

Liability for killing in war and why there is no ‘licence to kill’

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Abstract

This column argues that it no longer makes sense to speak about the ‘moral equality of soldiers’ or a soldier’s ‘licence to kill’ in wartime. International law now imposes individual criminal responsibility on those involved in the crime of aggression. International human rights law considers lives lost as a result of aggression to be arbitrary deprivations of the right to life and therefore the responsibility of the aggressor state. The individual soldiers on the aggressor side can be considered liable for contributing to acts violating the UN Charter and human rights law. This can lead to concrete legal consequences, such as becoming ineligible for asylum or liability to being individually sanctioned. Once we consider that all the lives lost as a result of aggression are human rights violations, this changes how violations of the right to life are reported and calculated. All soldiers and civilians killed as a result of a state’s aggression are victims of human rights violations, and the claims of their survivors are just starting to be heard.

Keywords

War, human rights, just war, asylum, refugees, humanitarian law, aggression, sanctions, UN Charter, sovereignty, right to life, accountability, international crimes.

I. HUMAN RIGHTS TREATIES APPLY IN TIMES OF WAR – BUT WHAPPENS WHEN THERE’S AN AGGRESSION UNDER INTERNATIONAL LAW?

It is now clear that human rights treaties continue to apply in times of war and all other types of armed conflict. The International Law Commission confirmed this in its Draft Articles on the Effects of Armed Conflicts on Treaties (2011).¹ The International Court of Justice, multiple

1. *Yearbook ILC* (2011), Vol II, Part Two, 108–30.

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treaty bodies, regional human rights bodies and courts have all applied provisions of human rights treaties to conflict situations.² UN fact-finding mechanisms covering conflict zones report on human rights violations to the Human Rights Council.³

Readers of this journal will be well aware of the debates and controversies surrounding the interaction between human rights law and international humanitarian law, recently captured so incisively by Katharine Fortin.⁴ Yes, there are some technical questions related to the applicability of specific human rights treaties (particularly concerning the death penalty) in times of Declared War;⁵ and we can examine the exact interrelationship between human rights law and certain provisions of the 1949 Geneva Conventions when it comes to internment of prisoners of war and security detainees;⁶ but all this is well-trodden ground, and the policy arguments are well-rehearsed. Readers will recall Fortin's wise counsel: 'The goal is to apply the two bodies of law in a complementary fashion and achieve the maximum protection of the human person.'⁷

What is less well understood, and where there remains considerable disagreement, is the question of killings in wartime that do not necessarily violate international humanitarian law. A soldier kills another soldier on the battlefield; let us imagine that there is no obvious question of a violation of international humanitarian law. Both are in uniform and belong to the armed forces of a state, no prohibited weapons or methods involving unnecessary suffering or superfluous injury are involved, and there is no perfidy or misuse of a protected emblem or flag. And let us further imagine the killing happens at the hands of a soldier engaged in an illegal aggression. Is this a violation of the victim's right to life? If so, what are the legal consequences for the state and the individual soldier? These are the topics I want to introduce and briefly explore in this column. I will situate our inquiry in the context of the Russia–Ukraine conflict.

2. TRADITIONAL WORRIES

To ask whether human rights law should protect soldiers' lives in battle is to challenge conventional wisdom. For years, a debate has raged amongst just war scholars over whether there should be individual liability for soldiers who fight on the unjust side of an unjust war. One traditional approach argues that the 'war convention' is built on the principle of the moral equality of soldiers, and that by joining the armed forces, individuals have forfeited their moral right to life. Therefore, it is suggested, under the traditional approach, that both soldiers in my imagined confrontation have forfeited

2. Hélène Tigroudja, 'Conflits armés et droit international des droits de l'homme' (2024) 444 *Hague Academy Collected Courses Online* (2024) 9; Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (CUP 2015); OHCHR, *International Legal Protection of Human Rights in Armed Conflict* (2011).

3. Philip Alston, Jason Morgan-Foster, and William Abresch, 'The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the 'War on Terror'' (2008)19 *EJIL* 183–209.

4. Katharine Fortin, 'The relationship between international human rights law and international humanitarian law: Taking stock at the end of 2022?' (2022) 40(4) *NQHR* 343.

5. Andrew Clapham, *War* (OUP 2021) 30–34.

6. Andrew Clapham, 'The Complex Relationship between the 1949 Geneva Conventions and International Human Rights Law', in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 701–35.

