswana and Germany Ratify Amendments on the Crime of Aggression and Article 8, Press Release, Doc. ICC-ASP-20130610-PR916, 20 June 2013; Kreß, 'The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq', 2 *JICJ* (2004) 245, at 247–255. On other states with domestic aggression legislation, see Coracini, 'Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute's Complementarity Regime', in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2009) 735; Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, Implementation Documents, available at http://crimeofaggression.info/resourcessearch/implementation-documents/.

Bundesverwaltungsgericht's approach elsewhere. Nonetheless, the Court's reasoning broke important ground, finding in the right of conscience a right not to be forced to do what the law must itself recognize to be wrong and normatively burdensome, and demonstrating how such a claim might be upheld. Perhaps few states with designs on waging aggressive war would pay heed to a human rights obligation not to force their soldiers to fight.[94] However, in addition to bolstering the refugee claim, international recognition of such a right would empower resisters to use international complaints mechanisms or domestic procedures to pressure such states to release them and annul the relevant convictions, especially after the war.[95] It would also give post-war leaders domestic political cover for doing just that. At the very least, it would change the cognitive frame within which the resister acts, affirming in law that she, no less than the soldier who refuses to perpetrate war crimes, is a human rights defender worthy of protection.

4 Victim Participation and Reparation

Revising our understanding of the core criminal wrong of aggression also has significant implications for soldiers harmed or killed fighting against aggressor forces. It entails that they, and not states, are the direct crime victims. At the ICC, this matters. Victims have rights to legal representation and participation at the pre-trial stage,[96] and the Court may allow them to present their views and interests during the trial itself, where victims have been permitted to lead evidence pertaining to guilt, question witnesses and challenge the admissibility of evidence.[97] Following a conviction, the Court may order the convict(s) to pay reparations 'to, or in respect of, victims'.[98]

A *Who Is a Victim at the ICC?*

In the ICC's first case, the Trial Chamber defined the class of victims eligible for reparations for Thomas Lubanga's conscription of child soldiers as persons whose harms were

94 Eide and Mubanga-Chipoya, *supra* note 84, paras 29, 34.

95 Cf. Office of the White House Press Secretary, Granting Pardon for Violations of the Selective Service Act, August 4, 1964 to March 28, 1973, 21 January 1977.

96 Rome Statute, *supra* note 7, Arts 15(3), 19(3), 68; Rules of Procedure and Evidence of the International Criminal Court (ICC RPE), UN Doc. PCNICC/2000/1/Add.1 (2000), Rules 86–88, 90, 92; ICC, Regulations of the Court (ICC Regulations), Doc. ICC-BD/01-05-16, 26 May 2004, revised 6 December 2016, Regulations 79–82, 83(2); see also Stahn *et al.*, 'Participation of Victims in Pre-Trial Proceedings of the ICC', 4 *JICJ* (2006) 219.

97 Rome Statute, *supra* note 7, Art. 68(3); ICC RPE, *supra* note 96, Rules 89–93; ICC Regulations, *supra* note 96, Regulations 86–87; Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Lubanga* (ICC-01/04–01/06), Appeals Chamber, 11 July 2008, §§ 86–105; Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber, 14 March 2012, §§ 13–14; Sixth Decision on Victims' Participation Relating to Certain Questions Raised by the Office of Public Counsel for Victims, *Bemba* (ICC-10/05–01/08-349), Pre-Trial Chamber III, 8 January 2009, § 2; Decision on Victims' Representation and Participation, *Kenyatta* (ICC-01/09-02/11–498), Trial Chamber V, 3 October 2012; T. Funk, *Victims' Rights and Advocacy at the International Criminal Court* (2015), ch. 4.

98 Rome Statute, *supra* note 7, Art. 75(2); see also Arts 57(3)(e), 82(4); ICC RPE, *supra* note 96, Rules 94–97; ICC Regulations, *supra* note 96, Regulations 56, 88, 117.

proximately caused by the crime, whether directly or indirectly.[99] The Appeals Chamber affirmed this standard in the abstract,[100] but reversed the Trial Chamber's holding that this would encompass those subject to sexual violence as a result of child conscription.[101] Referencing the crime's rationale – the protection of children from the fear and violence of combat and from the trauma of separation from family and school – it defined the 'direct victims' of the crime as the conscripted children and defined the harm to which reparations must respond as the physical injury and trauma, psychological trauma and loss of schooling associated with being conscripted into combat.[102] In the language of an earlier decision on victim participation, this meant defining direct victims as those the prohibition was 'clearly framed to protect' – those, in other words, who were subject to the core criminal wrong.[103] 'Indirect victims,' the Appeals Chamber held, were either individuals who suffered due to a 'close personal relationship' to direct victims or those who were harmed trying to protect direct victims from the crime.[104]

Addressing the very different war crime of destroying cultural heritage, the victim identification process adopted by the Trial Chamber in *Al Mahdi* nonetheless shared important features.[105] As in *Lubanga*, the Chamber rooted its approach in the normative core of the criminal provision, which it took to protect both the interest of communities in defining themselves and bonding across time and, at least in the case of world heritage, the global interests of 'humanity' in preserving its 'shared memory and collective consciousness'.[106] From this, the Chamber derived the crime victim classes as not only 'the faithful and inhabitants of Timbuktu [where the relevant mosque and mausoleums were destroyed], but also people throughout Mali and the international community'.[107] Deeming the people of Timbuktu to be those who suffered the disproportionate burden of criminal harm and who were best placed to preserve the attacked heritage (to the benefit of themselves, the people of Mali, and humanity), the Chamber devoted all but two symbolic euros of the award to that constituency.[108]

[99] Decision Establishing the Principles and Procedures to Be Applied to Reparations, *Lubanga* (ICC-01/04-01/06), Trial Chamber, 7 August 2012, §§ 249, 180 (*Lubanga* TC: Reparations Principles).

[100] Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to Be Applied to Reparations' of 7 Aug. 2012, *Lubanga* (ICC-01/04-01/06), Appeals Chamber, 3 March 2015, §§ 1, 124–130 (*Lubanga* AC: Reparations Principles).

