

THE YALE LAW JOURNAL

TOM DANNENBAUM

Why Have We Criminalized Aggressive War?

ABSTRACT. On the dominant view, accepted by both defenders and critics of the criminalization of aggression, the criminal wrong of aggressive war is inflicted on the attacked state. This view is mistaken. It is true that whether a war is criminally aggressive is determined ordinarily by whether it involves a particular form of interstate wrong. However, that is not *why* such wars are criminal. Aggressive war is a crime because it entails killing without justification. Five reasons explain why this is so. First, banning aggression *restricted* states from using force to protect their core sovereign rights, including even their rights of political independence and territorial integrity. Those core states' rights cannot make sense of the move to ban aggression. Second, what distinguishes aggression from any other sovereignty violation—what makes *it* criminal, when no other sovereignty violation is—is not that it involves an especially egregious violation of territorial integrity or political independence, but that it involves killing without justification. Third, the unjustified killing account makes sense of aggression's standing alongside genocide, war crimes, and crimes against humanity. The traditional notion that aggression is a crime against sovereignty instead isolates aggression as the inexplicably odd crime out. Fourth, the public reasons for restricting *jus ad bellum* rights in the early twentieth century focused not on infringements of states' rights but on the infliction of death without justification. Finally, the importance of wrongful killing to the criminalization of aggression was apparent at the post-World War II tribunals at Nuremberg and Tokyo. Understanding the crime in this way matters doctrinally. This understanding clarifies the boundaries of the crime, resolving hard cases like unilateral humanitarian intervention and bloodless invasion. It also has implications for the legal rights of soldiers involved on either side of such wars.

AUTHOR. Lecturer in Human Rights, University College London. For potent contributions ranging from conceptual discussions prior to the first draft to granular criticism of the fully drafted text, I am deeply indebted to Dapo Akande, Gary Bass, Charles Beitz, Kiel Brennan-Marquez, Amy Chua, David Crane, Oona Hathaway, Paul Kahn, Katerina Linos, Itamar Mann, Daniel Markovits, Frédéric Mégret, Marko Milanovic, Michael Reisman, Jed Rubenfeld, Kim Lane Scheppele, Scott Shapiro, John Witt, and participants in the Oxford Public International Law seminar and the American Society of International Law New Voices session. I am also very grateful to the *Yale Law Journal* editorial team, led by William Stone, for outstanding comments and suggestions, as well as for their work in shepherding this Article through to publication. As always, any errors are my sole responsibility.



ARTICLE CONTENTS

INTRODUCTION	1244
I. THE NORMATIVE UNDERPINNINGS OF A CRIME	1249
II. THE ORTHODOX NORMATIVE ACCOUNT OF THE CRIME OF AGGRESSION	1254
A. The Walzerian Account: The State as Victim and Perpetrator in the Law	1255
B. Criticizing the Criminalization of Aggression on Walzerian Terms	1261
III. WHY AGGRESSIVE WAR IS AN INTERNATIONAL CRIME	1263
A. Sovereignty Cannot Explain the <i>Jus Ad Bellum</i> or the Criminalization of Aggression	1265
B. The Human Core of Aggression	1270
C. The Humanization of International Law	1278
D. Revisiting the History of the Move to a Restrictive <i>Jus Ad Bellum</i>	1281
E. Aggression and the Human Dimension in the Courtroom	1283
F. The Wrong of Aggressive War	1286
IV. TWO PROBLEM CASES: BLOODLESS AGGRESSION AND HUMANITARIAN INTERVENTION	1287
A. Bloodless Invasion	1288
B. Humanitarian Intervention	1295
V. WHY IT MATTERS THAT AGGRESSION IS A CRIME OF UNJUSTIFIED KILLING	1301
A. The Utility of Normative Clarity in Resolving Ambiguous Cases	1301
B. The Right To Disobey	1306
C. Reparations and Participation at the ICC	1312
CONCLUSION	1317

INTRODUCTION

Nearly seventy years have passed since an international tribunal has convicted a defendant of the crime of aggressive war. Nonetheless, beginning this year, aggression is likely to join the list of violations over which the International Criminal Court (ICC) has jurisdiction.¹ To understand the implications of this development, and to grasp the controversies surrounding it, we need to be clear about what is criminally wrongful about aggressive war. This Article investigates that question.

Like most elements of international criminal law, aggression finds its foundation in the statutes and jurisprudence of the post-World War II tribunals at Nuremberg and Tokyo.² However, it is an anomalous crime in several respects. The statutes of every post-Cold War international and hybrid criminal tribunal other than the ICC have ignored aggression, even as the General Assembly has repeatedly endorsed its status as an international crime.³ This marginalization

-
1. Assembly of States Parties, Res. RC/Res.6 (June 11, 2010) [hereinafter ICC Aggression Amendments], http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf [<http://perma.cc/4AX5-JPK6>]; Rome Statute of the International Criminal Court art. 8 *bis*, July 17, 1998, 2187 U.N.T.S. 90 (last amended November 29, 2010, depository notification C.N.651.2010.TREATIES-8) [hereinafter Rome Statute]. The necessary thirty states' ratifications, *id.* art. 15 *bis* (2), have now been reached, *Status of Ratification and Implementation*, GLOB. CAMPAIGN FOR RATIFICATION & IMPLEMENTATION KAMPALA AMENDMENTS ON CRIME AGGRESSION (June 26, 2016), <http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation> [<http://perma.cc/KWN3-ESZH>].
 2. See, e.g., Charter of the International Tribunal for the Far East art. 5(a), Jan. 19, 1946, 1589 T.I.A.S. 21 [hereinafter IMFTE Statute]; Charter of the International Military Tribunal art. 6(a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter]; Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (Dec. 20, 1945), in 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 50, art. II(1)(a) (1946) [hereinafter Control Council Law No. 10]. For court decisions and proceedings accepting these innovative provisions as valid law, see *Judgment, in 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL* 411, 461-66, 524-26, 528-32, 533-34, 539-40, 544-45, 550-51, 556-57, 561-62, 568-69, 574-76, 580-82 (1948) [hereinafter *IMT Judgment*]; *International Military Tribunal for the Far East, Judgment of 12 November 1948*, in 20 THE TOKYO WAR CRIMES TRIAL 48,413, 48,437-41 (R. John Pritchard & Sonia Magbanua Zaide eds., 1981) [hereinafter *IMTFE Judgment*]; and *Judgment, in 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10*, at 385-89, 399-416, 418-35 (1949) [hereinafter *Ministries Case*].
On the landmark status of the Nuremberg and Tokyo trials in establishing the crime, see, for example, *R v. Jones* [2006] UKHL 16, [1], [2007] 1 AC 136 (appeal taken from Eng.); and WHITNEY R. HARRIS, TYRANNY ON TRIAL 555 (1954).
 3. On its General Assembly endorsement, see G.A. Res. 3314 (XXIX), annex art. 5(2), Definition of Aggression (Dec. 14, 1974) [hereinafter UNGA Definition of Aggression]; and G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Rela-

stands in stark contrast to the central focus placed on war crimes, crimes against humanity, and genocide in those tribunals. Even aggression's initial codification in the Rome Statute in 1998 was extraordinary. Despite being included as one of the four categories of crime, aggression was a placeholder bereft of content; the Statute required a subsequent definitional amendment before it would come into effect.⁴

The scope of criminal responsibility for aggression is also unique. At Nuremberg and Tokyo, the tribunals held that soldierly obedience was no excuse for participation in war crimes and crimes against humanity.⁵ In the case of aggression, however, they restricted criminal liability exclusively to members of the German and Japanese leadership cabals.⁶ The ICC amendment makes this leadership element explicit and buttresses it with a provision specific to aggression that narrows significantly the complicity doctrines on which almost every post-Cold War international conviction has hinged.⁷

Finally, and most significantly, aggression is widely understood to be rooted in a moral wrong "committed against a state" rather than in wrongs "against

tions and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) [hereinafter Friendly Relations Declaration]. Before the Rome Statute, the crime of aggression was part of the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind. See Int'l Law Comm'n, Rep. on the Work of Its Forty-Eighth Session, U.N. Doc. A/51/10 (1996) [hereinafter ILC, Draft Code of Crimes]. It finds no mention in the statutes of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Extraordinary Chambers in the Courts of Cambodia, or the Special Court for Sierra Leone.

4. Rome Statute, *supra* note 1, arts. 5(1)(d), 5(2).
5. On the duty to disobey, see *infra* note 150 and accompanying text.
6. See, e.g., Control Council Law No. 10, *supra* note 2, art. II(2) (applying the crime of aggression only to those who held "high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country"); United States v. Krauch, Military Tribunal VI, in 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1126 (1949) [hereinafter I.G. Farben Case]; United States v. Wilhelm von Leeb et al., in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 462, 488-90 (1949) [hereinafter High Command Case]; *IMTFE Judgment*, *supra* note 2, at 49,827.
7. Rome Statute, *supra* note 1, arts. 8 *bis* (1), 25 *bis* (3); see sources cited *infra* note 264 (discussing the "moral equality" doctrine for combatants). The notion that aggression is a "leadership crime" is often considered obvious, and it generated no debate in the ICC's amendment process. The United States' chief prosecutor at Nuremberg, Robert Jackson, later said, "It never occurred to me, and I am sure it occurred to no one else at the conference table, to speak of anyone as 'waging' a war except topmost leaders . . ." Robert H. Jackson, *The United Nations Organization and War Crimes* (April 26, 1952), 46 PROC..ANN. MEETING (AM. SOC'Y INT'L L.) 196, 198 (1952).

individuals.”⁸ In an open letter urging States Parties *not* to proceed with the incorporation of aggression, a coalition of pro-ICC human rights activists stressed precisely this normative contrast between the state-focused crime of aggression and the human-focused crimes of genocide, war crimes, and crimes against humanity.⁹ The distinction is arguably implicit in every relevant international criminal law provision, from Nuremberg and Tokyo to the ICC amendment.¹⁰

The most influential moral accounts of the crime of aggression also understand the wrong of aggression in these terms. For Michael Walzer and others defending its criminal wrongfulness, aggression is fundamentally a crime against the political collective, rooted in a “domestic analogy” in which states “possess rights more or less as individuals do.”¹¹ Critics of the criminalization of aggression adopt the same understanding of the internal normative posture of the law, but object to its classification alongside the other international crimes precisely *because* it privileges sovereignty over humanity.¹² For them, this feature of aggression contradicts what they take to be the defining moral thrust of international criminal law. Walzer and these critics disagree on whether the sovereignty violation that occurs in an aggressive war is a moral wrong worthy of criminalization. However, from the internal legal point of view, they agree that the crime as currently constituted is rooted in that claimed wrong.

Other international crimes, like genocide, also involve wrongs against a collective entity, but what is special about the putative wrong underpinning the crime of aggression on both of these competing views is that it occurs *exclusively* on the macro level. No one would deny that the individual men and boys

8. Letter from Aryeh Neier, President, Open Soc’y Inst. et al. to Foreign Ministers, Regarding Aggression and the International Criminal Court (May 10, 2010), <http://www.opensocietyfoundations.org/sites/default/files/icc-aggression-letter-20100511.pdf> [<http://perma.cc/G9GX-2FSX>].

9. *Id.*; see also *International Criminal Court: Amnesty International’s Call for Pledges by States at the 13th Session of the Assembly of States Parties*, AMNESTY INT’L 5, n.18 (Oct. 29, 2014) [hereinafter *International Criminal Court*], <http://www.amnesty.org/download/Documents/8000/ior530102014en.pdf> [<http://perma.cc/PW47-HZGA>] (“Although [Amnesty International] recognizes that an act of aggression by one state against another can lead to serious human rights abuses in international armed conflicts, it does not take a position on whether conflicts themselves should be determined to be just or legal or whether leaders suspected of committing the specific crime of aggression—a crime by one state against another state—should be prosecuted.”).

10. See *infra* Section II.A.

11. MICHAEL WALZER, *JUST AND UNJUST WARS* 58 (1977); see *infra* Section II.A.

12. See *infra* Section II.B.

killed at Srebrenica were the victims of genocide, even though it was also a crime against Bosnian Muslims as a group.¹³ In contrast, individual soldiers killed while fighting their states' lawful wars against aggression are generally *not* thought to be victims of a crime.¹⁴ Or so the traditional normative account goes.

This Article rejects that understanding. Not only are individuals, including soldiers, wronged gravely in an aggressive war, the wrongfulness of their treatment as individuals is the very crux of what explains the criminalization of aggression. It is the normative core of the crime.

To be clear, the dominant view, shared by both defenders and critics of the criminalization of aggression, is correct in one respect: a war of aggression is an interstate breach and, typically, a violation of sovereignty. In other words, whether a war is criminal depends in large part on whether that interstate breach occurred. However, imputing personal criminal responsibility for an interstate breach is anomalous; that violation is not *why* aggressive war is criminal. The core moral problem with aggressive war is neither that it infringes sovereignty, nor even the extent to which it infringes sovereignty. Indeed, in at least one circumstance, it need not infringe sovereignty at all.¹⁵ Rather, the core moral issue is that aggressive war entails killing and maiming for reasons that are now considered unacceptable: reasons other than the protection and security of human life.

This Article establishes and defends this internal normative account of the crime of aggression. Achieving normative clarity in this respect is not merely an academic or theoretical exercise. Coherent interpretation of the law requires understanding its moral underpinnings. Excavating and clarifying those foundations can have profound doctrinal and structural effects. Understanding that

-
13. See, e.g., Rb.-Den Haag 16 juli 2014, ECLI:NL:RBDHA:2014:8748 (Mothers of Srebrenica/Netherlands) (Neth.), ¶ 4.179 (noting that the laws against genocide “partly serve to protect Claimants’ family members”); *Victim Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecutions*, REDRESS & INST. FOR SECURITY STUD. 9 (Sept. 2015), <http://www.issafrica.org/uploads/Victim-Rights-Report-27-Aug-2015.pdf> [<http://perma.cc/Y77R-5CX6>] (arguing that crimes against humanity, genocide, and often war crimes may be collective in one sense, but they also “directly attack the personality and individuality of victims, disrespecting their very ‘human existence’” (quoting CHRISTOPH SAFFERLING, INTERNATIONAL CRIMINAL PROCEDURE 166 (2012))).
 14. Consider, for example, the explicit exclusion of such individuals from the reparations calculations of the claims commissions following the Iraqi invasion of Kuwait and the Eritrean invasion of Ethiopia at either end of the 1990s. See *infra* notes 294-296 and accompanying text.
 15. See *infra* notes 132-144 and accompanying text.

the criminal wrong of aggressive war is its unjustified infliction of death and human suffering has three material consequences.

First, it clarifies how to interpret hard cases. Even if one accepts the dominant view that humanitarian intervention without Security Council authorization is illegal, the normative framework offered here weighs heavily against an interpretation on which such action would be *criminal*. By responding defensively to the internationally criminal, massive infliction of human harm, a genuine humanitarian intervention lacks the core wrong that makes aggressive war worthy of criminalization. Similarly, “bloodless” military invasions are best interpreted as noncriminal, despite their extremely effective and illegal usurpation of territory and political control. To be clear, this does not mean that such invasions cannot be countered lawfully by means such as defensive force and sanctions (unilateral or collective). Nor does it mean that the ensuing occupation is lawful or shielded from other legal remedies. It only means that such actions are best interpreted as falling below the demanding threshold of criminality.

Second, normative coherence requires international law to take seriously the human rights and refugee claims of soldiers who refuse to fight in aggressive war. Some adherents to the traditional account see soldiers who fight in criminal wars as contributory cogs, no more intimately involved than taxpayers in a macro wrong against a foreign state. This is a mistake; such soldiers perpetrate directly the constituent wrongs of the criminal action. There are good reasons not to hold them criminally or civilly liable for their participation. However, these are not reasons to deny them the *right* to refuse to fight in such wars. On the contrary, the best interpretation of refugee and human rights law would affirm such a right.

Third, recognizing that the core victims of the crime of aggression are individuals, rather than states, sheds light on how we ought to conceive of victim judicial participation and reparations in ICC aggression prosecutions. The crime of aggression is the core element of international criminal law that protects combatants’ and collateral civilians’ right to life. Unlike recent *jus ad bellum* reparations regimes, which have excluded combatant deaths from the wrong warranting remedy, the ICC regime of reparations for aggression must reflect the normative centrality of precisely those personal violations.

This Article provides the normative foundation for those doctrinal and operational implications. Part I explains what it is to offer a normative account of a law and why it is appropriate here. Part II identifies the dominant normative account of aggression, as understood by both advocates and critics of its criminalization. On this view, the core wrong of aggressive war is a wrong against the victim state and the political collective that it represents. Part III debunks that account, arguing that five aspects of aggression and its legal context show

that its criminalization is primarily about wrongful killing: (1) sovereignty is indeterminate as a normative guide to the *jus ad bellum* and it cannot explain why aggression is criminal, but more severe sovereignty violations are not; (2) its infliction of unjustified human suffering *can* explain why illegal war is the only criminal sovereignty violation; (3) understanding aggression in this way reconciles it to the broader international criminal law project; (4) the claimed motivation for strengthening the *jus ad bellum* in the early- to mid-twentieth century was focused on human suffering, not states' rights or sovereignty; and (5) the jurisprudence of Nuremberg and Tokyo affirms the place of unjustified killing at aggression's normative core. Part IV addresses potential problems for this account posed by the legal status of bloodless aggression and humanitarian intervention. Part V introduces the key legal consequences of adopting this normative account.

I. THE NORMATIVE UNDERPINNINGS OF A CRIME

Stated most abstractly, a “normative account” aims to elaborate a notion of wrongfulness that would make sense of and underpin the law's posture on a given issue. The premise of engaging in work of this kind is that laws do not merely serve to coordinate or to set incentives; they also instantiate what the community in question takes to be important values. The balance between the coordinative and moral expressive functions varies across domains, but criminal law in particular takes a stand on what is right and wrong and on who has acted culpably. It does not provide priced permissions; it prohibits and it condemns.¹⁶

This is nowhere clearer than in international criminal law. We cannot make sense of the criminalization of obedient participation in crimes against humanity or genocide as a way of coordinating behavior.¹⁷ Confronting individuals with contradictory obligations under domestic and international law may even muddy coordination and confuse expectations. The criminalization of such

16. This is manifest in particularly sharp form in the moral expressivism and moral education theories of punishment. See, e.g., R. A. DUFF, TRIALS AND PUNISHMENTS 235-62 (1986); Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965); Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 212 (1984). For an account of expressive legal theory beyond the criminal law context, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

17. On the duty to disobey, see sources cited *infra* note 150.

obedient participation is instead a moral expression of the wrongfulness of such participation and the culpability of those who engage in it.¹⁸

The criminalization of aggression, like that of other behaviors, is an expression of fundamental moral values. At the core of the contemporary *jus ad bellum* is the public moral claim that certain kinds of war are fundamentally wrongful.¹⁹ Signatories to the Kellogg-Briand Pact of 1928—the first treaty to ban war explicitly—not only committed to “renounce” the recourse to war, but also to “condemn” it.²⁰ This followed the unabashedly moralized framing of the issue by the Pact’s intellectual forefathers and was accompanied by claims that war had finally been recognized as a global public wrong, rather than a state of bilateral dispute.²¹

-
18. For arguments that this is the most viable normative account of the prosecution and punishment of such acts, see MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 3, 61, 173-79 (2007); Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT’L CRIM. L. REV. 93, 117 (2002); Margaret M. deGuzman, *Choosing To Prosecute*, 33 MICH. J. INT’L L. 265, 312 (2012); Ralph Henham, *Some Issues for Sentencing in the International Criminal Court*, 52 INT’L & COMP. L.Q. 81, 111 (2003); David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 569, 576 (Samantha Besson & John Tasioulas eds., 2010); Robert D. Sloane, *The Expressive Capacity of International Punishment*, 43 STAN. J. INT’L L. 39, 42 (2007); and Bill Wringe, *Why Punish War Crimes?*, 25 LAW & PHIL. 159, 160 (2006). Just as at Nuremberg, see *infra* notes 25-26, international prosecutors today continue to use heavily moralized language. David Crane, in his opening statement at the trial of Revolutionary United Front leaders before the Special Court for Sierra Leone spoke of prosecuting leaders responsible for “horror, beyond the gothic into the realm of Dante’s inferno,” calling the defendants and their troops “evil.” *Prosecutor v. Sesay*, Case No. SCSL-2004-15-PT, Opening Statement of David M. Crane 2, 4 (July 5, 2004). The ICC relies on its “moral presence” to move states to arrest and prosecute most international criminals. *Informal Expert Paper: The Principle of Complementarity in Practice*, OFFICE PROSECUTOR INT’L CRIM. CT. 5, ICC-01/04-01/07-1008-AnxA (Mar. 30, 2003), <http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> [<http://perma.cc/4BJ2-8NG5>]. The Office of the Prosecutor understands the function of its own prosecutions in terms of moral expression, rather than deterrence or retribution. See *id.* One of the most prominent judicial voices in international criminal law, Antonio Cassese, used the regime’s “purpose” of punishing “morally reprehensible” behavior as an interpretive guide. *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 48 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).
19. David Luban, *Just War and Human Rights*, 9 PHIL. & PUB. AFF. 160, 161 (1980) (asserting that international law “expresses a theory of just war” and arguing that “to claim that international law is simply irrelevant to the theory of just war . . . is both implausible and question-begging”).
20. General Treaty for Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact].
21. John Dewey wrote that the proposal would “concentrat[e] all the moral forces of the world against modern war, that abomination of abominations.” John Dewey, *Foreword* to SALMON

The asserted connection between the criminalization of aggression and underlying moral values was even more explicit at Nuremberg. In his opening statement before the International Military Tribunal at Nuremberg (IMT), chief prosecutor Justice Robert Jackson stressed, “When I say that we do not ask for convictions unless we prove crime, I do not mean mere technical or incidental transgression of international conventions. We charge guilt on planned and intended conduct that involves moral as well as legal wrong.”²² He labeled the pre-Kellogg-Briand legal order “contrary to ethical principles” because it denied the maxim “that there are unjust wars and that unjust wars are illegal.”²³

The Tribunal itself went to some lengths to establish the positivist credentials for outlawing aggressive war.²⁴ However, it combined these efforts with deeply moralized claims. The IMT held that, even in the absence of an explicit criminal law prohibition, the leader of an aggressive war “must know that he is

O. LEVINSON, *OUTLAWRY OF WAR* 7, 7 (1921). Col. Raymond Robins wrote of progress in the “moral code of mankind” and described a desire to have “militarists branded as super felons among the criminals of the earth.” Raymond Robins, *Foreword* to LEVINSON, *supra*, at 10, 10. Levinson himself described waging war as “the greatest of all wrongs” and “the most lawful ‘crime’ in the world.” LEVINSON, *supra*, at 14-15. On the prominence of Levinson, Dewey, and Robins in this regard, see, for example, William Hard, *The Outlawry of War*, 120 ANNALS AM. ACAD. POL. & SOC. SCI. 136, 136 (1925); and OONA HATHAWAY & SCOTT SHAPIRO, *THE INTERNATIONALISTS: HOW THE RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* ch. 5 (forthcoming 2017) [hereinafter HATHAWAY & SHAPIRO, *THE INTERNATIONALISTS*]. On the shift to seeing war as a global public wrong, rather than a bilateral matter, see, for example, Henry L. Stimson, *The Pact of Paris: Three Years of Development*, 11 FOREIGN AFF. (SPECIAL SUPPLEMENT) vii, xi-xii (1932); and Quincy Wright, *The Meaning of the Pact of Paris*, 27 AM. J. INT’L L. 39, 59 (1933). Scott Shapiro and Oona Hathaway argue that this (and not the later U.N. Charter or the Nuremberg judgments) was *the* transformative moment in the transition of contemporary international law as a whole towards a global system of “outcasting,” rather than unilateral enforcement in bilateral relationships. HATHAWAY & SHAPIRO, *THE INTERNATIONALISTS*, *supra*. For their initial statement on outcasting, see Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011) [hereinafter Hathaway & Shapiro, *Outcasting*].

