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# Balancing “Aggression” and Compassion in International Law: The Crime of Aggression and Humanitarian Intervention

Alexander H. McCabe  
*Fordham University School of Law*

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**BALANCING “AGGRESSION” AND COMPASSION  
IN INTERNATIONAL LAW:  
THE CRIME OF AGGRESSION  
AND HUMANITARIAN INTERVENTION**

*Alexander H. McCabe\**

*There is a problematic overlap between bona fide humanitarian intervention and the crime of aggression. Under international law, the crime of aggression is defined so vaguely that it potentially could be applied to try leaders who seek to stop documented mass atrocities with armed force. This Note seeks a resolution to that overlap: a path that would allow those who would plan and engage in bona fide humanitarian intervention to be exempt from prosecution for aggression. The Note first examines the genealogy of the crime of aggression. It then analyzes several possible solutions to policing aggression without unduly deterring humanitarian intervention. Finally, this Note concludes that the existing imbalance can be corrected by: (1) granting the International Criminal Court exclusive jurisdiction to investigate and prosecute the crime of aggression, (2) modifying the current regulations to bar the U.N. Security Council in prosecuting the crime of aggression, and (3) developing an affirmative defense to the crime of aggression that would allow indicted leaders to use either a high or low evidentiary standard depending on whether their state acted alone or through a multilateral organization.*

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\* J.D. Candidate, 2015, Fordham University School of Law; B.A., 2008, Tufts University. Special thanks to Professor Thomas H. Lee for his outstanding guidance in writing this Note. Thanks also to Kat Yen for her indefatigable support during this process.

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#### INTRODUCTION

Something is rotten in the fictional state of Bellicosa. The small state has been brutally occupying and destroying cities in its restive eastern part. While the government claims to be crushing an open rebellion, the world media and local opposition groups have, for months, spread stories of indiscriminate use of armed force against civilians. There are rumors of torture and the deliberate bombing of local hospitals and schools. Since the majority of the population in this region consists of an ethnic minority, accusations of genocide gain traction.

While some member states at the U.N. Security Council (UNSC) strongly advocate a humanitarian military intervention to stop these atrocities, a powerful Bellicosian ally threatens to veto any resolution authorizing armed force. Back-channel negotiation and threats of serious economic sanctions prove unsuccessful.

Finally, an international alliance acts. Heads of state, cabinet officials, and military leaders from the world's most powerful nations plan and carry out an extended bombing campaign against government and military

targets. They later invade from neighboring states, occupying eastern Bellicosia and effectively ending any military activity in the region.

Back at the United Nations, Bellicosian allies and other states—concerned with what they perceive as the powerful alliance’s gross flaunting of restrictive international norms on the use of armed force—demand that the International Criminal Court (ICC) act against the alliance heads of state, cabinet, and military officials for planning and executing crimes of aggression against Bellicosia.<sup>1</sup> The ICC prosecutor launches an investigation against these leaders. The vague definitions of the “crime of aggression” and who can be prosecuted for it sparks a detailed and confusing international legal debate. Any hope that states once had for the ICC to be a respected part of international criminal law is buried under ambiguities and questions of procedure.

This Note concerns the concept of “aggression” in international law and the past and future practice of prosecuting individuals for the “crime of aggression.” It asks, and attempts to answer, three critical questions: (1) what is the crime of aggression and who gets to define it, (2) whom can we prosecute for the crime and who decides who shall be prosecuted, and (3) how can we ensure that state leaders and officials who use armed forces in a foreign country for legitimate humanitarian reasons do not get prosecuted for the crime?

To that end, Part I discusses the crime of aggression and humanitarian intervention, touching on their past histories and current state. Part II reviews the literature proposing both procedural and substantive solutions to address the problematic overlap. Part III critically assesses these solutions and concludes that (1) under international law the crime of aggression is still unclear but that a working definition sufficient to generate indictments can be pieced together from customary international law; (2) the ICC should have complete and exclusive jurisdiction for defining and prosecuting crimes of aggression as the international political branches—namely the U.N. General Assembly (UNGA) and Security Council—are unable to provide a fair trial and have proven to be too political in their past usage of aggression to be reliable; and (3) in the interest of protecting bona fide humanitarian interveners, the court should establish a two-tier affirmative defense. The two tiers establish a high standard of evidence when the initiator of force is outside of the target state’s region and a lower tier when regional multilateral organizations from within the target’s region initiate.

#### I. WALKING THE TIGHTROPE: THE BALANCE AS IT STANDS

This part clarifies the crime of aggression and humanitarian intervention as they currently stand in international law. It first provides a brief background of international law sources. It then examines the crime of aggression and “act of aggression” definitions as they have developed over time and as they currently stand today, dividing the sources between

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1. “Crimes of aggression” are defined *infra* Part I.B.

treaties, customary international law, and general principles. Finally, it examines emerging international legal standards for humanitarian intervention.

*A. Sources and Enforcement of International Law*

International law has a variety of sources, which are memorialized in the U.N.-created Statute of the International Court of Justice.<sup>2</sup> Article 38 of the statute lists three groups of sources: (1) international conventions and treaties, (2) customary international law, and (3) the general principles of law recognized by civilized nations.<sup>3</sup>

Treaties and international conventions are written, contract-like documents by which states explicitly agree to be bound.<sup>4</sup> They are the dominant form of international law and are interpreted according to principles outlined in the Vienna Convention on the Law of Treaties.<sup>5</sup> Article 31(1) of that convention provides that “a treaty shall be interpreted . . . in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>6</sup> If interpreting this plain meaning creates an “ambiguous or obscure” or “manifestly absurd or unreasonable” result, the treaty’s preparatory work (i.e., legislative history) and the “circumstances of its conclusion”—collectively known as the “travaux préparatoires”—may be used as a supplementary interpretative aid.<sup>7</sup>

The U.N. Charter is the preeminent international legal treaty, superior to all other legal obligations that any of its signatories may have.<sup>8</sup> It created the United Nations which continually acts to shape international law through its various bodies, primarily the UNSC and the UNGA.<sup>9</sup> Article 25 of the U.N. Charter binds member states to carry out Security Council decisions.<sup>10</sup> UNGA resolutions are recommendations and thus usually nonbinding,<sup>11</sup> but they do contribute to customary international law.<sup>12</sup> The U.N. Charter directly addresses and regulates the legality of uses of armed force in international affairs.<sup>13</sup>

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2. U.N. Charter art. 92–96; JAN KLABBERS, *INTERNATIONAL LAW* 21 (2013).

3. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031 [hereinafter ICJ Statute].

4. KLABBERS, *supra* note 2, at 25–26.

5. *Id.* at 26–27.

6. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

7. *Id.* at art. 32.

8. U.N. Charter art. 103.

9. *Id.* at art. 9–22 (creating and detailing the General Assembly’s structure and procedures), *id.* at art. 23–32 (creating and detailing the Security Council’s structure and procedures).

10. *Id.* at art. 25.

11. *Id.* at art. 10, 14; GERHARD KEMP, *INDIVIDUAL CRIMINAL LIABILITY FOR THE INTERNATIONAL CRIME OF AGGRESSION* 117 (2010).

12. KLABBERS, *supra* note 2, at 87.

13. U.N. Charter art. 33–38; *see also id.* at art. 1.

Customary international law is international law framed by the practices of nations performed out of a sense of legal obligation.<sup>14</sup> Accordingly, custom may evolve as state practices evolve, so long as the changes are attributable to a change in expectations of what law requires—*opinio juris*.<sup>15</sup>

The general principles of law recognized by civilized nations refers to rules of international law drawn from underlying principles of the world's major legal systems.<sup>16</sup> One example is “due process of law”: most of the world's states, including those with the most political and economic influence, accept the principle that a person is entitled to notice and an opportunity to be heard before a government takes away his or her liberty or property.

### *B. Crimes of Aggression: The History and Current State*

This section discusses the history and current state of the crime of aggression in international law. It first discusses the relevant international conventions and treaties,<sup>17</sup> then customary international law,<sup>18</sup> and finally the general principles relevant to defining acts of aggression.<sup>19</sup>

It is important to note that an act of aggression, as discussed in the U.N. Charter, and a crime of aggression are two separate and distinct concepts.<sup>20</sup> The act is the state-performed violation, while the crime is the individual criminal liability that the instigator or planner of an act of aggression may face.<sup>21</sup> While a *state* commits an act of aggression, an *individual* commits a crime of aggression.<sup>22</sup>

#### 1. International Conventions and Treaties

As discussed above, international conventions and treaties are the primary and most widely used international law sources today.<sup>23</sup> Both the crime and act of aggression are codified in two such sources: the U.N. Charter and the Rome Statute—which set forth the design and jurisdiction of the ICC.

14. KLABBERS, *supra* note 2, at 26–27.

15. Jonathan I. Charney, “Anticipatory Humanitarian Intervention in Kosovo,” in *Editorial Comments: NATO’s Kosovo Intervention*, 93 AM. J. INT’L L. 834, 836 (1999).

16. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1)(c)(4) (1987).

17. See *infra* Part I.B.1.

18. See *infra* Part I.B.2.

19. See *infra* Part I.B.3.

20. Richard L. Griffiths, *International Law, the Crime of Aggression and the Ius Ad Bellum*, 2 INT’L CRIM. L. REV. 301, 309–10 (2002).

21. *Id.*

22. Ioana Gabriela Stancu, *Defining the Crime of Aggression or Redefining Aggression?*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* 87, 88 (Mauro Politi & Giuseppe Nesi eds., 2004).

23. See *supra* Part I.A.

*a. The U.N. Charter*

Since its inception after the carnage of World War II, the U.N., through its founding charter, has made the prevention of “acts of aggression” its highest priority. Among the “[p]urposes of the United Nations” is “to maintain international peace and security” by suppressing “acts of aggression or other breaches of the peace.”<sup>24</sup> To this end, article 2 calls upon members to “refrain in their international relations from the threat or use of force against . . . any state” in any manner inconsistent with the purposes of the United Nations.<sup>25</sup>

Chapter VII of the U.N. Charter, comprising articles 39 to 51, gives the Security Council the power to determine the existence “of any threat to the peace, breach of the peace, or act of aggression” and react appropriately.<sup>26</sup> Specifically, article 40 allows the Council, before determining the existence of an article 39 threat, to demand provisional measures of the relevant states to cease their offending actions.<sup>27</sup> Article 42 allows the Council to authorize military force “to maintain or restore international peace and security.”<sup>28</sup> Article 51 notes that while nothing in the charter shall impair a state’s right to self-defense in the event of an armed attack, the Council reserves the right to take any action to maintain and restore international peace and security that it sees fit.<sup>29</sup>

But what exactly is an act of aggression? The U.N. Charter never specifically defines it,<sup>30</sup> though Germany and Japan’s wars of aggression were certainly the historical precedent the U.N.’s founders had in mind.<sup>31</sup> These same founders, however, feared that struggling with a definition would bring the Charter Conference to a standstill, and so left it to the Security Council to decide what constitutes the act, a threat to peace, and an attack on peace on a case-by-case basis.<sup>32</sup>

*b. The Rome Statute and the Kampala Conference Amendments*

The Rome Statute is a 2002 international treaty that established the ICC.<sup>33</sup> The treaty vested the ICC with jurisdiction over the crime of

24. U.N. Charter art. 1, para. 1.

25. *Id.* at art. 2, para. 4.

26. *Id.* at art. 39.

27. *Id.* at art. 40.

28. *Id.* at art. 42.

29. *Id.* at art. 51.

30. Umberto Leanza, *The Historical Background*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* 1, 4 (Mauro Politi & Giuseppe Nesi eds., 2004). While Article 2(4) of the U.N. Charter was later used as a basis for an “act of aggression” definition, there is no indication that this was the intent of the original document.

31. *See* KEMP, *supra* note 11, at 104.

32. *Id.* at 4–5.

