

Strengthening International Institutions by Enforcing Norms: The Way Forward for Prosecuting Aggression

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ABSTRACT

Strengthening institutions that enforce the prohibition on the use of force and prevent aggressive acts of war should be a priority in international law, as it struggles to respond collectively to the Russian invasion of Ukraine. Aggression is both prohibited in the Charter of the United Nations and in the Rome Statute, and the United Nations Security Council is blocking enforcement action in both international institutions. This Article explores alternative avenues of accountability for the crime of aggression in international law, and recommends the United Nations General Assembly, with the government of Ukraine, establish a hybrid international tribunal for aggression in the current invasion. In addition to creating a specialized tribunal, countries should use this crucial moment in time to show their support for the existing mechanism for prosecuting aggression, and join the amended Rome Statute. This Article concludes that states should take steps to allow the United Nations General Assembly to refer matters to the International Criminal Court.

I. INTRODUCTION

In a resolution adopted on March 2, 2022, the United Nations General Assembly (UNGA) “deplore[d] in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter.”¹ Russia’s invasion of Ukraine on February 24, 2022, is an act of aggression that violates not only the prohibition on the use of force enshrined in the United Nations Charter (UN Charter),² but also in international

1. U.N. GAOR, 11th Emergency Sess., U.N. Doc. A/ES-11/L.1 (Mar. 2, 2022).

2. U.N. Charter art. 1, ¶ 1; U.N. Charter art. 2, ¶ 4 (stating that Art. 1(1) provides: “The Purposes of the United Nations are: To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;” and that Art. 2(4) provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

criminal law, as per the Rome Statute of the International Criminal Court (Rome Statute).³

One of the clearest cases of aggression in the last ninety years has highlighted a significant gap in international law, and consequently, the United Nations, namely in the lack of institutional support against violations of international norms and specifically, acts of aggression. The United Nations Security Council (UNSC), with the Russian delegate presiding over the very meeting, was unable to pass a resolution condemning the Russian aggression and requiring Russia to end all hostilities immediately.⁴ The UNSC was unable to fulfil its obligation to maintain “international peace and security,”⁵ calling into question its validity in an increasingly polarized world.

The UNSC’s paralysis in the face of armed interventions has become a recent trend, with Russia and China increasingly casting vetoes in resolutions condemning conflicts and requiring action, such as in Syria.⁶ Consequently, where the United States and the United Kingdom previously used the UNSC to legitimize their military activities, these countries began unilaterally using force for humanitarian purposes.⁷ Consequently, the prohibition on the use of force weakened, allowing Russia (and other states) to act as

3. The Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 38544 (stating that Art. 5 provides: “The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (d) the crime of aggression.”).

4. Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Ending Ukraine War Crisis, as Russian Federation Wields Veto; Kyiv’s Permanent Representative Tells Council President, ‘Your Words Have Less Value Than a Hole in a New York Pretzel,’ U.N. Press Release SC/14808 (Feb. 25, 2022).

5. U.N. Charter, *supra* note 2, at Art. 24 (stating that “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”).

6. U.N. Docs, Security Council Veto List. Accessed January 18, 2023 at 5:55PM.

7. Douglas Guilfoyle, Juliette McIntyre & Tamsin Phillipa Paige, *Is international law powerless against Russian aggression in Ukraine? No, but it’s complicated*, THE CONVERSATION (Feb. 24, 2022, 10:32 PM), <http://theconversation.com/is-international-law-powerless-against-russian-aggression-in-ukraine-no-but-its-complicated-177905> [<https://perma.cc/FSQ7-ZL3Z>].

aggressors, in South Ossetia in 2008,⁸ in Syria since 2012,⁹ in Crimea in 2014,¹⁰ and now in Ukraine.

This Article will examine aggression in both the UN Charter and the Rome Statute and recommend a framework for institutional support when “crimes against peace,”¹¹ specifically crimes of aggression, are committed. Specifically, this Article will conclude that the UNGA should play a more active role in maintaining international peace: in the short run, by creating an international tribunal to try prosecution in the Russian invasion of Ukraine, and in the long run, by referring matters to the International Criminal Court (ICC). Part II of this Article examines the prohibition on the use of force in custom and treaty as a means to curtail aggression, and the intended UN implementation framework. Part III traces aggression’s inclusion and expansion in the Rome Statute, including its envisioned enforcement mechanism. Part IV analyzes alternative jurisdictional regimes for the crime of aggression, specifically in the context of the Russian aggression, and generally to strengthen international law in the long run.

II. AGGRESSIVE USE OF FORCE IN CUSTOMARY AND TREATY LAW

Even though countries are not bound by any restraint to adhere to international law, a majority of its norms and provisions are followed.¹² Whether states comply out of a sense of duty, fear of coercion, or an expectation of advantages, international law is frequently obeyed without any international monitoring police force.¹³ One such norm that is generally obeyed is the prohibition on the use of force. In fact, states commit fewer acts of aggression in recent times than they did previously, as demonstrated by comparing the state of international affairs before and after the UN Charter.¹⁴

8. See Gareth Evans, *Russia, Georgia and the Responsibility to Protect*, 1 AMSTERDAM L. F. 25, 25–27 (2009).

9. Ruth Sherlock, Scott Neuman & Nada Homsy, *Syria’s Civil War Started A Decade Ago. Here’s Where It Stands*, NPR (Mar. 15, 2021, 5:09 am), <https://www.npr.org/2021/03/15/976352794/syrias-civil-war-started-a-decade-ago-heres-where-it-stands> [<https://perma.cc/6PD2-8XV2>].

10. Thomas D. Grant, *Annexation of Crimea*, 109 AM. J. INT’L L. 68, 69–72 (2015).

11. Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of the Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.C. 280 [hereinafter *Prosecution and Punishment of the Major War Criminals*].

12. MALCOLM SHAW, *INTERNATIONAL LAW* 6–10 (5th ed. 2003).

13. Mary Ellen O’Connell, *Enforcing the Prohibition on the Use of Force: The U.N.’s Response to Iraq’s Invasion of Kuwait*, 15 S. ILL. U. L.J. 453, 461 (1991).

14. *Id.* at 462.

A. League of Nations and Kellogg-Briand Pact

One of the most significant outcomes of World War I was the creation of the League of Nations in 1920, the first international organization with permanent institutions committed to preserving world peace and promoting international cooperation by getting countries to commit to the prohibition on the use of force.¹⁵ The League of Nations drew upon the experiences of previous unsuccessful attempts to regulate the use of force and went one step ahead. It created a system of collective security based on the cooperation of states. States were allowed to wage war with another state that broke the Covenant of the League of Nations, but they were not obliged by it.¹⁶ It was the first international attempt to restrict the use of force and demonstrated a new attitude towards tackling the use of force internationally. Even though the Covenant of the League of Nations did not explicitly restrict using force, the Covenant allow for sanctions and other actions that fostered the spirit of prioritizing peaceful coexistence between states.¹⁷

Despite the lofty ambitions with which it was created, the lack of support from major powers, including The United States, ultimately resulted in its demise. However, The United States renounced war through alternative avenues, including through The General Treaty for the Renunciation of War (also known as the Kellogg-Briand Pact of 1928).¹⁸ Introduced by The United States and France, the Kellogg-Briand Pact was another step in the gradual evolution of states towards prohibiting war under international law.¹⁹ Parties to the Kellogg-Briand Pact agreed that they would abstain from warfare and renounce it in their dealings with one another. Additionally, they would engage in peaceful dispute resolution efforts.²⁰ Though its enforcement system was lacking, it was accepted widely, demonstrating a global desire to limit the use of force. Lastly, countries indicated they were not giving up their right to self-defense by providing exceptions to the prohibition on the use of force.²¹

15. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 23–24 (7th ed. 1997).

