

ESSAY

THE NEED FOR AN INTERNATIONAL TRIBUNAL ON THE CRIME OF AGGRESSION REGARDING THE SITUATION IN UKRAINE

*Jennifer Trahan**

ABSTRACT

This Essay examines the imperative need to prosecute the crime of aggression being committed against Ukraine and doing so through an international tribunal created on the recommendation of the UN General Assembly. It also makes the case for amending the Rome Statute of the International Criminal Court to expand jurisdiction over the crime of aggression to cover future similar situations. Both are critically important in order to enforce the core norm against the use of force within the UN Charter through the regime of individual criminal responsibility. The Essay also briefly explores the paralysis caused within the UN Security Council when a permanent member is the state violating the use of force prohibition within the UN Charter.

ABSTRACT.....	671
I. INTRODUCTION	672
II. ENFORCING ARTICLE 2(4) OF THE UN CHARTER THROUGH THE UN SYSTEM	672
III. THE POTENTIAL ROLE OF THE ICC IN PROSECUTING THE CRIME OF AGGRESSION	676
IV. HOW TO ENFORCE THE CRIME OF AGGRESSION GOING FORWARD	681
A. Amending the Kampala Crime of Aggression Amendment	681
B. Establishing an Ad Hoc Special Tribunal on the Crime of Aggression	683
V. CONCLUSION.....	689

I. INTRODUCTION

While this is hardly a new predicament, Russia's February 2022 invasion of Ukraine has highlighted the impediments to the Security Council's ability to enforce the United Nations ("UN") Charter when the core provision against the use of force contained in Article 2(4)¹ is violated by a permanent member of the UN Security Council. It has equally highlighted the imperative of prosecuting the crime of aggression—because absent the "original sin" of the invasion, none of the massive casualties and crimes would be inflicted on the Ukrainian people. This Essay will examine: (1) the structural impediments, seemingly built into the Charter system when a permanent member of the UN Security Council is committing the aggression; (2) the reluctance of states to utilize the International Criminal Court ("ICC") to enforce Article 2(4) through the prosecution of the crime of aggression; and (3) the alternative of creating a Special Tribunal on the Crime of Aggression ("STCoA") to investigate and prosecute the crime in the instant situation. The Essay also considers the need to amend the ICC's Rome Statute² to expand the Court's jurisdiction over the crime in the future, and the potential consequences to the international legal order of failing to address the crime of aggression in the current circumstances.

II. ENFORCING ARTICLE 2(4) OF THE UN CHARTER THROUGH THE UN SYSTEM

Article 2(4) of the UN Charter is the core norm within the UN Charter that prohibits the use of force.³ It, alongside the Security Council's Chapter VII powers⁴ and the right of states to individual and collective self-defense enshrined in Article 51,⁵ creates the trifecta arrangement that is designed to protect international peace and security.

* Clinical Professor, NYU Center for Global Affairs; Convenor, The Global Institute for the Prevention of Aggression. Thanks to Andras Vamos-Goldman and Astrid Reisinger Coracini for their insightful comments.

1. *See* U.N. Charter art. 2, ¶ 4.

2. *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

3. It states: "[a]ll 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."); U.N. Charter art. 2, ¶ 4.

4. *See generally id.* at arts. 39–42.

5. *See id.* at art. 51.

Maintaining international peace and security is one of the “[p]urposes”⁶ of the UN and a key reason for the establishment of the organization.⁷

The Charter charges the UN Security Council with “primary responsibility” for the maintenance of international peace and security⁸—essentially the ability to respond to Article 2(4) violations through a variety of measures.⁹ Yet, when a permanent member of the UN Security Council—with veto power¹⁰ over decision making under Chapter VII—is involved, this can, and often does, result in paralysis of that body.¹¹ For example, Russia vetoed a draft resolution cast the day after its invasion of Ukraine that would have condemned the invasion.¹²

The UN Charter provision granting the victors of World War II the veto power to provide them an alternative to the use of force when their vital interests are threatened has thus far successfully averted another world war.¹³ Yet, it has also resulted in these permanent members deciding for themselves when to use the veto. This has resulted in the Security Council becoming deadlocked in many situations that threaten international peace and security.¹⁴

There is no easy answer to this conundrum—which has plagued the UN Security Council since the Cold War¹⁵—other than states making more use of resolutions under Chapter VI (which pertains to pacific settlement of disputes), where obligatory abstention ought to apply.¹⁶ Such abstention from voting when a party to the dispute is

6. *Id.* at art. 1, ¶ 1.

7. *See id.* at pmb. (“determined to save succeeding generation from the scourge of war”).

8. *Id.* at art. 24, ¶ 1.

9. *See id.* at arts. 33–38 (addressing pacific settlement of disputes); *id.* arts. 39–42 (measures that can be taken to address threats to the peace, breaches of the peace and acts of aggression). The trigger for the Security Council’s acting under Chapter VII is contained in Article 39.

10. *See* U.N. Charter art. 27, ¶ 3.

11. *See* JENNIFER TRAHAN, EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES 30–47 (2020) (chronicling various uses of the veto).

12. *See generally* U.N. Doc. S/2022/155 (Feb. 25, 2022) (vetoed by the Russian Federation). The resolution that Russia vetoed on February 25, 2022, was under Chapter VI and thus Russia should not have been permitted to veto it. *See* U.N. Charter art. 27, ¶ 3 (“in decisions under Chapter VI, . . . a party to a dispute shall abstain from voting.”).

13. *See* U.N. Charter art. 27, ¶ 3.

14. *See* TRAHAN, *supra* note 11, at 30–47.

15. *See* Emma McClean, *Hard Evidence: Who Uses Veto in the UN Security Council Most Often – and for What?*, CONVERSATION (July 31, 2014), <https://theconversation.com/hard-evidence-who-uses-veto-in-the-un-security-council-most-often-and-for-what-29907> [<https://perma.cc/52BF-W3HG>].

