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CRIMINALIZING WAR: TOWARD A JUSTIFIABLE CRIME OF AGGRESSION

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Abstract: State parties to the International Criminal Court made history in 1998 when they agreed to include the crime of aggression as one of four crimes within the jurisdiction of the Court. The crime, however, was left undefined in 1998, and the Court’s jurisdiction over the crime of aggression has been postponed until state parties can agree to a definition at a Review Conference in 2009. Reaching such an agreement would represent the first time in history that national leaders would be bound by a specifically defined crime of international aggression with sanctions wielded by an international court. Parties to the Court, however, differ widely over two questions: whether the crime should be defined narrowly or broadly, and who should decide when aggression has occurred, thus triggering the Court’s jurisdiction over the culpable individuals. The two questions have largely split state parties between those citing the demands of the current international system and those committed to basic principles of fairness. This Note suggests that by applying the traditional utilitarian and retributivist rationales for the criminal law, state parties may be able to reach the most balanced and principled definition of aggression.

Introduction

In July 1998 a United Nations (U.N.) Conference in Rome negotiated and adopted a treaty that set up the world’s first International Criminal Court (ICC).1 State delegations in Rome settled on four crimes falling within the jurisdiction of the new court: “War Crimes,” “Crimes Against Humanity,” “Genocide,” and “Aggression.”2 The inclusion of the first three crimes was undisputed.3 The crime of aggression,
however, was highly controversial, and remains divisive today. Unlike the first three crimes, the crime of aggression implicates not only individual responsibility, but state responsibility as well. The Court would seemingly intrude on the province of the U.N. and the Security Council if it were to identify and prosecute instances of state aggression. And unlike the other crimes, which describe brutal acts of violence, aggression is a more subjective and circumstantial crime, highly dependent on perspective, and invoking the most sensitive questions of defense and international security.

Faced with these inherent differences, states in Rome faced two related problems: (1) how to define the prohibited acts with sufficient clarity; and (2) who would judge whether aggression had occurred, thus “triggering” the Court’s jurisdiction over individual liability. While these conceptual difficulties gave rise to calls for excluding the crime from the Court’s jurisdiction, many smaller states insisted on its inclusion. In the end, states agreed to a compromise: the Statute of the Court would include the crime of aggression, but the Court’s jurisdiction over the crime would be suspended until states could agree on a definition and on how the jurisdiction of the Court would be triggered. Member States created a working group on the crime of aggression that would work toward a resolution, and deferred the controversy until a Review Conference would convene to discuss amendments to the Statute seven years after it took effect. The Working Group has since expressed the goal of offering a unified proposal by

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4 Id.
6 Theodor Meron, Defining Aggression for the International Criminal Court, 25 Suffolk Transnat’l L. Rev. 1, 3 (2001).
8 See Meron, supra note 6, at 3.
9 See Ferencz, supra note 7, at 351; von Hebel & Robinson, supra note 2, at 82.
10 See von Hebel & Robinson, supra note 2, at 82.
12 See Rome Treaty, supra note 1, art. 5(2); see also Meron, supra note 6, at 2; Paulus, supra note 11, at 21.
14 See Rome Treaty, supra note 1, art. 123.
2008. And while the Working Group has produced thoughtful commentary and identified discrete options, its reports demonstrate the same competing commitments to principle and pragmatism that produced the stalemate in Rome.

The effort to define aggression is important. Despite the best efforts of its detractors, the ICC has become a relevant and useful force in the international community. While observers note the possibility of excluding the crime of aggression and using the other crimes to prosecute war criminals, the failure to include the crime of aggression would represent a significant regression in the rule of international law. Criminalizing aggression satisfies a universal need to affirm our shared values, deter unjustified conflict, and punish the criminal who disrupts peaceful lives through violence or the threat of violence. Criminalizing aggression is not merely an academic exercise; it is a significant expression of humanity’s rejection of war as statecraft, and potentially an important step towards a more just and peaceful international order.

In order to move beyond the current debate and towards a principled, fully justifiable crime of aggression, the Working Group should utilize the traditional analytic frameworks for domestic criminal law. Like domestic crimes, international criminal laws should accord with utilitarian and retributivist rationales to the greatest extent possible. The failure to justify the crime of aggression in accord with these philosophical frameworks will render a definition assailable by critics as

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15 See id.; Documents of the Fourth Session, supra note 5, para. 90.
16 See, e.g., Documents of the Fourth Session, supra note 5, paras. 66–68.
17 See Meron, supra note 6, at 5; Trahan, supra note 13, at 442.
21 See Ferencz, supra note 7, at 358.
22 See id.; Meron, supra note 6, at 3.
unjust or ineffective. By applying these traditional philosophies of penal law, the Working Group will be able to formulate the most justifiable and rigorous solution possible.

Part I of this Note will trace the history of the concept of aggression and the negotiating history of the crime of aggression. Part II will discuss the contributions of the Working Group and the important considerations of Member States. Part III will apply the traditional utilitarian and retributivist rationales in order to suggest specific approaches that are most consistent with the goals and purposes of the law.

I. Background

While war traditionally was viewed as a legitimate extension of statecraft—“political intercourse, carried on with other means,” in the words of Prussian military philosopher Carl von Clausewitz—World War I served to crystallize the notion that the aggressive acts of one state against another were not just unlawful but criminal. As early as 1919, the Treaty of Versailles contemplated measures to try Kaiser Wilhelm II of Hohenzollern in a court of law for “a supreme offense against international morality and the sanctity of treaties.” While the Kaiser won refuge in the Netherlands from the allied tribunal, the effort clearly asserted the principle that crimes against peace should be punished, and that international tribunals could exercise jurisdiction over such crimes. Indeed, while rejecting the allied request for extradition based on the ad hoc character of the proposed tribunal, the Netherlands added:

If in the future there should be instituted by the society of nations an international jurisdiction, competent to judge in case of war deeds qualified as crimes and submitted to its jurisdiction by statute antedating the acts committed, it would be fit for Holland to associate herself with the new regime.

