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Abstract. Compelled service in hostile forces is prohibited by International Humanitarian Law (IHL). In fact, in the context of an international armed conflict, it is a war crime to compel prisoners of war 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 isn’t—has puzzling implications. Take the example of Russia’s invasion of Ukraine. It is a war crime for Ukraine to compel Russian prisoners of war 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 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.

The 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 non-citizens 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 Luhanks 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’ freedom, who are called upon to fight, and possibly to die and kill, 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

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3 Zwanenburg, supra note 2.

protected persons to serve in hostile forces, when done by an occupying or detaining power, is a war crime under international humanitarian law (IHL). Conscription of the state’s own citizens to fight a war is, however, not only not a war crime, but recognized by international law as the state’s prerogative.

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. 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 against an unlawful war of aggression. However, it is not a war crime for Russia to compel its own citizens to fight its unlawful war—in fact, Russia’s conscription of its own citizens is permitted by international law. Even more so, if Russian citizens voluntarily decided to join Ukrainian armed forces to fight against Russian aggression—and some of them have—they 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 10 years in prison.

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


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 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. 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. It is concerned with the relationship between international law and morality, and in particular, with the question about 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. And a legal regime should also “make moral sense,” that is, it should be morally intelligible, in the sense that it doesn’t fail to take into account important moral reasons in favor of and against prohibiting certain behaviors.

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10 For distinction and argument, see Marcela Prieto Rudolphy, The Morality of the Laws of War: War, Law, and Murder (2023) pp.74–85.
11 For others who have done so, see 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) and Philipp Gisbertz-Astolfi, Reduced Legal Equality of Combatants in War, 35(3) Ethics & International Affairs, 443 (2001).
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 individuals are compelled to serve in—whether the war is legal or illegal—does not matter at all.

These are difficult arguments to make. The 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 it is morally wrong because non-citizens 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. And so, the first argument 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 the state’s own citizens is morally permissible. Making sense of this aspect of the regime requires another argument, which could support the permissibility of the latter. However, the best arguments that show why compelled service in hostile forces is wrong also put into question the permissibility of the state’s conscription of its own citizens. 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. It is morally incoherent because it is incomplete and cannot be made sense of. 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). 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 doesn’t mean that the compelled service in hostile forces prohibition (hereinafter, the CSHF prohibition) lacks value or is entirely morally misguided. The CSHF prohibition, the article will argue, protects fundamental rights and interests. However, it is incomplete. It is that incompleteness which

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13 Id.
14 Id.
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 the article proceeds as follows. Section 1 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. Section 2 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 the state’s conscription of its 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. Section 3 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 might be more wrongful, or morally worse, than the state’s conscription of its own citizens, this argument cannot support the latter’s permissibility. And the arguments that show why compelled service is morally wrong put into question the permissibility of conscription. Section 4 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) that the unlawfulness of the war in compelled service in hostile forces should be an additional aspect of the crime; and (3) that there is a pro tanto reason for international law to generally prohibit conscription to fight in war. Section 5 concludes.

1. 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 Prisoners of war—i.e., 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

16 RITA J. SIMON & MOHAMED ALAA ABDEL-MONEIM, *A HANDBOOK OF MILITARY CONSCRIPTION AND COMPOSITION THE WORLD OVER* viii–x (2011). They note that Greek and late Roman armies conscripted young men from enemy nations that had been defeated, or tribes that had signed a treaty to remain outside the empire.
The CSHF prohibition was introduced into treaty law with the Hague Regulations of 1899. Article 44 of the Hague Regulations of 1899 prohibits the compulsion of the population of occupied territory to take part in military operations against their own country.\textsuperscript{18} The Hague Regulations of 1907, article 23(h), prohibit 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.”\textsuperscript{19} This provision is limited to nationals of the hostile party.\textsuperscript{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.\textsuperscript{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 nationals.”\textsuperscript{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,” which is not limited to situations of occupation, but applies generally in the context of international armed conflicts (IACs).\textsuperscript{23} The Third Geneva Convention, relative to the Treatment of Prisoners of War, provides that compelling a prisoner of war (POW) or a protected person to serve in the forces of a hostile power is a grave breach of the conventions.\textsuperscript{24} 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.\textsuperscript{25}

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 civilian to serve in the forces of a hostile power” as part of the grave breaches of the 1949 Geneva Conventions under its jurisdiction.\textsuperscript{26} However, there were no convictions that relied exclusively on a violation of this provision, and no indictments for compelling prisoners of war or civilians to serve in the forces of a hostile power.\textsuperscript{27}

\textsuperscript{18} Geneva Convention (II), supra note 6.
\textsuperscript{19} 1907 Hague Convention, supra note 6, art. 23(h).
\textsuperscript{20} Zwanenburg, supra note 2.
\textsuperscript{21} Geneva Convention (IV), supra note 6 at art. 51, first para.
\textsuperscript{22} Geneva Convention (IV), supra note 6, art. 4.
\textsuperscript{23} Zwanenburg, supra note 2.
\textsuperscript{24} Geneva Convention (III), supra note 6 at art. 130.
\textsuperscript{25} Zwanenburg, supra note 2.
The Rome Statute for the ICC also includes the prohibition in question. The Statute distinguishes four categories of war crimes. First, grave breaches of the Geneva Conventions in the context of international armed conflicts (IACs). Second, other serious violations of IHL contained in the Hague Conventions, Additional Protocol I to the Geneva Conventions, the 1899 Hague Declaration, and the 1925 Geneva Gas protocol. Third, serious violations of article 3 common to the Geneva Conventions in the context of non-international armed conflicts (NIACs). Fourth, other violations of IHL in the context of NIACs.

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.

