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The Crime of Aggression: Its Nature, the Leadership Clause, and the Paradox of Immunity

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The Crime of Aggression: Its Nature, the Leadership Clause, and the Paradox of Immunity

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1. The renewed urgency of understanding aggression

Although this chapter is not about current affairs, one can't write about the crime of aggression without recognizing its special urgency in the wake of Russia's 2022 invasion of Ukraine. Aggression suddenly became a headline issue, after years in which it was principally a matter for scholars and jurists fine-tuning the Rome Statute's definition of the crime. By October 2023, the UN General Assembly had twice denounced Russian aggression, by lopsided votes; and, although the International Criminal Court (ICC) lacks jurisdiction to prosecute Russians for aggression, more than 40 states-parties referred the "Situation in Ukraine" to the ICC, leading to a remarkably swift arrest warrant for Russian President Vladimir Putin for (other) war crimes. The large number of state-party referrals was previously unheard of in ICC practice, and it was clearly a response to Russian aggression. Less than a month after the 2022 invasion, the International Court of Justice (ICJ) also entered the legal fray, ordering Russia to suspend its military operation in Ukraine, with only the Russian and Chinese judges dissenting.[2] Although the order was an exercise in legal futility, 33 states filed declarations of intervention in the case.[3]

The invasion was by no means the first act of aggression in recent decades – notably, in 2014 Russia lopped off Crimea from Ukraine and annexed it.[4] Nor was it the first modern large-scale war many describe as

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[2] Allegations of Genocide Under the Convention for the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022, p. 211.

[3] The declarations may be found at https://www.icj-cij.org/case/182/intervention.

[4] Officially, the annexation came via a post-conquest referendum on the future of Crimea, in which 87 percent of eligible voters turned out to vote, and 97 percent of the votes favored uniting with Russia. The vote, which seems too lopsided to be true, raises strong suspicions that it was not true. A 2013 poll found only 33 percent of Crimeans favoring annexation by Russia. IRI Public Opinion Survey Residents of the Autonomous Republic of Crimea May 16–30, 2013, at 17, https://www.iri.org/wp-

aggression: Vietnam (1965), Iraq-Iran (1980), Ethiopia-Eritrea (1998), and the United States-Iraq (2003) each caused tens to hundreds of thousands of deaths.[5] Even so, a number of factors make the 2022 Russian invasion a watershed moment: its scale, the blatantly phony justifications offered by Russia, the fierce Ukrainian resistance, the war aim of territorial conquest, Russia's massive, apparently deliberate, war crimes and crimes against humanity, nuclear saber-rattling, the tens of thousands of Russian men who quickly fled their country to avoid military service, the war's breach of Europe's "long peace," and President Putin's defiant assault on the liberal international order writ large.[6]

Because the ICC has no jurisdiction over non-members for the crime of aggression, proposals for alternative accountability mechanisms came swiftly from scholars, political bodies, and NGOs.[7] Their debates surfaced

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content/uploads/2013/10/201320October20720Survey20of20Crimean20Public20Opinion2C20May2016-302C202013.pdf.

[5] Whether the U.S.-Iraq war was a war of aggression depends on the legitimacy of preventive wars, discussed below. Other wars of aggression include Iraq-Kuwait, Azerbaijan-Armenia, and – depending upon the legitimacy of humanitarian interventions – the Kosovo War.

[6] By "blatantly phony justifications," I am referring to the Russian Federation's Article 51 letter to the UN Secretary General, which consists of President Putin's speech to the Russian people on the day of the invasion. Among Putin's justifications are (i) collective self-defense of the Donbass People's Republics, the existence of which was declared by insurrectionists just three days before the invasion (and which are not internationally recognized); (ii) individual self-defense against the supposedly existential threat posed by NATO expansion and Western cultural values ("pseudo-values … directly leading to degradation and degeneration … contrary to human nature itself," presumably referring to equal respect for gender non-conforming persons); and (iii) prevention of "genocide against the millions" of ethnic Russians in Ukraine, which is a patently absurd accusation. Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation addressed to the Secretary General, UNSC doc. S/2022/154. On the non-recognition of the newly-conjured People's Republics, see UNGA Resolution ES-11/4, Territorial Integrity of Ukraine: defending the principles of the Charter of the United Nations, UN Doc. A/RES/ES-11/4, Oct. 13, 2022, where 143 states voted against international recognition.

[7] What follows here is a sampling, which does not claim to be exhaustive, and names only English-language sources.

Scholars: Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, JUST SECURITY, March 10, 2022, https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/; Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea*, OPINIO JURIS, March 7, 2022, http://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/; Carrie McDougall, *Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics*, OPINIO JURIS, March 15, 2022, http://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/; Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIO JURIS, March 16, 2022, http://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/; multiple posts by Astrid Reisinger Coracini and Jennifer Trahan in Just

crucial theoretical as well as practical issues: the precise nature of the evils that the crime of aggression inflicts on its victims, the restriction of liability

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Security's series *U.N. General Assembly and International Criminal Tribunal for the Crime of Aggression in Ukraine*, JUST SECURITY, https://www.justsecurity.org/tag/u-n-general-assembly-and-international-criminal-tribunal-for-aggression-against-ukraine/; Claus Kress, Stephan Hobe, and Angelika Nußberger, *The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System*, JUST SECURITY, Jan. 23, 2023, https://www.justsecurity.org/84783/the-ukraine-war-and-the-crime-of-aggression-how-to-fill-the-gaps-in-the-international-legal-system/; Oona Hathaway, Maggie Mills, and Heather Zimmerman, *The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression Upon a Request of the UN General Assembly*, JUST SECURITY, May 5, 2023, https://www.justsecurity.org/86450/the-legal-authority-to-create-a-special-tribunal-to-try-the-crime-of-aggression-upon-the-request-of-the-un-general-assembly/ ; Ryan Goodman, *Toward an Interim Prosecutor's Office in The Hague for the Crime of Aggression Against Ukraine*, JUST SECURITY, Jan. 17, 2023, https://www.justsecurity.org/84767/toward-an-interim-prosecutors-office-in-the-hague-for-the-crime-of-aggression-against-ukraine/.

Jurists and NGOs: Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine (joint statement by 39 prominent political figures, jurists, and scholars, March 4, 2022), https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf; Luis Moreno-Ocampo, *Ending Selective Justice for the International Crime of Aggression*, JUST SECURITY, Jan. 31, 2023, https://www.justsecurity.org/84949/ending-selective-justice-for-the-international-crime-of-aggression/; Chile Eboe-Osuji, *Letter to the Editor: On So-Called Selectivity and a Tribunal for Aggression Against Ukraine*, JUST SECURITY, February 10, 2023, https://www.justsecurity.org/85060/letter-to-editor-on-so-called-selectivity-and-a-tribunal-for-aggression-in-ukraine/; multiple posts by Ambassador David Scheffer in Just Security's series *U.N. General Assembly and International Criminal Tribunal for the Crime of Aggression in Ukraine*, JUST SECURITY, https://www.justsecurity.org/tag/u-n-general-assembly-and-international-criminal-tribunal-for-aggression-against-ukraine/; Global Accountability Network, *Considerations for Setting Up the Special Tribunal for Ukraine on the Crime of Aggression* (July 2022), https://www.globalaccountabilitynetwork.org/_files/ugd/a982f0_6c35a85b089746a18a6334d2801e9c5d.pdf, and *Proposal to Create a Special Tribunal for Ukraine on the Crime of Aggression* (Sept. 2022), https://www.globalaccountabilitynetwork.org/_files/ugd/a982f0_c9fb874d8cf14270b3c5fd0a1bfb4971.pdf.

Governments: European Commission, *Ukraine: Commission present options to make sure that Russia pays for its crimes*, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7311; Eurojust, *International Centre for the Prosecution of the Crime of Aggression made official at United for Justice Conference in Ukraine*, March 5, 2023, https://www.eurojust.europa.eu/news/international-centre-prosecution-crime-aggression-made-official-united-justice-conference; *Ambassador Van Schaack's Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression* (March 27, 2023), https://www.state.gov/ambassador-van-schaacks-remarks/; Dr. Gabija Grigaitė-Daigirdė, *The Lithuanian Case for an International Special Tribunal for the Crime of Aggression Against Ukraine*, Just Security (June 1, 2023), https://www.justsecurity.org/86766/the-lithuanian-case-for-an-international-special-tribunal-for-the-crime-of-aggression-against-ukraine/. Ambassador Rein Tammsaar (Estonia), *An International Special Tribunal is the Only Viable Path to a Just and Lasting Peace in Ukraine*, JUST SECURITY, 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/.

to leaders, the extent of immunities from prosecution under domestic law, and the question of what it takes to make an aggression tribunal "international." This chapter will address these issues.

Conspicuously, none of the state referrals of the "Situation in Ukraine" to the ICC, or interventions in the ICJ case, came from the Global South.[8] Fifteen African states, including South Africa, abstained from the General Assembly condemnations of Russian aggression, as did India, Pakistan, and Bangladesh. Complaints from the Global South have focused on the supposed Eurocentrism of the furor over Russia's invasion. Calls for a special aggression tribunal to try Russian leaders invite the question of why there were no such calls in the wake of the Iraq War, or NATO's regime change in Libya.[9] I mention these concerns because – as we shall see – the underlying political grievances are woven into the very nature of the crime of aggression. They have been at least from the time of the Tokyo Tribunal (the International Military Tribunal for the Far East, IMTFE), when India's judge Radhabinod Pal denounced the criminalization of aggression as a Western ploy to freeze the colonialist status quo.

2. The Nuremberg moment

The first definitive criminalization of aggressive war came in the Charter of the Nuremberg Tribunal – the International Military Tribunal (IMT) for major war criminals. It defined a category of *crimes against peace*, "namely, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."[10]

As is now well-known (thanks to historian Francine Hirsch), the concept of crimes against peace originated with the Soviet jurist Aron Trainin.[11] The Soviet government translated Trainin's book *The Criminal*

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[8] For convenience I use this misleading and politicized label, which lumps together countries with little in common either politically or economically. See C. Raja Mohan, *Is There Such a Thing as a Global South?*, Foreign Affairs, Dec. 9, 2023, https://foreignpolicy.com/2023/12/09/global-south-definition-meaning-countries-development/?utm_source=Sailthru&utm_medium=email&utm_campaign=Flash%20Points%2012132023&utm_term=flash_points.

[9] Patryk I. Labuda, *Beyond rhetoric: Interrogating the Eurocentric critique of international criminal law's selectivity in the wake of the 2022 Ukraine invasion*, Leiden J. Int'l L First View, 6 June 2023, 1–22, https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/beyond-rhetoric-interrogating-the-eurocentric-critique-of-international-criminal-laws-selectivity-in-the-wake-of-the-2022-ukraine-invasion/BD9D81E2CFA79A7930769DD0F18BBA63.

[10] IMT Charter, art. 6(a). The definition in the Charter of the IMTFE differs slightly in its wording from the London Charter, adding "declared or undeclared" to "war of aggression." Japan's war with China in 1937 was undeclared.

[11] Francine Hirsch, Soviet Judgment at Nuremberg (Oxford UP, 2020), 7–8, 17–18, 35–38. In fact the idea of post-war trials rather than summary executions came from the USSR, not the United States.

Responsibility of the Hitlerites into English in 1944, and circulated it among the Allies. There Trainin explains, "Peaceful relations between countries are a basic surmise [sic] of any international association. Peace is the greatest social value and therefore infringement on peace constitutes … the first species of international offenses."[12] He continues: "A direct and most dangerous form of infringement of peace appears to be the attack on one country by another, i.e., aggression, which explodes peace directly and presses war upon people. Aggression therefore is the most dangerous international crime."[13]

The Nuremberg Charter has many noteworthy features, but for present purposes two will prove especially important. Article 7 abolishes sovereign immunity before the Tribunal, including head-of-state immunity. All subsequent international criminal tribunals follow this no-immunities doctrine. And Article 8 removes the superior-orders defense, although acting under superior orders could mitigate punishment when "justice so requires." Prosecutor Robert Jackson's opening statement at the IMT explains the logic:

> The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states. These twin principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind. Those in lower ranks were protected against liability by the orders of their superiors. The superiors were protected because their orders were called acts of state. Under the Charter, no defense based on either of these doctrines can be entertained. Modern civilization puts unlimited weapons of destruction in the hands of men. It cannot tolerate so vast an area of legal irresponsibility.[14]

Compelling on its face, Jackson's argument nevertheless raises questions that have bedeviled the effort to criminalize aggression ever since Nuremberg. Jackson was right that broad doctrines of immunity create an intolerably wide zone of legal irresponsibility – but can they be abolished by fiat? And stripping away the superior orders defense can create an intolerable scope of liability for lower ranks. The question, then, is how to navigate between the extremes of impunity and overpunishment.

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[12] A. N. Trainin, The Criminal Responsibility of the Hitlerites, ed. A. Y. Vishinsky (Moscow: Legal Publishing House NKU, 1944), 47, typescript available at https://cgsc.contentdm.oclc.org/digital/collection/p4013coll8/id/2366. Trainin's second species is "offenses connected with the war," which in the London Charter were divided into war crimes and crimes against humanity.

[13] Id. at 47–48.

[14] Second Day, Wednesday, 11/21/1945, Part 04, in Trial of the Major War Criminals before the International Military Tribunal. Volume II.