25 See id.
26 See id.
27 Carl von Clausewitz, On War 87 (Michael E. Howard & Peter Perret trans., 1976); see also Immanuel Kant, The Philosophy of Law, ch. 56 (B.D.W. Hastie trans. 2002).
28 See Alfaro, supra note 20, para. 6.
29 Id. para. 8.
30 Id. para. 12.
31 Paulus, supra note 11, at 9.
This insistence on a criminal code and permanent court were echoed by the architects of the League of Nations and the Permanent Court of International Justice (PCIJ) in 1920. While the advisory committee tasked with creating the new world court decided that a criminal jurisdiction posed unnecessary obstacles to the new PCIJ—a court established to judge the affairs of nations and not of individuals—the committee did not rule out the possibility of creating a separate branch of the court in the future to deal with criminal jurisdiction. Those who opposed including a criminal branch of the PCIJ at that early stage noted the absence of any international penal law, and the violation of the principle *nulla poena sine lege* (no punishment without law).

Efforts to outlaw wars of aggression continued throughout the early years of the League of Nations, and culminated in the expression of the Kellogg-Briand Pact of 1928. The United States, France, and the other major powers of the day concluded that the “time has come [for] a frank renunciation of war as an instrument of national policy . . . .” However, the international community failed to erect any enforcement mechanism over the ambitious agreement, and it came to be seen as little more than hortatory rhetoric.

The principle of a universal criminal jurisdiction over international crimes was again advanced in 1937 when states negotiated a Convention for the Prevention and Punishment of Terrorism. The Convention was accompanied by a Protocol to establish an international criminal court with the specific and limited jurisdiction over the alleged terrorists, but neither the Convention nor the Protocol ever garnered sufficient support to enter into force.

A. Nuremburg

In January 1942, in the midst of World War II, nine Allied governments met in London to condemn the atrocities of the Axis ag-

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33 See id. para. 16.
34 Id. para. 17.
36 Id.
37 See id.
gressors. The result of the meeting was the Inter Allied Declaration on Punishment of War Crimes, or the St. James Declaration, in which the Allies declared their aim to punish those responsible for war crimes “through the channel of organized justice.” The document cites the need to punish in order to avoid acts of vengeance committed by the general public “and in order to satisfy the sense of justice of the civilised world.” Lord Simon later added “we shall never do any good to our own standards, to our own reputation and to the ultimate reform of the world if what we do is not reasonably consistent with justice . . . .”

In August 1945, following the cessation of hostilities, the governments of the United States, France, Great Britain, and the Soviet Union, gathered in London to write a Charter establishing an International Military Tribunal (IMT) to try war criminals of the European Axis. The London Charter defined the crimes within the jurisdiction of the Tribunal as “crimes against the peace,” “war crimes,” and “crimes against humanity.” Justice Robert Jackson of the U.S. Supreme Court served as the Chief Prosecutor for the Tribunal before four judges representing each of the four Allied powers. The Charter defined “crimes against peace” simply as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” Thus, without any separate definition of what constituted a “war of aggression,” the Charter simply defined one vague concept—crimes against peace—by reference to another—a war of aggression.

Critics of the tribunal also pointed to four primary flaws: the tribunal was of an ad hoc nature, and not permanent; it was more political than juridical; the judges were appointed by the four allies and were not representative of the international community; and the

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40 Alfaro, supra note 20, para. 31.
41 Id. para. 32.
42 Id. para. 31.
43 Id. para. 34. These justifications offer a number of retributivist, utilitarian, and expressive rationales. See id.
45 Id. art. 6.
46 Id. art. 2; see Ferencz, supra note 7, at 344.
47 Charter of the International Military Tribunal, supra note 44, art. 6(a).
48 See Paulus, supra note 11, at 13. Justice Jackson conceded, “it is perhaps a weakness in this Charter that it fails itself to define a war of aggression.” Id. at 13–14.
charter was said to have disregarded the principle of *nulla crimen nulla poena sine lege* (there is no crime, nor punishment, without a law). In response to the last, and most serious criticism, the tribunal countered that wars of aggression were already illegal and a crime under customary law. Whether or not the Charter reflected the state of customary law in 1945, the judgments of the IMT have since become enshrined in international law, supporting a new—or at least more explicit—norm against international aggression.

While the tribunal at Nuremberg, and the later tribunal established by General McArthur for the Far East, represented the first actual international trials of individuals as war criminals—a huge innovation in international law—Jackson remained convinced that the greatest achievement of the tribunals was the condemnation of aggressive war itself. Indeed, the “crimes against peace” articulated in the Charter and the judgments of the Nuremberg Tribunal were unanimously affirmed by the General Assembly of the new United Nations in 1946. Cognizant, however, of the strict view that the London Charter had defined its crimes after the fact, and thus violated the principle of *nulla crimen nulla poena sine lege*, the U.N. directed the preparation of a formalized code of international crimes and a statute for a new international criminal tribunal. These efforts, however, proved difficult as the rapid dissolution of international unity after World War II gave way to the outright hostility of the Cold War. The perceived primacy of national security dramatically slowed the development of both the court and the codification of any criminal code.

50 *Id.* para. 103.
52 See Meron, * supra* note 6, at 6; see also Alfaro, * supra* note 20, para. 105; Paulus, * supra* note 11, at 3–4.
53 Alfaro, * supra* note 20, para. 41. The Far East Tribunal, established by General McArthur, included judges representing eleven nationalities. *Id.* It functioned in a manner and under principles almost identical with those of the Nuremberg tribunal. *Id.*
54 See Ferencz, * supra* note 7, at 346.
56 G.A. Res. 95(I), * supra* note 55, at 188; see also Alfaro, * supra* note 20, para 43; Ferencz, * supra* note 7, at 346–7.
B. United Nations General Assembly Resolution 3314

