WAR AND COERCION

MARCELA PRIETO RUDOLPHY*

ABSTRACT

Compelled service in hostile forces is prohibited by International Humanitarian Law. In the context of an international armed conflict, it is a war crime to compel prisoners of war ("POWs") or other protected persons to serve in the forces of a hostile power and to compel participation in military operations against the person's own country or forces. However, conscription—or compelled service in military forces—of a state's own citizens is not prohibited under international law. In fact, conscription, some aspects of which are regulated by International Human Rights Law, is generally legitimate.

This asymmetry—whereby compelling protected persons to fight or serve in the forces of a hostile power is a war crime, but compelling one's own citizens is not—has puzzling implications. Take the example of Russia's invasion of Ukraine. It is a war crime for Ukraine to compel Russian POWs to fight on behalf of Ukraine, even though Ukraine is fighting a lawful war of self-defense. Yet, it is not a war crime for Russia to compel its own citizens to fight, even though Russia is fighting an unlawful war of aggression.

Can we make moral sense of this asymmetric regime regarding compelled service in armed forces? Is the regime morally coherent? In order to make moral sense of the regime, two arguments must succeed. First, we must argue that it matters greatly whether individuals are compelled to fight

* Associate Professor of Law and Philosophy, University of Southern California Gould School of Law, Los Angeles, California, United States of America, mprieto@law.usc.edu. Profesora adjunta extraordinaria, Universidad Adolfo Ibáñez, Escuela de Derecho, Santiago, Chile. I am indebted to Scott Altman, Ángel Díaz, Felipe Jiménez, Mugambi Jouet, Erin Miller, Jeesoo Nam, Jessica Peake, and the attendees of the Southern California International Law Scholars Workshop; the attendees of the Diálogos of Derecho Internacional Conference; Norrinda Brown, Benjamin Zipursky, and the attendees of the Fordham Legal Theory Faculty Workshop; Jaya Ramji-Nogales and the attendees of the ASIL Mid-year Research Forum Meeting; Seana Shiffrin, Lawrence Sager, and the attendees of the UCLA Legal Theory Workshop; and the attendees of the USC Faculty Workshop for their generous feedback. A special thanks to Jessica Murphy for her assistance with research and the editors of the *Southern California Law Review* for their excellent work.

in hostile forces or in the armed forces of their own state. Second, we must argue that the nature of the war they are compelled to serve in—whether the war is legal or illegal—does not matter at all.

This Article argues that the second argument cannot but fail, but it is possible to argue that compelled service in hostile forces is morally wrong and often morally worse than compelled service in the armed forces of one's own state. It is morally worse because it is morally worse to harm those who are vulnerable and defenseless, like those who have fallen into the hands of a party to the conflict. And it is morally wrong because noncitizens lack duties to fight on behalf of other states. However, what makes compelled service in hostile forces morally wrong also makes conscription morally wrong. That is, what is wrong about compelled service in hostile forces is also present in the state's conscription of its own citizens.

This Article thus argues that the current regime concerning compelled service in armed forces is, in fact, morally incoherent. To render the regime morally coherent, international law should (1) appropriately distinguish between conscription to serve in legal wars and conscription to serve in illegal wars, and (2) generally prohibit compelled service in armed forces.

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INTRODUCTION

Russia has been conscripting men from occupied Crimea to serve in Russian armed forces for several years. During the ninth conscription campaign, which ended in June 2012, at least 3,300 men from Crimea had been enlisted, bringing the total of forced conscripted men to at least 18,000.[1]

Conscription in occupied Crimea was still ongoing in 2019.[2] By 2022, *The Guardian* reported that men in the Donbas region were being forcibly conscripted to serve in the armed forces of the self-declared Donetsk Peoples Republic and Luhansk Peoples Republic.[3] At the same time, Russia has been conscripting its own citizens to fight in Ukraine.[4]

In times of war, conscription of individuals in occupied territory and the state's conscription of its own citizens share an important feature. They both involve a severe restriction on individuals who are called on to fight, and possibly to kill and die, on behalf of the state. However, although they share this important feature, international law treats them differently. In fact, one might say that there is an asymmetry in how international law treats compelled service (or conscription) to serve in armed forces. Conscription of protected persons to serve in hostile forces, when done by an occupying or detaining power, is a war crime under International Humanitarian Law ("IHL").[5] Conscription of the state's own citizens to fight a war is, however,

1. Off. of the U.N. High Comm'r for Hum. Rts., Rep. on the Human Rights Situation in Ukraine: 16 May to 15 August 2019, ¶ 111 (2019), https://www.ohchr.org/sites/default/files/Documents/Countries/UA/ReportUkraine16Feb-15May2019_EN.pdf [https://perma.cc/VL53-T4MQ].

2. *Crimea: Conscription Violates International Law*, HUM. RTS. WATCH (Nov. 1, 2019, 12:00 AM), https://www.hrw.org/news/2019/11/01/crimea-conscription-violates-international-law [https://perma.cc/8MCU-YCTU]; *see* Marten Zwanenburg, *Ukraine Symposium—Forced Conscription in the Self-Declared Republics*, LIEBER INST. (Aug. 8, 2022), https://lieber.westpoint.edu/forced-conscription-self-declared-republics [https://perma.cc/2ACS-UTE9].

3. Zwanenburg, *supra* note 2 (citing Peter Beaumont & Artem Mazhulin, *'They Hunt Us Like Stray Cats': Pro-Russia Separatists Step Up Forced Conscription as Losses Mount*, GUARDIAN (July 20, 2022, 09:01 EDT), https://www.theguardian.com/world/2022/jul/20/pro-russian-separatists-step-up-forced-conscription-as-losses-mount [https://perma.cc/9ACP-ZPVC]).

4. Sarah Dean & Rob Picheta, *Russia Admits Conscripts Have Been Fighting in Ukraine, Despite Putin's Previous Denials*, CNN (Mar. 9, 2022, 7:27 PM), https://www.cnn.com/2022/03/09/europe/russia-conscripts-fighting-ukraine-intl [https://perma.cc/N65R-VE43].

5. Hague Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 44, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter 1899 Hague Convention]; Hague Convention (IV) Respecting the Laws and

not only not a war crime, but is also recognized by international law as the state's prerogative.[6]

Perhaps surprisingly, this asymmetry has received almost no attention in international legal scholarship. Perhaps even more surprisingly, the crime of compelled service in hostile forces and the ethics of conscription have also received very little attention, both in international legal scholarship and political theory. Yet the asymmetry regarding compelled service in armed forces (or the asymmetry regarding conscription) present in international law has some puzzling implications.

Take the example of Russia's invasion of Ukraine. Russia's conscription of its own citizens to fight its unlawful war of aggression is permitted by international law.[7] By contrast, it is a war crime for Ukraine to compel Russian prisoners of war ("POWs") to fight on behalf of Ukraine, even though Ukraine is fighting a lawful war of self-defense. Even more so, if Russian citizens voluntarily decided to join Ukrainian armed forces to fight against Russian aggression—and some of them have[8]—they are not protected by international law and could be prosecuted by Russia. In fact, in September 2022, Russia toughened up penalties for voluntary surrender to enemy forces, desertion, and refusal to fight by up to ten years in prison.[9]

International law thus distinguishes between compelled service in hostile forces and compelled service in the armed forces of one's own state—prohibiting the first but allowing the latter—but fails to distinguish between compelled service in legal wars and compelled service in illegal wars. The distinction drawn by international law suggests that there is a normatively relevant difference between compelled service in hostile forces and compelled service by one's own country—a difference significant enough to

Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 23(h), Oct. 18, 1907, 32 Stat. 1803, 1 Bevans 247 [hereinafter 1907 Hague Convention]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 51, ¶ 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)]; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention (III)]; Rome Statute of the International Criminal Court arts. 8(2)(a)(v), 8(2)(b)(xv), July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute].

6. *See, e.g.*, U.N. High Comm'r for Refugees, Guidelines on International Protection No. 10: Claims to Refugee Status Related to Military Service Within the Context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees, ¶ 5, U.N. Doc. HCR/GIP/13/10/Corr.1 (Nov. 12, 2014) [hereinafter Guidelines on International Protection No. 10].

7. Something that Russia is in fact doing. Dean & Picheta, *supra* note 4.

8. Michael Schwirtz, *They Are Russians Fighting Against Their Homeland. Here's Why.*, N.Y. TIMES (Feb. 12, 2023), https://www.nytimes.com/2023/02/12/world/europe/russian-legion-ukraine-war.html [https://perma.cc/6T94-M8BP].

9. *Russia Stiffens Penalty for Desertion; Replaces Top General*, AL JAZEERA (Sept. 24, 2022), https://www.aljazeera.com/news/2022/9/24/putin-toughens-penalty-for-surrender-refusal-to-fight-in-ukraine [https://perma.cc/N4GT-NQ3Z].

permit the latter and make the first a war crime. And it also suggests that there is no normatively relevant difference based on whether the wars one is forced to fight are legal or illegal.

This asymmetry demands a justification. We ought to try to make sense—moral sense—of the international legal regime on compelled service in armed forces. This is not the same as attempting to explain why the regime is the way it is. That explanation might be historical in character if, for example, states could agree regarding the prohibition on compelled service in hostile forces but could not agree—or did not want to agree—regarding the state's conscription of its own citizens or regarding the relevance of whether the wars individuals are compelled to serve in are legal or illegal. And that historical explanation might provide a moral justification for the *adoption* of the prohibition on compelled service in hostile forces.[10] For example, if we think compelled service in armed forces is always wrong and should be prohibited, but states could only agree to prohibit compelled service in hostile forces, we might argue that it is better to prohibit one morally wrong behavior than to prohibit nothing at all.

However, the question this Article is concerned with is not a question about the historical explanation of the current international regime on conscription, nor a question about whether we can justify its adoption. It is a question about its content. Can we make moral sense of this asymmetric regime regarding compelled service in armed forces during times of war? Is the regime morally coherent?

This Article thus brings moral and political philosophy to bear on international law.[11] It is concerned with the relationship between international law and morality and, in particular, with the question of how law *ought* to be if it wishes to be morally coherent. By moral coherence, I am referring to the idea that a legal regime (like the regime on conscription) should be complete; that is, it should equally prohibit behaviors that are similarly wrongful instead of failing to prohibit things that are as, or more, wrongful than the behaviors it already prohibits.[12] And a legal regime should also "make moral sense," that is, it should be morally intelligible, in the sense that it does not fail to take into account important moral reasons in favor of

10. For distinction and argument, see MARCELA PRIETO RUDOLPHY, THE MORALITY OF THE LAWS OF WAR: WAR, LAW, AND MURDER 74–85 (2023).

11. For others who have done so, see generally ADIL AHMAD HAQUE, LAW AND MORALITY AT WAR (2017); ARTHUR RIPSTEIN, KANT AND THE LAW OF WAR (2021); JEREMY WALDRON, TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE (2010); Philipp Gisbertz-Astolfi, *Reduced Legal Equality of Combatants in War*, 35 ETHICS & INT'L AFFS. 443 (2021).

12. Richard Wasserstrom, *The Laws of War*, 56 MONIST 1, 7–8 (1972). I am thus not concerned with the regime's integrity or coherence in the Dworkinian sense. *See* RONALD DWORKIN, LAW'S EMPIRE 176–275 (1986).

and against prohibiting certain behaviors.

In order to make moral sense of the international legal regime on conscription, two arguments must succeed. First, we must argue that it matters greatly whether individuals are compelled to fight in hostile forces or in the armed forces of their own state. Second, we must argue that the nature of the war that individuals are compelled to serve in—whether the war is legal or illegal—does not matter at all.

These are difficult arguments to make. This Article will argue that the second argument is impossible to make; it cannot but fail. Whether individuals are forced to fight legal or illegal wars is morally significant and should be accounted for. The first argument is more plausible: it is possible to show that compelled service in hostile forces is often *morally worse* than compelled service in the armed forces of one's own state and that compelled service in hostile forces itself is morally wrong. It is morally *worse* because it is morally worse to harm those who are vulnerable and defenseless, like those who have fallen into the hands of a party to the conflict, and because it is morally *worse* to be coerced to fight against those we care about. And it is morally *wrong* because noncitizens lack duties to fight on behalf of other states.

However, these arguments fail to support the current regime. This is so because the fact that compelled service in hostile forces is *morally worse* than the state's conscription of its own citizens cannot show, on its own, that the latter is morally permissible. The fact that something is morally worse than something else says nothing about whether what is morally better is permitted. Thus, showing that compelled service in hostile forces is often morally worse than the state's conscription of its own citizens cannot explain why compelled service in hostile forces is prohibited, but the state's conscription of its own citizens is allowed. And the second argument, which shows that compelled service in hostile forces is morally wrong, also fails to explain why conscription of a state's own citizens is morally permissible. This is so because citizens often lack duties toward their own states to kill and die on its behalf. That is, what is wrong about compelled service in hostile forces is also present in the state's conscription of its own citizens.

This Article makes then three claims, which are related but logically independent from each other. First, it is morally wrong to conscript individuals to fight wars of aggression, regardless of whether the citizen's state or hostile forces do so. Second, compelled service in hostile forces is often morally worse than the state's conscription of its own citizens and is also morally wrong. Third, conscription by the state, even to fight legal wars, is also often morally wrong. This Article thus concludes that the current

regime concerning compelled service in armed forces is, in fact, morally incoherent.[13] It is morally incoherent because it is incomplete and cannot be made sense of.[14] It is incomplete because it fails to criminalize or prohibit conduct (the state's conscription of its own citizens) that is similarly wrong when compared to what it already criminalizes (compelled service in hostile forces). And it cannot be made sense of because it fails to distinguish between legal and illegal wars, so that states are allowed to compel their own citizens to fight illegal wars.

The fact that the regime on compelled service is morally incoherent does not mean that the compelled service in hostile forces prohibition ("CSHF prohibition") lacks value or is morally misguided. The CSHF prohibition, this Article will argue, protects fundamental rights and interests. However, it is incomplete. It is that incompleteness that makes the current regime incoherent. To render the regime morally coherent, international law should (1) appropriately distinguish between conscription to serve in legal wars and conscription to serve in illegal wars, and (2) generally prohibit compelled service in war. The latter might seem entirely utopian. It might also make it harder for states to fight wars—possibly even lawful ones. But lawful (and just) wars are the exception, and conscription to fight in war imposes a severe restriction on individuals' freedom. Even if international law never comes to prohibit the state's conscription of its own citizens, there are powerful moral reasons for doing so. The fact that such a prohibition is utopian is not a (moral) reason against it.[15]

The remainder of this Article proceeds as follows. Part I gives a brief overview of the international regime on compelled service in armed forces, distinguishing between compelled service in hostile forces and the state's conscription of its own citizens. Part II argues that the regime's failure to distinguish between conscription to serve in legal wars and conscription to serve in illegal wars cannot be defended. At the very least, international law should prohibit states from conscripting their own citizens to fight wars of aggression, and the illegal nature of the war should be an additional aspect of the crime of compelled service in hostile forces. Part III tries to make sense of the fact that international law considers compelled service in hostile forces to be significantly worse than the state's conscription of its own citizens. It argues that although there is a plausible case for why compelled service in hostile forces is more wrongful, or morally worse, than the state's conscription of its own citizens, this argument cannot support the latter's permissibility. And some of the arguments that show why compelled service

13. Wasserstrom, *supra* note 12, at 7–8.
14. *Id.*
15. *See* David Estlund, *Utopophobia*, 42 PHIL. & PUB. AFFS. 113 *passim* (2014).

in hostile forces is morally wrong put into question the permissibility of conscription generally. Part IV discusses what it would take for the international legal regime on conscription to be morally coherent. It argues that (1) international law should make it a war crime for states to conscript their own citizens to fight in illegal wars; (2) the unlawfulness of the war in compelled service in hostile forces should be an additional aspect of the crime; and (3) there is a *pro tanto* reason for international law to generally prohibit conscription to fight in war.

