Within this context, globalist projects like the one advocated by Peters carry little hope of strengthening human rights. Rather, by removing the capacity of the most marginal and vulnerable to challenge their policy-based exclusions from society, they threaten to deepen already deep global divides, further undermining the very promise that post-war human rights indivisibility, universality, social duty, rights balancing, and proportionality and reasonableness review held out for strengthening inclusive democratic governance and hence preventing the global catastrophes that led to the post-war human rights catalogue in the first place.

In short, there is nothing *beyond human rights* in Peters's book. To the contrary, the book joins a growing chorus of internationalist literature that misdiagnoses national-level push-back pressures to absolutized notions and selective enforcement of individual rights. Claiming the need to "save" human rights from inflation, this growing literature insists not that human rights must be made more accessible to and effective for those without historic access to them, but rather more limited, elitist, and absolutist. Unless a different narrative of the interplay between individual rights and state sovereignty is told in international law, one which sees them not as existential Grundnorm rivals in a potential zero-sum game, but as necessary partners in the consolidation of localized rights-based participatory democratic governance, we will indeed have moved "beyond" human rights.

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The rights of soldiers in war have not been at the forefront of contemporary international law. Although the early laws of war focused on basic protections for wounded soldiers,[1] the twentieth century saw the emphasis shifting to the protection of civilians, in line with the rise of aerial bombardment and, later on, asymmetric warfare.[2] Accordingly, while international humanitarian law (IHL) has advanced significantly in recent decades in terms of the protections it affords to civilians, its protection of soldiers remains relatively basic. Significantly, the wholesale killing of soldiers is still tolerated by IHL, and is widely presumed to be part and parcel of the notion of military necessity.[3] The advent of the prohibition on the use of force in the mid-twentieth century (*jus ad bellum*) did not change this basic premise: the notion that *all* combatants—whether belonging to the aggressor or to the defender—remain fair game, endures as the predominant position in international law.[4] The paucity of international law concerning soldiers' rights has another, less explored manifestation: arguably, when states force their soldiers to kill other human beings in unlawful wars, they transform them into perpetrators, and deeply compromise their morality. In this context, also, international law remains aloof. Although international human rights law—including the right to conscientious objection[5]—has developed immensely in recent times, it has yet to extend

(Gerald L. Neuman ed., forthcoming 2019); Jason Horowitz, *In Matteo Salvini's Italy, Good is Bad and "Do-Gooders" Are the Worst*, N.Y. TIMES (Apr. 13, 2019).

[1] Robert Kolb, *The Main Epochs of Modern International Humanitarian Law Since 1864 and Their Related Dominant Legal Constructions*, *in* SEARCHING FOR A "PRINCIPLE OF HUMANITY" IN INTERNATIONAL HUMANITARIAN LAW 23, 38–39 (Kjeitl Mujezinović Larsen, Camilla Guldahl Cooper & Gro Nystuen eds., 2012).

[2] *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AJIL 239 (2000).

[3] *Compare* Yishai Beer, *Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity*, 26 EUR. J. INT'L L. 801 (2016).

[4] *See* Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEG. ANALYSIS 69, 117 (2010).

[5] UN Human Rights Commission, General Comment 22 (48) (Art. 18), para. 11, UN Doc. CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993).

to the right of soldiers, *qua* individuals, not to be coerced into fighting in aggressive wars.

Can international law's seeming disregard for soldiers' rights—both as possible victims and as potential perpetrators—be sustained in an era when law *itself* prohibits the use of force, and moreover, criminalizes acts of aggression? And if not, how should law be reformed? These are the key questions tackled by Tom Dannenbaum, Assistant Professor of International Law at the Fletcher School of Law and Diplomacy at Tufts University. In general, his book seeks to challenge the common understanding of the crime of aggression as mainly a crime against states. Instead, he recasts it as a crime perpetrated against individual rights, and offers legal reforms that would reflect this normative realignment.

The core of the book, therefore, advances a repudiation of the traditional view of the crime of aggression. By utilizing insights from legal theory and ethics, Dannenbaum convincingly argues that the key wrong addressed by the crime of aggression cannot lie in the unjust encroachment of state sovereignty, but rather, in the wrongful killing and maiming that it entails (both of defending soldiers and of civilians incidentally harmed). One key argument for this view is that other forms of violations of sovereignty are *not* criminalized by international law, even if these violations are more intrusive than some instances of aggression. The additional wrong—the one that makes aggression *criminal*—must therefore be the means through which this particular violation of sovereignty is pursued (pp. 79–93).