16. *See* U.N. Charter art. 27, ¶ 3.

involved, however, does not apply when the Council is acting under Chapter VII,¹⁷ and this is where the majority of the Council's powers lie.¹⁸ Of course, this conundrum would not be as pervasive if the permanent members were to use their veto privilege within the bounds set by international law and the UN Charter in situations where genocide, war crimes, and crimes against humanity are occurring, as this Author, in her book, argues is required,¹⁹ Some of the Author's arguments also apply to a permanent member committing aggression.²⁰ It is difficult to reconcile much of the veto use that is occurring with the requirements of international law.²¹

Thus, the veto is a built-in feature of the UN system—purposefully designed during the negotiations that established the Charter.²² The veto is nearly impossible to remove or formally alter because UN Charter amendments require the positive vote and ratification of two-thirds of UN Member States, “including all the permanent members of the Security Council.”²³ Thus, the veto needs to be contended with absent dissolving the UN and creating a new system. Another alternative is pursuing a legal challenge to veto use

17. *See id.* (showing a lack of comparable language on abstention regarding voting under Chapter VII).

18. *See id.* at arts. 39–51.

19. *See* TRAHAN, *supra* note 11, at 142–242. The author examines the legality of such vetoes in terms of their consistency with: (1) *jus cogens*; (2) UN Charter obligations, such as adhering to the “Purposes and Principles” of the United Nations; and (3) treaty obligations, such as the obligation to “prevent” genocide contained in Article 1 of the Genocide Convention, and the obligation to “ensure respect for” the 1949 Geneva Conventions, contained in their Common Article 1. *See* Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 78 U.N.T.S. 277; Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [collectively, the “1949 Geneva Conventions”].

20. *See* Jennifer Trahan, *Aggression and the Veto*, OPINIO JURIS (Feb. 28, 2022), <https://opiniojuris.org/2022/02/28/aggression-and-the-veto/> [<https://perma.cc/ULC4-SQMY>]; *see generally* Jennifer Trahan, *Legal Issues Surrounding Veto Use and Aggression*, 55 CASE WESTERN RESERVE J. INT'L L. 61 (2023).

21. *See* TRAHAN, *supra* note 11, at 30–47 (examining past vetoes); *see id.*, at 260–342 (containing detailed examination of vetoes related to the situation in Syria and veto threats related to the situation in Darfur, Sudan); *see also* Trahan, *Legal Issues*, *supra* note 20.

22. For discussion of the UN Charter negotiations that led to the creation of the veto power, *see* TRAHAN, *supra* note 11, at 10–21.

23. U.N. Charter art. 108.

that permits the continued perpetration of genocide, crimes against humanity, and war crimes, as this Author suggests in her book.²⁴

Paralysis brought on by veto use at the UN Security Council leaves states exploring the powers of the General Assembly and what it may contribute in such situations. Given the Security Council only has “primary” responsibility for the maintenance of international peace and security,²⁵ the General Assembly may also play a role, although its powers are limited under the Charter.²⁶ In the instant situation, the General Assembly has twice condemned Russia’s invasion²⁷ as well as Russia’s attempt at illegal annexation,²⁸ all three resolutions having passed with resounding support.²⁹ The General Assembly may yet have an additional, important role to play if states support the creation of a STCoA, an approach explored below.

States may obviously also act outside of the UN framework. For example, they may make use of bilateral or multilateral sanctions, as are being implemented against Russia.³⁰ These are sanctions that, were the Security Council not paralyzed by Russia’s veto power, could be implemented through that body, as have been other sanctions regimes.³¹ Sanctions implemented through the Security Council carry greater multilateral legitimacy.

24. See TRAHAN, *supra* note 11, at 8 (suggesting that states should make statements questioning the legality of vetoes cast when they: (1) permit the continued perpetration of genocide, crimes against humanity, and war crimes; (2) consider a General Assembly resolution on the topic; or (3) request an Advisory Opinion from the International Court of Justice (“ICJ”)); see also Trahan, *Legal Issues*, *supra* note 20 (extending arguments to aggression).

25. U.N. Charter art. 24, ¶ 1.

26. See *id.* at arts. 10–17.

27. See G.A. Res. A/RES/ES-11/1 (Mar. 2, 2022) (passing with 141 countries voting in favor); G.A. Res. A/RES/ES-11/2 (Mar. 2, 2022) (passing with 140 countries voting in favor).

28. See G.A. Res. A/RES/ES-11/4 (Apr. 7, 2022) (passing with 143 countries voting in favor).

29. See G.A. Res. A/RES/ES-11/1; G.A. Res. A/RES/ES-11/2; G.A. Res. A/RES/ES-11/4. The General Assembly has also passed a resolution to establish a reparations mechanism. See G.A. Res. A/RES/ES-11/5 (Nov. 14, 2022).

30. See *Fact Sheet: United States, G7 and EU Impose Severe and Immediate Costs on Russia*, WHITE HOUSE (Apr. 6, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/06/fact-sheet-united-states-g7-and-eu-impose-severe-and-immediate-costs-on-russia/> [https://perma.cc/4LRZ-8W9K].

31. See, e.g., *What to Know about Sanctions on North Korea*, COUNCIL FOREIGN REL. (July 16, 2019), <https://www.cfr.org/backgrounder/north-korea-sanctions-un-nuclear-weapons> [https://perma.cc/3279-C3K2].