I. THE INTERNATIONAL LEGAL REGIME ON CONSCRIPTION

A. COMPELLED SERVICE IN HOSTILE FORCES

Compelled service in hostile forces was not always prohibited and was, in fact, a common practice across different cultures.[16] POWs—that is, those combatants who had been captured, due to surrender or injury, by enemy powers—were thought to have forfeited their lives by surrender or capture, and, in practice, they were often required to join the forces of their captors.[17]

The CSHF prohibition was introduced into treaty law with the Hague Regulations of 1899. Article 44 of the Hague Convention of 1899 prohibits the compulsion of the population of occupied territory to take part in military operations against their own country.[18] The Hague Convention of 1907, Article 23(h), prohibits compelling the nationals of the hostile party to "take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of war."[19] This provision is limited to *nationals* of the hostile party.[20]

Later, the Geneva Conventions also included the CSHF prohibition. Under the Fourth Geneva Convention, it is a grave breach for an occupying power to compel protected persons to serve in its armed or auxiliary forces.[21] Protected persons are "those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not

16. *See* RITA J. SIMON & MOHAMED ALAA ABDEL-MONEIM, A HANDBOOK OF MILITARY CONSCRIPTION AND COMPOSITION THE WORLD OVER 7 (2011) (noting that Greek and late Roman armies conscripted young men from enemy nations that had been defeated or from tribes that had signed a treaty to remain outside the empire).

17. MICHAEL WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 148 (1970).

18. 1899 Hague Convention, *supra* note 5, at art. 44.

19. 1907 Hague Convention, *supra* note 5, at art. 23(h).

20. Zwanenburg, *supra* note 2.

21. Geneva Convention (IV), *supra* note 5, at art. 51.

nationals."[22] And Article 147 states that it is a grave breach to compel "a protected person to serve in the forces of a hostile Power,"[23] which is not limited to situations of occupation, but applies generally in the context of international armed conflicts ("IACs").[24] The Third Geneva Convention, relative to the "Treatment of Prisoners of War," provides that compelling a POW or a protected person to serve in the forces of a hostile power is a grave breach of the conventions.[25] Note, however, that while compelled service in hostile forces is a war crime, enlistment that is the result of pressure or propaganda is a violation of the Fourth Geneva Convention, but not a war crime.[26]

The CSHF prohibition is also contained in the statutes of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Court ("ICC").

The statute of the ICTY expressly included "compelling a prisoner of war or a civilian to serve in the forces of a hostile power" as part of the grave breaches of the 1949 Geneva Conventions under its jurisdiction.[27] However, there were no convictions that relied exclusively on a violation of this provision, and no indictments for compelling POWs or civilians to serve in the forces of a hostile power.[28]

The Rome Statute for the ICC also includes the prohibition in question. It distinguishes four categories of war crimes[29]: (1) grave breaches of the Geneva Conventions in the context of IACs;[30] (2) other serious violations of IHL contained in the Hague Conventions, Additional Protocol I to the Geneva Conventions, and the 1925 Geneva Gas protocol;[31] (3) serious violations of Article 3 common to the Geneva Conventions in the context of non-international armed conflicts ("NIACs");[32] and (4) other violations of

22. *Id.* at art. 4.
23. *Id.* at art. 147.
24. Zwanenburg, *supra* note 2.
25. Geneva Convention (III), *supra* note 5, at art. 130.
26. Zwanenburg, *supra* note 2.
27. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 art. 2(e), Sept. 2009, https://www.icty.org/en/documents/statute-tribunal [https://perma.cc/Z7T8-W94W].
28. WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 252 (2006).
29. Knut Dörmann, *War Crimes Under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes*, *in* 7 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 341, 344 (Armin von Bogdandy et al. eds., 2003).
30. *Id.*
31. *Id.*
32. *Id.*

IHL in the context of NIACs.[33]

The selection of war crimes to be ultimately included in the Rome Statute was based on two considerations: first, the norm should be part of customary international law ("CIL"); and second, the violation of the norm should give rise to individual criminal responsibility under CIL.[34]

The crime of forced service in hostile forces is enshrined in Articles 8(2)(a)(v) and 8(2)(b)(xv) of the Rome Statute. The former states that it is a war crime to compel a POW or other protected persons to serve in the forces of a hostile power in the context of an IAC.[35] The latter makes it a war crime to compel participation in military operations against a person's own country or forces in the context of an IAC.[36] The expression "forces" should be given a broad interpretation, and forced service is prohibited not only regarding forces hostile to the individual's own country, but also regarding allied countries and forces.[37]

The first provision—Article 8(2)(a)(v)—effectively combined the language of the Geneva Conventions with Article 23 of the 1907 Hague Regulations.[38] The second one is based solely on Article 23 of the 1907 Hague Regulations.[39]

Finally, the CSHF prohibition has now crystallized into CIL, at least in the context of IACs. The International Committee of the Red Cross's ("ICRC") statement on the latter includes, in Rule 95, the prohibition on uncompensated or abusive forced labor, and it specifies that compelling persons to serve in the forces of a hostile power is a specific type of forced labor that is prohibited in IACs.[40]

Many countries incorporate similar prohibitions in their military manuals and criminal codes.[41] And, in 2005, the Israeli Supreme Court found that the IDF's "Early Warning" procedure was at odds with international law, in part because it ran afoul of "a basic principle, which passes as a common thread running through all of the law of belligerent occupation," consisting of "the prohibition of use of protected residents as part of the war effort of

33. *Id.*
34. *Id.* at 345.
35. Rome Statute, *supra* note 5, at art. 8(2)(a)(v).
36. *Id.* at art. 8(2)(b)(xv).
37. *See* Dörmann, *supra* note 29, at 374.
38. *Id.*
39. *Id.*
40. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES 330, 333 (2005) [hereinafter ICRC Rule 95].
41. *Id.* at 331.

the occupying army."[42] The "Early Warning" procedure stipulated that IDF soldiers who wished to arrest a Palestinian suspected of terrorist activity may be assisted by a local Palestinian resident, who would warn the arrestee of possible harm to themselves or those present when the arrest took place.[43] The procedure could only be used when it posed no risk to the Palestinian resident, and the latter consented to it,[44] but the Court found that, given the inequality between the occupying force and the local resident, consent was unlikely to be real.[45]

B. CONSCRIPTION OF THE STATE'S OWN CITIZENS

Although forced labor is prohibited under International Human Rights Law, conscription is not treated as an instance of it.[46] Conscription—or compelled service in military forces—of a state's own citizens is not prohibited under international law, except in the case of children, in which case it is a war crime.[47]

Conscription is well accepted in international law regarding a state's own citizens. Voluntary enlistment and service in foreign forces is also not a violation of international law.[48] At the Hague Conference in 1907, the German delegation wanted to incorporate an article stating that belligerent parties could not ask neutral persons to render them war services, even if it was voluntary, which was supported by the United States.[49] The proposal did not succeed. More recently, in 2022, Russia issued a law that facilitates the attainment of Russian citizenship for foreigners who voluntarily enlist in the Russian army for at least a year.[50]

Regarding the conscription of noncitizens with permanent residence, the law is less settled. In fact, the United States drafted permanent residents at least during the Korean and Vietnam Wars. In both, the United States required military service of every non-U.S. male citizen admitted to permanent residency and actually residing in the United States for more than a year.[51] Often, the United States conscripted resident foreigners unless they

42. HCJ 3799/02 Adalah v. GOC Central Command, 60(3) PD 1, ¶¶ 24–25 (2005) (Isr.).
43. *Id.* at 1.
44. *Id.* ¶ 7.
45. *Id.* ¶ 24.
46. Hum. Rts. Council, Rep. of the Off. of the High Comm'r for Hum. Rts. on Conscientious Objection to Military Service, ¶ 2, U.N. Doc. A/HRC/9/24 (Aug. 20, 2008) [hereinafter U.N. Doc. A/HRC/9/24].
47. Rome Statute, *supra* note 5, § 8(2)(e)(vii).
48. William W. Fitzhugh & Charles Cheney Hyde, *The Drafting of Neutral Aliens by the United States*, 36 AM. J. INT'L L. 369, 370–71 (1942).
49. *Id.* at 370.
50. AL JAZEERA, *supra* note 9.
51. WALZER, *supra* note 17, at 108–09.

agreed to forfeit future claims to citizenship.[52]

During the course of the two World Wars, the main Allied belligerents also conscripted nationals of other states, much to the protest of the states in question.[53] Opposition was based on the general principles of international law, but more often, it was based on treaties that ensured states would not conscript each other's foreign nationals.[54] Sometimes, treaties were signed with the opposite purpose: in the course of World War II, the Allies entered into treaties with the United States to secure that nationals of the Allies residing in the United States would serve in either the forces of the United States or of their own countries.[55]

Thus, it is fairly clear that conscription of resident noncitizens is not a war crime under international law, even though it might be prohibited on account of bilateral international treaties. But it is unclear whether a prohibition on conscripting resident noncitizens has crystallized in CIL or whether it remains a rule of comity, as suggested in the 1970s by Frank Upham and Charles E. Roh, Jr.[56]

Regarding a state's own citizens, excepting children, conscription is well accepted by international law, both as a general practice in times of peace and as a practice in times of war. The practice of conscription itself has an old history, and after the two World Wars, it remained the norm in many countries.[57] With the end of the Cold War, the debate about universal military conscription regained force again, and at the beginning of the 1990s, France, the Netherlands, and Belgium abandoned the system of conscription, the universal draft, or both.[58] In the process of European reintegration, military conscription largely disappeared.[59] Belfer suggests that this has to do with the fact that security identities in post-Cold War Europe are increasingly forged by cosmopolitan values.[60]

Nonetheless, debates around conscription still occur in the public space, and, in the United States, resurfaced during the wars in Afghanistan and

52. *Id.* at 108.
53. Clive Parry, *International Law and the Conscription of Non-Nationals*, 31 BRIT. Y.B. INT'L L. 437, 439 (1954).
54. *Id.*
55. *Id.* at 442.
56. Charles E. Roh, Jr. & Frank K. Upham, *The Status of Aliens Under United States Draft Laws*, 13 HARV. INT'L. L.J. 501, 501–02 (1972).
57. SIMON & ABDEL-MONEIM, *supra* note 16, at 19.
58. *Id.*
59. Mitchell A. Belfer, *Conscription and European Security: A Theoretical First-Step*, 1 CENT. EUR. J. INT'L & SEC. STUDS. 28, 28 (2007).
60. *Id.*

Iraq.[61] Indeed, some commentators worried that reliance on all-volunteer forces ("AVF") would be insufficient to satisfy the demands of war in those countries.[62]

The decreasing practice of conscription in many countries has led some to speak of a "crisis of conscription."[63] There have also been increases in figures for conscientious objection in some countries like Italy, Spain, and Germany.[64] But protest and resistance to the draft or to conscription have been common in different contexts and cultures,[65] and the discourse of crisis is disputed. Leander and Joenniemi, for example, argue that the landscape of conscription is not homogenous, and the so-called crisis of conscription can take different forms, not all of which involve abolishing conscription.[66] Further, Leander is skeptical that conscription as a practice is coming to an end.[67]

At least legally, conscription, understood as service in military forces during times of peace or during times of war (in the latter case, the practice might be called "the draft"), is still recognized as the state's prerogative, following from the state's right to self-defense and sovereignty.[68] Conscription by non-state groups is, by contrast, prohibited.[69]

Nonetheless, in recent years, a right to conscientious objection has started to crystallize.[70] Both the Human Rights Committee and the UN Human Rights Council have recognized a right to conscientious objection to military service, based on the right to freedom of thought, conscience, and religion enshrined in Article 18 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[71] In 2019, the Human Rights Council reiterated the view that there is a right to conscientious objection to military service, even though a number of states

61. SIMON & ABDEL-MONEIM, *supra* note 16, at 20.

62. *Id.*

63. Rafael Ajangiz, *The European Farewell to Conscription?*, *in* 20 THE COMPARATIVE STUDY OF CONSCRIPTION IN THE ARMED FORCES 307, 308 (Lars Mjøset & Stephen van Holde eds., 2002).

64. *Id.*

65. *Id.*

66. Anna Leander & Pertti Joenniemi, *Conclusion: National Lexica of Conscription*, *in* THE CHANGING FACE OF EUROPEAN CONSCRIPTION 161, 161 (Pertti Joenniemi ed., 2016).

67. Anna Leander, *Drafting Community: Understanding the Fate of Conscription*, 30 ARMED FORCES & SOC'Y 571, 572–73 (2004).

68. *See, e.g.*, Guidelines on International Protection No. 10, *supra* at note 6, ¶ 5.

69. *Id.* ¶ 7. In this Article, I do not discuss the issue of conscription by non-state actors. Nonetheless, some of the arguments I discuss in Part III would apply, with some modifications, in this context.

70. *See generally, e.g.*, U.N. Doc. A/HRC/9/24, *supra* note 46.

71. RACHEL BRETT, QUAKER U.N. OFF., INTERNATIONAL STANDARDS ON CONSCIENTIOUS OBJECTION TO MILITARY SERVICE 3 (2011).

still do not recognize it.[72] And the European Court of Human Rights, which, previous to 2000, did not recognize the right to conscientious objection to military service, has also adopted the view that conscientious objection is an aspect of the right to freedom of thought, conscience, and religion.[73]

By contrast, selective conscientious objection, which accepts the legitimacy of some military action but objects to particular instances of it, is not recognized as a right under international law.[74] Still, Amnesty International has adopted cases of selective conscientious objection, which have arisen in places like South Africa and Israel.[75]

Finally, in some cases, the consequences following from objecting or evading conscription can amount to persecution for the purposes of being recognized as a refugee. In its 2014 guidelines on the issue, the Office of the United Nations High Commissioner for Refugees ("UNHCR"), consistent with international law, recognized the rights of states to require citizens to perform military service for military purposes, as well as the rights of states to impose penalties on those who avoid or desert military service, provided that "their desertion or avoidance is not based on valid reasons of conscience" and that the penalties and associated procedures in question comply with international standards.[76] In the context of refugee status, the UNHCR guideline states that persecution against draft evaders, deserters, or conscientious objectors might occur in certain circumstances, such as if there is a risk of threat to life or freedom or other serious human rights violations.[77] In those cases, those who selectively object to participating in military service in a conflict contrary to the basic rules of human conduct or in an unlawful conflict and those who object to the means and methods of warfare would be covered, provided that certain circumstances obtain.[78] And the Court of Justice of the European Union held in 2020 that conscription in a conflict characterized by the repeated and systematic commission of war

72. Hum. Rts. Council, Rep. of the Off. of the High Comm'r for Hum. Rts. on Approaches and Challenges with Regard to Application Procedures for Obtaining the Status of Conscientious Objector to Military Service in Accordance with Human Rights Standards, ¶ 4, U.N. Doc. A/HRC/41/23 (May 24, 2019) [hereinafter U.N. Doc. A/HRC/41/23].

73. ELIZAVETA CHMYKH, GRAZVYDAS JASUTIS, REBECCA MIKOVA & RICHARD STEYNE, LEGAL HANDBOOK ON THE RIGHTS OF CONSCRIPTS 60 (2020).

74. U.N. Doc. A/HRC/41/23, *supra* note 72, ¶ 26.

75. Edy Kaufman, *Prisoners of Conscience: The Shaping of a New Human Rights Concept*, 13 HUM. RTS. Q. 339, 349 (1991).

76. Guidelines on International Protection No. 10, *supra* note 6, ¶ 5.

77. *Id.* ¶ 14.

78. *Id.* ¶¶ 21–30. *See also* Daniel Davies, *Which Russians Fleeing Military Service Should Be Recognized as Refugees? The Answer Is More Complicated and More Interesting Than Politicians Think*, OPINIO JURIS (Oct. 17, 2022), https://opiniojuris.org/2022/10/17/which-russians-fleeing-military-service-should-be-recognized-as-refugees-the-answer-is-more-complicated-and-more-interesting-than-politicians-think [https://perma.cc/RFN6-5JYE].

crimes and crimes against humanity can be assumed to involve the commission of such crimes.[79] The Court also concluded that there is a strong presumption that the prospect of punishment for refusal to fight in such circumstances would amount to persecution for the purposes of refugee status.[80]

In sum, while compelled service in hostile forces is a war crime, states have the right to demand of their own citizens that they serve in their military forces during times of war and peace. The only exceptions to the scope of that right are the conscription of children and the right to conscientious objection.

In other words, international law draws a significant distinction between compelled service in hostile forces and compelled service in the armed forces of one's state. And it also fails to distinguish between legal and illegal wars. As a result, the current regime makes it a war crime to compel protected persons to fight in hostile forces, even if the latter are engaged in lawful wars. And it makes it a state's prerogative to conscript its own citizens to serve in its armed forces, regardless of whether the wars they are forced to fight are legal or illegal.

There is thus a question of whether the international legal regime on conscription can be rendered morally coherent. In order to do so, we would need to successfully claim that (1) the nature of the wars that people are forced to fight is irrelevant and (2) that it is much worse to be forced to fight by hostile forces than it is to be forced to fight by one's own state. Let us take each of these arguments in turn.