33. The Rome Statute came into force on July 1, 2002, the first day of the month after sixty days from the date the sixtieth state had ratified, accepted, approved, or acceded it. *See* Rome Statute of the International Criminal Court art. 126, para. 1, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

aggression.<sup>34</sup> Some countries such as the United States, the United Kingdom, and their Western allies opposed the inclusion of the crime in the court's jurisdiction in large part because of the potential for their leaders and generals to be prosecuted for aggression.<sup>35</sup> However, a coalition of many European Union states and approximately thirty members of the Movement of Non-Aligned Countries made their support of the Rome Statute contingent on its inclusion.<sup>36</sup> Because of how contentious this issue was, the conference's chairman brokered a compromise that asserted jurisdiction over "crimes of aggression" but left decisions on the crime's definition and the details of that jurisdiction to a future conference.<sup>37</sup> To create and research a workable definition, the conference created the Special Working Group on the Crime of Aggression (SWGCA) which met numerous times between 2003 and 2009.<sup>38</sup> The 2010 Kampala Conference largely adopted the working group's findings into the so-called Kampala Amendment, but the resulting definition will not go into force until after approval at another conference to be held before 2017.<sup>39</sup>

Under the definition adopted at Kampala, an individual can be prosecuted for a crime of aggression if he or she (1) is "in a position effectively to exercise control over or to direct the political or military action[s] of a State" and (2) has been involved in the "planning, preparation, initiation or execution" of an act of aggression that "by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."<sup>40</sup>

The Kampala Amendment further specifies that an act of aggression is "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations," essentially mirroring the language of U.N. Charter article 2(4).<sup>41</sup> The amendment specifically names the same seven acts listed in UNGA Resolution 3314 (XXIX) as "acts of aggression."<sup>42</sup>

34. *Id.* at art. 5, para. 1.

35. See *infra* notes 197–99 and accompanying text.

36. Elise LeClerc-Gagne & Michael Byers, *A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention*, 41 CASE W. RES. J. INT'L L. 379, 380 (2009).

37. Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT'L L.J. 161, 171 (2008).

38. International Criminal Court, Assembly of State Parties, *Special Working Group on the Crime of Aggression*, 7th Sess., Annex I, ICC-ASP/7/SWGCA/2 (Feb. 20, 2009).

39. Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, May 31–June 11, 2010, RC/9/11, at 18 (June 11, 2010) [hereinafter Review Conference], available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP9/OR/RC-11-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-ENG.pdf). While this definition is not yet in full force, its adoption by consensus and imminent re-visitation make it an important text and interpretation to consider when discussing the crime of aggression.

40. *Id.*

41. Compare *id.*, with U.N. Charter art. 2, para. 4 ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

42. Review Conference, *supra* note 39, at 18. See *infra* Part I.B.3.b. for a summary of the acts.



Finally, Annex III to the Kampala Amendment contains seven “Understandings” regarding the amendment’s legal interpretation.<sup>43</sup> While this section is not part of the proposed additions to the Rome Statute’s text, some negotiating parties insisted on its addition to the annex to clarify certain sections.<sup>44</sup> It is therefore, perhaps, most accurately considered a form of “soft law.”

Understandings 1 through 5 cover procedural, jurisdictional, and precedential points. Understandings 1 and 3 specify that the ICC may only exercise jurisdiction of UNSC-referred and ICC prosecutorial crime of aggression cases committed after the pre-January 1, 2017 meeting approves the amendment’s incorporation, or one year after ratification by thirty state parties.<sup>45</sup> Understanding 2 extends ICC jurisdiction of UNSC-referred cases to individuals regardless of whether their state has accepted the court’s jurisdiction.<sup>46</sup> Understandings 4 and 5 clarify that the act of aggression and crime of aggression definitions included in the amendment are solely for ICC purposes, not for “limiting or prejudicing in any way existing or developing rules of international law” nor do they create “the right or obligation” for a state to exercise domestic jurisdiction over an act of aggression committed by another state.<sup>47</sup>

In contrast, Understandings 6 and 7 most directly address the definition of crimes and acts of aggression.<sup>48</sup> Understanding 6 notes that aggression is the “most serious and dangerous form of the illegal use of force” and that—in accordance with the U.N. Charter—all circumstances surrounding a particular case must be considered before determining such an act exists, including the act’s gravity and consequences.<sup>49</sup> Understanding 7 clarifies the meaning of a “manifest violation” of the U.N. Charter noting that the three specified components—character, gravity, and scale—must *each and collectively* be sufficient to justify the “manifest determination.”<sup>50</sup> These thresholds indicate that not every act of aggression is a basis for criminal prosecution.<sup>51</sup> Indeed, the SWGCA meant “manifest” to exclude “borderline cases” or “those falling within a grey area” both factually and legally.<sup>52</sup> In other words, where it is debatable that a state’s actions have

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43. Review Conference, *supra* note 39, at 22.

44. Beth Van Schaak, *Negotiating at the Interface of Power and Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT’L L. 505, 596–97 (2010–11).

45. Review Conference, *supra* note 39, at 22.

46. *Id.*

47. *Id.* This echoes the Nuremberg Military Tribunal’s branding of aggression as the “supreme international crime.” *See infra* note 63.

48. Review Conference, *supra* note 39, at 22.

49. *Id.*

50. *Id.*

51. Joseph M. Isanga, *The International Criminal Court Ten Years Later: Appraisal and Prospects*, 21 CARDOZO J. INT’L & COMP. L. 235, 310 n.368 (2013). This interpretation is also consistent with the Nuremberg Military Tribunals discussed *supra* Part I.B.2.a.

52. Jennifer Trahan, *The Rome Statute’s Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference*, 11 INT’L CRIM. L. REV. 49, 58 (2011) (citing *February 2009 SWGCA Meeting*, in THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION 51, 87 (Stefan Barriga, Wolfgang Danspeckgruber & Christian Wenaweser eds., 2009)).

the sufficient “character” or where they do not meet the required “gravity” or “scale”, an act is not a manifest violation.<sup>53</sup>

It is currently unclear whether the “manifest” test would exclude borderline cases of humanitarian intervention, for instance, where there was no prior Security Council approval as was the case with the North Atlantic Treaty Organization’s (NATO) 1999 Kosovo bombings.<sup>54</sup> The U.S. delegation explicitly proposed a humanitarian intervention exception to the “acts of aggression” definition which would have brought some clarity.<sup>55</sup> This proposal was met with “severe reluctance” by many delegates citing concerns over how to judge “good faith” and time constraints during the conference.<sup>56</sup> The underlying concern was the possibility of pretextual invocations of humanitarian intervention by powerful states.

## 2. Customary International Law

This section discusses the customary international law sources which inform the act of aggression and crime of aggression definitions. It first considers the precedents set by the International Military Tribunals at Tokyo and Nuremberg. Second, it looks to aggression as the U.N. Security Council and the General Assembly have defined it. Finally, it discusses the International Court of Justice’s (ICJ) treatment of aggression.

### *a. The History of the Crime of Aggression and the International Military Tribunals at Nuremberg and Tokyo*

The genesis of the crime of aggression lies in the 1919 Treaty of Versailles that ended World War I.<sup>57</sup> The treaty called for the former German Emperor, Kaiser Wilhelm I, to be arraigned and tried before judges representing the allied powers for “a supreme offence against international morality and the sanctity of treaties.”<sup>58</sup> This inchoate definition can be seen

53. *Id.*

54. Van Schaak, *supra* note 44, at 565.

55. C. Kreß & L. von Holtendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT’L CRIM. JUST. 1179, 1205 (2010). The U.S. proposal for an understanding read in its entirety:

It is understood that, for the purposes of the Statute, an act cannot be considered to be a manifest violation of the United Nations Charter unless it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith, and thus an act undertaken in connection with an effort to prevent the commission of any of the crimes contained in Articles 6, 7 or 8 of the Statute would not constitute an act of aggression.

Laurie O’Connor, *Humanitarian Intervention and the Crime of Aggression: The Precarious Position of the “Knights of Humanity”* 33–34 (Oct. 15, 2010) (unpublished Bachelor of Laws dissertation, University of Otago), available at <http://www.otago.ac.nz/law/research/journals/otago036321.pdf>.

56. Kreß & von Holtendorff, *supra* note 55, at 1205; O’Connor, *supra* note 55, at 33–34.

57. Griffiths, *supra* note 20, at 303 (“The Treaty of Versailles represents the first recognition by states that war could be criminally, as well as delictually, wrong.”).

58. Treaty of Peace with Germany (Treaty of Versailles) art. 227, June 28, 1919, 2 U.S.T. 43.

as a predecessor to aggression as it was articulated after World War II and memorialized in the U.N. Charter. The tribunal was to be “guided by the highest motives of international policy” and incorporate the “obligations of international undertakings” and “international morality.”<sup>59</sup> The fates, however, conspired to deny future scholars this precedent: Kaiser Wilhelm I was given refuge in the Netherlands which refused to extradite him and the tribunal was never formed.<sup>60</sup>

The first actual implementation of crime of aggression prosecution by international tribunals occurred after World War II. The allied powers established International Military Tribunals at Tokyo and Nuremberg<sup>61</sup> to hold those deemed war criminals liable for a number of “crimes against peace” and “war crimes” including waging “wars of aggression.”<sup>62</sup> The Nuremberg court, in language later echoed at Kampala, went so far as to call instigating a war of aggression “the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”<sup>63</sup> The case law of these tribunals remains the primary and most cited precedent for crime of aggression prosecution,<sup>64</sup> and thus warrants a close examination.

Both the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East indicted dozens of former government and military officials for their involvement in aggressive war.<sup>65</sup> The charges against them criminalized both the planning and the active participation in the aggression.<sup>66</sup> Famously, the tribunals rejected the

59. *Id.*

60. See MARTIN GILBERT, *THE FIRST WORLD WAR: A COMPLETE HISTORY* 523 (1994).

61. For an extensive account of the legal basis of and innovation that went into the International Military Tribunals, see NEIL BOISTER & ROBERT CRYER, *THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL* (2008); KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* (2011); and Zachary D. Kaufman, *Transitional Justice for Tōjō's Japan: The United States Role in the Establishment of the International Military Tribunal for the Far East and Other Transitional Justice Mechanisms for Japan After World War II*, 27 EMORY INT'L L. REV. 755 (2013).

62. See Charter of the International Military Tribunal for the Far East art. 5(a), Jan. 19, 1946, 4 U.S.T. 20 [hereinafter Tokyo Charter] (creating individual responsibility for a “crime against peace” defined as “the planning, preparation, initiation or waging of a declared or undeclared war of aggression”); Charter of the International Military Tribunal art. 6(a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter] (creating individual responsibility for “crimes against peace” defined as “planning, preparation, initiation or waging of a war of aggression”).

63. *Judicial Decisions: International Military Tribunal (Nuremberg)*, 41 AM. J. INT'L L. 172, 186 (1947).

64. KEMP, *supra* note 11, at 5.

65. See TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE MILITARY TRIBUNAL 27–79 (1947) [hereinafter NUREMBERG TRIAL]; *Indictment*, in DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS 16–33 (Neil Boister & Robert Cryer eds., 2008) [hereinafter *Tokyo Indictment*].

66. At the Tokyo Tribunal, Count 1 charged defendants with acting as “leaders, organizers, instigators, or accomplices” in the “formulation or execution of a common plan or conspiracy” to wage wars of aggression. *Tokyo Indictment*, *supra* note 65, at 18. The other aggression-related counts on which the accused were convicted were waging a “war of aggression and a war in violation of international law, treaties, agreements and assurances,

defense that charged actions were committed under the orders of superiors<sup>67</sup> in holding with the scope of their official duties.<sup>68</sup>

Because the judgments against the accused included the totality of so many different actions—and because the judgments are worded in a way that does not differentiate between the aggression and non-aggression counts—it is hard to isolate the specific acts that could trigger criminal liability.<sup>69</sup>

It is useful, however, to look at the actions of those acquitted to see what *did not* constitute sufficient grounds to be liable for aggression. At Tokyo, Iwane Matsui was the only defendant completely acquitted on all aggression charges against him.<sup>70</sup> Although a general in the Japanese Army and, therefore, so closely associated with those who conceived and carried out the conspiracy to commit aggression that he “must have been aware” of their intentions, the court held that this mere association was insufficient to brand him as a conspirator.<sup>71</sup> Similarly, merely carrying out his duties as a military officer in waging an aggressive war was insufficient to convict him for waging aggression since the prosecution never proved he had knowledge of the “criminal character of the war.”<sup>72</sup> From these holdings, we can ascertain that only those involved in higher level planning than that of a field general and with the knowledge of aggressive intent—not simply carrying out their duties—are liable for the “crime of aggression.”

The tribunals at Nuremberg support these conclusions. There, ten defendants were completely acquitted of aggression charges.<sup>73</sup> Martin Bormann, Chief of Staff at the Office of the Führer’s Deputy, was acquitted of participation in the conspiracy since his knowledge of the conspiracy was never proven, nor could it be conclusively inferred from the positions that he held.<sup>74</sup> Hans Fritzsche, Head of the Radio Propaganda Ministry, was

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against” various allied nations. *Id.* at 25–26 (counts 27, 29, 31–33, 35). Count 36, concerning aggression actions against the USSR and Mongolia, includes the language “war of aggression in violation of international law, treaties, agreements and assurances.” *Id.* (emphasis added). At Nuremberg, the accused were charged and convicted with two aggression-related counts. Count 1 indicted those who participated “as leaders, organizers, instigators, or accomplices” in a conspiracy to plan, prepare, initiate, or wage “wars of aggression, which were also wars in violation of international treaties, agreements, or assurances.” NUREMBERG TRIAL, *supra* note 65, at 29. Count 2 charged the indicted with actually participating in the “planning, preparation, initiation, and waging of wars of aggression, which were also wars in violation of international treaties, agreements, and assurances.” *Id.* at 42.

