

WAR WITHOUT CONSEQUENCE FOR THE PERMANENT MEMBERS OF
THE SECURITY COUNCIL: THE NEED FOR URGENT REFORM: IN
WAKE OF THE RUSSIAN INVASION OF UKRAINE

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ABSTRACT

In light of the current Russian invasion of Ukraine and the subsequent veto of the Russian delegate in the United Nations preventing Security Council condemnation of the Russian invasion, this article explores the possibilities for recourse and the need for urgent Security Council reform. First, it discusses the role of the Security Council, proposing a possibility for reform that would ensure greater accountability within the Council. Of course, given that any reforms to the Council must pass through the Council itself, this article explores other possibilities for recourse, namely through the U.N. General Assembly Uniting for Peace resolution and possibility for the prosecution of Putin in the International Criminal Court.

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I. INTRODUCTION

On February 25, 2022, the United Nations Security Council voted on a resolution that would condemn the Russian invasion of Ukraine.¹ Not surprisingly, the Russian representative exercised his right to veto the resolution.² Had it not been for the veto, the resolution would have passed, with 11 affirmative votes (including those of the United States, the United Kingdom, and France) and three abstentions.³

The ability of Russia to block this resolution has reignited debates on Security Council reform efforts.⁴ Former UN officials have called for an

¹ See S.C. Res. 2022/155 (Feb. 25, 2022).

² U.N. SCOR, 77th Sess., 8979th mtg., 6. U.N. Doc. S/77/PV.8979 (Feb. 25, 2022).

³ *Id.* Abstentions are distinct from negative votes, in that a negative vote by a permanent member would result in a veto, but an abstention would not. See generally Matthew Gould & Matthew D. Rablen, *Reform of the United Nations Security Council: Equity and Efficiency*, SHEFFIELD ECON. RSCH. PAPER SERIES, 1, 4 (2016).

⁴ See, e.g., Kemal Derviş & José Antonio Ocampo, *Will Ukraine's Tragedy spur UN Security Council Reform?*, BROOKINGS (Mar. 3, 2022), <https://www.brookings.edu/opinions/will-ukraines-tragedy-spur-un-security-council-reform/>.

override procedure of a permanent member's veto.⁵ Others have challenged Russia's right to a permanent seat, calling its accession to the former Soviet Union's seat illegitimate.⁶ Challenging Russia's seat, however, is not the proper avenue for change since such change is specific only to Russia, and solutions should equally apply to all permanent members of the Security Council if proper reform is to take place. Nonetheless, international experts, delegates, and policymakers are currently considering various proposals to ensure that perpetrators of serious international law violations are held accountable, irrespective of status in the Security Council, the only international law organ capable of issuing sanctions and enforcing legally binding resolutions.

Accordingly, considering the current Russian invasion of Ukraine, this article sets forth a potential proposal that the United Nations must seriously consider if the international organization is to fulfill its mandate of maintaining international peace and security.⁷ That proposal urges the UN Security Council to prohibit a permanent member from invoking its veto power to block a decision concerning its own interests, when that State is the reason for the perpetration of a threat to the peace, breach of the peace, or an act of aggression. That is not to say that the permanent member at issue cannot cast a negative vote. It is only advocated that such a vote will not result in a veto in this very limited and exceptional case. Moreover, the UN Charter seemingly provides for mandatory abstentions in such situations, but complying with this provision has been inconsistent since the establishment of the United Nations.⁸ The possibility for recourse under both situations will be discussed herein.

Granted, it is acknowledged that any reforms to the Security Council must, ironically, pass through the five permanent members of the Council, where such reforms are likely to fail. Thus, the article also discusses alternative avenues for the maintenance of international peace and security, namely the United Nations General Assembly. The General Assembly "Uniting for Peace" resolution states that "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security . . . the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures

⁵ *Id.*

⁶ Patrick Wintour, *Effort Under Way to Challenge Russia's Right to Seat on UN Security Council*, THE GUARDIAN (Feb. 25, 2022, 2:27 PM), <https://www.theguardian.com/world/2022/feb/25/putin-facing-efforts-isolate-diplomatically-ukraine>.

⁷ U.N. Charter art. 1, ¶ 1.

⁸ See *In Hindsight: Obligatory Abstentions*, SEC. COUNCIL REP. MONTHLY FORECAST 2 (Security Council Report, New York, N.Y. Mar. 31, 2014).

