Introduction

> We are the ones who have to live
> with the memory that we were the instruments
> of your pigeon-breasted fantasies.
> We are inextricable accomplices
> in this travesty of dreams.
> But we are not alone.
>
> *Vietnam Veteran, WD Ehrhart*[1]

> I was part of the problem. And I didn't mean to be, and I didn't want to be, but I was there, you know? And that was the crime. The crime was that I was there.
>
> *Iraq Veteran, Garett Reppenhagen*[2]

Aggressive war entails broad and devastating violence. It is banned peremptorily and criminalized in international law. Its prohibition is in some ways the core premise of the contemporary international order. And yet, those who participate most intimately in the criminal action and those most directly impacted by it appear to be marginalized almost entirely from the international legal framework surrounding the crime of aggression.

International law generally requires that soldiers disobey criminal orders, potentially at profound personal cost. But even high-ranking soldiers who fight enthusiastically for an aggressor force commit no crime by doing so. Quite the opposite. In the vast majority of states, they commit a domestic crime if they *refuse* to fight, and international law

[1] The excerpt from "A Relative Thing" is reprinted from W. D. Ehrhart, Beautiful Wreckage (Adastra Press, 2017), pp. 9–10, by permission of the author.

[2] Matthew Gutmann. Breaking Ranks: Iraq Veterans Speak Out against the War (c) 2010 by the Regents of the University of California (University of California Press, 2010).

offers them no protection from prosecution for that refusal. In other words, these soldiers are required on pain of criminal punishment to kill, maim, and destroy in service of a criminal end.

The legal treatment of soldiers on the other side of such a war is less clearly developed, but at its heart is a similar peculiarity. Assuming no other legal violations, the soldiers killed by an aggressor force are the only human targets of the violence of an aggressive war. These men and women are killed intentionally, by a force that acts without justification, in violation of one of the core legal foundations of the contemporary international order. And yet, international law seems to be unmoved by their deaths. The international human right to life is non-derogable, but *soldiers'* lives, in Gabriella Blum's unsettling description, seem to be "dispensable" from the legal point of view.[3] The leader of an aggressor force perpetrates a grave and criminal wrong by waging an aggressive war, but seemingly not a wrong against *them*. That, at least, is the dominant normative understanding of the law we have.

On its face, this ought to be profoundly jarring. How can international law hold illegal war to be an "accumulated evil" and yet offer soldiers no right whatsoever to refuse to kill in its service? Are soldiers like Ehrhart and Reppenhagen mistaken, from an international legal point of view, when they wrestle with killing in wrongful wars? And can it really be that the lives of soldiers carry so little weight that they can be killed purposefully in furtherance of a criminal enterprise without they or their bereaved families suffering any legally cognizable wrong?

This book is an effort to answer these questions. It seeks to explain the normative posture of international law *vis-à-vis* soldiers, particularly with respect to the criminalization of aggression. As elaborated further in Chapter 2, to offer a normative account of the law here is to take seriously the notion that international law in this domain takes moral positions and that these positions can be articulated and understood in a way that goes beyond the requirements, permissions, and prohibitions of the law as it stands. Understood in this way, the criminalization of aggression is not just a formal prohibition, but also an expression of aggression's *wrongfulness* from the international legal point of view. Exploring the nature of that expressed wrongfulness in a way that remains faithful to the law we have is key to answering the questions posed above.

[3] Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. Legal Analysis 115 (2010).

On the traditional, and still dominant, normative account of the extant regime, the answers to these questions are relatively straightforward. From that point of view, we ought not be troubled by international law's treatment of soldiers. Endorsing both the criminalization of aggression and the general requirement to disobey criminal orders, this account holds nonetheless that the soldier ordered to fight in an illegal war is not ordered to do anything wrong. In adopting this posture, it recognizes no internal dissonance in the fact that she can be required on pain of criminal punishment to do precisely that. Similarly, on this account, the soldiers fighting against the aggressor force are legitimate targets, and so suffer no wrong when killed by an aggressor force. From that perspective, international systems of recognition and reparation associated with aggression need not, and ought not, focus on soldiers, because they are not the victims of a legal wrong.