22. *Opening Statement at Nuremberg by Justice Robert H. Jackson, Chief Prosecutor for the United States*, United States v. Göring (Nov. 21, 1945), in 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98, 102 (1947) [hereinafter *Jackson Opening Statement at Nuremberg*].
23. *Id.* at 145. Shortly after the trial, Jackson opined that the prosecution of the Nazi leaders, including for the crime of aggressive war, “may constitute the most important moral advance to grow out of this war.” ROBERT H. JACKSON, *Report to the President by Mr. Justice Jackson, October 7, 1946*, in, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 432, 439 (1949). Jackson’s colleague Whitney Harris emphasized the “moral condemnation” underpinning the prosecutions. HARRIS, *supra* note 2, at 529.
24. *IMT Judgment*, *supra* note 2, at 461-66.

doing wrong” and insisted that “it would be unjust if his wrong were allowed to go unpunished.”²⁵ It emphasized in this respect such wars’ wrongfulness in “the conscience of the world,” terming aggression “essentially an evil thing” and the “supreme international crime.”²⁶ The U.S.-administered Nuremberg Military Tribunals (NMT) took a similar line.²⁷

A normative account seeks to make sense of such a legal posture. What is it that makes aggression a “high crime” rather than a “mere tort” in international law?²⁸ What moral judgment underpins that status? To hold that such questions have answers is not to hold that any particular individual must accept the moral posture underpinning the substance of the law in all cases; it is merely to recognize the law’s internal claim to normativity.²⁹

Thus, to give a normative account of a law is to endeavor to inhabit the internal legal point of view.³⁰ This means starting not from first principles, but from an analysis of the current law. However, it also means seeking to account for that law’s underlying moral claim, rather than seeking merely to describe or interpret the rule. The premise of the argument that follows is that a normative

25. *Id.* at 462; see *Jackson Opening Statement at Nuremberg*, *supra* note 22, at 147 (“[I]f it be thought that the Charter . . . does contain new law I still do not shrink from demanding its strict application . . . I cannot subscribe to the perverted reasoning that society may advance and strengthen the rule of law by the expenditure of morally innocent lives but that progress in the law may never be made at the price of morally guilty lives.”).

26. *IMT Judgment*, *supra* note 2, at 427, 465; see also HARRIS, *supra* note 2, at 528-29 (“Insofar as these invasions were acts of pure aggression, and wholly without legal justification, the resultant killings offended the conscience of mankind . . . It is, after all, moral condemnation which underlies legal prosecution.”). It sourced the law of war “not only in treaties,” but also in “general principles of justice applied by jurists and practiced by military courts.” *IMT Judgment*, *supra* note 2, at 464.

27. *Ministries Case*, *supra* note 2, at 318-19 (finding that aggressive war was “essentially wrong” even before the Kellogg-Briand Pact).

28. Harry F. Cunningham, Note, *Meaning of “Aggression” in the United Nations Charter*, 33 NEB. L. REV. 606, 608 (1954).

29. This normative dimension is essential to what makes it law. See H.L.A. HART, *THE CONCEPT OF LAW* 40 (2d ed. 1994) (arguing that the law is not merely a set of commands backed by the threat of punishment, but that it also specifies subjects’ obligations, including for those who *want* to comply); *id.* at 55-57 (distinguishing legal rules from mere social habits, and noting that, from the internal point of view, those who violate the law are subject to legitimate and well-founded criticism); see also Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1157 (2006) [hereinafter Shapiro, *Internal Point of View*] (“Seen from the internal point of view, the law is not simply sanction-threatening, -directing, or -predicting, but rather obligation-imposing.”). This is why it makes sense (even from a positivist perspective) to talk of the law’s “moral aim.” See SCOTT J. SHAPIRO, *LEGALITY* 214-17 (2011).

30. See, e.g., HART, *supra* note 29, at 89-91; Shapiro, *Internal Point of View*, *supra* note 29.

account is superior to its alternatives in achieving that objective to the extent that it better satisfies three core criteria. First, it must offer an explanation for what the regime unambiguously permits and prohibits concerning the issue at hand. Second, it ought to reflect the law's core purposes, as evinced in the law's structure and in the articulations of its framers. Third, it should cohere with connected or related laws in domains adjacent to that which it explains. In forthcoming work, I argue that if multiple accounts pass the first three tests, the superior remaining account is that which is most morally plausible.³¹ However, that more controversial claim is unnecessary here, because the question that motivates this Article can be answered comprehensively with reference to the three primary criteria.

The first is a straightforward and inflexible threshold criterion. The essential feature of any normative account is an explanation of the morality of a given legal rule. It must explain what the law is, not what the law should be. The second and third criteria are more flexible. They do much of the work in distinguishing between better and worse accounts, but they are not minimum essential criteria. At their core is the basic observation that the law's credibility as a normative system depends on the schedule of imperatives it issues cohering with the public purposes those imperatives serve in a structure of mutual support, rather than collapsing into discord or internal contradiction.³² When the normative messages of different laws conflict, this undermines both the law's credibility in condemning violations and its authority in demanding action. Given the fragmented nature of international law's enforcement and the rarity of credible coercive backing, this internal-coherence imperative is particularly acute at the global level.³³

31. See Tom Dannenbaum, *Why Aggression Is a Crime and Why It Matters* (unpublished manuscript) (on file with author).

32. On the role of coherence in legal reasoning generally, see RONALD DWORKIN, *LAW'S EMPIRE* (1986); JOSEPH RAZ, *The Relevance of Coherence*, in *ETHICS IN THE PUBLIC DOMAIN* 277 (1994); Robert Alexy & Aleksander Peczenik, *The Concept of Coherence and Its Significance for Discursive Rationality*, 3 *RATIO JURIS* 130 (1990); Ronald Dworkin, *Law as Interpretation*, 9 *CRITICAL INQUIRY* 179 (1982); Ken Kress, *Coherence*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 533 (Dennis Patterson ed., 2d ed. 2010); Barbara Baum Levenbook, *The Role of Coherence in Legal Reasoning*, 3 *LAW & PHIL.* 355 (1984); and Neil MacCormick, *Coherence in Legal Justification*, in *THEORY OF LEGAL SCIENCE: PROCEEDINGS OF THE CONFERENCE ON LEGAL THEORY AND PHILOSOPHY OF SCIENCE, LUND, SWEDEN, DECEMBER 11-14, 1983*, at 235 (Aleksander Peczenik et al. eds., 1984).

33. Thomas Franck argues that "[i]f a decision has been reached by a discursive synthesis of legitimacy and justice, it is more likely to be implemented and less likely to be disobeyed." THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 481 (1995). For Franck, coherence is essential in this respect. In another book, he refers to the "relationship, not only between a rule, its various parts, and its purpose, but also between the particular

However, although coherence among laws and between legal rules and their stated objectives is an important trait of a good normative account of the law, it cannot be an essential criterion. Law is created and revised by the cumulative efforts of different agents, acting at different times with different objectives. It is the product of compromise and sometimes of deliberate efforts by competing lawmakers to create internal contradictions. As a result, it may be impossible in any given case to provide a normative account that both explains the moral core of a particular law and fits with the regime's purpose or with adjacent rules. In that scenario, the best normative account of the law in question will be dissonant with the regime as a whole. When no coherent alternative is viable, work on normative underpinnings can be valuable in helping to identify such dissonance.

The core claim of this Article, substantiated primarily in Part III, is that judged against these three criteria, a normative account of the crime of aggression that locates the wrong in the constituent killings is superior to the traditionally dominant alternative. To set the stage for that argument, consider first the nature and the appeal of the latter view.

II. THE ORTHODOX NORMATIVE ACCOUNT OF THE CRIME OF AGGRESSION

On the dominant normative account, the crime of aggression is a macro wrong against a foreign state (sometimes understood to draw its moral value from the self-determining collective it represents), not a compound of minor wrongs against a population of individual human persons. This sovereignty-focused understanding of aggression has long been the view of both critics and defenders of the criminalization of illegal war.

rule, its underlying principle, and the principles underpinning other rules of that society." THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 153 (1990). For a more complete discussion, see *id.* at 135-182. On the *jus ad bellum*, Hersch Lauterpacht observes, "A treaty is not concluded in a legal vacuum. It is part of a legal system which, for that very reason, cannot contain rules which are contradictory." Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 *BRIT. Y.B. INT'L L.* 206, 209 (1953). Thus, he argues, "once a treaty has been adopted which is of a fundamental and comprehensive character, it is difficult—and probably unscientific—to act on the view that it settles only that part of the law to which it expressly refers and nothing else." *Id.*

A. *The Walzerian Account: The State as Victim and Perpetrator in the Law*

The legal starting point for the orthodox account is clear. The judgments of the IMT and the International Military Tribunal for the Far East (IMTFE) described the crime of aggression as that of waging “aggressive wars” against other “countries” or “nations.”³⁴ In addition, both tribunals arranged their findings regarding aggression into individual criminal wars, identified and separated by victim state.³⁵ Similarly, Control Council Law No. 10, which governed the NMT, provided that the crime involved the “initiation of invasions of other countries,”³⁶ and the ICC amendment follows the General Assembly’s 1974 articulation in defining an aggressive war as one that violates the “sovereignty, territorial integrity or political independence of another State” or otherwise runs contrary to the U.N. Charter.³⁷

It is against this background that Michael Walzer describes international law on this issue as rooted morally in a “domestic analogy,” in which aggression is an infringement upon the attacked state akin to the infringement of burglary on a human person.³⁸ Under this “legalist paradigm,” states “possess rights more or less as individuals do.”³⁹ After all, he contends, it is “the state that

34. *IMT Judgment*, *supra* note 2, at 433; *IMTFE Judgment*, *supra* note 2, at 49,136; *see also IMTFE Judgment*, *supra* note 2, at 48,922, 48,936 (finding that states were the “intended victims of Japanese aggression”).

35. *See, e.g., IMT Judgment*, *supra* note 2, at 439-58; JULIUS STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION* 136 (1958) (noting that the IMT found “that Germany had been guilty of aggression against no less than twelve States”).

36. Control Council Law No. 10, *supra* note 2, art. II ¶1(a).

37. UNGA Definition of Aggression, *supra* note 3, art. 1; Rome Statute, *supra* note 1, art. 8 *bis* (2); *see also Elements of Crimes*, INT’L CRIM. CT. 30 (2013), <http://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf> [<http://perma.cc/8VEX-6XJF>] (defining the elements of the crimes of aggression, one of which is “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State”); ILC, Draft Code of Crimes, *supra* note 3, art. 16 ¶ 4 (“The rule of international law which prohibits aggression applies to the conduct of a State in relation to another State.”).

38. WALZER, *supra* note 11, at 58. On the relationship between Walzer’s work and the law, *see infra* note 42.

39. WALZER, *supra* note 11, at 58, 61. Jeff McMahan observes that underpinning “‘the traditional theory’ of the just war, the law of war, and common-sense thought about war” (which he rejects) is precisely this analogy, on which he adds,

[w]hen a state confronts a wrongful threat to its political sovereignty or territorial integrity, this is thought to be analogous to an individual’s confronting a wrongful threat to life or limb Loss of sovereignty is . . . for a state, analogous to death, while a loss of territory is like an amputation.

claims against all other states the twin rights of territorial integrity and political sovereignty” – the rights that the crime of aggression seeks to protect.⁴⁰ Understood in this way, aggression is a morally unique international crime. Whereas genocide, war crimes, and crimes against humanity are all rooted in wrongs against human beings, the normative heart of aggression is a wrong against states.⁴¹

Seeking to make moral sense of this idea,⁴² Walzer argues that it captures the genuine wrong an aggressive war inflicts on the attacked political collective—a collective that is defined imperfectly, but, all things considered, optimally, by state borders. For him, “[t]he state is constituted by the union of

Jeff McMahan, *What Rights May Be Defended by Means of War?*, in *THE MORALITY OF DEFENSIVE WAR* 115, 118 (Cécile Fabre & Seth Lazar eds., 2014). At Nuremberg, prosecutor Telford Taylor dismissed the notion that Germany’s invasion of Poland was intended to be a bloodless annexation, not a war of aggression, on the grounds that “it has never been a defense that a robber is surprised by the resistance of his victim, and has to commit murder in order to get the money.” Telford Taylor, *Statement of the Prosecution*, *United States v. Göring, Judgment* (30 Aug. 30, 1946), in 22 *TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL* 271, 280 (1948).

40. Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, in *THINKING POLITICALLY* 219, 221 (David Miller ed., 2007); cf. Rome Statute, *supra* note 1, art. 8 bis (2) (defining an act of aggression as a “use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”).
41. Jens Iverson, *Contrasting the Normative and Historical Foundations of Transitional Justice and Jus Post Bellum*, in *JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS* 80, 96 (Carsten Stahn, Jennifer S. Easterday & Jens Iverson eds., 2014) (finding that aggression prosecutions “do not implicate human rights violations”); Carsten Stahn, *The “End”, the “Beginning of the End” or the “End of the Beginning”? Introducing Debates and Voices on the Definition of “Aggression,”* 23 *LEIDEN J. INT’L L.* 875, 877 (2010) (noting that the crime of aggression “extends criminalization from its current focus on gross human rights violations and victims’ rights to interstate relations, the protection of state interests (‘sovereignty’, ‘territorial integrity’, ‘political independence’), and the preservation of peace”); see also *supra* notes 8-14 and accompanying text.
42. *Just and Unjust Wars* engages with the interstices of the law, history, and morality of Nuremberg and its legacy. Although Walzer writes that such trials “by no means exhaust the field of [moral] judgment” on the *jus ad bellum*, WALZER, *supra* note 11, at 288, the text frequently engages with the specifics of the Nuremberg cases, and is replete with moral analysis that uses the term “crime” rather than “wrong.” His starting paradigm, as elaborated in the first part of the book, is the “legalist paradigm.” *Id.* at 61. Here, in particular, Walzer offers a normative account of the regime. He then tweaks that account at the margins to accommodate concerns inadequately addressed by that framework.

Walzer’s account has achieved such widespread influence that he has been termed the “dean of contemporary just war theorists.” Brian Orend, *War*, *STAN. ENCYCLOPEDIA PHIL.* (rev. ed. July 28, 2005), <http://plato.stanford.edu/archives/spr2016/entries/war> [<http://perma.cc/RK6G-RH74>].

people and government,”⁴³ and the *jus ad bellum*’s relationship to individual human beings is in its protection of their “communal rights” of self-determination.⁴⁴ “Break into the [state] enclosures,” Walzer explains, “and you destroy the communities. And that destruction is a loss to the individual members”⁴⁵ In other words, if individuals are wronged when their state is invaded illegally, that wrong is suffered only indirectly, through the wrong to the political collective of which they are part.

Emphasizing the priority status of the collective here, Walzer insists that the wrong of aggression obtains irrespective of the responsiveness of the community to its members. It obtains whether or not the state is democratic or respectful of human rights and the rights of minorities. Only “when a government turns savagely upon its own people” does Walzer think the morality of states that underpins the crime loses its force because the state ceases to be a viable forum for collective self-determination.⁴⁶ Significantly, however, despite arguing that the morality of states’ rights finds its limit in this extreme context, Walzer is clear that his philosophical position on this point is a departure from the moral underpinnings of the law.⁴⁷ In other words, for Walzer, the legal crime of aggression is rooted fundamentally in a moral wrong between states. On extraordinary occasion, that statist morality may be misguided, but for the most part, Walzer not only identifies it as the moral posture underpinning international law on aggression, but also defends it as morally appropriate.⁴⁸ For him, the crime of aggression captures a real wrong—a wrong against the state, the moral value of which is derived from its function as a site of collective self-determination.

43. Walzer, *supra* note 40, at 221.

44. *Id.* at 230; see also WALZER, *supra* note 11, at 61, 90, 96 (discussing aggression’s violation of the “communal autonomy” of the state and the “right of men and women to build a common life”).

45. Walzer, *supra* note 40, at 234.

46. WALZER, *supra* note 11, at 101. See generally *id.* at 101-08 (discussing humanitarian intervention). It is in this scenario that the law’s equation of political collective with the state is, for Walzer, imperfect.

47. *Id.* at 86.

48. *Id.* at 51-108; see also Charles R. Beitz, *Bounded Morality: Justice and the State in World Politics*, 33 INT’L ORG. 405, 408-09 (1979) (discussing Walzer’s theory in relation to other theories about the “morality of states”); David Luban, *Preventive War*, 32 PHIL. & PUB. AFF. 207, 211-13, 211 n.2 (2004) (noting that Walzer’s core normative account of the legalist paradigm “represent[s] [Walzer’s moral] baseline, not his final position [which accommodates humanitarian intervention, for example]. But the [sovereignty-focused] baseline captures the core of the Charter system”).

This assessment has been endorsed repeatedly. For example, Paul Kahn contends that the criminalization of aggression at Nuremberg represented and initiated a “new legal regime founded on protecting state sovereignty through the prohibition on the use of force.”⁴⁹ Kahn sees this prohibition as an effort to ban and condemn violations of “positive sovereignty, understood as the self-formation of a people” in a state whose boundaries allow that people to function as “a single, collective actor.”⁵⁰ Similarly, Christopher Kutz argues that aggression’s wrong is in denying the target state’s people the chance to make “their politics on their own” – a denial that Kutz argues wrongs nondemocratic peoples no less than democratic ones.⁵¹ Unlike Walzer and Kahn, Kutz does not link this moral theory to the law. However, by locating the moral violation at the heart of aggression in its negation of collective autonomy through its infringement of states’ rights, he buttresses Walzer’s dominant account of the legal regime.⁵²

Each of these theorists identifies the political collective as the sovereign that is wronged by aggression. The core point for each is that aggression is a wrong against that collective that cannot itself be “reduced,” in David Rodin’s words, to an aggregation of harms against individuals.⁵³

Larry May arrives at a similar conclusion without relying on self-determination. He argues that “aggression is morally wrong because it destabilizes States that generally protect human rights more than they curtail them.”⁵⁴ For May, then, the state’s value lies in its service to human beings, rather than in its approximation of the political collective. Nonetheless, on his theory, the wrong of aggression remains a wrong against the state. This, he argues, has implications not just for how we understand the victim, but also how we define the perpetrator. Precisely because the wrong at the core of the crime of aggression occurs on the macro level, “the acts of individuals that make up war are conceptually and normatively distinct from the State aggression.”⁵⁵ This, he contends, raises a question about how we can hold even high-ranking individ-

49. PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY 54-55 (2008).

50. Paul W. Kahn, *The Question of Sovereignty*, 40 STAN. J. INT’L L. 259, 262-63 (2004).

51. Christopher Kutz, *Democracy, Defence, and the Threat of Intervention*, in THE MORALITY OF DEFENSIVE WAR, *supra* note 39, at 229, 231, 236.

52. *Id.* at 237; *see also id.* at 241-42 (discussing the “people’s political agency”).

53. DAVID RODIN, WAR AND SELF-DEFENSE 6, 127-32 (2002).

54. LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE 6-7 (2008).

55. *Id.* at 15.

uals “criminally liable for invading Poland,” since the core interstate wrong is simply not something that they can commit.⁵⁶

Of course, crimes against humanity and genocide have collective elements of their own: the former involves a widespread and systematic attack; the latter, an intent to destroy a group. But what distinguishes aggression for May is that the micro contributions of the participants in an aggressive war “are not themselves criminal,”⁵⁷ and, indeed, are “not themselves wrong independent of what is going on at the State level.”⁵⁸ Accordingly, May contends that rooting the wrong of aggression in the component killings and destruction would provide “no relevant moral distinction between aggressive wars and defensive wars.”⁵⁹ The result, May explains, is that aggression is not a wrong that individuals (“even lots of them”) can commit, unless they control the state itself.⁶⁰ High-ranking officials can be morally connected to that interstate wrong only if they combine the right level of control over the state with the intention to shape state action.⁶¹

Just as Walzer’s, Kutz’s, and Kahn’s accounts of the state as victim of aggression might be thought to explain morally the fact that the crime of aggression involves an attack on the state, May’s exploration of what it means to perpetrate the macro wrong of aggression could be argued to illuminate another important aspect of the legal framework—namely, that criminal liability turns on acting through the state.⁶² At Nuremberg, that an individual made a substantial contribution to an aggressive war or organized massive lethal attacks on enemy troops was not enough to make that individual criminally liable.⁶³ The same is true for an individual who had been aware of the criminal nature

56. *Id.* at 250–51.

57. *Id.* at 229.

58. *Id.* at 256.

59. *Id.* at 339.

60. *Id.* at 256.

61. *Id.* at 254.

62. Walzer, too, suggests that the macro feature of the crime is two-dimensional—with the wrong inflicted *on a victim state* by individuals acting *through a perpetrator state*. See *supra* note 40 and accompanying text.

63. Twenty-four members of I.G. Farben’s managing board were acquitted of *jus ad bellum* crimes on the grounds that they were “followers and not leaders,” I.G. Farben Case, *supra* note 6, at 1126, despite the fact that “Farben largely created the broad raw material basis without which the policy makers could not have even seriously considered waging aggressive war,” *id.* at 1216 (Herbert, J., concurring). The high-ranking military officers acquitted in the High Command Case were, of course, in charge of organizing major belligerent German operations. See High Command Case, *supra* note 6, at 463–65.

of the war and who acted under no duress.⁶⁴ Thus, even senior members of the Nazi High Command were acquitted of crimes against peace.⁶⁵ Only members of Hitler's "inner circle," who were able to "shape or influence" state policy, were found guilty.⁶⁶ Similarly, under the ICC amendment, criminal liability for aggression is limited to persons with the capacity to "exercise control over or to direct the political or military action of a State."⁶⁷

From this perspective, the macro nature of the crime is two-dimensional. The moral wrong at the core of aggression is a wrong inflicted on a victim state (or at least the collective it represents) by individuals acting through a pe-

-
64. See *id.* at 462, 488 ("[M]ere knowledge [of the aggressive character of the war] is not sufficient to make participation even by high ranking military officers in the war criminal."). The leadership requirement has in no context been connected to a duress standard.
65. *Id.* at 462-63, 491. A small number of senior Nazi members of the military—such as Chief of the Oberkommando der Wehrmacht (High Command of the Armed Forces) and Field Marshal Wilhelm Keitel—were convicted of crimes against peace at Nuremberg despite proffering the superior orders defense. *Final Statement of Dr. Otto Nelte, Counsel for Wilhelm Keitel, Monday 8 July 1946*, in 17 THE TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 603, 660-661 (1948); *Final Statement of Dr. Otto Nelte, Counsel for Wilhelm Keitel, Tuesday 9 July 1946*, in 18 THE TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 1, 37-38 (1948); *IMT Judgment*, *supra* note 2, at 533-36. However, these men were part of Hitler's leadership cabal at the top of the chain of command. Keitel's own lawyer described him as in Hitler's "closest circle and [as] his almost constant companion." *Final Statement of Dr. Otto Nelte, Counsel for Wilhelm Keitel, Monday 8 July 1946*, *supra*, at 614. On the focus on those who controlled the Nazi state apparatus, see HARRIS, *supra* note 2, at 29-30; and Jackson, *supra* note 7, at 197-98. As an aside, the NMT set a lower threshold for criminal liability for *preparing* for war than for participating in its initiation or continuation. Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 EUR. J. INT'L L. 477, 482-85 (2007).
66. *IMT Judgment*, *supra* note 2, at 547, 555 (finding those who were not members of Hitler's "inner circle" not guilty of crimes against peace); High Command Case, *supra* note 6, at 488 (discussing the "shape or influence" test); see also I.G. Farben Case, *supra* note 6, at 1102 ("No defendant was convicted under the charge of participating in the common plan or conspiracy unless he was . . . in such close relationship with Hitler that he must have been informed of Hitler's aggressive plans and took action to carry them out, or attended at least one of the four secret meetings at which Hitler disclosed his plans for aggressive war.").
67. Rome Statute, *supra* note 1, art. 8 *bis*. These Amendments built on the ILC's earlier work, which operated on the basic premise that "[i]ndividual responsibility for [a crime of aggression] is intrinsically and inextricably linked to the commission of aggression by a State." ILC, Draft Code of Crimes, *supra* note 3, at 43 ¶ 4, cmt. to art. 16. Heller has argued that this is a higher threshold than the "shape or influence" standard adopted at Nuremberg. Heller, *supra* note 65, at 495. However, even accepting that distinction, the point here is that both seem to root criminal liability in the individual's connection to the macro policy to invade another state.

trator state.⁶⁸ Importantly, for Walzer and others adopting his view, this is not just a moral account of the legal posture on aggression; it is also a moral *defense* of that posture. From that perspective, in an aggressive war, a genuine wrong occurs at the interstate level and that wrong is worthy of criminal punishment and official condemnation.

B. Criticizing the Criminalization of Aggression on Walzerian Terms

Critics of the criminalization of aggression agree with the Walzerian normative account of the law. They agree, in other words, that the crime of aggression is rooted in a claimed moral wrong “against a state” as opposed to “violations against individuals.”⁶⁹ The difference is that, for the critics, this account of the crime spotlights precisely why it should not be a crime at all.

David Luban, for example, accepts that “the crime of aggressive war is a crime of state against state.”⁷⁰ However, for him, this is where the Nuremberg endeavor took a wrong normative turn. Luban insists that “the achievements at which the trial was aiming were compromised, rendered equivocal, by the trial itself,” with the framers “unwilling to question . . . the political system of nation-states.”⁷¹ The problem, he argues, was precisely the Walzerian effort to “confer moral rights” on the state.⁷² By developing a crime that depends on such moral rights, Nuremberg “erected a wall around state sovereignty.”⁷³ Whereas crimes against humanity, together with the removal of official immunity and the imposition of liability for obeying orders that were legal according to the sovereign state, seemed to “perforate[] or even destroy[]” the classical doctrine of sovereignty “in the name of ‘humanity,’” Article 6(a) of the IMT Statute “fortified it by making aggressive war—a violation of sovereignty—an international crime.”⁷⁴ The result, for Luban, is that Nuremberg’s “central achievement” of recognizing crimes against humanity was undermined,

68. ILC, Draft Code of Crimes, *supra* note 3, at 43, ¶ 4, cmt. to art. 16; STONE, *supra* note 35, at 141.

69. Letter from Aryeh Neier to Foreign Ministers, *supra* note 8; see also *International Criminal Court*, *supra* note 9 (drawing a distinction between the crime of aggression and other crimes such as genocide and crimes against humanity).