...”⁹ Evidently, two days after the Russian veto in the Security Council, Resolution 2623 was adopted, calling for an emergency session of the General Assembly, consistent with the Uniting for Peace resolution.¹⁰

Lastly, this article also considers whether Putin’s actions can result in individual criminal responsibility in the International Criminal Court, arguing that his actions could and should lead to liability in the International Criminal Court, where the Court has jurisdiction over war crimes, crimes against humanity, or genocide taking place in the territory of Ukraine on the basis that Ukraine has accepted the Court’s jurisdiction indefinitely since 2014, which is still in effect today.¹¹ In order to ensure adequate application of justice, given Russia’s status as a permanent member of the Security Council, it is necessary to consider other avenues for retribution and condemnation.

Accordingly, this article is divided into four parts. Part I provides a general overview of international law as it relates to the operations of the UN Security Council and the various reforms that have been suggested throughout the Council’s establishment. Part II establishes another possibility for reform, in wake of the Russian invasion of Ukraine. Part III considers the role of the UN General Assembly where the Security Council is deadlocked and unable to act to address threats to the peace, breaches of the peace, or acts of aggression. Finally, Part IV considers other non-UN alternatives to address war crimes, crimes against humanity, and acts of genocide, namely through prosecution in the International Criminal Court.

In all cases, the current conflict has shed light on the potential abuse of the veto resulting in an imbalance of power in favor of the permanent members of the Security Council. States must consider all avenues to address this current blockade. The Russia-Ukraine war will eventually come to an end. The responsive actions that take place, now, however, will set the stage for the current conflict and future conflicts as well. It is imperative that the international community act accordingly to ensure that all States face consequence for serious breaches of international law, irrespective of whether or not that State is a permanent member of the Security Council. Addressing these shortcomings will contribute effectively to the successful operation of the United Nations, and its ability to maintain international peace and security both during this war and after.

II. THE ROLE OF THE SECURITY COUNCIL OF THE UNITED NATIONS IN

⁹ G.A. Res. 377 (V), ¶ 1 (Nov. 3, 1950).

¹⁰ S.C. Res. 2623 (Feb. 27, 2022).

¹¹ See Letter from Pavlo Klimkin, Minister for Foreign Affairs of Ukr., to Herman von Hebel, Registrar Int’l Crim. Ct. (Sept. 8, 2015) (on file with International Criminal Court), https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine [hereinafter “Letter from Pavlo Klimkin”].

RESPONDING TO THREATS TO THE PEACE, BREACHES OF THE PEACE,
AND ACTS OF AGGRESSION

A. *The UN Security Council*

The United Nations (“UN”) was established in 1945 after the Second World War to maintain international peace and security, to develop friendly relations among nations, to achieve international cooperation, and to harmonize the actions of nations.¹² The international organization operates through the Charter of the United Nations (“UN Charter”), where the powers and obligations of the UN are provided. The Charter establishes six main organs, which include the General Assembly and the Security Council.

The Security Council is the only UN body capable of issuing binding resolutions. Chapters V through VII of the Charter establishes the Council’s composition, function, and powers. Article 23 establishes the United States, France, China, the United Kingdom, and the former Soviet Union as the permanent members of the Security Council. In 1991, Russia assumed the seat of the now-disintegrated Soviet Union at the United Nations, including its permanent seat on the Security Council.¹³ This seat remained relatively unchallenged, until the current invasion.¹⁴

With regard to voting, the Charter makes clear that each of the five permanent members holds a veto power with respect to substantive matters.¹⁵ In such matters, nine members of the 15-member Security Council must vote in the affirmative for a resolution to pass, without any negative vote from any of the five permanent members. If one of the five permanent members casts a negative vote, the resolution will fail.

For procedural matters, however, resolutions are passed with an affirmative vote of nine members, and should one of the permanent five members cast a negative vote, that negative vote will not result in a veto.¹⁶ Procedural matters are therefore not subject to a veto, which explains why the Security Council resolution calling for an emergency session of the General Assembly on the Ukraine crisis was passed, despite Russia voting against it.¹⁷

¹² U.N. Charter, *supra* note 7, arts. 1-4.

¹³ Yehuda Z. Blum, *Russia Takes Over the Soviet Union’s Seat at the United Nations*, 3 EUR. J. INT’L L. 354, 356 (1992).

¹⁴ Thomas Grant, *Removing Russia from the Security Council: Part One*, OPINIOJURIS (Oct. 18, 2022), <http://opiniojuris.org/2022/10/18/removing-russia-from-the-security-council-part-one/>.

¹⁵ U.N. Charter, *supra* note 7, art. 27, ¶ 3.

¹⁶ *Id.* art. 27, ¶ 2.

