PROSECUTING THE CRIME OF AGGRESSION AT THE INTERNATIONAL CRIMINAL COURT: LESSONS FROM THE TOKYO TRIBUNAL

MIKAELA EDIGER*

In late 2017, the States Parties to the Rome Statute activated the International Criminal Court's jurisdiction over crimes of aggression. Prosecuting crimes of aggression involves holding states' leaders criminally accountable for illegal uses of force against other states. The Tokyo Trial, where crimes of aggression were last prosecuted over seventy years ago, can provide valuable guidance to ICC prosecutors in this realm. Held in Japan after the Second World War, the Tokyo Trial was a lesser-known counterpart to the Nuremberg Trial in Germany. It is widely considered to have had a null or negative impact and it continues to occupy a troubled position in Japanese discourse around war reconciliation. As a case study in the prosecution of crimes of aggression, the Tokyo Trial shows how war crimes tribunals can interact with the political context of an aggressor state in ways that undermine their own adjudicative function and institutional legitimacy. This Note begins with a comparative overview of how the crime of aggression will be prosecuted at the ICC and how it was prosecuted at the Tokyo Trial. The Note then presents three problems with the prosecution of aggression at Tokyo Tribunal, and traces how they impacted its reception among the Japanese: (1) the prosecution's selection of defendants; (2) its failure to collect adequate evidence and subsequent resort to generalizing arguments; and (3) its tendency to confuse trying individuals for crimes of aggression with trying Japan as a state. After showing how these undermined the Tokyo Tribunal's aims, each section concludes with a suggestion for how prosecutors of the ICC can avoid the problems experienced in Tokyo.

* Mikaela L. Ediger, J.D. 2018, New York University School of Law, M.A. 2015, Waseda University, B.A. 2012, University of Cambridge. I would like to thank Professor Kenji Yoshino of N.Y.U. School of Law for his guidance throughout the development of this Note, and Professor Chikako Ueki of Waseda University for her diligent supervision of the thesis research upon which this Note is partially based. This note was enhanced by the hard work and dedication of the editors of the N.Y.U. Journal of International Law and Politics.

I. INTRODUCTION

On December 15, 2017, the Assembly of States Parties to the Statute of the International Criminal Court (ICC) adopted a resolution that activated the court's jurisdiction over the crime of aggression.[1] Under international law, a state commits an act of aggression if it uses force against another state in a way that contravenes international agreements or customary international law.[2] The idea that states should use peaceful dispute resolution mechanisms before resorting to a use of force is not new—it dates back at least to the Hague Convention of 1899.[3] However, prosecuting the crime of aggression involves holding state leadership criminally responsible for state acts before and during armed conflicts. The idea that leaders can and should be held responsible for these state actions remains controversial. International judiciary bodies prosecuted aggression as a crime only once in history: at the international military tribunals (IMTs) held in Nuremberg and Tokyo after World War II.[4]

---

1. Int'l Criminal Court [ICC] Res. ICC-ASP/16/Res.5 (Dec. 14, 2017).

2. However, the definition of the crime of aggression limits which uses of force will apply. *See infra* Part I Section 2.

3. YUMA TOTANI, THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II 79 (2008).

4. The Tokyo Trial's official name is the International Military Tribunal for the Far East, but hereinafter it is referred to as the Tokyo Tribunal (in reference to the institution) or Tokyo Trial (in reference to the event). In this piece, the term IMTs refers to the international military tribunals held at Nuremberg and Tokyo, while the term *tribunals* refers more generally to institutions with the authority to adjudicate claims after international conflicts.

The Nuremberg Tribunal features prominently in commentary on the ICC's potential prosecution of the crime of aggression.[5] In contrast, commentary generally mentions the Tokyo Tribunal only as an appendage to the Nuremberg Tribunal. This could be because the Tokyo Tribunal has a more troubled legacy than the Nuremberg Tribunal. In Japan, views on the Tokyo Tribunal are polarized: right-wing groups continue to contest the "Tokyo Trial version of history,"[6] while liberals decry the Tribunal's strategic omission of some of Japan's atrocities.[7] In contrast to these strongly-held minority views, a 2006 poll found that the majority of Japanese citizens have little idea of the content of the war crimes trials.[8] The Tokyo Trial failed to allay historical revisionism within Japan, to gain widespread acceptance as a catalyst for war reconciliation, and to make an impact on international criminal law. Given this outcome, it is difficult to argue that the Tokyo Tribunal contributed significantly to long-term peace.

---

5. *See, e.g.*, Jocelyn Getgen Kestenbaum, *Closing Impunity Gaps for the Crime of Aggression*, 17 CHI. J. INT'L L. 51, 61–62 (2016) (comparing the Nuremberg Charter concept of aggression with the ICC definition); Noah Weisbord, *Conceptualizing Aggression*, 20 DUKE J. COMP. & INT'L L. 1, 55–56 (2009) (analyzing Nuremberg's organizational model).

6. HIRO SAITO, THE HISTORY PROBLEM: THE POLITICS OF WAR COMMEMORATION IN EAST ASIA 97 (2017) (describing how one faction of the LDP, Japan's long-ruling conservative party has rejected the "Tokyo Trial version of history" and justified the Asia-Pacific war Japanese resistance to Western domination). In 2013, Japan's Prime Minister, Shinzo Abe, created controversy by commenting that "Class A war criminals are not really criminals," indicating that he rejects the Tokyo Trial's judgment. *Id.* at 129 and note 1. The origins of this view can be traced back to the "Greater Asianist" ideology that took root in Japan in the 1930s. Greater Asianism holds that in the lead-up to war with the United States, Japan's incursions into neighboring territories were undertaken, not to colonize them, but to liberate them from the West in the spirit of Pan-Asiatic solidarity. WAKAMIYA YOSHIBUMI, THE POSTWAR CONSERVATIVE VIEW OF ASIA: HOW THE POLITICAL RIGHT HAS DELAYED JAPAN'S COMING TO TERMS WITH ITS HISTORY OF AGGRESSION IN ASIA 71–73 (1999).

7. TOTANI, *supra* note 3 at 3. Chief among these would be the hush-up of the Imperial Japanese army's medical experimentation at Unit 731. The American prosecutors had information about atrocities committed there. In exchange for turning over their findings to the U.S. authorities, the scientists and doctors responsible were not prosecuted. Liberal scholars have criticized the trial on this basis. TOTANI, *supra* note 3, at 248.

8. MADOKA FUTAMURA, WAR CRIMES TRIBUNALS AND TRANSITIONAL JUSTICE: THE TOKYO TRIAL AND THE NUREMBURG LEGACY 85 (2008).

Some scholars argue that the Tokyo Tribunal failed because it did not adhere to the same principles of legality and due process as the Nuremberg Trial,[9] or because it was controlled by the United States.[10] The Tribunal's procedural failures are well-documented. They include biases on the part of its judges,[11] inadequate resources for the defense,[12] and the imposition of a largely American-style judicial apparatus on a country with different legal traditions and norms.[13] However, recent studies show that that those involved in the procedure of the Tokyo Trial attempted to adhere to contemporary legal standards[14] and to the Nuremberg format both procedurally and substantively.[15] Yuma Totani's work on the Tokyo Tribunal counters the assertion that the United States orchestrated the Trial proceedings.[16] For all the problems with the execution of the trial, structurally, the Tokyo Tribunal was essentially a replica of the Nuremberg Tribunal.

This Note proceeds from the premise that the Tokyo Tribunal's failure is not only a result of structural differences, but

---

9. Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 565 (2006).

10. Jennifer Trahan, *A Meaningful Definition of the Crime of Aggression: A Response to Michael Glennon*, 33 U. PA. J. INT'L L. 907, 912 n.14 (2012).

11. *See* RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 134 (1971) ("There can be no doubt, however, that the categories and assumptions of Nuremburg broke down completely in their application at Tokyo . . . so long as the tribunal was not prepared to consider a verdict of not guilty.").

12. TOTANI, *supra* note 3, at 10.

13. JUDITH N. SHKLAR, LEGALISM: AN ESSAY ON LAW, MORALS AND POLITICS 128 (1964).

14. To Neil Boister and Robert Cryer, "the procedure was dominated by a (deeply) flawed attempt to run a fair trial (by the standards of the day)." NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL 311 (2008).

