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Accountability for Aggression: Atrocity, Attributability, the Legal Order, and Sanitized Violence

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In the year since the Russian Federation escalated its aggression against Ukraine into a full-scale invasion, criminal accountability for that violation has been the subject of multifaceted discussion and debate.¹ The nonviability of existing mechanisms has

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1. On the initial 2014 aggression, see Mary Ellen O’Connell, *The Crisis in Ukraine — 2014*, in *THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH* 855 (Olivier Corten & Tom Ruys eds., 2018). Following the 2022 escalation, both The Elders and an *ad hoc* group led by Gordon Brown, Dapo Akande, Philippe Sands, and others called for an aggression tribunal within days of the escalation. Rt. Hon. Gordon Brown Former Prime Minister of the UK, et al., *Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine* (Mar. 4, 2022), available at <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>; *The Elders call for a criminal tribunal to investigate alleged crime of aggression in Ukraine*, THE ELDERS (Mar. 5, 2022), <https://theelders.org/news/elders-call-criminal-tribunal-investigate-alleged-crime-aggression-ukraine>. Subsequent expert commentary and analysis has proliferated. See, for example: Larry Johnson, *United Nations Response Options to Russia’s Aggression: Opportunities and Rabbit Holes*, JUST SEC. (Mar. 1, 2022), <https://www.justsecurity.org/80395/united-nations-response-options-to-russias-aggression-opportunities-and-rabbit-holes/>; Sergey Vasiliev, *Aggression against Ukraine*:

Avenues for Accountability for Core Crimes, EJIL Talk! (Mar. 3, 2022), <https://www.ejiltalk.org/aggression-against-ukraine-avenues-for-accountability-for-core-crimes/>; Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea*, OPINIO JURIS (Mar. 7, 2022), <https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>; Jennifer Trahan, *U.N. General Assembly Should Recommend Creation of Crime of Aggression Tribunal For Ukraine*, JUST SEC. (Mar. 7, 2022), <https://www.justsecurity.org/80545/u-n-general-assembly-should-recommend-creation-of-crime-of-aggression-tribunal-for-ukraine-nuremberg-is-not-the-model/> [hereinafter, “U.N. General Assembly”]; Carrie McDougall, *Prosecuting Putin for his Crime of Aggression Against Ukraine Part I*, JUST SEC. (Sept. 20, 2022), <https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/> [hereinafter, “Prosecuting Part I”]; Carrie McDougall, *Prosecuting Putin for his Crime of Aggression Against Ukraine Part II*, OXFORD HUM. RTS. HUB (Mar. 8, 2022), <https://ohrh.law.ox.ac.uk/prosecuting-putin-for-his-crime-of-aggression-against-ukraine-part-two/>; Eric Chang, *Why Ukraine is Calling for a Special Tribunal to Prosecute Putin*, LAWFIRE (Mar. 10, 2022), <https://sites.duke.edu/lawfire/2022/03/10/eric-chang-on-why-ukraine-is-calling-for-a-special-criminal-tribunal-to-prosecute-putin/>; Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine*, JUST SEC. (Mar. 10, 2022), <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/> [hereinafter, “Mechanisms”]; Shane Darcy, *Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly*, JUST SEC. (Mar. 16, 2022), <https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/>; Carrie McDougall, *Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option*, OPINIO JURIS (Mar. 15, 2022), <https://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/> [hereinafter, “Why Creating a Special Tribunal for Aggression”]; Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIO JURIS (Mar. 16, 2022), <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>; Barrie Sander & Immi Tallgren, *On Critique and Renewal in Times of Crisis*, VÖLKERRECHTSBLOG (Mar. 16, 2022), <https://voelkerrechtsblog.org/on-critique-and-renewal-in-times-of-crisis/>; Ralph Wilde, *Hamster in a Wheel: International Law, Crisis, Exceptionalism, Whataboutery, Speaking Truth to Power, and Sociopathic, Racist Gaslighting*, OPINIO JURIS (Mar. 17, 2022), <https://opiniojuris.org/2022/03/17/hamster-in-a-wheel-international-law-crisis-exceptionalism-whataboutery-speaking-truth-to-power-and-sociopathic-racist-gaslighting/>; Dapo Akande, *Use of force under international law – The case of Ukraine*, 62nd meeting of the Committee of Legal Advisers on Public International Law, paras. 23–31 (Mar. 25, 2022), <https://rm.coe.int/cahdi-62-akande-use-of-force-under-pil-the-case-of-ukraine-25-march-20/1680a67f82>; Owiso Owiso, *An Aggression Chamber for Ukraine Supported by the Council of Europe*, OPINIO JURIS (Mar. 30, 2022), <https://opiniojuris.org/2022/03/30/an-aggression-chamber-for-ukraine-supported-by-the-council-of-europe/>; Janet H. Anderson, *A Nuremberg for Russia’s Crime of Aggression?*, JUSTICEINFO.NET (Apr. 22, 2022), <https://www.justiceinfo.net/en/91135-nuremberg-russia-crime-of-aggression.html>; Kateryna Busol, *Russia’s Aggression against Ukraine and the Idealised Symbolism of Nuremberg*, EJIL:TALK! (Jun. 16, 2022), <https://www.ejiltalk.org/21022-2/>; *Considerations for the setting up of the Special Tribunal for Ukraine on the Crime of Aggression*, GLOBAL ACCOUNTABILITY NETWORK (July 2022), https://www.jurist.org/news/wp-content/uploads/sites/4/2022/07/The_Special_Tribunal_for_Ukraine_on_the_Crime_of_Aggression.pdf; Oona Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I): An agreement between the United Nations and Ukraine can pave the way*, JUST SEC. (Sept. 20, 2022),

been exposed.² In response, and against the backdrop of debates regarding international legal authority and Ukrainian constitutional constraints, alternative institutional proposals have proliferated.³ In

<https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/> [hereinafter, “*The Case*”]; Astrid Reisinger Coracini, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part II), Jurisdiction and Composition*, JUST SEC. (Sept. 23, 2022), <https://www.justsecurity.org/83201/tribunal-crime-of-aggression-part-two/>; Jennifer Trahan, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part III) How Many to Prosecute, Immunity, Amnesty and More*, JUST SEC. (Sept. 26, 2022), <https://www.justsecurity.org/83238/tribunal-crime-of-aggression-part-three/> [hereinafter, “*The Case*”]; David Scheffer, *The Case for Creating a Special Tribunal to prosecute the Crime of Aggression Committed Against Ukraine (Part IV), Information Sharing, Victim participation, Outreach and More*, JUST SEC. (Sept. 28, 2022), <https://www.justsecurity.org/83290/tribunal-crime-of-aggression-part-four-2/>; Gaiane Nuridzhanian, *Justice for the Crime of Aggression Today, Deterrence for the Aggressive Wars of Tomorrow: A Ukrainian Perspective*, JUST SEC. (Aug. 24, 2022), <https://www.justsecurity.org/82780/justice-for-the-crime-of-aggression-a-ukrainian-perspective/>; Kevin Jon Heller, *Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis*, J. GENOCIDE RSCH. (2022) [hereinafter, “*Options*”]; Tom Dannenbaum, *A Special Tribunal for the Crime of Aggression?*, 20 J. INT’L CRIM. JUST. 859 (2022) [hereinafter, “*A Special Tribunal*”]; Rebecca J. Hamilton, *Ukraine’s Push to Prosecute Aggression: Implications for Immunity Ratione Personae & the Crime of Aggression*, 55 CASE WESTERN RESERVE J. INT’L L. (2023); Giulia Pinzauti & Alessandro Pizzuti, *Prosecuting Aggression against Ukraine as an ‘Other Inhumane Act’ before the ICC*, 20 J. INT’L CRIM. JUST. 1061 (2022); Olivier Corten & Vaios Koutroulis, *Tribunal for the Crime of Aggression Against Ukraine: A Legal Assessment*, In-Depth Analysis Requested by the European Parliament’s Subcommittee on Human Rights, EP/EXPO/DROI/FWC/2019_01/Lot6/1/C/21 (Dec. 2022), available at [https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA\(2022\)702574_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf); Ryan Goodman, *Toward an Interim Prosecutor’s Office in The Hague for the Crime of Aggression Against Ukraine*, JUST SEC. (Jan. 17, 2023), <https://www.justsecurity.org/84767/toward-an-interim-prosecutors-office-in-the-hague-for-the-crime-of-aggression-against-ukraine/>; Kai Ambos, *A Ukraine Special Tribunal with Legitimacy Problems?*, VERFASSUNGSBLOG (Jan. 6, 2023), <https://verfassungsblog.de/ukraine-special-tribunal-with-legitimacy-problems/>; Oona A. Hathaway, *Russia’s Crime and Punishment*, FOREIGN AFF. (Jan. 17, 2023), <https://www.foreignaffairs.com/ukraine/russia-crime-and-punishment-illegal-war-in-ukraine>.