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 first one states that it is a war crime to compel a prisoner of war or other protected persons to serve in the forces of a hostile Power in the context of an IAC. The second one makes it a war crime to compel participation in military operations against the person’s own country or forces in the context of an IAC. 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.

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

Finally, the CSHF prohibition has now crystallized into Customary International Law, at least in the context of international armed conflicts (IACs). The International Committee of the Red Cross’s (ICRC) statement of 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.

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29 Id.
30 Id.
31 Id.
32 Id.
33 Id. at 345.
34 Rome Statute supra note 5 art. 8.2(a)(v) [hereinafter Rome Statute]
35 Rome Statute, supra note 5 art. 8(2)(b)(xv).
36 Dörmann, supra note 28 at 374.
37 Id.
38 Id.
Many countries incorporate similar prohibitions in their military manuals and criminal codes. And, in 2005, the Israeli Supreme Court found that the IDF’s “advance warning procedure” was at odds with international law, in part because it ran afoul of “a basic principle, which passes 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 the occupying army.” The “advance 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. The procedure could only be used when it posed no risk to the Palestinian resident, and the latter consented to it, but the Court found that, given the inequality between the occupying force and the local resident, consent was unlikely to be real.

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. 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.

Conscription is well accepted in international law regarding the state’s own citizens. Voluntary enlistment and service in foreign forces is also not a violation of international law. 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 voluntary, which was supported by the United States. 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.

Regarding the conscription of non-citizens with permanent residence, the law is less settled. In fact, the U.S. drafted permanent residents at least during the Korean and the

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Vietnam wars. In both, the U.S. required military service of every non-U.S. male citizen admitted to permanent residency and actually residing in the U.S. for more than a year.\textsuperscript{50} Often, the U.S. conscripted resident foreigners, unless they agreed to forfeit future claims to citizenship.\textsuperscript{51}

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.\textsuperscript{52} Opposition was based on the general principles of international law, but more often, it was based on treaties that ensured states wouldn’t conscript each other’s foreign nationals.\textsuperscript{53} 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.\textsuperscript{54}

Thus, it is fairly clear that conscription of resident non-citizens 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 non-citizens has crystallized in Customary International Law or whether it remains a rule of comity, as suggested in the 70s by Frank Upham and Charles E. Roh Jr.\textsuperscript{55}

Regarding the 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.\textsuperscript{56} 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 and/or the universal draft.\textsuperscript{57} In the process of European reintegration, military conscription largely vanished as a feature of the political scene.\textsuperscript{58} Belfar suggests that this has to do with the fact that security identities in post-Cold war Europe are increasingly forged by cosmopolitan values.\textsuperscript{59}

Nonetheless, debates around conscription still occur in the public space, and, in the U.S., resurfaced during the war in Afghanistan and Iraq.\textsuperscript{60} Indeed, some commentators

\begin{itemize}
\item \textsuperscript{50} \textsc{Walzer}, \textit{supra} note 17 at 108–109.
\item \textsuperscript{51} \textit{Id.} at 108.
\item \textsuperscript{52} Clive Parry, \textit{International Law and the Conscription of Non-Nationals}, 31 Brit. YB Int’l L. 437, 442 (1954).
\item \textsuperscript{53} \textit{Id.} at 439.
\item \textsuperscript{54} \textit{Id.} at 9.
\item \textsuperscript{56} \textsc{Simon & Abdel-Moneim}, \textit{supra} note 16.
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textsc{Simon & Abdel-Moneim}, \textit{supra} note 16.
\end{itemize}
worried that reliance on All-Volunteer Forces (AVF) would be insufficient to satisfy the demands of war in those countries.\textsuperscript{61}

The decreasing practice of conscription in many countries has led some to speak of a “crisis of conscription.”\textsuperscript{62} There have also been increases in figures for conscientious objection in some countries, like Italy, Spain, and Germany.\textsuperscript{63} But protest and resistance to the draft or to conscription have been common in different context and cultures,\textsuperscript{64} and the discourse of crisis is disputed. Leander and Joenniemi, for example, argue that the landscape of conscription isn’t homogenous, and the so-called crisis of conscription can take different forms, not all of which involve abolishing conscription.\textsuperscript{65} Further, Leander is skeptical that conscription as a practice is coming to an end.\textsuperscript{66}

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.\textsuperscript{67} Conscientious objection to military service, even though a number of states still do not recognize it\textsuperscript{68}

Nonetheless, in recent years, a right to conscientious objection has started to crystallize.\textsuperscript{69} 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.\textsuperscript{70} 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 still do not recognize it.\textsuperscript{71} 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.\textsuperscript{72}

\begin{thebibliography}{9}
\bibitem{ara} Rafael Ajangiz, \textit{The European farewell to conscription?}, in \textit{20 The Comparative Study of Conscription in the Armed Forces} 307, 308 (2002).
\bibitem{id} Id.
\bibitem{id} Id.
\bibitem{id} Id.
\bibitem{id} Anna Leander, \textit{Drafting Community: Understanding the Fate of Conscription}, 30 \textit{Armed Forces & Society} 571, 572–573 (2004).
\bibitem{id} See e.g., Guidelines on International Protection No. 10 \textit{supra} at note 6 at para. 5.
\bibitem{id} Id. at para. 7.
\bibitem{id} U.N. Doc. A/HRC/9/24, \textit{supra} at note 45.
\bibitem{id} Elizaveta Chmykh et al., \textit{Legal Handbook on the Rights of Conscripts} 60 (2020).
\bibitem{id} https://www.dcaf.ch/sites/default/files/publications/documents/DCAF_LegalHandbookRightsConscripts_
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. Still, Amnesty International has adopted cases of selective conscientious objection, which have arisen in places like South Africa and Israel.