While progress during the Cold War was slow, the U.N. reached a consensus definition of aggression with the unanimous passage of Resolution 3314 in 1974.59 Under Article 24 of the U.N. Charter, the Security Council has the primary responsibility for maintaining global peace and security by countering acts of aggression,60 but the Charter does not define that term and the Security Council has been free to make such declarations without referencing any objective criteria.61 Therefore, the definition contained in U.N. Resolution 3314 was formulated ostensibly to guide the Security Council in its determinations of when aggression had occurred.62 The Resolution, non-binding in itself, condemned the use of armed force by a state against the sovereign territorial integrity or political independence of another state.63 The definition then goes on to list a series of acts that qualify as acts of aggression.64 The list of acts, however, is described as non-exhaustive and the General Assembly made clear that the Security Council may determine that other acts also constitute aggression,65 or that acts technically falling within the description of aggression might be justified under the circumstances of the case.66 The Resolution passed unanimously, but has since been largely ignored by the Security Council, which has generally avoided using the term.67 Observers note that the Council has been reluctant to alienate one party to a conflict by identifying an act of state as aggression, preferring instead to note threats or breaches of the peace.68

60 U.N. Charter art. 24, para. 1. Art. 24(1) reads, “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.” Id.
62 See Meron, supra note 6, at 7.
63 See Ferencz, supra note 7, at 347, 354–55.
64 G.A. Res. 3314, supra note 59, art. 3.
65 Id. art. 4.
66 Id. art. 2.
67 See Paulus, supra note 11, at 17.
68 Id.
C. The Rome Conference

The idea of an international criminal court was revived in the late 1980s and early 1990s, in part as a means to combat terrorism and transnational drug crimes.\textsuperscript{69} The International Law Commission of the U.N. (ILC) was tasked by the Security Council with setting up the court\textsuperscript{70} and issued a Draft Statute for a court in 1994\textsuperscript{71} as well as a Draft Code of Crimes in 1996.\textsuperscript{72} Between 1996 and 1998 a U.N. Preparatory Committee refined the work of the ILC, and in June and July 1998 160 state delegations met in Rome to finalize and adopt a convention.\textsuperscript{73}

The ILC Draft Statute recognized two categories of crimes.\textsuperscript{74} The first category, core crimes, included genocide, violations of the laws of war, crimes against humanity, and aggression.\textsuperscript{75} The second category was made up of treaty crimes, such as torture, drug crimes, and certain acts of terrorism.\textsuperscript{76} But from the beginning of negotiations, states expressed a preference for limiting the jurisdiction of the Court to core crimes.\textsuperscript{77} It was hoped that limiting the jurisdiction to those crimes that were customary would promote the widest acceptance and greatest credibility for the court.\textsuperscript{78} However, the inclusion of the crime of aggression remained controversial at Rome until the end of the conference.\textsuperscript{79} Three distinct questions separated the views of the state parties: whether the crime should be included at all; what was the proper role of the Security Council with respect to identifying instances of aggression; and how to define the crime so as to satisfy the principle of \textit{nullem crimen sine lege}.\textsuperscript{80}

With regard to the role of the Security Council, the ILC had recommended in its draft statute that the Security Council must first declare an act of aggression before the Court could take jurisdiction over
the crime.\textsuperscript{81} This provision was included for the sake of securing the broadest possible participation\textsuperscript{82} and based on the primary role of the Security Council in identifying acts of aggression as expressed in Art. 39 of the U.N. Charter.\textsuperscript{83} The proposed court was thus limited to determining individual responsibility for the crime, and shielded from the politically sensitive determination of when international aggression had taken place.\textsuperscript{84} This approach was supported strongly by the permanent members of the Security Council.\textsuperscript{85} Critics however, argued that this gave too much power to the Council.\textsuperscript{86} By wielding their veto power over disfavored determinations, the permanent members of the Council would be able to commit the crime with impunity or shield allies from the reach of the Court.\textsuperscript{87}

With respect to the problem of definition, three approaches were considered.\textsuperscript{88} The first was to provide a generic definition that would define state aggression.\textsuperscript{89} The second was to produce a general definition in combination with a list of acts representing aggression, such as Resolution 3314.\textsuperscript{90} The third approach was not to define aggression at all, leaving the determination to the Security Council.\textsuperscript{91} During the Rome conference states expressed concerns that a narrow definition would prove too restrictive,\textsuperscript{92} while a broad approach could be abused for political purposes and jeopardize the independence of the court.\textsuperscript{93}

Opponents of including the crime suggested that these conceptual difficulties posed insurmountable obstacles for the Conference in Rome.\textsuperscript{94} Others, however, argued that excluding the crime of aggression would represent a significant step backwards, since the Nuremberg and Tokyo Tribunals had prosecuted criminals for the same

\textsuperscript{81} von Hebel & Robinson, supra note 2, at 82.
\textsuperscript{82} Paulus, supra note 11, at 20.
\textsuperscript{83} See U.N. Charter art. 39. Art. 39 reads, “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Id.
\textsuperscript{84} See von Hebel & Robinson, supra note 2, at 82; see also Meron, supra note 6, at 13.
\textsuperscript{85} von Hebel & Robinson, supra note 2, at 82.
\textsuperscript{86} See Paulus, supra note 11, at 20, 21.
\textsuperscript{87} Id. at 21–22; see Dawson, supra note 19, at 440.
\textsuperscript{88} von Hebel & Robinson, supra note 2, at 82.
\textsuperscript{89} Trahan, supra note 13, at 449; von Hebel & Robinson, supra note 2, at 82.
\textsuperscript{90} Trahan, supra note 13, at 449; von Hebel & Robinson, supra note 2, at 82.
\textsuperscript{91} Trahan, supra note 13, at 449; von Hebel & Robinson, supra note 2, at 82.
\textsuperscript{92} von Hebel & Robinson, supra note 2, at 84.
\textsuperscript{93} Id. at 83.
\textsuperscript{94} See id. at 82.
crime fifty years earlier.95 Advocates for including the crime of aggression took a hard line in negotiations, but it became increasingly clear that states would not be able to agree on a definition of the crime or how the court’s jurisdiction would be “triggered.”96 The non-aligned movement eventually proposed a compromise that would include the crime but leave the definition to a later stage.97 Thus the current Statute includes the crime in the jurisdiction of the Court, but suspends that jurisdiction until state-parties can resolve the outstanding issues.98 The Statute makes clear that the definition must be consistent with the provisions of the U.N. Charter and be adopted in accordance with articles 121 and 123 of the Statute, which direct a Review Conference and amendment procedure seven years after the Statute enters into force. 99