70. Luban, *supra* note 19, at 164, 166; see DAVID LUBAN, LEGAL MODERNISM 337 (1994) (arguing that the General Assembly cast aggression as “the violation of sovereignty” in 1974, in keeping with the “spirit of Nuremberg”).

71. LUBAN, *supra* note 70, at 335.

72. Luban, *supra* note 19, at 164.

73. LUBAN, *supra* note 70, at 337.

74. *Id.* at 338-39.

and that the trials left “a legacy that is at best equivocal and at worst immoral,” with the criminalization of aggression “a major moral enemy of the human rights movement.”⁷⁵

Reacting to ICC’s pending amendment, Erin Creegan has put forth an updated version of this sentiment. She argues, “[A]ggression . . . is a crime committed by the leadership of one state, directed against the abstract interests of another state The harm of aggression is the insult to a state’s territorial independence and sovereignty [P]reventing wartime suffering is not the direct object of the crime of aggression”⁷⁶

Like Luban, Creegan finds this to be an unacceptable normative core. She contends that, “[w]ithout adversely affected human victims, it is hard to put a crime like aggression in a category similar to war crimes or crimes against humanity or genocide. And it does not seem to belong next to them; it almost demeans them.”⁷⁷ She goes on to describe human beings’ rights not to be subject to the wrongs of genocide, war crimes, and crimes against humanity as often “infinitely more” powerful than the right of states not to be the victims of aggression.⁷⁸

The dispute between Walzer and his critics on this issue is complex. From the internal legal point of view, they are in close agreement as to the basic moral underpinnings of the crime. For both sides, the crime is premised on the idea that aggression is a wrong against states (or the political collectives they represent).⁷⁹ Morally, however, they disagree about whether violating a state in that way is a wrong worthy of criminalization. Their agreement from the internal point of view is at the heart of their disagreement from the external point of view.

As discussed in Part V, if one accepts the widespread conception of aggression as an exclusively macro-level wrong, that understanding must underpin the “object and purpose” of the criminalization of aggression, with all of the entailed consequences for the proper interpretation of the crime and of connected

75. *Id.* at 335-37, 341.

76. Erin Creegan, *Justified Uses of Force and the Crime of Aggression*, 10 J. INT’L CRIM. JUST. 59, 62 (2012).

77. *Id.* at 63.

78. *Id.* at 68.

79. Notably, Luban describes Walzer’s defense as “the best defense I know” of the crime of aggression and the focus on sovereignty at its moral core. LUBAN, *supra* note 70, at 342 n.19.

rights and duties.⁸⁰ Those implications would hold whether or not one endorses the law as morally well directed.

But the shared premise is mistaken. The next Part reframes how we ought to understand aggression from the internal legal point of view. The normative core of the crime of aggression is not a morality of states' or political collectives' rights, but a morality that condemns the unjustified killing of human persons.

III. WHY AGGRESSIVE WAR IS AN INTERNATIONAL CRIME

To be clear, the position advanced here is not that sovereignty is irrelevant to the crime of aggression. Under current international law, *whether* a war is criminal is determined in part by whether it violates the “sovereignty, territorial integrity or political independence of another State” or is otherwise “inconsistent with the Charter of the United Nations.”⁸¹ In other words, *which* wars are wrongful is a macro-level question that depends typically, although not exclusively, on which side has violated the other's sovereignty.

But that interstate breach is not *why* waging such wars is criminal. Waging war in breach of those interstate rules is criminal because it entails widespread killing and the infliction of human suffering without justification. Seen in this way, aggression is a modified form of crime against humanity, perpetrated ordinarily through a violation of sovereignty.⁸²

To understand why this must be the case, consider the point from five perspectives. First, the concept of sovereign rights is indeterminate as a normative guide on the issue of aggression. The criminalization of such wars is as great a restraint on state sovereignty as it is a protection of it. Moreover, interstate violations that more effectively and dramatically infringe core sovereign rights than does aggressive war are not criminal. Second, what distinguishes aggression from any other sovereignty violation is that it involves killing without the

80. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 (requiring that treaty interpretation must proceed “in the light of [the treaty’s] object and purpose” and in the light of “[a]ny relevant rules of international law applicable in the relations between the parties”).

81. Rome Statute, *supra* note 1, art. 8 *bis* (2); *see supra* Section II.A.

82. Contrast the positions canvassed *supra* Section II.B. A key difference between aggression and the formal category of crimes against humanity is that the latter involves the perpetration of wrongs against a *civilian* population, whereas the former is concerned centrally with wrongs perpetrated against combatants. *Cf.* Rome Statute, *supra* note 1, art. 7 (defining and prohibiting crimes against humanity); *infra* note 131 and accompanying text (discussing aggression’s protection of combatants); *infra* Section V.C (discussing aggression’s relation to the rights of soldiers).

justification of responding to human violence or its immediate threat. Other forms of killing without justification are criminal in another form. By protecting combatants' and collateral civilians' right to life, the criminalization of aggression fills a crucial gap in that broader criminal-law approach to unjustified killing. Third, understanding aggression in this way reconciles its criminalization with the so-called "humanization" of international law—the rise of the human being as a normative focal point in legal interpretation and doctrinal development. This phenomenon is manifest especially clearly in international criminal law. Fourth, the claimed imperative to incorporate a restrictive *jus ad bellum* into twentieth-century international law was articulated not in terms of sovereignty, but in terms of human suffering. Finally, wrongful killing was normatively central to the reasoning of the judges and prosecutors at Nuremberg and Tokyo on the crime of aggression. Ultimately, states' rights are important in structuring when the use of force is permitted, but aggression is a crime about the infliction of human death and suffering without justification.

Recognizing the criminal wrong of aggression to be the infliction of unjustified human violence suggests that legal interpretation and thinking in this domain might be better illuminated by a more recent, revisionist tranche of just war theory than has thus far been recognized. A growing cohort of moral theorists has countered the longstanding Walzerian orthodoxy that the *jus ad bellum* can be restricted morally to the macro-level, with no implications for the rights or wrongs of the constituent actions.⁸³ These revisionist theorists, led by Jeff McMahan, have deliberately avoided engagement with international law, sometimes criticizing Walzer for what they consider to be a conflation of the law and the morality of war.⁸⁴ One of the upshots of the arguments in this Part is that these philosophical critics may have more to say about the internal normativity of the existing legal regime than they or international lawyers have understood.

83. See *infra* note 265 and accompanying text.

84. JEFF MCMAHAN, KILLING IN WAR 105 (2009) (describing a "ubiquitous tendency to conflate the morality of war with the law of war"); *id.* at 112 (on Walzer); Jeff McMahan, *Killing in War: A Reply to Walzer*, 34 PHILOSOPHIA 47, 51 (2006) ("Walzer believes that what he calls the war convention is just an adaptation, developed over many centuries, of our ordinary morality to the circumstances of war. But again I have doubts."). Walzer, for his part, argues, "What Jeff McMahan means to provide . . . is a careful and precise account of individual responsibility in time of war. What he actually provides, I think, is a careful and precise account of what individual responsibility in war would be like if war were a peacetime activity." Michael Walzer, *Response to McMahan's Paper*, 34 PHILOSOPHIA 43, 43 (2006).

A. *Sovereignty Cannot Explain the Jus Ad Bellum or the Criminalization of Aggression*

When it comes to war, sovereignty cuts both ways. Although banning aggressive war has protected certain sovereign rights, it has limited the sovereign's capacity to assert and protect many of its other rights. Indeed, despite his framing of Nuremberg and the U.N. Charter as moves toward protecting sovereignty,⁸⁵ Kahn recognizes that on a maximal vision of sovereignty in international affairs, "there is no difference between protection and assertion: To protect the state is to assert its power to defend its 'vital interests.'"⁸⁶

Prior to Nuremberg, and certainly prior to Kellogg-Briand, international law reflected precisely that principle: states had the power and authority to use violence to punish or seek to end nonviolent infringements of their legal rights.⁸⁷ They could wage war to settle a dispute, reverse a wrongful seizure, or otherwise retake what was rightfully theirs.⁸⁸ Capturing this core doctrine, Vattel wrote simply, "Whatever strikes at [a sovereign state's] rights is an injury,

85. See *supra* notes 49-50 and accompanying text.

86. Kahn, *supra* note 50, at 263.

87. HATHAWAY & SHAPIRO, *THE INTERNATIONALISTS*, *supra* note 21, chs. 1-4; HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 331 (Anders Wedberg trans., 1945); STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 225-39 (2005); 3 ROBERT PHILLIMORE, *COMMENTARIES UPON INTERNATIONAL LAW* 18-22 (2d ed. 1873); *Le Régime de Représailles en Temps de Paix*, ANNUAIRE INSTITUT DE DROIT INTERNATIONAL 708-711 (Institut de Droit International 1934); Linos-Alexander Sicilianos, *The Relationship Between Reprisals and Denunciation or Suspension of a Treaty*, 4 EUR. J. INT'L L. 341, 351-52 (1993).

88. HATHAWAY & SHAPIRO, *THE INTERNATIONALISTS*, *supra* note 21, chs. 1-4; see, e.g., Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts art. 1, Oct. 18, 1907, 36 Stat. 2241 (prohibiting the recourse to armed force for the recovery of contractual debts *only if* the debtor state submits to an offer of arbitral settlement and complies with the subsequent award); Convention for the Pacific Settlement of International Disputes art. 1, July 29, 1899, 32 Stat. 1799 (requiring only that signatories "use their *best efforts* to insure the pacific settlement of international differences" (emphasis added)); EMMER DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* §§ 333, 342 (Béla Kapossy & Richard Whatmore eds., Liberty Fund rev. ed. 2008) (1758) (on the sovereign's right to use force to vindicate its rights whenever there is a colorable rights claim and to use force to recover debts, repair injuries, or enact reprisals). Even the Covenant of the League of Nations allowed states to resolve international disputes with force, as long as they first submitted the dispute to the League of Nations Council (or arbitration or judicial settlement), and waited for a cooling-off period of nine months (six awaiting the ruling and three following the ruling). In the case of a Council referral, force would only be banned if the Council was unanimous and the other state complied with its ruling. See Covenant of the League of Nations arts. 12-16.

and a just cause of war.”⁸⁹ The use of force was the key tool of law enforcement and sovereignty *vindication* in an international regime focused on interstate relations and state rights.⁹⁰ Moreover, in the absence of a system of global institutions by which the “right” in any dispute could be verified, states also had the sovereign authority to determine whether such vindication was called for.⁹¹

In one sense, this system rendered states vulnerable to armed attack. But this was not because states’ rights were unimportant. Rather, the animating premise was that it was inconceivable that the state’s authority to determine whether force was necessary to protect its legal rights could be abrogated.⁹² The sovereign stood above international law.⁹³ From that position of priority, what was truly defensive of its rights was necessarily something “that a state had to judge for itself.”⁹⁴ Understood in this way, sovereignty “resists [the] universalization” upon which any genuinely restrictive *jus ad bellum* depends.⁹⁵

Recognizing this assertive dimension of sovereignty is crucial. Precisely because it lacked any meaningful *jus ad bellum* restraint, the pre-Nuremberg, pre-Kellogg-Briand era was the high-water mark of sovereignty in international law. Thus, rather than asserting that banning war would erect “a wall around sovereignty,”⁹⁶ Salmon Levinson—a vanguard advocate for what ultimately became the Kellogg-Briand Pact—felt compelled to rebut the allegation that allowing this “check upon [the state’s] original unlimited power” would unjusti-

89. VATTEL, *supra* note 88, § 26; see also FRANCISCO SUÁREZ, “On War” (*Disputation XIII, De Triplici Virtute Theologica: Charitate*), in SELECTIONS FROM THREE WORKS 797, 817 (Gladys L. Williams et al. trans., Clarendon Press 1944) (1610) (asserting that war may be declared to gain reparation for the losses suffered from any violation of a state’s rights).

90. CHARLES G. FENWICK, INTERNATIONAL LAW 4 (3d ed. 1948); WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 61 (7th ed. 1917); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 33-34 (1st ed. 1952).

91. HERBERT WHITTAKER BRIGGS, THE LAW OF NATIONS: CASES, DOCUMENTS, AND NOTES 976 (2d ed. 1952); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 78-79 (5th ed. 2012); HALL, *supra* note 90, at 61-62; W. Michael Reisman, Editorial Comment, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT’L L. 642 (1984).

92. FRANCIS LIEBER, GENERAL ORDER NO. 100: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD 18 (1863) (“The law of nations allows every sovereign government to make war upon another sovereign state . . .”). On one reading, states retained the authority to wage war not only to enforce their existing legal rights, but also to initiate legal change in the absence of a global legislature. Josef L. Kunz, Editorial Comment, *Bellum Justum and Bellum Legale*, 45 AM. J. INT’L L. 528, 528 (1951).

93. See Kahn, *supra* note 50, at 263 (channeling Carl Schmitt).

94. *Id.* at 263 n.18.

95. *Id.* at 276.

96. LUBAN, *supra* note 70, at 337.

fiably “invade” and “impair” core sovereign rights.⁹⁷ Accepting that adopting the prohibition would limit sovereignty, Levinson insisted that the retention of the sovereign right to use force at its own discretion was morally indefensible.⁹⁸ Along similar lines, Frank Kellogg acknowledged in a public address after the signing of the Pact that the key obstacle facing the drafters had been the longstanding notion that waging war was simply “a nation’s legal right.”⁹⁹

Of course, although the criminalization of aggression and the prohibition against the use of force have limited sovereignty in this way, the new regime has also enhanced states’ legal protection against armed attack.¹⁰⁰ However, that newly protected dimension is just one element of sovereignty. Precisely because of the elevation of that element, all other aspects of sovereignty lost the unilateral vindication mechanism upon which they had depended.¹⁰¹ The assertion and protection of those other rights have been taken away from the sovereign and transferred to the global collective.¹⁰²

The obvious defense of the traditional account here would be to argue that the ban on aggression prohibited and criminalized the *most severe* violation of state sovereignty in exchange for eliminating lesser sovereign rights. Had that been the exchange, a sovereignty-focused account could explain why aggression, alone among sovereignty violations, is an international crime and a violation of *jus cogens*.¹⁰³ The explanation would be that aggression has this special

97. LEVINSON, *supra* note 21, at 12, 21. On Levinson’s role in the move to ban war, see *supra* note 21.

98. LEVINSON, *supra* note 21, at 22 (“A sovereign nation that would set itself up above all the laws of justice in its dealings with other nations is unworthy to retain its sovereignty.”).

99. Frank B. Kellogg, Former U.S. Sec’y of State, *The Pact of Paris and the Relationship of the United States to the World Community, An Address Delivered over the Columbia Broadcasting System* (Oct. 30, 1935), http://avalon.law.yale.edu/20th_century/kb1935.asp [<http://perma.cc/AUF5-MKAX>].

100. In that narrow sense, despite the restrictions that this legal shift placed on a slew of sovereign rights, Kahn and Luban are not wrong to use the language of protection to describe the relationship between sovereignty and the criminalization of aggression. See *supra* notes 49, 70, and accompanying text.

101. On the role of the ban on war in transforming war from a system of unilateral enforcement to a system of collective enforcement, see HATHAWAY & SHAPIRO, *THE INTERNATIONALISTS*, *supra* note 21.

102. *Id.*

103. *Cf.* *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 205 (June 27) (finding that the use of force is a “particularly obvious” violation of sovereignty, but the category extends to any intervention in a state’s “choice of a political, economic, social and cultural system” and “foreign policy,” among other things). For a detailing of various nonviolent sovereignty violations, see G.A. Res. 52/119, *Respect for the Principles of National Sovereignty and Non-Interference in the Internal Affairs of States in*

status because it is the interstate violation most profoundly detrimental to the essential elements of sovereignty.

This, however, is not the case. Put to one side all of the sovereign rights given up in the ban on the use of force and consider in isolation the sovereign rights at the crux of today's *jus ad bellum*: political independence and territorial integrity.¹⁰⁴ On these issues alone, aggression is not uniquely harmful. A criminal use of force can be far more modest in its diminution, or even intended diminution, of these rights than would be nonbelligerent, noncriminal infringements of the same rights.

Consider, for example, the nonbelligerent installation of a puppet regime in a foreign state through the manipulation of its elections.¹⁰⁵ Puppet regimes create principal-agent problems for the intervening state, and democratic manipulation will not always work flawlessly. Such illegal actions, however, would infringe on political independence and self-determination profoundly, and often to a greater extent than is even *intended* by an illegal military attack.¹⁰⁶ And yet such nonviolent interventions are clearly not internationally criminal, since they lack "the use of armed force."¹⁰⁷

The same applies to nonviolent violations of territorial integrity. Failing to hand over territory to a lawfully seceding entity, holding another state's territo-

their Electoral Processes (Feb. 23, 1998); G.A. Res. 36/103, annex, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (Dec. 9, 1981); and Friendly Relations Declaration, *supra* note 3, at 122-23.

104. See U.N. Charter art. 2, ¶ 4; Rome Statute, *supra* note 1, art. 8 *bis*.

105. On the installation of a puppet regime as a sovereignty violation, see sources cited *supra* note 103. The Nuremberg judges knew well how effectively the installation of a puppet regime could eviscerate a state's political independence. See *IMT Judgment*, *supra* note 2, at 433-36, 573. For brief discussions of historical cases and future dangers of foreign electoral manipulation, see, for example, Jack Goldsmith, *What is Old, and New, and Scary in Russia's Probable DNC Hack*, LAWFARE (July 25, 2016), <http://lawfareblog.com/what-old-and-new-and-scary-russias-probable-dnc-hack> [<http://perma.cc/R35B-A7DW>]; and Bruce Schneier, *By November, Russian Hackers Could Target Voting Machines*, WASH. POST (July 27, 2016), <http://www.washingtonpost.com/posteverything/wp/2016/07/27/by-november-russian-hackers-could-target-voting-machines/> [<http://perma.cc/FHU9-UML9>].

106. Cécile Fabre has argued correctly that, to be consistent, Walzerian just war theory would need to classify such action as an aggression warranting defensive force. Cécile Fabre, *Cosmopolitanism and Wars of Self-Defence*, in *THE MORALITY OF DEFENSIVE WAR*, *supra* note 39, at 90, 103-04; see Kutz, *supra* note 51, at 242-43 (asserting precisely such a claim in moral theory but not as a matter of law).

107. Rome Statute, *supra* note 1, art. 8 *bis* (2). This exclusive focus on *armed* force, explicit in the criminal provision, is also generally understood to apply to Article 2, ¶ 4 of the U.N. Charter. See, e.g., INT'L LAW ASS'N USE OF FORCE COMM., REPORT ON AGGRESSION AND THE USE OF FORCE §§ A.2, C.3 (2014) [hereinafter *ILA USE OF FORCE COMM. REPORT*], <http://www.ila-hq.org/en/committees/index.cfm/cid/1036> [<http://perma.cc/QM4M-MAPE>].

ry following a misguided handover from a departing former colonial power, or illegally manipulating an independence referendum in a way that triggers an effective secession are all severe infringements of another state's territorial integrity.¹⁰⁸ However, without an armed attack, none would be internationally criminal.¹⁰⁹

By contrast, examples of criminal aggression listed in the ICC amendment, such as aerial bombardment or an attack on a foreign state's naval fleet, may do very little to undermine the victim state's self-determination, territorial integrity, or political independence.¹¹⁰ The same is true of drone strike campaigns against nonstate actors in foreign territory, which are perfectly compatible with leaving intact the political independence and territorial integrity of the host state.¹¹¹ The point is not just that such belligerent acts may prove unsuccessful in taking territory or overthrowing the government.¹¹² More fundamentally, it is that criminal aggression need not even pursue the *objective* of undermining significantly those core elements of sovereignty.¹¹³

The fact that belligerent actions with minimal impact or intended impact on sovereignty are criminal, while nonviolent infringements of political independence and territorial integrity are not, cannot be explained with reference to

108. For an example of the first case, see *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Judgment, 2002 I.C.J. 303 (Oct. 10).

109. Whether actions like Russia's role in the 2014 Crimean referendum qualify as criminal aggressions is discussed in Sections IV.A and V.A, *infra*. The best interpretation is that they do not, but they are marginal cases. Crucially, however, if they are criminal, it is because of their latent human violence.

110. Rome Statute, *supra* note 1, art. 8 *bis* (2).

111. Cf. HOUSE OF LORDS HOUSE OF COMMONS JOINT COMMITTEE ON HUMAN RIGHTS, THE GOVERNMENT'S POLICY ON THE USE OF DRONES FOR TARGETED KILLING, SECOND REPORT OF SESSION, 2015-16, HL 141, HC 574, ¶ 3.40 (UK) (indicating that an assertion of the right to target "any member of ISIL/Da'esh anywhere" in the world is incompatible with the *jus ad bellum*).

112. Consider, for example, Iraq's failed aggression against Iran. See U.N. Secretary-General, *Further Report of the Secretary-General on the Implementation of Security Council Resolution 598 (1987)*, ¶¶ 5-7, U.N. Doc. S/23273 (Dec. 9, 1991), quoted in R.K. Ramazani, *Who Started the Iraq-Iran War?: A Commentary*, 33 VA. J. INT'L L. 69, 84-85, 87-89 (1992) [hereinafter *Further Report of the Secretary-General*]; see also Ige F. Dekker, *Criminal Responsibility and the Gulf War of 1980-1988: The Crime of Aggression*, in *THE GULF WAR OF 1980-1988: THE IRAN-IRAQ WAR IN INTERNATIONAL LEGAL PERSPECTIVE* 249, 268 (Ige F. Dekker & Harry H.G. Post eds., 1992) (arguing that Iraq engaged in a criminal war of aggression).

113. Compare, for example, the Security Council's finding that Israeli airstrikes in Tunis in 1985 amounted to aggression, even though the target was the Palestine Liberation Organization headquarters, not Tunisian governmental targets, and there was no effort to take territory. S.C. Res. 573 (Oct. 4, 1985); see also *infra* notes 132-143 and accompanying text.

the *degree* to which each action violates those core sovereignty rights. If that were the standard, the outcomes would be reversed. The crime as currently constituted must be explained by something else.

B. The Human Core of Aggression

Far more robust as a normative explanation of the crime than the fact or degree of aggression's violation of sovereignty or states' rights is the *form* of that violation, the *means* by which it is perpetrated.¹¹⁴ What is unique about illegal war among violations of states' rights – what makes *it* criminal, when no other sovereignty violation is – is the fact that it entails the slaughter of *human* life, the infliction of *human* suffering, and the erosion of *human* security. To qualify as aggression, those harms must occur ordinarily (although not exclusively) in an unjustified attack in which one state infringes the core sovereign rights of another. However, it is the unjustified killing and infliction of human suffering, and not the violation of sovereignty, that are the wrongs at the heart of aggression. Consider three ways in which this is so.

First, even within the category of violent interstate interactions, the *reason* that a particular aggressive attack is unjustified is not that it infringes the target state's territorial integrity or political independence. Assuming no Security Council authorization, what determines that one side of an international armed conflict is in violation of the *jus ad bellum* is that it does not respond to an *armed* attack.¹¹⁵ Therefore, the use of force seeking to *remedy* or *prevent* a severe but nonviolent infringement of political independence or self-determination, such as the manipulation of its elections through hacking, would be illegal and could qualify as an act of criminal aggression.¹¹⁶ Similarly, according to the Eritrea-Ethiopia Claims Commission, it is a *jus ad bellum* violation, and thus at least potentially criminal, for a state to use force to *recover* its own territory, if that retaking does not respond to an armed attack.¹¹⁷ Indeed, even when one state

114. Cf. McMahan, *supra* note 39, at 117 (on the importance of the means-end distinction in understanding what makes aggressive war morally wrong).

115. U.N. Charter art. 2, ¶ 4; *id.* art. 51; *see also* sources cited *supra* note 103.

116. Cf. Fabre, *supra* note 106, at 104-05 (analyzing the morality of hypothetical forcible responses to interference with the right to vote).

117. Partial Award: *Jus Ad Bellum - Ethiopia's Claims 1-8* (Eri. v. Eth.), 16 R.I.A.A. 457, 464-67 (Eri.-Eth. Claims Comm'n 2005); cf. Friendly Relations Declaration, *supra* note 3, at 122. The Claims Commission did not find this particular action to be a criminal aggression. However, since it was a violation of the U.N. Charter, it could have qualified as aggression under the ICC Statute, had it been of the requisite character, gravity, and scale (thresholds it may well have surpassed had Badme not been a tiny, low-population border town). *See*

controls another's territory following an armed attack by the former, if the latter's forcible response is sufficiently delayed, it too would be illegal and potentially criminal.¹¹⁸

On the other hand, a defensive use of force that has a significant and intended impact on the aggressor's internal structures of government or its territory would be lawful as long as that force were necessary and proportionate to stopping the armed attack. The paradigmatically lawful wars against Germany and Japan in World War II each led to long-term occupations and regime changes, not to mention Germany's territorial and political fragmentation for half a century.