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. 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. 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. 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 crimes and crimes against humanity can be assumed to involve the commission of such crimes. 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.

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 exception to that rights’ scope is the conscription of children and rights 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

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75 Guidelines on International Protection No. 10, supra note 6 at para. 5.
76 Id. at para. 14.
79 Dannenbaum, supra note 78.
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 the 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 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.

2. 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—does not alter our moral evaluation of the facts. This claim, however, is highly implausible. Consider the following implications of the regime.

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 prisoners of war to fight against Russia than for Russia to compel Ukrainian prisoners of war 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—do not violate international law. Yet, they are also unprotected by international law of the sanctions, including criminal punishment, that states might impose on them if they do so.

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80 Schwirtz, supra note 9.
The current regime suggests that the nature of the wars one is forced to fight doesn’t matter at all or doesn’t matter enough to make a significant normative difference. It suggests that what only matters is 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 can’t be true. Even if we agree that coercion from a third-party is wrongful, 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 $US 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. 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 of them 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 has been forced to do something that not only she lacked a duty to do, but was in fact prohibited from doing (or had a weighty reason not to do).

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81 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 section 3.
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 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 an international crime that entails the individual responsibility of those who plan it and conduct it. \(^{82}\) 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. \(^{83}\) 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.” \(^{84}\) The core criminal wrong of the crime of aggression is, according to Dannenbaum, the unjustified killing and human violence it entails. \(^{85}\) An aggressive war results in unjustified displacement, killing, and harming of thousands of individuals. Finally, more recently, Saira Mohamed has pointed out that international law has no language to name the wrong that is committed by a state such as Russia, that fights an aggressive war by relying on conscription. \(^{86}\) 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. \(^{87}\)

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\(^{85}\) Id. at 265.

\(^{86}\) Saira Mohamed, *We Want You: Conscription and the Law in Russia’s War of Aggression*, 37 THE BERLIN JOURNAL (2023-24) 52.

\(^{87}\) Id. at 54.
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. 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 (e.g., by distinguishing between civilians and combatants). Self-defense and defense of others (that is, humanitarian interventions) are widely accepted amongst contemporary just war theorists as just causes for war. 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 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. Self-defense is recognized both as a just cause for war and a legal instance of the use of force in international law. 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. Additionally, under the U.N. Charter, the United Nation Security Council (UNSC) can authorize the use of force, and it could potentially do so in circumstances where

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88 See e.g., RIPSTEIN, supra note 11; JEFF McMahan, KILLING IN WAR (2009); FRANCISCO DE VITORIA, DE INDIS ET DE IURE BELLII RELECTIONES (John Pawley trans., 1917); HUGO Grotius, HUGO GROTITUS ON THE LAW OF WAR AND PEACE (Stephen C Neff ed., Cambridge Univ. Press 2012).
89 See e.g., CÉCILE FABRE, COSMOPOLITAN WAR (1st ed. 2012); RIPSTEIN, supra note 11; Jeff McMahan, Just cause for war, 19 ETHICS & INTERNATIONAL AFFAIRS 1 (2005), among others.
90 See e.g., McMahan (2005) supra note 89; FABRE supra note 89; RIPSTEIN, supra note 11.
92 See U.N. Charter.
93 Id.
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.\textsuperscript{94}

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 \textit{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.\textsuperscript{95} 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 the article, I will speak indistinctly of legal/just wars and illegal/unjust wars. Because the 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 where there is no overlap, and we cannot assume that a war is just merely because it is legal, the arguments I make are only applicable to the distinction between just and unjust wars. Further, this lack of overlap gives us powerful reasons to change the \textit{jus ad bellum} accordingly.

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 cannot be “rendered intelligible” in a moral sense.\textsuperscript{96} This is so because the regime fails to criminalize or prohibit conducts that are worse than, or as bad as, compelled service in hostile forces,\textsuperscript{97} in at least three instances.

First, the regime makes it so compelled service in hostile forces is \textit{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.\textsuperscript{98}

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 the state’s own citizens to fight an illegal war is \textit{allowed just as} the state’s conscription of its own citizens to fight a legal war? Given that conscription is already a grave intrusion into one’s personal

\textsuperscript{94} PRIETO RUDOLPHY, supra note 10 pp.14–15.
\textsuperscript{95} Id.
\textsuperscript{96} Wasserstrom, supra note 12 at 7–8.
\textsuperscript{97} Id.
freedom, nearly equivalent to an obligation to kill and die for the state,\(^{99}\) 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 shouldn’t 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 deployment in illegal wars.\(^{100}\) Dannenbaum has also argued that international law should grant refugee status to those who refuse to fight in illegal wars.\(^{101}\) 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.\(^{102}\) 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 conscription.\(^{103}\) 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.\(^{104}\) And I have argued, in previous work, that individuals should have a right to object deployment to 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.\(^{105}\)

However, even if one might be able to defend these conclusions through a progressive interpretation of international law, as Dannenbaum does,\(^{106}\) 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,\(^{107}\) Norway has hesitated to do so,\(^{108}\) Latvia,

\(^{99}\) *WALZER, supra* note 17.

\(^{100}\) *DANNENBAUM, supra* note 84 at 312; James Pattison, *The Legitimacy of the Military, Private Military and Security Companies, and Just War Theory*, 11 *EUROPEAN JOURNAL OF POLITICAL THEORY* 131, 149 (2012).

\(^{101}\) *DANNENBAUM, supra* note 84 at 312.

\(^{102}\) *Dannonbaum, supra* note 78.


\(^{104}\) *Id.*

\(^{105}\) *PRIETO RUDOLPHY, supra* note 10 pp. 262-268.

