

Justice from the General Assembly: An International Tribunal for the Crime of Aggression in Ukraine

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Abstract

In February 2022, the Russian Federation invaded the territory of Ukraine, igniting the largest military conflict in Europe since the end of the Second World War. After nearly two years of combat, considerable evidence has emerged that Russian forces have committed a multitude of international crimes throughout occupied Ukraine. While the ICC has jurisdiction over genocide, crimes against humanity, and war crimes committed on Ukraine's territory, it does not have jurisdiction over the crime of aggression. As a consequence, those most responsible for launching the invasion of Ukraine are currently beyond the reach of international justice. In the face of Security Council stalemate and an absence of ICC authority, this Article argues that under the powers articulated in the 1950 Uniting for Peace resolution, the General Assembly has the authority to convene an international tribunal capable of prosecuting the crime of aggression in Ukraine. To support this conclusion, this Article proceeds with an analysis of the crime of aggression, prior relevant tribunals and related theories of delegation and conferral, and the General Assembly's authority in the realm of international peace, security, and justice. It concludes that under a theory of delegated jurisdiction from Ukraine and conferred authority from the General Assembly, the international community has the tools necessary to constitute an international tribunal to prosecute the crime of aggression in Ukraine.

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I. INTRODUCTION

On February 24, 2022, Russian President Vladimir Putin launched a full-scale invasion of Ukraine, ordering troops arrayed along Ukraine's northern, western, and southern borders to commence an attack that would shortly turn into Europe's largest military engagement since World War II.¹ After nearly two years of what has since descended into World War I trench-style combat,² Russia's invasion of Ukraine has claimed an estimated 500,000 combined Russian and Ukrainian casualties.³ In the wake of Russia's repeated military setbacks, Russian soldiers have left behind a raft of evidence pointing to the large-scale commission of international crimes.⁴ Considerable authority now suggests that Russian soldiers have committed acts that constitute war crimes,⁵ crimes against humanity,⁶ and even genocide.⁷ Indeed, on March 17, 2023, the International Criminal Court (ICC) issued arrest warrants for President Vladimir Putin and Maria Alekseyevna Lvova-Belova for war crimes related to the unlawful deportation of Ukrainian children into Russian territory.⁸

The ICC has jurisdiction over war crimes in Ukraine pursuant to the Rome Statute, a multilateral treaty adopted in 1998 and which went into effect in 2002.⁹

¹ Matthew Mpoke Bigg, *Russia invaded Ukraine more than 10 months ago. Here is one key development from every month of the war*, N.Y. TIMES (Jan. 9, 2023), <https://perma.cc/XFW3-BNNK>; John Follain & Andra Timu, *Russia's War in Ukraine: Key Events and How It's Unfolding*, BLOOMBERG (Feb. 17, 2023), <https://perma.cc/9QAH-X8TW>.

² Marc Santora, *This is What Trench Warfare on the Front Line Is Like*, N.Y. TIMES (Mar. 5, 2023) <https://perma.cc/4Z3C-HCX3>; Peter Beaumont, *Fighting in east Ukraine descends into trench warfare as Russia seeks breakthrough*, THE GUARDIAN (Nov. 28, 2022), <https://perma.cc/WA9M-2BZR>.

³ Helene Cooper et al., *Troop Deaths and Injuries in Ukraine War Near 500,000, U.S. Officials Say*, N.Y. TIMES (Aug. 18, 2023), <https://perma.cc/PU44-GWKN> (citing U.S. official estimates of 300,000 Russian and 170,000-190,000 Ukrainian casualties).

⁴ See, e.g., Lori Hinnant & Jamey Keaten, *UN-backed inquiry accuses Russia of war crimes in Ukraine*, ASSOCIATED PRESS (Mar. 16, 2023), <https://perma.cc/E9C8-5V93>; Human Rights Watch, *Ukraine: Apparent War Crimes in Russia-Controlled Areas*, (Apr. 3, 2022), <https://perma.cc/7MFP-YAN6>.

⁵ Press Release, UN Commission concludes that war crimes have been committed in Ukraine, expresses concern about suffering of civilians, U.N. Press Release (Sept. 23, 2022), <https://perma.cc/T78U-GZX8>.

⁶ Jasmine Wright, *US declares Russia has committed crimes against humanity in Ukraine*, CNN POLITICS (Feb. 18, 2023), <https://perma.cc/ZFM6-7FCF>.

⁷ Council of Europe, *The forcible transfer and 'russification' of Ukrainian children shows evidence of genocide, says PACE* [Parliamentary Assembly of the Council of Europe], (Apr. 28, 2023), <https://perma.cc/EFF5-HFUY>; Alex Hinton, *A year on, we have clear evidence of genocide in Ukraine*, THE HILL (Feb. 19, 2023), <https://perma.cc/D855-DF4S>.

⁸ Press Release, *Situation in Ukraine: ICC Judges Issues Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova* (Mar. 17, 2023), <https://perma.cc/2CVL-SMRJ>.

⁹ Rome Statute of the International Criminal Court, Ch. XVIII, art. 126, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

Today, the Rome Statute has 123 States Parties and has subject matter jurisdiction over “core” international crimes: namely, war crimes, crimes against humanity, genocide, and aggression.¹⁰ Although Ukraine is not a State Party to the Rome Statute, in November 2013 and again in February 2014, Ukraine voluntarily accepted the jurisdiction of the ICC pursuant to Article 12(3) of the Rome Statute in response to earlier instances of Russian aggression.¹¹ On March 2, 2022, following a referral of the situation in Ukraine by several dozen States Parties pursuant to Article 13(a), the Prosecutor duly initiated an investigation.¹² However, while this gave the ICC the ability to prosecute perpetrators of war crimes, crimes against humanity, and genocide, it does not give the Court jurisdiction over the crime of aggression.

The crime of aggression is defined in the Rome Statute as the “use of armed force by a State against the sovereignty, territorial integrity or political independence of another State” in a manner which, by its character, gravity, and scale, constitutes a “manifest violation” of the U.N. Charter.¹³ While Article 8 *bis* of the Rome Statute bestows subject matter jurisdiction upon the ICC for the crime of aggression, this jurisdiction is severely limited. Article 15 *bis* of the Rome Statute explicitly states that “[i]n respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.”¹⁴ This precludes the ICC from exercising jurisdiction over those most responsible for the war in Ukraine: Russia’s military and political leadership.

In response to this dilemma, Ukrainian officials have begun to advocate for an international criminal tribunal specifically covering the crime of aggression.¹⁵ In December 2022, Ukrainian Ambassador at Large Anton Korynevych acknowledged that “[w]e have a loophole, a gap in accountability, when we talk about accountability for the crime of aggression against Ukraine” meaning that “[l]egally, currently, there is no international mechanism, which can investigate and prosecute the crime of aggression against Ukraine.”¹⁶ The importance of creating such a mechanism cannot be overstated: absent a separate tribunal, “the

¹⁰ Christine Schwöbel-Patel, *The Core Crimes of International Criminal Law* in THE OXFORD HANDBOOK OF INT’L CRIM. L. 768 (Kevin Jon Heller et al. ed., 2020).

¹¹ Ukraine: Situation in Ukraine, ICC-01/22, Investigation (Mar. 2, 2022) <https://perma.cc/3NJV-GM52>.

¹² *Id.*

¹³ Rome Statute, art. 8 *bis*.

¹⁴ *Id.* art. 15.

¹⁵ Jennifer Hansler, *Ukrainians push for US to support special tribunal to prosecute Russian leadership for crime of aggression*, CNN POLITICS (Dec. 14, 2022), <https://perma.cc/5ZP7-6JRS>.

¹⁶ *Id.*

crime of aggression by Russia will go unpunished.”¹⁷ While the U.N. Security Council (UNSC) has created such tribunals before,¹⁸ in the case of Ukraine, any such effort would be futile; as a permanent member of the UNSC, Russia will veto any measure intended to subject it to an international court, particularly one related to Russia’s war of conquest in Ukraine.

This Article therefore examines whether the General Assembly (GA) has the authority, absent UNSC support, to establish an international tribunal for the crime of aggression. While the idea of a special tribunal for Ukraine has been floated and supported by the European Union (which has already established an investigative body),¹⁹ the United States,²⁰ and Ukraine itself,²¹ this Article seeks to elucidate the framework under which such an institution could realistically be created, placing an emphasis on maximizing legitimacy, respecting the principle of legality, and overcoming domestic hurdles to successful prosecution. To that end, this Article contends that under the authority of the 1950 Uniting for Peace resolution, the GA has the legal authority to establish an international tribunal with competence over the crime of aggression pursuant to a theory of delegated jurisdiction from Ukraine and conferred authority from the GA. It further argues that such a tribunal should apply Ukrainian, not customary, law relating to the crime of aggression. In so doing, this Article contributes to the literature by departing from existing proposals for accountability in Ukraine; the most prominent of which argue for the application of customary instead of domestic law,²² seek a hybridized (as opposed to a completely international) tribunal,²³ or intend to use institutions such as the European Union as a mechanism for administering justice instead of the General Assembly.²⁴

The discussion proceeds in four parts. Part II provides background information on the crime of aggression and its unique jurisdictional framework.

¹⁷ Göran Sluiter, *The criminal justice response to the war in Ukraine one year later - the arrest warrant against Putin from the ICC and the discussion of a special ‘aggression tribunal’*, RETHINKING SLIC (Mar. 3, 2023), <https://perma.cc/RSV3-JZN4>.

¹⁸ See, e.g., S.C. Res. 955, (Nov. 8, 1994) (invoking Chapter VII in order to establish the International Criminal Tribunal for Rwanda).

¹⁹ Directorate-General for Neighbourhood and Enlargement Negotiations, *Ukraine: International Centre for the prosecution of Russia’s crime of aggression against Ukraine starts operations today*, EUROPEAN COMMISSION (July 3, 2023), <https://perma.cc/PHM6-36Z3>.

²⁰ Jennifer Hansler, *US announces it supports creation of special tribunal to prosecute Russia for ‘crime of aggression in Ukraine’*, CNN POLITICS (Mar. 28, 2023), <https://perma.cc/H2VS-KKZ9>.

²¹ Hansler, *supra* note 15.

²² See, e.g., Hans Corell, *A Special Tribunal for Ukraine on the Crime of Aggression: The Role of the U.N. GA*, JUST SECURITY (Feb. 14, 2023), <https://perma.cc/Z2T4-VQSX>.