As the book argues, the realization that aggression entails such wrongful killings produces two consequences pertaining to the moral rights of soldiers. On the aggressor side, soldiers ordered to fight are morally wronged by being coerced to unjustly kill other people. The gist of this wrong is that even if these soldiers would fight lawfully under IHL, they would *still* not be able to "wash their hands of guilt" for killing people in an aggressive war (pp. 25–30). On the defending side—and perhaps more intuitively—soldiers harmed in aggressive wars are also wronged, because they are not morally liable to the harm they suffer (ch. 1).

After establishing these propositions, the book moves to demonstrate that international law, as commonly understood, is oblivious to these moral consequences. On the one hand, international law criminalizes aggression, but on the other, it fails to recognize an internationally protected legal right to refuse to participate in aggression (p. 26). In the same vein, by viewing soldiers as fair game, it does not internalize the harm caused to defending soldiers in war (p. 34).

Dannenbaum recommends two relatively modest adjustments to positive international law that would rectify this anomaly: the law must protect the human right to refuse participating in aggression, inter alia, by conferring refugee status on deserters; and, on the other side, it must recognize the victim status of combatants harmed in a defensive war, for the sake of *post bellum* reparation regimes (ch. 11). While the latter proposal raises significant practical challenges—which the author readily acknowledges—it is (relatively) easy to defend theoretically. The former proposition is more challenging, since it goes to the core of one of the stickiest problems in the ethics of war—the problem concerning the moral responsibility of soldiers that participate in unjust wars. For this reason, most of the book deals with the moral status of the aggressor's soldiers as part of its argument that soldiers are morally wronged by being forced to fight in aggressive wars.

Following the classic structure of normative legal scholarship, the book begins by outlining the problem and introducing the book's key theoretical contribution; it then deals with possible objections; and it closes with normative suggestions. Accordingly, Part I presents the core theoretical argument of the book, described above, on the essence of the crime of aggression and its moral effects on soldiers. Part II offers an in-depth discussion of the possible objections to this theoretical premise, by exploring possible justifications for international law's stance on the rights of soldiers. Here, the discussion merges with an age-old problem in the ethics of war: can soldiers that participate in unjust wars maintain their morality? This problem has immediate

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implications for Dannenbaum's key proposition: if it is true that soldiers are not morally responsible for the wrongfulness of their war, then the aggressor's soldiers would be able to "wash their hands of guilt." This means, in turn, that they do not suffer moral harm if coerced to fight; and therefore, the moral imperative to grant them legal protections—should they refuse to participate in aggression—collapses.

As the book argues, it is ultimately impossible in this context to sever the moral connection between soldiers and the act of aggression in which they participate. At this point, Dannenbaum engages with common arguments for such a moral disconnect, namely: claims of duress (ch. 4); epistemic limitations (ch. 5); obligations of deference to state decisions (ch. 6); and, importantly, the traditional view that as long as soldiers fight in accordance with the "war convention" (or *jus in bello*), their morality is not compromised regardless of the justness of their war (ch. 7). Deploying both original arguments and tools from recent advances in just war theory, the author exposes the weaknesses of these objections. Simply put, while some of these arguments might explain why soldiers should not be held *criminally* liable for acts of aggression, none of them are strong enough to provide moral *vindication* for killing in aggressive war. For this reason, international law should recognize a right to disobey in such cases (p. 227). Nonetheless, the author finds merit in one cosmopolitan argument for limiting such right to disobey: a too wide right might jeopardize the functioning of militaries. Since the international legal order depends on state militaries for enforcement, harming national armed forces would endanger global security (pp. 227–43). On this latter point, one can wonder whether, historically, global security was not harmed more by blind and zealous obedience than by refusals to fight (whether genuine or opportunistic). Yet, the point is well taken that any operationalization of such a right in international law would have to take into consideration systemic concerns, not least because once an international right to disobey would crystalize, this would undoubtedly encourage more refusals.