II. LEGAL AND ILLEGAL WARS

The international law on conscription fails to distinguish between illegal and legal wars. This suggests that this distinction is normatively irrelevant—that for the purposes of conscription, whether in hostile forces or the armed forces of one's state, the fact that the war is legal or illegal does not matter at all—and does not alter our moral evaluation of the facts. This claim, however, is highly implausible. Consider the following implications of the regime.

79. Tom Dannenbaum, *Mobilized to Commit War Crimes?: Russian Deserters as Refugees, Part II*, JUST SEC. (Sept. 27, 2022) (citing EZ v. Bundesrepublik Deutschland, No. C-238/19 (E.C.J. 2020)), https://www.justsecurity.org/83269/russian-deserters-as-refugees-part-two [https://perma.cc/Y26K-36QK].

80. *Id.*

First, under the current regime, compelled service in hostile forces is a war crime. This will be the case regardless of whether those hostile forces are engaged in lawful or unlawful uses of force. That is, under the present regime, it would be *equally wrong* for Ukraine to compel Russian POWs to fight against Russia as for Russia to compel Ukrainian POWs to fight against Ukraine.

Second, because the state's prerogative to conscript its own citizens also fails to distinguish between legal and illegal wars, under the present regime, a state that conscripts its own citizens to fight an unlawful war of aggression commits no international crime. In fact, the state's behavior is arguably not even prohibited by international law. As a result, under the present regime, Russia acts permissibly when it conscripts its own citizens to fight against Ukraine.

Third, because the prerogative to conscript individuals belongs only to the state, conscription by non-state armed groups is prohibited by international law. This implies that if non-state armed groups were operating in Ukraine or Russia and forcing individuals to fight against Russia, they would be acting *as wrongfully* as non-state armed groups conscripting individuals to fight for Russia.

Finally, the regime also has implications for the treatment of individuals who voluntarily join foreign forces. Under international law, service in foreign forces is not prohibited, but it is also not protected. As a result, individuals who join foreign forces to fight a legal war—as some Russians are doing right now[81]—do not violate international law. Yet, international law does not protect them from the sanctions that their states might impose on them, including criminal punishment.

The current regime suggests that the nature of the wars one is forced to fight does not matter at all or does not matter enough to make a significant normative difference. It suggests that what matters is solely the identity of those who coerce individuals to fight: one's state or hostile states. But this is highly implausible. Suppose the CSHF prohibition is justified, in the sense that it is true that compelling service in hostile forces is wrong. That is, suppose the CSHF prohibition is a *mala in se* offense in international criminal law.

The present regime suggests that compelled service in hostile forces that are fighting a legal war is *as bad* or *equally wrong* as compelled service in hostile forces fighting a war of aggression. But this cannot be true. Even if we agree that coercion from a third-party is wrongful or that a third-party

81. Schwirtz, *supra* note 8.

lacks the authority to coerce us to do something, it matters what one is coerced to do.

Suppose B, A's neighbor, is upset that A severely mistreats his dog. B has observed that A often hits his dog, fails to feed him for several days at a time, leaves him outside chained to a wall when it is extremely cold or hot, and so on. Although B has spoken to A multiple times about the issue and has volunteered to adopt the dog, A refuses to alter his behavior or give the dog away. Eventually, B decides to take matters into her own hands. She goes to A's house brandishing a gun and tells A that if he does not immediately release the dog to her care, she will shoot him. A, afraid for his life, relinquishes the dog.

Now suppose D, C's neighbor, has a dog-fighting ring. D has observed that C owns a small dog that would be the perfect bait in dog fights. D has spoken to C repeatedly and has offered increasingly higher amounts of money to C so that she sells him the dog. But C does not wish to sell her dog, no matter how much money she is offered. Eventually, D, upset by C's multiple rejections and her love for the dog, decides to proceed anyway. He shows up at C's house brandishing a gun and tells her that she must release the dog to his care or give him $6,000 so he can get a similar dog for his fighting ring. C does not want to relinquish her dog and knows that sustaining or contributing to dog-fighting is morally wrong. However, afraid for her life, she gives D the money.

In both examples, B and D have violently coerced their neighbors to do something they did not wish to do, and for that reason, we might say that they have acted wrongly.[82] But it would be absurd to say that B's and D's behavior is, all things considered, equally wrong. B has forced A to do what was morally right, that is, what he should have done anyway: give the dog away. By contrast, D has forced C to commit a wrongful act: give money to a dog-fighting ring. Even if we think that both have acted wrongly in coercing their neighbors to do something, we would say that D's behavior is, all things considered, *worse*, morally speaking, than B's behavior. From the viewpoint of the coerced neighbors, we would also say that C's situation is worse than B's: unlike B, who was forced to do what he had a duty to do, C was forced to do something that she not only lacked a duty to do, but was also in fact prohibited from doing (or had a weighty reason not to do).

The same applies to the CSHF prohibition. One could perhaps respond that once protected persons are being compelled into service in hostile forces, the wrongfulness of the act is so high that it is irrelevant whether individuals

82. Note that if we think that in both cases coercion is wrong, this will put some pressure on the permissibility of conscription generally. I will come back to this in Part III.

are compelled to fight legal or illegal wars—that there is no sense in which either of the two is significantly or relevantly morally worse than the other. However, this position is too quick. It might be that there is no point in legally regulating them differently, but, in the example above, it seems that the fact that C has been forced to do something morally wrong is an additional aspect of the crime. It is not normatively insignificant.

It is thus not true that being coerced to fight in an illegal war is equally bad as being coerced to fight in a legal war. This is so because international law itself draws a clear and normatively significant distinction between legal and illegal wars. A legal war is a war fought to uphold the international order. By contrast, an unlawful war or a war of aggression is precisely the opposite.

In fact, aggression is considered by some to be the "crime of all crimes." It is not only prohibited by the UN Charter, but also constitutes an international crime that entails the individual responsibility of those who plan it and conduct it.[83] Accordingly, several international legal scholars have developed a view that explains why we have criminalized aggression and why aggressive war is wrong. Mégret, and later, Mégret and Redaelli, have defended a human rights characterization of the crime: aggressive war constitutes a massive violation of the human rights of citizens of both the victim state and the aggressor state, including combatants.[84] Dannenbaum has argued something similar. He contends that international law's "criminalization of aggression is not just a formal prohibition, but also an expression of aggression's *wrongfulness* from the international legal point of view."[85] The core criminal wrong of the crime of aggression is, according to Dannenbaum, the unjustified killing and human violence it entails[86]: an aggressive war results in unjustified displacement, killing, and harming of thousands of individuals. Finally, more recently, Saira Mohamed has pointed

83. U.N. Review Conference of the Rome Statute of the International Criminal Court, Adoption of Amendments on the Crime of Aggression, U.N. Doc. RC/Res. 6, Annex I (June 11, 2010), https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf [https://perma.cc/U9VF-YKW8].

84. Frédéric Mégret & Chiara Redaelli, *The Crime of Aggression as a Violation of the Rights of One's Own Population*, 9 J. ON USE FORCE & INT'L L. 99, 110–13 (2022); Frédéric Mégret, *What Is the Specific Evil of Aggression?*, *in* THE CRIME OF AGGRESSION: A COMMENTARY 1398, 1440–41 (Claus Kreß & Stefan Barriga eds., 2017).

85. TOM DANNENBAUM, THE CRIME OF AGGRESSION, HUMANITY, AND THE SOLDIER 2 (2018).

86. *Id.* at 265.

out that international law has no language to name the wrong that is committed by a state such as Russia, which fights an aggressive war by relying on conscription.[87] She argues that in such circumstance, individuals do not have a duty to fight for their state and, in fact, should be protected against doing so.[88]

Given what makes aggression wrong—unjustified violence against countless individuals—it is impossible to argue that the distinction between legal and illegal wars lacks relevance in the context of conscription.

Perhaps one could make the following argument in defense of the international regime's failure to consider the nature of the wars that individuals are coerced to fight: whether a war is legal or illegal is not what matters. What matters is whether a war is morally justified—whether a war is *just*.

Just war theory has long distinguished between just and unjust wars, arguing that the first kind are justified, while the second kind are not.[89] Generally speaking, a just war is one that has a just cause and meets certain requirements concerning proportionality and necessity and is fought in a just manner (for example, by distinguishing between civilians and combatants).[90] Self-defense and defense of others (that is, humanitarian interventions) are widely accepted amongst contemporary just war theorists as just causes for war.[91] By contrast, an unjust war is a war that is morally prohibited. It involves inflicting morally unjustified harm and death on countless innocent individuals.

In just war theory, then, the distinction between just and unjust wars is the distinction that matters. Unjust wars are morally prohibited and involve the commission of grievous moral wrongs. By contrast, just wars are morally justified. Thus, one could argue that the distinction between legal and illegal wars is normatively irrelevant; that we should concern ourselves with the distinction, at the level of morality, between just and unjust wars. But, of course, even if this argument is correct, it cannot work as a defense of the international regime on conscription. The latter fails to distinguish *at all* on the basis of the character or nature of the wars that individuals are

87. Saira Mohamed, *We Want You: Conscription and the Law in Russia's War of Aggression*, 37 BERLIN J. 52, 52 (2023–24).

88. *Id.* at 54.

89. *See generally* RIPSTEIN, *supra* note 11; JEFF MCMAHAN, KILLING IN WAR (2009); FRANCISCI DE VICTORIA, DE INDIS ET DE IVRE BELLI RELECTIONES (Ernest Nvs ed., 1917); HUGO GROTIUS, ON THE LAW OF WAR AND PEACE (Stephen C. Neff ed., 2012).

90. *See generally* CÉCILE FABRE, COSMOPOLITAN WAR (2012); RIPSTEIN, *supra* note 11; Jeff McMahan, *Just Cause for War*, 19 ETHICS & INT'L AFFS. 1 (2005).

91. *See, e.g.*, McMahan, *supra* note 90, at 46; FABRE, *supra* note 90, at 51–52; RIPSTEIN, *supra* note 11, at 104.

conscripted to fight. It fails to distinguish between legal and illegal wars, and it also fails to distinguish between just and unjust wars.

Further, there is some overlap between what makes a war just and what makes a war legal. This overlap is, however, not perfect.[92] Self-defense is recognized both as a just cause for war and a legal instance of the use of force in international law.[93] However, humanitarian interventions, which are widely recognized as a just cause for war, are not clearly legal uses of force under international law, unless they are authorized by the United Nations Security Council ("UNSC").[94] Additionally, under the U.N. Charter, the UNSC can authorize the use of force, and it could potentially do so in circumstances in which just cause, necessity, or proportionality are lacking. That is, a legally authorized use of force by the UNSC could be an instance of an unjust war.[95]

The fact that the overlap between the two is imperfect cannot, of course, support the conscription regime's lack of concern for whether the wars are legal or illegal, just or unjust. It does, however, provide reasons to modify the *jus ad bellum*—that is, the legal rules on resort to force—to make it more coherent with the distinction between just and unjust wars.[96] And because the overlap between legal and just wars is not perfect, the implications of the regime on conscription as it pertains to just and unjust wars merits attention as a separate set of implications. The current regime entails that states are free, under international law, to conscript their own citizens to fight unjust wars, while compelled service in hostile forces remains a war crime, even when the war individuals are conscripted to fight is a just one.

Nonetheless, in the remainder of this Article, I will speak indistinctly of legal/just wars and illegal/unjust wars. Because this Article and the arguments focus on wars of self-defense and wars of aggression, which are examples of legal and just wars and illegal and unjust wars, respectively, it is unnecessary to keep making the distinction. All the arguments I make are applicable to both. But in those areas in which there is no overlap, and we cannot assume that a war is just merely because it is legal, the arguments I make are applicable only to the distinction between just and unjust wars.

In sum, if wars of aggression are deeply morally wrongful, the failure of the international legal regime on conscription to incorporate that distinction renders some aspects of the regime morally incoherent: they

92. PRIETO RUDOLPHY, *supra* note 10, at 14–15.
93. *See* U.N. Charter art. 51.
94. *Id.* at art. 2, ¶ 7, art. 39.
95. PRIETO RUDOLPHY, *supra* note 10, at 14–15.
96. *Id.*

cannot be "rendered intelligible" in a moral sense.[97] This is so because, in at least three instances, the regime fails to criminalize or prohibit conduct that is worse than, or as bad as, compelled service in hostile forces.[98]

First, the regime makes it so compelled service in hostile forces is *equally bad* regardless of whether the war one is compelled to fight is legal or illegal. Given that a war of aggression is a grave violation of the international order and a clear instance of an unjust war, it should be a worse crime to compel protected persons to fight in hostile forces in pursuit of a war of aggression than to compel them to fight in hostile forces in pursuit of a war of self-defense. It seems, as Ryan suggests, that it would be "an additional aspect of the crime" to compel service in hostile forces in a war of aggression.[99]

Second, the same problem arises with the state's prerogative to conscript its own citizens. If aggression is the crime of all crimes, how can it be that conscription of a state's own citizens to fight an illegal war is *allowed just as* a state's conscription of its own citizens to fight a legal war? Given that conscription is already a grave intrusion into one's personal freedom, nearly equivalent to an obligation to kill and die for the state,[100] it seems that the kind of war citizens are conscripted to fight should be relevant. At the very least, conscription to fight legal wars and conscription to fight illegal wars should not be *equally* allowed.

This issue has been addressed by some scholars. Tom Dannenbaum and James Pattinson have argued that there should be a right to object to deployment in illegal wars.[101] Dannenbaum has also argued that international law should grant refugee status to those who refuse to fight in illegal wars.[102] More recently, he has argued that states have a legal obligation to recognize the refugee status of Russian troops who flee to avoid participating in a war of aggression, including those facing conscription.[103] He claims that the unlawful nature of the war should be enough to ground refugee status for Russian citizens who desert or flee Russia in order to avoid

97. Wasserstrom, *supra* note 12, at 7–8.

98. *Id.*

99. Cheyney Ryan, *Moral Equality, Victimhood, and the Sovereignty Symmetry Problem*, *in* JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 131, 143 (David Rodin & Henry Shue eds., 2008).

100. *See generally* WALZER, *supra* note 17 (discussing conscription, Walzer consistently refers to an obligation to "die" for the state).

101. DANNENBAUM, *supra* note 85, at 312; James Pattison, *The Legitimacy of the Military, Private Military and Security Companies, and Just War Theory*, 11 EUR. J. POL. THEORY 131, 149 (2011).

102. DANNENBAUM, *supra* note 85, at 312.

103. Dannenbaum, *supra* note 79.

conscription.[104] Although the crime of aggression does not entail the international criminal responsibility of mid- and low-level soldiers, aggression's wrongfulness lies in the fact that it causes widespread death and destruction without legal justification.[105] And I have argued in previous work that individuals should have a right to object to deployment in unjust wars, that international law should grant refugee status to those who refuse to fight in unjust wars, and that we should modify the *jus ad bellum*, too, so that it better conforms to the morally relevant distinction between just and unjust wars.[106]

However, even if one might be able to defend these conclusions through a progressive interpretation of international law, as Dannenbaum does,[107] at the moment, a right not to fight in illegal wars is not recognized by international law, states remain free to conscript their own citizens to fight in wars of aggression, and refugee status has not been extended to those who refuse to fight in illegal wars. In fact, Russian citizens who have fled Russia to avoid conscription have been met with varying responses. While Canada recently granted refugee status to a Russian man who had fled his country,[108] Norway has hesitated to do so;[109] Latvia, Lithuania, and Estonia have said they will not offer refuge to fleeing Russians;[110] and Poland has begun to turn away Russian citizens at the border.[111]

Third, compare compelled service in hostile forces to fight a legal war—a war crime under IHL—with the state's conscription of its own citizens to fight an illegal war—permitted under IHL. The current regime suggests that it is significantly worse to be compelled by hostile forces to fight a legal war than it is for the state to conscript its own citizens to fight an illegal war. But this should be, at the very least, controversial. Outside of this context, we do not think that the moral and legal status of actions people

104. Tom Dannenbaum, *The Legal Obligation to Recognize Russian Deserters as Refugees*, JUST SEC. (Mar. 2, 2022), https://www.justsecurity.org/80419/the-legal-obligation-to-recognize-russian-deserters-as-refugees [https://perma.cc/2W2U-5NZ8].

105. *Id.*

106. PRIETO RUDOLPHY, *supra* note 10, at 262–68.

107. DANNENBAUM, *supra* note 85, at 332.

108. *Russian Man in Canada Who Received Conscription Notice to Fight in Ukraine Granted Refugee Status*, RADIO CAN. INT'L (Jan. 18, 2023, 6:11 AM), https://ici.radio-canada.ca/rci/en/news/1949154/russian-man-in-canada-who-received-conscription-notice-to-fight-in-ukraine-granted-refugee-status [https://perma.cc/ZS63-Y3UF].

