ACADEMIC RESPONSIBILITY, SELECTIVITY, AND CRIME OF AGGRESSION

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ABSTRACT

Hypocrisy and selectivity are not monopolies of superpowers; all states have been privy to these vices from time to time. However, superpowers (or, more aptly, their statespersons) resort to these in the name of standing for justice; then, they become a stark mockery. This Article seeks to highlight the hypocrisy of many states regarding the terrible aggression of Russia in Ukraine, and how their focus on the potential war crimes and crimes against humanity in Ukraine ignores the core issue. It also demonstrates how often scholars knowingly or unwittingly pander to the chorus and offer a peripheral response to a perennial challenge facing humanity. It argues that this attempt at the low-hanging fruit is misplaced and regressive, and the international legal academe may and should play its part in countering this narrative.

INTRODUCTION

Russia's aggression[1] against Ukraine has been rightly met with near-unanimous condemnation by the international community. The outrageous aggression of a country invading a sovereign nation has shown a complete

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[1] United Nations General Assembly Resolution 3314 (XXIX) states: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition." G.A. Res. 3314 (XXIX), at (Dec. 14, 1974); Article 8 of the Rome Statute defines aggression as:

> [T]he planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

Rome Statute of the International Criminal Court art. 8, July 17, 1998, 3 U.N.T.S. 2187. An academic definition is: "the criminal law corollary to state responsibility for the most serious cases of illegal use of armed force." *see* Stefan Barriga, *The Crime of Aggression*, *in* INTERNATIONAL AND TRANSNATIONAL CRIME AND JUSTICE 350–54 (Mangai Natarajan 2d ed., 2019).

disregard for the laws of the use of force.[2] However, although the overwhelming condemnation is justifiable, the actions for which justice is sought are varied. Indeed, some of the crimes for which the perpetrators are sought to be tried raise some grave moral questions and yet again expose the problem of selectivity in international law or, aptly, the effort to adopt and apply international law selectively.[3] In this context, selectivity means the disparate, inconsistent, and discriminatory manner of applying legal rules and principles against different actors based on economic, geographical, political, or other factors.[4] Selectivity in international law is not a new topic. Some have argued that it is "so familiar as to be almost mundane."[5] However, this Article discusses a type of selectivity that does not often occupy the pages of law reviews.

Any observant eyes would have noticed the disproportionate attention Russia's aggression against Ukraine has received compared to previous acts of aggression against sovereign states by global superpowers. For instance, Ingrid Brunk and Monica Hakimi recently argued that the Russian invasion of Ukraine might be the most significant shock to the global order since the Second World War.[6] Brunk and Hakimi argued that the Russian aggression is unlike other aggressions (such as the United States' operations in Kosovo and Iraq, Libya, and Syria) because it clearly violates the prohibition of forcible annexations of foreign territory and lacks any scope of justification.[7] Similar to the aforementioned scholars, the international community has demonstrated a clear disparity in the treatment of the Russian aggression and previous acts of aggression by powerful states. Such commentators argued that other acts of aggression, like those done by the US, are more justifiable than the Russian aggression.[8] The inordinate treatment received by Ukrainian victims, as compared to victims of other acts of aggression, has also received criticism.[9] However, this Article does not argue that the apparently disproportionate attention to Russia's aggression against Ukraine is of dubious moral authority.[10] It simply argues that this is a propitious

[2] For a commentary on the practice of the use of force rule as contained in the UN charter, see David Wippman, *The Nine Lives of Article 2(4)*, 16 MINN. J. INT'L L. 387 (2007).

[3] Md. Rizwanul Islam, *The Crime of Aggression, Selectivity, and the Legal Academy*, GEO. J. INT'L L. BLOG (Nov. 22, 2022), https://www.law.georgetown.edu/international-law-journal/blog/the-crime-of-aggression-selectivity-and-the-legal-academy/ [https://perma.cc/W4B9-UR8G].

[4] For a similar definition *see*, Lea Brilmayer, *What's the Matter with Selective Intervention*, 37 AR. L. R. 955, 959 (1995).

[5] Asad G. Kiyani, T*he Three Dimensions of Selectivity in International Criminal Law*, 15 INT'L CRIM. JUST. 624, 624 (2017).

[6] Ingrid (Wuerth) Brunk & Monica Hakimi, *Russia, Ukraine, and the Future World Order*, 116 AM. J. INT'L L. 687, 688 (2022).

[7] *Id.* at 689

[8] *Id.* at 690.

[9] Jaya Ramji-Nogales, *Ukrainians in Flight: Politics, Race, and Regional Solutions*, 116 AM. J. INT'L L. UNBOUND 150 (2022). In this piece, the author writes, Europeans, and Global North states more broadly, have welcomed Ukrainians with a generosity that sits in stark contrast to their treatment of most contemporary refugees. This exceptional response demonstrates a key gap in the legal architecture, namely the absence of an international agreement on shared responsibility for hosting refugees. It also highlights a substantive shortcoming in international refugee law: its failure to protect most people fleeing armed conflict. *Id.*

See also UNHCR Chief Condemns 'Discrimination, Violence and Racism' Against Some Fleeing Ukraine, UN NEWS (Mar. 21, 2022), https://news.un.org/en/story/2022/03/1114282 [https://perma.cc/NJH6-727F].

[10] For arguments along that line, see Shivangi Seth, *Putting Putin on Trial to Enforce a Price for the Powerful*, THE INTERPRETER (Apr. 29, 2022), https://www.lowyinstitute.org/the-interpreter/putting-putin-trial-enforce-price-powerful [https://perma.cc/587E-NNKM]; Katrina vanden Heuvel, *America's*

moment for the international academic law establishment to avoid a different kind of selectivity: often not paying enough attention to aggression[11] and rather focusing on war crimes or crimes against humanity that follows aggression. And thus, it is no coincidence that the world has not witnessed any real prosecution of aggression in international law since the Nuremberg and Tokyo International Military Tribunals.

