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THE ROLE OF THE UN SECURITY COUNCIL & GENERAL ASSEMBLY IN RESPONDING TO THE INVASION OF UKRAINE

Abstract: This article explores the roles of the UN Security Council and UN General Assembly related to the 24 February 2022 invasion by Russian forces of the territory of Ukraine. It considers the Security Council's paralysis, and suggests states make more use of the UN Charter language that requires obligatory abstention in voting of a "party to a dispute" under Chapter VI; the article also considers legality issues related to a permanent member's veto use that aids its own jus cogens violation. As to both topics, the article suggests the General Assembly could weigh in by issuing a substantive resolution or requesting an Advisory Opinion from the International Court of Justice. The General Assembly, or the Council acting under Chapter VI, could also establish a Special Tribunal on the Crime of Aggression for the situation of Ukraine.

Keywords: Security Council; Ukraine; General Assembly; Chapter VI; vetoes; abstention; Advisory Opinion; ICJ; Special Tribunal on the Crime of Aggression; STCoA

This article examines the role of the United Nations Security Council and the United Nations General Assembly in responding to the 24 February 2022 invasion by Russian forces of the territory of Ukraine.

Initially, in Part 1, the article focuses on the paralysis created at the UN Security Council when a permanent member of the Council is involved in a situation (here, as the aggressor state).[1] Due to the use (and, arguably,

1 G.A. Res. ES-11/1, para. 2 (condemning the invasion as a breach of Article 2(4) of the UN Charter); Green, Henderson & Ruys. However, see caveat, note 17 *infra*.

abuse) of the veto, during most of its existence, the Security Council has been able to play only a very minor role in responding to a blatant invasion and breach of the UN Charter by a permanent member of the Council.[2] This has proven to be a serious deficiency, because the post WWII global peace and security architecture—legal and practical—is predicated upon a functioning Security Council. The framers of the UN Charter did not leave convenient alternative legal avenues. Thus, when the key body charged under the UN Charter with primary responsibility for the maintenance of international peace and security[3] is deadlocked much of the time, this seriously hampers the effectiveness of the international community in using the mechanism and legal rules designed for this purpose in the Charter. It also undermines the effectiveness of the UN as a legal framework and as a forum to resolve arguably the most serious issues that the international community faces. In the current situation, one sees the Security Council paralysis with the Russian Federation's 25 February 2022 veto of the Security Council resolution that would have condemned Russia's aggression and taken various measures in response, including mandating withdrawal of Russian Forces from the territory of Ukraine.[4] The Russian Federation also vetoed another resolution that would have condemned its subsequent attempts at holding referenda in occupied territories in the East of Ukraine.[5] All that the Security Council was able to agree on was a procedural resolution invoking the Uniting for Peace process and sending the matter to the UN General Assembly.[6]

Next, in Part 2, the article turns to the role of the General Assembly related to the situation of Ukraine. The General Assembly has been trying to fill in the power vacuum left by a deadlocked Security Council — issuing a series of important resolutions.[7] Yet, the General Assembly is only able to fill in for the Security Council to a limited extent because the Security Council and General Assembly have different competencies under the UN Charter.[8]

2 Part 4.1 (discussion of Iraq); n.166 (additional situations); n. 191 (number of vetoes cast). The Security Council was better able to function during the decade or so from the end of the Cold War to a couple of years after 9/11.

3 Charter of the United Nations, Article 24(1).

4 S/2022/155 (vetoed by the Russian Federation).

5 S/2022/720 (vetoed by the Russian Federation).

6 UNSCR, "Emergency Special Session of the General Assembly on Ukraine", Part 1.3.

7 See Part 2.1.

8 *Compare* UN Charter, Articles 40–42 (Security Council Chapter VII powers), *with* UN Charter, Articles 10–12 (UN General Assembly powers).

Thus, the General Assembly will never be a full substitute for a deadlocked Security Council. This is true even when the General Assembly is given the mandate to act pursuant to the Uniting for Peace process.

The article, in Part 3, considers how it would be possible to have a more responsive Security Council—one that is not perpetually deadlocked when a permanent member is involved in the situation. First, it makes the case that legality concerns arise when the veto is used—such as it was by the Russian Federation—to aid and assist in maintaining a serious breach of a peremptory norm of international law (here, a violation of the use of force regime under the UN Charter).[9] This is equally true when veto use blocks a Security Council resolution trying to prevent or stop the commission of genocide, crimes against humanity, and/or war crimes.[10] The article suggests that the General Assembly could be proactive in challenging this state of affairs, by either passing a resolution on the topic, or seeking an Advisory Opinion from the International Court of Justice (ICJ) focusing on veto use in the face of genocide, crimes against humanity, war crimes, or aggression, which can contravene existing rules of international law.[11]

Second, the article suggests another initiative to tackle Security Council paralysis that results when a state serving on the Security Council is involved in the situation. Namely, states could make more use of Security Council resolutions under Chapter VI of the UN Charter, where, according to the Charter's plain language, a party to the dispute is obligated to abstain from voting.[12] For example, if that requirement were utilized, a party to the dispute (e.g., Russia in the situation of Ukraine) would be obligated to abstain from voting on a resolution under Chapter VI. Because the Security Council has been lax in applying this requirement, the General Assembly

9 Analysis *infra* notes 85–88 and accompanying text that aggression (i.e., use of force contrary to the UN Charter) violates *jus cogens* (i.e., it is a peremptory norm of international law). For an overview of the arguments, which also consider veto use that is contrary to the Purposes and Principles of the United Nations, Part 3.1.2. For details, Trahan, "Legal Issues Surrounding Veto Use and Aggression."

10 For an overview of this and additional arguments related to such veto use, Part 3.1.1. For details, Trahan, "Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes", Chapter 4.

11 Notes 8–9 *supra*.

12 Article 27(3) states: "in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting." UN Charter, Article 27(3). While this law review article focuses on obligatory abstention under Chapter VI, the same arguments apply to a Chapter VIII resolution under Article 52, paragraph 3encouraging pacific settlement of disputes through regional arrangements.

also might need to play a role here. It could again consider utilizing the same two measures—passing a resolution on the topic (confirming the General Assembly's understanding of the UN Charter that obligatory abstention must apply to resolutions under Chapter VI), or seeking an Advisory Opinion from the ICJ. To illustrate how powerful a tool the proper use of Chapter VI resolutions could be: if states serving on the Security Council used obligatory abstention from voting by a party to the dispute, the Security Council could request—*not mandate*, as under Chapter VII, but at least *request* — action, such as the UN Secretary-General entering into negotiations for the establishment of a Special Tribunal on the Crime of Aggression (STCoA) for the situation of Ukraine.

Finally, in Part 4, the article examines one more crucial measure that the General Assembly could take in a situation such as that of Ukraine to compensate for a deadlocked Security Council. It could recommend the establishment of a tribunal, here, a STCoA for the situation of Ukraine to be created by agreement between the UN and Ukraine.[13] In the present situation, it appears unlikely that the Security Council will request such a tribunal; therefore, the General Assembly should recommend the tribunal's establishment—something that it is well within the General Assembly's competence.[14] The article also makes the case that, as a parallel initiative, States Parties to the Rome Statute[15] of the International Criminal Court (ICC) need to amend the ICC's jurisdiction over the crime of aggression to bring it in line with the ICC's jurisdiction over its other crimes, so that individual criminal responsibility for the crime of aggression may be pursued before the ICC in future similar situations.

1. Security Council Paralysis Related to the Situation of Ukraine

It is both unsurprising and exceedingly problematic that the Security Council has been able to play only a very limited role in relation to the situation of Ukraine. It is unsurprising in that one can anticipate a permanent member of the Security Council using its veto (i.e., negative vote)[16]

13 For explanation of the proposed STCoA, Part 4.1.

14 See Part 4.2.

15 Rome Statute of the International Criminal Court [hereinafter "Rome Statute"].

16 The word "veto" is not found in Article 27(3), which states that a resolution requires the affirmative vote of the permanent members in order to pass.UN Charter, Article 27(3). It is

to block resolutions when it is involved in the wrongdoing (here, invading a neighboring state in what appears[17] to be a blatant UN Charter violation).[18] This will block resolutions whether they are ones expressing condemnation of the permanent member's actions or containing implementing measures to be taken in response to the breach of international peace and security. Simultaneously, the situation is exceedingly problematic because the UN Security Council is *the* body charged under the UN Charter with primary responsibility for the maintenance of international peace and security.[19] This is the legal and practical foundation of the post-WWII international peace and security architecture. At the heart are the Chapter VII powers which can compel the international community of UN Member States to respond in such situations[20] —powers that no other body in the world, including the General Assembly, possesses.[21]

1.1. Use (and abuse) of the Veto to Block Condemnation of the Invasion

On 25 February 2022, the Russian Federation vetoed Security Council resolution 155, which would not only have condemned Russia's invasion, but mandated a whole host of other measures.[22] The resolution, co-sponsored by an impressive 81 UN Member States, would have:

> Endors[ed] the Secretary-General's call for the Russian Federation to stop its offensive against Ukraine, Condemn[ed] the 23 February 2022 declaration by the Russian Federation of a "special military operation" in Ukraine,
> 1. Reaffirm[ed] its commitment to the sovereignty, independence, unity, and territorial integrity of Ukraine within its internationally recognized borders;

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read to permit permanent members to abstain, also allowing the resolution to pass. That, however, is *voluntary* abstention, as opposed to the requirement of *obligatory* abstention under Chapter VI for a party to the dispute. Part 3.2.

17 If there were to be a STCoA or other tribunal created to adjudicate individual criminal responsibility regarding the crime of aggression, that there was a UN Charter violation would need to be adjudicated. A court must not take at face value the General Assembly's determination of such a violation (G.A. Res. ES-11/1; G.A. Res. ES-11/L.2), as the elements of the crime would need to be proven beyond a reasonable doubt. *See, e.g.*, Rome Statute, Articles 15*bis*(9), 15*ter*(4).

18 Note 1 *supra*.

19 UN Charter, Article 24.1.

20 Ibidem, Articles 40 (provisional measures), 41 (peaceful measures), 42 (forceful measures).

21 *Compare* ibidem, Articles 10–12 (UN General Assembly powers).