[101] *Lubanga* TC: Reparations Principles, *supra* note 99, §§ 207–209; *Lubanga* AC: Reparations Principles, *supra* note 100, §§ 196–99; see also Order for Reparations Pursuant to Article 75 of the Statute, *Katanga* (ICC-01/04-01/07-3728-tENG), Trial Chamber, 24 March 2017, §§ 148–154, 158–161, 177–180 (*Katanga* TC: Reparations Order).

[102] *Lubanga* TC: Reparations Principles, *supra* note 99, §§ 181, 187–191, 196–198.

[103] For that earlier language, see Decision on 'Indirect Victims', *Lubanga* (ICC-01/04-01/06-1813), Trial Chamber, 8 April 2009, §§ 45–48, 51. Articulating a similar standard, see Broomball, 'Commentary on Article 51: Rules of Procedure and Evidence', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, 2008) 1033, at 1033, n. 85. On participation (but not reparations), see Spiga, 'Indirect Victims' Participation in the Lubanga Trial', 8 *JICJ* (2010) 183, at 186–187.

[104] *Lubanga* AC: Reparations Principles *supra* note 100, §§ 190–191, 196–198; *Katanga* TC: Reparations Order, *supra* note 101, §§ 113, 120–121.

[105] Reparations Order, *Al Mahdi* (ICC-01/12-01/15–236), Trial Chamber, 17 August 2017, §§ 13–22 (*Al Mahdi* TC: Reparations Order). The statute does not use the term 'cultural heritage,' though that was the framing of the Court. Rome Statute, *supra* note 7, Art. 8(2)(e)(iv).

[106] *Al Mahdi* TC: Reparations Order, *supra* note 105, §§ 13–22.

[107] *Ibid.*, § 51.

[108] *Ibid.*, §§ 51–56, 106–107.

In defining the reparable damage, however, the *Al-Mahdi* Trial Chamber took a broad approach, including not just the harms to the buildings and the associated moral and cultural harm to the affected communities but also the collateral impact of the destruction on the local economy of Timbuktu, with prioritized individual reparations to those who had been wholly economically dependent on the sites.[109] Having described the normative core of the crime with reference to the former kinds of harm, rather than with reference to the economic significance of cultural heritage, the Chamber's inclusion of the latter in the category of reparable harm might appear to go beyond the 'framed to protect' approach of *Lubanga*. That said, there is another sense in which the approaches are not all that divergent. The Chamber included economic harm only when suffered by the people of Timbuktu – people, in other words, who had been selected already as the key victim constituency because of their cultural connection to the heritage and their capacity to preserve it going forward.[110] Those not 'part of [the Timbuktu] community at the time of the attack' were not considered, irrespective of their possible economic interests in the attacked heritage.[111] In that respect, it may be that the inclusion of collateral economic harm as reparable in this case should be understood primarily as a case-specific means by which to rehabilitate the core crime victims, both by enabling those most intimately connected to the rebuilt heritage to recommence and maintain their relationships with it and by restoring the local community's capacity to preserve the heritage in the long run, to the benefit of all who value it.[112]

Case law aside, there are both pragmatic and principled reasons to maintain a 'framed-to-protect' standard of victim classification at the ICC. The Court is struggling to manage thousands of victims as trial participants in crimes against humanity cases.[113] Reparations are limited initially by the wealth of the convict and secondarily by that of the poorly endowed Trust Fund for Victims, which may loan funds to cover indigent defendants' reparative obligations.[114] Confronted with these challenges, the Court has assigned common legal representatives to facilitate the participation of many victims at trial and has provided for collective reparations, either alone or together with limited individual awards, to maximize the reach of limited funds.[115]

[109] *Ibid.*, §§ 60–72 (damage to the buildings), 73–83 (economic loss), 84–94 (moral damage), 104.

[110] *Ibid.*, §§ 51–56.

[111] *Ibid.*, §§ 56.

[112] Lending some support to this framing, see *ibid.*, §§ 83; Judgment on the Appeal of the Victims against the 'Reparations Order', *Al Mahdi* (ICC-01/12-01/15 A), Appeals Chamber, 8 March 2018, § 39. If economic damage were the normative concern, the crime of enemy property destruction would seem more appropriate than that of cultural heritage destruction, at least as an additional charge. Cf. Rome Statute, *supra* note 7, Art. 8(2)(e)(xii).

[113] For a critical appraisal, see Haslam and Edmunds, 'Common Legal Representation at the International Criminal Court', 12 *International Criminal Law Review* (2012) 871.

[114] *Lubanga* AC: Reparations Principles *supra* note 100, §§ 106–117.

[115] *Ibid.*, §§ 210–115. Order on the Organisation of Common Legal Representation of Victims, *Katanga and Ngudjolo* (ICC-01/04–01/07), Trial Chamber, 22 July 2009, § 11; *Al Mahdi* TC: Reparations Order, *supra* note 105, § 67; Haslam and Edmunds, *supra* note 113. To be clear, it has also been deemed important in some cases to award individual reparations to certain victims, in addition to the collective award. *Katanga* TC: Reparations Order, *supra* note 101, §§ 281–295; *Al Mahdi* TC: Reparations Order, *supra* note 105, §§ 73–83.

Those techniques depend heavily on relatively coherent victim classes that can be represented and repaired meaningfully in a collective way, particularly given the imperative to 'address the victims as individuals', as much as possible, even in collective awards.[116] Those criminally wronged by a given action are more likely to cohere in that way than are all persons harmed foreseeably by the same action.