Overpunishing lower ranks was not a large question for the IMT, which had jurisdiction only over "major war criminals of the European Axis."[15] Even so, the Tribunal pointedly rejected the Charter's doctrine that mere membership in a criminal organization like the SS made one a criminal, fearing that could lead to mass punishments in national courts.[16] Overpunishment became a live question in the second round of Nuremberg trials, the Nuremberg Military Tribunals (NMT), which prosecuted offenders "other than those dealt with by the International Military Tribunal."[17] Although in fact the NMTs targeted only prominent individuals for crimes against peace, the governing statute, known as Control Council Law No. 10, sets no explicit lower bound on liability.[18] That raised the questions of who, apart from top leaders, could be prosecuted for the crime of aggression, and what the theory would be for drawing the line.

This chapter will closely examine issues about leadership and immunity in sections 7 and 8. I will argue for a broader definition of leadership and accomplice liability than those in the ICC's Rome Statute, and will take a decidedly unorthodox position on immunity, arguing that there has never been a rule of sovereign immunity for the crime of aggression.

First, I address more general questions: what is aggression (sections 3 and 4)? How does aggression fit into just war theory (section 5)? What are the specific wrongs of aggression that justify placing it in the pantheon of evils alongside war crimes, crimes against humanity, and genocide (section 6)?

3. The concept of aggression

Outside the law, "aggression" has ambiguous meaning. Consider the Oxford English Dictionary's definition: "1. An unprovoked attack; the first attack in a quarrel …."[19] An unprovoked attack and a first attack are not necessarily the same. To take a simple example, suppose a thief snatches B's backpack from the floor of a coffee shop and bolts for the door. B tackles

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[15] IMT Charter, art. 1.

[16] 22 Trial of the Major War Criminals before the International Military Tribunal 497–500, Sept. 30, 1946. Article 9 of the Charter grants the IMT the power to declare organizations criminal, and article 10 frees national authorities to try individuals for mere membership in criminal organizations. Article 10 also declares that in such trials the criminality of the organization "is considered proved and shall not be questioned." No subsequent international tribunals have included these doctrines in their statutes, and the International Law Commission (ILC) did not include them in the Nuremberg Principles of international law.

[17] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (1945)[hereafter: CCL 10], chapeau. The NMT functioned from 1946 to 1949.

[18] CCL 10, art. 2(1)(a) defines crimes against peace.

[19] Oxford English Dictionary (1971), letter "A" p. 182. The secondary meaning is "2. The practice of setting upon anyone; the making of an attack or assault."

the thief to stop his escape and recover the backpack. B is the first attacker, but B's tackle is not an *unprovoked* attack. If we label it aggression (as per the second definition), arguably it is justified aggression, however odd that concept sounds.

Some of the same ambiguity exists in international law. The UN Charter prohibits the threat or use of force violating another state's territorial integrity or political independence, "or in any other manner inconsistent with the Purposes of the United Nations, except in self-defense against armed attack."[20] The purposes of the UN, set out in Article 1 of its Charter, make peace the supreme value:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[21]

The prohibition on the threat or use of force contains no exception for legitimate grievances against another state; and Article 51 permits use of force in self-defense only "if an armed attack occurs." The root idea seems clear: if no state uses force first, no state will need to use force second. Notice that suppressing acts of aggression is an expressly-stated purpose of the United Nations. That implies that aggression can never be justified, not even when the aggressor has been wronged.

Here, it seems, the UN Charter understands aggression as first use of force – what we might call the *pacifist* interpretation. Reinforcing this interpretation, scholars trace the roots of Article 2(4) to the Kellogg-Briand Peace Pact of 1928, which renounced war even in the face of legitimate grievances.[22] And the UN General Assembly's 1974 definition of aggression in Resolution 3314 states: "No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression."[23]

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[20] UN Charter art. 2(4).

[21] UN Charter, art. 1(1).

[22] See Oona A. Hathaway and Scott J. Shapiro, The Internationalists: How a Radical Plan to Outlaw War Remade the World (2017), pp. 194–99 (tracing the connection between the Pact and the Charter); 280–83 (showing the role of the Pact in the IMT prosecution of crimes against peace). Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy (1928)(the Kellogg-Briand Pact), art. 1: "the High Contracting Parties … condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations to one another."

[23] UNGA Resolution 3314 (1974), Annex, art. 5(1).

Now, a ban on use of force sounds utopian, even fantastic; so did the Kellogg-Briand pact and the anti-aggression articles of the League of Nations Covenant. On the supposition that the UN's framers were realists and not naïve dreamers, that might make the pacifist interpretation implausible. Perhaps, however, the framers hoped that this time could really be different, because the Charter gives the UN enforcement powers that the League lacked.[24] And, lest it be thought that the anti-aggression project turned out to be an abject failure, Oona Hathaway and Scott Shapiro have assembled data showing otherwise. In the UN era, the average number of conquests fell to 0.26 per year, down from 1.15 per year in the two preceding decades (and 1.21 in the previous century) – a 77% drop. The acreage of conquered territory fell by 94%, and the odds of a country being conquered dropped from 1.33 percent each year to .17 percent.[25]

The counter to the pacifist interpretation is that not all uses of force are aggression. Article 2(4) forbids threats or uses of force only if they violate the political independence or territorial integrity of another state, "or in any other manner inconsistent with the purposes of the UN Charter." During the 1962 Cuban missile crisis, the United States argued that this leaves wide latitude for threats or use of force, including the U.S. naval blockade of Cuba:

> [N]ot all threats or uses of force are prohibited; only those which are inconsistent with the purposes of the United Nations are covered by Article 2, paragraph 4. The presence of the word "other" in the concluding clause of the paragraph makes this clear. Even assuming that the measures taken could be considered to impinge upon the territorial integrity or political independence of some state or states, they would not be contrary to Article 2, paragraph 4, as long as they were not inconsistent with the purposes of the United Nations.[26]

This textual argument is a bit slick, but it isn't frivolous. Perhaps *some* threats or first uses of force are not aggressions after all, if they bolster peace and security or prevent ("real") aggressions. The more detailed definition of aggression in UN General Assembly Resolution 3314 says only that a first use of force is *prima facie* evidence of aggression, not that first use is aggression *per se*. It also includes a fudge factor: "the Security Council may, in conformity with the Charter, conclude that a determination

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[24] UN Charter, art. 42–47.

[25] Hathaway & Shapiro, 313–14.

[26] Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AJIL 515, 523 (1963). The author was the Deputy Legal Adviser to the U.S. State Department at the time. He argued that the blockade was consistent with Chapter VIII of the Charter, an argument we need not consider here. That the blockade, which brought the world to the brink of thermonuclear Armageddon, was consistent with maintaining international peace and security is, to put it mildly, a dubious proposition. One might think that consistency with the Charter's purposes requires more than consistency with Chapter VIII.

that an act of aggression has been committed would not be justified in the light of other relevant circumstances."[27] Call this the *permissive* interpretation of the UN schema, according to which some first uses of force might be justified.

In the end, then, the UN schema is ambiguous in much the same way as the dictionary definition of aggression. Taken together, the Charter and UNGA Resolution 3314 leave unclear whether aggression includes all first attacks (the pacifist interpretation), or only unjustified first attacks (the permissive interpretation). This ambiguity is important for "gray area" cases such as humanitarian intervention and preemptive warfare. There is no consensus on their legality. Much has been written about both (including by me), but they are beyond the scope of this chapter.[28] Also beyond the scope of this chapter are wars launched to recover territory conquered by another state years earlier – although I touch on this subject in section 6 below.[29]

4. More definitional debates: acts of aggression and wars of aggression

In fact, for years states were reluctant to define the crime of aggression. The Allies meeting in London to frame the Nuremberg Charter concluded that defining aggressive war would be too difficult and contentious.[30] It remained contentious throughout the 1950s and 1960s: states occasionally proposed definitions of aggression, but they were always custom-tailored to include actions of Cold War adversaries and exclude

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[27] UNGA Resolution 3314 (1974), art. 2. The Charter empowers the Security Council to "determine the existence of any … act of aggression" (art. 40).

[28] On humanitarian intervention, see for example The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (ICISS) (Dec. 2001); Thomas Franck, *Legality and Legitimacy in Humanitarian Intervention*, in Humanitarian Intervention 143–57 (Terry Nardin & Melissa S. Williams eds., 2006); Thomas Pogge, *Moralizing Humanitarian Intervention: Why Jurying Fails and How Law Can Work*, in Pogge, in Pogge, Politics as Usual: What Lies Behind the Pro-Poor Rhetoric 165–82 (2013). On preventive war, see for example David Luban, *Preventive War*, 32 Phil. & Pub. Aff. 207 (2004); Sean Murphy, *The Doctrine of Preventive Self-Defense*, 50 Villanova L. Rev. 699 (2005).

[29] Eliav Lieblich, *Wars of Recovery*, 34 EJIL 349 (2023).

[30] See Carrie McDougall, The Crimes Against Peace Precedent, in 1 The Crime of Aggression: A Commentary 53–63 (Claus Kreß and Stefan Barriga eds., 2017)[hereafter Kreß & Barriga]. Initially, the U.S. and British representatives thought it was essential to define "aggression," but the Soviets were opposed; eventually the U.S. representative, Robert Jackson, gave in. Hirsch, Soviet Judgment at Nuremberg, 66–73. The London negotiators agreed that German aggression was so clear that it would satisfy any conceivable definition of aggression, so there was no need to get bogged down in refining a definition. This turned out not be true in the cases of the nearly bloodless conquest of Austria and Czechoslovakia, and in the end none of the IMT defendants solely involved in those conquests was convicted of aggression. However, the statutory definition of crimes against peace in Allied Control Council Law No. 10 expanded to include "invasion" as a predicate crime, and that change permitted convictions in the Nuremberg Military Tribunals (NMT) for the *Anschluss* and the invasion of Czechoslovakia. Kevin Jon Heller, The Nuremberg Criminal Tribunals and the Origins of International Criminal Law (OUP, 2011), 180–81.

one's own uses of force, and they went nowhere.[31] When, in a period of Cold War détente, the General Assembly finally formulated a definition of aggression in Resolution 3314, it involved messy compromises. States in the Global South, which suspected that they would be aggressors' prey and not the predators, wanted a broad definition. States with powerful militaries – including both the United States and the USSR – wanted a narrow definition or no definition at all. The result: Resolution 3314 lists seven *acts* of aggression, but declares only *wars* of aggression to be crimes against international peace. Non-criminal aggression "gives rise to international responsibility," but the Resolution coyly fails to explain what "international responsibility" means, who or what bears responsibility, or what the consequences are of breaching that responsibility.[32] The Rome Statute of the International Criminal Court (ICC) likewise distinguishes between acts of aggression and the crime of aggression. The latter requires a "character, gravity and scale [that] constitutes a manifest violation of the Charter of the United Nations."[33]

In both instruments, therefore, scale matters. The ICJ has likewise distinguished "the most grave forms of the use of force (those constituting an armed attack) from other less grave forms."[34] A "mere frontier incident," for example, is not an armed attack.[35] We thus find a hierarchy of force: "mere frontier incidents"; acts of aggression (armed attacks) that don't qualify as crimes; and criminal aggressions. For convenience I will call the criminal aggressions "aggressive wars," following the language of

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[31] Kirsten Sellars, *The Legacy of the Tokyo Dissents on 'Crimes Against Peace,'* in 1 Kreß and Barriga, 119–130.

[32] UNGA Res. 3314, art. 5(2). Sellars, 133–34. Resolution 3314 came many years before the ILC proposed Draft Articles on the Responsibility of States for Internationally Wrongful Acts, eventually adopted by the General Assembly in 2001. UNGA Res. 56/83 (2001), corrected in document A/56/49(Vol. I)(Corr. 4).

[33] Rome Statute of the International Criminal Court [hereafter: Rome Statute], art. 8 *bis*(1). It borrows Resolution 3314's non-exclusive list of seven exemplary acts of aggression. There is some dispute about what a "manifest" violation of the Charter is. Claus Kreß offers a detailed argument that "gray area" cases such as humanitarian interventions and preventive attacks don't cross the threshold. Kreß, *The State Conduct Element*, in 1 Kreß & Barriga, 474–79, 489–502; on other gray area cases, id. at 457–502; see also Keith A. Petty, *Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict*, 33 Seattle U. L. Rev. 105, 119–36 (2009). By contrast, members of the U.S. delegation at Kampala, which opposed the entire effort of activating the crime of aggression, warned that even a single bullet fired across a border might count as a "manifest"" violation of the Charter. Harold Hongju Koh and Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AJIL 257, 270–71 (2015). As Kreß points out, the threshold has both a qualitative and quantitative character—the scale of violence is not the sole tipping point in gray area cases. Id. at 511.

[34] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, § 191.

[35] Id. § 195. The distinction matters because Article 2(4) prohibits uses of force, but only armed attacks trigger the Article 51 right of self-defense.

Resolution 3314. Most of this chapter confines discussion to aggressive wars.

So much for the legalities. What is the underlying theory?

5. Aggressive war and just war theory

Just war theory offers a natural way to theorize the UN schema. The primary *jus ad bellum* requirement is just cause, and the Article 2(4)/ Article 51 regime rests on a theory that the only just cause of war is self-defense. The Charter's Preamble explains why: the nations are "determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind." The narrow theory of just cause contrasts with the Clausewitzian view that war is a legitimate instrument of national policy – a view common until the world wars changed the thinking of the great powers. Before the "Great War" blew the long 19th century to smithereens, war-making was a sovereign's prerogative.