22 S/2022/155 (vetoed by the Russian Federation).

2. Deplore[d] in the strongest terms the Russian Federation's aggression against Ukraine in violation of Article 2, paragraph 4 of the United Nations Charter;
3. Decide[d] that the Russian Federation shall immediately cease its use of force against Ukraine and shall refrain from any further unlawful threat or use of force against any UN member state;
4. Decide[d] that the Russian Federation shall immediately, completely, and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders;
5. Deplore[d] the Russian Federation's 21 February 2022 decision related to the status of certain areas of [the] Donetsk and Luhansk regions of Ukraine as a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter of the United Nations; [and]
6. Decide[d] the Russian Federation shall immediately and unconditionally reverse the decision related to the status of certain areas of [the] Donetsk and Luhansk regions of Ukraine;
7. Call[ed] on the parties to abide by the Minsk agreements and to work constructively in relevant international frameworks, including in the Normandy Format and Trilateral Contact Group, towards their full implementation;[23] [brackets should go around footnote number];
8. Call[ed] upon all parties to allow and facilitate the rapid, safe, and unhindered access of humanitarian assistance to those in need in Ukraine, to protect civilians, including humanitarian personnel and persons in vulnerable situations, including children;
9. Condemn[ed] all violations of international humanitarian law and violations and abuses of human rights, and calls upon all parties to strictly respect the relevant provisions of international humanitarian law, including the Geneva Conventions of 1949 and their Additional Protocols of 1977, as applicable, and to respect human rights;

23 Under the Minsk Accords, Russia and Ukraine previously had agreed, among other things, to a ceasefire in certain areas of the Donetsk and Luhansk regions of Ukraine. S.C. Res. 2202, Annex I (on the Package of Measures for the Implementation of the Minsk Agreements). "The Minsk Agreements were first negotiated… between Vladimir Putin and Petro Poroshenko, and then in the Normandy Format, between representatives of Ukraine, Russia, Germany, and France. Later the Trilateral Contact Group (Ukraine, Russia, and the OSCE), drafted and signed them." "News and Views from Ukraine."

10. Welcome[d] and urges the continued efforts by the Secretary-General, UN Member States, the Organization for Security and Cooperation in Europe, and other international and regional organizations, to support de-escalation of the current situation, and also the efforts of the United Nations to respond to the humanitarian and refugee crisis that the Russian Federation's aggression has created;
11. Decide[d] to remain actively seized of this matter.[24]

Thus, the resolution was fairly comprehensive. As an initial response, it hoped to alter Russia's conduct through condemnation of Russia's invasion and called for Russia to immediately cease its use of force. This was blocked by the Russian veto, and the Security Council has been unable to issue any substantive resolutions on the situation since.[25]

1.2. Questioning the Veto of a Resolution If It Was under Chapter VI of the UN Charter

One significant question that exists as to the resolution was whether the Security Council issued it under Chapter VI or Chapter VII of the Charter. The Security Council is free to use whatever response it wishes in any situation. Chapter VI resolutions are meant to direct member states to pacific settlement of disputes,[26] whereas Chapter VII resolutions can actually compel UN Member States to carry out a specific course of action contained in the resolution.[27]

The Security Council does not always indicate under which Chapter a resolution is passed. Andras Vamos-Goldman, who was head of the political section and later served as legal adviser to the Canadian Mission to the UN the last time Canada served on the Security Council, explains:

> The negotiations over resolutions often involve extremely nuanced language, using ambiguity to allow the various sides to have different understandings of the same text, thus making agreement possible. Therefore, sometimes

24 S/2022/155 (vetoed by the Russian Federation).
25 Russia also later vetoed a resolution that would have condemned the sham so-called referenda held in the Russian occupied territories of Luhansk, Donetsk, Kherson, and Zaporizhzhya. S/2022/720 (vetoed by the Russian Federation).
26 UN Charter, Chapter 6.
27 Ibidem, Chapter 7.

> the language of the resolution needs to be deciphered in order to have an idea which Chapter it is meant to be under—if indeed this was ever agreed on. In such cases, the rule of thumb is that the more hortatory, advisory the language, especially urging cessation and dialogue, the more likely it is a Chapter VI resolution. The more clear, directive language that compels member states to carry out specific, clearly definable actions, the more likely that the resolution is under Chapter VII. But sometimes it is not possible to tell what was intended, because the same text is understood differently by each side.[28]

Apparently, the resolution was intended to be under Chapter VII, but last minute shifted to being under Chapter VI, although some language related to Chapter VII was still left in (e.g., "decid[ing]" to mandate withdrawal). Thus, it is disputed whether the resolution was under Chapter VI or VII.[29] On its face, the resolution invokes neither Chapter.[30]

The distinction between Chapter VI and Chapter VII is significant. For one thing, Chapter VI resolutions are non-binding,[31] whereas Chapter VII resolutions can be binding—depending if they are "decisions" with clear language compelling compliance, as opposed to something of a lesser weight, such as recommendations.[32] And, here, the resolution was worded

28 7/11/23 interview with Andras Vamos-Goldman.

29 6/7/23 email exchange with a Permanent Representative of a UN Member State to the UN.

30 S/2022/155 (vetoed by the Russian Federation).

31 Kolb, "Does Article 103 of the Charter of the United Nations Apply Only to Decisions or Also to Authorizations Adopted by the Security Council?" ("[I]t has also been admitted by the International Court that the Security Council can take binding decisions outside of Chapter VII, whenever it deems necessary to do so; the legal basis of such binding force would then directly rest on Article 25 of the Charter. Thus, the Security Council could, if it deemed necessary, impose binding decisions in different matters where it possesses jurisdiction; but it could be asked whether the Council could use the device of Article 25 in order to, for example, impose a binding settlement in a dispute. It is doubted that such a course could be taken, since that would completely transform the character of Chapter VI by a sort of coup d'état, and constitute a major intrusion into the sovereignty of States.").

32 Article 25 of the UN Charter provides that "decisions" of the Security Council are binding. *See* UN Charter, Article 25. *See also* Dag Hammerskjöld Library, "Are UN Resolutions Binding?" ("In general, resolutions adopted by the Security Council acting under Chapter VII of the Charter, are considered binding, in accordance with Article 25 of the Charter."); *Prosecutor v. Dusko Tadić,* Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 44 ("The Security Council when, acting under Chapter VII of the United Nations Charter,... makes decisions binding by virtue of Article 25 of the Charter."). Compare Kelsen, *Law of the United Nations: A Critical Analysis of Its Fundamental Problems: With Supplement* ("[T]he meaning of Article 25 is that the Members are obliged to carry out only those decisions which the Security Council has taken

as containing various "decisions," which could be read to indicate that it was intended to create binding obligations.[33]

There is another significant difference. Article 27.3 provides that "in decisions under Chapter VI, ...a party to a dispute shall abstain from voting."[34] This exclusion from voting under Chapter VI applies to both elected and permanent members of the Council.[35] There is no corollary obligation for a party to the dispute to abstain from voting when the resolution is under Chapter VII.[36]

Thus, if the resolution was under Chapter VI, then the Russian Federation should not have been able to veto; the same is true of the later Security Council resolution on Ukraine that would have condemned sham so-called referenda held in the occupied territories of Ukraine.[37] Unfortunately, even when it is indisputably clear that a resolution is under Chapter VI (i.e., when it says so, or when the language is unambiguous), Security Council practice appears to ignore the obligatory abstention requirement under Chapter VI.

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in accordance with the Charter; and the Charter characterises certain decisions of the Security Council in a way which permits the interpretation that they are not intended to be binding upon the Members, as, for instance, 'recommendations' (Articles 36, 37, 38, 39) or 'plans' (Article 26).").

33 According to Vamos-Goldman: When there is sufficient agreement in the Security Council for a resolution to be under Chapter VII, it is usually noted within the resolution. Otherwise, just because a paragraph in a resolution says "decides that" does not automatically mean that it is compelling compliance. Without any other indication, the resolution would need to be further analyzed to see what the various negotiating parties understood by that language. This could be done through looking at what states said publicly about their interpretation of the resolution. Just looking at the language to see if it is intending to be under Chapter VII, what the Security Council "decides" must be something that it also clearly directs UN Member States to carry out. 7/11/23 interview with Andras Vamos-Goldman.

34 UN Charter, Article 27(3).

35 Wouters & Ruys, "Security Council Reform: A New Veto for a New Century?," 5, 12.

36 Enrico Milano explains the history of the distinction: [T]he provision for the so-called obligatory abstention (to be distinguished from voluntary abstentions under Art. 27) derived from a compromise between the positions of Britain, on the one hand, which held that both considerations of fairness (*nemo iudex in re sua*) and of effectiveness required members to a dispute to abstain from voting, and of the USSR, on the other hand, which was very reluctant to diminish the enhanced status of the P-5 within the Council, even in those cases in which the permanent member were a party to a dispute dealt with by the Council. The end result was to limit the duty to abstain to non-binding, conciliatory measures adopted mainly under Chapter VI of the Charter. Milano, "Russia's Veto in the Security Council: Whither the Duty to Abstain under Art. 27(3) of the UN Charter?," 217, citing Tavernier, *La Charte des Nations Unies, Commentaire article par article sous la direction de Jean-Pierre Cot et Alain Pellet*, 5.

37 S/2022/720 (vetoed by the Russian Federation).

It is simply not utilized,[38] even though the language requiring it is plain under the UN Charter. Even the question of deciding whether a state serving on the Security Council is "party to a dispute" is left to the state in question to decide.[39] The last use of such abstention was in 1960 when a dispute related to Israel's abduction of Adolf Eichmann from Argentina came before the Council and Argentina (then serving on the Council) abstained from voting on the resolutions being considered.[40] Although the issue of abstention—whether it should be used—has arisen since then, there has been no successful subsequent use of such abstention.[41]

1.3. Security Council Paralysis, Other than Triggering the Uniting for Peace process

That early Russian veto was a harbinger of things to come. Having been unable to pass the initial resolution condemning the invasion, and mandating withdrawal as well as compliance with other obligations under international law—as well as the later resolution that would have condemned the holding of the so-called referenda[42]—the Security Council was basically sidelined. The Council was only able to pass a resolution calling for an emergency special session of the General Assembly to be held on Ukraine.[43] That resolution, which was a procedural one and thus not subject to the veto,[44] triggered the General Assembly meeting in an emergency special session. The text of the Security Council resolution was brief. It provided:

> Taking into account that the lack of unanimity of its permanent members... has prevented it from exercising its primary responsibility for the maintenance

38 For background, see Milano, "Russia's Veto in the Security Council: Whither the Duty to Abstain under Art. 27(3) of the UN Charter?".