109. Thomas Nilsen, *Norway Hesitates on Granting Asylum for Russians Fleeing Army Draft*, BARENTS OBSERVER (Jan. 24, 2023), https://thebarentsobserver.com/en/borders/2023/01/norway-hesitate-asylum-russians-fleeing-army-draft [https://perma.cc/NG9S-JNRL].

110. Andrius Sytas, *Baltic Nations Say They Will Refuse Refuge to Russians Fleeing Mobilisation*, REUTERS (Sept. 21, 2022, 11:06 AM), https://www.reuters.com/world/europe/latvia-says-it-wont-offer-refuge-russians-fleeing-mobilisation-2022-09-21 [https://perma.cc/GFA9-69RL].

111. *Id.*

are forced to do is irrelevant, and, further, we certainly do not think that being forced to do something illegal and immoral is less bad than being forced to do something legal and morally justified, purely based on the identity of who is coercing us into doing so.

Perhaps the identity of who is coercing individuals is relevant in this context; perhaps the state is specially positioned to demand certain things from its citizens, and I will return to this in Part III. But to defend this aspect of the regime, the claim that must be defended is not only that the identity of who is coercing individuals matters, but also that it matters much more than whether individuals are being coerced to fight legal or illegal wars.

Finally, the fact that the international legal regime on conscription fails to distinguish between legal and illegal wars not only fails to capture something that is normatively significant. It is also self-defeating; that is, it is bad at achieving what international law presumably aims to achieve. If one of the goals of international law, or the *jus ad bellum*, is to achieve or sustain peace,[112] a regime that allows states to "generate soldiers for war-making"[113] independent of whether they are doing so to uphold the international regime or to breach it, seems likely to generate more and longer wars than a regime that prohibited states from conscripting its citizens to fight in illegal wars.

In sum, the fact that the international regime on conscription does not pay attention to the nature of the wars that individuals are coerced to fight cannot be made sense of, morally speaking. The current regime treats equally things that are morally dissimilar in a relevant way.

International law should thus distinguish between legal and illegal wars. In the context of the state's conscription of its own citizens, this implies that states should be prohibited from conscripting individuals to fight illegal wars or wars of aggression. In the context of compelled service in hostile forces, this implies that the illegal nature of the war one is compelled to fight should be an additional aspect of the crime.

But there is still a remaining dimension of the regime that demands justification and has not been entirely undermined by the arguments so far. Recall that justifying the present regime on conscription requires the success of two arguments. First, that the distinction between legal and illegal wars does not matter at all. This argument has failed. And second, that compelled service in hostile forces is *significantly worse* than compelled service by one's state. This argument is necessary to justify the fact that compelled service in hostile forces, even to fight a legal war, is a war crime while the

112. *See* Marcela Prieto Rudolphy, *Who Is at War? On the Question of Co-Belligerency*, 25 Y.B. INT'L HUMANITARIAN L. 141, at 152 (Heike Krieger et al. eds., 2022).

113. Ryan, *supra* note 99, at 141.

state's conscription of its own citizens to fight a legal war remains the state's prerogative. Engaging with this argument will be the task of Part III.

III. HOSTILE FORCES AND THE STATE

In Part II, I argued that the international legal regime on conscription is morally incoherent in a particular way: it treats equally, either by permitting both or criminalizing both, things that are morally dissimilar. It matters whether the wars that individuals are coerced to fight are just or unjust, legal or illegal.

If we accept the arguments made in Part II and their implications, we should accept that there is a powerful *pro tanto* reason for international law to prohibit the state's conscription of its own citizens to fight illegal wars and to make the illegal nature of the war an additional aspect of the crime of compelled service in hostile forces.

However, having accepted these implications, there is a second aspect of the regime whose moral coherence remains to be proved: whether compelled service in hostile forces is both wrong and significantly worse than compelled service in the armed forces of one's state. This argument is necessary to render morally intelligible the fact that compelled service in hostile forces to fight *legal* wars is a war crime, while compelled service in the armed forces of one's state to fight *legal* wars is the state's right.

Some of the arguments I will explore will also have implications for compelled service in illegal wars. As I just noted, Part II provides a *pro tanto* reason for international law to prohibit compelled service in illegal wars. Although I think that Part II provides a conclusive, and not just a *pro tanto*, reason for international law to prohibit the state's conscription of its own citizens to fight illegal wars, the case in favor of prohibition does not rest solely on that argument. It can also rely on some of the arguments that follow.

Nonetheless, most of the arguments in this Part attempt to explain why international law treats compelled service in hostile forces to fight *legal* wars differently from a state's conscription of its own citizens to fight *legal* wars. Perhaps there is something particularly wrong about compelling persons who are in custody or in occupied territory to serve in hostile military forces—something wrong that is present in these circumstances but is not present when states conscript their own citizens to fight wars. If this argument exists, then we can explain at least this aspect of the international legal regime on conscription.

The complexity of making moral sense of this aspect of the regime is increased by the fact that compelled service in hostile forces is not merely

prohibited by IHL, but is a war crime, that is, a crime that entails individual, and not just state, responsibility. Whatever justification is provided, it must be able to account not only for the CSHF prohibition itself, but also for its criminalization as part of international criminal law. However, there is no unitary theory of war crimes nor a satisfactory definition of them.

War crimes belong to the general category of international crimes. International crimes are one of the few areas of international law in which duties are imposed directly on individuals who might be personally responsible for their conduct. Not every human rights violation is an international crime. Louise Arbour, former UN High Commissioner of Human Rights, explains the distinction in this way: "*Human rights law violations* are actions and omissions that interfere with the birthright of all human beings—their fundamental freedoms, entitlements and human dignity. *Humanitarian crimes* are, in essence, crimes that are so heinous that they shock the human conscience."[114]

The idea that international crimes are a particular category of very heinous acts, one that shocks the conscience of humankind, is quite common. Some authors, however, have offered a different theoretical account of international crimes.

David Luban, for example, has provided a theory of crimes against humanity, understanding them as an assault on a particular aspect of human beings, namely, our character as political animals.[115] Larry May, as we will see below,[116] has developed a theory about war crimes that relies on notions of honor and the vulnerability of certain individuals during war.[117] As I will argue in Section III.D, May's theory can explain why compelled service in hostile forces is often worse than the state's conscription of its own citizens, but it cannot explain the permissibility of conscription.

There is, however, significant uncertainty and confusion about the definition of "war crimes," and the term is often used in various and sometimes contradictory ways.[118] This is probably partly explained by the fact that the concept of grave breaches, and the idea of a war crime itself, is a body of law "whose normative provisions were drawn from different, and somewhat inconsistent, treaty provisions."[119]

114. Judith Blau & Alberto Moncada, *It Ought to Be a Crime: Criminalizing Human Rights Violations*, 22 SOCIO. F. 364, 365–66 (2007) (footnote omitted).

115. David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 90 (2004).

116. *See infra* notes 161–67 and accompanying text.

117. *See generally* LARRY MAY, WAR CRIMES AND JUST WAR (2007).

118. Oona A. Hathaway, Paul K. Strauch, Beatrice A. Walton & Zoe A.Y. Weinberg, *What Is a War Crime?*, 44 YALE J. INT'L L. 53, 68 (2019).

119. SCHABAS, *supra* note 28, at 233.

The most common definition of war crimes is "violations of the laws of war that incur individual criminal responsibility."[120] The international criminal tribunals, as well as the ICC, have coalesced around three basic elements of war crimes: (1) an armed conflict; (2) a nexus between the acts of the accused and the armed conflict; and (3) knowledge of the armed conflict.[121]

Other accounts of war crimes, like that of Hathaway, Strauch, Walton, and Weinberg, require that the violation of the laws of war is also serious.[122] It is generally assumed that all grave breaches of the Geneva Conventions are serious, but the seriousness of other violations might depend on the nature of the infraction itself and, perhaps, the manner in which the prohibition is broken.[123] This is somewhat ambiguous, both in the statute of the ICTY and in the Rome Statute, in which the Elements of Crimes introduce elements to Article 8 that require the act to be sufficiently serious to justify international condemnation.[124] There might also be breaches of the laws of armed conflict that do not qualify as serious and meriting international condemnation, but that should be the subject of domestic proceedings.[125]

The most accepted definition of war crimes (violations of IHL that entail individual criminal responsibility) fails to offer a theory of criminalization. That is, it fails to guide criminal tribunals and other organs in determining what a war crime is and lacks a deep underlying justification.[126] It is not clear at all that this is what the definition is trying to do—perhaps it aims simply to give a positivist account of war crimes. But the truth is that we do not agree on a theory of criminalization, both at the domestic level[127] and at the international one. The purpose of International Criminal Law itself is also deeply contested.[128] This poses some difficulties

120. Charles Garraway, *War Crimes*, *in* PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 377, 377 (Elizabeth Wilmshurst & Susan Breau eds., 2007).

121. SCHABAS, *supra* note 28, at 227–40.

122. Hathaway et al., *supra* note 118, at 55.

123. Garraway, *supra* note 120, at 385.

124. *Id.* (citing Rome Statute, *supra* note 5, at art. 8(2)(b)(vii), *reprinted in* THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 754 (Roy S.K. Lee ed., 2001)).

125. *Id.* at 386.

126. Hathaway et al., *supra* note 118, at 54.

127. *See* Nicola Lacey, *Historicising Criminalisation: Conceptual and Empirical Issues*, 72 MOD. L. REV. 936, 941 (2009). For some theories of criminalization, see, e.g., VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW (2011); ANTONY DUFF, THE REALM OF CRIMINAL LAW (2018); THE BOUNDARIES OF THE CRIMINAL LAW (R.A. Duff et al. eds., 2010).

128. *See generally* Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561 (2002); Bill Wringe, *Why Punish War Crimes? Victor's Justice and Expressive*

in terms of the arguments I will offer. It might be plausible to conclude that some things should be forbidden by international law, but something else is presumably required in order for a behavior to constitute a war crime. I will come back to this at the end, but I cannot do anything but leave the issue somewhat open. To do otherwise would require developing a theory of criminalization in the context of IHL.

For now, the main challenge is to explain why compelled service in hostile forces might be morally worse than the state's conscription of its own citizens. I will address several different but somewhat related arguments: (a) compelled service in hostile forces is irrational; (b) the CSHF prohibition aims to incentivize surrender and disincentivize longer wars; (c) citizens feel loyalty toward their own states and that loyalty should be respected; (d) protected persons are in a particularly vulnerable situation vis-à-vis their captors, which makes it morally worse to compel them into service; and (e) unlike foreigners, citizens have duties toward their own states to fight legal wars.

A. COMPELLED SERVICE IN HOSTILE FORCES IS IRRATIONAL

One possible argument why compelled service in hostile forces is significantly different from the state's conscription of its own citizens is that individuals forced to fight for hostile or enemy forces would likely defect or surrender as soon as possible and, generally speaking, would make for bad fighters.

This might be true in certain circumstances. Some individuals feel strong loyalty toward their states and armies and if compelled to fight might in fact decide to do so badly. However, this difference between compelled service in hostile forces and the state's conscription of its own citizens cannot explain why compelled service in hostile forces is a war crime. It only shows why it is a bad idea for any given state to compel protected individuals to fight in hostile forces—that is, it shows why it is likely irrational to do so. But mere irrationality does not provide a conclusive argument in favor of the international criminalization of compelled service in hostile forces. There are plenty of things that states do that might be a bad idea, but bad ideas are not enough to "shock the conscience"[129] of humankind.

Further, conscripted soldiers fighting for their own state might also be bad fighters, particularly in comparison to professional armies. They might

Justifications of Punishment, 25 L. & PHIL. 159 (2006); David Tolbert & Marcela Prieto Rudolphy, *Transitional Justice in the 21st Century: History, Effectiveness, and Challenges*, *in* THE OXFORD HANDBOOK ON ATROCITY CRIMES 581 (Barbora Holá et al. eds., 2022).

129. *See supra* note 114 and accompanying text.

be reluctant to kill or engage in combat or lack relevant training. Thus, if the CSHF prohibition was justified because protected persons are likely to make bad fighters, conscription would be put into question for similar reasons. But the fact that individuals might make bad fighters is, in any case, not enough to explain why compelling individuals to fight is wrong or should be prohibited. Again, it only shows why it is a bad idea.

One might object at this stage that whether compelled protected persons make good fighters is irrelevant. What the CSHF prohibition aims to achieve is to provide incentives to surrender. Let us examine this argument.

B. POWS AND INCENTIVES TO SURRENDER

Privileged combatants can become POWs and are consequently entitled to certain rights and protections.[130] POWs are those who have fallen into the power of the enemy and belong to one of the categories specified in Article 4 of Geneva Convention III.[131] *Hors de combat*, that is, persons who are in the power of an adverse party, express a clear intention to surrender, and have been rendered unconscious or otherwise incapacitated by wounds or sickness,[132] are also entitled to certain protections against mistreatment.[133] Among those protections is the prohibition against compelled service in hostile forces.[134]

One might thus argue that, if combatants knew that after surrendering or becoming wounded or incapacitated they might be compelled by the adverse party to serve in its armed forces, they would be less likely to surrender and more likely to fight until the very end. If everyone did that, this might, in turn, make wars longer.

The CSHF prohibition then is concerned with providing individuals with incentives to surrender. In doing so, it aims to make wars shorter, and perhaps in making wars shorter, it reduces suffering. Of course, this rationale would not explain why the CSHF prohibition also applies to those in occupied territory; it is limited to POWs.

130. *See generally* Geneva Convention (III), *supra* note 5.

131. *Id.* at arts. 4, 13, 42.

132. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) art. 41, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API].

133. *See generally* Geneva Convention (III), *supra* note 5; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva Convention (II)].

134. *See supra* Section 1.A.

The idea that the goal of IHL is to reduce suffering (to make wars more humane) is familiar and is often referred to as "the humanitarian view."[135] If this is right, and the incentives work in this way, then we might be able to explain why it makes sense to provide individuals with certain protections when they surrender, such as the prohibition on compelled service in hostile forces.

The humanitarian view has been the object of a variety of objections, both as a justification of the legal equality of combatants[136] and as a justification of the law on co-belligerency.[137] In the context of the international legal regime on conscription, the humanitarian view can explain why the CSHF prohibition is a reasonable rule to have, but it cannot explain why compelled service in hostile forces is worse than the state's conscription of its own citizens. In fact, if the state's conscription of its own citizens is likely to make wars longer or to increase suffering, there would be at least a *pro tanto* reason to prohibit the practice.

Note, as well, that the humanitarian account is also likely to provide an additional reason for prohibiting states' conscription in illegal wars. If we rely on accounts of what people have incentives to do, we should, presumably, reduce incentives to wage and participate in illegal wars.

C. LOYALTY

A third argument that might explain why there is something different between compelled service in hostile forces and the state's conscription of its own citizens is that the former violates the ties of loyalty that bind individuals to their own states, while conscription by one's own state does not. Compelled service in hostile forces entails fighting against one's own state and betraying one's loyalty to it.