Accordingly, Part III of the book suggests domestic and international legal reforms that would take into consideration both the institutional imperative to maintain functioning armies, and the moral rights of soldiers. Domestically, Dannenbaum suggests a normative framework that would at once "protect disobedience whenever the soldier has good reason for doubting the legality of the war," yet would also bolster the soldier's reasons to defer to state authority, in a manner that would minimize wrong refusals (e.g., when the war is lawful) (p. 285). This would be achieved by creating within states a "devil's advocate" position on *jus ad bellum*, supplemented by a permanent post-war commission of inquiry. (ch.10). These institutions would augment soldiers' ability to assert correctly whether their wars are lawful, and to trust state discretion in a manner that would prevent false assessments and harm to the military institution. Internationally, the author suggests an interpretation of existing international refugee law as affording refugee status for those who refuse to fight in illegal wars, an interpretation of international human rights law that would recognize the freedom of conscience in this context, and the recognition of victim status in International Criminal Court proceedings for soldiers harmed in a war of aggression (ch. 11).

This book is a major contribution to the field, and cannot be overlooked by anyone with either a practical or theoretical interest in the crime of aggression. The most immediate reason is that the book is incredibly timely. As is well known, the states parties to the International Criminal Court activated the crime of aggression only in late 2017.[6] While this is rightly viewed as a momentous achievement, much remains unclear concerning the interpretation of the crime.[7] One particularly difficult issue concerns the requirement, in the Rome Statute's definition of the

[6] International Criminal Court Press Release, Assembly Activates Court's Jurisdiction Over Crime of Aggression (Dec. 15, 2017), *at* https://www.icc-cpi.int/Pages/item.aspx?name=pr1350.

[7] For a comprehensive and masterful analysis of the Crime of Aggression at the ICC, see the various contributions in THE CRIME OF AGGRESSION: A COMMENTARY (Claus Kreß & Stefan Bariga eds., 2016).

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act of aggression, that the act "by its character, gravity and scale, constitutes a manifest violation" of the UN Charter.[8] In other words, the definition includes an internal gravity threshold: presumably, not every violation of the prohibition on the use of force would amount to criminal aggression. Without exhausting the debate on the nature of this threshold,[9] if Dannenbaum's view on the normative core of aggression is accepted, this might shed light on its contents. For instance, applying the book's reasoning could support the view that acts that would harm a large number of defending soldiers are more likely to cross the gravity threshold than those that do not; and similarly, acts that might violate the prohibition on the use force—such as unilateral humanitarian intervention—might not constitute aggression since, ideally, those targeted in the intervention are killed in defense of others, and thus not wrongfully (p. 106). Another immediate point of practical importance concerns the book's argument concerning the victim status of defending soldiers. The Rome Statute recognizes significant rights for victims, both in terms of participation and reparations.[10] Should a prosecution of aggression take place, it would be impossible to sidestep the question whether defending soldiers are victims, *at least* for the purposes of the Statute. In this context, the book's suggestions might play a central role in judicial considerations.

Beyond these important practical implications, it is also worthwhile to situate this book in a wider theoretical perspective. To properly place the book in the current discourse on the law and morality of wars, it should be read against an ongoing debate in the ethics of war—or just war theory—between "traditionalists" and "revisionists."[11] While this debate reshaped the ethical discussion on war in the last two decades, it had, until the last few years, a limited effect on international legal discourse. This book is one of several works in recent years in which international lawyers began to engage deeply with this debate, and is one of the few that reflects true expertise in legal doctrine, theory, and philosophy.[12]

To understand the book's specific contribution to this discussion, some elaboration is required. Traditional just war theory proceeds from several basic points of departure. The first is that states are unique political forms that possess rights greater than the aggregate of rights of the individuals comprising them. On this view, aggression is a special crime precisely because it attacks these transcendental rights.[13] Second, and relatedly, since war between states is a unique phenomenon, combatants—when otherwise fighting lawfully—do not commit a moral wrong by killing other combatants in war. Rather, they find themselves hurled into a position of mutual threat, while fulfilling their national duties and professional roles. Accordingly, a fundamental premise of orthodox just war theory is that there is a moral disconnect between the political decision to embark on a wrongful war, and the actions of soldiers who actually fight it. The direct result is that all combatants are morally equal.[14] Since international law—in its recognition that *all* combatants possess an equal right to fight—reflects the idea of belligerent equality, traditionalists find no discrepancy between law and morality.