39 6/7/23 email exchange with a Permanent Representative of a UN Member State to the UN.

40 Security Council Report, "Article 27(3) and Parties to a Dispute: An Abridged History" (listing twelve situations where abstention occurred, with the last being in 1960 with the abstention of Argentina related to the Eichmann question).

41 Ibidem (listing fourteen situations where the question of abstention was either raised or considered without success); Milano, "Russia's Veto in the Security Council: Whither the Duty to Abstain under Art. 27(3) of the UN Charter?" (noting 16 instances of non-compliance with the rule), citing Blum, "Eroding the United Nations Charter," 307.

42 S/2022/720 (vetoed by the Russian Federation).

43 S.C. Res. 2623.

44 UN Charter, Article 27.3 (nine affirmative votes required for procedural matters).

> of international peace and security..., [d]ecides to call an emergency special session of the General Assembly to examine the [situation of Ukraine].[45]

It was the US that in 1950 spearheaded[46] passage of the first Uniting for Peace resolution,[47] in order for matters related to the Korean War to be taken up by the General Assembly. This was out of concern that the USSR's presumptive veto would block passage of a Security Council resolution authorizing the use of force.[48] The Uniting for Peace process has only been used eleven times.[49] Triggering the General Assembly meeting in an emergency special session possibly carried a bit more significance when the General Assembly did not meet year round, as it now does.[50] Most authorities appear to accept that, while the Uniting for Peace process gives the General Assembly an extra mandate to take up the matter at hand, it cannot create powers that the General Assembly does not otherwise possess under the UN Charter.[51]

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45 S.C. Res. 2623. The only negative vote was that of Russia, meaning the resolution garnered the support of 14 of 15 members of the Security Council.

46 Krasno & Das, *The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Council*, 179.

47 G.A. Res. 377 A.

48 Krasno & Das, *The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Council*, 173. Three resolutions on Korea did ultimately pass the Council—including a recommendation for the use of force—but only because the U.S.S.R. was absent for the vote. Ibidem, 178, citing S.C. Res. 84. "In 1950, the Soviet Union had boycotted the Security Council on grounds that the UN had failed to grant the People's Republic of China (Communist China), which had achieved control of the mainland after 1949, the seat of China in the UN and on the Council."

49 United Nations, General Assembly of the United Nations, "Emergency Special Sessions."

50 United Nations, Rules of Procedure of the General Assembly, para. 49 ("At its fifty-seventh session, the General Assembly, by its resolution 57/301 of 13 March 2003, amended rule 1 of the rules of procedure whereby the Assembly would meet every year in regular session commencing on the Tuesday of the third week of September, counting from the first week that contains at least one working day.").

51 Reicher, *The Uniting for Peace Resolution on The Thirtieth Anniversary of Its Passage*, 34. Ibidem, 48 ("The Uniting for Peace Resolution was a constitutional landmark in the history of the Charter—not in the sense of creating *new* powers, but in the sense of revealing a latent potential in the Charter itself, and setting it on a firm foundation."). "It 're-legitimized' what was already there." Ibidem *See also* Andrassy, *Uniting for Peace*, 572 ("The Resolution grants the Assembly no greater powers than those it has under Article 10 and 11, paragraph 2."); Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 476 ("[T]he resolution serves to reveal the latent potential of the Assembly already residing within the UN Charter, and constructs a procedural framework for its exercise.").

2. The General Assembly's Role Related to the Situation of Ukraine

With the Security Council largely deadlocked, focus shifted to what the General Assembly could accomplish. The General Assembly could have discussed the situation in Ukraine on its own authority, but it would not have been able to make recommendations while the Security Council remained seized with the same situation. The Security Council's resolution calling for the emergency special session constituted the request that enabled the General Assembly also to make recommendations.[52]

2.1. General Assembly Resolutions Related to the Situation

As a consequence, the General Assembly became fairly proactive related to the situation. It issued: two resolutions condemning Russia's invasion;[53] a resolution expelling Russia from the Human Rights Council;[54] a resolution condemning Russian attempts at annexing territory in the East of Ukraine and holding illegal referenda there;[55] a call for the establishment of a compensation mechanism;[56] and a call for a just and lasting peace as well as accountability.[57]

Specifically, on 2 March 2022, the General Assembly issued a resolution covering many of the topics that would have been addressed by the Security Council's initial, vetoed resolution.[58] The General Assembly's resolution, *inter alia*, "condemn[ed] the 24 February 2022 declaration by the Russian Federation of a 'special military operation' in Ukraine," and "recogniz[ed]

52 UN Charter, Article 11(2) ("The General Assembly may discuss any question relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations… and… may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or both."). However, Article 12(1) states: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests." UN Charter, Article 12(1); *see also* UN Charter, Article 10 (allowing the General Assembly to discuss "any questions or any matters within the scope of the present Charter" and make recommendations, except as provided in Article 12).

53 G.A. Res. ES-11/1; G.A. Res. ES-11/2.

54 G.A. Res A/RES/ES-11/3.

55 G.A. Res. A/RES/ES-11/4.

56 G.A. Res A/RES/ES-11/5.

57 G.A. Res A/RES/ES-11/6.

58 G.A. Res. ES-11/1.

that the military operations of the Russian Federation inside the sovereign territory of Ukraine [was] on a scale that the international community has not seen in Europe in decades and that urgent action is needed to save this generation from the scourge of war."[59] It went on to "deplore in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter"; "demand that the Russian Federation immediately cease its use of force against Ukraine"; demand unconditional withdrawal of all military forces; and condemn [International Humanitarian Law (IHL)] violations and demand full compliance with IHL.[60]

Of course, there is one tremendous difference between a General Assembly resolution and a Security Council resolution. A General Assembly resolution, except in very limited situations, can only recommend action by UN Member States,[61] whereas the Security Council's resolution—if under Chapter VII—could have been binding.[62] Thus, the General Assembly's resolution was not a full substitute for the Security Council's resolution. That said, having passed by affirmative vote of 141 states, the resolution certainly expressed the strong resolve by the international community that the recommendations it contained should be complied with.

On 24 March 2002, the General Assembly issued a second resolution: again condemning the invasion; demanding unconditional withdrawal; and stressing the dire humanitarian consequences of the aggression.[63] It again demanded "an immediate cessation of the hostilities" as well as implementation of specific measures to protect civilians, civilian objects, and humanitarian personnel, and condemned IHL violations.[64] It too passed with strong support—140 affirmative votes.

The General Assembly, next, on 7 April 2022, suspended the Russian Federation from the Human Rights Council in response to "grave concern at

59 Ibidem, preamble.

60 Ibidem, paras. 2, 3, 4, 11, 12.

61 UN Charter, Articles 10–12 (power to make recommendations); Sloan, "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations," 31 ("As a general rule, resolutions, for lack of intention or mandatory power, in the [General] Assembly, do not create binding obligations in positive law."). UN Member States consider General Assembly resolutions to be non-binding except in very limited situations—such as approval of the budget of the UN (UN Charter, Article 17.1) and election of members to UN bodies (e.g., General Assembly Decision 68/403). Dag Hammarskjöld Library, "Are UN Resolutions Binding?".

62 UN Charter, Article 25 ("Members of the United Nations agree to accept and carry out the decisions of the Security Council... .").

63 G.A. Res. ES-11/2.

64 Ibidem, paras. 2, 3, 5, 9.

the ongoing human rights and humanitarian crisis in Ukraine, in particular... the reports of violations and abuses of human rights and violations of [IHL] by the Russian Federation."[65]

Then, on 13 October 2022, the General Assembly adopted a resolution—similar to the second vetoed Security Council resolution[66]—condemning Russia's illegal attempts at annexation. The resolution, *inter alia*, noted "that the Donetsk, Kherson, Luhansk and Zaporizhzhia regions of Ukraine... have been under the temporary military control of the Russian Federation, as a result of aggression, in violation of the sovereignty, political independence and territorial integrity of Ukraine." It additionally affirmed the territorial integrity of Ukraine, condemning the illegal referenda that had been held.[67]

Subsequently, on 14 November 2022, the General Assembly called for reparations—recognizing "the need to establish an international mechanism for reparations for damage, loss or injury arising from the internationally wrongful acts of the Russian Federation in or against Ukraine" and the need to establish an international register of damages.[68]

Finally (as of this writing), by resolution adopted on 23 February 2023, the General Assembly issued a resolution entitled "Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine."[69] It underscored "the need to reach, as soon as possible, a comprehensive, just and lasting peace in Ukraine"; again demanded immediate, complete and unconditional withdrawal; and "emphasize[d] the need to ensure accountability for the most serious crimes under international law committed on the territory of Ukraine through appropriate, fair and independent investigations and prosecutions at the national or international level, and ensure justice for all victims and the prevention of future crimes."[70]

Thus, the General Assembly was able to pass a number of resolutions related to the situation of Ukraine, including on topics vetoed at the Security Council. Yet, as explained, General Assembly resolutions do not have

65 G.A. Res. ES-11/3, passing by 93 votes. The March 2006 resolution that established the Human Rights Council stated that the General Assembly may suspend membership rights of a country "that commits gross and systematic violations of human rights." A/RES/60/251. Thus, the resolution expelling Russia from the Human Rights Council was treated as binding.

66 S/2022/720 (vetoed by the Russian Federation).

67 G.A. Res. A/RES/ES-11/4, passing by 143 votes.

68 G.A. Res. ES-11/5, passing by 94 votes.

69 G.A. Res. ES-11/6, passing by 141 votes.

70 Ibidem, paras. 1, 5, 9.

the weight of Security Council resolution, particularly resolutions under Chapter VII, which can be binding and impose mandatory coercive measures.[71]

3. Envisioning a More Responsive Security Council

The limited ability of the Security Council to function in the situation of Ukraine raises the question of whether the Security Council will always be so hampered if a permanent member is involved in the situation—whether that permanent member acts as an aggressor state; is implicated in crimes such as genocide, crimes against humanity, or war crimes; or is protecting an ally implicated in such crimes.[72] Despite the historical record,[73] at least two paths are open to challenging Security Council practice and making the Council more able to act when a permanent member is involved. One is by pursuing challenges regarding the *legality* of some of the permanent members' veto use, specifically where the veto is used to stop the Council from acting in the face of genocide, crimes against humanity, war crimes, or aggression. The second is by making more use of Chapter VI resolutions and ensuring the obligatory abstention of a party to the dispute from voting. The General Assembly could play a significant role in pursuing both measures.