16. *Id.* at 24.

17. SHAW, *supra* note 12, at 1216–17.

18. *Id.* at 1122.

19. MALANCZUK, *supra* note 15, at 24, 308–09, 354.

20. SHAW, *supra* note 12, at 942, 1122.

21. *Id.* at 501.

B. United Nations

Despite various attempts to limit the use of force by states, World War II broke out, and the international system welcomed the establishment of the United Nations (UN) and the UN Charter, which came into force on October 24, 1945.²² For the first time, an international institution was given the authority to act when international peace and security was breached. The UN Charter was clear on two aspects: (1) a blanket prohibition on the use of force with limited exception, and (2) noninterference in an internal conflict.²³ The prohibition on war provided some much-needed stability and peace in international law.²⁴

As per the Preamble of the UN Charter, the objective of the organization was to “save succeeding generations from the scourge of war.”²⁵ Preserving the peace was made the primary goal of the UN, as evidenced by Article 1 of the UN Charter, and a comprehensive ban on the use of armed force.²⁶ The UN had the authority to make a decision on whether a threat to international peace existed and could pass binding economic and military measures against violators of international security.²⁷

One important way the language of the UN Charter differed from that of the Covenant of the League of Nations was that the latter did not end a state’s right to resort to war. For example, the members of the League of Nations were supposed to abide by a cooling-off period of three months following a judicial decision or arbitral award before engaging with one another.²⁸ The League of Nations could also use war as a means to settle a dispute.²⁹ However, there was not an effective sanction system; the League of Nations could suggest sanctions, but not oblige countries to impose them. The UN Charter, on the other hand, explicitly addressed breaches of peace and states’ obligations to prevent, remove, and suppress threats to peace and acts of aggression.³⁰

22. See MALANCZUK, *supra* note 15, at 27.

23. Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT’L L.J. 703, 704 (2006).

24. Graham Cronogue, *Responsibility to Protect: Syria The Law, Politics, and Future of Humanitarian Intervention Post-Libya*, 3 INT’L HUMAN. LEGAL STUD. 124, 129 (2012).

25. U.N. Charter, *supra* note 2, at pmbl.

26. See *id.* at art. 1.

27. MALANCZUK, *supra* note 15, at 27.

28. *Id.* at 308; see also League of Nations Covenant art. 12(1).

29. Ian Brownlie, *The Use of Force in Self-Defence*, 37 BRIT. Y.B. INT’L L. 183, 196 (1961).

30. See U.N. Charter art. 1, ¶ 1.

C. Prohibition on the Use of Force in the UN Charter

As per Article 2(4) of the UN Charter (Article 2(4)), states were not only prohibited from using force, but also from threatening to use it.³¹ A comprehensive ban on use of force was in place for all situations except those consistent with the purposes of the UN. One example is Article 51 of the Charter.³² Article 51 enshrined a state's individual and collective right to self-defense and Chapter VII of the UN Charter, which laid out the framework for collective security.³³

As envisioned by the UN Charter, collective security action authorized by the UNSC would have precluded the need for use of unilateral force. Aggrieved states would approach the UNSC, which would exercise its authority and defend the rights that had been violated by prescribing an appropriate amount and type of force to be used against the offending nation collectively.³⁴ This organ was responsible for maintaining security and peace in the international arena and member states of the UN were obligated to conform to its decisions;³⁵ yet member states also retained the right to use force for self-defense, as enshrined in Article 51.³⁶

Article 2(4) was created to eliminate the "need for the unilateral use of force." however, the powers bestowed upon the UNSC by the article proved to be ineffective due to a lack of consensus between the permanent members of the council, whose unanimity was integral to the UNSC's effective functioning.³⁷ Consequently, the UNSC only operated as originally conceived in those rare instances where there was a short-term interest in collaboration.³⁸

D. Significance of Article 2(4)

The ratification of Article 2(4) was the culmination of more than one hundred years of effort by the global community and has significantly

31. U.N. Charter art. 2, ¶ 4.

32. U.N. Charter art. 51.

33. *See id.*

34. W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 279 (1985).

35. *Id.*

36. U.N. Charter art. 51.

37. *Id.* at 279–80.

38. *See id.* at 280.

changed the way states use force³⁹ as it prevents states from using force against weaker states without justification.⁴⁰ Article 2(4) is binding on the members of the international community, regardless of their membership in the UN.⁴¹ Article 2(6) of the UN Charter, which states that the UN “shall ensure that states which are not members of the United Nations shall act in accordance with these Principles so far as many be necessary for the maintenance of international peace and security.”⁴² Additionally, Article 2(4) was considered a core part of the UN Charter, with the International Court of Justice describing “the prohibition on transnational force as ‘a cornerstone of the United Nations Charter.’” in the case *Armed Activities on the Territory of Congo*.⁴³ Therefore, if a country were to use force today, it must be as a last resort with an accompanying reason.

E. Force

Article 2(4) was both well drafted in what it included and poorly drafted in what it excluded. For example, the first notable aspect of the UN Charter’s language was that the word “force” was used rather than war.⁴⁴ This allowed coverage for situations that involved violence falling short of the requirements for war.⁴⁵ Additionally, threats of force also fell under the ambit of Article 2(4), as outlined in the advisory opinion, *Legality of the threat or Use of Nuclear Weapons*, if the envisaged use of force would be unlawful itself.⁴⁶

Uncertainty exists as to what type of force is referred to with regards to Article 2(4).⁴⁷ The question is whether economic force is also included, therefore rendering economic embargos against states illegal.⁴⁸ The language of the UN Charter does not make this ambiguity any clearer.⁴⁹ Where Article 51 specifically used the term “armed force,” Article 2(4) did not.⁵⁰ However, various declarations placed obligations on states to refrain from

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- 39. O’Connell, *supra* note 13, at 457.
 - 40. *Id.*
 - 41. SHAW, *supra* note 12, at 1018.
 - 42. *Id.*
 - 43. Cronogue, *supra* note 24, at 130.
 - 44. See SHAW, *supra* note 12, at 1019–20.
 - 45. *Id.*
 - 46. *Id.* at 1020.
 - 47. *Id.* at 1019.
 - 48. *Id.*
 - 49. *Id.*
 - 50. *Id.*

exerting economic or political pressure as a means of coercion.⁵¹ The case can be made either way.⁵²