15. Howard Ball emphasizes that "[t]he IMTFE followed Nuremberg's format, procedurally and substantively." HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE 79 (1999).

16. In her review of policy documents from the time, Totani finds that though the Supreme Commander of the Allied Forces, General MacArthur, had some influence in the initial selection of lawyers and prosecutors, his powers over the trial were largely nominal. The prosecutors and judges usually rebuffed his attempts to intervene in the trial proceedings. TOTANI, *supra* note 3, at 32; *see also* TIM MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS 55 (2001) (supporting the contention that MacArthur intervened on a limited basis).

also a result of the Trial's interaction with the social and political context of early postwar Japan. As a case study in prosecuting leaders for state acts of aggression, the Tokyo Trial provides insight into how the prosecution of crimes of aggression interacts with the political context of an aggressor state, and how that interaction may undermine adjudicative aims. The policymakers, judges, and lawyers that created and participated in the Tokyo Tribunal tried to strike a balance between the aims of meting out justice to the accused and contributing to lasting peace in Japan.[17] Examining the ways in which they failed to strike this balance provides insight into how the ICC can avoid an outcome where the judicial mechanism has a null or negative effect on peacebuilding.

This Note begins with an overview of the rationale for prosecuting the crime of aggression. It then details how the crime of aggression would be prosecuted at the ICC and how it was prosecuted at the Tokyo Trial. In Part III, the Note analyzes the Tokyo Tribunal's interaction with its political context and shows how the judicial mechanism conflicted with concurrent political strategies—resulting in a loss of institutional legitimacy. Specifically, Part III presents three problems with the prosecution of aggression at Tokyo Tribunal, and traces how they impacted its reception among the Japanese: (1) the prosecution's selection of defendants; (2) its failure to collect adequate evidence and subsequent resort to generalizing arguments; and (3) its tendency to confuse trying individuals for crimes of aggression with trying Japan as a state. After showing how these undermined the Tokyo Tribunal's aims, each section concludes with a suggestion for how prosecutors of the ICC can avoid the problems experienced in Tokyo.

II. The Crime of Aggression at the ICC and in Tokyo

A. *The Rationale for Prosecuting Aggression*

Justifications for prosecuting aggression fall into two categories: justice arguments and peace arguments.[18] Justice argu-

17. *See infra* Part I Section 1.

18. Harold Koh, former Legal Advisor to the U.S. Department of State, and Todd Buchwald employ this dichotomy, arguing that the crime of aggression necessarily demands consideration of how to balance the interests of peace and justice. Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 Am. J. Int'l. L. 257, 263 (2015).

ments center on the premise that the leadership of a state should be held responsible for the conflicts that it instigates as well as the often unconscionable acts committed in the course of these conflicts. Peace arguments posit that punishing a subset of a country's leadership for instigating the conflict in the first place has socially beneficial effects for the state and the international community.

The main locus of scholarly controversy concerns the interaction of these two aims; whether they necessarily reinforce each other, or whether certain situations require trade-offs between the two. The ICC's official position maintains that justice in the form of war crimes prosecutions contributes to peace-building. The ICC envisions that its judgments will not only punish perpetrators and instigators of conflicts and war crimes, but also promote peace in post-conflict societies.[19] Scholars have theorized that war crimes tribunals promote peace in several ways: by delineating who within a government was responsible for aggression, which effectively absolves the rest of the government and population;[20] by establishing a record of the conflict, which deters historical revisionism among the populations of aggressor states;[21] and by establishing an international precedent of punishment for leaders who pursue courses of aggression.[22] In addition to the typical deterrent and retributive goals of criminal punishment, the prosecution of crimes of aggression has a communicative or educational aspect of creating consensus on who was responsible for a war

19. Carsten Stahn, *The 'End', the 'Beginning of the End' or the 'End of the Beginning'? Introducing Debates and Voices on the Definition of 'Aggression'*, 23 LEIDEN J. INT'L L. 875, 876–77 (2010).

20. FUTAMURA, *supra* note 8, at 47 (tracing the individualization of responsibility as a rationale for war crimes trials from Nuremberg, to Yugoslavia and Rwanda).

21. *Id.* at 49 (arguing that since Nuremberg, war crimes trials have been considered an appropriate forum for creating a record of events during a conflict).

22. *See* JUTTA F. BERTRAM-NOTHNAGEL, COAL. FOR THE INT'L CRIMINAL COURT, A PLEA TO REINFORCE PEACE: CALLING FOR ACTIVATION OF THE INTERNATIONAL CRIMINAL COURT'S EXERCISE OF JURISDICTION OVER THE CRIME OF AGGRESSION 3–4 (2017), http://www.coalitionfortheicc.org/document/plea-reinforce-peace-calling-activation-international-criminal-courts-exercise-jurisdiction (arguing that the ICC may deter more effectively because of the Court's "stature and . . . principled conceptions.").

or other armed conflict.[23] Proponents of prosecuting aggression at the ICC argue that justice leads to peace—that is, bringing wrongdoers to justice will consequently create a more secure international community.[24]

However, based on the experience of the postwar trials and subsequent international tribunals in Rwanda, Yugoslavia, and East Timor, other scholars question the alleged correlation between international war crimes prosecutions and peace.[25] For example, when a war crimes prosecution begins before the end of a conflict, the timing of the prosecution and the individuals indicted may preclude the possibility of amnesties or other soft reconciliation mechanisms, such as truth and reconciliation commissions.[26] The delineation of responsibility produced by judicial mechanisms is stark. Once drawn, the lines of culpability cannot be redrawn in response to a political shift without compromising the legitimacy of the tribunal, and trying leaders without regard to political circumstances can weaken a post-conflict society's fledgling institutions.[27] Noah Weisbord, a scholar of international criminal law, argues that the judges of the ICC must strike a difficult balance between justice and peace when prosecuting aggression.[28] Rather than assuming justice produces peace, Weisbord argues the ICC's judges and prosecutors should tailor their judgments on aggression to the conflict at hand.[29]

---

23. FUTAMURA, *supra* note 8, at 58.

24. For example, through deterrence of other would-be war criminals. *Id.* at 4.

25. *See* Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5, 5 (2003) ("[T]he prosecution of perpetrators of atrocities according to universal standards—risks causing more atrocities than it would prevent . . . .").

26. *See* Noah Weisbord, *Judging Aggression*, 50 COLUM. J. TRANSNAT'L L. 82, 86–87 (2011) (discussing the difficulties of prosecuting war crimes without disrupting extra-judicial attempts to resolve disputes).

27. *See* Snyder & Vinjamuri, *supra* note 25, at 14–15 (arguing that in nations in which institutions are weak, the decision to try members of the former regime should be weighed against the possibly adverse effects on the state's institutions).

28. *See* Weisbord, *supra* note 26, at 109–10 (arguing for a more nuanced understanding of the relationship between peace and justice).

29. *Id.*

B. *Institutional Structure of the Tokyo Tribunal and the ICC*

The legal basis for holding the Tokyo Tribunal emerged from the terms of Japan's surrender to the Allies, formally signed on September 2, 1945. When Japan signed the Potsdam Declaration, it recognized the right of the Allies to try Japanese individuals as war criminals.[30] Many war crimes tribunals occurred across the territories that Japan had formerly occupied, but the Tokyo Tribunal, held in central Tokyo and open to spectators, was the largest and most public of these events.[31] The Tokyo Tribunal aimed to hold individuals responsible not only for Class B and C war crimes—crimes committed against civilian populations and prisoners of war—but also for crimes related to the waging of aggressive war, or Class A war crimes.

The legal basis for criminalizing aggression has its roots in a series of international conventions. The Hague Convention of 1899 obligated states to seek peaceful solutions before resorting to force.[32] The Covenant of the League of Nations of 1919 aimed to prevent recourse to war during international disputes.[33] The Kellogg-Briand Pact of 1928 likewise condemned and renounced recourse to war.[34] Japan signed and ratified all of these treaties.[35] By the time of the Nuremberg

---

30. Article 10 of Annex II of the Potsdam Declaration reads in part, "[w]e do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners." Berlin (Potsdam) Conference, July 17–August 2, 1945, *in* A DECADE OF AMERICAN FOREIGN POLICY: BASIC DOCUMENTS: 1941-49, at 39–40 (1950).

