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Why Do International Criminal Tribunals Rarely Prosecute the Crime of Aggression?

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Abstract. The establishment of the United Nations in 1945 and the jus contra bellum regime gave rise to a body of law which outlawed the process of going to war in all conditions other than the generally-accepted self-defense. International criminal tribunals, the most modern incarnation of which is the International Criminal Court, have always adhered to the same vision of an international community, where even statesmen may be held accountable and seemingly ineluctable impunity for atrocities ended. However, the crime of aggression stands out. This paper examines why aggression, once deemed the "supreme international crime" and ipso facto the most fundamental trangression of the United Nations Charter, is now the least prosecuted international crime despite its normative significance. Through analysis of four case studies, it will be demonstrated that great powers, who are always the winners of conflicts if not often outright the aggressors, are able to systematically obstruct prosecution, with obstacles like vague definitions being not merely technical barriers but mechanisms reflecting and preserving power disparity. Justice under the current framework may only be had by the victors.

Keywords: aggression, crime of aggression, International Criminal Court, Rome Statute, international criminal tribunal, impunity, jus ad bellum, victor's justice, Kampala Amendment, great power politics

1. Introduction

Before 1945, international law as we know it today did not exist. States were free to wage war for any reason they deemed just, with no obligation to explain themselves to any broader mechanism and no way to hold leaders accountable for atrocities. The establishment of the United Nations (UN) and the subsequent inception of international criminal tribunals sought to change this paradigm. The fundamental purpose of international criminal tribunals is to touch the untouchable, to convict those whom domestic courts cannot convict, and to end impunity for atrocities. Yet, this mandate remains quite unfulfilled when it comes to the crime of aggression, despite its existence as an ipso facto violation of the Charter of the United Nations at the most basic level. Article 2(4) of the Charter reads: "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." It makes peace the default while aggression creates war, and still, the crime is almost never prosecuted in practice.

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Why, then, is the crime of aggression the least prosecuted international crime? War crimes, crimes against humanity, and genocide do not see this utter lacuna of enforcement. This paper argues that the reason international tribunals such as the International Criminal Court (ICC) rarely prosecute the crime of aggression is that great powers are usually the aggressors and are effective at blocking action. This paper will argue that, in addition to myriad jurisdictional barriers as a symptom, the underlying reason prosecution of aggression is so difficult is that aggressor states always hold the power to block legal action and make successful prosecution vanishingly difficult. To determine this, after reviewing existing literature on the crime of aggression and its history, four keystone case studies will be examined to determine what obstacles exist in the way of prosecution and what may be done to rectify the situation.

2. Literature review

2.1. The "supreme international crime"

Let us first establish the normative significance of aggression. The crime of aggression was once, in the Nuremberg trials of 1945 and 1946, considered the "supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole" [1]. In short, the wrong of aggression is not only that it destroys peace and disrupts sovereignty, but that it causes war and is responsible for the lives of combatants legally lost under the privilege of belligerency, for bringing about a state of affairs in which the thinkable is made unthinkable, as Mégret argued [2]. In this way, aggression may be the greatest human rights violation possible, both in the sense of forcing a nation to reluctantly take up arms in self-defence and in subjecting the aggressor state's own citizens to harm that is theoretically avoidable – it is the crime which allows the permissive regime of international humanitarian law to take effect. Those who conducted the Nuremberg trials understood the significance of this ad bellum crime and how it differed from the scores of in bello crimes which Nazi leaders also committed, such that they found it necessary to coin a novel term for this particular injustice.

Despite this, there has always been a greater focus on the in bello crimes under the Rome Statute. Out of the 71 public indictments issued by the ICC, charges of genocide have been brought against 1 individual, charges of crimes against humanity against 46, and charges of war crimes against 49. The ICC has never, since its establishment in 1998 and the Kampala Amendment taking effect in 2017, prosecuted an individual for the crime of aggression. Yet, the crime of aggression remains very much alive in the 21st century.