It is also pertinent to note that the UN Charter limits its scope to international force, not internal force used to quell riots or suppress insurrections.⁵³ This remained a matter of contention, as the number of civil wars increased and interstate conflicts decreased.⁵⁴

*F. Territorial Integrity or Political Independence or in Any Other
Manner Inconsistent With the Purposes of the
United Nations*

As per Article 2(4), the use of force was prohibited against the “territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”⁵⁵ International law was founded on the principle of territorial sovereignty and the respect states owed another’s territory.⁵⁶ Therefore, states did not have the right to directly or indirectly intervene in another state’s internal or external affairs, be it cultural, economic, or political. This principle was reaffirmed in various declarations and cases in front of the International Court of Justice.⁵⁷

An example of exclusionary language could be seen in this phrase. Potentially, Article 2(4) left space for the use of force for other purposes, such as protecting human rights, as this did not conflict with “territorial integrity” or “political independence.”⁵⁸ However, humanitarian intervention is not recognized as an exception to the prohibition on the use of force. Since the purposes of the UN are related to peace, security, and protecting human rights, it is difficult to see how breaching international peace

51. *Id.*

52. *Id.* at 1019–20.

53. *Id.* at 1020.

54. See MALANCZUK, *supra* note 15, at 318.

55. U.N. Charter art. 2, ¶ 4.

56. SHAW, *supra* note 12, at 1147–48.

57. *Id.* at 1076–78. The International Court of Justice held in the *Corfu Channel Case* that intervention amounted to a use of force that no longer had a place in international law. The Court went on to say that territorial sovereignty was the basic premise of international relations. Additionally, the 1970 Declaration on Principles in International Law also reaffirmed the principle of territorial sovereignty. In *Nicaragua*, the Court also held that force cannot be used to implement human rights.

58. MALANCZUK, *supra* note 15, at 309.

would not go against the UN's mission.⁵⁹ In fact, throughout the UN Charter, language supporting resolving disputes peacefully can be found repeatedly.⁶⁰ Though there is inconsistency between policy and practice given the number of conflicts since 1945,⁶¹ Article 2(4) was still considered a valid law with narrow exceptions, explained briefly below.

G. Classical Exception: Self-Defense

As mentioned above, Article 2(4) went on to prohibit force in any way "inconsistent with the Purposes of the United Nations."⁶² This indicated there were certain situations in which the use of force could be justified: Article 51 outlining the principles of self-defense, and Chapter VII, indicating collective security with UNSC authorization.

Like the prohibition on the use of force, a state's right to self-defense was also part of customary international law, finding its origins in the principles established in the *Caroline* case around a century before the UN Charter was adopted.⁶³ The then U.S. Secretary of State formulated the basics of self-defense: the necessity for self-defense had to exist, such that it was instant, leaving no choice of means, no moment for deliberation, and was overwhelming.⁶⁴ Additionally, the action taken in response could not be unreasonable or excessive.⁶⁵ Accepted by the British government at that time, it was still considered part and parcel of customary international law and was enshrined in Article 51.⁶⁶

H. Classical Exception: Collective Self-Defense

Article 51 also recognized the inherent right to collective self-defense, where one state may use force to defend another state. It became the foundation of comprehensive regional security systems, such as NATO. In fact, the creation of NATO and the Warsaw Pact after World War II was specifically grounded in collective self-defense. As per these agreements, an attack on one member state was considered an attack on all members.⁶⁷

59. *Id.* at 310.

60. *Id.*

61. MALANCZUK, *supra* note 15, at 311; Reisman, *supra* note 34, at 279.

62. U.N. Charter art. 2, ¶ 4.

63. SHAW, *supra* note 12, at 1024–25. The *Caroline* case is considered the textbook case of self-defense. British subjects destroyed a vessel it had seized in an American port. This was in response to them reinforcing Canadian rebels from American ports. Two Americans died in the process and a British subject was arrested.

64. *Id.* at 1025.

65. *Id.*

66. U.N. Charter art. 51.

67. *Id.*

The *Nicaragua* Case supported this idea, emphasizing the foundation of the right to the establishment of collective self-defense in customary international law, but also laid out requirements to be fulfilled for other countries to exercise this right. According to the International Court of Justice, the concerned state had to declare itself a victim of an armed attack and request assistance. Additionally, the wrongful act that required a response had to be an armed attack.⁶⁸ Only then could the right to collective self-defense be exercised lawfully.

I. UN Enforcement Mechanism: Chapter VII Authorization

Drawing upon the experience of the League of Nations, the UN Charter was drafted with the aim of enforcing peace through collective security.⁶⁹ Collective security referred to the idea that a wronged state was to be protected by the international community and all should punish the wrongdoing state. Chapter VII of the UN Charter⁷⁰ encompasses Article 39 to Article 51 and outlines the economic, military, and political enforcement measures that can be taken against an unauthorized use of force.⁷¹ The UNSC played the primary role in collective security, as it was tasked with maintaining “international peace and security”⁷² and its decisions were binding on member states.⁷³

The UNSC begins by determining whether a “threat to peace,” “breach of the peace,” or “act of aggression took place.”⁷⁴ The UN Charter did not define these terms, instead their definitions have developed over time through practice.⁷⁵ By 1995, widespread human rights violations were considered threats to peace, even if they were happening within a single state and in an internal armed conflict.⁷⁶ Unfortunately, the UNSC declined to qualify

68. SHAW, *supra* note 12, at 1036.

69. MALANCZUK, *supra* note 15, at 387.

70. *Id.* at 387. Chapter VII of the UN Charter is titled “Action with respect to threats to the peace, breaches of the peace, and acts of aggression.”

71. *Id.*

72. SHAW, *supra* note 12, at 1119.

73. *Id.* at 1119.

74. MALANCZUK, *supra* note 15, at 388 (providing that “the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”).

75. SHAW, *supra* note 12, at 1120.

76. VAUGHAN LOWE & ANTONIO TZANAKOPOULOS, HUMANITARIAN INTERVENTION, <https://opil-ouplaw-com.sandiego.idm.oclc.org/display/10.1093/law:epil/9780199231690/>

many instances of illegal uses of force as aggression.⁷⁷ By some counts, perpetrators used force “200 times, and by another count, 680 times” between 1945 and 1989, after which respect for international laws increased again.⁷⁸ This lack of characterization as aggression did not affect the scope of the crime as applicable to an individual since state violations of the UN Charter, rather than violations by individuals, trigger Chapter VII powers.⁷⁹ Therefore, Chapter VII triggers can have stronger political implications rather than judicial ones.⁸⁰

Pursuant to a finding under Article 39, the UNSC could first approve provisional measures⁸¹ and then authorize non-forcible measures under Article 41 of the UN Charter,⁸² such as imposing trade embargos and severing diplomatic relations. If those measures were deemed inadequate by the UNSC, Article 42 of the UN Charter permitted authorization of forcible measures to “restore international peace and security.”⁸³ Article

law-9780199231690-e306?rskey=s1X5Vv&result=2&pr=MPIL [https://perma.cc/W5WA-N87X].