¹⁷ S.C. Res. 2623, *supra* note 10; Press Release, Security Council, Security Council Calls Emergency Special Session of General Assembly on Ukraine Crisis, Adopting Resolution 2623

Over the years, the matter of whether to call for an emergency session in the General Assembly became regarded as a procedural matter by the Council.¹⁸ Other matters regarded as procedural include, *inter alia*, requests to add new items to the Council's agenda, requests for participation of certain representatives, and requests to convene or postpone Security Council meetings.¹⁹ The most recent procedural vote calling for an emergency special session of the General Assembly to address the current crisis, passed with 11 voting in favor, one (Russia) voting against it, and three abstentions (China, India, and the United Arab Emirates).²⁰ This resolution, which is discussed in more detail in Part II, grants the General Assembly the power to "decide whether to use armed force, when necessary, to maintain or restore international peace and security."²¹

Of course, primary responsibility to maintain international peace and security lies with the Security Council.²² Chapter VII grants the Council power to pass binding resolutions where there has been a threat to the peace, breach of the peace, or an act of aggression.²³ The Charter does not define these instances, leaving the Security Council with the flexibility to determine whether an action falls under any of these three situations.²⁴ If so, the Council may now impose sanctions in the form of binding resolutions, ranging from economic sanctions to military action.²⁵ Because of the veto power, Article 42 of the UN Charter, granting the Council with the power to authorize use of

(2022) by 11 Votes in Favour, 1 Against, 3 Abstentions, U.N. Press Release SC/14809 (Feb. 27, 2022), <https://www.un.org/press/en/2022/sc14809.doc.htm>.

¹⁸ *Procedural Vote*, SEC. COUNCIL REP. (Nov. 23, 2020), <https://www.securitycouncilreport.org/un-security-council-working-methods/procedural-vote.php>.

¹⁹ *Id.*; see *The Procedural Vote from 1992 on*, SEC. COUNCIL REP. (Nov. 23, 2020), https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/working_methods_procedural_vote-1.pdf; G.A. Res. 267 (III) (Apr. 14, 1949).

²⁰ Security Council Calls Emergency Special Session, *supra* note 17.

²¹ *Id.*

²² U.N. Charter, *supra* note 7, art. 24, ¶ 1.

²³ *Id.* art. 39.

²⁴ *Id.*; LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 17 (Wolters Kluwer 2nd ed. 2018); Erika de Wet, *Peace, Threat to*, MAX PLANCK ENCYC. PUB. INT'L L. (2009), https://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Herdegen/de_Wet/WiSe_2017/Voelkerrecht_III__Collective_Security/EPIL_Peace_Threat_to.pdf.

²⁵ See U.N. Charter, *supra* note 7, arts. 40-42.

force, has been used sparingly, most notably against North Korea in the Korean War in 1950, and against Iraq in the Gulf War in 1990.²⁶

B. Suggested Reforms to the UN Security Council

Since the 1990s, various suggestions have been proposed to reform the Security Council. Article 108 of the UN Charter establishes the process for such amendment, which states:

“Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.”²⁷

The United Nations Charter has been amended three times since its formation, in 1963, 1965, and 1973.²⁸ The Security Council has only undergone reform twice, both in 1965, to increase the number of seats on the Security Council from 11 to 15 members, and to increase the number of required affirmative votes from seven to nine.²⁹ Other amendments concern other UN bodies.

Because amendments are subject to approval by all five permanent members of the Security Council, reforms to the Council’s veto power become difficult, if not impossible, to achieve. Nonetheless, that has not stopped government officials, experts, and others from theoretically engaging in discussion on possible reform.

One of the most popular structural reforms put forward stem from the Group of Four (“G4”) proposal, comprising four states: Brazil, Germany, India, and Japan.³⁰ This proposal, like others in its category, envisages an expansion of non-permanent member seats as well as permanent member seats, without the grant of veto (for at least 15 years after the reform enters into force, at which time a review is to be held).³¹ In 2005, the G4 proposed a

²⁶ See S.C. Res. 678 (Nov. 29, 1990); S.C. Res. 84 (July 7, 1950); Nigel D. White, *From Korea to Kuwait: The Legal Basis of United Nations’ Military Action*, 20 INT’L HIST. REV. 597, 597 (1998).

²⁷ U.N. Charter, *supra* note 7, art. 108.

²⁸ *United Nations Charter*, U.N., <https://www.un.org/en/about-us/un-charter> (last visited Mar. 13, 2022).

²⁹ *Can the UN Charter be Amended, and How Many Times Has This Occurred?*, U.N.: ASK DAG <https://ask.un.org/faq/140440> (last updated July 20, 2022).