2. See, e.g., Corten & Koutroulis, *supra* note 1, at 20; Dannenbaum, *Mechanisms*, *supra* note 1; McDougall, *Why Creating a Special Tribunal for Aggression*, *supra* note 1; McDougall, *Prosecution Parts I & II*, *supra* note 1; Hathaway, *Russia’s Crime and Punishment*, *supra* note 1; Ambos, *supra* note 1.

3. On the General Assembly, see, for example, *U.N. General Assembly*, *supra* note 1; Johnson, *supra* note 1; Corten & Koutroulis, *supra* note 1, at 14–6; Hathaway, *The Case*, *supra* note 1; Ambos, *supra* note 1. On alternative options (including both hybrid and ad hoc options), see, for example, Brown et al., *supra* note 1; Heller, *Options*, *supra* note 1; Owiso, *supra* note 1; Corten & Koutroulis, *supra* note 1, at 16–19; Annalena Baerbock, German Federal Foreign Minister, *Strengthening International Law in Times of Crisis*, Speech in The Hague (Jan. 16, 2023), <https://www.auswaertigesamt.de/en/newsroom/news/strengthening-international-law-in-times-of-crisis/2573492>.

On the issue of constitutional constraints, see, for example, Alexander Komarov & Oona Hathaway, *Ukraine’s Constitutional Constraints: How to Achieve Accountability for the*

appraising these alternatives, much of the legal community's attention has been devoted to technicalities relating to jurisdiction, immunity, individual responsibility, and in absentia trials.⁴ At a broader level, commentators have raised concerns about hypocrisy, politicization, practicality, and legitimacy.⁵ States and international organizations have started to signal their views.⁶ Overall, the intensity and breadth of

Crime of Aggression, JUST SEC. (Apr. 5, 2022), <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>; Alexander Komarov & Oona Hathaway, *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, JUST SEC. (Apr. 11, 2022), <https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/>. Discussing (approvingly) Ukrainian and Dutch proposals to create an Interim Prosecutor's Office while the broader institutional details get worked out, see Goodman, *supra* note 1.

4. See, e.g., Corten & Koutroulis, *supra* note 1 at 21–34; Reisinger Coracini *supra* note 1; Trahan, *The Case*, *supra* note 1; Dannenbaum, *Mechanisms*, *supra* note 1; Johnson, *supra* note 1; Hamilton, *supra* note 1; Heller, *Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea*, *supra* note 1; Heller, *Options*, *supra* note 1; McDougall, *Why Creating a Special Tribunal for Aggression*, *supra* note 1.

5. See, e.g., Corten & Koutroulis, *supra* note 1, at 35–37; Dannenbaum, *A Special Tribunal*, *supra* note 1; Heller, *Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea*, *supra* note 1; Heller, *Options*, *supra* note 1.

6. See *infra* note 59; Press Release, Ministry of Foreign Aff. of the Republic of Lithuania, *The ministers of Estonia, Latvia and Lithuania call to establish a Special Tribunal to investigate the crime of Russia's aggression* (Oct. 16, 2022), <https://urm.lt/default/en/news/the-ministers-of-estonia-latvia-and-lithuania-call-to-establish-a-special-tribunal-to-investigate-the-crime-of-russias-aggression>; Hoekstra backs special tribunal to try Russian aggression against Ukraine, DUTCHNEWS.NL (Dec. 13, 2022), <https://www.dutchnews.nl/news/2022/12/hoekstra-backs-special-tribunal-to-try-russian-aggression-against-ukraine/>; *Dutch MP's want special Putin tribunal setup in The Hague*, NL TIMES (Oct. 20, 2022), <https://nltimes.nl/2022/10/20/dutch-mps-want-special-putin-tribunal-set-hague>; Jan Lipavský, Statement by Jan Lipavský Minister of Foreign Affairs of the Czech Republic at the UN Security Council (Sept. 22, 2022), https://www.mzv.cz/jnp/en/about_the_ministry/organization_of_the_ministry/minister/speeches_and_articles/archive/statement_by_minister_of_foreign_affairs_1.html; See Baerbock, *supra* note 3; Press Release, Foreign, Commonwealth & Dev. Off., Att'y Gen.'s Off., Rt. Hon. James Cleverly MP & Rt. Hon. Victoria Prentis KC MP, UK Joins Core Group Dedicated to Achieving Accountability for Russia's Aggression Against Ukraine (Jan. 20, 2023), <https://www.gov.uk/government/news/ukraine-uk-joins-core-group-dedicated-to-achieving-accountability-for-russias-aggression-against-ukraine#:~:text=The%20UK%20will%20play%20a,announced%20today%2C%20Friday%2020%20January>; Statement by Dmytro Kuleba Minister of Foreign Affairs of Ukraine on the initiative to create a Tribunal for bringing the leadership of the Russian Federation to justice for the crime of aggression against Ukraine (Mar. 8, 2022), <https://mfa.gov.ua/en/news/statement-minister-foreign-affairs-ukraine-dmytro-kuleba-initiative-create-tribunal-bringing-leadership-russian-federation-justice-crime-aggression-against-ukraine>; Declaration by NATO Parliamentary Assembly, Standing With Ukraine, 111 SESP 22 E rev.1 fin, para. 18 (j) (May 30, 2022), <https://www.nato-pa.int/download-file?filename=/sites/default/files/2022-05/111%20SESP%2022%20E%20rev.1%20fin%20-%20DECLARATION%20ON%20UKRAINE.pdf>; Parliamentary Assembly of the Council of Europe, Res. 2436, § 11.6 (Apr. 28, 2022), <https://pace.coe.int/en/files/30024/html>; European

attention devoted to accountability for aggression during this period has surpassed anything since the prosecutions of senior German and Japanese officials at Nuremberg and Tokyo following World War II. And yet, relatively little has been said about the normative imperative driving these efforts.⁷ Why is it important that there be criminal accountability for aggression?

This is a question that ought to be taken seriously. The seven decades of impunity since the tribunals at Nuremberg and Tokyo preclude responding with the simple fact that aggression is a crime under customary international law.⁸ It is, of course. But it is also true that the longstanding dormancy of the crime of aggression has not been an accident. Both the International Criminal Court's (ICC) delayed and debilitatingly narrow jurisdiction over the crime and the rarity and immunity-constrained nature of domestic jurisdiction are the products of a long-running combination of apathy, skepticism, and straightforward hostility towards the project of criminalizing

Parliament, Res. 2022/2655(RSP) §§ 12–13 (May 19, 2022), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0218_EN.pdf; European Parliament Res. P9_TA(2023)0015, *The establishment of a tribunal on the crime of aggression against Ukraine* (Jan. 19, 2023), https://www.europarl.europa.eu/doceo/document/TA-9-2023-0015_EN.pdf; Statement by Foreign Affairs Committee Chairs Calling for the Creation of an International Criminal Tribunal into Vladimir Putin's Criminal Conspiracy, (Mar. 7, 2022), <https://www.pgaction.org/pdf/2022/international-criminal-tribunal-putin.pdf>; Parliamentary Assembly of the Council of Europe, *The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes, Reply to Recommendation Doc. 15645* (Oct. 18, 2022), <https://pace.coe.int/pdf/4bc8a7831b0c055b84c3075c8c7b9a964f1262035f204342fd4dea431f22d365/doc.%2015510.pdf>; European Comm'n, *Statement by President von der Leyen on Russian accountability and the use of Russian frozen assets* (Nov. 30, 2022), https://ec.europa.eu/commission/presscorner/detail/en/statement_22_7307; European External Action Service Press Release, Council of Europe Summit in Reykjavik: EU Leaders Join European Show of Unity in Support of Ukraine and Fundamental Values (May 17, 2023), https://www.eeas.europa.eu/delegations/council-europe/council-europe-summit-reykjavik%20ADk-eu-leaders-join-european-show-unity-support-ukraine-and-fundamental_en#:~:text=On%2016%2D17%20May%2C%20in,while%20reaffirming%20solidarity%20with%20Ukraine;President's%20Office:36%20countries%20in%20Core%20Group%20on%20Special%20Tribunal%20for%20Russian%20crime%20of%20aggression,KYIV%20INDEPENDENT (May 5, 2023), <https://kyivindependent.com/presidents-office-36-countries-in-core-group-on-special-tribunal-for-russian-crime-of-aggression/>; Press Release, White House, G7 Leaders' Statement on Ukraine (May 19, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/19/g7-leaders-statement-on-ukraine/>.