7. Fortin (n 4) 343.

their right to life—and neither is liable for killing the other. An alternative approach stresses the agency of the soldier who engages in killing and considers the right to life of the victims.⁸

For the avoidance of doubt, we are examining here the individual ‘liability’ of soldiers as a matter of moral and legal responsibility. We are not considering the idea that a certain status, threatening role, or belonging to a collectivity renders soldiers generally *liable to attack*; nor are we considering the associated notion that joining the armed forces or refusing to leave the armed forces renders oneself *liable to attack*. Liability as a matter of *responsibility* can be separated from the issue of being liable to attack.

The just war literature may be confusing for lawyers, as the word liability is used to denote both the accountability of the killer and the vulnerability of the victim. There is, nevertheless, an essential reason for continuing to use the word in both senses here. This one word is the fulcrum on which fate turns. For example, there may be a good case to say that the liability of an individual, say an individual suspected terrorist, ought to result in liability to be prosecuted rather than liability to be targeted and killed. The word liability is laden with deadly ambiguity.⁹

A second related convention is to be found amongst lawyers focused on international humanitarian law. They stress that individual soldiers in such a situation should not be punished (held liable) for merely taking part in hostilities (war crimes would be another matter). They also argue that the causes of the war should be kept separate from the law applicable to the armed conflict; they recoil at the idea that the *jus ad bellum* might play a role in the *jus in bello*.¹⁰ And they feel that if soldiers knew they would be punished on capture for simply being on the other side, there would be no incentive for such soldiers to abide by international humanitarian law,¹¹ nor indeed to lay down their arms, thus needlessly prolonging the war.

A third approach to this conundrum stresses that violations of the UN Charter concerning illegal resort to force are inter-state matters. Additionally, it is claimed that resorting to human rights law is

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8. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (5th edn, Basic Books 2015); Dapo Akande, Jennifer Welsh, and David Rodin (eds), *The Individualization of War: Rights, Liability, and Accountability in Contemporary Armed Conflict* (OUP 2023); Ka Lok Yip, *The Use of Force against Individuals in War under International Law: A Social Ontological Approach* (OUP 2022); Seth Lazar, *Sparing Civilians* (OUP 2015) Ch 6; Jens D. Ohlin, Larry May, and Claire Finkelstein (eds), *Weighing Lives in War* (OUP 2017) 58–76; David Rodin and Henry Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (OUP 2008).
 9. For examples of the word liable being used with interchangeable meanings see Dapo Akande, Jennifer Welsh, and David Rodin, ‘Introduction: Understanding Individualization’, in Akande, Welsh, and Rodin (n 8); and see also Sarah Nouwen ‘Tensions between the Pursuit of Criminal Accountability and Other International Policy Agendas in Situations of Armed Conflict’, in the same volume; and on liability to attack Cécile Fabre, ‘Guns, Food, and Liability to Attack in War’ (2009) 120 *Ethics* 36.
 10. Kubo Mačák, ‘In Honour of Yoram Dinstein - The Separation Between the *Jus in Bello* and the *Jus in Bellum*’ (2024) *Articles of War* <https://lieber.westpoint.edu/separation-between-jus-in-bello-jus-ad-bellum/> accessed 9 June 2025; Jasmine Moussa, ‘Can *jus ad bellum* override *jus in bello*? Reaffirming the separation of the two bodies of law’ (2008) 90(872) *IRRC* 963; Adam Roberts, ‘The Equal Application of the Laws of War: A Principle Under Pressure’ (2008) 90(872) *IRRC* 931; Christopher Greenwood, ‘The relationship between *ius ad bellum* and *ius in bello*’ (1983) 9 *Review of International Studies* 221.
 11. ‘For if every action of any soldier fighting in an unjust cause were illicit, there would be no incentive on the soldiers to moderate their actions.’ David Fisher, *Morality and War: Can War be Just in the Twenty-First Century* (OUP 2011) 71; of course there is every incentive, as the punishment for war crimes would be on top of any possible sanction for fighting in a war of aggression.

inappropriate or even dangerous in such contexts. Inappropriate, according to the UK's highest court, because the supervision of human rights treaties is not the arena for determining aggression; and dangerous because, as Lieblich explains, states could justify their military action as part of their obligation to respect the right to life. Thus, in his words, we would see 'the transformation of self-defence from a privilege to a duty and the danger that human rights discourse be securitized to legitimate dubious resorts to force.'¹²