2.2. A problem of definition

A general understanding of the crime of aggression is that it is a violation of Article 2(4) and a "crime against peace" in the Nuremberg sense. However, this is hardly a substantial legal definition, and part of the reason the ICC has never undertaken a prosecution of aggression is that its definition is vague and difficult to interpret.

As scholar McCabe noted in an analysis of aggression and humanitarian intervention, among the purposes of the UN as stated in Article 1 is "the suppression of acts of aggression or other breaches of the peace" [3]. Furthermore, Chapter VII Article 39 grants the Security Council the ability to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and accordingly "make recommendations" [4]. Nowhere in the UN Charter is an "act of aggression" specifically defined, so in general it is left to the Security Council to decide on a case-by-case basis

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what does and does not constitute aggression. There then arise a plethora of issues associated with allowing a political body such as the Security Council to make legal decisions.

This was partially amended by the 2010 Kampala Amendments to the Rome Statute, which added Articles 8bis and 15bis to the Statute. The original drafters of the Statute had considered making aggression a core crime of the ICC, but it hadn't been put forth because they anticipated disagreement that would slow down the process.

Although the Annex to the Kampala Amendments, containing several Understandings which aid the legal interpretation of Articles 8bis and 15bis, was not officially added to the Statute, there are some helpful stipulations. In particular, Understanding 7 noted that for a violation to be "manifest", it must meet the thresholds of character, gravity, and scale to be grounds for ICC prosecution; if provably lacking any one of the three factors, it would not constitute a "manifest" violation. Thus, if the case could at all be construed as borderline, it is not "manifest" and therefore not grounds for a prosecution. It is not specified whether cases of humanitarian intervention, where the "aggressor" state may in fact be acting on the responsibility to protect, are considered borderline or aggression at all.

2.3. Restrictions of the rome statute

Apart from the vague definition discouraging prosecutions, there are a number of other factors built into the fabric of the Rome Statute that restrict its ability to act.

For one, states party to the Rome Statute's authority are self-selected. Simmons and Danner assessed that "the ICC will find its strongest support from a coalition of principled, highly accountable, nonviolent states, and states with weak domestic accountability mechanisms." [5] This is because governments with weak or corrupt accountability domestic mechanisms may use cooperation with the ICC as a "hand-tying" mechanism to enhance their credibility at the cost of some sovereignty. Principled and nonviolent countries, in addition, are unlikely to ever have an ICC prosecution brought against a national because they are unlikely to commit crimes which fall under the court's jurisdiction, and if they did, the complementary principle of the Rome Statute [6] almost ensures that they would be able to address the issue in domestic courts first. The states least likely to cooperate, therefore, are those active or recently active in violent conflicts, but with viable domestic accountability mechanisms to prosecute and punish those who commit atrocities. Because the Rome Statute is completely opt-in, aggressor states can simply decide not to commit, which alone dulls the potential deterrent effect of the organisation significantly.

In addition, only 49 states have ratified the 2010 Kampala Amendments which added the crime of aggression to the jurisdiction of the Court [7].. This creates a 'cut-out' in the Statute as a whole, with some countries party to the 'complete' Statute and others only to the non-amended version. There may thus arise a situation in which a national commits a clear and provable crime of aggression, but because their state is not party to the Kampala Amendments, they can only be prosecuted for the other three in bello crimes, making them in a sense more convenient.

Aside from legal restrictions, the ICC is a slow-moving organisation that relies on its member states to enforce its verdicts. It is understandable that crimes on an international scale warrant far more rigorous investigation than domestic ones, and also that the Court's investigations are often hindered by the oft-reluctant local or national authorities it relies on, but it still holds true that the Court's indictments often arrive after the most important part of a conflict has already passed. One egregious example of this was the case of Omar Al-Bashir in 2009. When the only man to be convicted of genocide in the ICC's history landed in South Africa for an African Union meeting, South Africa was obligated to arrest him as a party to the Rome Statute. However, he was allowed to

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leave the country unharassed on the basis that he had immunity as a state leader – reasoning that was later overturned by an ICC decision, by which point it was too late to apprehend Al-Bashir, who remains at large to this day. Members of the African Union have long expressed bitterness at the perceived case-selection discrimination of the ICC Office of the Prosecutor, a sentiment which culminated in an African Union resolution for the organisation's collective withdrawal from the ICC being passed by an overwhelming majority [8]. The resolution was not legally binding, and states did not actually withdraw in an individual capacity, but it shows that African states have long felt targeted by the Court's decisions. The African Union chairman and Chadian President at the time, Idriss Deby, echoed this: "Elsewhere in the world, many things happen, many flagrant violations of human rights, but nobody cares."