31. TOTANI, *supra* note 3, at 8–10, 22.

32. "In case of serious disagreement or conflict, before an appeal to arms, the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers." Pacific Settlement of International Disputes (Hague, I) tit. II, art. 2, July 29, 1899, 32 Stat. 1779, T.S. No. 392.

33. League of Nations Covenant art. 10 ("The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.").

34. Renunciation of War as an Instrument of National Policy arts. I, II, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (entered into force July 24, 1929).

35. Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War

Trial, the Allies argued that the prohibition on the use of force was customary international law, though the defense at both Nuremberg and Tokyo criticized the tribunals for enforcing *ex post facto* law given that state acts of aggression had never been prosecuted as a crime.[36]

The Tokyo Tribunal consisted of judges and prosecutors from eleven countries, including those that had secured Japan's surrender—Britain, China, the United States, and the Soviet Union—and allies of the British and American forces: Canada, Australia, New Zealand, France, the Netherlands, India, and the Philippines. In accordance with the Tokyo Charter, which was modeled after the Nuremberg Charter,[37] each of these countries sent one judge and one prosecutor.[38] The defense consisted of a team of Japanese lawyers for each defendant, assisted by around twenty American lawyers.[39] In response to difficulties coordinating the international prosecution at Nuremberg, the Far Eastern Commission,[40] decided that at Tokyo an International Prosecution Section would be led by a single chief prosecutor. The American prosecutor, Joseph Keenan, filled this role.[41]

The prosecution investigated a group of approximately one hundred Class A suspects, who were held at Sugamo prison.[42] They indicted twenty-eight Class A suspects.[43] Of

---

on Land. The Hague, 29 July 1899., List of States Parties, INTERNATIONAL COMMITTEE FOR THE RED CROSS, available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=150 (listing Japan as a state party to the Hague Convention); THOMAS W. BURKMAN, JAPAN AND THE LEAGUE OF NATIONS: EMPIRE AND WORLD ORDER 1914-1938 xi (2008) (Japan joined the League of Nations in 1920 as one of forty-two charter members); Kellogg-Briand Pact, YALE LAW SCHOOL AVALON PROJECT, available at http://avalon.law.yale.edu/20th_century/kbpact.asp (listing Japan as having signed and ratified the Kellogg-Briand Pact).

36. TOTANI, *supra* note 3, at 84–85.

37. *Id.* at 28.

38. *Id.* at 10. Most countries sent a team consisting of one lead prosecutor and accompanying staff, but some simply sent one prosecutor. *Id.* at 18.

39. *Id.* at 10.

40. The Far Eastern Commission was the highest international decision-making body that authorized policies to direct the occupation of Japan. It was comprised of representatives from all Allied powers. *Id* at 28.

41. *Id.* at 29.

42. *Id.* at 62.

43. *Id.* at 64.

these, there were ten civilians: nine career bureaucrats and one author.[44] There were fifteen army officers of the rank Field Marshal, General, Lieutenant General, and Colonel, and three naval officers of the rank Admiral and Vice Admiral.[45] Of the indictees, two died of natural causes during the trial, and the tribunal declared one unfit to stand trial, reducing the total number of defendants to twenty-five.[46] The prosecution's case lasted from June 4, 1946 to January 24, 1947.[47] The defense presented their case between February 24, 1947 and January 12, 1948.[48] The trial adjourned on April 16, 1948[49] and delivered its judgment from November 4–12 of that year.[50] The judgment comprised a majority opinion signed by eight judges, two dissenting opinions from judges who signed the majority opinion, and three separate opinions.[51] Seven defendants received death sentences, and the remaining eighteen received prison terms.[52]

It took nearly twenty years for the international community to grant the ICC the power to prosecute the crime of aggression, more than seventy years after it was first prosecuted at the postwar tribunals. The subject matter jurisdiction of the ICC in the Rome Statute, adopted in 1998, initially included the crime of aggression.[53] At that time, the competence of the ICC to prosecute aggression depended on two future determinations: (1) the adoption of a definition of aggression, and (2) a delineation of the circumstances in which the ICC could ex-

---

44. *Id.*

45. *Id.*

46. *Id.*

47. Yuma Totani, *The Case Against the Accused, in* YUKI TANAKA ET AL., BEYOND VICTOR'S JUSTICE? THE TOKYO WAR CRIMES TRIAL REVISITED 147, 152 (2010).

48. *Id.*

49. Ann Trotter, *Justice Northcroft (New Zealand) in* YUKI TANAKA ET AL., BEYOND VICTOR'S JUSTICE? THE TOKYO WAR CRIMES TRIAL REVISITED 81, 89 (2010).

50. Totani, *supra* note 47 at 152.

51. *Id.*

52. THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST IN TWENTY-TWO VOLUMES 854–858 (R. J. Pritchard & S. M. Zaide ed., 1981). *See also id.* at 770-853 (giving the Tribunal's detailed findings on the guilt of each accused).

53. Rome Statute of the International Criminal Court art. 5(1)(d), July 17, 1998, 2187 U.N.T.S. 3.

ercise jurisdiction.[54] The crime of aggression has always been controversial, and its inclusion in the Rome Statute is one of the primary irritants in the troubled relationship between the United States and the ICC.[55] During the 2010 Review Conference in Kampala, the States Parties to the ICC finally reached agreement on both a definition of aggression and the ICC's jurisdiction over it.[56] The States Parties set the ICC's jurisdiction over aggression to activate upon agreement after January 1, 2017.[57] The States Parties met at the United Nations from December 4 through 14, 2017, and again voted to activate the ICC's jurisdiction.[58]

At the ICC, jurisdiction over an act of aggression can be triggered in three ways: referral by a state party, referral by the Security Council, or *proprio motu* (by independent action of the ICC).[59] Leaders of nations that are not parties to the ICC cannot be prosecuted for aggression unless the Security Council refers the situation under Article 15 *ter*.[60] There are some differences in the investigation procedure based on whether it was triggered by Article 15 *bis*, which covers situations referred by state parties or by the prosecutor acting *proprio motu*—or by Article 15 *ter*, where jurisdiction comes from a Security Council referral. In the case of State Party referrals and investigations *proprio motu*, the prosecutor must first establish whether the Security Council has determined that there has been an act of aggression.[61] If the Security Council makes such a determination, the prosecutor can proceed with the investigation. If, six months after having been notified by the prosecutor, the Security Council has not made the determination, a Pre-Trial

54. *Id.* at art. 5(2).

55. Koh & Buchwald, *supra* note 18, at 257–59.

56. Rome Statute of the International Criminal Court, Adoption of Amendments on the Crime of Aggression, art. 8 *bis*, June 11, 2010, C.N.651.2010.TREATIES-8 [hereafter Amendments to the Rome Statute].

57. *Id.* art. 15 *bis*.

58. Int'l Criminal Court [ICC] Res. ICC-ASP/16/Res.5, *supra* note 1.

59. *Conditions for Action by the ICC*, Global Campaign for Ratification & Implementation of the Kampala Amends. on the Crime of Aggression, https://crimeofaggression.info/role-of-the-icc/conditions-for-action-by-the-icc/ (last visited Oct. 21, 2018).

60. For a summary of the negotiation process that led to this outcome, see generally Claus Kreβ & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. Int'l Crim. Just. 1179 (2010).

61. Amendments to the Rome Statute, *supra* note 56, art. 15 *bis* (6).

Chamber of the ICC may authorize the investigation to proceed.[62] In the case of Security Council referrals, the prosecutor may immediately start an investigation into the commission of the crime of aggression. In both instances, a determination of an act of aggression by the Security Council is not binding on the ICC.[63] Ultimately, the ICC makes its own findings on the crime of aggression.