More generally, there is a widely shared assumption that it would be 'entirely impossible', or 'impracticable', to provide fair trials for such soldiers from the aggressor side, as the legal controversies concerning duress and knowledge would be 'entirely insurmountable' under the 'pressures of war'. For 'obvious' reasons, it is said, one cannot prosecute 'all the members of the army'.¹³

Readers will be relieved that I do not intend to rehearse and react to all or any of these arguments. An insightful overview of the problem, covering both the moral and legal aspects, has recently been published by Adil Haque.¹⁴ I want to do two things instead. First, contextualize the issue by focusing on the liability of the Russian Federation for violations of the right to life in the context of the bombing of Ukraine. And second, float the idea that liability (in the sense of accountability or blame) can indeed be extended to individual soldiers without raising the spectre of prosecuting hundreds of thousands of soldiers. This last point challenges another assumption repeated in this literature: it is often stated (wrongly, I believe) that individuals do not have responsibilities regarding human rights or the rules on international peace and security.¹⁵

3. LIVES LOST FROM AGGRESSION ARE ARBITRARY DEPRIVATIONS OF LIFE

The assumption that soldiers killed in wars were not the victims of human rights violations took a severe knock in 2018 with the adoption of General Comment 36 on the Right to Life under the International Covenant on Civil and Political Rights. The UN Human Rights Committee concluded that 'States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant'.¹⁶ Article 6 protects the right not to be

12. *R (Gentle) v The Prime Minister and Others* [2008] UKHL 20, where the House of Lords considered they could not apply human rights law to resolve 'questions about the resort to war.' (per Lord Bingham at para 8(2)); discussed by Eliav Lieblich, 'The Humanization of *Jus ad Bellum*: Prospects and Perils', (2021) 32 EJIL 579, who makes the further point that a human rights approach to matters of *jus ad bellum* could mean that states present their military action in self-defence as a human rights obligation, at page 605; Similarly Jonathan Hell, 'Acts of Aggression as *Ipso Facto* Violations of the Right to Life: Scrutinising the Human Rights Committee's Proposed Link between Human Rights Law and the *Jus ad Bellum*', (2025) 24 Chinese Journal of International Law, who raises issues related to the use of lethal force in times of belligerent occupation.

13. See the authors discussed and quoted by Tamar Meisels, *Contemporary Just War: Theory and Practice* (Routledge 2018) Ch 1.

14. Adil Haque, 'After War and Peace', in Dapo Akande, Jennifer Welsh, and David Rodin (eds), *The Individualization of War: Rights, Liability, and Accountability in Contemporary Armed Conflict* (OUP 2023) 41–57; see also Frédéric Mégret, 'What is the Specific Evil of Aggression?', in Claus Kreß (ed), *The Crimes of Aggression: A Commentary* (CUP 2016) 1398.

15. Miles Jackson and Dapo Akande, 'The Right to Life and the *Jus ad Bellum*: Belligerent Equality and the Duty to Prosecute Acts of Aggression' (2022) 71 *ICLQ* (2022) 453, 459; but see Andrew Clapham, 'The Individual and the International Legal System', in M. Evans (ed), *International Law* (6th edn, OUP 2024) 280, 288–290.

16. General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, UN Doc CCPR/C/GC/36, 30 October 2018, para 70.

arbitrarily deprived of one's life. A similar protection is found in the African Charter on Human and Peoples' Rights. And the African Commission on Human and Peoples' Rights had already paved the way when it adopted its own General Comment in 2015. It stated, 'A deprivation of life is arbitrary if it is impermissible under international law, or under more protective domestic law provisions.'¹⁷

Our focus in this column is on soldiers, rather than civilians, being killed in a war of aggression. Of course, civilians may also be killed without this constituting a violation of international humanitarian law. An example would be civilians whose deaths were not considered excessive compared the military advantage anticipated from an attack on a military objective. This column is not about killings in violation of international humanitarian law (these too would be arbitrary deprivations of the right to life). My point here is that the General Comment reveals that all civilian lives lost as a result of aggression (whether or not as a result of a violation of international humanitarian law) should also be covered as violations of the right to life. Considering the thousands of civilian lives lost as 'collateral damage' in what are claimed to be proportionate attacks on military objectives, or as the incidental result of blockade and siege, this aspect of the topic should not be forgotten. But let us focus on the soldier victim, as it allows us to avoid the distraction of what might constitute proportionate civilian loss of life, along with the debate over the interaction between human rights law and international humanitarian law in the context of targeting.¹⁸

Does all this theory about soldiers' lives lost on the battlefield have any practical relevance? I would suggest it does, and the theory is about to be tested in the real world. The UN Human Rights Committee has received a communication from the Ukrainian families of civilians and *soldiers* killed in a Russian air strike on Ukraine.¹⁹

'In July 2022, a Russian missile strike on the city of Vinnytsia killed 29 Ukrainian persons and injured over 200 people. Relying on a previously untested interpretation of international human rights law, the communication alleges that Russia violated the right to life of all those killed in the attack. An individual communication was filed jointly by [the Clooney Foundation for Justice] CFJ, leading Ukrainian organization Truth Hounds, and [Legal Action Worldwide] LAW on behalf of the families of Ukrainian civilians and soldiers.'

