LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW

VOLUME 10 SUMMER 2023 ISSUE 3

JUSTICE TODAY, PEACE TOMORROW: REINVENTING THE CRIME OF AGGRESSION IN THE AGE OF PUTIN

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"No charges can be filed in the destruction of souls, the loss of childhood, and the breaking of dreams."

-Julie Mertus

War. One word can conjure up so much: suffering, instability, chaos, destruction, and death. It is no wonder then that many countries have condemned Russia's invasion of Ukraine. Though many governments have given aid to Ukraine and sanctioned Russia, much of the world remains paralyzed, recognizing the danger of Russia's lawless actions but unable to do anything about it. Now, as talk has turned to war crimes tribunals, it is vital that we remember a critical feature of international criminal law: the crime of aggression.

The crime of aggression, also known as crimes against peace, is the prohibition of aggressive warfare. Prosecuted after World War II at both Nuremberg and Tokyo, the crime of aggression has entered a stage of disuse, with many advocating for Vladimir Putin and others to be tried for war crimes and crimes against humanity, while the crime of aggression has

remained, in many cases, conspicuously excluded. This is compounded by the International Criminal Court's ("ICC") inability to prosecute the crime of aggression and, in this instance, the absence of a clear definition of it.

Despite these hurdles, it is critical that to reestablish international peace, security, and justice, we breathe new life into the crime of aggression. To do this, the United Nations General Assembly, not the Security Council, must create ad hoc tribunals to investigate and try instances of alleged criminal conduct and adopt a definition of the crime of aggression more in line with the Shape and Influence standard adopted at Nuremberg. These measures will aid in peacebuilding and ensure perpetrators of this war are brought to justice.

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INTRODUCTION

On the night of February 23, 2022, the skies over Ukraine were quiet. For Zakhida Adylova, who lives in Kyiv with her mother and daughter, the first sign of trouble was at 6:20 a.m., when she awoke to her daughter screaming.[1] Zakhida checked her phone to see dozens of missed calls and texts warning her that Russian troops had crossed the border and Russian rockets were hurtling toward targets across the country.[2] A friend urgently texted her to go to a bomb shelter.[3] Zakhida and her family panicked.[4] Her daughter packed her toys while Zakhida remembered that their mosque had an air raid shelter.[5] By 7:00 a.m., they, along with so many of their neighbors, had poured into the streets.[6] Some were fleeing the country, while others were only looking for shelter.[7] The mosque had no bomb shelter, so Zakhida and her family returned home to construct

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[1] *Zakhida Adylova: A Mother's Diary from Kyiv Shares an Eyewitness Account of Life as Putin's Invasion Unfolds*, MILWAUKEE INDEPENDENT (Mar. 1, 2022), https://www.milwaukeeindependent.com/syndicated/zakhida-adylova-mothers-diary-kyiv-shares-eyewitness-account-life-putins-invasion-unfolds/.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

a makeshift bomb shelter in their apartment.[8] As she worked, she waited for updates from friends scattered around Ukraine.[9] While sleeping with her mother and daughter in the makeshift bomb shelter, Zakhida was suddenly awoken by the sound of yet another bombing near Kyiv.[10] Russia had invaded. War had begun.

The international outcry was swift. The United States, its allies, and others condemned the war and promised sanctions to punish Russia.[11] Neighboring countries declared states of emergency and opened their borders to immigrants while urging a collective response to defend potential incursions into other countries.[12] Russian President Vladimir Putin justified his attack by arguing that Ukraine was historically a part of Russia, and he was simply taking it back.[13] As Putin's war dragged on, calls grew for him and other leaders to face prosecution for their actions.[14] Notably, these calls included plans for him to be prosecuted for crimes of aggression– the crime of starting the war in the first place.[15]

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Nathan Hodge et al., *Russia Launches Military Attack on Ukraine with Reports of Explosions and Troops Crossing Border*, CNN (Feb. 24, 2022, 4:41 AM), https://www.cnn.com/2022/02/23/europe/russia-ukraine-putin-military-operation-donbas-intl-hnk/index.html.
[12] *Ukraine Conflict: Russian Forces Attack from Three Sides*, BBC (Feb. 24, 2022), https://www.bbc.com/news/world-europe-60503037.
[13] *See* Andrew Roth, *Putin Compares Himself to Peter the Great in Quest to Take Back Russian Lands*, THE GUARDIAN (June 10, 2022, 5:09 PM), https://www.theguardian.com/world/2022/jun/10/putin-compares-himself-to-peter-the-great-in-quest-to-take-back-russian-lands.
[14] Ewelina U. Ochab, *Is There Progress for Addressing Putin's Crime of Aggression?*, FORBES (May 23, 2022, 2:40 PM), https://www.forbes.com/sites/ewelinaochab/2022/05/23/is-there-progress-in-addressing-putins-crime-of-aggression/?sh=19ab3bb6c41f.
[15] *See id.*

Since the war began more than a year ago,[16] the West has largely stood by Ukraine, providing it with arms and sanctioning Russia.[17] Calls for Putin and others to stand trial for war crimes have grown more serious, with the ICC even issuing an arrest warrant for Putin, though not for the crime of aggression.[18] As planning for a potential trial has begun, the global community should not ignore the crime of aggression due to its importance in protecting international order and its utility in bringing the architects of the invasion to justice.

The crime of aggression, the so-called "supreme international crime," was first prosecuted after World War II.[19] Prominent German and Japanese political and military leaders were arrested, tried, and punished for illegally planning and executing a war as an instrument of national policy in violation

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[16] This does not include Russian military action in eastern Ukraine, nor the annexation of Crimea in 2014, both of which would likely count as crimes of aggression. *See, e.g.,* Holly Ellyatt, *Russia Took Crimea from Ukraine in 2014. Now, Kyiv is Fighting Back*, CNBC (Aug. 18, 2022, 9:25 AM), https://www.cnbc.com/2022/08/18/russia-took-crimea-from-ukraine-in-2014-now-kyiv-is-fighting-back.html.

[17] *See* Jonathan Masters & Will Merrow, *How Much Aid Has the U.S. Sent Ukraine? Here Are Six Charts.*, COUNCIL ON FOREIGN RELATIONS (Feb. 22, 2023, 9:00 AM), https://www.cfr.org/article/how-much-aid-has-us-sent-ukraine-here-are-six-charts (noting that the United States alone has given $46.6 billion to Ukraine while many others have contributed as well); Sumathi Bala, *France Says Sanctions Against Russia are 'Very Efficient' as More are Being Considered*, CNBC (Feb. 27, 2023, 2:50 AM), https://www.cnbc.com/2023/02/27/france-says-sanctions-against-russia-are-very-efficient-.html (noting international sanctions imposed by several countries, including the United States); *but see* Noah Berman & Anshu Siripurapu, *One Year of War in Ukraine: Are Sanctions Against Russia Making a Difference?*, COUNCIL ON FOREIGN RELATIONS (Feb. 21, 2023, 2:45 PM), https://www.cfr.org/in-brief/one-year-war-ukraine-are-sanctions-against-russia-making-difference (noting that some countries, particularly China and India, have been "reluctant to embrace sanctions").

[18] Mike Corder & Raf Casert, *International Court Issues War Crimes Warrant for Putin*, AP (Mar. 17, 2023), https://apnews.com/article/icc-putin-war-crimes-ukraine-9857eb68d827340394960eccf0589253.

[19] GERHARD KEMP, INDIVIDUAL CRIMINAL LIABILITY FOR THE INTERNATIONAL CRIME OF AGGRESSION 81 (2010).

of the Kellogg-Briand Pact of 1928.[20] At the famous International Military Tribunal (Nuremberg Trial) and the subsequent International Military Tribunal for the Far East (Tokyo Trial), the world witnessed something momentous. For the first time, humanity came together to prosecute war crimes, crimes against humanity, and crimes against peace.[21] For the first time, humanity declared that it would no longer tolerate such atrocities.[22] For the first time, humanity had outlawed – no, *criminalized* – war.[23]

Despite that early promise, hopes born from the ashes of a hot war soon gave way to the *realpolitik* of a cold war.[24] Political dysfunction at the United Nations stalled talks of a permanent international tribunal to try war criminals.[25] When that dream was finally realized and the ICC was established, parties could not agree on how to proceed with crimes of aggression.[26] As a compromise, the ICC recognized crimes of aggression but initially had no power to prosecute them.[27] Despite this progress toward an international court, several countries, including Russia, China, and the United States, have not joined the ICC, further limiting its jurisdiction.[28] Years later, state parties agreed to an amendment that allows the ICC to

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[20] *Id.* at 82–84.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *See* M. Cherif Bassiouni, *The Status of Aggression in International Law from Versailles to Kampala – and What the Future Might Hold*, *in* 7 SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE 51–52 (Leila Nadya Sadat ed., 2018).
[25] KEMP, *supra* note 19, at 103–04.
[26] YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 138–140 (6th ed. 2017).
[27] *Id.*
[28] Claire Klobucista, *The Role of the International Criminal Court*, COUNCIL ON FOREIGN RELATIONS (Mar. 28, 2022, 2:00 PM), https://www.cfr.org/backgrounder/role-international-criminal-court#:~:text=Several%20dozen%20others%20signed%20the,Syria%2C%20and%20the%20United%20States.&text=Note%3A%20Burundi%20and%20the%20Philippines%20joined%20the%20ICC%20but%20later%20withdrew.

prosecute crimes of aggression, but only in certain, limited circumstances.[29]

After nearly a century of work, no one has been charged with the crime of aggression since the postwar tribunals at Nuremberg and Tokyo, despite near-universal agreement that aggressive war is illegal.[30] Several barriers still exist to bringing charges of aggression, including the lack of an identifiable organization to investigate and prosecute crimes of aggression,[31] conflicting and unclear definitions over what constitutes a crime of aggression and who can commit it,[32] and an apparent preference to prosecute war crimes and crimes against humanity instead of, rather than in addition to, crimes of aggression.[33] Russia's invasion of Ukraine thus presents an opportunity for the global community to renew its commitment to upholding this fundamental pillar of international law and to break down barriers to its enforcement.