Quite clearly, this book's theoretical premises run counter to the basic traditionalist

[8] Rome Statute of the International Criminal Court, Art. 8*bis*(1), July 17, 1998, 2187 UNTS 90 (hereinafter Rome Statute).

[9] For a doctrinal analysis see Astrid Reisinger Coracini & Pål Wrange, *The Specificity of the Crime of Aggression*, *in* THE CRIME OF AGGRESSION, *supra* note 7, at 321–23.

[10] *See, e.g.*, Rome Statute, *supra* note 8, Arts. 68, 75.

[11] For a short outline of the debate, see Cécile Fabre & Seth Lazar, *Introduction*, *in* THE MORALITY OF DEFENSIVE WAR 1–3 (Cécile Fabre & Seth Lazar eds., 2014).

[12] For other contributions that display such command see, for instance, JANINA DILL, LEGITIMATE TARGETS? SOCIAL CONSTRUCTION, INTERNATIONAL LAW AND U.S. BOMBING (2014); ADIL AHMAD HAQUE, LAW AND MORALITY AT WAR (2017); and the various contributions in WEIGHING LIVES IN WAR (Jens David Ohlin, Larry May & Claire Finkelstein eds., 2017). This is of course not an exhaustive list.

[13] The seminal articulation of his view is found in MICHAEL WALZER, JUST AND UNJUST WARS 51–59 (4th ed. 2006).

[14] For these propositions see *id.*, ch. 3.

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propositions. First, if it is true that aggression is about states' rights, individual soldiers cannot be said to be the direct victims of aggression. This is especially so if we view defending soldiers as fulfilling a unique professional role. Second, if all combatants are morally equal, there is scant normative imperative to recognize a right to refuse fighting in such wars: in the author's terms, there is no "guilt to be washed" to begin with.

Unsurprisingly, therefore, the book's approach is more in tune with *revisionist* just war theory. Revisionists reject all of the traditionalists' basic premises. In their view, states cannot have transcendental rights greater than the aggregate of the rights of individuals comprising them; therefore, war—by being no more than a coordinated, en masse clash between individuals—must be assessed in light of the same moral standards that apply to individuals.[15] The result of applying normal morality to killing in war is the realization that there cannot be true moral equality between soldiers on the aggressing and defending sides.[16] Revisionist just war theory, thus, easily accommodates the book's key contentions that: the main wrong of aggression is wrongful killing of individuals; aggressing soldiers cannot "wash their hands of guilt"; and defending soldiers are victims.

Dannenbaum is explicit on the relation between his work and existing revisionist just war thought (pp. 3–4). Yet, he is possibly the first scholar, to my knowledge, who succeeds in suggesting a plausible *legal* reform based on the notion that soldiers are not *morally* equal. To understand this, some elaboration on the common revisionist view concerning the relations between ethics and law is needed. Most revisionists, after offering a devastating critique of ideas like the moral equality of combatants, concede that for pragmatic reasons, *legal* belligerent equality should be maintained. A possible explanation for this concession is that usually, when the potential legal implications of the revisionist position are explored, the emphasis is placed on the dramatic consequences that would follow holding soldiers accountable for killing in war. The classic problem, in this context, is that if aggressing soldiers would be treated as murderers *ex post*, their *ex ante* incentive to comply with the laws of war would diminish. For this reason, revisionists confine their radical propositions to "deep morality," while accepting the desirability of the legal notion of belligerent equality.[17]

This book, however, shifts the discussion from the question whether aggressing soldiers are morally permitted to kill in war—and what should be the legal consequences of their doing so—to the moral harm suffered by those who are wrongfully coerced to kill, and to the responsibility of guilty leaders to compensate defending soldiers. The author neither suggests that aggressing soldiers should be criminally liable for (otherwise lawful) killings in war, nor that they should compensate defending soldiers directly. By realigning the debate, the book succeeds in bringing the revisionist critique back from "deep morality" into law, while not risking the systemic effects of relinquishing belligerent equality altogether.