Once initiated, the ICC's prosecution of the crime of aggression proceeds similarly to ICC prosecutions of other crimes. First, the Office of the Prosecutor must determine whether there is adequate evidence of crimes of sufficient gravity falling under the ICC's jurisdiction.[64] Then, the prosecution identifies suspects from among the leaders of the aggressor state and requests issuance of an arrest warrant or summons to appear from ICC judges.[65] The ICC relies on its member states to make domestic arrests and transfer suspects to the ICC.[66] Once the suspect is in custody, the judges hold confirmation of charges hearings and decide, based on submissions by the prosecution, defense, and legal representatives of victims, whether there is enough evidence for the case to go to trial.[67] At trial, the prosecution must prove the guilt of the accused beyond reasonable doubt.[68]

C. *The Definition of Aggression*

At the Tokyo Tribunal, Class A war crimes comprised the "planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."[69] Despite minor differences, this defini-

62. *Id.*, art. 15 *bis* (8).

63. *Id.*, art. 15 *bis* (9).

64. *How the Court Works*, INT'L CRIMINAL COURT, https://www.icc-cpi.int/about/how-the-court-works (last visited Oct. 21, 2018).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Charter of the International Military Tribunal for the Far East art. 5(a), Jan. 19, 1946, T.I.A.S. No. 1589.

tion substantively tracks the definition used in the Nuremberg Charter.[70]

For the purposes of ICC prosecution, the crime of aggression is defined as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action . . . which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."[71] Article 8 *bis* further defines what constitutes an act of aggression: "[t]he invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof."[72] Article 8 *bis* further provides examples of armed attacks that constituting aggression.[73]

---

70. The words "declared or undeclared" were added before the word "war" to underscore the fact that a state could not avoid charges of aggression if it did not formally declare war. The word "law" was added to clarify that the crime of aggression was established not only by treaties between states, but also by customary international law. TOTANI, *supra* note 3, at 81.

71. Amendments to the Rome Statute, *supra* note 56, art. 8 *bis*.

72. *Id.* art. 8(1) *bis*.

73. These include:

> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Id. art. 8(2) *bis*.

The definitions used in the postwar tribunals and the definition used by the ICC differ in three ways. First, the ICC definition remedies the vagueness of the Nuremberg and Tokyo definition, which describes crimes of aggression as "waging of a war of aggression" but fails to define "aggression." The ICC definition does this by including examples of aggression and indexing aggression to a violation of the UN Charter.[74] Second, the reference to "war" in the Nuremberg and Tokyo definition is not in the ICC definition, which accords with the postwar practice of avoiding characterizing armed conflicts as wars—instead using terms like incursions, police actions, or border disputes. Third, the ICC definition reaches only persons in senior leadership, defined as those "in a position effectively to exercise control over or to direct the political or military action of a State."[75] This limits the scope of prosecution to the senior-most governmental and military officials.

However, the basis for both definitions is the same. Both are fundamentally based on an international legal prohibition on the use of force in international conflict. The Tokyo definition references aggression in contravention of treaties or customary international law,[76] while the ICC definition refers to aggression in contravention of the UN Charter, most pertinently Article 2(4)—which codifies the customary international legal prohibition on using force against other states.[77]

III. Lessons from the Tokyo Tribunal

A. *Prosecutors Should Carefully Select the Defendants They Charge with Crimes of Aggression*

At the Tokyo Tribunal, the defendants convicted for Class A war crimes were supposed to bear full responsibility for Japan's acts of aggression.[78] However, because there was little apparent rationale for the inclusion of some defendants in the

74. *See* Trahan, *supra* note 10, at 921–23 (arguing that these examples make the criticism of vagueness applied to the Nuremberg definition inapplicable to the ICC's definition).

75. Amendments to the Rome Statute, *supra* note 56, art. 8(1) *bis*.

76. Futamura, *supra* note 8, at 118.

77. U.N. Charter art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . .")

78. Futamura, *supra* note 8, at 116–117.

trial and the exclusion of others, the prosecutors' decision of who to indict and try undermined the Tribunal's legitimacy for the Japanese people and compromised its aims. The ICC prosecution will select defendants from among the political and military leaders of the aggressor state, as the Tokyo prosecution did.[79] Though a more restrictive definition of aggression cabins the scope of prosecution, it is likely that the decision of who to prosecute will nonetheless be a difficult one, requiring insight into that state's civil-military relations and its political structures. Going forward, ICC prosecutors should be aware that selecting an unrepresentative group of defendants will undermine the peacebuilding aims of their enterprise.

Mired in difficult investigations, the prosecution at the Tokyo Trial selected only a limited number of defendants as representative of the key phases of the war.[80] The twenty-eight defendants, selected from around one hundred Class A indictees at Sugamo, were not necessarily the most prominent suspects or even those with the most evidence against them.[81] The prosecutors considered resource and time limitations and did not intend the Tokyo Trial to serve justice to all those with potential involvement in war planning.[82] Arthur Comyns-Carr, the British prosecutor, led an initiative to select the first group of twenty-eight as a "representative group" based on the aim of securing a ruling that planning and waging aggressive war was a criminal act.[83] Around sixty-five other Class A suspects remained at Sugamo prison,[84] including eight members of the Tojo cabinet.[85] The prosecution chose defendants under the assumption that there would be several more Class A trials after the initial trial.[86]

---

79. *See supra* note 71 and accompanying text (defining the crime of aggression for ICC purposes as only committable by those "in a position effectively to exercise control over or to direct the political or military action of a State.").

80. TOTANI, *supra* note 3, at 66.

81. *Id.* at 67–69 (describing how the idea for a "representative group" of indictees prevailed over the idea for merit-based selection criteria).

82. *Id.* at 66–67.

83. *Id.* at 66.

84. Totani indicates that by the end of the selection process, around sixty-five suspects remained in custody. *Id.* at 69–70.

85. *Id.* at 73.

86. *Id.* at 69.

As the initial trial wound to a close two years later, the idealism of the immediate postwar years had subsided and tensions were rising between the United States and the Soviet Union. The occupying forces defunded ongoing democratization efforts—including the war crimes prosecutions—and redirected resources into an anti-communist purge.[87] This policy led to a hasty conclusion of the Tokyo Trial's proceedings.[88] Funding ran out, and most of the suspects still at Sugamo were released without being tried.[89] From the Japanese perspective, the selection of figures for trial appeared somewhat random,[90] and the punishments even more so.[91] It was not clear why these twenty-five men were put on trial and, in seven cases, sentenced to death,[92] while other more prominent figures walked free.[93] Of the eighteen prison sentences, four were served and the remaining fourteen convicted individuals were paroled by 1955.[94] Some of the suspects and paroled convicts

87. *John W. Dower, Occupied Japan and the Cold War in Asia, in* JAPAN IN WAR AND PEACE 155, 186–87 (1993).

88. *Id.* at 187.

89. The budget for war crimes trials in the third quarter of 1948 amounted to $740,000, but only $249,000 was available for continued activity in 1949. MAGA, *supra* note 16, at 128. In late October, 1947, the International Prosecution Section had insufficient evidence on 31 detainees to pursue indictment and released them. TOTANI, *supra* note 3, at 72. While 19 were flagged for potential trial in the future, given the lack of funding for the international prosecution, the responsibility for these trials passed to the Legal Section of the American occupying forces. *Id* at 73. Though the leader of the Legal Section initially planned a trial of the Tojo cabinet, he abandoned the effort because he believed the Tokyo Tribunal judgment did not provide a promising precedent for conviction and released all eight suspects. *Id.* at 76–77.

90. FUTAMURA, *supra* note 8, at 125 and note 51.

91. Kaino Michitaka, *Kyokuto Saiban: Sono Go, in* CHOSAKU-SHU VOL. 3: SAIBAN 1, 276–278 (Ushiomi Toshitaka ed., 1977) (describing how the political ascendance of Mamoru Shigemitsu, a Class A convict who became Prime Minister in 1954, made the Tokyo Trial's punishments appear unnecessary).

92. Hirota Koki, thirty-second prime minister of Japan, was the only civilian sentenced to death. There was great public outcry over the perceived harshness of his sentence. He was convicted for having prior knowledge of the atrocities at Nanjing and failing to try to stop them. FUTAMURA, *supra* note 8, at 70.