Frederick the Great was more candid than most about why he launched the first Silesian War (1740), which seized Silesia from Austria:

> At my father's death I found all Europe at peace .... I found myself with highly trained forces at my disposal, together with a well-filled exchequer, and I myself was possessed of a lively temperament. These were the reasons that prevailed upon me to wage war against Theresa of Austria, queen of Bohemia and Hungary. Ambition, advantage, my desire to make a name of myself – these swayed me, and war was resolved upon.[36]

Of course, this is not a rationale even the most permissive just war theorist could accept: "ambition, advantage, a desire to make a name for myself" seems like the paradigm case of an unjust cause. A war could be justified only to rectify legitimate grievances, and only if they could not be settled peaceably. The result, as Hathaway and Shapiro document, is that declarations of war routinely included a manifesto of grievances detailing the (supposed) just cause.[37] Often, the *casus belli* was defense against aggression; as Martens wrote in 1795, "In almost every war both parties claim the defensive. This is done in order throw on the enemy, as the agressor [sic], all the injuries arising from the war."[38] But self-defense was

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[36] Quoted in 1 Gerhard Ritter, The Sword and the Scepter: The Problem of Militarism in Germany 18-19 (Heinz Norden trans., 1969) (internal quotation marks and citation omitted).

[37] Oona A. Hathaway & Scott Shapiro, The Internationalists, 32–45.

[38] Georg Friedrich Martens, *Summary of the Law of Nations Founded on the Treaties and Customs of the Modern Nations of Europe,* trans. William Cobbett (Littleton, Colo.: Fred B. Rothman, 1986)(1795), bk. 8, chap. 2, §2n, p. 272. Hathaway and Shapiro confirm Martens's assertion: examining 400 war manifestos between the 15th century and World War II, they find that 69 percent of them cite self-defense as their *casus belli*. Hathaway and Shapiro, 43.

not the only just cause; any legitimate grievance would do (and who was to judge whether a grievance was legitimate?). Frederick's official beef with Austria was a typically ornate dispute over whose dynasty had inherited Silesia two centuries earlier. When diplomacy failed, royal grievances were settled on the battlefield, where force of arms delivered the verdict.[39]

Additionally, the law of nations permitted the victor to retain conquered territory and loot regardless of whether it was the just or unjust side of the war. These possessory doctrines rested on two grounds:

> (a) that it is too hard for outsiders to judge which is the just side, so the law has no choice but to treat them symmetrically; and
>
> (b) quickly settling clear title to land and commodities is essential to trade and commerce.[40]

We might call the first rationale *epistemic modesty* and the second *commerce before justice.* Obviously, these doctrines created perverse incentives to launch wars of acquisition on dubious pretexts or no pretexts at all.

Making matters worse, most theorists accepted that wars could justly be launched not only to get restitution but to punish another state's wrongdoing. I have argued elsewhere that retribution is never a just cause of war; but only a few of the classical theorists (including Immanuel Kant) agreed.[41] Erasmus was especially eloquent: "If anyone cries that it is unjust not to punish a sinner, my answer is that it is much more unjust to call down absolute disaster on so many thousands of innocents who have not deserved it."[42] But Erasmus and Kant were in the minority. Supporters of the

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[39] James Q. Whitman, The Verdict of Battle: The Law of Victory and the Making of Modern War (Harvard UP, 2012).

[40] Hathaway and Shapiro 23–26, 69–71. They attribute the view to Grotius, but of course it long predates him. In the *Politics* Aristotle writes that "the things conquered in war are said to belong to their conquerors" (bk. 1, ch. 6, 1255a5), indicating that "might makes right" was a conventional view in the ancient world, where conquerors enslaved those they conquered.

[41] David Luban, *War as Punishment*, 39 Phil. & Pub. Aff. 299 (2011). Kant asserts flatly that a "war of punishment (*bellum punitivum*) between states is inconceivable, since there can be no relationship of superior to inferior among them." Kant, *Perpetual Peace*, Ak. 8:347. In the *Rechtslehre*, Kant advances the even stronger proposition that if a state launches a punitive war, it itself commits an offense. Kant, *The Metaphysics of Morals: The Doctrine of Right*, trans. Mary Gregor (Cambridge University Press, 1991)(1797), p. 154 [pt. I, §58, Ak. 6:348].

[42] Erasmus, "Dulce bellum inexpertis (War is sweet for those who have not tried it)," *The Adages of Erasmus*, William Baker ed., Dennis Drysdal, trans. (University of Toronto Press, 2001), p. 343, adage IV i 1; *Collected Works*, vol. 35, p. 427. Where Kant rejects wars of punishment because of the *par in parem* principle, Erasmus rejects it because war punishes the innocent.

punishment theory include St. Augustine, Gratian, St. Thomas Aquinas, Vitoria, Cajetan, Grotius, and Locke.[43]

The result: In theory, just war requires a just cause; in European practice, Clausewitzian realism reigned, and war was an instrument of policies that included territorial acquisition and vengeance. Hathaway and Shapiro label this view the "Old World Order." Old Order just war theory accepted a broad theory of just cause: any legitimate grievance that couldn't be settled peacefully would do. And for practical purposes the law of nations gutted just war theory by treating both sides of a war as if they are equally just, and by allowing the victor to keep the spoils.

Matters changed gradually. At the end of World War I, the victorious allies debated whether to put Kaiser Wilhelm II on trial for aggression, but they concluded that the existing legal basis was too shaky. They settled for the accusation that the Kaiser had committed "a supreme offense against international morality" (deliberately left undefined and uncriminalized), and in the end they never pressed for his extradition and trial.[44] Then came the Kellogg-Briand Peace Pact, renouncing war, with its impressive 62 states-parties. Finally, at Nuremberg and Tokyo, planning and waging aggressive war were declared crimes against peace, and the UN Charter followed by Resolution 3314 aimed to create a legal and political order outlawing aggression.

The Charter narrows just cause to self-defense, and it requires that states settle their disputes peaceably. That demands a very different version of just war theory than the wide grievance-based theory of just cause. The theory was provided by Michael Walzer, whose 1977 *Just and Unjust Wars* is the only post-war work with the sweep and stature of the great 17th and 18th century treatises.[45]

Walzer echoes the Nuremberg Charter: "Aggression is the name we give to the crime of war."[46] Walzer's argument rests on a "domestic analogy" between the society of states and civil society: aggression is the international equivalent of robbery or murder.[47] Walzer proposes a *legalist paradigm* in which "[a]ny use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act," and "[n]othing but aggression

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[43] See Luban, *War as Punishment*, 305–312.

[44] William A. Schabas, The Trial of the Kaiser (2018). The quote is from article 227 of the Versailles Treaty.

[45] Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations (Basic Books, 1977); the book is now in its fifth edition. I have argued for its stature and originality in David Luban, *Prefaces and Postscripts:* Just and Unjust Wars *Today*, in Walzer and War: Reading *Just and Unjust Wars* Today (Palgrave Macmillan, 2020), 15–30. The occasion was a conference reconsidering *Just and Unjust Wars* forty years after its publication.

[46] Walzer, Just and Unjust Wars, 51.

[47] Id., 58. He might have added assault and battery to the analogues.

can justify war."[48] For the moment, I postpone discussion of Walzer's reasons for this doctrine — the specific evils that in his view warrant the legalist paradigm. I return to it in section 6 below. But his theory plainly harmonizes with the UN Charter scheme and anchors international law in just war theory.

Egalitarianism is crucial to the domestic analogy: just as natural persons in civil society are equal before the law, states in international society are equal, and the UN is "based on the principle of sovereign equality of all its members."[49] Sovereign equality supposedly implies the legal principle known as *par in parem non habet imperium* – equals have no dominion over equals, a principle dating from Dante's *De Monarchia* (1313).[50] *Par in parem* turns out to be central to issues of accountability for the crime of aggression: it implies that no state's acts can be tried in the courts of another state. It is an immunity principle.

Logically, sovereign equality does not really imply the *par in parem* principle, because a world in which all states can try wrongful acts of other states would also be a world of sovereign equality. Equal legal vulnerability is no less egalitarian than equal immunity. This logical point matters for the crime of aggression: intuitively, you might think that the defender's right to fight the aggressor to the death contains the right to prosecute the aggressor as a "lesser included" implication of the right of self-defense.[51] If so, immunity from prosecution for the crime of aggression seems anomalous. In section 8 below, I argue that it *is* anomalous.

6. What are the evils of aggression?

Aggression is one of the four core crimes in the Rome Statute, alongside war crimes, genocide, and crimes against humanity. There is no great mystery why the latter three are there. What is the specific evil of aggression that warrants criminalizing it? Is it the affront to state sovereignty, or the damage aggressive wars inflict on individuals, or something else? Let's consider a few answers to this question.

1. *Sovereignty.* A standard view among international lawyers is unapologetically statist: the victim of aggression is the aggressed-against

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[48] Id., 62.

[49] UN Charter, art. 2(1).

[50] Yoram Dinstein, *Par in Parem Non Habet Imperium*, 1 Israel L. Rev. 407, 409 (1966).

[51] See Miguel Lemos, *The Law of Immunity and the Prosecution of the Head of State of the Russian Federation for International Crimes in the War against Ukraine*, EJIL: Talk!, Jan. 16, 2023, https://www.ejiltalk.org/the-law-of-immunity-and-the-prosecution-of-the-head-of-state-of-the-russian-federation-for-international-crimes-in-the-war-against-ukraine/; Dapo Akande, "A criminal tribunal for aggression in Ukraine," *Chatham House* (4 March 2022) https://www.youtube.com/watch?v=XdHGf50fCCk (at 41:20). In his IMTFE dissent, the Dutch Judge Bert Röhling argued that although the proceedings were ex post facto, the Allies had the authority to imprison aggressors as a defensive measure; he dissented, however, from the authority to execute them. Röhling dissent typescript, 46–50, https://www.legal-tools.org/doc/fb16ff/pdf/.

state – an artificial person – not natural persons. The General Assembly equates armed intervention with "interference or attempted threats against the personality of the State," rather than against the personalities of its inhabitants.[52] The International Law Commission's *Responsibility of States for Internationally Wrongful Acts* recognizes only states and "the international community as a whole" as possible victims of internationally wrongful acts.[53] The Rome Statute, following the line of Resolution 3314, defines the crime of aggression as "the use of armed force against the sovereignty, territorial integrity, or political independence of a state …."[54] None of this should come as a surprise: public international law is a statist discipline.

Notice that the Resolution 3314 and Rome Statute definitions break out sovereignty from territorial integrity and political independence as a discrete value in their formula; Article 2(4) of the UN Charter mentions only the latter two. In the years of decolonization between the Charter and Resolution 3314, sovereignty understandably became a paramount value and a badge of honor for former colonies in the Global South; and one way of conceptualizing the evil of aggression is its affront to the victim state's sovereignty.[55]

However, doing so runs the danger of reifying sovereignty and treating an abstraction as if it were a *Ding an sich*, the numinous "personality of the State." We should remind ourselves, once and for all, that outside the heaven of legal concepts there is no such thing as the personality of the State.[56] It is hard to see what the grave evil is of aggression against a bare legal abstraction.

Perhaps, though, the distinction between political independence and sovereignty can be brought down to earth and made concrete. A state consists of a territory, a people, and a government.[57] *Political independence* means having a government of its own (not an occupation government or a

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[52] UNGA Res. 2625 (XXV)(1970), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

[53] ILC *Responsibility of States for Internationally Wrongful Acts* (2001), art. 33, 42.

[54] Rome Statute, art. 8 *bis*(2).

[55] On the paramount value of sovereignty to small states, see Mark Mazower, No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations (Princeton University Press, 2009), 25, 27, 199.

[56] On the heaven of legal concepts, Rudolf von Jhering, *Im Juristischen Begriffshimmel*, in Scherz und Ernst in der Jurisprudenz (11th ed. 1912), 245; Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809 (1935). On sovereignty as a denizen of Concept Heaven, Louis Henkin remarks: "I don't like the 'S-word.' Its birth is illegitimate and it has not aged well. The meaning of 'sovereignty' is confused and its uses are various, some of them unworthy, some even destructive of human values." Louis Henkin, That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera, 68 Fordham L. Rev. 1 (1999).

[57] Montevideo Convention on the Rights and Duties of States (1934), art. 1.

puppet government, nor being under the thumb of a colonial, mandatory, or trusteeship regime). *Sovereignty* means that that government controls its own affairs free of external coercion. Within limits, of course: in the UN era, states have no sovereign right to launch wars against other states.[58] States likewise have no sovereign right to commit genocide, crimes against humanity, or war crimes. Whether leaders admit it or not, sovereignty no longer includes the right to violate human rights within their territory and jurisdiction. Even within these limits, however, a sovereign government is one that controls its own policies on its own territory. That is what sovereignty means once we descend to earth from the heaven of legal concepts.[59]

The right to control state affairs is, properly speaking, a right of the state's *government*. Aggression interferes with that right. That does not adequately answer our earlier question, though, about why aggression is so bad. Why should exclusive governmental control over policies matter so much that interfering with it should join genocide, crimes against humanity, and war crimes in the pantheon of evils? Governments come and go, and their policy choices are not necessarily valuable except to their ruling elites.

2. Self-determination. The answer seems clear. For sovereignty to matter normatively, it must be that the government represents the *people* of the state, in a material and not merely formal sense.