This leaves two questions unresolved: Who can commit crimes of aggression, and how should we hold them accountable? This comment argues that the crime of aggression can and should be prosecuted by ad hoc commissions created by the United Nations General Assembly, which would be better forums than the ICC for seeking justice for victimized communities, developing international law, and deterring present and future violations of international law. Further, this comment argues that the "shape and influence" test for analyzing a defendant's criminal liability for the crime of aggression should be used instead of the ICC's recently adopted direct-control test. Part I of this comment discusses the historical evolution of crimes of aggression. Part II discusses how various ad hoc tribunals can prosecute individuals under existing international law and precedent. Part II also compares competing definitions of the crime of aggression used

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[29] DINSTEIN, *supra* note 26, at 138–140.
[30] KEMP, *supra* note 19, at 104.
[31] Manuel J. Ventura, *The Illegal Use of Force as a Crime Against Humanity*, *in* SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE 386, 391–93 (2018).
[32] *See* DINSTEIN, *supra* note 26, at 149–56.
[33] *See* NOAH WEISBORD, THE CRIME OF AGGRESSION: THE QUEST FOR JUSTICE IN AN AGE OF DRONES, CYBERATTACKS, INSURGENTS, AND AUTOCRATS 81 (2019).

historically and contemporaneously while discussing why the crime of aggression is still relevant in the twenty-first century. This comment argues that a renewed interest in enforcing the prohibition of wars of aggression is both possible and necessary for the maintenance of global peace and security.

I. WAR, HISTORY, AND LAW

Finding the best way to the future often involves looking to the past. For as long as humanity has developed legal codes and systems, it has tried to use those systems to stop unnecessary war.[34] Though these efforts have not always been successful, they show how societies have tried to outlaw war in the past and inform our efforts to do so today.

A. EARLY ATTEMPTS TO STOP WAR

Our story begins 4,000 years ago, along the banks of the Tigris and Euphrates rivers, as Mesopotamian leaders tried to establish when war was acceptable and when it was not.[35] Hammurabi, in the epilogue of his empire-wide legal code, justified his various invasions as pacification.[36] He, like Cyrus the Great of Persia, insisted that his conquests were simply a means to end the constant war and tyranny that were plaguing the people.[37] Regardless of whether Hammurabi and Cyrus were telling the truth, these sources illuminate a key principle about the legality of war: Sometimes it is allowed, and sometimes it is not.[38] Rather than defend their sovereign right as kings to wage war as they wished, they took pains to justify their role as humanitarian, not aggressive.[39]

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[34] *See* Larry May, *The Just War in Ancient Legal Thought*, *in* 103 SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE 103 (Leila Nadya Sadat ed., 2018).
[35] *See id.* at 104.
[36] *See id.* at 104–05.
[37] *Id.*
[38] *See id.* at 105–06.
[39] *See id.*

The imperative to justify war is seen elsewhere as well. In pre-Republic Rome, a specialized group of priests reviewed causes for war and determined whether there was good cause to attack.[40] If these priests felt that the war was not justified, the state could not act.[41] Early Christian theologians and legal thinkers, St. Augustine of Hippo and St. Thomas Aquinas, similarly argued that war was allowed only if it was a just war that met certain criteria.[42] Under just war theory, four elements must be met before a war is justified. First, the war must be for a just cause. Second, it must be declared by a "lawful authority." Third, the force used must be proportionate to the aims of the war. Finally, it must be the only recourse.[43] Notably, there had to be an objectively just reason to go to war; states could not go to war simply to pursue purely political aims.[44]

Early international law scholars also emphasized that states did not have an unlimited right to wage war, and that every war had to be just.[45] While these thinkers were influenced by their biases and politics, it is notable that, throughout human history, there has been a presumption that states do not have an unlimited right to make war; rather, war must be *justified*. As scholars continued to debate theories of just war, little of their theories were put into practice. It would take an unimaginably bloody and technologically advanced war, World War I, before humanity took the next step toward criminalizing war.

After World War I, the victorious Allies wanted someone to be punished for the war.[46] The Treaty of Versailles explicitly allowed for Kaiser Wilhelm II to stand trial for

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[40] *See* DINSTEIN, *supra* note 26, at 67–68.
[41] *Id.* These specialized priests, the *fetiales*, judged whether there were "substantive" grounds for war such as a treaty violation, and, without their approval, leaders were prohibited from going to war. *Id.*
[42] *Id.* at 68.
[43] John F. Coverdale, *An Introduction to the Just War Tradition*, 16 PACE INT'L L. REV. 221, 229 (2004).
[44] DINSTEIN, *supra* note 26, at 68.
[45] *Id.* at 69–70.
[46] William A. Schabas, *Origins of the Criminalization of Aggression: How Crimes Against Peace Became the "Supreme International Crime," in* 18 THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 21 (Mauro Politi & Giuseppe Nesi eds., 2004).

starting the war, but he escaped to the Netherlands before a trial could take place.[47] In the interwar years, countries made various non-aggression pacts to ensure peace, but none were more ambitious than the General Treaty for Renunciation of War as an Instrument of National Policy, commonly known as the Kellogg-Briand Pact.[48] For the first time, the global community "condemn[ed] recourse to war for the solution of international controversies, and renounce[d] it as an instrument of national policy."[49] Though flawed in scope and force, a record 63 countries signed it and agreed to renounce aggressive war.[50] At this moment, the world finally moved from simply theoretical limits on states' war powers to practical ones.[51] Almost 4,000 years of debate, discussion, and deliberation had finally culminated in a declaration that aggressive war would no longer be tolerated.

B. JUDGMENT AT NUREMBERG AND TOKYO

Despite its optimism, the Kellogg-Briand Pact failed. For the second time in the twentieth century, humanity was confronted with a world war. As the Allies grew closer to victory during World War II, they began to discuss how to deal with enemy leaders after the war.[52] The United Nations War Crimes Commission[53] met from 1943 through 1944 and debated

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[47] *Id.*
[48] *See* DINSTEIN, *supra* note 26, at 81, 87.
[49] General Treaty for Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.
[50] *See* DINSTEIN, *supra* note 26, at 87. Unlike the ICC, the Kellogg-Briand Pact counted world powers such as the United States, the Soviet Union, Germany, the United Kingdom, and France among its signatories. *See* Julie M. Bunck & Michael R. Fowler, *The Kellogg-Briand Pact: A Reappraisal*, 27 TUL. INT'L & COMP. L. REV. 229, 258 (2019).
[51] DINSTEIN, *supra* note 26, at 87–89.
[52] Schabas, *supra* note 46, at 22.
[53] The United Nations War Crimes Commission was created to investigate Axis war crimes and advise Allied governments on how such war crimes could be prosecuted. U.N. WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 2–4 (1948).

whether to charge Axis leaders and what charges might be appropriate.[54] The Commission differed sharply on whether aggression had been criminalized and issued a majority and minority report on the subject.[55] To break the deadlock, the United States, United Kingdom, Soviet Union, and France debated at the 1945 London Conference whether to charge Axis leaders with crimes of aggression.[56] The British government favored summary executions for high-ranking Axis officials, but President Roosevelt insisted on criminal trials.[57] The American representative at the Conference, Supreme Court Justice Robert H. Jackson, drafted a proposal arguing that crimes of aggression had been explicitly outlawed by the Kellogg-Briand Pact.[58] This proposal formed the basis for the subsequent trials of Axis leaders in both Germany and Japan.[59]

After the war ended, Justice Jackson and representatives from the United Kingdom, France, and the Soviet Union got to work planning the first international war crimes tribunal: the Nuremberg Trial.[60] At the first and highest-profile tribunal, Allied prosecutors charged 24 Nazi leaders with three different substantive charges: crimes of aggression, conventional war crimes, and crimes against humanity.[61] The tribunal defined crimes of aggression as "planning, preparation, initiation, or

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Though the U.N. Charter was not signed until after World War II, the Declaration by United Nations in 1942 formed the Allied Powers and eventually was the basis for the United Nations we know today. It was this document that gave the Allies their formal name used by the War Crimes Commission. *See* Declaration by United Nations, January 1, 1942, E.A.S. 236 (1942); *see also* U.N. Charter art. 3.

[54] Schabas, *supra* note 46, at 22.

[55] *Id.* at 24–25.

[56] William A. Schabas, *Nuremberg and Aggressive War*, *in* 58 SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE 75–77 (Leila Nadya Sadat ed., 2018).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 59–60 (1993).

[61] Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1111 (2009).

waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances," or participating in a conspiracy to commit war crimes or crimes against humanity.[62] A panel of judges from each of the four Allied nations judged the defendants, and the trial uncovered dramatic human rights abuses.[63] The defendants charged with crimes of aggression argued that they could not be convicted because such crimes did not exist when the war started; thus, *nullum crimen sine lege* (no crime without a law) applied.[64] The court disagreed, holding that the Kellogg-Briand Pact, which Germany had signed, sufficiently gave notice to the defendants that war was illegal.[65] Therefore, since war was illegal, the defendants could be charged criminally for the war's casualties.[66]

In all, twelve defendants were convicted of crimes of aggression.[67] Even though the court called the crime of aggression the "supreme" crime, no defendant who was convicted solely of crimes of aggression was sentenced to death.[68] At 1:00 a.m. on October 16, 1946, military police ushered the press into the gymnasium of the prison where the defendants were held.[69] One by one, ten men were led up the scaffold and hanged.[70] A new international order, where crimes against peace and humanity would not be tolerated, had begun.

The subsequent trial of Japanese war criminals applied the Nuremberg Principles but proved to be far more

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[62] Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S 279, 288.
[63] *See* Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 189 (1997).
[64] Matthew Lippman, *The History, Development, and Decline of Crimes Against Peace*, 36 GEO. WASH. INT'L L. REV. 957, 999 (2004).
[65] *See* DINSTEIN, *supra* note 26, at 134.
[66] KEMP, *supra* note 19, at 87.
[67] FRANCINE HIRSCH, SOVIET JUDGMENT AT NUREMBERG 387 (2020); WEISBORD, *supra* note 33, at 1.
[68] Schabas, *supra* note 46, at 30.
[69] HIRSCH, *supra* note 67, at 390.
[70] *Id.* at 390–99. Though eleven defendants were given the death penalty, Hermann Goering ingested cyanide shortly before the executions took place. *Id.*

controversial.[71] Twenty-five defendants, including former Prime Minister Tojo Hideki, faced judgment, with seven receiving death sentences.[72] Despite starting with a similar charter, the International Military Tribunal for the Far East's ("IMTFE") effectiveness was hindered by several serious missteps, including General Douglas MacArthur's lack of enthusiasm for a tribunal,[73] the lack of charges against Emperor Hirohito,[74] the majority's uncritical acceptance of the prosecution's historically flawed version of events,[75] and various procedural flaws.[76] The IMTFE judges also fractured, writing one majority opinion and several concurring and dissenting opinions.[77] Again, the tribunal declared crimes against peace the supreme crime but chose not to punish them as harshly as crimes against humanity.[78] While defendants at Tokyo also challenged crimes of aggression, their appeals fell on deaf ears, even among some of the dissenting judges.[79] While the IMTFE continues to have a mixed legacy, at its conclusion, one thing was unmistakably clear: War as an instrument of national policy was illegal, and leaders who engaged in such aggressive actions were criminally liable.