Focusing on those the crime was framed to protect is also a contextually principled approach. ICC reparations are adjudicated in a criminal court, attached to a criminal prosecution and limited to the specific crime(s) of which the relevant defendant was convicted.[117] As such, ICC reparations are connected inextricably to the condemnation of criminal wrongdoing in a way that other reparative systems are not and ought not be.[118] This provides good reason for conceiving of the ICC participation and reparations regime primarily in terms of moral expression[119] and defining those proximately harmed by the crime as those that suffer the harm 'by virtue of which [the crime] is judged to be blameworthy'.[120] Understood in this way, the ICC's participatory and reparative features are for the Court to acknowledge the conduct not only to be a violation against the global community, and thus worthy of punishment, but also a wrong against specific persons with whom the community expresses solidarity via the reparations award. Along these lines, the Court has emphasized that reparations can have a 'symbolic' value, that they help to 'express' the accountability of the perpetrator to his victims and that they 'must reflect' the context of criminal prosecution.[121]

On this view, ICC victims are those 'against whom' the crime is committed.[122] Genocide foreseeably harms business and tourism in the region in which it occurs. However, although persons suffering those losses may have valid civil claims as a result, it would be a mistake to identify them as victims of genocide. Their losses are not why genocide is a crime. It may be, in line with *Al Mahdi*, that a full reparative response to those who *are* the core victims of a crime like genocide ought to include a response to the economic losses they suffered. Separately, reparative mechanisms untethered to criminal courts ought to be far more expansive in their identification of the victim constituency. However, both pragmatism and fidelity to the criminal context militate in favour of defining the class of victims at the ICC with reference to the

[116] *Katanga* TC: Reparations Order, *supra* note 101, §§ 274–275, 294–295.

[117] *Lubanga* AC: Reparations Principles, *supra* note 100, §§ 65, 99.

[118] D. Shelton, *Remedies in International Human Rights Law* (2nd edn, 2005) at 237; O'Shea, 'Reparations under International Criminal Law', in M. du Plessis and S. Peté (eds), *Repairing the Past?* (2007) 179, at 189.

[119] Cf. Redress and Institute for Security Studies (ISS), *Victim Participation in Criminal Law Proceedings* (2015), at 17, 19, 23, 25; C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (2012), at 61–62, 133, 188.

[120] J. Feinberg, *The Moral Limits of the Criminal Law* (1987), vol. 1, at 123. On proximate cause, note 99 above.

[121] *Lubanga* AC: Reparations Principles, *supra* note 100, at §§ 65, 70, 202.

[122] This is how they have been defined at other international criminal tribunals. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, UN Doc. IT/32/Rev.37 (2006), Rule 2; Judgment, *Duch* (001/18-07-2007-ECCC/SC), Appeals Chamber, 3 February 2012, § 416; International Law Association, Resolution 2/2010: Declaration of International Law Principles on Reparation for Victims of Armed Conflict, 15–20 August 2010, Art. 3.

rationale for the criminal prohibition. Precisely because it is a criminal court, the ICC cannot be the sole mechanism by which to provide reparative justice in contexts of war and mass atrocity.

Even if a broader approach would be preferable in a context of greater resources, there is good reason to at least prioritize those who are criminally wronged when resources cannot stretch to all of those harmed.[123] Analogous domestic systems do precisely that.[124] For a criminal court in the situation of the ICC, the focus on core crime victims and their loved ones in *Lubanga* makes sense as a long-term standard.

B *Victims of Aggression on the Orthodox Account*

If that standard holds in the long run, victim status in aggression prosecutions will hinge on how we understand the criminal wrong. For those beholden to the orthodox account, 'the typical victim [of the crime] is a "state".[125] Even for adherents of that account, adopting this position would not be without difficulties.[126] Most obviously, the definition of 'victim' in the Court's Rules of Procedure and Evidence focuses primarily on natural persons, with only narrow exceptions for specific legal persons burdened with forms of harm typically associated with particular international humanitarian law violations.[127] Of course, this definition could be interpreted broadly, as might have been the case in *Al Mahdi*.[128] Alternatively, the definition of 'victim' in the ICC's Rules of Procedure could be revised. However, revision was an option ignored at Kampala, and the inclusion of states as victims would arguably 'run against the purpose and mandate of the court'.[129]

[123] International Center for Transitional Justice Submission on Reparations Issues, *Lubanga* (ICC-01/04-01/06), Trial Chamber, 10 May 2012, §§ 15, 58.

[124] Redress and ISS, *supra* note 119, at 25; see also 17, 19, 23. On the genealogical relationship between the ICC victims framework and domestic *partie civilie* proceedings, see W. Schabas, *An Introduction to the International Criminal Court* (2007), at 330–331; McCarthy, *supra* note 119, at 51; Draft Statute of the International Criminal Court, Working Paper Submitted by France, Doc. A/AC.249/L.3, 6 August 1996, Art. 50 on 'Rights of Victims'.

[125] Stahn, *supra* note 9, at 877, 880; H. van Houtte *et al.*, *Post-War Restoration of Property Rights under International Law* (2008), vol. 1, at 238; C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013), at 293; McCarthy, *supra* note 119, at 43–44; Schabas, *supra* note 124, at 324–325; Sari, *The Status of Foreign Armed Forces Deployed in Post-Conflict Environments*, in Stahn, Easterday and Iverson, *supra* note 61, 467, at 483; see also Pobjie, *supra* note 9, at 816–821 (under the current approach to victim status, the state would be the core victim); R. Hofmann, *Report: Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)*, 15–20 August 2010, Commentary to Art. 3 (questioning whether a *jus ad bellum* focused on 'the territorial integrity of States' can give rise to an 'individual claim to reparation').

[126] Perhaps for this reason, Hofmann suggests that the incorporation of aggression at the ICC may change our definition of the 'victim(s)' of illegal war. *Ibid.*

[127] ICC RPE, *supra* note 96, Rule 85.

[128] Both the people of Mali and the international community were deemed victims of the war crime of attacking cultural heritage sites in *Al Mahdi*, which awarded symbolic reparations to the Malian state and to the United Nations Educational, Scientific and Cultural Organization as a result. *Al Mahdi* TC: Reparations Order, *supra* note 105, §§ 51, 53, 106–107.

[129] Stahn, *supra* note 125, at 881; see also Brodney, 'Accounting for Victim Constituencies and the Crime of Aggression', 59 *Harvard International Law Journal* (2017) 37; McDougall, *supra* note 125, at 293; Pobjie, *supra* note 9, at 851–852. On Kampala, see *ibid.*, at 823–825.