This is Walzer's approach. He too breaks out sovereignty as a value distinct from territorial integrity, and he agrees that aggression is a crime that states commit against states – a view that follows definitionally from the domestic analogy.[60] Yet his view is more subtle than this suggests, and it is far removed from the lawyers' formalistic emphasis on sovereignty as such. In the (underappreciated) preface to *Just and Unjust Wars*, Walzer writes that "the arguments we make about war are most fully understood … as efforts to recognize and respect the rights of individual and associated men and women. The morality I shall expound is in its philosophical form a doctrine of human rights."[61] Elsewhere he explains that "[t]he real subject of my argument is not the state at all but the political community that (usually) underlies it."[62]

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[58] When the General Assembly declared in Resolution 2625 that "[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State," they were not only protecting sovereignty – they were also telling sovereign states what they cannot do.

[59] Here we are talking about the ideal of sovereignty. In reality, it's fanciful to suppose that states with little political or economic clout make their policies on their own. Stephen D. Krasner, Sovereignty: Organized Hypocrisy (1999).

[60] Walzer, Just and Unjust Wars, 51.

[61] Id., xvi-xvii.

[62] Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 Phil. & Pub. Aff. 209, 210 (1980).

Walzer's communitarian interpretation of sovereignty ties it to a people's right of self-determination, rather than the right of their government to choose policies. Clearly, Walzer is on to something that matters to people. It's the Ukrainian people's unyielding commitment to self-determination that drives their resistance to Russian aggression. Walzer unpacks the right of self-determination thus: "the rights of contemporary men and women to live as members of a historic community and to express their inherited culture through political forms worked out among themselves …."[63] His de-reification and de-deification of the state thus ties it more closely to the human rights of its inhabitants (not the rights of its government) than his embrace of the domestic analogy suggests: "the rights … of territorial integrity and political sovereignty … derive ultimately from the rights of individuals."[64]

It's a nice question whether self-determination as Walzer analyzes it is a group right (the right of a people to express their inherited culture through political forms worked out among themselves) or an individual right to live in a state that enjoys that group right. Walzer blends the two when he speaks of "the rights of individual and associated men and women." His individual-rights interpretation seems less natural, because in states riven by ethnic, racial, or religious strife, individual members of subordinated groups will probably *not* live in a state that expresses *their* inherited culture politically. In those states, the so-called people's right of self-determination will be merely a polite name for the dominant group's right.[65] But this group-right-versus-individual-right distinction may not matter if the state comes under attack. War collectivizes, and the right of self-determination against the invader will take on heightened prominence, even in the eyes of subordinated groups; they too will often rally against the invader.[66]

Even so, the individual right to live in a self-determining state is just one human right among many, and it is not as basic as other rights that aggressive war offends. Here I follow Henry Shue in defining *basic rights*

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[63] Id., 211.

[64] Walzer, Just and Unjust Wars, 53.

[65] So I have argued in various critiques of Walzer's view, over more than 40 years. Luban, Prefaces and Postscripts, 22–24; David Luban, *Just War and Human Rights*, 9 Phil. & Pub. Aff. 160 (1980); David Luban, *The Romance of the Nation-State*, 9 Phil. & Pub. Affa. 392 (1980); David Luban, *Preventive War*, 32 Phil. & Pub. Aff. 207, 214–18 (2004).

[66] To take a striking example, before Hamas attacked Israel on October 7, 2023, polling of Israeli Arab citizens found that no more than half feel they are "very much and quite a lot" a part of the State of Israel and its problems. A month after the attack, that number had risen to 70%, and even in late December, with casualties in Gaza approaching 20,000, the proportion of Israeli Arabs reporting a strong sense of belonging to the State of Israel stood at 65%. Adam Asad and Yaron Kaplan, *Most Arab Israelis: October 7 Attack Does Not Reflect Islamic, Palestinian, or Arab Society Values: Public Opinion Survey of Arab Society in Israel on the War in Gaza November–December 2023*, Israel Democracy Institute, https://en.idi.org.il/articles/52016.

as those without which no other rights can be enjoyed. In Shue's sense, the two most basic rights are those to security and subsistence – and it is those, not only self-determination, that aggressive war imperils.[67] It's a mistake to elevate sovereignty (understood either as the right of governments to control their own affairs or as the right of people to live in a self-determining state) as the basic value that aggression harms. From a basic rights point of view, the detour through state sovereignty to explain the evil of aggression is a wrong turn. Instead, we should look more directly to aggression's affront against basic human rights and interests, which include much more than self-determination. That is the direction other theorists have taken, and that I favor as well.[68]

3. The human costs of aggressive war: atrocity. By the time Aron Trainin wrote *The Criminal Responsibility of the Hitlerites*, Soviet authorities had amassed a trove of grisly evidence of Nazi atrocities on a scale vastly exceeding the ordinary cruelties of war.[69] Trainin introduces his book as follows:

> The monstrous peculiarity of the Hitlerite war methods lies in the fact that enormous masses of people, millions of them, armed according to the latest technical ideas, systematically and in an organized fashion, engage in piratical raids, annihilate the population of seized territories, rob and destroy cities and villages, plunder and destroy the cultural wealth of nations.[70]

Lawrence Douglas argues that it was the atrocities, not the breach of peace as such, that Trainin saw as the true evil of Nazi aggression.[71] Trainin does not say this in so many words, but his frequent references to "barbarism" and "Hitlerite methods" support Douglas's reading, and it's noteworthy that Trainin's book devotes only five pages to crimes against peace, as compared with 36 pages on atrocity crimes. So one way to understand the evil of aggression is that it is the gateway to atrocity.

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[67] Henry Shue, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy (2nd ed. 1996), 19–29.

[68] See generally Luban, *Just War and Human Rights*.

[69] Hirsch, Soviet Judgment at Nuremberg, 17–18, 25–27.

[70] Trainin, 1.

[71] Lawrence Douglas, An Essentially Evil Thing: Aggression, Atrocity and the Mystic Sovereignty of the State (forthcoming). To put it mildly, Trainin's Soviet masters were not exactly opposed to territorial conquest. One might marvel at Trainin's hypocrisy, especially when he writes, "The Soviet Union constantly and unfailingly plays the part of protector of the sovereignty and equal rights of great and small nations." The Criminal Responsibility of the Hitlerites, at 9. In partial defense, neither Trainin nor other Soviet jurists knew about the secret annex to the Molotov-Ribbentrop pact in which Hitler and Stalin agreed to carve up eastern Europe between them. They only learned of it at the IMT. Even so, Trainin wrote his book well after the USSR launched an aggressive war against Finland.

4. The human costs of aggressive war: wrongful violence. But not all aggressive wars are waged atrociously. Atrocious or not, though, wars kill people and break things; violence is violence. Tom Dannenbaum argues that it is the violence that makes aggressive war evil. In Dannenbaum's words, "its criminalization is about wrongful killing."[72] (Presumably that also includes wrongful wounding and wrongful destruction of property – "killing" as a synecdoche for violence in various forms.) Walzer probably would not disagree. "The wrong the aggressor commits is to force men and women to risk their lives for the sake of their rights."[73]

There is an apparent circularity in this approach: it assumes that the violence unleashed by aggressive war is unjust, because the war violates the *jus ad bellum*. But isn't the very question about aggressive war's evils whether it violates the *jus ad bellum*?

The objection misunderstands Dannenbaum's point. He *does* assume that aggressive war violates the *jus ad bellum* and is therefore illegal. But not everything illegal is criminal. His question is why aggression is not merely illegal but criminal. And his answer is: it's illegal conduct that kills.

This approach does, however, raises questions about why "bloodless aggression" – an invasion where the weaker side surrenders without a fight, as in Hitler's annexations of Austria and Czechoslovakia – is also a crime.[74] Dannenbaum argues that bloodless invasions should be treated as illegal but not criminal.[75] I believe, however, that decriminalization is not a necessary consequence of Dannenbaum's focus on violence and killing as the primordial evil of aggressive war. An invader seldom has benign designs on the conquered people, especially those of different ethnicity or politics. As John Locke writes, "let his pretence be what it will, I have no reason to suppose that he, who would *take away my Liberty*, would not when he had

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[72] Tom Dannenbaum, *Why Have We Criminalized Aggressive War?*, 126 Yale L.J. 1242, 1249 (2017). This path-breaking article is incorporated in Dannenbaum's book The Crime of Aggression, Humanity, and the Soldier (Cambridge: Cambridge University Press, 2018), chapter 3.

[73] Walzer, Just and Unjust Wars, 51; similarly Mégret, 1403.

[74] The *High Command* case, at the second round of Nuremberg trials, the Nuremberg Military Tribunals (NMT), defined an invasion as "the implementation of the national policy of the invading state by force even though the invaded state, due to fear or a sense of the futility of resistance in the face of superior force, adopts a policy of nonresistance ad thus prevents the occurrence of any actual combat." *High Command*, XI TWC 485. For discussion, see Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law, 180–83.

[75] Id. at 1288–95. Supporting Dannenbaum's view is the fact that no IMT defendants were convicted of crimes against peace if their only involvement was the seizure of Austria or Czechoslovakia, which the IMT labeled "acts" of aggression but not "wars" of aggression, and therefore not crimes against peace as defined in the London Charter. IMT Judgment, 119. This was not true at the NMT. The reason is that Allied Control Council Law No. 10 (CC 10) reworded the definition of crimes against peace to include "invasion" as a crime against peace.

me in his Power, take away every thing else."[76] An occupation by force must be maintained by force. Sooner or later, it is likely to be met by insurrection leading to violent repression; if it does not, it will be because the repression began immediately. What began bloodlessly will not stay bloodless for long.[77]

5. The human costs of aggressive war: all casualties' human rights. Fréderic Mégret offers a somewhat different argument that it's the violence against people, not states or their sovereignty, that is the evil of aggression. Mégret frames the evil in terms of human rights law.[78] International human rights law offers more stringent protections against violence than international humanitarian law (IHL), i.e., the law of armed conflict. The ICJ has held that human rights law (IHRL) does not cease to apply during armed conflicts, but its prohibition on arbitrary killing must be interpreted using IHL as the *lex specialis* – effectively, if not doctrinally, replacing IHRL by IHL where it matters the most.[79] What counts as an arbitrary killing in peacetime may not be arbitrary in war.

Mégret rightly emphasizes that IHL licenses an enormous level of *lawful* killing – he calls this the humanitarian "laundering of violence."[80] It follows that the evil of aggression consists of removing people from the protections of peacetime human rights into the rocky realm of IHL, the realm of killing and being killed, directly or collaterally. For Mégret, the human costs of aggression may even include the violence suffered by the invading troops at the hands of just defenders, a more capacious view than Dannenbaum's wrongful-killing formulation.[81] The reason is that justified killings in self-defense are killings nonetheless, and they too should be laid at the feet of those who launched the war of aggression. By December 2023, Putin's war had cost hundreds of thousands of Russian casualties.[82]

However, couching the argument in legalistic terms, as Mégret does, is misleading. The evils of aggression don't turn on the specific contents of IHRL and IHL, and certainly not on whether a paragraph in an ICJ opinion announces a doctrine of *lex specialis*. But the underlying idea is not legalistic at all: the evil of aggressive war is the violence it unleashes, and

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[76] John Locke, *Second Treatise of Government*, bk. II, ch. III: 279-80 (Cambridge: Cambridge University Press, 1960).

[77] On this point, see Kreß, *The State Conduct Element*, at 523.

[78] Fréderic Mégret, *What is the Specific Evil of Aggression?* in 1 Kreß & Barriga.

[79] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, *1996 I.C.J. Reports*, p. 226, §25.

[80] Fréderic Mégret, *What is the Specific Evil of Aggression?* in 1 Kreß & Barriga, at 1420.

[81] Id., at 1442–43.

[82] Jonathan Landay, *U.S. intelligence assesses Ukraine war has cost Russia 315,000 casualties – source*, Reuters, Dec. 12, 2023, https://www.reuters.com/world/us-intelligence-assesses-ukraine-war-has-cost-russia-315000-casualties-source-2023-12-12/. Note, however, that the Russian government states that Western estimates are "vastly exaggerated."

if human rights mean anything, it is that people at peace (including soldiers in the invading army) have a right against being subjected to it.

What we see, then, is a successive widening of the aperture: on Douglas's interpretation, Trainin locates the evil of aggressive war in the ensuing atrocities; Dannenbaum includes non-atrocious killings by the invader; and Mégret adds the invader's war dead as well. The evil of aggression encompasses all the laundered violence of war, as well as the unlaundered and blood-stained shrouds of atrocity victims.

6. Disruption of peace. So far we have examined theories ascribing the evils of aggressive war to their attacks on sovereignty, on self-determination, and on basic human rights. But there is another possibility as well. The original framing at Nuremberg of "crimes against peace" makes it appear that the evil of aggression is the disruption of peace as such. As Mégret observes, "Although it is a little forgotten today, the overwhelming emphasis at Nuremberg was neither on the sovereignty violations resulting from aggression nor on the human rights or even humanitarian consequences of war *per se*, but on the world order shattering potential of aggression."[83]

In response, some have objected that an oppressive and unjust peace is not worth preserving. Most famously, this was the critique offered by Justice Radhabinod Pal in his blistering (and long-winded) dissent in the Tokyo trial (the IMTFE). Pal would have acquitted all the Japanese defendants, and put the allies defending their colonial empires in the dock. As for criminalizing violations of peace, he rejects a peace that freezes in place Western empire and colonialism.

> [T]here can hardly be any justification for any direct and indirect effort at maintaining, in the name of humanity and justice, the very *status quo* which might have been organized and hitherto maintained only by force by pure opportunist "Have and Holders" … [E]very part of humanity has not been equally lucky and a considerable part is still haunted by the wishful thinking about escape from political dominations. … They know how the present state of things came into being. A swordsman may genuinely be eager to return the weapon to its scabbard at the earliest possible moment after using it successfully for his gain, if he can keep his spoil without having to use it anymore. But, perhaps one thing which you cannot do with weapons like bayonets and swords is that you cannot sit on them.[84]

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[83] Mégret., at 1414.