The importance of loyalty to one's state is not unheard of in the context of war. Levinson, for example, discusses the case of Ernst von Weizsaecker, State Secretary of the German Foreign Ministry.[138] Von Weizsaecker had internally opposed the war, but the issue of why he did not inform the Russian ambassador of Hitler's plans against Russia in 1941 came up during the Nuremberg trials.[139] If he had done so, he would have put himself in great

135. *See* Prieto Rudolphy, *supra* note 112, at 147–48; HAQUE, *supra* note 11, at 38.
136. *See, e.g.*, PRIETO RUDOLPHY, *supra* note 10, at 61–74; HAQUE, *supra* note 11, at 38–43.
137. *See* Prieto Rudolphy, *supra* note 112, at 149–53.
138. Sanford Levinson, *Responsibility for Crimes of War*, 2 PHIL. & PUB. AFFS. 244, 260–65 (1973).
139. *Id.* at 262–63.

danger, would not have changed Hitler's policy, and would have led to greater German losses:

> The prosecution insists, however, that there is criminality in his assertion that he did not desire the defeat of his own country. The answer is: Who does? One may quarrel with, and oppose to the point of violence and assassination, a tyrant whose programs mean the ruin of one's country. But the time has not yet arrived when any man would view with satisfaction the ruin of his own people and the loss of its young manhood. To apply any other standard of conduct is to set up a test that has never yet been suggested as proper, and which, assuredly, we are not prepared to accept as either wise or good.[140]

This argument about loyalty was not just an idiosyncratic belief of the Nuremberg judges. The ICRC database on customary IHL states that the reasoning behind the CSHF rule is "the distressing and dishonourable nature of making persons participate in military operations against their own country—whether or not they are remunerated."[141] Bothe also finds the rationale of the rule in avoiding "bringing a detained person or a person in occupied territory into an unbearable loyalty conflict."[142] And the ICTY, in interpreting the concept of "civilians" for the purposes of the Fourth Geneva Convention, relied on the idea of "genuine bonds of loyalty and allegiance," dismissing, however, the requirement of nationality.[143] In the ICTY, the issue as to who counted as civilians for the purposes of the Fourth Geneva Convention arose because the latter refers to those who find themselves "in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[144] This was pressing in the case of Bosnian Muslims, who could not be considered protected persons under the Convention because their persecutors were also of Bosnian nationality.[145]

In the philosophical literature, arguments from loyalty have been discussed in the context of the crimes of treason and espionage.[146]

Arguments that rely on loyalty have, however, limited purchase. Loyalty can be understood as the "practical disposition to persist in an intrinsically valued (though not necessarily valuable) associational

140. *Id.* at 263 (citation omitted).
141. ICRC Rule 95, *supra* note 40, at 334.
142. Michael Bothe, *War Crimes*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 379, 394 (Antonio Cassese et al. eds., 2002).
143. SCHABAS, *supra* note 28, at 247.
144. *Id.*
145. *Id.*
146. *See generally* Youngjae Lee, *Punishing Disloyalty? Treason, Espionage, and the Transgression of Political Boundaries*, 31 L. & PHIL. 299 (2012); Cécile Fabre, *The Morality of Treason*, 39 L. & PHIL. 427 (2020).

attachment, where that involves a potentially costly commitment to secure or at least not to jeopardize the interests or well-being of the object of loyalty."[147] In institutional settings, "loyalty can simply take the form of commitment and willingness not to undermine institutions which do well by us and, thereby, not to harm our fellow community members."[148]

One of the issues with a loyalty-based argument is that loyalty can often be morally problematic. This is so because individuals might experience loyalty toward all sorts of projects and associations, some of which will have no value at all, or even negative value. This would be the case with individuals who experience loyalty toward, say, racist associations, criminal organizations, and so on.

Perhaps loyalty-based arguments can succeed if we can argue that loyalty toward one's own state (or nation) is valuable to the point of requiring protection from international law. Yet, although some states perform valuable functions, it might be better if individuals felt stronger loyalty toward other fellow human beings, rather than to their own state. This kind of loyalty also seems more consistent with some of international law's cosmopolitan aspirations.[149] And relying on this account of loyalty might provide an additional argument as to why compelled service in hostile forces to fight illegal wars should be a war crime. When states do compel such service, they are asking individuals to engage in conduct that is disloyal to states that are engaged in legal wars and to the international legal system.

In any case, even if we concede that betraying one's loyalty to one's state is presumptively wrongful, that presumption can be overridden by other considerations—mainly, whether one's state is engaged in violating the fundamental rights of others.[150] Yet, this is precisely what states engaged in aggressive wars are doing. Recall that we are trying to answer why compelled service in hostile forces to fight a legal war is both wrong and significantly worse than the state's conscription of its own citizens to fight a legal war. This would require arguing that an individual's loyalty toward a state fighting a war of aggression should be protected by making compelled service in hostile forces a war crime. However, that individual's loyalty is surely misguided from the viewpoint of the international legal system itself,

147. John Kleinig, *Loyalty*, STAN. ENCYC. PHIL. (MAR. 22, 2022), https://plato.stanford.edu/archives/sum2022/entries/loyalty [https://perma.cc/ZA55-3PBP].

148. Fabre, *supra* note 146, at 442.

149. *See generally* ROLAND PIERIK & WOUTER WERNER, COSMOPOLITANISM IN CONTEXT: PERSPECTIVES FROM INTERNATIONAL LAW AND POLITICAL THEORY (2010) (exploring the ideal of cosmopolitanism and its strained relationship with existing international legal institutions).

150. Fabre, *supra* note 146, at 444–45. Fabre, in fact, argues that under certain circumstances, individuals are not only morally permitted but might also have a *pro tanto* duty to commit informational treason. *Id.*

and it is, effectively, loyalty toward an actor engaged in serious legal (and moral) wrongdoing.

Perhaps we can argue that the objective value of an individual's loyalty is irrelevant. It only matters whether the individual in fact experiences ties of loyalty to their own state. If they do, that loyalty should be protected. But this argument is both over and underinclusive. It is overinclusive because it would require international law to protect individuals' loyalty toward their own state in a wider range of circumstances, extending far beyond service in hostile forces. And it is underinclusive because it would require international law *not* to concern itself with instances in which that loyalty is not present. That is, if particular individuals felt no special ties of loyalty toward their own state, or if they had no state, the CSHF prohibition could not be justified in their case; states would do nothing morally wrong if they chose to compel those foreigners to serve in their armed forces. This seems to miss something important.[151]

It might be the case that many individuals do feel strong ties of loyalty to their own states, even if they are misguided in doing so. This might counsel for excusing their behavior in certain circumstances. But it is difficult to argue that international law should encourage that loyalty when it is misguided by making compelled service in hostile forces a war crime.

This is not to say that loyalty is completely irrelevant in all circumstances. Individuals, for example, might be loyal to members of their own family or their loved ones, or they might have special duties to protect them from harm.[152] It is understandable, from that perspective, why forcing someone to harm their own loved ones would be worse than forcing them to harm a stranger. Since fighting against one's own country might involve harming one's loved ones, it is plausible to argue that, in those cases, compelled service in hostile forces is worse than compelled service in the armed forces of one's state; thus, it might be wrongful, under certain circumstances, for states to compel individuals to harm their loved ones.

However, ties of loyalty and duties of protection in close interpersonal relationships are insufficient to fully account for the CSHF prohibition due to two reasons.

151. A variation of the loyalty argument might rely on commitment, whereby individuals might have voluntarily committed to fulfill duties of conscription to their own state. The argument runs into similar problems as loyalty-based ones when applied to conscription. On the obligation to obey the law and commitments, see generally Felipe Jiménez, Legality, Legal Obligation, and Commitment (n.d.) (unpublished manuscript), https://law.ucla.edu/sites/default/files/PDFs/Law_and_Philosophy/Felipe_Jimenez-Legality_Legal_Obligation_and_Commitment.pdf [https://perma.cc/B5UF-3QHT].

152. *See generally* Seth Lazar, *Associative Duties and the Ethics of Killing in War*, 1 J. PRAC. ETHICS 3 (2013) (discussing the limited relevance of associative duties of protection in the context of killing in war).

First, this is not the kind of relationship that exists between states and their own citizens, nor is it the kind of relationship that exists between citizens themselves.[153] Further, interpersonal relationships and ties of loyalty do not necessarily overlap with citizenship in a given state—individuals might have family and loved ones in other countries, and, in the context of civil conflict, in which states can coerce their own citizens to fight, ties of loyalty to the state will be conflicted and, sometimes, nonexistent. Finally, even if we grant that individuals can draw deep personal meaning from their association to their state, their nation, their community, and so on, the strength of those ties pales in comparison to those in close interpersonal relationships.

At this point, one might object that it is unclear why interpersonal relationships should be so different from the kind of relationships that exists between individuals and their communities (however expansively we define the latter). After all, people draw profound meaning from their membership in those communities and often feel bound to act in certain ways on account of that membership. I find this kind of argument unpersuasive, partly because I am committed to a more cosmopolitan view of our moral obligations and the sources that give meaning to our lives. Nonetheless, even those who reject strong versions of cosmopolitanism should be persuaded by the second reason why ties of loyalty and associative duties are insufficient to account for the CSHF prohibition.

This is so because even the ties of loyalty and duties of protection that arise in interpersonal relationships are not impervious to the impartial demands of morality. That is, individuals are not morally allowed to do anything they can to protect their loved ones (or the members of their communities) from harm nor are they allowed to be partial to the interests of their loved ones in all possible circumstances. In the context of the CSHF prohibition, it can hardly be the case that associative duties and ties of loyalty toward one's own state and its institutions—which seem categorically different or, at the very least, weaker, from those present in interpersonal relationships—could override moral obligations not to wrongfully harm others. Or, put differently, it cannot be the case that it is morally *wrong* for individuals to fight a war of self-defense against their own states. If hostile forces are prohibited from coercing individuals into doing so—as I think they are—it cannot be merely because doing so involves making them breach duties of loyalty or protection toward their own states. Those duties will most often be inexistent or overridden by duties not to wrongfully harm others (as

153. For a similar argument in the context of the difference between loyalty toward the state and toward those with whom we have close interpersonal relationships, see Lee, *supra* note 146, at 310–12.

individuals often do when fighting in an illegal war).

In sum, while we can acknowledge that individuals often feel loyalty toward their own states and they also have duties of protection toward their loved ones, this argument only explains why fighting against one's own state can be *worse*, from an agent-relative perspective, than fighting against other states. But alone, outside of limited circumstances in which fighting for hostile forces might involve breaching duties of protection toward one's loved ones, it cannot explain why compelled service in hostile forces is morally prohibited.

D. MISTREATMENT AND VULNERABILITY

A different way in which we can argue that there is a significant difference between the state's conscription of its own citizens and compelled service in hostile forces relies on the idea that POWs and persons in occupied territory are in a particularly vulnerable position. This argument is, of course, underinclusive—it can only explain what is wrong with compelled service in the case of POWs and those in occupied territories, but it cannot explain what is wrong with compelling "the nationals of the hostile party to take part in the operations of war directed against their own country."[154]

A vulnerability-based argument has two dimensions. One is more obviously concerned with the incentives at play that explain why POWs or individuals in occupied territory are more likely to be treated in objectionable ways. The second one focuses on what is particularly wrong with harming or coercing vulnerable individuals. Both dimensions of the argument are related. The first one aims to explain why the CSHF prohibition is required to protect certain individuals who are likely to be the victims of objectionable treatment. The second one aims to explain why certain forms of treatment are objectionable.

The first part of the argument worries, then, about the CSHF prohibition's role in protecting individuals in contexts in which states might have incentives to treat them in objectionable ways. We might say, for example, that if states were allowed to conscript protected persons to fight, they would likely use them in cruel ways, as cannon fodder or diversions, in missions that have little chance of succeeding, and so forth.

Incentives are likely to operate in this way. In fact, a study by Valentino, Huth, and Croco shows that highly democratic states face great pressure to reduce the human costs of war and are thus more likely than other states to

154. Rome Statute, *supra* note 5, at art. 8(2)(b)(xv).

employ strategies that minimize military casualties.[155] States—namely, democratic states—might thus have incentives to protect their own citizens and avoid high casualties, but they are less likely to have similar incentives regarding foreigners, to whom they are not politically accountable. And we have powerful reasons to impede states from employing individuals in these objectionable ways.

However, this argument alone, although plausible, cannot meaningfully distinguish between the state's conscription of its own citizens and compelled service in hostile forces. Simply as a matter of history, the CSHF prohibition was prior to any human rights standards that might have governed how states treated their own soldiers and conscripts, which only developed after World War II.[156]

Going beyond this historical point, the argument about incentives cannot explain why compelled service in hostile forces is meaningfully different from the state's conscription of its own citizens. It might be true that states often have fewer incentives to use their own citizens as cannon fodder, send them into missions certain to fail, and so on. But there are a range of circumstances in which states will, in fact, have few incentives to protect their own citizens. For example, authoritarian states are less responsive to public opinion, and as a result might be more willing to employ their own citizens in these ways. States might also employ their own citizens as cannon fodder as a war tactic in a desperate attempt to avoid defeat, particularly in the case of citizens from oppressed minority groups.

Thus, although this argument can provide a good reason for having the CSHF prohibition, it also provides good reasons for having a prohibition on conscription of the state's own citizens. If the CSHF prohibition is justified because incentives are likely to make states use individuals in objectionable ways during combat, there would be a reason to enact a similar prohibition in all contexts in which the incentives to use individuals in those objectionable ways exist or to directly prohibit those objectionable ways themselves. Yet, no such prohibitions exist.

Although some standards of treatment have been imposed regarding soldiers and conscripts,[157] there is no restriction on states sending out their own citizens into difficult or impossible missions, nor any restrictions on

155. *See generally* Benjamin A. Valentino, Paul K. Huth & Sarah E. Croco, *Bear Any Burden? How Democracies Minimize the Costs of War*, 72 J. POL. 528 (2010).

156. PETER ROWE, THE IMPACT OF HUMAN RIGHTS LAW ON ARMED FORCES 5–6 (2006).

157. CHMYKH ET AL., *supra* note 73, at 14–15.

using them as cannon fodder.[158] The standard of treatment recognized by the European Court of Human Rights, for example, demands that military service is performed in "conditions compatible with respect for human dignity" and that do "not impose distress or suffering of an intensity exceeding the unavoidable level of hardship inherent in military discipline" and service,[159] thus leaving wide discretion to states in terms of military strategies and planning. In the context of IHL, the debate concerning states' obligations to their own soldiers seems also currently limited to the state's obligation to tend to the wounded, which extends to the state's own soldiers.[160]

The argument so far, although insufficient to render the regime coherent, does give a reason in favor of the CSHF prohibition: compelled service in hostile forces might be one instance in which incentives to treat individuals in certain objectionable ways are very often present. Here is where the second dimension of the argument enters the picture. I have just pointed out that states are likely to have incentives to treat foreigners in objectionable ways when they send them into combat. The second dimension of the argument explains, precisely, why it is worse to treat POWs and persons in occupied territory in certain ways, and it relies on the notion of vulnerability, as understood by Larry May and Seth Lazar.

Larry May has developed an account of war crimes that relies on duties of humane treatment, in which war crimes are understood as "crimes against humaneness."[161] They are a violation of the principle that requires soldiers to act humanely, with mercy and compassion.[162] This is a difficult task, May acknowledges, because while soldiers might be required to act humanely toward some, they are still allowed to—or are not prohibited from—killing enemy combatants.[163] Ultimately, for May, the rules of war are grounded in notions of honor and mercy, as well as the protection of the vulnerable.[164]

Regarding confined soldiers (POWs and *hors de combat*) and prohibitions on their mistreatment, May argues that humane treatment

158. *See* Saira Mohamed, *Cannon Fodder, or a Soldier's Right to Life*, 95 S. CAL. L. REV. 1037, 1080–82 (2022) (noting the neglect of the human rights community regarding service members' rights and the need to "humaniz[e] actors too often deemed instruments").

159. CHMYKH ET AL., *supra* note 73, at 14–15.

160. Saira Mohamed, *Abuse by Authority: The Hidden Harm of Illegal Orders*, 107 IOWA L. REV. 2183, 2189 (2022). *But see generally* Cóman Kenny & Yvonne McDermott, *The Expanding Protection of Members of a Party's Own Armed Forces Under International Criminal Law*, 68 INT'L & COMP. L.Q. 943 (2019) (discussing recent developments in international criminal law).

161. MAY, *supra* note 117, at 1–2.

162. *Id.*

163. *Id.*

164. *Id.* at 6.

becomes paramount: POWs are confined by one party, and that party has "every reason to want to exert vengeance or retribution on those who have been killing members of one's armed forces."[165]

It is the asymmetry in power between confined prisoners and the party confining them that partly motivates May's account. The laws of war, he argues, should counteract the strong possibility of abuse perpetrated by those who have weapons against those who do not.[166] POWs are in a "special moral situation because they are utterly dependent on their captors and are vulnerable in ways that soldiers on the battlefield are not."[167] Walzer makes a similar point: "Just beyond the state there is a kind of limbo, a strange world this side of the hell of war, whose members are deprived of the relative security of political or social membership."[168]

This concern about vulnerability, understood as defenselessness or the inability to diminish one's vulnerability to a threat, is echoed by Seth Lazar in defending the prohibition against deliberately targeting civilians.[169] Lazar argues that harming those who are vulnerable or defenseless is particularly bad or worse than harming the nonvulnerable because doing so is exploitative, risky, breaches a duty to protect the especially vulnerable, dominates and disempowers them, and generates unfair distributions of risk on the innocent.[170]

Vulnerability is also the object of special protection in domestic criminal codes, in which it can operate as an aggravating circumstance in certain crimes such as homicide, or as giving rise to certain duties of protection toward, say, children.[171]

Following this line of argument, one might then reason that the vulnerability of POWs and those in occupied territories is what explains the CSHF prohibition. It does so because prisoners and persons in occupied territories are in vulnerable positions such that states have incentives to treat them in objectionable ways, and harming those who are vulnerable is morally wrong and morally *worse* than harming the nonvulnerable.

