

UKRAINE V. RUSSIA: A CASE FOR CHANGE IN  
INTERNATIONAL ENFORCEMENT

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## INTRODUCTION

On February 24, 2022, in a speech to the Russian people, Russian President Vladimir Putin invoked Article 51 of the U.N. Charter to explain the “special military operation” in Ukraine.<sup>1</sup> As justification, he raised the specters of Nazis and genocide, describing the invasion into Ukraine as a moral imperative to protect ethnically Russian Ukrainians.<sup>2</sup> In doing so, Putin attempted to color Russia’s actions as necessary in the eyes of both domestic Russian audiences and international spectators. However, popular opinion is not enough to secure the future of Russian-held Ukrainian territories. Putin must also orchestrate acceptance of his actions by the international community. The strategy Russia has used to cast the invasion as permissible under the international legal order employs several familiar tropes.

First, Russia unilaterally recognizes the independent state (a strategy used before in Crimea).<sup>3</sup> Next, Russia contends that it must envelop the new entity within its federation framework.<sup>4</sup> Finally, Russia invokes the right of self-defense or another internationally-accepted premise in order to prevent interference from international actors.<sup>5</sup>

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1. Vladimir Putin, President of Russia, Address by the President of the Russian Federation (Feb. 24, 2022), <http://en.kremlin.ru/events/president/news/67843> [<https://perma.cc/KMM8-V5Y9>] [hereinafter Putin Address Regarding Ukraine].

2. *See id.*

3. *See generally* Thomas D. Grant, *Annexation of Crimea*, 109 AM. J. INT’L L. 68, 68-69 (2015); *Russia’s Vladimir Putin Recognizes Crimea as Nation*, BBC NEWS (Mar. 17, 2014), <https://www.bbc.com/news/world-europe-26621726> [<https://perma.cc/6CNE-7LYS>]; Rick Gladstone, *The U.S. and Other Nations Blast Russia at an Emergency U.N. Security Council Meeting*, N.Y. TIMES (last updated Mar. 30, 2022), <https://www.nytimes.com/live/2022/02/21/world/ukraine-russia-putin-biden> [<https://perma.cc/63VW-AVNH>].

4. *See Putin Announces Russian Annexation of Four Ukrainian Regions*, AL JAZEERA (Oct. 1, 2022, 6:38 AM), <https://www.aljazeera.com/news/2022/9/30/putin-announces-russian-annexation-of-four-ukrainian-regions> [<https://perma.cc/YY5G-73C9>]; *see also* Sofia Cavandoli & Gary Wilson, *Distorting Fundamental Norms of International Law to Resurrect the Soviet Union: The International Law Context of Russia’s Invasion of Ukraine*, 69 NETH. INT’L L. REV. 386, 387-89 (2022); Roy Allison, *Russia and the Post-2014 International Legal Order: Revisionism and Realpolitik*, 93 INT’L AFFS. 519, 526 (2017) (discussing the weak justifications behind Crimea’s referendum).

5. *See* Putin Address Regarding Ukraine, *supra* note 1; *see also* Yaroslav Lukov, *Ukraine War: Putin Warns Against Foreign Intervention*, BBC NEWS (Apr. 27, 2022), <https://www>.

With his speech and the invasion it sought to explain, Putin has shone a light into the cracks in the international legal order. Specifically, he has (inadvertently) raised this question: when a state ignores the basic tenets of international rule of law, what can the international community do?<sup>6</sup>

Since the inception of the United Nations (U.N.) after World War II, this question has been addressed very little. A scant few territorial violations have occurred in the twentieth and twenty-first centuries, and those that have occurred generally prompted quick and unequivocal condemnation, as well as efforts to return to the status quo.<sup>7</sup> Notable violations—the Six-Days War, the Turkish invasion of Cyprus, the Falklands War, Iraq’s invasion of Kuwait, and Russia’s annexation of Crimea—have prompted a short menu of international responses. The Six-Days War and the invasion of Crimea both prompted years’ worth of political criticism for Israel and Russia, respectively, as both nations have held onto at least parts of the lands seized.<sup>8</sup> The Falklands War prompted almost immediate diplomatic condemnation and efforts to negotiate a peace settlement, but was resolved with military force beyond the control of the international community.<sup>9</sup> Iraq’s invasion of Kuwait and

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bbc.com/news/world-europe-61252320 [https://perma.cc/D75A-4SPF].

6. The U.N. Charter prioritizes, above all else, respect for the territorial sovereignty of other nations and maintenance of international peace. See U.N. Charter art. 1, ¶ 1; *id.* art. 2, ¶ 4; Allison, *supra* note 4, at 533.

7. See generally *Persian Gulf War Timeline*, ENCYCLOPEDIA BRITANNICA (Feb. 19, 2018), <https://www.britannica.com/list/persian-gulf-war-timeline> [https://perma.cc/NUC2-KBAE]; *Ukraine Crisis: Timeline*, BBC NEWS (Nov. 13, 2014), <https://www.bbc.com/news/world-middle-east-26248275> [https://perma.cc/B3P5-Y5C2]; *Timeline: The Six Day War*, NPR (June 4, 2007, 9:18 AM), <https://www.npr.org/templates/story/story.php?storyId=10694216> [https://perma.cc/9EAC-6X63]; *The Falklands War: A Chronology of Events*, HIST. PRESS, <https://www.thehistorypress.co.uk/articles/the-falklands-war-a-chronology-of-events/> [https://perma.cc/X5DU-VQ5V]; *Turkish Invasion of Cyprus*, NEW WORLD ENCYCLOPEDIA, [https://www.newworldencyclopedia.org/entry/Turkish\\_invasion\\_of\\_Cyprus](https://www.newworldencyclopedia.org/entry/Turkish_invasion_of_Cyprus) [https://perma.cc/Q9BP-37VL].

8. See Jeremy Bowen, *1967 War: Six Days that Changed the Middle East*, BBC NEWS (June 5, 2017), <https://www.bbc.com/news/world-middle-east-39960461> [https://perma.cc/7HHQ-X6YE]; S.C. Res. 242, ¶ 1 (Nov. 21, 1967) (unanimously calling for the withdrawal of Israeli forces from occupied lands); G.A. Res. 68/262, ¶ 6 (Mar. 27, 2014); *UN Resolution Condemns Russia's Occupation of Crimea*, ALJAZEERA (Dec. 10, 2019), <https://www.aljazeera.com/news/2019/12/10/un-resolution-condemns-russias-occupation-of-crimea> [https://perma.cc/2G7D-U2Q5].

9. See S.C. Res. 502, ¶ 2 (Apr. 3, 1982) (demanding withdrawal of Argentine forces from the Falkland Islands); *Falkland Islands War*, ENCYCLOPEDIA BRITANNICA (Sept. 19, 2023), <https://www.britannica.com/event/Falkland-Islands-War> [https://perma.cc/Q48D-J7F9].

Turkey's invasion of Cyprus also prompted virtually unanimous condemnation and economic and diplomatic sanctions, as well as military intervention.<sup>10</sup>

A closer look at each of these territorial violations shows that the success of an international response relies heavily on two variables: (1) the scope and character of the pressure applied and (2) the responsiveness of the violating nation to that pressure. While a nation's responsiveness is dictated by innumerable internal and external factors, the strength of the international response is often tied directly to the desires and dictates of the U.N. Security Council and its permanent members.

These violations of territorial integrity highlight pervasive concerns regarding the enforceability of international law. This Note will explore this question by examining the events unfolding in Ukraine, categorizing Russia's actions thus far, and assessing the potential mechanisms that might be brought to bear. Part I will overview the recent history of Russia's involvement in Ukraine. Part II will discuss the presently-available international enforcement mechanisms and their general ineffectiveness. Part III will discuss how the broad ineffectiveness of international law is best expressed in the structure and practice of the U.N. Security Council. Finally, Part IV will offer recommendations for the improvement of current enforcement structures.

## I. RUSSIAN INTERFERENCE

Ukraine, following a brief period of independence after the collapse of imperial Russia, achieved sovereignty in its modern form in 1991 with the dissolution of the Soviet Union (U.S.S.R.).<sup>11</sup> While the influence of the Russian Federation in the region has never

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10. See S.C. Res. 353 (July 20, 1974) (concerning the outbreak of violence in Cyprus and the need to restore the constitutional Republic of Cyprus); S.C. Res. 660, ¶¶ 1-2 (Aug. 2, 1990) (condemning Iraq's invasion of Kuwait and demanding withdrawal); S.C. Res. 678, ¶ 2 (Nov. 29, 1990) (authorizing use of force to implement resolution 660 and restore international peace and security); *This Day In History: Iraq Invades Kuwait*, HISTORY (July 30, 2021), <https://www.history.com/this-day-in-history/iraq-invades-kuwait> [<https://perma.cc/JX4T-S335>]; *UNFICYP Fact Sheet*, UN PEACEKEEPING, <https://peacekeeping.un.org/en/mission/unficyyp> [<https://perma.cc/RG62-Z8VK>].