'The joint communication requests that the Human Rights Committee affirm the norm against aggression and bring justice for families of the victims of the Vinnytsia attack by determining that Russia's actions during this unlawful attack violated the right to life of those killed in the attack.'

17. General Comment No.3 on the African Charter on Human and Peoples' Rights on the right to life (Article 4) 2015, para 12.

18. Frédéric Mégret, 'What might a Human-Rights-Harmonious International Regime on the Use of Force Look Like?' (2023) 14(2) Transnational Legal Theory 211; Gus Waschefort, 'The Alchemy of the Right to Life during the Conduct of Hostilities: A Normative Approach to Operationalizing the 'Supreme Right'' (2023) 34(3) EJIL 615; Darragh Murray (ed), *Practitioners' Guide to Human Rights Law in Armed Conflict* (OUP 2016); Charles Garraway, 'The Law Applies, But Which Law? A Consumer Guide to the Laws of War', in Matthew Evangelista and Henry Shue (eds), *The American Way of Bombing: Changing Ethical and Legal Norms, from Flying Fortresses to Drones* (Cornell University Press 2014) 87.

19. 'HRC56 Side Event: Russia's Violation of the Right to Life in Ukraine – An Unprecedented Communication before the UN Human Rights Committee' (2024) Legal Action Worldwide <https://legalactionworldwide.org/event/hrc56-side-event-russias-violation-of-the-right-to-life-in-ukraine-an-unprecedented-communication-before-the-un-human-rights-committee/> accessed 9 June 2025.

Thinking pragmatically, some will immediately say: ‘Oh but Russia will not pay up’, or ‘the views of the Committee are unenforceable’, or ‘this will not stop the war’, and so on. But instead of speculating on the possible concrete legal outcomes, I want to highlight the *mind shift* that this approach implies. Rather than attempting to second-guess the battlefield decision-making of a commander considering whether or not the expected civilian damage was excessive in the circumstances (and in the ‘fog of war’),²⁰ the determinations revolve around whether or not there was an aggression as understood in international law, and whether the deaths flowed from such an act of aggression. The international body is no longer weighing anticipated military advantage against expected civilian loss, or seeking to determine whether the soldier is *hors de combat*, before it can determine if the violation of humanitarian law should lead to a violation of human rights. Rather, the human rights violation flows from the violation of the UN Charter and the consequent loss of life. This is a different legal pathway and represents a new chapter in how conflicts are seen and reported on. I would suggest that this new direction has important implications for how non-governmental organizations and the relevant UN agencies, such as the Office of the High Commissioner for Human Rights, collect and process their information. All civilians killed are victims of a violation of the right to life, all loss of life should be counted—including the lives of enemy soldiers extinguished on the battlefield.

The presumption that a human rights approach is basically about determining civilian fatalities will, I would suggest, now start to be adjusted. This means cataloguing the actual damage caused by the aggression and not only focusing on violations of international humanitarian law and possible war crimes.²¹ This shift in the Ukraine context may already now be reinforced due to the establishment, within the framework of the Council of Europe, of the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine (RD4U). This Hague-based body is building a ‘record of claims submitted by individuals, entities, and the State of Ukraine for compensation for the damage, loss, and injury inflicted by the aggression of the Russian Federation against Ukraine. The Register also retains the supporting evidence for these claims.’²² The Register codes claims according to damage and not by reference to a specific battlefield violation of the laws of war.

20. Hitoshi Nasu, ‘The Rule of Law in Armed Conflict’ (2025) 34 *Minnesota Journal of International Law* 237, and ‘Judging Battlefield Conduct’ (2025) *Articles of War* <https://lieber.westpoint.edu/judging-battlefield-conduct/> accessed 9 June 2025.