Although many African state leaders (including Deby himself) are far from the most morally upstanding defenders of impartial justice one could ask for, it does stand that the ICC, when faced with states unwilling to cooperate, has no means of enforcing its verdicts. Exploration of the ICC's enforcement mechanisms are not within the scope of this paper, but it is possible that there is an indirect link between non-prosecution and enforcement, with the Court only pursuing the most 'obvious' charges like crimes against humanity because they are less morally and politically contentious and are more likely to go over well with parties with the responsibility to enforce arrest warrants.

3. Hypotheses

3.1. The prerequisite

There is one main answer to the question of why aggression is rarely prosecuted, so obvious that it scarcely bears mentioning. It is that most courts do not possess jurisdiction over it. Ever since the Nuremberg Trials, only one other body has been granted the ability to preside over the crime of aggression – the International Criminal Court. And in that case, the Kampala Amendment only came into effect in 2017, so between the Nuremberg trials and 2017, there was no body with jurisdiction at all [9]. Of course, jurisdiction is needed to prosecute. Let's, for now, set that aside.

3.2. The Jus Ad Bellum and the Jus Ad Bello

War crimes, crimes against humanity, and genocide are in bello violations, and can be proven relatively easily through testimony and material evidence. There is also seemingly more 'immediacy' to obvious atrocities, as opposed to the archaic and abstract concept of aggression, which is concerned with not war but the decision to initiate war. It is simply easier to prove in bello crimes, which may incentivise international courts to place more emphasis on them, considering limited time and resources.

There is also the vague definition of Article 8bis. The "manifest violation" threshold is not easy to meet, and the standard for which a crime must meet the threshold is still untested. None of the several possible readings of the Kampala Amendments and their Annexes have been substantiated by the Court, because no prosecution has occurred yet. In combination, this makes it difficult to prove aggression and makes prosecution of the other three core crimes of the Rome Statute more appealing.

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3.3. Cooperation of great powers

The last hypothesis is that prosecution can only occur when it aligns with the interests of great powers, which is not often, as great powers are often the aggressors. Simply put, if the aggressor is a great power and they emerge victorious, prosecution is unlikely. If the aggressor is not a great power, there is a much higher chance of them being brought to justice.

One of the clearer expressions of this dynamic is the role of the Security Council in referring cases to the ICC under Article 15bis. The Court may not proceed with investigations into aggression involving non-party states unless the Security Council refers the situation. However, three of the five permanent members of the Council (the U.S., Russia, and China) are not party to the Statute and can veto any referral that threatens their interests, making the most powerful actors in the international system effectively immune from prosecution. This hypothesis will also be substantiated by more examples in the case studies to follow.

4. Case studies

In this section, four case studies chosen for their normative and legal significance have been selected to represent the variety of ways the crime of aggression can manifest. Because the definition under the Rome Statute is so vast and vague, a number of different situations may fall under its umbrella, so this section seeks to illustrate the plethora of possible 'excuses' for invasion and the lack of clarity in the definition.