At present, the Security Council is paralyzed by the veto power of a permanent member,³² and the General Assembly, as of this writing, has played only a circumscribed role. The limitations of the UN system have thus become dramatically apparent. This damages both the institutional credibility and legitimacy of the Security Council, as well as the UN more broadly.³³

III. THE POTENTIAL ROLE OF THE ICC IN PROSECUTING THE CRIME OF AGGRESSION

The ICC could also play a significant role in enforcing Article 2(4) of the UN Charter through its regime of individual criminal responsibility. It could investigate and prosecute the crime of aggression. Yet, this would first require states to give the ICC sufficient jurisdiction over the crime of aggression under the ICC's Rome Statute.

The crime of aggression, as defined in Article 8*bis* of the Rome Statute, is basically a way to enforce Article 2(4) of the UN Charter. Article 8*bis* provides:

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.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression³⁴

32. The author is not claiming that the absence of the veto would solve the present situation; when the aggressor state is a nuclear power, various options are off the table.

33. The other UN actor potentially able to contribute in such instances is the UN Secretary-General through his "good offices" function, which may for example be used in negotiating humanitarian corridors, or peace negotiations. See Joanna Sugden, *U.N. Chief Calls for Humanitarian Corridors, End to War in Ukraine*, WALL ST. J. (Apr. 26, 2022), <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-04-26/card/u-n-chief-calls-for-humanitarian-corridors-end-to-war-in-ukraine-V9xrR6RVkOXVRbMqB7bk> [<https://perma.cc/C343-32JZ>].

34. Rome Statute, *supra* note 2, at art. 8*bis*.

There is then a list of covered acts of aggression from General Assembly Resolution 3314.³⁵

Importantly, the “act of aggression,” specifically the first sentence of paragraph 2, basically tracks the language of Article 2(4) of the UN Charter³⁶ Thus, unlike the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East (Tokyo), both of which were designed to prosecute full-scale “wars of aggression,”³⁷ the Rome Statute follows the UN Charter’s approach, and defines the act of aggression in terms of the “use of armed force.”³⁸ It thereby, subject to certain additional limitations, covers what is prohibited under Article 2(4), excluding anything encompassed by the Security Council acting under its Chapter VII power as well as acts that fall within the ambit of Article 51 self-defense.³⁹

An illustrative list contained in Article 8*bis* provides examples from General Assembly Resolution 3314. Certain ones seem particularly relevant regarding Russia’s invasion, including:

- (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; . . .
- (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; [and] . . .
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries^[40] which carry out acts of armed force

35. *See id.*

36. The word “sovereignty” is contained in Article 8*bis* but not Article 2(4); the “threat” of the use of force is contained in Article 2(4) but not Article 8*bis*.

37. *See, e.g.,* Annex to Prosecution and Punishment of Major War Criminals of the European Axis (London Charter) art. 6(a), Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544 [hereinafter Nuremberg Charter] (covering “war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing[.]”).

38. *See* Rome Statute, *supra* note 2, at art. 8*bis* and text accompanying note 34.

39. Force authorized under Chapter VII or permitted under Article 51 would be consistent with the UN Charter and not encompassed by the crime.

40. For background on the “Wagner Group,” *see* Eric Sof, *Wagner Group: Notorious Private Military Company*, SPECIAL OPERATIONS MAG. (Apr. 19, 2022), <https://special-ops.org/wagner-group-notorious-private-military-company/> [<https://perma.cc/Q2A8-XXZM>].

against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.⁴¹

As to Belarus, the following appears relevant: “(f) [t]he 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.”⁴²

However, the definition of the crime of aggression in Article 8*bis* is also conservative. It does not encompass *any* violation of the UN Charter but only ones that by their “character, gravity, and scale” constitute a “manifest” violation of the Charter.⁴³ This “manifest” requirement covers only clear or flagrant UN Charter violations, and not those that are in a debatable area of legality.⁴⁴ *Jus ad bellum* rules themselves are clear, but there are “grey areas” where their application, or the outside parameters of the rules, are less clear; thus, the drafters added the “manifest qualifier.”⁴⁵ The definition also excludes *de minimis* violations,⁴⁶ which, in any event, would not be in line with the ICC’s requirement of prosecuting only the “most serious crimes of concern to the international community.”⁴⁷

The crime therefore perfectly appears to encompass the present situation, where it is difficult to find a plausible legal theory in defense of Russia’s invasion.⁴⁸ By contrast, where there are “grey areas” or ambiguous uses of force (or *de minimis* ones), these would not be

41. Rome Statute, *supra* note 2, art. 8*bis*(2)(a)–(g). See also Ryan Goodman & Rebecca Hamilton, *Prosecutor v. President Vladimir Putin: A Model Indictment for the Crime of Aggression Against Ukraine*, JUST SEC. (Mar. 14, 2002), <https://www.justsecurity.org/80669/model-indictment-of-the-crime-of-aggression-against-ukraine-vladimir-putin/> [<https://perma.cc/XH9F-L4S5>].

42. Rome Statute, *supra* note 2, art. 8*bis*(2)(f).

43. *Id.* art. 8*bis*(1) (containing the manifest requirement).

44. The definition excludes “seriously controversial cases . . . in order not to decide major controversies about the content of primary international rules of conduct through the back door of international criminal justice.” Claus Kreß, *Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus*, 20 EUR. J. INT’L L. 1129, 1142 (2009).

45. *Id.*

46. See Silvia A. Fernandez de Gurmendi, *Completing the Work of the Preparatory Commission: The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*, 25 FORDHAM INT’L L.J. 589, 597 (2002) (“[B]order skirmishes, cross-border artillery, [minor] armed incursions, and similar situations should not fall under the definition.”).