³⁰ Gould & Rablen, *supra* note 3, at 10.

³¹ See *id.* at 9. See e.g., *Joint G4 Statement by Brazil, Germany, India and Japan, Delivered by H.E. Ambassador Yasuhisa Kawamura, Deputy Permanent Representative of Japan to the United Nations, at the Informal Meeting of the General Assembly, Second Intergovernmental*

draft resolution recommending an increase in Security Council members, from 15 to 25, six permanent and four non-permanent, to reflect regional diversity, arguing that the makeup of the United Nations has changed drastically since 1945 and the Council should reflect that change.³²

Unlike the G4 proposal, the draft resolution put forward by the African Union would require the veto power to be extended immediately upon the inclusion of new permanent members.³³ The African appeal urges for an expansion in Security Council seats for African countries, both as permanent and non-permanent members. Stemming from legitimate concerns that African states are underrepresented in the Security Council, the African Union variation for reform would reserve two permanent seats and five non-permanent seats solely for African states.³⁴ This position is based on equality of representation, such that the African position advocates for abolition of the veto power. In the case that the veto power still exists, however, it should equally be extended to all permanent members.³⁵ In January 2021, the African Union renewed its call for favorable reform, illustrating the international community's continued interest in Security Council reform.³⁶

Another proposal also deals with expansion of the Security Council, advocating for an increase in non-permanent seats. The Uniting for Consensus proposal was created to counter the G4 proposal.³⁷ It consists of around 40 states, including Italy. The proposal calls for an increase in non-permanent seats from 10 to 20.³⁸ In Italy's view, the fact that the proposal does not call for changes to the permanent member structure of the Security Council evidences successful diplomatic efforts on its part.³⁹ Rather, the proposal calls for non-permanent members from regional groups to serve for an extended

Meeting on Security Council Reform, PERMANENT MISSION OF JAPAN TO THE U.N. (Feb. 25, 2019), https://www.un.emb-japan.go.jp/itpr_en/kawamura022519.html; G.A. Res. A/59/L.64, at 3 (July 6, 2005).

³² G.A. Res. A/59/L.64, *supra* note 32, at 2.

³³ *Reform of the United Nations Security Council*, GER. FED. FOREIGN OFF. (Jan. 14, 2022), <https://www.auswaertiges-amt.de/en/aussenpolitik/internationale-organisationen/vereintenationen/reformsr-fragen/231618>.

³⁴ ELISABETTA MARTINI, UN SECURITY COUNCIL REFORM, CURRENT DEV. 5 (Istituto Affari Internazionali 2009).

³⁵ *United Nations Security Council Reform*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN (Mar. 2022), <https://www.mofa.go.jp/files/100059111.pdf>.

³⁶ *See Africa Renews Push for Favourable UN Security Council Reforms*, BUS. STANDARD (Jan. 21, 2022, 01:54 AM), https://www.business-standard.com/article/international/africa-renews-push-for-favourable-un-security-council-reforms-122012001750_1.html.

³⁷ MARTINI, *supra* note 34, at 6.

³⁸ *Id.*

³⁹ *See id.* at 7.

term.⁴⁰ In accordance with the UN Charter, non-permanent members currently serve two-year terms.⁴¹ The Uniting for Consensus proposal would extend this duration to three-to-five years.⁴² Interestingly, in 2020, the Italian delegate, speaking on behalf of the Uniting for Consensus group, advocated for the increase of permanent member seats to nine, representative of geographical distributions.⁴³

Other proposed reforms include the requirement that two permanent members vote against a resolution for a veto to be invoked.⁴⁴ Or an override procedure of a permanent member's veto such that a veto may be overturned in certain situations.⁴⁵

All these reforms take into consideration five factors identified in a General Assembly decision regarding Security Council reform: (1) categories of membership, (2) the power of veto, (3) diversity in representation, (4) increases in the size of the Council and its working methods, and (5) the relationship between the Council and the General Assembly.⁴⁶ In sum, all reforms share the common goal of increasing accountability and representation in the Security Council. The current Russian invasion against Ukraine has rekindled discussions on Security Council reform. No matter the proposal advanced, it appears clear that some change to the makeup of the Security Council is warranted. The next section discusses one potential reform as it relates to accountability.

III. AN UNLIKELY BUT URGENTLY NEEDED SECURITY COUNCIL REFORM

Given the current situation, it is urged that the Security Council seriously consider all calls for reform. A draft resolution put before the Council would have condemned the Russian invasion of Ukraine but was deadlocked, owed solely to the negative vote of Russia.⁴⁷

This article considers one possibility for reform that would increase transparency and accountability in the Council: the prohibition of invoking the veto power where the permanent member invoking it is the subject of the dispute or situation. In the current case, for example, Russia would be

⁴⁰ *Id.* at 6.