This Article argues that the Russian aggression on Ukraine not only exposes the well-covered selectivity of international law (or more aptly, of some states and international lawyers) but also demonstrates the hypocrisy of many of them that seek to respond to the outcome of an illegal action (the aggression) while ignoring or playing down the wrongful act itself. This contributes to drifting the focus from the important point of outlawing war to a much less important question of conducting war in a *legal* or humane way.[12] However, this Article does not in any way trivialize the terrible aggression, and the devastation and suffering of the people of Ukraine that it has unleashed. Arguably, since the Second World War, the world has witnessed fewer inter-state wars.[13] This is not a coincidence, as the unequivocal prohibition on the use of force and opening up of many avenues for the peaceful resolution of inter-state disputes appear to have played a role in this.[14] If aggression against a state is not condemned unequivocally, the world may regress to a time when resorting to force against another state was not illegal per se and international agreements did not meddle in the vital interests of the High Contracting Parties. As Brierly writes, "a state might go to war for any cause or no cause at all."[15]

In essence, the arguments of this Article are twofold. First, it argues that much emphasis on the compliance on *jus in bello* (the law governing warfare conduct) with very little or scant regard to the *jus ad bellum* (the conditions under which states may resort to war) is not by any means humane. Second, it argues that the international legal academe should be more assertive in condemning aggression for what it is — a grotesque violation of contemporary international law. Assuming that there is enough political will to prosecute Russian leadership to account for their aggression on Ukraine, a pertinent question would be: through what avenue? However, the avenue for a potential trial for aggression in Ukraine has been the subject of

Hypocrisy over Ukraine and 'Spheres of Influence', WASH. POST (Apr. 12, 2002), https://www.washingtonpost.com/opinions/2022/04/12/americas-hypocrisy-over-ukraine-spheres-influence [https://perma.cc/SB5X-ZVUN]; Elena Chachko & Katerina Linos, *International Law after Ukraine: Introduction to the Symposium*, 116 AM. J. INT'L L. UNBOUND 124, 126–29 (2022).

[11] For more on the definition of aggression, see Antonio Cassese, *On Some Problematical Aspects of the Crime of Aggression*, 20 LEIDEN J. INT'L L. 841 (2007). For a detailed discussion on the nature of aggression, see Alexander H. McCabe, *Balancing "Aggression" and Compassion in International Law: The Crime of Aggression and Humanitarian Intervention*, 83 FORDHAM L. Rev. 991 (2014).

[12] Islam, *supra* note 3.

[13] GARY GOERTZ, PAUL F. DIEHL & ALEXANDRU BALAS, THE PUZZLE OF PEACE: THE EVOLUTION OF PEACE IN THE INTERNATIONAL SYSTEM (2016). Of course, the actual number of wars may be very difficult to determine. As one scholar notes, there is a tendency not to formally sign any peace treaties to avoid any potential liabilities for the leaders for war crimes. *See* Tanisha M. Fazal, *The Demise of Peace Treaties in Interstate War*, 67 INT'L ORG. 695, 697 (2013). The author notes that of 64 interstate wars which were fought in the 20th century, only 23 were accompanied by formal peace treaties. *Id.* at 698.

[14] ANNA SPAIN BRADLEY, HUMAN CHOICE IN INTERNATIONAL LAW 89 (2021).

[15] J. L. BRIERLY, THE LAW OF NATIONS 309 (5th ed. 1955).

academic commentary already[16] and discussion of it is beyond the scope of this Article.

I. THE HYPOCRISY, SELECTIVITY, AND THEIR CONSEQUENCES

A. SELECTIVITY OF THE POLITICIANS

Many western leaders have labelled the events in Ukraine either as war crimes or crimes against humanity and vowed to ensure accountability of the perpetrators. For instance, U.S. President Joe Biden stated that Russian President Vladimir Putin "is a war criminal" and called for a "war crime trial" over Russia's actions.[17] If there was a reasonable prospect of an impending negotiation between the Russian and American leadership on the ceasefire, then there could be some justifiable reasons for President Biden's omission of the word "aggression." It is also apparent that he was ready to accuse his Russian counterpart of an international crime for which he needed more evidence to be put to a court. However, he was not ready to mention the more brazen violation of international law: the unwarranted aggression against Ukraine with no apparent justification. Denouncing Russia's aggression against Ukraine requires little evidentiary burden, leading a prominent scholar to describe the case against Russia's aggression a "slam dunk."[18]

Unlike after the Tokyo International Military Tribunal trial, which some argued (including the dissenting Justice Pal) was the victor's trial for an *ex post facto* crime,[19] the current international law has a well-defined regime on aggression.[20] This should mean that despite the very real pragmatic challenges of putting the Russian leadership on the dock, there should be no legal or moral qualm in demanding them to be on the docket. And just as difficult as it may be to put them on the docket for aggression, nearly the same challenges apply to do the same for trying them for war crimes or crimes against humanity. This demonstrates that impracticability is unlikely to drive President Biden's choice of words. Rather, it is plausible that his real reason for the omission aligns with the practices of some former regimes—of the United States and its allies—that have "progressively dismantled the

[16] For a discussion on this, see Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIO JURIS (Mar. 16, 2022), http://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/ [https://perma.cc/22TA-Y7FS]; Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, JUST SECURITY (Mar 10, 2022), https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/ [https://perma.cc/W79B-37R6].

[17] CSPAN (@cspan), TWITTER (Apr. 4, 2022, 7:51 AM), https://twitter.com/cspan/status/1510993467299799051?s=20&t=PPd0vboipexbQWtOtnTx8g [https://perma.cc/7KLB-KE5E].

[18] Sam Wolfson, *'It's a Slam Dunk': Philippe Sands on the Case Against Putin for the Crime of Aggression*, GUARDIAN (Mar. 31, 2022), https://www.theguardian.com/law/2022/mar/30/vladimir-putin-ukraine-crime-aggression-philippe-sands [https://perma.cc/H2H2-49PW].

[19] Tokyo Trial, Dissenting Opinion of Justice Pal, ¶ 42 (Int'l Mil. Trib. For the Far East Jan. 11, 1948), *reprinted in* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL 829 (Robert Cryer & Neil Boister eds., 2008).

To say that the victor can define a crime at his will and then punish for that crime would be to revert back to those days when he was allowed to devastate the occupied country with fire and sword, appropriate all public and private property therein, and kill the inhabitants or take them away into captivity.

[20] For a detailed account on the international legal regime governing the crime of aggression, *see* Stefan Barriga, *The Crime of Aggression*, *in* INTERNATIONAL AND TRANSNATIONAL CRIME AND JUSTICE 350–54 (Mangai Natarajan 2d ed., 2019).

prohibition on the use of force and arrived at a doctrine of preventive war which gives [them] the license to use force almost without limit."[21] Further, it is not implausible that he was not too willing to set a precedent. After all, it is well recognized in international affairs that often state leaders loathe to act when their action may put their fellow leaders under scrutiny either now or in the future.[22]

Even a Nobel Peace Prize laureate, former U.S. President Barack Obama, has said that he believes "the United States of America must remain a standard bearer in the *conduct of war* [not on the abolishment of war]."[23] When there is so much of a desire to be a standard bearer in the conduct of war, there appears to be a clear endorsement of the idea of embracing war. Any fervor to the aggressive use of force also undermines the avenues of peaceful resolution of inter-state disputes. Article 2(4) of the Charter of the United Nations calls upon members to "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."[24] The International Court of Justice ("ICJ") confirmed this to constitute a *jus cogens* norm.[25]

B. SELECTIVITY OF THE ACADEME

Even when there is a call for a trial for aggression, there has also been a call for a special tribunal epitomizing selectivity over the charges brought.[26] The demands for a special tribunal further signals the existence of the

[21] M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SING. Y.B. INT'L L. 19, 47 (2006).