This normative marginalization of the soldier in questions about going to war is odd. Much of the work in writing this book has occurred in the United States. It is difficult not to be struck by the normative force of the notion of "supporting our troops" in public discourse here. It is rare to drive any significant distance on a highway without encountering a slogan or icon expressing that sentiment on the bumpers of multiple cars. A virtue of this slogan is that it recognizes that soldiers do not waive their moral status when they put on a uniform. A decision to go to war is thought to require an accounting for the sacrifice those men and women will be asked to make. From this perspective, their lives are not dispensable. They matter as individuals, and they have claims against those whose decisions affect them.

Of course, in domestic public discourse, the recognition of this truth is decidedly partial and partisan. The hint is in the central term of the slogan – "our." Although civilians on all sides are recognized (unequally) as being sources of value, active enemy soldiers hold little or no normative significance in domestic debates.

Panning out to a global perspective on war necessarily breaks down this normative segregation between "our" and "their" troops. However, on the traditional normative account, the result seems to be a leveling down, rather than a leveling up. Waging aggressive war is an international crime with profound consequences for every soldier involved on either side of the conflict. And yet, on the traditional account, soldiers are excluded appropriately, and almost entirely, from the structure of legal rights and responsibilities associated with that crime.

This book offers an alternative vision. It presents a normative account of the law that is more in line with the moral insights of revisionist just

war theory than international lawyers or revisionist theorists have thus far recognized. A scrupulous normative account of international law must recognize that the killing and violence performed in an illegal war is profoundly wrongful. In fact, the wrongfulness of that violence is the very reason why aggressive war is a crime. On that account, the soldiers who feel burdened by their participation in that wrongful violence get it right. As such, international law's failure to protect them from being forced to fight ought to be deeply unsettling on the law's own terms. That failure to protect may be defensible, but any defense of it must take seriously the moral burden that such a regime shifts onto the soldier and must account for that displacement.

Recognizing the wrongfulness of the killing and violence performed in an illegal war also requires appreciating that soldiers are wronged when they are killed or harmed by an aggressor force. On this account, their lives are not dispensable from the international legal point of view. The most significant normative function of the criminalization of aggression is precisely to condemn and punish the unjustified taking of soldiers' lives and to offer criminal law protection to their right to life. Moving to the international level does not require dropping the insight of the "support our troops" slogan regarding going to war, it requires globalizing the sentiment, and dropping the possessive. The leader who takes her state into an aggressive war inflicts a direct criminal wrong on the soldiers her forces kill and maim. That must be recognized explicitly in the appropriate legal forms.

The argument is structured as follows. Chapter 1 details the legal framework on aggression, disobedience, and victim status in international criminal law and the relevant related regimes. In so doing, it identifies the normative tension at the heart of international law in this domain and lays the foundation for the puzzle that motivates this book. It also emphasizes that this is not simply a question of doctrinal aesthetics. There is good evidence to believe that soldiers who fight in aggressive war experience real moral pain associated with their participation in its wrongful violence. Equally, there is good reason to believe that those who suffer criminal wrongs without recognition of that wrongfulness suffer a significant second-order harm.

The objective of the book is to provide a normative account of the crime of aggression and the associated treatment of soldiers under international law. Chapter 2 explains what that means and why it is a worthy project. Stated most abstractly, a normative account aims to elaborate a moral framework that would make sense of, and underpin,

the law's normative posture on a given issue. To offer such an account is not to start from first principles or to insist that the moral standards articulated ought to be accepted on their own terms. Rather, it is to inhabit the internal legal point of view, and to insist that the moral standards articulated best explain and make sense of the law that we have.

In light of international criminal law's tendency towards the moral expressive, as opposed to coordinative, function of law, giving an account of the crime of aggression means asking what framework of right, wrong, culpability, and innocence would most coherently underpin the existing positive regime. Chapter 2 argues that a candidate account is superior to its alternatives in achieving that objective, to the extent that it better satisfies four criteria. First, it must offer an explanation for what the regime unambiguously requires, permits, and prohibits on the issue at hand. Second, it ought to reflect the law's core purposes. Third, it should cohere with connected or related laws in domains adjacent to that which it explains. Finally, if multiple accounts pass the first three tests, the superior remaining account is that which is most morally plausible. The chapter also defends the project against realist objections and explains the connection between the law and the human experience discussed at the end of Chapter 1.