11. *Ukraine*, CIA: THE WORLD FACTBOOK (Sept. 25, 2023), <https://www.cia.gov/the-world-factbook/countries/ukraine/> [<https://perma.cc/87E4-2KR5>].

disappeared entirely, the underlying tension of Russia's continued interest in the region came to a boil in 2013 after then-President of Ukraine Viktor Yanukovich spurned a legislatively-approved trade agreement with the European Union in favor of strengthening ties with Russia.<sup>12</sup> The protests that followed gave way to violence as the Russian-backed government worked to restrict the right to protest.<sup>13</sup> The Ukrainian government also encouraged police to violently suppress protests when they did occur.<sup>14</sup> Ultimately, Yanukovich was forced to flee ahead of a vote for his impeachment and eventual indictment for mass murder.<sup>15</sup> This power shift—while occurring almost entirely within the domestic sphere of Ukrainian politics— set the stage for Russia's invasion of Crimea in 2014.<sup>16</sup>

### A. *The Annexation of Crimea*

Crimea, a peninsula stretching from the Ukrainian mainland into the Black Sea, has long been the subject of conflict between states.<sup>17</sup> Following the dissolution of the U.S.S.R., Crimea was ceded to Ukraine, rather than maintaining the autonomous status it had briefly held under Soviet rule.<sup>18</sup> Despite multiple previous agreements that the newly-minted Russian Federation would respect

12. *See id.* Under pressure from the Kremlin, Yanukovich undermined a trade and cooperation agreement with the European Union that the Verkhovna Rada (Ukrainian parliament) had already agreed upon. *See The Maidan Protest Movement*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Ukraine/The-Maidan-protest-movement> [<https://perma.cc/RJR6-D6VB>].

13. *See* ENCYCLOPEDIA BRITANNICA, *supra* note 12.

14. *See id.*; *What Did Ukraine's Revolution in 2014 Achieve?*, ECONOMIST (Feb. 16, 2022), <https://www.economist.com/the-economist-explains/2022/02/16/what-did-ukraines-revolution-in-2014-achieve> [<https://perma.cc/P5XC-23NC>].

15. *See* ENCYCLOPEDIA BRITANNICA, *supra* note 12.

16. There was no direct involvement by international actors in addressing the protests, but the European Union did enact sanctions against the Yanukovich government when it failed to quell the violence. *See id.*

17. The Crimean Peninsula has changed hands nearly ten times between its original settlement in 1000 BCE until its annexation by Russia in 1783. *History of Crimea*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Crimea/History> [<https://perma.cc/AK6A-JVS7>]. It would continue to be of strategic importance in Europe, involving fighting with Britain and France as well as the Turks, until Crimeans declared it (briefly) independent following the Bolshevik Revolution. *See id.* Ultimately, Crimea was ceded to Ukraine following the fall of the Soviet Union. *Id.*

18. *See id.*

Ukraine's borders, Russia's interests in the region continued to make this a challenge.<sup>19</sup> Maintaining respect for Ukraine's territorial sovereignty was further complicated by Crimea's predominantly Russian population.<sup>20</sup>

After President Yanukovich's flight from Ukraine in 2014, Crimean paramilitary forces appealed to Russia for intervention to protect ethnically Russian Crimeans.<sup>21</sup> Within two weeks, "little green men" appeared in Crimea.<sup>22</sup> Despite initial denials, Vladimir Putin eventually claimed the forces as Russian, confirming his direct orders to secure the Crimean region after Yanukovich's flight from Ukraine.<sup>23</sup>

This intervention, Putin argued, was necessary to facilitate a "peaceful and free" referendum to "help [the Crimean people] express their opinion."<sup>24</sup> This referendum was held by the Supreme

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19. *See generally* Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, Dec. 5, 1994, 3007 U.N.T.S. 167; Treaty on Friendship, Cooperation, and Partnership, Russ.-Ukr., May 31, 1997, 3007 U.N.T.S. 117.

20. A 2001 census by the State Statistics Committee of Ukraine shows that approximately 60 percent of the Crimean populace identifies as ethnically Russian. *See About Number and Composition Population of Autonomous Republic of Crimea, By Data All-Ukrainian Population Census*, STATE STAT. COMM. UKR., <http://2001.ukrcensus.gov.ua/eng/results/general/nationality/Crimea/> [<https://perma.cc/X3JG-LNSS>].

21. U.S. ARMY SPECIAL OPERATIONS COMMAND, "LITTLE GREEN MEN": A PRIMER ON MODERN RUSSIAN UNCONVENTIONAL WARFARE, UKRAINE 2013-2014 30-31 (2015) [hereinafter U.S. SOCOM, LITTLE GREEN MEN].

22. The "little green men" label was coined by Ukrainians in Crimea after soldiers, wearing green Russian-styled uniforms and carrying Russian weapons but without any insignia identifying them as Russian, began appearing in Crimea to man roadblocks and cordon off Ukrainian forces. *See* Steven Pifer, *Watch Out for Little Green Men*, BROOKINGS (July 7, 2014), <https://www.brookings.edu/opinions/watch-out-for-little-green-men/> [<https://perma.cc/S5AH-6PEB>]. Russian leaders, including Ambassador to the European Union Vladimir Chiznov, Defense Minister Sergei Shoigu, Foreign Minister Sergei Lavrov, and President Vladimir Putin himself, denied any direct involvement with the forces appearing in Crimea prior to the referendum, variably terming them "self-defense units" and "pro-Russian forces." *Id.* Approximately a year after the annexation, however, a documentary regarding the events showed President Vladimir Putin unequivocally claiming the "little green men" as Russian forces under his direction. Carl Schreck, *From 'Not Us' to 'Why Hide It?': How Russia Denied Its Crimea Invasion, Then Admitted It*, RADIOFREEEUROPE/RADIOLIBERTY (Feb. 26, 2019, 5:00 PM), <https://www.rferl.org/a/from-not-us-to-why-hide-it-how-russia-denied-its-crimea-invasion-then-admitted-it/29791806.html> [<https://perma.cc/5FVN-T736>]; *see generally* U.S. SOCOM, LITTLE GREEN MEN, *supra* note 21.

23. *See* Schreck, *supra* note 22.

24. *See id.*

National Council of the Autonomous Republic of Crimea, which voted on March 16, 2014 to declare independence.<sup>25</sup> Within days, the Kremlin recognized Crimea's independence and subsequently incorporated the newly-coined Republic of Crimea and Sevastopol into the Russian Federation.<sup>26</sup> Following Russia's invasion and subsequent annexation of Crimea, the international community broadly condemned the Kremlin's actions and has refused to recognize any change in the legal status of Crimea.<sup>27</sup>

Despite clear violations of international law and broad condemnation, Russia has emerged with the Crimean Peninsula and limited effective sanctions.<sup>28</sup>

### *B. Conflict on the International Stage*

In a harrowing echo of the past, Putin has begun to walk the same path in eastern Ukraine. Stating the need to protect ethnic Russians in the Donbass region of Ukraine, President Putin invoked the same reason he cited in the annexation of Crimea: a need

25. Robin Geiß, *Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind*, 91 INT'L L. STUD. 425, 429 (2015).

26. See Press Release, President of Russia, Executive Order on Recognising Republic of Crimea (Mar. 17, 2014, 10:30 PM), <http://en.kremlin.ru/events/president/news/20596> [<https://perma.cc/HA8L-JZFF>]; *Ukraine Crisis: Putin Signs Russia-Crimea Treaty*, BBC NEWS (Mar. 18, 2014), <https://www.bbc.com/news/world-europe-26630062> [<https://perma.cc/GB9H-XLTH>].

27. See U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *Ukraine 2019 Human Rights Report* 58-59 (2019), <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/ukraine/crimea/> [<https://perma.cc/BK5G-SDAH>] ("In March 2014 Russia announced the peninsula had become part of the Russian Federation following a sham referendum that violated Ukraine's constitution."); see also G.A. Res. 68/262, ¶ 6 (Mar. 27, 2014) (calling upon states "not to recognize any alteration of the status of the Autonomous Republic of Crimea"); G.A. Res. 74/168, ¶ 11 (Dec. 18, 2019); Lauri Mälksoo, Review Essay, *The Annexation of Crimea and Balance of Power in International Law*, 30 EUR. J. INT'L L. 303, 303-04 (2019) (reviewing Władysław Czapliński et al. eds., *The Case of Crimea's Annexation Under International Law*; Rein Müllerson, *Dawn of a New Order: Geopolitics and the Clash of Ideologies*).