Following the successful negotiation and passage of the Rome Charter in 1998, the Assembly of States Parties (ASP) charged a Preparatory Commission with fleshing out remaining issues, such as rules of procedure and the definition of aggression.100 While the Commission was not able to reach an agreement on the crime before the Court took effect, it did offer a useful discussion paper in July 2002 offering options to both define the crime and trigger the jurisdiction of the Court.101 The Commission also created a Working Group on the Crime of Aggression to continue to elaborate on these proposals with the aim of reaching a consensus at a future Review Conference.102 Since that time, the Working Group has debated elements of the crime, issuing the latest report on its progress in June 2005.103

95 Id. at 82; see also Dawson, supra note 19, at 446–47.
96 Ferencz, supra note 7, at 350–51; von Hebel & Robinson, supra note 2, at 85.
97 See von Hebel & Robinson, supra note 2, at 85.
98 Rome Treaty, supra note 1, art. 5(2); von Hebel & Robinson, supra note 2, at 85.
99 Rome Treaty, supra note 1, art. 5(2). Art. 5(2) reads, “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.” Id.
102 Id. at 2; see also Trahan, supra note 13, at 446.
II. Discussion

The two main obstacles facing the Working Group have been the difficulty (a) defining the crime; and (b) “setting out the conditions under which the Court shall exercise jurisdiction with respect to the crime.”104 This second issue is the more politically intractable of the two, pitting the presumed power and prerogative of the Security Council against the principles of fairness and accountability.105

A. Determining Aggression

The final compromise worked out in Rome clarified that the eventual definition of aggression would include the circumstances “under which the Court’s jurisdiction may be exercised”—i.e. how the Court’s jurisdiction would be “triggered.”106 While the Court may be competent to try individuals, determinations implicitly condemning an act of state were thought to be beyond the competence of the Court.107 Thus a prior determination of aggression by an external body should be made a precondition of the Court’s jurisdiction.108 Additionally, the Court’s Statute explicitly notes that any eventual provision must be consistent with the U.N. Charter.109 While it is clear that this refers to the role of the U.N. in “triggering” the jurisdiction of the Court, states have divided widely on the appropriate relationship between the Court and the U.N.110

Some, echoing the ILC Draft Statute, suggest that the permanent members of the Council will insist on their presumed prerogative under Articles 24 and 39 of the U.N. Charter,111 and that in order to mitigate politicized accusations against the major powers and garner

104 Rome Treaty, supra note 1, art. 5, para. 2; see also Trahan, supra note 13, at 447.
105 See Trahan, supra note 13, at 453; see also Paulus, supra note 11, at 24–25.
106 See Rome Treaty, supra note 1, art. 5(2).
107 See Working Group Report, supra note 103, para. 66; see also Trahan, supra note 13, at 464.
109 Rome Treaty, supra note 1, art. 5(2).
110 See Working Group Report, supra note 103, para. 65.
111 U.N. Charter art. 39; Working Group Report, supra note 103, para 66. Art. 39 reads, “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” U.N. Charter art. 39.
the support of those states, the Council should be given the exclusive ability to initiate a charge of aggression.\textsuperscript{112}

Those arguing against exclusive competence of the Security Council point out that Article 24 confers only “primary” and not “exclusive” competence on the Council.\textsuperscript{113} Providing exclusive competence would paralyze the Court if the Council proved unwilling or unable to address any dispute.\textsuperscript{114} Furthermore, exclusivity would permit the permanent members of the Security Council\textsuperscript{115} to shield their nationals or allies from prosecution, thus resulting in a two-tiered administration of justice.\textsuperscript{116} Additionally, Art. 39 must be understood in the context of Chapter VII of the U.N. Charter, which relates to the responsibility of the Council to maintain peace between states.\textsuperscript{117} The Council’s determination under Art. 39 is thus for the purpose of maintaining peace and security at a systemic level, and not for the purpose of assigning individual criminal responsibility.\textsuperscript{118} Finally, concern has been expressed that a political determination would undermine the development of precedent and customary law.\textsuperscript{119} According to this argument, political determinations would destroy the credibility of the prosecution and provide little principled guidance for future determinations.\textsuperscript{120}

Some supporters of the Court suggest that the Court itself should make the determination that aggression has occurred.\textsuperscript{121} This option would seem to maximize the independence and power of the Court.\textsuperscript{122} However, the option would also thrust the Court into delicate questions of international relations and invite charges of politicization, unaccountability, and incompetence.\textsuperscript{123} The option was included in the discussion paper of the coordinator, but the Working Group appears to

\textsuperscript{112} See Paulus, \textit{supra} note 11, at 24; see also Meron, \textit{supra} note 6, at 12–13.

\textsuperscript{113} Working Group Report, \textit{supra} note 103, para 69; see also Paulus, \textit{supra} note 11, at 21.

\textsuperscript{114} Working Group Report, \textit{supra} note 103, para. 73.

\textsuperscript{115} The permanent members of the Security Council include the United States, China, Russia, Great Britain, and France. These five states wield a veto over any substantive decision taken by the Council. See UN Security Council, Membership in 2007, http://www.un.org/sc/members.asp (last visited May 5, 2007).

\textsuperscript{116} See Working Group Report, \textit{supra} note 103, para. 71.

\textsuperscript{117} See U.N. Charter ch. VII.

\textsuperscript{118} See Working Group Report, \textit{supra} note 103, para 69; see also Paulus, \textit{supra} note 11, at 21.

\textsuperscript{119} See Working Group Report, \textit{supra} note 103, at para. 68.

\textsuperscript{120} Id.

\textsuperscript{121} See \textit{id}. at para. 72.

\textsuperscript{122} See \textit{id}.; see also Dawson, \textit{supra} note 19, at 448.