3.1. Questioning the Legality of Certain Vetoes

3.1.1. The Basic Proposition

One topic that has received insufficient attention is the examination of the compatibility of some veto use with other areas of international law. A concern arises when veto use aids in maintaining a situation where a serious breach of a peremptory norm of international law is occurring, or is inconsistent with the "Purposes" and "Principles" of the UN.[74] Sometimes,

71 Notes 61–62.

72 For background on veto use in the face of such crimes, see Trahan, "Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes", Chapter 1.

73 Ibidem.

74 UN Charter, Articles 1–2.

veto use also is at odds with treaty obligations. In other words, one must consider the *legality* of veto use under these circumstances.

In my book, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes*, I raise legality concerns related to vetoes in the face of ongoing, or the serious risk of, genocide, war crimes, and/or crimes against humanity.[75] The basic proposition is: if such crimes are occurring and at least nine member states serving on the Council have a proposed plan to stop them or try to ameliorate their occurrence, use of the veto blocks attempts to stop the crimes; in other words, it aids and assists in maintaining the *status quo* (the continued perpetration of the crimes). My book raises legality concerns at three levels as to veto use in the face of genocide, crimes against humanity, and/or war crimes. Such veto use: (1) perpetuates violations of *jus cogens* (serious breaches of peremptory norms of international law);[76] (2) is inconsistent with the "Purposes" and "Principles" of the UN,[77] with which, under the Charter, the Security Council is required to act in accordance;[78] and (3) is inconsistent with obligations under treaties such as the Genocide Convention,[79] with its Article 1 obligation to "prevent" genocide,[80] and the 1949 Geneva Conventions,[81] with their Common Article 1 obligation to "ensure respect" for Convention provisions,[82] including not committing the war crimes contained in the Conventions.[83]

75 Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes*, Chapter 4. See also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro)*, Judgment, para. 431 (the obligation to prevent genocide is triggered when "the State learns of, or should normally have learned of, the existence of a *serious risk* that genocide will be committed") (emphasis added).

76 *Jus cogens* norms receive the highest level of protection in the international legal system in that no derogations may be permitted from them except through the creation of a new norm having the same character. Vienna Convention on the Law of Treaties, Article 53 (hereinafter "VCLT").

77 UN Charter, Articles 1–2.

78 Ibidem, Article 24.2.

79 Convention on the Prevention and Punishment of the Crime of Genocide [hereinafter, "Genocide Convention"].

80 Ibidem, Article 1.

81 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention III Relative to the Treatment of Prisoners of War; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War [hereinafter collectively, "1949 Geneva Conventions"].

82 1949 Geneva Conventions, Common Article I.

83 International Committee for the Red Cross (ICRC), Grave Breaches Specified in the 1949 Geneva Conventions and in Additional Protocol I of 1977 ("grave breaches"); 1949 Geneva Conventions, Common Article 3. Common Article I is also found in Protocols I and III. *See* Protocol

3.1.2. Legality Concerns as to Veto Use and Aggression

The first two arguments also apply to veto use in the face of aggression.[84] Aggression (i.e., use of force contrary to the UN Charter) is also a peremptory norm of international law prohibited at the level of *jus cogens*. The ICJ has recognized this in the *Nicaragua* case,[85] and the International Law Commission (ILC) has also.[86] Additionally, "an overwhelming majority of scholars view the prohibition [of aggressive use of force, i.e., use of force contrary to the UN Charter] as having a peremptory character."[87] In fact, one judge serving on the ICJ has written that: "[t]he prohibition of the use of force... is universally recognized as a *jus cogens* principle, a peremptory norm from which no derogation is permitted."[88]

States have obligations that arise when a peremptory norm of international law is violated. Specifically, the ILC, in its Articles of State

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Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (hereinafter "Protocol I"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (hereinafter "Protocol III").

84 The third level of argument, related to treaty obligations, merges with the second argument, related to the UN Charter, as the treaty breached when aggression is committed *is* the UN Charter.

85 *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, para. 190. There remains a slight question whether the ICJ concluded there was such a norm or was simply reciting the ILC's view. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 223–24 ("It is the view of the present writer that the Court concluded here that the prohibition of the use of force was a peremptory norm, although it must be said that others have a different interpretation.... Strengthening the view that the Court has interpreted the prohibition of the use of force as a peremptory norm are statements made to this effect by judges in their individual opinions [in] the Nicaragua case.").

86 The International Law Commission's list of peremptory norms is as follows: (a) The prohibition of aggression; (b) The prohibition of genocide; (c) The prohibition of crimes against humanity; (d) The basic rules of international humanitarian law; (e) The prohibition of racial discrimination and apartheid; (f) The prohibition of slavery; (g) The prohibition of torture; (h) The right of self-determination. International Law Commission, Report of the International Law Commission: Seventy-first Session, Draft Conclusion 23 and Annex (adopted) (emphasis added).

87 Green, "Questioning the Peremptory Status of the Prohibition of the Use of Force," 216. Green takes the opposite view but appears to be in the minority. For a lengthy list of scholars recognizing the peremptory norm, see ibidem, 216 n. 4 (compiling authority); see also Johnston, "Identifying The *Jus Cogens* Norm in The *Jus Ad Bellum*," 42; Linderfalk, "The Source of Jus Cogens Obligations – How Legal Positivism Copes with Peremptory International Law."

88 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 254 (sep. op. Elaraby, J., July 9) (emphasis added) [hereinafter, "*Wall* Advisory Opinion"].

Responsibility for Internationally Wrongful Acts (ARSIWA), specifies in Article 41 that:

1. States shall cooperate to bring to an end through lawful means any serious breach [of a peremptory norm of international law]... . [and]
2. No State shall recognize as lawful a situation created by a serious breach [of a peremptory norm of international law]... , nor render aid or assistance in maintaining that situation.[89]

Article 41 thus encompasses three related obligations: (1) states must cooperate to bring to an end serious breaches of peremptory norms of international law; (2) states must not recognize as lawful a situation created by a serious breach of a peremptory norm of international law; and (3) states must not render aid or assistance in maintaining the situation. Significantly, the ICJ has applied the obligations in Article 41 as binding ones in the *Wall* and *Chagos* Advisory Opinions.[90]

Through its use of the veto, Russia aided and assisted in maintaining the status quo in a situation where there was a serious breach of a peremptory norm of international law occurring, i.e., Russia's use of force contrary to the UN Charter.[91] Russia's initial negative vote blocked the Security Council's attempts at restoring the situation to before the breach of the UN Charter (pre-aggression). Specifically, that vote blocked the Security Council from mandating withdrawal, mandating adherence to the UN Charter, and thus ending a breach of Article 2(4) of the UN Charter. Both of Russia's vetoes

89 International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (adopted), Article 41. Article 40(2) of the ARSIWA provides "[a] breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation." Ibidem, Article 40(2).

90 In the *Wall* Advisory Opinion, the ICJ applied Article 41 when it stated: "All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation... ." *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 200, para. 159. In the *Chagos* Advisory Opinion, after determining that "the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination"—which it recognized as an *erga omnes* obligation—and that "the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State," the ICJ held that "the United Kingdom has an obligation to bring to and end its administration of the Chagos Archipelago as rapidly as possible, and that all Member State must co-operate with the United Nations to complete the decolonization of Mauritius." *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, paras. 177, 182.

91 Note 1; but see caveat, n. 17.

also violated the separate obligation to cooperate to bring to an end a serious breach of a peremptory norm of international law. The second veto—blocking condemnation of the illegal referenda[92]—additionally helped Russia maintain its serious breach of a peremptory norm of international law.[93] As I analyze in more detail elsewhere,[94] there is nothing to suggest that permanent members of the UN Security Council do not need to respect *jus cogens*. To the contrary, *jus cogens* obligations are "binding on all subjects of internationallaw,"[95] with no exception made, even for states serving on the Security Council.[96] Nor should voting be used to further *jus cogens* violations.[97]

92 S/2022/720 (vetoed by the Russian Federation).

93 Blocking condemnation and recognition by the Security Council of the illegal nature of the referenda furthered Russia in maintaining its serious breach of a peremptory norm of international law—use of force contrary to the UN Charter.

94 Trahan, "Legal Issues Surrounding Veto Use and Aggression,"107–16 (vetoes and aggression).

95 Heieck, *A Duty to Prevent Genocide: Due Diligence Obligations Among the P5*, 189 (citing Orakhelashvili, *Peremptory Norms in International Law*, 9, 423 ("Given their non-derogable character, *jus cogens* norms are... superior to all sources and binding on all subjects of international law."); *see also* Salahuddin & Rahman, "The Concept and Status of *Jus Cogens*: An Overview," 111 ("According to Oxford Dictionary of Law[,] *jus cogens* refers to a "rule or principle in international law that is so fundamental that it binds all states and does not allow any exception." Thus the concept of *jus cogens* in the context of international law indicates that it is a body of fundamental legal principle which is *binding upon all members of the international community in all circumstances*.") (emphasis added).

96 Orakhelashvili, *Peremptory Norms in International Law*, 69 ("The direct and immediate effect of *jus cogens* means that the Council's acts are subject to it in the same way as the acts of any other actor."); Hossain, "The Concept of *Jus Cogens* and the Obligation Under the UN Charter," 78–79 ("States regard these rules [of *jus cogens*] as being so important to the international society of states and to how that society defines itself, such that *they cannot conceive of an exception*.") (emphasis added).

97 The ICJ's *Certain Expenses* Advisory Opinion has been construed to make the requirement of good faith applicable to voting, so there is nothing that makes the act of voting beyond judicial scrutiny. See Anne Peters, "The Security Council's Responsibility to Protect," 43–44 (the obligation of good faith carries over to UN voting, including on the Security Council: UN members must exercise their voting power "in good faith, in accordance with the Purposes and Principles of the Organization and in such a manner as not to involve any breach of the Charter."), citing *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, paras. 9, 21, 25.