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[71] Robert Cryer, *The Tokyo International Military Tribunal and Crimes Against Peace (Aggression)*, *in* 80 SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE 88 (Leila Nadya Sadat ed., 2018); *see also* Mikaela Ediger, *Prosecuting the Crime of Aggression at the International Criminal Court: Lessons from the Tokyo Tribunal*, 15 N.Y.U.J. INT'L L. & POL. 179, 209 (2018).

[72] *Id.* at 186.

[73] HERBERT P. BIX, HIROHITO AND THE MAKING OF MODERN JAPAN 582 (2016).

[74] YUMA TOTANI, THE TOKYO WAR CRIMES TRIAL 250 (2008); *see also* TIM MAGA, JUDGMENT AT TOKYO 35–41 (2001).

[75] Cryer, *supra* note 71.

[76] *See* RICHARD H. MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL 32 (1971).

[77] ARNOLD C. BRACKMAN, THE OTHER NUREMBERG 387 (1987).

[78] B.V.A. RÖLING & ANTONIO CASSESE, THE TOKYO TRIAL AND BEYOND 68 (1994).

[79] *Id.* at 69. Judge Röling argued it would have been unjust to fail to convict defendants when they knew their actions were illegal and would result in the deaths of millions.

C. CODIFYING INTERNATIONAL CRIMES: THE ROAD TO KAMPALA

As the dust settled from the post-war tribunals, the development of international law struggled to overcome political realities in the Cold War era.[80] When North Korea committed an act of aggression by invading South Korea in 1950, the Security Council was only able to authorize action in defense of South Korea because the Soviet Union at that time was boycotting the Security Council.[81] Recognizing the probability of Security Council paralysis in the future, the General Assembly adopted the Uniting for Peace Resolution,[82] allowing the General Assembly to intervene in matters of international security if the Security Council is deadlocked.[83] Therefore, the United Nations still can counter acts of aggression, even if the Security Council cannot.[84]

This important step clarified *how* the international community could counter aggression, but it did not clarify *when* something was truly aggressive. In 1947, the General Assembly adopted Resolution 3314 as a consensus definition of the crime of aggression.[85] Though it was successful in defining what constituted a state action of aggression, it poorly defined individual liability for aggression.[86] In 1951, the International Law Commission ("ILC"), a UN advisory body, circulated a draft "Code of Offences against the Peace and Security of Mankind," which attempted to define the crime of aggression.[87] However, this definition failed to gain international consensus, and some wondered if the crime should be defined, or if a

[80] *See* Bassiouni, *supra* note 24, at 51–52.
[81] KEMP, *supra* note 19, at 21. The Soviet Union would not have voted to allow military intervention against another communist state. *Id.*
[82] G.A. Res. 377 (V), at 10 (Nov. 3, 1950).
[83] KEMP, *supra* note 19, at 21–22.
[84] *Id.*
[85] *Id.* at 117.
[86] *Id.* at 119–120.
[87] *Id.* at 108–110.

definition would merely enable perpetrators to get around the formal definition.[88]

The ILC released two new drafts of the crime of aggression in 1991 and 1996, though these drafts also failed to gain an international consensus.[89] Furthermore, the lack of an international court created questions about how to enforce international criminal law.[90] These questions culminated in 1998 when the Rome Statute was adopted.[91] The Rome Statute established the ICC and codified crimes the ICC could prosecute.[92] However, the ICC did not originally have jurisdiction over the crime of aggression because the Rome Statute failed to define it.[93] This definition instead came in the form of the Kampala Amendments, adopted in 2010.[94] Unfortunately, this latest attempt to codify the crime of aggression has proved controversial because it narrows the scope of individual liability, and it is difficult to exercise jurisdiction over states that are not parties to the Rome Statute or that have opted out of the crime of aggression.[95] Under current law, even if the ICC prosecuted crimes of aggression, many individuals who planned and participated in the war would be immune from legal responsibility, and only a small handful of individuals could be made to stand trial.

This leaves us with disorganization and disputes regarding the crime of aggression. While the international community has accepted that war as an instrument of national policy is illegal, it has not adopted a consensus definition of the

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[88] *Id.*
[89] *Id.* at 111–16.
[90] *See* David M. Crane, *International Military Law in an Age of Extremes*, *in* 154 SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE 162 (Leila Nadya Sadat ed., 2018).
[91] *See id.*
[92] Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998), 2187 U.N.T.S. 90 (1998).
[93] Saeid Mirzaee Yengejeh, *Reflections on the Role of the Security Council in Determining an Act of Aggression*, *in* 125 THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 125 (Mauro Politi & Giuseppe Nesi eds., 2004).
[94] DINSTEIN, *supra* note 26, at 139–140.
[95] Ventura, *supra* note 31, at 391–92.

crime of aggression or how it can be prosecuted.[96] Given Russia's invasion of Ukraine, it is time to revisit the crime of aggression and create a functional process for investigating, prosecuting, and punishing violators of international criminal law.

II. CONFRONTING TRAGEDY WITH ACTION

Any discussion about the crime of aggression must answer two questions: How should the crime be prosecuted, and who should be prosecuted? These discussions are distinct, though deeply intertwined, so this comment addresses each issue separately. Rather than one global court, the General Assembly should create ad hoc tribunals to try these cases and return to Nuremberg's definition of who can be charged with the crime of aggression.

A. HOW TO PROSECUTE CRIMES OF AGGRESSION WITHOUT AN INTERNATIONAL COURT

Since World War II, the international community has not prosecuted crimes of aggression, preferring instead to focus on other international crimes such as genocide and crimes against humanity.[97] Russia's war against Ukraine, however, is precisely the type of crisis that the postwar international order, based on the Nuremberg Principles, was supposed to prevent. Considering this failure, it is time to reinvent the crime of aggression and face the military and political realities of the twenty-first century.[98] We cannot rely on the ICC to keep the

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[96] KEMP, *supra* note 19, at 104.

[97] *Id.*

[98] Enforcing other international crimes, such as genocide, crimes against humanity, and war crimes also is vital to global peace and justice. These crimes undoubtedly could, and should, be tried under the kinds of tribunals this comment proposes. However, since the crime of aggression has gone unprosecuted since World War II, this comment focuses on that crime; other international crimes are largely beyond the scope of this comment.

peace and provide a meaningful deterrent or avenue for the punishment of crimes of aggression. Its lack of jurisdiction over acts of aggression committed by states that are not parties to the Rome Statute or who have opted out of crimes of aggression creates a significant weakness, compounded by the probability of a deadlocked Security Council in cases involving the crime of aggression.[99] Furthermore, the ICC's definition of the crime of aggression narrows the Nuremberg precedent significantly, allowing only for the prosecution of those at the very top of the command structure. Finally, the ICC is ill-equipped to be a successful transitional justice institution due to its structure and fixed location.

Rather than relying on the ICC to keep the peace, the General Assembly must play an active role in prosecuting the crime of aggression. When the Security Council is deadlocked, the General Assembly can use the Uniting for Peace Resolution to authorize a commission to investigate and prosecute international crimes.[100] A key feature of these ad hoc tribunals will be flexibility. They will be able to adapt to the cultural and factual context of a given situation to ensure that the form of transitional justice (e.g., a trial, a truth and reconciliation commission, or anything in between) most helpful for the given context is used. Their location near the site of conflict also will ensure that victims are given a sense of ownership over the proceedings, making them more likely to accept the outcome and help heal the community. Finally, these tribunals will be able to adopt the Nuremberg standard for the crime of aggression, balancing flexibility and predictability in what is necessarily a context-dependent and fact-driven analysis for determining individual criminal liability.

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[99] Shane Darcy, *Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly*, JUST SECURITY (Mar. 16, 2022), https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/. While Darcy recognizes the need for the General Assembly to act, he still envisions the General Assembly referring prosecutions to the ICC, rather than individual tribunals. *Id.*

[100] Yengejeh, *supra* note 93, at 127.

1. THE ICC'S LACK OF JURISDICTION

Despite its international character, the ICC's jurisdiction is fairly limited.[101] Specifically, the Kampala Amendments create an exception that allows state parties to "opt out" of enforcement of crimes of aggression.[102] Furthermore, the court has no jurisdiction over states that are not parties to the statute, such as Russia, China, and the United States.[103] There is one carveout to these general rules – the Security Council itself can refer an issue to the ICC.[104] While this may purport to solve the jurisdictional problems, it is highly improbable that the Security Council will become more effective at taking decisive action in the future.[105] This predicament leaves the ICC unable to exercise jurisdiction against several powerful countries without a Security Council referral, which is further complicated by the fact that the Council's five most powerful members are permanent members who can veto Security Council actions. Even many states that are not permanent members, such as North Korea, have close ties to permanent members, further shielding these states from enforcement.[106]

The Kampala Amendments' explicit "opt-out" provision makes the crime of aggression unique among other international crimes covered under the Rome Statute.[107] The ICC's relatively weak enforcement mechanisms are

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[101] WEISBORD, *supra* note 33, at 108.
[102] Ventura, *supra* note 31, at 391.
[103] *Id.* at 392–93; Joseph M. Isanga, *The International Criminal Court Ten Years Later: Appraisal and Prospects*, 21 CARDOZO INT'L COMP. POL'Y & ETHICS L. 235, 301 (2013).
[104] Ventura, *supra* note 31, at 393.
[105] *See Members Warn That Persistent Deadlock Threatens Security Council's, 'Remaining Credibility', in Meeting on United States Air Strike Against Syria*, UNITED NATIONS MEETINGS COVERAGE AND PRESS RELEASES (Apr. 7, 2017), https://press.un.org/en/2017/sc12783.doc.htm.
[106] Michelle Nichols, *U.S. Accuses China, Russia of Enabling North Korea's Kim Jong Un*, REUTERS (Oct. 5, 2022, 4:49 PM), https://www.reuters.com/world/china/us-accuses-china-russia-protecting-north-korea-un-2022-10-05/.
[107] *See* Ventura, *supra* note 31, at 392–93.

compounded by the opt-out provision that itself conflicts with an original section of the Rome Statute.[108] Furthermore, this raises serious doubts as to whether the ICC, as represented by its state parties, is serious about prosecuting the crime of aggression. After all, if the amendment could not pass without the right to opt-out, are the state parties committed to criminalizing aggressive war in practice?