77. James N. Boevig, *Aggression, International Law, and the ICC: An Argument for the Withdrawal of Aggression from the Rome Statute*, 43 COLUM. J. TRANSNAT’L L. (2005). See also Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT’L L. 71, 90–96 (listing acts of aggression committed by countries that violate Art 2(4) and the Rome Statute).

78. Glennon, *supra* note 77, at 94. See also United Nations General Assembly, Report of the High-Level Panel on Threats, Challenges and Change on a More Secure World: Our Shared Responsibility [A/59/565] 54 (2004) (stating, “For the first 44 years of the United Nations, Member States often violated these rules and used military force literally hundreds of times, with a paralyzed Security Council passing very few Chapter VII resolutions and Article 51 only rarely providing credible cover. Since the end of the cold war, however, the yearning for an international system governed by the rule of law has grown”).

79. Boevig, *supra* note 77, at 567.

80. *Id.* at 567.

81. MALANCZUK, *supra* note 15, at 388 (Providing that Article 40 of the U.N. Charter states:

“In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures, as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measure”).

82. *Id.* at 389 (providing that Article 41 of the U.N. Charter states:

“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations”).

83. *Id.* (Providing that Article 42 of the U.N. Charter provides:

42 and Article 43 together constituted the enforcement action that could be undertaken by the UN. So far, the UN imposed the most wide-ranging economic sanctions after Iraq invaded Kuwait in 1990. It went as far as to ban all the imports and exports from Iraq and occupied Kuwait.⁸⁴

Enforcement action was first seen in practice after North Korea attacked South Korea in 1950 and the UNSC swiftly agreed to pass resolutions on the matter, including asking for UN members' help in compelling North Korea to withdraw. The UN also established the Unified forces, and though they flew the UN flag and received medals from the UN, the United States made all decisions regarding the operation of the forces.⁸⁵ This demonstrated one of the reasons enforcements under Article 42 weakened over time: the inability to effectively implement Article 43 of the UN Charter.⁸⁶ Article 43 illustrated what the UN envisioned—a standing army at the UN's disposal. This force was intended to suppress acts of aggression on the UNSC's behalf, but disputes among member states prevented this from happening.⁸⁷ Consequently, when the UNSC authorizes the use of force in response to aggression, it calls on member states to “use all necessary means to . . . restore peace and security in the area.”⁸⁸

J. UN Enforcement Mechanism in Russia-Ukraine Conflict

In his declaration of war, Russian President Vladimir Putin outlined the various times America and its allies have violated Art. 2(4),⁸⁹ making their

“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations.”)

84. SHAW, *supra* note 12, at 1242–43.

85. MALANCZUK, *supra* note 15, at 392.

86. *Id.* at 389 (stating that Article 43 of the UN Charter provides:

“All Members of the United Nations . . . undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. . . . The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members . . . [of the United Nations]”).

87. SHAW, *supra* note 12, at 1135.

88. SECURITY COUNCIL, RESOLUTION 678 (1990).

89. *Putin's Declaration of War on Ukraine*, THE SPECTATOR (Feb. 24, 2022), <https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine> [<https://perma.cc/AKA8-8KSR>]; see also *Situation Along Russian Federation-Ukraine Border*

calls on Russia to adhere to the norm hollow. In addition to a weakened norm against the use of force, internal politics and vested interests have made structural problems in the UNSC evident, at the cost of international peace and security in regions such as Syria, Myanmar, Iraq, and Yemen. This was once again highlighted when Russia not only presided over the UNSC meeting in which the resolution relating to the military offensive it was perpetrating was being voted on, it also cast the single deciding veto on the draft resolution.⁹⁰ As the Ukrainian delegate correctly pointed out, a delegation presiding over a matter that directly relates to that state is against the rules of procedure of the UNSC.⁹¹ Similarly, Russia could have abstained from voting on the resolution, as Article 27(3) of the UN Charter imposes the only limitation on a Permanent Member's veto power in the UNSC; "a party to a dispute shall abstain from voting."⁹² The restraint applies specifically to decisions being made under Chapter VI of the UN Charter,⁹³ and Permanent Members generally do not pressure states to abstain, unwilling to set the precedent in situations they are likely to be involved in.⁹⁴ In fact, no UNSC member called into question Russia's veto of a resolution condemning its own annexation of Crimea in 2014.⁹⁵

Consequently, the UNSC did not pass any resolution on sanctioning Russia, which means countries are taking these steps individually. As a

Can Only Be Resolved through Diplomacy, Political Affairs Chief Tells Security Council, UNITED NATIONS MEETINGS COVERAGE AND PRESS RELEASES (2022), <https://www.un.org/press/en/2022/sc14783.doc.html> [<https://perma.cc/2PQJ-3JXS>]; see also Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto | Meetings Coverage and Press Releases, *supra* note 4 (noting that in UNSC meeting on 25 February 2022, the Russian Delegate stated "... the United States, which excels in the number of invasions it has undertaken, he said Washington, D.C., is in no position to moralize").

90. Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto, *supra* note 4.

91. *Id.* (stating "Whenever the President of the Security Council deems that for the proper fulfillment of the responsibilities of the presidency he should not preside over the Council during the consideration of a particular question with which the member he represents is directly connected, he shall indicate his decision to the Council").

92. U.N. Charter, *supra* note 2, art. 27 ¶ 3.

93. *Id.* at ch. VI.

94. See John Chappell & Emma Svoboda, *Must Russia Abstain on Security Council Votes Regarding the Ukraine Crisis?*, LAWFARE (Feb. 11, 2022), <https://www.lawfareblog.com/must-russia-abstain-security-council-votes-regarding-ukraine-crisis> [<https://perma.cc/WR9V-EGEQ>] (listing the times Permanent Members have abstained from voting on issues that directly relate to them, from 1946, when the United Kingdom and France did not vote on "whether to call for the removal of foreign troops from Syria and Lebanon," to 1960, when Argentina did not participate in a resolution concerning a Nazi war criminal's capture in Argentina by Israel).

95. Enrico Milano, *Russia Milano*, TEM CSL CITATION {"citationID": "nAN8wAXs", "properties": {"formattedCitation": "Enrico Mil, 75 ZÖRV 215, 221 (2015)."

result, Russia is the target of some of the most punitive sanctions in recent history, from getting cut out integral banking systems to businesses and media organizations ceasing operations in the country.⁹⁶ However, sanctions are not being imposed uniformly and do not have the humanitarian cover that can come with imposition through the UNSC.⁹⁷

Though the Chapter VII enforcement mechanism is out of the question at the moment, there are other legal avenues that Ukraine can rely on for military help. Ukraine, as Kuwait previously did, can call on other countries to participate in its collective self-defense, through Article 51 of the UN Charter.⁹⁸ Even though there are calls to impose no-fly zones over Ukraine, there are concerns that NATO's direct participation in the conflict could make matters worse and prolong the war.⁹⁹ For now, that option is off the table, even as the war rages on and Ukrainian President Zelenskyy calls upon NATO to act on its behalf.¹⁰⁰ However, that does not preclude a coalition of other willing nations to step in and act in collective defense of the targeted state, especially as Russia attacks one of the largest nuclear power plants in Europe.¹⁰¹

As attempts to hold the Russia accountable through the UNSC seem fruitless for now, other international law institutions are trying to bridge the gap. The International Court of Justice (ICJ) issued an order on 16 March 2022 on Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide.¹⁰² In the matter of *Ukraine v Russian Federation*, the ICJ ordered the Russian Federation to

96. *What sanctions are being imposed on Russia over Ukraine invasion?*, BBC NEWS, Sept. 30, 2022, <https://www.bbc.com/news/world-europe-60125659> [<https://perma.cc/P2SC-LKPY>].