165. *Id.* at 142–43.
166. *Id.* at 145.
167. *Id.*
168. Michael Walzer, *Prisoners of War: Does the Fight Continue After the Battle?*, 63 AM. POL. SCI. REV. 777, 777 (1969).
169. SETH LAZAR, SPARING CIVILIANS 102–22 (2015).
170. *Id.* at 113.
171. *See, e.g.*, CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 12, nos. 2, 6, 12 (Chile); STRAFGESETZBUCH [STGB] [PENAL CODE], § 174 (GER.), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [https://perma.cc/RL2M-MXG5]; CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 22, nos. 1–2 (Spain); CAL. PENAL CODE § 273a (West 2024).

It is certainly true that both occupation and custody create a situation of vulnerability. In that sense, it is understandable why states might have duties to provide and care for individuals in custody and under occupation. And it is quite plausible that it is morally worse to harm the vulnerable than the nonvulnerable. If so, then we can explain why compelled service in hostile forces is morally worse than the state's conscription of its own citizens: to the extent that POWs, *hors de combat*, and those in occupied territories are vulnerable and defenseless relative to citizens of the state, and to the extent that compelling them into service will entail treating them in objectionable ways, it is worse to compel the former into service than to compel citizens.

This argument, however, faces some difficulties. Recall that we are trying to answer why compelled service in hostile forces to fight a legal war is morally worse than compelled service by one's own state to do the same. So far, the argument has established that harming those who are vulnerable is worse than harming those who are not, and that states might have incentives to treat POWs and those in occupied territories in objectionable ways (that is, states might have incentives to harm them). There are several problems with this.

First, as mentioned before, states can have similar incentives regarding their own citizens, and yet they are not prohibited from treating their own citizens in such ways. The argument is, in that sense, overinclusive.

Second, the argument on its own says very little about whether conscription is morally prohibited or permissible. This is so because the argument explains why compelled service in hostile forces is *worse* than the state's conscription of its own citizens. Whether compelled service in hostile forces is morally *wrong* depends on whether it *harms* those compelled to fight. I have suggested that it does so when they are used in certain objectionable ways, or that it might do so when it forces them to breach associative duties toward their loved ones (under certain circumstances), but I have not argued that it does so in every instance. That is, I have not yet provided an argument as to whether coercion to fight legal wars on behalf of hostile forces *always* harms those forced to fight.

Put simply, the fact that harming someone who is vulnerable is worse than harming someone who is not does not say anything about whether the latter is morally prohibited or permitted. It only implies that one is worse than the other. That is, the fact that harming a defenseless child is worse than harming an adult does not prove, on its own, that harming the adult is morally permissible. That depends on whether the harm itself is justified.

Applied to the CSHF prohibition, one can argue that it is worse to compel protected persons into service than it is to compel one's own citizens.

That might be the case. But alone, this cannot answer whether compelled service in military forces is allowed in the first place.

Third, the argument that relies on vulnerability also requires that vulnerability is applied in a particular way, so that only those who have fallen under the power of an adverse party to the conflict and those that are in occupied territory are understood as vulnerable. However, not all POWs remain in physical custody during war, and citizens in their own states are also quite vulnerable to coercion on the state's part (think, for example, of those who are serving criminal sentences). Further, refusing conscription might lead to criminal punishment, and the state has a wide arsenal of enforcement mechanisms at its disposal. If it is vulnerability that is driving the CSHF prohibition, then one might also find vulnerability in the state's context when compelling individuals to serve in its own forces.

Still, we can argue that it will often be the case that POWs and those in occupied territories will be in a highly vulnerable position, and that states are likely to have incentives to use them in objectionable ways during combat, and so the CSHF prohibition is predicated on that likelihood. In those cases, we can explain why compelled service in hostile forces is wrong, and why it might be morally worse than the state's conscription of its own citizens. But vulnerability itself might be present in the state's own citizens. More importantly, this vulnerability-based argument does not say why compulsion to fight a legal war is always equivalent to unjustifiably harming individuals.

E. CITIZENS AND DUTIES TOWARD THE STATE

Is coercion to fight a legal war equivalent to unjustified harm? Or is it coercion to do what one already has a moral duty to do? Does it matter whether it is one's state who coerces one to fight?

What is wrong (or right) about compelled service in legal wars cannot be coercion itself. It would prove too much: it would immediately make the state's conscription of its own citizens morally suspect. It also makes coercion—which is a key feature of the state—generally morally wrong. This argument should thus be discarded. Coercion might always require justification, but what makes coercion justified responds to other facts, such as what one is coerced to do, or who has authority to coerce other individuals.

Perhaps the difference between compelled service in hostile forces and the state's conscription of its own citizens is that citizens, unlike noncitizens, owe certain duties to their own states, and among those duties, there is the duty to fight on behalf of one's state. If successful, this argument can explain why international law permits states to conscript their own citizens and why compelled service in hostile forces is a war crime. The first is permitted

because citizens already have enforceable duties to fight that are owed to the state. The second is prohibited because noncitizens do not owe such duties to other states, and it is wrong for those states (or hostile forces) to coerce individuals to fight when those individuals lack any relevant duties to do so. Forcing them to fight would constitute unjustified harm, in a sense, and it is even worse to harm those who are vulnerable or defenseless.

At this stage, one might argue that, in the case of compelled service in hostile forces, the issue of citizens' duties toward their own states arises twice. First, because those who are compelled to serve in hostile forces have a duty toward their own states that compelled service in hostile forces causes them to breach. And second, because those who are compelled to serve in hostile forces lack duties toward hostile forces, and compelling them to fight as if they had such duties is morally wrong. However, recall that we are now concerned with the question of why compelled service in hostile forces to fight legal wars is worse than the state's conscription of its own citizens to fight legal wars. In this case, when states breach the CSHF prohibition, they are doing so in relation to individuals who, if fighting for their own states, would be fighting a war of aggression, which is also an unjust war. When states are engaged in unjust wars, the question of whether their citizens still retain a duty to fight on behalf of their states is highly controversial, and the most plausible answer is that they almost always lack such duties toward the state, at least in cases of egregiously unjust wars.[172] Thus, I will not address whether compelled service in hostile forces *also* involves making individuals breach duties toward their own states.

The argument based on duties owed to the state thus requires showing that citizens have certain duties toward their own states (or their political communities) that noncitizens lack, and, in particular, that they have duties to *fight* on behalf of their state that noncitizens lack.[173] This argument is obviously related to the question of political obligation, that is, the question of whether individuals have a prima facie, context- and content-independent moral duty to obey the law of the jurisdiction they are in.[174] Because

172. *See* PRIETO RUDOLPHY, *supra* note 10, at 94–110, 241–67; MCMAHAN, *supra* note 89, at 66–78; Susanne Burri, *If You Care About a Rule, Why Weaken Its Enforcement Dimension? On a Tension in the War Convention*, 41 L. & PHIL. 671, 671 (2022). *But see generally* David Estlund, *On Following Orders in an Unjust War*, 15 J. POL. PHIL. 213 (2007) (arguing that under certain limited circumstances, soldiers might be morally obligated to follow orders to fight in an unjust war); Yitzhak Benbaji, *A Defense of the Traditional War Convention*, 118 ETHICS 464 (2008) (arguing that the moral equality of combatants is a fair and mutually beneficial norm that can explain why soldiers can follow orders to fight in unjust wars).

173. I thus leave aside whether citizens might have enforceable duties owed to the state to participate in the war effort in other ways. Some of the arguments I develop here will be applicable in this context too, but there are some important differences as well.

174. Samuel Scheffler, *Membership and Political Obligation*, 26 J. POL. PHIL. 3, 3 (2018).

conscription is often implemented through the legal regime, refusal to accept conscription will often involve disobeying the relevantly applicable laws.

However, the question of political obligation is somewhat different in character to the question of whether citizens have a duty to fight—to die and kill—for their states. The first difference is that conscription in times of war, unlike other instances of duties imposed by law, is extremely demanding: individuals are likely to face mortal and moral peril when they are called to kill and die on behalf of the state.[175] Fighting in war, unlike complying with most legal rules, is a significant burden. War is risky, both in physical and moral terms,[176] and individuals only have one life to live—their own.

As a result, general arguments as to why individuals have moral duties to obey the law of their own states might not be sufficiently powerful or weighty to explain why individuals might have moral duties to die and kill for their states. This is not implausible: no account of political obligation defends an absolute duty to obey the law, independent of its content, and most accounts are qualified in several respects.[177] Further, some political theorists, like Hobbes and Rousseau, have treated the question of an obligation to kill and die for the state as a separate, distinct issue.[178] Rousseau, for example, held the view that to bear arms on behalf of the state was the ultimate public duty because every individual shares in the moral goods of the community.[179] Hobbes contended that individuals do not have a duty to fight on behalf of the state because once the state demands citizens to die on its behalf, the social contract breaks down: the state and the citizen are at war with each other and they are hence returned to the state of nature.[180] This is so because the end of the state, for Hobbes, is individual life.[181] An individual who dies for the state defeats the very purpose of forming that state: the preservation of life.[182] Others interpret this aspect of Hobbes's theory as a matter of prudence, in the context of which self-preservation was paramount.[183]

175. *See generally* MOSHE HALBERTAL, ON SACRIFICE (2012) (discussing sacrifice in the context of war and violence).

176. *See* PRIETO RUDOLPHY, *supra* note 10, at 195, 248–49.

177. LIAM MURPHY, WHAT MAKES LAW: AN INTRODUCTION TO THE PHILOSOPHY OF LAW 120 (2014); Scheffler, *supra* note 174, at 3.

178. WALZER, *supra* note 17, at 77–98.

179. *Id.*

180. *Id.* at 81–84. There are some passages where Hobbes seems more ambivalent. *See id.* at 85–86.

181. *Id.* at 82.

182. *Id.*

183. Cheyney Ryan, *The Dilemma of Cosmopolitan Soldiering*, *in* HEROISM AND THE CHANGING CHARACTER OF WAR 120, 128 (Sibylle Scheipers ed., 2014).

The second reason why the question of political obligation is different from the question of conscription is that the first one is a question about whether there is a content- and context-independent duty to obey the law. By contrast, the question regarding conscription is not content-independent: it is a question of whether individuals have duties, owed to their state, to fight in *legal* wars.

Despite these differences, conscription has received little theoretical attention from political and moral philosophers[184] besides focused attention on the legitimacy of the draft in the 1960s and early 70s.[185] In fact, in the contemporary ethics of war, the question about conscription has been posed as a question of whether conscription might have an impact on one's liability to defensive force. In other words, questions about conscription have been reduced so far to the question of whether coercion would make conscripted unjust combatants morally impermissible targets.[186] But the legitimacy of conscription itself has been hardly discussed.[187]

This omission is quite puzzling. As things are, states have the capacity of generating "unlimited numbers of soldiers by their coercive practices."[188] Indeed, during the 19th century, pacifism about war included an argument against conscription, which was considered to be a "type of enslavement at the heart of war" that led to a system of inhumanity; that is, a system where war was seen as taking a life of its own.[189] Although liberal thinkers like Hobbes, Locke, and others during the 18th and 19th centuries have remarked on the incompatibility of the rights of individuals with the power that the military possesses over its soldiers, very few thinkers have seriously questioned the permissibility of the state's conscription practices.[190]

184. *See, e.g.*, Mathias S. Sagdahl, *Conscription as a Morally Preferable Form of Military Recruitment*, 17 J. MIL. ETHICS 224, 225 (2018); Ryan, *supra* note 99, at 143.

185. CHEYNEY RYAN, THE CHICKENHAWK SYNDROME: WAR, SACRIFICE, AND PERSONAL RESPONSIBILITY 20 (2009).

186. *See, e.g.*, MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 151 (4th ed. 2006); MCMAHAN, *supra* note 89, at 50; HELEN FROWE, DEFENSIVE KILLING 21 (1st ed. 2014); VICTOR TADROS, TO DO, TO DIE, TO REASON WHY: INDIVIDUAL ETHICS IN WAR 237 (2020). *But see* Ryan, *supra* note 99, at 133.

187. *But see* Ryan, *supra* note 99, at 133.

188. *Id.* at 131.

189. Cheyney Ryan, *Bearers of Hope. On the Paradox of Nonviolent Action*, *in* SOFT WAR: THE ETHICS OF UNARMED CONFLICT 184 (Michael L. Gross & Tamar Meisels eds., 2017).

190. Ryan, *supra* note 99, at 142.

Because the philosophical treatment of conscription is sparse, the literature on political obligation is a good starting point for assessing arguments in favor of a duty to fight for one's state, even if there are relevant differences between the two.

Insofar as we can establish that a duty to accept conscription in times of war exists and is owed to one's state or to one's political community, we can explain the distinction that exists in international law between compelled service in hostile forces and the state's conscription of its own citizens. This thought—that the justification of conscription relies on the existence of a duty toward one's community or one's state—is familiar. Conscription, as Ryan notes, is often experienced both as naked coercion and as embodying a legitimate social obligation.[191]

Let us start by discussing how different theories of political obligation have justified the existence of a duty to obey the law.

1. Theories of Political Obligation

In the literature on political obligation, context- and content-independent duties to obey the law have been grounded on consent,[192] fairness,[193] natural duties of justice,[194] associative duties,[195] on the basis of democratic authority,[196] and a commitment to law.[197] However, some authors remain skeptical that any such duties exist.[198]

Theories based on consent[199] or commitment[200] regard political obligations as obligations of commitment.[201] The idea is that the community has granted authority to the government and chose to undertake political

191. *Id.* at 139.

192. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 3 (Ian Shapiro ed., 2003).

193. *See, e.g.*, H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 178 (1955); Russell Hardin, *The Free Rider Problem*, STAN. ENCYC. PHIL. (2003), https://plato.stanford.edu/archives/spr2013/entries/free-rider [https://perma.cc/SH9V-C9UZ].

194. Jeremy Waldron, *Special Ties and Natural Duties*, 22 PHIL. & PUB. AFFS. 3, 3 (1993).

195. Scheffler, *supra* note 174, at 4; RONALD DWORKIN, LAW'S EMPIRE 195–216 (1986).

196. Thomas Christiano, *The Authority of Democracy*, 11 J. POL. PHIL. 266, 268 (2004); Daniel Viehoff, *Democratic Equality and Political Authority*, 42 PHIL. & PUB. AFFS. 337, 338 (2014).

197. *See generally* Jiménez, *supra* note 151 (arguing that the duty to obey the law can be explained on the basis of a commitment).

198. MURPHY, *supra* note 177, at 110–43; A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 189 (1979).

199. *See generally, e.g.*, LOCKE, *supra* note 192.

200. *See generally, e.g.*, Jiménez, *supra* note 151.

201. SIMMONS, *supra* note 198, at 58.

obligations,[202] or that individuals have adopted a commitment to law.[203] These theories tend to be voluntaristic (what matters for establishing a duty to obey the law is whether individuals have, in fact, consented), in which case the arguments discussed pertaining to loyalty will apply. When they are less voluntaristic (what matters is whether people *should* consent, or whether people in certain idealized circumstances would have consented), the arguments that apply to fairness, associative duties, and natural duties–based theories will often apply to them as well.

Fairness-based theories argue that states provide their citizens with significant benefits that they would otherwise not obtain. In a Hobbesian account of the state, for example, we would argue that citizens benefit from membership in their state because the latter's existence allows them to exit the state of nature.[204] In broader accounts, we might posit that the state allows individuals to access a number of goods that they could not obtain otherwise, such as security, the existence of a legal system, the solution of coordinative problems, and so on. Plausibly, noncitizens do not benefit as much as citizens from these arrangements. A fairness-based account of political obligation, then, holds that when a number of individuals "engage in a just, mutually advantageous, cooperative venture according to rules and thus restrain their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to similar acquiescence on the part of those who have benefited from their submission."[205] Acceptance of the relevant benefits, even in the absence of express or tacit consent to cooperate, are enough to bind individuals to do their fair share in the group.[206] Fairness-based accounts of political obligation explain the existence of the latter on the idea that individuals benefit from certain arrangements, and those benefits make it the case that they are obligated to participate in their production by following the rules of the scheme of cooperation.

In the context of conscription, Rawls, for example, suggested that the draft could be defended as a fair way of sharing in the burdens of national defense.[207] Given that even just and well-ordered societies cannot entirely eliminate the possibility of aggression by another state, they should make sure that the burden to defend one's country should be evenly shared by all members of society over the course of their lives and that there is no

202. *Id.* at 58–59.

203. *See generally* Jiménez, *supra* note 151 (arguing that reasons to act in conformity with law depend on agents' commitments).