7. On this question, see, for example, *A Special Tribunal*, *supra* note 1, at 859; Nuridzhanian, *supra* note 1.

8. See, e.g., Prosecutor v. Göring et al., Judgment (1946), in 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411 (1947); Prosecutor v. Araki et al., Judgment (1948), in 20 THE TOKYO WAR CRIMES TRIAL 48,413 (R. John Pritchard & Sonia Magbanua Zaide eds., 1981).

aggression.⁹ The widely perceived need for a new institution for the prosecution of those responsible for the aggression against Ukraine is itself the product of careful and deliberate efforts to preclude criminal accountability in situations of precisely this kind, including by those who now support the creation of an ad hoc tribunal.¹⁰ If the war in Ukraine is to be a turning point on the issue of accountability for aggression under international law, it is important to be clear about the normative impetus and its implications beyond the current case.

There are instrumental and intrinsic reasons for precision in that regard. Specificity as to the stakes could help to motivate and focus support for the pursuit of accountability in a context in which overt backing for a tribunal remains limited, despite the widespread condemnation of Russia's aggression and the associated annexations.¹¹ Moreover, given the centrality of expressivism as a function of international criminal law, one of the regime's primary reasons for being depends on clarity about the principles that are to be vindicated through accountability.¹² Certainly, the expressive specifics of

9. Specifying the narrow ICC jurisdiction over aggression (and the narrowest interpretation of it), see ICC Assembly of States Parties, Res. RC/Res.6: The Crime of Aggression (Jun. 11, 2010); ICC Assembly of States Parties, Res. ICC-ASP/16/Res.5 (Dec. 14, 2017). Exemplifying the pressure to narrow the crime and limit the Court's jurisdiction, see: Harold Hongju Koh & Todd Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT'L L. 257 (2015); Edwige Belliard, *France, in THE CRIME OF AGGRESSION: A COMMENTARY* 1143 (Claus Kreß & Stefan Barriga eds., 2017); Christopher Whomersley, *United Kingdom, in id.* 1285; Harold Hongju Koh & Todd F. Buchwald, *United States, in id.* 1290. See also NOAH WEISBORD, *THE CRIME OF AGGRESSION* 107 (2019); Jennifer Trahan, *From Kampala to New York*, 18 INT'L CRIM. L. REV. 197 (2018); Annegret L. Hartig, *Dubious Negotiations in New York: Did France and the UK come to blow it up?*, INTLAWGRRLS (Jan. 18, 2018), <https://ilg2.org/2018/01/18/dubious-negotiations-in-new-york-did-france-and-the-uk-come-to-blow-it-up/>; Ambos, *supra* note 1.

10. On the pivotal roles of France, the United Kingdom, and the United States in delaying and then limiting ICC jurisdiction over the crime of aggression, see *supra* note 9. None of the three states has ratified the Kampala amendments or codified the crime of aggression domestically. On their support for aggression accountability in the context of Ukraine, see Ministère de L'Europe et des Affaires Étrangères [Ministry of Europe and Foreign Affairs], *Ukraine - Special tribunal on Russian crimes of aggression* (Nov. 30, 2022), <https://www.diplomatie.gouv.fr/en/country-files/ukraine/news/article/ukraine-special-tribunal-on-russian-crimes-of-aggression-30-nov-22>; Press Release, Foreign, Commonwealth & Dev. Off., *supra* note 6; Beth Van Schaack, *Ambassador-at-Large for Global Criminal Justice, Remarks, Nuremberg Principles Meeting, Catholic University of America* (Mar. 27, 2023), <https://www.state.gov/ambassador-van-schaacks-remarks/>.

11. G.A. Res. ES-11/1, U.N. Doc. A/RES/ES-11/1 (Mar. 2, 2022); G.A. Res. ES-11/4, U.N. Doc. A/RES/ES-11/4 (Oct. 13, 2022).

12. On expressivism in international criminal law, see MARK DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* 3, 12, 61, 173–79 (2007); David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 569, 575–76 (Samantha Besson & John

particular criminal categories are highly relevant to charge selection (and decisions to pursue cumulative convictions) in contexts in which multiple criminal categories could attach.¹³ Of course, international criminal law is also supposed to deter activities to which criminal accountability attaches. However, the strongest empirical evidence indicates that the deterrent impact of international criminalization derives not from the prospect of punishment, but from the social costs arising from the expressive taint of criminality—a phenomenon Hyeran Jo and Beth Simmons have called “social deterrence” and Geoff Dancy has identified as deterrence through stigmatization.¹⁴ That, too, might be at least partly contingent on how the criminal wrongfulness of the relevant conduct is understood—at least insofar as the expressive distinctions across criminal categories entail a degree of stigmatic differentiation.¹⁵

I. EXISTING RATIONALES

As noted above, much of the discussion around accountability in the context of Russia’s aggression against Ukraine has focused on legal technicalities, institutional design, and politics.¹⁶ Underlying rationales for criminal accountability have been articulated on occasion, but often in a relatively declaratory manner. Particularly given the stakes, those putative justifications for the accountability imperative warrant deeper interrogation.

Three prominent rationales stand out in that respect. The first is that Russia’s aggression entails a fundamental attack on the international legal order.¹⁷ Implicit in this framing is the claim that

Tasioulas eds., 2010); Robert D. Sloane, *The Expressive Capacity of International Punishment*, 43 STAN J. INT’L L. 39 (2007); Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT’L CRIM. L. REV. 93, 117 (2002); Margaret M. deGuzman, *Choosing to Prosecute*, 33 MICH. J. INT’L L. 265 (2012); Ralph Henham, *Some Issues for Sentencing in the International Criminal Court*, 52 INT’L & COMP. L.Q. 81, 111 (2003); Bill Wringer, *Why Punish War Crimes?*, 25 L. & PHIL. 151 (2006). For a comprehensive overview of expressivism in international criminal law, see CARSTEN STAHN, *JUSTICE AS A MESSAGE* (2020).

13. Tom Dannenbaum, *Siege Starvation: A War Crime of Societal Torture*, 22 CHI. J. INT’L L. 368, 394–400 (2022).

14. Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT’L ORG. 443 (2016); Geoff Dancy, *Searching for Deterrence at the International Criminal Court*, 17 INT’L CRIM. L. REV. 625 (2017).

15. Dannenbaum, *supra* note 13 at 396–400.

16. *See supra* notes 2–8 and accompanying text.

17. *See, e.g.*, Gordon Brown et al., *supra* note 1; Mary Robinson, *quoted in* The Elders *supra* note 1; Baerbock, *supra* note 3; *Assembly of States Parties Side Event organized*

impunity for such an attack would imperil the very structure of contemporary international law, portending either a descent into anarchy or a shift to an international legal order that is distinct from, and less desirable than, the extant framework. Accountability is an imperative on this view because all legal tools must be deployed to guard against that descent. A second rationale focuses less on the system and more on the specific victims of the current conflict. On this account, aggression is best understood as an umbrella crime (one that encapsulates the war crimes and crimes against humanity committed in the conflict), or, relatedly, as a progenitor crime (the crime without which those atrocities would not have been perpetrated).¹⁸ Seen in this

by *Liechtenstein and Luxembourg: Prosecuting the Crime of Aggression to Defend the Rules-Based International Order*, 21st Session of the Assembly of States Parties, PUB. INT'L LAW AND POL'Y GRP. (Dec. 6, 2022), <https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2022/12/7/asp21-side-event-prosecuting-the-crime-of-aggression-to-defend-the-rules-based-international-order>; UNITED NATIONS, *U.N. General Assembly Side Event organized by Estonia, Latvia, Liechtenstein, Lithuania, and Ukraine, Law Not War: A Special Tribunal for the Crime of Aggression* (Oct. 25, 2022), <https://media.un.org/en/asset/k1q/k1qyewjw26> [hereinafter, "*UN Side Event*"]; United Nations Security Council, Letter dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council (S/2014/136), UN Doc. S/PV.8979 (Feb. 25, 2022); United Nations Security Council, Chair's summary of the event entitled "Yale Club roundtable: a special tribunal for the crime of aggression recommended by the UN General Assembly?"; U.N. Doc. A/ES-11/7-S/2022/616 at 2–4, 9–10 (Aug. 17, 2022); Nuridzhanian, *supra* note 1 (but note that Nuridzhanian also incorporates what is argued here to be the more compelling rationale *infra* note 44); Hathaway, *The Case*, *supra* note 1; Oona A. Hathaway, *A Crime in Search of a Court*, FOREIGN AFF. (May 19, 2022), <https://www.foreignaffairs.com/articles/ukraine/2022-05-19/crime-search-court>; Hathaway, *Russia's Crime and Punishment*, *supra* note 1; Janet H. Anderson, *A Nuremberg for Russia's Crime of Aggression?*, JUSTICEINFO.NET (Apr. 22, 2022), <https://www.justiceinfo.net/en/91135-nuremberg-russia-crime-of-aggression.html> (quoting Carrie McDougall and Kateryna Busol). Although not specifically on the issue of criminal accountability, see also Joe Biden, President of the United States, Remarks by President Biden on the United Efforts of the Free World to Support the People of Ukraine (Mar. 26, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/26/remarks-by-president-biden-on-the-united-efforts-of-the-free-world-to-support-the-people-of-ukraine/>; Ingrid (Wuerth) Brunk & Monica Hakimi, *Russia, Ukraine, and the Future World Order*, 116 AM. J. INT'L L. 687, 687 (2022).