\(^{106}\) *DANNENBAUM, supra* note 84 at 332.


Lituania, and Estonia have said they will not offer refuge to fleeing Russians,\textsuperscript{109} and Poland has begun to turn away Russian citizens at the border.\textsuperscript{110}

Third, compare compelled service in hostile forces to fight a legal war—a war crime under IHL— and 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 don’t think that the moral and legal status of actions people are forced to do is irrelevant, and, further, we certainly don’t 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 especially positioned to demand certain things from its citizens, and I will return to this in section 3. 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 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 \textit{jus ad bellum}, is to achieve or sustain peace,\textsuperscript{111} a regime that allows states to “generate soldiers for war-making”\textsuperscript{112} 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.


\textsuperscript{110} Id.


\textsuperscript{112} Ryan, \textit{supra} note 98 at 141.
But there is still a remaining dimension of the regime that demands justification and that hasn’t 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 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 section 3.

3. Hostile Forces and the State

In section 2, 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 section 2 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 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, section 2 provides a pro tanto reason for international law to prohibit compelled service in illegal wars. Although I think that section 2 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 section attempt to explain why international law treats compelled service in hostile forces to fight legal wars differently from the 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 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 where duties are directly imposed 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.”

The idea that international crimes are a particular category of very heinous acts, that shock 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. Larry May, as we will see below, has developed a theory about war crimes that relies on notions of honor and the vulnerability of certain individuals during war. As I will argue in section 3.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. This is probably partly explained by the fact that the concept of grave breaches and the idea of war crimes itself is a body of law “whose normative provisions were drawn from divergent, and somewhat inconsistent, treaty provisions.”

The most common definition of war crimes is “violations of the laws of war that incur individual criminal responsibility.” The international criminal tribunals, as well as the ICC, have coalesced in three basic elements of war crimes: an armed conflict; a nexus between the acts of the accused and the armed conflict; and knowledge of the armed conflict.

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115 LARRY MAY, WAR CRIMES AND JUST WAR (2007).
117 SCHABAS, supra note 27 at 233.
119 SCHABAS, supra note 27 at 227–240.
Other accounts of war crimes, like Hathaway, Strauch, Walton and Weinberg’s, require that the violation of the laws of war is also serious.\textsuperscript{120} 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.\textsuperscript{121} This is somewhat ambiguous, both in the statute of the ICTY and in the Rome Statute, where the Elements of Crimes introduce elements to article 8 that require the act to be sufficiently serious to justify international condemnation.\textsuperscript{122} 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.\textsuperscript{123}

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.\textsuperscript{124} 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,\textsuperscript{125} and at the international one. The purpose itself of International Criminal Law is also deeply contested.\textsuperscript{126} This poses some difficulties 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 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 towards 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; (e) unlike foreigners, citizens have duties toward their own states to fight legal wars.

\textsuperscript{120} Hathaway et al., supra note 116.
\textsuperscript{121} Garraway, supra note 118 at 385.
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 386.
\textsuperscript{124} Hathaway et al., supra note 116 at 54.
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 towards 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 doesn’t provide a conclusive argument in favor of the international criminalization of compelled service in hostile forces. There are plenty of things states do that might be a bad idea, but bad ideas are not enough to “shock the conscience of humankind.”

Further, conscripted soldiers fighting for their own state might also be bad fighters, particularly in comparison to professional armies. They might be reluctant to kill or engage in combat or lack relevant training. Thus, if the CSHF prohibition were 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 prisoners of war (POWs) and are consequently entitled to certain rights and protections. Prisoners of war 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. 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, are also entitled to certain protections against mistreatment. Among those protections, there is the prohibition against compelled service in hostile forces.

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

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127 Geneva Convention (III), supra note 6.
128 Geneva Convention (III), supra note 6 at arts. 4, 13, 42.
130 See API, GCIII, GCII.
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 regarding those in occupied territory; it is limited to POWs.

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.” 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, among them, 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 and as a justification of the law on co-belligerency. 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 the state’s 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 different 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 first one violates the ties of loyalty that bind individuals to their own states, while conscription by one’s own state doesn’t. 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. 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.

131 See Prieto Rudolphy, supra note 111; Haque, supra note 11.
132 Haque supra note 11; Prieto Rudolphy, supra note 10, pp. 61–74.
133 Prieto Rudolphy, supra note 111.
134 Sanford Levinson, Responsibility for Crimes of War, PHILOSOPHY & PUBLIC AFFAIRS 244 (1973).
came up during the Nuremberg trials.\textsuperscript{135} If he’d done so, he would have put himself in great 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 the point of violence and assassination, a tyrant whose programs meant 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.”\textsuperscript{136}

This argument about loyalty was not just an idiosyncratic belief of the Nuremberg judges. The International Committee of the Red Cross’s (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.”\textsuperscript{137} 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.”\textsuperscript{138} And the ICTY itself, 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.\textsuperscript{139} 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.”\textsuperscript{140} This was pressing in the case of Bosnian Muslims, who could not be considered protected persons under the convention because their perpetrators were also of Bosnian nationality.\textsuperscript{141}

In the philosophical literature, arguments from loyalty have been discussed in the context of the crimes of treason and espionage.\textsuperscript{142} However, arguments that rely on loyalty have limited purchase. Loyalty can be understood as the “practical disposition to persist in an intrinsically valued (though not necessarily valuable) associational 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.”\textsuperscript{143} In institutional settings, “loyalty can simply take the

\begin{itemize}
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} ICRC, supra note 39 Rule 95.
\item \textsuperscript{139} SCHABAS, supra note 27 at 248.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Id.
\end{itemize}
form of commitment and willingness not to undermine institutions which do well by us and, thereby, not to harm our fellow community members.”