Scholars have speculated that the General Assembly could use the Uniting for Peace Resolution to refer cases to the ICC.[109] However, there are serious flaws to this approach. The ILC studied whether, under the Rome Statute, the General Assembly could refer cases of aggression to the ICC and it chose not to decide the issue, citing "different views."[110] Some states advocated for language that would explicitly allow the General Assembly to refer crimes of aggression to the ICC, but the United States opposed it, arguing that the Security Council is better equipped to deal with such crises than the General Assembly.[111] That language was ultimately excluded, seeming to confirm that the Rome Statute does not allow for referrals by the General Assembly.[112] One possible solution is simply to amend the Rome Statute to allow these referrals,[113] but under a hypothetical criminal trial, that would almost certainly lead to howls of ex post facto law enforcement from defendants.

The reality is that Russia, and other states, did not join the ICC for a reason. To try them under it would smack of victor's justice, which would only transform Russian leaders into martyrs and, in turn, stunt the peacebuilding process in Russia.[114] Additionally, ad hoc tribunals would be better vehicles for the administration of international justice and peacebuilding than the ICC.[115] Rather than try to work an unworkable situation that could question the legitimacy of the

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[108] *See id.* at 392.
[109] Darcy, *supra* note 99.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *See infra* Section II.A.3.
[115] *Id.*

entire process, the General Assembly should create ad hoc tribunals and bypass the ICC altogether.

When considering any war crimes tribunal, one fact looms large: Russia is unlikely to allow its leaders to be arrested.[116] In fact, the world largely shrugged off the ICC's arrest warrant for Putin as symbolic,[117] particularly in light of the fact that the ICC cannot try him for the crime of aggression.[118] So why should we care about a framework to try such defendants if it is unlikely that they will ever stand trial? First, governments change. Perhaps someday there will be a Russian government that will allow Russian defendants to be tried. It was thought to be unlikely that other high-profile defendants, such as Slobodan Milosevic and Radovan Karadzic, would ever stand trial, but they eventually did, at the International Criminal Tribunal for the former Yugoslavia ("ICTY").[119] Second, even if such a tribunal operated without defendants, it still could complete the vital tasks of documenting crimes, hearing evidence from witnesses, and offering advisory opinions that could limit bloodshed in an active war zone.[120]

Ultimately, the ICC's jurisdiction is hopelessly muddled because it is fundamentally premised on two things. First, that states will allow themselves to be prosecuted for international crimes. Second, the Security Council can ensure that international crimes are prosecuted even if a state does not consent. Unfortunately, many states act out of self-interest and

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[116] *See* Tara Law, *The ICC Has Issued a Warrant for Vladimir Putin. Will He Actually Be Arrested?*, TIME (Mar. 17, 2023, 5:14 PM), https://time.com/6264280/vladimir-putin-icc-warrant-arrest/.
[117] *See* Laura King, *International Criminal Court Issues Arrest Warrant for Putin on Alleged Ukraine War Crimes*, L.A. TIMES (Mar. 17, 2023, 5:33 PM), https://www.latimes.com/world-nation/story/2023-03-17/icc-hague-arrest-warrant-putin-ukraine-war-crimes.
[118] Gordon Brown, *We Owe it to the People of Ukraine to Bring Vladimir Putin to Trial for War Crimes*, THE GUARDIAN (Feb. 24, 2023, 7:00 AM), https://www.theguardian.com/world/commentisfree/2023/feb/24/people-ukraine-vladimir-putin-trial-war-crimes.
[119] Michael Scharf & Laura Graham, *Bridging the Divide Between the ICC and the UN Security* Council, 52 GEO. J. INT'L L. 977, 982 (2021).
[120] *Infra* Section II.A.3.c.

will not allow themselves to be prosecuted while the Security Council has failed to take decisive action. These fundamental weaknesses cannot be fixed from within the ICC; rather, they must be fixed from without.

We are left with the inevitable conclusion that the ICC simply cannot be tasked with enforcing international crimes.[121] While the goals behind the ICC are laudable, an international court cannot function without global buy-in. In other words, it cannot be an international court unless it is truly an *international* court. With some states in and some states out, its patchwork enforcement mechanisms create an incentive not to work toward peace at all. Why would a state participate in creating fair and equitable procedures for prosecuting international crimes if it has no intention of submitting to the court?

2. AD HOC COMMISSIONS CREATED BY THE GENERAL ASSEMBLY

Given the ICC's weaknesses, the global community should focus on creating a new model for enforcing international crimes on a truly universal basis. By creating ad hoc tribunals, the United Nations can investigate and prosecute serious international crimes on a global scale. Unfortunately, the Security Council at this point seems incapable of taking decisive action. In some ways, the existence of the veto insulates these countries from accountability.[122] Therefore, when the Security Council refuses to act, the General Assembly should act instead by creating these ad hoc tribunals itself to ensure global adherence to the rule of law.

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[121] *See, e.g.*, Hans van der Burchard, *Germany's Baerbock Proposes Special Tribunal to Prosecute Russian Leadership*, POLITICO (Jan. 16, 2023, 4:58 PM), https://www.politico.eu/article/germany-annalena-baerbock-russia-ukraine-war-proposes-special-tribunal-to-prosecute-russian-leadership/.

[122] *See UN: Veto Resolution is a Vital Step Towards Accountability*, AMNESTY INT'L (Apr. 26, 2022), https://www.amnesty.org/en/latest/news/2022/04/un-veto-resolution-is-a-vital-step-towards-accountability/.

A. USING THE UNITING FOR PEACE RESOLUTION TO BREAK SECURITY COUNCIL DEADLOCK

The Security Council has primary, but not *exclusive*, authority over "the maintenance of international peace and security."[123] Unfortunately, the Security Council is perhaps uniquely predisposed to deadlock because of the P5 members with veto powers.[124] Perhaps foreseeing potential deadlock, the UN Charter explicitly gives the General Assembly broad authority, including over matters of international security.[125] To define this authority and ensure that the UN would be able to respond to breaches of the peace, the General Assembly passed the Uniting for Peace resolution in 1950.[126]

The need for such a resolution was stark. When North Korea invaded South Korea, the only reason the Security Council was able to act is because the Soviet Union was boycotting the Security Council.[127] Had the Soviet Union been in attendance, the UN would not have been able to authorize the resultant coalition that defended South Korea.[128] Envisioning the need for decisive action when one permanent member was *not* boycotting, the resolution commands that the General Assembly "shall consider the matter" if "the Security Council . . . fails to exercise its primary responsibility."[129] The General Assembly has used the Uniting for Peace resolution several times, including during the Korean War.[130]

In addition to maintaining peace and security, the Security Council also plays a primary role in declaring acts of aggression.[131] Unfortunately, the Council has been almost totally unsuccessful in this endeavor. From its inception until

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[123] Yengejeh, *supra* note 93, at 127; U.N. Charter art. 12, ¶ 2.
[124] *See* UNITED NATIONS MEETINGS COVERAGE AND PRESS RELEASES, *supra* note 104.
[125] U.N. Charter art. 11, ¶¶ 1–2.
[126] G.A. Res. 377 (V), at 10 (Nov. 3, 1950).
[127] KEMP, *supra* note 19, at 21–22.
[128] *Id.*
[129] G.A. Res. 377 (V), at 10 (Nov. 3, 1950).
[130] Scharf & Graham, *supra* note 119, at 1019–20.
[131] U.N. Charter art. 39.

1990, the Council declared only a single act of aggression, the invasion of South Korea, and even then, only because one permanent member was boycotting.[132] Given the Security Council's dismal track record, it is imperative that the General Assembly step in and use the Uniting for Peace resolution to enforce crimes of aggression and other international crimes.

In cases of manifest violations of the UN Charter, such as Russia's invasion of Ukraine, the General Assembly must act if the UN, let alone international law, is to maintain any semblance of legitimacy. After all, it was this failure to take decisive action that doomed its predecessor, the League of Nations.[133] When the Security Council fails to act, the General Assembly should use the authority granted it under the UN Charter and the Uniting for Peace resolution to create tribunals and commissions to investigate and prosecute violations of international law. In fact, the General Assembly has proven able to stand up to Russia's aggression, passing multiple resolutions opposing the war.[134] While one could argue that the Security Council deserves deference, its legitimacy is lost when one of its own members engages, or allows an ally to engage, in a flagrant violation of international and humanitarian norms. How can it claim to act with the mandate of protecting global peace and security when states with veto power are themselves grievously violating international law and the UN Charter, or protecting those who are?

Allowing a Security Council deadlock to stand impedes the administration of international law and shakes the very foundation upon which that law and the entire postwar order depend. It allows any permanent member to recklessly endanger global security with virtual impunity and boils the lofty goals of international law down to a system where powerful nations enforce it on others. The preamble of the UN

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[132] Mohammed M. Gomaa, *The Definition of the Crime of Aggression and the ICC Jurisdiction Over That Crime," in* 55 THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 24–25 (Mauro Politi & Giuseppe Nesi eds., 2004).

[133] *See* Bassiouni, *supra* note 24, at 21.

[134] *See, e.g.*, G.A. Res. ES-11/1 (Mar. 2, 2022); G.A. Res. 11/L.7 (Feb. 23, 2023).

Charter acknowledges that world wars brought "untold sorrow" twice in the drafters' lifetimes and identifies peace as one of the fundamental aims of the UN and the postwar world.[135] If the General Assembly does not act to further these goals when the Security Council refuses to, then the postwar hope is truly dead, and we should acknowledge them for what they are: empty words.

B. THEORIES OF JURISDICTION

Any potential defendant at a proposed ad hoc tribunal would likely challenge the jurisdiction of the court, as did the defendants at Nuremberg and Tokyo.[136] Therefore, it is important to identify a few reasons why these tribunals would have jurisdiction over international crimes, particularly the crime of aggression. After all, if international law is to exist, there must be some international judiciary.

First, the prohibition of the use of force is *jus cogens,* or a peremptory norm in international law.[137] A peremptory norm is a fundamental principle, and it is universally recognized that it is illegal to use aggressive force.[138] Furthermore, both the ILC and the International Court of Justice ("ICJ") have recognized it as such.[139] Given its status as a peremptory norm, states and individuals are on notice of the type of conduct that is prohibited. Moreover, UN Resolution 3314 defines the crime of aggression, giving further weight to the notion that wars of aggression are criminal.[140]

In addition to international norms and resolutions widely recognizing the crime of aggression, judicial precedent supports this position as well. The international military tribunals at Nuremberg and Tokyo are heralded as creating a new international order where international crimes and,

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[135] U.N. Charter preamble.
[136] *See* PIERRE HAZAN, JUDGING WAR, JUDGING HISTORY: BEHIND TRUTH AND RECONCILIATION 50 (2010).
[137] KEMP, *supra* note 19, at 48–49.
[138] *Id.*
[139] DINSTEIN, *supra* note 26, at 110.
[140] G.A. Res. 3314 (XXIX) (Dec. 14, 1974).

critically, the individuals who commit them, would be prosecuted.[141] A key element of these trials was prosecuting the crime of aggression. These tribunals create a strong precedent for enforcing international law through ad hoc tribunals and provide case law that would give these tribunals guidance on how to apply the law to future defendants.