28. For detailed analysis regarding the legality of each step of the Crimean annexation, see Christian Marxsen, *The Crimea Crisis: An International Law Perspective*, 74 HEIDELBERG J. INT'L L. 367, 380-89 (2014). See, e.g., DEP'T TREASURY, OFF. OF FOREIGN ASSETS CONTROL, *UKRAINE/RUSSIA-RELATED SANCTIONS PROGRAM* 3 (2016); Anders Åslund & Maria Snegovaya, *The Impact of Western Sanctions on Russia and How They Can Be Made Even More Effective*, ATL. COUNCIL (May 3, 2021), <https://www.atlanticcouncil.org/in-depth-research-reports/report/the-impact-of-western-sanctions-on-russia/> [<https://perma.cc/9NXP-CCUU>].

to protect ethnically-Russian Ukrainians.<sup>29</sup> Putin has also continued a long tradition of trading genocide allegations back and forth between Russia and Ukraine.<sup>30</sup>

The methods used by Moscow to legitimize the current invasion in Ukraine have followed those used in Russia's invasion of Crimea like a playbook. As in Crimea, the invasion of Ukraine began with allegations of violence and genocide against ethnic Russians within the target area to justify military interference.<sup>31</sup> Once sufficient control was established, a referendum was held to illustrate the people's desire for autonomy and self-determination in the Luhansk and Donetsk regions, just as a referendum had been held in Crimea.<sup>32</sup> Finally, the newly-minted Luhansk and Donetsk People's Republics were then formally recognized, and the newly independent regions were enveloped within the larger Russian Federation, just as Crimea was incorporated into the Russian Federation.<sup>33</sup> The differences between Crimea and the Luhansk and Donetsk regions, however, have created significantly different issues for Russia.

The increasing proliferation of social media has served to broaden public access to information and thus the public's ability to challenge false allegations.<sup>34</sup> Additionally, "fact check" examinations increasingly report on the disinformation campaign that Russia has promoted to support these false allegations.<sup>35</sup> Russia has also

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29. Putin Address Regarding Ukraine, *supra* note 1.

30. See Matthew Kupfer & Thomas de Waal, *Crying Genocide: Use and Abuse of Political Rhetoric in Russia and Ukraine*, CARNEGIE ENDOWMENT FOR INT'L PEACE (July 28, 2014), <https://carnegieendowment.org/2014/07/28/crying-genocide-use-and-abuse-of-political-rhetoric-in-russia-and-ukraine-pub-56265> [<https://perma.cc/6QGM-UCTH>].

31. See Lukov, *supra* note 5; Ben Saul, *The Battle for Legal Legitimacy in Crimea*, ABC NEWS (Mar. 2, 2014, 9:18 PM), <https://www.abc.net.au/news/2014-03-03/saul-the-battle-for-legal-legitimacy-in-crimea/5294828> [<https://perma.cc/UT5E-4N6X>].

32. See Schreck, *supra* note 22; Gladstone, *supra* note 3; Press Release, Security Council, So-Called Referenda During Armed Conflict in Ukraine 'Illegal,' Not Expression of Popular Will, United Nations Political Affairs Chief Tells Security Council, U.N. Press Release SC/15039 (Sept. 27, 2022).

33. See BBC NEWS, *supra* note 3; Gladstone, *supra* note 3.

34. See Daniel Funke, *Fact Check: Putin's Claims Justifying War in Ukraine Are Baseless, Experts Say*, USA TODAY (Mar. 30, 2022, 2:16 PM), <https://www.usatoday.com/story/news/factcheck/2022/03/30/fact-check-why-putin-claims-justifying-war-ukraine-baseless/7089270001/> [<https://perma.cc/Z5BU-NSBX>].

35. See *id.*

experienced explicit resistance to its narrative from representatives in the U.N.<sup>36</sup>

Additionally, the political landscape of Ukraine is vastly different now than in 2014. Not only was Crimea annexed immediately following a period of significant political turmoil, the events that unfolded following the annexation have themselves shifted the landscape further.<sup>37</sup> In fact, since Ukraine's loss of Crimea and the ouster of President Yanukovich, Ukraine has undertaken massive reform to shift toward Western democratic states and ideals.<sup>38</sup> Increasing trade and military cooperation with Western Europe and the United States and a growing distaste for remaining Soviet connections have cemented a Western shift.<sup>39</sup>

Despite struggles and significantly greater bloodshed than its forces experienced during the Russian invasion of Crimea, Russia has continued its war in Ukraine.<sup>40</sup> With the recognition of the independence of the Donetsk and Luhansk People's Republics and their subsequent incorporation into the Russian Federation, its strategy seemed almost complete, as Russia has now held these territories for over a year.<sup>41</sup> However, Moscow's leveraging of genocide

36. See Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto, U.N. Press Release SC/14808 (Feb. 25, 2022) (The U.K.'s representative to the U.N. called Russia's claims of self-defense "absurd," and the Ukrainian representative informed his Russian counterpart, "Your words have less value than a hole in a New York pretzel.").

37. See *supra* notes 12-16 and accompanying text.

38. See *What Did Ukraine's Revolution in 2014 Achieve?*, *supra* note 14.

39. See *id.*

40. See Scott McDonald, *Russian Dead and Wounded Passes 100,000 in War's Ninth Month: Pentagon*, NEWSWEEK (Nov. 13, 2022, 8:21 PM), <https://www.newsweek.com/russian-dead-wounded-passes-100000-wars-ninth-month-pentagon-1759179> [<https://perma.cc/AQM5-AW3K>]; Stijn Mitzer & Jakub Janovsky, *Attack on Europe: Documenting Russian Equipment Losses During the Russian Invasion of Ukraine*, ORYX (Feb. 24, 2022), <https://www.oryxspioenkop.com/2022/02/attack-on-europe-documenting-equipment.html> [<https://perma.cc/Q4KN-BECA>] (cataloging prolific losses of tanks, armored vehicles, and other military end-item equipment by Russian military forces); Seth G. Jones, *Russia's Ill-Fated Invasion of Ukraine: Lessons in Modern Warfare*, CTR. FOR STRATEGIC & INT'L STUD. (June 1, 2022), <https://www.csis.org/analysis/russias-ill-fated-invasion-ukraine-lessons-modern-warfare> [<https://perma.cc/8C9U-RWQW>] ("Without access to rail transport and with roads clogged with Russian vehicles, Russian ground forces failed to move fuel, munitions, spare parts, and other matériel [sic] quickly and efficiently to forward-deployed units.").

41. See Gladstone, *supra* note 3; ALJAZEERA, *supra* note 4. While Russian forces have lost control of a significant portion of the Donetsk region as of August 2023, the Russian Federation has not changed its position on the legal status of the area. See *Ukraine's*

allegations to explain its invasion may have given Ukraine a new lever to pull to vindicate itself and its territory.

### C. *Allegations of Genocide*

Allegations of genocide within and between Russia and Ukraine are not a new phenomenon. Although Ukraine's experience with contested genocide dates back to the 1930s, the present trend of genocide allegations has much more recent roots in Ukraine's Orange Revolution.<sup>42</sup>

The Orange Revolution, a series of peaceful protests following the 2004 presidential election in Ukraine, transpired as a result of allegations of fraud regarding the run-off victory of Kremlin-backed incumbent Viktor Yanukovich over opposition candidate Viktor Yushchenko.<sup>43</sup> The protests succeeded in achieving a review of the election by Ukraine's Supreme Court, which ultimately overturned the election and ordered a new run-off.<sup>44</sup> Yushchenko then won by a margin of over 2.26 million votes.<sup>45</sup>

Following Yushchenko's run-off victory, online groups in southeastern Ukraine—a predominantly ethnically Russian area—began warning of a “genocide” perpetuated by the Ukrainian government against ethnically Russian Ukrainians, citing fears that the Russian language would be eliminated from the country's official

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*Counteroffensive Against Russia in Maps—Latest Updates*, FIN. TIMES (Nov. 20, 2023), <https://www.ft.com/content/4351d5b0-0888-4b47-9368-6bc4dfbcbcf5> [<https://perma.cc/7S9Y-TER8>].

42. The Ukrainian “Holodomor”—or extermination by hunger—was a 1933 famine in eastern Ukraine caused by Soviet grain requisition policies that killed approximately two million people in Ukraine, with effects also felt in various parts of the Soviet Union. See Kupfer & de Waal, *supra* note 30. Despite the enormity of the tragedy, the event went entirely unrecognized until the fall of the U.S.S.R. See *id.* It is officially recognized in Ukraine today and colors the background of conflict between Ukraine and Russia. See *id.*

43. See Paul Quinn-Judge & Yuri Zarakovich, *The Orange Revolution*, TIME (Nov. 28, 2004), <http://content.time.com/time/magazine/article/0,9171,832225,00.html> [<https://perma.cc/Q26Y-ULE7>].

44. See *id.*

45. *On the Publication of the Results of the Repealed Voting on December 26, 2004 for the Elections of the President of Ukraine*, CENT. ELECTION COMM'N (Jan. 10, 2005), [http://www.cvk.gov.ua/postanovy/2005/p0015\\_2005.htm](http://www.cvk.gov.ua/postanovy/2005/p0015_2005.htm) [[https://web.archive.org/web/20050312021855/http://www.cvk.gov.ua/postanovy/2005/p0015\\_2005.htm](https://web.archive.org/web/20050312021855/http://www.cvk.gov.ua/postanovy/2005/p0015_2005.htm)] (Ukrainian Central Election Commission's publication of December 26 run off).

operations.<sup>46</sup> These allegations of genocide against ethnically Russian areas of Ukraine continue to issue from Donetsk separatists as well as Russian politicians regarding the events that occurred in Crimea during Russia's annexation.<sup>47</sup> The effects of the Orange Revolution fundamentally altered relations between Russia and Ukraine, creating a divisiveness where there had once been a sense of shared history and future.<sup>48</sup> Now, Putin has once again revived the theme of genocide to explain the 2022 invasion of Ukraine and subsequent war, further entrenching the intractable nature of the present conflict.<sup>49</sup>

Just two days after the Russian invasion began, Ukraine filed an application with the International Court of Justice (I.C.J.) under the Convention on the Prevention and Punishment of the Crime of Genocide (also known as the Genocide Convention, or the Convention).<sup>50</sup> A departure from most applications under the Convention,<sup>51</sup>

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46. See Kupfer & de Waal, *supra* note 30.