²³ See, e.g., Kevin Jon Heller, *Jennifer Trahan’s Cambodia Problem*, OPINIO JURIS, (Apr. 17, 2023), <https://perma.cc/4WDT-XCLH>.

²⁴ See, e.g., European Union Agency for Criminal Justice Cooperation, International Centre for the Prosecution of the Crime of Aggression against Ukraine, <https://perma.cc/KMN8-72VP>.

Part III provides an overview of relevant international tribunals which did not rely on the UNSC and related theories of delegated and conferred jurisdiction. Part IV assesses the GA's legal authority in the context of international peace, security, and law. While considering relevant Ukrainian law, Part V addresses the competence of the GA to constitute an aggression tribunal for Ukraine and concludes that such a tribunal would be an *intra vires* assertion of GA authority.

II. THE CRIME OF AGGRESSION

Although aggression is a core crime within the jurisdiction of the ICC, its mode of commission and liability are distinct from those of the other crimes covered by the Rome Statute. Generally speaking, international criminal law concerns the protection of individuals from atrocities.²⁵ The concept of war crimes grew out of the “laws and customs of war” and provides individuals with certain protections during wartime.²⁶ Crimes against humanity and genocide protect populations from “gross human rights abuses.”²⁷ By contrast, the crime of aggression is a crime not against an individual or a group, but against the territorial integrity of the State. Furthermore, the crime of aggression is a “leadership crime,” meaning that unlike crimes against humanity, war crimes, or genocide, the crime of aggression can only be committed by individuals at the policy-making level.²⁸ In this regard, the crime of aggression is unique; as opposed to other core crimes, it is “inextricably linked to an unlawful act of a State against another State.”²⁹ This section addresses the relevant history, development, and present status of the crime of aggression.

A. Historical Development

The crime of aggression was conceived as a tool to target the masterminds of violent conflicts. Article 6(a) of the London Charter—the Allied agreement that laid out the charges to be levied against Nazi war criminals—gave the Nuremberg International Military Tribunal (IMT) jurisdiction over “crimes against peace,” defined in part as the preparation, planning, and waging of a war of aggression “in

²⁵ See, e.g., Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 97 (Int'l Crim. Trib. For the former Yugoslavia Oct. 2, 1995); see also ROBERT CRYER, DARRYL ROBINSON & SERGEY VASILIEV, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 3 (4th Edition) (2019).

²⁶ CRYER ET AL., *id.*, at 3.

²⁷ *Id.*

²⁸ See, e.g., Rep. of the Int'l L. Comm'n, on the Work of Its Forty-Eighth Session, U.N. Doc. A/51/10, Art. 16(4) (Jul. 26, 1996).

²⁹ CRYER ET AL., *supra* note 25, at 297.

violation of international treaties, agreements or assurances.”³⁰ In rendering its verdict, the Nuremberg IMT articulated the fundamental importance of punishing the crime of aggression. “To initiate a war of aggression,” read the judgment, “is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”³¹

In response to accusations that the Nuremberg IMT was violating the principle of legality by prosecuting German defendants under a novel and uncodified concept of criminal liability, the IMT turned to the Kellogg-Briand Pact.³² The 1929 Pact “outlawed” war by binding States Parties to never settle international disputes “except by pacific means.”³³ The agreement, to which all of the major belligerent states in WWII were parties, was regarded by many contemporaries and modern commentators “more as a statement of moral intent than an instrument of international law.”³⁴ Nonetheless, the principles enshrined in it were considered “robust enough” to impose criminal liability on German—and later Japanese—offenders.³⁵ The IMT determined that because the pact constituted a “solemn renunciation of war as an instrument of national policy,” it followed that “war is illegal in international law” and that those who engage in acts of aggression “are committing a crime in so doing.”³⁶

In the years since the IMT’s judgment a consensus emerged that, notwithstanding the novelty of the charge at the time of Nuremberg, the crime of aggression had since passed into customary international law and had therefore become binding on States.³⁷ The U.N. Charter, ratified shortly after the Nuremberg judgments, required that “[a]ll Members . . . refrain in their international relations from the threat or use of force.”³⁸ In 1974, the GA adopted

³⁰ Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, art. 6(a), Aug. 8, 1945, 280 U.N.T.S. 1951 [hereinafter London Agreement].

³¹ *Nuremberg Trial Proceedings*, Vol. 22, at 426 (Sept. 30, 1946) <https://perma.cc/6UH5-F6LU>.

³² Kellogg-Briand Pact art. 2, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

³³ *Id.*

³⁴ RICHARD OVERY, *BLOOD & RUINS: THE LAST IMPERIAL WAR, 1931-1945* 610 (2021).

³⁵ *Id.*

³⁶ Judgment and Sentences, at 218 (Int’l Mil. Trib. (Nuremberg), Oct. 1, 1946) *reprinted in* 41 AM. J. OF INT’L L. 172, 218 (1947) [hereinafter Judgment and Sentences]; *see also* CRYER ET AL., *supra* note 25, at 298.

³⁷ Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT’L L. J. 357, 370 (2012); *see also* North Sea Continental Shelf, Judgment, 1969 I.C.J. 3, 44 (Feb. 20) (holding that in order for a rule to become part of customary international law “[n]ot only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it [. . .] the states concerned must feel that they are conforming to what amounts to a legal obligation”).

³⁸ U.N. Charter art 2(4).

Resolution 3314, which codified the meaning of aggression under international law, prohibiting acts such as “invasion or attack by the armed forces of a State of the territory of another” as well as occupation, bombardment, and blockades.³⁹ In addition to enumerating an inexhaustive list of acts that constitute aggression, the resolution affirmed that “a war of aggression is a crime against international peace” and that “[a]ggression gives rise to international responsibility.”⁴⁰ Crucially, it also acknowledged that “[n]o territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.”⁴¹ In 1996, the International Law Commission (ILC) published its Code of Crimes against the Peace and Security of Mankind, in which it determined that the prohibition of aggression is a “rule of international law,” the violation of which “gives rise to the criminal responsibility of the individuals who played a decisive role in planning, preparing, initiating or waging aggression.”⁴² Thus, in the years after 1945, the crime of aggression “quickly ripened into customary international law.”⁴³ Following the ILC’s 1996 conclusions, any lingering doubts about the legitimacy or contours of the crime of aggression were laid to rest by the adoption in 1998 of the Rome Statute.

B. Aggression in the Rome Statute

Although the Rome Statute was adopted in 1998 and went into force in 2002, it did not have jurisdiction over the crime of aggression until nearly two decades later.⁴⁴ As adopted, Article 5 of the Rome Statute gave the ICC jurisdiction over the crime of aggression, along with genocide, war crimes, and crimes against humanity.⁴⁵ However, unlike the other core crimes, jurisdiction over aggression was qualified. Paragraph 2 of Article 5 limited the Court’s jurisdiction over aggression until such a time as “a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction.”⁴⁶ These provisions were codified as amendments to the Rome Statute in 2010, but additional conditions continued to distinguish the crime of aggression.

³⁹ G.A. Res. 3314 (XXIX), at 143 (Dec. 14, 1974).

⁴⁰ *Id.* art. 5.

⁴¹ *Id.*

⁴² Rep. of the Int’l L. Comm’n on the Work of Its Forty-Eighth Session, U.N. Doc. A/51/10, art. 16 (Jul. 26, 1996).

⁴³ Scharf, *supra* note 37, at 370.

⁴⁴ Nu Ri Jung, *A Study on the Efficacy of the Kampala Amendments for Suppression of Aggression: Examined by the Case of Armed Conflicts in the Korean Peninsula*, 10 LOY. U. CHI. INT’L L. REV. 157, 162 (2013).

⁴⁵ Rome Statute, art. 5.

⁴⁶ *Id.*; Juan José Quintana, *A Note on the Activation of the ICC’s Jurisdiction over the Crime of Aggression*, 17 L. AND PRAC. INT’L CTS. & TRIBUNALS 236, 238 (2018).

Unlike war crimes, crimes against humanity, or genocide, States Parties to the Rome Statute have the option to “opt out” of the Court’s jurisdiction as it relates to aggression. First, pursuant to Article 121, in the case of amendments to the crimes enumerated in the Rome Statute, “the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory” if the State Party has not accepted the amendment.⁴⁷ Since the crime of aggression was added via amendment in 2010, States Parties can decline to subject themselves to the Court’s jurisdiction. As a result, “the nationals and territory of a State Party are not exposed to the Court’s jurisdiction over the crime of aggression until the State ratifies or accepts the Kampala amendments.”⁴⁸ This provision is grounded in the policy of *nullum crimen sine lege*, since “what is at stake here is nothing less than a modification of the substantive law of the Rome Statute[.]” States Parties should not be forced to accept jurisdiction over a new crime without first providing their consent.⁴⁹ Second, pursuant to Article 15 *bis*, the Court cannot exercise jurisdiction with respect to the crime of aggression over non-States Parties.⁵⁰ This contrasts with criminal liability for other core crimes in the Rome Statute, pursuant to which even non-States Parties can find themselves within the purview of the Court if their criminal acts are sufficiently linked to a State that *has* accepted the Court’s jurisdiction.⁵¹

C. Implications for Russian Aggression in Ukraine

The structure of the crime of aggression in the Rome Statute severely limits the ICC’s reach. As it stands, the ICC would not be able to prosecute Russian nationals for the crime of aggression even though Ukraine has voluntarily accepted the ICC’s jurisdiction. The language of Article 15 *bis* is unequivocal; the Court has no authority to prosecute non-States Parties with respect to the crime of aggression. Although the law of aggression has matured considerably since the Nuremberg IMT, Russian impunity in the present case illustrates that effective authority over the “ultimate evil or supreme international crime” continues to be greatly restricted.⁵² If Russian perpetrators are to be tried for the crime of

⁴⁷ Rome Statute, art. 121.

⁴⁸ CRYER ET AL., *supra* note 25, at 313.

⁴⁹ Quintana, *supra* note 46, at 243.

⁵⁰ Rome Statute, art. 15.

⁵¹ See, e.g., Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27, Pre-Trial Chamber III (Nov. 14, 2019).