To avoid that problem, while adhering to the orthodox account, the Court would need to define aggression victims, unlike victims of other crimes, to include persons not directly inflicted with the core criminal wrong.[130] The natural international precedent for such an approach would be that of the UN Compensation Commission (UNCC), which included as reparable any harm 'which, as a matter of objective assessment, would have been expected as a normal and natural consequence' of Iraq's invasion of Kuwait.[131] This broad standard underpinned reparations awards to 1.5 million claimants,[132] including, *inter alia*, persons harmed by traffic accidents and property losses caused by the general breakdown of civil order in Kuwait (as distinct from those caused by the violence of conflict) as well as persons who suffered losses because the conflict precluded the continuation of a contract.[133] Such an approach may be appropriate for a civil compensation commission, but, as discussed above, the criminal context is different.[134] It is difficult to imagine the ICC including as victims of genocide or crimes against humanity persons whose sole connection to those crimes is losing contracting opportunities because of the foreseeable disruption of those crimes. A robust case would need to be made for why such deviation would be appropriate in the context of aggression.[135]

C *ICC Victims on the Unjustified Killing Account*

On the unjustified killing account, the situation is simpler. The Court's approach to aggression victims could be defined by the core criminal wrong, remain centred on natural persons and focus on a narrower and more unified class than that addressed by the UNCC. This simplicity is not serendipitous; it is a natural consequence of that account's more coherent fit in international criminal law's broader normative posture.[136] From this perspective, those criminally wronged by aggression – those whose rights the crime is framed to protect – are not the attacked states but, rather, the human beings that are the direct objects of aggression's legally unjustified violence and yet unprotected by any other criminal prohibition.[137] In short, the direct victims

[130] Biting that bullet and arguing for a different standard for victims of aggression, see Pobjie, *supra* note 9, at 820–822, 826–831.

[131] UNCC Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of 'F3' Claims, Doc. S/AC.26/1999/24, 9 December 1999, § 23.

[132] United Nations Compensation Commission (UNCC), Claims, available at www.uncc.ch/claims.

[133] UNCC Governing Council, Decision 9, Doc. S/AC.26/1992/9, 6 March 1992, paras 9–10; UNCC Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category B Claims), 26 May 1994, at 25; UNCC Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning the First Installment of Individual Claims for Damages up to US$100,000 (Category C Claims), Doc. S/AC.26/1994/3, 21 December 1994, at 109, 133, 154; UNCC Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of E2 Claims, Doc. S/AC.26/1998/7 (1998), para. 147.

[134] Cf. section 3.A above.

[135] Arguing for a broad approach, while recognizing the 'universe of victims' to be 'potentially massive'. See Pobjie, *supra* note 9, at 843.

[136] See notes 22–25 above and accompanying text.

[137] Combatants' right to life is granted narrow protections in the *jus in bello*. See, e.g., Rome Statute, *supra* note 7, Art. 8(2)(b)(vi, xi), 8(2)(c), 8(2)(d)(ix). However, that regime does not protect combatants from the illegal and non-defensive violence of an aggressor. See note 20 above.

of aggression are the soldiers killed or harmed (physically or psychologically) fighting against the aggressor force and the civilians killed or harmed in proportionate collateral damage. Their deaths, injuries and losses are what make aggression a crime. Their loved ones are its indirect victims.[138] It is this large, but relatively focused, class of persons that ought to be represented in aggression proceedings and targeted with collective reparative awards, including memorials, contributions to veterans' care and reintegration programs, rebuilding programs, or the dissemination of aggressors' apologies, where plausibly sincere and relevant.[139] Notable among those not included in this category would be soldiers on the aggressor side, victims of *jus in bello* violations inflicted by the aggressor force and many of those compensated at the UNCC, such as those impacted by the non-fulfilment of contracts.

The exclusion of those harmed by an aggressor's war crimes warrants explanation. They are, after all, criminally wronged as a foreseeable consequence of the initiation of an illegal war. However, contrary to some prominent assertions, this wrongful violence cannot explain aggression's criminality.[140] Most obviously, that criminality does not depend on the occurrence of war crimes.[141] More fundamentally, a key virtue of the unjustified killing account is that it explains aggression's significance by recognizing that it fills what would otherwise be an anomalous gap in the criminality of unjustified killing and harming.[142] That gap is composed, by definition, of those that suffer the *jus-in-bello*-compliant violence of the aggressor force. War crimes are already criminal in another form, and attach to different perpetrators. Of course, if the war crimes inflicted in an aggressive war are not charged, their victims may never gain standing at the ICC.[143] But this problem is not unique to aggression. The *Lubanga* victims were limited to the child soldiers, not those harmed by the crimes inflicted foreseeably by those children once conscripted.[144] The failure to charge Thomas Lubanga with the latter crimes denied their victims standing and eligibility for reparations.[145] However, the injustice in such situations is the failure to prosecute him (or anyone else) for the other crimes. Expanding who counts as a victim of the crimes that are charged would not correct that failure. Instead, the Trust Fund for Victims can and should support a broader constituency of victims in the exercise of its independent mandate to assist victims not covered by ICC reparations.[146]

[138] See *supra* note 104.

[139] Rehabilitation is a core form of ICC reparations. Rome Statute, *supra* note 7, Art. 75. On the dissemination of a voluntary apology, see *Al Mahdi* TC: Reparations Order, *supra* note 105, § 71.

[140] Asserting the link between aggression and *in bello* atrocities, see, e.g., Ferencz, 'Epilogue: The Long Journey to Kampala', in Kreß and Barriga, *supra* note 9, 1501, at 1510.

[141] Mégret, *supra* note 11, at 1419.

[142] See notes 12–20 above and accompanying text; Dannenbaum, *supra* note 2, at 1272–1275.

[143] Arguing that this is a reason to extend aggression victim status to those harmed by *jus in bello* violations, see Pobjie, *supra* note 9, at 840.