47. See *id.*

48. See Peter Dickinson, *How Ukraine's Orange Revolution Shaped Twenty-First Century Geopolitics*, ATL. COUNCIL (Nov. 22, 2020), <https://www.atlanticcouncil.org/blogs/ukrainealert/how-ukraines-orange-revolution-shaped-twenty-first-century-geopolitics/> [<https://perma.cc/2CGT-PZG3>].

49. Max Fisher, *Putin's Baseless Claims of Genocide Hint at More Than War*, N.Y. TIMES (Feb. 19, 2022), <https://www.nytimes.com/2022/02/19/world/europe/putin-ukraine-genocide.html> [<https://perma.cc/Y7Y3-887X>].

50. The Convention on the Prevention and Punishment of the Crime of Genocide, popularly referred to as the Genocide Convention, was the first human rights instrument adopted by the U.N.'s General Assembly in the wake of World War II. See *Ratification of the Genocide Convention*, U.N. OFFICE GENOCIDE PREVENTION & RESP. TO PROTECT, <https://www.un.org/en/genocideprevention/genocide-convention.shtml> [<https://perma.cc/QTT8-P2D3>]. Its primary purpose is to codify the international definition of "genocide" and the duty of State Parties both to refrain from committing genocide and to punish and prevent genocide in their territories. See *id.* Ratified by 153 countries, the obligations it outlines are considered customary international law and thus binding regardless of ratification. See *id.*; see also *Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukr. v. Russ.)*, Application Instituting Proceedings, (Feb. 26, 2022), <https://www.icj-cij.org/en/case/182> [<https://perma.cc/47KD-NBCN>] [hereinafter *Application by Ukraine*].

51. Most applications under the Genocide Convention are made by states alleging genocide against another and are thus founded on Article VIII, which provides that "[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide." Convention on the Prevention and Punishment of the Crime of Genocide, art. 8, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277.

Ukraine's filing finds the court's jurisdiction on Article IX of the Convention, which stipulates that "[d]isputes ... relating to the interpretation, application or fulfillment" of the Convention should be submitted to the I.C.J.<sup>52</sup> This application allows the international community to directly address Russia's allegations of genocide through the I.C.J. It is vital to note that Ukraine has not alleged that Russia is pursuing a policy of genocide in Ukraine. Ukraine's predominant argument is that Russia has misinterpreted and abused the Genocide Convention to provide a pretext for its invasion of Ukraine.<sup>53</sup>

The process of Ukraine's I.C.J. application, thus far, has raised concerns regarding Russia's willingness to engage with the court. Despite the urgent nature of the application, as well as the advance notice given, the Russian Federation indicated that it would not participate in oral proceedings on Ukraine's request for provisional measures.<sup>54</sup> The general non-responsiveness of the Russian Federation has extended even to the I.C.J.'s order of provisional measures.<sup>55</sup>

Ukraine submitted its Memorial—the document outlining its allegations—to the I.C.J. well ahead of the September 23, 2022 deadline.<sup>56</sup> While the initial deadline for the Russian Federation to

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52. *See id.* ¶ 6; Convention on the Prevention and Punishment of the Crime of Genocide, art. 9, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

53. *See* Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukr. v. Russ.), Memorial of Ukraine, (July 1, 2023), <https://www.icj-cij.org/en/case/182> [<https://perma.cc/F7T2-RHN2>].

54. *See* Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukr. v. Russ.), Document from the Russian Federation Setting Out Its Position Regarding Alleged "Lack of Jurisdiction" of the Court in the Case, ¶¶ 2-3 (Mar. 7, 2022), <https://www.icj-cij.org/case/182/other-documents> [<https://perma.cc/QZ5Q-DRJZ>] [hereinafter Russian Response in I.C.J.].

55. Among its provisional measures issued on March 16, 2022, the I.C.J. mandated that the Russian Federation must "suspend [its] military operations." Allegations of Genocide Under Convention on Prevention and Punishment of Crime of Genocide (Ukr. v. Russ.), Order of Provisional Measures, ¶ 86 (Mar. 16, 2022), <https://www.icj-cij.org/en/case/182> [<https://perma.cc/VPP3-RCXQ>] [hereinafter Mar. 16 Order]. Despite the binding nature of this measure, Russia has continued its operations to date. *See id.*

56. The Ukrainian Ministry of Foreign Affairs (MFA) reported that the nation's Memorial was submitted to the court on July 1, 2022. Press Release, Ministry of Foreign Affairs of Ukraine, Statement of the MFA of Ukraine on the Filing of its Memorial in the Case Against the Russian Federation in the International Court of Justice Under the Genocide Convention (July 1, 2022, 6:30 PM), <https://mfa.gov.ua/en/news/zayava-mzs-ukrayini-shchodo-podachi-memorandumu-u-spravi-proti-rosijskoyi-federaciyi-v-mizhnarodnomu-sudi-oon-za->

submit its Counter-Memorial was March 23, 2023, the state formally filed preliminary objections on October 3, 2022.<sup>57</sup> In its Counter-Memorial, the Russian Federation contested both the jurisdiction of the court and the admissibility of Ukraine's application.<sup>58</sup> Public hearings regarding the preliminary objections were held from September 18 through 27, 2023.<sup>59</sup> The court announced its judgment in early February 2024, finding that it does, in fact, have jurisdiction to analyze the truth of Russia's claims of genocide.<sup>60</sup>

The court's finding of jurisdiction stops short of permitting it to analyze whether Russia's use or abuse of genocide allegations is in keeping with its other international obligations.<sup>61</sup> This comes as the court rejected Ukraine's request to find that Russia's use of force and its annexation of Donetsk and Luhansk were violative of the Genocide Convention.<sup>62</sup> In summary, the court will limit its search to whether Russia's allegations of genocide are founded and will not determine itself whether the falsity of such accusations, and the subsequent military operation they support, are themselves a violation of international law. While this may appear disappointing to some observers, it is in keeping with the Genocide Convention's mandate which is limited *only* to questions of genocide, not to the use of force or other legal issues.<sup>63</sup> While it is likely to take several

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konvenciyeyu-pro-zapobigannya-zlochynu-genocidu-ta-pokarannya-za-nogo [https://perma.cc/S297-KW6N]; Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order Fixing Memorial and Counter-Memorial Timeline, (Mar. 23, 2022), <https://www.icj-cij.org/en/case/182> [https://perma.cc/33DW-QXW9] [hereinafter Mar. 23 Order].

57. Mar. 23 Order, *supra* note 56. Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order Fixing Timeline for Response to Preliminary Objections, (Oct. 7, 2022), <https://www.icj-cij.org/en/case/182> [https://perma.cc/3JUH-JTW2] [hereinafter Oct. 7 Order].

58. *See* Oct. 7 Order, *supra* note 57. Press Release, I.C.J., The Court to Hold Public Hearings on the Preliminary Objections Raised by the Russian Federation from Monday 18 to Wednesday 27 September 2023 (Aug. 22, 2023), <https://www.icj-cij.org/case/182> [https://perma.cc/9DZ5-K36C].

59. *Id.*

60. *See* Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. V. Russ), Judgement on Preliminary Objections (Feb. 2, 2024), <https://www.icj-cij.org/sites/default/files/case-related/182/182-20240202-jud-01-00-en.pdf> [https://perma.cc/KQ9Z-WDPF].

61. *See id.* ¶¶ 137-48.

62. *See id.*

63. *See id.* ¶ 146.

more years for the court to reach a conclusion on the merits, this provides a vital opportunity to expose Russia's genocide allegations to the international community, bear out the truth, and vindicate Ukraine.<sup>64</sup>

## II. ALL ROADS LEAD TO THE SECURITY COUNCIL

As the case in the I.C.J. has unfolded with the typical glacial pace of international legal proceedings, numerous investigations into the events in Ukraine have been launched.

The U.N., through its Office of the High Commissioner on Human Rights, sponsored an independent mission regarding the allegations against Ukraine just months after the invasion began.<sup>65</sup> The Independent International Commission of Inquiry on Ukraine conducted its first mission to the area in June 2022 and its first report, published on October 18, 2022, found evidence that a wide variety of war crimes, crimes against humanity, and other violations of international law had been committed in Ukraine between February and October, mostly by armed Russian forces.<sup>66</sup> The Commission continues to investigate and, subsequent to each visit undertaken thus far, has reaffirmed the occurrence and ongoing commission of

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64. In another case filed with the I.C.J. between Ukraine and Russia, nearly three years elapsed between the initial application and the Court's ruling on *preliminary* objections. From there, it was an additional four years before public hearings were held. See *generally* Application of International Convention for Suppression of Financing of Terrorism and of International Convention on Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Application Instituting Proceedings, (Jan. 16, 2017), <https://www.icj-cij.org/sites/default/files/case-related/166/166-20191108-JUD-01-00-EN.pdf> [<https://perma.cc/8786-7YF4>]; Application of International Convention for Suppression of Financing of Terrorism and of International Convention on Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Judgment on Preliminary Objections, (Nov. 8, 2019), <https://www.icj-cij.org/sites/default/files/case-related/166/166-20191108-JUD-00-EN.pdf> [<https://perma.cc/Q5PS-SYP4>]; Press Release, I.C.J., Conclusion of Public Hearings on Application of International Convention for the Suppression of Financing of Terrorism and of International Convention on Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.) (June 14, 2023), <https://www.icj-cij.org/en/case/166> [<https://perma.cc/9AE2-29LW>].