⁴¹ U.N. Charter, *supra* note 7, art. 23 ¶ 2.

⁴² MARTINI, *supra* note 34, at 6.

⁴³ See U.N. GAOR, 75th Sess., 27-28th plen. mtg., U.N. Doc. A/75/SR.27-28 (Nov. 16, 2020).

⁴⁴ Gould & Rablen, *supra* note 3, at 3.

⁴⁵ Derviş & Ocampo, *supra* note 4.

⁴⁶ See G.A. Res. 62/557 U.N. Doc. A/63/49 (Vol. III), at 107 (Sept. 15, 2008).

⁴⁷ See S.C. Res. S/2022/155, *supra* note 1, ¶ 6.

prohibited from invoking its power to veto the resolution condemning it, to prohibit Russia from acting as “party, judge, and jury at the same time.”⁴⁸

Support for this suggested reform may be found in Article 27(3) of the UN Charter, a binding treaty obligation under international law. Article 27(3) states:

Decisions of the Security Council on [non-procedural] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; *provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting* (emphasis added).⁴⁹

This provision clarifies the obligation of a Security Council member, whether permanent or not, to abstain from decisions with respect to the peaceful settlement of disputes.⁵⁰ The obligation to abstain, however, does not apply to Chapter VII, concerning threats to the peace, breaches of the peace, or acts of aggression.⁵¹ The Security Council’s power to issue sanctions only falls under Chapter VII. Moreover, the practice of the Security Council shows non-compliance with mandatory abstentions even with respect to Chapter VI, and the Article 27(3) limitation has transformed to voluntary in practice.⁵² The provision has only been invoked a handful of times, the last being in 1960 when Argentina used the provision to abstain due its involvement in the *Eichmann* case, concerning Israel’s capture of a Nazi war crimes perpetrator in Argentina to stand trial in Israel.⁵³

Since then, the duty to abstain has never been invoked. Security Council members have declined to apply the limitation in Article 27(3) even when the situation warrants compliance. In 2014, for example, Russia vetoed a decision on the situation in Ukraine that would have reaffirmed Ukraine’s sovereignty and invalidated the results of the referendum in Crimea.⁵⁴ No Council member raised the issue of whether Russia should participate in the vote.⁵⁵ Experts

⁴⁸ See *In Hindsight: Obligatory Abstentions*, *supra* note 8, at 2.

⁴⁹ U.N. Charter, *supra* note 7, art. 27, ¶ 3.

⁵⁰ See *id.*

⁵¹ See *id.* arts. 39-51.

⁵² U.N. SCOR, 58th Sess., 4753d mtg. at 8, U.N. Doc. S/PV.4753 (May 13, 2003). See e.g., *In Hindsight: Obligatory Abstentions*, *supra* note 8, at 2.

⁵³ See John Chappell & Emma Svoboda, *Must Russia Abstain on Security Council Votes Regarding the Ukraine Crisis?*, LAWFARE (Feb. 11, 2022), <https://www.lawfareblog.com/must-russia-abstain-security-council-votes-regarding-ukraine-crisis>.

⁵⁴ See *In Hindsight: Obligatory Abstentions*, *supra* note 8, at 2; S.C. Res. S/2014/189 (Mar. 15, 2014); *UN Security Council action on Crimea*, U.N.: U.N. NEWS (Mar. 15, 2014), <https://news.un.org/en/story/2014/03/464002-un-security-council-action-crimea-referendum-blocked>.

⁵⁵ Chappell & Svoboda, *supra* note 53.

argued that these actions appeared “to confirm that Council members in general do not see any compelling interest in bringing the provision [concerning mandatory abstentions] back to life” and that such “abstentions seem to have vanished under a tactic agreement.”⁵⁶ Given the more recent Russian veto of the resolution that would have condemned Russia’s involvement in Ukraine, this stands true today. “[N]o permanent member of the Security Council was willing to challenge the unlawful action by Russia because they want to leave open the possibility of vetoing any resolution in which they might be involved.”⁵⁷ Given these facts, a more long-lasting resolution would be to reform the Security Council, with the approval of all permanent members.