67. Nuremberg Charter, *supra* note 62, at art. 8; Tokyo Charter, *supra* note 62, at art. 6.

68. Nuremberg Charter, *supra* note 62, at art. 7; Tokyo Charter, *supra* note 62, at art. 6.

69. See *Majority Judgment: Verdicts*, in DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS 598–628 (Neil Boister & Robert Cryer eds., 2008) [hereinafter *Tokyo Verdicts*].

70. See *id.*; see also app. 1.

71. *Tokyo Verdicts*, *supra* note 69, at 612.

72. *Id.*

73. See app. 1. Although Hans Frank and Fritz Sauckel were acquitted of their aggression crimes, available records give insufficient detail to identify specifics. Thus, they are not included in the following analysis. NUREMBERG TRIAL, *supra* note 65, at 296 (Frank indictment), 320 (Sauckel indictment).

74. *Id.* at 338–39.

acquitted of the conspiracy charges since he never gained “sufficient stature to attend the planning conferences which led to aggressive war” and had no control over propaganda policies.<sup>75</sup> Ernst Kaltenbrunner, a general officer in the Schutzstaffel (SS), was acquitted even though the prosecution had proven he committed an aggressive act because this act was not considered part of the aggressive war.<sup>76</sup>

Hjalmar Schacht, President of the Reichsbank and Minister without Portfolio, was acquitted both on conspiracy and execution counts—despite being actively involved in German rearmament—because the prosecution never proved that (1) he was aware the rearmament was going to be used in aggressive wars and (2) he was close enough to the conspiracy to know of the aggressive war or influence its plans.<sup>77</sup> Moreover, his actions (1) incorporating Austrian and Czech banks after annexation, (2) setting exchange rates, and (3) making violent pro-Nazi speeches were judged as insufficient to qualify as participation in the conspiracy to commit aggressive war.<sup>78</sup>

Albert Speer, Minister of Armaments and War Production, was acquitted on both aggression charges against him since his activities directing Germany’s armament industry were judged insufficient to be considered participating in the conspiracy or the waging of aggressive wars.<sup>79</sup> The court reasoned that since he did not become head of the armament industry until after all aggressive wars had been initiated, his management “of German armament production [was] in aid of the war effort in the same way that other productive enterprises aid in the waging of war.”<sup>80</sup> The tribunal was not prepared to declare all such activities as qualifying as engaging in aggressive war.<sup>81</sup>

Julius Streicher was acquitted since he was never in Hitler’s inner circle and there was no proof he had ever attended important conferences at which others planned the war or that he had knowledge of the created policies.<sup>82</sup>

The court found that while Franz von Papen—Germany’s foreign representative in Vienna—engaged in “intrigue and bullying” which aided in the occupation of Austria, there was no evidence he was party to the plans that identified Austrian occupation as the first step in an aggressive war, nor was there evidence that he participated in the plans to occupy that country by aggressive war if necessary.<sup>83</sup>

Baldur von Schirach—leader of Nazi youth group “Youth in the German Reich”—was actively involved in the militarization, pre-military training, and radicalization of Germany’s youth.<sup>84</sup> Despite this, the court found that

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75. *Id.* at 336–37.

76. *Id.* at 291–93.

77. *Id.* at 307–10.

78. *Id.* at 309–10.

79. *Id.* at 330–31.

80. *Id.*

81. *Id.*

82. *Id.* at 301–02.

83. *Id.* at 326–27.

84. *Id.* at 317–18.

he was not involved in the aggressive war conspiracy since he was not directly involved in Hitler's plans for territorial expansion.<sup>85</sup>

These cases inform the following guiding principles. First, aggressive acts are separate from aggressive war and merely carrying out or being otherwise involved in the act is insufficient to convict for the criminal aggression.<sup>86</sup> Secondly, not all actions in aid of an aggressive war effort are necessary to its planning qualify as the crime of aggression.<sup>87</sup> Specifically, carrying out a general officer's duties,<sup>88</sup> being involved in the industrial planning that allows for rearmament,<sup>89</sup> carrying out the financial transactions necessary for rearmament and the incorporation of annexed states,<sup>90</sup> advancing propaganda,<sup>91</sup> administrative work,<sup>92</sup> youth radicalization and militarization,<sup>93</sup> and foreign affairs intrigue<sup>94</sup> are all—in and of themselves—insufficient. Third, criminal liability requires conclusive evidence of (1) active participation in supporting the war of aggression and (2) knowledge of the aggressive nature of the war, either through direct involvement in the planning or otherwise.<sup>95</sup> This second element appears to be the far more difficult of the two to prove since the prosecution could not do it for even high-ranking officials.

While these tribunals were the first recognition that aggression was an offense, the allied powers alleged that these crimes and their prosecution were based on international law as it existed in 1939.<sup>96</sup> This contention may have been debatable in the late-1940s, but today, the decisions of these tribunals and other subsequent developments make criminal liability for aggression an unquestionable part of current customary international law.<sup>97</sup>

#### *b. UNSC Aggression Determinations*

The Security Council enjoys the power to determine “the existence of any threat to the peace, breach of the peace, or act of aggression.”<sup>98</sup> Since the U.N. Charter uses these three separate terms it is reasonable to assume

85. *Id.*

86. *Id.* at 291 (distinguishing the Anschluss as an “aggressive act” but not an “aggressive war” and acquitting Kaltenbrunner on conspiracy to commit aggressive war charges despite his involvement).

87. *See supra* notes 71–82 and accompanying text.

88. *Tokyo Verdicts, supra* note 69, at 611–12 (Matsui).

89. NUREMBERG TRIAL, *supra* note 66, at 307–09 (Schacht), 330–31 (Speer).

90. *Id.* at 307–09 (Schacht).

91. *Id.* at 336–37 (Fritzsche).

92. *Id.* at 338–39 (Bormann).

93. *Id.* at 317–18 (von Schirach).

94. *Id.* at 326–27 (von Papen).

95. CODIFICATION DIV., U.N. OFFICE OF LEGAL AFFAIRS, HISTORICAL REVIEW OF DEVELOPMENTS RELATING TO AGGRESSION 74 (2003) [hereinafter U.N. AGGRESSION]; *see also Tokyo Verdicts, supra* note 69, at 611–12 (Matsui).

96. Griffiths, *supra* note 20, at 307.

97. *Id.* at 307–08. Additionally, UNGA resolution 95 (I) unanimously sanctioned the Charter of the Nuremberg Tribunal and the decisions issued by the tribunal. Leanza, *supra* note 30, at 3–4; *see also* LeClerc-Ganges & Byers, *supra* note 36, at 379–80.

98. U.N. Charter art. 39.

that they are meant to have different meanings and, thus, that they cover different actions and levels of severity.<sup>99</sup> Their separate usage as such across the U.N. Charter and General Assembly resolutions further supports such an interpretation.<sup>100</sup> Original intent and subsequent usage in international law indicate that only the most severe actions qualify as acts of aggression.<sup>101</sup> Therefore, in theory, there exists a hierarchy among the three Security Council determinable offenses: a “threat to peace” is roughly equivalent to a threat to use force, a “breach of the peace” is an actual use of force or the consequences of a threat that have tangible results negatively affecting international peace and security, and an act of aggression is reserved for the most serious “breaches of the peace.”<sup>102</sup>

In practice, the Security Council has defined “acts of aggression” quite differently.<sup>103</sup> Notably, the Security Council has never used General Assembly Resolution 3314 (XXIX) in defining aggression.<sup>104</sup> While most condemnations were aimed at a series of general, unspecified acts, the specifically condemned acts reveal a set of actions which the Security Council believes constitute an act of aggression.<sup>105</sup> These include: an operation in which six aircrafts dropped five bombs in an airstrike, a small arms attack on a presidential palace and an airport, an attack against another nation’s capital which used small arms and bombs to kill twelve, two targeted assassinations and collateral loss of life, violence against diplomatic missions, and “armed invasions.”<sup>106</sup> The action most common to these aggressive acts is the use of armed force against the victim state’s territorial integrity.<sup>107</sup> Such actions, especially the targeted assassinations, fall far below the threshold that the textual definition of “acts of aggression” would suggest.<sup>108</sup>

This list excludes several state actions that would seem unambiguous examples of aggression, including the Korean War, the Iran-Iraq War, the Falklands War, and several Israeli operations.<sup>109</sup> This failure either resulted from aborted attempts at resolutions or a failure to even consider the situations.<sup>110</sup>

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99. CARRIE MCDUGALL, *THE CRIME OF AGGRESSION UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 65 (2013). Such a conclusion derives from a plain reading of the text as the Vienna Convention requires. *See supra* Part I.A.

100. MCDUGALL, *supra* note 99, at 65.

101. *Id.* at 66–68.

102. *Id.* at 67–70.

103. *See* R. BELLELLI, *INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW* 507–10 (2010) (compilation of UNSC resolutions that have used “aggression”); O. SOLERA, *DEFINING THE CRIME OF AGGRESSION* 201 (2007); Weisbord, *supra* note 37, at 169. McDougall argues that though the Security Council has used the word “aggression,” it is difficult to conclude that they have ever made an article 39 determination. *See* MCDUGALL, *supra* note 99, at ch. 6.

104. MCDUGALL, *supra* note 99, at 83.

105. *Id.*

106. *Id.* at 84–85.

107. *Id.* at 85.

108. *Id.* at 86.

109. Weisbord, *supra* note 37, at 169.

110. *Id.*

Additionally, the list of “acts of aggression” betrays an extreme selectivity as to which countries the UNSC chooses to denounce.<sup>111</sup> Out of the twenty resolutions, ten denounced apartheid South Africa, six were directed at the “racist regime” in Southern Rhodesia, two described and denounced Israel, one was against a multinational mercenary force, and one was against Iraq.<sup>112</sup> The evidentiary record indicates that the Security Council’s use of aggression is more political and rhetorical than legal, and therefore, perhaps too unreliable to be of use in legal proceedings.

*c. UNGA Aggression Determinations*

The UNGA also has branded actions as aggression in its own resolutions. Though they do not enjoy the binding “law” status of Security Council resolutions, they are admissible as empirical evidence of customary international law. Resolution 498 (V) found that China’s intervention in the Korean War, as well as the actions of those it was supporting, constituted aggression.<sup>113</sup> Resolution 1899 (XVIII) condemned South African incursions into South West Africa saying that “any attempt to annex a part or the whole of the Territory of South West Africa constitutes an act of aggression.”<sup>114</sup> In Resolution S-9/2 the UNGA denounced South Africa’s illegal occupation of Namibia and interference in Angola and Zambia as acts of aggression.<sup>115</sup> The UNGA applied its 1974 definition of aggression to find the following South African acts of aggression against Namibia: illegal and colonial occupation in defiance of past UNGA and UNSC resolutions, military attacks against other African states launched from Namibia, specific attacks on Angola, Botswana, Mozambique, Zambia, and Zimbabwe, and its partial occupation of Angola.<sup>116</sup> It further declared the following South African actions to constitute aggression: attempts to “annex or encroach upon the territorial integrity of [Basutoland, Bechuanaland and Swaziland]” (1962),<sup>117</sup> armed intervention in Southern Rhodesia (1969),<sup>118</sup> raiding Matola, Mozambique (January 1981) and invading Angola (July 1981) and the Seychelles (November 1981),<sup>119</sup> military aggression against Angola, Botswana, Lesotho, Mozambique, Seychelles, Swaziland, Zambia, and Zimbabwe,<sup>120</sup> continued occupation of Angola and armed aggression against Lesotho and Mozambique,<sup>121</sup> and

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111. *Id.*

112. See U.N. AGGRESSION, *supra* note 95, at 225–37; Weisbord, *supra* note 37, at 169.

113. U.N. AGGRESSION, *supra* note 95, at 242.

114. *Id.* at 242–43 (quoting G.A. Res. 1889 (XVIII), U.N. Doc. A/5605 (Nov. 6, 1963)).

115. *Id.* at 243.

116. *Id.* at 243–44.

117. *Id.* at 245 (citing G.A. Res. 1954 (XVII), at 8, U.N. GAOR, 17th Sess., 1277th plen. mtg. U.N. Doc. A/L.441 (Dec. 11, 1963)).

118. *Id.* (citing G.A. Res. 2508 (XXIV), U.N. Doc. A/7759 (Nov. 21, 1969)).