Dannenbaum is also subtle in the manner in which he articulates the relations between law and morality. While philosophers of war can be generally content with an external moral critique of law, lawyers that argue for legal reform on the basis of ethical principles need a theory on the connection between law and morality. One family of theories involves a top-down view on why law should be changed to better reflect morality. This book, however, opts for an "internal" perspective, arguing that its normative insights—including those from revisionist just war theory—are *already* inherent in positive international law (pp. 4, 57). If this is true, the door is opened to make an argument for legal reform on the basis of relatively uncontested propositions, such as the familiar Dworkinian idea that law should be coherent (pp. 52–60).[18]

Of course, like any theory on law and morality, this view can be challenged. For instance, one

[15] Jeff McMahan, *War as Self-Defense*, 18 ETHICS & INT'L AFF. 75, 75 (2004).

[16] *See generally* Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693 (2004).

[17] *Id.* at 730–33.

[18] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 184 (1986).

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possible alternative is to begin from first principles, to argue why law must aspire to morality, and then expose the moral merits or shortcomings of this or that legal interpretation.[19] Yet, it is probably true that the internal view could be more effective in convincing skeptics, by its reference to intralegal perspectives.

Last, it is important to point out that the fact that Dannenbaum is careful—and probably prudent—to suggest legal reforms that appear to be modest does not mean that his soldier-centric view of aggression lacks far-reaching implications. For one, if it is true that the main wrong of aggression lies in the wrongful killing of individuals, it becomes unclear why the crime of aggression should require inter-*state* force to begin with. If killing soldiers in war can form the normative basis for an international crime, we should think, perhaps, of a comparable crime that would capture the wrongfulness of unjust wars even when *nonstate* actors are involved. For instance, one can think of extending criminal liability to unjust attacks by nonstate actors, even when they target combatants. Conversely, it is even possible to imagine a crime of unjust resort to force by states against armed groups, absent sufficient justification. While these notions must be examined thoroughly, this book's normative account certainly calls for a proper engagement with these questions.

In sum, *The Crime of Aggression, Humanity and the Soldier* excels in the challenging task of transposing ethical concepts into detailed suggestions for legal reform. By constantly considering the institutional and practical implications of its proposals, the book remains grounded and does not veer off to utopianism. Moreover, it is well structured, expertly written, and never digresses from its main argument. This book will surely be central in shaping the debate on the crime of aggression in the years to come.

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[19] This approach is taken, for instance, in HAQUE, *supra* note 12, ch. 2.

The Kenyan TJRC: An Outsider's View from the Inside. By Ronald C. Slye. New York: Cambridge University Press, 2018. Pp. xxiii, 291. Index.

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Following elections held at the end of 2007, Kenya descended into unprecedented sectarian violence along ethnic and political lines, which are too often coextensive in Kenyan politics.[1] The conflagration was spurred by concerns among members of the opposition party and its supporters that the election—which brought Kikuyu President Mwai Kibaki to power—had been rigged. Supporters of Kibaki's challenger, Raila Odinga, attacked members of the Kikuyu and Kisii communities; retaliatory raids then targeted ethnic groups associated with the opposition, including the Luo, Luhya, and Kalenjin communities. All told, over 1,000 lives were lost, 600,000 citizens were internally displaced or forced from their homes, countless women and men were subjected to sexual violence (including genital mutilation), and thousands of pieces of private and governmental property were destroyed.[2] Although this post-election violence was to a certain degree spontaneous, evidence subsequently emerged that government officials at the local and national levels organized, financed, and otherwise spurred the perpetrators on and deployed armed gangs, including the shadowy *Mungiki*, to join the fray.[3] This tragic turn of events took many by surprise, as Kenya had long been considered a beacon of stability, development, and pluralism in the region. Thanks to several investigative commissions convened following the election, it is now

[1] Jacob Mwathi Mati, *Ethnicity and Politics in Kenya*, *in* THE PALGRAVE HANDBOOK OF ETHNICITY 1–17 (Feb. 11, 2019).

[2] *See* Office of the High Commissioner for Human Rights, Report from OHCHR Fact-Finding Mission to Kenya, 6–28 (Feb. 2008).

[3] Felix Olick, *The International Criminal Court (ICC) Has a List of Former Mungiki Members Set to Testify Against Deputy Prime Minister Uhuru Kenyatta and Former Head of Civil Service Francis Muthaura*, STANDARD DIGITAL (Nov. 16, 2012).