97. *See id.*

98. U.N. Charter, *supra* note 2, art. 51.

99. Daniel Davis, *A no-fly zone means Nato shooting down Russian jets. We must not do that*, THE GUARDIAN (Mar. 8, 2022, 06:18 EST), <https://www.theguardian.com/commentisfree/2022/mar/08/ukraine-no-fly-zone-nato-russia-war> [<https://perma.cc/682W-M269>].

100. *Id.*

101. Calla Wahlquist & Donna Lu, *Zaporizhzhia nuclear power plant: everything you need to know*, THE GUARDIAN (Mar. 4, 2022, 14:15 EST), <https://www.theguardian.com/world/2022/mar/04/zaporizhzhia-nuclear-power-plant-everything-you-need-to-know> [<https://perma.cc/23LJ-FSFW>].

102. Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n), Order, 2022 I.C.J. No. 182, at 19 (Mar. 16). The case was instituted by Ukraine only under the Genocide Convention, so it was narrow in scope. Fifteen judges heard the request, of which 13 voted in favor of a cessation of military activities.

stop its military operations in Ukraine and for both parties not to take any actions that would prolong the dispute or make it harder to solve.¹⁰³ Additionally, the UNGA demanded Russia “immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders.”¹⁰⁴ The United Nations Human Rights Council also created an independent international commission of inquiry to investigate human rights international humanitarian law violations in Ukraine.¹⁰⁵ The Commission will collect, record, and preserve all evidence according to international law standards.¹⁰⁶ Where state accountability is lagging, criminal accountability may be more forthcoming.

III. AGGRESSION AS AN INTERNATIONAL CRIME

The foundation for treating aggressive use of force as a crime came from the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE).¹⁰⁷ Despite finding twelve individuals guilty, the IMT did not provide an exact definition of aggression and the IMTFE followed largely the same model as the IMT.¹⁰⁸ Aggression or a “war against international treaties”¹⁰⁹ was also recognized as a “crime against peace” by the International Law Commission,¹¹⁰ making the two terms “asynchronous”.¹¹¹ Before the creation of the International Criminal Court, the act of aggression by a state fell under the UNSC and the International Court of Justice’s domain.¹¹² Individual criminal responsibility for the crime of aggression, though established in the IMT and IMTFE, was

103. *Id.*

104. *General Assembly Resolution Demands End to Russian Offensive in Ukraine*, UN NEWS, Mar. 2, 2022, <https://news.un.org/en/story/2022/03/1113152> [<https://perma.cc/KM67-8A5V>].

105. *Independent International Commission of Inquiry on Ukraine*, UNITED NATIONS HUMAN RIGHTS COUNCIL, <https://www.ohchr.org/en/hr-bodies/hrc/iic/hr-ukraine/index> [<https://perma.cc/3P79-G7S2>] (last visited Apr. 8, 2022).

106. *Id.*

107. Jennifer Trahan, *An Overview of the Newly Adopted International Criminal Court Definition of the Crime of Aggression*, 2 ST. JOHN’S J. INT’L & COMP. L. 31, 33 (2011); see also No. 251. Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of the Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6, Aug. 08, 1945.

108. Boevig, *supra* note 77, at 564–65.

109. International Law Commission, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* (1950).

110. *Id.*

111. Boevig, *supra* note 77, at 565.

112. *Id.* at 571–72.

not pursued again,¹¹³ despite successful prosecutions in Nuremberg and Tokyo and even though an aggressive war was considered “the supreme international crime.”¹¹⁴

A. Aggression in the Rome Statute

The Rome Statute gave ICC jurisdiction over four crimes, including aggression.¹¹⁵ However, the difficulties in defining aggression rolled over into the Rome Statute,¹¹⁶ resulting in it creating a “placeholder”¹¹⁷ for the crime of aggression. According to Article 5(2) of the Rome Statute

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.¹¹⁸

Following years of negotiation, the definition finally adopted was a combination of language found in the UN Charter, the IMT Tribunal, and UNGA resolutions and encompasses the crime at both the state level and the individual level.¹¹⁹ As per Article 8 *bis* (Art. 8),

1. For the purpose of this Statute, “crime of aggression” means 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 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.¹²⁰

113. See *id.* at 572.

114. Trahan, *supra* note 107, at 33.

115. The Rome Statute of the International Criminal Court art. 5, July 1, 2002, 2187 U.N.T.S. 38544.

116. Boevig, *supra* note 77, at 571. The author outlines attempts made by the International Law Commission, the UNGA, and a UNGA Special Committee on formulating a definition for the crime of aggression. He also raises the debate surrounding indirect aggression in the form of economic, diplomatic, or ideological pressures, and how they can be more detrimental than military forms of aggression, but are not often considered international crimes. See also Michael J. Glennon, *The Blank-Page Crime of Aggression*, 35 YALE J. INT'L L. 71 (2010), for an in-depth discussion on concerns with the definition of the crime of aggression.

117. Trahan, *supra* note 107, at 34.

118. Rome Statute, *supra* note 3.

119. Trahan, *supra* note 107, at 36–37.

120. The Rome Statute of the International Criminal Court, art. 8 *bis*, July 1, 2002, 2187 U.N.T.S. 38544. This amendment, and others relating to definition and jurisdiction

While the first part of the above definition (“planning, preparation, initiation or execution”) is a remnant of the Nuremberg Charter, the second part highlights that it is a leadership crime, as the individual must either be able to exercise “effective control” or “direct” a state’s actions.¹²¹ The last part of the definition points to a threshold: a “manifest” UN Charter violation, based on the scale, gravity, and character of the act.¹²² Article 8(2) goes on to reiterate the prohibition on the use of force enshrined in the UN Charter and ends with a list of acts that constitute an act of aggression, even without a declaration of war.¹²³

B. Jurisdiction

The conditions for the exercise of jurisdiction over aggression were just as hotly debated as the definition of aggression.¹²⁴ Since the UNSC was responsible for determining an act of aggression through Article 39 of the UN Charter, one emerging position was that it should also be the only body referring issues to ICC.¹²⁵ Understandably, other countries were concerned that the political body of the UNSC would have exclusive control over what does and does not get referred to a judicial institution.¹²⁶ It was also argued that Chapter VII of the UN Charter, and therefore Article 39, dealt with enforcement, and not criminal adjudication, as the Rome Statute did.¹²⁷ Another viewpoint was that ICC did not require another body to determine whether aggression had taken place; it could make this determination on its own.¹²⁸

Eventually, both positions were included in the Rome Statute. Article 15 *bis* allows either State Parties to refer a matter of aggression to the ICC or the Prosecutor to initiate a claim, with an ICC Pre-Trial Division review, and Article 15 *ter* allows the UNSC to refer a matter to the ICC.¹²⁹ Another key aspect of the ICC’s jurisdiction over aggression was what it excluded for the purposes of Article 15 *bis*: nationals and crimes committed in the

of aggression, were adopted by the Review Conference in Kampala in 2010, which is why they are often referred to as the Kampala Amendments.