204. *See generally* THOMAS HOBBES, LEVIATHAN (Edwin Curley ed., 1994).

205. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 90 (1974).

206. *Id.*

207. JOHN RAWLS, A THEORY OF JUSTICE 380–81 (rev. ed. 1999).

avoidable class bias in selection.[208] Further, given that conscription is "a drastic interference with basic liberties," Rawls argued that conscription would be justified only if it is demanded for the defense of liberty itself.[209] Rawls did not think this duty was content-independent: he suggested there might be a right or a duty to disobey if the war is unjust or is being fought in an unjust manner.[210]

An alternative way to ground duties of obedience is to argue that citizens have associative duties or membership-dependent reasons to do their share, "as defined by the norms and ideals of the group itself, to help sustain it and contribute to its purposes," provided that the norms are neither gravely unjust nor irrational, and the group is not corrupt.[211] Scheffler argues that this might, on certain assumptions, provide the basis of an argument in favor of the existence of a duty to obey the law.[212] Those assumptions are, first, that membership in a political society can be noninstrumentally valuable; second, that the laws of a society are among its norms of individual conduct; and third, that these reasons amount to duties.[213] Note that whether membership in the state (or any group) is noninstrumentally valuable depends on the justice (or injustice) of the group in question: at a certain point, the injustice of any given society will erode the value of membership in that society for, as Scheffler observes, part of the value of membership in a political society such as the state is that "it makes it possible to live on just terms with others."[214]

Accounts based on natural duties provide a different alternative.[215] They contend that there is a natural duty of justice which requires individuals to support and to comply with just institutions that exist and apply to them, as well as to further just arrangements not yet established (at least when it is not too costly for individuals).[216]

Finally, duties to obey the law might also be based on the law's democratic provenance.[217] The democratic authority account obviously has a problem regarding scope: it can only justify conscription in democratic states. Thus, it could not explain why compelled service in hostile forces is worse than the state's conscription of its own citizens. If successful, it can

208. *Id.*
209. *Id.*
210. *Id.* at 381.
211. Scheffler, *supra* note 174, at 6.
212. *Id.* at 9.
213. *Id.*
214. *Id.* at 14.
215. RAWLS, *supra* note 207, at 114–17, 333–37. *See generally* Waldron, *supra* note 194.
216. RAWLS, *supra* note 207, at 115.
217. *See, e.g.*, Estlund, *supra* note 172, at 213.

only explain why compelled service in hostile forces is worse than democratic states' conscription of their own citizens and why conscription by democratic states is permissible.

All the arguments just discussed aim to explain why individuals might have content- and context-independent duties to obey the law, within certain limits. But duties of obedience can also be grounded instrumentally, that is, on the basis of the ability of the state, the legal system, or the practice of widespread obedience to the law of securing certain good outcomes.[218] Of course, instrumentalist accounts of duties to obey the law fail to support a context- and content-independent duty to obey the law—that is not what instrumentalist accounts are trying to do.[219] At most, an instrumentalist account will be able to support duties to obey certain laws, insofar as obeying those laws is a way of securing the outcomes we want to secure.[220] In the case of conscription, the argument would be able to support the duty to accept conscription if doing so was the kind of thing that helped secure certain outcomes or if not doing so would risk the collapse of, say, one's state (provided that the state is a valuable institution).

Historically, conscription, both in times of peace and in times of war, has been justified instrumentally on the basis of different outcomes or goals,[221] some of which Leander refers to as "myths" regarding conscription.[222] Some of these myths have been empirically debunked, but they tend to fail on their own terms anyway.

One argument in favor of conscription, and against all-volunteer armed forces ("AVF"), is that the latter pose a danger to democracy, while conscription is central for controlling the use of force in society.[223] There is thus a supposed link between the preservation of democracy and conscription, or, alternatively, all-volunteer armed forces can pose a threat to the political community, democracy, and freedom which conscription-based armies are less likely to pose.

However, historical examples do not support the notion that conscription-based armies are particularly effective in controlling or constraining the use of force by their own state leaders. The general draft

218. MURPHY, *supra* note 177, at 125.

219. *Id.* at 129.

220. *Id.*

221. *See* Matthew Kosnik, *Conscription in the Twenty-First Century: Do Reinforcements Equal Security?*, 36 COMPAR. STRATEGY 457, 457 (2017).

222. Leander, *supra* note 67, at 573–74.

223. *See, e.g.*, *id.* at 580–82; Milton Friedman, *Why Not a Voluntary Army?*, 4 NEW INDIVIDUALIST REV. 3, 4–7 (1967). Neither Leander nor Friedman think this argument is sufficient to defend conscription.

allowed Hitler to form a powerful army and conscripts did not stop his plans from within, and both Stalin's and Mussolini's armies were composed of conscripts, who also posed no considerable internal resistance.[224] Conscript-based militaries in Chile, Argentina, and Turkey also offered no resistance to military takeovers.[225] It is thus not true that conscription can be a cure to the threat that all voluntary armies pose, and as Keil notes, the "equation 'conscription equals democracy' is badly flawed."[226] Interestingly, a study conducted in thirty-four European states in 1997–2017 found that in countries with conscription-based recruitment, there are higher levels of support for the military.[227]

Further, even if it were true that AVFs pose graver threats to democracy than conscript-based forces, this would not, on its own, provide an argument in favor of the permissibility of conscription. It only highlights an aspect that makes conscription better than AVFs. Pattison, for example, has argued that the AVF is the most legitimate way of organizing the military, partly because it does not severely infringe on individuals' liberty.[228]

A second myth is that conscription works to construct a more tightly knit society, both as a source of social mobility and as a source of social integration.[229] This logic does not resist analysis: in most places, women are not subject to conscription, so whatever social integration or mobility is created clearly excludes roughly half the population.[230] It is also unclear why social integration should stop at the border of one's own country.[231] Further, this argument might work for conscription as a state's general practice during times of peace, but it does not really support conscription or the draft in times of war. There is no social integration when people are dead.

A third argument usually employed to support conscription is that it helps to form loyal and virtuous citizens because conscription itself works as the "school of the nation."[232] However, as Leander points out, the idea that the military could and should play a role in forming virtuous citizens is in tension with democratic understandings of what makes a virtuous citizen in

224. Carsten Keil, On Conscription 6 (Nov. 19, 2001) (unpublished manuscript), https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=60044ff7f202faa491c4aa8b5fdddf81e63c4d01 [https://perma.cc/A6FW-TXE8].

225. Kosnik, *supra* note 221, at 458.

226. Keil, *supra* note 224, at 6.

227. Ioannis Choulis, Zorzeta Bakaki & Tobias Böhmelt, *Public Support for the Armed Forces: The Role of Conscription*, 32 DEFENCE & PEACE ECON. 240, 243 (2021).

228. Pattison, *supra* note 101, at 149.

229. Leander, *supra* note 67, at 573–74.

230. *Id.* at 574.

231. *Id.*

232. *Id.* at 576–77.

most contemporary political thinking.[233] Even if that were the case[234]—that is, even if conscription was an effective tool in creating "virtuous citizens"—it cannot be plausibly sustained that as a result the state can demand people to kill and die on its behalf. The intrusion on personal freedom and the sacrifice demanded of individuals is far too great in comparison to the pursued goal, which is relatively insignificant. It is also far from clear that the state, at least one committed to some version of political liberalism, can coercively make individuals believe and endorse its own conception of virtuousness.

Thus, an instrumentally justified duty to accept conscription must go beyond these arguments. It must rely on the benefits that the state provides for its citizens, which might be diminished if the war is lost or eliminated entirely if losing the war entails the destruction of the state. In the latter case, one might be facing something like a "supreme emergency."[235] I will come back to this point later.[236] In the first case, the argument relies on the notion that states fulfill valuable ends and thus have a right to their own survival. Citizens, then, must contribute to the survival of their own state by fighting.

2. The Shortcomings of Theories of Political Obligation

Whichever way one grounds these duties, if successful, individuals might have duties to fight on behalf of their state. If so, then we will have an additional reason why compelled service in hostile forces is worse than conscription, and why conscription to fight legal wars is permitted by international law. However, these theories struggle to support this notion.

First, the theories tend to be overinclusive. If we accept that individuals can owe certain duties to groups or that there are instrumentally justified duties to fight legal wars, then there is no reason to think that those duties would be owed exclusively, or even primarily, to one's state. Any community, political or otherwise, would be able to generate such duties, provided that individuals have consented to them, the community is reasonably just, individuals benefit from the existence of the community, and so on. There is, thus, a difficult question of demarcation: why is the state the

233. *Id.* at 578.

234. A study by Choi et al. found that states with conscription policies have higher levels of electoral participation than states without conscription policies. Min Jae Choi, Seung Wook Yoo & Zack Bowersox, *Conscription and Political Participation: How Conscription Policies Affect Voter Turnout*, 50 ARMED FORCES & SOC'Y 315, 316 (2024).

235. WALZER, *supra* note 186, at 250–67.

236. Of course, instrumentally justified duties face a number of objections. In this context, the difficulty is that one person's refusal to fight does not, in fact, have a great effect on the overall outcome of war, but, at the same time, it imposes a significant burden on the individual. On this, see Jonathan Glover & M.J. Scott-Taggart, *It Makes No Difference Whether or Not I Do It*, 49 PROC. ARISTOTELIAN SOC'Y, SUPPLEMENTARY VOLUMES 171, 171 (1975).

right entity to which individuals owe duties to fight legal wars?

We live in an increasingly interconnected society in which noncitizens can, in fact, benefit considerably from the functioning and existence of other states—and sometimes to a greater extent than the state's own citizens. Further, individuals might also benefit from the existence of the international legal system, in which case they would be obliged to *that* system or to *all* states, not just to their own. In the context of war, if pacifism is false,[237] there is a plausible argument that legal wars, when they are just and aim to uphold the prohibition on aggression, concern and benefit not just citizens of the states involved, but also the international community as a whole. This has implications for the theories of political obligation just discussed.

Take the fairness and natural duty-based accounts. If legal wars generate benefits to everyone, then everyone would have a duty to fight, and that duty would not be owed to one's state but to the relevant group (those who benefit from legal wars). If everyone has duties to uphold and further just institutions, then everyone would have a duty to fight a legal war, which would not be owed to one's state, but to all states or the international community.[238] If we take an instrumental account of political obligation, then one would be required to fight anytime it would help uphold the legal regime or the existence of sufficiently valuable states. And, again, it is unclear why that duty would be owed to any particular state or to one's own.

The problem, then, is to draw a significant line between citizens and noncitizens. If this is right, accounts of political obligation can explain why the state's conscription of its own citizens is permitted. However, they will struggle to explain why compelled service in hostile forces to fight legal wars is a war crime, or why non-state groups are prohibited from conscripting individuals to fight legal wars. They provide a reason to the contrary. That is, they provide a reason in favor of everyone having duties to fight legal wars: duties that are owed not to one's own state, but to the international community as a whole or to other relevant groups. If so, compelled service in hostile forces of the kind that does not involve objectionable forms of treatment or the breach of duties toward others would not be morally unjustified. Even though it would be worse than the state's conscription of its own citizens, it would be permissible. And although prisoners and those

237. *See* PRIETO RUDOLPHY, *supra* note 10, at 184–85 (pointing out that pacifism is difficult to resist). *See generally* Cheyney C. Ryan, *Self-Defense, Pacifism, and the Possibility of Killing*, 93 ETHICS 508 (1983) (arguing that pacifism, understood as opposition to killing, is attractive at an emotional and intellectual level, and arguments against it are difficult to make).

238. Waldron, *supra* note 194, at 9–11. Waldron proceeds to argue for some differences in the extension of those duties, but he does not deny that duties of justice might exist toward other societies. Similar objections are also developed by Simmons. SIMMONS, *supra* note 198, at 146–52. This is known as the particularity objection in the literature on political obligation.

in occupied territories would remain vulnerable, coercing them to fight would not, in at least some circumstances, constitute an instance of harming them, given that it would, in fact, constitute the enforcement of a moral duty to fight.

The second problem with theories of political obligation is that they cannot support the notion that many, or even most, individuals have duties to fight legal wars that are owed to all states, their own states, or the international community. This is so because theories of political obligation have been developed under certain ideal assumptions, mainly that institutions and states are reasonably just. In these ideal circumstances—that is, when states are just and treat members equally—these accounts might be able to take off, to a greater or lesser extent.[239] But they struggle greatly in nonideal conditions, which are the present conditions of all states (and of the international community).

Take the fairness-based theory. In most states, individuals do not equally benefit from the state's existence and the prevailing social arrangements. In fact, many states not only fail to benefit certain sectors of the population, but also actively contribute to their oppression and marginalization. That is, some individuals are not only not benefitted by the state but also are harmed by it. For example, Raff Donelson has argued that Black people and police in the United States are locked in a Hobbesian state of nature; that is, in this respect, the state fails to secure even the most basic conditions of personal security.[240]

A fairness-based account already struggles in ideal circumstances. It is hard to accept that the mere fact of benefiting from a social practice or institution provides a good argument as to why those who benefit—and who might not have accepted nor wanted the practice, the institution, or the benefit—can be burdened to obey.[241] This is particularly the case when the benefits are not equally distributed among members or the costs of complying with the obligations are higher than the benefits the person obtains from the social practice.[242] The latter is especially relevant in the context of conscription, in which the costs of compliance are very high (risking severe injury and death in addition to putting oneself at risk of committing morally wrongful acts), but the benefits any given person obtains from the state are likely to be significantly smaller in comparison. In

239. I personally agree with Murphy and Greene that no context- and content-independent duty to obey the law exists. *See* ABNER S. GREENE, AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY 186 (2012); MURPHY, *supra* note 177, at 125.

240. Raff Donelson, *Blacks, Cops, and the State of Nature*, 15 OHIO ST. J. CRIM. L. 183, 183 (2017).

241. NOZICK, *supra* note 205, at 90–95.

242. *Id.*

nonideal circumstances this is an even more pressing issue, and the argument simply cannot take off: some individuals (often those who are most likely to be conscripted or drafted) do not benefit from the existence of the state, or benefit very little, and thus cannot be obliged to take on the higher burden of fighting to defend it.[243]

The same is true in an associative duties-based account: some individuals simply lack any reason to place noninstrumental value on the existence of their state. The state actively makes their lives worse or prevents them from living justly with others. And in a consequentialist or instrumentalist account, there is no reason for individuals to fight to defend a state (or an international legal order) that they might be better off without, or from which they might benefit little, when the burden of fighting is so high. Further, a consequentialist account could not establish that individuals have *general* duties to fight; it can only establish that, depending on the circumstances, sometimes some individuals will have duties to fight.[244] These might seem, as Murphy writes, "banal empirical observation[s]," but "it is through ignoring such banalities that philosophers generate theories which allow them to spread iniquity in the ignorant belief that they are spreading righteousness."[245]

Theories of political obligation then struggle in two dimensions. First, in their idealized versions, they might actually ground duties to fight legal wars that are owed to the community of states. If this is true, then there is a *pro tanto* reason *against* the CSHF prohibition when protected individuals are compelled to fight in hostile forces engaged in legal wars. This, of course, cannot provide a complete argument against the CSHF prohibition. Compelled service in hostile forces would remain both morally worse than the state's conscription of its own citizens and morally wrong when involving objectionable treatment. Further, incentives to treat foreigners poorly would still exist and provide a reason in favor of the prohibition.

Second, in nonideal circumstances (which are the circumstances of all present states), theories of political obligation struggle to ground duties to obey the law. If they struggle to even do this, it is even harder to argue that they could support a duty to fight and kill on behalf of the state (or the community of states), given how demanding the duty is. Theories of political obligation are not unresponsive to the demandingness of the burdens associated with compliance with the law. In the case of conscription, the

243. *See* Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFFS. 217, 240 (1973) (making similar arguments regarding punishment).

244. On the inability of act- and rule-consequentialist arguments to support a duty to obey the law, see GREENE, *supra* note 239, at 96–108.

245. Murphy, *supra* note 243, at 241.

obligation to fight is extremely demanding, which makes it harder to defend. It is also a grave imposition on individuals' freedom, which also makes it harder to justify.

If this is true, then both compelled service in hostile forces and the state's conscription of its own citizens are unjust practices. Although the first is often worse than the second, both are morally wrong. This is so because, in nonideal circumstances, individuals often do not have duties toward the international community nor to their own state to fight and kill on its behalf. And because many individuals lack those duties, it is wrong for states to force them to fight, even in legal wars.