\textsuperscript{123} See Meron, \textit{supra} note 6, at 3, 13.
have dismissed the idea, noting that the Security Council would seem to have some mandatory role under Article 39—though not necessarily an exclusive one.\textsuperscript{124}

Alternatively, the failure of the Council to act on any matter may be seen to cede the issue to the General Assembly.\textsuperscript{125} The U.N. Charter gives the Assembly the right to consider any topic,\textsuperscript{126} and make any recommendation in the interests of peace,\textsuperscript{127} subject only to constraints when the Security Council is affirmatively acting on a matter\textsuperscript{128} or when an issue requires “action” by the Security Council.\textsuperscript{129} The determination of aggression may well be seen to fall within the Assembly’s powers of discussion and “recommendation.”\textsuperscript{130}

Additionally, the General Assembly has previously asserted its power when the Security Council has proven unable to assume its responsibilities under the U.N. Charter.\textsuperscript{131} The Uniting for Peace Resolution of 1950, expressly resolved that:

[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures . . . .\textsuperscript{132}

\begin{itemize}
\item \textsuperscript{124} See Discussion Paper, \textit{supra} note 101, at 3; Working Group Report, \textit{supra} note 103, para. 72.
\item \textsuperscript{125} See Working Group Report, \textit{supra} note 103, para. 70; see also Historical Review, \textit{supra} note 51, para. 406.
\item \textsuperscript{126} U.N. Charter art. 10. Art. 10 reads, “The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.” \textit{Id}.
\item \textsuperscript{127} U.N. Charter art 14.
\item \textsuperscript{128} \textit{Id.} art. 12.
\item \textsuperscript{129} \textit{Id.} art. 11(2).
\item \textsuperscript{130} See \textit{id.} arts. 10, 14.
\item \textsuperscript{132} Uniting for Peace Resolution, \textit{supra} note 131, para. 1.
\end{itemize}
Since 1950, the General Assembly has acted under this power on a number of occasions thus providing the added authority of precedent and customary law.133

Finally, the ICJ may also be held competent to trigger jurisdiction.134 A determination made by a judicial organ would not be subject to the same critiques of overt politicization.135 The ICJ is an established court, representative of the international community and, as the “principal judicial organ of the United Nations,” is indisputably competent to make such determinations.136 The ICJ has previously interpreted acts of aggression and proven sensitive to the critical question of self-defense and justification.137 Thus, determinations would be most authoritative if made by such a representative and competent judicial organ.138

However, according to the U.N. Charter, either the General Assembly or the Security Council must request an ICJ advisory opinion.139 Therefore, the jurisdiction of the ICJ must itself be “triggered” by a request from one of the other two bodies.140 Thus, the options available to the Working Group are: (a) a determination made exclusively by the Security Council; (b) a determination made by either the Council or the General Assembly; or (c) a “three power” approach including all the organs of the U.N.141 Providing for determinations from multiple bodies, however, has raised the concern over the risk of inconsistent determinations.142

A final issue concerns the effect of any pre-determination on the ICC.143 If the Security Council or the ICJ makes a determination that aggression has occurred, is it appropriate for the prosecutor to re-

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133 See Historical Review, supra note 51, paras. 415–29; Working Group Report, supra note 103, para. 70.
134 Working Group Report, supra note 103, para. 65; see also Trahan, supra note 13, at 462.
135 See Working Group Report, supra note 103, para. 68; see also Trahan, supra note 13, at 462–63.
136 U.N. Charter art. 92; see also Paulus, supra note 11, at 25. Paulus suggests the ICJ is also probably more conservative than the ICC is likely to be. Paulus, supra note 11, at 25.
138 See Working Group Report, supra note 103, para. 68.
139 U.N. Charter art. 96(1).
140 See id.
141 See Working Group Report, supra note 103, para 65; Meron, supra note 6, at 14.
142 Trahan, supra note 13, at 462. As a matter of building an autonomous and apolitical definition, the multi-organ approach is problematic. See id.; Working Group Report, supra note 103, para. 68.
143 See Trahan, supra note 13, at 462; see also Working Group Report, supra note 103, paras. 60–62.
evaluate that judgment or merely to find the responsible individual?\textsuperscript{144} A re-evaluation clearly risks the ICC coming to a different conclusion.\textsuperscript{145} But a binding decision by any of the U.N. organs would appear to violate the rights of the accused and presume guilt instead of innocence.\textsuperscript{146}

B. The Definition

The second controversy is how to define the act of aggression.\textsuperscript{147} States have debated three basic approaches to define the act of aggression.\textsuperscript{148} The first uses a generic definition that would define state aggression. \textsuperscript{149} The second method is to adopt the approach of Resolution 3314 and describe specific acts that constitute aggression.\textsuperscript{150} The third approach does not define the act of aggression at all leaving the matter completely to the determination of the Security Council.\textsuperscript{151}

The Coordinator’s discussion paper suggests that the crime of aggression is committed when a person:

being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation in the Charter of the United Nations.\textsuperscript{152}

The discussion paper then provides three options for clarifying the proposal.\textsuperscript{153} The first option would add “such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of or annexing the territory of another State or part thereof.”\textsuperscript{154} The second option adds essentially the same provi-

\textsuperscript{144} See Trahan, supra note 13, at 462; see also Working Group Report, supra note 103, Annex II-C, B(1).
\textsuperscript{145} Trahan, supra note 13, at 462; see also Working Group Report, supra note 103, para. 62.
\textsuperscript{146} See Trahan, supra note 13, at 462; Working Group Report, supra note 103, paras. 60–62.
\textsuperscript{147} Trahan, supra note 13, at 448–49; see also Working Group Report, supra note 103, para 75.
\textsuperscript{148} Trahan, supra note 13, at 449.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Discussion Paper, supra note 101, at 3.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
sion but substitutes “and amounts to” for “such as,” thereby strictly limiting the definition to cases of occupation or annexation.\textsuperscript{155} Option three is simply to leave the proposal as is.\textsuperscript{156}