⁵² CRYER ET AL., *supra* note 25, at 313; Nu Ri Jung, *A Study on the Efficacy of the Kampala Amendments for Suppression of Aggression: Examined by the Case of Armed Conflicts in the Korean Peninsula*, 10 LOY. U. CHI. INT’L L. REV 157, 160 (2013).

aggression, it will most certainly not be at the ICC. An assessment of several other international criminal tribunals illuminates another potential path forward.

III. INTERNATIONAL CRIMINAL TRIBUNALS: JUSTICE BEYOND THE UNSC

Since Nuremberg, the international community has created a number of international legal mechanisms. Perhaps most notable among these were the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), both of which were established in the 1990s to prosecute core crimes in Yugoslavia and Rwanda respectively⁵³. For the present analysis however, neither the ICTY nor ICTR is particularly instructive. Both were products of the UNSC, which used its Chapter VII authority to create the tribunals.⁵⁴ Of course, as a permanent member, Russia would veto any proposal to subject itself to the jurisdiction of an international tribunal created by the UNSC. Thus, this section focuses on two other tribunals, neither of which drew their authority from the UNSC: the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), frequently referred to as “hybrid” or “internationalized” courts.⁵⁵ This section concludes with a discussion of the concept of delegated and conferred jurisdiction.

A. The Special Court for Sierra Leone

After nearly a decade of violent civil conflict that began in 1991, President Kabbah of Sierra Leone sent a letter to the Secretary-General of the U.N.⁵⁶ The letter was a request for assistance in which President Kabbah formally sought the aid of the U.N. in establishing a court to try perpetrators of “violent atrocities committed during the course of the conflict.”⁵⁷ In describing his vision for the proposed court, President Kabbah suggested that the court could be “a blend of both international law and Sierra Leonean criminal law and procedure,” which could cast a “wider web to catch the leaders of the violence and atrocities committed.”⁵⁸ In August of 2000, the UNSC adopted Resolution 1315, which

⁵³ S.C. Res. 827, (May 25, 1993) (establishing the ICTY); S.C. Res. 955, (Nov. 8, 1994) (establishing the ICTR).

⁵⁴ *Id.*

⁵⁵ Jennifer Trahan, *U.N. GA Should Recommend Creation of Crime of Aggression Tribunal for Ukraine: Nuremberg is Not the Model*, JUST SECURITY (Mar. 7, 2022), <https://perma.cc/BM9C-JVYY>.

⁵⁶ Sarah Kendall, “Hybrid” Justice at the Special Court for Sierra Leone, 51 *STUD. IN L., POL. & SOC’Y: SPECIAL ISSUE: INTERDISC. LEGAL STUD.—THE NEXT GENERATION* 1, 8 (2010).

⁵⁷ *Id.*

⁵⁸ *Id.*

requested that the Secretary-General negotiate an agreement with the government of Sierra Leone to create a special international court.⁵⁹ The resolution further recommended that the hypothetical court have subject matter jurisdiction over international crimes as well as “crimes under relevant Sierra Leonean law.”⁶⁰ In 2002, an agreement between the U.N. Secretary-General and the government of Sierra Leone led to the creation of the SCSL, a hybrid international tribunal which would ultimately have jurisdiction over crimes deriving from both international and Sierra Leonean law.⁶¹

Notably for this analysis, although the UNSC spurred the Secretary-General to action with Resolution 1315, the SCSL’s structure was ultimately not a product of the UNSC, unlike the ICTY or ICTR. The final text of the agreement between the U.N. and the government of Sierra Leone emphasizes the independence of the SCSL from the UNSC, declaring in its preamble that “the Secretary-General of the United Nations . . . and the Government of Sierra Leone . . . have held such negotiations for the establishment of a Special Court.”⁶² Thus, unlike the ad hoc tribunals, the SCSL was “not a subsidiary organ of the U.N. Security Council but a separate international institution.”⁶³ As a “treaty-based *sui generis* court,” the SCSL did not therefore derive its authority or jurisdiction from the UNSC.⁶⁴ To the contrary, the UNSC explicitly elected *not* to endow the SCSL with Chapter VII powers.⁶⁵ Because the SCSL had the “express cooperation of the [government of Sierra Leone], which the ad hoc tribunals had lacked in former Yugoslavia and Rwanda,” the UNSC determined that bestowing Chapter VII authority upon the SCSL was unnecessary.⁶⁶

By endowing itself with jurisdiction over crimes under both Sierra Leonean and international law, the SCSL sought to preempt “any challenge to the Court’s legality on the basis of the principle of *nullum crimen sine lege*.”⁶⁷ The concept of “*nullum crimen*,” also known as the legality principle, is fundamental to the just

⁵⁹ S.C. Res. 1315 (Aug. 14, 2000).

⁶⁰ *Id.*

⁶¹ Kendall, *supra* note 56, at 10–11.

⁶² Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137.

⁶³ CRYER ET AL., *supra* note 25, at 176.

⁶⁴ U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, at 3, U.N. Doc. S/2000/915, (Oct. 4, 2000); Beth K. Dougherty, *Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone*, 80 INT’L. AFFS. 311, 316–17 (2004).

⁶⁵ Dougherty, *id.*, at 321.

⁶⁶ *Id.*

⁶⁷ Alison Smith, *Sierra Leone: The Intersection of Law, Policy, and Practice*, in INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 133 (Cesare P.R. Romano, André Nollkaemper, & Jann K. Kleffner eds., 2004).

administration of criminal law.⁶⁸ At its most basic level, *nullum crimen* prohibits both *ex post facto* criminal laws and the retroactive application of criminal laws and sanctions.⁶⁹ In an effort to adhere to this principle and thereby protect its legitimacy, the only international crimes included within the SCSL's subject matter jurisdiction included crimes against humanity, violations of common Article 3 and Additional Protocol II, and "other serious violations of international humanitarian law."⁷⁰ Critically, each of these international crimes was "considered to have had the status of customary international law at the time they were allegedly committed," thereby ensuring the SCSL's compliance with the principle of legality.⁷¹ The SCSL's provisions under Sierra Leonean law related to crimes committed against girls and "wanton destruction of property," both of which had been criminalized in Sierra Leone long before the outbreak of war.⁷²

Notwithstanding efforts to ensure the SCSL's adherence to the legality principle, the structure and legitimacy of the SCSL was not without its critics. Counsel for Moinina Fofana—a Sierra Leonian commander who was ultimately convicted of war crimes—rejected the principle that the Secretary-General had the authority to conclude an agreement with Sierra Leone and denied the premise that Sierra Leone's consent was sufficient to bestow the tribunal with binding jurisdiction.⁷³ "By the agreement with Sierra Leone," contended the defense, "the United Nations has, on the one hand, allowed Sierra Leone to transfer the prosecution of suspects to the international level . . . and, on the other hand transferred the responsibility for matters of concern to the international community as a whole to a court beyond its influence or control."⁷⁴ The defense concluded that "[t]he consent of the state concerned can remedy neither of these defects."⁷⁵ These arguments proved unavailing. In rejecting the defense's proposition, the Appeals Chamber determined that it is "well established that the United Nations can conclude treaties with a government."⁷⁶ It further determined that because the Secretary-General is an "executive organ" it does not need "a

⁶⁸ See, e.g., Aly Mokhtar, *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, 26 STATUTE L. REV. 41, 41 (2005).

⁶⁹ *Id.*

⁷⁰ Smith, *supra* note 67, at 133.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Prosecutor v. Moinina Fofana, Case No. SCSL-2003-11-PT, Reply to the Prosecution Response to the Preliminary Defence Motion on the Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations, ¶ 7 (Nov. 30, 2003).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Prosecutor v. Moinina Fofana, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Illegal Delegation of Powers by the United Nations, ¶ 18 (May 25, 2004).

delegation of power to become active . . .”⁷⁷ Once the Secretary-General was given a mandate—in this instance, creating a tribunal with sufficient jurisdiction to render binding judgments on Sierra Leonean perpetrators with the consent of Sierra Leone—he was well within his authority to proceed.⁷⁸ Because of this, the defense’s arguments that “the consent of Sierra Leone is not enough to remedy the illegal exercise of powers of the UN” and that the SCSL represented an “illegal delegation of powers” were rejected by the Appeals Chamber in their entirety.⁷⁹

The SCSL’s *sui generis* structure, mixed bases of subject-matter jurisdiction, delegated authority, and lack of “institutional links to the [UNSC]” provides a valuable analogy for a potential path forward vis-à-vis Russian aggression in Ukraine, as will be discussed in Part V.⁸⁰

B. Extraordinary Chambers in the Courts of Cambodia

In the latter half of the 1970s, the people inhabiting the territory of present-day Cambodia were subjected to the notoriously violent rule of the Khmer Rouge, a revolutionary guerilla movement that established the short-lived state of Democratic Kampuchea.⁸¹ Under the misgovernance of the Khmer Rouge between April 1975 and January 1979, nearly a quarter of Cambodia’s population—somewhere between 1.5 and 2 million people—was killed.⁸² It would be more than two decades before a court was formed that was capable of holding the perpetrators of the Democratic Kampuchea era accountable.⁸³ In 1997, Cambodia’s co-prime ministers sent a letter to the Secretary-General requesting U.N. aid in “bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge.”⁸⁴

Acknowledging Cambodia’s lack of resources and expertise, the letter sought the U.N.’s assistance in establishing a court similar to the tribunals created for Yugoslavia and Rwanda.⁸⁵ In February 1998, the GA issued Resolution 52/135 requesting the Secretary-General to “examine the request by the Cambodian authorities for assistance in responding to past serious violations of Cambodian

⁷⁷ *Id.* at 16.

⁷⁸ *Id.* at 1.

⁷⁹ *Id.*

⁸⁰ Dougherty, *supra* note 64, at 316.

⁸¹ JOHN D. CIORCIARI & ANNE HEINDEL, HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 2 (2014).

⁸² *Id.*

⁸³ *Id.* at 7.

⁸⁴ REBECCA GIDLEY, ILLIBERAL TRANSITIONAL JUSTICE AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 81 (2019).