To the extent that the ICJ in the *Jurisdictional Immunities of the State* case suggests that something procedural is not subject to *jus cogens*, that conclusion is illogical. See *Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening)*, Judgment. If something substantive is subject to *jus cogens*, why should something of lesser weight be exempt from it? Alternatively, while the act of voting is perhaps a mechanical act, what it achieves is very much substantive. See Talmon,

Additionally, it is difficult to see how Russia's 25 February 2022 veto of its own aggression can possibly be in line with the "Purposes" and "Principles" of the UN. The UN's "Purposes," set forth in Article 1 of the Charter, include: (1) "the prevention and removal of threats to the peace, and… the suppression of acts of aggression"; (2) acting "in conformity with the principles of justice and international law"; (3) achieving "international co-operation in solving international problems of a… humanitarian character"; and (4) "promoting and encouraging respect for human rights."[98] The UN's "Principles," set forth in Article 2 of the Charter, include: (1) the obligation of "good faith"; (2) the obligation to "settle… international disputes by peaceful means"; and (3) the obligation to refrain in their international relations from the threat or use of force contrary to Article 2(4).[99] Moreover, Article 24(2) of the Charter mandates that the Security Council "act in accordance with the Purposes and Principles of the UN."[100] As the author has explained in further depth elsewhere,[101] if the Security Council must act in accordance with the UN's Purposes and Principles, then the permanent members must as well, since they cannot have power greater than that of the Council of which they form a part.[102] Additionally, the Charter is also clear that UN Member States must adhere to the UN's Purposes and Principles,[103] and the permanent members are, after all, also UN Member States.

"Jus Cogens after Germany v Italy: Substantive and Procedural Rules Distinguished" ("In the case concerning *Jurisdictional Immunities of the State*, the ICJ held that rules of *jus cogens* did not automatically displace hierarchically lower rules of state immunity. The Court's decision was based on the rationale that there was no conflict between these rules as the former were substantive rules while the latter were procedural in character. The "substantive–procedural" distinction has been heavily criticized in the literature. Much of the criticism seems to be motivated by the unwanted result of the distinction, namely de facto impunity for the most serious human rights violations.").

98 UN Charter, Articles 1.1, 1.3.

99 Ibidem, Articles 2.2–2.4.

100 Ibidem, Article 24.2.

101 Trahan, "Veto Use and the UN Charter Obligation to Act in Accordance with the 'Purposes and Principles' of the United Nations."

102 In the *Tadić* case, the International Criminal Tribunal for the former Yugoslavia ("ICTY") held that the Security Council's "powers cannot… go beyond the limits of the jurisdiction of the Organization at large [the United Nations]." *Prosecutor v. Duško Tadić,* Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 28. Just as the Security Council, as an organ of the UN, cannot have powers greater than the UN, the same is true of individual permanent members—they cannot have powers greater than those of the Council.

103 UN Charter, Article 2 ("The Organization and its Members, in pursuing of the Purposes stated in Article 1, shall act in accordance with the following Principles.").

By casting its 25 February 2022 veto, Russia was not working toward the "prevention and removal of threats to the peace, and... the suppression of acts of aggression," but was furthering its own threat to the peace and continuing its act of aggression. By vetoing a resolution that would have mandated adherence to international law, Russia was hardly acting "in conformity with the principles of justice and international law." On the contrary, it was furthering its breach of these obligations. By casting its veto, Russia was not working to achieve "international co-operation in solving international problems of a... humanitarian character," rather its antithesis. And, in casting its veto, Russia was hardly working at "promoting and encouraging respect for human rights."[104] All of these are mandated by the UN's Purposes. The veto was also antithetical to the UN's Principle of acting in "good faith," and completely antithetical to the Principle of settling "international disputes by peaceful means" and respecting the obligation in Article 2(4) to refrain from the threat or use of force contrary to the UN Charter.[105] Some of the same arguments hold true for Russia's second, 30 August 2022, veto.[106]

There can be little argument that the vast majority of UN Member States have been clear in their opposition to veto use that is incompatible with some key areas of international law. For example, as part of the French/Mexican initiative and ACT Code of Conduct, nearly two-thirds of UN Member States[107] are on the same page in calling for voluntary veto restraint—i.e., that the veto should not be used in the face of genocide, war crimes, or crimes against humanity.[108] However, after pursuing this approach for over twenty years[109]—

104 UN Charter, Articles 1.1, 1.3.

105 Ibidem, Article 2(4).

106 For example, Russia's veto of condemnation of its illegal attempts at annexation was hardly in conformity with the UN's Purpose of respecting "principles of justice and international law." Ibidem, Article 1.1. Nor was it consistent with the Purpose of "international co-operation in solving international problems of a... humanitarian character." Ibidem, Article 1.3.

107 Global Centre for the Responsibility to Protect, "List of Signatories to the ACT Code of Conduct" (121 member states and 2 observer states have signed).

108 70th General Assembly of the United Nations, Political Statement on the Suspension of the Veto in Case of Mass Atrocities, Presented by France and Mexico, open to signature to the members of the United Nations [hereinafter, "French/Mexican initiative"]; G.A. Res. 70/621–S/2015/978, Annex I to the letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General, Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity or War Crimes [hereinafter, "ACT Code of Conduct"].

109 The report of the International Commission on Intervention and State Sovereignty ("ICISS") called for veto restraint in 2001. See International Commission on Intervention and State Sovereignty, "The Responsibility to Protect," para. 6.21.

with only two permanent members on board[110]—states should consider alternative, yet still parallel and compatible approaches. The clearest and most obvious of these is to pursue *legality* challenges related to vetoes cast in the face of these crimes, as well as vetoes cast in the face of aggression.[111]

3.1.3. The Potential Role of the General Assembly in Issuing a Resolution or Requesting an Advisory Opinion

While it is conceivable that the Security Council could tackle the issue of veto use in the face of genocide, crimes against humanity, war crimes, or aggression,[112] it is more likely that the initiative would come from the General Assembly.

The General Assembly could address this topic in at least two ways. First, it might consider passing a resolution on its understanding that any use of the veto—particularly regarding situations where genocide, war crimes and/or crimes against humanity are occurring (and, I would argue, also in the face of aggression)—must be in conformity with international law. While such a resolution would not be binding, especially if it garnered broad support, it would express the powerful sentiment of the international community against such veto use. Coupled with the many echoing statements by UN Member States over the past decades,[113] and the widespread state support that voluntary veto restraint initiatives enjoy,[114] a General Assembly resolution could help further the view that veto use in the above

110 France and the UK endorse the ACT Code of Conduct, and France co-leads the French/Mexican initiative. None of the other permanent members have joined either initiative, although the US has committed itself to being restrained in its veto use. Remarks of Ambassador Linda Thomas-Greenfield on the Future of the United Nations ("We will refrain from the use of the veto except in rare, extraordinary situations. In particular, any Permanent Member that exercises the veto to defend its own acts of aggression loses moral authority and should be held accountable.").

111 For a detailed explanation of the legality issues arising from veto use in the face of aggression, see Trahan, "Legal Issues Surrounding Veto Use and Aggression."

112 As mentioned, the UK and France have joined in, or spearheaded, calls for voluntary veto restraint. See note 110 *supra*.

113 For a compilation of statements by states against veto use in the face of genocide, war crimes and/or crimes against humanity, *including* concerns with the legality of such vetoes, see Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes*, Chapter 4.2.4.2.

114 Note 107 *supra* (nearly two-thirds of states support).

circumstances is carried out without the support of the vast majority of UN Member States, and that legality concerns matter.

To be precise, the French/Mexican initiative and ACT Code of Conduct are "soft law"[115] initiatives. They take the view that the veto *should not* be used in the face of genocide, war crimes and/or crimes against humanity—but they do not address the issue of *legality* concerns with such veto use. And, because, thus far, three permanent members fail to endorse voluntary veto restraint,[116] there appears to be a limit to what current voluntary veto restraint initiatives can achieve. Accordingly, a General Assembly resolution suggesting the inconsistency of some vetoes with obligations found in international law would be qualitatively different and a significant step forward.

Second, the General Assembly might request[117] an Advisory Opinion from the ICJ. This could take one of two forms. It could be posed as a general question as to the legality of veto use in situations when there are nine positive votes in the Security Council to stop or prevent genocide, war crimes, or crimes against humanity (and, I would argue, also the crime of aggression) from occurring. The General Assembly could alternatively request an Advisory Opinion on the use of the veto in a specific situation.[118]

A general question might be: does existing international law contain limitations on the use of the veto power by permanent members of the UN Security Council in situations where there is ongoing genocide, crimes against humanity, and/or war crimes? Or, it could also include the crime of aggression. The advantage of focusing on only three crimes is that they have

115 "Soft law is a term used to describe a range of non-legally binding instruments used by States and international organizations in contemporary international relations, as opposed to hard law, which is always binding." Da Rocha Ferreira, Carvalho, Graeff Machry & Barreto Vianna Rigon, "Formation and Evidence of Customary International Law," 194. A code of conduct and a political declaration, such as the ACT Code of Conduct and French/Mexican initiative, are classic soft law instruments.

116 Note 110 *supra*.

117 While the Security Council may also request ICJ Advisory Opinions, it would seem more politically probable that such a request would come from the General Assembly. *See* UN Charter, Article 96 (either the Security Council or the General Assembly may request an ICJ Advisory Opinion).

118 This might also be sent as a request for an Advisory Opinion. Alternatively, it might be brought in the form of a contentious case, for example, under the Genocide Convention (related to a veto in the face of genocide), or under the Torture Convention (related to a veto in the face of torture). *See* Genocide Convention, Article IX (permitting suits on interpretative questions); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 30(1) (permitting suits on interpretative questions).

been the focus of the French/Mexican initiative and ACT Code of Conduct, so a significant number of states[119] are already clearly on the record opposing veto use in the face of those crimes. As explained above, there are similar legality concerns with vetoes in the face of aggression;[120] yet, such veto use has to date not been included in, or the focus of, similar initiatives.