4.1. Iraq, 2003

Perhaps the single most widely cited example of unprosecuted aggression is the United States' invasion of Iraq in 2003. Codenamed "Operation Iraqi Freedom", the U.S. led a combined coalition of troops from several nations to invade Iraq, plunging the country into a civil war and leading to the deaths of over 300,000 Iraqis over the course of the ensuing war [10]. At the time, it was said by Congress that Iraq's alleged possession of Weapons of Mass Destruction "poses a continuing threat to the national security of the United States", and the main goals of the invasion were to neutralize this threat and remove the sitting Iraqi President Saddam Hussein [11]. These claims would form the legal basis for the invasion, along with certain resolutions from the Security Council which, it may be argued, granted authority for the invasion. However, it is now widely agreed that these allegations of Iraqi WMDs were false or greatly exaggerated: the Iraq Survey Group's Duelfer report established that Iraq did not possess WMDs when it was invaded, and indeed that Iraq's nuclear program had been terminated in 1991 [12]. In addition, President George W. Bush and his top officials had made at least 935 false statements in the two years following 9/11 about the severity of the threat posed by Iraq, so the WMDs and argument of self-defense can be taken as a mere fig leaf [13].

There are broadly three ways to view the legality of the invasion: that (a) the U.S. was merely legitimately exercising its right to self-defense or acting on the Security Council's authorization, making the whole charade entirely legal; that (b) it did in fact violate Article 2(4), and the stability of international law is worse for it; and that (c) it did in fact violate Article 2(4), but it should be taken as an opportunity to revise the system [14].

In regards the Security Council's supposed approval of the invasion, Resolution 1441, adopted unanimously in 2002, offered a "final opportunity" to Hussein and "warned Iraq that it will face serious consequences as a result of the continued violations of its obligations" [15]. However, this

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can hardly be taken as clearance for a full attack. With the threat not being a legitimate one, it then follows that the invasion could not have constituted an act of self-defense under Article 51 and thus was illegal. Even among contemporary American scholars, there were strong misgivings about the invasion's legitimacy under international law. Contemporary legal scholars Kramer, Michalowski, and Rothe argued in 2005 that the invasion rested on two legally indefensible premises: first, that Iraq posed an imminent threat, and second, that the Security Council had explicitly authorized the use of force [16]. Neither, they argued, held up to factual or legal scrutiny.

But all of this did not enable the ICC, or some other organization, to prosecute. Neither the U.S. nor Iraq was a party to the Rome Statute and the Kampala Amendments, of course, did not exist at the time. This has not changed since. Despite widespread censure from UN member states and legal scholars, as well as little doubt about the illegal nature of the whole affair, the U.S. and the attack's perpetrators faced no consequences. As law professor Glennon commented after the Iraq crisis, "States are not bound by rules to which they do not agree" [17]. That is pertinent not only in regard to the U.S.' flagrant unilateral decision-making pertaining to the use of force but also to the U.S.' non-signature of the Rome Statute. By design, the system of international law is a voluntarist one, with all that that necessarily entails. Referring back to the patterns of self-selection observed in ICC countries, it is consistent that the U.S., a great power engaged in violent conflict but without need for external accountability mechanisms, would not see the need to sign the Rome Statute. Joining the ICC would incur significant sovereignty costs, there being a fairly high chance that it would eventually be forced to surrender a national to the Court, without any of the "hand-tying" benefits that undeveloped countries may reap in turn. In this case, the U.S. being the obvious aggressor state, lost nothing by staying squarely out of the ICC's jurisdiction.

The other option for prosecution would have been the Security Council referring the case to the ICC. It can be assumed that the U.S. would certainly have vetoed any resolution proposing such a thing, though, and seeing as it wasn't party to the Rome Statute, we can theorize that its self-defence justification was at least in part to avoid the Security Council considering its case an act of aggression.

4.2. Kosovo, 1999

The NATO bombing campaign in the FRY in 1999 is another parallel example. Unlike Iraq, where self-defence was used as a legal fig leaf, the justification here was the prevention of mass atrocities in Kosovo, with NATO claiming that the Serbian regime under Slobodan Milošević was engaged in ethnic cleansing against Kosovo Albanians. In a statement released after the campaign, NATO "condemn[ed] these appalling violations of human rights and the indiscriminate use of force by the Yugoslav government". The intervention was not proposed in the Security Council because they feared a likely veto from China or Russia, marking the second military intervention taken by NATO and the first without explicit Security Council authorization. There are a range of opinions on the legality of this intervention (a far greater diversity than with Iraq). The intervention was consistent with the stated intent of several Security Council resolutions, which condemned Milošević's actions, but were unable to achieve meaningful results [18]. In addition, there are many who consider 'genuine' humanitarian intervention, executed by a democratic country to overthrow a despotic and corrupt regime, not to constitute and in some cases to be necessary; for all cases of the use of force to constitute aggression "rapes common sense" [19].