47. Rome Statute, *supra* note 2, at art. 5(1).

48. See, e.g., James A. Green, Christian Henderson & Tom Ruys, *Russia’s Attack on Ukraine and the Jus ad Bellum*, 9 J. USE OF FORCE AND INT’L L. 4 (2022) (explaining that all of Russia’s *jus ad bellum* claims fail, with most of them on multiple levels).

encompassed within the crime.⁴⁹ Of course, if the current situation is subject to legal adjudication, the legality/illegality of the intervention would need to be adjudicated and any legal theories advanced to the contrary would warrant thorough consideration.⁵⁰

Yet, as it is by now well-known, ICC prosecution of the crime of aggression in the instant situation is precluded under the Rome Statute. Specifically, Article 15*bis*, paragraph 5, provides: “[i]n respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime . . . when committed by that State’s nationals or on its territory.”⁵¹ This precludes ICC jurisdiction vis-à-vis the crime of aggression over Russian nationals or crimes committed on Russian territory, as Russia is not a State Party to the Rome Statute.⁵² The same is true for the nationals of, or crimes committed on the territory of, Belarus—which is also not a State Party to the Rome Statute.⁵³

Accordingly, the ICC, whose prosecutor has opened an investigation into crimes being committed on the territory of Ukraine (with two warrants issued to date),⁵⁴ is limited to investigating and prosecuting war crimes, crimes against humanity, and genocide (if applicable).⁵⁵ While Ukraine is not a Rome Statute State Party, it has

49. See, e.g., Jennifer Trahan, *Defining The “Grey Area” Where Humanitarian Intervention May Not Be Fully Legal, But Is Not the Crime of Aggression*, 2 J. USE OF FORCE & INT’L L. 42 (2015).

50. The standard of proof would of course be beyond reasonable doubt, with the burden of proof on the prosecution. See, e.g., Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, ¶ 21 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 925, ¶ 20 (Nov. 8, 1994) [hereinafter ICTR Statute]; Statute of the Special Court for Sierra Leone, S.C. Res. 1315, ¶ 17 (Aug. 14, 2000) [hereinafter SCSL Statute]; Rome Statute, *supra* note 2, at arts. 55, 66, 67 (listing fair trial rights).

51. Rome Statute, *supra* note 2, at art. 15*bis*(5).

52. See *Penal Matters, Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en [https://perma.cc/9ELQ-MHBG] (last updated Jan. 20, 2022).

53. See *id.*

54. See *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/8X94-43PH]; *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, INT’L CRIM. CT. (Mar. 17, 2023) <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> [https://perma.cc/Z22L-QRJX].

55. See Rome Statute, *supra* note 2, at art. 12 (jurisdiction regarding crimes of genocide, war crimes, and crimes against humanity).

accepted the ICC's jurisdiction through the execution of two Article 12(3) declarations.⁵⁶

Simultaneously, the magnitude of the harm Russia is inflicting upon the Ukrainian people suggests that the Judgment of the International Military Tribunal at Nuremberg was not wrong when the judges wrote that aggression is “the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”⁵⁷ While war crimes investigations and prosecutions will examine specific situations, despite all the investigative teams being deployed,⁵⁸ it will be impossible to investigate and prosecute every war crime. Even if prosecuting every war crime were possible, that would not address the decision to launch a full-scale invasion of a neighboring state, resulting in massive loss of life—and this is what needs to be prosecuted and deterred from happening again. Simply recognizing the ICC lacks jurisdiction and leaving the crime to be investigated by willing national jurisdictions—where, as discussed below, personal immunities⁵⁹ could plague prosecution of the very leaders who the crime is designed to

56. See *Situation in Ukraine*, INT’L CRIM. CT., <https://www.icc-cpi.int/situations/ukraine> [<https://perma.cc/BW3V-7JUX>] (last visited Apr. 19, 2023). Ukraine could reflect its full support for the ICC by acceding to the (amended) Rome Statute—which includes the crime of aggression. While that would be an important endorsement of the ICC and the crime of aggression, Ukraine’s accession would still not create jurisdiction vis-à-vis the crime of aggression in the instant situation due to the application of Rome Statute Article 15bis(5). Yet, it would also *not* create additional legal exposure for Ukraine; Ukraine’s Article 12(3) declarations have already exposed Ukrainian nationals to ICC jurisdiction related to the other ICC crimes.

57. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 421 (1948).

58. The ICC has deployed 42 investigators, forensic experts, and support personnel. See *ICC Prosecutor Karim A.A. Khan QC Announces Deployment of Forensics and Investigative Team to Ukraine, Welcomes Strong Cooperation with the Government of The Netherlands*, INT’L CRIM. CT. (May 17, 2022), <https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine> [<https://perma.cc/A9L3-XFSK>].

59. See Astrid Reisinger Coracini & Jennifer Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-applicability of Personal Immunities*, JUST SEC. (Nov. 8, 2022), <https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/> [<https://perma.cc/8R6Q-FPLX>]; see also *infra* notes 93 (discussing the *Yerodia*, *Charles Taylor*, and *Bashir* cases).

prosecute,⁶⁰ and which would lack the gravitas of international proceedings—would provide a completely unsatisfactory result.

IV. HOW TO ENFORCE THE CRIME OF AGGRESSION GOING FORWARD

States are faced with an existential question: do they *really* want to enforce Article 2(4) of the UN Charter or not? An extremely clear violation appears to have been committed. Will states address this through the framework of international law and individual criminal responsibility? Moreover, what are the potential geopolitical risks of failing to do so?

A. Amending the Kampala Crime of Aggression Amendment

States Parties to the ICC’s Rome Statute should revisit the 2010 negotiations that extensively limited the ICC’s jurisdiction over the crime of aggression.⁶¹ States could in principle amend one sentence in the Rome Statute (Article 15*bis*(5)), and if done while Russia is still militarily intervening in Ukraine, this could *still* create ICC jurisdiction over the crime.⁶²

60. Under Article 8*bis*, paragraph 1, the crime only applies to “persons in a position effectively to exercise control over or to direct the political or military action of a State. . . .” Rome Statute, *supra* note 2, at art. 8*bis*(1).