119. *Id.* (citing G.A. Res. 36/172C, U.N. Doc. A/RES/36/172[C] (Dec. 17, 1981)).

120. *Id.* (citing G.A. Res. 38/14, annex, U.N. Doc. A/RES/38/14 (Nov. 22, 1983)).

121. *Id.* (citing G.A. Res. 38/39C, U.N. Doc. A/RES/36/39[C] (Dec. 5, 1983)).



overt and covert actions to destabilize neighboring states and attacks against South African and Namibian refugees.<sup>122</sup>

In the 1970s the General Assembly passed three resolutions condemning Portuguese aggression for its illegal occupation of parts of Guinea-Bissau and repeated military actions against Guinea-Bissau and Cape Verde.<sup>123</sup>

Finally, the General Assembly has branded several Israeli actions acts of aggression. These include: “any military occupation, however temporary, or any forcible annexation of such territory [Palestine], or part thereof, as an act of aggression” and continuing actions there,<sup>124</sup> its attack against Iraqi nuclear facilities,<sup>125</sup> its June 1982 invasion of Lebanon, and its occupation of the Golan Heights.<sup>126</sup>

Finally, the General Assembly condemned Serbia and Montenegro’s 1992 military incursions into Bosnia and Herzegovina as “aggressive acts.”<sup>127</sup>

Again, these designations betray a preference toward finding acts of aggression when a state has violated another’s territorial sovereignty and, again, they concentrate on particular pariah or politically targeted states.<sup>128</sup> Thus, the UNGA too seems an inapt institution for generating a definition of the crime of aggression that is fair to potential defendants and can serve to guide prosecutions in an even-handed way.

#### *d. International Court of Justice and the Act of Aggression*

The International Court of Justice is the principal judicial organ of the United Nations.<sup>129</sup> As such, its findings and decisions contribute to the international legal standard.<sup>130</sup> The court has twice taken legal disputes implicating alleged acts of aggression.<sup>131</sup>

The first was *Military and Paramilitary Activities in and Against Nicaragua* (1986),<sup>132</sup> a case concerning Nicaraguan allegations that the United States had perpetrated armed attacks against it in violation of

122. *Id.* (citing G.A. Res. 39/72G, U.N. Doc. A/RES/39/72[G] (Dec. 13, 1984)).

123. *Id.* at 246–47 (citing G.A. Res. 2795 (XXVI), U.N. Doc. A/8549 (Dec. 10, 1971); G.A. Res. 3061 (XXVIII), at 2–3, U.N. GAOR, 28th Sess., 2163rd plen. mtg. U.N. Doc. A/L.702 (Nov. 2, 1973)) U.N. Doc. A/RES/3061 (Nov. 2, 1973); and G.A. Res. 3113 (XXVIII), U.N. Doc. A/9338 (Dec. 12, 1973)).

124. *Id.* at 247 (citing G.A. Res. 3414 (XXX), at 6–7, U.N. GAOR, 30th Sess., 2429th plen. mtg. U.N. Doc. A/L.783 (Dec. 5, 1975)).

125. *Id.* at 248.

126. *Id.* at 249–50.

127. *Id.* at 250–51.

128. *See supra* notes 102–07 and accompanying text.

129. U.N. Charter art. 92. The court is authorized to make legal advisory opinions when the UNGA, UNSC, or a UNGA-authorized entity requests it. *Id.* at art. 96. In practice, these cases often involve international disputes between states. For a list of such cases, see *Contentious Cases*, INT’L COURT OF JUSTICE, <http://www.icj-cij.org/docket/index.php?p1=3>.

130. *See supra* notes 2–5 and accompanying text.

131. U.N. AGGRESSION, *supra* note 95, at 262–63.

132. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). For a detailed discussion of this case and its ramifications on the crime of aggression, see MCDUGALL, *supra* note 99, at 68–69.

international law.<sup>133</sup> Two parts of the ICJ decision are relevant to clarifying the legal concept of “aggression.” Firstly, the court held that the definition of aggression contained in Resolution 3314 (XXIX) article (3), section (g) was “customary international law,” increasing the Resolution’s importance and visibility.<sup>134</sup> Second, the court emphasized that not all uses of force constituted aggression when it differentiated the concept from “less grave forms of the use of force.”<sup>135</sup> In so doing, it gave support to the aforementioned use of force hierarchy and legal consequences.<sup>136</sup>

In *Armed Activities on the Territory of the Congo* (2005),<sup>137</sup> the Democratic Republic of the Congo (DRC) accused Uganda of committing acts of aggression against its territory when it invaded, attacked, and occupied DRC territory in violation of Resolution 3314 (XXIX)’s article 1 and the U.N. Charter’s article 2.<sup>138</sup> While the court used the same part of Resolution 3314 it had used in the *Nicaragua* case to conclude that the DRC had sent no armed bands or irregulars against Uganda, its final judgment made no specific determination on acts of aggression.<sup>139</sup>

### 3. General Principles: The Struggle to Define Aggression

In addition to Security Council and General Assembly resolutions and ICJ decisions, the young United Nations initiated two committees concerned in whole or in part with defining the crime of aggression. These committees were the International Law Commission (ILC) and a group that General Assembly Resolution 2230 created to define both the act and crime of aggression.<sup>140</sup>

#### *a. The ILC Path*

In the years following World War II, the U.N. sought to create a permanent court—on the model of the Tokyo and Nuremberg tribunals—that would hold leaders criminally liable for violations of international law.<sup>141</sup> To that end, General Assembly Resolution 378/B (V) in November 1950 created the ILC and charged it with producing an international criminal code.<sup>142</sup> As early as 1954, its draft code of international crimes

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133. U.N. AGGRESSION, *supra* note 95, at 262.

134. *Id.* at 263; *see also Nicaragua*, 1986 I.C.J. ¶ 195.

135. MCDUGALL, *supra* note 99, at 68 (citing *Nicaragua*, 1986 I.C.J. ¶ 191) (“Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force.”).

136. *Id.*

137. (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168 (Dec. 19).

138. U.N. AGGRESSION, *supra* note 95, at 263–64.

139. *Congo*, 2005 I.C.J. at 223, 280–83.

140. Oscar Solera, *The Definition of the Crime of Aggression: Lessons Not Learned*, 42 CASE W. RES. J. INT’L L. 801, 805–06 (2010).

141. *Id.*

142. Kari M. Fletcher, *Defining the Crime of Aggression: Is There an Answer to the International Criminal Court’s Dilemma?*, 65 A.F. L. REV. 229, 239 (2010); Leanza, *supra* note 30, at 5.

included individual liability for committing “acts of aggression.”<sup>143</sup> The ILC was soon blocked from fulfilling its mandate, however, amid the early Cold War’s tense political climate and both Soviet and American concerns over how international prosecution would undermine sovereignty.<sup>144</sup> The lofty goals of defining these contentious legal issues lay dormant until 1996 when, in a more favorable political climate, the ILC was reinstated and issued a draft code.<sup>145</sup> The draft drew upon the Nuremberg judgment and the U.N. Charter as the “main sources of authority with regard to individual criminal responsibility for acts of aggression,” but ignored the 1974 General Assembly definition<sup>146</sup> which it considered “overly political” and lacking in legal precision.<sup>147</sup>

The ILC definition states that “[a]n individual who, as the leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.”<sup>148</sup> The body did not attempt to define “aggression committed by a State,” finding it “beyond the scope of the code.”<sup>149</sup>

#### *b. The Path to Resolution 3314*

Partially in recognition that its original hopes for an ILC definition had become a lost cause, the General Assembly created a separate committee charged with crafting a definition of acts and crimes of aggression.<sup>150</sup> The committee’s efforts were formalized in December 1974 with UNGA Resolution 3314 (XXIX).<sup>151</sup> That resolution defined aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”<sup>152</sup> In an unprecedented attempt at an explicit definition, the resolution lists seven specific acts that qualify as *prima facie* acts of aggression: (1) the invasion, attack, occupation, or annexation of another state’s territory, (2) the bombardment by the armed forces of a state against the territory of another state, (3) “the blockade of the ports or coasts of a State by the armed forces of another State,” (4) any attack by the armed forces of one state against another state’s armed forces, (5) the use of armed forces by one state against those of another state whose forces had been invited by a receiving third state, (6) a state allowing a second state to use its territory to attack a third state, and (7) a state sending

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143. Fletcher, *supra* note 142, at 237–39.

144. *Id.* at 237; Leanza, *supra* note 30, at 6.

145. Fletcher, *supra* note 142, at 239.

146. *See supra* Part I.B.3.b.

147. Weisbord, *supra* note 37, at 170 (quoting Report of the International Law Commission, 48th Sess. Supp. No. 10, May 6–July 26, 1996, at 83–85, U.N. Doc. A/51/10 (Jan. 1, 1996) [hereinafter ILC Report]).

148. *Id.*

149. ILC Report, *supra* note 147, at 42–43.

150. Leanza, *supra* note 30, at 6.

151. *Id.*

152. G.A. Res. 3314 (XXIX), U.N. Doc. A/9890 (Dec. 14, 1974).

“armed bands, groups, irregulars or mercenaries” against another state.<sup>153</sup> Additionally, the resolution notes that “[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.”<sup>154</sup> Under the procedure set forth in the resolution, these acts would only be considered “acts of aggression” after the Security Council had so determined them.<sup>155</sup>

Finally, the resolution states that a “war of aggression is a crime against international peace” giving rise to international responsibility.<sup>156</sup> The resolution is, however, silent on the matter of whether any of the above “acts of aggression” would constitute a “war of aggression” or to what extent international responsibility would be incurred.<sup>157</sup> In light of the differences between the terms, their usage in other documents, and their differentiation in this document, the two seem to be distinct.

This definition gained prominence when the ICC adopted it to define “acts of aggression” as a prerequisite for the “crime of aggression.”<sup>158</sup>

### *c. Aggression in Domestic Law*

The crime of aggression has found further recognition in the general principles of civilized states through domestic legal rulings. The United Kingdom’s House of Lords considered it in *R v. Jones and Others*.<sup>159</sup> In that case, two peace activists used a 1977 law—which provided that a person may use reasonable force to prevent a crime—as a defense against criminal charges for breaking into a British military base to damage fuel tankers and, in so doing, preventing what they considered a crime of aggression against Iraq.<sup>160</sup> While the court acknowledged the crime of aggression as a part of international law, it refused to recognize the crime as part of British criminal law without further legislative approval.<sup>161</sup>

### *d. Ad Hoc Trials: A Lack of Aggression Considerations*

The crime of aggression proved entirely absent from twentieth century ad hoc trials.<sup>162</sup> For instance, the United Nations created ad hoc international criminal tribunals in both Rwanda and the former Yugoslavia to address past atrocities.<sup>163</sup> The tribunals were based on the precedent cases at

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153. *Id.*

154. *Id.* at 143–44.

155. The UNSC may decide that the acts or their consequences are not of “sufficient gravity” to be “acts of aggression.” *Id.* at 143.

156. *Id.* at 144.

157. *Id.*

158. *See supra* Part I.B.1.b (discussing Kampala definitions).

159. Weisbord, *supra* note 37, 172–73 (citing *R v. Jones*, [2006] UKHL 16 (appeal taken from Eng.), available at <http://www.bailii.org/uk/cases/UKHL/2006/16.html>).

160. *Id.* at 172.

161. *Id.* at 173.

162. *Id.* at 169.

163. *Id.* at 169–70.

Nuremberg.<sup>164</sup> Despite the World War II tribunals' focus on aggression, no individual in either one of the modern tribunals was indicted on crimes of aggression.<sup>165</sup> The courts instead chose to focus on genocide, crimes against humanity, and war crimes, possibly because both situations primarily involved "intra-national" rather than "international violence."<sup>166</sup>

In the First Gulf War—a conflict unambiguously involving international violence—while coalition forces considered holding Iraqi leader Saddam Hussein criminally liable for his invasion of Kuwait, the plan ultimately fell through.<sup>167</sup> While the reasons behind this failure remain unclear, it seems that coalition forces may have decided that international sanctions against Iraq were a more fitting punishment than deposing and prosecuting the nation's leader.<sup>168</sup> A similar effort after the Second Gulf War was foiled when the Attorney General for England and Wales deemed the possibility of prosecution for the crime of aggression to be "remote" and due to political concerns in the U.S. and U.K. that prosecuting Hussein for aggression might eventually set a precedent that could be used against coalition participants.<sup>169</sup>

### C. *Bona Fide Humanitarian Intervention*

This Note is limited to "bona fide" forcible humanitarian intervention, also known as "unilateral humanitarian intervention."<sup>170</sup> Such action is defined as when a state (or group of states) uses military force against another state for the primary purpose of preventing widespread deprivations of human rights.<sup>171</sup> Further, because intervention that is invited, Security Council-approved, or in self-defense is widely considered legal under international law<sup>172</sup>—and thus unlikely to be considered aggression in the first place—this Note deals only with circumstances where the UNSC has

164. *Id.*

165. *Id.*

166. *Id.* at 170. Weisbord also suggests that declining to tackle the crime of aggression at these tribunals was a UNSC acknowledgement of its "poor track record at fulfilling its essential function: to prevent aggression and mass violence." *Id.*

167. *Id.* at 169.