The discussion paper continues in paragraph two, stating that an act of aggression means an act referred to in UNGA Resolution 3314 (XXIX) of December 14, 1974, which is determined to have been committed by the state concerned.\textsuperscript{157} The two options listed after paragraph two both seek to clarify that another body—the Security Council or some combination of the Council, Assembly, and ICJ—must first make the determination that the crime has occurred.\textsuperscript{158}

The discussion paper also outlines the elements of the crime separately, clarifying the mens rea, the leadership nature of the crime, and the required gravity of the aggression to qualify as a crime.\textsuperscript{159}

Among the competing concerns at the Working Group are the degree of faithfulness to a “traditional” definition, such as the Nuremberg principles, and the ability to define the evolving nature of the crime.\textsuperscript{160} According to the former argument, the “core” crimes that were included in the Statute were customary crimes, the decision having been made not to include “treaty crimes” within the jurisdiction of the new court.\textsuperscript{161} The definition of each concept should therefore reflect a traditional understanding of the crime.\textsuperscript{162} Others argue, however, that previous tribunals, such as Nuremberg, have been concerned with completed acts of aggression, and therefore have not needed to think of the crime in a progressive or evolving way.\textsuperscript{163} Since the Rome Statute treats the other “customary” crimes, such as crimes against humanity, in an extraordinarily progressive fashion, it is appropriate to advance the definition of aggression, including not only traditional forms of aggression, such as military occupation, but evolving methods as well.\textsuperscript{164} In its 2005 report, the Working Group notes simply that among its state delegations there exists a considerable

\textsuperscript{155} Id.
\textsuperscript{156} See id.
\textsuperscript{157} Discussion Paper, supra note 101, at 3.
\textsuperscript{158} See id. at 3–4.
\textsuperscript{159} See id. at 4–5.
\textsuperscript{160} See Working Group Report, supra note 103, paras. 78, 79; see also Meron, supra note 6, at 8.
\textsuperscript{161} See von Hebel & Robinson, supra note 2, at 80, 81.
\textsuperscript{162} Working Group Report, supra note 103, para. 78; see also Meron, supra note 6, at 8, 11–12.
\textsuperscript{163} See Working Group Report, supra note 103, para. 79.
\textsuperscript{164} Id.; Trahan, supra note 13, at 456.
preference for a generic approach, motivated presumably by a desire to capture the evolving variations of the crime by would-be aggressors.165

III. Analysis

The act of punishing an individual for a violation of criminal law can be justified on a number of philosophical grounds.166 The two dominant rationales for a penal law are the desire for retribution and the utilitarian desire to prevent or deter such violations altogether.167 Viewing the choices facing the Working Group from the perspective of these two rationales, it is possible to distinguish a principled and rigorous formulation for the crime of aggression.168

Retributivists such as Immanuel Kant have stressed the uncompromising demands of justice above all else.169 The guiding principle of this rationale is that the initial evil committed by the criminal must be turned on the actor.170 Thus, the retributivist emphasizes two corresponding requirements: society is under a duty to exact justice and the punishment must be proportional to the crime.171 The failure to punish the wrongdoer is a dereliction of duty that inculpates all of society.172 In the famous formulation of Kant:

Even if a Civil Society resolved to dissolve itself . . . the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice.173

According to this deontological view of crime and punishment, individuals guilty of the crime of aggression must be prosecuted in whichever State they may be found.174 Retributivists would have little patience for political impunity merely because the individual is the

165 See Working Group Report, supra note 103, para. 75.
166 See Fletcher, supra note 24, at 698.
167 See Greenawalt, supra note 23, at 347.
168 See id. at 346.
170 See id. at 196.
172 See id. at 347; see also KANT, supra note 27, at 198.
173 KANT, supra note 27, at 198.
174 See id.
national of one of the Permanent Members of the Security Council. This consideration would seem to support a very liberal triggering mechanism that provides the widest possible jurisdiction. Failure to trigger the jurisdiction of the Court would inculpate the entire international system for allowing the crime to go unpunished. Thus a “three power” or “all powers” approach would best satisfy the need for certain prosecution.

However, the retributivist will also insist that punishment must be deserved—the just desert of the wrong-doer. Political determinations of aggression made by the Security Council or the General Assembly have the potential to be influenced by considerations of self-interest, expediency, or jealousy. This increases the likelihood that individuals will be prosecuted and punished without ever having committed a crime—an inexcusable abuse to the retributivist. Thus, the relatively apolitical courts would seem the best choice to avoid undeserved prosecution.

Utilitarians, however, such as Bentham and Mill, view punishment not as a duty or the exaction of a debt, but as a means to prevent future crimes. Individuals base their actions on whether it results in pain or pleasure and the chief end of society is to maximize the total happiness of the community. Since punishment and criminal trials are costly and reduce the overall happiness of society, they are only justified insofar as they may reduce the future incidence of crime and unhappiness. The utilitarian perspective of the trigger mechanism is thus somewhat conflicted. A broader triggering mechanism—along the lines of the three power model—would result in a maximum degree of jurisdiction. This is a negative in the sense that it may result in unnecessary prosecutions that are painful for in-

175 See id. at 195–96; see also Trahan, supra note 13, at 460.
176 See KANT, supra note 27, at 195–96; see also Working Group Report, supra note 103, para. 71.
177 See KANT, supra note 27, at 195, 198.
178 See Meron, supra note 6, at 14; Working Group Report, supra note 103, paras. 70, 71.
179 See KANT, supra note 27, at 195.
180 See Paulus, supra note 11, at 20–21; Trahan, supra note 13, at 460–461.
181 KANT, supra note 27, at 195.
182 See id.; Working Group Report, supra note 103, para. 68.
183 See Greenawalt, supra note 23, at 351.
184 Jeremy Bentham, Principles of Morals and Legislation, in The Utilitarians 7, 162 (1961); see also Greenawalt, supra note 23, at 350.
185 See Bentham, supra note 184, at 166.
186 See id.
187 See Greenawalt, supra note 23, at 351.
individuals and—more importantly—politically costly for states. The broader triggering mechanism of the three power model, for example, may encourage more prosecutions than are absolutely necessary to deter aggression. Furthermore, by inviting political tensions into the international system, a broad triggering approach may well erode support for international institutions generally, thus countering any positive effects of deterrence. In this respect, the utilitarian perspective would appear to support the least costly, most politically acceptable approach: i.e., determinations made exclusively by the Security Council. Able to protect themselves and their allies through the use of the veto, the permanent members of the Council will ensure that prosecutions proceed only when they do not pose any significant extrinsic cost to the system.