The fundamental question here, therefore, is whether unilateral humanitarian intervention does constitute a crime of aggression. The phrase "illegal but legitimate" has been often mentioned, but this sets a dangerous precedent – if the law prevents the use of legitimate force, the correct course of

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action is to revise that law rather than forsake it entirely [20]. Although it seems intuitively justified, allowing for exceptions to the law can only create greater gaps for impunity. Perhaps, just as with the Iraqis, the need to depose Milošević was real but should have been left to the Albanians' "arduous struggle of self-help", as with the Iraqis.

Regardless of the invasion's legitimacy, there was actually no institution that could have prosecuted NATO had it been necessary. The ICTY did not possess jurisdiction over ad bellum crimes, and there was no precedent for trying a regional organization such as NATO as a whole. However, there are still some insights which may be gained in this case. Firstly, the inherent lack of jurisdiction rather seems to affirm the imprecision surrounding what exactly constitutes aggression, such that courts and international organizations would prefer to cast out the idea entirely and focus on the much easier-to-prove in bello crimes; if not that, it at least shows that in bello crimes are viewed as more worthy of systematic prosecution than their ad bellum counterparts.

4.3. Ukraine, 2022

Unlike Iraq or Kosovo, the Russian invasion of Ukraine in 2022 is a case where its clear character as an act of aggression is both "manifest" and relatively uncontested under international law. On February 24, 2022, the Russian Federation launched a full-scale military invasion of the Crimea region. In a televised address announcing the attack, Russian President Vladimir Putin claimed that the "special military operation" was aimed at the "demilitarization and denazification" of Ukraine, asserting that the country posed a security threat to Russia [21]. Unlike the Iraq case, there was no pretence of Security Council authorization or humanitarian intervention; it is a matter of policy whether the justification of pre-emptive self-defence is sufficient to warrant such drastic military action. The invasion was quickly condemned by a wide majority of UN member states, and the General Assembly passed multiple resolutions affirming the illegality of the Russian aggression [22].

Under the definition of aggression outlined in Article 8bis, Russia's conduct fits squarely, regardless of any vagueness in definition: "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State." Russia is clearly the aggressor; Ukraine did not attack or threaten Russia, and there is no plausible self-defense justification. The invasion was also certainly a "manifest" violation, being serious in character, gravity, and scale, thereby fulfilling the threshold for responsibility under Understanding 7 [23].

Despite the clarity of the legal violation, no Russian official has been charged with the crime of aggression, with the primary obstacle being, once again, jurisdiction. While Ukraine has accepted ICC jurisdiction over war crimes and crimes against humanity as an ad hoc party to the Rome Statute since 2024, thereby allowing a prosecution for those two crimes to be brought against Vladimir Putin, it is not a full state party and has not accepted the Kampala Amendments [24]. Crucially as well, Russia is not a party to either the Statute or the Kampala Amendments, limiting the ICC's jurisdiction: it can only prosecute individuals for the crime of aggression if both the 'aggressor' state and 'victim' state have ratified it, as per the 2017 activating resolution for the Amendments [25].

It is not clear why Ukraine has not ratified the Kampala Amendments in addition to the Statute, or become an ad hoc party. However, to address the issue of prosecution of aggression in particular, the Council of Europe (not affiliated with NATO) has established an ad hoc Special Tribunal for the Crime of Aggression against Ukraine aimed at prosecuting Russian officials for the crime of aggression. This separation of power away from the ICC and established international mechanisms

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may further weaken the ICC's legitimacy as the sole permanent international criminal tribunal. On this, only time will tell, as the Special Tribunal's verdicts are yet forthcoming.