65. Press Release, U.N. Off. High Comm'r Hum. Rts., Commission of Inquiry on Ukraine to Conduct First Mission to the Country (June 3, 2022), <https://www.ohchr.org/en/press-releases/2022/06/commission-inquiry-ukraine-conduct-first-mission-country> [<https://perma.cc/C94B-A4Q5>].

66. See *generally* Report of the Independent International Commission of Inquiry on Ukraine, A/77/533 (Oct. 18, 2022); Commission of Inquiry on Ukraine to Conduct First Mission to the Country, *supra* note 65.

war crimes and crimes against humanity within the territory of Ukraine.<sup>67</sup>

Following referral from an unprecedented thirty-nine State Parties, the Office of the Prosecutor for the International Criminal Court (I.C.C.) opened an investigation into the situation in Ukraine on March 2, 2022, sending its largest ever deployment of investigators.<sup>68</sup> Since beginning the investigation, the I.C.C. has issued two arrest warrants: one for President Vladimir Putin and one for the Russian Commissioner for Children's Rights, Ms. Maria Lvova-Belova.<sup>69</sup> Both warrants allege the war crimes of unlawful deportation and unlawful transfer of population.<sup>70</sup> Ukraine's Office of the Prosecutor General is also courting an unprecedented array of war crimes investigations. Over 100,000 crimes and counting have been documented by the Office since the beginning of the invasion.<sup>71</sup>

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67. See Press Release, U.N. Off. High Comm'r Hum. Rts., Commission of Inquiry on Ukraine to Conduct Mission to the Country (Aug. 24, 2023), <https://www.ohchr.org/en/press-releases/2023/08/commission-inquiry-ukraine-conduct-mission-country> [<https://perma.cc/9GDP-TNZA>]; Press Release, U.N. Off. High Comm'r Hum. Rts., UN Commission of Inquiry on Ukraine Finds Continued Systematic and Widespread Use of Torture and Indiscriminate Attacks Harming Civilians (Sept. 25, 2023), <https://www.ohchr.org/en/press-releases/2023/09/un-commission-inquiry-ukraine-finds-continued-systematic-and-widespread-use> [<https://perma.cc/QX7R-L4GZ>]; Press Release, U.N. Off. High Comm'r Hum. Rts., UN Commission of Inquiry on Ukraine Finds Continued War Crimes and Human Rights Violations Gravely Impacting Civilians (Oct. 20, 2023), <https://www.ohchr.org/en/press-releases/2023/10/un-commission-inquiry-ukraine-finds-continued-war-crimes-and-human-rights> [<https://perma.cc/458E-YKTL>]; *Independent International Commission of Inquiry on Ukraine*, OFF. HIGH COMM'R HUM. RTS., <https://www.ohchr.org/en/hr-bodies/hrc/iic/hr-ukraine/index> [<https://perma.cc/4JS7-HL3K>].

68. An additional four states have since joined or separately referred the situation to the I.C.C. See *Situation in Ukraine*, INT'L CRIM. CT., <https://www.icc-cpi.int/ukraine> [<https://perma.cc/T2RD-VRT3>]; *ICC Prosecutor Karim A.A. Khan QC Announces Deployment of Forensics and Investigative Team to Ukraine, Welcomes Strong Cooperation with the Government of the Netherlands*, INT'L CRIM. CT. (May 17, 2022), <https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and-investigative-team-ukraine> [<https://perma.cc/HGZ5-TEC7>].

69. See *Situation in Ukraine*, *supra* note 68.

70. See *id.*

71. See Liz Sly, *66,000 War Crimes Have Been Reported in Ukraine. It Vows to Prosecute Them All.*, WASH. POST (Feb. 6, 2023, 11:50 AM), <https://www.washingtonpost.com/world/2023/01/29/war-crimes-ukraine-prosecution/> [<https://perma.cc/K52H-BCHR>]; *Ukraine War Crimes Investigations and Prosecutions*, AM. BAR ASSOC. (May 24, 2023), [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/publications/washington-letter/may-23-wl/ukraine-0523wl/](https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washington-letter/may-23-wl/ukraine-0523wl/) [<https://perma.cc/5KCX-ASXD>]; *Ukraine's Quest for Justice: A Conversation with Prosecutor General Andriy Kostin*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Sept. 26, 2023), <https://carnegieendowment.org/2023/09/26/ukraine-s-quest-for-justice->

Beyond formal investigations exist the base facts of the conflict. Russia launched a military invasion into Ukraine without U.N. Security Council approval and a paper-thin claim to Article 51 self-defense authority.<sup>72</sup> This is a clear violation of the U.N. Charter provisions on territorial integrity and falls easily within the accepted international definition of an act of aggression.<sup>73</sup> Russia's invasion has been almost uniformly condemned as an act of aggression by the international community.<sup>74</sup>

Given the density of investigations and the flagrancy of Russia's conduct, the challenge then is likely not proving the existence of a crime to the appropriate evidentiary standard, but instead identifying an appropriate enforcement mechanism that can be applied *effectively*.<sup>75</sup> A detailed look at the mechanisms available reveals a pervasive weakness in the international legal order: the futility of appealing to the U.N. Security Council when in conflict with any permanent member of the council.

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conversation-with-prosecutor-general-andriy-kostin-event-8161 [https://perma.cc/YC35-D66R].

72. See John B. Bellinger III, *How Russia's Invasion of Ukraine Violates International Law*, COUNCIL ON FOREIGN RELATIONS (Feb. 28, 2022, 2:25 PM), <https://www.cfr.org/article/how-russias-invasion-ukraine-violates-international-law> [https://perma.cc/TQ4B-UX5U].

73. See U.N. Charter arts. 2, 39.

74. See G.A. Res. A/ES-11/L.1 (Mar. 1, 2022), [https://www.eeas.europa.eu/sites/default/files/a\\_es-11\\_1\\_1\\_e.pdf](https://www.eeas.europa.eu/sites/default/files/a_es-11_1_1_e.pdf) [https://perma.cc/FL2V-YQPT]; G.A. Res. A/ES-11/L.7 (Feb. 16, 2023), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/048/58/PDF/N2304858.pdf> [https://perma.cc/HZ84-XQZB].

75. The Independent International Commission of Inquiry on Ukraine has already identified crimes including indiscriminate attacks with explosive weapons, summary executions, unlawful confinement, rape, torture, and still more. See Report of the Independent International Commission of Inquiry on Ukraine, *supra* note 66, at 8-15; see, e.g., Molly Quell, *Ukraine Has Few Legal Options to Hold Russia Accountable for Invasion*, COURTHOUSE NEWS SERV. (Feb. 24, 2022), <https://www.courthousenews.com/ukraine-has-few-legal-options-to-hold-russia-accountable-for-invasion/> [https://perma.cc/X7DG-63QX] (discussing very generally potential avenues for enforcement mechanisms for actions taken in Ukraine both by individuals and state actors); Jacqueline Thomsen & Mike Scarcella, *Explainer: How Could Russia's Putin be Prosecuted for War Crimes in Ukraine?*, REUTERS (Apr. 4, 2022, 5:41 AM), <https://www.reuters.com/world/how-could-russias-putin-be-prosecuted-war-crimes-ukraine-2022-03-22/> [https://perma.cc/CB49-ACN4] (discussing prosecution of war crimes and the general difficulty thereof in context of the Russian invasion in Ukraine).

### A. *International Court of Justice*

A product of the United Nations, the I.C.J. is considered the ultimate forum for pacific settlement of disputes between nations.<sup>76</sup> The focus of Ukraine's case against Russia under the Genocide Convention is the settlement of the dispute over Russia's allegations of genocide against Ukraine.<sup>77</sup> The case will then be analyzing any evidence of a Ukrainian genocide against ethnic Russians in eastern Ukraine. This is incredibly unlikely to return any finding of genocide. The accepted definition of genocide offered by the Genocide Convention focuses on three elements: (1) specific actions that injure, threaten, or otherwise violate the rights of the target groups, (2) a defined group, and (3) intent to destroy.<sup>78</sup> This final element has historically created the greatest evidentiary burden.<sup>79</sup> The case regarding Yugoslavia (known at the time as Serbia and Montenegro) is the closest that the I.C.J. has come to finding a state responsible for genocide against another, but the court fell short of

76. *History*, INT'L CT. JUST., <https://www.icj-cij.org/history> [<https://perma.cc/Z2Y4-Q33L>].