Chapter 3 answers the first major question of the book. Why have we criminalized aggressive war? It identifies mass killing without the justification of responding to the same as the normative core of the crime of aggression. In so doing, it debunks the traditional normative account of the crime, adopted by both defenders and critics of the criminalization of aggression, which defines it as a macro wrong against a foreign state or people.

To be clear, it is plainly true under current international law that *whether* a war is criminal depends typically, although not exclusively, on which side has violated the other's sovereignty. But that interstate breach is not *why* waging such wars is criminal. It is criminal because waging war in breach of those interstate rules entails widespread killing and the infliction of human suffering without justification. Recognizing this redefines aggression as a crime against humanity perpetrated ordinarily through a violation of sovereignty.

The consequences of these arguments are two. First, the soldier's acts in a criminal war are themselves wrongful from the legal point of view. If soldiers are not wronged by being forced to perform these killings, it can only be because they are innocent of the wrongs they perpetrate. Second, the soldiers

killed fighting against a criminal use of force are the primary victims of the criminal wrong. In light of this, Part II of the book considers how to understand international law's posture towards soldiers on both sides.

That task begins in Chapter 4 with a consideration of whether we can make moral sense of the law's posture towards soldiers who fight and kill in criminal wars on the grounds that they are non-culpable for the wrongs they perpetrate due to the duress of being sandwiched between the enemy threat on one side and the legal and social threat from their home government and its people on the other. This theory cannot explain the exclusion of soldiers from victim status, although it might be thought to raise a question as to whether soldiers on the aggressor side would also qualify as victims of the crime. It is true that soldiers forced to fight in aggressive wars are wronged, and that part of that wrong is being subjected to the risk of violence. However, the wrongfulness of that exposure inheres in the domestic coercion that forces them to fight, not in the criminality of aggression. In that sense, it is not a sufficient reason to understand them as direct victims of the crime.

The primary focus of the duress argument is instead on the dissonance of soldiers being forced to kill in criminal wars. For two reasons, it is not a plausible way of making sense of that aspect of the existing regime. First, the level of duress applicable to many soldiers who fight in illegal wars falls far below the threshold ordinarily required for a full excuse for participation in an international crime. Second, and more fundamentally, the duress argument answers the wrong moral question. The crux of the legal dissonance is precisely that a soldier may be punished for refusing to kill in an illegal war. In other words, the duress is the problem; it cannot be the solution. The nature of the duress faced by individuals forced to do wrong in this way may mitigate, and in some cases eliminate, their liability to punishment. It may also remove the standing of many others, especially those connected to the imposition of the duress, to condemn soldiers for that wrongdoing. But to say that it should therefore be easy for such individuals to live with having perpetrated those wrongs misunderstands the first-personal moral perspective.

Chapter 5 considers whether we can instead make moral sense of the law's posture towards soldiers who fight and kill in criminal wars on the grounds that many of them lack access to information essential to defining the *jus ad bellum* status of their wars and are therefore "invincibly" ignorant of the wrongfulness of their acts.

Although superficially attractive, this theory advances implausible moral standards that contradict pervasive legal principles on uncertainty.

It is true that few soldiers *know* their wars to be criminal, but many soldiers fighting in illegal wars lack good reason to believe those wars to be *lawful*. This is crucial. Domestic criminal law, the *jus in bello*, and the *jus ad bellum* all hold it to be wrongful to inflict violence intentionally when uncertain as to whether the justificatory conditions for doing so obtain. Underpinning that bias against the infliction of violence when uncertain about the justificatory conditions is the distinction between killing and letting die, which is also reflected in the law governing both individual and international uses of force.

Of course, the invincible ignorance account does not hold that ignorance itself exculpates. Instead, it holds that the non-culpability of the soldier is a function of his ignorance combined with his trusting deference to the judgment of those with far greater relevant knowledge, namely his leaders. However, three factors undermine the soldier's grounds for presuming the reliability and honesty of the state's official position on the *jus ad bellum* status of a war: multiple, countervailing epistemic authorities; the interestedness of the soldier's leaders; and a global history of state mendacity and mistake on *jus ad bellum* facts. If there is an argument for the soldier to defer on epistemic grounds, it supports deferring not to the soldier's own state, but to the preponderance of uninterested states and international organizations.