4.4. The nuremberg trials

Of all the situations we may examine in reference to this question, the Nuremberg trials may be the most divorced from the present day, both in terms of time passed and the legal landscape. Despite that, it is still the single example we have of a successful prosecution for aggression. The International Military Tribunal at Nuremberg, held after World War II in 1945 and 1946, was the first time that senior state officials were held individually accountable for crimes committed on behalf of a sovereign state. Most importantly for this paper, it was also the first and only time individuals were prosecuted for what was then called "crimes against peace", now codified as the crime of aggression by the Rome Statute. The Tribunal's jurisdiction was established by the London Charter of 1945, an instrument unilaterally drafted by the Allied powers [26]. The definition of crimes against peace in Article 6(a) of the Charter was novel [27], and pre-1945, it was not illegal in this way to simply go to war under general international law. Many legal scholars later argued that the retroactive application of this standard violated nullum crimen sine lege, though it has been argued in equal measure that the principle of non-retroactivity should be applied less stringently in some international law cases [28].

The Tribunal itself acknowledged the novelty of the charges, but justified its authority by pointing to the Kellogg–Briand Pact of 1928, a multilateral treaty in which signatories, including Germany, agreed to "[renounce] war as an instrument of national policy […] to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated" [29]. The Pact, while lacking enforcement mechanisms, served as the legal basis for criminalizing aggression; the IMT interpreted it as imposing individual criminal liability on leaders who violated its terms, even though no such provision existed in the original treaty text. Thus, from its very inception at Nuremberg, the crime of aggression was swathed in legal ambiguity, emerging from a specific historical moment when the victorious Allies sought to hold the Axis powers accountable not merely for the atrocities of the war, but for starting the war itself. It caused the crime of aggression to be associated ever since with ethnic cleansing and the legacy of Nazi Germany. The crucial phrase "the supreme international crime" comes directly from the Nuremberg Judgment, but it must be noted that this judgement was written by judges appointed by the victors, applying a novel jurisdictional framework they themselves had constructed.

This has led many to characterize Nuremberg as a case of victor's justice. Only Axis leaders were charged; no scrutiny was applied to legally dubious Allied actions such as the firebombing of Dresden or the atomic bombings of Hiroshima and Nagasaki. The uneven application of the principles established at Nuremberg weakens their normative power, and while the UN General Assembly affirmed the Nuremberg principles in Resolution 95 in 1946, no enforcement mechanism for aggression was created in the decades that followed [30]. In this sense, Nuremberg functioned as a unique historical exception rather than a precedent-setting case in international law, with extreme contemporary significance that hadn't been seen prior or since. While it laid the rhetorical groundwork for the crime of aggression, it simultaneously created the conditions for its own obsolescence, and the absence of prosecutions for aggression in the 80 years that followed suggests that the lesson drawn from Nuremberg by subsequent states was not the universality of the crime, but the danger of codifying it. Nuremberg, although known for its legacy of the crime of against peace, had an even stronger humanitarian legacy.

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Despite that, the power of criminalizing aggression cannot be doubted, and until now it has enjoyed undeniable deterrent power.

4.5. Cross-case analysis

Our prerequisite, although obvious from the start, has been proven again to be critically important in successful prosecution of aggression. In the cases of Iraq, Kosovo, and Ukraine, the relevant international bodies did not have the necessary jurisdiction in key ways: for Iraq, the relevant state(s) are not party to the Rome Statute at all; for Kosovo, the ICTY did not possess jurisdiction over aggression; and for Ukraine, the relevant state(s) are not party to the 2010 Kampala Amendment to the Rome Statute. In the single successful prosecution of aggression – the Nuremberg trials – the International Military Tribunal did possess explicit jurisdiction over aggression. We can only speculate on why the ICTY and original Rome Statute preside over in bello crimes only.