The solution proposed herein would allow the Security Council member to retain its ability to cast a negative vote on resolutions concerning it, since it would be difficult to reach consensus if this power were to be taken away. If this removal of power were to be welcomed, then the system of obligatory abstentions would have sufficed. Thus, the power to cast a negative vote even if the party is connected to the dispute remains. However, where the permanent member casting a negative vote is involved in the dispute, whether directly or indirectly, the power to veto would be prohibited. To apply this reform to the current problem, a permanent member of the Security Council (here, Russia) that invades another state (here, Ukraine) should not be allowed to use the veto power to protect its interests concerning that invasion.

Of course, challenges can be presumed with respect to defining precisely what constitutes direct or indirect involvement. For that, the Security Council must come to an agreement that would serve the interest of justice while, at the same time, maintaining accountability within the Council for all U.N. members.

Whether through resumption of the duty to abstain or through Security Council reform, the veto power illustrates how difficult it is for the Council to make decisions that conflict with the interests of permanent members. Any reform to the Council must withstand opposition from the permanent members in the form of non-ratification. Accordingly, the ability of other organs to promptly respond to situations where the Security Council is deadlocked must be considered.

IV. AN ALTERNATIVE APPROACH: THE GENERAL ASSEMBLY AND THE

⁵⁶ *In Hindsight: Obligatory Abstentions*, *supra* note 8; see Enrico Milano, *Russia’s Veto in the Security Council: Whither the Duty to Abstain under Art. 27(3) of the UN Charter?*, 75 HEIDELBERG J. INT’L L. 215, 222 (2015).

⁵⁷ Bruce Knotts, *UU Nations: Why Was Russia Allowed to Veto the UN Resolution on Ukraine?*, UUWORLD (Mar. 1, 2022), <https://www.uuworld.org/articles/uu-nations-russia-2022-03-01>.

UNITING FOR PEACE RESOLUTION

Primary responsibility for the maintenance of international peace and security lies with the Security Council.⁵⁸ The current situation has illustrated, however, that sometimes the Security Council may not perform this task effectively. In this instance, recourse must be had, most likely through the United Nations General Assembly.

A. The Role of the UN General Assembly

The General Assembly of the United Nations is made up of all 193 States Parties to the U.N. Charter.⁵⁹ Like the Security Council, the General Assembly also passes resolutions, though these resolutions are not binding, unless they reflect customary international law.⁶⁰ For the most part, General Assembly resolutions are merely recommendations, illustrated by the language of the Charter, that the General Assembly *may* discuss matters within its scope, or that it *may* make recommendations to the Security Council.⁶¹ Still, General Assembly resolutions reflects international opinion on current state of affairs, crystallized in written form. Thus, condemnation in the General Assembly serves the important purpose of exerting immense political influence, where needed.

One mechanism through which the General Assembly may exert such influence is through the Uniting for Peace framework.

B. The Uniting for Peace Resolution and its Application to the Current State of Affairs

The 1950 Uniting for Peace Resolution is a General Assembly framework that addresses what the United Nations can do when the Security Council is deadlocked. General Assembly Resolution 377 states:

“[I]f the Security Council, because of 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 General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including*

⁵⁸ U.N. Charter, *supra* note 7, art. 24 ¶ 1.

⁵⁹ *See id.* art. 9, ¶ 1.

⁶⁰ *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 86 (July 9, 2004).

⁶¹ *See* U.N. Charter, *supra* note 7, arts. 10-11.

in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security” (emphasis added).⁶²

Resolution 377 demonstrates that when the Security Council, due to its lack of unanimity, is unable to act to maintain international peace and security, the responsibility shifts to the General Assembly. The resolution also states:

“If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any nine members, or by a majority of the Members of the United Nations.”⁶³

The Uniting for Peace resolution was originally invoked to recommend collective action against China during the Korean war in 1951.⁶⁴ In all cases, “States can consider the full range of measures, including collective sanctions, non-recognition and even establishment of a tribunal to prosecute those responsible for the crime of aggression.”⁶⁵ As previously mentioned, even though General Assembly resolutions are not binding, they are incredibly influential in evoking political pressure through collective action.

While the Security Council was deadlocked due to the Russian exercise of its veto power and was therefore unable to secure a condemnation of the Russian invasion of Ukraine, a similar resolution in the General Assembly passed with overwhelming majority.⁶⁶ In an emergency special session, only the 11th since the U.N.’s establishment, the General Assembly secured 141 affirmative votes, representing global condemnation of Russian intervention in Ukraine.⁶⁷ The Assembly explicitly referred to and quoted language from the Uniting for Peace resolution in condemning Russian military operations in Ukraine and in demanding that Russia cease such operations immediately, consistent with its international law obligations.⁶⁸ In this case, the resolution isolates Russia from the rest of the world with regard to its recent actions.