61. For discussion of the 2010 negotiations at the Kampala, Uganda Review Conference, see Jennifer Trahan, *Negotiating the Amendment on the Crime of Aggression: Proceedings at the Kampala Review Conference on the International Criminal Court*, 11 INT’L CRIM. L. REV. 49 (2011).

62. Additionally, Ukraine would probably need to become a State Party to the amended Rome Statute (including the crime of aggression)—which it should do regardless. *See supra* note 56. Depending on how the amendment is done, one might also need to rely on an expansive reading of the 2017 ASP resolution that activated the crime of aggression’s jurisdiction before the ICC. *See infra* notes 69–70. Otherwise, the text of that activating resolution might also need to be revised to be clear that ratification or accession by the victim state suffices to create ICC jurisdiction over the crime. *See* ASP, Activation of the Jurisdiction of the Court Over the Crime of Aggression, ICC-ASP/16/Res.5 (Dec. 14, 2017), https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf [<https://perma.cc/49NQ-RUKW>] [hereinafter Activating Resolution]. Retroactivity would also need to be considered; yet an argument can be made that for a “continuing crime,” jurisdiction exists over earlier acts. Certainly the aggression committed post amendment (or post activation of the amendment) would fall within the ICC’s jurisdiction. Unfortunately, the amendment negotiations are predicted to be complex and time-consuming, and thus unlikely to come in time to cover the present situation. *See* Astrid Reisinger Coracini, *Is Amending the Rome Statute the Panacea Against Perceived Selectivity and Impunity for the Crime of Aggression Committed Against Ukraine?*, JUST SEC. (Mar. 21, 2023), <https://www.justsecurity.org/85593/is-amending->

Alternatively, even if not done in time to cover the present situation, States Parties need to amend the ICC's jurisdictional regime for the future.⁶³ A review of the crime is required by the 2010 resolution of the ICC's Assembly of States Parties ("ASP") that adopted the crime of aggression amendment.⁶⁴ The resolution provides for review to occur seven years after the crime's activation,⁶⁵ which occurred in 2018;⁶⁶ thus, the review is due in 2025. Yet, there is nothing to preclude review from occurring earlier, as the ASP is always free to consider Rome Statute amendments.⁶⁷ In any event, for States Parties to adopt an amendment in 2025, they should commence their consideration well in advance of that date.

Unfortunately, with the United States having narrowed the ICC's crime of aggression jurisdiction in 2010 vis-à-vis non-States Parties (by insisting on the addition of Article 15*bis*(5)),⁶⁸ and France and the United Kingdom further narrowing jurisdiction⁶⁹ (or arguably doing so⁷⁰) vis-à-vis States Parties in the ASP's 2017 resolution that activated jurisdiction,⁷¹ it is unclear that the political will exists for a further amendment. Yet, one should not assume a lack of political will. The invasion of Ukraine makes it far more difficult to defend the dramatic difference in jurisdictional regimes that exists for the crime of aggression in comparison to the ICC's other three crimes.⁷²

the-rome-statute-the-panacea-against-perceived-selectivity-and-impunity-for-the-crime-of-aggression-committed-against-ukraine/ [https://perma.cc/9UCC-GKTF].

63. See *Statement on Russia's Invasion of Ukraine: A Crime of Aggression. The Need to Amend the Crime of Aggression's Jurisdictional Regime*, GLOB. INST. FOR THE PREVENTION OF AGGRESSION (Mar. 24, 2022), https://crimeofaggression.info/wp-content/uploads/GIPA-Statement_24-March-2022-7.pdf [https://perma.cc/FV3Z-SL46] (calling for amending jurisdiction).

64. See ASP, Resolution RC/Res.6* (June 11, 2010).

65. See *id.* at para. 4 ("[f]urther decides to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction").

66. See Activating Resolution, *supra* note 62.

67. See Rome Statute, *supra* note 2, at art. 121(1)–(2) (timing of amendments).

68. See generally Trahan, *supra* note 61 (detailing the 2010 negotiations).

69. See generally Jennifer Trahan, *From Kampala to New York—The Final Negotiations to Activate the Jurisdiction of the International Criminal Court Over the Crime of Aggression*, 18 INT'L CRIM. L. REV. 197 (2018) (detailing the 2017 negotiations).

70. There is an argument that a mere resolution was ineffective to modify a statutory amendment—i.e., the Kampala crime of aggression amendment's jurisdictional regime. See *id.*

71. See Activating Resolution, *supra* note 62.

72. Compare Rome Statute, *supra* note 2, at arts. 12–13 (jurisdiction as to genocide, war crimes, and crimes against humanity), with *id.* at arts. 15*bis*–15*ter* (jurisdiction as to the crime of aggression).

It is, of course, particularly ironic that three of the Allies that established the International Military Tribunal at Nuremberg, which prosecuted crimes against peace (i.e., the crime of aggression),⁷³ have narrowed the ICC's jurisdiction over the crime. The narrowing of jurisdiction in 2010 now renders the ICC unable to investigate and prosecute Russian nationals (and those of Belarus) in the current situation.

B. Establishing an Ad Hoc Special Tribunal on the Crime of Aggression

Another alternative being considered is the creation of an ad hoc STCoA to address the current situation. Such a tribunal would in no way displace the work of the ICC but complement its crucially important work, as the ICC will investigate and prosecute war crimes, crimes against humanity, and genocide (if warranted).⁷⁴ Yet, the ICC quite clearly does not have jurisdiction over the crime of aggression in the instant situation, as explained above in Part III.