21. On the danger more generally of seeing human rights monitoring through an atrocity crimes lens see Philip Alston, ‘Criminalizing Human Rights’ (2023) 15(3) *Journal of Human Rights Practice* 660; on the need to move towards civilian harm rather than focusing on civilian victims of violation of international humanitarian law see Luke Moffett, ‘Redressing Civilian Harm and Going Beyond IHL Compliance’ (2024) *Articles of War* <https://lieber.westpoint.edu/redressing-civilian-harm-going-beyond-ihl-compliance/> accessed 9 June 2025, for an extensive scientific study and an appeal to move beyond a narrow set of legal obligations see Ioana Cismas, Katharine Fortin, Rebecca Sutton, Ezequiel Heffes, and Anastasia Shesterinina, ‘The Beyond Compliance Approach: Centering Harm + Need Towards Full(er) Protection in Armed Conflict’ (2025) (on file with author).

22. ‘Functions and Scope of the Register’ *RD4U* [https://rd4u.coe.int/en/faq/general#{%22379613%22:\[0\]}](https://rd4u.coe.int/en/faq/general#{%22379613%22:[0]}) accessed 9 June 2025; this is of course separate from the Council of Europe’s Statute of the Special Tribunal for the Crime of Aggression against Ukraine (STCoA). Kevin J. Heller has pointed out that the Tribunal will have to consider whether soldiers and their families will be considered ‘specially affected victims’ of the aggression under Article 22 of the new Statute. ‘The New STCoA: The Good, the Bad, the Curious, and the Terrible’ (2025) *Opinio Juris* <https://opiniojuris.org/2025/07/11/the-new-stcoa-the-good-the-bad-the-curious-and-the-terrible/> accessed 25 July 2025. Also, see the Intergovernmental Negotiation Committee on an International Treaty to establish a Claims Commission for Ukraine.

Code A2.1 simply refers to ‘Death of an immediate family member’. How exactly damages will be calculated remains an essential and evolving question.²³

For present purposes, our focus has been on the loss of life in inter-state wars amounting to aggression. A more complicated question might be whether one could consider rebel fighters in a civil war to be the victims of a human rights violation using a similar logic.²⁴ This issue is, however, outside the scope of the present column, which focuses on the Russia – Ukraine aggression.

The other presumption - that an individual soldier ‘merely’ killing enemy soldiers has done nothing wrong - must also now come under review. I consider that this flows in part because it makes no sense to say that a state is responsible under human rights law for the unlawful taking of a life, and yet the agent responsible has no liability at all, rather some argue these individuals have a so-called apparent ‘licence to kill’ in such circumstances.²⁵ Let us turn to see what might be the practical implications of holding members of the state’s armed forces liable for such killing.

4. INDIVIDUAL LIABILITY FOR KILLING IN WAR AS PART OF AN AGGRESSION

Our focus is on participation in an aggression. Of course, there could also be liability for a long list of crimes under international law, such as war crimes, genocide, crimes against humanity, torture, enforced disappearance, and so on. For an individual to be tried for the crime of aggression before the International Criminal Court, the Statute demands, however, not only a series of acceptances by the state of nationality of the defendant and the state where the aggression took place,²⁶ but also that the individual was involved in the ‘planning, preparation, initiation or execution’, of the act of

23. For a broader look at reparations for soldiers’ deaths beyond Ukraine, see Hannes Jöbstl and Dean Rosenberg, ‘The Humanization of War Reparations: Combatant Deaths and Compensation in Unlawful Wars’ (2024) 45(1) Michigan Journal of International Law 39.

24. Eliav Lieblich, ‘Internal *Jus ad Bellum*’, (2016) 67(3) Hastings Law Journal 687.

25. I am aware that much has been written on the interrelationship between human rights law and international humanitarian law, but there is no need to resume this debate here, the focus on this column is on the interaction between human rights law and the law of the UN Charter. It is possible that some acts could be legal under international humanitarian law, for example the paradigmatic example of the soldier killing the soldier on the battlefield as outlined at the start of the column, and yet be illegal under another branch of international law. This was confirmed by the International Court of Justice in its judgment on the merits in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (2015) at para 474: ‘There can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another. Thus, it cannot be excluded in principle that an act carried out during an armed conflict and lawful under international humanitarian law can at the same time constitute a violation by the State in question of some other international obligation incumbent upon it.’ For the perception in contemporary just war theory that there is obviously a licence to kill, see Tamar Meisels who claims that ‘The rudiments [of the rules of the just war tradition] are widely familiar to citizens who have never heard of Michael Walzer or attended a university class: soldiers are equally licensed to kill in wartime, and all are legitimate wartime targets’. *Contemporary Just War: Theory and Practice* (Routledge 2018) 151; see also Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (5th edn Basic Books 2015) Chapter 3 36–37: ‘Though there is no license for war-makers, there is a license for soldiers, and they hold it without regard to which side they are on; it is the first and most important of their war rights. They are entitled to kill, *not anyone*, but men whom we know to be victims’; on the perceived need for a legal rather than a moral licence to kill, see Lionel K. McPherson, ‘Individual Self-Defense in War’, in Larry May (ed), *The Cambridge Handbook of the Just War* (Cambridge 2018) 135.