This is not to say that soldiers who participate in criminal wars without good reasons to believe their wars to be lawful should be punished for their contributions. For a number of reasons, such punishment would be a mistake. However, the key factor in determining whether the law must accommodate a right to disobey is not whether soldiers ought to be liable to punishment if obedient, but whether or not obedient participation entails the first-personal challenge of living with having done wrong. As introduced in the preceding chapter, the standards on the latter normative dimension are less forgiving.

In attempting to reconcile the seemingly dissonant aspects of the extant regime, the natural response to the cosmopolitan arguments advanced in these early chapters is to argue that soldierly obedience in at least dubious wars is warranted on the grounds of political obligation or associative duty. Chapter 6 considers whether we can make moral sense of the legal posture from either of those perspectives.

The first emphasizes the soldier's obligation to obey domestic law in the absence of an explicit countervailing international legal rule. This argument cannot do the necessary work. Unmoved by the soldier's

parochial duty to execute the will of his sovereign, the judges at Nuremberg articulated global cosmopolitan duties under international criminal law. Since Nuremberg, and building on that principle, soldiers have been granted a right to disobey on *jus in bello* grounds even when they would not be criminally liable for following the orders in question. As long as the order was in fact illegal, there is no requirement that the soldier was certain of that illegality at the time of his disobedience. Indeed, this is true of aggression for military's top brass. The unique exclusion of aggression from this principle for all other soldiers, despite the wrongfulness of the killing they are ordered to perpetrate, is one of the core normative peculiarities that the book seeks to explain.

Related to the political obligation argument is the view that soldiers have special duties to protect their co-citizens, their domestic institutions, and the common life that they share. The second half of the chapter considers stronger and weaker forms of this argument. The stronger version, which holds that associative duties excuse soldiers who fight in even clearly criminal wars, stands on a false empirical premise, is morally implausible in holding that the mere possibility of such a response could justify the preemptive killing of innocents, and is inconsistent with the post-Nuremberg regime, which specifically excludes such preventive killing. A more modest alternative holds that the combination of associative duties and the soldier's epistemic limits renders participation in most criminal wars non-culpable. Although more plausible, this applies only to a narrowing range of armed conflicts in which the soldier's home state's security is directly at stake. Even in that class of wars, it can plausibly affect his culpability only when the epistemic balance is close. And even when both of these hurdles are overcome, the associative duties cannot displace the burden of engaging in wrongful killing.

Ultimately, in the wars to which the soldier's associative duties plausibly apply, those ordered to fight in an illegal war may be left with a choice between doing right by their people and doing right by the basic duty not to engage in wrongful killing. In that context, international law cannot coherently deny protection to those who uphold the latter.

Chapter 6 closes by shifting to the situation of those killed fighting against aggression. For many, soldiers have overriding political or associative duties to fight on behalf of their society when it is attacked wrongfully. Typically, this includes a duty to risk their own lives in the protection of that society, or in furtherance of its protection of others – a practice often characterized as sacrifice. However, the fact that soldiers

have a duty to risk their lives in this context cannot weaken the wrongfulness of their being killed when they do.

Chapter 7 turns to the importance of the symmetrical application of the law of armed conflict, or *jus in bello*, to both sides. This symmetry is often said to serve the crucial values of limiting the hell of war and facilitating peace. Some argue that this warrants defining the rights and wrongs of conduct in war exclusively in terms of the law of armed conflict and constraining the soldier's responsibilities accordingly in the form of a "warrior's code" role morality. The first move would explain the exclusion of combatant deaths from reparations practice. The second would explain the failure to protect soldiers who refuse to fight in illegal wars. However, neither of these moves withstands scrutiny. Although upholding the *jus in bello* and the warrior's code associated with it is morally important, doing so does not require excluding the *jus ad bellum* completely from the normative space of wartime conduct.

The two kinds of wrong – the violations of the *jus ad bellum* on the one hand and the violations of the *jus in bello* on the other – can be distinguished, criticized in different tones and for different reasons, and prosecuted as different crimes without one undermining or swallowing the other. The fact that the *jus in bello* does not prohibit killing combatants is no reason to exclude their deaths from *jus ad bellum* reparations.