Moreover, using force in response to a foreign armed attack is lawful, even if that attack does not threaten the victim's territorial integrity or political independence.¹¹⁹ Indeed, according to the Ethiopia-Eritrea ruling, such defensive uses of force are lawful even if the objective is merely to defend the attacked state's personnel while they are exercising peaceful control over the aggressor's *own* sovereign territory.¹²⁰

What unifies these cases is that a lawful use of force by a state must respond to an international attack on, or threat to, the lives of its human subjects; that is what it means for an attack to be *armed*.¹²¹ Of course, territorial integrity and political independence are often protected by defensive war and violated by aggressive war. But the legal realities discussed above indicate the overriding importance of human life and physical integrity. Severe violations of territorial integrity or political independence are not internationally criminal, and do not trigger a right to use remedial force, unless they also involve a severe threat of violence to human beings. At the same time, uses of force that do little or nothing to protect core sovereign rights are lawful as long as they respond to an armed attack. Conversely, it *is* criminally aggressive to inflict violence on human beings in a foreign state even if there is no intention or significant pro-

Rome Statute, *supra* note 1, art. 8 *bis* (1-2). For a critique of the Claims Commission's approach to the fact that Eritrea's armed attack was inflicted on Ethiopian forces on Eritrean territory, see Christine Gray, *The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?*, 17 EUR. J. INT'L L. 699, 710-18 (2006).

118. See DINSTEIN, *supra* note 91, at 230-33.

119. See, e.g., *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 72 (Nov. 6) ("The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence . . .')."

120. See sources cited *supra* note 117 (demonstrating that Ethiopia was found not to have violated the *jus ad bellum* in defending itself against Eritrea's effort to retake Badme).

121. On threats to life (as opposed to consummated killings), see *infra* notes 205-214 and accompanying text.

spect of harm to territorial integrity or political independence as a result of the attack. Indeed, this holds even if that infliction of violence aims merely to recover the aggressor's own sovereign territory.

There are, of course, marginal *jus ad bellum* cases in which human life seems to play a less central role and core sovereignty rights appear to come to the fore. The most notable such case is that of the so-called "bloodless invasion." I address this case at greater length in Part IV, below. However, by way of brief preview, whether bloodless invasions are criminal at all is at least debatable. Moreover, even if they are criminal, the key to understanding their criminality is not the fact that such invasions infringe sovereignty, but rather that they do so by imposing the immediate threat of lethal violence against anyone who might resist.

The second reason in favor of the unjustified killing account of aggression is that it fits with the broader legal posture on violence to human beings. Whereas aggression is unique among sovereignty violations in its criminal status, it is decidedly not unique in that respect among forms of large-scale killing and human harm that do not respond defensively to the threat or infliction of such killing and harm. On the contrary, such nondefensive killing is generally criminal in one form or another.

Perhaps the most important element of sovereignty is the state's monopoly on the legitimate use of internal force. However, that authority is not unlimited. When state agents inflict widespread killing or human harm internally, without responding to some form of attack or imminent internal threat, they commit a crime against humanity.¹²² State militaries may use force against insurgents in a noninternational armed conflict, but until such insurgents have formed (and thus have begun to pose an internal belligerent threat) the state cannot initiate such an attack. To do so would be to engage in a widespread and systematic attack on a civilian population.¹²³ If nonstate actors coalesce into a

122. Rome Statute, *supra* note 1, art. 7.

123. Unlike state armed forces, nonstate "combatants" do not exist until the protracted hostilities necessary to trigger a noninternational armed conflict are underway. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 5, June 8, 1977, 1125 U.N.T.S. 609 (requiring that the nonstate actor have "control over a part of its territory as to enable them to carry out sustained and concerted military operations" before the treaty is engaged); Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [<http://perma.cc/4C98-SP5E>] (requiring "protracted" armed violence before the law of noninternational armed conflict is engaged); Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, INT'L COMMITTEE RED CROSS 27, 36 (2009), <http://www.icrc>

military response to such an attack by the state, then, from that point on, such actors would become combatants and state forces may target them without committing a crime.¹²⁴ But that transformation would not change the criminality of state actors' initial attack on human life.

Similarly, when nonstate actors inflict widespread death or human harm against civilians, they too commit crimes against humanity.¹²⁵ When they inflict harms of this kind on state armed forces or other combatants, they commit murder and other universally applicable domestic crimes without the international law privileges of belligerency.¹²⁶ Although the latter harms are not internationally criminal, they are domestically criminal in all states, and international law offers no immunity to those who perpetrate such crimes on behalf of nonstate actors.

On a smaller scale, other forms of killing not justified on defensive grounds are war crimes.¹²⁷ Classic examples are killing civilians or prisoners of war.¹²⁸ And, outside the context of armed conflict, killings that do not protect persons or the broader community are criminalized domestically as murder; international human rights law demands as much.¹²⁹

.org/eng/assets/files/other/icrc-002-0990.pdf [http://perma.cc/D3R8-HD9F] (“[A]ll persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In noninternational armed conflict, organized armed groups constitute the armed forces of a nonstate party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities”); Melzer, *supra*, at 33 (“[M]embership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict.”).

124. For a discussion of nonstate combatancy, see Melzer, *supra* note 123, at 31-35.

125. Rome Statute, *supra* note 1, art. 7.

126. See Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerrillas and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323 (1951); Knut Dörmann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 85 INT’L REV. RED CROSS 45 (2003); see also, e.g., Military Commissions Act of 2009, § 1802, 10 U.S.C. §§ 948a(6)-(7), 948c, 950t (2012).

127. For relevant war crimes involving killing and human suffering, see Rome Statute, *supra* note 1, art. 8.

128. See, e.g., *id.* arts. 8(a)(i), 8(b)(i), (vi).

129. On the human rights law requirement that the unjustified takings of life be met with criminal sanction, see, for example, *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. 3124 ¶ 115; and Human Rights Comm., General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). The only nonprotective killing that need not trigger criminal sanction is the death penalty in states where it remains legal; however, its permissibility in international human rights law is fragile and awkward. Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the

Thus, whether perpetrated by the state, a nonstate group, or an individual, killing cannot be used to change even an illegal or unjust status quo unless it responds to human violence or the threat thereof. Of course, the point at which such violence or threat of violence becomes criminal varies depending on the actors and contexts involved. There is a presumption in favor of the legitimacy of internal uses (and especially threats) of force by the state and a strong presumption against the use or threat of force by nonstate actors. Similarly, the context of war changes the flexibility of what constitutes defensive action and the attribution of responsibility for unjustified killing.

In that sense, the differentiation across these crimes is important. Indeed, it helps to make sense of the interstate element of aggression (which typically involves a sovereignty violation). Rather than being the core criminal wrong, as the traditional account would have it, that interstate infringement identifies a particular form of unjustified massive killing and enables the thresholds of criminality to reflect the presumptions of legitimacy and contextual considerations appropriate to that form. The state has a lower presumption of legitimacy using (or threatening) force internationally than it does domestically, and a higher presumption of legitimacy than do nonstate actors. But this differentiation *among crimes* ought not obscure the common trait that makes them all crimes. The nondefensive use of lethal force by any actor is generally criminally prohibited, even if its purpose is to remedy an unjust status quo. Aggression extends that fundamental principle to the interstate context.¹³⁰

Viewing aggression in this way spotlights why it is its own crime. The other provisions described above prohibit rebels' killing of civilians and combatants; they prohibit a state's forces from killing civilians or groups yet to form a lethal rebellious threat; and they prohibit nondefensive killing outside of armed conflict. What no provision other than the crime of aggression prohibits is a state's forces' unjustified killing of a foreign states' combatants and collateral civilians. In the absence of a crime of aggression, the unjustified infliction of death and suffering in such interstate contexts would have been the normative anomaly in which such harms could be inflicted without any prospect of criminal liability. Aggression fills a crucial gap, providing otherwise missing

Death Penalty in All Circumstances, 2002, C.E.T.S. No. 187; U.N. Secretary-General, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/67/275 (Aug. 9, 2012).

130. Jackson *Opening Statement at Nuremberg*, *supra* note 22, at 149 (“[W]hatever grievances a nation may have, however objectionable it finds the *status quo*, aggressive warfare is an illegal means for settling those grievances or for altering those conditions.”).

criminal law protection to the right to life of combatants and collateral civilians.¹³¹

The third aspect of the unjustified killing account's explanatory superiority is that at least one type of criminally aggressive war involves the infliction of human violence, but no violation of sovereign rights. Article 8 *bis* includes as a category of criminal war *alternative* to uses of armed force "against the sovereignty, territorial integrity or political independence of another State," the "use of armed force by a State . . . in any other manner inconsistent with the Charter of the United Nations."¹³² As in the U.N. Charter, the more specific categories serve as points of emphasis.¹³³ However, for the broader category of armed force used "in any *other* manner inconsistent with the Charter" to make sense, it must include wrongful wars that do *not* infringe another state's "sovereignty, territorial integrity or political independence."

One obvious example of a use of force fitting that description would be a war waged by a state in its own territory against a U.N.-authorized force deployed to prevent the host state from engaging in atrocities. A recent example was the use of force by Libya in its own territory against the U.N.-authorized North American Treaty Organization (NATO) coalition in 2011.¹³⁴

In that particular war, NATO engaged only aerially and suffered little damage and zero casualties, so the Libyan action against NATO would almost certainly not surpass the character, gravity, and scale threshold requirements of Article 8 *bis* (1).¹³⁵ However, for the reasons outlined below, the little force that Libya did muster was plainly "inconsistent with" the U.N. Charter, as required by 8 *bis* (2). Counterfactually, had Libya caused sufficient NATO casualties to exceed the 8 *bis* (1) threshold, its action in doing so would have been criminal aggression. Because the conflict took place exclusively within universally recognized Libyan territory and the subject of dispute was Libyan domestic policy,

131. See *supra* note 129; *infra* note 183. As the "supreme crime," it is perhaps fitting that aggression protects the right of life, or what is sometimes termed the "most fundamental human right, or the supreme right." HOUSE OF LORDS HOUSE OF COMMONS JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 111, ¶ 3.56.

132. Rome Statute, *supra* note 1, art. 8 *bis* (2).

133. See IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 267 (1963); DINSTEN, *supra* note 91, at 89-90.

134. On the authorization, see S.C. Res. 1973 (Mar. 17, 2011). On Libyan force against the NATO intervention, see, for example, *U.S. Navy Drone Missing over Libya Was "Shot Down" by Gaddafi's Forces*, DAILY MAIL (Aug. 5, 2011), <http://www.dailymail.co.uk/news/article-2023069/U-S-Navy-drone-missing-Libya-shot-Gaddafis-forces.html> [<http://perma.cc/V2TQ-Y9UV>].

135. See *infra* Section V.A (discussing why bloodless invasions should not count as criminally aggressive).

this is explicable only in light of the lack of justification for the violence against coalition troops, not in light of any infringement of sovereignty.

The inconsistency of such action with the U.N. Charter is established by three elements. First, the Charter prohibits states from using force in their “international relations” – including on their own territory – in any way contrary to the Charter’s “purposes.”¹³⁶ Interactions between a host state like Libya and a U.N.-authorized force clearly fall in the category of international relations, and the furtherance of the Security Council’s work under Chapter VII is clearly a U.N. purpose.¹³⁷ Second, the only exception to the Charter’s prohibition on the use of force (other than acting pursuant to a Security Council authorization) is self-defense. Under Article 51 of the Charter, however, self-defense applies only “until the Security Council has taken the measures necessary to maintain international peace and security” and self-defensive measures “shall not in any way affect the authority and responsibility of the Security Council” to act under Chapter VII.¹³⁸ Third, the authorization of forces to prevent domestic atrocity is now widely recognized as part of the Security Council’s authority, and indeed responsibility, under Chapter VII, as part of its activity in maintaining international peace and security.¹³⁹ As such, it overrides any affected state’s right of self-defense.

136. U.N. Charter art. 2, ¶ 4. For a discussion of Article 2(4)’s applicability and relevant examples of state practice and legal opinion, see Tom Ruys, *The Meaning of “Force” and the Boundaries of the Jus Ad Bellum: Are “Minimal” Uses of Force Excluded from UN Charter Article 2(4)?*, 108 AM. J. INT’L L. 159, 180-88, 209 (2014). For an argument that Georgia’s use of force against Russian troops in South Ossetia (Georgian territory) was an illegal armed attack triggering a Russian right to use force in self-defense (a right that Russia exceeded in its response), see 1 INDEP. INT’L FACT-FINDING MISSION ON THE CONFLICT IN GEOR., REPORT 23-25 (2009). See also ILA USE OF FORCE COMM. REPORT, *supra* note 107, § A.2 (concluding that the U.N. Charter prohibition was meant to be an “all-inclusive” ban on the use of force in international relations, with “no loopholes”). For a contrary view, see Oliver Dörr, *Use of Force, Prohibition of*, in 10 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 607, 612 (2012), which argues that “to come under the prohibition, the use of armed force by a State must be directed against the territory of another State.”

137. See U.N. Charter art. 1 ¶ 1; *id.* arts. 24-25, 39.

138. *Id.* art. 51; ILA USE OF FORCE COMM. REPORT, *supra* note 107, § B.2 (interpreting Article 51 to mean that a state’s right to use force in self-defense ceases when the Security Council steps in).

139. The interpretation of internal human rights abuses as threats to international peace and security capable of triggering Chapter VII is long established. See, e.g., S.C. Res. 418 (Nov. 4, 1977); S.C. Res. 181 (Aug. 7, 1963). The 2011 authorization to use force in Libya rested on the internal atrocities and anticipated atrocities of the Gaddafi regime. S.C. Res. 1973 (Mar. 17, 2011). On the Security Council’s claimed *responsibility* to authorize such forces, see G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138-39 (Sept. 16, 2005); S.C. Res. 1674, ¶ 4 (Apr. 28, 2006); U.N. Secretary-General, *Implementing the Responsibility To Protect* 8-9, U.N.

The upshot is clear. When states fight back against U.N.-authorized forces on their territories, their actions meet the core requirement of Article 8 *bis* (2). As long as the action is of sufficient character, gravity, and scale, it is a criminal aggression.¹⁴⁰

Thus understood, “aggression” is a term of art; its meaning is defined not by which state struck first, but by which engaged in an illegal and grave use of force.¹⁴¹ As the Institut de Droit International resolved in 1971, “the party opposing the United Nations Forces has committed aggression,” irrespective of whether it acted first or crossed a border to do so.¹⁴²

This definition bears on the question at hand. Reference to core states’ rights cannot explain the criminality of waging war against a U.N.-authorized humanitarian intervention force operating exclusively in the attacking state’s own territory.¹⁴³ But the criminality of killing U.N. personnel in order to de-

Doc. A/63/677 (Jan. 12, 2009); INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT ¶¶ 6.13-.28 (2001) [hereinafter ICISS REPORT]; Anne Peters, *The Security Council’s Responsibility To Protect*, 8 INT’L ORGS. L. REV. 15 (2011).

140. Some have argued that, in addition to meeting the *chapeau* of Article 8 *bis* (2), an action must also fall into one of the examples listed in the ensuing sub-paragraphs (a)-(g). DINSTEIN, *supra* note 91, at 139; Kai Ambos, *The Crime of Aggression After Kampala*, 53 GERMAN Y.B. INT’L L. 463, 487 (2010); Marina Mancini, *A Brand New Definition for the Crime of Aggression: The Kampala Outcome*, 81 NORDIC J. INT’L L. 227, 234-35 (2012). Even if this were correct, an attack on U.N.-authorized forces within a state’s territory would be an attack on “the land, sea or air forces, or marine and air fleets of another State.” Rome Statute, *supra* note 1, art. 8 *bis* (2)(d). In any event, the dominant view is that the list is illustrative, with 8 *bis* (1) and the *chapeau* of 8 *bis* (2) sufficient to define the crime. See, e.g., Rep. of the Special Working Grp. on the Crime of Aggression, at 14, I.C.C. Doc. ICC-ASP/6/20/Add.I (2008); AM. BRANCH OF THE INT’L LAW ASS’N INT’L CRIMINAL COURT COMM., THE CRIME OF AGGRESSION: THE NEW AMENDMENT EXPLAINED, QUESTIONS AND ANSWERS 6-7 (2011); CARRIE MCDUGALL, THE CRIME OF AGGRESSION UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 103-05 (2013); Roger S. Clark, *Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May-11 June 2010*, 2 GOETTINGEN J. INT’L L. 689, 696 (2010); Matthew Gillett, *The Anatomy of an International Crime: Aggression at the International Criminal Court*, 13 INT’L CRIM. L. REV. 829, 844-45 (2013); Claus Kreß & Leonie von Holtendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT’L CRIM. JUST. 1179, 1191 (2010); Astrid Reisinger, *Defining the Crime of Aggression*, in FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 425, 440 (Carsten Stahn & Larissa van den Herik eds., 2010).
141. DINSTEIN, *supra* note 91, at 140 (noting that the criminal aggressor need not have opened fire).
142. INSTITUT DE DROIT INTERNATIONAL, CONDITIONS OF APPLICATION OF HUMANITARIAN RULES OF ARMED CONFLICT TO HOSTILITIES IN WHICH UNITED NATIONS FORCES MAY BE ENGAGED art. 7 (1971).
143. In defense of the traditional account of aggression, one might argue that an attack on the U.N.-authorized troops would be a violation of those troops’ states’ rights. Cf. Ruys, *supra*

fend an ongoing atrocity *can* be explained with reference to killing and inflicting human suffering without justification.

Of course, humanitarian intervention without Security Council authorization is generally thought to be illegal. The notion that fighting against a humanitarian intervention within one's own borders could itself be criminal therefore applies most plausibly only when the intervention has Security Council backing.¹⁴⁴ Nonetheless, even if limited to that scenario, this argument further supports an account of aggression as a crime rooted in wrongful killing, not the severe violation of states' rights. The special case of unauthorized humanitarian interventions is addressed in Parts IV and V.

For each of the reasons discussed in this Section, the nondefensive killing in an illegal war is why waging such a war is criminal. This explanation best accounts for why the state's right to protect itself from armed attack survived Nuremberg and the U.N. Charter, whereas its right to use force to vindicate each of its other legal rights was discarded comprehensively. It is consistent with the criminalization of unjustified killing more generally. And it is what clarifies why using force against an invading U.N.-authorized humanitarian intervention would itself involve waging a criminally aggressive war.

C. *The Humanization of International Law*

An additional virtue of the unjustified killing account is that it reconciles the criminalization of aggression to the broader normative context. In recent decades, the very foundations of international law have shifted away from a regime rooted exclusively in state sovereignty and toward a regime that privileges human rights and human values — a transformation often termed the “humanization” of international law.¹⁴⁵ This phenomenon is most explicit in the con-

note 136, at 180. However, this would require articulating the relevant sovereign rights in a way that renders them either derivative of the human cost of the attack or detached from what Walzerian and related accounts have in mind. *See supra* Part II.

144. On the legal status of humanitarian intervention, see *infra* notes 215-216 and accompanying text.

145. LOUIS HENKIN, *THE AGE OF RIGHTS* 2-10 (1990); THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* (2006); RUTI G. TEITEL, *HUMANITY'S LAW* 27 (2011); Yoram Dinstein, *The Interaction of International Law and Justice*, 16 *ISR. Y.B. HUM. RTS.* 9, 41-42 (1986); Tom Farer, *Remarks on “Bombing for Peace: Collateral Damage and Human Rights,”* 96 *PROC. ANN. MEETING (AM. SOC'Y INT'L L.)* 104, 106 (2002); W. Michael Reisman, *Editorial Comment, Sovereignty and Human Rights in Contemporary International Law*, 84 *AM. J. INT'L L.* 866, 872 (1990); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 *AM. U. L. REV.* 1, 1 (1982); see also Paul W. Kahn, *American Hegemony and International Law: Speaking Law to Power: Popular Sovereignty, Human Rights, and the New In-*

temporary notion that sovereignty is at some level *conditional* on the state discharging its “responsibility to protect” the basic human rights of those within its control.¹⁴⁶ The account presented here identifies the initial criminalization of aggression as an early step in this trajectory and makes sense of its ongoing customary criminality and its incorporation into the Rome Statute in the more deeply humanized contemporary international legal context.

The humanization process has been especially prominent and consequential in international criminal law. At the vanguard of that regime’s revival, the International Criminal Tribunal for the former Yugoslavia (ICTY) wasted no time in framing its interpretive approach in precisely such terms, reasoning that “[a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.”¹⁴⁷

This notion is manifest throughout the framework of international criminal law. Crimes against humanity, war crimes, and genocide focus on the most se-

ternational Order, 1 CHI. J. INT’L L. 1, 5-6, 10-16 (2000) (identifying the trend, but also picking out some of the challenges associated with it); Madeleine K. Albright, Opinion, *The End of Intervention*, N.Y. TIMES (June 11, 2008), <http://www.nytimes.com/2008/06/11/opinion/11albright.html> [<http://perma.cc/MN58-ZWMD>] (noting the debate between those supporting and those opposing this shift as a debate rooted in two opposed perspectives: that international law is a “living framework of rules intended to make the world a more humane place,” or that it is merely “a collection of legal nuts and bolts cobbled together by governments to protect governments”).

146. ICISS REPORT, *supra* note 139, ¶¶ 1.3, 2.14-.15, 2.30-.32; U.N. High-Level Panel on Threats, Challenges & Change, *A More Secure World: Our Shared Responsibility*, ¶¶ 29-30, U.N. Doc. A/59/565 (Dec. 2, 2004); *see also* Carsten Stahn, *Responsibility To Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99, 118 (2007) (“The core tenet of the concept (sovereignty entails responsibility) enjoys broad support among states, and in the United Nations and civil society.”); Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST 49-50 (Sept. 16, 1999), <http://www.economist.com/node/324795> [<http://perma.cc/3N9C-Z9UG>] (“States are now widely understood to be instruments at the service of their peoples, and not vice versa.”); Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, FOREIGN AFF. (Jan./Feb. 2004), <http://www.foreignaffairs.com/articles/2004-01-01/duty-prevent> [<http://perma.cc/KE8K-A4RB>] (describing R2P as “nothing less than the redefinition of sovereignty itself”).

147. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 97 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [<http://perma.cc/4C98-SP5E>]. The Tribunal later insisted that human dignity had “become of such paramount importance as to permeate the whole body of international law.” Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 183 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

vere harms to human beings.¹⁴⁸ The Office of the Prosecutor at the ICC selects cases with a view to surpassing the gravity threshold for admissibility based on the severity of the human harms they involve.¹⁴⁹ And, in perhaps the most obvious privileging of humanity over sovereignty, international criminal law requires subjects to disobey domestically authoritative sovereign commands in order to protect other human beings.¹⁵⁰

The traditional account suggests that the criminalization of aggression is in tension with, or even opposition to, this “humanization,” and thus with international criminal law itself.¹⁵¹ The account presented here, by contrast, locates aggression at the heart of that process.¹⁵² Criminalizing aggression constrains the sovereign’s previously unlimited authority to vindicate its rights with force, preserving that authority only when necessary to protect human beings from the illegal infliction of violence or to respond to the illegal threat of such human violence.¹⁵³ Seen in this light, the classification of aggression (and no other sovereignty violation) alongside genocide, crimes against humanity, and war crimes makes sense.

148. See Rome Statute, *supra* note 1, arts. 6-8; *cf. supra* note 13 and accompanying text (discussing how mass crimes, like genocide, also have an individual impact).

149. See Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, INT’L CRIM. CT., ¶¶ 61, 63 (Nov. 2013), http://www.legal-tools.org/uploads/tx_ltpdb/OTP_-_Policy_Paper_Preliminary_Examinations_2013-2.pdf [<http://perma.cc/2DGA-9D7Q>]; see also Rome Statute, *supra* note 1, art. 17(1)(d) (providing the gravity threshold).

150. *E.g.*, IMT Charter, *supra* note 2, art. 8; Control Council Law No. 10, *supra* note 2, art. II(4)(b); IMFTE Statute, *supra* note 2, art. 6; Rome Statute, *supra* note 1, art. 33(1); *IMT Judgment*, *supra* note 2, at 466, 470 (discussing the duty to disobey domestic laws that violate international laws and providing examples of those international laws that unambiguously protect human beings); Statute of the Special Court for Sierra Leone art. 6(4), Jan. 16, 2002, <http://www.rscsl.org/Documents/scsl-statute.pdf> [<http://perma.cc/DX4E-9UAJ>]; S.C. Res. 955, annex, Statute of the International Tribunal for Rwanda, art. 6(4) (Nov. 8, 1994); Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7(4), May 25, 1993, http://www.icty.org/x/file/Legal%20Library/Statute/statute_septo9_en.pdf [<http://perma.cc/CCC3-TTZ5>]; 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 470-88 (1949); 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 551-55, 563-67 (2009).