[144] See *ibid.*, at 836; see notes 99–118 above and accompanying text.

[145] Cf. Spiga, *supra* note 103.

[146] Outside the aggression context, see *Katanga* TC: Reparations Order, *supra* note 101, §§ 154, 161; Dannenbaum, 'The International Criminal Court, Article 79, and Transitional Justice', 28 *Wisconsin International Law Journal* (2010) 234.

A final point worth noting here is that recognizing combatants as aggression's core victims departs not only from the traditional statist account but also from the otherwise far broader approaches of the UNCC and the Ethiopia-Eritrea Claims Commission (EECC), both of which excluded almost all combatant deaths and injuries from compensable *jus ad bellum* damages.[147] Excluding those combatants at the ICC would deny official recognition and solidarity to those whose death and suffering is at the heart of why aggression is a crime.

5 Four Objections

For the above reasons, the unjustified killing account of the criminalization of aggression underpins a *prima facie* interpretive case for two sets of soldiers' rights. However, more is at stake in reparations and disobedience rights than the moral core of the crime. Some might object that the reparations framework offered above threatens the separation of *jus ad bellum* and *jus in bello* or, alternatively, that it ignores the deaths of soldiers on the aggressor side. The proposed *jus ad bellum* right to disobey might be thought to place inappropriate demands on courts or to threaten military functioning in lawful wars. These objections are addressed in turn.

A *The Separation of* Jus ad Bellum *and* Jus in Bello

The UNCC did not explain the exclusion of almost all *jus-in-bello*-compliant combatant deaths and harms from its otherwise far-reaching *jus ad bellum* awards.[148] The EECC did. It reasoned that including such harms would weaken the force of the *in bello* regime.[149] As it happens, by including *jus-in-bello*-compliant harm to civilians as part of its award, the EECC failed to adhere to its own logic.[150] Nonetheless, the claim warrants consideration here. It is worth noting first that two differences weaken the purchase of the *in bello*/*ad bellum* argument in its application to the scope of reparations owed by leaders (or states), as compared to its importance as part of the explanation of soldiers' *jus ad bellum* immunity.[151] First, in the former context, there cannot be a

[147] Eritrea–Ethiopia Claims Commission (EECC), *Final Award: Ethiopia's Damages Claims*, 17 August 2009, § 338 (EECC: *Ethiopia's Award*). The UNCC allowed a narrow category of claims on behalf of Kuwaiti soldiers killed or injured during the days of and immediately following the invasion, but excluded combatants killed by Iraqi forces once the coalition was engaged. UNCC Governing Council, Decision 11, Doc. S/AC.26/1994/1, 26 May 1994; UNCC Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category B Claims), Doc. S/AC.26/1994/1, 26 May 1994, at 15.

[148] UNCC Governing Council, Decision 11, *supra* note 147, at 1.

[149] EECC: *Ethiopia's Award*, *supra* note 147, § 316. Cf. Heiskanen and Leroux, 'Applicable Law: *Jus ad Bellum*, *Jus in Bello* and the Legacy of the UN Compensation Commission', in T. Feighery, C. Gibson and T. Rajah (eds), *War Reparations and the UN Compensation Commission* (2015) 51. Cf. Walzer, *supra* note 9, at 38; Shue, 'Do We Need a "Morality of War"?', in Rodin and Shue, *supra* note 63, 87, at 89. Paulus objects to the criminalization of aggression itself on these grounds. Paulus, 'Second Thoughts on the Crime of Aggression', 20(4) *EJIL* (2009) 1117, at 1126.

[150] EECC: *Ethiopia's Award*, *supra* note 147, at §§ 321–349.

[151] See *supra* notes 71–76 and accompanying text.

claim about typical *jus ad bellum* non-culpability. The scope of *jus ad bellum* reparations is only at issue in cases in which a state or leader has been found responsible or criminally culpable for aggression and liable for repairing the victims.[152] Second, institutional obedience imperatives are relevant exclusively to subordinates, not to leaders or states.

These differences matter, because it is in the context of minimal general culpability and institutional obedience imperatives that the third reason for soldiers' *jus ad bellum* immunity – the value of sharpening *jus in bello* incentives – has bite. Without those elements, the *jus in bello* can function effectively as a cumulative regime of incentives that applies alongside and supplements the *jus ad bellum*.[153] In most cases, the likelihood of a conclusive *jus in bello* ruling (and thus the expected reparative cost of violation) is higher than is that of a *jus ad bellum* ruling. In any event, violating the *jus in bello* would entail additional, steeper reparative costs on top of *jus ad bellum* liabilities. And since subordinates have a duty to disobey only orders requiring that they violate the *jus in bello*, issuing such orders would risk triggering disobedience and undermining the war effort.[154]

Most fundamentally, the criminalization of aggression at the ICC itself rejects implicitly the notion that the *ad bellum* immunity of leaders is necessary to sharpen their *in bello* incentives. It is difficult to imagine that merely adding expressive civil liability for the deaths of enemy soldiers would distort leaders' incentives to comply with the *jus in bello* if the necessarily prior prospect of criminal liability for that very aggression were not already enough to do so.[155]

Incentives aside, a deeper worry might be that treating combatant killings as part of aggression's criminal wrong would entail the *jus ad bellum* swallowing the *jus in bello*.[156] This is a mistake. Appreciating the true independence of these regimes means recognizing that the two bodies of law prohibit and condemn different wrongs.[157] The fact that one regime does not prohibit an action cannot preclude the prohibition of that action by the other. Such preclusion would render the latter regime subservient to the former in precisely the way that the principle of independence denies.[158] It is uncontroversial that *jus in bello* violations can be prosecuted and otherwise sanctioned as illegal, even when perpetrated in the service of a lawful cause. The converse is also true; *jus ad bellum* reparations must apply even (perhaps especially) to 'acts or practices which in themselves comply with the rules of the law of war'.[159]

[152] Rome Statute, *supra* note 7, Art. 75(2).

[153] Applying them cumulatively, see House of Lords House of Commons Joint Committee on Human Rights, The Government's Policy on the Use of Drones for Targeted Killing, Doc. HL 141 HC 574, 10 May 2016, paras 3.12, 3.13, 3.16.