121. Trahan, *supra* note 107, at 37.

122. *Id.* at 38.

123. The Rome Statute of the International Criminal Court, art. 8(2), July 1, 2002, 2187 U.N.T.S. 38544.

124. Trahan, *supra* note 107, at 40; Boevig, *supra* note 77, at 558.

125. Trahan, *supra* note 107, at 40.

126. *Id.*

127. *Id.*

128. *Id.*

129. Rome Statute of the Int’l Crim. Ct., art. 15, July 7, 1998, 2187 U.N.T.S. 38544.

territory of non-State Parties.¹³⁰ This did not bar the UNSC from referring acts of aggression including non-State parties to the ICC, though. While many lamented excluding non-State parties from the ICC's jurisdiction over aggression, agreement over this key point may have been the reason consensus was ever established.¹³¹ Consequently, since The United States¹³² and Russia (and China)¹³³ are now not state parties to the ICC, they are excluded from the ICC's jurisdiction over the crime of aggression. Their membership in the UNSC also precludes matters revolving these countries, and presumably their allies, to get referred to the ICC.

On the 20th anniversary of the Rome Statute, on 17 July 2018, the ICC's jurisdiction over aggression came into effect.¹³⁴ With the absence of three key Permanent Members from the ICC, it may seem that prosecuting the crime of aggression internationally did not get a lot of traction. However, domestically there have been significant developments. A number of countries have integrated the crime of aggression into their national criminal codes, either by ratifying the Kampala Amendments or by virtue of having something similar in place already.¹³⁵ The Russian invasion of Ukraine is the first international violation of the crime of aggression since the definition was adopted and international response to it may very well set the blueprint for what to do and not do in the future.

130. *Id.* ("In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.").

131. Trahan, *supra* note 107, at 42.

132. *Id.*

133. Russia withdraws from International Criminal Court treaty, BBC NEWS (Nov. 16, 2016), <https://www.bbc.com/news/world-europe-38005282> [<https://perma.cc/2GHJ-A5HC>]. Though Russia signed the Rome Statute, it never ratified the treaty. The ICC authorized an investigation into "the 2008 Russia-Georgia conflict in South Ossetia" and it had also ruled that "Russia's activity in Crimea amounted to an ongoing occupation."

134. PERMANENT MISSION OF THE PRINCIPALITY OF LIECHTENSTEIN TO THE UNITED NATIONS ET AL., RATIFICATION AND IMPLEMENTATION OF THE KAMPALA AMENDMENTS ON THE CRIME OF AGGRESSION TO THE ROME STATUTE OF THE ICC (3d ed. 2019).

135. See Status of Ratification and Implementation, THE GLOBAL CAMPAIGN FOR THE PREVENTION OF AGGRESSION (Feb. 3, 2022), <https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/> [<https://perma.cc/JEM3-YVYB>].

1. ICC

Ukraine is not a State Party to the Rome Statute, which means it cannot refer situations to the ICC. Russia is also not a member of the Rome Statute, meaning crimes committed by it cannot be prosecuted by the ICC of its volition or through the UNSC, due to Russia's veto power.

Ukraine accepted the ICC's jurisdiction over crimes committed in its territory on two separate occasions. The first time, the ICC was given jurisdiction over crimes committed between 21 November 2013 and 22 February 2014,¹³⁶ and the second time, the ICC jurisdiction was extended for an indefinite period of time, over crimes taking place after 20 February 2014.¹³⁷ It was on this basis that the ICC Prosecutor announced he would open an investigation into the Situation on Ukraine, and called upon the international community to support its efforts.¹³⁸ In following with the Rome Statute, the ICC Prosecutor stated the next step would be obtaining authorization from the Pre-Trial Chamber, which could be avoided if a State Party would refer the situation to the ICC Prosecutor's Office.¹³⁹ The ICC Prosecutor later announced that thirty-nine State Parties took this step, thus expediting the investigation into the Ukraine Situation.¹⁴⁰ In this instance, the ICC has jurisdiction over crimes against humanity, genocide, and war crimes. It cannot prosecute aggression in the Russian invasion of Ukraine.

ICC jurisdiction over aggression is only triggered if the victim and the perpetrator have accepted it, which both Ukraine and Russia have not. Even if Ukraine were to ratify the amendments relating to aggression now,

136. See Embassy of Ukraine: No. 61219/35-673-384 (2014), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf> [<https://perma.cc/P3SE-SKZB>].

137. *Ukraine Accepts ICC Jurisdiction Over Alleged Crimes Committed Since 20 February 2014*, INT'L CRIM. CT. (Sept. 8, 2015), <https://www.icc-cpi.int/news/ukraine-accepts-icc-jurisdiction-over-alleged-crimes-committed-20-february-2014> [<https://perma.cc/7ANE-ESR8>].

138. Office of the Prosecutor, 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, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening> [<https://perma.cc/SJW7-DH2P>].

139. *Id.*

140. Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, INT'L CRIM. CT. (Mar. 2, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> [<https://perma.cc/SS4Y-9FDB>].

the crime does not have retroactive application.¹⁴¹ With the ICC unable to move forward on aggression, the next venue would be national courts, exercising either territorial jurisdiction or national courts exercising universal jurisdiction.

2. National Courts

Ukraine is one of the countries that has adopted national criminal legislation on aggression.¹⁴² In fact, arguably the first criminal trial on a war of aggression, since IMT, took place in Ukraine and resulted in a conviction for two Russian ex-service military men.¹⁴³ While this does not mean that Ukraine will be able to successfully indict, prosecute, and convict Russian political or military leaders for aggression, it demonstrates a trend towards ending impunity for perpetrating international crimes. However, a domestic court exercising territorial jurisdiction cannot pierce immunity and also challenge the traditional “principle that states cannot stand in judgment of one another.”¹⁴⁴

States have increasingly begun exercising universal jurisdiction, as landmark convictions for crimes committed in Yemen¹⁴⁵ and Syria¹⁴⁶ have recently been delivered. Countries that adopted universal jurisdiction legislation domestically can also try acts of aggression, in the case of Germany and Netherlands, and these prosecutions can encompass higher ranking officials as well.¹⁴⁷ Unfortunately, these cases are rarely undertaken, as they generate controversy,¹⁴⁸ and face geographical and logistical

141. Rome Statute of the Int'l Crim. Ct., art. 11(2), July 7, 1998, 2187 U.N.T.S. 38544.

142. Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, *supra* note 135, at 4.