[84] Dissentient Judgment of Justice Pal, IMTFE (1952), at 117, http://www.sdh-fact.com/CL02_1/65_S4.pdf. David Cohen and Yuma Totani roundly criticize Justice Pal's dissent. They point out that even before the trial he told the other judges that he planned to dissent, and he was absent from many sessions. In their eyes his dissent was a political

There are really two distinct versions of the "crimes against peace" interpretation of aggression. One is that peace *per se* is always better than war. Here, Pal's rebuttal is strong: peace at any price includes the peace of domination, not only the peace of tranquility.[85] The Universal Declaration of Human Rights recognizes that people may "be compelled to have recourse, as a last resort, to rebellion against oppression and tyranny," and Resolution 3314 reserves the right of "peoples under colonial and racist regimes or other forms of alien domination" to struggle for self-determination and to receive outside aid in their effort – presumably, without that aid being labeled aggression.[86] Notably, when Trainin defines crimes against peace he adds in a footnote, "It is obvious, that just wars for liberation are not comprised here."[87] In 1982, Argentina justified its attempted seizure of the Falkland Islands/Malvinas from the United Kingdom by arguing that the century and a half of British occupation was a "continuous aggression."[88] Therefore Argentinian aggression was actually self-defense. India had made the same argument to the Security Council when it forcibly ejected Portugal from Goa in 1961, arguing that Goa was "illegally occupied" by Portugal in 1510, therefore annexing it 450 years later was not aggression.[89] Western colonial powers chose not to pursue the Goa issue, knowing they would be outvoted in a General Assembly that now included the Global South (the "non-aligned" bloc in the parlance of the time). The UN debate about Goa was a turning point for the anticolonial movement, as the non-aligned bloc flexed its muscles; the debate echoed and amplified Justice Pal's arguments at the IMTFE.[90]

However, there is a better version of the crimes-against-peace interpretation of aggressive war's evil. At Nuremberg and Tokyo, and again at Dumbarton Oaks and San Francisco, jurists and statesmen confronted the devastation of two continents through world war. The potential of aggression to spiral into an all-consuming inferno was something they had witnessed twice in three decades, and the U.N. international order was supposed to be a firewall against World War III, if not by eliminating the

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diatribe, not a reasoned judicial opinion. David Cohen & Yuma Totani, The Tokyo War Crimes Tribunal: Law, History, and Jurisprudence 431–52 (2018). They note that Justice Pal vacillates between an anti-colonial critique of imperialism and a defense of Japan's imperialism. Ibid., 447.

[85] Walzer, at any rate, does not make this mistake. "We know the crime [of aggression] because of our knowledge of the peace it disrupts – not the mere absence of fighting, but peace-with-rights, a condition of liberty and security that can exist only in the absence of aggression itself." Just and Unjust Wars, 51.

[86] UDHR Preamble; UNGA Res. 3314, art. 7.

[87] Trainin, at 47–48. He does not explain how to reconcile this exception with the claim that "peace is the greatest social value."

[88] Quoted in Lieblich, *Wars of Recovery*, 34 EJIL 349, 355 (2023).

[89] So argued India's Ambassador Jha, UN Security Council, *Security Council Official Records*, 18 Dec. 1961, UN Doc. S/PV.987, 7–8, 9, 14, §§ 33, 46, 61.

[90] On the historical importance of the "Goa effect," see Sellars, 126–29 and Mazower, 188.

use of force, then by cabining it. In an age of thermonuclear weapons, no task can be more important than cabining war and preventing escalation. Criminalizing aggression was one part of that larger institutional project.

Here, however, what matters is not peace as such (which includes the radically unjust peace of domination), nor is it state sovereignty. It is the risk of violence in an age of thermonuclear weapons and conventional weapons of devastating power. And the best way of thinking about the crimes-against-peace interpretation is that the evil of aggression is the intolerable risk it imposes on the inhabitants of a tightly networked world.

This, too, is an interpretation of the crime of aggression in human terms rather than statist or communitarian terms. In my view, it works in tandem with the other violence-centered accounts of the specific evil of aggressive war: Trainin's focus on atrocities, Dannenbaum's on unjust killing, and Mégret's on all killing, just or unjust, unleashed by the leaders who launch aggressive wars. The crimes-against-peace view adds to actual violence the risk of intolerable potential violence.

7. A leadership crime only? Who is a leader?

Only leaders were prosecuted for crimes against peace in the Nuremberg and Tokyo proceedings, and the nearly unanimous view of commentators is that only leaders can or should be prosecuted for waging wars of aggression – this despite the fact that Control Council Law No. 10, the Nuremberg Principles, and many domestic-law aggression statutes contain no such limitation. The argument for restricting the crime of aggression to leadership has always been the absurdity and injustice of punishing thousands of ordinary soldiers and sailors who fought on the aggressor's side.[91]

This supposed *reductio ad absurdum* is too quick, however. "Punish only leaders, or punish everyone including foot soldiers?" plainly rests on a false dichotomy. It ignores all the intermediate positions in the chain of command, not to mention industrialists, mercenary bosses, warmongering media moguls, religious leaders preaching holy war, or others who contribute substantially to the aggressive war. None of these are foot soldiers.

But even setting that false dichotomy aside, the argument is worth scrutinizing. Why shouldn't foot soldiers who knowingly wage aggressive war be liable for the crime of aggression? To be clear, I am not suggesting

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[91] This was the argument in I.G. Farben Trial, 10 The U.N. War Crimes Comm'n, Law Reports of Trials of War Criminals [henceforth TWC] 37–38 (1949)("there could be no practical limitation on criminal responsibility that would not include, on principle, the private soldier on the battlefield…."). It is obvious that only leaders can commit the IMT article 6(a) crimes of planning, preparation, and initiation of aggressive wars. The only crime of which foot soldiers could be accused is waging the war.

they *should* be held liable; I am asking why they shouldn't. The answer is not obvious. They knowingly and intentionally waged aggressive war. What more than *mens rea* and *actus reus* is needed for criminal liability? Even if they adhered to the *jus in bello* they may have killed people, maimed others, and destroyed property; if they didn't, they aided and abetted their comrades who did.

Sometimes the argument against foot soldier liability for aggression is couched in practical logistical terms: it is impossible to conduct tens of thousands of investigations and trials, and grotesque to imprison entire armies. Call this the *impracticality argument.*[92] It fails to convince. It is a powerful argument for amnesty, but amnesty has nothing to do with culpability. Amnesty forgives the guilty and innocent alike, and it is fully consistent with criminal guilt. Amnesty is exactly the strategy proposed for non-international armed conflicts such as civil wars: rather than prosecuting all the rebels, Additional Protocol II to the Geneva Conventions requires that "[a]t the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict …."[93] A civil war can include thousands of rebels, so the parallel to an international armed conflict is a solid one.

A second argument against foot soldier liability is that if soldiers think they will be prosecuted for aggression, they will see no reason to refrain from other war crimes. In for a penny, in for a pound. This *perverse incentives argument* is even worse than the last. Is a soldier facing prison time for aggression indifferent to additional years of penal servitude for war crimes? Plainly not, and the "in for a penny, in for a pound" argument assumes the contrary: that laws against war crimes lose their deterrent power over those already in legal jeopardy. The argument also assumes that nothing but law restrains soldiers from raping and looting – not conscience, not honor, not pity, not discipline, not their fellow soldiers or officers. It assumes the worst: that soldiers are, in Wellington's infamous description of his own army, mere scum of the earth.

A more plausible and less obnoxious form of the perverse incentives argument is that exposing foot soldiers to criminal liability for aggression will motivate them to fight on rather than surrender, and, as Jeff McMahan puts it, "it is irrational to establish incentives to protract wars rather than to terminate them."[94] However, the argument overlooks the most salient

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[92] Jeff McMahan, The Ethics of Killing in War, 114 Ethics 693, 731 (2004).

[93] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977) [hereafter: AP II], art. 6(5).

[94] McMahan, *The Ethics of Killing in War*, 731. To take a real example, in 2016 Ukraine convicted two captured Russian soldiers of waging a war of aggression. Ukraine finds Russian 'soldiers' guilty of waging war, BBC News, 18 April 2016, https://www.bbc.com/news/world-europe-36070383. They were soon returned to Russia in a prisoner swap. Sergey Sayapin, *A Curious Aggression Trial in Ukraine: Reflections on the* Alexandrov and Yerefeyev *Case*, J. Int'l. Crim. Justice 16(5) (2018): 1093–1104. If

incentive not to fight on: fear of death. Individual soldiers who don't surrender remain legitimate targets, and the circumstances under which soldiers drop their weapons and put their hands up is the perceived inevitability of being killed if they don't surrender. Surely that outweighs the more remote and abstract risk of being prosecuted for aggression. The same is true of collective surrender that ends wars: nations surrender because they are beaten.

A better argument is that ordinary military personnel cannot be expected to know whether the war they are waging is aggressive, nor should they be required to investigate a legal and political issue so far above their pay grade. This is an *epistemic modesty argument*, and unlike the last two, it plainly has merit. Traditional just war theorists including Cajetan, Suárez, and Vitoria argued in precisely this fashion. Suárez, for example, asserts that whereas princes and their advisors are required to make "diligent examinations" of the justice of war, "common soldiers, as subjects of princes, are in no wise bound to make diligent investigation, but rather may go to war when summoned to do so, provided it is not clear to them that the war is unjust."[95]

Note the exception, however: by its terms, epistemic modesty shouldn't excuse soldiers who wage aggressive war in full knowledge that it is aggressive.[96] Suárez, Vitoria, and Cajetan required foot soldiers to disobey the order to deploy if the war is not merely unjust, but *manifestly* unjust, requiring no special diligence on the soldiers' part to discern. Manifest illegality also happens to be today's legal test for whether a military member has a valid superior orders defense for war crimes – and it shows the limits of the epistemic modesty argument.[97]

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anything, the 2022 invasion suggests that Russian troops did not fear being prosecuted for aggression.

[95] Francisco Suárez, *De bello*, part of the larger work *De triplici virtute theologica*, excerpted in Gregory M. Reichberg, Henrik Syse, and Endre Begby, *The Ethics of War: Classic and Contemporary Readings* (Blackwell, 2006), Disputation XIII, section VI: What Certitude as to the Just Cause of War is Required in order that War may be Just?, pp. 357-59. Identical views, in nearly identical words, can be found a century earlier in treatises by Cajetan and Vitoria. Thomas Cajetan, *Summula* (1524), in Reichberg et al. *The Ethics of War*, p. 246. Francisco Vitoria, *On the Law of War*, in Reichberg et al., pp. 318-19.

[96] The case is not hypothetical. Even though Hitler's invasion of Poland was based on a false flag operation that he used to claim Polish aggression, the pretense of self-defense obviously did not survive long; no soldier invading the USSR as Hitler ranted about *Lebensraum* could doubt that Operation Barbarossa was aggressive war. Consider as well the case of Karl Marlantes, a US Marine second lieutenant who was also a Rhodes scholar in 1967. He recognized the wrongness of the Vietnam War, but after anguished discussions in Oxford with a fellow Rhodes scholar he nevertheless decided to serve; his bond to the Marine Corps was too strong. He saw combat at its most brutal, and he killed. Marlantes did not have the epistemic excuse available to him, and in his writing he does not hide behind it. Marlantes, What It Is Like to Go to War (Atlantic Monthly Press, 2011), 134–37.

[97] E.g., Rome Statute, art. 33. As Trainin put it,

In my view, the most convincing argument against foot soldier liability rests neither on the logistics of mass trials, nor on soldiers' invincible ignorance. It rests on the requirements of military discipline and civilian control of the military, which themselves have a firm moral basis. Call this the *military discipline* argument. Discipline is crucial for preventing war crimes; and civilian control of militaries is a necessary firewall against the military coups and dictatorships that have plagued human history since ancient times. For that reason, there should be a heavy thumb on the scale in favor of soldiers obeying their government's orders to deploy.[98] I'm not suggesting that soldiers should be punished for conscientiously refusing to fight in a war they reasonably believe is aggressive; they should not.[99] But they should equally not be punished for obeying a deployment order.[100] The same argument applies beyond foot soldiers: officers in subordinate ranks should also be exempt from prosecution for waging wars of aggression, although perhaps high-ranking generals commanding theater-level operations should not.[101]

Notice, though, that this is not an argument against the *culpability* of soldiers who knowingly wage aggressive war. It is an argument that the

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> Of course, an army can not exist without strict discipline. … But always and everywhere it is only a question of *military* discipline. An order to cast women and children in the fire, an order to poison innocent people in a 'little boat', is essentially not a *military* order; it is *instigation to evil-doing*, for which both the instigators and the agents can and must bear full responsibility.

Criminal Responsibility of the Hitlerites, 122.

[98] I discuss the epistemic modesty and military discipline arguments in greater detail in David Luban, *Knowing When Not to Fight*, in The Oxford Handbook of the Ethics of War (Helen Frowe & Seth Lazar eds., 2018): 185–203. Something along this line was floated during discussions of the Special Working Group on the Crime of Aggression. Astrid Reisinger Coracini & Päl Wrange, *The Specificity of the Crime of Aggression*, in 1 Kreß & Barriga 307, 311 note 17.