151. See *supra* notes 8-10, 70-78 and accompanying text.

152. In more recent work, Luban seems to have sympathy for something similar to this account, writing that “[t]he decision to ban the use of force except in self-defense represented a judgment, emerging from the smoldering ruins of Europe and Japan, that treating war as an instrument of policy poses an intolerable threat to ‘fundamental human rights’ and ‘the dignity and worth of the human person.’” Luban, *supra* note 48, at 218.

153. See *supra* Section III.A; *supra* notes 114-121, 132-144 and accompanying text; *infra* notes 205-214 and accompanying text.

A legal regime's core claim to normativity is strengthened when it coheres internally.¹⁵⁴ The traditional account renders international criminal law “equivocal” and self-undermining—simultaneously a major step forward in human rights and “a major moral enemy of the human rights movement.”¹⁵⁵ This tension weighs heavily against it. Conversely, on the unjustified killing account, aggression is of a normative piece with the rest of international criminal law, and is an important element of the human rights movement. This militates powerfully in its favor. Therefore, even if, contrary to the arguments in Sections III.A and III.B, the traditional account and the unjustified killing account offered equally plausible explanations of the crime, the latter would still be the better normative account.

D. Revisiting the History of the Move to a Restrictive Jus Ad Bellum

This focus on the human being is not merely a matter of internal normative logic. It has historical plausibility as part of the regime's purpose. Following the devastation of World War I, human life was the overriding public concern of those who led the intellectual and political movement that ultimately produced the Kellogg-Briand Pact—the key legal hook for the aggression convictions at Nuremberg.¹⁵⁶

In his 1921 pamphlet laying the foundations for this transition, Levinson described war as “inhuman” and compared legal toleration of the practice to the toleration of dueling, which had since become “plain murder under our laws.”¹⁵⁷ Levinson recognized that the ban would require states to forswear the sovereign authority to vindicate their rights through the “legal device of violence.”¹⁵⁸ Rather than bolstering this argument with a claim that sovereignty would also be augmented by the ban on interstate armed attacks, he insisted that the longstanding maximalist vision of sovereign authority was no longer tenable, given its infliction of “the worst form of violence and crime existing among men.”¹⁵⁹ Colonel Raymond Robins, a fellow proponent of the outlawry

154. See *supra* note 32 and accompanying text.

155. LUBAN, *supra* note 70, at 341; see *supra* note 75 and accompanying text.

156. *IMT Judgment*, *supra* note 2, at 460-66.

157. LEVINSON, *supra* note 21, at 14, 16. On Levinson's significance in the movement to ban war, see sources cited *supra* note 21.

158. LEVINSON, *supra* note 21, at 18.

159. *Id.* at 23.

of war, wrote of the movement as an effort to “declare[] [war] in international law to be what it is in fact, the supreme enemy of the human race.”¹⁶⁰

Leading political figures also adopted this framing. President Harding spoke of the move toward a restrictive *jus ad bellum* as the call “of humanity crying for relief.”¹⁶¹ Former British Prime Minister David Lloyd George reflected in his memoirs on the growing sense in this period that war was a “crime against humanity” the “perpetrators and instigators” of which ought to be punished.¹⁶² Secretary of State Kellogg wrote to the French Ambassador in the months before the Pact’s conclusion, “From the broad standpoint of humanity and civilization, all war is an assault upon the stability of human society, and should be suppressed in the common interest.”¹⁶³ Following the Pact, and with the carnage of World War I still fresh in memory, he described war as an “assault on human existence” and noted that the first thought in eliminating it was “the millions of wounded and dead” that result from armed conflict.¹⁶⁴

The various efforts to ban the use of force reached their first global legal fruition in 1928 in the Kellogg-Briand Pact. Notably, the treaty’s preamble emphasized not sovereignty, but states’ “solemn duty to promote the welfare of mankind” through the “humane endeavor” of ending war.¹⁶⁵ Picking up on this idea, Ruti Teitel has described the Pact as a treaty whose focus on humanity forged a “connection . . . between the two historical strands of *jus ad bellum* and *jus in bello* (humanitarian law).”¹⁶⁶

None of this is to say that there would not be sovereignty benefits to banning aggressive war. Nor is it to say that these benefits were unrecognized by those involved in the drafting of the Pact. But those sovereignty benefits (exchanged for sovereignty sacrifices) were not the focus of the public reasons given for this very fundamental legal restructuring. Instead, the focus was on the

160. Robins, *supra* note 21, at 10.

161. President Warren Harding, Keynote Conference Address (Nov. 12, 1921), *quoted in* LEVINSON, *supra* note 21, at 5.

162. 1 DAVID LLOYD GEORGE, MEMOIRS OF THE PEACE CONFERENCE 55 (1939).

163. Letter from Frank B. Kellogg, U.S. Sec’y of State, to Paul Claudel, Ambassador of Fr. (Feb. 27, 1928), *reprinted in* DAVID HUNTER MILLER, THE PEACE PACT OF PARIS: A STUDY OF THE BRIAND-KELLOGG TREATY 174, 176 (1928).

164. Kellogg, *supra* note 99.

165. Kellogg-Briand Pact, *supra* note 20, pmbl.

166. TEITEL, *supra* note 145, at 27. Presaging this line of thought, Francis Lieber—a key figure in the development of the contemporary *jus in bello*—emphasized that it is the human suffering of war that animates *jus ad bellum* requirements of justification and necessity. 2 FRANCIS LIEBER, MANUAL OF POLITICAL ETHICS, DESIGNED CHIEFLY FOR THE USE OF COLLEGES AND STUDENTS AT LAW 635 (Boston, Charles C. Little & James Brown 1839).

human wrongs inflicted by those who initiate war without justification. If anything, advocates of the Kellogg-Briand Pact, including Kellogg himself, were forced to defend it against the charge that it ceded too much in the way of sovereign authority.¹⁶⁷

E. Aggression and the Human Dimension in the Courtroom

This focus on the unjustified infliction of death and human suffering as the normative core of the issue was also palpable at Nuremberg and at Tokyo. Justice Jackson, the lead American prosecutor at the IMT, argued, “[W]hat appeals to men of good will and common sense as the crime which comprehends all lesser crimes, is the crime of making unjustifiable war. War necessarily is a calculated series of killings, of destructions of property, of oppressions.”¹⁶⁸ In his retrospective on the trials, Jackson’s Nuremberg colleague, Whitney Harris, adopted a similar line, reasoning:

Hitler ordered the killing of men called to the defense of countries which German armies invaded at Hitler’s command. Insofar as these invasions were acts of pure aggression, and wholly without legal justification, the resultant killings offended the conscience of mankind just as the slaughter of persons in concentration camps offended universal conscience. . . . The killing of innocent human beings by order of heads of states is subject to substantially the same moral blame whether it is the killing of civilian populations in connection with war or the killing of troops resisting unlawful aggression. . . . It is not the fact of initiating and waging aggressive war which reprehends it, but that it is necessarily a course of killings and of brutality which is attained in no other relationship of man or nation.¹⁶⁹

Nuremberg prosecutor and subsequent University of Chicago law professor Bernard Meltzer argued that “the Kellogg-Briand Pact and similar agreements are important, not because they directly made aggressive war a crime, but because, by destroying it as a defense, they made the instigators of aggression

¹⁶⁷. See, e.g., *Hearings on the General Pact for the Renunciation of War, Signed at Paris August 27, 1928 Before the S. Comm. on Foreign Relations*, 70th Cong. (1928) (statement of Frank B. Kellogg, Sec’y of State of the United States).

¹⁶⁸. Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, DEP’T ST., 51 (1949), http://www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf [<http://perma.cc/2HDC-TFX9>].

¹⁶⁹. HARRIS, *supra* note 2, at 528-29.

subject to the universal laws against murder.”¹⁷⁰ Hartley Shawcross, the chief British prosecutor at the IMT, brought this framing into the courtroom, emphasizing in his closing statement that “where a war is illegal . . . there is nothing to justify the killing, and these murders are not to be distinguished from those of any other lawless robber bands.”¹⁷¹

These were not mere prosecutorial flourishes. The IMT judgment described aggression as “the supreme international crime differing only from other war crimes in that it contains within itself the *accumulated evil* of the whole.”¹⁷² Similarly, the NMT described aggression as the “pinnacle of criminality” due to its infliction of “horror, suffering, and loss.”¹⁷³ The wrong the tribunals recognized in these statements is not the macro violation of sovereignty, but the aggregation of harms that that macro policy entails.¹⁷⁴ It is the death and destruction internal to aggression that is evil, and it is the accumulation of that evil that warrants criminalizing the war.¹⁷⁵

The IMTFE was more direct, holding that waging illegal war is the gravest crime because it entails “that death and suffering will be inflicted on countless human beings.”¹⁷⁶ Going even further than their IMT counterparts, the prosecutors in Tokyo had supplemented the charge of waging aggressive war with the charge of murder as a crime against the peace, including in the latter the killings of enemy soldiers in the course of an illegal invasion.¹⁷⁷ The Tribunal

170. Bernard D. Meltzer, *A Note on Some Aspects of the Nuremberg Debate*, 14 U. CHI. L. REV. 455, 460-61 (1947).

171. *Closing Statement at the Nuremberg Trials (July 26, 1946) by Hartley Shawcross, Chief Prosecutor for the U.K.*, in 19 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 458 (1948); see also Thomas Weigend, “In General a Principle of Justice”: The Debate on the “Crime Against Peace” in the Wake of the Nuremberg Judgment, 10 J. INT’L CRIM. JUST. 41, 50 (2012) (“[I]f war as such had been declared to be illegal, then the killing, wounding and destruction incident to any war lost its legal protection . . .”).

172. *IMT Judgment*, *supra* note 2, at 427 (emphasis added); see also *id.* at 465 (citing favorably the Resolution of the Sixth Pan-American Conference’s declaration that a “war of aggression constitutes an international crime against the human species”).

173. *Ministries Case*, *supra* note 2, at 342; see also *id.* at 318-19, 333 (describing the atrocities and horror inherent to war).

174. For an author who understands “accumulated evil” in this way, see DINSTEIN, *supra* note 91, at 128.

175. Preparatory Comm’n for the Int’l Criminal Court, *The Crime of Aggression: A Further Informal Discussion Paper*, UNITED NATIONS ¶ 10 (Nov. 13, 2000), <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/742/89/PDF/N0074289.pdf> [<http://perma.cc/VVQ7-47AA>] (emphasizing the death and destruction that make aggression of global concern).

176. *IMTFE Judgment*, *supra* note 2, at 49,769.

177. *Id.* at 48,452.

adopted this reasoning, declining to consider the murder charge only because it was deemed redundant to the charge of waging aggressive war. Specifically, the IMFTE held:

If, in any case, the finding be that the war was not unlawful then the charge of murder will fall with the charge of waging unlawful war. If, on the other hand, the war, in any particular case, is held to have been unlawful, then *this involves unlawful killings . . . at all places in the theater of war and at all times throughout the period of the war*. No good purpose is to be served, in our view, in dealing with these parts of the offences by way of counts for murder when the whole offence of waging those wars unlawfully is put in issue upon the counts charging the waging of such wars.¹⁷⁸

More recently, a committee reporting to the ICTY on NATO's aerial campaign against Yugoslavia in 1999 found that "a person convicted of a crime against peace may, potentially, be held criminally responsible for all of the activities causing death, injury or destruction during a conflict."¹⁷⁹ Similarly, British Attorney General Lord Peter Goldsmith warned Prime Minister Tony Blair of the outside possibility that he could be charged with murder for killings by British soldiers in the 2003 invasion of Iraq, should the war be deemed illegal.¹⁸⁰ Meanwhile, Security Council condemnations of aggressions since World War II have expressed concern and indignation not only at the infringement of sovereignty, but also at the killing and human suffering entailed.¹⁸¹

^{178.} *Id.* at 48,452-53 (emphasis added); *see also id.* at 49,576.

^{179.} Int'l Criminal Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, UNITED NATIONS ¶ 30 (2000), <http://www.icty.org/x/file/Press/natoo61300.pdf> [<http://perma.cc/LQY6-NBKY>].

^{180.} Memorandum from Peter Goldsmith, Att'y Gen., U.K. Att'y Gen.'s Office, to Tony Blair, Prime Minister, U.K. Prime Minister's Office ¶ 34 (Mar. 7, 2003) (on file with author).

^{181.} *See* S.C. Res. 611, pmb. (Apr. 25, 1988); S.C. Res. 580, pmb., ¶¶ 1-2 (Dec. 30, 1985); S.C. Res. 573, ¶ 4 (Oct. 4, 1985); S.C. Res. 571, pmb. (Sept. 20, 1985); S.C. Res. 568, pmb. (June 21, 1985); S.C. Res. 546, pmb. (Jan. 6, 1984); S.C. Res. 455, pmb. (Nov. 23, 1979); S.C. Res. 424, pmb. (Mar. 17, 1978); S.C. Res. 411, pmb. (June 30, 1977); S.C. Res. 405, pmb. (Apr. 14, 1977); S.C. Res. 326, pmb. (Feb. 2, 1973). *But see* S.C. Res. 387 (Mar. 31, 1976).

F. The Wrong of Aggressive War

For the reasons provided in this Part, an account of aggression that locates its core wrong in unjustified killing better fulfills the three criteria of a good normative account of the law than does an approach that focuses instead on the harm to sovereignty.

First, identifying the wrong as the unjustified killing in an aggressive war explains the legal contours of the crime in a way that a focus on sovereignty or even self-determination cannot. The *jus ad bellum* restrains the sovereign capacity to vindicate legal rights using force as much as it protects the sovereign rights to territorial integrity, political independence, and self-determination. Moreover, nonbelligerent acts that more severely infringe territorial integrity, political independence, or self-determination than does aggressive war are not criminal. Conversely, other forms of unjustified killing *are* criminalized in some other form. And illegal uses of interstate force that involve no sovereignty violation, or that vindicate territorial integrity or political independence rights without responding to an armed attack, are criminal aggressions. In each of these respects, neither sovereignty nor self-determination can make sense of the *jus ad bellum* and its role in international criminal law. In contrast, a focus on killing and human suffering is illuminating. Were it not criminal, aggressive war would be the key form in which such harms are inflicted on a massive scale without either being justified as a necessary and proportionate response to the threat or infliction of such harms by another, or being criminalized in some other way.

Second, the humanity-based explanation of aggression comports better with the overall purpose of the law in this domain, aligning both with the motivations for the initial outlawry of war and with the overall purposes of international criminal law as a key dimension of the “humanization” of international law. A connection between the killings in aggressive war and the wrong of murder ran through the heart of the prosecutions and convictions at Nuremberg and Tokyo, and has been reiterated in the work of several legal authorities since.

Third, a normative account rooted in humanity coheres with adjacent legal rules: explaining why aggression is the only criminal sovereignty violation and accounting for aggression’s fit within the broader legal approach to the unjustified infliction of human suffering. By contrast, as Luban and others emphasize, a crime that privileges sovereignty over humanity would sit extremely uneasily—and possibly in conflict—with the general humanizing posture of interna-

tional criminal law and the noncriminal status of all other sovereignty violations.¹⁸²

Aggression typically involves a sovereignty violation, but it is fundamentally a crime against human beings. It is a “law that has as its purpose protecting the fundamental right to life of millions of people.”¹⁸³ What makes it special in international criminal law is not that it protects sovereignty, rather than humanity, but that it alone protects the right to life of combatants and proportionate collateral civilians against the wrongful violence of foreign states.

IV. TWO PROBLEM CASES: BLOODLESS AGGRESSION AND HUMANITARIAN INTERVENTION

Before introducing the doctrinal implications of this normative reconceptualization, two potential problem cases should be addressed: bloodless invasion and humanitarian intervention. A “bloodless invasion” is an illegal military taking of territory or usurpation of governmental power without the infliction of casualties. Such actions are, by definition, unlawful. Although the legal status of humanitarian interventions lacking Security Council authorization is contested, the dominant view is that they, too, are unlawful. As illegal uses of force, a case can be made that both actions are also criminal.

The putative problem is this. Both actions involve a clear infringement of sovereignty. But neither appears to fit the unjustified killing paradigm. Bloodless invasions involve no killing at all, and the killing in a humanitarian intervention is responsive to the illegal human violence and killing of an atrocity crime in much the same way as the killing in a defensive war responds to the unjustified killing of an armed attack. Therefore, if such actions are criminal, the moral explanation would seem to be rooted not in human life, but in state sovereignty. Or so the objection would go.

This Part rebuts that concern. The criminal status of bloodless invasion at Nuremberg was dubious and marginal, and little has occurred to change this reality since. Indeed, there is space in Article 8 *bis* to exclude bloodless invasion from the crime altogether. This is telling, because if the sovereignty-focused, traditional account were true, bloodless invasions ought to be the paradigmatic example of the crime. The fact that they are not militates strongly against the traditional account. Moreover, the reason bloodless invasions are even poten-

¹⁸². See *supra* notes 8-10, 70-78, 153 and accompanying text.

¹⁸³. Mary Ellen O’Connell & Mirakmal Niyazmatov, *What is Aggression? Comparing the Jus Ad Bellum and the ICC Statute*, 10 J. INT’L CRIM. JUST. 189, 192 (2012); see *supra* notes 129, 131 and accompanying text.

tially criminal under current law is rooted not in their impact on sovereignty, but in their latent killing. This is what underpinned the limited criminal status of bloodless invasions at Nuremberg and it is what distinguishes bloodless invasion from the noncriminal sovereignty violations discussed in Section III.A. Thus, if bloodless invasions are criminal, the reason why would only serve to add further support to the unjustified killing account.

The humanitarian intervention objection is weaker. There is no precedent for the prosecution of a leader of such an action and the contemporary illegality of such interventions is most plausibly rooted not in the principle that such wars infringe sovereignty, but in the worry that legalization would encourage wars waged on a humanitarian pretext, and thus unjustified killing. Here too there is both interpretive space and good reason to exclude humanitarian intervention from the crime. Even if it were to be included, it would be with reference to encouraging unjustified killing.

A. *Bloodless Invasion*

Under the pending Article 8 *bis* of the Rome Statute, a war is criminal when it infringes the “territorial integrity or political independence” of a state.¹⁸⁴ Rodin argues that “this condition is both logically and factually independent of the question of whether the lives of individual citizens within the state are threatened.”¹⁸⁵ Rodin here invokes the specter of so-called “bloodless,” or at least near-bloodless, aggression.¹⁸⁶

The category is far from a null set. Most would recognize Russia’s 2014 invasion and annexation of Crimea as a prominent recent example. Following the Maidan protests, the flight and *de facto* abdication of President Yanukovich, and the pro-European takeover in Kiev in late February 2014, Russia took decisive military and paramilitary action in Crimea, purportedly to protect Russian nationals in the autonomous region.¹⁸⁷ Far exceeding the terms of a 1997

184. Rome Statute, *supra* note 1, art. 8 *bis* (2).

185. RODIN, *supra* note 53, at 132. Rodin’s focus is on self-defense, not the crime of aggression. However, his point is to emphasize the significance of bloodless aggression in illuminating what is at stake in the legal *jus ad bellum*, and the language he focuses on (territorial integrity and political independence) is anyway common to the bans on the use of force and aggression, not the “armed attack” rule that triggers a right to self-defense. *Cf.* U.N. Charter art. 2 ¶ 4; *id.* art. 51; Rome Statute, *supra* note 1, art. 8 *bis* (2).

186. RODIN, *supra* note 53, at 132.

187. For useful overviews of the events in Ukraine and the subsequent reactions, see Olivier Corten, *The Russian Intervention in the Ukrainian Crisis: Was Jus Contra Bellum “Confirmed Rather than Weakened”?*, 2 J. USE FORCE & INT’L L. 17 (2015); Kristina Daugirdas & Julian Davis

agreement with Ukraine regarding Russian troops' presence, the deployment enabled the armed takeover of the regional parliament, public buildings, and infrastructure.¹⁸⁸ In a hastily arranged referendum, conducted under the shadow of that dominant military presence, Crimeans voted to secede from Ukraine and to accede to Russia, paving the way for further troop deployments and a full annexation. Moscow now claims Crimea as its own, near-global nonrecognition of the transfer notwithstanding.¹⁸⁹ Most important for the discussion here, despite the clear impact of Russian military action in effecting the annexation, there were no significant casualties.¹⁹⁰

Uses of force such as that in Crimea undermine what Walzer terms the “highest values of international society” – namely, “the survival and freedom of political communities” – curtailing the political independence and self-determination rights that he insists “are worth dying for,” even when no one actually dies for them.¹⁹¹ Even if the attacked state's central politics are left intact and the population of the annexed region has little objection to their new sovereign, the territorial taking anyway violates the other core sovereign value protected by the *jus ad bellum*: territorial integrity.¹⁹² In short, such invasions involve severe and illegal infringements of sovereignty, but no human death or

Mortenson, *Contemporary Practice of the United States Relating to International Law*, 108 AM. J. INT'L L. 784, 784-815 (2014); and Antonello Tancredi, *The Russian Annexation of the Crimea: Questions Relating to the Use of Force*, 1 QUESTIONS INT'L L. 5 (2014). In addition to the claim regarding the protection of Russian nationals, Russian representatives asserted the right to intervene at the invitation of the ousted Yanukovich and subsequently at the invitation of Sergey Aksyonov, who was installed as the Prime Minister of the Republic of Crimea during the intervention. See, e.g., Corten, *supra*, at 18-19; Tancredi, *supra*, at 10.

188. See, e.g., Tancredi, *supra* note 187, at 6, 19-20.

189. On the coercive context in which the referendum occurred, see Office of the U.N. High Comm'r for Human Rights, Rep. on the Human Rights Situation in Ukraine, ¶¶ 6, 83-86 (Apr. 15, 2014).

190. Tancredi, *supra* note 187, at 7-8 (describing the use of “abundant[]” military coercion “even without opening fire” and noting that, after denial and obfuscation, Putin eventually admitted that “the Russian servicemen did back the Crimean self-defense forces” and made “a substantial, if not *the decisive*, contribution to enabling the people of Crimea to express their will”).

191. WALZER, *supra* note 11, at 253-54; see also Luban, *supra* note 19, at 164 (describing aggression's core wrong as “dictatorial interference” by one state in another's affairs (citing HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 167 (1950))).

192. Thus, McMahan observes, a bloodless invasion – what he terms a “lesser aggression” – “is not really lesser according to the traditional theory,” for, despite inflicting no immediate physical harm on individuals, it “may be lethal, or severely disabling, in its effect on the state.” McMahan, *supra* note 39, at 118 (emphasis added).

violence. If they are indeed criminal, this might seem to militate in favor of the traditional account and against the unjustified killing account of aggression.

In fact, the reverse is true. The *criminal* status of an illegal invasion that takes territory or usurps a foreign state's government without spilling a drop of blood is ambiguous and marginal at best—a point that weighs heavily against the traditional sovereignty-focused account.

Unlike each of its other invasions, Germany's relatively bloodless annexations of Austria and Bohemia and Moravia were excluded from the criminal indictment before the IMT, which then distinguished them explicitly from wars of aggression in its final judgment.¹⁹³ This exclusion is telling. If the core wrong of aggression were its infringement of sovereignty or nullification of a people's self-determination, bloodless aggression would be the paradigmatic form of the crime. Invasions that lack violent military confrontation eviscerate the territorial integrity and political independence of the victim states with far greater efficacy than do ordinary wars of aggression, many of which are unsuccessful in unseating the target government or holding territory.¹⁹⁴ The Nazi annexations of Austria and Bohemia and Moravia exemplify this perfectly, so the point would not have been lost on those at Nuremberg.¹⁹⁵

On the traditional normative account, then, it is difficult to make sense of either the failure to charge those invasions before the IMT, or of their separate normative status in the final judgment. On the account presented here, however, this marginalization makes perfect sense. For, while bloodless invasions are no less harmful to political independence and territorial integrity, they lack the same human violence as aggressive wars involving conflict and casualties.

Of course, although it was the most significant aggression prosecution to date, the IMT's was not the only word on this issue. The NMT subsequently adopted a broader definition of the crime, which included the invasions of Aus-

193. *IMT Judgment*, *supra* note 2, at 427; see also UNGA Definition of Aggression, *supra* note 3, annex art 5(2).

194. *Cf. supra* notes 105-113 and accompanying text (contrasting nonviolent violations of territorial integrity with belligerent acts). Compare the decisive impact of Russia's bloodless annexation of Crimea to the far bloodier war in Donbass, the effects of which have been less clear-cut. On the current situation in Donbass, see, for example, Office of the U.N. High Comm'r for Human Rights, Rep. on the Human Rights Situation in Ukraine 16 November 2015 to 15 February 2016 (Mar. 3, 2016) [hereinafter OHCHR 2016 Report]. Likewise, were it not for the U.N.-authorized intervention, Iraq's relatively low-casualty 1990 annexation of Kuwait would have been far more effective than its bloody and ultimately futile aggressive war against Iran in the 1980s. On Iraq's aggression against Iran, see *Further Report of the Secretary-General*, *supra* note 112.