Admittedly, neither a General Assembly resolution nor an ICJ Advisory Opinion would be binding. But both would carry significant weight, increasing pressure against such veto use. The former would express the views of a considerable number of states, and ICJ Advisory Opinions are considered highly authoritative,[121] even if, strictly speaking, not binding. Even having UN Member States come together in the General Assembly to ask the ICJ for an Advisory Opinion would demonstrates a unity of sentiment against veto use that contravenes other requirements of international law.

3.2. Making More Use of Security Council Resolutions under Chapter VI Along with Obligatory Abstention from Voting of a Party to the Dispute

3.2.1. The Problem

The Russian Federation's 25 February 2022, veto of what some consider a Security Council resolution under Chapter VI[122]—and potentially also its 30 August 2022 veto[123]—additionally raise the question: why continue ignoring the language contained in the UN Charter that a party to a dispute shall abstain from voting on a resolution when the Council acts under Chapter VI? As explained above, obligatory abstention is basically ignored because states serving on the Security Council decide for themselves whether they are a "party" to the dispute and should abstain from voting.[124] It would, however, bend incredulity beyond the breaking point for the Russian

119 Note 107 *supra* (nearly two-thirds of states support).

120 Part 3.1.2.

121 ICJ Advisory Opinions "are authoritative *erga omnes* and strongly influence the international community's understanding of international law as well as the normative expectations of States." Mayr & Mayr-Singer, "Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law," 444.

122 Part 1.2.

123 The same questions exist as to the August 30, 2022 veto. The resolution did not invoke Chapter VII, so may also have been under Chapter VI, raising questions of why the Russian Federation was voting on the resolution. *See* S/2022/720 (vetoed by the Russian Federation).

124 See text accompanying note 39 *supra*.

Federation or anyone else to argue that the Russian Federation is not a "party" to the dispute in Ukraine.

One modest proposal has met with some success. That is Liechtenstein's Resolution 76/262 (2022), which, with the support of 83 co-sponsoring states, passed the General Assembly by consensus.[125] The resolution requires debate within the General Assembly within 10 days of any veto cast within the Security Council.[126] This provides both a useful moral and political avenue for UN Member States to express their views on the particular veto and against inappropriate veto use more generally.

Another such modest (but potentially powerful) measure would be to utilize the UN Charter requirement for a party to the dispute to abstain when the Council is voting under Chapter VI.[127] Permanent members have been protecting their own wrongdoing, and that of their allies, by veto use for far too long.[128] While it would not solve the issue when the Council is acting under Chapter VII, by shifting to more use of Chapter VI resolutions parties to the dispute would be Charter-blocked from vetoing such resolutions, if they were required to adhere to the Charter and abstain from voting.

A large role could also be played in this by the country occupying the monthly rotating role of being the President of the Security Council. Vamos-Goldman explains:

> Each Security Council member—elected and permanent—rotates on a monthly basis, so elected (non-permanent) members occupy the Presidency two-thirds of the time. The monthly President exerts considerable power over the agenda of the Security Council. An equally important role can be played by the UN Security Council Secretariat, the professional international public servants assigned to the Security Council. Their job includes ensuring that the Security Council (especially but not exclusively procedurally) functions in accordance

125 G.A. Res. 76/262. Liechtenstein was the state to first propose the resolution.

126 Ibidem.

127 UN Charter, Article 27(3).

128 For discussion of vetoes and veto threats in the face of genocide, crimes against humanity and war crimes, see Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes*, Chapter 1. One example is all the Russian vetoes (with China sometimes joining) cast in relation to the situation in Syria (1) blocking recognition of crimes; (b) blocking referral of the situation to the ICC; (c) blocking measures against chemical weapons use; and (4) blocking humanitarian assistance. For a detailed discussion of the vetoes, see ibidem, Chapter 5.1. For documentation of the commission of large-scale war crimes and crimes against humanity in Syria, see reports of the Independent Commission of Inquiry on the Syrian Arab Republic at https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Documentation.aspx.

with the Charter. A large part of their work involves primarily advising the monthly President—and as necessary, other Security Council members in this regard. A monthly Security Council President who is determined to adhere to the terms of the Charter working with a conscientious Security Council Secretariat should therefore be able to ensure that the issue of the abstention of a party to a dispute that is subject to a Chapter VI resolutions is brought before the Security Council. Such a focus, opening up debate to other states serving on the Council, could create pressure for the permanent member that is a party to the dispute to adhere to the terms of the Charter and abstain from voting.[129]

3.2.2. The Potential Role of the General Assembly in Issuing a Resolution or Requesting an Advisory Opinion on the Topic

While this initiative could potentially come from within the Security Council, as suggested above, the General Assembly could also address the topic of obligatory abstention under Chapter VI.

One could imagine the General Assembly tackling the topic in the same two ways discussed above—issuing a resolution or making a request of the ICJ for an Advisory Opinion. As to the former, the General Assembly could, for example, pass a resolution stressing the unambiguous clarity of the words in the UN Charter: "in decisions under Chapter VI,... a party to a dispute shall abstain from voting,"[130] and the need to give effect to those words.[131] Alternatively, the General Assembly could request an Advisory Opinion from the ICJ on how those words should be read. A third variation is for the General Assembly to issue the resolution and then seek the ICJ Advisory Opinion.[132] It must, however, be remembered and taken into account that there are risks associated with requesting an ICJ Advisory Opinion. As any large panel of judges, the ICJ faces the challenge of coming up with clear, coherent legal guidance, which is the purpose of requesting an Advisory Opinion.

129 7/11/23 interview with Andras Vamos-Goldman.

130 UN Charter, Article 27.3.

131 Added questions exist as to: (a) who would decide that a state is a "party" to a dispute and therefore must abstain from voting; (b) and how disputes could be resolved if the state deemed a "party" to the dispute disagrees.

132 Author 6/21/23 conversation with Croatian Ambassador Ivan Šimonović, Permanent Representative of the Mission of Croatia to the United Nations.

Past experience shows that such attempts can also result in the issues being examined becoming even murkier than they were.[133] Thus, the positive value of a strong political statement by the General Assembly membership requesting an Advisory Opinion from the ICJ needs to be tempered with a realistic assessment of the value of what that Advisory Opinion might or might not say.[134]

It also must be acknowledged that neither a resolution nor even a favorable ICJ Advisory Opinion will legally (let alone practically) change the status quo. Either would be a good, useful, positive step, but neither would provide a definitive solution. For that, one would also need practice reflecting compliance with the resolution or ruling.[135] Yet, while neither the General Assembly resolution nor the ICJ Advisory Opinion would be binding, either could be significantly influential in creating political pressure that the Charter requirement of obligatory abstention of a party to the dispute under Chapter VI needs to be implemented. This could potentially help usher in a more responsive Security Council that is not perpetually deadlocked when a Security Council member state is involved in the situation, at least when the Security Council is under Chapter VI.[136]

3.3. The Security Council's Potential to Request Establishment of a Special Tribunal on the Crime of Aggression through a Chapter VI Resolution

After February 2022, a variety of proposals surfaced for the creation of a tribunal to adjudicate individual criminal responsibility for the crime

133 See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (finding nuclear weapons use hardly compatible with IHL but not ultimately rendering a decision).

134 The same caveat also pertains to requesting an Advisory Opinion on the legality of certain veto use, discussed in Part 3.1.3.

135 The same caveat also pertains to requesting an Advisory Opinion or General Assembly resolution on the legality of certain veto use. Although, if a challenge to such veto use were brought in the context of a contentious ICJ case, see note 118 *supra*, the resulting decision would at least create binding legal obligations to comply.

136 Milano, "Russia's Veto in the Security Council: Whither the Duty to Abstain under Art. 27(3) of the UN Charter?," 231 ("Resuming the functioning of the duty to abstain under Art. 27, para. 3, would go exactly in [the direction of revitalizing the role of the Security Council] and would render the Council a more credible, effective and impartial institutional actor in the performance of its task of promoting international peace and security"). On the difference between a party to the "dispute" and "situation", ibidem, 222–23.

of aggression related to the situation of Ukraine.[137] Because it is fairly clear that aggression was committed,[138] this means that the crime of aggression was also committed.[139] A separate tribunal is being proposed as the ICC's Rome Statute does not confer jurisdiction over the crime of aggression in the present situation. This is because the ICC lacks jurisdiction over the nationals of non-States Parties and crimes committed on the territories of non-States Parties vis-à-vis the crime of aggression,[140] with Russia being a non-State Party.[141]

Much momentum to date has focused on the General Assembly recommending the establishment of a STCoA for the situation of Ukraine (a proposal discussed below).[142] Yet, another distinct possibility would be for the Security Council to request the establishment of such a tribunal under Chapter VI if states start applying obligatory abstention, so that Russia (a party to the dispute) abstains from voting.

The Council could request under a Chapter VI resolution that the UN and Ukraine enter into negotiations for an agreement establishing such a tribunal. The resulting tribunal, due to lack of a Chapter VII mandate, admittedly would not have the same powers as a tribunal created by a Chapter VII resolution. A tribunal thus initiated under Chapter VI , for example, would be unable to mandate that third states comply with arrest warrants.[143] By contrast, all UN Member States could be legally obligated

137 E.g., Letter Dated 12 August 2022 from the Representatives of Latvia, Liechtenstein and Ukraine to the United Nations Addressed to the Secretary-General, at Annex: Yale Club Roundtable: A Special Tribunal for the Crime of Aggression Recommended by the UN General Assembly?

138 Note 1 *supra;* but see note 17 *supra* (caveat that aggression would need to be proven).

139 For the ICC's definition of the crime of aggression, see Rome Statute, Article 8*bis*.

140 Ibidem, Article 15*bis*(5). The same is true of Belarus (which permitted its territory to be used to launch the invasion), and actually, even Ukraine, also not a party to the Rome Statute. The ICC has jurisdiction over war crimes, crimes against humanity, and (if applicable) genocide committed in the territory of Ukraine by virtue of Ukraine having accepted the ICC's jurisdiction by executing two Article 12(3) declarations. See International Criminal Court, *Situation in Ukraine* (two declarations). Ukraine could further express its support both for the ICC and the rule of law more generally by becoming a State Party to the Rome Statute.