[22] Theodor Meron, *Closing the Accountability Gap: Concrete Steps Toward Ending Impunity for Atrocity Crimes*, 112 AM. J. INT'L L. 433, 448 (2018).

[23] President Barack Obama, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize [https://perma.cc/V3GT-8UL9] (emphasis added).

[24] U.N. Charter art. 2(4). The same tone is also indirectly present in U.N. Charter art. 33, which reads:

(1) The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

(2) The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

[25] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 90 (June 27).

[26] Oona A. Hathway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I), JUST SECURITY* (Sept. 20, 2022), https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/ [https://perma.cc/W6PU-JA4M]; European Parliament Press Release, Ukraine: MEPs Want a Special International Tribunal for Crimes of Aggression (May 19, 2022), https://www.europarl.europa.eu/news/en/press-room/20220517IPR29931/ukraine-meps-want-a-special-international-tribunal-for-crimes-of-aggression [https://perma.cc/WK4K-ERZY]; *Statement: Calling for the Creating of a Special Tribunal for the Punishment of the Crime of Aggression* Against Ukraine, GORDON AND SARAH BROWN, https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf [https://perma.cc/X2NW-M9PW] (last visited Aug. 31, 2023); Murray Hunt, *A Special Tribunal for Putin*, PROJECT SYNDICATE (Mar. 11, 2022), https://www.project-syndicate.org/onpoint/special-tribunal-putin-crime-of-aggression-by-murray-hunt-2022-03 [https://perma.cc/CK2K-B946].

selectivity problem.[27] Of course, there are some exceptions,[28] but they are *exceptions*. Also, there have been far more calls for war crimes and crimes against humanity trials than those for the aggression. Others vaguely assert that Putin needs to be "accountable" for the events in Ukraine without precisely pointing to the aggression.[29] This is exactly where the legal academe needs to play its role in emphasizing that irrespective of the place and interests involved, aggression *is* violence and the leaders who perpetrate it need to be condemned and held legally accountable.

Within a week of Russia's invasion, the International Criminal Court ("ICC") prosecutor, concluded that there was a reasonable basis to proceed with opening an investigation into potential alleged war crimes and crimes against humanity committed.[30] However, he could not act on the crime of aggression because the ICC had no jurisdiction over the Russian aggression, leaving much of the violence and destruction inflicted on Ukrainians completely unaddressed. Indeed, war crimes in Ukraine are the progeny of aggression. Regard should be had to what the Military Tribunal at Nuremberg pronounced: "[t]o initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[31] George A. Finch also nailed the central importance of preventing aggression when he wrote "the prevention of aggression as a breach of the international peace must be the foundation stone upon which the whole structure of international order will have to stand in the future or it will be built upon sand."[32]

As the legal grounds for one state to use force against another increasingly narrow, waging war against another state, except in self-defense, should be illegal. This should give some hope to less powerful states, offering them a sense of security against the unpredictable aggressions from more powerful states. Indeed, the whole international legal edifice on the use of force built after the Second World War was conceived as the best chance for the protection of the weak against the powerful.[33] Failing to hold states legally accountable for the aggressive use of force against another state would defeat the original purpose of the international legal regime. If a disproportionately powerful state determines that the only price of the spoils of war is putting the rank and file of the military on the dock, it may

[27] Heller, *supra* note 16. The selectivity problem identified here is the demand for piecemeal special tribunals limited only to a particular incident of aggression.

[28] *See, e.g.,* Gordon Brown, John Major, Kevin Rudd, & Malcolm Turnbull, *A Tribunal for Putin's War Crimes*, PROJECT SYNDICATE (Mar. 22, 2022), https://www.project-syndicate.org/commentary/tribunal-putin-war-crimes-by-gordon-brown-et-al-2022-03 [https://perma.cc/HH2P-9B3S].

[29] *See, e.g.*, Seth, *supra* note 10.

[30] *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation"*, INT'L CRIM. CT. (Feb. 28, 2002), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening [https://perma.cc/TCP6-SVET].

[31] Int'l Mil. Tribunal (Nuremberg), *Judgment*, 41 AM. J. INT'L L. 172, 186 (1947).

[32] George A. Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT'L L. 20, 26 (1947).

[33] Sornarajah, *supra* note 21, at 21. *See*, *e.g.*, Katrina vanden Heuvel, *America's Hypocrisy Over Ukraine and "Spheres of Influence"*, WASH. POST (Apr. 12, 2022), https://www.washingtonpost.com/opinions/2022/04/12/americas-hypocrisy-over-ukraine-spheres-influence [https://perma.cc/X2N9-K4RQ].

encourage warmongering and spell a huge danger for small states.[34] Allowing this to happen would make the international legal regime a sword for the aggressors rather than a shield for less powerful states.

By making war "humane"—which is an oxymoron—the patent brutality of war has somewhat been less evident; arguably, engaging in aggression in various forms has become easier.[35] In the words of Mónica García-Salmones, "[t]he maxim of 'peace through law' goes, structurally, hand in hand with the maxim of 'war through law.'"[36] This may create a dangerous mirage that as long as war is fought legally by observing the "rules of the war game," it may be unfortunate, but *not* illegal. Scholarly works have even argued that the war can be perceived as a game licensing human beings to kill other human beings in a legitimate manner, albeit in compliance with the rules of the game.[37] Such branding of war, even if meant to highlight the value of international law,[38] is unfortunate because it indirectly legitimizes the idea of opting for war from the outset.

The concept of making war humane can be compared with the mixed martial arts fighting sport of the Ultimate Fighting Championship (the largest mixed martial arts organization in the world). Generally, a person knocking another out with brutal punches and kicks would be considered unacceptable in a "civilized" society. For instance, if someone witnessed a person being punched on the streets of Los Angeles until they became unconscious, they would be severely distressed. However, when organizations like the Ultimate Fighting Championship set rules for punching and kicking and put fighters in a cage, it becomes more acceptable to the viewers. Not only do the viewers accept the brutal fighting that often leaves the fighters bloody, but they also cheer when one fighter knocks the other one out. Setting rules for an immoral act may give the act certain moral legitimacy in the viewers' perception. A similar trend can be seen in movies in which a soldier, who adheres to a "moral code" and fights in a war resulting from their country's aggression, is portrayed as the protagonist. The world is now too familiar with the devastating consequences of "holy" or "just" wars.[39] The international

[34] *See* Sundaresh Menon, *The Rule of Law, the International Legal Order, and the Foreign Policy of Small States*, 10 ASIAN J. INT'L L. 50, 63 (2019). The author writes:

Recent years have seen a global revival of nationalism in the political landscapes of advanced economies. Politicians have campaigned and won on protectionist agendas which have then, at times, been translated into policy. In its wake, some say we have seen something of a "gradual decay of the international order that emerged after World War II" and increasing disregard for the international rule of law, which seems susceptible to being subordinated to the vicissitudes of domestic politics. Countries seem to adopt a zero-sum mentality in eschewing multilateral agreements as "shackles on sovereignty and a burden on economic growth.