[154] Pobjie, *supra* note 9, at 841; Kreß, *supra* note 73, at 1134.

[155] Cf. Paulus, *supra* note 151, at 1126.

[156] Walzer, *supra* note 9, at 38, 128.

[157] Mégret, *supra* note 11, 1435, 1445.

[158] Kreß, *supra* note 73, at 1135.

[159] *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005) 168, para. 5, Declaration of Judge Ad Hoc Verhoeven.

B *The Tragedy of Deaths on Both Sides*

An alternative objection to the proposed scope of victim status might argue that war's core evil is that soldiers on all sides are equally coerced into its hell, whether by duty, duress, mendacity or enemy attack, and so all are ultimately the victims of the crime perpetrated by the aggressor leader.[160] There is a truth in that claim. Those forced to fight in an illegal war are wronged in two ways. As discussed above, they suffer the wrong of being forced to perpetrate a criminal wrong.[161] But they also suffer the wrong of being manipulated into a situation in which they are the legitimate targets of defensive violence and in which they may suffer harm or death.[162] The question is whether the latter wrong should ground ICC victim status. A strong reason that it should not is that it is not inherent in the crime. The killing and harming of aggressor troops is fully legally justified – compliant with both the *jus ad bellum* and the *jus in bello*.[163] The wrong that many of those troops suffer in this context turns not on the legal status of the war or the conduct within it but, rather, on the coercion and manipulation that puts them in a position of vulnerability to legitimate violence. If that coercion and manipulation is absent – as it would be in the case of volunteers or contractors who sign up aware of, or indifferent to, the war's criminality – those individuals suffer no wrong through their subjection to lawful defensive violence.[164]

In contrast, the wrongfulness of the violence inflicted upon soldiers fighting against aggression is determined simply by the fact of the crime. That distinguishes it from even the wrongful harm inflicted on those that are coerced or manipulated into fighting for an aggressor force. Including the latter as ICC victims would be in tension with expressive and practical reasons for the institution to focus on core crime victims.[165] Soldiers on the aggressor side punished or otherwise harmed in the course of trying to refuse to fight may qualify as 'indirect victims', but those harmed while fighting (even reluctantly) would not.[166] None of this is to say that the wrong inflicted on those harmed after being forced to fight in a criminal war ought not be acknowledged. Rather, the claim is that due to the remoteness of that harm from the criminal wrong, an ICC aggression prosecution is the wrong place for that acknowledgement. Although not framed in this way, the United Kingdom's Chilcot Inquiry into the Iraq War provides a partial and indicative model of an appropriate forum for such a process.[167]

[160] Mégret, *supra* note 11, at 1428, 1442–1443; Pobjie, *supra* note 9, at 843–844; see also Walzer, *supra* note 9, at 30, 37, 306; Lichtenberg, *supra* note 70, at 112

[161] Albeit without criminal liability for it. See section 2 above.

[162] Cf. notes 68–70 above.

[163] Cf. M. Halbertal, *On Sacrifice* (2012) at 85–89; E. de Vattel, *The Law of Nations*, translated by Charles Fenwick (1916 [1758]), vol. 3, para. 137.

[164] Mégret, *supra* note 11, at 1442.

[165] See notes 113–124 above and accompanying text.

[166] See note 104 above.

[167] Notably, the families of British soldiers and civilians killed in Iraq were reserved one-third of the seats for Tony Blair's testimony. 'Seats Ballot for Tony Blair's Grilling on Iraq War', *BBC News* (5 January 2010). On the need to provide an accounting to this constituency, see Walzer, *supra* note 9, at 110; 'Why Did Our Sons Die? An Inquiry into the Iraq War Is Essential', *The Guardian* (25 March 2009); Zappala, 'It's Official: My Brother Died in Vain', *Los Angeles Times* (14 January 2005), at B11.

C *Justiciability*

The proposed right to disobey on *jus ad bellum* grounds raises different concerns. One possible objection is that granting asylum to those who refuse would necessarily require determining the legality of foreign state action in violation of *par in parem imperium non habet*.[168] Notably, an understanding annexed to the aggression amendment stipulates that it 'shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State'.[169] This non-justiciability objection is misplaced. The ICC understanding, unlike the 1996 International Law Commission's draft, does not assert that the domestic exercise of jurisdiction over aggression by other states is prohibited; it merely observes that the Rome Statute has no impact on that question.[170] And domestic courts determining the legality of foreign conduct in order to discharge other obligations is less anomalous than the objection admits. It is often a prerequisite of non-refoulement or complicity determinations.[171]

It is not obvious why assessing foreign aggression would pose qualitatively unique problems in this respect.[172] In fact, international and regional refugee laws already presume domestic institutions' competence to do precisely that. The Refugee Convention and the EU Directive on Refugees exclude perpetrators of aggression from refugee status, requiring the receiving state to determine whether there are 'serious reasons' for considering that aggression has been committed.[173] The 1969 African Refugee Convention recognizes the refugee status of those fleeing the consequences of aggression.[174] And a *jus ad bellum* determination would be necessary if a senior official potentially liable for aggression were ever to flee punishment for her refusal to lead an aggressive war.[175] Even if a given state's domestic law were to preclude justiciability, clarifying that this is the reason for denying asylum would itself be significant.

[168] Cf. Van Schaack, 'Par in Parem Imperium Non Habet', 10 *JICJ* (2012) 133.

[169] ASP, *supra* note 18, Annex III, para. 5.

[170] Kreß and von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression', 8 *JICJ* (2010) 1179, at 1216; Scharf, 'Universal Jurisdiction and the Crime of Aggression', 53 *Harvard International Law Journal* (2012) 357. Cf. Report of the International Law Commission on the Work of its Forty-Eighth Session, Doc. A/51/10, 2(2) *ILC Yearbook* (1996) 27, at 30, Art. 8.