However, according to the utilitarian perspective, the broader triggering mechanism is also a positive outcome because it maximizes the certainty of punishment for crimes, thus providing the most efficacious deterrent to would-be aggressors. The narrower model, triggering prosecutions based only on an Article 39 determination of the Security Council, would inject a degree of uncertainty and impunity into the system as each permanent member of the Council would be perceived as acting to shield its own citizens and those of its allies. Would-be criminals would be invited to seek allies on the Council, precipitating the kinds of cat and mouse games that have plagued the Security Council in the post-Cold War era. Deterrence will be most effective if criminals are reasonably certain that they cannot escape the Court's jurisdiction through political maneuvering. Following this rationale, the triggering mechanism should be vested as broadly as possible, providing maximum accountability. Thus, the pre-determination should not be vested solely in the Security Council, but should be made by any of the U.N. organs.

\[188\] See Bentham, supra note 184, at 166.

\[189\] See id.

\[190\] See id.; see also Paulus, supra note 11, at 34.

\[191\] See Paulus, supra note 11, at 34–35.

\[192\] See id. at 24; see also Meron, supra note 6, at 13.

\[193\] See Bentham, supra note 184, at 172–73; Ferencz, supra note 7, at 342; see also Rubin, supra note 18, at 42.

\[194\] Paulus, supra note 11, at 21–22.

\[195\] See, e.g. Saddam defies the UN, again, Economist, Nov. 8, 1997, at 47.

\[196\] See Ferencz, supra note 7, at 342; see also David J. Scheffer, International Judicial Intervention, Foreign Pol'y, Mar. 22, 1996, at 34.

\[197\] See Bentham, supra note 184, at 172.

\[198\] See id.
With regard to the definition of the crime, the utilitarian argues that a broader definition of the crime will not only prevent the clear cases of aggression, but will deter borderline cases as well.\textsuperscript{199} A strict definition of the crime will merely enable bad actors to conform their conduct to the strict requirements of the law, while contravening its spirit.\textsuperscript{200} A broader definition capable of incorporating the margins of the crime will deter more bad behavior.\textsuperscript{201} As Lord Simon wrote, “those who choose in such situations to sail as close as possible to the wind inevitably run some risk.”\textsuperscript{202}

However, in addition to deterring blameworthy acts, a broader definition may also deter positive action.\textsuperscript{203} States may be less likely to commit peacekeepers, intervene in humanitarian disasters, or defend themselves against apparent threats if they perceive a risk of subsequently being labeled as aggressors.\textsuperscript{204}

Furthermore, one of the many utilities cited for the criminal law is its value as an expressive vehicle.\textsuperscript{205} It thus serves a number of purposes in affirming a shared moral code, in denouncing bad behavior, and in inculcating positive mores and habits.\textsuperscript{206} According to this rationale, the criminal law must serve some expressive purpose.\textsuperscript{207} But a criminal law that imprecisely defines the crime fails to identify or affirm any shared value.\textsuperscript{208}

A retributivist would approach the question of definition from the requirement of notice.\textsuperscript{209} Would-be wrong-doers must have adequate notice that their contemplated actions violate a social norm.\textsuperscript{210} Failure to define the crime with adequate specificity criminalizes acts that are otherwise lawful and condemns law-conforming citizens who

\begin{itemize}
\item \textsuperscript{199} See Trahan, \textit{supra} note 13, at 456; see also Nash v. United States, 229 U.S. 373, 377 (1913) (“[T]he law is full of instances where a man’s fate depends on his estimating rightly . . . some matter of degree.”).
\item \textsuperscript{200} See Trahan, \textit{supra} note 13, at 456.
\item \textsuperscript{201} See id.
\item \textsuperscript{203} See Dawson, \textit{supra} note 19, at 443.
\item \textsuperscript{204} See id.
\item \textsuperscript{205} See, e.g., \textit{Joel Feinberg, Doing and Deserving} 98, 100–105 (1970).
\item \textsuperscript{206} See Johannes Andenaes, \textit{General Prevention—Illusion or Reality}, 43 J. Crim. L., Criminology & Police Sci. 176, 179–80 (1952); see also Ferencz, \textit{supra} note 7, at 358.
\item \textsuperscript{207} See Andenaes, \textit{supra} note 206.
\item \textsuperscript{208} See id.
\item \textsuperscript{209} See, e.g., City of Chicago v. Morales, 527 U.S. 41, 64 (1999).
\item \textsuperscript{210} See Trahan, \textit{supra} note 13, at 456; see also Morales, 527 U.S. at 56.
\end{itemize}
have inadvertently crossed the line. While this principle of criminal law also serves a utilitarian goal—limiting the discretion of courts and enforcers—its primary concern is the indefensibility of punishing individuals who have not made morally blameworthy choices. Thus, domestic courts have traditionally required a sufficient degree of specificity in the description of a crime. Without a morally blameworthy act, retributivists would deny the right of society to exact any retribution, even if it were to serve as a deterrent to others. Despite the preference of the Working Group for a general definition of the crime, this rationale would seem to support a narrower definition, stating clearly the nature and gravity of the prohibited acts.

However, the retributive rationale focuses on the blameworthiness of the act and not on any artificial notion of technical specificity. Acts that are clearly blameworthy are punishable—indeed must be punished—even if they are not spelled out in minute detail or foreseen by the courts. This concern with punishing criminally blameworthy acts would appear to suggest a flexibility of definition. For example, the specificity of the clearly listed acts of Resolution 3314 provides the requisite notice to would-be aggressors. Leaving the list open-ended so that evolving forms of the crime could be included—either by treaty or by prospective declaration of the ICJ—would provide the flexibility to capture evolving forms of aggression.