[35] SAMUEL MOYN, HUMANE: HOW THE UNITED STATES ABANDONED PEACE AND REINVENTED WAR (2022). The humane war, is, of course, much less lethal for the aggressor, and much more expansive both in geographical scope and duration, which in turn, is more an affront to the peace.

[36] Mónica García-Salmones, *Walter Schücking and the Pacifist Traditions of International Law*, 22 EUR. J. INT'L L. 755, 767 (2011).

[37] JENS DAVID OHLIN, THE ASSAULT ON INTERNATIONAL LAW 171 (2015).

[38] *See generally id.* Ohlin's book is a defense of international law and at this juncture, seeks to demonstrate that how international law does not unduly constrain US government's ability to respond to the threat of terrorism etc.

[39] For more on the just war theory, see David Luban, *Just War and Human Rights*, 9 PHIL. & PUB. AFFS. 160 (1980). The author writes:

> Doctrines of just war have been formulated mainly by the theologians and jurists in order to provide a canon applicable to a variety of practical solutions. No doubt these doctrines originate in a moral understanding of violent conflict. The danger exists, however, that when the concepts

community should remain vigilant against any attempts to legitimize war, even if it has legal justifications.

The selective application of international law is also often at play even in the international criminal courts and tribunals.[40] The International Court of Justice ("ICJ") has actively issued provisional orders against Russia in a case filed by Ukraine.[41] The ICJ's orders use the Genocide Convention in what can be seen as a disingenuous strategy to obtain a legal declaration that Russia must cease its use of force in Ukraine.[42] It is very difficult to imagine that the same could have happened if a case had been brought to redress the aggression on Iraq by the Bush and Blair regime, even if the jurisdiction was indirectly invoked on different grounds. The selective approach to the crime of aggression has been apparent since the inception of the Rome Statute. Powerful states have demonstrated their skepticism about the viability of prosecuting the crime of aggression, inter alia, that such politically laden matters could burden the ICC.[43] These states seemingly ignore that other international crimes defined under the Rome Statute can also carry their own political ramifications. Indeed, nearly all the crimes defined under the Rome Statute could have some political elements.

The U.N. Human Rights Council too has joined the chorus and passed a resolution that it would investigate possible war crimes in Ukraine; though there is a conspicuous absence of the crime of aggression in the scope of its investigation.[44] However, if a non-party state like the US decides to ignore the ICC and removes its signature from the Rome Statute, the hypocrisy of the Council's steps would become more patent.[45] Every time scholars contribute to the chorus of trying for war crimes while ignoring the aggression that triggered it, they risk sending the wrong signal to the public that justice is being meted out. The rank-and-file soldiers who execute the command of their political and military leadership would be on the dock and those who triggered the aggression could remain untouched. This undermines the emancipatory potential of international law, a view effectively articulated by the founding Editor-in-Chief of the American

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of the theory are adopted into the usage of politics and diplomacy their moral content is replaced by definitions which are merely convenient. If that is so, the concepts of traditional theory of just war could be exactly the wrong starting point for an attempt to come to grips with the relevant moral issues.

For a different account of the just war theory, see Nicholas Rengger, *On the Just War Tradition in the Twenty-First Century*, 78 INT'L AFFS. 353 (2002).

[40] John Reynolds & Sujith Xavier, *The Dark Corners of the World*, 14 J. INT'L CRIM. JUST. 959 (2016).

[41] Allegations of Genocide Under the Convention on the Prevention of and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Order, 2022 I.C.J. 211 (Mar. 16, 2022).

[42] *Id.*

[43] Stefan Barriga & Leena Grover, *A Historic Breakthrough on the Crime of Aggression*, 105 AM. J. INT'L L. 517, 519 (2011).

[44] Justine N. Stefanelli, *UN Will Investigate War Crimes in Ukraine*, AM. SOC'Y INT'L L. (May 16, 2022), https://www.asil.org/ILIB/un-will-investigate-war-crimes-ukraine [https://perma.cc/E596-3NRM].

[45] For scholarly discussion on the U.S.'s exit from of the Rome Statute, *see* Giogi Bagdavadze, *Russia's Obligation Not to Defeat Object and Purpose of Rome Statute of the International Criminal Court*, 79 J.L. POL'Y & GLOBALIZATION 211 (2018); Luke A. McLaurin, *Can the President "Unsign" a Treaty? A Constitutional Inquiry*, 84 WASH. U. L. REV. 1941 (2006); John R. Worth, *Globalization and the Myth of Absolute National Sovereignty: Reconsidering the "Un-signing" of the Rome Statute and the Legacy of Senator Bricker*, 79 IND. L.J. 245 (2004).

Journal of International Law: "law, not force, should rule the world."[46] Even if this idealistic vision may remain elusive, at the very least, those who inflict unbearable sufferings should be made aware that there is law on *how* to rule the world. Moreover, condoning aggression like that perpetrated by Putin further encourages the dismemberment of neighboring states on flimsy grounds.[47] To condemn such action, one has to condemn the very aggression itself, not only the war crimes or crimes against humanity that are mere offshoots of the aggression.

C. THE ROLE OF LEGAL ACADEME IN THE FACE OF SELECTIVE APPROACH TO AGGRESSION

In the ruptured international community and current state-centric international legal order, it is nearly impossible to see that the leaders of the "great powers" would be subject to accountability in international courts or tribunals in the near future.[48] However, the political improbability of ensuring legal accountability cannot justify academics ignoring the true origin of the horrific events in Ukraine.[49] It is precisely this void that scholars should aim to fill. Regardless of pragmatic considerations, the laws prohibiting aggression by one state against another are normative standards. A large portion of the moral legitimacy of international law derives from this normativity. Academics ought to be among the first to remind the public and those who hold power of the normative standards of prohibiting aggression. As members of the international civil society, legal scholars' opinions on international law may shape public perception and debate.[50] Of course, that does not imply that the scholarly community is monolithic or speaks with an identical voice on behalf of all of humanity.[51]

Furthermore, such intervention should not be confined to traditional scholarly outlets, whose readership predominantly limited to the scholarly community.[52] Most legal scholars often write for other legal scholars and, more often than not, in parlance inaccessible to non-specialists.[53] While there are some exceptions, like during constitutional or political crisis—such as the January 2021 attack on the US Capitol Hill[54]—or even in relatively less prominent matters like corporate transactions—such as Elon Musk's bid to

[46] *Frederic de Martens*, 3 AM. J. INT'L L. 983, 985 (1909).