26. ICC Statute Article 15 bis paras 4 and 5.

aggression, and that this person was ‘in a position effectively to exercise control over or to direct the political or military action of a State’.²⁷

This narrow circumscription of who can be prosecuted at the international level for the crime of aggression may not necessarily reflect the full scope of who can commit the international crime as a matter of customary international law.²⁸ And it does not end the discussion on what constitutes aggression—certain African treaties extend aggression to cover attacks by non-state actors.²⁹ In our context, Patrycja Grzebyk has suggested that there is even regional customary law (Eastern European) that would allow for a wider operational definition of the individual crime of aggression for future prosecutions. Her scholarly article suggests that:

‘all those who took part in waging a war of aggression could be prosecuted, so not only commanders who prepared and started the war but also those who were involved at the later stage, in the commission of subsequent acts of aggression that formed part of a war of aggression, such as blockades of the ports, facilitation of annexation of territories or administration of territories under occupation’.³⁰

Recent domestic cases in the Ukraine context have questioned who can be prosecuted for aggression. In the recent 2024 judgment of the Ukrainian Supreme Court, concerning prosecution of Russians for aggression under the Ukrainian Criminal Code, we find the statement that the crime can be committed by those who ‘significantly influence political, military, economic, financial, information and other processes in their own state or outside its borders, and/or manage specific directions of political or military actions’.³¹ As explained by Taras Leshkovych and Patryk Labuda: ‘The decision further states, by way of illustration, that such persons could be heads of States and governments, members of parliament, leaders of political parties, diplomats, heads of special services, military commanders, or heads of State bodies’.³²

So, in practice, individual criminal liability for the Russian aggression is not necessarily limited to the leaders who control the state, but can extend to military commanders who manage the specific direction of military actions. This development undermines the assertion by just war philosophers that holding more than the top leaders liable for aggression necessarily means the ‘collective punishment’ of those who ‘obviously’ cannot get a fair trial.³³ Such arguments start to fall away once one considers the problem more contextually. We are no longer discussing the prosecution of thousands of hapless recruits miles from the front line, but we are admitting that it makes moral sense,

27. ICC Statute Article 8 bis para 1.

28. Kevin J. Heller, ‘Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression’, (2007) 18(3) *EJIL* (2007) 477; Miguel Lemos, ‘Is Aggression a Leadership Crime? Revisiting Nuremberg Principles’ (2024) *Opinio Juris* <http://opiniojuris.org/2024/05/21/is-aggression-a-leadership-crime-revisiting-nuremberg-principles/> accessed 9 June 2025.

29. African Union Non-Aggression and Common Defence Pact (2005) and Protocol on Non-Aggression and Mutual Defence in the Great Lakes Region (2006).

30. Patrycja Grzebyk, ‘Crime of Aggression against Ukraine: The Role of Regional Customary Law’, (2023) 21 *Journal of International Criminal Justice* 435, 457.

31. As explained and translated by Taras Lesgkovych and Patryk Labuda, ‘Prosecuting the Crime of Aggression in Ukraine and Beyond: Seizing Opportunities, Confronting Challenges and Avoiding False Dilemmas’ (2024) *Just Security* <https://www.justsecurity.org/94104/prosecuting-aggression-ukraine-and-beyond/> accessed 9 June 2025.

32. *ibid*; for further criminal procedures before the Ukrainian authorities, see Sergey Sayapin, ‘A Curious Aggression Trial in Ukraine: Some Reflections on the *Alexandrov and Yerosfeyev* Case’ (2018) 16(5) *JICJ* 1093; Iryna Marchuk, ‘Domestic Accountability Efforts in Response to the Russia-Ukraine War: An Appraisal of the First War Crimes Trials in Ukraine’ (2022) 20(4) *JICJ* 787.