18. See, e.g., PUB. INT'L LAW AND POL'Y GRP., *supra* note 17; *U.N. Side Event*, *supra* note 17; Baerbock, *supra* note 3; *Albania, Belgium, Guatemala, Estonia, Latvia, Liechtenstein, Lithuania, Luxembourg, Marshall Islands, North Macedonia, Poland, Ukraine, Frequently Asked Questions: A Special Tribunal for the Crime of Aggression against Ukraine*, JUST SEC. at Q. 4 (Jan. 18, 2023), https://www.justsecurity.org/wp-content/uploads/2023/01/FAQ_Special-Tribunal-for-the-Crime-of-Aggression.pdf [hereinafter, "*Albania et al.*"]; Permanent Mission of Ukraine to the United Nations in New York, *Statement by Minister of Foreign Affairs of Ukraine Dmytro Kuleba on the initiative to create a Tribunal for bringing the leadership of the Russian Federation to justice for the crime of aggression against Ukraine* (Mar. 7, 2022), <https://ukraineun.org/en/press-center/535-statement-of-the-minister-for-foreign-affairs-of-ukraine-mr-dmytro-kuleba-on-the->

way, accountability for aggression is necessary to comprehensively vindicate the rights of those victimized by the atrocities that comprise the war. Third, in a related but more instrumental vein, it has been suggested that aggression is the crime with which Vladimir Putin and other Russian leaders can most straightforwardly be attributed.¹⁹ Here, the idea is that relying exclusively on war crimes or crimes against humanity charges could result in a situation in which those presumed to be most responsible are able to escape accountability due to the difficulty of establishing their individual connections to those specific crimes. Given the clear role of such individuals in initiating the war, aggression would appear to offer a more straightforward path to accountability.

II. EVALUATING EXISTING RATIONALES

Within the specific context of Russia's aggression against Ukraine, these ways of motivating accountability for aggression are, in a sense, descriptively correct. That is to say, Russia's war can indeed be characterized as an attack on the international legal order; it has created the conditions for widespread war crimes and crimes against humanity; and, given the perennial challenges with linkage evidence in cases against high-ranking officials, it is fairly clear that, jurisdiction permitting, an aggression case would offer a more promising path to

establishment-of-the-tribunal-aimed-at-delivering-justice-for-the-crime-of-armed-aggression/Volodymyr Zelensky, President of Ukraine, For Russia to be Held Account for Aggression, a Special Tribunal is Needed, and we are Doing Everything to Create it – Address by the President of Ukraine (Nov. 29, 2022), [https://www.president.gov.ua/en/news/shob-bula-vidpovidalnist-rosiyi-za-agresiyu-potriben-special-79537#:~:text=For%20there%20to%20be%20responsibility,dicated%20to%20this%20task%20exactly;Andrii Smyrnov, We Need a Special Tribunal to Put Putin and His Regime on Trial, TIME \(Sept. 23, 2022\), https://time.com/6216040/putin-war-crimes-tribunals;Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine, OFF. GORDON & SARAH BROWN \(Jan. 6, 2023\), https://gordonandsarahbrown.com/2023/01/statement-calling-for-the-creation-of-a-special-tribunal-for-the-punishment-of-the-crime-of-aggression-against-ukraine/](https://www.president.gov.ua/en/news/shob-bula-vidpovidalnist-rosiyi-za-agresiyu-potriben-special-79537#:~:text=For%20there%20to%20be%20responsibility,dicated%20to%20this%20task%20exactly;Andrii Smyrnov, We Need a Special Tribunal to Put Putin and His Regime on Trial, TIME (Sept. 23, 2022), https://time.com/6216040/putin-war-crimes-tribunals;Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine, OFF. GORDON & SARAH BROWN (Jan. 6, 2023), https://gordonandsarahbrown.com/2023/01/statement-calling-for-the-creation-of-a-special-tribunal-for-the-punishment-of-the-crime-of-aggression-against-ukraine/); Hathaway, *Russia's Crime and Punishment*, *supra* note 1.

19. *UN Side Event*, *supra* note 17; Akande, *supra* note 1, paras. 25–26; Sam Wolfson, *It's a slam dunk': Philippe Sands on the case against Putin for the crime of aggression*, *GUARDIAN* (Mar. 31, 2022), <https://www.theguardian.com/law/2022/mar/30/vladimir-putin-ukraine-crime-aggression-philippe-sands>; Smyrnov, *supra* note 18. Clearly, in any given scenario it may be possible to attribute leaders with war crimes, crimes against humanity, or genocide. Indeed, shortly before this article went to press, the ICC issued an arrest warrant for Putin for war crimes relating to child deportation. Press Release, Int'l Crim. Ct., Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (Mar. 17, 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>. Nonetheless, the point is a relative one.

the conviction of Vladimir Putin and others in the Russian leadership cabal than would a combination of war crimes and crimes against humanity charges.

However, these ways of framing the crime do not offer the most compelling reasons for pursuing criminal accountability for aggressive war (generally or in the specific context of Russia's aggression against Ukraine). To invoke the practical utility of aggression as a mechanism through which to convict leaders presumes the value of such convictions, rather than justifying the pursuit of that outcome. Although aggression's role in creating the conditions for war crimes or crimes against humanity could, in theory, provide that justificatory underpinning, it falls short both in holding the wrongfulness of aggression contingent on facts unrelated to the core violation and in obscuring aggressive war's status as an atrocity in its own right. Efforts to motivate aggression accountability with reference to preserving the contemporary international legal order are similarly deficient. Far from being a ban the normative weight of which is contingent on its contribution to the existing international legal order, the ban on aggression is the component of that legal framework that would be most worthy of preservation even in a new international order, otherwise reimagined to remedy the inequities and injustices of the status quo. Consider these points in turn.

A. *The Most Straightforward Route to Leader Accountability*

The ease with which an aggression case could be prosecuted should not be overstated.²⁰ A special tribunal is widely thought to be a prerequisite to criminal accountability for Russia's war in Ukraine precisely because aggression is the international crime that raises the most significant difficulties regarding jurisdiction and immunity.²¹ Even assuming that those hurdles can be overcome through careful institutional design, the combination of ambiguities in the ICC Statute definition (which has the most credible claim to defining the customary crime) and the dearth of aggression case-law since Nuremberg and Tokyo portends significant interpretive contestation in any criminal case today.²²

20. Cf. *supra* note 17.

21. See *supra* notes 3-5.

22. On the ambiguities, see Ambos, *supra* note 1; Michael J. Glennon, *The Blank Prose Crime of Aggression*, 35 YALE J. INT'L L. 71; Koh & Buchwald, *supra* note 9, at 263-73. I have argued elsewhere that these ambiguities are overstated. Tom Dannenbaum,

Nonetheless, the point is a relative one. Assuming a court capable of overcoming immunities is indeed created, aggression very likely would be more straightforwardly attributable to those at the apex of the Russian state, including President Vladimir Putin, than would war crimes or crimes against humanity.²³ The primary difference across these categories concerns the issue of linkage evidence. Leaders are often remote (physically and in the command chain) from the commission of war crimes, complicating both the evidentiary challenge of linking them to crimes, as well as the legal question of whether such a link would even establish liability.²⁴ In contrast, as those with the ultimate authority to decide whether to resort to force, leaders are the principal perpetrators of aggression, the *actus reus* of which involves planning, preparing, initiating, or executing the “use of armed force by a State.”²⁵ Moreover, in the current context, the publicly available evidence relevant to establishing both the criminality of the invasion of Ukraine and the individual responsibility of key Russian leaders is already quite potent.²⁶

Aggression and Atrocity: The Interstate Element, Politics, and Individual Responsibility, in *RETHINKING THE CRIME OF AGGRESSION: INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES* 225, 245–8 (Stefanie Bock & Eckart Conze eds., 2022). Moreover, the invasion of Ukraine is not a marginal case. Nonetheless, the fact of textual ambiguity and the dearth of case-law is such that it would be prudent for any prosecutor to expect interpretive challenges.