By considering the crime of aggression in the light of both the utilitarian and retributivist rationales it becomes apparent that the initial determination of aggression must be vested broadly enough to maximize deterrence, yet narrowly enough to protect states from politicized prosecution. The ICJ is the ideal trigger. Unlike the two

211 See e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972).
213 See KANT, supra note 27, at 195.
214 See Morales, 527 U.S. at 56.
216 Working Group Report, supra note 103, para. 75.
217 See Trahan, supra note 13, at 456.
218 See Greenawalt, supra note 23, at 347; see also Shaw v. Director of Public Prosecutions [1962] A.C. 220, 268 (Eng.) (decision of Viscount Simonds) (arguing for the broad power of the common law courts to punish crime, even where the act is not specifically outlawed).
219 See KANT, supra note 27, at 195.
220 See id.; Trahan, supra note 13, at 456.
221 Trahan, supra note 13, at 456.
222 See id. at 457.
223 See Meron, supra note 6, at 13; Scheffer, supra note 196; see also Greenawalt, supra note 23, at 347.
political organs of the U.N. it is able to offer reasoned and demonstrably apolitical decisions.\textsuperscript{225} And unlike the ICC itself it is an appropriate and indisputably competent forum to handle questions of a systemic international nature.\textsuperscript{226} In order to ensure the fairest jurisdictional reach, the ICJ opinion can, consistent with the U.N. Charter, itself be triggered by a request from either the Security Council or the General Assembly.\textsuperscript{227} This comports with both the utilitarian goal of maximizing deterrence and also the retributivist goal of minimizing impunity.\textsuperscript{228}

In order to comport with statutory requirements and the apparent direction of the U.N. Charter, the Security Council should be vested with the primary responsibility for determining when aggression has occurred.\textsuperscript{229} However, if the Council proves unable to act, the General Assembly should be able to assume its duties.\textsuperscript{230} Both the Security Council and the General Assembly—by proxy—could either make the determination or refer the issue, as a procedural matter, to the ICJ.\textsuperscript{231} There is no sound justification for making the determination of an external body binding on the ICC and the prosecution should itself be required to establish the act of aggression.\textsuperscript{232} However, since the ICJ offers a thorough discussion of the facts and reasoning of its decisions, a judicial referral may provide persuasive reasoning useful to the prosecution.\textsuperscript{233}

The two rationales additionally provide some guidance in formulating a justifiable definition of aggression.\textsuperscript{234} Retributivist principles require specificity in order to provide adequate notice to would-be aggressors that they are in danger of violating international criminal laws.\textsuperscript{235} Utilitarian analysis adds the value of deterring bad actors who would exploit a rules-based definition by the creation of a more flexible standard.\textsuperscript{236} Thus a specific definition, such as Resolution 3314,

\textsuperscript{224} See U.N. Charter art. 92; Working Group Report, \textit{supra} note 103, para. 68; Trahan, \textit{supra} note 13, at 462–63.
\textsuperscript{225} See Working Group Report, \textit{supra} note 103, para. 68.
\textsuperscript{226} See U.N. Charter art. 92.
\textsuperscript{227} U.N. Charter art. 96, para. 1.
\textsuperscript{228} See Greenawalt, \textit{supra} note 23, at 347.
\textsuperscript{229} See U.N. Charter arts. 24, 39.
\textsuperscript{230} See Uniting For Peace Resolution, \textit{supra} note 131.
\textsuperscript{231} U.N. Charter art. 96, para 1.
\textsuperscript{232} See Working Group Report, \textit{supra} note 103, para. 61.
\textsuperscript{233} See id. paras. 61, 68.
\textsuperscript{234} See Greenawalt, \textit{supra} note 23, at 347.
\textsuperscript{235} See KANT, \textit{supra} note 27, at 195; see also Shaw v. Director of Public Prosecutions [1962] A.C. 220, 281 (Eng.) (decision of Lord Reid).
\textsuperscript{236} See Shaw, [1962] A.C. 220, 268 (Eng.) (decision of Viscount Simonds).
with an open-ended list of illustrative acts would provide both the required notice and maintain the flexibility necessary to meet evolving forms of aggression.\textsuperscript{237} A prospective declaration by the ICJ that a particular act is aggressive would both deter similar conduct in the future and enjoin the actor from continued violation.\textsuperscript{238}

**Conclusion**

The crime of aggression is currently included in the jurisdiction of the International Criminal Court, an increasingly relevant and useful institution in the international community. The Court’s jurisdiction over aggression, however, will only become effective once the member parties of the Court are able to agree on a definition of the crime. Among questions related to the problem, the Working Group on the Definition of Aggression has identified two main conceptual difficulties in reaching an accord: how the Court will know that aggression has occurred between states, and how the definition describes the crime. The Working Group has already identified a number of options for a definition and offered thoughtful debate on both questions. But international legal theorists have yet to analyze the potential crime in the light of the traditional justifications for criminal law. Analyzing the Working Group’s options in the light of utilitarian and retributivist principles yields a useful framework for analysis and offers helpful suggestions towards a principled solution. Allowing both the General Assembly and the Security Council to request an ICJ advisory opinion on the question of whether aggression has taken place accords with both the retributivist principles of accountability as well as utilitarian principles of deterrence and safety from political prosecution. Defining the crime specifically and providing an open-ended list of illustrative acts provides both the prerequisite moral guidelines of the retributivist as well as the flexibility to deter new and evolving forms of aggression.

While it is yet unclear how well the crime may deter the act, the definition of the crime will almost certainly have a profound impact on international law itself. A working definition of aggression will assert more than the mere criminality of the act; it will assert affirmatively, for the first time, that war is no longer an acceptable extension of statecraft, that nations are not powerless to punish, and that—even in the murky legality of the world order—the rule of law will not tolerate impunity for those who bring the world to the brink of war.

\textsuperscript{237} See G.A. Res. 3314, \textit{supra} note 59, Annex, art. 3.
\textsuperscript{238} See, \textit{e.g.}, Keeler v. Superior Court, 470 P.2d 617, 639 (Cal. 1970).