93. Notably, the members of Tojo's cabinet. *See supra* note 89.

94. The men paroled by 1955 were known to have committed severe crimes, which made their shortened sentences confusing for the Japanese people. To give three examples, Shunroku Hata was found guilty of atrocities against Chinese civilians, Takasumi Oka advocated the shooting of mili-

reentered public life and regained their political power as though the trial had never happened.[95] This made the whole effort appear pointless, and hindered public acceptance of the trial's authority for attributing blame for the war.[96]

The change in political climate in 1948 also impacted the controversy surrounding Emperor Hirohito's role in the war.[97] General MacArthur ensured that the Emperor was not indicted in 1946, as he feared it would destabilize the country.[98] During the trial, the defense and prosecution collaborated and avoided implicating the Emperor in the trial proceedings.[99] If the trial had only been prosecuting war crimes instead of the broader crime of aggression, excluding the Emperor would have been a simpler matter. However, prosecuting the crime of aggression involved establishing and propagating a narrative of the events that led Japan to war. The Emperor was the symbolic head of the Japanese army and Japanese propaganda underscored that Japan's wars were fought on his behalf.[100] Further, he was one of very few leadership figures involved in government throughout the entire war period, from his succession to the throne in 1926 to the surrender in 1945.[101] Technically, the Tokyo Tribunal could still

---

tary and civilian survivors of Allied ships, and General Teiichi Suzuki reportedly designed slave labor policies in China. MAGA, *supra* note 16, at 135.

95. Kishi Nobusuke of the Tojo cabinet, grandfather of the current Prime Minister, Shinzo Abe, became Prime Minister in 1960. Kaya Okinori, sentenced to 7 years, became Minister of Justice in 1963, and Shigemitsu Mamoru, sentenced to seven years, served as Minister of Foreign Affairs from 1954–1955 and Deputy Prime Minister from 1954–1956.

96. Kaino, *supra* note 91, at 276–278.

97. *See infra* notes 107–111 and accompanying text (describing how rising Cold War tensions led Occupation authorities and Japan's fledgling democratic government to pressure the Emperor to remain silent over his war guilt).

98. MacArthur argued that destroying the Emperor would lead to widespread revolt in Japan. JOHN W. DOWER, EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II 281 (1999). Tim Maga argues that his conclusions were "based . . . more on personal assessment than on any hardcore intelligence information." MAGA, *supra* note 16, at 36.

99. For example, the prosecution sent a message to Tojo Hideki encouraging him to clarify his testimony after he came close to implicating the Emperor. He changed his testimony the following day to avoid such an implication. DOWER, *supra* note 98, at 325.

100. *Id.* at 277.

101. TOTANI, *supra* note 3, at 43.

pass sound legal judgment on the indicted Japanese leaders without the presence of the Emperor, and there was no obligation for his indictment under international law.[102] However, from the perspective of the public, the trial's account of the events leading Japan toward aggressive war seemed incomplete, as the person for whom the military fought was not part of the proceedings.[103] Two of the trial judges wrote separate opinions that disagreed with the judgment on this basis.[104] The decision not to try the Emperor at the Tokyo Trial in 1946 made it difficult for the Japanese to accept that the Tokyo Tribunal fully determined who was culpable.[105] This decision compromised the entire trial's legitimacy.[106]

The prosecutors of the Tokyo Tribunal did not intend to exonerate Emperor Hirohito,[107] but this was the end result of his exclusion, as the prosecution did not otherwise address his role in the war.[108] When the Tribunal handed down the trial judgment, the Emperor considered abdicating or making an apology.[109] However, MacArthur and the U.S.-friendly Yoshida government, elected under the supervision of the Occupation in 1946, encouraged the Emperor's silence. They worried that any statement would put the Emperor in the same category as

---

102. Boister & Cryer, *supra* note 14, at 68.

103. *See* FUTAMURA, *supra* note 8, at 121 ("By immunizing the Emperor, the Tokyo Trial obscured Japanese war responsibility in a rather distorted way.").

104. These judges were Judge William Webb of Australia and Judge Henri Bernard of France. United States v. Araki, Separate Opinion of the President (Int'l Mil. Trib. for the Far E. Nov. 1, 1948), https://www.legal-tools.org/doc/68c6aa/pdf/. United States v. Araki, Dissenting Judgment of the Member from France of the International Military Tribunal of the Far East (Int'l Mil. Trib. for the Far. E. Nov. 12, 1948), https://www.legal-tools.org/doc/675a23/pdf/.

105. For Tsurumi Shunsuke, the Emperor's absence "gave the War Crimes Trial the character of an offering of scapegoats to the altar of the conquerors in the view of the Japanese people both at the time and today." SHUNSUKE TSURUMI, A CULTURAL HISTORY OF POSTWAR JAPAN 1945–1980, at 16 (1987). *See also* FUTAMURA, *supra* note 8, at 124 and note 52 (describing how many of Futamura's interviewees saw those punished as mere scapegoats given the Emperor's absence).

106. Tsurumi Shunsuke asserts that the Emperor's absence was well-discussed among the Japanese and became "a denial of the very logic of the trial for war crimes." *Id.*

107. TOTANI, *supra* note 3, at 56, 62.

108. *Id.* at 62.

109. DOWER, *supra* note 98, at 320.

those convicted for Class A war crimes.[110] They wanted to keep the Emperor in power in order to ensure the stability of the Occupation and Japan's future allegiance to the United States, especially in light of rising Cold War tensions.[111]

The discussion above recognizes that many of the political forces comprising the Tokyo Tribunal's aims were outside the control of the prosecutors. They could not have prosecuted the Emperor in 1946: the Emperor's future was considered a matter to be decided among the Allied governments.[112] They also had no control over the early release of those convicted.[113] They could not have known that the Emperor would never publicly address his role in the war after he was excluded from the Trial, or that the Japanese people or government would not press him to address his war guilt in the ensuing decades. They also could not have anticipated that the Tokyo Trial's funding would be curtailed such that their original "representative group" would be the only group that was tried for Class A crimes.[114] Nonetheless, the initial selection of who to put on trial became an important determinant of the trial's reception.

The far-reaching consequences of the prosecutors' decisions at the Tokyo Trial suggest that the selection of which leaders to prosecute for war crimes matters a great deal. The state's population will be attentive to who is indicted, tried, and punished, and will question the tribunal's legitimacy if the selections conflict with public understanding. Governments are large organizations. Responsibility for crimes of aggression

110. MacArthur's attaché wrote to the Emperor's aide that "[h]is abdication, especially if it coincided with the announcement of war crimes punishments, would, in the eyes of the world, identify the Sire as one of the Military clique." *Id.* at 328.

111. *Id.* at 328–29.

112. TOTANI, *supra* note 3, at 52–54.

113. With the end of the Occupation, the responsibility for those in prison at Sugamo was passed to the Japanese government. FUTAMURA, *supra* note 8, at 76. If the Japanese government recommended parole, and a majority of the other governments involved in the Tokyo Trial approved, the prisoners could be released early. *Id* at 72 and note 34.

114. *Id.* at 69–73 (describing how Chief Prosecutor Keenan initially believed there would be more Class A trials and proceeded with the first trial of the "representative group" on this basis, but changed his mind in late 1947 because he believed that subsequent trials would dilute the impact and message of the Tokyo Trial).

and atrocities could be ascribed to many individuals within a government: the policymakers who conceived of a potential course of action, the leaders who approved or failed to oppose it, or the functionaries or groups that carried it out. As such, it is logistically impossible to prosecute everyone who played a role in acts of aggression. When prosecutors decide which leaders to spare from a trial's scrutiny, it is important they consider how that decision will be perceived. They should consider whether there is a widely acceptable rationale for including some leaders and excluding others. They should also confirm that those selected fairly represent those whose actions led to aggression.

The Tokyo Trial's vacillation between judicial rectitude and political expediency contributed to its lack of perceived legitimacy. As discussed above, when the Emperor was protected in order to stabilize the country, and when Class A criminals were paroled more than a decade before the ends of their sentences, it became clear to the Japanese that the moral imperative of punishment was not absolute.[115] The experience of the prosecutors at Tokyo shows that when prosecuting the crime of aggression, a tribunal's success at delineating responsibility for the conflict in the eyes of the populace may depend entirely on the prosecutors' careful choice of individuals for prosecution.