However, loyalty can often be morally problematic. This is so because individuals might experience loyalty towards 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 towards, say, racist associations, criminal organizations, and so on.

Perhaps loyalty-based arguments can succeed if we can argue that loyalty towards one’s own state is valuable to the point of requiring protection from international law. However, although some states perform valuable functions, it might be better if individuals felt stronger loyalty towards 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. 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 so, 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.

However, 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. 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 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 towards 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, and it is, effectively, loyalty towards 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 so, 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 towards their own state, or if they had no state, the CSHF prohibition could not be justified in their case; states would do nothing

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144 Fabre, supra note 142 at 442.
146 Fabre, supra note 142 at 444-445. 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.
morally wrong if they chose to compel those foreigners to serve in their armed forces. This seems to miss something important. 147

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 exceedingly difficult to argue that international law should encourage that loyalty when it is misguided. Yet this is the argument that would be required to support the claim that compelled service in hostile forces is significantly worse than the state’s conscription of its own citizens.

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 might have special duties to protect them from harm. 148 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.

However, ties of loyalty in close interpersonal relationships are insufficient to fully account for the CSHF prohibition. This is so because this is not the kind of relationship that exists between states and their own citizens, nor the kind of relationship that exists between citizens themselves. 149 Further, interpersonal relationships do not necessarily overlap with nationality: individuals might have family and loved ones in other countries. Still, loyalty towards one’s own loved ones is partially able to explain why compelled service in hostile forces can be morally worse than compelled service in one’s own state in some limited instances. It cannot yet explain, however, whether conscription is permitted.

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.” 150

147 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 than loyalty-based ones when apply to conscription. On the obligation to obey the law and commitments, see Felipe Jimenez, Legality, Legal Obligation, and Commitment, https://law.ucla.edu/sites/default/files/PDFs/Law_and_Philosophy/Felipe_Jimenez-Legality_Legal_Obligation_and_Commitment.pdf.


149 For a similar argument in the context of the difference between loyalty towards the state and towards those with whom we have close interpersonal relationships, see Lee, supra note 142 at 310-312.

150 Rome Statute, supra note 5 art. 8(2)(b)(xv).
The argument from vulnerability 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 where 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, etc.

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 employ strategies that minimize military casualties.\(^\text{151}\) States—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 is previous to any human rights standards that might have governed how states treated their own soldiers and conscripts, which only developed after World War II.\(^\text{152}\)

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 in 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 minorities.

Thus, this argument cannot render the regime morally coherent. If what explains the significant moral difference between compelled service in hostile forces and the state’s conscription of its own citizens is that incentives are likely to make states use individuals in objectionable ways during combat, we should expect either that a similar prohibition exists in all contexts in which the incentives to use individuals in those objectionable ways exist or


that those objectionable ways themselves are the object of prohibition. Yet, no such prohibitions exist.

Although some standards of treatment have been imposed regarding soldiers and conscripts, there is no restriction on states’ sending out their own citizens into difficult or impossible missions, nor any restrictions on using them as cannon fodder. 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, 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.

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.” They are a violation of the principle that requires soldiers to act humanely, with mercy and compassion. This is a difficult task, May acknowledges, because while soldiers might be required to act humanely towards some, they are still allowed—or not prohibited—from killing enemy combatants. Ultimately, for May, the rules of war are grounded in notions of honor and mercy, as well as the protection of the vulnerable.

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153 Chmykh et al, supra note 72 at 14-15.
154 Noting the neglect of the human rights community regarding service members’ rights and the need to “humanize” “actors too often deemed instruments”, see Saira Mohamed, Cannon Fodder, or a Soldier’s Right to Life, 95 SOUTHERN CALIFORNIA LAW REVIEW, 1037 (2022).
157 MAY, supra note 115 at 1–2.
158 Id.
159 Id.
160 Id. at 6.
Regarding confined soldiers (POWs and hors de combat) and prohibitions on their mistreatment, May argues that humane treatment 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.”\footnote{Id. at 142–143.}

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 don’t.\footnote{Id. at 145.} 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.”\footnote{Id.} 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.”\footnote{Walzer, supra note 17 at 146.}

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.\footnote{Seth Lazar, Sparing civilians 102–122 (1st ed. 2015).} Lazar argues that harming those who are vulnerable or defenseless is particularly bad or worse than harming the non-vulnerable 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.\footnote{Id. at 113.}

Vulnerability is also the object of special protection in domestic criminal codes, where it can operate as an aggravating circumstance in certain crimes, like homicide, or as giving rise to certain duties of protection towards, say, children.\footnote{See e.g. Chilean Criminal Code, German Criminal Code, Spanish Criminal Code; Cal. Penal Code.}

Following this line of argument, one might then argue 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, where states have incentives to treat them in objectionable ways, and harming those who are vulnerable is morally wrong and morally worse than harming the non-vulnerable.

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 non-vulnerable. 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 prisoners of war and hors de combat, as well as 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 first 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 might do so when they are used in certain objectionable ways, but I have not argued that it might do 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 doesn’t 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 rule, 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 prisoners of war 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 what 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 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. And, more importantly, this vulnerability-based argument doesn't say why compulsion to fight a legal war is always equivalent to unjustifiably harming individuals.

e. Citizens and duties towards 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 generally—which is a key feature of the state—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 non-citizens, 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 one is permitted because citizens already have enforceable duties to fight that are owed to the state. And the second is prohibited because non-citizens 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 them 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). Because 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 towards the state, at least in cases of egregiously unjust wars),168 I will not

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168 See PRIETO RUDOLPHY, supra note 10 pp. 94-110; 241-267; McMahan, supra note 88; Susanne Burri, If You Care About a Rule, Why Weaken Its Enforcement Dimension? On a Tension in the War Convention, LAW AND
address whether compelled service in hostile forces also involves making individuals breach duties towards their own states.