195. *IMT Judgment*, *supra* note 2, at 433-36, 573.

tria and Bohemia and Moravia.¹⁹⁶ It is in this sense that the Nuremberg legacy on bloodless invasions is ambiguous.

However, the reasoning for the NMT's more expansive approach itself weighs heavily in favor of the unjustified killing account. In explaining the inclusion of these invasions as criminal aggressions, the NMT emphasized the fact that they were achieved against the backdrop of threatened slaughter by an overwhelmingly militarily superior Nazi force.¹⁹⁷ What made these actions criminal, the tribunal emphasized in the High Command Case, was "the exerting of violence" by German forces, even though that exertion was met with no resistance and thus the latent killing it entailed was not ultimately consummated.¹⁹⁸

Moral theorists critical of the Walzerian approach have started to bring precisely this notion of latent violence to the fore in related areas of philosophical discussion. Thus, as Cécile Fabre argues, a key normative link between bloodless invasions and traditional aggressions is that the former involve at their core "individuals posing a lethal threat, either ongoing or imminent, to other individuals."¹⁹⁹ This is what distinguishes both kinds of invasion from the kind of nonbelligerent, and noncriminal, sovereignty infringements discussed above.²⁰⁰ Whereas the latter violate political independence and territorial integ-

196. Control Council Law No. 10 included both illegal "war" and "invasions of other countries," whereas the IMT Charter focused exclusively on illegal "war." Control Council Law No. 10, *supra* note 2, art. II(1)(a); *see* IMT Charter, *supra* note 2, art. 6(a).

197. The NMT emphasized the Nazis' use of "overwhelming force" in these actions, noting that Germany perpetrated an "act of war" notwithstanding its "ab[ility] to so overawe the invaded countries" that its invasion was relatively bloodless. Ministries Case, *supra* note 2, at 330-31. It emphasized that, in such a situation, the attacked population chooses not to fight for "fear or a sense of the futility of resistance in the face of superior force . . . and thus prevents the occurrence of any actual combat." High Command Case, *supra* note 6, at 485. Similarly, the IMT held that what made the annexations of Austria and Czechoslovakia condemnable (though not prosecuted) was that they relied on the threatened use of "the armed might of Germany . . . if any resistance was encountered." *IMT Judgment*, *supra* note 2, at 435. It found that Czech President Emil Hácha submitted only under Hermann Göring's explicit threat to "destroy Prague completely from the air" and having been told by the German delegation that their "troops had already received orders to march and that any resistance would be broken with physical force." *Id.* at 439. This finding was subsequently cited by the NMT. Ministries Case *Judgment*, *supra* note 2, at 429. For similar reasoning in Tokyo, *see IMTFE Judgment*, *supra* note 2, at 49,582a-83, 49,769.

198. High Command Case, *supra* note 6, at 485.

199. Fabre, *supra* note 106, at 99. Fabre is discussing the trigger for self-defense here, but as with Rodin's comment above, *see supra* note 185 and accompanying text, the point holds equally well for aggression, *see infra* notes 205-214 and accompanying text.

200. *See supra* notes 105, 117 and accompanying text.

rity without exerting violence, the former achieve that end by inflicting latent lethal harm.

This distinction is crucial. If bloodless invasions are criminal (as the NMT suggests they are), the key trait that defines them as such, just as in the ordinary aggression case, is the *means* by which sovereignty is violated, not the fact or degree of the sovereignty violation. The difference between an aggressive military invasion that achieves its sovereignty-infringing end bloodlessly and the illegal foreign manipulation of elections is akin to the interpersonal difference between mugging someone for her wallet with a lethal weapon and pick-pocketing the same wallet from her without any physical threat.²⁰¹ One inflicts latent violence; the other does not. If aggression is criminal, its criminality as compared to the mere illegality of otherwise similar sovereignty violations would parallel armed mugging's felony status as compared to the misdemeanor status of nonviolently stealing the same item.²⁰²

How the ICC or domestic criminal courts will approach bloodless invasions is unclear. No legal authority has assessed the criminality of such actions since World War II. Indeed, the analysis and debate regarding the precise legal status of Russia's 2014 annexation of Crimea has not even considered whether it might have been criminal (presumably due to the lack of any viable means of prosecution).²⁰³ Nonetheless, it is notable that in various deliberations on the matter at the Security Council and elsewhere, the concept of latent Russian violence to human life was raised frequently. Those condemning the operation as an act of aggression described Crimean voters as acting under "the barrel of a gun" and "in the shadow of Russian bayonets."²⁰⁴ If the annexation of Crimea was criminal, this feature of the invasion was surely the crucial one.

Seen in this light, bloodless aggression does not provide a counterexample to the humanity-based account of the crime of aggression. On the contrary, in combination with the arguments in Part III, it fills out a context in which that is the only viable account of aggression. First, nonviolent but severe infringements of sovereignty are not criminal. Second, large-scale, lethal uses of international force not responsive to armed attacks are criminal, even when they vindicate the core sovereign rights related to territorial integrity, political independence, or self-determination. Third, bloodless invasions that threaten significant human harm are at the margin of criminality—of mixed status at Nu-

201. See *infra* note 213 and accompanying text.

202. Cf. MODEL PENAL CODE §§ 222.1, 223.1(2) (AM. LAW INST., Proposed Official Draft 1962).

203. On the legal status of the action in Crimea, see, for example, the sources cited *supra* note 187. No international court holds jurisdiction and domestic prosecution is politically unrealistic.

204. See, e.g., U.N. SCOR, 69th Sess., 7134th mtg. at 8, 19, U.N. Doc. S/PV.7134 (Mar. 13, 2014).

remberg, and, as elaborated in Part V, of dubious criminal status under the ICC regime. Fourth, when including such invasions in the crime, NMT judges emphasized the latent violence of those actions.

This analysis deals with the core objection, but before turning to humanitarian interventions, it is worth addressing a second dimension of the worry about bloodless invasions—namely, that the lawfulness of wars waged defensively against such invasions might be thought to contradict the argument in Section III.B that the *jus ad bellum* allows for the use of force only in response to an attack on, or threat to, human life.²⁰⁵ This challenge differs from that of the purported criminality of bloodless invasions, because the right to self-defense is triggered not by subjection to criminal aggression, but by subjection to an “armed attack”—a distinct and autonomous legal concept.²⁰⁶ Nonetheless, the crux of the response is the same.

To warrant defensive force, an invasion must carry the immediate threat of lethal force; it must be an *armed attack*.²⁰⁷ A bloodless deployment of border officials and national flags to foreign territory would satisfy this criterion no better than the kind of electoral manipulation discussed above.²⁰⁸ Of course, the arrest or eviction of such an unarmed deployment could trigger an (illegal) use of armed force on the part of the invading state. Under existing doctrine, however, the right to self-defense arises only following the application of such force, or at least its certain imminent application, not merely because it may loom as the potential mechanism for preserving the effects of an unarmed in-

205. RODIN, *supra* note 53, at 131-32; *see supra* notes 115-121 and accompanying text (discussing the armed attack requirement). The moral difficulty of explaining the justification for such wars, and the links between the presumption that such wars are justified and the sovereignty focus of the traditional normative account of international law, is examined in THE MORALITY OF DEFENSIVE WAR, *supra* note 39.

206. *See, e.g.*, Eri.-Eth. Cl. Comm’n, Decision Number 7: Guidance Regarding *Jus Ad Bellum* Liability, ¶ 5 (July 27, 2007). Of course, the ICJ has frequently used the General Assembly’s definition of aggression in its jurisprudence on self-defense. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 195 (June 27). For an illuminating discussion of how to interpret the ICJ’s jurisprudence on this issue in a way that preserves and explains the distinction between “armed attack” and the crime of aggression, *see* Dapo Akande & Antonios Tzanakopoulos, *The International Court of Justice and the Concept of Aggression*, in THE CRIME OF AGGRESSION: A COMMENTARY (Claus Kreß & Stefan Barriga eds., forthcoming 2018).

207. *See supra* notes 115-121 and accompanying text.

208. *See, e.g.*, *Japanese Police Arrest Hong Kong Activists Who Sailed to Disputed Islands*, GUARDIAN (Aug. 15, 2012, 9:23 AM), <http://www.theguardian.com/world/2012/aug/15/japanese-arrest-activists-territory-dispute> [<http://perma.cc/8KGGK-4JVA>].

tervention.²⁰⁹ Moreover, even when the immediate lethal threat to human beings is present, the use of defensive force is lawful only to the extent it is proportionate to the wrongful armed threat to which it responds.²¹⁰

Just as it is essential to the potentially criminal status of a bloodless invasion, this element of latent violence to human persons is also vital to grounding the right to self-defense. Fabre argues, “The crucial question [in this context] is not whether sovereignty-rights themselves warrant defending by force; rather, it is whether [combatants of the attacked state] are under a duty to surrender those rights as a means to save their life and as an alternative to killing” combatants of the aggressor state.²¹¹ She contends that they are under no such duty because their rights to defensive force are engaged by the “actual threat of future lethal harm.”²¹² Again drawing an analogy to violent mugging, those making this moral argument invoke the parallel disparity between the quantum of force appropriate in resisting an armed mugger demanding “your money or

209. On the high threshold for triggering the right to self-defense, see, for example, *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. ¶¶ 191-95. On distinguishing self-defense from counter-measures in this respect, see *id.* ¶ 210. On the imminence requirement for defense against future attacks, see, for example, D.J. HARRIS, *CASES & MATERIALS ON INTERNATIONAL LAW* 931-33 (6th ed., 2004); and U.N. High-Level Panel on Threats, Challenges & Change, *supra* note 146, ¶¶ 188-92.

210. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168 (Dec. 1), ¶ 147; *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶¶ 43, 51, 73-74, 77 (Nov. 6); *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. ¶¶ 176, 194; Letter from Daniel Webster, Sec’y of State, U.S. Dep’t of State, to Henry S. Fox, British Minister to the United States (Apr. 24, 1841), http://avalon.law.yale.edu/19th_century/br-1842d.asp [<http://perma.cc/AS9B-AN9H>].

211. Fabre, *supra* note 106, at 109.

212. *Id.* at 111; see also Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34, 54-55 (2005) (arguing that the lethal threat of a wrongful but potentially bloodless aggressor increases significantly the amount of force that may be used in response, even if it does not justify the same quantum of force as would an aggression aimed at causing death); Jeff McMahan, *Innocence, Self-Defense and Killing in War*, 2 J. POL. PHIL. 193, 196 (1994). McMahan has since put forward a more equivocal view, due to the number of minimally culpable aggressor soldiers that would be killed in such a war. McMahan, *supra* note 39, at 146-54. Notably, however, this is a view that would *preclude* morally the use of defensive force in such scenarios altogether, not one that would offer an alternative normative account of why such force is *lawful*. For other arguments along these lines, see Seth Lazar, *National Defence, Self-Defence, and the Problem of Political Aggression*, in *THE MORALITY OF DEFENSIVE WAR*, *supra* note 39, at 11, 26; and David Rodin, *The Myth of National Self-Defence*, in *THE MORALITY OF DEFENSIVE WAR*, *supra* note 39, at 69, 77, 81-85.

your life” and that which would be appropriate to prevent a nonviolent attempt to steal the same item.²¹³

Only if we understand the right to defensive force as a right that responds to the aggressive infliction of latent violence can we explain why bloodless military invasions trigger a legal right to the use of defensive force, while the non-violent infringements of territorial integrity and political independence discussed in Part III do not.²¹⁴ Here too the status of bloodless invasions coheres better with the unjustified killing account than with the sovereignty-focused, traditional account.

B. Humanitarian Intervention

The second apparent problem case is that of humanitarian intervention lacking Security Council authorization. A small minority of states and other authorities have argued that such interventions can be lawful.²¹⁵ If this is right,

213. Lazar, *supra* note 212, at 25; see Fabre, *supra* note 106, at 109-113; Hurka, *supra* note 212, at 54-55; McMahan, *supra* note 212, at 196; cf. MODEL PENAL CODE § 3.06(3)(d)(ii) (AM. LAW INST., Proposed Official Draft 1962) (allowing the use of deadly force in response to “arson, burglary, robbery or other felonious theft or property destruction” *only* if the perpetrator has “employed or threatened deadly force” or “the use of force other than deadly force to prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of serious bodily injury”). Seth Lazar accepts that “[I]f the defence against an aggressor that rolls over the border, promising to kill anyone who resists, is probably justifiable in individualist terms.” Lazar, *supra* note 212, at 26. However, he argues that at least some bloodless aggressors promise instead only to use force if subject to lethal defensive force themselves. *Id.* at 26-27. This misunderstands the language of invasion. The overtly armed nature of attacks that trigger the right to self-defense is a threat to kill those who pose any form of effective resistance, including enemy soldiers who place themselves between the aggressors and their objectives, without themselves firing on the aggressors. See Fabre, *supra* note 106, at 110.

214. See *supra* notes 105-107, 115-121 and accompanying text (discussing why nonviolent infringements of state sovereignty, such as the manipulation of a foreign state’s elections, do not give the violated state a right to use defensive force).

215. The Dutch, Belgian, and U.K. governments have articulated this position at various points. See Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 232, 239-40 (J.L. Holzgrefe & Robert O. Keohane eds., 2003); Robin Cook, Sec’y of State for Foreign & Commonwealth Affairs, Speech to the American Bar Association Meeting in London (July 19, 2000), reprinted in *U.K. Materials on International Law*, 71 BRIT. Y.B. INT’L L. 646 (2000); *Chemical Weapon Use by Syrian Regime: UK Government Legal Position*, PRIME MINISTER’S OFFICE, 10 DOWNING ST. (Aug. 29, 2013), <http://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/html-version> [http://perma.cc/BFJ9-9EXF]. Shortly after stepping down as U.S. State Department legal adviser, Harold Koh

humanitarian intervention poses no difficulty for the account presented here. However, most experts and states reject that position.²¹⁶ If the latter view is correct, unauthorized humanitarian intervention might be thought to pose a difficulty for the unjustified killing account. Without taking a view on the legality of humanitarian intervention, the following discussion assumes such actions to be illegal for the sake of argument.

The putative difficulty posed by the presumed illegality of humanitarian intervention is as follows. Article 8 *bis* criminalizes all “manifest violation[s]” of the U.N. Charter’s rules on the use of force, as defined by their “character, gravity and scale.”²¹⁷ Efforts during the amendment process to attach an explicit understanding excluding humanitarian intervention from the crime failed.²¹⁸ As such, the argument goes, manifestly illegal humanitarian interventions are necessarily criminal.²¹⁹ The problem is that genuine and proportionate humanitarian interventions use lethal violence only to defend against criminally wrongful killing and violence.²²⁰ In other words, they lack the wrong of aggression defined above—namely, the infliction of death and violence that is *not* justified by its response to the threat or infliction of the same.²²¹

insisted that such interventions are at least arguably lawful. See Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY (Oct. 2, 2013, 9:00 AM), <http://www.justsecurity.org/1506/koh-syria-part2> [<http://perma.cc/SV9P-LT84>].

216. Koh admits that “[a]mong international legal commentators, the emerging party line seems to be that President Obama was threatening blatantly illegal military action in Syria . . .” Koh, *supra* note 215; see also CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 47, 51 (3d ed. 2008) (noting that many states have stated that they regard humanitarian intervention to be illegal); *Debate Map: Use of Force Against Syria*, OXFORD PUB. INT’L L. (Apr. 29, 2014), http://opil.ouplaw.com/page/debate_map_syria/debate-map-use-of-force-against-syria [<http://perma.cc/YPS9-FZT6>].
217. Rome Statute, *supra* note 1, art. 8 *bis* (1).
218. Beth Van Schaack, *The Crime of Aggression and Humanitarian Intervention on Behalf of Women*, 11 INT’L CRIM. L. REV. 477, 482-83 (2011). It is notable also that the preamble to the Rome Statute reaffirms the U.N. Charter’s posture on the use of force and notes in that regard that “nothing in this Statute shall be taken as authorizing any State Party to intervene in . . . the internal affairs of any State.” Rome Statute, *supra* note 1, pmb. ¶¶ 7-8.
219. See Sean D. Murphy, *Criminalizing Humanitarian Intervention*, 41 CASE W. RES. J. INT’L L. 341 (2009) (elaborating on the line of interpretation that would include humanitarian interventions as criminal, but predicting that a prosecution on these grounds is unlikely); Van Schaack, *supra* note 218 (recognizing the possibility of an interpretation that would include humanitarian interventions as criminal, but arguing against it on feminist grounds).
220. See, e.g., G.A. Res. 60/1, *supra* note 139, ¶ 139; S.C. Res. 1674, *supra* note 139, ¶ 4; ICISS REPORT, *supra* note 139, ¶¶ 4.13, 4.19-4.26.
221. See *supra* Section III.B; *supra* notes 122-131 and accompanying text (explaining the basic consistency of this principle across crimes, notwithstanding different thresholds of criminality).

To be clear, humanitarian interventions do involve killing in an illegal action. In other words, they do involve *legally* unjustified killing.²²² However, the lack of legal justification for the killing in such an intervention is derivative of the illegality of the intervention. And the latter is not itself explicable with reference to the deeper wrong of killing without the justification of responding to the threat or infliction of illegal killing or analogous violence.

The problem posed by the purported criminality of humanitarian intervention, then, is that the lack of legal justification for killing in a humanitarian intervention might be thought to reflect a privileging of sovereign rights over the value of human life.²²³ Such interventions do, after all, tend to have significant impact on the political independence and territorial integrity of the target state.²²⁴ On that basis, if humanitarian intervention is criminal, this might seem to militate in favor of the traditional sovereignty-focused account, and against the unjustified killing account, of aggression.

As with the concern about bloodless invasion, however, the objection fails. First, it misrepresents the normative status of humanitarian intervention in the contemporary order. The illegality of such interventions is not about protecting sovereignty over human life; it is about banning “good” wars so as not to encourage or facilitate “bad” wars. If genuine humanitarian interventions are criminal, it is so as to prevent the unjustified killing of disproportionate or pretextual interventions. Second, as discussed in Part V, there is ample interpretive space, and good reason, to exclude presumptively illegal humanitarian intervention from the crime.

This explains why the legal right to use force obtains only when the state responds proportionately to an armed attack, and not when it faces more severe, but nonviolent, violations of its territorial integrity, its political independence, or the self-determination of its people. See *supra* notes 105-109, 115-121 and accompanying text.

222. This, at least, distinguishes them from plainly noncriminal, nonviolent sovereignty infringements. See *supra* Section III.A.
223. This is the root of Luban’s charge that the criminalization of aggression has been “a major moral enemy of the human rights movement.” See *supra* notes 70-75 and accompanying text.
224. The Kosovo intervention resulted in the external administration and subsequent secession of the territory. See S.C. Res. 1244, ¶ 10 (June 10, 1999) (establishing the U.N. Interim Administration Mission in Kosovo (UNMIK), and thus usurping the political authority of Serbia and Montenegro); *International Recognitions of the Republic of Kosovo*, REPUBLIC KOS. MINISTRY FOREIGN AFF., <http://www.mfa-ks.net/?page=2,224> [<http://perma.cc/G8ZF-G6KM>] (listing states that have recognized Kosovo’s sovereign status). Tanzania’s intervention in Uganda resulted in the overthrow of the Ugandan government. THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 143-44 (2002). India’s intervention in East Pakistan precipitated the secession of that territory, which became Bangladesh. *Id.* at 139-42.

In any domain, there is an inevitable gap between even optimally crafted law and the internal normative foundations of that law.²²⁵ Put another way, there are always hard cases, where legal status does not reflect moral status, even when judged against the very moral standards on which the law is premised. This is for the familiar reason that optimal legal rules, unlike the underlying moral principles of right and wrong, must take account of moral hazard, the risks of abuse, the danger of slippery slopes, the collateral impact of rules on broader normative culture, and the “migration” of regulated behaviors out of the intended domain.²²⁶

On a normative account that has gained particular prominence since NATO’s 1999 intervention in Kosovo, and which offers the most coherent explanation of contemporary international law in this area, humanitarian interventions fall precisely into this gap between the law and its own underlying moral posture.²²⁷ Along these lines, an influential independent report on the Kosovo intervention declared NATO’s actions to have been “illegal but legitimate.”²²⁸ Prominent voices have endorsed this as the appropriate, long-term normative equilibrium for humanitarian intervention.²²⁹ And several of the

225. See LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* (2001); ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 199 (1999); Larry Alexander, *The Gap*, 14 HARV. J.L. & PUB. POL’Y 695 (1991).

226. See, e.g., Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 671 (1994); Kim Lane Scheppele, *Hypothetical Torture in the ‘War on Terrorism,’* 1 J. NAT’L SECURITY L. & POL’Y 285, 307-18 (2005).

227. The account described in this Section is perhaps the most common moral defense of the existing regime. See Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT’L L. 1005, 1020 (1998); W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT’L L. 3, 16 (2000).

228. INDEP. INT’L COMM’N ON KOSOVO, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* 4 (2000).

229. See FRANCK, *supra* note 224, at 166-89 (framing the issue as one of “good law producing a very bad result” and “hard cases” making “bad law”); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 126 (1991) (“It would be better to acquiesce in a violation that is considered necessary and desirable in the particular circumstances than to adopt a principle that would open a wide gap in the barrier against unilateral use of force.”); see also Anthea Roberts, *Legality vs Legitimacy: Can Uses of Force Be Illegal but Justified?*, in *HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE* 179, 212-13 (Philip Alston & Euan MacDonal eds., 2008) (arguing that the “illegal but justified” frame might “ossify” the law in that posture, obstructing customary reform through shifting practice); Stromseth, *supra* note 215 (arguing that the uncertain legality of humanitarian intervention serves to increase the burden of justification on those who would intervene without U.N. authorization).

states that participated in the campaign claimed moral justification, while insisting that the intervention ought not be understood as a legal precedent.²³⁰

Underpinning this idea is the view that an explicit ex ante legal permission for even genuine humanitarian wars would facilitate the waging of both non-humanitarian interventions on a humanitarian pretext and disproportionate interventions that far exceed their humanitarian purpose, and that these twin dangers outweigh the benefit of enabling genuine, proportionate humanitarian interventions.²³¹ In short, the aggregate risk of false positives under a permissive regime is thought to outweigh the risk of false negatives under a restrictive regime.

Pretext is a heightened danger here because the *jus ad bellum* is typically evaluated and enforced not by a judicial authority, capable of engaging in fine-grained, case-by-case analysis, but by states acting collectively to sanction and ostracize lawbreakers.²³² In that sense the effective enforcement of the *jus ad bellum* depends on broad consensus in each case. Because the precise threshold for humanitarian intervention is less easily identified than is the armed attack threshold of self-defense, it would be difficult, were genuine humanitarian intervention lawful, for an uncoordinated population of states to engage in such

230. See Stromseth, *supra* note 215, at 239 (discussing the French and German positions against treating the war as a precedent). These same leaders identified a humanitarian moral imperative to act. See, e.g., DANIEL LEVY & NATAN SZNAIDER, *THE HOLOCAUST AND MEMORY IN THE GLOBAL AGE* 166 (2006) (noting that the German Chancellor, Foreign Minister, and Defense Minister “all cited the lessons of the Holocaust to justify sending troops to Kosovo”); U.N. GAOR, 54th Sess., 14th plen. mtg., U.N. Doc. A/54/PV.14 (Sept. 25, 1999); *NATO Attack on Kosovo Begins*, CNN (Mar. 24, 1999, 3:29 PM), <http://www.cnn.com/WORLD/europe/9903/24/kosovo.strikes> [<http://perma.cc/Y2VK-YUJZ>] (quoting French President Jacques Chirac’s explanation that Serbia’s “unacceptable” treatment of Kosovar Albanians had triggered an imperative to act to “contain a tragedy”).

231. See, e.g., DINSTEIN, *supra* note 91, at 74; FRANCK, *supra* note 224, at 175-78; GRAY, *supra* note 216, at 52; SCHACHTER, *supra* note 229, at 126; Simon Chesterman, *Hard Cases Make Bad Law: Law, Ethics, and Politics in Humanitarian Intervention*, in *JUST INTERVENTION* 46, 50 (Anthony F. Lang Jr. ed., 2003); Kutz, *supra* note 51, at 230; U.K. Foreign and Commonwealth Office, Foreign Policy Doc. No. 148, reprinted in *U.K. Materials on International Law*, 57 BRIT. Y.B. INT’L L. 614, 619 (1986). But see Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT’L L. 107, 107, 110-11, 126-27 (2006) (arguing that claiming a humanitarian intervention justification is more likely to generate pressure on leaders to limit their uses of force than would claiming self-defense).