[47] Tom Ginsburg, *Article 2(4) and Authoritarian International Law*, 116 AM. J. INT'L L. UNBOUND 130, 132–33 (2022).

[48] Islam, *supra* note 3.

[49] *Id*.

[50] *See* MADELAINE CHIAM, INTERNATIONAL LAW IN PUBLIC DEBATE 3 (2021). In this book, the author illustrates the role international law and its language played in public debates during the Iraq War. She explains "the 2003 debates [regarding the Iraq War] illustrate a move from the use of international legal language as part of collective justifications to the use of international law an autonomous justification for state actions."

[51] For more on the purposes of legal scholarship, *see* Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. R. 221, 230–39 (1988). For an account of international lawyers' role as new world order professionals, agents of humanitarianism, gentle civilizers, and persons of actions, see Anne Orford, *Embodying Internationalism: The Making of International Lawyers,* 19 AUSTL. Y.B. INT'L. L. 1 (1998).

[52] Asit K. Biswas & Julian Kirchherr, *Prof, No One is Reading You*, STRAITS TIMES (Apr. 11, 2015), https://www.straitstimes.com/opinion/prof-no-one-is-reading-you [https://perma.cc/V8FR-GRNH].

[53] *Id.* For many legal topics, that is perhaps natural and acceptable.

[54] Jorge Heine, *The Attack on the US Capitol: An American Kristallnacht*, 1 PROTEST 126–41 (2021).

take over Twitter[55] — these instances are not the norm. Mainstream traditional scholarly writings are valuable, especially on matters such as an illegal armed attack impinging on the territorial integrity of another state. However, scholars should also write for popular outlets with a much wider readership than traditional scholarly outlets. These writings should be diverse and appealing to a broader spectrum of the audience while remaining straightforward enough for non-experts to understand. At one level, arguably, there is some synergy between scholarly and non-scholarly, non-fictional writings, because "knowledge is not, and need not, be shelved only in academic commentaries."[56] Indeed, shorter, more accessible commentaries are not the only avenue to reach the wider public; there can be monographs written in styles that can connect to the wider lay readers.[57]

In this context, one may be reminded of the role scholars play in legal regimes. Their role is not limited to the greater understanding of the laws they study. Indeed, such works often go without receiving scholarly accolades. Although many legal scholars contain their work to a purely positivist approach that is commonly seen in scientific scholarship, their moral duty is also to critique and prescribe. As Edward Rubin rightly argues, "[c]ontemporary legal scholars are now generally aware that their work consists of recommendations addressed to legal decision-makers, recommendations that are ultimately derived from value judgments rather than objective truth."[58] Legal scholars have a duty to uphold the integrity of the international legal community as an institution that calls out and criticizes any deviation from the accepted standards. Through this critical endeavor, scholars play a role in the check-and-balance mechanism that the legal regime aspires to establish.

Scholars are rational actors, and naturally they would be tempted to engage in scholarly writing which accompanies academic accolades and other tangible gains in the form of tenure, promotion, and other visible gains.[59] While such gains are generally absent in non-scholarly writings, they still carry some concrete benefits and have an impact beyond academia—something that is not a regular feat for legal academia. Clinging on to the academic proclivity of publishing seminal articles that often do not reach the wider community may be damaging in a case like this. By maintaining academic rigor, commentaries accessible to the laypersons may be a difficult task. But it is not a task beyond the grasp of the international legal academe, which is shown through the increasing number of blog and opinion essays regularly contributed by international legal academics. Academics are also political beings, regardless of how positivist their academic endeavors claim

[55] Sujeet Indap, *Twitter/Musk Circus Brings Unlikely Celebrity to Law Scholars*, FIN. TIMES (Aug. 12 2022), https://www.ft.com/content/8e1d56b2-ad47-4f6e-ba5b-3e4b106f77cc [https://perma.cc/D58R-668E].

[56] Md. Rizwanul Islam, *Synergy Between Op-ed and Academic Publishing*, NEW STRAITS TIMES (May 3, 2016), https://www.nst.com.my/news/2016/05/143116/synergy-between-op-ed-and-academic-writings [https://perma.cc/XBX3-JMVS].

[57] *See, e.g.*, HAROLD HONGJU KOH, THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW (2018); OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (2017). The claim, though, is not that all legal or international legal topics would be amenable to this sort of publicly accessible commentaries.

[58] Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1904 (1988).

[59] *See* Amy Gajda, *Academic Duty and Academic Freedom*, 91 IND. L.J. 17, 35 (2015).

to be. It is nearly impossible for legal scholarship to remain completely descriptive or value-neutral.[60] As supporters of the international law ethos, the international legal academe can play a great role in gathering support for the right cause. After all, supporters of a cause can justify its viewpoint better than most.[61]

At times, the relationship between the international legal academe and governments may be of mutual interest[62] making it harder for the former to critique the latter. For instance, in a country like China, where the state political regime has a strong hold on the academe, and there is often an expectation that scholarship serve state interests, there is likely direct pressure on the academe to avoid positions that conflict with government views, or the academe risks losing the state support that is crucial for research funding and associated benefits.[63] Conversely, there may be pressure on the academe or even direct effort to silence the academe in non-functional democracies.[64] However, even in such a delicate situation, as long as the state is not directly involved in an international conflict, the academe may try to express itself. Alternatively, the academe may simply write nothing that dilutes its academic character and render it as a mouthpiece of the regime. Even silence can be a powerful contribution in this kind of scenario.

One could question the value of such scholarly endeavors. One could argue that a warmongering despotic regime would not be perturbed by scholarly criticism.[65] However, even a titular democratic regime or outright authoritarian regime may not be entirely oblivious to the dictates of the law or scholarly condemnation. Joseph Raz famously stated that it is the nature

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[60] *See* Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1 (2004). The author wrote in a preaching tone to his readers:

> On occasions like this one it is hard to resist speaking directly to young scholars who have not yet joined a doctrinal army. So I close with this appeal to those of you who plan to take up legal philosophy. When you do, take up philosophy's rightful burdens, and abandon the cloak of neutrality. Speak for Mrs Sorenson [a victim of negligence of medicine companies, who has no proof of which company's medicine caused her ailment in Dworkin's hypothetical case] and for all the others whose fate depends on novel claims about what the law already is. Or, if you can't speak for them, at least speak to them, and explain why they have no right to what they ask. Speak to the lawyers and judges who must puzzle about what to do with the new Human Rights Act. Don't tell the judges that they should exercise their discretion as they think best. They want to know how to understand the Act as law, how to decide, and from what record, how freedom and equality have now been made not just political ideals but legal rights. If you help them, if you speak to the world in this way, then you will remain more true to Herbert Hart's [whose account of legality claims to value neutral] genius and passion than if you follow his narrower ideas about the character and limits of analytic jurisprudence. I warn you, however, that if you set out in this way you are in grave danger of being, well, interesting.