Similarly, accepting the empirical claim that upholding combatant immunity for *jus in bello* compliant acts serves the values of mitigating the hell of war and facilitating peace does not mean accepting that soldiers may fight *non-culpably* in illegal wars. If the soldier is to rely on professional adherence to the warrior's code to dissociate morally from the wrongfulness of killing in a manifestly criminal war, it can only be because the sense of duty rooted in that code has sufficient normative heft to override the presumptive moral duty not to participate. There is no such code-based duty. Soldiers do not enhance or uphold the warrior's code by fighting in illegal wars. *If* they fight, they uphold it by adhering to the *jus in bello*. However, *refusing* to fight in no way undermines or impedes the efficacy of the code. If anything, such refusal would further the objectives of mitigating war's hell and facilitating peace.

Chapter 8 puts forward the best account of international law's failure to protect soldiers who refuse to fight and kill in criminal wars. The deep institutional problem with granting soldiers the right to disobey in an illegal war is that whatever system might be used to vindicate or reject the disobedient soldier's claim would (at the moment of disobedience)

almost always need the soldier to make his own judgment on the *jus ad bellum*. The worry is that this would risk military breakdown, *even in lawful wars*.

This is of international concern, because international law depends on strong states capable of fighting lawful wars. Not only is that capacity necessary to push back against aggression when it occurs, it is vital to the military deterrence that limits the incidence of aggression in the first place.

Crucially, however, this does not establish the deeper innocence of those who fight in illegal wars, except, perhaps, on the epistemic margins. Any effort to translate the necessity of enforced obedience into a role morality of obedience would have to show not just that global human security depends on the enforcement of obedience in illegal wars, but also that it depends on soldiers actually obeying orders to fight in illegal wars. For a number of reasons, this translation fails. The result is that international law's dependence on functioning militaries may leave it with no alternative but to empower states to force soldiers to do wrong by its own lights. On this account, soldiers are left bearing the normative remainder of international law's core institutional weakness.

Chapter 8 concludes by considering whether a necessity argument could also underpin the practice of excluding the deaths of those killed fighting against aggression from the wrong redressed by reparations. The strongest argument to that effect is that excluding coerced and deceived soldiers on the aggressor side from any recognition as victims of the wrong of aggression would stoke national resentment of the kind that could prove counter-productive to the reconciliation of former warring parties.

Part III turns to the doctrinal and institutional implications of this account of the law we have. The defining characteristic of a necessity defense of a particular institutional posture is that it endures only as far as the necessity applies and that it implies an enduring imperative to mitigate the harms whenever doing so is consistent with the institutional necessity. Chapter 9 looks at ways in which changing patterns of war-fighting have begun to call into question the enduring application, and even the foundational empirical premises, of the necessity account offered in Chapter 8.

One of the most notable shifts in twenty-first century warfare has been the rise of weaponized unmanned vehicles. This has led to armed conflicts in which the participants on one side do not bear any significant risk. This has two important consequences regarding the situation of

soldiers forced to participate in aggression. First, the absence of risk to its soldiers reduces the domestic political cost to a government of going to war without good reason and thus weakens the soldier's basis for trusting his government's claim to be pursuing a lawful action. Second, and more significantly for the argument here, it eviscerates the institutional necessity account, by nullifying the detrimental impact of war on the soldier's *jus ad bellum* judgment, capacity to act, and unit cohesion.

A further notable shift in the conduct of war is the expanding role of private military contractors in contemporary armed conflict. This has broader implications than does the rise of drones and riskless warfare. If strict obedience were truly required to ensure effective institutional performance in war and if the guarantee of such obedience were truly essential to the broader security of the state, one would not expect to see major military powers turn to contractors or other non-military actors for significant security roles in their wars. And yet the practice of major military states has confounded this expectation emphatically. At a bare minimum, this suggests that the empirical premises of the necessity claim must be reexamined, even in the case of wars involving mutual risk.