232. On the collective enforcement of international law, see, for example, Hathaway & Shapiro, *Outcasting*, *supra* note 21. See also text accompanying *infra* note 258 (discussing the sanctions imposed on Russia). On the relevance of disagreement here, consider Hersch Lauterpacht’s observation that “the existing imperfections of the law in the matter of determining whether there has occurred a breach of the obligation not to have recourse to aggressive war are themselves part of the law.” Lauterpacht, *supra* note 33, at 211.

collective enforcement against states that wage illegal war on a humanitarian pretext. Or so the theory goes.

Understanding the illegality of unauthorized humanitarian intervention in this way makes better sense of the contemporary legal structure than does the sovereignty-based account. It fits with the notion that the Security Council is thought to have a *responsibility* to authorize (and thus render lawful) precisely the same substantive action.²³³ The procedural requirement of Council authorization imposes a political and epistemic check that is likely to block the vast majority of pretextual interventions.²³⁴ Although some genuine humanitarian interventions will be prohibited, the presumption is that this is a defensible tradeoff, especially if the genuine interventions can be excused as legitimate post hoc.²³⁵ This understanding also makes sense of the debate regarding humanitarian intervention's illegality. As a hard case on the law's own normative terms, it is not surprising that different states and commentators have come to different legal views as to its permissibility.²³⁶

233. See *supra* note 139 and accompanying text. On the potential impact of even limited Security Council-authorized interventions on the target state's political independence, consider the way in which the narrow aerial intervention in Libya in 2011 led to regime change (whether as a necessary means to (or collateral effect of) its humanitarian aim, or, less charitably, as a deliberate exploitation by the intervening states of the authority granted them by the Council). See, e.g., Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT'L L. 355, 387-91 (2012); Simon Tisdall, *The Consensus on Intervention in Libya Has Shattered*, GUARDIAN (Mar. 23, 2011, 11:11 PM), <http://www.theguardian.com/commentisfree/2011/mar/23/libya-ceasefire-consensus-russia-china-india> [<http://perma.cc/PM6P-EP9M>].

234. Cf. FRANCK, *supra* note 224, at 102-05 (discussing the Security Council's "jury" function in checking abuses of preemptive self-defense); *id.* at 185-87 (discussing the ex post facto "jurying" of the U.N.'s political organs in retrospectively excusing a humanitarian intervention).

235. See sources cited *supra* notes 229-231. Even those who consider the Council to be broken seek to replicate the same function by requiring the endorsement of a diverse coalition or regional organization. See, e.g., ICISS REPORT, *supra* note 139, ¶¶ 6.28-6.40; Cook, *supra* note 215, at 647; see also Allen Buchanan & Robert O. Keohane, *Precommitment Regimes for Intervention: Supplementing the Security Council*, 25 ETHICS & INT'L AFF. 41, 52-55 (2011) (describing the structure of a democratic coalition regime).

236. See *supra* notes 215-216. Given the recent nature of both the responsibility to protect and the willingness of states to claim the lawfulness of humanitarian intervention, the case for this understanding of the illegality of humanitarian intervention is plainly stronger today than it was in 1998. However, the "benevolent silence" of the international community vis-à-vis earlier interventions suggests that it may have been the optimal normative account even at that earlier stage in international law's ongoing evolution. FRANCK, *supra* note 224, at 154. See generally *id.* ch. 9 (examining the international responses to several humanitarian interventions prior to the development of the responsibility to protect the norm).

Most significantly here, this account of humanitarian intervention's illegality is compatible with the normative account of aggression described above. Humanitarian intervention, on this understanding, is illegal not because it inflicts the wrong of massive killing without responding defensively to the threat or infliction of the same, but because permitting it would encourage wars that *do* inflict that wrong—that is, pretextual or disproportionate interventions. If humanitarian interventions are criminal, therefore, it is with a view to the prevention of unjustified killing, even though those interventions do not themselves inflict that wrong.

This reconciles the illegality (and possible criminality) of humanitarian intervention with the unjustified killing account. However, it also highlights the unusual nature of humanitarian intervention among illegal uses of force—namely, that it lacks the core criminal wrong of aggression. As discussed in the next Part, even assuming the illegality of humanitarian intervention, this militates against its criminality, and there is ample interpretive space to exclude it from the crime.

V. WHY IT MATTERS THAT AGGRESSION IS A CRIME OF UNJUSTIFIED KILLING

Getting the normative underpinnings of the crime of aggression right is not a purely theoretical exercise. Doing so has practical consequences for the law and its application. In forthcoming work, I elaborate three such consequences, which are introduced here.²³⁷ The first, raised tangentially in Part IV, emphasizes how understanding the moral meaning of a crime can help to guide interpretation of ambiguous aspects of that very criminal prohibition. The second and third identify implications for related rules governing how we treat soldiers on either side of an aggressive war.

A. The Utility of Normative Clarity in Resolving Ambiguous Cases

The first internal implication of identifying the wrong of aggressive war as the infliction of massive killing not in response to the same is that this clarifies the object and purpose of the crime, and thus sheds light on how the ICC should interpret ambiguous cases.²³⁸ As indicated above, both bloodless invasion and humanitarian intervention fall into this category. The first, although

²³⁷. See Dannenbaum, *supra* note 31.

²³⁸. See Vienna Convention on the Law of Treaties, *supra* note 80, art. 31 (requiring that a treaty be interpreted in a way that coheres with its object and purpose).

clearly illegal, has a mixed criminal law legacy; the second is of disputed legality and has not been evaluated in criminal case law.

The focus here is different from that in Part IV. There, the task was to explain why the (presumed) illegality of humanitarian intervention and the dubious (but presumed) criminality of bloodless invasions are compatible with the unjustified killing account of aggression. This Part turns to the separate and distinct question of what the unjustified killing account indicates regarding the optimal legal assessment of either action by the ICC. In contrast to the traditional account, the unjustified killing account of aggression weighs against the criminality of either action.

As argued above, if humanitarian intervention is currently illegal, it is “illegal but legitimate” by the law’s own normative lights. Two factors explain why this means that the best interpretation of Article 8 *bis* would exclude such wars. First, the condemnation and punishment inherent in criminal conviction heighten the imperative to narrow the gap between laws and the moral principles that underpin them.²³⁹ This is particularly so in a domain focused exclusively on “the most serious crimes.”²⁴⁰ The normative authority of international criminal law would suffer if the leader of a genuine humanitarian intervention were convicted of the “supreme international crime” of aggression, despite not perpetrating its core “accumulated evil.”²⁴¹ In other words, the justificatory threshold for a regime under which an action is “supremely criminal but legitimate” is significantly higher than is that for a regime under which an action is merely “illegal but legitimate.”

Second, whereas the *jus ad bellum* is ordinarily enforced collectively by states, international crimes are enforced by a single judicial authority capable of reaching nuanced case-by-case judgments with authoritative effect.²⁴² As such,

239. On “the gap,” see Alexander, *supra* note 225, at 696. On the imperative to narrow it, see *id.* at 698, which states that “[i]t is difficult to bring ourselves to punish those who have done what we acknowledge was the correct thing to do, even when we understand the consequentialist warrant for punishing them.” See also *supra* notes 16-18 and accompanying text.

240. See Rome Statute, *supra* note 1, pmb. ¶ 4; see also sources cited *supra* note 18 (describing the moral condemnation entailed in international criminal punishment). Claims that a given action could be internationally *criminal*, but legitimate, are rare. For a highly controversial position along those lines, see H CJ 5100/94 Pub. Comm. Against Torture in Isr. v. State of Isr. 53(4) PD 817 (1999) (Isr.) (holding that individuals may be criminally liable for engaging in torture, even when doing so is morally required by urgent necessity, and resolving that the best such soldiers can hope for is the post hoc mercy of the prosecutors or the courts).

241. On the notion of aggression as an “accumulated evil” and the “supreme international crime,” see *IMT Judgment*, *supra* note 2, at 427.

242. Under the ICC’s system of complementarity, domestic courts have primacy and a final say in the case, unless the relevant domestic actors prove unwilling or unable to investigate and (if

unlike the broader *jus ad bellum*, international criminal law operates in an institutional context in which a rule permitting genuine humanitarian interventions would not thereby encourage large numbers of bad wars.²⁴³ In that sense, the key justification for humanitarian intervention's illegality is inapplicable in the criminal context.

Consider these points together. The justification for criminalizing humanitarian intervention despite it lacking the core wrong is higher than is the threshold for justifying its illegality. And a core aspect of the justification for its illegality is anyway absent. Combining this with the observation above that humanitarian intervention lacks the core criminal wrong, there is good internal reason to exclude humanitarian intervention from the crime.

This frames how the ICC ought to interpret aggression. Article 8 *bis* (1) provides that only those illegal uses of force with the "character" and "gravity" to constitute a "manifest" violation of the Charter are criminal.²⁴⁴ As the attached understandings emphasize, "aggression is the most serious and dangerous form of the illegal use of force; . . . a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences."²⁴⁵

The normative account put forward in this Article demands measuring the "seriousness," "gravity," "character," and "danger" of an illegal use of force by its unjustified infliction of human death and suffering. Pursuant to that reading, genuine humanitarian interventions would fall short of the criminal threshold. In that sense, Harold Koh and Todd Buchwald are right to insist that, "[w]hatever one's legal views on whether humanitarian intervention is a permissible basis under international law for resorting to force, a true humanitari-

appropriate) prosecute perpetrators, at which point the international court takes over. Rome Statute, *supra* note 1, art. 17(1)(a)-(c).

243. See *supra* notes 232-235 and accompanying text.

244. Rome Statute, *supra* note 1, art. 8 *bis* (1); see also, e.g., Van Schaack, *supra* note 218, at 486 ("[T]he only way for any party to address potentially unlawful but nonetheless legitimate uses of force is with reference to the tripartite factors of character, gravity, and scale The term 'character', as a more qualitative term, is the most elastic of the three factors and might provide an opening"). But see Murphy, *supra* note 219, at 362 ("Rather than carve out humanitarian intervention, the purpose of the threshold language . . . seems to be to eliminate minor incidents of armed force from the crime of aggression, such as frontier incidents involving border patrols or coast guards.").

245. ICC Aggression Amendments, *supra* note 1, annex III, ¶ 6.

an intervention . . . should not entail the risk of international criminal prosecution.”²⁴⁶

For similar reasons, the normative account presented here can guide the interpretation of bloodless invasions. On the dominant, sovereignty-focused account, the proper interpretation of Article 8 *bis* would surely include future actions along the lines of Russia’s 2014 annexation of Crimea.²⁴⁷ The account presented here insists instead that such cases are not at all clear-cut. If anything, the stronger argument is for their exclusion from the crime.

This position may seem to be out of sync with the widespread condemnation of Russia’s annexation of Crimea, which a number of states labeled “aggression.”²⁴⁸ Indeed, there was good reason to use the term. As Tancredi observes, the Russian intervention exemplified several of the acts of aggression listed in Article 3 of the General Assembly’s definition.²⁴⁹ Those same acts are included in the identical list in Article 8 *bis* (2) of the Rome Statute amendment.

However, there is a crucial distinction. Public condemnations of Russia’s actions have not claimed criminality, and criminal punishment of the Russian orchestrators has never been on the table. This is important, because one can hold that the Crimean intervention was an act of aggression without endorsing the notion that it exemplified a criminal use of force. The “character” and “gravity” thresholds internal to Article 8 *bis* qualify “acts of aggression,” including precisely those listed in 8 *bis* (2).²⁵⁰ In other words, by the very structure of the provision, not all instances of the listed acts of aggression are criminal, only those of the requisite character and gravity.²⁵¹

Measured with reference to unjustified human harm, the latent violence that could underpin the criminality of bloodless invasions is plainly of lesser “seriousness,” “danger,” and “gravity” and of a different “character” than consummated violence.²⁵² As such, bloodless invasions fall somewhere between

246. Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT’L L. 257, 273 (2015).

247. See *supra* notes 187–190 and accompanying text. Prosecution for the action in Crimea itself is not feasible at the ICC, since Russia is not a State Party to the Rome Statute, and Article 8 *bis* will have only prospective effect. Rome Statute, *supra* note 1, arts. 15 *bis* (2), 15 *ter* (2).

248. Corten, *supra* note 187, at 29–30; Tancredi, *supra* note 187, at 19.

249. Tancredi, *supra* note 187, at 19–29.

250. See Rome Statute, *supra* note 1, art. 8 *bis* (1)–(2).

251. Notably these thresholds are internal to the definition of the crime, unlike the general gravity requirement in the Court’s admissibility criteria. See *id.* art. 17, ¶ 1(d).

252. This reflects a general principle that, although the attachment of latent violence to a lower-level legal breach serves as a gravity multiplier, consummated violence is graver still. If an

clearly noncriminal acts—like illegally, but nonviolently, manipulating foreign elections—and clearly criminal, high-casualty invasions. This raises the real possibility that even highly effective bloodless invasions are not criminal under Article 8 *bis*.

There is an obviously troubling aspect to letting the leaders of a bloodless invasion off the criminal hook. Had their presence been resisted by Ukraine, Russian troops stationed in Crimea would almost certainly have responded with lethal force. That was surely why they were stationed throughout the territory, and it is how Russian forces reacted to resistance in Donbass subsequently.²⁵³ In that sense, the bloodlessness of Crimea was due not to restraint in Moscow, but to supererogatory restraint in Kiev.²⁵⁴ To condemn and punish leaders for one of these invasion types and not the other might appear morally arbitrary.

However, such divergent treatment is commonly accepted in morality and law. Persons are judged morally not on what they would have done had circumstances outside of their control been different, but on what they actually did.²⁵⁵ Similarly, criminal law gives the perpetrator the strong benefit of the doubt, recognizing, however unlikely it may be, that a threat may never have been consummated, and that those who make a threat, even if it succeeds, should not be treated equivalently to those who make and consummate that threat. Notably, most other international crimes require more than latent unjustified violence: they require its direct infliction. There are rare exceptions, such as the war crime of “declaring that no quarter will be given” or the crime of inviting unjustified killing through shielding one’s own troops with civilians.²⁵⁶ But those crimes are anomalous and aggression is the “supreme” crime,

armed mugging is more serious than merely stealing the same item, killing an individual who resists that mugging is more serious a violation still. For more on how latent violence aggravates wrongfulness (as in the difference between armed mugging and merely stealing the same item), see *supra* notes 199-214 and accompanying text.

253. OHCHR 2016 Report, *supra* note 194, ¶¶ 2, 22, 28, 37 (noting casualties in Donetsk and Russian involvement in Ukraine).

254. Although Ukraine’s leaders were lauded for their restraint in refraining from using force in Crimea at the Security Council, most would recognize that they had the right to respond militarily to Russia’s actions. For statements of the representatives from Luxembourg, the United States, and the United Kingdom praising Ukrainian restraint, see U.N. Doc. S/PV.7134, *supra* note 204, at 4-5, 7.

255. See Thomas Nagel, *Moral Luck*, in MORTAL QUESTIONS 24 (1979); Bernard Williams, *Moral Luck*, in MORAL LUCK 20 (1981).

256. Rome Statute, *supra* note 1, art. 8, ¶¶ 2(b)(xii), 2(b)(xxiii), 2(e)(x).

defined by an internal gravity threshold.²⁵⁷ There is good reason to hold that bloodless invasion falls short of that threshold.

To be clear, the noncriminality of such actions is compatible both with the dominant view that Russia engaged in a serious violation of public international law, and with the collective and severe sanctions imposed on Russia in response, including nonrecognition of the annexation.²⁵⁸ Bloodless invasions are serious violations of international law that warrant significant consequences. The argument above goes only to the question of whether the leaders of states that engage in such actions should be prosecuted as the world's supreme criminals, alongside perpetrators of genocide, crimes against humanity, and war crimes.

This is not to say that the normative account presented here disposes unequivocally with the question of bloodless invasion's criminality. As explained in Part IV, the unjustified killing account is compatible with a lower threshold that would include bloodless aggressions as criminal.²⁵⁹ However, in recognizing that such invasions are less grave on the core measure of the crime's wrongfulness, and in stark contrast to the dominant account, the argument weighs against including such invasions among the "most serious and dangerous" forms of illegal force that count as instances of the "supreme crime." The best interpretation of Article 8 *bis* is that bloodless invasions are not criminal.

Even if it were thought appropriate, after reflection and debate, to adopt a lower threshold and count some bloodless invasions as criminal aggressions, the account presented here would identify a criminality threshold within the category of bloodless invasions. Specifically, criminality would turn on the scope of the action's latent human violence.

B. *The Right To Disobey*

The second practical implication of the normative account presented here goes to the legal rights of soldiers ordered to fight in criminal wars. Viewed on the traditional account as remote, and thus morally detached, from the macro wrong against the victim state, such soldiers have been denied an international-

257. See *supra* notes 26, 250-251 and accompanying text.

258. See G.A. Res. 68/262, ¶¶ 5-6 (Mar. 27, 2014); Edward Hunter Christie, *Sanctions After Crimea: Have They Worked?*, NATO REV. MAG., <http://www.nato.int/docu/Review/2015/Russia/sanctions-after-crimea-have-they-worked/EN/index.htm> [http://perma.cc/HJ8F-WGD6]; *EU Sanctions Against Russia over Ukraine Crisis*, EUROPA, http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm [http://perma.cc/NK4T-DPCM].

259. See *supra* Section IV.A.

ly protected right to refuse to participate. On the account presented here, that is a mistake. Although typically nonculpable, soldiers are involved intimately in the unjustified killing and violence that are the core criminal wrongs of aggressive war. A better interpretation of existing law would recognize their right to refuse to perform those wrongs.

It is legally clear that only those who control, or at least influence, the policy to wage illegal war can be criminally liable for aggression.²⁶⁰ On the Walzerian normative account, this reflects the deeper moral truth that soldiers are responsible only for what falls within “their own sphere of activity.”²⁶¹ They are detached morally from any macro interstate wrong, because they lack influence at that level.²⁶² This idea of a tightly defined sphere of soldierly activity and responsibility underpins the so-called “moral equality” of combatants – the idea that soldiers waging an aggressive war are no less licensed morally to kill combatants (and proportionate collateral civilians) than are their opponents.²⁶³

The idea that trivial or remote contributions to a macro wrong can be subject so easily to moral detachment ought to be controversial from the legal point of view, particularly in light of international criminal law’s broad and oft-used doctrines of shared responsibility.²⁶⁴ But even accepting that premise, on

-
260. See *supra* notes 5-7 and accompanying text. For more on the leadership element, see Heller, *supra* note 65. See also Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 43(2) (1977) [hereinafter Additional Protocol I] (on the combatant’s privilege to fight with immunity if *jus in bello* compliant).
261. WALZER, *supra* note 11, at 39; see *id.* at 304; Paul W. Kahn, *The Paradox of Riskless Warfare*, 22 PHIL. & PUB. POL’Y 2, 2 (2002); Dan Zupan, *A Presumption of the Moral Equality of Combatants: A Citizen-Soldier’s Perspective*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 214, 214 (David Rodin & Henry Shue eds., 2008).
262. See WALZER, *supra* note 11, at 39 (claiming that “[g]enerals may well straddle the line” of culpability in that regard, but “that only suggests that we know pretty well where it should be drawn”); see also *supra* notes 54-61 and accompanying text.
263. See WALZER, *supra* note 11, at 35. For elaboration on the moral equality idea, see PAUL CHRISTOPHER, *THE ETHICS OF WAR AND PEACE* 25 (1994); WALZER, *supra* note 11 at 21, 34-41, 127-28, 136-37, 299-306; DANIEL S. ZUPAN, *WAR, MORALITY, AND AUTONOMY: AN INVESTIGATION IN JUST WAR THEORY*, 67, 76-77, 128 (2003); G.E.M. ANSCOMBE, *Mr. Truman’s Degree*, in ETHICS, RELIGION AND POLITICS 62, 67 (Oxford, Basil Blackwell 1981) (1961); Kahn, *supra* note 261, at 2-3; Thomas Nagel, *War and Massacre*, 1 PHIL. & PUB. AFF. 123, 138-40 (1972); and Walzer, *supra* note 84, at 43-45.
264. See, e.g., Rome Statute, *supra* note 1, art. 25, ¶ 3(d); Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges (Pre-Trial Chamber I) ¶ 288 (Dec. 16, 2011), http://www.icc-cpi.int/CourtRecords/CR2012_06457.PDF [<http://perma.cc/3VYT-QXSC>]; Prosecutor v. Tadić, IT-94-1-A, Judgment, ¶¶ 191, 196-222 (Int’l Crim. Trib. for the Former Yugoslavia: Appeals Chamber July 15, 1999); Elies van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, 5 J. INT’L CRIM.

the unjustified killing account, soldiers are not remote from the wrong of aggression. Quite the opposite: the interstate violation is criminal *because* the killings of the soldiers on the aggressor side, unlike those of their enemies, cannot be justified. The moral foundations of that legal posture are best explained by Walzer's revisionist critics, who have insisted that it is untenable to hold that soldiers participating in an aggressive war have a moral license to "kill people who have done nothing other than to defend themselves and other morally innocent people from an unjust attack."²⁶⁵

To identify the legal relevance of this insight is not to hold that soldiers should be criminally liable for participating in aggressive wars.²⁶⁶ On the contrary, there are two cumulative reasons to grant soldiers blanket *jus ad bellum* immunity. First, their typical uncertainty about the war's legality, their associative sympathies, and the heightened culpability threshold for international criminal liability mean that very few soldiers are sufficiently *culpable* for their wrongful killings to warrant prosecution.²⁶⁷ Moreover, it is institutionally infeasible to identify the few that surpass that threshold.²⁶⁸ Second, guaranteeing soldiers *jus ad bellum* immunity arguably helps to frame a set of incentives maximally conducive to *jus in bello* compliance and thus mitigates the horrors of

JUST. 184, 187 (2007); Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT'L CRIM. JUST. 953, 969 (2007). For a philosophical account of noncontrolling culpability, see CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 113-145 (2007).

265. MCMAHAN, *supra* note 84, at 35. For more information, see generally many of the contributions to *JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS*, *supra* note 261, which is structured around the moral equality of combatants question, with voices on both sides. In addition to McMahan, who has been particularly prolific on this issue, see, for example, RODIN, *supra* note 53, at 165-73; David Rodin, *Two Emerging Issues of Jus Post Bellum*, in *JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE*, 53, 68-75 (Carsten Stahn & Jann K. Kleffner eds., 2008); and David R. Mapel, *Response to War and Self-Defense: Innocent Attackers and Rights of Self-Defense*, 18 *ETHICS & INT'L AFF.* 81 (2004). As noted above, this position has been articulated in the context of moral philosophy, not as a normative account of the law we have. See *supra* note 84 and accompanying text.

266. MOSHE HALBERTAL, *ON SACRIFICE* 69, 85, 88-89 (2012) (noting a "moral self-deception" in the notion that the risk borne by soldiers on both sides creates a moral equality and insisting that even though it may be sensible not to punish soldiers for participating in wars of aggression, "there is, morally speaking, a huge difference between" aggressor soldiers and those on the defensive side).

267. See, e.g., *id.* at 110-15, 191; Judith Lichtenberg, *How To Judge Soldiers Whose Cause Is Unjust*, in *JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS*, *supra* note 261, at 112, 123-24.

268. See Lichtenberg, *supra* note 267, at 125; Mapel, *supra* note 265, at 83; Ernst J. Cohn, *The Problem of War Crimes To-day*, *TRANSACTIONS GROTIUS SOC'Y* 125, 144 (1941).

war, once underway.²⁶⁹ Given soldiers' typical nonculpability, sharpening the impact of the *in bello* regime in this way sets the best incentives for good conduct.

However, these good reasons not to punish soldiers for aggression cannot reverse the wrongfulness of their *jus-in-bello*-compliant killing in a criminal war.²⁷⁰ This is not merely a point about philosophical accuracy. It goes to the proper interpretation of soldiers' rights.

Soldiers have a clear right to disobey orders that violate *jus in bello*.²⁷¹ Those punished for such refusal are eligible for refugee status.²⁷² Neither the

269. On the role of the *jus in bello* in limiting the horrors of war by applying a universal minimum irrespective of the *jus ad bellum*, see CHRISTOPHER, *supra* note 163, at 163 (1994); WALZER, *supra* note 11, at 31, 33, 129-137; Janina Dill & Henry Shue, *Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption*, 26 ETHICS & INT'L AFF. 311, 319, 324 (2012); Lauterpacht, *supra* note 33, at 212, 224, 233; Tamar Meisels, *Combatants—Lawful and Unlawful*, 26 LAW & PHIL. 31, 45 (2007); and Henry Shue, *Do We Need a 'Morality of War'?*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS, *supra* note 261, at 31, 33, 129-137. On the importance of reciprocity in enforcement, see Lauterpacht, *supra* note 33, at 242; and James D. Morrow, *When Do States Follow the Laws of War?*, 101 AM. POL. SCI. REV. 559 (2007). On the soldier's immunity for all acts compliant with *jus in bello*, see Additional Protocol I, *supra* note 260, arts. 43-45. This stated succinctly a position that underpins Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949). See also Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, 9 CASE W. RES. J. INT'L L. 205, 212 (1977) ("The concept of penal sanctions in the law of war is based on certain fundamental assumptions. One of the most crucial of these is that those who are entitled to the juridical status of 'privileged combatant' are immune from criminal prosecution for those warlike acts which do not violate the laws and customs of war but which might otherwise be common crimes under municipal law.").