[99] See Jeff McMahan, *The Moral Responsibility of Volunteer Soldiers*, Boston Review, Nov. 6, 2013, http://www.bostonreview.net/forum/jeff-mcmahan-moral-responsibility-volunteer-soldiers; Dannenbaum, *Why Have We Criminalized Aggressive War?* at 1306–12. For a thoroughgoing debate about the morality of selective conscientious objection, readers should consult the 2002 symposium issue on the subject in the *Israel Law Review*.

[100] Their moral culpability is a different matter. It turns on their actual knowledge that they are waging a war of aggression.

[101] China convicted Japanese Lieutenant General Takashi Sakai of "participating" in a war of aggression; it is unclear whether the tribunal thought he was a sufficiently high leader, or simply did not recognize the leadership requirement for the crime of aggression. Summary: Trial of Takashi Sakai before the Chinese War Crimes Military Tribunal of the Ministry of National Defence at Nanking, 14 TWC 1 (1949), https://www.derechos.org/intlaw/doc/chnsakai.html. Roger Clark believes that he should not have been convicted because he had no influence on the Japanese policy of aggression. Roger S. Clark, *The Crime of Aggression: From the Trial of Takashi Sakai, August 1946, to the Kampala Review Conference on the ICC in 2010*, in The Hidden Histories of War Crimes Trials (Kevin Heller & Gerry Simpson, eds., 2013), 387–410, https://academic.oup.com/book/26719/chapter/195552341.

values of military discipline and civilian control – values orthogonal to guilt and innocence – outweigh the value of accountability for the crime of aggression. Once we see this, we see as well that nothing *intrinsic to the crime of aggression* makes it a "leadership crime." To exempt foot soldiers from prosecution is not to exonerate them.

Recognizing this helps us to frame the leadership issue accurately. We should not begin by *assuming* that only apex leaders can be culpable of aggression, and we should not automatically look with suspicion on liability for those lower down. We should instead ask of other influential warmongers and enablers why they should *not* be held liable.

How far up the food chain should the law draw the line? Neither the IMT nor the IMTFE tried to answer this question explicitly, but it arose in the Nuremberg Military Tribunals prosecuting crimes under Control Council Law No. 10. All the pertinent NMT judgments agreed that only leaders, not subordinates, should be prosecuted for waging wars of aggression, but they differed in their formulations of what it takes to establish a leader's culpability. In the *High Command* case, the legal test was whether the accused was in a position to "shape or influence" the policy of aggression, and this is the formula most commonly accepted as customary international law.[102] Formal rank didn't matter; function did. Even civilians not part of the state could be in a position to shape or influence policy; German industrialists could be prosecuted if they participated in aggression.

There matters rested until it came time to activate the aggression clause of the Rome Statute of the ICC. After years of elaborate preparatory work, article *8 bis* (adopted in 2010 at the Kampala meeting of the Assembly of States Parties) shrinks the circle of principal liability to those "in a position effectively to exercise control over or to direct the political or military action of a State." And article 25(3) *bis* narrows accomplice liability to the same set of malefactors.[103]

Intuitively, the difference between this "control or direct" test and the "shape or influence" test is this: only someone granted the final say-so on a political or military action is in a position to effectively control or direct it, because by definition those without final say-so can be overruled.[104] But those lacking that authority can nevertheless shape or influence the decision through their advice or their action. A president's trusted advisers might be

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[102] US v. von Leeb et al [The *High Command* case], (1950) 11 TWC 1, 491. In the *Ministries* case, the accused had to be in a position in the "administration or execution" of the policy, who could at least try to frustrate it. US v. von Weizsäcker et al [The *Ministries* case], (1953) 14 TWC 323, 409. See Yudan Tan, The Rome Statute as Evidence of Customary International Law (Brill Nijhoff, 2021), 212.

[103] Art. 8*bis*, 25(3).

[104] This need not be the supreme political or military leader. If a supreme leader delegates the final say-so on a political or military action to a subordinate, then that subordinate is in a position to effectively control or direct it.

in a position to dissuade him from ordering an act of aggression, even if the sole final authority is the president's. So too, a field commander who explains to higher-ups why proposed acts of aggression are operationally impractical may influence policy, even though the field commander cannot control or direct the state's military policy. On this reading, the "control or direct" formula applies to fewer people than the *High Command* "shape or influence" test; scholars disagree about whether it was intended that way, or whether negotiators merely misread the NMT cases.[105]

Either way, the problem is that the change in language invites future interpreters to narrow the scope of the leadership clause regardless of the drafters' and negotiators' intent. Assuming, for the moment, that the drafters intended to narrow the pre-existing customary international law, one question is whether the Rome Statute's restrictive definition of leadership is henceforth the new customary international law. Article 10 of the Rome Statute expressly states that nothing in its crime definitions "shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute," which implies that the answer should be no.[106] A better answer, in my judgment, is that it is too soon to tell: whether the Kampala leadership formula crystallizes into customary international law depends on how many states eventually incorporate it into their own criminal codes and military training, how they interpret it, and how it is treated in future judicial proceedings.[107] The argument that adopting the Kampala amendments is by itself decisive state practice and *opinio juris* of the 123 ICC member states is a fallacy: it overlooks that nothing in the Kampala amendments exempts them from Article 10 or indicates that the parties have abandoned it for the crime of aggression. Thus, they adopted the Kampala amendments conditional on

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[105] Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 EJIL 477, 489 (2007)(quoting several delegations and scholars who regard the "control or direct" test as a restatement of the "shape or influence" test, not a narrowing of the circle of liability; Heller himself disagrees); Carrie McDougall, The Crime of Aggression Under the Rome Statute of the International Criminal Court 182 ("key negotiators were aware of the distinction proposed and its precedent and made a conscious choice to narrow the scope of perpetrator captures"); on the other hand, Claus Kreß, one of the German negotiators, informs me that there was no such intention (personal communication). Nikola Hajdin likewise sees no narrowing in the "control or direct" test. Hajdin, Aggression in International Criminal Law, 127–34 (unpublished manuscript); see also Nikola R. Hajdin, Responsibility of Private Individuals for Complicity in a War of Aggression, 116 AJIL 788 (2002). Yudan Tan, The Rome Statute as Evidence of Customary International Law (Brill Neijhoff 2021), concludes that the Rome Statute's version of the leadership clause does not represent customary international law, because of the possibility that it narrows it. Tan, 202-46.

[106] Rome Statute, art. 10.

[107] A few countries, including Germany, already have adopted the Kampala definition. Tan, 242–43; Annegret Hartig, 'Post Kampala: The Early Implementers of the Crime of Aggression ', 17 Journal of International Criminal Justice 485, 489 (2019).

their pre-existing agreement that new crime definitions have no binding validity in prosecutions outside the ICC.

I see no reason for narrowing the scope of liability more tightly than those who shape or influence aggressions.[108] Obviously, states have an understandable, if hardly commendable, desire to shield their civilian and military elites from aggression accusations. Narrowing the leadership clause makes it easier for states to recruit nervous elites to their military adventures – the elites needn't fear prosecution for the crime of aggression. But it also renders the ICC's power to deter and punish aggression even more toothless than its already-restrictive jurisdictional and opt-in requirements.[109]

A narrow leadership clause is especially hard to fathom as a limitation on accomplice liability.[110] Making effective control or direction of policy a threshold requirement for prosecuting mere aiders and abettors narrows the circle of liability to no evident purpose other than to shield elites from liability.[111] That is hardly a progressive development in the law, and it will be unfortunate if the Kampala leadership formula becomes customary international law that binds all courts and tribunals (unless, of course, it is interpreted as a restatement rather than a narrowing of existing law). It may happen, of course. As Roger O'Keefe warns overly-idealistic jurists, states make the law, and their leaders shape it to their liking.[112]

8. The paradox of immunity

The paradox of immunity is simply stated: aggression is a leadership crime, but under regnant legal doctrine, apex leaders are immune from

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[108] Here I agree with Mark A. Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains*, 41 Case W. Res. J. Int'l L. 321 (2009), who argues that broadening the leadership clause would enhance the expressive power of the law, id. at 313–14.

[109] Rome Statute, art. 15*bis*(4)–(5). These clauses narrow jurisdiction over the crime of aggression well beyond the ICC's jurisdictional limits on prosecuting other core crimes. Again, I agree with Drumbl, when he writes, "Too onerous a leadership requirement might inhibit the ability of national courts (or other accountability mechanisms) to root out the deeper, systemic causes of aggression."

[110] Rome Statute, art. 25(3)(c).

[111] Nikola Hajdin has argued that someone who controls or directs the policy of aggression – a principal – might also count as an accomplice to specific acts of aggression. This would make the narrowed leadership clause for accomplice liability less irrational than I am suggesting. Nikola R. Hajdin, *Responsibility of Private Individuals for Complicity in a War of Aggression*, 116 AJIL 788, 796–97 (2022). But what about other aiders and abettors? Here, Hajdin argues that aiders and abettors who can decisively influence aggressive policy, because their participation is a "but-for" cause of the policy taking the direction it does, satisfy the "control or direct" test. Id. at 795. In this way, he actually broadens the "control or direct" formula to something closer to "shape or influence," at least for accomplice liability. Because I also favor a broader rather than narrower leadership clause, I am sympathetic to his reading. My argument in the text is a critique of a narrower reading.

[112] Roger O'Keefe, *An "International Crime" Exception to the Immunity of State Officials From Foreign Criminal Jurisdiction: Not Currently, Not Likely*, 109 AJIL Unbound 167, 167–72 (2015).

prosecution in national courts. That includes the courts of the victim state, even if it has criminalized aggression in its own domestic law (as Ukraine, Russia, and Belarus have).[113] The only people who can be prosecuted for aggression may be immune from prosecution.

This is overstated and oversimplified: *some* individuals who satisfy the leadership clause may fall outside the magic circle of immunity. But the law of immunity protects those leaders who are most likely to be responsible for launching wars of aggression: the head of state and head of government.

Doctrinally, state officials' immunity from prosecution in foreign courts can be based either on their personal status as a high official, or on the status of their conduct as a state act. The former is immunity *ratione personae* ("by reason of the person") while the latter is immunity *ratione materiae* ("by reason of the subject-matter"). For short, I will label them P-immunity and M-immunity. Heads of state and heads of government enjoy P-immunity, and the ICJ's *Arrest Warrant* decision confers P-immunity on foreign ministers as well.[114] In the lingo, these three offices are known as the "troika." Whether any other ministerial office confers P-immunity is unsettled.[115] Diplomats likewise enjoy P-immunity, although their home state can waive it (and may well do so if, for example, the diplomat goes on a murder spree in the host country). Unless it is waived, P-immunity protects its beneficiaries' personal acts as well as state acts – thus, a kleptomaniacal king is P-immune from prosecution for shoplifting in a foreign country, even though the shoplifting is not a state act. The moment he abdicates, however, he loses P-immunity for his personal crimes, because it is status-based; and the foreign state can now prosecute him for his royal thefts. His state acts are a different matter: they are M-immune forever, unless the state itself waives his immunity.

That is a sketch of the doctrine. What is the theory? In the case of M-immunity, it is straightforward: under the *par in parem* principle, one state cannot adjudicate acts of the other state. P-immunity rests on two different theories. According to the *representational theory*, the state's sovereign is the flesh-and-blood embodiment of the state itself, and to prosecute the head of state or head of government is to prosecute the state – a mortal insult, supposedly, to the dignity of its people or its personality.

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[113] Ukraine Criminal Code, art. 437; Russian Federation Criminal Code, art. 353; Belarus Criminal Code, art. 22.

[114] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, I.C.J. Reports 2002, p. 3 [hereafter *Arrest Warrant]*.

[115] France has taken the position that in addition to the troika, defense ministers are immune for the same reason as foreign ministers: "the essentially diplomatic nature of the functions exercised, requiring numerous travels abroad." Letter from *Procureur de la République* to Mr. Patrick Badouin, Case of Donald Rumsfeld—triggering contesting the decision of the Paris District Prosecutor to dismiss the case, 27 February 2008, available at https://ccrjustice.org/files/Rumsfeld_FrenchCase_%20Prosecutors%20Decision_02_08.pdf. The case concerned a complaint by civil society groups against the former U.S. Secretary of Defense for his involvement in the torture of detainees.

As Lord Millett put it in his speech in the *Pinochet* decision: indicting a state's leader "would be an affront to the dignity and sovereignty of the state which he personifies."[116]

There is more than a touch of mysticism in the representational theory, however. It is a relic of medieval political theology, according to which the king has two bodies: the body natural that is born to die, and the immortal body politic that God has incarnated in the body natural.[117] The theory bears the lingering odor of divine right of kings, and we should not forget that it originated in a superstitious era, when in England and France the King's Touch was believed to cure scrofula.

The alternative *functional theory* is less metaphysical, and it applies comfortably to foreign ministers and diplomats as well as sovereigns. It looks to the official's function in foreign affairs. Heads of state and government, and foreign ministers, represent their states in diplomacy. As *Arrest Warrant* puts it,

> a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office.[118]

Here, it's important to note, "representative" does not mean that troika members *embody* the state, as in the representational theory. In the functional theory, "representative" carries no mystical or metaphysical baggage of that sort. Saying that the foreign minister represents the state is no more mysterious than saying that a lawyer represents a client or that a purchasing agent represents her firm.

And, *Arrest Warrant* reasons, to fulfill their representative function, troika members need freedom to travel to foreign countries without fear of arrest and prosecution. Hence, they enjoy P-immunity as well as M-immunity. The reasoning is functional and practical, not spooky.