Some might argue that the intersection of judicial decisions and political actions that undermined the efficacy of the Tokyo Tribunal emerged from the unique and particular circumstances of that Tribunal. However, prosecuting crimes against aggression is fundamentally a politicized venture—if ICC prosecutors assume that future trials will not occur in politicized contexts, they are in danger of repeating the errors that undermined the Tokyo Trial. The Tokyo Trial case provides a precautionary example for ICC prosecutors, cautioning them to take care that the leader or group of leaders they prosecute is adequately and comprehensively representative of those responsible. They should also ensure that any political compromises made outside the trial will not undermine its communicative aim with regard to the population of that state. During the Tokyo Trial, this problem could have been mitigated if the prosecutors had been aware of limitations on the

115. *See supra* notes 93–95 and accompanying text.

funding for the trial and that their original representative group would be the only group tried. If aware of this, the prosecutors could have ensured that the group was representative not only of the phases of the war but of the leaders who were most responsible.

The Tokyo Trial shows that there is no easy way to exclude key political figures from a trial for the crime of aggression.[116] As trials concerning the crime of aggression typically involve assigning culpability for a war, any prominent wartime politician who could be, but is not, indicted may make the population skeptical of the tribunal's impartiality. At Tokyo, the Emperor's exclusion from the Tokyo Trial compromised its aims because his culpability for the war was never addressed in any other setting.[117] The lack of cohesive international message on the Emperor's guilt gave the impression that the trial exonerated him, and compromised its legitimacy.[118] The Occupation forces might have counteracted this impression by giving the Emperor authorization to address the issue. However, this course of action risked diminishing his utility as a stabilizing force. The best lesson for the prosecution at the ICC may be to only prosecute the crime of aggression if the group of defendants is truly representative of those responsible. While exclusion of some leaders may be politically advantageous, prosecutors must be aware of the mixed message that such exclusion sends. Even if aggression cannot be prosecuted against a certain individual, the ICC can still prosecute war crimes and crimes against humanity, neither of which require that the group of defendants represent those who led the state into conflict.

116. *See supra* notes 102-105 and accompanying text (arguing that, considering that the Japanese fought the war on Emperor Hirohito's behalf, his exclusion from the prosecution of crimes of aggression compromised the aims of the Tribunal).

117. *See supra* note 106–110 and accompanying text (arguing that the exclusion of the Emperor from the Trial and his subsequent failure to address his war guilt compromised the Japanese people's perceptions of the legitimacy of the Tokyo Trial).

118. *Id.*

B. *Prosecutors Should Secure as Much Documentary Evidence as Possible and Ensure that their Use of Conspiracy Doctrine Aligns with Available Evidence*

A second lesson from the Tokyo Trial is that any allegations on aggression should mobilize as much documentary evidence as possible of the decision-making process leading to war. This is important for war crimes tribunals' communicative and educational function—the establishment a definitive record of the atrocities that happened during the war and who was responsible. The ICC will conduct its investigations into the guilt of the accused through interaction with the remaining institutions of the aggressor state. These investigations may be difficult in post-conflict societies—the conflict may have destroyed infrastructure, and if the aggressor regime is still fully or partially in power, it will be unwilling to cooperate.[119] At Tokyo, the lack of documents led to prosecutorial strategies aiming at linking all the defendants together in a conspiracy, which was at odds with the public's knowledge of how the defendants at the Tokyo Trial interacted with each other before the war.[120]

It was easier for the prosecutors at Nuremberg to build a case for aggression than it was for the prosecutors at Tokyo. First, the German governmental structure centralized power, and all policy decisions could be attributed to Hitler as Chairman of the Nazi party, and to his cabinet.[121] In Japan, the Tribunal had to consider a longer time period and assess a more complex governmental structure. In order to establish culpability for the war, including the years of Japanese expansionism throughout Southeast Asia, beginning with the Manchu-

119. Kestenbaum, *supra* note 5, at 66.

120. *See* TOTANI, *supra* note 3, at 90 (contrasting the Nuremberg Tribunal's findings of "many separate plans rather a single conspiracy embracing all" [Nazi defendants] with the Tokyo Tribunal's determination of an all-encompassing conspiracy).

121. The Enabling Law of 1933 passed all legislative power in Germany to Hitler and his cabinet, and Hitler's own will became the foundation for all legislation. U.S. HOLOCAUST MEMORIAL MUSEUM: HOLOCAUST ENCYCLOPEDIA, FOUNDATIONS OF THE NAZI STATE, *available at* https://encyclopedia.ushmm.org/content/en/article/foundations-of-the-nazi-state (last visited October 30, 2018).

rian Incident in 1931.[122] Throughout the 1930s, there were frequent changes in power in the Japanese government as a result of shifting political allegiances, military coups, and waves of political assassinations. In 1932, a reactionary group of naval officers assassinated the Prime Minister.[123] From 1928–1945, Japan's cabinet changed seventeen times.[124] After a coup d'etat in 1936, the army and navy gained the power to dissolve the cabinet, which gave them significant power over cabinet decisions.[125] It was not clear to the prosecutors who was involved in which wartime decisions, as a various combinations of military leaders, politicians, bureaucrats, and members of the imperial family made decisions across a fifteen-year period marred by frequent changes in power.[126] Second, while the Allied forces invaded Germany and captured many Nazi governmental documents, in Japan, the government destroyed most of its internal documents in the two-week period between the surrender and the beginning of the Occupation.[127] The prosecution at Tokyo, mistakenly believing that all documents had been destroyed, relied on interrogating war crimes suspects and oral evidence.[128] In reality, there were important governmental records preserved that could have significantly strengthened the prosecution's case.[129]

The prosecution undertook two legal strategies in the face of this information deficit. Since the purpose of the Tokyo Tribunal was to prosecute the new crime of aggressive war, the prosecution selected the original group of twenty-eight de-

122. In Japan, the fifteen-year period from 1931–1945 has become known as the Asia-Pacific War or the Fifteen-Years War. Yuma Totani theorizes that the Tokyo Tribunal was instrumental in establishing this causal link between Japan's colonial expansionism in China and the war with the United States. *Id.* at 97.

123. *5.15 Incident of 1932*, NAT'L DIET LIBRARY, http://www.ndl.go.jp/modern/e/cha4/description02.html (last visited Oct. 21, 2018).

124. FUTAMURA, *supra* note 8, at 88–89.

125. Susan Townsend, *Japan's Quest for Empire 1931–1945*, BBC, http://www.bbc.co.uk/history/worldwars/wwtwo/japan_quest_empire_01.shtml (last updated Mar. 30, 2011).

126. FUTAMURA, *supra* note 8, at 89.

127. It is estimated that as much as seventy percent of the army's wartime records were burned or otherwise destroyed during this period. Edward Drea, *Introduction* to RESEARCHING JAPANESE WAR CRIMES RECORDS: INTRODUCTORY ESSAYS 3, 9 (2006).

128. TOTANI, *supra* note 3, at 32–33.

129. *Id.* at 107.

fendants specifically for that purpose—each defendant having been involved at some stage of Japanese expansionism after 1931. However, no single one of the defendants had been in government throughout the full period from 1931 to 1945. Since the Emperor was not on trial, the prosecutors could not allege that they were all conspiring to wage aggressive war on his behalf.[130]

As an alternative strategy, the prosecutors indicted the civilian propagandist Okawa Shumei.[131] Okawa's political thought advocated for the creation of a Japanese empire in Southeast Asia—however, it did not represent a high-level military strategy or represent official government policy.[132] Regardless, the prosecution alleged that all of the defendants—military and naval leaders, politicians, and bureaucrats—had participated in a single conspiracy to wage aggressive war that stretched over the entire period in question, tied together by Shumei's work.[133] Due to the complexity and opacity of the structures of Japanese government decision-making, the concept of liability through conspiracy was the easiest way to tie all of the defendants together into one criminal plot. Through this strategy, the prosecutors did not have to prove the complex and shifting lines of political authority throughout the 15-year period in question,[134] which would have been difficult given the lack of documentary evidence.