168. *Id.*

169. See William A. Schabas, *Issue #15: Should Saddam Hussein Be Prosecuted for the Crime of Aggression?*, GROTIAN MOMENT BLOG (Oct. 19, 2005), <http://www.law.case.edu/Academics/AcademicCenters/Cox/GrotianMomentBlog/TabId/861/ArtMID/1996/ArticleID/45/Issue-15-Should-Saddam-Hussein-be-Prosecuted-for-the-Crime-of-Aggression.aspx>.

170. Sean D. Murphy, *Criminalizing Humanitarian Intervention*, 41 CASE W. RES. J. INT'L L. 341, 341 (2009).

171. *See id.*

172. *See* U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 72 (2011) (arguing that the Charter forbids "inter-State force" except in cases of self defense or where authorized by the Security Council). *But see* JULIUS STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION* 43 (1958) (arguing that the U.N. Charter only prohibits use of force aimed at violating "territorial integrity and political independence").

been somehow prevented from solving the situation through its available means.

NATO's actions in the former Yugoslavia during the 1990s are the seminal and most often used case to demonstrate such intervention.<sup>173</sup> During that campaign, NATO forces bombed Serbian militants and the Federal Yugoslav Republic Army in an effort to stop their murder of Kosovar Albanians.<sup>174</sup> A Security Council sponsored action was not possible due to the ever-present threat of a Russian veto to protect their Serbian allies.<sup>175</sup> Although many, both at the time and since, have decried the NATO campaign as a gross violation of international law,<sup>176</sup> formal international legal channels mostly remained silent on the matter.<sup>177</sup> Three days after NATO started its campaign, for instance, the UNSC refused a request to condemn the military action.<sup>178</sup> After the bombing campaign and the peace that followed, an attempted UNSC resolution condemning NATO's actions was overwhelmingly rejected by a vote of twelve-to-three.<sup>179</sup> The UNSC actually tacitly approved NATO's actions in its Resolution 1244 which endorsed an "international armed presence" in post-conflict Kosovo and authorized it to exercise "all necessary means to fulfill its responsibilities."<sup>180</sup>

Whether unilateral humanitarian intervention, in general, is legal in international law falls outside the purview of this Note because states powerful enough to conduct such intervention have proven themselves willing to use such force even when that use is widely considered illegal.<sup>181</sup>

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173. See, e.g., Christopher P. DeNicola, *A Shield for the "Knights of Humanity": The ICC Should Adopt a Humanitarian Necessity Defense to the Crime of Aggression*, 30 U. PA. J. INT'L L. 641, 660 (2008).

174. INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT (2000), available at <http://reliefweb.int/sites/reliefweb.int/files/resources/F62789D9FCC56FB3C1256C1700303E3B-thekosovoreport.htm>.

175. See O'Connor, *supra* note 55, at 40 n.199.

176. See, e.g., Louis Henkin, "Kosovo and the Law of 'Humanitarian Intervention,'" in *Editorial Comments: NATO's Kosovo Intervention*, 93 AM. J. INT'L L. 824, 826 (1999).

177. See Ruth Wedgewood, "NATO's Campaign in Kosovo," in *Editorial Comments: NATO's Kosovo Intervention*, 93 AM. J. INT'L L. 824, 830–31 (1999).

178. See *id.*

179. See DeNicola, *supra* note 173, at 660; Wedgewood, *supra* note 177, at 830–31.

180. Wedgewood, *supra* note 177, at 830.

181. Aaron Schwabach, *Kosovo: Virtual War and International Law*, 15 L. & LITERATURE 1, 11 (2003) (noting that NATO states involved in the humanitarian intervention in Kosovo provided no legal basis for their actions at an ICJ case brought against them and suffered no economic or military punishments as a result of their participation). For further discussion on the legality of humanitarian intervention, see KEMP, *supra* note 11, at 64–70 (discussing international legal justifications of international law); Clinton W. Alexander, *NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval*, 22 HOUS. J. INT'L L. 403, 449 (2000) (arguing that the intervention was legal); Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107, 108–12 (2006) (noting that over 130 states have declared unilateral humanitarian intervention illegal through international statements); Griffiths, *supra* note 20, at 348–55 (summarizing the arguments of both sides before concluding against legality); Henkin, *supra* note 176, at 824–28 (arguing for legality); Thomas H. Lee, *The Law of War and the Responsibility to Protect Civilians: A Reinterpretation*, 55 HARV. INT'L L.J. 251 (2014) (arguing that customary

Relevant, however, is whether the heads of state and government officials who plan and execute unilateral humanitarian intervention could be liable for a “crime of aggression.”<sup>182</sup>

Under current international law, the answer is unclear.<sup>183</sup> While the planning and execution could be analogized to the Tokyo and Nuremberg defendants, and they are certainly comparable to acts that the Security Council has branded “aggressive,” their determinations have been applied too inconsistently for a clear determination to be made.<sup>184</sup> This threat of criminal liability could deter such intervention altogether allowing humanity’s most vulnerable groups to suffer or be slaughtered.<sup>185</sup>

## II. THE POSSIBLE LEGAL SOLUTIONS TO BALANCE HUMANITARIAN INTERVENTION WITH THE CRIME OF AGGRESSION

This part examines five possible solutions to the aforementioned ambiguities, allowing the crime of aggression to be prosecuted while exempting bona fide humanitarian interventions. The solutions discussed here are both procedural<sup>186</sup>—redefining the crime of aggression’s prosecutorial processes—and substantive—discussing the possible definitions themselves.<sup>187</sup>

### A. Substantive Solutions

There are two substantive solutions: strictly adhering either to the ICC’s Kampala Amendment or the definitions in UNGA Resolution 3314 and prosecuting accordingly.

#### 1. Change ICC’s Kampala Amendment

One possible solution to the problematic definition would be to give the ICC absolute jurisdiction over determining and prosecuting crimes of aggression. This would allow the court to determine and investigate prima facie acts of aggression for possible criminal liability free from Security

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international law permits a sovereign state to use armed force to protect civilians facing imminent risk of group extermination in another sovereign state without UNSC authorization or self-defense justification); Mary Ellen O’Connell & Mirakmal Niyazmatov, *What Is Aggression?: Comparing the Jus Ad Bellum and the ICC Statute*, 10 J. INT’L JUST. 189, 202 n.68 (2012) (arguing that there is no right of humanitarian intervention without Security Council approval or self-defense necessity); Joshua L. Root, “First Do No Harm”: *Interpreting the Crime of Aggression to Exclude Humanitarian Intervention*, 2 U. BALT. J. INT’L L. 63 (2014) (arguing that bona fide humanitarian intervention is not a use of force prevented by U.N. Charter article 2(4)).

182. See, e.g., DeNicola, *supra* note 173; Murphy, *supra* note 170, at 341; O’Connor, *supra* note 55; Root, *supra* note 181; Beth Van Schaack, *The Crime of Aggression and Humanitarian Intervention on Behalf of Women*, 11 INT’L CRIM. L. REV. 477 (2011).

183. See *supra* note 182.

184. See *supra* Part I.B.1.a.

185. Weisbord, *supra* note 37, at 220.

186. See *infra* Part II.B.

187. See *infra* Part II.A.

Council interference.<sup>188</sup> Under its current “crimes of aggression” definition, the court would follow the guidance of UNGA Resolution 3314 (XXIX) and then, through its own systems, determine which cases were severe enough to meet the necessary “manifest” threshold and prosecute individuals involved in the planning and execution accordingly.<sup>189</sup>

Commentators have argued that there are a host of potential benefits to this plan.<sup>190</sup> First, they argue that the ICC has already been set up and gained a degree of international legitimacy.<sup>191</sup> A majority of the world’s nations have accepted its authority, and cases are already being tried under its auspices.<sup>192</sup> Second, it eventually would provide a clear jurisprudence that would clarify for government actors the specific actions that could incur a crime of aggression indictment.<sup>193</sup> Finally, the ICC is a court of law which can provide defendants with a fair investigation, indictment, and trial.<sup>194</sup>

Others, however, note that numerous factors complicate any ICC attempt to exempt unilateral humanitarian intervention. First, the current crime of aggression definition suffers from a distinct lack of clarity for humanitarian intervention purposes.<sup>195</sup> Under the existing definitions, any bona fide humanitarian intervention would almost certainly qualify as a prima facie act of aggression under Resolution 3314’s list.<sup>196</sup> Secondly, the ICC’s future use and legitimacy is far from a foregone conclusion since seventy-five states have yet to ratify the Rome Statute.<sup>197</sup> These include China, India, Indonesia, Pakistan, Russia, and the United States—some of the world’s most militarily and economically powerful states.<sup>198</sup> The United States’ refusal to sign on and subsequent active efforts to undermine the ICC have garnered the most attention.<sup>199</sup>

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188. *See supra* Part I.B.1.b.

189. *See supra* Part I.B.1.b.

190. *See, e.g.*, O’Connor, *supra* note 55; Van Schaak, *supra* note 44.

191. *See, e.g.*, Van Schaak, *supra* note 44, at 508–10.

192. *U.N. Treaty Collections—The Rome Statute of the International Criminal Court*, UNITED NATIONS (Jan. 2, 2014, 5:55 PM), [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en).

193. Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 ST. LOUIS U. PUB. L. REV. 249, 250 (2007).

194. *Id.* at 251.

195. *See supra* note 182 and accompanying text.

196. O’Connor, *supra* note 55, at 22–23.

197. *See supra* note 192.

198. *See supra* note 192. For a discussions of country-specific objections, see Anthony Cullen, *The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)*, 12 J. CONFLICT & SEC. L. 419 (2007) (generally); Guan Jing, *The ICC’s Jurisdiction over War Crimes in Internal Armed Conflicts: An Insurmountable Obstacle for China’s Accession?*, 28 PENN ST. INT’L L. REV. 703 (2010) (China); Mark D. Kielsgard, *War on the International Criminal Court*, 8 N.Y. CITY L. REV. 1 (2005) (United States); Jianping Lu & Zhixiang Wang, *China’s Attitude Towards the ICC*, 3 J. INT’L CRIM. JUST. 608, 611–12 (2005) (China); Bakhtiyar Tuzmukhamedov, *The ICC and Russian Constitutional Problems*, 3 J. INT’L CRIM. JUST. 621 (2005) (Russia).

199. *See, e.g.*, Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510 (2003);



Furthermore, even existing ratifiers have criticized the court. In 2013, the African Union (AU) held a special meeting to address the ICC's perceived anti-African bias and consider whether all thirty-four of the AU states that have ratified the Rome Statutes should withdraw from the treaty all together.<sup>200</sup> While no such withdrawal came about, the AU did agree to a resolution stating that no sitting African head of state should be made to appear before the court and demanded that existing Kenyan President Uhuru Kenyatta's ICC case be deferred, effectively undermining the ICC's authority.<sup>201</sup>

Finally, as the proposed amendment is written, it is unclear how an act of aggression could become something severe enough to be prosecutable. A particular concern is the term "character" which some scholars argue is unclear beyond meaning separate from a "violation of the Charter,"<sup>202</sup> while others have called it effectively meaningless and at the complete discretion of the court.<sup>203</sup> Still others have criticized the lack of definition for "manifest" within the charter and called the "gravity" and "scale" criteria inadequate since they provide nothing but a highly subjective threshold test,<sup>204</sup> while another has called it "particularly vague."<sup>205</sup> Additionally, scholars question both the validity and usefulness of the "Understandings."<sup>206</sup>

Additionally, the court's legal interaction with the Security Council is extremely ambiguous.<sup>207</sup> Though it was the clear intention of numerous

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David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47 (2002); Meghan E. Lantto, *The United States and the International Criminal Court: A Permanent Divide?*, 31 SUFFOLK TRANSNAT'L L. REV. 619 (2008). Of particular note is the so-called Hague Invasion Act, a federal law that, along with restrictions on international peacekeeping and military aid for ICC countries who refuse to exempt American military personnel from extradition, allows the President to use "all means necessary and appropriate to bring about the release of any [US or allied personnel] being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court." See American Service-Members' Protection Act, 22 U.S.C. §§ 7402, 7424, 7427 (2012).

200. James Bullock, *AU and the ICC—How They Voted*, THINK AFRICA PRESS (Oct. 15, 2013), <http://thinkafricapress.com/legal/au-and-icc-how-they-voted>.