143. Sergey Sayapin, *A Curious Aggression Trial in Ukraine: Some Reflections on the Alexandrov and Yerofeyev Case*, 16 J. INT'L CRIM. JUST. 1093, 1094 (2018).

144. 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/> (differentiating between functional and status immunity and outlining how various accountability measures would be able to overcome the obstacle of immunity) [<https://perma.cc/76QH-NT67>].

145. *Fighting Impunity for Crimes in Syria: Victory in Germany, Setback in France*, HUMAN RIGHTS WATCH (Jan. 27, 2022), <https://www.hrw.org/news/2022/01/27/fighting-impunity-crimes-syria-victory-germany-setback-france> [<https://perma.cc/6BNJ-3PZM>].

146. *Id.*

147. Guilfoyle, McIntyre, and Paige, *supra* note 7, at 6.

148. Dannenbaum, *supra* note 144.

difficulties, such as international arrests, collection of evidence in foreign territories, and extradition.¹⁴⁹

IV. RECOMMENDED FRAMEWORK FOR PROSECUTING AGGRESSION: THE PRESENT AND THE FUTURE

Assuming that the Russian invasion of Ukraine cannot be prosecuted in the ICC this Article recommends the creation of an international hybrid tribunal for the present, and strengthening the existing framework for ICC jurisdiction over aggression in the future.

A. Hybrid International Tribunals

An international tribunal for the crime of aggression, can either be a permanent one, or one specifically to prosecute aggression in Ukraine, committed by Russia. The ICJ has left the door open for international criminal tribunals to circumvent status immunity, without explaining the threshold that would make a criminal tribunal “international.”¹⁵⁰ Comprehensively exploring functional and status immunity in national and international courts is outside the scope of this Article, but precedent shows that the UNSC has used its powers under Chapter VII of the UN Charter and the UNGA has entered into treaties to create tribunals that have convicted previous heads of state for war crimes, genocide, and crimes against humanity.¹⁵¹

A UNSC authorized international tribunal seems out of the question, not only because of Russia’s veto power, but also due to other Permanent Members’ reluctance to create a tribunal that might one day prosecute their own acts of aggression.¹⁵² While it is hypocritical that the very nations

149. Guilfoyle, McIntyre, and Paige, *supra* note 7, at 6.

150. Heather Noel Doherty (Ludwig), *Tipping the Scale: Is the Special Tribunal for Lebanon International Enough to Override State Official Immunity*, 43 CASE W. RES. J. INT’L L. 831, 838 (2011). In *The Arrest Warrant* case, the International Court of Justice gave the International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, and the future ICC as examples of international tribunals. The common thread between these tribunals is that they were created by the UNSC, under Chapter VII. The Special Court of Sierra Leone, created by the UN as a tribunal removing the immunity of Liberia’s former president, was an international court and went on to state that “the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.” The author provides a detailed comparison chart of various international tribunals, the source of their establishment, and whether there was a provision removing immunity from high-ranking officials in the source charter.

151. *Id.* at 874–75.

152. Shane Darcy, *Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly*, JUST SECURITY (2022), <https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/> [<https://perma.cc/ZWU7-6KH4>].

that argued strenuously against the crime of aggression in the Rome Statute and limited the ICC's jurisdiction over it would now be in favor for creating a specialized tribunal on the same crime, a dedicated tribunal may be the only way to prosecute Russian officials for launching an invasion into Ukraine.

There is much debate about the nature of the international tribunal, the ability of the tribunal to pierce immunity, and the efficacy of such a tribunal when the ICC already exists. On the one hand, Johnson proposes that the UNGA, on the request of the Ukrainian government, could establish a hybrid tribunal on aggression that could theoretically pierce immunity and garner support from non-State parties to the ICC.¹⁵³ While the UNGA cannot "create criminal jurisdiction where there would otherwise be none,"¹⁵⁴ it can exercise Ukraine's territorial jurisdiction over the crime, on its behest.¹⁵⁵ Heller's responding argument is twofold. First, he cautions against the precedent that a handful of countries could come together to create an international tribunal for the express purpose of overcoming jurisdictional burdens national courts bear.¹⁵⁶ Secondly, he argues that the creation of an international tribunal, instead of utilizing the ICC, would send a clear signal about selective international criminal justice and divert resources and credibility from an institution already set up for this purpose.¹⁵⁷ When The United States, the United Kingdom, and its allies invaded Iraq illegally, in what is perhaps one of the "most flagrant acts of aggression since the Vietnam War,"¹⁵⁸ there were no calls to create a specialized tribunal, and none of the leaders were prosecuted for aggression. Creating a tribunal whose laws apply to others, but not to one's own, actions, does not inspire confidence in international law, global institutions, or universal justice.

153. Larry D. Johnson, *United Nations Response Options to RussianID*: "rYguUmg", "properties": {"formattedCitat, JUST SECURITY (2022), <https://www.justsecurity.org/80395/united-nations-response-options-to-russias-aggression-opportunities-and-rabbit-holes/> [https://perma.cc/YZK7-R3NP].

154. Carrie McDougall, *Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics*, OPINIO JURIS (2022), <http://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/> [https://perma.cc/9KX5-ZKYV].

155. *Id.*

156. Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea*, OPINIO JURIS (2022), <http://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/> [https://perma.cc/M2YG-5KT3].

157. *See id.*

158. *Id.*

However, allowing the current Russian aggression to go unpunished because previous aggressions were not prosecuted is also not the way forward. Similarly, simply because it cannot be punished in the ICC does not mean accountability for aggression should not be pursued through other avenues. Rather, it is time to recognize that the international justice system can and should be better, and steps should be taken to ensure accountability. Since the crime of aggression was added to the Rome Statute and its jurisdiction became effective, this is the first flagrant violation of it, and it should not go unpunished.¹⁵⁹

Trahan supports the creation of an international tribunal, while also highlighting the importance of strengthening the punishment for crime of aggression in the ICC.¹⁶⁰ According to Trahan, Heller is critical of an international tribunal comprised by a few countries, instead of the UNGA. A tribunal stemming from the UNGA would have multilateral support, as the UNGA is the more representative body compared to the UNSC.¹⁶¹ Secondly, the UNGA has created them previously, when it created the Special Court for Sierra Leone, with agreement from Sierra Leone government, and the Extraordinary Chambers in the Courts of Cambodia, with agreement from Cambodia.¹⁶² A tribunal styled after these two, created by the UNGA, instead of one along the lines of the IMT, would most likely quell criticism that a few countries joined together to create an international tribunal.¹⁶³ While there are some doubts that the UN member states would support the creation of a tribunal to prosecute the leaders of another country for committing crimes of aggression,¹⁶⁴ extensive consultation among member states is one way to figure out if the desired outcome is possible. If a consensus in the UNGA cannot be achieved, then a tribunal can be created through an international treaty.¹⁶⁵ However, there is doubt that a tribunal created through a treaty, instead of through a UN organ, may set the immunity of senior Russian officials aside.¹⁶⁶ Such a tribunal may also not be considered “international” enough, and therefore face legal challenges, in addition to logistical and financial problems.