[171] The refugee must be 'unable, or owing to [his fear of persecution], unwilling to avail himself of the protection' of his state of nationality. Convention Relating to the Status of Refugees (Refugee Convention) 1951, 189 UNTS 150, Art. 1(A)(2) (as amended by the Protocol Relating to the Status of Refugees 1967, 606 UNTS 267). This often requires a finding that the home state is failing in its international human rights law obligations. O'Keefe, *supra* note 41, at 951. Defending refugee law's emphasis on state action, see Price, 'Persecution Complex', 47 *Harvard International Law Journal* (2006) 413. On complicity, consider *Belhaj v. Straw*, [2017] UKSC 3; ECtHR, *Al-Nashiri v. Poland*, Appl. no. 28761/11, Judgment of 24 July 2014.

[172] It should be borne in mind here that criminal aggression is both a violation of global concern and is limited to cases where the law is clear. O'Keefe, *supra* note 41, at 950–953.

[173] Refugee Convention, *supra* note 171, Art. 1(F)(a); *UNHCR Handbook*, *supra* note 37, at 149; Directive on Refugees, *supra* note 37, at 9, Art. 12(2)(a).

[174] Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, 1001 UNTS 45, Art. 1(2).

[175] *Hinzman v. Minister of Citizenship and Immigration [Canada]*, [2006] FC 420, para. 151; see also note 51 above.

For one thing, justiciability obstacles would not apply in all cases. If an international authority, such as the UN Security Council, the International Court of Justice or the ICC has made a *jus ad bellum* finding, an asylum court would not need to. And even in the absence of such a ruling, an asylum court could find in favour of an applicant on the procedural grounds that there are no domestic protections of any kind for *jus ad bellum* disobedience in his home state.[176]

D *The Global Importance of Military Functioning*

A final objection might focus on the institutional impact of a right to disobey. A military without strict obedience, it has long been claimed, would simply collapse in war.[177] Of course, the military collapse of an aggressor would typically be less destructive than prominent lawful alternatives for defeating such a force and, thus, presumably, a highly desirable outcome.[178] However, the objection is that, for three reasons, protecting disobedience in illegal wars would undermine military functioning in lawful wars.[179] First, war inflicts such hell on its participants that if certain conditions would enable soldiers to exit without penalty, there is a risk that motivated cognitive bias would cause some to believe that those conditions obtain, even when they do not. In other words, driven by the desire to get out, some troops may come to believe incorrectly that their war is illegal.[180] Second, the panic associated with killing and facing death is so disruptive to independent decision-making that the only way to avoid widespread emotional paralysis in war is through a system of mechanistic obedience.[181] Third, and perhaps most importantly, unit cohesion, which depends heavily on a sense of reciprocal obligation among comrades, is essential to the will to fight under such

[176] Cf. note 54 above.

[177] *Parker v. Levy*, 417 US 733, 763 (1974), Blackmun J concurring; *In re Grimley*, 137 US 147, 153 (1890); F. Lieber, *Manual of Political Ethics* (1839), vol. 2, at 667; S. Huntington, *The Soldier and the State* (1957), at 73; Walzer, *supra* note 9, at 289.

[178] Cf. McMahan, *supra* note 63, at 99–100. The standard response to aggression is defensive war. Additionally, the UN Security Council's ultimate tools for responding to aggression are economic sanctions and the authorization of armed force. The destructiveness of the latter (as compared to mass disobedience) speaks for itself. Among the most devastating sanctions regimes, that inflicted on Iraq following its invasion of Kuwait stands out.

[179] Ryan, 'Democratic Duty and the Moral Dilemmas of Soldiers', 122 *Ethics* (2011) 10, at 24; *United States v. Lusk*, 21 MJ 695, 700 (ACMR 1985). Arguing the opposite position – that states' need to gain soldiers' buy-in is a useful check on war – see McMahan, *supra* note 63, at 97–101; Scarry, 'War and the Social Contract', 139 *University of Pennsylvania Law Review* (1991) 1257. An alternative response is that forcing a soldier to fight against his or her conscience can itself undermine military efficacy. Hammer, *supra* note 39, at 215.

[180] Making related points, see P. Stromberg *et al.*, *The Teaching of Ethics in the Military* (1982), at 30; Osiel, *supra* note 38, at 65; Ryan, *supra* note 179, at 35. On the other hand, see Halbertal, *supra* note 163, at 68, 77–78, 89–90 (observing a dangerous 'moral self-deception' whereby those experiencing risk thereby understand themselves to be doing the right thing).

[181] Osiel, *supra* note 38, at 64–65; Shue, *supra* note 77, at 275. On fear, see Daddis, 'Understanding Fear's Effect on Unit Effectiveness', *Military Review* (July–August 2004) 22. On the difficulty of killing, see D. Grossman, *On Killing* (rev. edn, 2009) at xxxv, 4–29 74, 88, 92, 252. On how automatic action (often pursuant to orders) overcomes this, see Grossman, *ibid.*, at 143; Daddis, *ibid.*, at 24–26. Arguing against this necessity, see Osiel, *supra* note 38, at 171, 211–221, 227, 275.

conditions.[182] In combination, the worry is that mistaken disobedience or deliberative paralysis on the part of a few soldiers could trigger disobedience cascades, undermining functioning in lawful wars.[183] Since the manifest quality of a criminal aggression's illegality may not be apparent to lower-level troops, limiting the right to criminal wars would not forfend these risks.[184] Instead, a system of swift punishment for any refusal is thought to be institutionally essential.[185] If this is right, then preserving the ability of states to force their soldiers to fight in all wars may be vital to ensuring both that they have the means to respond to illegal attack and that their militaries are sufficiently well functioning to deter potential aggressors. Given the contribution of these capacities to global security, this is a matter of international concern.