A variety of proposals for the creation of an ad hoc crime of aggression tribunal have been set forth, including pooling domestic jurisdictions,⁷⁵ a hybrid tribunal created between Ukraine and the EU or between Ukraine and the Council of Europe, or a tribunal internal to Ukraine.⁷⁶ A prosecutor's office has now also been created in The Hague, without knowing what tribunal its work might feed into.⁷⁷

73. See Nuremberg Charter, *supra* note 37, at art. 6(a).

74. See *supra* note 54 (showing the opening of the ICC investigation).

75. See The Office of Gordon and Sarah Brown, *Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine*, (Jan. 6, 2023), <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf> [<https://perma.cc/9ABH-Q6W9>].

76. See, e.g., Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIO JURIS (Mar. 16, 2022), <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/> [<https://perma.cc/9ZW4-K3KY>] (discussing the variety of proposals for the creation of an ad hoc crime of aggression tribunal); US Dep't of State, *Ambassador Van Schaack's Remarks* (Mar. 27, 2023), <https://www.state.gov/ambassador-van-schaacks-remarks/> [<https://perma.cc/7WQY-5JY5>] (calling for an "internationalized tribunal" within the Ukrainian system).

77. See Arnaud Siad, Niamh Kennedy & Amy Cassidy, *International Center for Prosecution of "Crime of Aggression" in Ukraine Will Be Set Up in The Hague, EU Says*, CNN (Feb. 2, 2023), https://edition.cnn.com/europe/live-news/russia-ukraine-war-news-2-2-23/h_477dc2ed87b8e77e1cd859d4689bd56b#:~:text=An%20international%20center%20for%20the%20prosecution%20of%20the,Commission%2C%20Ursula%20von%20der%20Leyen%2C%20announced%20on%20Thursday [<https://perma.cc/RWE3-6L5B>]. For concerns, see Kevin Jon Heller, *A Concerning Update about a Special Tribunal for Russian Aggression*,

However, the most legitimate way to establish the tribunal would involve the UN General Assembly.⁷⁸ Proceeding based on General Assembly recommendation would involve the greatest international buy-in, and, necessarily require cross-regional support. Accordingly, a UN General Assembly recommendation would carry the greatest legitimacy. Such an international tribunal would also be the only clear way of avoiding immunities that could otherwise attach.⁷⁹

The proposed STCoA could be created: (1) after a request by the Government of Ukraine; (2) upon a resolution of the UN General Assembly; (3) which would recommend the creation of the STCoA and request the Secretary-General of the UN to initiate negotiations between the Government of Ukraine and the UN; and (4) with the STCoA ultimately created by a bilateral agreement concluded between the Government of Ukraine and the UN.⁸⁰ While the terms of the

OPINIO JURIS (Nov. 3, 2022), <https://opiniojuris.org/2022/11/03/a-concerning-update-about-a-special-tribunal-for-russian-aggression> [<https://perma.cc/PJ2H-EDZA>].

78. See Alexander Komarov & Oona Hathaway, *The Best Path for Accountability for the Crime of Aggression*, JUST SEC. (Apr. 11, 2022), <https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law> [<https://perma.cc/FJW7-XCNL>]. Establishing a tribunal through the UN Security Council is also a theoretically possible approach (as the Security Council established both the ICTY and ICTR), but would not work in the current situation due to Russia's veto power. See S.C. Res. 827 (May 25, 1993) (establishing the ICTY); S.C. Res. 955 (Nov. 8, 1994) (establishing the ICTR). The Security Council also established the Special Tribunal for Lebanon ("STL"), although it was a court within the Lebanese system. See S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007) (establishing the STL); Statute of the Special Tribunal for Lebanon, art. 2, 2007 (applying Lebanese criminal law).

79. See *infra* text accompanying notes 96.

80. Coracini & Trahan, *supra* note 59. See also Hans Corell, *A Special Tribunal for Ukraine on the Crime of Aggression—The Role of the U.N. General Assembly*, JUST SEC. (Feb. 14, 2023), <https://www.justsecurity.org/85116/a-special-tribunal-for-ukraine-on-the-crime-of-aggression-the-role-of-the-u-n-general-assembly/> [<https://perma.cc/D8UG-DKAE>]. The Special Court for Sierra Leone was created by agreement between the UN and Sierra Leone. See *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, RESIDUAL SPECIAL CT. SIERRA LEONE (Jan. 16, 2002), <http://www.rscsl.org/Documents/scsl-agreement.pdf> [<https://perma.cc/H9T2-RNRT>] [hereinafter *Agreement between the United Nations and Sierra Leone*]. After a request from Cambodia and the establishment of a Group of Experts to study the issue of a tribunal, the promulgation of the Law on the Extraordinary Chambers in the Courts of Cambodia ("ECCC") was "[w]elcome[d]" by the General Assembly. G.A. Res. 56/169, ¶ IV.2 (Feb. 28, 2002); see also G.A. Res. 57/228 (Feb. 27, 2003) (requesting resumption of negotiations and "recommending" various features); G.A. Res. 57/228B (May 13, 2003) (approving draft agreement on cooperation). While the Special Court was a freestanding new institution, the ECCC became a chamber within the Cambodian court system. See *Law on the Establishment of the Extraordinary Chambers, with Inclusion of Amendments*, as promulgated on 27 October 2004 (NS/RKM/1004/006), GOV'T OF CAMBODIA

agreement would ultimately be left to Ukraine and the UN (acting within the mandate of the General Assembly) to negotiate, and while this short Essay does not permit a comprehensive discussion of them, some key features of such a tribunal are suggested below.⁸¹

One could, for example, imagine the tribunal located in The Hague, Netherlands, with internationally appointed judges. Having internationally appointed judges would be very important to ensure the greatest legitimacy and appearance of legitimacy in terms of impartiality. One could also imagine the tribunal having an internationally appointed prosecutor.