Id. at 37.

[61] *See* George W. Dent, Jr., *Toward Improved Intellectual Diversity in Law Schools*, 37 HARV. J.L. & PUB. POL'Y 165, 166 (2014).

[62] *See generally* David W. Kennedy, *A New Stream of International Law Scholarship,* 7 WIS. INT'L L.J. 1 (1988).

[63] Matthew S. Erie, *China and Comparative International Law: Between Social Science and Critique*, 22 CHI. J. INT'L L. 59, 64 (2021). Of course, the same or even inseparably direct nexus may exist between academics acting on behalf of a government office. *See also* Harold H. Koh & Aaron Zelinsky, *Practicing International Law in the Obama Administration,* 35 YALE J. INT'L L. ONLINE 4, 11 (2009); Mathew Y. H. Wong and Ying-ho Kwong, *Academic Censorship in China: The Case of The China Quarterly*, 52 PS: POL. SCI. & POL. 287 (2019).

[64] SCHOLARS AT RISK, OBSTACLES TO EXCELLENCE: ACADEMIC FREEDOM AND CHINA'S QUEST FOR WORLD-CLASS UNIVERSITIES 16 (2019).

[65] *See generally* Islam, supra note 3.

of governments to claim moral legitimacy.[66] No state admits to being governed by immoral principles or lacking moral legitimacy. Even the most moral regimes do not confess to breaking international law or human rights.[67] It is the nature of states to claim that their actions are always morally and legally justifiable. This may partially explain why Russia has (though rather unpersuasively) denied launching any war against Ukraine. Russia's official line has been that it has only launched a special military operation in Ukraine as a sort of pre-emptive self-defense and to protect ethnic Russians in Ukraine and does not have the intention to occupy Ukrainian territory.[68] Assuming *arguendo* that Russia's claim is honest, it is still devoid of any legal basis in contemporary international law as already indicated. It does not authorize any state to launch a military operation in another state except either (1) in self-defense or (2) upon authorization from the UN Security Council or the government of the state in which the military force is sent.[69] The ICJ in *Nicaragua* appears to have laid to rest the option of legally using force on this kind of a flimsy ground by observing that "the Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system."[70]

The argument here is not that a despot would inevitably respond to the prospect of being tried by an international court for its aggression on another state, but the prospect of justice can encourage the victims to stay off vengeance.[71] Indeed, if the prospect of punishment could eliminate the commission of crimes, then there would perhaps be no crime committed. The U.N. Charter provisions would indicate that the effort to prevent an aggression is purely a political task, not a legal or academic task. International law offers scholars tools that can be used to serve as "a moral guide and strategic asset" for just causes.[72]

The role of academics could be to hold a sort of trial in the public court with the hope of impending response of the electorates. This could not only be relevant for the aggressor but also allies of the aggressor in other states who may be beholden to the aggressor for economic or strategic reasons. For

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[66] Joseph Raz, *The Law's Own Virtue*, 39 OXFORD J. LEGAL STUD. 1, 5 (2019). Raz wrote:

> Well, governments are constituted by law and, in creating them, the law, explicitly or implicitly, identifies their purposes. It is in their nature, as governments, that they ought to follow and apply the law, though the law may create exceptions, exempting governments from having to obey some laws. Why is it a virtue of governments to obey the law? Remember that, by its nature, the law claims to possess moral legitimacy and, by their nature, governments are the laws' instrument for their application and development.

Id.

[67] *See* Md. Rizwanul Islam, *Is the Doomsday of International Law Looming around in the Twenty-First Century?: A Response to the Sceptics of Efficacy of International* Law, 78 NORDIC J. INT'L L. 293 (2009).

[68] *Full Text of Vladimir Putin's Speech Announcing 'Special Military Operation' in Ukraine*, THE PRINT (Feb. 24, 2022, 5:18 PM), https://theprint.in/world/full-text-of-vladimir-putins-speech-announcing-special-military-operation-in-ukraine/845714/ [https://perma.cc/75SK-RMN3].

[69] Adil Ahmad Haque, *An Unlawful War*, 116 AM. J. INT'L L. UNBOUND 155 (2022).

[70] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶263 (Jun. 27, 1986).

[71] OHLIN, *supra* note 37. Although even an authoritarian regime often shows signs that it has to somewhat respond to public concern. *See e.g.*, Max Seddon, *Moscow Seems to Calm Unrest Over Draft*, FIN. TIMES (Sept. 27 2022).

[72] Haque, *supra* note 69.

this to happen, a formal indictment in an international court would be a potent tool which, even if evaded by the wartime leader wielding popular support of indoctrinated or intimidated electorates, could lead to gradual seclusion from much of the rest of the world and eventual diminishing of power.[73] But absent that, even the stigmatization of a grave international crime through academic and popular commentaries still holds value. The role of academic works in outlawing war after the First World War may serve as a practical example of what role academic works may play in this.

Pointing to the immorality of war and how ludicrously war legitimizes the brutality of cold-blooded murder, Raymond Robins wrote:

> All wars of aggression or conquest are legal. Why was the Kaiser never brought to trial? Because he is guilty of no crime known to international law. War-making is the legal exercise of sovereignty—"the King can do no wrong." If as an individual citizen I assault and kill a human being I am guilty of murder. If as a king or a diplomat I start a war that kills ten million lads I am guilty of no crime known to the law of nations.[74]

Pointing to the need for outlawing aggressive war, not just for having rules on *regulating* war, S.O. Levinson wrote:

> An interesting volume . . . comparing the code of honor between individuals with that called international law between nations, the Hague Conventions occupying the place of culminating futility in the latter. In one case as the other, we want not laws *of* war, but laws *against* war, just as we have laws *against* murder, not *laws* of murder.[75]

One can squabble that it was not the scholarly writing, but rather the experience of the devastation of the First World War, which gave the impetus to the Kellogg-Briand Pact. While that would factually hold, if the academic focus had been predominantly on mere regulation of war, rather than on outlawing it altogether, the same outcome could have been difficult to achieve.

Academic effort may be choreographed with coordinated campaigns by civil society organizations and may require more public attention.[76] Indeed, history would inform its attentive readers that scholarly works had played a role in combatting injustice when the odds were against them. A reference may be made to the role of relentless writings on anti-slavery that arguably have played a role in the abolition of slavery in the United States.[77] Had the writers been daunted by the apparent widespread acceptance of the existing norms, their writings could not have achieved anything. Similarly, it is well

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[73] Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 29 (2001).

[74] Raymond Robins, *The Outlawry of War-The Next Step in Civilization*, 120 ANNALS AM. ACAD. POL. & SOC. SCI. 153, 154 (1925).