⁸⁵ *Id.*

and international law.”⁸⁶ After initially promising consultations between the Secretariat and Cambodian officials, negotiations over the shape of the court stalled in early 2002.⁸⁷ However, a final agreement between the U.N. and the Cambodian government was ultimately signed in 2003 after France and Japan sponsored another GA resolution requesting that the Secretary-General “resume negotiations, without delay, to conclude an agreement” over a future court.⁸⁸ The result of these negotiations was the June 2003 Framework Agreement, a treaty between the U.N. and Cambodia that, together with the passage of domestic legislation in Cambodia, established the ECCC.⁸⁹ Interestingly, while the Secretariat had an “implicit green light” from the UNSC to negotiate with Cambodian officials, the Russian and Chinese representatives on the UNSC “stridently argued that the [UNSC] did not need to be involved in the process,” distinguishing the ECCC from the tribunals for Yugoslavia and Rwanda.⁹⁰

The ECCC has a more “ambiguous legal identity” than the SCSL, namely because it is “the only hybrid court featuring U.N. involvement to be established by an act by a domestic legislature.”⁹¹ Unlike the SCSL, or any other international tribunal for that matter, the ECCC is a creature of domestic law, a “national court with international characteristics.”⁹² Like the SCSL, the ECCC was given jurisdiction over a mixture of international and domestic crimes.⁹³ Internationally, the ECCC had authority to try perpetrators for genocide, crimes against humanity, and war crimes (all well-established in the annals of customary international law).⁹⁴ Domestically, the ECCC was given authority over suspects accused of various crimes under the 1956 Cambodian Penal Code; namely, homicide, torture, and religious persecution.⁹⁵ In addition to its hybrid jurisdiction, the ECCC had a unique hybrid structure; the court’s officers included a national and international co-prosecutor, national and international co-investigating judges, and a mixture of

⁸⁶ G.A. Res. 52/135, ¶ 16 (Feb. 27, 1998).

⁸⁷ CIORCIARI & HEINDEL, *supra* note 81, at 33.

⁸⁸ *Id.*; G.A. Res. 57/228, art. 1 (Dec. 18, 2002).

⁸⁹ CIORCIARI & HEINDEL, *supra* note 81, at 33.

⁹⁰ Agreement Between the UN and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Phnom Penh, June 6, 2003, 2329 U.N.T.S. 117; GIDLEY, *supra* note 84, at 92.

⁹¹ CIORCIARI & HEINDEL, *supra* note 81, at 42.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

national and international judges in the Pre-Trial Chamber, Trial Chamber, and the Supreme Court Chamber.⁹⁶

The ECCC's mixed jurisdiction over international and domestic crimes, compounded by its *sui generis* status as a quasi-domestic internationalized court, gave rise to objections that mirrored those raised in opposition to the authority of the SCSL. In Case 002—in which multiple defendants were ultimately convicted of crimes against humanity, war crimes, and genocide—the defense argued that because the ECCC was essentially a creature of domestic law, it lacked jurisdiction over international crimes and modes of liability.⁹⁷ This argument was roundly rejected by the Co-Investigating Judges, who determined that “whether the ECCC are Cambodian or international ‘in nature’ has no bearing on the ECCC’s jurisdiction to prosecute [international] crimes, provided the principle of *nullum crimen sine lege* is respected.”⁹⁸

Much like the SCSL, it was imperative that the ECCC abide by the legality principle; for a court blessed with the imprimatur of the U.N., it was essential that the ECCC adhere to “international standards of justice.”⁹⁹ In accordance with the principle of legality, the ICTY has held that while international courts cannot prosecute defendants for crimes that are not criminalized under either international or domestic law at the time they are committed, so long as the criminal act is “proscribed under either conventional or customary law,” it is not necessary for the offense to be “criminalized in precisely the same terms in which it is prosecuted as long as the underlying conduct is the same.”¹⁰⁰ In such a case, the legality principle is satisfied where a defendant is able to comprehend that his “conduct is criminal in the sense generally understood.”¹⁰¹

C. Delegated and Conferred Jurisdiction in the International Criminal Context

1. Delegation theory.

While the ECCC, unlike the SCSL, was partially embedded within the domestic legal structure of its home state, it nonetheless placed a similar reliance on the principle of delegated jurisdiction in order to assert authority over crimes established and committed in a domestic context but tried in an internationalized one. From the Nuremberg IMT to the ICC, the concept of delegated jurisdiction

⁹⁶ Andrew T. Cayley, *Prosecuting Mass Atrocities at the Extraordinary Chambers in the Courts of Cambodia (ECCC)*, 11 WASH. U. GLOB. STUD. L. REV., 445, 446 (2011).

⁹⁷ CIORCIARI & HEINDEL, *supra* note 81, at 51.

⁹⁸ *Id.*

⁹⁹ *Id.* at 31.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

has endowed international tribunals with the necessary authority to try cases arising out of crimes committed on the territory of consenting states.¹⁰² In justifying its legitimacy, the Nuremberg IMT determined that by creating the tribunal, the signatory powers “have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.”¹⁰³ The concept of delegated jurisdiction therefore “provides an overarching foundation to explain how a treaty-based international court can exercise powers of criminal jurisdiction traditionally reserved to states.”¹⁰⁴

In the modern era, “delegated jurisdiction has largely become the presumed legal basis” by which international courts legitimately exercise jurisdiction over other countries’ nationals.¹⁰⁵ In the *Legality of the Use of Nuclear Weapons* Advisory Opinion, the ICJ clarified the meaning and reach of delegated jurisdiction and its consequences for international organizations and tribunals. Such entities, the ICJ held, “are subjects of international law which do not, unlike States, possess a general competence,” but rather “are governed by the ‘principle of specialty,’ that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.”¹⁰⁶ International tribunals created without the UNSC are therefore empowered with only so much prosecutorial authority as the state with the delegatory authority itself possesses. The SCSL and ECCC were given authority over domestic crimes on the grounds that Sierra Leone and Cambodia respectively—as sovereign powers with jurisdiction over crimes committed on their territory—could have done “singly” what they ultimately decided to do through internationalized courts. Any attempt by the GA to create a court with binding jurisdiction over Sierra Leonean or Cambodian perpetrators without either the consent of the territorial states or Chapter VII authority from the UNSC would have been an *ultra vires* assertion of power. Thus, were the GA to create a tribunal capable of trying Russian perpetrators of the crime of aggression, the binding nature of such a court would have to come from the delegated jurisdiction of Ukraine itself.

¹⁰² MONIQUE CORMIER, THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT OVER NATIONALS OF NON-STATES PARTIES 44–46 (2020).

¹⁰³ *Id.*; Judgment and Sentences, *supra* note 36 at 218.

¹⁰⁴ CORMIER, *supra* note 102, at 38.

¹⁰⁵ *Id.* at 50.

¹⁰⁶ *Id.* at 53; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66, 78 (July 8).

2. Conferral theory.

Delegation is not, however, the only theory upon which international tribunals exercise jurisdiction. Whereas delegated jurisdiction is conceptually limited to the grant of authority by an entity with jurisdiction to one that does not, the concept of conferred jurisdiction is more expansive.¹⁰⁷ Delegated jurisdiction rests on the theory that states can do together what one of them can do individually, whereas conferred jurisdiction argues that states can do together what *none* of them can do individually.¹⁰⁸ Under this theory, states confer their jurisdiction to international courts and tribunals “not to transfer a subset of their own power to those entities, but because they often want and need those courts and tribunals to do things that they cannot do in their national systems.”¹⁰⁹ The concept of conferral is a recognition that “the collective totality of sovereign States is greater than the sum of the individual powers of these States.”¹¹⁰

The theory of conferral is, for example, the basis upon which the ICJ exercises its jurisdiction. States established the ICJ “precisely because, by and large, they cannot hear disputes between sovereign States in their national courts.”¹¹¹ They thus created the ICJ, an “entity to which their disputes may be submitted and the decisions of which are binding upon them.”¹¹² Conferral, as opposed to mere delegation, is similarly the basis upon which courts like the European Court of Human Rights (ECtHR) exist. Parties to the ECtHR have not delegated a part of their sovereignty or jurisdiction to the ECtHR, but rather are giving their citizens access to an additional venue in which to assert their rights under international law.¹¹³ While the rights over which the ECtHR has subject-matter jurisdiction—those articulated in the European Convention on Human Rights—are provided for in the domestic laws of some States Parties, they are not present in all of them, and “may or may not be justiciable before their national courts.”¹¹⁴ Thus, the theory upon which the ECtHR exists is not delegation of an existing power, but rather collective conferral onto a supranational entity power which does not necessarily exist individually.¹¹⁵

¹⁰⁷ Lelia N. Sadat, *The Conferred Jurisdiction of the International Criminal Court 1* (2023) (Wash. Univ. in St. Louis Legal Stud. Rsch. Paper No. 23-03-01).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ CORMIER, *supra* note 102, at 56.

¹¹¹ Sadat, *supra* note 107, at 5.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

In the *Reparations for Injuries Suffered in the Service of the United Nations* case, the ICJ recognized the validity of the conferral theory. The court determined that “fifty States, representing the vast majority of the Members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone.”¹¹⁶ In 2018, the Pre-Trial Chamber of the ICC similarly recognized the theory of conferral: “[I]t is the view of the Chamber that more than 120 States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity called the [ICC], possessing objective international personality, and not merely personality recognized by them alone.”¹¹⁷ The theory of conferred jurisdiction, as opposed to merely delegated jurisdiction, will play a crucial part in overcoming potential issues relating to immunities for heads of state in any future tribunal for the crime of aggression, as will be discussed in Section IV.

IV. THE GENERAL ASSEMBLY’S AUTHORITY

The previous section illustrated the capacity of the U.N. to act decisively in the realm of international criminal law even without the UNSC. The successes of the SCSL and ECCC speak to the potential for the U.N. to be an instrument of international justice even where the UNSC has decided it need not—or, in the case of Ukraine, simply will not—act. While the previous section focused primarily on the capacity to build tribunals without the binding authority of a Chapter VII resolution, this section places the focus on the GA itself, assessing its powers and weaknesses within the U.N. system as it relates to issues of security and the administration of international criminal justice generally and with respect to the Uniting for Peace resolution specifically.

A. GA Authority Generally

Chapter IV of the U.N. Charter establishes the GA as the deliberative body within the U.N. system, and the GA’s relevant authority is defined in Articles 10, 11, 12, 14, and 22. Under Article 10, the GA may “discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter.”¹¹⁸ Article 11

¹¹⁶ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 185 (Apr. 11); CORMIER, *supra* note 102, at 56.

¹¹⁷ Request under Regulation 46(3) of the Regulations of the Court, Case No. ICC-RoC46(3)-01/18, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,” Pre-Trial Chamber I, ¶ 48 (Sept. 6, 2018) (emphasis added); CORMIER, *supra* note 102, at 56.