77. See Application by Ukraine, *supra* note 50 (statement of Minister of Foreign Affairs of Ukraine Dmytro Kuleba) (“[T]he dispute at issue concerns the falsity of allegations of genocide, and unlawful measures that have been undertaken on the basis of such false allegations.”).

78. Article 2 of the Genocide Convention states:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 52, art. 2.

79. The I.C.J. has adjudicated only three previous inter-state cases under the Genocide Convention and only two of those were on the merits. In neither of the cases reaching the merits did the I.C.J. determine that the nation in question was *responsible* for genocide. See generally Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. 3, ¶¶ 401, 440-42, 499, 507, 515 (Feb. 3); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶¶ 276-77, 376, 379, 413 (Feb. 26); Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosn. & Herz.), Judgment, 2003 I.C.J. 7 (Feb. 3) (this final instance was an appeal to reconsider the Court's exercise of jurisdiction over Yugoslavia and was thus not a question on the merits of the case).

that conclusion.<sup>80</sup> That case exposed the immense burden that the intent element of genocide creates.<sup>81</sup>

Even without the substantial evidentiary burden created by the jurisprudence on genocide, the allegations against Ukraine simply do not support a reasonable finding of genocide. In its preliminary objections filed with the I.C.J., the Russian Federation lays out a factual record that aims to support the allegations.<sup>82</sup> However, even accepting the characterization of events as adopted by Russia, the events bear out political turmoil and civil war, not genocide.<sup>83</sup>

However, the benefit of the I.C.J. proceeding is not necessarily in vindicating Ukraine's denial of the allegations, but in permitting a full factual record regarding the appropriateness of Russia's collective self-defense claim. This is uniquely important in this case because of Russia's extensive history of spreading disinformation.<sup>84</sup>

In its preliminary objections, Russia cites Article 51 of the U.N. Charter and its allowance for collective self-defense.<sup>85</sup> In that, Russia claims that the independent regions of Donetsk and Luhansk requested Russian military support and that the U.N. Charter thus permits Russia's "special military operation."<sup>86</sup> Therefore, success in

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80. In *Bosnia & Herzegovina v. Serbia & Montenegro*, the court held only that genocidal actions had occurred, but failed to find any genocidal intent, nor any attribution of those genocidal actions to the state itself. See Judgment, 2007 I.C.J. 43, ¶¶ 413-15.

81. This is not to say that the international community has never found genocide, only that it has never done so in the context of one state perpetrating genocide against another. See generally *The ICTR in Brief*, U.N. INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, <https://unictr.irmct.org/en/tribunal> [<https://perma.cc/3BBX-N3Z4>]. For further discussion regarding the weaknesses of the Genocide Convention as drafted, see Jeffrey Bachman, *The Genocide Convention and the Politics of Genocide Non-Prevention* (May 2013) (Ph.D. dissertation, Northeastern University) (on file with the Northeastern University Library system).

82. See *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.)*, Preliminary Objections of the Russian Federation, (Oct. 1, 2022) [hereinafter Russia's Preliminary Objections], <https://www.icj-cij.org/sites/default/files/case-related/182/182-20221003-wri-01-00-en.pdf> [<https://perma.cc/699W-3TDY>].

83. See *id.*

84. See Boris Bondarev, *The Sources of Russian Misconduct*, FOREIGN AFFS. (Oct. 17, 2022), <https://www.foreignaffairs.com/Russian-federation/sources-russia-misconduct-boris-bondarev> [<https://perma.cc/8GYR-R66T>] (providing a detailed accounting of misinformation efforts within the Russian government by a defected Russian diplomat). For an extensive discussion of disinformation and its practice, see P.W. SINGER & EMERSON T. BROOKING, *LIKEWAR: THE WEAPONIZATION OF SOCIAL MEDIA* (2018).

85. U.N. Charter art. 51.

86. See Russia's Preliminary Objections, *supra* note 82.

the I.C.J. will likely involve bearing out the falsity of Russia's genocide accusations and ordering Russia to end its military invasion.

However, even a successful proceeding against Russia is unlikely to produce any substantive effects. First, the amount of time the case will inevitably take decreases the likelihood that active fighting will be ongoing when a decision is reached. More important, however, is the lack of coercive power of the I.C.J.<sup>87</sup>

Despite the fact that the I.C.J. issued provisional measures requiring Russia to suspend its combat operations, Russia's invasion has not halted for even a moment.<sup>88</sup> This is evidence of one of the greatest weaknesses of the "World Court": the I.C.J. holds no coercive power of its own to force states to comply with its judgments.<sup>89</sup> In fact, when states fail to abide by their binding obligations to the I.C.J., the I.C.J. has no ability to bind other states to enforce measures against them, but rather presents the matter to the U.N. Security Council, which can consider measures to enforce the judgment.<sup>90</sup> Even with the assumption that the I.C.J. will eventually hold Russia's genocide allegations unfounded and order it to end military intervention in Ukraine, delegating recourse to the Security Council, of which Russia is a permanent member, makes any attempt at coercive measures pointless.

### *B. Domestic Prosecutions*

War crimes, genocide, acts of aggression, and crimes against humanity are all codified as crimes under Ukrainian law.<sup>91</sup> In fact, war crimes prosecutions are already underway in Ukraine.<sup>92</sup> So far,

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87. See *How the Court Works*, INT'L CT. OF JUST., <https://www.icj-cij.org/how-the-court-works> [<https://perma.cc/QP2C-SYUM>].

88. See Mar. 16 Order, *supra* note 55, ¶ 86; Sofia Stuart Leeson, *Russia Rejects International Court Ruling to Stop Invasion of Ukraine*, EURACTIV (Mar. 18, 2022), <https://www.euractiv.com/section/europe-s-east/news/russia-rejects-international-court-ruling-to-stop-invasion-of-ukraine/> [<https://perma.cc/ZEY2-3YZL>].

89. See *How the Court Works*, *supra* note 87.

90. See *id.*

91. See Criminal Code of Ukraine, arts. 437 (planning, preparation and waging of an aggressive war), 438 (violation of the rules of warfare), 442 (genocide).

92. See Patrick Jackson & James Waterhouse, *Ukraine War: Russian Soldier Vadim Shishimarin Jailed for Life over War Crime*, BBC NEWS (May 23, 2022), <https://www.bbc.com/news/world-europe-61549569> [<https://perma.cc/SGV8-3Q3C>].

the nation's domestic courts have issued dozens of indictments and convicted over fifty Russians.<sup>93</sup> However, fifty is barely a drop in the more than 100,000 war crimes that Ukraine's Prosecutor General Andriy Kostin claims have been documented.<sup>94</sup> Beyond the sheer volume of cases facing the Ukrainian justice system is a separate but no less daunting issue: gaining control of the alleged perpetrators.

Despite the intensity with which Ukraine is pursuing the war crimes allegations, the majority of the cases thus far have been tried in absentia.<sup>95</sup> Given how few soldiers indicted for war crimes Ukraine has been able to gain custody of, in absentia proceedings are likely to continue.<sup>96</sup> With a coercive capacity limited by its own territorial reach, it will be difficult to get custody of offenders who are likely in Russia or Russian-controlled territory. This, coupled with the immense overload in the system, indicates that domestic prosecutions are likely to see little traction, especially while fighting continues.

Domestic investigations are vital to the documentation and eventual vindication of war crimes. However, the limits of Ukraine's coercive power make clear that the existence of an international conflict is likely to require an international solution.

### C. *International Criminal Court*

Unlike the I.C.J., the International Criminal Court (I.C.C.) brings cases against *individuals*, not states.<sup>97</sup> The I.C.C. can also prosecute war crimes, crimes against humanity, genocide, and acts of aggression.<sup>98</sup> As discussed above, while allegations of genocide may be

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93. See *Kyiv Says More Than 50 Russian Soldiers Have Been Convicted Since Russia's Full Scale Invasion*, RADIOFREEEUROPE (July 16, 2023), <https://www.rferl.org/a/ukraine-russian-soldiers-convicted-war-crimes/32505625.html> [<https://perma.cc/8MCZ-C6AE>]; Sly, *supra* note 71; AM. BAR ASS'N, *supra* note 71.

94. See CARNEGIE ENDOWMENT FOR INT'L PEACE, *supra* note 71.

95. See Sly, *supra* note 71.

96. See *id.*

97. See *How the Court Works*, INT'L CRIM. CT., <https://www.icc-cpi-int/about/how-the-court-works> [<https://perma.cc/KZG7-EGXW>].

98. See *id.*

rampant, it is unlikely any court will find genocide is being committed.<sup>99</sup>

In addition to the two arrest warrants already issued,<sup>100</sup> I.C.C. investigation into Ukraine is likely to produce further indictments for war crimes and perhaps even for crimes against humanity. Unlike the Ukrainian government, the I.C.C. has *no* force of its own and must rely on the cooperation of states to acquire control of offenders.<sup>101</sup> However, the I.C.C. does not permit trials in absentia, which are considered prohibited under Article 63 of the I.C.C.’s Rome Statute.<sup>102</sup> As such, the I.C.C. will face similar challenges in gaining control of alleged perpetrators in order to prosecute them, but is left without recourse if those efforts fail. The burden in the case of Ukraine is even greater because, while State Parties to the I.C.C. are obligated to cooperate with the court, Russia is not a State Party.<sup>103</sup> Non-State Parties can be “invited” to cooperate, but the record of the invasion and Russia’s reactions to international involvement thus far make such cooperation incredibly unlikely.<sup>104</sup> That again leaves only the U.N. Security Council with the authority to compel Russia to extradite suspects or otherwise cooperate with the I.C.C. for prosecution of war crimes or crimes against humanity.