23. As noted above (*supra* note 19), shortly before this article went to press, the ICC issued an arrest warrant for Vladimir Putin for war crimes related to child deportation. As at Nuremberg, it is, of course, possible that any given leader is attributable with multiple crimes across the categories of international criminal law. The point, however, is that aggression is more straightforwardly attributable at the leadership level than are most other crimes.

24. See, e.g., Joseph Powderly, *Introductory Note to Prosecutor v. Jean-Pierre Bemba Gombo: Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III’s ‘Judgment Pursuant to Article 74 of the Statute’ (Int’l Crim Ct.)*, 57 INT’L L. MATERIALS 1031 (2018); Patryk Labuda, *The ICC’s Evidence Problem*, VÖLKERRECHTSBLOG (Jan. 18, 2019), <https://voelkerrechtsblog.org/the-iccs-evidence-problem/>; Ben Batros, *The ICC Acquittal of Gbagbo: What Next for Crimes Against Humanity?*, JUST SEC. (Jan. 18, 2019), <https://www.justsecurity.org/62295/icc-acquittal-gbagbo-crimes-humanity/>; Miles Jackson, *Geographical Remoteness in Bemba*, EJIL:TALK! (July 30, 2018), <https://www.ejiltalk.org/geographical-remoteness-in-bemba/>.

25. International Criminal Court, *Elements of Crimes*, ICC-PIDS-LT-03-002/11_Eng at 43 (2011).

26. *Model Indictment for the Crime of Aggression Committed against Ukraine*, OPEN SOC’Y JUST. INITIATIVE (May 9, 2022), <https://www.justiceinitiative.org/publications/model-indictment-for-the-crime-of-aggression-committed-against-ukraine>; Ryan Goodman & Rebecca Hamilton, *Model Indictment for Crime of Aggression Against Ukraine: Prosecutor v President Vladimir Putin*, JUST SEC. (Mar. 14, 2022), <https://www.justsecurity.org/80669/model-indictment-of-the-crime-of-aggression-against-ukraine-vladimir-putin/>.

However, the fact that creating the conditions for an aggression prosecution would facilitate the accountability of Russian leaders is motivating of aggression accountability only if one presumes the desirability of convicting those individuals. It does not itself provide an independent justification for the pursuit of that end. Similarly, unless one takes the existing limits on individual criminal responsibility for war crimes and crimes against humanity to be overly favorable to defendants, the difficulty associated with those routes to accountability cannot itself provide the basis for establishing an alternative, unless there is some independent basis for the latter.

To be clear, assuming the viability of an independent justification for pursuing aggression accountability, its utility as the charge most likely to stick in criminal cases against political and military leaders would be an additional reason to facilitate the pursuit of that option. However, in that role, the fact of attributability would serve only to supplement a deeper explanation of why accountability is important.

B. Aggression as a Progenitor Crime

In the discourse around the need to pursue accountability for Russia's aggression against Ukraine, that deeper explanation has often been framed by noting that without the initial and ongoing aggression, the ensuing atrocities that appear to have been perpetrated in Bucha, Mariupol, Kherson, and elsewhere would not have occurred.²⁷ Aggression, on this account, is a progenitor crime. It is the umbrella category that captures each of the atrocities that follow.

Here, too, the account is not entirely off-base. It is clearly true that none of the atrocities within the war would have occurred without the aggressive resort to war. However, pointing to the wrongfulness of those subsequent crimes as the basis for the criminal wrongfulness of the resort to force is both descriptively incomplete and normatively deficient.

27. See, e.g., ORG. FOR SEC. & COOP. IN EUROPE OFF. FOR DEMOCRATIC INSTS. & HUM. RTS., REPORT ON VIOLATIONS OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW, WAR CRIMES AND CRIMES AGAINST HUMANITY COMMITTED IN UKRAINE (1 APRIL – 25 JUNE 2022) (July 14, 2022), <https://www.osce.org/files/f/documents/3/e/522616.pdf>; ORG. FOR SEC. & COOP. IN EUROPE OFF. FOR DEMOCRATIC INST. & HUM. RTS., REPORT ON VIOLATIONS OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW, WAR CRIMES AND CRIMES AGAINST HUMANITY COMMITTED IN UKRAINE SINCE 24 FEBRUARY 2022 (Apr. 13, 2022), <https://www.osce.org/files/f/documents/f/a/515868.pdf>.

In some cases, those leaders who might plausibly be the targets of an aggression prosecution would also be plausibly attributable with the war crimes that follow during the conflict. In others, they would not. However, in both scenarios, it is axiomatic that the *jus ad bellum* status of the war would be irrelevant to the question of the leaders' attributability with the ensuing war crimes. Similarly, it ought to be axiomatic that compliance with international humanitarian law can no more expunge or mitigate the wrongfulness of aggression than can compliance with the *jus ad bellum* absolve the defensive party from its obligations under international humanitarian law. And yet, in rooting the wrongfulness of aggression in violations of international humanitarian law, the progenitor theory would appear to hold the normative force (if not the technical legal application) of the *jus ad bellum* contingent on considerations arising under the *jus in bello*.

This is not to say that the war crimes and crimes against humanity that occur in war (and that have occurred during Russia's invasion of Ukraine) are irrelevant to the wrongfulness of the aggression that created the conditions for those subsequent wrongs. However, they cannot be definitive of that wrongfulness and their characterization as war crimes cannot be the basis for whatever relevance they may have in that respect. To insist otherwise would be to render aggression anomalously normatively derivative and to get the separation and independence of *jus ad bellum* and *jus in bello* backwards.²⁸ The latter precludes defining *jus ad bellum* wrongs in terms of *jus in bello* violations no less than it precludes defining *jus in bello* wrongs with reference to *jus ad bellum* violations.

C. *Aggression as an Attack on the Legal Order*

A prominent alternative rationale for criminal accountability for aggression is that aggression entails an attack on the current international legal order.²⁹ In the clearest form of this account, the ban on aggression is identified as the keystone principle of that order, such that to allow aggression to go unpunished would be to leave international law in its contemporary manifestation undefended, opening the door to systemic breakdown.

Here, too, there is a strong element of descriptive accuracy. The prohibition on the use of force in international affairs (with narrow

28. Relatedly, see: TOM DANNENBAUM, *THE CRIME OF AGGRESSION, HUMANITY, AND THE SOLDIER* 208–22 (2018).

29. See *supra* note 17.

self-defense and security council authorization exceptions) is indeed central to the structure of contemporary international law. The recent work of Oona Hathaway and Scott Shapiro has been particularly illuminating in this respect, charting how the abolition of the sovereign prerogative to resort to war transformed the international legal system, both by enabling deeper levels of cooperation and by necessitating a paradigm shift in the mechanisms through which to enforce and vindicate legal claims.³⁰ In that sense, an argument can be made that the aggression ban is the rule of greatest systemic significance to the legal order as it exists today.

However, just as there is no intrinsic connection between a rule's status as foundational to a domestic constitutional system and any imperative to enforce that rule through criminal law, a rule's systemic centrality at the international level does not entail that its violation ought to trigger international criminal accountability. In fact, systemic centrality of that kind is neither necessary nor sufficient for criminality. Moreover, in the specific case of aggression, reliance on systemic centrality gets the justificatory story backwards, divesting the account of normative and motivational force, particularly among those for whom the obvious inequities and injustices in the existing legal order call into question the need to preserve that specific legal order as such. Further, the very states that benefit most from the current legal order are themselves responsible for the existing jurisdictional deficit when it comes to aggression accountability.³¹

That systemic centrality is not a necessary component of justifying criminal accountability is clear from its marginal role in efforts to justify the criminality of the other core international crimes, such as genocide, crimes against humanity, and war crimes. It is debatable whether such actions are properly characterized as attacks on the international legal order at all. However, even accepting that all international crimes fall into that category, their legal systemic significance is rarely invoked to explain why accountability for such atrocities is important.³²

A second, and related point, is that it is not clear precisely what constitutes an attack on the international legal order in the first place. For the concept to be meaningful, it cannot be that any (or even any

30. OONA HATHAWAY & SCOTT SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* chs. 13–17 (2017).

31. *See supra* note 10.