¹¹⁸ U.N. Charter art. 10.

empowers the GA to “discuss any questions relating to the maintenance of international peace and security.”¹¹⁹ While the GA is not permitted to adjudicate any “dispute or situation” that is properly within the ambit of the UNSC—Article 12 states that the “[GA] shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests”—its authority is nonetheless defined “quite expansively.”¹²⁰ Article 14, for instance, permits the GA to recommend measures for the “peaceful adjustment of any situation” which it deems capable of impairing the “general welfare” or “friendly relations among nations.”¹²¹ Furthermore, under Article 22, the GA may establish “such subsidiary organs as it deems necessary for the performance of its functions.”¹²² In the 1954 *Effects of Awards* Advisory Opinion, the ICJ affirmed the GA’s authority to constitute an adjudicatory tribunal under Article 22.¹²³ The ICJ was called upon to determine the legitimacy of a GA-created tribunal capable of “pass[ing] judgment upon applications,” a body which was not merely an advisory organ or subcommittee of the GA, but rather “an independent and truly judicial body pronouncing final judgements without appeal within the limited field of its functions.”¹²⁴ The ICJ upheld the legitimacy of the tribunal by determining that the GA is empowered with authority beyond that which is expressly provided for in the U.N. Charter.¹²⁵ The Court concluded by finding that the GA has additional authority “conferred upon it by necessary implication as being essential to the performance of its duties.”¹²⁶ Nonetheless, the GA is not a judicial body, and other than its authority over internal matters like the U.N. budget and elections, the GA alone is not endowed with the authority to make coercive decisions that are binding on member states.¹²⁷

Nonetheless, in addition to its capacity to establish judicial bodies capable of rendering binding judgments, the GA has slowly accreted to itself something resembling legislative power as well. One way in which it has done so is through the adoption of multilateral treaties. This process is initiated when a state or cohort of states introduces a proposal to the GA, whereafter it is sent to a drafting body

¹¹⁹ *Id.* art. 11.

¹²⁰ *Id.* art 12; Anne-Cécile Robert & Romuald Sciora, *The General Assembly: The Hidden Side of the United Nations*, 6 INT’L POL. REV. 20, 21 (2018).

¹²¹ U.N. Charter art 14.

¹²² *Id.* art. 22.

¹²³ *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal*, Advisory Opinion, 1954 I.C.J. 15 (July 28).

¹²⁴ *Id.* at 53.

¹²⁵ *Id.* at 53.

¹²⁶ *Id.* at 56.

¹²⁷ SIMON CHESTERMAN ET AL., *Legal Status, in LAW AND PRACTICE OF THE UNITED NATIONS: DOCUMENTS AND COMMENTARY* 113 (2d ed. 2016).

within the GA, after which the sponsoring state's draft is subjected to negotiations. This process is finalized once the treaty has been ratified or acceded to by the necessary number of States Parties.¹²⁸ One such treaty and a subsequent ICJ opinion interpreting it illustrate the quasi-legislative capacities of the GA. The 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States proclaimed, in relevant part, that every state has a duty to refrain from the threat or use of force against the territorial integrity of another state and that a war of aggression “constitutes a crime against the peace, for which there is responsibility under international law.”¹²⁹ While the resolution did not itself represent a significant break from previous exercises of the GA's authority, a subsequent ICJ opinion relating to the resolution did.¹³⁰

In the 1986 *Nicaragua* case on the use of force, the ICJ was presented with a direct opportunity to address the legal character of the 1970 Resolution.¹³¹ Although it was long settled that GA resolutions had the power to codify or clarify international law already in existence, the ICJ in the *Nicaragua* case elevated such resolutions to something more.¹³² The Court held that “the effect of consent to the text of such resolutions cannot be understood as merely that of a ‘reiteration or elucidation’ of the treaty commitment undertaken in the Charter,” but rather, “it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.”¹³³ That is to say, the resolution is not a codification of a rule already in existence, but is a rule in and of itself. While the extent of the GA's law-making authority continues to be contested—indeed, one commentator maintains that it “is debatable whether the states that voted [the resolution] into existence had visualized it as creating law”—the GA has undeniably expanded its competence into something that, though perhaps not explicitly legislative, strongly resembles it.¹³⁴ Articles 10–14 of the U.N. Charter and subsequent interpretations of the GA's authority thus “provide ample scope for the [GA] to act assertively on issues of humanitarian emergencies and of peace and security,” particularly where the UNSC has declined to act.¹³⁵

¹²⁸ *Id.* at 152.

¹²⁹ *Id.* at 154; G.A. Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (Oct. 24, 1970) [hereinafter *1970 Resolution*].

¹³⁰ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgement, 1986 I.C.J. 14 (June 27).

¹³¹ *Id.*

¹³² CHESTERMAN ET AL., *supra* note 127, at 153.

¹³³ Nicaragua, *supra* note 130, ¶ 188, (emphasis added).

¹³⁴ CHESTERMAN ET AL., *supra* note 127, at 153.

¹³⁵ Mohammad Tanzimuddin Khan & Saima Ahmed, *Dealing with the Rohingya Crisis: The Relevance of the General Assembly and R2P*, 5 ASIAN J. COMP. POL. 121, 134 (2020).

B. The GA in Security and International Law

Article 24 of the U.N. Charter endows the UNSC with primary responsibility for issues relating to international peace and security, however, the Advisory Opinion of the ICJ in the 1962 *Certain Expenses* case conclusively established that the UNSC's authority in this realm is not exclusive.¹³⁶ The ICJ determined that in the area of international peace and security, the authority of the GA under the Charter is more than just "hortatory."¹³⁷ The Court held that while only the UNSC may order coercive measures in furtherance of international peace and security, "the functions and powers conferred by the Charter on the [GA] are not confined to discussion, consideration, and the initiation of studies and the making of recommendations."¹³⁸ The ICJ concluded by determining that even as it relates to issues of peace and security, the GA is capable of taking actions involving "dispositive force and effect."¹³⁹ Per the ICJ's holding, the GA is not barred under the Charter from financing measures intended to maintain or promote peace and security under the logic that *financing* such measures is not technically *enforcing* those measures (which would properly fall under the authority of the UNSC).¹⁴⁰

Indeed, consistent with the ICJ's determination, the GA has in the intervening years become increasingly involved in the realm of international security and justice, passing a variety of resolutions that have radically transformed a space previously thought to be the sole province of the UNSC. These include the Convention on the Prevention and Punishment of the Crime of Genocide in 1948, the International Convention on the Elimination of All Forms of Racial Discrimination in 1965, the Convention on the Elimination of All Forms of Discrimination against Women in 1979, and the 2005 World Summit Outcome Document establishing states' responsibility to protect ("R2P") their populations from genocide, war crimes, and crimes against humanity.¹⁴¹ Leaning into its role as a body capable of more than mere exhortation, the GA has embraced its authority over issues pertaining to international peace and security by establishing peacekeeping forces in the Middle East, requesting the Secretary-General to send a special assistance mission to Afghanistan, establishing fact-finding missions and commissions of inquiry in Afghanistan, the Balkans, Congo, Mozambique, South

¹³⁶ Rebecca Barber, *Accountability for Crimes against the Rohingya: Possibilities for the General Assembly where the Security Council Fails*, 17 J. INT'L CRIM. JUST. 557, 562 (2019).

¹³⁷ *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 163 (July 20, 1962).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Barber, *supra* note 136, at 564.

¹⁴¹ Khan & Ahmed, *supra* note 135, at 133–34.

Vietnam, and Cambodia,¹⁴² and directly regulating U.N. trustee and mandated territories.¹⁴³

Furthermore, even though Article 12(1) of the Charter maintains that the GA “shall not make any recommendation with regard” to a dispute or situation that the UNSC is actively engaged in, even this prohibition has slowly eroded over the years.¹⁴⁴ While initially this provision was interpreted to be a complete bar on the GA’s ability to consider issues on the UNSC’s agenda, in the *Wall* Advisory Opinion, the ICJ acknowledged that the meaning of Article 12 had evolved over time.¹⁴⁵ The Court determined that there had been a growing tendency “for the [GA] and the [UNSC] to deal in parallel with the same matter concerning international peace and security.”¹⁴⁶ In such instances, the UNSC typically focuses on how a given situation affects international peace and security, while the GA “has taken a broader view, considering also their humanitarian, social and economic aspects.”¹⁴⁷ In the realm of international justice, the GA has fully embraced its newfound role.

In 1997, as a leadup to the creation of the ECCC, the GA created the Group of Experts for Cambodia.¹⁴⁸ The Group of Experts was charged with evaluating the evidence available and determining the “nature of the crimes committed,” determining whether leaders of Democratic Kampuchea could realistically be brought to justice, and assessing the feasibility of trying such perpetrators either domestically or internationally.¹⁴⁹ Following the GA’s creation of the Human Rights Council (HRC) in 2006, the GA’s presence in the field of international peace, security, and justice expanded dramatically. Over the course of the following ten years, “HRC sponsored commissions would investigate violations in Palestine (2006), Lebanon (2006), Darfur (2006), Libya (2011), Côte d’Ivoire (2011), Syria (2012), Eritrea (2014), and DPRK (2014).”¹⁵⁰

These commissions have not shied away from making legal determinations on the basis of their inquiries.¹⁵¹ In Libya, the HRC acknowledged that some of

¹⁴² Barber, *supra* note 136, at 580.

¹⁴³ Michael Ramsden & Tomas Hamilton, *Uniting Against Impunity: The UN General Assembly as a Catalyst for Action at the ICC*, 66 INT’L CRIM. L. Q. 893, 916 (2017).

¹⁴⁴ Barber, *supra* note 136, at 564.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 149 (July 9) [hereinafter *Wall Advisory Opinion*].

¹⁴⁷ Barber, *supra* note 136, at 564.

¹⁴⁸ Michael Kirby, *Human Rights, the United Nations and Cambodia*, 67 AUSTRALIAN Q. 948, 949 (1999).

¹⁴⁹ *Id.*; Steven R. Ratner, *The United Nations Group of Experts for Cambodia*, 93 AM. J. INT’L. L. 948, 949 (1999).

¹⁵⁰ Ramsden & Hamilton, *supra* note 143, at 897.