141 International Criminal Court, "Assembly of States Parties to the Rome Statute."

142 Part 4.

143 This was true of the Special Court for Sierra Leone ("SCSL"), established by agreement between the UN and Sierra Leone, after the Security Council issued a resolution requesting the establishment of the tribunal under Chapter VI. See Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone; S.C. Res. 1315. For example, when former Liberian President Charles Taylor was under indictment but

to comply with arrest warrants of a tribunal created under Chapter VII, such as the ICTY and the International Criminal Tribunal for Rwanda (ICTR).[144] Yet, the difference might not prove as consequential as it might appear. If a state is inclined to execute an arrest warrant, it likely would do so whether under a legal mandate or not, and a state disinclined to comply (e.g., the Russian Federation vis-à-vis a warrant for a Russian national—at least under Russia's current leadership) might not comply regardless.[145]

To date, the notion of the Security Council requesting the establishment of a STCoA for the situation of Ukraine under a Chapter VI resolution has not attracted support, possibly out of concern that China (not a party to the dispute) would veto the resolution.[146] Yet, the other permanent members—the US, UK and France—might actually prefer utilizing this route rather than setting the precedent (discussed below) of the General Assembly passing a resolution recommending that the Secretary-General enter into negotiations to establish a tribunal to prosecute the crime of aggression.

4. One Additional Significant Task for the General Assembly

In addition to pursuing the above initiatives, there is another significant task facing the General Assembly. Because the Security Council's requesting the establishment of a STCoA under a Chapter VI resolution has to date not attracted interest, the General Assembly should proceed in recommending the establishment of the STCoA for the situation of Ukraine. A General Assembly resolution, while a recommendation, would express the strong support of UN Member States that the Secretary-General should enter into negotiations with Ukraine for the purpose of establishing such a tribunal.

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at one point prior to his arrest had gone to Nigeria, because the SCSL was created by agreement between Sierra Leone and the UN, only Sierra Leone had arrest obligations. Neither Nigeria (nor Liberia) had such obligations.

144 S.C. Res. 827 (establishing the ICTY), para. 4 (deciding that all States shall cooperate fully with the tribunal); S.C. Res. 955 (establishing the ICTR), para. 2 (deciding that all States shall cooperate fully with the tribunal). The Security Council also authorized the creation of the Special Tribunal for Lebanon ("STL") under Chapter VII. S.C. Res. 1757.

145 Exceptions could be envisioned—for example, the arrest and surrender of someone who has fallen out of political favor.

146 Because China is not a "party" to the dispute between Russia and Ukraine, it would not be subject to obligatory abstention.

4.1. The General Assembly Recommending the Establishment of a STCoA

While a full discussion of the crime of aggression is beyond the scope of this article, suffice it to say that the crime has been well-recognized since its prosecution before the International Military Tribunals at Nuremberg[147] and the International Military Tribunal for the Far East (Tokyo).[148] Admittedly, prosecution of the crime languished during the Cold War—as did prosecution of other international crimes[149]—but the crime resurfaced with the finalization of the Rome Statute in 1998. Already then, the Rome Statute specified that there were four crimes within the jurisdiction of the ICC.[150] However, the definition of the crime of aggression and conditions for the ICC's exercise of jurisdiction over the crime were not finalized until 2010 when States Parties adopted them in an amendment package to the Rome Statute at the ICC Review Conference in Kampala, Uganda. The central, substantive amendments are now Rome Statute Article 8*bis* (the definition of the crime) and Articles 15*bis* and 15*ter* (the ICC's jurisdiction over the crime).[151] Activation of the ICC's jurisdiction over the crime was agreed on in 2017, effective July 2018.[152]

Yet, the ICC's jurisdiction over the crime of aggression is different from its jurisdiction over the ICC's other three crimes, in that it is far more limited.[153] As already mentioned, nationals of non-States Parties and crimes committed on their territories are completely excluded from ICC jurisdiction vis-à-vis the crime of aggression.[154] Because Russia is not a State Party to the Rome Statute,[155] Russian nationals and crimes committed on Russian territory are outside the ICC's jurisdiction insofar as the crime of aggression is concerned. By contrast, the ICC has jurisdiction regarding war crimes, crimes against humanity and genocide (if any) committed on the territory of Ukraine

147 Charter of the International Military Tribunal.

148 International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander to the Allied Powers at Tokyo, January 19, 1946; Charter dated 19 January 1946; Amended Charter dated 26 April 1946.

149 The field of international justice resumed again, after the Cold War, with the 1993 creation of the ICTY. S.C. Res. 827.

150 Rome Statute, Art. 5(1).

151 ASP, Resolution RC/Res.6*.

152 Activation of the Jurisdiction of the Court Over the Crime of Aggression.

153 Rome Statute, Articles 12–13 for the ICC's jurisdiction over genocide, crimes against humanity and war crimes.

154 Ibidem, Article 15*bis*(5).

155 Note 141 *supra* (States Parties).

by virtue of Ukraine having executed two Article 12(3) declarations accepting the ICC's jurisdiction,[156] but the acceptance does not reach the crime of aggression.

While it would be preferable to swiftly amend the Rome Statute and eliminate these jurisdictional difference so that aggression committed in and against Ukraine could be within the ICC's jurisdiction, the amendment negotiations are predicted to be complex, difficult, and lengthy.[157] During earlier negotiations, there was opposition to the definition of the crime of aggression, particularly by powerful states,[158] and strenuous efforts to limit the ICC's jurisdiction over the crime.[159] Amending the Rome Statute needs to be done[160] so that similar future situations of aggression fall within the ICC's jurisdiction, and because there is no cogent reason why jurisdiction over the crime of aggression should be so truncated compared to the ICC's jurisdiction over its other crimes. While these negotiations are undertaken, a gap filler is needed—the STCoA.

Much has already been said on suggested key features of a STCoA,[161] why the tribunal needs to be international,[162] and why it needs to be established through the United Nations.[163] Establishing an international tribunal through the UN would have many advantages over national or regional initiatives. To name just one, a tribunal established through the UN would be able to avoid personal immunities from shielding top Russian leaders from accountability.[164] This, and a number of other advantages

156 International Criminal Court, *Situation in Ukraine* (two declarations).

157 Reisinger Coracini, *Is Amending the Rome Statute the Panacea Against Perceived Selectivity and Impunity for the Crime of Aggression Committed Against Ukraine?*

158 See Koh & Buchwald, "The Crime of Aggression: The United States Perspective."

159 For background on the negotiations, see Trahan, "Negotiating the Amendment on the Crime of Aggression: Proceedings at the Kampala Review Conference on the International Criminal Court"; Trahan, "From Kampala to New York—The Final Negotiations to Activate the Jurisdiction of the International Criminal Court Over the Crime of Aggression."

160 E.g., "Statement on Russia's Invasion of Ukraine: A Crime of Aggression. The Need to Amend the Crime of Aggression's Jurisdictional Regime" (calling for amending jurisdiction).

161 For discussion of proposed key features, see, e.g., Letter Dated 12 August 2022 (Yale Club Roundtable); "Blog Series: The Case for Creating and International Tribunal to Prosecute the Crime of Aggression Against Ukraine" (Parts I, II, III, IV).

162 Reisinger Coracini & 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*; Trahan, "Why a 'Hybrid' Ukrainian Tribunal on the Crime of Aggression Is Not the Answer".

163 Ibidem.

164 Ibidem.

of establishing an international tribunal through the UN, are topics on which the present author, as well as others, have written extensively elsewhere.[165]

It is important to stress that this article is not advocating for selective application of justice—i.e., prosecuting the crime of aggression only when Russian nationals are potentially implicated. A blatant violation of the UN Charter should be prosecuted whenever committed, regardless of the country involved. All permanent members have, at one time or another, acted in ways that could be seen as a contravention of Article 2(4) of the UN Charter.[166]

It is worth remembering that there were no similar calls for creating a tribunal related to the US's 2003 invasion of Iraq (a/k/a Gulf War II). This may have been because, at that time, the definition of the crime of aggression, at least for ICC purpose, was still being finalized.[167] Yet, one might well question the legality of that invasion, which lacked express UN Security Council authorization.[168] Whether older open-ended Security Council resolutions that authorized the use of force in response to Iraq's earlier invasion of Kuwait[169] provided sufficient legal justification for the use of force in 2003 is debated.[170] Of course, it is also only a "manifest" (i.e., super clear, blatant) violation of the Charter that triggers individual criminal responsibility under the ICC's definition of the crime of aggression.[171] This means that the use of force

165 Notes 161–162.

166 In addition to Iraq, situations include the invasions of Panama and Grenada, the 1956 attack to capture the Suez Canal, and China's invasion of Vietnam.

167 From 1999 through 2002, negotiations took place during meetings of the Preparatory Commission for the Establishment of an International Criminal Court. From 2003–09, negotiations continued before the Special Working Group on the Crime of Aggression.

168 The legal threshold for anticipatory self-defense also was not met, and pre-emptive self-defense is not an accepted legal doctrine.

169 S.C. Res. 678 (authorizing "all necessary means").

170 There is a "revival argument" that Iraq's material breach of its obligations related to chemical and biological weapons inspections revived the earlier use of force authorization, which was arguably still in effect if Iraq engaged in "hostile or provocative action." S.C. Res. 687 (chemical and biological weapons inspection regime); S.C. res. 686 (1991) (force authorization continued during "hostile or provocative action"). *See* Law Society of Scotland, "Iraq: A Basis in Law?" ("The primary legal justification for the invasion was predicated on what has become known as the 'revival argument'. The US and UK argued that the Security Council's resolutions 660, 678 and 687 in relation to the first Gulf War were revived by Iraq's alleged failure to comply with resolution 687."). Many arguments used to justify the 2003 invasion were later rejected. *See* UK House of Commons Library, Briefing Paper, *Chilcot Inquiry*.