The judges found all twenty-five defendants who stood trial guilty of participation in this conspiracy.[135] Historians argue that it would have been more accurate to find multiple overlapping conspiracies, given the long period of conflict and

---

130. *See supra* notes 97–99 and accompanying text (describing the political factors that led to the Emperor's exclusion from the trial).

131. Symposium, *Proof of a Conspiracy: The Writings of Okawa Shumei*, *in* TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM 109–10 (Chihiro Hosoya et al. eds., 1986).

132. TOTANI, *supra* note 3, at 89 (summarizing legal scholar Okuhara Toshio's view that Okawa's publications were "mere prophecies" that did not represent concrete plans for a conspiracy) (quoting Okuhara Toshio, 3 TOKYO SAIBAN NI OKERU KYODO BOGI RIRON 190–191 (1970)).

133. TOTANI, *supra* note 3, at 82.

134. *See* FUTAMURA, *supra* note 8, at 89 (arguing that the prosecution alleged one conspiracy despite the shifting and incoherent lines of decision-making in the Japanese government, and despite the fact that there was no central decision-making body to which all the defendants belonged).

135. *Id.* at 88.

the frequent changes of government.[136] Further, if the prosecution had more successfully investigated documentary evidence, perhaps by forging strategic connections to overcome government obstructionism, the prosecution could have relied less on a legal theory that necessitated characterizing all of the defendants as conspirators in a single plot.[137]

The idea that all of the defendants were involved in a single conspiracy generated criticism from legal and historical analysts of the trial, both within Japan and abroad.[138] One reason for the criticism stems from the fact that while some high-profile defendants like Tojo Hideki were clearly implicated in acts of aggression, others, like the propagandist Okawa, were not in the inner circles of government. It is unlikely they conspired with top governmental figures.[139] Some Japanese scholars also found it absurd that the defendants, representing various elements of a complex and fractious government, all had the same common plan.[140] The public recognized some of the defendants as political enemies who even confronted each other during the trial. The idea that these political enemies had conspired together to wage war seemed incongruent.[141]

In the future, ICC prosecutors will likely rely on conspiracy doctrine when attributing criminal responsibility to particular leaders within complex political structures.[142] In so doing, it may run into the same problems experienced in Tokyo. In a conflict lasting many years, determining which state committed the act of aggression in the first place may be difficult, and

136. *See id.* at 90 (arguing that if the Tokyo Tribunal had handed down a conspiracy ruling similar to the "many separate plans" finding of the Nuremburg Tribunal, it would have faced less criticism in subsequent years).

137. *Id.* at 107–08.

138. *See, e.g.*, MINEAR, *supra* note 11, at 134.

139. TOTANI, *supra* note 3, at 89.

140. *Id.* at 88.

141. For example, Togo Shigenori, a diplomat, and Admiral Shimada Shigetaro confronted each other over Japan's war planning during the trial. FUTAMURA, *supra* note 8, at 89.

142. Mark Osiel argues that the doctrine of joint criminal enterprise, which has been used to link individual conduct to state acts at the International Criminal Tribunal for the Former Yugoslavia (analogous to conspiracy as it was used at Nuremberg), is a "dangerously illiberal" doctrine because liability often "threatens to exceed the scope of moral culpability." Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1772, 1860 (2005).

determining which individuals in that state's government should be held culpable for it even more so. Furthermore, military organizations and governments commonly destroy any records of ordering atrocities.[143] Now, since liability for aggressive war extends to leaders, destruction may extend to *any* evidence of decision-making processes.

While using some theory of joint criminal enterprise or conspiracy is unavoidable in prosecuting crimes of aggression,[144] the Tokyo case calls for caution. Prosecutors should keep the communicative impact of their legal strategies in mind. When documentation is thin, conspiracy doctrine provides one method of implicating leaders in acts of aggression. However, the strategy backfired at Tokyo because the prosecution's argument was out of step with general knowledge of who the defendants were and the roles they had played in advocating—or, in some cases, opposing—the war.[145] It was not necessarily the use of conspiracy doctrine in itself that provoked skepticism, it was the argument that *all* of the defendants were involved in the same conspiracy to pursue the same goals.[146] If the prosecution had alleged multiple overlapping conspiracies among the defendants, its narrative of Japan's acts of aggression would have better coincided with the shifts in political power that the Japanese public observed throughout 1931–1945.[147] Ultimately, it is crucial that the prosecution secures and uses every surviving piece of documentation in constructing their argument.

At Tokyo, the prosecution failed to investigate government documents that could have helped them construct a more accurate argument. This was mainly because Chief Prosecutor Joseph Keenan did not believe such documents existed and did not understand the importance of seeking them out.[148] This mistaken assumption undermined the Tribunal's ability to make accurate findings on how the Japanese govern-

143. Nancy Amoury Combs, *Deconstructing the Epistemic Challenges to Mass Atrocity Prosecutions*, 75 WASH. & LEE L. REV. 223, 249 (2018).

144. *See* Noah Weisbord, *supra* note 5, at 54–56 ("Joint criminal enterprise, specially tailored, is the most promising conceptual link for the crime of aggression.").

145. TOTANI, *supra* note 3, at 88.

146. *Id.* at 88–89.

147. *Id.*

148. *Id.* at 32–33.

ment's decision-making led to aggressive war, and the record of history that resulted contributed to the eventual backlash against the Tokyo Trial.[149] The Tokyo Trial shows that if war crimes tribunals make inaccurate findings on how crimes of aggression occurred, it can compromise the legitimacy of the tribunal as a whole.

C. *Prosecutors Should Focus their Arguments on Individuals, Not States, to Avoid Revisionist Backlash*

The third mistake of the Tokyo Tribunal arose from the Chief Prosecutor's use of rhetoric that made it seem like the nation of Japan was on trial.[150] The rhetoric prompted arguments for an alternate historical narrative that Japan was not at fault, propagated through the institution of the Tribunal itself.[151]

The crime of aggression targets individuals for actions taken by a state.[152] This is intended to deter leaders from contravening Article 2(4).[153] If leaders know that their state is party to the ICC or liable to be designated an aggressor by the Security Council, they will know that they can personally be held liable for ordering acts of aggression against other states.

The Nuremberg and Tokyo Tribunals aimed to foster the same deterrence.[154] One primary motivator for the expense of

---

149. DOWER, *supra* note 98, at 463 (arguing that the Tribunal's finding that there was a common conspiracy among the leaders did not accord with the documentary materials introduced at trial); FUTAMURA, *supra* note 8, at 88–90, 94 (arguing that the finding of conspiracy among the leaders was inaccurate and that it led to revisionist backlash in the long term).

150. *See infra* note 163 and accompanying text (showing how Chief Prosecutor Keenan's rhetoric framed the Tokyo Trial as Japan put on trial by civilization).

151. *See infra* notes 168–171 and accompanying text (describing how one of the Tribunal's own justices, Radhabinod Pal, wrote a dissent that became a touchstone for those who argue Japan was not responsible for the war).

152. *See supra* notes 69–71 and accompanying text (comparing the definitions of aggression used at Tokyo and the ICC, both of which seek to hold individuals responsible for state actions).

153. *Conditions for Action by the ICC, supra* note 59 ("Once activated, the ICC's jurisdiction over the crime of aggression will serve as a deterrent against illegal war-making and other serious instances of illegal use of force.")

154. "Our purpose is one of prevention or deterrence . . . . we do hope in these proceedings that it is neither impossible nor improbable that the branding of individuals who visit these scourges upon mankind as common

years-long international judicial proceedings was clarification that World War II was the result of individual leaders' decisions, not the actions of the entire populace of Germany and Japan.[155] In punishing specific leaders, the Allies hoped to allow the populations to move on from the past, and open the possibility for peaceful relations in the future. However, as the Tokyo Trial progressed, the public perceived that the Tribunal was not trying individuals, but the nation of Japan itself.[156] The public, at least to some extent, sympathized with the defendants at the Tokyo Trial.[157] This conflicted with the Tribunal's aim of distinguishing the individuals responsible from the innocent population.[158] The Tokyo Trial case suggests that the perception that an entire state is on trial can lead to revisionist backlash,[159] which would be against the ICC's aims in prosecuting aggression.