The crucial question is whether high officials' immunity extends to core international crimes they commit – violations of the *jus cogens*. At the

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[116] *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others*, ex parte *Pinochet Ugarte*, 24 March 1999, [1999] All ER 97, HL (speech of Lord Millett), available at https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino7.htm.

[117] Ernst H. Kantorowicz, The King's Two Bodies: A Study of Medieval Political Theology (1957). At its apogee in the 17th century, the theory fused divine right with royal absolutism; in the words of Louis XIV's court preacher Bossuet, "the whole state is in him; the will of the whole people is contained in his." La Politique tirée des propres paroles de l'Ecriture Sainte, Book V, art. I, prop. i, in OEuvres de Bossuet (Paris, 1877), I, 373, quoted in Paul W. Fox, *Louis XIV and the Theories of Absolutism and Divine Right*, 26 Canadian J. Econ. & Poli. Sci. 128, 135 (1960).

[118] *Arrest Warrant*, §53.

turn of the millennium, it seemed the answer might be no, following on the British House of Lords' *Pinochet* decision that Chile's former president could be extradited to Spain for tortures inflicted during his military dictatorship.[119] Lord Browne-Wilkinson's crucial argument was that after Chile acknowledged torture as an international crime by joining the Convention Against Torture (CAT), Pinochet regime tortures could no longer count as state acts; they were *ultra vires* and fell outside the magic ring of M-immunity.[120] Otherwise, Lord Browne-Wilkinson reasoned, "bizarre results" ensue: CAT criminalizes only official acts of torture, and if their status as state acts cloaks torturers in immunity, no one could ever be prosecuted for torture in the courts of another state, even though CAT makes torture a universal jurisdiction crime.[121] The paradox of immunity would defeat the point of CAT: "to provide a system in which there is no safe haven for torturers."[122]

A logical extension of this reasoning would apply it to other universal jurisdiction offenses as well as torture, stripping away M-immunity from officials who commit them. In the early 21st century – a time of optimism about international criminal justice – *Pinochet* made it seem that a revolution in accountability was possible.[123] Indeed, 23 years after *Pinochet*, the International Law Commission proposed stripping away M-immunity for half a dozen core crimes (although it left P-immunity untouched).[124]

The revolution may still happen, but it hasn't yet. Instead, a series of state-centric decisions by the International Court of Justice and the European Court of Human Rights strongly reaffirmed official immunities even for *jus cogens* crimes – in effect, a judicial counterinsurgency.[125] The Empire struck back.

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[119] *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others*, ex parte *Pinochet Ugarte*, 24 March 1999, [1999] All ER 97, HL. More precisely, the Law Lords held that he could be extradited for those tortures committed after Chile had joined the Convention Against Torture.

[120] Id., https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino2.htm.

[121] Id. Note that torture also can't be prosecuted in an international tribunal unless it is committed in circumstances that make it a crime against humanity, a war crime, or an act of genocide.

[122] Id.

[123] Naomi Roht-Arriaza, The Pinochet Effect: Transitional Justice in the Age of Human Rights (University of Pennsylvania Press, 2005).

[124] Draft Articles on Immunity of State officials from foreign criminal jurisdiction, in Report of the International Law Commission, 73rd sess. (18 April–3 June and 4 July–5 August 2022), UNGA Supp. No. 10 (A/77/10), art. 7, at 190–91.

[125] Al-Adsani v United Kingdom (App. No. 35763/97), [2001] ECHR 35763/97 21 Nov. 2001; Jones v. UK; *Arrest Warrant*; *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, I.C.J. Reports 2012, p. 99 (Feb. 3, 2012). See David Luban, *European Court of Human Rights to Torture Victims: Get Lost*, Just Security (Jan. 15, 2014), https://www.justsecurity.org/5726/echr-torture-victims-lost/ (describing the decisions as "the ugly face of counter-revolution"). The *Jones* decision poo-pooed Lord

And – importantly – the ILC omitted the crime of aggression from its exceptions to M-immunity. The Special Rapporteur candidly explains why: concern about the "political implications it could have for the stability of relations between States" if state leaders could be tried for aggression in the courts of another state.[126] The decision to omit aggression from the list was deeply contentious, and it led to a first-ever divided vote in the Commission.[127] This should come as no surprise – after all, impunity for the crime of aggression also has political implications for the stability of relations between States, which the ILC majority brushed aside.

Arrest Warrant, the most important of the counter-reformation decisions, reassures us that immunity does not mean impunity, offering four threadbare reasons. First, the state can waive a troika member's P-immunity (but why would it? by definition, P-immunity implies that the troika is still in power). Second, it can try the member for core crimes under its own law in its own courts (ditto). Third, leaders can step down and forfeit P-immunity (but they retain M-immunity if their crimes were state acts). Fourth, leaders may be tried before an international court, where immunity does not apply. But international courts' capacity is limited, and in thirty years only one troika incumbent and five former incumbents have ever faced an international judge.[128] As Judge van den Wyngaert politely notes in her dissenting opinion, these four possibilities are "highly hypothetical" – doctrinally possible but farfetched in practice.[129] On Planet Earth, immunity means impunity in all but the rarest of cases.

Let's turn to the merits of the ICJ and ECHR's immunity decisions, which all turn on the same argument: that the courts can find no state practice creating a *jus cogens* exception to the rule of immunity. The ILC's Special Rapporteur made the same argument regarding the crime of aggression.[130]

Browne-Wilkinson's argument that international crimes are not state acts because he and one other Law Lord were the only ones who made it.

[126] Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, ILC 68th Sess., UNGA Doc. A/CN.4/701 (14 June 2016), §222, incorporated by reference in Report of the ILC, 69th Sess., UNGA Doc. A/72/10 (2017), §122.

[127] Open Society Justice Initiative, Immunities and a Special Tribunal for the Crime of Aggression against Ukraine, Feb. 2023, 23–24, https://www.justiceinitiative.org/publications/immunities-and-a-special-tribunal-for-the-crime-of-aggression-against-ukraine. Since then, many states have asked the ILC to reconsider, and to add aggression to the list of crimes for which there is no M-immunity.

[128] *Arrest Warrant*, §§60–61. The incumbent was Kenyan President Uhuru Kenyatta, unsuccessfully prosecuted in the ICC. The former incumbents were Biljana Plavšić, Slobodan Milošević, and Radovan Karadžić in the ICTY; Charles Taylor, in the SCSL; and Hissène Habré in the AEC. The ICC has issued arrest warrants for Vladimir Putin and Omar al-Bashir, and the prosecutor has requested an arrest warrant for Benjamin Netanyahu.

[129] *Arrest Warrant*, dissenting opinion of Judge van den Wyngaert, §§34–38.

[130] *Arrest Warrant*, §58 ("unable to deduce from … practice … any form of exception to the rule according immunity …, where they are suspected of having committed war crimes

Notice the structure of this argument. It assumes the rule of immunity and looks for *jus cogens* exceptions, which the courts report they cannot find. The assumed immunity rule indisputably exists for ordinary crimes and – since *Arrest Warrant* – also for war crimes, torture, and crimes against humanity (disputably!).

But suppose we start the inquiry from the other end, by asking whether there really is a global rule of immunity, rather than assuming it. Specifically, we should ask whether there has ever been a customary rule immunizing state officials from prosecution *for the crime of aggression*. That is by no means obvious. To answer yes should require an established state practice of immunizing officials from prosecution for the crime of aggression in the courts of another state (presumably the victim state). But there are none. The handful of World War II cases prosecuting Nazi officials in national courts for crimes against peace all resulted in convictions.[131]

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or crimes against humanity"); *Jurisdictional Immunity*, §83 (no state practice strips immunity from cases involving "serious violations of human rights law or the law of armed conflict"); §89 (no state practice or *opinio juris* strips immunity from cases involving *jus cogens* violations); Al-Adsani v. United Kingdom, [2001] ECHR 35763/97, §61 (no "firm basis" in law for a torture exclusion from state immunity in civil suits); Jones v. United Kingdom, §§196–98 (finding *Jurisdictional Immunity* authoritative); ILC Fifth report on immunity of State officials from foreign criminal jurisdiction, §222 ("there do not seem to be any cases of State practice in which the crime of aggression has been characterized as a limitation or an exception to the exercise of immunity, at either the legislative or judicial level").

It might be thought that the issue was settled in favor of immunity by the UN Convention on Jurisdictional Immunities of States and Their Property: "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention" (UNGA Doc. A/59/508 (2004), art. 5). The Convention makes no exception for criminal acts. By the same token, however, it says nothing about immunity from criminal prosecution of state *officials* (as distinct from the state itself), and to date the Convention has only 28 states-parties. So it is solely the judicial holdings, not conventional law, that find expansive immunity from criminal jurisdiction.

The *Jurisdictional Immunities (Germany v. Italy)* decision offers a distinct argument about why there can be no *jus cogens* exception to immunity: jurisdictional immunity is a procedural issue that must be settled before addressing the merits, but the gravity of the violation is a merits issue. This "presents a logical problem." ¶82. This argument is singularly unimpressive. Courts everywhere find themselves obligated to adjudicate their own jurisdiction if a defendant challenges it. If that requires them to examine the allegations in a preliminary way, they may do so; it's not a final finding of fact, it may rest on presumptions, and it is in this respect no different from a court finding probable cause to issue a warrant or take a case to trial.

[131] Best-known is the first-ever aggression prosecution – preceding the IMT: that of Arthur Greiser, deputy Gauleiter of the Warthegau. Mark A. Drumbl, *'Germans are the Lords and Poles are the Servants': The Trial of Arthur Greiser in Poland, 1946*, *in* The Hidden Histories of War Crimes Trials, 411 (Oxford Univ. Press, 2013); 1949 Law Reports of Trials of War Criminals (Law Reports), The UN War Crimes Comm'n, Law Reports of Trials of War Criminals, 13 (1949) 70; Patrycja Grzebyk, *The Role of the Polish Supreme National Tribunal in the Development of Principles of International Criminal Law*, *in* Historical Origins of International Criminal Law, 2 (Bergsmo, Wui Ling, Ping 2014). Other Polish

Nor does *opinio juris* regarding immunity for the crime of aggression have a solid history. Classical sources from Grotius through Vattel made no mention of head-of-state immunity for any crime. As late as 1919, when the victorious allies were debating whether to put Kaiser Wilhelm on trial, *opinio juris* on his immunity was divided. The French experts Larnaude and Lapradelle argued that while head-of-state immunity before national courts is clearly established "for an offense against ordinary law," it provides "too narrow a basis" for the crimes of which the Kaiser was accused, which included aggression. "If it is not possible to punish the nation … it by no means follows that the German Emperor is immune."[132] Larnaude and Lapradelle's arguments are rather thin and conclusory, and they favor an international tribunal over prosecution in a national court.[133] Stronger arguments about customary law came in an official report by the British expert, Sir John McDonnell. He classifies prior authorities into:

(1) those following "the ancient usage of war as to vanquished sovereigns in all its severity" (not good!);

(2) early modern writers urging magnanimity and moderation (but not immunity) in the treatment of defeated kings and generals;

(3) "those who, especially around the time of Louis XIV., seek to exalt the sacrosanct character of the sovereign"; and

(4) "those recent writers who use comprehensive language as to such immunity without having in mind the exact point."[134] As McDonnell elaborates point (4), the recent writers

> do not distinguish between the position of a Sovereign who visits or resides in a foreign country at the invitation or by

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convictions were Albert Forster, Josef Bühler, and Ludwig Fischer (as an accomplice); the USSR also convicted several Sachsenhausen personnel for crimes against peace. Jonathan Friedman, *The Sachsenhausen Trials: War Crimes Prosecution in the Soviet Occupation Zone and in West and East Germany* in Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes, 159, 162-63 (Patricia Heberer and Jürgen Matthäus, eds. 2008)

[132] Ferdinand Larnaude & Albert Geoffre de Lapradelle, Enquiry into the Penal Liabilities of the Emperor William II., in Commission on the Responsibility of the Authors of the War, Minutes of Meetings of the Commission, United State National Archives 181, 1201/16, pp. 4–18, pp. 8, 11 (no immunity); 13, 14, 16 (aggression among the crimes).

[133] William Schabas reads Larnaude and Lapradelle as defenders of P-immunity before municipal courts, but not before an international tribunal. Schabas, The Trial of the Kaiser, 54–55, 162. I read them differently, as asserting the P-immunity rule before municipal courts only for "ordinary" or "common law" crimes, and for *in bello* war crimes. Larnaude & Lapradelle, at 8, 9. They approvingly cite Vitoria, Bellini, and Vattel, who recognize no head-of-state immunity for launching an unjust war, without proposing an international court. Id. at 13.

[134] First, Second and Third Interim Reports from the Committee of Enquiry into Breaches of the Laws of War, with Appendices, First Interim Report, at 31 British National Archives, CAB\24\11. I am grateful to Bill Schabas, who kindly provided me with a copy of this document. However, he disagrees with my views on the immunity issue.

> the permission, express or implied, of its Sovereign, and that of a Sovereign who invades and occupies foreign territory in spite of the resistance of its Sovereign. For immunity in the latter case there seems to be no authority.[135]

This addresses the functional argument for immunity, which rests on the need for safe diplomatic travel. That justification is hardly applicable to a conqueror's visit to the victim country. Hitler's visit to Compiègne to personally accept France's surrender in 1940 was triumphalism, not diplomacy.