201. Mark Doyle, *African Union Urges ICC to Defer Uhuru Kenyatta Case*, BBC NEWS (Oct. 12, 2013), <http://www.bbc.co.uk/news/world-africa-24506006>. Kenya's parliament had already voted to withdraw from the ICC a month prior to the meeting. Gabriel Gatehouse, *Kenya MPs Vote to Withdraw from ICC*, BBC NEWS (Sept. 5, 2013), <http://www.bbc.co.uk/news/world-africa-23969316>.

202. O'Connell & Niyazmatov, *supra* note 181, at 204.

203. Andreas Paulus, *Second Thoughts on the Crime of Aggression*, 20 EURO. J. INT'L L. 1117, 1121 (2010).

204. Solera, *supra* note 140, at 808.

205. O'Connor, *supra* note 55, at 35.

206. See *supra* notes 43–56 and accompanying text; see also David Scheffer, *The Complex Crime of Aggression Under the Rome Statute*, 43 STUD. TRANSNAT'L LEGAL POL'Y 173, 180 (2011); Kevin Jon Heller, *Are the Aggression "Understandings" Valid?*, OPINIO JURIS (June 16, 2010, 1:25 AM), <http://opiniojuris.org/2010/06/16/are-the-aggression-understandings-valid/>; Marko Milanovic, *Marko Milanovic on Understandings*, OPINIO JURIS (June 16, 2010, 7:39 AM), <http://opiniojuris.org/2010/06/16/marko-milanovic-on-understandings/>.

207. Scheffer, *supra* note 206, at 180–82.

state parties that the ICC be jurisdictionally independent from the UNSC,<sup>208</sup> the legality of this position is controversial. Firstly, if, as article 8 *bis*(2)'s second paragraph states, an act of aggression shall be determined "in accordance" with UNGA Resolution 3314 (XXIX), then any such determination is contingent on UNSC approval.<sup>209</sup> The Kampala Amendment's Understanding 6 seems to reinforce such an interpretation as its language mirrors Resolution 3314 article 2 closely.<sup>210</sup> Furthermore, because the U.N. Charter's language suggests that the Security Council has authority to determine an act of aggression, many scholars have interpreted it as the exclusive body with such a right<sup>211</sup> Other scholars have rejected this exclusivity interpretation.<sup>212</sup> Even assuming that the Security Council does not hold this power, however, the amendment seems to indicate that the Council can unilaterally alter the ICC's jurisdiction. A strict article 15 *bis* reading suggests that the prosecutor determines there is a reasonable basis to proceed with a crime of aggression investigation and notifies the U.N. Secretary General, who then seeks a Security Council "determination."<sup>213</sup> What exactly it means to make a "determination" and how it affects the ICC prosecutor's investigation and the court's proceedings remains ambiguous.<sup>214</sup> Whatever the meaning, after the Security Council has made such a determination, the prosecutor can proceed with the investigation.<sup>215</sup> Should the Council opt not to make a determination or somehow be prevented from doing so, the prosecutor must wait for six months before proceeding with the investigation.<sup>216</sup> Outside of any of this, the Security Council can invoke its article 16 powers to further delay ICC investigations.<sup>217</sup> There exists, however, no specific provision for what happens when the Security Council makes a negative determination, which is technically allowed in the amendments.<sup>218</sup> Scholars have argued that these different treatments make no sense if "determination" is used to mean anything other than "a positive determination."<sup>219</sup> Indeed, if whether the Council makes a positive or negative finding has no effect on the prosecutor's investigation, then

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208. Trahan, *supra* note 52, at 61.

209. G.A. Res. 3314, *supra* note 152; Review Conference, *supra* note 39, at 18.

210. Compare G.A. Res. 3314, *supra* note 152 ("[R]equires consideration of all the circumstances . . . including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations."), with Review Conference, *supra* note 39, at 18.

211. See *infra* Part II.B.1.

212. See *infra* Part II.B.1.

213. Review Conference, *supra* note 39, at 19; Scheffer, *supra* note 206, at 180.

214. Scheffer, *supra* note 206, at 182.

215. *Id.* at 180.

216. Review Conference, *supra* note 39, at 19; Scheffer, *supra* note 206, at 180.

217. Review Conference, *supra* note 39, at 19; Scheffer, *supra* note 206, at 180. Drew Kostic speculates that such a determination could only be made by a formal council resolution. Drew Kostic, *Whose Crime Is It Anyway?: The International Criminal Court and the Crime of Aggression*, 22 DUKE J. COMP. & INT'L L. 109, 140 (2012).

218. Review Conference, *supra* note 39, at 19; see Scheffer, *supra* note 206, at 182; see also Kostic, *supra* note 217, at 139.

219. See, e.g., Scheffer, *supra* note 206, at 183.

requiring a six-month waiting period when the Council has remained silent is redundant.<sup>220</sup>

## 2. Use UNGA Resolution 3314 (XXIX)

Another possible standard by which the crime of aggression may be determined is a strict adherence to Resolution 3314. This approach has the advantage of emerging out of an international effort and being recognized as customary international law in whole by numerous legal scholars and in part by the ICJ.<sup>221</sup>

However, this resolution also has been severely criticized. Writing at the time of its passage, Julius Stone noted that it “appears to have codified into itself (and in some respects extended) all the main ‘juridical loopholes and pretexts to unleash aggression’ available under preexisting international law, as modified by the UN Charter.”<sup>222</sup> More recently, Gerhard Kemp called the resolution “not a very successful attempt to define aggression” from an international criminal law perspective.<sup>223</sup> The main concerns voiced are that the definition lacks clear *actus reus* (criminal act) and *mens rea* (criminal intent) guidance to make it a viable individual criminal liability.<sup>224</sup> Concerning *actus reus*, articles 1 through 4 define aggression in terms far too vague to be bases for criminal law.<sup>225</sup> The *mens rea* is completely absent making the required mental state a mystery and totally undermining the definition’s usefulness.<sup>226</sup> These points are vital to any code to be used for international criminal liability, since proving these two elements are a key aspect of domestic laws around the world.<sup>227</sup> At both Nuremberg and Tokyo, the “threat of force” was a central part of the crime of aggression but does not even appear within this resolution’s text.<sup>228</sup> Furthermore, this omission runs contrary to the World War II tribunal precedents in customary international law since both had these elements of criminal prosecution.<sup>229</sup> Finally, the history of the resolution and its nature

220. Kostic, *supra* note 217, at 139.

221. See, e.g., Mohammed M. Goma, *The Definition of the Crime of Aggression and the ICC Jurisdiction over That Crime*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* 55, 74 (Mauro Politi & Giuseppe Nesi eds., 2004); Muhammad Aziz Shukri, *Will Aggressors Ever Be Tried Before the ICC?*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* 33, 35 (Mauro Politi & Giuseppe Nesi eds., 2004); Ioana Gabriela Stancu, *Defining the Crime of Aggression or Redefining Aggression?*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* 87, 90 (Mauro Politi & Giuseppe Nesi eds., 2004).

222. Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 *AM. J. INT’L L.* 224, 224 (1977).

223. KEMP, *supra* note 11, at 120.

224. Fletcher, *supra* 142, at 239; KEMP, *supra* note 11, at 120.

225. G.A. Res. 3314, *supra* note 152, at 143 (“[T]he use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”); KEMP, *supra* note 11, at 120–21.

226. KEMP, *supra* note 11, at 120–21.

227. *Id.* at 120; Fletcher, *supra* note 142, at 239.

228. Fletcher, *supra* note 142, at 238.

229. KEMP, *supra* note 11, at 121–22.

suggest that states passing it intended for it to be a guide for the Security Council, not a basis for criminal prosecution.<sup>230</sup>

### B. Procedural Solutions

The legal ambiguity of a crime of aggression, as it relates to humanitarian intervention, has at three potential procedural solutions: (1) having the UNSC exclusively determine a crime of aggression, (2) having the UNGA or the ICJ determine a crime of aggression, and (3) allowing a crime of aggression exemption where intervention involves regional multilateral participation.

#### 1. UNSC Approval

One possible solution to the conflict is for the Security Council to exclusively determine both acts and crimes of aggression. This solution would be in line with the Council's existing powers to determine an act of aggression under U.N. Charter article 39 which, as mentioned below, some believe grants the Council exclusive power to determine an act of aggression.<sup>231</sup> Others believe that since aggression is so contentious an issue, it is best left to a political body, like the UNSC, rather than a judicial one.<sup>232</sup>

Other scholars argue that the council does not have exclusive authority to determine acts or crimes of aggression.<sup>233</sup> They argue that article 39 of the U.N. Charter maintains that the UNSC authority over acts of aggression is solely for the purposes of maintaining international peace and security, not for establishing criminal liability.<sup>234</sup> These scholars also point to article 24's language stating that U.N. members "confer on the Security Council primary responsibility for the maintenance of international peace and security" as implying central, but not exclusive, rights to determine aggression.<sup>235</sup>

Among the concerns scholars have voiced against putting this power in the UNSC's hands are, firstly, that such a solution leaves a political body to apply a strictly legal test, no doubt resulting in a myriad of political and fair

230. Fletcher, *supra* note 142, at 239.

231. *Id.* at 250.

232. Troy Lavers, *[Pre]Determining the Crime of Aggression: Has the Time Come to Allow the International Court Its Freedom?*, 71 ALB. L. REV. 299, 309 (2008).

233. See, e.g., Benjamin B. Ferencz, *Enabling the International Criminal Court to Punish Aggression*, 6 WASH. U. GLOBAL STUD. L. REV. 551, 562 (2007); Lavers, *supra* note 232, at 303, 309; Daniel D. Ntanda Nsereko, *Aggression Under the Rome Statute of the International Criminal Court*, 71 NORDIC J. INT'L L. 497, 511–13 (2002); Mark S. Stein, *The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive Is the Security Council's Power to Determine Aggression?*, 16 IND. INT'L & COMP. L. REV. 1, 13 (2006); Weisbord, *supra* note 37, at 198.

234. Fletcher, *supra* note 142, at 250.

235. *Id.*; see also Giorgio Gaja, *The Respective Roles of the ICC and the Security Council in Determining the Existence of an Aggression*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* 121, 123 (Mauro Politi & Giuseppe Nesi eds., 2004).

trial issues.<sup>236</sup> Since the five permanent members of the Council each have veto power over any decision, determining a crime of aggression would require the agreement of China, France, Russia, the United States, and the United Kingdom. This would restrict any such determination to essentially a broad multilateral agreement palatable to the national and political interests of these five nations.<sup>237</sup> The result, some scholars argue, is a system so incapable of making a determination on aggression that the Council will often understate the severity of a situation just to gain consensus.<sup>238</sup> Indeed, historically, even in the most serious situations, the Security Council has shied away from using the term “aggression,” and instead branded most actions as less severe “[t]hreats to international peace and security.”<sup>239</sup> Furthermore, as mentioned above, where the council has determined that an act of aggression exists, such decisions have an obvious political slant.<sup>240</sup> Moreover, the Council has even passed resolutions that are largely inconsistent with international law, undermining any credibility that they could put political priorities over legal ones.<sup>241</sup>

Additionally, Carrie McDougall—in her thorough study of what the UNSC has called aggression—has identified dozens of potential cases that the Council has ignored while focusing on other, seemingly less severe ones, where politically unpopular states are the aggressors.<sup>242</sup> Furthermore, she notes that the council has proved itself inconsistent on the severity of the acts it deems aggression.<sup>243</sup> The term, originally meant to be reserved for only the most serious breaches of peace, has been used to describe targeted assassinations to full-scale invasion and everything in between.<sup>244</sup> While McDougall partially resolved this inconsistency by pointing out that the small-scale actions were almost always embedded in larger conflicts,<sup>245</sup> this standard of branding is nevertheless too inconsistent for criminal prosecution.<sup>246</sup>

A Security Council-exclusive determination of an act or crime of aggression brings serious concerns over the accused’s ability to obtain a fair trial.<sup>247</sup> For the ICC to guarantee the defendant a fair trial, the prosecution must prove each element of the offense, including whether the defendant’s

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236. See Griffiths, *supra* note 20, at 309; Stein, *supra* note 233, at 8 (“The Security Council is a political body, and it has used the term ‘aggression’ in its resolutions in a political way.”).

237. See Griffiths, *supra* note 20, at 309; see also NORMAN BRENTWICH & ANDREW MARTIN, COMMENTARY ON THE CHARTER OF THE UNITED NATIONS 85 (1951).