[75] S.O. Levinson, *The Legal Status of War*, 14 THE NEW REPUBLIC: A JOURNAL OF OPINION 171, 172 (1918).

[76] Meron, *supra* note 22, at 443.

[77] *See* EARLY AMERICAN ABOLITIONISTS: A COLLECTION OF ANTI-SLAVERY WRITINGS 1760–1820 (James G. Basker ed., 2005); *cf.* James Lee Ray, *The Abolition of Slavery and the End of International War*, 43 INT'L ORG. 405 (1989).

known that scholarly writings played a pivotal role in the French Revolution. Arguably, condemning aggression and seeking justice in such cases is a more straightforward task than orchestrating monumental tasks, like leading the French Revolution or abolishing slavery. This is because under the contemporary international law, the challenge does not lie in proving the illegality of aggression. Rather, it lies in enforcing the law and, to an extent, widening the scope of international law to ensure the aggressors are held accountable—that is, to ensure that prosecution becomes easier.

Scholarly writing may also play a key role in internalizing a particular rule. The internalizing attitude toward law is termed the "internal point of view" by H. L. A. Hart.[78] To put simply, Hart argued that to take the internal point of view toward a law means to accept the law as a standard of guiding one's conduct. Although one may be tempted to believe that taking an internal point of view toward a law is always a result of the law's moral legitimacy or justifiability, it is not always true. There may be many reasons behind one's acceptance of a law, including, but not limited to, imitation, social pressure, and so forth. Hart clarifies while discussing the reasons behind one taking an internal point of view toward a law:

> But the dichotomy of 'law based merely on power' and 'law which is accepted as morally binding' is not exhaustive. Not only may vast numbers be coerced by laws which they do not regard as morally binding, but it is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so, though the system will be most stable when they do so. In fact, their allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; *or the mere wish to do as others do*. There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so.[79]

Hart rightly pointed out that one may take the internal point of view toward a law simply because others have also accepted the law. Thus, the wide support and promotion of prohibition of aggression from the legal academe may result in the society internalizing it. This can perhaps be done more efficiently through non-academic writings, as discussed previously.

Another potential contribution of international legal academe is through the teaching of international law, and for many diplomats and policy makers, the learning at the tertiary level institutions may well be the only formal

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[78] *See* H. L. A. HART, THE CONCEPT OF LAW 89–98 (Paul Craig ed., 3d ed. 2012). To explain the "internal point of view" in Hart's theory, Scott Shapiro writes in Scott J. Shapiro, *What is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1160 (2006):

> With respect to the practical point of view, there are two attitudes that the insider can take towards the rules: acceptance and nonacceptance. Anyone who accepts the rules has, according to Hart, taken the internal point of view. Anyone who does not accept the rules, either because he is like the bad man and takes the practical, but non-accepting, point of view, or because he is merely observing and hence does not take a practical stance at all, has taken the external point of view.

[79] HART, *supra* note 78, at 203 (emphasis added).

learning of international law that they may ever receive.[80] Even if, in many cases, the teaching and training of international law may take place later on, it is probable that the first teaching of international law in universities would have some imprint in their professional careers.[81] This would appear to confer on international legal academe some power that accompanies great responsibility.[82] This is yet another reason why international legal academe should confront this egregious violation of international law.

International law academics, at times have faced very stark choices of supporting aggressive regimes or standing up to power and sticking to their calling, being ready for what may come.[83] While all superpowers are not functioning democracies, many of them are. Be that or not, scholars generally enjoy greater latitude than judges and diplomats, and it is a function of the scholars to speak the truth in the face of power.[84] It is a duty of the academics to serve the society with the production of knowledge, which is a *raison d'être* for academic freedom that they enjoy.[85] In autocracies like Russia, it may be the 'patriotic duty' of scholars to conform to the official narrative or remain muted. However, scholars from other states who are not facing dire consequences should not have any difficulty in calling aggression what it is and attaching prime importance to its prosecution.

Again, for many academics today, particularly in functioning democracies, the choice for academics is not so stark. This bolsters the case for scholars to invest their intellectual capital in unequivocally condemning aggression and seek a wider embrace of the international courts to try aggression. Academic endeavors for establishing accountability for the aggression may fail, even if the endeavors have been sustained with candor.

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[80] GERRY SIMPSON, THE SENTIMENTAL LIFE OF INTERNATIONAL LAW: LITERATURE, LANGUAGE, AND LONGING IN WORLD POLITICS 4 (2021); Ryan Scoville & Milan Markovic, *How Cosmopolitan Are International Law Professors?*, 38 MICH. J. INT'L L. 119, 121 (2016).

[81] SIMPSON, *supra* note 80.

[82] *See* Anthony T. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 965 (1981), in which the author writes:

> In my view, law teachers not only have a reason to care whether advocacy affects a person's character in the way I have suggested; they have a responsibility-a moral responsibility-to do what they can to prevent the indifference to truth that advocacy entails from hardening into a cynical carelessness about efforts to discover the truth concerning the various aspects of human social life that the law encompasses. It was this responsibility that I had in mind at the outset when I referred to the moral education that forms a part of a law student's training.

See also Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC.. 3, 3 (1991). The author writes:

> Law teachers cannot avoid modeling some version of "the good lawyer"; thus, they cannot avoid teaching ethics. By the very act of teaching, law teachers embody lawyering and the conduct of legal professionalism. We create images of law and lawyering when we teach doctrine through cases and hypotheticals.

See also Norman Redlich, *Professional Responsibility of a Law Teachers*, 29 CLEVELAND STATE L. REV. 623, 624 (1980) ("[I]t is essential that students . . . assume personal responsibility for their advice and actions . . . . Responsibility is taught by the process of being responsible.").

[83] Heiko Meiertöns, *An International Lawyer in Democracy and Dictatorship – Re-Introducing Herbert Kraus*, 25 EUR. J. INT'L L. 255, 256 (2014).

[84] Rashid I. Khalidi, *Edward W. Said and the American Public Sphere: Speaking Truth to Power*, 25 BOUNDARY 2, 161–77 (1998).

[85] Nicholas J. Eastman & Deron Boyles, *In Defense of Academic Freedom and Faculty Governance: John Dewey, the 100th Anniversary of the AAUP, and the Threat of Corporatization*, 31 EDUC. & CULTURE 17, 26–27 (2015).

Still, scholars may take solace in thinking that an academic "is able only to set forth the norms which govern, or ought to govern, social organization. The practical establishment of these norms is a function of statesmen, of legislators."[86] International law and international law academe may serve as a catalyst for fighting for the cause of justice. As Koskenniemi writes "International law will not bring about world revolution. Perhaps no such revolution is possible, or necessary. But it might support just causes in the international world and become an object of progressive political commitment."[87] Without international legal academe playing its due role, the words of international law are a blunted tool in the quest for such justice and progressive direction in global order.