¹⁵¹ *Id.* at 898.

the human rights violations “may also amount to crimes,” and subsequent factfinding missions in Eritrea, DPRK, Myanmar, Palestine, Syria, and South Sudan have similarly acknowledged the existence of potential crimes.¹⁵² In the case of Syria, several countries even pushed back on the GA’s active role in the realm of international criminal justice.¹⁵³ Following the establishment by the GA of the International, Impartial, and Independent Mechanism (IIIM) to assist in the investigation and prosecution of perpetrators in Syria pursuant to Resolution A/71/248 in 2016, Syria and Russia both voiced objections.¹⁵⁴ The President of the GA responded by referencing “the accepted practice of the [GA] to consider, in parallel with the [UNSC], the same matter concerning the maintenance of international peace and security.”¹⁵⁵ Thus, as it presently stands, the U.N. Charter provides a “positive legal basis for the [GA] to consider and make recommendations on matters of international peace and security,” so long as it does not breach Article 12(1) by directly contradicting a position adopted by the UNSC or violate Article 11(2) by “impos[ing] an explicit obligation of compliance” on affected states.¹⁵⁶

C. Uniting for Peace

In 1950, the GA laid the groundwork for a full-scale and deliberate usurpation of UNSC authority with the issuance of Resolution 377, known as “Uniting for Peace” (“U4P”). U4P was first conceptualized as a means of overcoming the Soviet Union’s veto power on the UNSC in light of its obstruction of any U.N. action relating to the Korean War.¹⁵⁷ U4P calls for GA action in the face of UNSC stalemate in the realm of international security and justice.¹⁵⁸ It resolves that:

If the [UNSC], because of a lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the [GA] shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary.¹⁵⁹

¹⁵² *Id.*

¹⁵³ Barber, *supra* note 136, at 565.

¹⁵⁴ *Id.*; G.A. Res. 71/258, (2016).

¹⁵⁵ Barber, *supra* note 136, at 565.

¹⁵⁶ *Id.*

¹⁵⁷ Larry D. Jonhson, “Uniting for Peace”: *Does it Still Serve Any Useful Purpose?*, 108 AM. J. OF INT’L L. UNBOUND 106, 108 (2014).

¹⁵⁸ G.A. Res. 377 (V), Uniting for Peace (Nov. 3, 1950) [hereinafter *Uniting for Peace*].

¹⁵⁹ *Id.* at ¶ 1.

U4P is activated under two circumstances: either a member of the UNSC can request the GA to commence a special session, or GA members can do so by a majority vote.¹⁶⁰ U4P thereby creates a “procedural framework by which the Assembly could consider and make recommendations on matters of international peace and security.”¹⁶¹ Pursuant to the language of the resolution, U4P has two “trigger” mechanisms before the GA may intervene.¹⁶²

First, there must be a lack of unanimity among the permanent members of the UNSC on an issue relating to international peace and security.¹⁶³ While at first glance this seems straightforward, authorities differ on what a lack of unanimity actually means. Two theories dominate. The first maintains that “for the preconditions [of the first requirement] to be met, the deliberations in the Council must be brought to a vote.”¹⁶⁴ In such a situation, the situation must be discussed, a resolution voted on, and the resolution must then be vetoed by a permanent member. The second interpretation is more permissive and maintains that a lack of unanimity is itself sufficient whether or not the issue is ultimately brought to a vote and a veto is issued.¹⁶⁵ Ultimately, the distinction is of little practical consequence, since a permanent member hoping to establish the necessary lack of unanimity could simply put the matter to a vote and then use its veto to send the situation to the GA. U4P has been invoked ten times following a UNSC veto: five times by the former Soviet Union, twice by the U.S. alone, twice by France, the U.K., and the U.S. voting in tandem, and once by France and the U.K.¹⁶⁶

Second, there must be a failure on the part of the UNSC to exercise its responsibility for maintaining and protecting international peace and security.¹⁶⁷ In order for this provision to be satisfied, there must therefore be either (1) a threat to the peace, (2) a breach of the peace, or (3) an act of aggression. The use of a veto by a permanent member of the UNSC is an insufficient basis to determine whether such a failure has occurred.¹⁶⁸ Rather, the GA must independently assess whether such a situation exists, meaning specifically that the GA needs to determine if a situation that falls within Chapter VII of the U.N. Charter has arisen.¹⁶⁹ If such a determination is made, it follows that the UNSC has failed in its duty to maintain and protect international peace and security, and

¹⁶⁰ *Id.*

¹⁶¹ Barber, *supra* note 136, at 568.

¹⁶² Johnson, *supra* note 157, at 107.

¹⁶³ *Uniting for Peace*, *supra* note 158.

¹⁶⁴ Barber, *supra* note 136, at 568.

¹⁶⁵ *Id.*

¹⁶⁶ Johnson, *supra* note 157, at 107.

¹⁶⁷ *Id.*

¹⁶⁸ Barber, *supra* note 136, at 568.

¹⁶⁹ *Id.*; Johnson, *supra* note 157, at 107.

a member of the Council has thereby exercised its veto power “illegitimately or unreasonably.”¹⁷⁰

This determination is drawn from one of three conclusions about the U.N. Charter itself. First, “[i]f a veto prevents the Council from responding to a threat to or breach of the peace, it may be argued that the veto was not in accordance with the purposes and principles of the U.N., thus denoting failure.”¹⁷¹ Second, Article 2(2) of the Charter requires that States Parties conduct themselves in “good faith.” An unreasonable failure to act where a threat to international peace and security clearly exists is therefore a violation of the Charter.¹⁷² Third, scholars have justified the existence of a violation based on the “abuse of rights doctrine,” whereby a “decision that is arbitrary, taken for an extraneous purpose, or in bad faith is rendered *ultra vires*.”¹⁷³ The abuse of rights doctrine is given credence by the *travaux préparatoires* of the Charter, which states that permanent members of the UNSC should not use their veto power “willfully to obstruct the operation of the Council.”¹⁷⁴

Furthermore, any ambiguity as to whether or not a permanent member has wielded an illegitimate veto is clarified by the 2015 “code of conduct regarding [UNSC] action against genocide, crimes against humanity, and war crimes,” which, at its launch, enjoyed the support of 104 U.N. States Parties.¹⁷⁵ Embodying the second threshold requirement of U4P, the Code calls on the UNSC “to not vote against a credible draft resolution before the [UNSC] on timely and decisive action to end the commission of genocide, crimes against humanity or war crimes, or to prevent such crimes.”¹⁷⁶ A violation of the Code of Conduct can therefore constitute *ipso facto* evidence of UNSC failure sufficient to satisfy the second threshold requirement of U4P. Further eliminating any ambiguity about the existence of a threat is the practice of the UNSC itself. Since the Charter’s founding, the Council has determined that relevant threats include terrorism, humanitarian crises, apartheid, the existence of weapons of mass destruction, and violations of human rights and humanitarian law.¹⁷⁷ The GA is therefore supplied

¹⁷⁰ Barber, *supra* note 136, at 569.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 570; G.A. Res. 70/621, Strengthening of the United Nations System, (Dec. 14, 2015) [hereinafter *Code of Conduct*]; Parliamentarians for Global Action, *Launch of the Code of Conduct Regarding UNSC Action Against Genocide, Crimes Against Humanity or War Crimes* (Oct. 27, 2015) <https://perma.cc/3LVS-VJAB>.

¹⁷⁶ *Code of Conduct*, *supra* note 175, ¶ 2.

¹⁷⁷ Barber, *supra* note 136, at 571.

with ample means to determine for itself if and when a Chapter VII threat has arisen.

Where both conditions of U4P are met, the GA “shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures.”¹⁷⁸ While U4P does not purport to infringe on the UNSC’s exclusive authority to use coercive measures under Chapter VII, it does explicitly contemplate using armed force where an act of aggression or breach of the peace has arisen.¹⁷⁹ Since its conception, U4P has been invoked on numerous diverse occasions: imposing an arms embargo in Congo in 1960, demanding the withdrawal of Soviet troops from Afghanistan in 1980, and condemning the South African occupation of Namibia in 1981, to name but a few.¹⁸⁰

It is relevant to note that U4P does not necessarily expand the GA’s authority; rather, it is an expression of what the GA considers to be its authority and responsibility within the bounds of the U.N. Charter. U4P is important “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.”¹⁸¹ When the GA invokes U4P and adheres to its two-prong criteria, it is in essence creating a rebuttable presumption that it is not encroaching on the UNSC’s primary authority over issues pertaining to international peace and security.

V. JUSTICE FROM THE GENERAL ASSEMBLY

The previous two sections demonstrate the power of the U.N. system to act in instances where the UNSC is unwilling or unable to do so. Section III analyzed the SCSL and ECCC, two courts established under the auspices of the GA and the Secretariat which illustrate the capacity of the international community to establish courts capable of exercising binding judgments over defendants accused of both domestic and international crimes. In both instances, these courts asserted jurisdiction without the authority of a binding Chapter VII resolution from the UNSC; indeed, in the case of the SCSL, the UNSC explicitly rejected the notion that a Chapter VII resolution was necessary since the territorial state had acquiesced to the creation of the court.¹⁸²

Section IV established the considerable authority of the GA to act even in situations involving international peace and security, terrain originally conceived of as the sole province of the UNSC. First, the ICJ has repeatedly demonstrated

¹⁷⁸ *Uniting for Peace*, *supra* note 158.

¹⁷⁹ *Id.*; Johnson, *supra* note 157, at 107.

¹⁸⁰ Johnson, *supra* note 157, at 111.

¹⁸¹ Barber, *supra* note 136, at 572 (citing Harry Reicher, *The Uniting for Peace Resolution on the Thirtieth Anniversary of Its Passage*, 20 COLUM. J. TRANSNAT’L L. 1, 48 (1981)).