238. See Gaja, *supra* note 235, at 124.

239. See Lavers, *supra* note 232, at 305–06.

240. See *supra* Part I.B.1.a.

241. See Lavers, *supra* note 232, at 306–07.

242. See MCDUGALL, *supra* note 99, at 84–85.

243. See *id.* at 85.

244. See *id.* at 84–85.

245. See *id.* at 86.

246. Griffiths, *supra* note 20, at 309–10.

247. See *id.* at 310; see also Ntanda Nsereko, *supra* note 233, at 513.

actions constitute an act of aggression in the first place.<sup>248</sup> The Council, however, is not a judicial body; its decisions are political, not based on law and evidence, and thus are certain to fall below the standards of a fair trial.<sup>249</sup>

## 2. UNGA and/or ICJ Determination

Where the Security Council fails to address a *prima facie* case of aggression, some have suggested that the General Assembly or the ICJ could make this determination instead.<sup>250</sup> In the General Assembly's case, authority for this plan comes from the 1950 Uniting for Peace Resolution, which allows the UNGA to condemn armed attacks and to authorize the use of force where the Security Council proves unable to reach a consensus.<sup>251</sup> The ICJ's authority would come from its U.N. Charter article 96 mandate to advise on "any legal question."<sup>252</sup> Furthermore, as discussed previously and as commentators have pointed out, both bodies have a history of determining aggression.<sup>253</sup> The diversity of voices and interests could also potentially alleviate many of the concerns voiced<sup>254</sup> about a straight Security Council determination.<sup>255</sup>

Opponents of the General Assembly/ICJ plan argue that the General Assembly is still a political body and, thus, that many of the most compelling reasons for avoiding the Security Council would remain unremedied.<sup>256</sup> Furthermore, this system quickly could break down if the General Assembly refuses either to rule on an issue or to refer it to the ICJ.<sup>257</sup> Finally, the assembly would suffer from the same lack of legal and evidentiary standards that would imperil the ability for the accused to obtain a fair trial.<sup>258</sup>

## 3. Regional Multilateralism

Another possible solution is to exempt those who work with regional groups which carry out intra-regional humanitarian intervention from prosecution for crimes of aggression. Such a solution has precedent: the Economic Community of West African States (ECOWAS) twice sent troops into Liberia and Sierra Leone—both ECOWAS member states—to

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248. Griffiths, *supra* note 20, at 310. It is also not clear what the standard of proof would be.

249. *Id.*

250. *See, e.g.,* Ferencz, *supra* note 233, at 562–63.

251. G.A. Res. 337 (V), U.N. Doc. A/RES/377 (Nov. 3, 1951). While an "armed attack" in and of itself would not be an act of aggression, certainly all acts of aggression would involve an armed attack in some way.

252. U.N. Charter art. 96.

253. *See* Fletcher, *supra* note 142, at 252–53; Weisbord, *supra* note 37, at 201.

254. Fletcher, *supra* note 142, at 252 n.206.

255. *Id.* at 252–53.

256. *Id.* at 253.

257. *Id.*

258. *Id.*

intervene in domestic conflicts.<sup>259</sup> While these interventions had no legal basis in the U.N. Charter, they were widely supported by the U.N., the Security Council, and the international community.<sup>260</sup>

The Security Council praised ECOWAS in nearly every one of its fifteen resolutions and nine statements regarding the Liberian Civil War.<sup>261</sup> The council went so far as to specifically exempt ECOWAS forces from Security Council Resolution 788 weapons importation embargo.<sup>262</sup> It even formally recognized the ECOWAS forces as part of the peacekeeping effort in Resolution 866—a move Jeremy Levitt considers a “*retroactive de jure seal* on the ECOWAS intervention.”<sup>263</sup>

Similarly, ECOWAS intervened in Sierra Leone in 1997 after a military coup ousted the state’s democratically elected President.<sup>264</sup> The President had officially requested an ECOWAS intervention to restore him to power just before fleeing his country.<sup>265</sup> Security Council Resolution 1132 imposed an arms and petroleum embargo against the military junta and sanctioned ECOWAS as an instrument to enforce the resolution’s terms.<sup>266</sup> After ECOWAS forces defeated the rebellion and restored the President to power, Resolution 1162 commended the organization’s actions.<sup>267</sup>

Supporters of the regional multilateralism solution argue that regional organizations are more willing to engage in expensive military actions and are most likely to have the cultural, lingual, and political knowledge to know how best to address the inevitable challenges.<sup>268</sup> The multilateral nature of these organizations “guard[s] against partiality, . . . avoid[s] escalation of conflicts by inadvertent provocation of important actors, and . . . invoke[s] the authority of a broad normative community.”<sup>269</sup>

One particularly illustrative example is NATO, which can claim the legitimacy of a multinational decision process whose guidelines, joint treaties, and agreements make it a relatively objective regime.<sup>270</sup> As Sean Murphy argued regarding NATO’s actions in Kosovo, any prosecutor would surely be “influenced by the fact that this ‘unilateral’ humanitarian intervention involved sixteen NATO countries—fully democratic and therefore fully accountable to their people—collectively deciding that the intervention was justified as a matter of international law and policy.”<sup>271</sup>

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259. See Wedgewood, *supra* note 177, at 832; see also Jeremy Levitt, *Humanitarian Intervention by Regional Actors in International Conflicts, and the Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT’L & COMP. L.J. 333, 344–45 (1998).

260. Levitt, *supra* note 259, at 347.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* at 365.

265. *Id.*

266. *Id.* at 366.

267. *Id.* (citing S.C. Res. 1162, U.N. Doc. S/RES/1162 (Apr. 17, 1998)).

268. Wedgewood, *supra* note 177, at 832.

269. *Id.*

270. *Id.* at 833.

271. Murphy, *supra* note 170, at 372.

Furthermore, any conflict severe enough to warrant a humanitarian intervention is also likely to affect neighboring countries due to the mass refugee emigration and peripheral violence likely to spill across borders. This gives regional states very real security concerns to address. Refugees fleeing the humanitarian emergency in Yugoslavia, for example, burdened the “delicate political balance in Macedonia” and overwhelmed Albania’s aid capacity.<sup>272</sup> While neither country was a NATO member at the time, they both shared (and continue to share) a border with NATO member Greece.<sup>273</sup> They are also situated in an area where regional instability has historically had Europe-wide ramifications. As such, any military intervention to quell these circumstances and stabilize the country could be justified under a self-defense rubric allowed by U.N. Charter article 51.<sup>274</sup>

Opponents of this argument have noted that such intervention still violates the U.N. Charter.<sup>275</sup> Aside from a common reading that military action is only legal when taken either in self-defense, by invitation, or with prior Security Council approval, article 53 explicitly allows regional organizations to intervene militarily *only* where the Security Council has approved such action.<sup>276</sup> Such critics further point out that, as with the ECOWAS interventions, the Security Council has often remained silent at the time of the conflict and retroactively approved the regional organization’s actions.<sup>277</sup> Finally, just because regional states agree on a decision does not mean that the group is unbiased against the leadership of a particular country or willing to use force for their own political will under the guise of humanitarian concerns.<sup>278</sup>

### III. FINDING THE RIGHT BALANCE: RESOLVING THE ISSUES

This part proposes an alternative to the current system to better balance aggression and compassion in international law. It first proposes that the crime of aggression should be tried exclusively by the ICC. It next urges that the Security Council should have no power that would dictate which acts the ICC may investigate as *prima facie* “acts of aggression” for which individuals may be criminally liable. Finally, this part advocates for an affirmative humanitarian intervention defense for crime of aggression prosecutions to insulate those who use force with compassion against prosecution.

#### A. Give the ICC Exclusive Power

The ICC should have exclusive power to prosecute crimes of aggression. The ICC is one of the few bodies capable of carrying out a fair trial for this

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272. Wedgewood, *supra* note 177, at 832.

273. *Member Countries*, NATO (Aug. 20, 2013, 9:32 AM), [http://www.nato.int/cps/en/natolive/topics\\_52044.htm](http://www.nato.int/cps/en/natolive/topics_52044.htm).

274. U.N. Charter art. 51.

275. *See supra* note 172.

276. *See* U.N. Charter art. 53.

277. Wedgewood, *supra* note 177, at 832.

278. LeClerc-Gagne & Byers, *supra* note 36, at 386.



type of crime.<sup>279</sup> It uses judges who make legal rulings and distinctions and who concern themselves with the rights of the indicted. This makes the ICC a far better body to carry out a criminal trial and investigation than many other available options.<sup>280</sup> It is also the sole international body that—despite its flaws—has claimed jurisdiction over the criminal prosecution of aggression and made an attempt to define the crime and the conditions for liability.<sup>281</sup> Furthermore, a majority of the world’s nations have approved the ICC’s legitimacy to investigate and prosecute such crimes.<sup>282</sup> Though many major international states still take a strong stand against the body,<sup>283</sup> many of these same states are still interested in making the system work as evidenced by their active participation in the Kampala Amendment conference.<sup>284</sup> Their objections need not doom the ICC’s future. Furthermore, even in the direst of situations—the ICC indicting a serving African Head of State—African Union members still chose to remain ICC parties rather than withdraw their support,<sup>285</sup> proving the body’s international legitimacy and staying power.

#### B. Remove the Security Council

The Security Council should have no power to deny an aggressive act’s existence or to block an ICC investigation. First, as the Council itself has proven in the past, its aggression determinations are too heavily based on the political will of its five veto-wielding permanent members, and its determinations are concentrated against particularly convenient state villains for their involvement in a criminal investigation and prosecution to be desirable.<sup>286</sup> To give this organization any additional power—let alone something as crucial as deciding who has committed acts and crimes of aggression—would undermine the usefulness and legitimacy of this type of prosecution and the ICC, as the body involved.<sup>287</sup>

Second, to deny the Security Council the ability to determine an act of aggression for criminal liability purposes is in no way a violation of its U.N. Charter Chapter VII mandate. As noted above, it is widely believed in customary international law that the Security Council’s power to determine

279. *See supra* Part I.B.1.b.

280. *Compare supra* Part II.B.1 (discussing UNSC weaknesses), *with supra* Part II.A.1 (discussing ICC strengths).

281. *See supra* Part I.B.1.b.

282. *See supra* Part I.B.1.b.

283. *See supra* Part II.A.1.

284. *See, e.g.,* Kreß & von Holtendorff, *supra* note 55, at 1205 (noting that it was widely recognized amongst the other delegates that the United States had come to the Kampala conference with an “open and constructive spirit”); Van Schaak, *supra* note 44, at 514 (discussing the United States, China, and Russia’s active efforts to place limits on the Kampala aggression definition).

285. *See supra* Part II.A.1 (discussing African Union objections to the ICC and its recent withdrawal threats).

286. *See supra* Parts I.B.2.b, II.B.1 (discussing the UNSC’s aggression determinations).

287. *See supra* Part I.B.1.b (detailing the Kampala amendment’s procedures); *supra* Part II.A.1 (discussing the UNSC’s ambiguous role in aggression determinations as an ICC weakness).

acts of aggression was never meant—and still is not meant—to be exclusive.<sup>288</sup> Regardless, this mandate was certainly never intended to apply to international criminal prosecutions, but was meant—as the U.N. Charter plainly states—as a standard by which to “maintain or restore international peace and security.”<sup>289</sup> Because any prosecution for the crime of aggression comes only after said crime has taken place, determining the existence of a crime and who has committed it has no direct role in maintaining or restoring peace and security.

The Security Council’s role in ICC aggression investigation should be clarified so as to prevent the Council from blocking an investigation. Such a path was, indeed, the majority will at the Kampala Amendment discussions, though this issue was largely tabled in the interest of finding a consensus.<sup>290</sup> As mentioned previously, the Rome Statute’s proposed article 15 *bis* gives no explicit guidance on what happens when the Security Council determines that an act the ICC prosecutor wants to investigate is not aggression.<sup>291</sup> Furthermore, giving the Security Council the ability to interfere with such an investigation indefinitely<sup>292</sup> leaves justice subordinate to political concerns. The Rome Statute should be amended to exclude this likely possibility.

The political feasibility of this plan is, of course, problematic since it will deprive some of the world’s most politically, economically, and militarily powerful countries of control. As the history of the Security Council has proven, however, there can be no justice or reliable and respected system for prosecution if a political body can dictate legal decisions.<sup>293</sup> That a single country can block any action only makes a system involving the UNSC more dubious and incredible. In the interests of justice and deterring aggression—the point of prosecuting the crime in the first place—the council should not be involved.

### *C. Include an Affirmative Defense*

In addition to these structural issues, the ICC should reform its crime of aggression definition. The current definition is too broad, vague, confusing, and political to allow bona fide humanitarian interventions free from the specter of criminal liability.<sup>294</sup> Because of the resolution’s own deference

288. See *supra* Part II.B.1 (outlining the arguments against the UNSC aggression determination being an exclusive power).