32. For a notable exception, see Ryan Liss, *Crimes Against the Sovereign Order: Rethinking International Criminal Justice*, 113 *AM. J. INT'L L.* 727 (2019).

serious) violation of international law constitutes an attack on the legal order. Rather, the category must be limited to a subset of rules that are central to the contemporary legal order. As noted above, the ban on aggression is plausibly understood in those terms as a rule that underpins the current system. However, just as the accountability imperative for other international criminal categories is not generally framed with reference to the international legal order, there are violations of keystone rules of that order with respect to which international criminal accountability is not generally understood to be an imperative.

This point raises the third and most important issue, which is that however one defines the keystone rules of the contemporary legal order, it inevitably includes rules that either manifest or ossify profound injustices and inequities. The authority and structure of the U.N. Security Council is a particularly obvious example. In addition to granting veto power on questions of peace and security to five powerful states, each of which has been credibly alleged to have violated either core *jus ad bellum* or human rights rules in a major way during its tenure,³³ the distribution of power through this system

33. In the case of Russia, the invasion of Ukraine is itself exemplary. For each of the other four permanent members, several significant violations could be invoked, but consider one high-profile example for each: The United States and United Kingdom were at the forefront of the illegal invasion of Iraq. Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L. J. 173 (2004); Ewan MacAskill & Julian Borger, *Iraq War was Illegal and Breached UN Charter*, says Annan, GUARDIAN (Sept. 16, 2004); Rapport Commissie van Onderzoek Besluitvorming Irak [*Report of the Dutch Committee of Inquiry on the War in Iraq: Chapter 8: The Basis in International Law for the Military Intervention in Iraq*] (Neth.), translated in 57 NETH. INT'L L. REV., <https://actorenregister.nationaalarchief.nl/actor-organisatie/commissie-van-onderzoek-besluitvorming-irak>. China's ongoing mistreatment of its Uyghur population is thought to involve widespread human rights violations rising to the level of crimes against humanity. Off. of the High Comm'r for Human Rights (OHCHR), *OHCHR Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China* ¶ 148 (Aug. 31, 2022), <https://www.ohchr.org/en/documents/country-reports/ohchr-assessment-human-rights-concerns-xinjiang-uyghur-autonomous-region>; Press Release, OHCHR, China must address grave human rights concerns and enable credible international investigation: UN experts (June 10, 2022), <https://www.ohchr.org/en/press-releases/2022/06/china-must-address-grave-human-rights-concerns-and-enable-credible>; AMNESTY INT'L, "LIKE WE WERE ENEMIES IN A WAR": CHINA'S MASS INTERNMENT, TORTURE, AND PERSECUTION OF MUSLIMS IN XINJIANG (2021), available at <https://www.amnesty.org/en/documents/asa17/4137/2021/en/>; "Break their Lineage, Break their Roots": China's Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims, HUMAN RTS. WATCH (Apr. 19, 2021), <https://www.hrw.org/report/2021/04/19/break-their-lineage-break-their-roots/chinas-crimes-against-humanity-targeting>. With respect to France, consider, for example, the systematic use of torture and rape during Algeria's war of independence: Angelique Chrisafis, *France Admits Systematic Torture During Algeria War for First Time*, GUARDIAN (Sept. 13, 2018), <https://www.theguardian.com/world/2018/sep/13/france-state-responsible-for-1957-death-of->

reflects the broader institutional exclusion of states that were still under colonial subjugation in 1945, with obvious racialized implications.³⁴ Although less evidently unjust in the abstract, the doctrine of intertemporal law is, in practice, a critical shield against efforts to remedy historic injustices that preceded the current legal order, including those arising from colonialism.³⁵ Meanwhile, foundational rules of intellectual property law have underpinned what has been critiqued as “vaccine apartheid” during the COVID-19 pandemic.³⁶ Exemplifying the sense of enduring injustice in the structure of international economic law, an overwhelming majority of states (123 to 50) recently reiterated the longstanding and oft-repeated call for a new international economic order.³⁷

Perhaps one might quibble over whether any one of these rules is central to the current legal order (although the lack of clarity on that point may itself impugn the analytical utility of the concept). But it is difficult to deny that that order includes, entrenches, and preserves many significant injustices. Indeed, a robust line of critique spotlights the way in which the order is structured (and institutions designed) such that even formally defensible laws are applied in a way that “keep[s] a racially hegemonic colonial order in place, decades after the formal anti-colonial and independence movements came and went.”³⁸ And this alone provides reason to be ambivalent about the preservation of the existing legal order as such, regardless of the precise list of rules one takes to be constitutive of it. Indeed, in certain respects, there is a

dissident-maurice-audin-in-algeria-says-macron; Raphaëlle Branche, *Des Viols Pendant la Guerre d'Algérie* [Rapes During the Algerian War], 75 *REVUE D'HISTOIRE* 123 (2002).

34. Marissa Jackson Sow, *Ukrainian Refugees, Race, and International Law's Choice Between Order and Justice*, 116 *AM. J. INT'L L.* 698, 701 (2022) (“Though admitted to the UN after independence, the new Black- and Brown-led states were never accorded institutional equity, nor have international norms ever been equally applied to them. Western, European, and other majority-white states enjoy outsized sovereignty by comparison and exert disproportionate decision-making power within the international law regime.”).

35. Carsten Stahn, *Reckoning with colonial injustice: International law as culprit and as remedy?*, 33 *LEIDEN J. INT'L L.* 823 (2020); Andreas von Arnould, *How to Illegalize Past Injustice: Reinterpreting the Rules of Intertemporality*, 32 *EUR. J. INT'L L.* 401 (2021).

36. Matiangai Sirleaf, *Omicron: The Variant that Vaccine Apartheid Built*, *JUST SEC.* (Dec. 2, 2021), <https://www.justsecurity.org/79403/omicron-the-variant-that-vaccine-apartheid-built/>; E. Tendayi Achiume, Open Letter from the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to the World Trade Organization’s Twelfth Ministerial Conference (Jun. 13, 2022).

37. G.A. Res. 77/174, U.N. Doc. A/RES/77/174 (Dec. 14, 2022). *See* G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/S-6/3201 (May 1, 1974); G.A. Res. 3202 (S-VI), U.N. Doc. A/RES/S-6/3202 (May 1, 1974).

38. Sow, *supra* note 34, at 702.

clear basis for demanding systemic change, not just to specific rules, but to the international legal order itself.³⁹

None of this is to deny the importance of the rule of law. A descent into international anarchy would be a catastrophic deterioration, notwithstanding the flaws in the current system. That, however, is not plausibly what is at stake in the specific question of whether to create a new institution to pursue criminal accountability for aggression in Ukraine, particularly when it is far from the only available legal response to that violation and when every other aggression since World War II has been followed by impunity.⁴⁰ Additionally, in contemplating the complex relationship between violation, legal change, and the rule of law at the international level, it is important to acknowledge that customary international legal change (and even certain forms of treaty change) may occur in part through violation.⁴¹ Starting from the premise that some transformations of the current legal order would be justified and desirable, and recognizing the possibility of legal change through breach, it is not obvious that a particular rule's centrality to that order ought to justify or motivate the resort to criminal law in its enforcement.

And yet, what ought to be crystal clear is that any transformation of the legal order that would jettison the ban on aggression would itself be catastrophically regressive. The critical point, however, is that it would be so not because the ban on aggression performs the instrumental function of upholding the current international legal order, but because banning aggressive war ought to be one of the central functions of any international legal system. In other words, if the international legal order today were to be reimagined in a more just and equitable form, one of the components of the existing system that absolutely ought to be maintained as a central component of that reimagined order would be the ban on aggression. To recognize this is to recognize that the value of the

39. *Id.* at 708.

40. Kristen Eichensehr, *International Institutions Mobilize to Impose Accountability on Russia and Individual Perpetrators of War Crimes and Other Abuses*, 116 AM. J. INT'L L. 631 (2022); Elena Chachko & Katerina Linos, *International Law After Ukraine*, 116 AJIL UNBOUND 124 (2022); Elena Chachko & J. Benton Heath, *A Watershed Moment for Sanctions?*, 116 AJIL UNBOUND 135 (2022); REBECCA M. NELSON, CONG. RSCH. SERV., IF12092, THE ECONOMIC IMPACT OF RUSSIA SANCTIONS (Dec. 13, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF12092#:~:text=Sanctions%20that%20isolate%20Russia%20are,slowdown%20in%20global%20economic%20growth>.