Beyond the I.C.C.’s ability—or lack thereof—to prosecute individuals for war crimes, aggression has become the cornerstone of conversations regarding Russia’s invasion of Ukraine. Often considered the crime from which all others spring, the modern world has had no better example of aggressive war since the definition was officially settled in 2010.<sup>105</sup> The crime of aggression is

99. *See supra* Part II.B.

100. *See supra* notes 67-68 and accompanying text.

101. *See How the Court Works, supra* note 87.

102. Rome Statute of the International Criminal Court art. 63, July 17, 1998, 2187 U.N.T.S. 38544.

103. *See* INT’L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 32 (2020); Iryna Marchuk & Aloka Wanigasuriya, *The ICC and the Russian-Ukraine War*, 26 AM. SOC’Y INT’L L. 1, 1 (2022). Ukraine, while also not a State Party, has issued an Article 12(3) declaration accepting the court’s jurisdiction over crimes committed in its territory from Feb. 20, 2014, onward. *See Situation in Ukraine, supra* note 68.

104. *See* Lukov, *supra* note 5; Leeson, *supra* note 88.

105. The Kampala Conference established an accepted definition of aggression in 2010, but the I.C.C.’s jurisdiction over the crime did not achieve sufficient consensus for formal adoption until 2017, activating the crime officially in 2018. *See* INT’L CRIM. CT., *supra* note 103, at 26, 29.

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity, or scale, constitutes a manifest violation of the Charter of the United Nations.<sup>106</sup>

The crime of aggression seeks to hold those most responsible—those in charge of a state—accountable for the prosecution of an unjust war. The discussion of aggression in Ukraine, however, centers on Russia’s immunity from prosecution for the crime.

Limitations placed on the I.C.C.’s jurisdiction prohibit the court from exercising jurisdiction over the crime of aggression when alleged against a non-State Party.<sup>107</sup> Despite Ukraine’s acceptance of I.C.C. jurisdiction over its territory, these limits still preclude I.C.C. prosecution for aggression.<sup>108</sup> This is additionally concerning when considering international courts are the only commonly-accepted venue for prosecutions of heads of state.<sup>109</sup> The only exception to the jurisdictional limitations on the crime of aggression is a referral to the court by the U.N. Security Council under Chapter VII of the U.N. Charter.<sup>110</sup>

#### *D. Ad Hoc International Tribunal*

Recognizing the vanishingly small likelihood of such a referral, significant support has been raised for the establishment of an *ad hoc* international tribunal specifically to prosecute Russia’s aggression in Ukraine.<sup>111</sup> Continuing discussion will develop the best

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106. Rome Statute art. 8 *bis*.

107. See INT’L CRIM. CT., *supra* note 103, at 26, 29.

108. See *Situation in Ukraine*, *supra* note 68.

109. Heads of state are generally recognized as immune from prosecution by other states. See *Case Concerning the Arrest Warrant of 11 April 2000 (DRC v. Belgium)*, Judgment, (Feb. 14, 2002). While recognized as an outgrowth of state immunity, it was considered and accepted by the I.C.J. in its judgment in the *Case Concerning the Arrest Warrant of 11 April 2000 (DRC v. Belgium)*. See *id.* In that case, the I.C.J. held that heads of state cannot be prosecuted in another country for their crimes (effectively limiting Belgium’s attempts to use universal jurisdiction), but that they can be prosecuted before certain international tribunals. See *id.*; INT’L CRIM. CT., *supra* note 103, at 14.

110. See INT’L CRIM. CT., *supra* note 103, at 26.

111. See Oona A. Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine*, JUST SEC. (Sept. 20, 2022), <https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to->

course for such a plan, but a look to history cautions against too much optimism. To date, the only international tribunals established without the consent of the state being prosecuted were established by U.N. Security Council resolution.<sup>112</sup>

The broad lack of coercive power in international bodies—an intentional design to respect state sovereignty—becomes a major flaw in the system when presented with a nation strong enough to withstand significant political and economic pressure. Russia’s flagrant violations of international law have shown a spotlight onto this flaw and even a measured response demands change. If we assume that there must be a mechanism for change within the international order as it already exists, it becomes abundantly clear that there is only one organ vested with the coercive power appropriate to act: the U.N. Security Council.

### III. AND ALL ROADS END AT THE SECURITY COUNCIL

The U.N. Security Council is unique within the international legal order because of its structure and the power with which it is vested. Now comprised of fifteen members, the Security Council hosts a cast of rotating nations who sit alongside the Permanent Five (P5) members—China, the United Kingdom, France, the United States, and Russia.<sup>113</sup>

The existence of the P5 was established in the aftermath of World War II as nations—principally the United States and the U.S.S.R.—jockeyed for dominant positions in the post-war global order.<sup>114</sup> Charged with the “maintenance of international peace and security,” the Security Council was originally envisioned as a global policing body.<sup>115</sup>

The most important aspect of status as a P5 member is not permanence, but control. The voting procedure requires that all substantive votes of the Security Council receive the assent of all

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prosecute-the-crime-of-aggression-against-ukraine/ [https://perma.cc/5CTB-AFUM].

112. See S.C. Res. 827 (May 25, 1993) (establishing the International Criminal Tribunal for the former Yugoslavia); S.C. Res. 955 (Nov. 8, 1994) (establishing the International Criminal Tribunal for Rwanda).

113. *The UN Security Council*, COUNCIL ON FOREIGN REL. (Feb. 28, 2023, 11:00 AM), <https://www.cfr.org/background/un-security-council> [https://perma.cc/X299-Q2S7].

114. *See id.*

115. *See id.*

five permanent members to pass.<sup>116</sup> This structure thus gives all five nations a “veto power,” which has provided the P5 with extraordinary power over the affairs of the world.

### A. *Veto in Practice*

Since the inception of the United Nations, members of the P5 have exercised their veto power 271 times.<sup>117</sup> The vast majority of these have been cast by the United States and Russia.<sup>118</sup> Despite their charge to maintain international peace and security, the voting record shows that the P5 have often exercised their veto against peace and security in pursuit of their own national or partner interests.

In 1980, while involved in combat against the mujahadeen, the U.S.S.R. vetoed measures affirming the sovereignty of Afghanistan and condemning the armed intervention there.<sup>119</sup> Following a decision from the I.C.J. labeling its involvement in Nicaragua illegal in 1986, the United States vetoed a resolution calling for it to abide by the court’s decision and reaffirming Nicaragua’s right to sovereignty.<sup>120</sup> The United States has consistently vetoed any measures calling for Israel to halt its occupation or activities in the occupied

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116. The Yalta Formula, proposed by President Roosevelt, provided the following:

1. Each member of the Security Council should have one vote.
2. Decisions of the Security Council on procedural matters should be made by an affirmative vote of seven members.
3. Decisions of the Security Council on all other matters should be made by an affirmative vote of seven members, including the concurring votes of the permanent members; provided that, in decisions under Chap. VIII, Sec. A, and under the second sentence of Paragraph 1 of Chap. VIII, Sec. C, a party to a dispute should abstain from voting.

See Francis O. Wilcox, *The Yalta Voting Formula*, 39 AM. POL. SCI. REV. 943, 944-45 (1945). This language was largely adopted, with changes to numbering, as Article 27 of the U.N. Charter. See U.N. Charter art. 27.

117. There have been 271 actual vetoes across 219 different draft resolutions. See *UN Security Council Meetings & Outcomes Tables*, DAG HAMMARSKJÖLD LIBR., <https://research.un.org/en/docs/sc/quick> [<https://perma.cc/8RE3-DR4X>].

118. Russia vetoed measures 120 times as the U.S.S.R. and 34 times as the Russian Federation for a total of 154 vetoes. See *The UN Security Council*, *supra* note 113. The United States has used the veto 87 times. See *id.* The next highest veto exercise is by the United Kingdom with 32 instances, all of which occurred before 1991. See *id.*

119. See Security Council Meeting Records, U.N. Doc. S/PV.2190, at 17-18 (Jan. 7-9, 1980).

120. See Security Council Meeting Records, U.N. Doc. S/PV.2704, at 58 (July 31, 1986).

Palestinian territories.<sup>121</sup> The “Palestinian Question,” as it has become euphemistically labeled, has grown into a full-blown humanitarian crisis characterized by cyclical violence and pervasive rights violations.<sup>122</sup> It is clear from the above examples that the veto power has forced the Security Council to, at times, work in direct contravention to its mandate.<sup>123</sup>

Russia’s veto exercise in Syria from 2011 to the present has created one of the most glaring examples of self-serving use of the power. While Russia backed the Syrian government headed by Bashar al-Assad, reports proliferated regarding the government’s violations of international criminal and humanitarian law.<sup>124</sup> In spite of these reports and its duty to promote international peace and security as a member of the Security Council, Russia has vetoed eighteen resolutions to address and mitigate various aspects of the conflict in Syria.<sup>125</sup> These vetoes blocked a variety of Security Council actions, including condemnation of crimes committed by the Assad regime (resolutions condemning crimes by the Islamic State of Iraq and the Levant (ISIL) and other involved terrorist groups were passed without issue), referral of the situation to the I.C.C., inspections regarding the alleged use of chemical weapons, and supply of humanitarian assistance to civilians during the siege of Aleppo.<sup>126</sup>

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121. See, e.g., Security Council Meeting Records, U.N. Doc. S/PV.2850, at 34 (Feb. 17, 1989); S/PV. 2867, at 31 (June 9, 1989); S/PV.3756, at 6 (Mar. 21, 1997); S/PV.4438, at 30 (Dec. 14-15, 2001); S/PV.4934, at 3 (Mar. 25, 2004); S/PV.5565, at 3 (Nov. 11, 2006); S/PV.8274, at 4 (June 1, 2018).