289. See U.N. Charter art. 39; see also *supra* Part II.B.1 (offering arguments against the Security Council’s determinations being used in a criminal or legal context).

290. Van Schaak, *supra* note 44, at 515–17.

291. See *supra* Part II.A.1 for broader discussion on this point.

292. Rome Statute, *supra* note 33, at art. 16 (“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”).

293. See *supra* Part II.B.1.

294. See *supra* Parts I.B.3.b, II.A.2.

to the Security Council, the procedure is too intertwined with political bodies to ensure ICC independence.<sup>295</sup>

The most effective remedy to this issue would be to provide an affirmative defense exemption for humanitarian intervention. Such an exemption would have two evidentiary tiers: a “unilateral intervention” tier for humanitarian intervention that individual or a small group of states initiate and a “regional alliance” tier used when regional alliances or small groups of local nations initiate.

This Note proposes that the “unilateral intervention” tier be crafted along the same lines as the exemption proposed by Elise Leclerc-Gange and Michael Byers.<sup>296</sup> Under this plan, bona fide humanitarian intervention would be an affirmative defense in which the accused individuals would be required to prove all three of the following elements: (1) a humanitarian principle motivation, (2) prior knowledge of gross human rights violations, and (3) a well founded belief in the Security Council’s impotence.<sup>297</sup>

First, the defendant would have the burden of presenting evidence to show that her principal motivation for using force was “a genuine humanitarian desire to prevent gross human rights violations” and, finding such motivation, no individual criminal responsibility would be assigned.<sup>298</sup> The accused could prove such intent through evidence such as documents related to the planning and execution of the military action, diplomatic communications, and specific orders and illustrated efforts to avoid civilian casualties.<sup>299</sup> This would allow the ICC to distinguish “bona fide” interventions from pretextual invasions or occupations. Second, the accused would need to establish a prior knowledge that gross human rights violations—those which are “particularly severe”—were occurring in the target state.<sup>300</sup> Third, the accused would have to prove she had a “well-founded belief” that the Security Council was unable or unwilling to respond to the crisis for reasons unrelated to the accused’s (or his state’s) own threats or inaction.<sup>301</sup> This would recognize the U.N. Charter’s preference for Security Council-sanctioned military action.

This Note’s plan differs from the Leclerc-Gange and Byers recommendations in that it distinguishes interventions by regional alliances by requiring a more lenient standard of proof (and thus a more easily proven defense). A defendant could escape liability by proving (1) their state’s own national security and self-defense were implicated and (2) their actions were narrowly-tailored to address those concerns.<sup>302</sup> The former could be proven using statistics showing refugee flows, credible reports of

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295. See G.A. Res. 3314, *supra* note 152 (requiring that any prima facie act of aggression go through the UNSC before being formally defined as such).

296. For full details of their proposed plan, see LeClerc-Gange & Byers, *supra* note 36, at 386–89.

297. *Id.* at 387.

298. *Id.*

299. *Id.* at 388.

300. *Id.*

301. *Id.*

302. See *supra* Part II.B.3 (discussing the advantages of regional multilateralism).

border incursions, harm to noncombatants in bordering states, or intra-governmental documents showing intention. The court itself could judge the latter using established precedent, reports from local defense departments and international organizations about their actions and goals, and the results of what actually took place. This distinction for regional interventions recognizes (1) the subjective nature of proving a humanitarian intervention was bona fide, (2) the legitimate security concerns that states face, and (3) the legitimacy a regional organization gives.

The benefits of a two-tier system are extensive. First, the affirmative defense incentivizes states which would act alone or with scarce support to be extremely careful in how they conduct humanitarian interventions since their rationale will have to withstand strict legal scrutiny. One could imagine the governments and defense departments of particularly active states setting up protocols by which information on their justification and actions is well recorded and collected. Second, those states will have incentive to work through regional organizations near the troubled target state because of the relaxed legal standard. Third, it would legitimize these types of interventions since regional groups will ostensibly be acting primarily to address their own security and self-defense concerns. They could thus more credibly invoke the U.N. Charter's self-defense exception to the otherwise legally troublesome use of force.<sup>303</sup> Additionally, since U.N. involvement—through peacekeeping, development, and aid—almost inevitably follows any bona fide humanitarian intervention, and that involvement is usually heavily reliant on the cooperation of regional groups, a retroactive endorsement of the humanitarian intervention is far more likely.<sup>304</sup> Fourth, the regional organizations need local knowledge and expertise and would mitigate the logistical challenges and costs inherent to any humanitarian intervention.<sup>305</sup> Fifth, working in cooperation with regional groups would increase the popularity of such intervention in distant, powerful states through lessened risks for their personnel and a more limited financial involvement. This, in turn, will make humanitarian interventions more frequent and, most importantly, save civilian lives. Finally, the two-tier system gives regional organizations an incentive to deal with potential humanitarian situations early enough to prevent more horrific and extensive atrocities because they will not be hindered by unclear or high evidentiary barriers.

Finally, the two-tier solution is both realistic and practical since slightly modifying the ICC's definition and relation to the Security Council does not require a huge rebalancing and reorganization of the U.N. Charter-mandated prerogatives or require the enactment of a completely new legal organization.

Applying this test to the above hypothetical and real life events may prove useful. Indicted government and military officials from the coalition

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303. U.N. Charter art. 51.

304. *See supra* Part II.B.3 (discussing the U.N. retroactive endorsement of ECOWAS activity and incorporation of their own activities with ECOWAS forces).

305. *See supra* Part II.B.3.

that invaded Bellicosia would use the “unilateral intervention” tier, since no regional organizations were utilized. They would thus have to submit evidence proving the Bellicosian government’s atrocities, their own government’s concern with them, and the threatened Security Council veto of the Bellicosian ally prevented the authorization of force through any of the international channels. Leaders of a “lone wolf” regional state who invaded one of its neighbors—say, Vladimir Putin in Russia’s recent invasion of Ukraine—would be under the same tier and would have to prove that (1) evidence of the Ukrainian government’s atrocities against its own people, (2) the Russian invasion was due to these concerns, and (3) Russia was blocked in the Security Council from being able to get their military action authorized. Such a defense would likely fail. Even if Russia, or a country in a similar future situation, were to use a regional alliance which they effectively control to break into the lower tier—a situation the court would likely see through anyway—it likely would still fail since the defendant would have to prove both there was an actual threat to the national security of his or her country and that the invasion was narrowly tailored to address this problems. An annexation or permanent occupation simply would not meet the guidelines.

#### CONCLUSION

The easiest solution, of course, would be to abandon international criminal liability for the crime of aggression completely. Indeed, doing so would avoid many of the inevitable political and legal battles to come. Though perhaps overly idealistic, individual liability for the crime of aggression is a piece of customary international law worth preserving and advancing. It may be hard to imagine that such a system would work flawlessly in today’s world, but a system to legally punish planners and executors of wars of aggression is certainly a part of the world in which we wish we lived.

Such a system, however, is doomed at the start if it is not crafted to the highest legal standards. This is only possible if the system removes political bodies completely. Furthermore, its legal standards must be clear enough to allow and incentivize humanitarian intervention in the horrible yet inevitable cases of necessity. The two-tier formula outlined above would fulfill all of these needs.

Perhaps, in our increasingly globalized world, where sovereignty—and thus aggression—increasingly has no meaning, we must deal with the realities of our current paradigm. There will long be a need both to bring the world’s aggressors to justice and for powerful nations to use force to defend the world’s humanity. If international law is to fulfill the goals that the post-World War II world had envisioned for it, a robust and unambiguous system to prosecute aggression while allowing the best uses of force is vital.

*Appendix I. List of Officials Indicted on Aggression Charges at World War II Tribunals.*

<b>Name</b>	<b>Tribunal</b>	<b>Result</b>	<b>Major Positions During the War</b>
BORMANN	Nuremberg	Guilty (Other grounds)	Reichsleiter; Chief of Staff, Office of Führer's Deputy; Head, Party Chancellery
DONITZ	Nuremberg	Guilty	Head of State; Commander-in-Chief, German Navy
FRANK	Nuremberg	Guilty (Other grounds)	Reichsleiter; President, Academy of German Law
FRICK	Nuremberg	Guilty	Minister of the Interior; Reich Protector of Bohemia and Moravia
FRITZSCHE	Nuremberg	Not Guilty	Director, Wireless News Service Ministry; Head of Radio Propaganda Ministry
FUNK	Nuremberg	Guilty	Minister of Economics; President of Reichsbank; Member, Central Planning Board
GORING	Nuremberg	Guilty	Commander-in-Chief, German Air Force; Plenipotentiary for the Four Year Plan
HESS	Nuremberg	Guilty	Member, Secret Cabinet Council; Member, Council for the Defense of the Reich
JODL	Nuremberg	Guilty	Chief, National Defense Section; Chief, Operations Staff
KALTENBRUNNER	Nuremberg	Guilty (Other grounds)	Head, German Secret Police; Head, Reich Security Office
KEITEL	Nuremberg	Guilty	Chief, High Command of the Armed Forces
RAEDER	Nuremberg	Guilty	Admiral

Name	Tribunal	Result	Major Positions During the War
ROSENBERG	Nuremberg	Guilty	Head, Nazi Ideological & Educational Research; Minister, E. Occupied Territories
SAUCKEL	Nuremberg	Guilty (Other grounds)	High Officer, German Secret Police; Member, Reichstag
SCHACHT	Nuremberg	Not Guilty	President of the Reichsbank; Minister without Portfolio
SEYSS-INQUART	Nuremberg	Guilty	Austrian Minister of Security and Interior
SPEER	Nuremberg	Guilty (Other grounds)	Minister for Armaments and Munitions; Member, Central Planning Board
STREICHER	Nuremberg	Guilty (Other grounds)	Member, Reichstag; Editor, Anti-Semitic Weekly Newspaper
von NEURATH	Nuremberg	Guilty	Minister of Foreign Affairs; President, Secret Cabinet Council
von PAPAN	Nuremberg	Not Guilty	Ambassador to Turkey
von RIBBENTROP	Nuremberg	Guilty	Minister of Foreign Affairs
von SCHIRACH	Nuremberg	Guilty (Other grounds)	Leader, Youth in the German Reich; Governor & Defense Commissioner of Vienna
ARAKI	Tokyo	Guilty	General; Minister of Education; Minister of War
DOHIHARA	Tokyo	Guilty	General; Minister of Education; Minister of War
HASHIMOTO	Tokyo	Guilty	Army Officer

Name	Tribunal	Result	Major Positions During the War
HATA	Tokyo	Guilty	Commander, China Army; Inspector General of Military Education; Minister of War
HIRANUMA	Tokyo	Guilty	Home Minister; Minister without Portfolio; President, Privy Council; Prime Minister
HIROTA	Tokyo	Guilty	Foreign Minister; Prime Minister
HOSHINO	Tokyo	Guilty	Chief Secretary of the Cabinet; Minister w/o Portfolio; President, Planning Board
ITAGAKI	Tokyo	Guilty	Chief of Staff of the China Army, Commander of the S.E. Asia Army; Minister of War
KAYA	Tokyo	Guilty	Finance Minister
KIDO	Tokyo	Guilty	Lord Keeper of the Privy Seal; Minister of Education
KIMURA	Tokyo	Guilty	Commander, Burma Army; Chief of Staff, Kwangtun Army; Vice War Minister
KOISO	Tokyo	Guilty	Chief of Staff, Kwangtun Army; Governor of Korea; Prime Minister
MATSUI	Tokyo	Guilty (Other grounds)	Commander, Shanghai Expeditionary Force
MINAMI	Tokyo	Guilty	Commander, Kwantung Army; Governor of Korea
MUTO	Tokyo	Guilty	Chief, Military Affairs Bureau; Chief of Staff, Philippines Army
OKA	Tokyo	Guilty	Chief, Naval Affairs Bureau at the Naval Ministry
OSHIMA	Tokyo	Guilty	Military Attache, Berlin Embassy; Ambassador to Germany



Name	Tribunal	Result	Major Positions During the War
SATO	Tokyo	Guilty	Chief, Military Affairs Bureau
SHIGEMITSU	Tokyo	Guilty	Foreign Minister
SHIMADA	Tokyo	Guilty	Naval Minister
SHIRATORI	Tokyo	Guilty	Advisor to Foreign Office; Ambassador to Italy
SUZUKI	Tokyo	Guilty	Minister w/o Profile
TOGO	Tokyo	Guilty	Foreign Minister
TOJO	Tokyo	Guilty	Chief of Staff, Kwantung Army; Prime Minister; Minister of War; Vice Minister of War
UMEZU	Tokyo	Guilty	Commander, Kwantung Army; Commander, Northern China Army; Vice Minister of War