The tribunal would not need to be large. It should be an international tribunal, but would not resemble the International Criminal Tribunal for the former Yugoslavia (“ICTY”) or the International Criminal Tribunal for Rwanda (“ICTR”) in size. It could more resemble the size of the Special Court for Sierra Leone (“SCSL”)⁸² or be even smaller.

While the SCSL had the limited mandate to prosecute only those bearing the “greatest responsibility” for the crimes committed during the latter part of Sierra Leone’s Civil War,⁸³ a similar restriction would

https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf [https://perma.cc/KD4G-HJFW]. (last updated Aug. 26, 2007). It is thus an amalgamation of the process for creating the Special Court for Sierra Leone (created by agreement of the country and the United Nations) and the process for creating the ECCC (based on resolutions of the UN General Assembly) that would be followed. Importantly, when the ECCC’s creation was first contemplated, it was not envisioned to be a tribunal within the Cambodian court system.

81. The author’s proposals stem from a White Paper initially drafted by the author, working in conjunction with the Permanent Mission of Liechtenstein to the United Nations, Professor Oona A. Hathaway and former Ambassador-at-Large for War Crimes Issues David Scheffer. Also joining these endeavors have been Professor Claus Kreß and Professor Astrid Reisinger Coracini. See General Assembly, Letter dated 12 August 2022 from the Representatives of Latvia, Liechtenstein and Ukraine to the United Nations Addressed to the Secretary-General, UN Doc. A/ES-11/7-S/2022/616 (Aug. 17, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/09/UNSC-Letter-12-August-2022.pdf> [https://perma.cc/Z2HE-5G6U]; *Blog Series: The Case for Creating and International Tribunal to Prosecute the Crime of Aggression Against Ukraine*, JUST SEC., <https://www.justsecurity.org/tag/u-n-general-assembly-and-international-criminal-tribunal-for-aggression-against-ukraine/> [https://perma.cc/CFG4-XBCV] (last visited Apr. 25, 2023). The current article is not purporting to comprehensively set out all of the features of such a tribunal.

82. There were only ten tried by the SCSL. See *Residual Special Court for Sierra Leone, The SCSL, Cases, AFRC* (3 tried), *RUF* (3 tried), *CDF* (3 tried), *Taylor* (1 tried), *The SCSL - RSCSL*.

83. *Agreement between the United Nations and Sierra Leone*, *supra* note 80, at art. 1.1 (permitting the prosecution of “persons who bear the greatest responsibility. . .”).

be unnecessary as to the crime of aggression. The crime only encompasses a limited number of perpetrators—namely those “in a position to effectively exercise control over or to direct the political or military action of a State.”⁸⁴ That requirement effectively creates a built-in numerical limitation in terms of the number to be prosecuted.

The tribunal would only have jurisdiction to prosecute the crime of aggression and should utilize the definition in Article 8*bis* of the Rome Statute. This definition took years to negotiate and has already been widely endorsed, as it was accepted in 2010 by consensus decision of all States Parties to the ICC’s Rome Statute.⁸⁵ It also represents customary international law.⁸⁶

The territorial jurisdiction could be the territory of Ukraine. Aggression is committed in two states (the “victim state” and the “aggressor state”). Jurisdiction in the victim state would suffice, as at least one element of the crime would have occurred there.⁸⁷

As to temporal jurisdiction, it would ideally commence in 2014, thereby encompassing the attempted illegal annexation of Crimea and earlier incursions into Eastern Ukraine, as well as the 2022 invasion.⁸⁸ Another possibility would be to commence temporal jurisdiction only in 2022. The latter could decrease the cost of the tribunal, but would

84. Rome Statute, *supra* note 2, at art. 8*bis*(1) (containing the “leadership clause”).

85. See G.A. Res. RC/Res.6*, annex I, para. 1 (June 11, 2010) (adopted by consensus).

86. As Reisinger Coracini explains: “[t]he prohibition and criminalization of aggression involve rules that are beyond any doubt part of customary international law. This is true for the customary nature of the prohibition on the use of force, the principle of individual criminal responsibility for serious violations of international law, and the crime of aggression.” Astrid Reisinger Coracini, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part II)*, JUST SEC. (Sept. 23, 2022), <https://www.justsecurity.org/83201/tribunal-crime-of-aggression-part-two/> [<https://perma.cc/7MX2-BF98>].

87. See ICC-RoC46(3)-01, Decision on the Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, (Sept. 6, 2018) (ruling related to Bangladesh/Myanmar). Element 3 of the elements of the crime of aggression requires that the aggression be committed. See *Elements of Crimes*, INT’L CRIM. CT. (2011), <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> [<https://perma.cc/G5ZW-QPR5>]. The crime is being committed partly on the territory of Ukraine.

88. Cyberattacks in 2015 and 2016 (as well as 2022–2023) would thereby also be encompassed, as cyber is an additional modality by which aggression, and other ICC crimes, may be committed. See *The Council of Advisers’ Report on the Application of the Rome Statute of the International Criminal Court to Cyberwarfare*, PERMANENT MISSION OF LIECHTENSTEIN TO U.N. (Aug. 2021), <https://www.regierung.li/files/medienarchiv/The-Council-of-Advisers-Report-on-the-Application-of-the-Rome-Statute-of-the-International-Criminal-Court-to-Cyberwarfare.pdf> [<https://perma.cc/832H-AFPP>].

not encompass the totality of Russia's actions. To start jurisdiction in 2022 might also give the inadvertent impression that the crime of aggression only applies when a full-scale invasion has occurred; commencing jurisdiction in 2014 would correctly emphasize that acts other than a massive invasion are also encompassed within the crime's definition.⁸⁹