There were two sources for the belief that the Tokyo Tribunal was not trying individuals for crimes of aggression, but Japan as a nation. The first was the rhetoric of Chief Prosecutor Joseph Keenan.[160] Though most participants in the Tokyo Trial recognized the need for limiting the scope of the trial to the judgment of those before the Tribunal, Keenan had a different view. His opening statement exemplified the way he perceived the enterprise and his own role in it: he declared that Japan declared war upon civilization, and that the Tokyo Trial was part of a battle to "preserve the entire world from destruction."[161] Rather than limiting the trial mechanism to

---

felons, and punishing them accordingly, may have a deterring effect upon aggressive warlike activities of their prototypes of the future, should they arise." Joseph Keenan, Chief Prosecutor for the Int'l Military Tribunal for the Far East, Prosecution Opening Statement (June 4, 1946), *in* THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST IN TWENTY-TWO VOLUMES 387–88 (R. J. Pritchard & S. M. Zaide ed., 1981).

155. FUTAMURA, *supra* note 8, at 43–45, 116–117.

156. The Asahi Shimbun research group reflected in 1953, "sometimes it seemed that the Tokyo Trial was punishing the state, and at other times individuals." KYOKUTO KOKUSAI GUNJI SAIBAN KIROKU: MOKUROKU OYOBI SAKUIN 5 (1953).

157. FUTAMURA, *supra* note 8, at 124.

158. *See, e.g.*, TOTANI, *supra* note 3, at 40 (describing how, after his testimony, the Japanese perceived Tojo Hideki as a "defender of Japan").

159. FUTAMURA, *supra* note 8, at 136.

160. DOWER, *supra* note 98, at 445.

161. Keenan, *supra* note 154, at 384.

the determination of guilt and innocence for the accused, this rhetoric led to the sense among the Japanese that Japan itself was on trial.[162]

One of the main aims of the Tokyo Tribunal was establishing, for posterity's sake, that Japan was at fault for the aggression that led to war with the United States.[163] This mission infiltrated the Tribunal's rhetoric and contributed to the sense that Japan, as a nation, was on trial. One of the most impressive moments of the trial for many Japanese was Keenan's cross-examination of Tojo Hideki, Prime Minister of Japan from 1941 to 1944, who gave a reasoned argument that Japan waged the war in self-defense.[164] Keenan was unprepared, and stumbled through his questions, while Tojo was calm and articulate in defending Japan's actions.[165] Though historians have confirmed many of the trial's findings on Japan's aggression, for example, that the Mukden Incident was a pretext for Japan's invasion of Manchuria,[166] Tojo's reasoning resonated with the Japanese.[167] Tojo's cross-examination only contributed to the sense that Japan, as a nation, was on trial for waging aggressive war.

In the end, the view that it was unfair to put Japan on trial was condoned by Judge Radhabinod Pal's dissent to the Tribunal judgment. Pal, the judge from India, wrote a dissent finding every defendant not guilty.[168] His dissent, backed with his authority as one of the trial's own judges, argued that Japan should not be prosecuted for aggressive war because aggression was not a crime when Japan committed it—meaning that its prosecution would constitute *ex post facto* law.[169] In 1952, Judge Pal's dissent was published as the "Japan-Is-Not-Guilty"

---

162. Tsurumi identifies the American chief prosecutor accusing "the former leaders of Japan in the name of civilization" as one of the four chief issues that prevailed in the discourse of the time. TSURUMI, *supra* note 75, at 14.

163. DOWER, *supra* note 98, at 445.

164. Awaya Kentaro, *The Tokyo Tribunal, War Responsibility and the Japanese People*, 4 ASIA–PAC. J. 1, 3 (Timothy Amos trans., 2006).

165. TOTANI, *supra* note 3, at 39.

166. *Id.* at 93–97.

167. *Id.* at 40.

168. RADHABINOD PAL, INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST: DISSENTIENT JUDGMENT OF JUSTICE PAL 697 (1999).

169. *Id.* at 578.

view.[170] It became extremely popular in Japan, and is still celebrated by those who use the Tokyo Trial version of history as a focal point for their revisionist advocacy.[171]

These types of revisionist narratives post-judgment are likely to surface in ICC prosecutions. The ICC's jurisdiction is only over state parties who have consented to its jurisdiction, which means it will not face the same legitimacy concerns as Nuremberg and Tokyo.[172] However, it is not realistic to assume that crimes of aggression will always be committed by clear aggressors, or that tracking the historical narrative will be a straightforward task. In order to avoid the pitfalls of the Tokyo Tribunal, ICC prosecutors might focus their argumentation as narrowly as possible on the task of establishing aggression and establishing the guilt of the individuals involved. Avoiding broad rhetoric about state culpability, as opposed to individual culpability, will help prevent backlash against ICC trials within aggressor states. This narrow approach may also mitigate revisionist responses. After the Tokyo Trial, revisionists rejected the trial's findings outright because of the perceived injustice of their state as a whole on trial before the international community. While a tribunal cannot fully prevent this kind of response, if the prosecutors maintain a realistic discourse around the trial's own powers and aims, they are less likely to provoke the same kind of outrage.

IV. Conclusion

The lack of interest in the Tokyo Tribunal by legal scholars is understandable,[173] as it had little impact on the development of international criminal law. However, the Tokyo Tribunal remains a focal point of tensions around war reconciliation in Japan today, more than seventy years after Japan's surrender.[174] This should, at least, sound a cautionary note as the ICC opens the possibility of prosecuting aggression again.

---

170. Totani, *supra* note 3, at 224. *See generally* Pal, *supra* note 168 (providing extensive legal and descriptive support for Pal's view that Japan is not guilty).

171. Madoka Futamura, *Japanese Societal Attitudes Towards the Tokyo Trial: A Contemporary Perspective*, 9 Asia–Pac. J. 1, 6 (2011).

172. Futamura, *supra* note 8 at 32–33, 68.

173. *Id.* at 8–11.

174. *See, e.g.*, Koji Sonoda, *The Quest to Revise Japan's Constitution*, Diplomat (June 2, 2016), https://thediplomat.com/2016/06/the-quest-to-revise-ja

The above discussion shows three ways in which the Tokyo Tribunal's mandate of prosecuting aggression conflicted with its political context, and the impact of those tensions on the judgment's ultimate reception. First, the original representative group of twenty-eight defendants were not generally perceived as the most culpable, and even those found culpable were not fully punished. This led to a sense that the architects of the Tokyo Tribunal were more concerned with politics than justice.[175] Second, the prosecution, and ultimate judgment, of the trial relied on broad theories of liability that translated poorly in Japan's social context. Third, the Trial's Chief Prosecutor characterized its enterprise as putting Japan on trial as a nation, which exacerbated revisionist backlash against the tribunal as a whole.

Although the ICC is structured differently than the postwar IMTs, procedural protections do not fully obviate any of these challenges. They result from the interaction of judicial mechanisms and socio-political dynamics. Ultimately, the Tokyo Trial's lesson for future prosecutors of the ICC may be that bringing leaders to justice for state acts of aggression requires an attentive balancing of interests. The Tokyo Tribunal attempted to bring justice to those responsible for crimes of aggression, but its judicial aim was at cross-purposes with concurrent political strategies geared towards creating a lasting peace in Japan. It did not succeed in its primary aim of creating consensus around who was responsible for crimes of aggression. The controversial place that the Tokyo Trial occupies in Japan's postwar discourse suggests that when it comes to the prosecution of crimes of aggression, the risk of judicial overreach is high, and the consequences of error are severe. If ICC prosecutors can broaden their perspective to include not only their judicial context, but the external political dynamics of

---

pans-constitution/ (describing the ideology of the Japan Conference, a 38,000 member right-wing group that attacks the Tokyo Trial view of history and how they contributed to the controversial revisions of Japan's constitution that have been in progress since 2013).

175. *See supra* notes 90–96 and accompanying text (describing how the group of defendants selected did not make sense to the Japanese, and how early release of those compromised their belief in the Tokyo Trial's legitimacy). *See also supra* note 102–106 and accompanying text (arguing that the Emperor's exclusion from the Trial made the Trial's judgment on Japanese leaders' commission of crimes of aggression seem incomplete).

aggressor states, they will be better-equipped to face these challenges than their predecessors were at Tokyo.