Chapter 10 explores the internal implications for domestic law and institutions of the normative account developed throughout the book. Uniquely, the burden of killing in a wrongful war transcends the distinction between global moral concerns and domestic, or associative, moral concerns related to waging war. The latter are often framed in terms of a failure to garner democratic authorization or an unnecessary sacrifice of troops. The issue discussed here is different. The violation is a wrong inflicted by a government on its own agents through forcing them to do wrong internationally. It is this multilayered normativity that locates the violation at two levels. On the one hand, the harm is fundamentally international – the lives taken and the political community threatened or destroyed exist outside the soldier's own community; his connection to his victims cuts across the boundaries of any political association. On the other hand, the harm is also fundamentally domestic, because it is the soldier's government (and his broader community) that wrongs him by forcing him to do wrong. It is through this normative intersection that an account of the international crime of aggression underpins domestic doctrinal and institutional imperatives.

The most fruitful domestic reforms would respond to the imperative along one or both of two dimensions: bolstering the soldier's reasons to trust and defer to his state over others (so as to lessen the burden when forced to fight) and alleviating the coercion that drives him to fight in an

illegal war. The most viable way to improve the grounds for deference would be to strengthen the influence of the *jus ad bellum* over decision-makers and intelligence agencies in a way that is evident and reliable from the perspective of soldiers. Two institutional steps would combine to advance that objective: the creation of a domestic *jus ad bellum* devil's advocate and the permanent institutionalization of a post-war commission of inquiry. Framework proposals for those kinds of institutions, building on existing institutions in parallel contexts (including, for example, the post-Iraq inquiries in various participating states) are put forward here.

In addition to reform targeted at addressing the soldier's epistemic posture, a second dimension of institutional change offers a limited right for soldiers to refuse to fight in internationally illegal wars whenever such protection is compatible with the preservation of military functioning in lawful wars. The formal classification of wars into low- and high-risk categories is not an implausible ambition. If that were implemented, providing disobedience rights in low-risk wars would be viable without undermining institutional functioning. More ambitiously, a retrospective system of rights vindication has the potential to avoid the institutional danger even in traditional high-risk wars. Under such a system, soldiers who disobey would be punished during the war, regardless of its legality. To make a claim for disobedience protection, the soldier would need to refuse to participate prior to deployment (or redeployment) and outside the theater of conflict, to turn himself in immediately, and to cite the war's illegality at the time of disobedience. If post-war review by the commission of inquiry noted above were to find the war to have been illegal, those who raised that claim at the time of disobedience would be subject to retrospective exoneration, the clearing of their records, and release from any remaining imprisonment. This would maintain the key institution-preserving features of the current system, while encouraging only those highly confident of the illegality of the war to disobey.

Of course, the normative account presented in Parts I and II is an account of international law. As such, its most direct implications arise at the global level. Chapter 11 elaborates on three such implications. The first key interpretive implication of the account presented above is that soldiers who resist participation in illegal war and who face punishment at home should be considered refugees under international law. Thus far, courts have declined to interpret the Refugee Convention this way, despite identifying *jus in bello* resisters as refugees. This chapter draws on existing jurisprudence to establish an interpretation of refugee law

that would protect those who refuse to fight in illegal wars and face punishment at home. It also identifies several ways in which existing refugee jurisprudence already demands that asylum authorities reach *jus ad bellum* determinations and otherwise determine the lawfulness of foreign state conduct.

A second reform at the international level would be the development of a human right against being forced to fight in such wars. Like the proposed revision to refugee law, this too could be achieved through the progressive interpretation of existing human rights law. The most promising existing interpretive avenues for the development of such a right are rights of conscience, the developing right to peace, and the rights of rights defenders. Elaborating a right to refuse to participate in aggressive war would give soldiers in states subject to human rights review bodies or courts the possibility of petitioning those institutions when incarcerated for refusing to fight in a wrongful war – a tool most likely to be of significant utility in putting pressure on the state after the war.

Finally, recognizing that the core victims of the crime of aggression are individuals rather than states reframes the normative core of reparations for criminal war. The soldiers killed, injured, and scarred fighting against aggression are the primary victims of an internationally criminal wrong. Indeed, the crime of aggression should be understood to be the core element of international criminal law that protects combatants' right to life. Exploring how a reparations regime associated with aggression might better reflect these normative realities than it has in past cases, this section explores the possibilities and limits of international reparations, and especially the fledgling reparations system of the ICC. It argues for aggression reparations projects that fund veterans' care or reintegration programs, assist dead soldiers' families, and otherwise acknowledge the true wrong at the heart of the crime.