The idea that in bello crimes are much easier to prove and thus easier to prosecute has also been reinforced. To prosecute a case of war crimes, genocide, or crimes against humanity, one only needs to gather sufficient testimony and evidence that the crime occurred. On the other hand, aggression is subject not only to interpretation but abuse, and the circularity of its definition in the Rome Statute makes it difficult to ascertain the jus ad bellum. In fact, the sheer muddle of the legal grey area surrounding the definition of the crime of aggression may be a causal factor in its exclusion from tribunals' mandates – perhaps it was not only in Yugoslavia that investigation of the jus ad bellum was deemed too unprecedented and difficult as to be beneficial for the situation, making the focus to turn to the jus in bello. Had the parameters of aggression been more clearly defined, there may be greater impetus to pursue prosecution of it, even where contentious. After all, nowhere is it made clear whether unilateral intervention is aggression – although the Kosovo incident has certainly set a precedent in the negative – or the extent to which self-defense or preemptive self-defense can be considered proportional.

Lastly, the hypothesis that prosecution is only possible if politically viable for a great power has also been supported by the case studies. In Iraq and Kosovo, the aggressing party emerged the victor and also a far more dominant power politically, so a case could not easily be brought against them. The Nuremberg trials are an obvious example of victor's justice for the Allies. The ICTY's political proximity to NATO, even being considered an extension of NATO's diplomatic arm, meant that it would never have pursued a charge against it or at least that it believed there were bigger fish to fry first. It is telling that the 2017 activating resolution of the 2010 Kampala Amendment contains a provision which essentially shields non-ratifying states from prosecution for aggression. It is the only part of the Rome Statute which requires both 'aggressor' and 'victim' to be party for a prosecution to occur, with the other three in bello crimes containing no such stipulation.

All three factors taken together, it seems that the issue of non-prosecution arises not only because of lack of jurisdiction, but because powerful aggressor states can exploit the vague definition of aggression or prevent the crime of aggression from falling under the jurisdiction of criminal tribunals to avoid prosecution. When there is justice, as in Nuremberg, it is only justice for the defeated – and what could be better evidence of the reality of impunity than that?

5. Policy recommendations

As it stands, the definition of aggression in Article 8bis is too vague and, in some readings, cedes interpretive power of the law to the Security Council. The ICC, as a legal rather than political body,

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should have sole interpretive power of what does and does not constitute aggression. In additional, the Rome Statute must clarify that humanitarian intervention without the authorization of the Security Council does constitute an act of aggression, and as does "self-defense" without justification in the way that the U.S. claimed when invading by Iraq.

The December 2017 activating resolution should be amended to lower jurisdictional barriers. As it stands, in its most common reading, the resolution restricts the Court's ability to exercise jurisdiction over crimes of aggression to cases where both the aggressor and victim states are parties to the Rome Statute and have ratified the Kampala Amendments. This provision introduces a jurisdictional asymmetry not present for the other core crimes under the Statute. To create functional parity and widen the Court's jurisdiction, the resolution should be amended so that only one state must be party to the Statute. Such a change could be pursued during the next Assembly of States Parties. As an extension of this, the consolidation of aggression as a prosecutable international crime depends on expanding the community of states willing to accept the Court's jurisdiction. In particular, small and mid-sized states, which are often the most vulnerable to unlawful uses of force, stand to benefit from a functional regime that criminalizes aggression. Because powerful aggressor states have little incentive to sign the Rome Statute and Kampala Amendments, it falls onto smaller states to do so as a preventative measure – the example of Ukraine should be enough proof that it is better to have this legal insurance.

6. Conclusion

As this paper has demonstrated, the consistent failure of international courts to prosecute the crime of aggression is structural, but not incidental. Great powers, often the architects of unjust wars, exploit issues of jurisdiction to shield themselves from accountability, opting out of international treaties such as the Rome Statute and ensuring definitions remain ambiguous. Meanwhile, weaker states face selective enforcement, their leaders not granted the privilege of impunity that great powers enjoy.

Although the Nuremberg trials set a precedent, their legacy is ultimately one of victor's justice rather than a true end to impunity. Unless the ICC and future such tribunals can overcome the political and legal obstacles, justice in international law will forever remain unequal. Otherwise, this "supreme international crime" will continue to be international law's supreme hypocrisy.

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