⁶² G.A. Res. 377 (V), *supra* note 9, art. 1.

⁶³ *Id.*

⁶⁴ See G.A. Res. 498 (V), ¶ 4 (Feb. 1, 1951).

⁶⁵ Devika Hovell, *Council at War: Russia, Ukraine and the UN Security Council*, EJIL: TALK! (Feb. 25, 2022), https://www.ejiltalk.org/council-at-war-russia-ukraine-and-the-un-security-council/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2.

⁶⁶ G.A. Res. A/ES-11/L.1 (Mar. 1, 2022); U.N. GAOR, 11th Emergency Special Sess., 5th plen. mtg. at 15, U.N. Doc. A/ES-11/PV.5 (Mar. 2, 2022).

⁶⁷ U.N. GAOR, 11th Emergency Special Sess., *supra* note 66.

⁶⁸ G.A. Res. A/ES-11/L.1, *supra* note 66, at 2.

Only five states, including Russia, voted against the resolution. Even Serbia, one of Russia's closest allies, voted to condemn the Russian invasion, serving as a barometer of democracy and exhibiting strength in numbers and unity.⁶⁹

While global pressure does serve its purpose, and its use should not be underestimated, the General Assembly nonetheless lacks the ability to impose binding sanctions, thereby lacking punitive enforcement power. Thus, the next section explores the possibility of the judiciary, namely the International Criminal Court, to prosecute Putin for his actions in Ukraine.

V. THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN PROSECUTING PUTIN

A. *The International Criminal Court*

In 2002, the International Criminal Court (“ICC”) was established to prosecute perpetrators of genocide, war crimes, crimes against humanity, and, from July 17, 2018 onwards, the crime of aggression.⁷⁰ It is a court of last resort, one that may only exercise jurisdiction over crimes within the Court’s statute if the national court is unable or unwilling to do so.⁷¹

Article 27 of the Rome Statute of the ICC provides that the Court may exercise jurisdiction over “all persons without any distinction based on official capacity.”⁷² Thus, immunities attaching to Heads of State will not exempt a person from criminal responsibility in the International Criminal Court.⁷³ Accordingly, in 2009 and 2010, the ICC issued a warrant for the arrest of then-president of Sudan Omar Al Bashir for acts of genocide, war crimes, and crimes against humanity committed in Sudan.⁷⁴ The case remains in the pre-trial stage, however, because the ICC cannot try Al Bashir until he is arrested and transferred to the Court.⁷⁵ Thus, while the ICC may try

⁶⁹ See U.N. GAOR, 11th Emergency Special Sess., 5th plen. mtg., *supra* note 66.

⁷⁰ Rome Statute of the International Criminal Court, 2, arts. 1, 5, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter ICC Statute]; Dapo Akande & Antonios Tzanakopoulos, *Treaty Law and ICC Jurisdiction over the Crime of Aggression*, 29 EUR. J. INT’L L. 939, 940 (2018).

⁷¹ ICC Statute, *supra* note 70, arts. 1, 17.

⁷² *Id.* art. 27, ¶ 1.

⁷³ *Id.*

⁷⁴ Prosecutor v. Al Bashir, Case No. ICC-2/05-01/09, Decision on Warrant of Arrest for Omar Hassan Ahmad Al Bashir, at 3 (Mar. 4, 2009), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01514.PDF; Prosecutor v. Al Bashir, Case No. ICC-2/05-01/09, Second Decision on the Prosecution’s Application for a Warrant of Arrest, at 3 (Jul. 12, 2010), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04826.PDF.

⁷⁵ *Al Bashir Case*, Int’l Crim. Ct., (last visited Sept. 25, 2022), <https://www.icc-cpi.int/darfur/albashir>.

individuals wanted for the most serious international law crimes, the Court has been described as a “giant without limbs.”⁷⁶ It cannot function without state cooperation in arresting and transferring suspects to its jurisdiction.

In any event, there are three ways in which the Court has jurisdiction over acts of genocide, war crimes, crimes against humanity, and the crime of aggression: (1) through state party referral, (2) through U.N. Security Council referral, or (3) through the prosecutor’s own motion.⁷⁷ The ICC can only exercise jurisdiction if: (1) the accused is a national of a state party or other state accepting the jurisdiction of the Court, (2) the crimes took place on the territory of a state party or other state accepting the jurisdiction of the Court, or (3) the U.N. Security Council refers the situation to the Court.