171 Article 8*bis* defines the crime of aggression as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which by its character, gravity, and scale constitutes a *manifest* violation of the Charter of the United Nations." Rome Statute, Article

that is in a "grey area," or debatable in terms of its legality will not make a strong case.[172] Whether there was a crime of aggression committed with the 2003 invasion of Iraq is unlikely to be resolved judicially (at least at the international level), as the definition of the crime was adopted only in 2010, with ICC jurisdiction effective in 2018, and jurisdiction does not apply retroactively.[173]

That said, prosecution of the crime in the current instance—or at least issuance of indictments[174]—would set hugely significant precedent of the unacceptability of a blatant (i.e., manifest) UN Charter violation and that individual criminal responsibility must follow. This could be an extremely important step for the future preservation of international peace and security, and an additional way to enforce the UN Charter's use of force regime.[175]

4.2. The General Assembly's Power to Recommend the Establishment of a STCoA

One issue that has arisen is whether the STCoA could be created through the General Assembly as opposed to the Security Council. As mentioned, the Security Council created the ICTY and ICTR under its Chapter VII

8*bis*(1) (emphasis added). For more on the "manifest" requirement, *see*, *e.g.*, Kress, "Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus," 1142 (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").

172 Trahan, "Defining the 'Grey Area' Where Humanitarian Intervention May Not Be Fully Legal, But Is Not the Crime of Aggression".

173 Rome Statute, Articles 15*bis*(2)–(3), 15*ter*(2) –(3). Additionally, jurisdiction would be lacking because neither the US nor Iraq are parties to the Rome Statute, nor were they in 2003. Even if one of them had been a State Party, jurisdiction over the crime of aggression still would not exist due to the ban on retroactivity.

174 Apprehension of Russian nationals could pose significant challenges, but that is no reason why justice should not proceed—investigations and issuance of indictments. Other steps that can be taken in the absence of an accused include the preservation of evidence and confirmation of charges.

175 Use of force contrary to the UN Charter is also prohibited when it is *not* a "manifest" Charter violation. *See* UN Charter, Article 2.4 (lacking any "manifest" requirement). But a non-manifest Charter violation would not give rise to individual criminal responsibility, at least under the ICC's definition of the crime. Thus, the crime of aggression is basically a way to enforce through the regime of individual criminal responsibility consequences for more serious UN Charter violations related to use of force.

power.[176] It also requested the establishment of the Special Court for Sierra Leone ("SCSL")—ultimately created by bilateral agreement between the UN and Sierra Leone[177] under Chapter VI.[178]

Initially, it is important to clarify that the General Assembly would not be creating or establishing the STCoA, but recommending its establishment. As discussed previously, such resolutions clearly fall within the General Assembly's competence.[179] The tribunal would then be established under an agreement between the United Nations and Ukraine.

This is similar to the process used when the Security Council requested the Secretary-General to negotiate the establishment of the SCSL, which was then implemented by an agreement between the United Nations and Sierra Leone.[180] Importantly, the Security Council did not "mandate" the creation of the SCSL—as it was not acting under Chapter VII—but, acting under Chapter VI, "request[ed] the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create" the SCSL.[181] Thus, a General Assembly resolution to the effect that the Secretary-General negotiate an agreement with the Government of Ukraine to create the STCoA would be of very similar politically authoritative weight on the person to whom it is directed—the Secretary-General—as a Chapter VI resolution by the Security Council.

There is also ample precedent for the General Assembly's involvement in the creation of tribunals. For example, the General Assembly was involved in the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC). Prior to the ECCC's formation, various possibilities were being considered for how the court would be established—including going through the General Assembly. Oona Hathaway, Maggie Mills and Heather Zimmerman explain:

General Assembly Resolution 52/135 . . . requested that the Secretary-General establish a Group of Experts for Cambodia, which recommended that "the United Nations should establish an ad hoc international tribunal to try Khmer Rouge officials for crimes against humanity and genocide...

176 Part 3.3.

177 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone.

178 S/RES/1315.

179 UN Charter, Articles 10, 11, 12 (power to make recommendations).

180 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone.

181 S/RES/1315.

that the Security Council establish this tribunal under Chapter VI or VII of the Charter of the United Nations, or, should it not do so, *that the General Assembly establish it.*"[182]

The ECCC was ultimately formed under Cambodian law,[183] but the example illustrates how a process leading to the establishment of a tribunal could be triggered by a resolution of the General Assembly, and the Cambodia Group of Experts certainly held the view that the General Assembly could have been one path to establishing the ECCC.

Significantly, the General Assembly has also established both the UN Administrative Tribunal,[184] and an investigative mechanism to compile crime evidence in Syria, known as the IIIM.[185] Couple these precedents with the fact that the Security Council has given the General Assembly a mandate to take up the situation of Ukraine under the Uniting for Peace process,[186] and the ICJ's ruling in the *Certain Expenses* Advisory Opinion that the General Assembly plays a role in the maintenance of international peace and security,[187] there is solid precedent for the General Assembly being used once again to express the will of UN Member States in favor of creating a tribunal—in this case, the STCoA. Under-Secretary General for Legal Affairs (ret.) Ambassador Hans Corell—who headed the UN's legal office for a decade—agrees with this assessment[188] as do additional legal scholars.[189]

182 Hathaway, Mills & Zimmerman, "The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression Upon the Request of the UN General Assembly" (emphasis added).

183 Law on the Establishment of the Extraordinary Chambers.

184 G.A. Res. 351(IV)[A].

185 The full name is "The International, Impartial and Independent Mechanism to assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic Since March 2011." See G.A. Res. 71/248 (establishing the IIIM).

186 S.C. Res. 2623.

187 *Certain Expenses of the United Nations*, Advisory Opinion, 163 ("The Charter makes it abundantly clear... that the General Assembly is also to be concerned with international peace and security."). See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, para. 26 (reaffirming the Security Council's primary, but not exclusive, responsibility for the maintenance of international peace and security).

188 Corell, "A Special Tribunal for Ukraine on the Crime of Aggression – The Role of the U.N. General Assembly."

189 e.g., Hathaway, Mills & Zimmerman, "The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression Upon the Request of the UN General Assembly."

Conclusion

The invasion by Russian forces of the territory of Ukraine has not only proven tragic for the people of Ukraine[190] but created profound challenges in terms of the international community's ability to respond, particularly through the Security Council.

The Security Council's inability to act in the situation of Ukraine has once again cast a spotlight on the use (and abuse) of the veto by permanent members of the Security Council. Regardless of how the Security Council may have operated (or failed to operate) during the Cold War[191] and regarding the invasion of Iraq and other situations,[192] it is unsustainable to have the permanent members commit aggression free of Security Council condemnation and response. It is a fact that the Security Council, charged with primary responsibility for the maintenance of international peace and security,[193] has certain built-in limitations to this responsibility. Article 27(3), in giving permanent members the ability to veto Chapter VII resolutions for practical, geopolitically important reasons, has also resulted in the use (and abuse) of that privilege in situations where genocide, war crimes, crimes against humanity, and aggression, are taking place. These are situations that are also governed by other international law rules that must be taken into account. That lack of accountability is resulting in many situations in which the Security Council is deadlocked. There need to be alternative solutions when the Security Council's Chapter VII enforcement tools are blocked—not to override the geopolitical importance of the veto—but to ensure that it is not abused when applied contrary to international law.

When the Security Council is paralyzed by veto use—whether in the face of genocide, crimes against humanity, war crimes, or aggression—alternative solutions may exist within the Security Council in the broader use of Chapter VI coupled with application of the obligatory abstention of a party to the dispute. It is also logical to look to the General Assembly to see the extent to which it can act. In the present situation, especially after

190 It has also been tragic for both Ukrainian and Russian soldiers—none of whom should have had to fight and/or die in an illegal war. The victim base of the crime is extensive.

191 Since the first veto in 1946, Russia has exercised its veto 143 times, the United States 86 times, the United Kingdom 30 times, and China and France each 18 times. *UN to Debate Security Council Permanent Member Veto Power,* Al Jazeera.

192 Discussion *supra* notes 166–173 and accompanying text.

193 UN Charter, Article 24.1.

the Security Council resolution asking for an emergency special session on the situation in Ukraine, the UN General Assembly has been active in issuing a number of forcefully worded resolutions. While they generally have the weight of non-binding "recommendations,"[194] with respect to requesting the Secretary-General to negotiate with Ukraine for an international tribunal, a resolution with sufficient support would convey the political will of UN Member States that would be hard for any Secretary-General to ignore. Because establishing a tribunal to focus on one crime in only one particular situation is not ideal in terms of achieving impartial application of the rule of law, States Parties to the ICC's Rome Statute also need to amend the Rome Statute to harmonize the ICC's jurisdiction over the crime of aggression to bring it in line with the ICC's jurisdiction as to its other crimes.

More broadly speaking, the General Assembly could play other important roles. The General Assembly could issue a resolution on its understanding that any use of the veto—particularly regarding situations where genocide, war crimes and/or crimes against humanity are occurring (and, I would argue, also in the face of aggression)—must be in conformity with international law. Alternatively, it could request an ICJ Advisory Opinion on the legality of such vetoes. The basis for this request would be the understanding that the veto should not be used to aid and assist in maintaining serious violations of peremptory norms of international law—with all four crimes being prohibited at that level.[195] Such a legal challenge could also examine, as detailed in the author's book,[196] whether such veto use is consistent with the "Purposes" and "Principles" of the United Nations, and whether (as to vetoes in the face of genocide or war crimes) they are consistent with foundational treaties such as the Genocide Convention and 1949 Geneva Conventions.[197] The General Assembly could additionally consider issuing a resolution on the proper reading of Article 27(3)'s obligatory abstention requirement, or it could request an ICJ Advisory Opinion on the question. Both initiates have potential to challenge the way the Security

194 Note 61 *supra* (weight of General Assembly resolutions).

195 Note 86 *supra* (aggression, genocide, crimes against humanity, and "the basic rules" of IHL prohibited at the level of *jus cogens*).

196 Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes*, Chapter 4.

197 For details as to the arguments, *see* ibidem, Chapter 4.2–4.3. As to crimes against humanity, there is as of yet no comparable treaty. And, as mentioned, for aggression, the treaty violated is the UN Charter, so the author's second argument (as to violations of the UN's Purposes and Principles) largely merges with the third argument (based on treaties).

Council operates, so that it would no longer be a "given" that the Council will be unable to act when a permanent member is involved in the situation. Because there are limitations to what can be achieved under Chapter VI (where the Security Council can suggest and cajole the parties to settle their dispute peacefully but cannot mandate Chapter VII measures), a challenge to the legality of veto use in the face of genocide, crimes against humanity, war crimes, and/or aggression should be pursued regardless.

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