Third, the doctrine of *hostis humani generis* can provide additional justification for these types of prosecutions. Under the doctrine of *hostis humani generis*, which means "enemy of all mankind," any state can punish violations of fundamental human rights.[142] Historically, the doctrine was used to allow any country to punish pirates, but the doctrine has since been used to justify the postwar tribunals and was floated as a way to hold terrorists accountable post 9/11.[143] *Hostis humani generis* should not be used lightly. It should be used only when there is an overwhelming and fundamental need to protect the lives and rights of people and when the perpetrators present an existential threat to *all* mankind.[144] Perpetrators of international crimes do exactly that. By engaging in wholesale slaughter and wanton destruction, they forfeit their right to make jurisdictional challenges. By choosing to exist outside the realm of international law, [145] they have submitted to universal

[141] Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT'L L.J. 161, 217 (2008).
[142] *See* Bassiouni, *supra* note 24, at 24.
[143] *See id.*
[144] *See* Ziv Bohrer, *International Criminal Law's Millennium of Forgotten History*, 34 LAW & HIST. REV. 393, 395 (2016) (noting that universal jurisdiction under *hostis humani generis* applies to "core international crimes"); *but see* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation* 45 HARV. L. INT'L L.J. 183, 186 (2004) (arguing that universal jurisdiction to prosecute piracy did not lie in the "heinousness" of piracy).
[145] The postwar order is built on several fundamental principles. Among them is each state's right to self-determination and the need to settle disputes peacefully. By choosing to engage in aggressive war to accomplish its own policy objectives, a state, and its leaders, set aside those fundamental principles. In doing so, they do not simply break laws written in a statute book but instead choose to disregard that on which the postwar is built. Therefore, they exist entirely outside of international law.

judgment. Those who go to war for selfish aims and subject millions to the never-ending nightmare that follows become enemies of all mankind.

It is true that *hostis humani generis* is strong medicine, and a claim to such jurisdiction cannot be taken lightly. It still is worth considering for two reasons. First, the need to prosecute international crimes is so central to maintaining global peace that it warrants this grant of jurisdiction. Second, any potential for abuse by states as cover to accomplish their own political ends likely is not a practical concern. States bent on carrying out their own objectives, regardless of international law, will likely do so regardless of whether their lawyers tell them they can. They may come to use this doctrine as justification but would find a different way to justify their acts, just as Putin did.

Finally, legal thinkers across the centuries have acknowledged limits to war.[146] From Hammurabi to Cyrus and from St. Augustine to Grotius, humanity has always conceded that there are valid and invalid reasons for war.[147] This historic tradition further erodes any argument that states, inherent in their sovereignty, have an unlimited power to go to war.[148] Deciding against prosecuting international crimes in the name of state sovereignty would only embolden current and future aggressors, leading to more conflicts and a more dangerous world.

Ad hoc tribunals would be able to exercise jurisdiction over crimes of aggression and other international crimes and would overcome the inevitable jurisdictional challenges. Resolution 3314 and the postwar tribunals, coupled with the

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[146] *See supra* Section II.

[147] *Id.*

[148] *See* Winston P. Nagan & Aitza M. Haddad, *Sovereignty in Theory* and Practice, 13 SAN DIEGO INT'L L.J. 429, 455 (2012). Nazi Germany argued that state sovereignty allowed it to conduct war without legal repercussions. After World War II, the Nuremberg tribunal held that state sovereignty was not a defense to the crimes committed, effectively limiting the reach of state sovereignty. *Id. See also* Steven Lee, *A Puzzle of Sovereignty,* 27 CAL. W. INT'L L.J. 241, 243–44 (1997) (noting that state sovereignty has traditionally been conceived of as "absolute").

prohibition of aggression's status as a peremptory norm, provide an adequate legal basis for establishing jurisdiction. The practical need to deal with these types of criminals also is central to the maintenance of international peace and human rights. *Hostis humani generis*, along with the long-understood limits to legal warfare, provides justification for the use of these tribunals. It is important for these tribunals to stand on solid legal footing, and today, they can rely on the body of international law that has developed since Nuremberg and Tokyo. Therefore, any challenge to jurisdiction could and would be dismissed as a feeble attempt to escape responsibility for perhaps the greatest crimes one could commit.

3. TRANSITIONAL JUSTICE WEAKNESSES OF THE ICC

International tribunals serve to promote and preserve international order and foster and further peace.[149] For communities emerging from a period of mass violence and distrust in institutions and each other, tribunals should be constructed not only to bring lawbreakers to justice, but also with an eye towards rebuilding the society that has been broken.[150] Since World War II, transitional justice has largely been the framework used to consider tribunals or commissions in the aftermath of massive suffering.[151] Transitional justice has two main goals: finding justice for the victims and aiding the transition of the society toward a stable government.[152] A largely successful example of this approach is the Nuremberg Trials, which punished war criminals and created a historical account for current and future generations that resulted in a democratic West Germany with an official policy of repentance.[153] The postwar trials led the way in transitional

[149] *See* HAZAN, *supra* note 136, at 8–9.
[150] Dustin Sharp, *Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice through the Lens of Critique*, 14 CHI. J. INT'L L. 165, 168 (2013).
[151] *See id*. at 165 (noting that transitional justice is increasingly accepted as an important element of post-conflict peacebuilding).
[152] HAZAN, *supra* note 136, at 30.
[153] *Id.* at 16, 19.

justice innovation,[154] but this feature of international criminal justice has continued to elude the global community. It is useful to consider transitional justice principles when discussing a potential tribunal for this war, not just for Ukraine, but also for Russia. After all, Russian citizens have been deceived by propaganda and stand to benefit from a strong tribunal showcasing the deceit of the Putin regime.[155]

Transitional justice can take many forms, ranging from criminal trials to truth and reconciliation commissions; however, no matter the form, the most fundamental goal of transitional justice is to create a comprehensive historical record of the event.[156] Creating this record plays a role in preventing future atrocities by "never forgetting" and aids in healing by giving victims an opportunity to tell their stories.[157] Criminal tribunals themselves, such as the ICTY, have been sensitive to their own role in creating a historical understanding.[158] To do this, courts must practice sound historical research and analysis by examining a copious amount of documents and witnesses.[159] However, if courts fail to properly weigh evidence or engage in a grand-but-flawed historical analysis,[160] their result can be viewed as "flawed, patchy, and overly politicized." [161] Therefore, any tribunal must carefully consider its historical

[154] Rui Teitel, *Transitional Justice: Postwar Legacies*, 27 CARDOZO L. REV. 1615, 1617 (2006).

[155] *See, e.g.,* Julian A. Barnes, *Russia Intensifies Its Propaganda Campaign Against Ukraine*, N.Y. TIMES (Oct. 26, 2022), https://www.nytimes.com/2022/10/26/us/politics/russia-propaganda-dirty-bomb.html.

[156] Peter R. Baehr, *How to Come to Terms with the Past*, *in* 6 ATROCITIES AND INTERNATIONAL ACCOUNTABILITY: BEYOND TRANSITIONAL JUSTICE 16 (Edel Hughes, William A. Schabas, & Ramesh Thakur eds., 2007).

[157] *Id.*; Pablo de Greiff, *Theorizing Transitional Justice*, 51 NOMOS 31, 69 (2012).

[158] Daniel Joyce, *The Historical Function of International Criminal Trials: Re-thinking International Criminal Law*, 461 NORDIC J. INT'L L. 461, 462 (2004).

[159] *Id.* at 465.

[160] *Id. at* 463.

[161] *Id.* at 471.

record, but also be equipped to do the kind of historical analysis required of this type of tribunal.

While the ICC has played an admirable role in furthering justice against international criminals, it is ill-suited to aid in successful transitional justice because of its remote location from the site of conflict, its lack of ability to adapt to the cultural context, and its rigid structure, which precludes forms of transitional justice other than criminal tribunals. If the prosecution of international crimes is to be successful, it must not only create an authoritative narrative and punish criminals; it must also seek to rebuild broken communities.

A. LOCATION

The most obvious weakness of the ICC from a transitional justice standpoint is its location. Located in The Hague, defendants, witnesses, lawyers, and judges are away from any conflict zone. This is problematic for several reasons. First, it robs victims of a sense of ownership over the proceedings, which impairs the ability of the tribunal to help heal the community.[162] Instead, tribunals should foster a sense of ownership by carefully listening to victims and taking evidence in a clear manner that is fair to both the accused and the victims. Removing trials from the region in conflict limits community involvement and interest.[163] Overall, the ICTY has been considered successful in achieving its aims, but its location in The Hague has made it difficult for some witnesses to testify and, in some ways, has reduced its effectiveness.[164] Furthermore, a key consideration of transitional justice is the appearance of impartiality.[165] Trying defendants far away from where their crimes took place only reinforces the notion that these are crimes that the West is simply imposing on others.

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[162] Patricia Lundy & Mark McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom Up*, 35 J.L. & SOC'Y 265, 278 (2008).
[163] *See id.*
[164] H.H. Judge Peter Murphy & Lina Baddour, *International Criminal Law: Celebrating its Achievements, Fearing for its Future*, 55 S. TEX. L. REV. 307, 319 (2013).
[165] *See* HAZAN, *supra* note 136, at 15.