33. Tamar Meisels, *Contemporary Just War: Theory and Practice* (Routledge 2018) Ch 1.

and is legally feasible, to consider the different forms of liability of a wider group of people for waging an aggression, going beyond the handful of people that can be considered the leaders of the state as circumscribed by the Rome Statute.

5. LIABILITY FOR KILLING IN WAR BEYOND THE ISSUE OF CRIMINAL PROSECUTION

This wider conception of the scope of those liable to be prosecuted for the crime of aggression does not fully challenge head-on the idea that there should be a ‘moral equality for soldiers’ as proposed by Michael Walzer and approved by others. We are only arguing about the scope of the aggression exception to his principle. But I wanted here to challenge the popular idea that ordinary soldiers have no liability for the killing of other soldiers as part of the war of aggression—even if they might fall outside the evolving scope of the crime of aggression. Walzer is adamant in the present context that it is not a crime ‘to be a Russian Soldier in Ukraine’, and that ‘The only people responsible for an unjust war are the political and military leaders of the country’. When it comes to the issue of personal responsibility, Walzer claims: ‘they don’t have to refuse to fight in an unjust war.’ He concludes: ‘there is a more important argument for battlefield equality rooted in the classical version of just war theory. It is simply inconceivable that anyone would want to hold Russia’s bedraggled soldiers responsible for Putin’s war.’³⁴

I want to challenge continuing adherence to this ‘classical’ version of just war theory, and also suggest that it is indeed now conceivable that people do want to hold Russia’s soldiers, perhaps not all, criminally responsible. And that for all such soldiers (bedraggled or not) there could be legal consequences. We have already seen that some interned Russian soldiers in Ukraine could be held responsible under a larger understanding of the crime of aggression under Ukrainian law, but might there be other ways in which they could be held to account (in theory and in practice)? I think there are conceivable ways in which this can happen.

Let us consider the case of an ordinary soldier who reflects that they do not want to participate in an aggression and the associated killings, and let us imagine they succeed in getting to the European Union.³⁵ Should they seek asylum there, the issue would turn partly on the relevant 2024 EU Regulation, and they would have to show ‘persecution’. An act of persecution under the Regulation can take the form of ‘prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include’ among other things ‘acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.’³⁶

This possibility of claiming refugee status or subsidiary protection is admittedly not the equivalent of saying they have to ‘refuse to fight in an unjust war’ (the claim dismissed above by the just

34. Michael Walzer, ‘It’s No Crime to Be a Russian Soldier in Ukraine’ (2022) *Foreign Policy*.

35. Not at all a hypothetical situation: ‘In EU first, France grants visas to six Russian soldiers who deserted Ukraine war’ (2024) *France 24* <https://www.france24.com/en/europe/20241017-eu-first-france-grants-visas-six-russian-soldiers-deserters-ukraine-war> accessed 9 June 2025.

36. See Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council Article 9(2)(e) combined with Article 12(2)(c). See also Tom Dannenbaum ‘The Legal Obligation to Recognize Russian Deserters as Refugees’ (2022) *Just Security*.

war theorist Michael Walzer), but it does help suggest that such a refusal is recognized as a sort of right.³⁷ In turn, it also suggests that deciding to engage in a war of aggression may have concrete consequences for the individual. There is, I would suggest, a sort of individual accountability for joining the killing in an aggressive war. How is this so?

The definition of persecution in the Regulation relies on an exclusion clause related to acts contrary to the UN Charter. This clause covers the soldier who remains and fights in an aggressive war in violation of the UN Charter. This person can be excluded from asylum or refugee status. This exclusion clause is mirrored in the Refugee Convention and applies beyond the European Union as a matter of refugee law. Article 1F(c) of the 1951 Refugee Convention states: 'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: ... (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.' Although the use of the word 'guilty' suggests a prosecution, in fact, this provision is interpreted by reference to the phrase 'serious reasons to believe' as requiring something less than criminal prosecution or even an actual crime, as this exclusion refers to 'acts' rather than crimes.

Scholarly accounts of the application of this provision stress its expanding scope in the twenty-first century as it has come to be used against suspected terrorists in the post-September 11 world.³⁸ But our focus here is on the fact that the international system somehow considers some people, in our case, the individual soldiers, as 'undeserving' or 'unworthy' of protection by the refugee regime. In Colin Grey's words, this represents 'the judgment that those culpable for excludable crimes or acts are undeserving of the international community's beneficence, withheld as the expression of a non-punitive form of blame.'³⁹ This sort of blame is a form of liability. The soldier is liable to be refused asylum.