¹⁸² *Id.*

that the GA has an important and complementary role to play in the realm of international peace, security, and justice. In the *Certain Expenses* case, the ICJ confirmed that the UNSC's authority over issues that implicate the Council's Chapter VII authority is not exclusive; in the *Wall* Advisory Opinion, the ICJ further determined that Article 12 of the U.N. Charter no longer constitutes a complete bar on the GA's ability to consider issues being deliberated by the UNSC; in the *Nicaragua* case, the ICJ confirmed that GA resolutions may be more than merely declarative or clarificatory; in the *Effect of Awards* Advisory Opinion, the ICJ upheld the GA's authority to establish an adjudicatory tribunal under Article 22 of the U.N. Charter. Together, these precedents provide support for the notion that GA resolutions can assume "binding effect where this reflects the will of the U.N. membership to confer on [a] body authoritative competencies."¹⁸³ Second, through the Uniting for Peace resolution, the GA has established a framework by which it is permitted to take decisive action on issues implicating Chapter VII where the UNSC has manifestly failed in its duty to maintain and protect international peace and security. As a consequence, the GA "has the potential to assume an important role concomitant with its status as the global plenary organ" in the realm of international justice, one which places it in a unique position to take action against impunity in Ukraine.¹⁸⁴

With these arguments in mind, Section V lays out the means by which the GA may constitute a binding international court with jurisdiction over the crime of aggression in Ukraine.

A. Triggering U4P

That U4P is applicable in the context of Russia's invasion of Ukraine is of little doubt. On February 27, 2022, merely three days after Russia invaded, the UNSC adopted Resolution 2623.¹⁸⁵ The resolution acknowledged that a "lack of unanimity of its permanent members [over the issue of the invasion of Ukraine] has prevented it from exercising its primary responsibility for the maintenance of international peace and security," and as a consequence, decided to "call an emergency special session of the GA to examine the situation."¹⁸⁶ The vote was supported by 11 members of the UNSC with one in opposition (Russia) and three abstentions (China, India, and the United Arab Emirates).¹⁸⁷ By referring the situation to the GA, the UNSC activated U4P and satisfied the first of its two

¹⁸³ Ramsden & Hamilton, *supra* note 143, at 916.

¹⁸⁴ *Id.* at 921.

¹⁸⁵ S.C. Res. 2623 (Feb. 27, 2022).

¹⁸⁶ *Id.*

¹⁸⁷ Press Release, Security Council, Security Council Calls Emergency Special Session of GA on Ukraine Crisis, Adopting Resolution 2623 (2022) by 11 Votes in Favour, 1 Against, 3 Abstentions, U.N. Press Release SC/14809 (Feb. 27 2022), <https://perma.cc/2X68-K9W4>.

trigger mechanisms: an issue before the UNSC was brought to a vote, and a lack of unanimity was clearly illustrated by Russia's opposition.

U4P's second requirement, that the GA determine for itself whether "there appears to be a threat to the peace, breach of the peace, or act of aggression," was satisfied on March 2, 2022, by GA Resolution ES-11/1.¹⁸⁸ The GA "deplore[d]" the act of aggression by Russia and Ukraine in violation of the U.N. Charter, demanded that Russia "immediately cease its use of force against Ukraine" and "refrain from any further unlawful threat or use of force against any Member State," and further demanded that Russia immediately and unconditionally withdraw its military from Ukraine's territory.¹⁸⁹ In addition to reaffirming the obligation under Article 2(2) that U.N. Member States "shall fulfil in good faith the obligations assumed by them in accordance with the Charter," the Resolution explicitly referenced the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.¹⁹⁰ As discussed earlier in Section VI, the 1970 Resolution was determined by the ICJ to be more than a mere recitation or clarification of existing law, but instead "may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves."¹⁹¹

The GA has thus established the existence of an act of aggression and threat to the peace sufficient to normally trigger the UNSC's Chapter VII authority. The failure of the UNSC to act on account of an absence of unanimity, and the subsequent referral of the situation to the GA, thereby satisfied U4P's two trigger mechanisms, justifying further GA action. Per the language of U4P, the GA is therefore within its rights to "mak[e] appropriate recommendations to Members for collective measures."¹⁹² Furthermore, because the situation involves not just a threat to the peace, but an actual breach and an act of aggression, the GA may recommend the use of armed force.¹⁹³ The creation of a tribunal therefore falls well within the bounds of potential action established by U4P.

In order to establish a tribunal, the GA will have to rely on Article 22. As discussed in Section VI, the ICJ determined in the *Effect of Awards* case that the GA may create "an independent and truly judicial body [capable of] pronouncing final judgments without appeal within the limited field of its functions."¹⁹⁴ So long as such a body is "necessary for the performance" of the GA's functions, an international court for the crime of aggression would be an *intra vires* exercise of

¹⁸⁸ G.A. Res. ES-11/1 (Mar. 2, 2022).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*; 1970 Resolution, *supra* note 129.

¹⁹¹ Nicaragua, *supra* note 130, ¶ 188.

¹⁹² *Uniting for Peace*, *supra* note 158.

¹⁹³ *Id.*

¹⁹⁴ Effect of Awards of Compensation Made by the U.N. Administrative Tribunal, *supra* note 123.

authority. That the maintenance of international peace, security, and justice are part and parcel of the GA's functions is now without question; both the *Certain Expenses* and the *Wall* Advisory Opinions clarified that the UNSC is not the only body with authority over issues pertaining to international peace and security.¹⁹⁵ It follows that in the absence of UNSC action, the creation of a body designed to bring justice to perpetrators of international crimes is "necessary for the performance" of the GA's functions.

Furthermore, the purpose for which the U.N. was created operates as an independent source of authority. The U.N.'s *raison d'être* is the prevention of the "scourge" of war and ensuring comity between nations; if, therefore, "a particular course of action by the Assembly is essential" in order to maintain international peace and security, "there is a presumption that it is *intra vires*."¹⁹⁶ As discussed, the GA did just that by dispatching a peacekeeping force to the Middle East in 1956 and more recently through the creation of the IIIC in 2016 to investigate the commission of crimes committed during the Syrian civil war. And, of course, the GA encouraged and assented to the establishment of the ECCC. Under Article 22, it therefore appears well within the GA's established authorities to constitute a tribunal for the crime of aggression in Ukraine. While, as earlier discussed, the GA is not alone permitted to exercise coercive authority over States and could not therefore *alone* exercise binding jurisdiction over defendants in a criminal tribunal, this problem is readily solved under the theory of delegated jurisdiction.

B. Jurisdiction

In the SCSL and the ECCC, the tribunals did not have jurisdiction over criminal defendants because of some latent coercive power embedded within the authority of the Secretariat or the GA. Rather, the jurisdiction was given to those bodies by the states that had territorial jurisdiction over the crimes being charged: Sierra Leone and Cambodia. Indeed, it is exactly because the SCSL was constituted with the "express cooperation" of Sierra Leone that the UNSC determined that coercive Chapter VII authority was unnecessary to create a binding tribunal in that case, in contrast to the tribunals for Yugoslavia and Rwanda.¹⁹⁷ As the Nuremberg IMT established early on in the history of international criminal law, countries may do "together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law."¹⁹⁸ Thus, since the GA has the established authority to create a tribunal, and

¹⁹⁵ *Certain Expenses of the United Nations*, *supra* note 137, at 163; *Wall Advisory Opinion*, *supra* note 146, at 163.

¹⁹⁶ Barber, *supra* note 136, at 580.

¹⁹⁷ Dougherty, *supra* note 64, at 321.

¹⁹⁸ Barber, *supra* note 136, at 580; Judgment and Sentences, *supra* note 36.

Ukraine plainly has territorial jurisdiction over crimes committed on its territory and could therefore prosecute the crimes itself were it to so choose, together, there is little question that Ukraine may properly delegate its jurisdiction to a special tribunal created by the GA.

Furthermore, under the conferral theory, a court created by consensus among members of the GA would be able to overcome issues relating to Head of State immunities that exist at the domestic level. It is well established that personal immunity is an “absolute procedural bar to prosecution of sittings Heads of State in all foreign domestic jurisdictions.”¹⁹⁹ Thus, Ukraine could not simply try Vladimir Putin with the crime of aggression in its domestic court; as a sitting head of state, Putin enjoys immunity. However, in the *Arrest Warrant* case, the ICJ held that “an incumbent or former Minister . . . may be subject to criminal proceedings before certain international criminal courts where they have jurisdiction.”²⁰⁰ This logic was later upheld by the Appeals Chamber in the trial of Al-Bashir.²⁰¹ While neither Ukraine nor any other state has the authority to exercise jurisdiction over a sitting head of state pursuant to a theory of delegation, this is not the end of the story. Pursuant to a theory of conferral, by which a “vast majority of states” may “confer certain powers on an international organization that, individually, they do not have,” the problem of immunities can likely be overcome, consistent with the findings of the Appeals Chamber.²⁰² Thus, the conferred authority of a majority of the members of the GA, together with the delegated jurisdiction of Ukraine over the crime of aggression itself, would be sufficient both to render a binding judgment against Russian perpetrators and overcome the traditional Head of State immunity.

C. Form of the Tribunal for Ukraine

While Section III held up the SCSL and ECCC as examples upon which a tribunal in Ukraine may be based, this analysis was based solely on what the GA and Secretariat could conceivably do in the absence of UNSC support. It did not take into account what *Ukraine* could do, or how those tribunals would comport with Ukrainian law. A quirk in the Ukrainian constitution likely renders a tribunal like the ECCC impossible. This is because Article 125 of the Ukrainian constitution places a direct bar on courts like the ECCC. Article 125 of the constitution states plainly that the “creation of extraordinary and special courts

¹⁹⁹ CORMIER, *supra* note 102, at 93.

²⁰⁰ Arrest Warrant of 11 April 2000 (*Congo v. Belg.*), 2002 I.C.J. 3, ¶ 61 (Feb. 14) (discussing the conditions under which traditional immunities may be abrogated consistent with international law).

²⁰¹ Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-397-Anx1, Judgement in the Jordan Referral re Al-Bashir Appeal, Joint Concurring Opinion of Judges Eboe-Ussui, Morrison, Jofmański, and Bossa (May 6, 2019).

²⁰² *Id.*; CORMIER, *supra* note 102, at 93.

shall not be permitted.”²⁰³ This provision was included in the 1996 constitution as protection against the specter of Soviet puppet courts like those used in the Gulag system and the Great Purge. These “extraordinary” or “special” courts were tools of the totalitarian system from which Ukraine, at the time of its constitution’s creation, had just broken free. It is a historical irony that today those provisions should form an impediment to trying Russian criminals. Indeed, in 2001, the Ukrainian Constitutional Court held that Ukraine could not ratify the Rome Statute on account of Article 125.²⁰⁴ In 2016, Ukraine amended its constitution, so Article 124 now explicitly recognizes the jurisdiction of the ICC.²⁰⁵ However, Article 125 still remains in full force, and Article 157 maintains that the constitution of Ukraine “shall not be amended in conditions of martial law or a state of emergency,” meaning that Ukraine cannot now, in the midst of its conflict with Russia, amend Article 125 to permit for a special tribunal. Therefore, because the ECCC formed an “extraordinary” body *within* the Cambodian system, an equivalent structure in Ukraine would likely run afoul of Article 125. By contrast, the SCSL was a purely international court operating outside the confines of the Sierra Leonean judicial system. In order to comport with Ukrainian constitutional law, any tribunal for Ukraine will have to be similarly international and exist wholly outside the Ukrainian legal system.