McDonnell's point in his fourfold classification is the shakiness and relative recency of *opinio juris* regarding blanket head of state immunity. His skepticism about the sacrosanct character of sovereigns at the stage when the immunity rule coalesced is plain – and, I think, justified. Notably, the time of Louis XIV was the apogee of royal absolutism fused with divine right, including the sovereign's right to make war. This is a background theory that for excellent reasons lost is cachet by the early 20th century.[136]

Regardless of whether McDonnell's analysis of the precedents is accurate – others in the debate over trying the Kaiser disagreed on the immunity issue, just as they disagreed that aggression was an established crime[137] – the British and French reports show that as recently as 1919 there was no consensus that a head of state should enjoy immunity for invading foreign countries.

Which brings us back to the question: Where is the evidence of a customary rule of immunity from prosecution for the crime of aggression? Shouldn't courts answer that question before they search for exceptions to an immunity rule whose existence they are merely postulating?

Impatient lawyers might respond that this is a silly trick question. The crime of aggression, with individual criminal responsibility, has only existed since 1946. Apart from an anomalous 2016 prosecution of two Russian soldiers by Ukraine (who were quickly released in a prisoner swap),[138] there have been no domestic prosecutions since Poland convicted Josef Bühler and Albert Forster of aggression in 1948 – so it isn't surprising that the number of immunity grants is also zero. Zero out of zero means nothing. And – the response might continue – even though *Arrest Warrant* and *Jurisdictional Immunities* never squarely addressed the issue of immunity for aggression (the cases concerned other crimes), it seems like

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[135] Ibid.

[136] On the extravagant nature of Louis's absolutism, which far exceeded the claims of medieval political theories and even those of the 16th century, see Fox, *Louis XIV and the Theories of Absolutism and Divine Right.*

[137] Schabas, The Trial of the Kaiser, 161–69. Schabas believes that McDonnell cherry-picked his sources. Ibid, 55.

[138] Ukraine finds Russian 'soldiers' guilty of waging war, BBC News, 18 April 2016, https://www.bbc.com/news/world-europe-36070383.

an obvious, even trivial, extension of their gung-ho pro-immunity approach to other *jus cogens* violations. We must infer that the immunity rules for other crimes applies as well to the crime of aggression.

Must we? The inference assumes that the crime of aggression is qualitatively similar to the other core crimes, but it isn't. Unlike other *jus cogens* crimes, aggression strikes at the heart of the UN Charter scheme. As we've seen, the scheme's crucial goal is "to save succeeding generations from the scourge of war," and the UN's declared purpose – listed first in Article 1 – is "to maintain international peace and security" by "suppression of acts of aggression." In this respect, the crime of aggression is *sui generis*, because it involves a sovereign's attack not only on another state and its people, but on the core principles of the legal order. Recall the dictum from the IMT judgment: "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[139]

Of course, we may doubt that aggression *per se* is worse than the accumulated evil of the whole. In purely human terms, the opposite is true: the evil of the whole, the death and destruction and risk of nuclear war, not the bare offense against sovereignty, is where the horrors lie. But the Nuremberg dictum matters nonetheless, because it anticipates the UN Charter scheme, and that scheme is nothing less than the gravitational center of postwar public international law.

As we've seen, some theorists (myself among them) believe that the protection of human rights against the violence of warfare, not the protection of states and their sovereignty, ought to be the core principle of the legal order.[140] Those maintaining this position might deny that there is a qualitative difference between the crime of aggression and the other core crimes: they are all about illicit violence. But it absolutely does not follow that those of us accepting the human rights view accept the rule of P-immunity for aggression, merely because it is on a par with immunity for other core crimes. Just the opposite: theorists with the human rights orientation would strip away immunity for those crimes as well, a view well represented by dissenting judges in *Al-Adsani*, *Arrest Warrant*, and *Jurisdictional Immunities*.

The most forceful version is ICJ Judge Cançado-Trinidade's lengthy dissent in the ICJ's 2012 *Jurisdictional Immunities* case. At issue was a dispute between Italy and Germany over whether Italian courts can award damages to victims of German war crimes in World War II. The Court

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[139] Pin-cite.

[140] In addition to Dannenbaum and Mégret, we may include David Rodin, War and Self-Defense (OUP, 2002), Luban, Just War and Human Rights; Luban, The Legacies of Nuremberg. Ratner.

upheld Germany's sovereign immunity claim, and Judge Cançado-Trinidade responded angrily:

> In my understanding, what jeopardizes or destabilizes the international legal order, are the international crimes, and not the individual suits for reparation in the search for justice. In my perception, what troubles the international legal order, are the cover-up of such international crimes accompanied by the impunity of the perpetrators, and not the victims' search for justice. …
>
> The doctrine of sovereign immunities, which blossomed with the myopia of a State-centric approach, -- which could only behold inter-State relations, -- unduly underestimated and irresponsibly neglected the position of the human person in international law. …
>
> *Jus cogens* stands above the prerogative or privilege of State immunity, with all the consequences that ensue therefrom, thus avoiding denial of justice and impunity. On the basis of all the aforesaid, my firm position is that there is no State immunity for international crimes.[141]

In sum, we should remain skeptical that there is a customary rule of immunity for the crime of aggression. Using the orthodox methods for ascertaining a rule of customary international law, there is simply no there there.

9. The Gordian knot of what makes a tribunal "international"

This is not to say that victim states *ought* to prosecute aggressors on their own. Doing so would create at least the appearance of unfairness and

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[141] *Jurisdictional Immunities (Germany v. Italy)*, Dissenting opinion of Judge Cançado-Trinidade, §§ 129, 179, 181, 316.

In line with the final paragraph quoted, the dissenting judgment of Judges Rozakis and Caflisch in *Al-Adsani* write (on behalf of themselves and six other judges on the European Court of Human Rights):

> [T]he basic characteristic of a *jus cogens* rule is that … it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule. … The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions.

In her *Arrest Warrant* dissent, Judge van den Wyngaert ventures a similar argument. §28. Judge Cançado-Trinidade's argument explicitly ties the primacy of *jus cogens* to the primacy of individual human rights over the desires of states and their leaders. See, e.g., §§ 129, 179, 181, 305. That connection is only implicit in the other dissents cited here.

arbitrariness, and perhaps the reality as well. During the 1919 debates over trying the Kaiser, even those most in favor of it recognized the bad optics of a vengeful state prosecuting its enemy's sovereign, and they agreed that an international tribunal was needed to give the trial legitimacy. The same may be true today.

Yet the immunity issue still matters, albeit for a different reason than aggression prosecutions in domestic courts. As we have seen, various actors including the European Union have proposed creating a special international tribunal for aggression. Recall that international tribunals do not recognize sovereign immunities. That would avoid the immunity issue, but in its place it raises the question of what it takes to make a tribunal genuinely international.

Obviously, Russia's veto power ensures that the Security Council will never create such a tribunal, and most lawyers agree that the General Assembly has no authority to create a criminal tribunal on its own (even supposing there are enough votes).[142] In past practice, the GA has authorized the Secretary General to negotiate a treaty with an affected state to create a hybrid tribunal; that was the procedure by which the Extraordinary Criminal Chambers of Cambodia were established.[143] But the Security Council had authorized the GA to do so, and it is unclear whether the Assembly can make the recommendation without the Council's blessing. Alternatively, some have suggested a treaty-based regional tribunal for aggression.

But any treaty-based tribunal must show that it has more authority than a single state to overcome the *par in parem* immunity standardly thought to exist. Under the ancient *nemo plus iuris* rule ("no one can transfer more rights to another than he himself has"), it seems impossible for states to jointly create a jurisdiction none of them possesses. Or so it is argued; others have forcefully rebutted the argument.[144] (For example, if we were

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[142] Although some disagree. Oona Hathaway, Maggie Mills, and Heather Zimmerman, *The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression Upon a Request of the UN General Assembly*, JUST SECURITY, May 5, 2023, https://www.justsecurity.org/86450/the-legal-authority-to-create-a-special-tribunal-to-try-the-crime-of-aggression-upon-the-request-of-the-un-general-assembly/.

[143] The SCSL deemed itself sufficiently international that Liberian President Charles Taylor could not claim immunity. SCSL, Immunity Decision of the Special Court, May 31, 2004, §§ 42, 51–53.

[144] E.g., Chile Eboe-Osuji, The Absolute Clarity of International Legal Practice's Rejection of Immunity Before International Criminal Courts, Just Security, Dec. 8, 2022, https://www.justsecurity.org/84416/the-absolute-clarity-of-international-legal-practices-rejection-of -immunity-before-international-criminal-courts/. See also Miguel Lemos, The Law of Immunity and the Prosecution of the Head of State of the Russian Federation for International Crimes in the War against Ukraine, EJIL Talk!, Jan. 16, 2023, https://www.ejiltalk.org/the-law-of-immunity-and-the-prosecution-of -the-head-of-state-of-the-russian-federation-for-international-crimes-in-the-war-against-ukraine/. For a searching discussion, see Leila N. Sadat, The Conferred Jurisdiction of the International Criminal Court, 99 Notre Dame L. Rev. 549 (2023) – or, for a quick overview of the argument, Sadat's blog post Conferred Jurisdiction and the ICC's Putin and Lvova-Belova

to take the *nemo plus iuris* rule literally, the United Nations could not exist, because the Charter confers powers on it that no state has – and nobody is willing to go that far.[145]) The ICC has rejected a *nemo plus iuris* argument against its power to charge leaders of non-member states for crimes committed on the territory of a member.[146]

But the ICC has 123 members, drawn from every continent; it has at least some claim to speak for the international community. Can a tribunal with a smaller base of support make the same claim? – and how small is too small? What criteria must a tribunal satisfy to qualify as international? That remains an unanswered question, and if one accepts the view that troika members are immune from prosecution in domestic courts but not international courts, any doubts about whether a tribunal is international should be resolved in the defendant's favor.[147]

If my arguments hold water, however, we can cut this Gordian knot, because there is no customary rule of immunity for the crime of aggression. In principle, states can establish domestic jurisdiction over the crime of aggression, so the *nemo plus iuris* objection never arises.

Of course there are political objections to a small number of states forming a tribunal to try aggression, declaring their tribunal "international," and indicting another state's president. (Could Russia and Belarus create an "international" tribunal to prosecute Ukrainian leaders for aggression?) As Dapo Akande says,

> I don't believe in regime change by force. And I don't believe in regime change by international tribunals either. Because that's in effect what we are talking about. To the extent that we take the view that there's no immunity before international tribunals which are created by states, then all we are saying is that two states, three states, fifteen states can set up an "international tribunal" to remove in effect the head

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Warrants, Just Security, Apr. 21, 2023, https://www.justsecurity.org/86079/conferred-jurisdiction-and-the-iccs-putin-and-lvova-belova-warrants/.

[145] Carlos Vázquez has pointed this out in conversation..

[146] "[W]hen adjudicating international crimes, [international courts] do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole. Accordingly, the principle of *par in parem non habet imperium*, which is based on the sovereign equality of States, finds no application in relation to an international court such as the International Criminal Court." Situation in Darfur in the Case of the Prosecutor v. Al-Bashir, Judgment in the Jordan re Al-Bashir Appeal, Case No. ICC-02/05-01/09 OA2 (May 6, 2019), §115.

[147] In international practice this rule of lenity is known as *in dubito pro reo.* For a sober assessment of the immunity issue for different proposed aggression tribunals, see the OSJI Report, 10–20.

> of state of another state. I don't think that's conducive to good international relations.[148]

Akande was not speaking specifically of the crime of aggression, and one might respond that launching aggressive wars is even less conducive to good international relations. More to the point, though, is that there is a difference between a small number of states (two or three, or perhaps even fifteen) declaring themselves the voice of the international community and today's proposals: a larger number, representing most of a region, establishing a tribunal after more than 140 states have voted to declare that the Russian invasion is aggression. The last point is important: even if no UN organ proves willing to create an aggression tribunal, the overwhelming international condemnation of Russia's aggression creates a powerful tailwind to overcome doubts that a regional aggression tribunal speaks for more than the states establishing it.

Of course, any such tribunal would have to be constructed in a way that is, and is seen to be, scrupulously fair.[149] That would require familiar institutional safeguards, including the rule that no two judges can come from the same country; that all judges maintain the high ethical standards recently proposed by the Ethica project;[150] that all the due process guarantees enshrined in Articles 14 and 15 of the ICCPR are met; that proof be beyond a reasonable doubt; that adequate defense resources to establish equality of arms be provided; that evidence be rigorously authenticated; and that indictments be subject to judicial disapproval as in the ICC. – In short, the tribunal would need to respect all the decencies of natural justice.

Here, the Nuremberg precedent is instructive. Telford Taylor recalls that the prosecutors were terrified that some defendants would be acquitted. They feared that acquittals would de-legitimize the IMT. In hindsight, the opposite was the case: the acquittals showed that the trials were not rigged, and that perception of fairness secured the IMT's legitimacy.

A reasonably broad base, widespread international antipathy to an aggressive war, and scrupulous fairness should suffice to make an aggression tribunal international.

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[148] Dapo Akande, oral remarks, Wayamo Foundation Conference, 24-26 March 2016, Panel VII: Immunity of Heads of State under International Law, available at https://youtu.be/A_O1Yzvhcp0 at timestamp 1:15:34 to 1:16.28.x

[149] So I have argued in David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in Samantha Besson and John Tasioulas, eds., THE PHILOSOPHY OF INTERNATIONAL LAW (Oxford University Press, 2010), pp. 569-88.

[150] Ethica: Ethical Principles for International Criminal Judges (2023), https://www.nurembergacademy.org/fileadmin/user_upload/Ethica_Principles_English.pdf.