41. Michael J. Glennon, *How International Rules Die*, 93 GEO. L. J. 939 (2004). See also Vienna Convention on the Law of Treaties art. 31(3)(b) (May 23, 1969) 1155 U.N.T.S. 331, 8 I.L.M. 679.

aggression ban is not simply derivative of its function in the existing legal order (an order about which there is some justifiable normative ambivalence). It is normatively prior to that role.⁴²

It is in this sense that pointing to the existing legal order as the reason to pursue accountability for aggression is normatively backwards. One of the main reasons to value the current legal order despite its injustices and inequities is that it includes the prohibition on the resort to aggressive force, not the other way around. To recognize this does not mean denying either aggression's status as a keystone rule of the current legal order or the importance and value of a range of other components of that order. However, to shift to this framing *is* to affirm the possibility of advocating a transformed legal order while committing to preserve the ban on aggression and to hold aggressors accountable. As such, it roots the case for aggression accountability at the most fundamental level and frames it in a way that does not presume in its audience an uncritical endorsement of the legal order as it exists today.

Before turning to the central question of how to define the independent value of the ban on aggression, one might object at this point that any legal or institutional changes that would maintain the ban ought to be understood to be adjustments within a preserved legal order, rather than transformations of the legal order. This conclusion at least might seem to follow from any account in which the aggression ban is *the* keystone and defining element of the contemporary legal order.⁴³

The possibility of an objection along these lines emphasizes the importance of precision in articulating what it means to root the accountability imperative in the notion that aggression is an attack on the legal order. If the "legal order" here refers simply to any legal

42. Parenthetically, it is historically prior to that role, too. The transformation in the legal order charted by Hathaway and Shapiro following the Pact of Paris was not the motivation for the Pact, but instead arose through efforts to accommodate the prohibition on the resort to war, which was introduced for its own independent reasons. HATHAWAY AND SHAPIRO, *supra* note 30, Parts II–III.

43. Scott Shapiro intervened along these lines in the discussion of this topic following the Gerber Lecture on which this paper is based. Scott Shapiro, Charles F. Southmayd Professor of Law and Professor of Philosophy, Yale Law School, Response to Tom Dannenbaum, Associate Professor of International Law, The Fletcher School of Law & Diplomacy, Tufts University, Keynote Address at the University of Maryland Francis King Carey School of Law Annual International and Comparative Law Symposium: Why Accountability for Aggression Matters and the Difficulty of Getting it Right (Nov. 3, 2022), at 46:13–49:25 and 1:20:37–1:22:07, available at <https://mediasite.umaryland.edu/Mediasite/Play/8b6e08c1217b44719faf031c8ef0bedc1d>.

framework that centers the ban on aggression (and is distinct, therefore, only from legal orders that do not include that prohibition), then it becomes difficult to distinguish this rationale from one that identifies the value of the aggression ban as external to its contingent role in upholding the existing legal order. After all, on such a definition, upholding the contemporary legal order simply means upholding the system that bans aggression and preventing a reversion to a legal order in which aggression is not prohibited. To the extent that the independent reasons to value the ban on aggression are central to motivating that non-reversion, the distinction between the legal-order articulation and the rationale provided below may turn out to be primarily semantic. If, on the other hand, the contemporary legal order is understood in a more specific way (such that there is more than one imaginable legal order that centers the ban on aggression), then the test of the rationale would be whether it is about maintaining the aggression ban specifically, or about maintaining the current legal order as such.

D. *Aggression as an Atrocity Crime*

What is lost in the rationales discussed thus far is the sense in which aggressive war is an atrocity in its own right.⁴⁴ Its status as such is neither contingent on, nor derivative of, the parallel infliction of war crimes or crimes against humanity. On the contrary, aggression complements those crimes by filling the gap arising from their separation and independence from the *jus ad bellum*. Moreover, as an atrocity, aggression entails wrongdoing with a normative significance independent from the constitutive role of its prohibition in the current international legal order. Indeed, one of the primary virtues of the transition to the contemporary legal order was that it included the prohibition (and criminalization) of a grave wrong that had previously been thought a sovereign prerogative.

Like other atrocities, waging aggressive war entails inflicting widespread death, destruction, and suffering without legal justification. However, due to the separation and independence of *jus ad bellum* and *jus in bello*, much of that wrongful violence is regularized by, and fully compliant with, international humanitarian law, thus precluding the availability of other criminal categories. The criminalization of aggression closes that gap. It recognizes the wrongful killing and maiming of Ukrainian combatants and “proportionate” collateral civilians in the pursuit of an aggressive end,

44. Tom Dannenbaum, *Why Have We Criminalized Aggressive War?*, 126 YALE L. J. 1242 (2017).

and the infliction of suffering on those otherwise affected by the conflict in ways that are not prohibited under IHL, as no less worthy of criminal accountability than the war crimes and crimes against humanity perpetrated in Bucha, Mariupol, and elsewhere.⁴⁵

The imperatives not to acquiesce in this massive wrong and to stand in solidarity with those who have suffered from it provide the normative impetus for pursuing accountability for aggression in Ukraine. This feature of aggression is the better way of understanding the oft-cited Nuremberg dictum that aggressive war contains within it the “accumulated evil of the whole.”⁴⁶ It reflects the determination made at the International Military Tribunal for the Far East that waging aggressive war necessarily “involves unlawful killings . . . at all places in the theater of war and at all times throughout the period of the war”⁴⁷ and the Human Rights Committee’s 2018 assessment that all deprivations of life in the course of an act of aggression “violate ipso facto” the human right to life as codified in the International Covenant on Civil and Political Rights, regardless of whether the loss of life qualifies as a violation of international humanitarian law.⁴⁸

Thus understood, the imperative to respond to aggression as an atrocity crime would hold even if the war were being conducted generally in compliance with international humanitarian law. Indeed, the need for aggression accountability in the latter case would, in a sense, be particularly acute precisely because the violence would be cognizably wrongful only through its characterization as aggression.⁴⁹ Moreover, although necessarily contingent on the illegality of the resort to force, this understanding of the accountability imperative depends neither on a commitment to the preservation of the current legal order as such, nor to the determination that the illegal use of force in question in fact entails a threat to that order. Recognizing the independent value of the ban on aggression, one can advocate both a

45. *Id.* at 1272–75; Tom Dannenbaum, *The Criminalization of Aggression and Soldiers’ Rights*, 29 EUR. J. INT’L L. 859, 862–63 (2018); Frédéric Mégret, *What Is the Specific Evil of Aggression?*, in Kreß and Barriga, *supra* note 9, at 1398; Ohlin, ‘The Crime of Bootstrapping’, in Kreß and Barriga, *supra* note 9, at 1454. Including this point as part of the rationale for a special tribunal for Ukraine, see Nuridzhanian, *supra* note 1; Akande, *supra* note 1, para. 25; Hathaway, *Russia’s Crime and Punishment*, *supra* note 1.

46. Prosecutor v. Göring et al., *supra* note 8, at 427. See Dannenbaum, *supra* note 44, at 1284; Nuridzhanian, *supra* note 1.

47. Prosecutor v. Araki et al., *supra* note 8, at 48452–53, 49576.

48. Human Rights Committee, UN Doc. CCPR/C/GC/36 of 30 October 2018, para. 70.

49. See *supra* note 45.

fundamental reimagining of the existing legal order and accountability for aggression as one of its central principles.

III. EXPRESSION AND LEGITIMACY

Recognizing this to be the normative impetus for aggression accountability, there are various institutional routes through which to pursue that objective. At stake in the selection among them are critical practical considerations such as the tribunal's capacity to overcome immunities, its compatibility with Ukraine's constitutional obligations, its relationship to existing criminal justice efforts in domestic and international fora, and its sources of funding. Many of these have been examined at length elsewhere.⁵⁰

There is, however, a way in which institutional design might be informed by the imperative to pursue accountability and particularly to the latter's roots in the expressivist underpinnings of international criminal law.

In the background of efforts towards accountability for Russia's aggression against Ukraine are some stark contrasts: impunity for past aggressions; the British, French, and American role in the deliberate jurisdictional incapacitation of the ICC with respect to aggression;⁵¹ the limited ratification of the amendments enabling that jurisdiction;⁵² and the widespread eschewal of domestic criminalization (or other efforts to codify *jus ad bellum* constraints in domestic law).⁵³

To be clear, past failures are not a reason against the war in Ukraine marking a turning point on the issue of aggression accountability. However, were that history to be supplemented with an

50. See *supra* notes 2–6.

51. See *supra* notes 9–10.

52. Volodymyr Zelenskyy, President of Ukraine, Speech to Representatives of the Public, Political, and Expert Circles of the Kingdom of the Netherlands and International Institutions Based in The Hague (May 4, 2023), <https://www.president.gov.ua/en/news/vistup-volodimira-zelenskogo-pered-predstavnikami-gromadskos-82653>.