Second, the distance makes it difficult to collect evidence.[166] If the tribunal is located near the site of the conflict, prosecutors and defense attorneys can collect more evidence and interview more witnesses in the region.[167] This helps create a sense of local ownership and assists in creating an authoritative historical account.[168] Creating a historical account is one of the most important functions of transitional justice because an "official version of the facts" helps the society understand how its leaders are culpable.[169] Because this is central to the goals of transitional justice, access to evidence and witnesses should weigh heavily in favor of a locally situated tribunal.[170]

B. CULTURAL CONTEXT

One of the most challenging issues any international tribunal faces is understanding the cultural norms and expectations of the society it is judging.[171] Bringing in judges and prosecutors from around the world makes it more likely that they will be unfamiliar with the culture of the defendants.[172] While this cannot be an excuse for criminal conduct committed,[173] the tribunal should ensure that it

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[166] Aleksandar Maršavelski & John Braithwaite, *Transitional Justice Cascades*, 53 CORNELL INT'L L.J. 207, 227–28 (2020).
[167] *Id.*
[168] *See* HAZAN, *supra* note 136, at 16.
[169] *See id.*
[170] Ukrainian efforts to contemporaneously document war crimes for a potential trial show their desire to play an important role in future prosecutions. *See, e.g.*, Lily Hyde, *Meet the Ukrainians Documenting Russian War Crimes, in Real-time*, POLITICO (May 19, 2022, 4:00 AM), https://www.politico.eu/article/ukraines-sprawling-unprecedented-campaign-to-document-russian-war-crimes/.
[171] Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 818 (2004).
[172] The exact makeup of the tribunal and its staff is beyond the scope of this comment. However, it is likely that judges and prosecutors would come from around the world and would therefore be unfamiliar with the cultural context where the tribunal would take place.
[173] Posner & Vermeule, *supra* note 171.

understands the norms and assumptions of the defendants so that its judgment is a more accurate historical document that will be accepted by the community. For example, Bert Röling, the Dutch judge at the IMTFE, cited the judges' lack of familiarity with Japanese culture as a contributing factor that may have led to bias on the part of some of the judges.[174] This type of bias damages the tribunal's credibility and allows opponents to attack it as an exercise of raw political, rather than judicial, power.

Ad hoc tribunals will be more likely to adapt to the cultural context of a given situation because of their location and inherent flexibility. The ICC is a more permanent institution with a defined location and staff. Ad hoc tribunals will be able to adapt to the cultural realities of the region because judges and prosecutors will be more likely to learn about and understand the local culture firsthand. They will also be able to employ lawyers, as well as other individuals, from the region to help eliminate cultural misunderstandings.

Ad hoc tribunals also can synthesize themselves with local methods of justice, creating a complimentary system that aids in healing and reconciliation. Rather than the top-down approach found at the ICC, this method will allow communities to aid in the tribunal while also ensuring justice is done.[175] Each context is different, and transitional justice should change to match the context.[176] For example, communities in Rwanda held traditional, community-based *gacaca* trials to allow victims to be heard and to judge the guilty.[177] The ICC's approach

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[174] *See* RÖLING, *supra* note 78, at 87.

[175] Lundy & McGovern, *supra* note 162, at 265.

[176] Joyce, *supra* note 158, at 483.

[177] WEISBORD, *supra* note 33, at 84. The International Criminal Tribunal for Rwanda has made other important contributions to international law and is an important example of an ad hoc tribunal that this comment proposes. *See* Irene C. Lu, *Curtain Call at Closing: The Multi-dimensional Legacy of the International Criminal Tribunal for Rwanda*, 34 U. PA. J. INT'L L. 859 (2013); *but see* Parker Patterson, *Partial Justice: Successes and Failures of the International Criminal Tribunal for Rwanda in Ending Impunity for Violations of International Criminal Law*, 19 TUL. J. INT'L & COMP. L. 369 (2010).

significantly damages these types of institutions, which are vital to community healing and acceptance of the verdict.[178]

C. LACK OF FLEXIBILITY

Finally, the ICC's lack of flexibility makes it unable to adapt to each new context. Every situation deserves its own transitional justice approach, and the one-size-fits-all, legalistic approach of the ICC is simply unable to be as effective as context-specific approaches.[179] The ICC cannot change on a dime; however, each ad hoc tribunal can function differently because each one is created differently. For example, ad hoc tribunals can possess different formats, panels, identities of judges, ways to offer evidence, and modes of cooperation with national and local tribunals. Transitional justice should be approached holistically, and adapting to the context can aid in victim healing, restoration of trust, and the transition to democracy.[180]

The first decision any tribunal must make is format. While most would likely picture a courtroom-style tribunal like Nuremberg or Tokyo, transitional justice can take many forms, such as Truth and Reconciliation Commissions in post-Apartheid South Africa.[181] Truth and reconciliation commissions try to rebuild trust in a community and place an emphasis on disclosure and hearing victims.[182] These commissions are sometimes the result of a political deal to ensure cooperation and participation in a deeply divided society, but they still can be useful in helping a society heal.[183] The choice of format is fundamental and will determine the rest

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[178] *See* Neha Jain, *Radical Dissents in International Criminal Trials*, 28 EUROPEAN J. INT'L L. 1163, 1185 (2004).
[179] Joyce, *supra* note 158, at 483.
[180] *See* de Greiff, *supra* note 157, at 32.
[181] HAZAN, *supra* note 136, at 35.
[182] *Id.* at 33.
[183] *Id.; see also* Michael P. Scharff, *Trading Justice for Peace: The Contemporary Law and Policy Debate*, *in* 246 ATROCITIES AND INTERNATIONAL ACCOUNTABILITY: BEYOND TRANSITIONAL JUSTICE (William Schabas ed., 2007).

of the endeavor, including its success. Not allowing a tribunal to adapt to new scenarios will significantly stunt its transitional justice potential.

Finally, ad hoc tribunals can operate without defendants. Unfortunately, international criminals are not always arrested; some even continue to lead their nations. However, there are benefits to operating local commissions or tribunals during and after conflicts. First, such tribunals still are able to create comprehensive historical accounts of what happened, which is valuable for their own sake as well as for future judicial proceedings.[184] Second, they can engage in "lawfare," the use of legal opinions and letters to communicate with unit commanders to apprise them of the risk of breaking international law.[185] This approach has worked in the past and could continue to save lives;[186] it helps demonstrate the benefit of ad hoc tribunals, even when traditional trials are impossible.

Every country, community, and conflict is different. Therefore, rather than impose one model of justice onto a suffering society, tribunals should work collaboratively with local leaders to build a transitional justice institution that works in that context. This will not only aid in acceptance of the verdict but also in healing the community. Constructing a new institution every time may be difficult and time-consuming, but it will give us a better chance at fostering lasting peace.

B. CREATING A DEFINITION OF AGGRESSION

If the General Assembly is to begin creating ad hoc tribunals to prosecute international crimes, it must give these tribunals basic definitions to use. While the global community agrees that the crime of aggression exists, agreement on a single definition has been elusive. The crime of aggression is a two-

[184] Catherine Harwood & Larissa van den Henrik, *Commissions of Inquiry and the* Jus ad Bellum, *in* SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE 189 (2018).
[185] Maršavelski & Braithwaite, *supra* note 166, at 226–27.
[186] *Id.*

step analysis.[187] First, a state must commit an act of aggression.[188] Second, to be criminally liable for said act, an individual must be able to influence state policy.[189] These are two discrete steps that must be defined and analyzed. Therefore, this comment will examine these two separate concepts in turn.

1. WHAT IS AN ACT OF AGGRESSION?

The first step, determining whether an act of aggression occurred, looks to the actions of a state. This step has two parts.[190] First, a court must determine if an act of aggression occurred.[191] Second, a court must determine if that act was a "manifest" violation of the UN Charter.[192] These are certainly related inquiries, but this comment will address them separately to demonstrate their similarities and differences.

A. WHAT COUNTS AS AGGRESSION?

In the years since World War II, various international groups have tried to define aggression. The charter of the Nuremberg Tribunal defined a war of aggression as "a war in violation of international treaties, agreements, or assurances."[193] In the 1950s, the ILC adopted a draft code that defined aggression as any armed attack, threat of armed attack, or preparation for an armed attack.[194] In 1974, the General Assembly adopted a "consensus" definition of the crime of aggression that provided an exhaustive list of kinds of armed

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[187] Hans-Peter Kaul, *The Crime of Aggression: Definitional Options for the Way Forward*, *in* 97 THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 98 (2004).
[188] *Id.*
[189] *Id.*

[190] *See* Yoram Dinstein, *The Crime of Aggression Under Customary International Law*, *in* 285 SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE 302 (Leila Nadya Sadat ed., 2018).
[191] *Id.*
[192] *Id.*
[193] Charter of the International Military Tribunal, *supra* note 62.
[194] KEMP, *supra* note 19, at 108–09.

attacks that qualified as aggression.[195] The Kampala Amendments defined aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State."[196]

While these types of armed attacks fit the classical model of aggression, they are twentieth century solutions to twentieth century problems. Therefore, the definition of aggression should be expanded, particularly in one crucial way: to include cyberattacks.[197] Cyberattacks can cripple national economies, threaten infrastructure, and impede national security.[198] This is just one example of how current international law focuses on the *instrumentalities* of aggression, rather than on the *outcome* of aggression. International law should instead focus on the outcome of aggressive acts because we have entered an age where malware and hacking can be just as devastating as bullets and bombs.

Finally, it is worth considering what aggression is not. The key defense against charges of aggression is self-defense.[199] The UN Charter specifically allows states to engage in self-defense,[200] but that does not mean a state may engage in war whenever it feels threatened. Rather, there must be an immediate and pressing need. An important illustration of self-defense as a justification for aggression was provided in 1837.[201] During an anti-British uprising in Canada, sympathetic Americans used the steamship *Caroline* to give supplies to the rebels.[202] British militia crossed the American border and sank her to prevent further supplies from crossing the Canadian border, violating American sovereignty.[203] In the ensuing diplomatic row, U.S. Secretary of State Daniel Webster wrote to

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[195] G.A. Res. 3314 (XXIX) (Dec. 14, 1974). The resolution included invasion, bombardment, blockade, and occupation, among other forms of armed attack. *Id.*
[196] Int'l Crim. Ct. 13th Plenary Meeting Res. 6, (June 11, 2010).
[197] WEISBORD, *supra* note 33, at 136–38.
[198] *Id.*
[199] KEMP, *supra* note 19, at 57–58.
[200] U.N. Charter art. 51.
[201] WEISBORD, *supra* note 33, at 127.
[202] *Id.*
[203] *Id.*

British Ambassador Henry Fox that any self-defense argument would have to show "[n]ecessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[204] The right to self-defense is also limited by proportionality: A state may not use unduly harsh responses for a minor breach.[205]

While the international law community has tried repeatedly to find a suitable definition for aggression, one has yet to be created. Perhaps, then, it would be beneficial to consider whether such an ironclad definition is necessary or even desirable.[206] A vague and ambiguous definition would be better than a strictly enumerative one because it would likely be easier to pass and would prevent aggressors from attempting to tailor their acts so as to avoid falling under the definition.[207] Accordingly, the General Assembly should provide a general definition of aggression that is focused on the outcome of an attack rather than a specific definition that allows aggressors to escape consequences.