Rather than parsing the provision in its context and considering the case-law, let us here simply reference the EU Agency for Asylum Guidance produced, for example, for those fleeing Iraq in 2021:

In order to apply this exclusion provision, the acts must have an international dimension in the sense that they are capable of having a negative impact on international peace and security or the friendly relations between States. However, there is no requirement that the perpetrator hold a position of power in a State or a State-like entity in order to be excluded under this provision. Accordingly, this exclusion ground may apply to certain acts which constitute serious and sustained human rights violations and/or acts specifically designated by the international community as contrary to the purposes and principles of the UN'.⁴⁰

Once we move away from the language of crimes against peace (or the crime of aggression), and look instead at arbitrary deprivations of the right to life connected to the prohibition on the use of force in the UN Charter, it becomes easier to see two things. First, when it comes to the right to life, the human rights regime covers a much broader class of victims than those protected under

37. Tom Dannenbaum, *The Crime of Aggression, Humanity, and the Soldier* (CUP 2018); Tom Dannenbaum, 'The Criminalization of Aggression and Soldiers' Rights' (2018) 29 EJIL 859.

38. Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edn OUP 2021) 219; see also Edward Kwakwa, 'Article 1 F(c) Acts Contrary to the Purposes and Principles of the United Nations' (2000) 12 International Journal of Refugee Law 79.

39. Colin Grey, 'Cosmopolitan Pariahs: The Moral Rationale for Exclusion under Article 1F' (2024) 36 International Journal of Refugee Law 201, 203.

40. 'c. Acts contrary to the purposes and principles of the UN' <https://euaa.europa.eu/country-guidance-iraq-2021/c-acts-contrary-purposes-and-principles-un-0> accessed 9 June 2025.

international humanitarian law (in particular, enemy soldiers, as well as civilians considered legitimate collateral damage). And second, the refugee regime could be seen as attaching 'blame' to those who participate in the arbitrary loss of life entailed in fighting on the aggressor side.

6. FINAL REMARKS

The Russian attack on Ukraine compels us to think about the scope of the human right to life, and whether it covers Ukrainian soldiers and civilians who are killed without any particular accompanying violation of international humanitarian law. The interpretation by the UN Human Rights Committee that lives lost as a result of a state's aggression are violations of the human right to life, has real implications for how to think about claims made against the Russian Federation and its soldiers. If these killings are international violations of the right to life, then I would argue that it follows that those who commit these killings are the agents of a human rights violation. Both these results are impossible to square with the traditional just war theorist's assertion that soldiers are morally equal, they are all liable to be killed, and that they all have a so-called 'right to kill'. One cannot speak of a licence to kill where such action involves a human rights violation.⁴¹

I have also sought to show that individual liability for such killing cannot be simply dismissed as impracticable, impossible, and involving insurmountable problems. The 'liability of soldiers' should be more than a shorthand for: 'they can be targeted and killed'. The liability of soldiers on the unjust side can mean accountability through law. Liability will attach to those seeking asylum, liability will attach to those seeking visas, liability will attach to those singled out for sanctions such as travel bans or asset freezes,⁴² and liability can attach when considering the evolving scope of the crime of aggression beyond the International Criminal Court.

Let us stop writing and teaching about a liability to be killed and an imaginary 'licence to kill'—and focus more on the liability of killers and the scope of the right to life.

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41. For a look at the origin and meaning of the OO7 signifier in James Bond and the legislation in the United Kingdom which permits officers to break the domestic criminal law (but not kill in violation of human rights) under the Covert Human Intelligence Sources (Criminal Conduct) Act 2021, see Clapham (n 5) 268–279.

42. Consider for example, the UK financial sanctions imposed on this member of the armed forces (among others) for the invasion and violation of sovereignty. 'Lieutenant General Andrei Sergeyevich IVANAYEV is a member of the Armed Forces of the Russian Federation, he currently holds the position of Commander of the 20th Combined Arms Army of the Western Military District. He is considered to have been in direct command of and/or to have substantial influence regarding the deployment of Russian forces involved in the Russian invasion of Ukraine. There are therefore reasonable grounds to suspect that he is a person who is responsible for, engages in, provides support for, or promotes any policy or action which destabilises Ukraine or undermines or threatens the territorial integrity, sovereignty or independence of Ukraine.' 'Consolidated List of Financial Sanctions Targets in the UK' (last updated: 28/05/2025) <https://www.gov.uk/government/publications/financial-sanctions-ukraine-sovereignty-and-territorial-integrity> accessed 9 June 2025.