53. Counting approximately 40, see Astrid Reisinger Coracini, (*Extended Synopsis: The Crime of Aggression under Domestic Law*, in Kreß and Barriga, *supra* note 9, at 1038. Using the broader category of “domestic offences that overlap with key ingredients of the crime” of aggression, Carrie McDougall has argued that there is a significantly wider constituency of codifying states, totaling 68. CARRIE MCDUGALL, *THE CRIME OF AGGRESSION UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 190 (2nd ed., 2021). Only a minority of these states have codified aggression as a universal jurisdiction crime. *Id.* at 382 (estimating at least 17).

ad hoc institutional response to the invasion of Ukraine and thus the promise of enduring jurisdictional deficits beyond the current case, the legitimacy impact would be more acute.⁵⁴

Condemning wrongdoing and expressing solidarity with victims—central functions of criminal punishment on the expressivist view—are second-personal normative acts.⁵⁵ As such, they depend on the moral standing of the expressive agent—in criminal law, the court or tribunal that issues punishment.⁵⁶ Where that standing is deficient, these acts (central to the very reason for the system of criminal accountability) may lose their normative weight. Given the normative centrality of the condemnatory function to a criminal court, this in turn implicates the legitimacy of the institution.⁵⁷ This reality is independent from the third-personal questions of the wrongfulness of the impugned act or the culpability of the perpetrator.⁵⁸

Given the history of aggression and impunity in international law, this has material implications. If a special tribunal for aggression is to perform its normative function, considerations relating to moral standing must play a central role in its design and in the framework within which it operates. In particular, the standing of any special tribunal would be fundamentally imperiled by the central involvement of any of the states that have played a key role in limiting the aggression jurisdiction of the International Criminal Court or that have otherwise sought to shield their own leaders from accountability for aggression. Precisely this danger is now on the horizon, with France, the United Kingdom, and the United States having endorsed the creation of an aggression tribunal (albeit in a form that differs from that advocated by Ukraine).⁵⁹ On the other hand, the tribunal's standing

54. *A Special Tribunal*, *supra* note 1, at 9–15 (2022).

55. Tom Dannenbaum, *Legitimacy in War and Punishment*, in OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW 120–153, 132–136 (Kevin Jon Heller et al. eds., 2020).

56. On moral standing and condemnation in individual morality, see Gerald A. Cohen, *Casting the First Stone: Who Can, and Who Can't Condemn the Terrorists?*, in FINDING ONESELF IN THE OTHER 115 (2013); Marilyn Friedman, *How to Blame People Responsibly*, 47 J. VALUE INQUIRY 271 (2013); T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 175–76 (2008).

57. Compare Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405, 422–24 (2006).

58. SCANLON, *supra* note 56, at 176–178; Cohen, *supra* note 56, at 124–128.

59. On the support of France, the United Kingdom, and the United States, see *supra* note 10. The ongoing debate is regarding whether the tribunal will be “internationalized” (i.e. hybrid) or “purely international” in nature. See, e.g., sources cited at *supra* note 3. Exemplifying the alternative perspectives advanced by different states, compare Baerbock,

would be augmented to the extent its authority is underpinned by a form of institutional approval over which no state exercises disproportionate control (such as endorsement by the General Assembly)⁶⁰ and/or by the leading involvement of states that have made material commitments to the accountability of their own leaders for acts of aggression (as would be indicated by domestic criminalization, by ratification of the ICC's aggression amendments or the Malabo Protocol in the African Union system, or by advocacy around an amendment to the ICC Statute to eliminate the aggression-specific limits on the Court's jurisdiction).⁶¹ Indeed, it would only be through robust material commitments along those lines that the involvement of any state implicated in the existing system of impunity for aggression might participate actively in the creation of a special tribunal in anything other than a profoundly counterproductive way. To be clear, this is not to ask for such states' opposition to the project; it is to ask for their humility in understanding the conditions under which their active involvement might backfire.

supra note 3; Press Release, Foreign, Commonwealth & Dev. Off, *supra* note 6; and Van Schaack *supra* note 10 (supporting a hybrid or internationalized tribunal) with advocacy for a purely international tribunal: Speech by Volodymyr Zelenskyy to Representatives of the Public, Political, and Expert Circles of the Kingdom of the Netherlands and International Institutions Based in The Hague (May 4, 2023), <https://www.president.gov.ua/en/news/vistup-volodimira-zelenskogo-pered-predstavnikami-gromadskos-82653>; Ambassador Rein Tammsaar, *An International Special Tribunal is the Only Viable Path to a Just and Lasting Peace in Ukraine*, JUST SEC. (May 9, 2023), <https://www.justsecurity.org/86516/an-international-special-tribunal-is-the-only-viable-path-to-a-just-and-lasting-peace-in-ukraine/>; Dr. Gabija Grigaitė-Daugirdė, *The Lithuanian Case for an International Special Tribunal for the Crime of Aggression Against Ukraine*, JUST SEC. (Jun. 1, 2023), <https://www.justsecurity.org/86766/the-lithuanian-case-for-an-international-special-tribunal-for-the-crime-of-aggression-against-ukraine/>.

60. Advocating General Assembly endorsement, see sources cited in *supra* note 4, Albania et al., *supra* note 18, Q.5-7. The European Parliament has also indicated its preference for this route: European Parliament Res. P9_TA(2023)0015, The establishment of a tribunal on the crime of aggression against Ukraine (Jan. 19, 2023) §§ 3-4.

61. Baerbock, *supra* note 3 (advocating both ratification of the ICC aggression amendments and an amendment to apply the same jurisdictional regime to aggression as is applied to genocide, crimes against humanity, and war crimes, as codified in the original ICC Statute); European Parliament Res. P9_TA(2023)0015, The establishment of a tribunal on the crime of aggression against Ukraine (Jan. 19, 2023) § 15 (advocating ratification of the ICC aggression amendments). The Malabo Protocol, which criminalizes aggression in article 28M remains to be ratified, almost a decade after having been adopted. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, June 27, 2014, 1 African J. Int'l Crim. Just. 122 (Malabo Protocol).

Of course, the support of powerful states would have practical benefits.⁶² However, to dismiss concerns relating to standing and legitimacy as utopian considerations that should be put to one side in a pragmatic pursuit to achieve accountability would be to overlook the contingency of the criminal function on the moral standing of the institutions through which it operates. In an expressive act, the identity of the expressive agent is not merely an aesthetic concern; it is central to the expression itself. A tribunal lacking standing would not be competent to perform the function for which it would have been created.

IV. CONCLUSION

The creation of any new institution of international criminal law ought to be undertaken with a clear understanding of both the normative imperative justifying that creation and the prerequisites for institutional legitimacy. Clarity on these points is particularly important in the case of an institution that would be created to underpin accountability for a crime that has been the subject of three quarters of a century of impunity.

In the case of a possible aggression tribunal for Ukraine, the normative justification is potent. But for the criminality of aggression, there would be no accountability for the wrong inflicted on the individuals and communities who are suffering a manifold atrocity that would otherwise be overlooked and even superficially sanitized by other components of the regime. In addition to its intrinsic value, a clear-eyed identification of this as the crux of the case for aggression accountability could help to mobilize support among those understandably skeptical of exhortations to defend the international legal order, while emphasizing why war crimes and crimes against humanity cases (even when viable against leaders such as Putin) will always be expressively insufficient. Aggression is a crime with human victims. Its function in international criminal law is distinctive from, but no less important than, those of crimes against humanity, genocide, or war crimes.

62. In addition to financing, powerful states could use diplomatic heft to broaden support. Aarif Abraham & Anton Korynevych, *The UK's Support is Critical to Establish a Special Tribunal to Prosecute Russian Crimes of Aggression*, THE HOUSE (Dec. 14, 2022) (arguing "Britain's support could be decisive in diplomatic circles in the UN and in activating the support of the Commonwealth and other states outside Europe."). However, the legitimacy concerns associated with their participation may also carry diplomatic costs in that respect.

At the same time, in the expressive work of international criminal law, the messenger matters. A tribunal created by an ad hoc coalition including longstanding saboteurs of aggression accountability would entail a legitimacy deficit sufficient to undermine its fitness for purpose. To avoid that risk, political energy should be channeled into advocacy for a special tribunal endorsed by the United Nations General Assembly, combined with a statutory amendment to align the ICC's jurisdiction over aggression with its jurisdiction over the other core crimes.

If that goal proves to be politically unattainable, those states that have undermined the possibility of general accountability for aggression should have the humility to defer institutional authorship and leadership to those states and organizations that have committed to some form of aggression accountability for their own leaders. Criminal law's potential to play a role in vindicating the rights of those wronged by Russia's aggression is contingent on institutional standing. No one will be served by a tribunal debilitated in that respect by the hypocrisy of its sponsors.