There are, however, reasons to question whether enforced obedience without a *jus ad bellum* exception is in fact essential to military functioning in lawful wars. At least some of the arguments above were presented against requiring disobedience on *jus in bello* grounds.[186] And, if strict obedience were truly required to ensure effective institutional performance in war, one would not expect to see major military powers turn to contractors lacking such strict lines of command for significant security roles in their wars, as did Britain and the USA in Iraq and Afghanistan.[187] More fundamentally, even on its own terms, the institutional necessity account is contingent. Consider three alternative ways of protecting disobedience without running afoul of its imperatives. First, protections that would apply only to disobedience occurring after an authoritative international determination of the war's legality would not threaten obedience in other wars.[188]

Second, and more ambitiously, disobedience rights could be upheld in all aggressive wars, with certain constraints. Consider, for example, a right to disobey that would be vindicated only retrospectively, after the war's end, for those who were punished during the war and who had disobeyed outside the theatre of conflict – whether predeployment, between deployments or because their role did not require in-theatre

[182] Grossman, *supra* note 181, at 149–155; *US Army Field Manual*, Doc. 6–22.5 (23 June 2000), paras 2–5, combat stress; Osiel, *supra* note 38, at 212–221; B. Shalit, *The Psychology of Conflict and Combat* (1988); *Parker v. Levy*, 417 US 733, 788 (1974), Stewart J dissenting; *R v. Michael Peter Lyons*, [2011] EWCA Crim. 2808, para. 39.

[183] Osiel, *supra* note 38, at 224–230; *Michael Peter Lyons*, *supra* note 182, para. 39; Daddis, *supra* note 181, at 26–27. When warranted, disobedience cascades can work in a positive direction to overcome the deep disposition to obey. S. Milgram, *Obedience to Authority* (1974), at 119.

[184] See Elements of Crimes, *supra* note 8, at 43 (elements 5–6); Anggadi, French and Potter, 'Negotiating the Elements of the Crime of Aggression', in S. Barrage & C. Kreß (eds), *The Travaux Préparatoires of the Crime of Aggression* (2011) 58, at 75–79.

[185] *US ex rel. Toth v. Quarles*, 350 US 11, 22 (1955); Lincoln, Letter to New York Democrats, 12 June 1863, reprinted in R. Current (ed.), *The Political Thought of Abraham Lincoln* (1965) 248; Osiel, *supra* note 38, at 51–52.

[186] See, e.g., Eagleton, 'Punishment of War Criminals by the United Nations', 37 *AJIL* (1943) 495, at 497.

[187] *In re KBR*, 736 F. Supp. 2d 956, 956 (D. Md. 2010); H. Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (2011), at 28–53; L. Dickinson, *Outsourcing War and Peace* (2011), ch. 2; Wither, 'European Security and Private Military Companies', 4(2) *Connections* (2005) 107, at 115–117.

[188] See discussion between notes 175–176 above.

deployment. Given the generally strong propensity to submit to authority and the certainty of immediate punishment during the war (and the hope of only delayed retrospective vindication), few who are not highly confident of their war's illegality would be moved to disobey.[189] Requiring that disobedience occur out of the theatre of conflict would also minimize the danger of triggering emotional paralysis in the heat of battle.[190] Since the impact on unit cohesion is contingent on the first two phenomena, this, too, would be relatively well shielded, except perhaps in wars with overwhelming public evidence of illegality.

A third alternative way to protect disobedience would be to focus on certain kinds of war. Actions composed almost exclusively of remotely piloted operations or aerial attacks on enemies lacking the means to respond do not entail (for the soldiers on the side running those operations) the hellish risks that underpin motivated bias, emotional paralysis and the need for unit cohesion.[191] Protecting disobedience in illegal drone wars would not undermine the state's capacity to wage lawful wars.[192] Notably, Harold Koh, the US Department of State's legal adviser, argued in testimony before the Senate Foreign Relations Committee that their low-risk profile warranted treating such wars differently under domestic law.[193]

The aim in spotlighting these three scenarios is not to provide a fully fleshed-out schedule of disobedience rights. Instead, it is to show that, to the extent it applies at all, the institutional necessity of obedience is limited. Scope for a *jus ad bellum* right to disobey that would not undermine military functioning in lawful wars exists, and the unjustified killing account of aggression entails that it should be respected whenever compatible with that institutional necessity.

6 Conclusion

International criminal law is part of a broader legal system in which, fragmentation notwithstanding, there are lines of basic normative interdependence. As such, understanding the normative core of an international crime has repercussions that extend beyond how to interpret the boundaries of the crime itself. Recognizing aggression to

[189] Milgram, *supra* note 183; H. Kelman and V.L. Hamilton, *Crimes of Obedience* (1989), at 146–166.

[190] See McMahan, *supra* note 63, at 97–98; Shue, *supra* note 77, at 275, n. 14; Osiel, *supra* note 38, at 289. In wars fought abroad, desertion in theatre is far less likely than desertion at home. Osiel, *supra* note 38, at 209.

[191] See notes 180–185 above.

[192] The USA's use of Central Intelligence Agency agents and private contractors (neither bound by the ban on desertion) for many early drone operations indicates as much. Uniform Code of Military Justice, 10 USC § 885 (2006), Art. 85; Taussig-Rubbo, 'Outsourcing Sacrifice', 21 *Yale Journal of Law and Humanities* (2009) 101.

[193] Testimony by Legal Adviser Harold Hongju Koh, US Department of State on Libya and War Powers before the Senate Foreign Relations Committee, 28 June 2011, at 8. On the phenomenon of risklessness, see, e.g., Rogers, 'Zero Casualty Warfare', 837 *International Review of the Red Cross* (2000) 165; Beard, 'Law and War in the Virtual Era', 103 *AJIL* (2009) 409; Walzer, 'Kosovo', in M. Walzer, *Arguing about War* (2005) 99.

be a crime of unjustified killing has implications for relevant areas of refugee law and international human rights law, as well as for the application of the ICC's principles of victim participation and reparation in aggression proceedings. Soldiers ordered to fight for an aggressor force have a right to refuse. Those harmed fighting against an aggressor force are, together with collaterally harmed civilians, the core victims of the crime and are eligible for that status at the ICC. In both respects, recognizing the human core of aggression clarifies the vital role that its criminalization plays in protecting those whose rights are all too often overlooked because they put on a uniform.