D. Applicable Law

As discussed in Section I, since 1945, the crime of aggression “has . . . ripened into customary international law.”²⁰⁶ In 1996, the ILC determined that “the crime of aggression constitutes a crime under international law,”²⁰⁷ and of course, following the Kampala Amendments, aggression is included as a crime in the Rome Statute. Aggression is also a crime in Ukraine’s domestic criminal code. Article 437 provides that:

- (1) Planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes shall be punishable by imprisonment for a term of seven to twelve years.
- (2) Conducting an aggressive war or aggressive military operations shall be punishable by imprisonment for a term of ten to fifteen years.²⁰⁸

²⁰³ Конституція України [CONSTITUTION] Jun. 28, 1996, art. 125 (Ukr.) (hereinafter *Ukrainian Constitution*).

²⁰⁴ CORMIER, *supra* note 102, at 74.

²⁰⁵ *Id.*; *Ukrainian Constitution*, *supra* note 203, arts. 124, 125.

²⁰⁶ Scharf, *supra* note 37, at 370.

²⁰⁷ Int’l L. Comm’n, Rep. on the Work of Its Forty-Eighth Session, U.N. Doc. A/51/10, Art. 16 (Jul. 26, 1996); Scharf, *supra* note 37, at 373.

²⁰⁸ Кримінальний кодекс України [CRIMINAL CODE OF UKRAINE] art. 437 (Ukr.).

Alternative plans for accountability in Ukraine largely rely on customary international law or the Rome Statute's articulation of aggression as the basis for bringing a potential prosecution. This proposal disagrees. Ukrainian law is not only sufficient and largely analogous to definitions under customary international law, it also ensures a strict adherence to the principle of legality. Russia is one of the states that explicitly did *not* ratify either the Rome Statute or the Kampala Amendments. As discussed, even the Kampala amendments have an opt-out mechanism for states that do not wish to be subjected to the jurisdiction of the ICC for the crime of aggression. Given this, relying on Ukraine's crime of aggression appears to comport with the principle of legality more closely. Ukraine is the territorial state, it has undisputed jurisdiction, it is the victim of the crime for which Russian perpetrators would be charged, and its right to try such crimes is unimpeachable.

Furthermore, the reality of charging defendants under the customary definition of aggression is a legal novelty. The closest historical analogy was at the Nuremberg IMT, where defendants were charged with "crimes against peace."²⁰⁹ There therefore exist several legal ambiguities that could seriously hamstring a successful prosecution. Chief among these is the nature of a crime under customary international law. While the prohibition on aggression is indeed *jus cogens*, meaning that states have a non-derogable obligation to refrain from committing acts of aggression, "the obligation to avoid committing [international crimes] might rise to the level of universal international law without international law directly criminalizing those acts."²¹⁰ That is to say, the inquiry into whether an international crime is *jus cogens* is philosophically and legally distinct from an inquiry into whether direct criminalization is *jus cogens*.²¹¹ Indeed, "[i]t is exceedingly unlikely that state practice and *opinion juris* establish that direct criminalization of international crimes is a *jus cogens* norm." Meaning that an act such as aggression can simultaneously be forbidden but un-prosecutable as a matter of customary international law.²¹² The legal murkiness inherent to charging a defendant under the customary crime of aggression militates in favor of charging defendants under Ukrainian domestic law.

E. Comparison to Competing Proposals

The proposal to establish a tribunal competent over the crime of aggression for Ukraine is not novel and has been the subject of rich academic and legal debate

²⁰⁹ Judgment and Sentences, *supra* note 36, at 218.

²¹⁰ Kevin Jon Heller, *What Is an International Crime? (A Revisionist History)*, 58 HARVARD INT'L L. J. 353, 368 (2017).

²¹¹ *Id.*

²¹² *Id.*

both within and without Ukraine. Several of the most prominent proposals are discussed and compared here. In March 2022, the group known as ‘The Elders’—established by Nelson Mandela in 2007—suggested the creation of a tribunal for Ukraine that would be “complementary” to other proceedings.²¹³ ‘The Elders’ proposal runs headlong into Ukraine’s constitutional constraints, discussed in Section V.C. Namely, under Article 125, Ukraine cannot establish subsidiary, complementary, or extraordinary courts. This flaw is shared by several proposals, most recently in one suggested by Professor Kevin Jon Heller at the University of Copenhagen in April 2023.²¹⁴ Writing for *Opinio Juris*, Heller defends the hybrid model currently favored by the UK, Germany, France, Italy, and the US—that is, a tribunal approximating the ECCC—without once mentioning or accounting for the incompatibility of Ukraine’s Constitution with that model.²¹⁵

On March 4, 2023, the European Union (EU) agreed to establish an International Centre for the Prosecution of Crimes of Aggression against Ukraine (ICPA).²¹⁶ While the EU proposal overcomes Article 125 of the Ukrainian Constitution, a tribunal established under the auspices of the EU—a supranational organization with twenty-seven Member States—encounters a separate problem pertaining to Head of State immunities.²¹⁷ As earlier discussed, the ICJ has affirmed that traditional Head of State immunities may not be applicable before “certain international criminal courts.”²¹⁸ However, the power of international tribunals to abrogate traditional immunities derives from the theory of conferred authority, by which a “vast majority of the members of the international community” may do together what they cannot do separately, an opinion maintained by the ICJ in 1949 and again by the ICC in 2019.²¹⁹ In 1949 the requisite number was fifty states and in 2019, more than 120. It remains unclear whether an international tribunal constituted by a mere twenty-seven states would enjoy the same authority under international law. By contrast, 141 states—representing nearly two-thirds of the GA’s 193 members—condemned Russian

²¹³ *The Elders Call for a Criminal Tribunal to Investigate Alleged Crime of Aggression in Ukraine*, THE ELDERS (Mar. 5, 2022), <https://perma.cc/435V-2REX>.

²¹⁴ Kevin Jon Heller, *Jennifer Trahan’s Cambodia Problem*, OPINIO JURIS (Apr. 17, 2023), <https://perma.cc/8XJM-TJQ5>.

²¹⁵ *Id.*

²¹⁶ Ursula von der Leyen, President of the Eur. Comm’n, Statement by President von der Leyen on the Establishment of the International Centre for the Prosecution of Crimes of Aggression against Ukraine (Mar. 4, 2023), <https://perma.cc/A9KA-9QFG>.

²¹⁷ *International Centre for the Prosecution of the Crime of Aggression against Ukraine*, EUR. UNION AGENCY FOR CRIM. JUST. COOP. (Sept. 16, 2023) <https://perma.cc/YE7E-65PR>.

²¹⁸ Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 3, ¶ 61 (Feb. 14, 2002).

²¹⁹ Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 185 (Apr. 11); CORMIER, *supra* note 102, at 56; Request under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18-37, Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,’ Pre-Trial Chamber I (Sept. 6, 2018).

aggression in March 2022.²²⁰ The power of tribunals assembled under the auspices of the GA to abrogate Head of State immunities has repeatedly been reaffirmed, both at the SCSL and the ECCC. The ability of the EU to do the same is far from clear. Furthermore, aside from the questionable legal authority of the ICPA, an EU-led tribunal lacks the normative power of an initiative deriving from the GA, an entity that, by its nature, represents a “vast majority” of the world’s states.

On September 7, 2022, the Ukraine Task Force of The Global Accountability Network submitted a proposed resolution for the GA and an accompanying proposal for a statute for a special tribunal for Ukraine on the crime of aggression.²²¹ The proposal is robust and thorough; however the draft statute explicitly relies on the GA’s 1974 definition of aggression pursuant to Resolution 3314 (XXIX) as the basis for a prosecution, a definition reflected in customary law. As discussed in Section V.D, this Article contends that the actual criminalization of aggression, as opposed to its prohibition, is far from settled. A reliance on the Ukrainian crime of aggression avoids this potential pitfall and adheres most closely to the principle of *nullum crimen sine lege*.

VI. CONCLUSION

“If the crime of aggression had not been committed,” noted Ukraine’s Prosecutor General Andriy Kostin during an April 2023 speech at Columbia Law School, “then there would not be 80,000 war crimes committed by Russians, there would be no thousands and thousands of victims or people who have suffered from this war . . . Every Ukrainian is a victim of this war.”²²² Prosecutor General Kostin’s observation harkens back to a sentiment first expressed at Nuremberg: the crime of aggression is the supreme crime, without which no other war crimes can occur. This Article has sought to demonstrate that the international community is already armed with the tools to bring justice to Ukraine. Under the framework established by U4P, the GA is well within its rights to create a court with jurisdiction over the crime of aggression via delegated jurisdiction from Ukraine and conferred authority from the GA itself. Such a tribunal, similar in kind to the SCSL, would apply Ukrainian law, would be capable of overcoming Head of State immunities, and would enjoy the legitimacy derived from an overwhelming consensus among Member States of the U.N.

²²⁰ Press Release, General Assembly, General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federal Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops, U.N. Press Release GA/12407 (Mar. 2, 2020), <https://perma.cc/U28R-ZU28>.

²²¹ Hans Corell, *A Special Tribunal for Ukraine on the Crime of Aggression: The Role of the U.N. General Assembly*, JUST SECURITY (Feb. 14, 2023), <https://perma.cc/92VL-Y8VL>.

²²² Andriy Kostin, Prosecutor General of Ukr., Speech at Columbia Law School Human Rights Institute (Apr. 21, 2023).

In reference to the conscript army that Ukraine has been forced to raise in response to Russia's invasion, Prosecutor General Kostin observed that

“[t]hese servicemen yesterday were civilians . . . as a matter of justice for them, the act of aggression and people who initiated and executed and implemented it must be punished.”

The GA has the authority to do just that.²²³

²²³ *Id.*