In the case of Omar Al Bashir, Sudan is not a party to the International Criminal Court. Nor does it accept the jurisdiction of the Court. Nonetheless, the Security Council referred the situation to the Court, thereby granting the Court with jurisdiction over him.⁷⁸

B. *The Role of the International Criminal Court in Prosecuting Putin*

Since the outbreak of the Russian invasion of Ukraine, U.N. sources have reported numerous Russian attacks on civilian targets, including the killing and maiming of civilians, and bombings of civilian schools, hospitals, and nurseries, among other civilian objects.⁷⁹ Direct attacks on civilians is expressly prohibited under law of armed conflict and is classified as a war crime under the ICC Statute.⁸⁰ As is the use of weapons that can result in indiscriminate suffering.⁸¹ Thus, the Russian attacks, if proven, very likely qualify as war crimes under the law.

Regarding jurisdiction, however, it is inconceivable that the Security Council would refer the situation to the International Criminal Court even if warranted in doing so, owed to the Russian ability to veto any such resolution. Russia is not a party to the International Criminal Court Statute.⁸² Neither is

⁷⁶ See, e.g., Jackson Nyamuya Maogoto, *A Giant Without Limbs: The International Criminal Court’s State-Centric Cooperation Regime*, 29 U. QUEENSL. L. J. 102, 102 (2004).

⁷⁷ ICC Statute, *supra* note 70, art. 13.

⁷⁸ S.C. Res. 1593 (Mar. 31, 2005).

⁷⁹ See *Russian Attacks on Civilian Targets in Ukraine Could Be a War Crime: UN Rights Office*, U.N.: U.N. NEWS (Mar. 11, 2022), <https://news.un.org/en/story/2022/03/1113782>.

⁸⁰ ICC Statute, *supra* note 70, art. 8.

⁸¹ *Id.*

⁸² 10. *Statute of the International Criminal Court*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en (last visited Mar. 15, 2022).

Ukraine.⁸³ Thus, absent Security Council referral, the only way that the Court may exercise jurisdiction over the current situation is through state consent.

Fortunately, in 2015, Ukraine deposited with the ICC a Declaration under Article 12(3) of the ICC Statute, accepting the Court's jurisdiction "for an indefinite duration."⁸⁴ Rightfully, after receiving referrals from 39 states that accept the Court's jurisdiction, the ICC's current prosecutor Karim Khan has proceeded in this manner, confirming that there is a reasonable basis to open an investigation regarding war crimes and crimes against humanity that are alleged to have been committed in the territory of Ukraine.⁸⁵

Like the Al Bashir case demonstrates, issuing an arrest warrant is not problematic. Enforcing it, however, is no easy feat. That is where state cooperation comes in to ensure that perpetrators of the most heinous international law crimes are brought to justice. For now, criminal investigation and evidence-gathering will take up much of the ICC prosecutor's time. For now, the best one could hope for is that the investigation culminates in the issuance of an arrest warrant so that steps to overcome challenges associated with prosecution of heads of state may be undertaken.

VI. CONCLUSION

The Russian invasion of Ukraine has illustrated the need for urgent Security Council reform. This article has discussed one such possibility for reform, through prohibiting a permanent member of the Council from exercising a right to veto when the dispute concerns that member. Nonetheless, Security Council reform is difficult to achieve in practice, given that such reform must be accepted by all five permanent members.

In urgent situations where the Security Council is deadlocked, recourse may be had through the General Assembly's Uniting for Peace resolution. Through international cooperation and unity, states can express worldwide condemnation of international law violations perpetrated by permanent members of the Security Council who would otherwise not be held accountable. Even then, these resolutions lack the binding power to enforce

⁸³ *Id.*

⁸⁴ Letter from Pavlo Klimkin, *supra* note 11.

⁸⁵ *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I Have Decided to Proceed with Opening an Investigation."*, ICC, (Feb. 28, 2022), <https://www.thestar.com/news/canada/2022/03/10/what-qualifies-as-a-war-crime-could-russias-vladimir-putin-face-justice-at-the-icc.html>.

coercive action in response to threats to the peace, breaches of the peace, or acts of aggression.

Thus, one may turn to the enforcement mechanism provided by the International Criminal Court to hold perpetrators of the most serious international law violations accountable. By holding Putin responsible for his actions in the International Criminal Court and by condemning Russia's actions in the General Assembly, states can express the will to create a more equitable system, one in which no perpetrator can escape accountability.

Every crisis provides opportunity for change. Russia's invasion of Ukraine has demonstrated lack of accountability for the permanent members of the Security Council. Now is the time to consider other viable alternatives alongside serious radical change in the makeup and operations of the Council, one that is not discriminatory and in line with equality.