270. Lauterpacht argues that the normative logic of the criminalization of aggression implies that the constituent killings are murderous, but insists that this provides a "warning against indiscriminate reliance on legal logic in this matter." Lauterpacht, *supra* note 33, at 218. However, his arguments in this respect are all *immunity* arguments, not permissibility or nonculpability arguments. Emphasizing the distinction, see, for example, Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 99, ¶ 52 (Feb. 3), which finds Germany immune for acts that displayed a "complete disregard for the 'elementary considerations of humanity'"; and Ingrid Wuerth, *Pinochet's Legacy Reassessed*, 106 AM. J. INT'L L. 731, 763-64 (2012). As Janina Dill and Henry Shue observe, *jus in bello* rules "need not be in the business of blessing what they do not prohibit." Dill & Shue, *supra* note 269, at 319. Additional Protocol I, the key contemporary text of the war convention, recognizes this explicitly, providing in its preamble that the application of the same *jus in bello* rules to both parties to the conflict is *not* to be understood in any way as "legitimizing or authorizing" violations of the *jus ad bellum*. Additional Protocol I, *supra* note 260, at 239; see Dill & Shue, *supra* note 269, at 318-19, 325-26; Henry Shue, *Laws of War, Morality, and International Politics: Compliance, Stringency, and Limits*, 26 LEIDEN J. INT'L L. 271, 279, 283-84 (2013).

271. See, e.g., Uniform Code of Military Justice, 10 U.S.C. § 892 art. 92 (2006); Armed Forces Act 2006, c. 52, art. 12 (U.K.); United States v. New, 55 M.J. 95, 100 (C.A.A.F. 2001); U.S.

core right, nor the refugee claim, requires that the soldier would have been personally criminally liable had he obeyed the illegal orders; it is enough that, if obedient, he would have been sufficiently intimately associated with the wrong to be unable to “wash his hands of guilt.”²⁷³

Similar rights have not been extended to those who refuse to fight in criminal wars of aggression. When not relying on the political question doctrine to ignore such claims, domestic and foreign courts have reasoned that there is no right to disobey such orders because there is no legal duty to do so—because, in other words, the individual soldier’s contribution to a criminal war is not itself wrongful from the legal point of view.²⁷⁴ This position was applied even in

DEP’T OF THE ARMY, FIELD MANUAL 27-2: YOUR CONDUCT IN COMBAT UNDER THE LAW OF WAR (1984); U.K. Ministry of Defence, 1 Manual of Service Law, Jan. 31, 2011, ch. 7, at 1-7-40 to 1-7-41 (Oct. 3, 2016); *see also* G.A. Res. 53/144, art. 10, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Mar. 8, 1999) [hereinafter U.N. Declaration on Human Rights Defenders] (explaining 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”); COUNCIL OF EUR., ENSURING PROTECTION-EUROPEAN UNION GUIDELINES ON HUMAN RIGHTS DEFENDERS (2008) (providing guidelines for implementing the U.N. Declaration in Europe).

272. *See* U.N. High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 171, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979, reedited 1992); *see also* Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011, 337 O.J. (L 337) 9, 16; JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 180-81 (1991).
273. *Key v. Minister of Citizenship & Immigration*, [2008] F.C. 838, para. 23 (Can.). On refugee law, *see*, for example, *id.* ¶¶ 14-29; and *Krotov v. Sec’y of State for the Home Dep’t*, [2004] EWCA (Civ) 69 (Eng.). Domestically, *see*, for example, *New*, 55 M.J. at 100; U.S. DEP’T OF DEF., MANUAL FOR COURTS-MARTIAL UNITED STATES ¶ 14(c)(2)(a)(i), at iv-19 (2008), which permits soldiers to challenge the legality of orders that are not patently illegal, but places the evidentiary burden on the disobedient soldier in the case of orders that are illegal, but not patently so; and MARK OSIEL, OBEYING ORDERS 242 (1999), which states that “[s]everal Northern European states excuse the soldier who disobeys lawful orders he reasonably believes to be illegal.”
274. Among home courts refusing their soldiers the right to disobey orders to participate in a criminal war, *see*, for example, *United States v. Huet-Vaughn*, 43 M.J. 105, 114-15 (1995); *R v. Lyons* [2011] EWCA (Crim) 2808; *RAF Doctor Jailed Over Iraq Refusal*, GUARDIAN (Apr. 13, 2006), <http://www.theguardian.com/uk/2006/apr/13/military.iraq> [<http://perma.cc/LBE5-VZM7>]; and *RAF Doctor Must Face Iraq Court Martial*, DAILY MAIL, (Mar. 22, 2006), <http://www.dailymail.co.uk/news/article-380677/RAF-doctor-face-Iraq-court-martial.html> [<http://perma.cc/E8GL-V6N5>]. *See also* U.S. v. *Kabat*, 797 F.2d 580, 590 (8th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987). For sources on denying a deserter’s asylum claim, *see* *Colby v. Minister of Citizenship & Immigration*, [2008] F.C. 805 paras. 11, 15 (Can.); *Hinzman v. Minister of Citizenship & Immigration*, [2006] FC 420 paras. 141-42, 158-60 (Can.); *Hughey v. Minister of Citizenship & Immigration* [2006] F.C. 421, para. 153 (Can.); and

Germany after the IMT judgment to those who had refused to fight in Nazi aggressions.²⁷⁵

If the normative core of aggression were a macro interstate wrong, treating *jus ad bellum* resisters in this way might be normatively comprehensible given how far removed they are from that macro violation. However, if soldiers' contributions to an aggressive war are the wrongs that make the war worthy of criminalization, soldiers that refuse to fight on those grounds sound their claims in the law's own normative register. They cannot be told coherently that they ought to be able to wash their hands of guilt.

As I explore in forthcoming work, perhaps the most plausible alternative explanation for the denial of soldiers' rights to disobey rests on the damage that recognizing such rights would do to the functioning of military institutions in lawful wars, and thus to global security.²⁷⁶ This justification, however, is contingent on both the nature of war and the nature of military institutions. That contingency underpins an imperative internal to international law's own normative posture to carve out disobedience rights for soldiers refusing to fight in criminal wars whenever doing so would be compatible with preserving military functionality in lawful wars.

The results of two isolated cases offer hope for a more coherent jurisprudence in this respect. Mohammed Al-Maisri, a Yemeni deserter from the Iraqi invasion of Kuwait in 1990, was granted asylum in Canada in 1995 on the

Press Release, Bundesamt für Migration und Flüchtlinge [Federal Office for Migration and Refugees], Kein Asyl für US-Deserteur [No Asylum for US Deserter] (Apr. 4, 2011) <http://www.bamf.de/SharedDocs/Pressemitteilungen/DE/2011/110404-0009-pressemitteilung-deserteur.html?nn=1366068> [<http://perma.cc/F47V-C94Y>]. The Federal Court of Appeal upheld the Federal Court's denial of Hinzman's and Hughey's applications for refugee status without addressing the relevance of the war's legality, instead dismissing the claim on the grounds that the procedural safeguards in U.S. courts were sufficient to ensure that they would not be persecuted even if they were prosecuted for their desertions. *Hinzman v. Minister of Citizenship & Immigration*, [2007] F.C.A. 171, paras. 39-62 (Can.), *leave to appeal to the Supreme Court refused*, [2007] S.C.C.A. No. 321.

275. Adolf Arndt & Gustav Radbruch, *In re Garbe*, 2 SÜDDEUTSCHE JURISTEN-ZEITUNG 323, 323-30 (June 1947); *Antifaschistisches Gewissen: Garbe im Kreuzfeuer* [*Antifascist Conscience: Garbe in the Crossfire*], DER SPIEGEL, Jan. 25, 1947, at 7; *see also* Lauterpacht, *supra* note 33, at 240-41 n.2. The vast majority of the more than eight thousand Nazi soldiers who survived the war with desertion convictions lived the rest of their lives as convicted felons; political clemency was not granted until the new millennium. *See* Gesetz zur Änderung des Gesetzes zur Aufhebung nationalsozialistischer Unrechtsurteile in der Strafrechtspflege [Statute Amending the Statute Repealing Nazi Wrongful Judgments in Criminal Justice], July 23, 2002, BGBl I at 23, § 2714 (Ger.); Tristana Moore, *Nazi Deserter Hails Long-Awaited Triumph*, BBC NEWS (Sept. 8, 2009), <http://news.bbc.co.uk/2/hi/8244186.stm> [<http://perma.cc/446Y-BN45>].

276. *See* Dannenbaum, *supra* note 31.

grounds that “the invasion and occupation of Kuwait was condemned by the United Nations.”²⁷⁷ And Florian Pfaff, a German Federal Army Major who refused to provide support to the U.S.-led invasion of Iraq in 2003, had his right to disobey upheld domestically by the German Federal Administrative Court on the grounds that he identified “objectively serious legal reservations” to the war.²⁷⁸ In neither case did the court explore the nature of the soldier’s relationship to the wrong in question. However, the holdings protected the right of those individuals not to violate the rights of others.²⁷⁹

C. *Reparations and Participation at the ICC*

The third and final implication of the normative account offered here goes to the rights of soldiers fighting against aggression. Two of the ICC’s landmark innovations in international criminal law are that it provides crime victims the opportunity to participate (with legal representation) in various ways in the criminal proceedings and that it renders such victims eligible to receive reparations following a conviction.²⁸⁰ The upshot of the account articulated in Part III is that, in an aggression prosecution, those participatory and reparative rights and privileges must attach primarily to combatants killed or injured fighting an aggressor force and to civilians harmed in proportionate collateral damage. These are the constituencies whose rights the criminalization of aggression protects.²⁸¹

277. *Al-Maisri v. Minister of Employment and Immigration*, [1995] F.C. 642, para. 6 (Can.).

278. BVERWG, June 21, 2005, 2 WD 12.04, <http://www.bverwg.de/entscheidungen/pdf/210605U2WD12.04.o.pdf> [<http://perma.cc/2TXT-ZMMZ>]; see also Ilja Baudisch, *Germany v. N. Decision No. 2 WD 12.04*, 100 AM. J. INT’L L. 911 (2006) (providing an English language summary of the case).

279. Cf. U.N. Declaration on Human Rights Defenders, *supra* note 271, art. 10 (explaining that “no one shall be subjected to punishment or adverse action of any kind for refusing” to violate human rights); *supra* notes 129, 131, 183 and accompanying text.

280. On victim participation at the ICC, see Rome Statute, *supra* note 1, arts. 15(3), 43(6), 68-69; Rules of Procedure and Evidence of the International Criminal Court, No. ICC-ASP/1/3, Rules 85-93 (Sept. 9, 2002); and Regulations of the Court of the International Criminal Court, No. ICC-BD/01-01-04, ch. 5 (May 26, 2004). These provisions have been praised as a “major structural achievement.” Carsten Stahn et al., *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. INT’L CRIM. JUST. 219, 219 (2006). On reparations, see Rome Statute, *supra* note 1, art. 75(2). See also Rules of Procedure and Evidence of the International Criminal Court, *supra*, Rules 94-97; Regulations of the Court of the International Criminal Court, *supra*, Regulation 88.

281. See *supra* notes 129, 131, 183.

Certain aspects of the ICC's developing approach to defining the scope of victims in nonaggression prosecutions are worthy of note here. In the first decision on reparations in 2012 (following Thomas Lubanga's conviction for child conscription), the Trial Chamber articulated a potentially broad standard, holding that the Court could issue reparations to all whose harms were proximately caused by an international crime, including both direct and indirect victims.²⁸² Although affirming these points in the abstract, the Appeals Chamber interpreted the terms narrowly.²⁸³ Declining to include the full spectrum of persons harmed as a foreseeable consequence of the crime, it identified "direct victims" with reference to the rationale for the criminal prohibition—namely the protection of children from the fear and violence of combat and from the trauma of separation from family and school.²⁸⁴ On this reading, the direct victims of Lubanga's crime were the conscripted children, and the harms relevant to the reparations proceedings were the physical injury, psychological trauma, and loss of schooling associated with that criminal wrong.²⁸⁵ In other words, the direct victims were those the criminal prohibition was "clearly framed to protect"—terminology used by the Trial Chamber in an earlier effort to follow Appeals Chamber guidance on the victims eligible to participate in the criminal proceedings.²⁸⁶ The Appeals Chamber limited "indirect victims" for the purposes of both participation and reparations to those who suffered due to a

282. Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures To Be Applied to Reparations, ¶ 249 (Aug. 7, 2012), http://www.icc-cpi.int/CourtRecords/CR2012_07872.pdf [<http://perma.cc/H7V2-9G69>]; see also *id.* ¶ 180.

283. Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Judgment on the Appeals Against the "Decision Establishing the Principles and Procedures To Be Applied to Reparations" of 7 August 2012, ¶¶ 1, 124-129, 196-199 (Mar. 3, 2015), http://www.icc-cpi.int/CourtRecords/CR2015_02631.pdf [<http://perma.cc/KDA9-DFRF>] (affirming the standard, but rejecting the Trial Chamber's inclusion of those subject to sexual violence as a result of child conscription).

284. *Id.* ¶¶ 181, 187-91, 196-98.

285. *Id.*

286. Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-1813, Redacted Version of "Decision on 'Indirect Victims,'" ¶¶ 45-48, 51 (Apr. 8, 2009), http://www.icc-cpi.int/CourtRecords/CR2009_02492.pdf [<http://perma.cc/5F3P-4WM5>]; Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Judgment on the Appeals of The Prosecutor and The Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ¶¶ 32, 58, 62 (July 11, 2008), http://www.icc-cpi.int/CourtRecords/CR2008_03972.pdf [<http://perma.cc/P5H6-VKJW>]. On the specific issue of participation, rather than reparations, see Valentina Spiga, *Indirect Victims' Participation in the Lubanga Trial*, 8 J. INT'L CRIM. JUST. 183, 186-87 (2010).

“close personal relationship[]” to direct victims or who were harmed in the course of protecting direct victims.²⁸⁷

The focus on core victims of the crime, rather than all persons foreseeably harmed by the crime, is probably inevitable given the wide scope of international crimes and the limited capacity of the Court.²⁸⁸ It is also arguably more in line with the context of a criminal prosecution, which might be thought to require a focus on repairing the criminal wrong, rather than providing comprehensive civil compensation.²⁸⁹

If this approach to defining victims holds in the context of aggression prosecutions, the implications of the traditional normative account are clear. For those who subscribe to that view, “the typical victim [of the crime of aggression] is a ‘state,’” and the natural implication is to accord victims’ rights and

287. *Dyilo*, Case No. ICC-01/04-01/06, Judgment on the Appeals Against the “Decision Establishing the Principles and Procedures To Be Applied to Reparations” of 7 August 2012, ¶¶ 190-191, 196-198.

288. *Victim Participation in Criminal Proceedings*, *supra* note 13, at 25 (claiming that when subject to similar practical constraints, analogous domestic systems limit participation to those who were “the direct object of the crime (and where they are deceased, their family members)”). At the ICC, the solution to large numbers has been to assign common legal representation across many victims as a technique for managing large numbers of victim participants in the trial process and to provide for collective, rather than individual, reparations. *Dyilo*, Case No. ICC-01/04-01/06, Judgment on the Appeals Against the “Decision Establishing the Principles and Procedures To Be Applied to Reparations” of 7 August 2012, ¶¶ 210-215 (discussing collective reparations); see also Emily Haslam & Rod Edmunds, *Common Legal Representation at the International Criminal Court: More Symbolic than Real?*, 12 INT’L CRIM. L. REV. 871, 883-901 (2012) (discussing the problems with the ICC’s practice of assigning common legal representation across many victims as a technique for managing large numbers).

289. *Cf. Victim Participation in Criminal Proceedings*, *supra* note 13, at 17, 19, 23, 25 (citing domestic criminal justice systems that define “victims” or at least “primary victims” with standing in criminal proceedings as those “whose interests are protected by the prohibition of the Conduct,” or “who were the direct object of the crime,” especially when practical considerations dictate that focus). On the importance of defining ICC reparations with reference to the criminal context, see *Dyilo*, Case No. ICC-01/04-01/06, Judgment on the Appeals Against the “Decision Establishing the Principles and Procedures To Be Applied to Reparations” of 7 August 2012, ¶ 65. See also DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 237 (2d ed. 2005); Andreas O’Shea, *Reparations Under International Criminal Law*, in REPAIRING THE PAST? INTERNATIONAL PERSPECTIVES ON REPARATIONS FOR GROSS HUMAN RIGHTS ABUSES 179, 189 (Max du Plessis & Stephen Peté eds., 2007). On the expressive role of reparations, see *Dyilo*, Case No. ICC-01/04-01/06, Judgment on the Appeals Against the “Decision Establishing the Principles and Procedures To Be Applied to Reparations” of 7 August 2012, ¶¶ 70, 202; and CONOR MCCARTHY, REPARATIONS AND VICTIM SUPPORT IN THE INTERNATIONAL CRIMINAL COURT 61-62, 133, 188 (2012).

privileges to state representatives, with the ICC channeling reparations to the attacked state following a conviction.²⁹⁰

On the unjustified killing account, this would be a mistake. The state is not the person (and its sovereignty is not the value) that the criminalization of aggression was “clearly framed to protect.” The criminalization of aggression protects combatants’ and collateral civilians’ right to life.²⁹¹ The harm by virtue of which aggression is criminally wrongful is that inflicted through unjustified violence against human beings.

Seen in that light, those granted participatory rights and privileges in aggression prosecutions must be combatants who fought against aggression and civilians harmed as collateral damage, probably as two or more broad classes with collective representation.²⁹² Reparations should focus on the same groups, funding veterans’ care or reintegration programs, assisting the families of dead soldiers and collaterally harmed civilians, and otherwise acknowledging the true wrong at the heart of the crime.²⁹³

In addition to diverging radically from a state-focused participation and reparations regime at the ICC, this upshot also stands in stark contrast to recent *jus ad bellum* reparations regimes in the compensation commission context. Consider here the U.N. Compensation Commission (UNCC), set up after Iraq’s 1990 invasion of Kuwait, and the Ethiopia-Eritrea Claims Commission (EECC), set up following Eritrea’s armed attack on Ethiopia at the turn of the millennium. Both commissions issued a wide array of awards relating to the losses suffered by Kuwaiti and Ethiopian businesses and civilians as a result of

290. Stahn, *supra* note 41, at 877, 880-81. For additional authors taking a similar stance, see HANS DAS & HANS VAN HOUTTE, 1 POST-WAR RESTORATION OF PROPERTY RIGHTS UNDER INTERNATIONAL LAW 238 (2008); MCDUGALL, *supra* note 140, at 293. To be clear, accepting the traditional account and recognizing this to be its logical implication does not entail thinking this is a good idea. Thus, Stahn writes of his own observation that this may “run against the purpose and mandate of the court.” Stahn, *supra* note 41, at 881. In some ways, this is a more specific form of Luban’s broader position. See *supra* Section II.B. For other suggestions that the “victims” of aggression are states, see MCCARTHY, *supra* note 289, at 293; WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 324-25 (2007); and Aurel Sari, *The Status of Foreign Armed Forces Deployed in Post-Conflict Environments: A Search for Basic Principles*, in *JUS POST BELLUM*, *supra* note 41, at 467, 483 (claiming that the “demise of the concept of punishment for aggression” after the post-World War II prosecutions and the “humanization of reparations” are part of the same normative trajectory).

291. See *supra* notes 129, 131, 183 and accompanying text.

292. On participation as a class with a common legal representative, see *supra* note 288.

293. Rehabilitation is a core reparative modality at the ICC. See Rome Statute, *supra* note 1, art. 75.

the respective wars.²⁹⁴ Among the many claims deemed eligible by the more expansive UNCC were traffic accidents that occurred due to the general breakdown of civil order in Kuwait, individual and corporate property losses caused by that breakdown, and losses caused when the continuation of contracts became impossible for one or more of the parties due to the conflict.²⁹⁵ However, despite their generally broad approaches to defining eligible victims, both commissions *excluded* almost all harms suffered by combatants fighting against the aggressor force, other than those caused by *jus in bello* violations.²⁹⁶

As indicated above, that a compensation commission would take a broader reparative approach than a criminal court is quite appropriate. However, in light of what is most fundamentally wrong with aggressive war from the internal point of view, the marginalization of soldiers' deaths and suffering was a grave mistake that the International Criminal Court must not replicate. Together with collaterally harmed civilians, those combatants should in fact be at the very heart of participatory and reparative rights at the ICC.

294. For the details of the UNCC's work, see *Reports and Recommendations of the Panels of Commissioners*, UNITED NATIONS COMP. COMMISSION, <http://www.uncc.ch/reports-and-recommendations-panels-commissioners> [<http://perma.cc/DK5W-FJDE>]. For the more limited work of the EECC on *jus ad bellum* claims, see Ethiopia's Damages Claims (Eri. v. Eth.), 26 R.I.A.A. 631, 716-68 (Eri.-Eth. Claims Comm'n 2009).

295. See Report and Recommendations Made by the Panel of Commissioners Concerning the First Installment of "E2" Claims, ¶ 144, U.N. Doc. S/AC.26/1998/7 (July 2, 1998); 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), 109, 133, 154, U.N. Doc. S/AC.26/1994/3 (Dec. 21, 1994); Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims) 24-25, U.N. Doc. S/AC.26/1994/1 (May 26, 1994); Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation, ¶¶ 9-10, U.N. Doc. S/AC.26/1992/9 (Mar. 6, 1992).

296. See *Ethiopia's Damages Claims*, 26 R.I.A.A. at 735 ¶ 338 (noting the exclusion from Commission jurisdiction of damages to combatants); Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims), UNCC Governing Council, U.N. Doc. S/AC.26/1994/1 (May 26, 1994) (excluding damages to members of the Allied Coalition Armed Forces, except for those inflicted on prisoners of war in violation of international humanitarian law). Although the UNCC allowed claims regarding Kuwaiti Armed Forces for personal injury or death during the day of the invasion and the days immediately following, it allowed no reparation for combatants killed by the Iraqi military once the defensive Coalition Forces had been constituted. See Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims), UNCC Governing Council, 14-15, U.N. Doc. S/AC.26/1994/1 (May 26, 1994); Eligibility for Compensation of Members of the Allied Coalition Armed Forces, UNCC Governing Council, U.N. Doc. S/AC.26/1992/11 (June 26, 1992).

These three implications—clarifying the marginal status of humanitarian intervention and bloodless aggression, the soldier’s right not to fight in an illegal war, and the centrality of combatant death and suffering to victim status and reparations at the ICC—are only sketched in introductory form here. Plainly, each demands more detailed elaboration and consideration. However, this sketch illustrates why defining the normative core of aggression matters doctrinally. With the Court poised to take jurisdiction over the crime, clarity on these issues is a matter of urgency.

CONCLUSION

This Article has debunked a common misconception—that aggression is a normative anomaly in international criminal law, uniquely rooted in a wrong inflicted on the attacked state, rather than in an accumulation of wrongs inflicted on individual human beings. Not only are individuals wronged gravely in an aggressive war, the wrongfulness of their treatment as individuals is at the very crux of what explains the criminalization of such wars. For five reasons, wrongful killing—and not aggression’s typical infringement of sovereignty—is the normative core of the crime.

First, sovereignty is indeterminate as a normative guide on the issue of aggression. The criminalization of such wars is at least as great a restraint on state sovereignty as it is a protection of it. Moreover, other sovereignty violations that more effectively and dramatically infringe the core sovereign rights of territorial integrity or political independence, or the collective right of self-determination, are not criminalized. Second, what distinguishes aggression from other sovereignty violations is that it involves unjustified, direct attacks on the lives and physical integrity of human beings. Indeed, some criminal wars involve the infliction of unjustified death and human suffering without infringing sovereign rights at all. And, crucially, if aggression were not a crime, it would be the anomalous context in which unjustified killings were noncriminal. Third, understanding aggression in this way reconciles it to the broader moral project of international criminal law—namely, the protection of individuals and groups from the most egregious violations of their rights and dignity. Fourth, the claimed imperative to incorporate a restrictive *jus ad bellum* into twentieth century international law was articulated not in terms of sovereignty, but in terms of humanity. Finally, the reasoning of the judges and prosecutors at Nuremberg and Tokyo reveals a shared understanding that the prohibition of wrongful killing is the normative core of the crime.

For all of these reasons, the account of aggression advanced here better explains the contours of the crime, comports more closely with the purposes of international criminal law, and better aligns with adjacent areas of international

law. Recognizing this ought to inform how we interpret the criminal law status of bloodless invasions and humanitarian intervention, how we understand the claims of soldiers who refuse to fight in criminal wars, and how we define the expressive focus of victim participation and reparations in ICC aggression prosecutions.