B. WHEN IS AN ACT OF AGGRESSION A "MANIFEST" VIOLATION OF THE UN CHARTER?

An act of aggression is not always a crime. For an aggressive act to rise to the level of criminality, it must be a "manifest" violation of the UN Charter. Therefore, we must turn to what "manifest" means. First, it will be helpful to examine the UN Charter itself. The UN was founded on broad principles of human rights and state sovereignty,[208] so any act that "manifestly" violates these principles will likely pass this test. Merriam-Webster defines "manifest" as "easily

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[204] *Id.* at 127–28.
[205] Douglas J. Pivnichny, *The International Court of Justice and the Use of Force*, *in* 194 SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE 209 (2018).
[206] KEMP, *supra* note 19, at 122–24.
[207] Phani Dascalopoulou-Livada, *Aggression and the ICC: Views on Certain Ideas and Their Potential for a Solution*, *in* 79 THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 80–81 (2004).
[208] U.N. Charter preamble.

understood or recognized by the mind: obvious."[209] Therefore, any violation of these principles must be done clearly and obviously.

Any conception of a manifest violation of the UN Charter must include an exception for humanitarian intervention.[210] Current interpretations of the crime of aggression have disapproved of the use of force to put an end to widespread suffering.[211] The Kampala Amendments also do not create an exception for humanitarian intervention, and this creates a "disincentive" for states to intervene when serious human rights are at stake.[212] While an exception for humanitarian intervention should be created, it will be difficult to create a clear standard for what human rights abuses are sufficient grounds for intervention.

Given these difficulties, it will be difficult to define what exactly constitutes a "manifest" violation of the Charter. Instead, tribunals should be given authority to conduct a context-specific inquiry, rather than the General Assembly creating a bright line rule. The humanitarian intervention exception cannot be absolute since that would mean any human rights abuse in any state could serve as a pretext for invasion. Indeed, Vladimir Putin has argued that his war in Ukraine is about removing a corrupt and abusive regime.[213] Allowing

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[209] *Manifest*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/manifest#:~:text=1%20of%203-,adjective,recognized%20by%20the%20mind%20%3A%20obvious (last visited Nov. 28, 2022).

[210] *See* Alexander H. McCabe, *Balancing "Aggression" and Compassion in International Law: The Crime of Aggression and Humanitarian Intervention*, 83 FORDHAM L. REV. 991, 993 (2014).

[211] DINSTEIN, *supra* note 26, at 76; Federica D'Alessandra & Robert Heinsch, *Rethinking the Relationship Between* Jus in Bello *and* Jus ad Bellum, *in* 453 SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE 472 (2018).

[212] David J. Scheffer & Angela Walker, *Twenty-First Century Paradigms on Military Force for Humane Purposes*, *in* 493 SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE 525 (2018).

[213] Simon Smith, *First "Nazis," Now "Terrorists": Putin's Latest Campaign Stems from Desperation*, THE GUARDIAN (Oct. 12, 2022, 6:33 AM),

tribunals to exercise their judgment considering UN principles will allow these ad hoc tribunals to carefully weigh the evidence and come to just conclusions while ensuring that states have the flexibility to defend their actions as legitimately humanitarian.

2. WHO CAN COMMIT THE CRIME OF AGGRESSION?

Having determined *what* state aggression is, we must now consider *who* can commit the crime of aggression. This is a difficult question, but it largely hinges on the fact that the crime of aggression is a leadership crime.[214] It is the leaders—the decision-makers—who can commit this crime, not the rank-and-file soldiers.[215] The question, therefore, is how far down the chain of command does criminal liability go? Certainly, the chief executive of a state would be guilty, but what about their cabinet? Perhaps the defense minister is guilty, but what about the education minister who supported the government without playing a direct role in the war? To answer these questions, courts must apply an "acid test" to determine how far the intent to commit the crime of aggression goes down the government ranks.[216] But how much control must someone have to be convicted? At Nuremberg, the tribunals enforced a "shape and influence" test to determine whether someone had requisite control over government policy, whereas the Kampala Amendments offer a more stringent "direct control" test.[217] This comment will analyze both of these standards and then argue that the shape and influence test, with some modifications, should be adopted by the global community to ensure all those who commit the crime of aggression can be charged.

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https://www.theguardian.com/commentisfree/2022/oct/12/putin-nazi-terrorist-ukraine-desperation-russia.

[214] Mauro Politi, *The Debate Within the Preparatory Commission for the International Criminal Court*, *in* 43 THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 46–47 (2004).

[215] *See id.*

[216] DINSTEIN, *supra* note 26, at 156.

[217] LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE 197, 244 (2008).

A. NUREMBERG'S "SHAPE AND INFLUENCE" TEST

The International Military Tribunal and the subsequent military tribunals in Germany judged defendants based on what has come to be known as the "shape and influence test."[218] To be guilty under this test, a defendant must have been able to shape and influence government policy. "Mere participation" of criminality is not enough; the defendant must *know* they are participating in an aggressive war.[219] While the blackletter law is important, it is useful to illustrate how it works in practice. For some defendants at the postwar tribunals, there was little defending their roles in the prosecution of the war. Some, however, were able to argue that they were not involved enough in the planning and preparation to be convicted of crimes against peace.

Take, for example, Ernst von Weizsaecker.[220] Von Weizsaecker served as State Secretary from 1938–1943, a position similar to deputy foreign minister.[221] Despite his high position, he was largely cleared of crimes of aggression because he did not necessarily know about Hitler's plan to use aggression to conquer various countries.[222] Von Weizsaecker further argued he should be acquitted because he resisted the Nazi regime.[223] The court, however, found that he failed to establish that "he did all that lay in his power to frustrate a policy which outwardly he appeared to support."[224] He was,

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[218] *Id.*
[219] *Id.*
[220] *Id.* at 172; He was charged at one of the subsequent trials, known as the Ministries Trial, and not during the main Nuremberg Tribunal. *Id.*
[221] Jaime Malamud Goti, *The Moral Dilemmas About Trying Pinochet in Spain*, 32 U. MIAMI INTER-AM. L. REV. 1, 8 (2001).
[222] MAY, *supra* note 217, at 172.
[223] Matthew Lippman, *Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War*, 15 DICK. J. INT'L L. 1, 92 (1996).
[224] Gabriella Blum, *The Laws of War and the "Lesser Evil"*, 35 YALE J. INT'L L. 1, 12 (2010). This type of defense is perhaps why a vague definition of aggression is better. Determining whether a government official was a bona fide resister, or simply claims to be one after the fact, is precisely the type of nuanced, fact-intensive inquiry that defies easy

however, convicted of crimes of aggression relating to Germany's invasion of Czechoslovakia because he knowingly lied about Germany's intentions to the Czechoslovakian government.[225] Therefore, it was his *participation* in aggression that he *knew* was illegal that resulted in his conviction.[226] This suggests that simply being in "the room where it happens" is not enough to convey criminal conviction. Rather, someone must take firm, concrete steps to further the crime.

This limitation is illustrated by the trial of civilians who benefitted from the Nazi war machine. For example, no one was convicted of the crimes of aggression at the IG Farben Trial.[227] At issue were former officers of IG Farben, a German manufacturer that produced armaments, fuels, and chemicals.[228] The lead defendant, Karl Krauch, had been a leader in the government and at Farben and had personally brokered deals to increase production of chemical weapons.[229] Though Farben became "inextricably linked" to the Nazi state, Krauch and the others were acquitted of crimes against peace because, as businessmen, the prosecution had not proven beyond a reasonable doubt that they participated in aggression.[230] Though they likely knew that their actions were helping create aggressive war, they had not *planned* the war and so could not be held accountable.[231] However, Judge Hebert in

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categorization. While the contours of this "good motive defense" are beyond the scope of this comment, it is certainly an issue that is worth future discussion. *See, e.g.*, *id.* at 91.

[225] Matthew Lippman, *The History, Development, and Decline of Crimes Against Peace*, 36 GEO. WASH. INT'L L. REV. 957, 1052–53 (2004).

[226] *See, e.g.,* Roger S. Clark, *Nuremberg and the Crime Against Peace*, 6 WASH. U. GLOBAL STUD. L. REV. 527, 550 (2007).

[227] Doreen Lustig, *The Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Revisiting Franz Neumann's Concept of Behemoth at the Industrialist Trials*, 43 N.Y.U. J. INT'L L. & POL. 965, 995 (2011).

[228] MAY, *supra* note 217, at 191.

[229] Matthew Lippman, *War Crimes Trials of German Industrialists: The "Other Schindlers,"* 9 TEMP. INT'L & COMP. L.J. 173, 211 (1995).

[230] MAY, *supra* note 217, at 191.

[231] *Id.* at 197. The court also noted the defendants did not have the necessary criminal intent because they did not have knowledge of Hitler's plan to commit aggression. Had they *known* that Hitler had

the concurrence makes clear that private citizens could be held accountable for the actions of the state, just not in this instance.[232]

This approach is not perfect. Its scope could be too broad, and it could cause the conviction of relatively low-level individuals who had no power over starting the war and thus did not truly satisfy the leadership element.[233] Nonetheless, this test leaves the door open to prosecuting industrialists, propagandists, and others who helped push the country toward war, despite assertions that subsequent military tribunals at Nuremberg arguably shut the door to such an interpretation.[234] This test also provides an incentive for people within government to try to stop the war. After all, if the scope of criminal responsibility is broad, there will be an incentive for many people to avoid criminal punishment by explicitly or implicitly resisting aggression from inside government.

B. KAMPALA'S "DIRECT CONTROL" TEST

While the original Rome Statute did not include the crime of aggression, a Special Working Group (SWG) was

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planned on carrying out aggressive wars, the judgment would perhaps have been different. *See* Lippman, *supra* note 223, at 21.

[232] Alberto L. Zuppi, *Slave Labor in Nuremberg's I.G. Farben Case: The Lonely Voice of Paul M. Hebert*, 66 LA. L. REV. 495, 515–16 (2006). This concurrence is particularly important because it provides clarification and precedent that one need not be a state actor to be convicted of the crime of aggression. However, one must actually *join* the conspiracy to commit aggression, and, although it was clear they knew aggression was happening, Hebert could not know if they had agreed to take part in such a conspiracy. *Id*. This type of inquiry could potentially be critical in the future, as non-state actors have already been accused of crimes of aggression. *See, e.g.*, Andrius Sytas, *Ecumenical Patriarch: Russian Church Shares Blame for 'Crimes' in Ukraine*, Reuters (Mar. 22, 2023, 9:20 AM), https://www.reuters.com/world/europe/ecumenical-patriarch-russian-church-shares-blame-crimes-ukraine-2023-03-22/.