D. THE IMMORALITY OF AGGRESSION: AGGRESSION AS A FORM OF IMPOSITION

Beyond the question of the destruction that aggression entails, it is a tool for nations to subjugate others or for a powerful nation to project its dominance over a weaker nation. This reality alone warrants unequivocal condemnation. As Samuel Moyn observes so poignantly, "[h]umane war is another version of the slavery of our times, and our task is to aim for a law that not only tolerates less pain but also promotes more freedom."[88] When enslaving even just one human being is a crime, there is no reason to ignore the gravity of subjugating the whole population of an entire state. The latter is no less abhorrent than the former. By curtailing the fundamental freedom of people, an aggressive war can be as restrictive, if not more so, than slavery. Unlike slavery, which has impacted individuals and specific groups, launching an aggressive war can curtail the freedom of an entire population.

Those who wish to justify warmongering in both a defensive and offensive nature on the grounds of the "greater good" may try to argue that law can also be a moral activity.[89] However, unless they occupy the same moral plane as absolute pacifists, they are not entitled to introduce the moral issue of war at all.[90] Although they may successfully argue that war is a practical or logical need, it would be illogical to argue that aggression or war can ever be moral. The scope of their justification is inherently limited to logic or pragmaticism, not morality. Walter Mills describes the relationship between war and morality by noting,

> From these difficulties, which confront those who reject the position of the absolute pacifists, those who might be described as absolute bellicists offer a logical, if unattractive, way out. If the cause is just, war is not only licit but morally required; one not only may but must fight for the right, and it follows that any kind of horror or violence that carries some reasonable chance of victory and will more quickly terminate the struggle is morally acceptable. This is the logic of the

[86] L. Kopelmanas, *The Problem of Aggression and the Prevention of War*, 31 AM. J. INT'L L. 244, 257 (1937).
[87] Martti Koskenniemi, *What Should International Lawyers Learn from Karl Marx?*, 17 LEIDEN J. INT'L L. 229, 230 (2004).
[88] MOYN, *supra* note 35, at 325.
[89] Walter Mills, *War as a Moral Problem*, 2 WORLDVIEW MAG., July 1959, at 7–8.
[90] *Id*.

> greater good. It was the logic of those who supported war against what seemed the positive evil of Nazi, Fascist and Japanese aggression; it was also the logic which led such patently ethical men as Truman, Stimson and their advisers to incinerate the innocent non-combatants of Hiroshima in the nuclear fires. As John Cogley observes, most of us still feel that the war on Nazism was a morally justified enterprise—it was better to have fought that evil, even, at the price of a slaughter, than to have acquiesced in it. But many of us still feel qualms about the Hiroshima and Nagasaki bombs, and, indeed, about the equally terrible and indiscriminate Tokyo and Hamburg fire-raids.
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> We recoil from such consequences of the bellicist theory of the greater good, logical though they may be. And we recoil the more because all experience has taught us that no man (or nation) can be trusted unilaterally to determine what is the greater good; no man can be judge in his own cause; no nation in defending its right can be sure that it is not unjustly trampling upon the rights of others; in fighting for what is right against what is evil it cannot know that its values are universal values.[91]

This Article, however, does not argue that war for self-determination is immoral.[92] War for self-determination, by its nature, does not amount to aggression. The question of self-determination arises when the state fighting for self-determination is invaded by another state. It is our understanding that those fighting for self-determination are naturally not the ones initiating aggression. Because of its unique nature, those fighting against colonial powers for self-determination do not suffer from the deficit of morality, which is the theme of this Article.

CONCLUSION

Hersch Lauterpacht has commented that international law should be functionally oriented toward both the establishment of peace between nations and the protection of fundamental human rights.[93] If international legal scholars unaffiliated with any government can embrace their roles as international lawyers and confront the power structure without being labeled as "nationalists" or "lawyers for the state," they would not only render a service to the field of international law, but also to humanity as a whole. The

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[91] *Id.* at 7. *See also* Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986). In a similar tone, to uncover the *jus ad bellum* from the mythical mist of morality or justness the author writes:

> Yet a stable society of sovereign states cannot exist if each is free to destroy the independence of another. Nor can we reasonably contemplate, in the present conditions of power, that either of the superpowers could impose its rule by coercion on the rest of the world or establish a condominium of shared authority over the globe. Their ruling elites are surely aware of the supreme risks to their survival in the event of a major clash of arms. The legal constraints on unilateral recourse to force reflect this reality. They are not solely the product of moral sentiment.

Id. at 145.

[92] For more on self-determination, *see* Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT'L. L. 733 (1995). Avishai Margalit & Joseph Raz, *National Self-Determination*, in GROUP RIGHTS 445, 461 (Peter Jones ed., 2009).

[93] H. Lauterpacht, *The Grotian Tradition in International Law*, BRIT. Y.B. INT'L L. 1, 51 (1946).

Kaiser may or may not be on the dock,[94] but there should be relentless pressure to put him there. Academics or their works may not change the world, but they can be an engineer in changing it or, at the least, trying to make it better. If the law is a weapon of war in the contemporary world,[95] academic writings can be a weapon of persistent condemnation of aggressive war in whatever name it may be waged.

Academics do not rule the world, and they do not wage aggressive war. However, it is undeniable that they historically had the power to shape the world around them through their scholarly contributions. The influence of Enlightenment philosophers like John Locke, Thomas Hobbes, and Jeremy Bentham on the U.S. Constitution, is an ideal example of how influential scholarly writing can be.[96] International law scholars should not be hesitant to denounce acts of aggression, for whatever it is worth. When scholars choose the easier path by focusing on "war crimes" or "crimes against humanity," public confidence in international law is undermined. This would also take the world back to the days of Thucydides: "The strong do what they can and the weak suffer what they must."[97] We may not reach that point with just one or two aberrations, but an accumulation of such may subtly usher in a new norm. It behooves international legal academia to play their due role in condemning aggression. By doing that, international legal academics may play a conscientious role. Academics may not possess the wherewithal to put the aggressor on the dock, but their principled writings may play a significant role in it. Academics should send an unequivocal message that the world needs to enforce laws preventing wars, rather than merely regulating them. The alacrity for the trial of war in a way legitimizes the resort to war. Academics have the opportunity and responsibility to stand in its way.

[94] For a fascinating and in-depth account of the efforts to put the Kaiser on the dock, *see* WILLIAM SCHABAS, THE TRIAL OF THE KAISER (2018).

[95] ORDE F. KITTRIE, LAWFARE: LAW AS A WEAPON OF WAR 1 (2016).

[96] Harlod J. Berman*, The Impact of the Enlightenment on American Constitutional Law*, 4 YALE J.L. & HUM., 311, 313, 324 (1992).

[97] THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR 566–67 (2003).