The tribunal would, crucially, follow the UN's long-standing rule⁹⁰ and provide that a head of state or government official lacks immunity before the tribunal. The international nature of the tribunal would permit it to benefit from the rulings in the *Yerodia* (Arrest Warrant) case of the ICJ,⁹¹ the Charles Taylor case before the SCSL,⁹² and the ICC's ruling against Jordan for its failure to arrest Sudanese President Bashir,⁹³ that heads of state, heads of government, and ministers of foreign affairs lack personal immunity before international criminal courts and tribunals for crimes under customary international law.⁹⁴ Former President Slobodan Milošević of the Federal Republic of Yugoslavia was also indicted for crimes committed under customary international law while he was an incumbent head of state.⁹⁵ Because, as explained previously, the crime of aggression is a "leadership crime," it is imperative that the tribunal have the capacity to prosecute

89. See Rome Statute, *supra* note 2, at art. 8*bis* and accompanying text.

90. See, e.g., ICTY Statute, *supra* note 50, at art. 7.2; ICTR Statute, *supra* note 50, at art. 6.2; SCSL Statute, *supra* note 50, at art. 6.2. See also Nuremberg Charter, *supra* note 37, at art. 7 ("[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."); Rome Statute, *supra* note 2, at art. 27.

91. Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), [2002] I.C.J. 3, [2002] 41 I.L.M. 536 (differentiating between foreign domestic courts where personal immunities attach, and "certain international criminal courts" before which personal immunity for heads of state, heads of government, and ministers for foreign affairs do not attach).

92. Prosecutor v. Charles Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction (Spec. Ct. for Sierra Leone May 31, 2005) (holding that Charles Taylor was not immune from prosecution before the SCSL even though indicted while a sitting head of state). The Appeals Chamber explained: "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." *Id.* at ¶ 52. For why the Appeals Chamber deemed the SCSL to constitute such an international criminal court or tribunal, see Coracini & Trahan, *supra* note 59.

93. Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶ 162 (May 6, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02856.PDF [<https://perma.cc/UBY6-5BAN>] ("there was no Head of State immunity that would have prevented Jordan from executing the [ICC] warrant for the arrest and surrender" of then-President Al-Bashir of Sudan).

94. See also Coracini & Trahan, *supra* note 59.

95. See Prosecutor v. Milošević, Case No. IT-99-37-PT, Decision on Review of the Indictment and Application for Consequential Orders (May 24, 1999).

top leaders—something a regional or national tribunal would most likely be unable to do because of immunities applying before it.⁹⁶

The unanswered question is whether states have the political will to create such a tribunal. Affirmative votes by at least a majority of states present and voting would be required for the General Assembly to recommend the tribunal. Hopefully, significantly more votes would be obtained.⁹⁷

As mentioned, an ad hoc approach is not ideal, as the law should be enforced impartially vis-à-vis the nationals of all states and not on an ad hoc basis.⁹⁸ This has, unfortunately, thus far not proven to be possible in the field of international criminal justice. There have been ad hoc international and hybrid criminal tribunals in certain situations and not others; the ICC's Rome Statute has been ratified by 123 States Parties,⁹⁹ but not other states; the Security Council has made two referrals of situations to the ICC,¹⁰⁰ but not made referrals in other equally meritorious situations. None of this, however, suggests that the investigations and prosecutions that have been possible should not have been pursued, nor does it in any way impact the legitimacy of the prosecutions that have been possible.

Establishing the STCoA could additionally help clarify that it was not the Russian people who are responsible for the aggression, but the most senior leaders and their enablers who planned, prepared, initiated, and executed it. Even if such leaders cannot be apprehended—as arrests are difficult to predict¹⁰¹—the indictment of such individuals would convey a powerful statement about the illegality of such blatant use of force contrary to Article 2(4) of the UN Charter and the importance of pursuing individual criminal responsibility.

96. For analysis of what is an “international tribunal” before which personal immunities would not attach, see Coracini & Trahan, *supra* note 59.

97. If an Emergency Special Session is called utilizing the Uniting for Peace process, a two-thirds vote would be required. See G.A. Res. 377(V) (Nov. 3, 1950) (the initial Uniting for Peace resolution); S.C. Res. 2623 (Feb. 27, 2022) (triggering the Uniting for Peace process vis-à-vis Ukraine).

98. In the long run, the author believes crime of aggression prosecutions should occur before the ICC and not an ad hoc tribunal. ICC prosecution of the crime of aggression was provided for in 1998 when the Rome Statute was negotiated and was the motivation behind negotiating the crime of aggression amendment. See Rome Statute, *supra* note 2, at art. 5(1) (including the crime within the ICC's jurisdiction).

99. See U.N. TREATY COLLECTION, *supra* note 52.

100. See S.C. Res. 1593 (Mar. 31, 2005); S.C. Res. 1970 (Feb. 26, 2011).

101. One should not rule out apprehensions (eventually). Slobodan Milošević and Charles Taylor probably never envisioned they would face prosecution, and yet they did.

V. CONCLUSION

The international community is facing profound challenges and existential questions as to whether it will enforce Article 2(4) of the UN Charter in the present situation and more broadly through individual criminal responsibility. If states wish to have a more functional UN system, they must also tackle Security Council paralysis and question the legality of some of the vetoes that are being cast. Having witnessed the catastrophic consequences of Russia's 2022 invasion of Ukraine, states additionally need to reexamine the ICC crime of aggression's jurisdictional regime and broaden it to cover similar situations in the future. States must also have the accompanying political will to establish a STCoA. Many states have responded to the invasion by providing military assistance to Ukraine and imposing economic sanctions, but the challenge is whether they will also show strong support for enforcing the rule of law.

Finally, if the international community does not seize present opportunities for prosecuting the crime of aggression, this could have profound consequences for the preservation of international peace and security and the international legal order. One may well ask regarding the crime of aggression: if it is not prosecuted now, when will it be? The crime is too important to be confined to being a relic on a shelf, incapable of use.