[233] Ventura, *supra* note 31, at 391.

[234] *See* DINSTEIN, *supra* note 26, at 152.

convened to add it to the Rome Statute.[235] The result, commonly referred to as the Kampala Amendments, revived the crime of aggression, but it is still on "life support."[236] The Kampala Amendments implicitly reject the shape and influence test from the postwar tribunals and instead adopt a direct control test, meaning that for someone to be guilty of the crime of aggression, they must be in a position to directly control the actions of the state.[237]

This is a significantly narrower standard than the shape and influence test applied by the postwar tribunals.[238] The approach has numerous issues, including potentially preventing humanitarian intervention,[239] but by narrowing the scope of the Nuremberg precedent, it also significantly restricts who could be convicted of the crime of aggression.[240] The SWG argued that the Kampala Amendments were simply restating the Nuremberg precedent and that the tribunals themselves provided a narrow application of the crime of aggression.[241] This claim should be flatly rejected.[242] Scholars agree the Kampala Amendments limit criminal liability within governments and almost certainly prevent industrialists, propagandists, and others from being prosecuted, despite repeated assertions at Nuremberg that private citizens could be convicted.[243] Thus, the adoption of the Kampala Amendment is a policy choice to narrow the crime of aggression to leaders at the very top. Whether some individuals convicted in postwar tribunals under the shape and influence test would be convicted under the direct-control test is an open question, which itself proves the standard has been narrowed by the ICC.[244]

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[235] Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, EUROPEAN J. INT'L L. 477, 478 (2007).
[236] *See* Bassiouni, *supra* note 24, at 54–55.
[237] DINSTEIN, *supra* note 26, at 153.
[238] Heller, *supra* note 235, at 480.
[239] Scheffer & Walker, *supra* note 212, at 525.
[240] Ventura, *supra* note 31, at 390.
[241] Heller, *supra* note 235, at 490.
[242] *Id.*
[243] *Id.* at 480, 490.
[244] *Id.* at 490.

There are certainly justifications for creating a narrow test. It could reasonably be said that individuals at the very top of government set policy and so only those with the capacity to actually make decisions should be accountable for them. However, there are three main concerns with this approach. First, it would codify the defense of "superior orders" and allow subordinates to push their responsibility onto a small number of people at the top.[245] Second, it would not provide incentives for people within government to resist the war, including at the initial decision-making phases.[246] Finally, it would allow people who planned, supported, and waged aggressive war to escape culpability.[247] When a state goes to war, there is widespread criminality, guilt, and responsibility. "Hitler could not make aggressive war by himself. He had to have cooperation of statesmen, military leaders, diplomats, and business men."[248] Waging war involves people at all levels of government plotting, planning, and preparing for the war. Holding only a few of the top leaders accountable will both be unjust and damage healing efforts within the community.[249] It will, simply, let them get away with murder.

C. RE-ESTABLISHING THE SHAPE AND INFLUENCE TEST'S FACT-INTENSIVE INQUIRY

No legal standard is, or can ever be, perfect. The General Assembly should adopt a standard closer to the shape and influence test, with the acknowledgment that this determination is fact-intensive and context-specific. This approach is consistent with judicial precedent and will ensure tribunals can weigh the complicated issues at stake. Punishing only those who have direct control over a state is simply too narrow, while the shape and influence test, with certain

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[245] *See* Matthew Lippman, *The Development and Scope of the Superior Orders Defense*, 20 PENN ST. INT'L L. REV. 153, 153–54 (2001).
[246] *See* Blum, *supra* note 224, at 63.
[247] Heller, *supra* note 235, at 477.
[248] *United States v. Goering et al.*, *in* 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947).
[249] Scharff, *supra* note 183, at 251.

additions, will provide a flexible basis for judging individual actions. No test can adequately account for the political, cultural, and social differences across the many cultures where tribunals may be convened. For example, the Western conception of a constitutional monarchy was significantly different from the position that Emperor Hirohito occupied during World War II, certainly one of the factors that allowed him to escape trial.[250] This standard allows courts to assess each individual's actions, role, and power by delving into the facts of a particular case while leaving assumptions and misconceptions behind.

This standard also is beneficial when prosecuting individuals, such as Vladimir Putin, whose states have not signed on to the Rome Statute. The shape and influence test applies not only under international judicial precedent, but also under multiple UN resolutions codifying and adopting the Nuremberg Principles.[251] Furthermore, there are policy reasons for adopting this standard. First, it will increase criminal responsibility for the crime of aggression so people within government who have some power to stop, or at least argue against, the war, will do so. Second, charging more individuals will lead to more plea deals, leading to the discovery of more details of the crimes committed.[252] One prosecutor at the ICTY noted that "one plea agreement led to another plea agreement which led to another mass grave."[253] Finally, holding people, even those who had less power, accountable will assist in healing the community by showing that those who inflicted war are being held accountable, not just those at the very top.[254]

Critics of this approach may point to its broad sweep and argue that it would hold hapless bureaucrats accountable for the actions of a few crazed aggressors. While this standard would absolutely mean accountability for more people than the

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[250] *See* BIX, *supra* note 73, at 8.
[251] *See* KEMP, *supra* note 19, 106–07.
[252] Maršavelski & Braithwaite, *supra* note 166, at 235.
[253] *Id.*
[254] It should be noted that those at the top cannot always be prosecuted. The most notable example is Adolf Hitler's suicide robbing the Allies of the chance of prosecuting him. *See* TAYLOR, *supra* note 60, at 538.

ICC's current approach, as stated above, it would be a positive change.[255] However, this standard should be adopted with the proviso that those who worked in the government to try to stop or end the war should be given wide latitude so long as they can provide corroborating evidence of their actions. Additionally, the punishment should fit the crime. A head of state should likely receive greater punishment than a mid-level bureaucrat. While everyone who participated in creating and planning the war should be held accountable, what that accountability looks like will be different for each person depending on mitigating and aggravating factors.

We will not always be able to anticipate how future criminals will use war, and so a flexible standard will allow for prosecution under multiple standards. This comment's proposed shape and influence standard will incentivize people within government to try to stop the war by providing increased responsibility for lower-ranked officials while ensuring mitigating factors will be considered. Though far from perfect, it will at least ensure that the "little men" who insist that they have no responsibility for following orders are recognized for what they are: criminals.

CONCLUSION

As the world watched, almost paralyzed, as Russia invaded Ukraine, the West was largely unified in denouncing it. While the immediate attention turned to arming Ukraine and solving the refugee crisis, many leaders argued that there must be criminal trials.[256] Canada has called for an international tribunal, though Foreign Minister Mélanie Joly noted that the ICC does not have jurisdiction.[257] German Foreign Minister

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[255] *Supra* Section II.B.2.c.

[256] *See, e.g.* Dan Mangan, *Biden Calls to Put Putin on Trial for War Crimes Over Russia Killings in Ukraine*, CNBC (Apr. 4, 2022, 3:16 PM), https://www.cnbc.com/2022/04/04/biden-calls-to-put-putin-on-trial-for-war-crimes-over-russias-actions-in-ukraine.html.

[257] Joseph Gedeon, *Canada Endorses Special Tribunal to Investigate Russia, Joly Says*, POLITICO (Feb. 16, 2023, 3:35PM),

Annalena Baerbock also admitted that the ICC could not be used to try Russian war criminals and instead called for an international tribunal based on Ukrainian law.[258] Although that may indeed solve the immediate question, it does nothing to solve the next crisis.

And let there be no mistake: As long as there is no solid mechanism for prosecuting international crimes, there *will* be another crisis, another war, another would-be imperial power. It is then for us to use this moment to take the next step forward in international accountability and ensure the world is never faced with the question of how to hold war criminals accountable ever again.

Unfortunately, the current international structures are not only unprepared; they are in fact totally *unable* to hold many such individuals accountable. With the Security Council incapable of acting now and likely far into the future, it falls to the General Assembly as the last remaining international body with the legitimacy to act. Therefore, under the Uniting for Peace resolution and powers granted to it by the UN Charter, the General Assembly should create ad hoc tribunals to try these types of crimes. Further, it should instruct these tribunals to implement a shape and influence test, as was applied at Nuremberg, to weigh guilt. While imperfect, it is the best test to guide inquiry into the complicated politics of a wartime government.

This comment has largely analyzed *how* to prosecute crimes of aggression, but it has not discussed *why* we should prosecute them. So often, the crime of aggression – the act of starting a war – precedes other atrocities. Genocide, crimes against humanity, and other war crimes almost always follow. And so, we should try to prevent these atrocities from occurring in the first place by stopping war. Yet world leaders seem to continue ignoring the crime of aggression despite it being the first and most obvious crime committed.[259]

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https://www.politico.com/news/2023/02/16/canada-endorses-special-tribunal-russia-joly-00083250.

[258] Burchard, *supra* note 121.

[259] *See, e.g.,* Alex Ward, *US Formally Accuses Russia of Crimes Against Humanity in Ukraine*, POLITICO (Feb. 18, 2023, 12:54 PM),

But war itself is an atrocity, even if carried out according to legal conventions. The level of criminality and involvement is almost unfathomable. People at the top deciding to make war and countless officials working to make it a reality. Military officials drafting plans and bureaucrats procuring food and supplies. Propagandists selling the war at home and diplomats selling it abroad. Bankers and businessmen providing arms and ammunition. It is a massive undertaking that reaches all sectors of government and society.

And the result is equally unfathomable. Death on a massive scale. Homes, businesses, places of worship – whole communities – wiped out. The irreparable destruction of innocence and hope. How then, can justice be served? It can't. Nothing can repair the damage done. But we still have to try. We have to try for the soldiers who will never come home. We have to try for the children who will never have a childhood. We have to try for the millions who will never again know peace in their hearts. And we have to try for the unknown next victims. For just as certain as the present war will end, the next war will come unless we act, bringing more broken fortunes, families, and futures. The only prevention is to prosecute aggression now to stop it later. Our attempts will never bring true justice to the victims, but it is the best way to restore justice today and perhaps create peace for tomorrow.

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https://www.politico.eu/article/us-formal-accuse-russia-crimes-against-humanity-ukraine-kamala-harris/; Cristina Gallardo, *Boris Johnson: Vladimir Putin Guilty of War Crimes*, POLITICO (Mar. 2, 2022, 3:36 PM), https://www.politico.eu/article/boris-johnson-accuse-vladimir-putin-war-crime/.