The argument based on duties owed to the state requires then to show that citizens have certain duties toward their own states (or their political communities) that non-citizens lack, and, in particular, that they have duties to fight on behalf of their state that non-citizens lack. 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. Because 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, they are called to die and kill on behalf of the state. Fighting in war, unlike complying with most legal rules, is a significant burden. War is risky, both in physical and moral terms, 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. Further, some political theorists, like Hobbes and Rousseau, have treated the question of an obligation to die and kill for the state as a separate, distinct issue. 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. And 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. This is so because the end of the state, for Hobbes, is

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169 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.
172 Prieto Rudolphy, supra note 10.
173 Liam Murphy, What Makes Law. An Introduction to the Philosophy of Law 120 (2014); Scheffler, supra note 170 at 3.
174 Walzer, supra note 17.
175 Id.
176 Id. at 81–84. There are some passages where Hobbes seems more ambivalent. See Id. at 85–86.
individual life.\textsuperscript{177} An individual who dies for the state defeats the very purpose of forming that state: the preservation of life.\textsuperscript{178} Others interpret this aspect of Hobbes’s theory as a matter of prudence, in the context of which self-preservation was paramount.\textsuperscript{179}

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 the state, to fight in legal wars.

Despite these differences, conscription has received little theoretical attention from political and moral philosophers,\textsuperscript{180} besides focused attention on the legitimacy of the draft in the 1960s and early 70s.\textsuperscript{181} 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.\textsuperscript{182} But the legitimacy of conscription itself has been hardly discussed.\textsuperscript{183}

This omission is quite puzzling. As things are, states have the capacity of generating “unlimited numbers of soldiers by their coercive practices.”\textsuperscript{184} And, indeed, during the 19th century, pacifism about war included an argument against conscription, which was considered to be a “type of enslavement of the heart,” that led to a system of inhumanity, that is, a system where war was seen as taking a life of its own.\textsuperscript{185} But 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.\textsuperscript{186}

\textsuperscript{177} WALZER, supra note 17 at 82.
\textsuperscript{178} Id.
\textsuperscript{179} Cheyney Ryan, The Dilemma of Cosmopolitan Soldiering, in HEROISM AND THE CHANGING CHARACTER OF WAR 120, 128 (Sibylle Scheipers eds.).
\textsuperscript{180} See, making this point, e.g., Mathias S. Sagdahl, Conscription as a Morally Preferable Form of Military Recruitment, 17 JOURNAL OF MILITARY ETHICS 224, 225 (2018); Ryan, supra note 98.
\textsuperscript{182} See e.g., MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (2006); McMahan, supra note 88; HELEN FROWE, DEFENSIVE KILLING (1st ed. 2014); VICTOR TADROS, TO DO, TO DIE, TO REASON WHY: INDIVIDUAL ETHICS IN WAR (2020).
\textsuperscript{183} But see Ryan, supra note 98.
\textsuperscript{185} Id. at 184.
\textsuperscript{186} Ryan, supra note 98 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 the 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 towards one’s community or the state—is familiar. Conscription, as Ryan notes, is often experienced both as naked coercion and as embodying a legitimate social obligation.\(^\text{187}\)

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

i. Theories of Political Obligation

In the literature on political obligation, context- and content-independent duties to obey the law have been grounded on consent,\(^\text{188}\) fairness,\(^\text{189}\) natural duties of justice,\(^\text{190}\) associative duties,\(^\text{191}\) on the basis of a commitment to law,\(^\text{192}\) and on the basis of democratic authority.\(^\text{193}\) However, some authors remain skeptical that any such duties exist.\(^\text{194}\)

Theories based on consent\(^\text{195}\) or commitment\(^\text{196}\) regard political obligations as obligations of commitment.\(^\text{197}\) The idea is that the community has granted authority to the government and has also chosen to undertake political obligations,\(^\text{198}\) or that individuals have adopted a commitment to law.\(^\text{199}\) 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

\(^{187}\) Id. at 139.


\(^{190}\) Jeremy Waldron, Special Ties and Natural Duties, Philosophy & Public Affairs 3 (1993).

\(^{191}\) Scheffler, supra note 170; Ronald Dworkin, Law’s Empire 195–216 (Repr ed. 2010).

\(^{192}\) See Jimenez, supra note 147.


\(^{194}\) Murphy, supra note 173 at 110–143; A. John Simmons, Moral Principles and Political Obligations (1979).

\(^{195}\) Locke, supra note 188.

\(^{196}\) Jimenez, supra note 147.

\(^{197}\) Simmons, supra note 194 at 58.

\(^{198}\) Id. at 58–59.

\(^{199}\) Jimenez, supra note 147.
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 the state because the latter’s existence allows them to exit the state of nature. In other, broader, accounts, we might posit that the state allows individuals to access a number of goods, such as security, the existence of a legal system, the solution of coordinative problems, and so on, that they could not obtain otherwise. Plausibly, non-citizens 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 benefitted from their submission.” 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. Fairness-based accounts of political obligation explain the existence of the latter on the idea that individuals benefit from certain arrangements, and that 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. 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 avoidable class bias in selection. 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. 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.