3. The Authority of the State to Enforce Duties to Fight Legal Wars

Note that the argument so far does not establish that *no one* has duties to fight legal wars that are owed to the state or the international community. The argument only establishes that in nonideal circumstances, many individuals lack such duties. However, at least some individuals might have duties to fight legal wars because, for example, they benefit considerably from the existence of their own state, or they have consented to have such duties by, say, joining the army. Others might have duties to fight a legal war based on instrumental reasons, and some individuals might have moral duties to fight that are owed to their own community or group.

Of course, it can be hard for the state to identify who these people are. But if it could do so, and these individuals refused to fight, can the state enforce their duties to fight?

This is a question about the political legitimacy or authority of the state.[246] Although related to the question of political obligation, it is not the same. The question of political obligation pertains to whether individuals have a prima facie moral duty to obey the law. The question about political authority pertains to whether the state is justified to issue and enforce binding directives, sometimes referred to as the question of political legitimacy.[247] Some think that the two questions can come apart: it is possible that states are justified in issuing and enforcing directives while, at the same time, individuals lack a moral duty to obey them.[248]

In the context of conscription, this would mean that states might be justified in demanding conscription of citizens, even in cases in which citizens might lack any duties to accept conscription that are owed to the state. If so, one could argue that compelled service in hostile forces is wrong

246. MURPHY, *supra* note 177, at 116.
247. *Id.*
248. *Id.*

because hostile forces lack authority over individuals to coerce them to fight on their behalf; that is, they lack political authority regarding foreigners, but they do have authority over their own citizens. Coercion over their own citizens is thus legitimate, whether it involves coercion to pay taxes or to fight wars.

The first problem with relying on the legitimacy of the state is that although most political philosophers agree that legitimacy does not require that the state is perfectly just, it does require that the state is reasonably just.[249] However, a significant number of states are not even reasonably just. Only 57% of states in 2017 were "democracies of some kind,"[250] and there is disagreement about whether certain states that are "democracies of some kind" are sufficiently just to be legitimate.[251] Thus, this reliance on political legitimacy cannot explain why conscription is allowed under international law. If anything, it should be severely restricted.

Second, political legitimacy aims to justify state coercion generally. But it cannot justify every instance of coercion: in fact, all theories of political legitimacy recognize limits. Conscription to fight in war is exceedingly burdensome. If, as I have argued, some citizens lack duties to accept conscription precisely due to the state's failure to protect them, benefit them, or make them better off, then surely the state lacks any sort of prerogative, for the same reasons, to enforce directives to kill and die on its behalf. The state's authority would only be plausible in the case of those very few citizens who have duties toward the state and, perhaps, in the case of those who have duties to fight owed to other members of the community (but not to the state). For example, in other work I have argued that when burdens are imposed unfairly, the group to which the individual belongs to is corrupt or unjust, and refusal to fight is costly, individuals can have a *pro tanto* reason to accept conscription because refusing it would entail deflecting harm on other, innocent individuals.[252] In this case, however, it is obvious that the state cannot enforce that obligation: that obligation is not, in fact, owed to the state, and the state is acting wrongfully when demanding conscription.[253]

In the first case, when duties to fight are owed to the state, we might still put into question the state's legitimacy to enforce those duties, particularly in severely unequal and individualistic (i.e., capitalist) societies.

249. C.H. Wellman, *The Space Between Justice and Legitimacy*, 31 J. POL. PHIL. 3, 9 (2023).

250. Drew Desilver, *Despite Global Concerns About Democracy, More Than Half of Countries Are Democratic*, PEW RSCH. CTR. (May 14, 2019), https://www.pewresearch.org/short-reads/2019/05/14/more-than-half-of-countries-are-democratic [https://perma.cc/DS8D-625S].

251. Wellman, *supra* note 249, at 3.

252. PRIETO RUDOLPHY, *supra* note 10, at 240.

253. *Id.*

Such societies, Murphy argues, incentivize individualism. In that context, there is something perverse about the state's enforcement of obligations to fight and die on its behalf when doing so "presuppose[s] a sense of community in a society which is structured to destroy genuine community."[254]

Finally, wars, even legal wars, involve causing harm against many innocent people, including civilians. Legal wars are also often fought unjustly, and war is a particularly morally risky enterprise. If, as Parry and Easton have argued, individuals have a presumptive claim against exposure to moral risk—which grounds duties in others (such as the state) not to expose them to moral risk—then states can hardly demand individuals to fight on their behalf.[255] And if, as I have argued, the moral nature of what one is coerced to do matters, individuals facing conscription in conflicts that are fought in breach of *jus in bello* norms could also not be coerced to fight.

Ultimately, even if some citizens have duties to fight, it will often be the case that citizens are similarly placed to noncitizens: both will lack duties to fight that are owed to the state, and the state will lack authority to enforce duties to fight on its behalf. If that is true, then the state's conscription of its own citizens is not generally permissible. Conscription to fight in wars cannot be justified as a legitimate practice deserving of international protection—at least not until states become more just.

IV. A MORALLY COHERENT INTERNATIONAL REGIME ON CONSCRIPTION

I have argued that the international legal regime on conscription is morally incoherent. In order to justify the regime, two arguments needed to succeed, yet both have failed.

First, the regime's failure to distinguish between legal and illegal wars cannot be justified. There is no argument why compelled service in hostile forces to fight a legal war is *equally bad* or *equally wrong* as compelled service in hostiles forces to fight a war of aggression. The latter seems significantly worse. Although both cases involve coercion, the latter involves coercion to contribute to an international crime. As a result, the nature of the war one is coerced to fight should be an additional aspect of the crime.

254. Murphy, *supra* note 243, at 239.

255. *See* Jonathan Parry & Christina Eaton, *"Filling the Ranks": Moral Risk and the Ethics of Military Recruitment*, AM. POL. SCI. REV., 2023, at 1, 3, https://www.cambridge.org/core/services/aop-cambridge-core/content/view/AECBBE88736D2AB01470BDB404E537BF/S0003055423001247a.pdf/filling-the-ranks-moral-risk-and-the-ethics-of-military-recruitment.pdf [https://perma.cc/855E-Q9LU].

Further, the distinction between legal and illegal wars is also relevant pertaining to the state's conscription of its own citizens. States should be prohibited from conscripting their own citizens to fight wars of aggression. There are also powerful reasons for thinking it should be a war crime; severely infringing individuals' liberty to coerce them to participate in deeply wrongful acts does seem to "shock the conscience" of humankind. And it certainly seems sufficiently serious for international law to be concerned with it.

Second, although, all else equal, compelled service in hostile forces of protected persons is often morally worse than the state's conscription of its own citizens, the argument that supports this claim—that it is worse to harm those who are vulnerable and to be forced to fight against those we care about—cannot render the state's conscription of its own citizens permissible. It can only show that the state's conscription of its own citizens might be morally better (or less bad) than compelled service in hostile forces. But the fact that the state's conscription of its own citizens is morally better (or less bad) than compelled service in hostile forces cannot show, in and of itself, that conscription by the state is permissible or justified. In fact, in current, nonideal conditions, citizens will often lack duties to fight that are owed to their own states, and the state will also lack authority to compel its own citizens to fight, even in legal wars. This is what makes both compelled service in hostile forces and conscription to fight wars morally *wrong*.

There are thus powerful *pro tanto* reasons for international law to prohibit states from conscripting or drafting individuals to fight wars. There might also be reasons why it should be an international crime, for the same reasons why conscription in the context of illegal wars should be one. Conscription has been described as "tyranny," and the peculiar horror of modern warfare as a social practice is that states can exercise " 'tyrannical power' " against their own loyal people as well as their enemies.[256] I will not argue in favor of this, but, if that were the case, the war's illegality should be an additional aspect of the crime of conscription.

In sum, to render the regime morally coherent, the state's conscription of its own citizens to fight an aggressive war should be a war crime; the illegality of the war should be an additional aspect of the crime of compelled service in hostile forces; and the state's conscription of its own citizens should be generally prohibited.

However, I have not made an all-things-considered case in favor of the prohibition of conscription at the international level. I have said that the

256. Ryan, *supra* note 99, at 131 (citation omitted).

regime is morally incoherent and there are powerful reasons to render it coherent. But perhaps there are other, more powerful reasons why the state's conscription of its own citizens to fight legal wars should be permitted by international law.

First, one might argue that prohibiting conscription would make it harder to fight both legal and illegal wars. If anything, it would make the former harder than the latter. This is so because if international law prohibited conscription, the states more inclined to comply with that prohibition would be precisely those states more likely to be engaged in legal wars. On the contrary, states likely to be engaged in illegal wars would be more likely to breach that prohibition. If that were the case, then international law would create a perverse system in which rogue states would breach the prohibition on conscription while law-abiding states would not, thus allowing the first to gain a significant military advantage over the latter.

I think this worry is overblown. It might be that legal wars would become more expensive to fight than illegal wars if the first relied on professional armies and the latter relied on conscription. However, I do not think the costs of war are reasons weighty enough to permit conscription, which severely infringes on individuals' liberty. States would remain free to have AVFs, and they would also remain free to ask individuals to volunteer to fight in legal wars in certain circumstances.

Second, some might argue that conscription would be justified in the case of what Walzer calls a "supreme emergency,"[257] in which the very existence of the state (or the international community) is at stake. Friedman, who was generally opposed to conscription, suggested that for a major war or "in times of the greatest national emergency," a strong case in favor of compulsory service can be made.[258] This would be the case if winning the war required conscription because, say, not enough individuals would volunteer to fight otherwise. But whatever one thinks about this case, it is not enough, on its own, to show that conscription should thus be generally permitted by international law. It only shows that there might be an exception regarding the (moral) prohibition on conscription. But laws should not be made thinking solely about the exception, especially when they are likely to be abused to commit wrongdoing.

Third, suppose that international law is committed to peace, as discussed before. And suppose, further, that lack of conscription in times of war makes it more likely for state leaders to go to war. This is known as the

257. WALZER, *supra* note 186, at 323–27.
258. Friedman, *supra* note 223, at 5–6.

"chickenhawk syndrome."[259] Basically, the existence of an all-volunteer army, as opposed to one based on the draft or conscription, severs the connection between citizens and the wars that are fought on their behalf.[260] Doing so makes war much easier: political leaders are more likely to go to war when war requires no personal sacrifice of their own or of their loved ones.[261]

One might then posit that the prohibition on conscription would be self-defeating: instead of resulting in fewer wars, it would result in more wars, thus making peace more difficult to achieve. It is hard to know what to make of this objection. Conscription of citizens who lack duties to fight involves the violation of individuals' most important rights at the hands of the state. It is at the very least controversial that we can make trade-offs regarding such rights in order to achieve certain desired outcomes (in this case, fewer wars).[262] If anything, the solution to this problem is to introduce other modifications, at the domestic or international level, to make wars harder to fight and that do not involve the violation of individuals' rights.

Further, it is not clear at all that the inability of states to conscript their own citizens to fight would result in more wars. States are much more likely to fight illegal (and unjust) wars than to fight just ones, and allowing them to conscript individuals only facilitates their wrongdoing.

Finally, one might argue that although it is true that many individuals do not have duties to fight on behalf of the state, at least some individuals do. Thus, because at least some of the time conscription involves forcing people to do what they already have a duty to do, it should not be prohibited by international law. However, it would be impossible for states to determine who has moral duties to fight on their behalf (and in some cases, the state would still lack legitimacy to enforce such duties). As a result, a regime of conscription that could distinguish between those who have duties to fight and those who do not is not only unfeasible, but also very likely to get it wrong and thus violate individuals' freedom by forcing them to fight. This seems to me a sufficient reason to generally forbid conscription to fight wars: if when states conscript individuals, they are likely to violate their freedom, then we should generally forbid conscription.

Again, the argument so far does not establish that all individuals in all circumstances lack duties to fight legal wars. Some individuals will have

259. RYAN, *supra* note 185, at 12.
260. *Id.*
261. *Id.* at 4.
262. *See, e.g.*, Jonathan Quong & Rebecca Stone, *Rules and Rights*, *in* 1 OXFORD STUDIES IN POLITICAL PHILOSOPHY 222 (David Sobel et al. eds., 2015).

such duties in certain circumstances—for example, due to instrumental reasons, or because the state or the international community has benefitted them considerably. The point is only that the state should not be generally allowed to conscript individuals because, in present circumstances, many individuals lack those duties and conscripting them constitutes a grievous violation of their freedom. There are powerful reasons to generally prohibit state practices that are likely to violate the rights of many individuals, particularly when we cannot ensure that the practice is conducted in a way that can appropriately distinguish between individuals who have duties to fight and individuals who do not.

It is also important to note that the fact that there might be a legal prohibition on the state's conscription of its own citizens does not present an insurmountable obstacle in enforcing moral duties to fight regarding those individuals who have them. In those cases, social pressure to comply with duties to fight might be justified, and states might be able to avail themselves of other mechanisms, short of coercion, to persuade individuals to fight on their behalf.

Thus, I think that the reasons in favor of rendering the international legal regime morally coherent are not just *pro tanto* reasons, but also conclusive ones, at least if one thinks that individuals' rights should operate as a constraint on state action. International law should prohibit conscription to fight in war. The state's conscription of its own citizens to fight aggressive wars should be a war crime. And the illegality of the wars individuals are compelled to fight should be an additional aspect of the crime of conscription.

There are different ways in which these changes could be achieved. For example, they might involve making conscription generally prohibited under international human rights law, with conscription to fight aggressive wars qualifying as a war crime under the jurisdiction of the ICC. It would also be necessary to grant extensive rights to individuals to engage in conscientious objection against military service in war and expand refugee protections to those who are forced to fight wars of aggression. The latter mechanism has the advantage of leaving the assessment of the war's legality to domestic tribunals, thus bypassing the usual deadlock in the UNSC regarding these matters. I leave somewhat open the details of what a coherent regime would look like in practice, how it should be effectively enforced, and so on.

The idea that international law should generally prohibit conscription in times of war is, perhaps, completely utopian. It is also likely to destabilize other areas of international and domestic law, given how pervasive the idea

that we owe special duties to our states is.[263] We might thus think that it is very unlikely that states would ever agree to any such norm prohibiting conscription during times of war, and that we should focus on making it a crime for states to conscript individuals to fight in wars of aggression. This might be true as a matter of what is presently feasible to achieve and how we should set our priorities.

However, the fact that something is utopian does not alter the moral demands.[264] If conscription to fight legal wars is often wrong, then it remains wrong—even if we are unable to prohibit it—at least until states or the international community are more successful in achieving justice.

CONCLUSION

This Article started by pointing out an asymmetry in the international legal regime on conscription: while compelled service in hostile armed forces is a war crime, a state's conscription of its own citizens is the state's prerogative. In order to defend the content of this regime, two arguments needed to succeed: first, that the distinction between legal and illegal wars is normatively insignificant; second, that compelled service in hostile forces is significantly different from conscription.

Both arguments have failed. The distinction between legal and illegal wars is morally significant. And although compelled service in hostile forces is wrong and is often morally worse than the state's conscription of its own citizens, the latter is often not morally permissible.

As a result, the international legal regime on conscription is morally incoherent. It is morally incoherent because it is incomplete and cannot be made sense of.[265] It is incomplete because it fails to criminalize or prohibit conduct (the state's conscription of its own citizens) that is similarly wrong than what it already criminalizes (compelled service in hostile forces). Furthermore, it cannot be rendered morally intelligible in two ways. First, what makes compelled service in hostile forces wrong *also* makes the state's conscription of its own citizens wrong, yet the latter is permitted. Second, international law fails to distinguish between legal and illegal wars.

None of these implications mean that the CSHF prohibition lacks value or is morally misguided. On the contrary, the CSHF rule prohibits something that is morally wrong in a context in which states are likely to have perverse

263. For example, it might put into question norms that criminalize treason, although not necessarily, as instrumentalist arguments in their favor can remain available. *See* Lee, *supra* note 146, at 333; Fabre, *supra* note 146, at 432.

264. *See* Estlund, *supra* note 15, at 116.

265. Wasserstrom, *supra* note 12, at 7–8.

incentives to use individuals in objectionable ways, and as such, it is a valuable rule. Nonetheless, the international legal regime on conscription allows states to use the lives and bodies of millions of people to fight wars, both lawful and unlawful. Furthermore, it allows them to do so through coercive means. In order to render this regime morally coherent, conscription should be prohibited, and the unlawfulness of the war individuals are coerced to fight should be an additional aspect of the crime of conscription.

After all, individuals have only one life to live, and wars sow destruction, death, and suffering on a massive scale. As Walzer notes, "there has never been a more successful claimant of human life than the state."[266]

266. WALZER, *supra* note 17, at 77.