159. Johnson, *supra* note 153.

160. Jennifer Trahan, *U.N. General Assembly Should Recommend Creation Of Crime Of Aggression Tribunal For Ukraine: Nuremberg Is Not The Model*, JUST SECURITY (Mar. 7, 2022), <https://www.justsecurity.org/80545/u-n-general-assembly-should-recommend-creation-of-crime-of-aggression-tribunal-for-ukraine-nuremberg-is-not-the-model/> [<https://perma.cc/J6MT-23DN>].

161. *Id.*

162. *Id.*

163. *Id.*

164. McDougall, *supra* note 153.

165. *Id.*

166. Heller, *supra* note 156.

Even as international law experts recognize the need to improve the ICC's jurisdiction over aggression as an important step forward for international criminal law, they realize it is not likely that non-State parties will get included in its ambit.¹⁶⁷ It took twenty years from the creation of the Rome Statute for the crime of aggression's jurisdiction to become effective, and negotiations were fraught with controversy. Change, though necessary, will not come quickly enough to deal with the current Russian invasion of Ukraine. However, states should use the momentum caused by the outrage towards the invasion and join the amended Rome Statute, and take steps to ratify the amendment related to the crime of aggression. Recognizing the difficulties that are coming with prosecuting aggression currently, dialogue should begin for removing the extra jurisdictional barriers surrounding aggression and including it in the same scheme as the other three international crimes. Only by strengthening the crime of aggression can further instances be avoided. States should also consider the possibility of allowing the UNGA to make referrals to the ICC.

B. UNGA Referrals to the ICC

As of 2021, the UNSC has only referred two situations to the ICC, and in both situations it did not taken Chapter VII enforcement mechanism supporting the referral.¹⁶⁸ The UNSC did not deliver evidence or secure arrest warrants, and did not allow the UN to refund the ICC for costs associated with the referrals.¹⁶⁹ What is even more glaring is the situation of aggression that the UNSC did not referred to the ICC; the Syrian conflict. Of the twelve resolutions vetoed, some contained provisions referring the Syrian situation to the ICC.¹⁷⁰

As the UNSC remains paralyzed to handle matters of international peace and security promptly and effectively, the UNGA has taken a more active role, by not only creating the tribunals mentioned above, but by also establishing commissions of inquiry and fact finding in Syria and Myanmar. As mentioned above, the UNGA can assign power to subsidiary bodies to investigate, while only the UNSC can delegate the power to

167. Trahan, *supra* note 160.

168. FERGAL GAYNOR, GENERAL ASSEMBLY REFERRAL TO THE INTERNATIONAL CRIMINAL COURT, IN *THE PAST, PRESENT AND FUTURE OF THE INTERNATIONAL CRIMINAL COURT* 328, 335 (Alexander Heinze & Viviane E. Dittrich eds., 2021).

169. *Id.* at 328–29.

170. *Id.* at 329.

investigate.¹⁷¹ When the UNGA is investigating international crimes and mass atrocities in a target state, the target state is not legally obliged to comply with the investigation.¹⁷² This is considered non-coercive action, which the UNGA now routinely and lawfully performs.¹⁷³ Similarly, referring a matter to the ICC could also be considered non-coercive action against a non-consenting state (if the state is not a Party to the Rome Statute).¹⁷⁴ The referral could come through the Uniting for Peace Resolution,¹⁷⁵ which needs a two-third majority of the UNGA in order to pass. A two-third majority of the most democratic body in the institution that represents the international community is a “powerful and legitimate basis for the grant of criminal jurisdiction,”¹⁷⁶ and should hold more weight than a single veto from one state in the UNSC. The best way to determine the legality of the UNGA referring matters to the ICC is to ask the International Court of Justice for an advisory opinion on the matter.¹⁷⁷ The call to allow the UNGA to make referrals to the ICC is gaining popularity, and is certainly not a novel one, as many states initially argued that the UNGA should have this power within the Rome Statute itself, though it was eventually excluded.¹⁷⁸

Currently, the Rome Statute does not envision ICC referrals from the UNGA, and to allow that would need an amendment, which is a complicated procedure. Given the way matters are unfolding in Ukraine and the growing frustrating with an inability to prosecute heads of states for committing aggressive acts of war, there might be support for amending the Rome Statute. It is time to make a lasting mark on the accountability front, and

171. *Id.* at 341. According to Gaynor, the U.N. Charter does not differentiate between the power to investigate and the power to prosecute, giving only the former to the UNGA and both to the UNSC. The U.N. Charter is a living document, that evolves with the times and allows for expansive UNGA powers.

172. *Id.* at 339.

173. *Id.*

174. *Id.* at 336–39. Gaynor analyses the relevant sections of the International Court of Justice’s advisory opinions in the *Reparations for Injuries Suffered in the Service of the United Nations* and in the *Certain Expenses of the United Nations* and Article 11(2), 12, and Article 14 of the U.N. Charter to conclude that the UNGA has the implied power to refer situations to the ICC when a UNSC referral is blocked by a veto.

175. G.A. Res. 377 (V), annex, Uniting for Peace (Nov. 3, 1950).

176. Gaynor, *supra* note 168, at 341.

177. *Id.* at 342.

178. Darcy, *supra* note 153; see also *Eighth report on the draft Code of Crimes Against the Peace and Security of Mankind by Mr. Doudou Thiam, Special Rapporteur: Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court*, [1990] 2 Y.B. INT’L L. COMM’N, U.N. Doc. A/CN.4/430 and Add.1; *Report of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No. 10*, [1994] 2 Y.B. INT’L L. COMM’N, U.N. Doc. A/49/10.

the time for taking those steps is now, when the case of aggression is clear-cut.

V. CONCLUSION

The only way to prevent aggression is by enforcing Art 2(4) uniformly and holding accountable the state and citizen of every state that violates the prohibition on the use of force. There are two ways to do this in international law, through the UN and through the ICC. When the UNSC blocks accountability through both avenues, it is time to rethink the structure of international law and develop it so that it remains an effective tool for preventing violations in the future. The crime of aggression is unique in that stopping and penalizing it is integral to international peace, but prosecuting it is so fraught with complexities. This Article highlighted some of those complexities and recommended that the tide turn towards allowing the UNGA to make referrals to the ICC, to ensure perpetrators of all ranks committing aggression are prosecuted. Simultaneously, countries should reaffirm their commitment to the ICC by joining the amended Rome Statute and ratifying the relevant amendment on aggression. They should also take steps to include the crime of aggression in their domestic legislation, so that national prosecutions can act as a deterrence. While these are all plausible long-term solutions, expediency is key in the current situation. Accountability for the Russian invasion of Ukraine will send a strong sign that aggression will not go ignored, and in the absence of ICC proceedings, the UNGA and the Ukrainian government should work towards creating a hybrid international tribunal where aggression can be prosecuted.