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 purpose,” provided that the norms are neither gravely unjust nor irrational and the group is not corrupt. Scheffler argues that this might, on certain assumptions, provide the basis of an argument in

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202 Id.
204 Id.
205 Id.
206 Id. at 381.
207 Scheffler, supra note 170 at 6.
favor of the existence of a duty to obey the law. 208 Those assumptions are, first, that membership in a political society can be non-instrumentally valuable; second, that the laws of a society are among its norms of individual conduct; and third, that these reasons amount to duties. 209 Note that whether membership in the state (or any group) is non-instrumentally 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.” 210

Accounts based on natural duties provide a different alternative. 211 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). 212

Finally, duties to obey the law might also be based on the law’s democratic provenance. 213 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 only explain why compelled service in hostile forces is worse than democratic states’ conscription of its 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. 214 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. 215 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. 216 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, the state (provided that the state is a valuable institution.)

208 Id. at 9.
209 Id.
210 Id. at 14.
211 See Waldron, supra note 190; RAWLS, supra note 203 at 114–117; 333–337.
212 RAWLS, supra note 203 at 115.
213 See e.g., Estlund, supra note 168.
214 MURPHY, supra note 173 at 125.
215 Id. at 129.
216 Id.
Historically, conscription, both in times of peace and in times of war, has been justified instrumentally on the basis of different outcomes or goals, some of which Leander refers to as “myths” regarding conscription. 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. 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 the state's leaders. The general draft 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. Conscript-based militaries in Chile, Argentina, and Turkey also offered no resistance to military takeovers. 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 flawed.” Interestingly, a study conducted in 34 European states in 1997-2017, found that in countries with conscription-based recruitment there are higher levels of support for the military.

Further, even if it were true that all-volunteer forces 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 all-volunteer forces. 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.

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. This logic doesn’t resist analysis: in most places women are not subject to conscription, so whatever social integration

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218 Leander, supra note 66 at 573–574.
219 See e.g., Id. at 57; Milton Friedman, Why Not a Voluntary Army?, 4 NEW INDIVIDUALIST REVIEW 3, 4–7 (1967). Neither Leander nor Friedman think this argument is sufficient to defend conscription.
221 Kosnik, supra note 217 at 458.
222 Keil, supra note 220 at 6.
224 Pattison, supra note 100 at 149.
225 Leander, supra note 66 at 573–574.
or mobility is created clearly excludes roughly half the population.\textsuperscript{226} It is also unclear why social integration should stop at the border of one’s own country.\textsuperscript{227} Further, this argument might work for conscription as a state’s general practice during times of peace, but it doesn’t 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.”\textsuperscript{228} But, 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 most contemporary political thinking.\textsuperscript{229} And even if that were the case,\textsuperscript{230} that is, even if conscription was an effective tool in creating “virtuous citizens,” it cannot be plausibly sustained that if so, the state can demand people to kill and die on its behalf. The intrusion upon 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.” I will come back to this point later.\textsuperscript{231} In the first case, the argument relies on the notion that states fulfil valuable ends and thus have a right to their own survival. Citizens, then, must contribute to the survival of the state by fighting.

ii. 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 might be able to explain 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.

\textsuperscript{226} ld. at 574.
\textsuperscript{227} Id.
\textsuperscript{228} Id. at 576–577.
\textsuperscript{229} Id. at 578.
\textsuperscript{230} 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, Sage Journals: ARMED FORCES & SOCIETY 0095327X221112028, 3 (2022).
\textsuperscript{231} 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, It Makes no Difference Whether or Not I Do It, 49 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, SUPPLEMENTARY VOLUMES 171 (1975).
First, the theories tend to be over-inclusive. 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 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; that the community is reasonably just; that individuals benefit from the existence of the community, and so on. There is, thus, a difficult question of demarcation: why is the state the right entity to which individuals owe duties to fight legal wars?

We live in an increasingly interconnected society, where non-citizens 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, 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. If we take an instrumental account of political obligation, then one would be required to fight anytime it would help upholding 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.

The problem, then, is to draw a significant line between citizens and non-citizens. If this is right, accounts of political obligation can explain why the state’s conscription of its own citizens is permitted. But 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 the 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, would not be morally unjustified; it would be permissible. Even though prisoners and those in occupied territories would remain vulnerable, coercing them to fight could not

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232 This is a big if. Pacifism regarding war is incredibly difficult to resist. See PRIETO RUDOLPHY, supra note 10; Cheyney C. Ryan, Self-defense, Pacifism, and the Possibility of Killing, ETHICS 508 (1983).

233 Waldron, supra note 190 at 9–11. He then 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, supra note 194 at 146–152. This is known as the particularity objection in the literature on political obligation.
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 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.\(^{234}\) But they struggle greatly in non-ideal 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 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.\(^{235}\)

A fairness-based account already struggles in ideal circumstances. It is hard to accept that the mere fact of benefitting from a social practice or institution provides a good argument as to why those who benefit, who might not have accepted nor wanted the practice, the institution, or the benefit can be burdened to obey.\(^{236}\) 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.\(^{237}\) The latter is especially relevant in the context of conscription, where 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 non-ideal 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.\(^{238}\)

The same is true in an associative duties-based account: some individuals simply lack any reason to place non-instrumental 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

\(^{234}\) 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 (2012); Murphy, supra note 173.


\(^{236}\) Nozick, supra note 201 at 90–95.

\(^{237}\) Id.

\(^{238}\) See making similar arguments regarding punishment, Jeffrie G. Murphy, Marxism and Retribution, Philosophy & Public Affairs 217, 240 (1973).
consequentialist or instrumentalist account, there is no reason for individuals to fight to
defend a state (or an international legal order) they might be better off without or might benefit
little from 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.\textsuperscript{239}

These might seem, as Murphy writes, “banal empirical observations,” 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.”\textsuperscript{240}

Theories of political obligations 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, would not provide a complete argument against the CSHF prohibition; there
might be powerful instrumentalist reasons for maintaining it, given the incentives at play).

Second, in non-ideal 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 obligations are not unresponsive to the demandingness of the burdens associated
with compliance with the law. In the case of conscription, the 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 conscription of the
state’s own citizens are unjust practices, for similar reasons. They are unjust practices because
in non-ideal circumstances, individuals often do not have duties towards the international
community nor to their own states 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.

iii. 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 non-ideal circumstances, many individuals lack such duties. But at least some
individuals might have duties to fight legal wars because, for example, they benefit
considerably from the existence of the state; they have consented to have such duties by, say,
joining the army; and so on. 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.

\textsuperscript{239} On the inability of act- and rule-consequentialist arguments to support a duty to obey the law, see GREENE,
\textit{supra} note 234 at 96-108.
\textsuperscript{240} Murphy \textit{supra} note 238 at 241.
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. 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. 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.

In the context of conscription, this would mean that states might be justified in demanding conscription of citizens, even in cases where 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 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. However, a significant number of states are not even reasonably just. Only 57% of states in 2017 were “democracies of some kind,” and there is disagreement about whether certain states that are “democracies of some kind” are actually sufficiently just to be legitimate. 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 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

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241 *Murphy, supra* note 173 at 116.
242 *Id.*
243 *Id.*
245 Drew Desilver, *Despite global concerns about democracy, more than half of countries are democratic*, Pew Research Center (14 May 2019) https://www.pewresearch.org/short-reads/2019/05/14/more-than-half-of-countries-are-democratic/
246 Wellman, *supra* note 244 at 3.
which the individual belongs to is corrupt or unjust, when 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. 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.

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. 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 a sense of community in a society which is structured to destroy genuine community.”

Finally, wars, even legal wars, involve causing harm against many innocent people, including civilians. Legal wars are also often fought unjustly. War is also 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 of individuals to fight on their behalf. 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 non-citizens: 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 there might be nothing that can meaningfully and generally distinguish between the state’s conscription of its own citizens and compelled service in hostile forces so as to make the first 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.

4. 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.

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247 PRIETO RUDOLPHY, supra note 10.
248 Id.
249 Murphy, supra note 238 at 239.
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 there is a plausible case for why, 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—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, the arguments that explain what is wrong with compelled service in hostile forces put into question the permissibility of the state’s own conscription or draft practices. In current, non-ideal conditions, many citizens will 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.

There are thus powerful pro tanto reasons for international law to prohibit states from conscripting or drafting individuals to fight wars. I am inclined to think that there are also 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. If that is the case, the war’s illegality should be an additional aspect of the crime of conscription.

In sum, to render the regime morally coherent, international law should distinguish between conscription to fight legal wars and conscription to fight illegal wars. And it should also generally prohibit conscription.

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 regime is morally incoherent, and that 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 first 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

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251 Ryan, supra note 98 at 131.
prohibition. If that were the case, then international law would create a perverse system, where rogue states would breach the prohibition on conscription while law-abiding states wouldn’t, 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. But I do not think the costs of war are reasons weighty enough to permit conscription, which severely infringes upon individuals’ liberty. States would remain free to have all-volunteer forces 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,”\(^{252}\) where 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.\(^{253}\) 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 chickenhawk syndrome.”\(^{254}\) 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.\(^{255}\) In doing so, it 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.\(^{256}\)

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).\(^{257}\) If anything, the solution to this problem is to introduce other modifications, at the domestic or

\(^{252}\) Walzer, supra note 182 at 323-327.
\(^{253}\) Friedman, supra note 220 at 5–6.
\(^{254}\) Ryan, supra note 181 at 3.
\(^{255}\) Id.
\(^{256}\) Id. at 4.
\(^{257}\) See e.g., Jonathan Quong & Rebecca Stone, Rules and Rights, in Oxford Studies in Political Philosophy, Volume 1 222 (David Sobel, Peter Vallentyne, & Steven Wall eds., 2015).
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, and thus, conscription should not be prohibited by international law, since at least some of the time, conscription will involve forcing people to do what they already have a duty to do, and, in those cases, it would be legitimate. However, it would be impossible for states to determine who has moral duties to fight on its 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 don’t 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 such duties in certain circumstances, due to instrumental reasons or because the state or the international community has benefitted them considerably, and so on. 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 such a way that it can appropriately distinguish between individuals who have duties to fight and individuals who don’t.

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 the state might be able to avail itself of other mechanisms, short of coercion, to persuade individuals to fight on its behalf.

Thus, I think that the reasons in favor of rendering the international legal regime morally coherent are not just pro tanto reasons, but 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. 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 to fight aggressive wars a war crime, under the jurisdiction of the International Criminal Court, while making conscription generally prohibited under international human rights law. It would also be necessary to expand refugee protections to those who are forced to fight wars of aggression. This 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 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 law, given how pervasive the idea that we owe special duties to our states is.258 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 feasible, at the moment, to achieve and how we should set our priorities.

However, the fact that something is utopian does not alter the moral demands.259 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, the 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. And 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.260 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). And it cannot be rendered morally intelligible in two ways. First, what makes compelled service in hostile forces wrong also often makes conscription of the state’s own citizens wrong,

258 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 142; Fabre, supra note 142.
259 See Estlund, supra note 15.
260 Wasserstrom, supra note 12 at 7–8.
yet the latter is permitted. And second, international law fails to distinguish between legal and illegal wars.

None of these implications mean that the CSHF prohibition lacks value or is entirely morally misguided. On the contrary, the CSHF rule prohibits something that is morally wrong, and as such, it is a valuable rule. But 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. And not only that, 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.” 261

261 WAlZER, supra note 17 at 77.