122. The current conflict in Gaza is the latest in iterative violence between Israel and Palestine and continues to illustrate the United States’ use of its veto power to shield Israel from international pressure. See Security Council Meeting Records, U.N. Doc. S/PV.9499, at 3-4 (Dec. 8, 2023); *History of the Question of Palestine*, UNITED NATIONS, <https://www.un.org/unispal/history/> [<https://perma.cc/8DD7-BWLT>].

123. The Security Council’s mission is to “maintain or restore international peace and security” and its repeated failures to address humanitarian crises or call for an end to armed conflict are clear failures to adhere to its mission. See U.N. Charter art. 39.

124. See *generally Syria*, AMNESTY INT’L, <https://www.amnesty.org/en/location/middle-east-and-north-africa/syria/report-syria/> [<https://perma.cc/4DZA-UDXA>].

125. See *UN Security Council Meetings & Outcomes Tables*, *supra* note 117.

126. See JENNIFER TRAHAN, EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES 300 (2020).

Finally, Russia has also proceeded to veto any measures directed at the current invasion of Ukraine.<sup>127</sup> While Russia is separated from the situation in Syria at least to a small degree, there is no denying that Russia's exercise of its veto power regarding Ukraine is in use in a situation in which it is a direct party. These apparent abuses beg the question of how and if the veto power can be constrained.

### *B. Abstention Obligation*

The history of veto use by the Security Council implies a sort of impunity for the P5 and their closest allies. However, the strict wording of the U.N. Charter indicates that this was not the intent.<sup>128</sup> The veto power described in the U.N. Charter carries limits in theory that are not used in practice.<sup>129</sup> One of these is the abstention obligation.<sup>130</sup>

Under paragraph 3 of Article 27 of the U.N. Charter, "part[ies] to a dispute shall abstain from voting" in decisions under Chapter VI or paragraph 3 of Article 52.<sup>131</sup> This provision, clear on its face, has been largely ignored for most of its history, and nearly non-existent in the twenty-first century.<sup>132</sup> Even in the few instances in which the abstention obligation was cited specifically, states have only done so in vague and non-committal language.<sup>133</sup>

It is important to note that the abstention obligation applies with equal force to permanent and non-permanent Security Council members alike.<sup>134</sup> However, there is unique danger in the failure of permanent members to abide by the abstention obligation because of the power of their choice to vote or veto. The history of veto abuse

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127. See Security Council Meeting Records, U.N. Doc. S/PV.9143, at 3-4 (Sept. 30, 2022), S/PV.8979, at 6, 8-9 (Feb. 25, 2022). Russia also vetoed a measure aimed at its actions during the invasion and annexation of Crimea in 2014. See Security Council Meeting Records, U.N. Doc. S/PV.7138, at 2-3 (Mar. 15, 2014).

128. U.N. Charter art. 27, ¶ 3.

129. See *infra* notes 129-31 and accompanying text.

130. U.N. Charter art. 27, ¶ 3.

131. *Id.*

132. *In Hindsight: Obligatory Abstentions*, SEC. COUNCIL REP. (Mar. 31, 2014), [https://www.securitycouncilreport.org/monthly-forecast/2014-04/in\\_hindsight\\_obligatory\\_abstentions.php](https://www.securitycouncilreport.org/monthly-forecast/2014-04/in_hindsight_obligatory_abstentions.php) [<https://perma.cc/NV7C-QUNN>].

133. See *id.*

134. See *id.*

and the broad reliance on the U.N. Security Council throughout the international legal order seem to condemn us to a system of impunity for a powerful few, trading certainty in the international power structure for true effectiveness.

#### IV. RECOMMENDED STEPS

Change at the international level is immensely difficult. However, this cannot be a reason to allow a system which supports national sovereignty and impunity over anything else, even humanity. The flagrant and repeated nature of Russia's violations make it clear that international law is ill-equipped to vindicate Ukraine's interests and punish Russia's aggression.<sup>135</sup> Only substantive change in the international procedure will suffice to enforce an international legal order. Larger and more extensive amendments to the international legal system are beyond the scope of this Note. This Note offers a few first steps to bolstering the effectiveness of the international system through the U.N. Security Council.

##### *A. Enforce the Abstention Obligation*

The first of these steps is simply to enforce the abstention obligation as it is written. This naturally would limit some of the abuses of the veto power that have arisen in the Security Council, as can be seen by the veto's use in prohibited situations above, though it would not touch on the more coercive measures available in Chapter VII of the U.N. Charter.<sup>136</sup> The difficulty is *how* to enforce an obligation that has largely been ignored for most of the U.N.'s history.

The first question to face is why the abstention obligation is so often ignored. As discussed above, the veto is most often exercised in pursuit of national self-interest.<sup>137</sup> However, this doesn't explain why the other permanent members would fail to demand abstention where it is obligated. The clearest and most likely explanation is that the members of the P5 are unwilling to enforce the abstention

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135. *See supra* Part II.

136. *See supra* Part III.

137. *See supra* Part III.A.

requirement as it could dilute the power of their own votes and vetoes in the future.<sup>138</sup> It is precisely this politicking which defeats much of the efficacy of the international system.

Although ignoring the abstention obligation throughout history has rendered it largely moot, there has been no formal action to abrogate or remove it. As such, it is still a standing provision of the U.N. Charter. Thus, no change to hard law is required. There are likely two avenues by which to begin enforcing the obligation.

The first is the same avenue by which the abstention obligation was set aside: practice. The United Kingdom and France, both P5 members, have refrained from use of the veto entirely since the fall of the U.S.S.R. in 1991.<sup>139</sup> However, neither have raised the issue of abstention obligations in that time.<sup>140</sup> Reestablishing the obligation is a long-term plan and would require continued practice by nations. It would also require those nations abstaining to explicitly cite the article in order to revive its force within the Security Council. There appears to be some movement in this regard.<sup>141</sup> The General Assembly voted in April of 2022 to require Security Council members to formally explain their use of the veto.<sup>142</sup> This requirement could provide the opportunity to continually raise the issue and the additional leverage needed to pressure non-conforming states to abide by the abstention obligation.

A more formal and potentially faster avenue is through a vote within the Security Council itself. Any member of the Security Council could put forth the issue of reviving the enforcement of the abstention obligation. There is a compelling argument that the vote would be *procedural*, as it pertains not to any action taken by the Security Council, but is limited to the practice of voting, which is by definition procedural. A procedural vote avoids the necessity of

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138. See Colum Lynch, *Russia's Actions Fuel Calls for U.N. to Rein in Security Council Veto Power*, FOREIGN POLY (Mar. 1, 2022, 4:54 PM), <https://foreignpolicy.com/2022/03/01/russia-ukraine-war-un-security-council-veto/> [<https://perma.cc/UPQ2-J3AK>].

139. *The UN Security Council*, *supra* note 113.

140. The last nation to explicitly raise the issue of the abstention obligation was Libya in 2000. See Security Council Meeting Records, U.N. Doc. S/PV.4128, at 30 (Apr. 17, 2000).

141. See *UN General Assembly Mandates Meeting in Wake of any Security Council Veto*, U.N. NEWS (Apr. 26, 2022), <https://news.un.org/en/story/2022/04/1116982> [<https://perma.cc/6KFV-THTK>].

142. *Id.*

assent from the P5 members, as procedural votes only require the approval of any nine members of the Security Council to pass.<sup>143</sup>

A procedural vote on the abstention obligation is liable to create an uproar. However, Russia's flagrant violations of international law have provided precisely the cause behind which an appropriate leader can rally support to resume the practice of abstentions.<sup>144</sup> There is already significant support from other U.N. member nations to do so.<sup>145</sup>

Reinforcing the abstention obligation through practice might also be expedited by the leveraging of sanctions against non-compliant states. While such sanctions would necessarily be voluntary and likely have limited impact, compounded sanctions could provide the pressure necessary to force states to abide by the abstention obligation.

Further, the General Assembly could expand use of the Uniting for Peace resolution. Adopted in 1950, this resolution permits the General Assembly to act in the face of atrocity crimes when the Security Council is unable to do so due to a veto from one of its permanent members.<sup>146</sup> Expanding the use of the Uniting for Peace resolution could provide a greater ability to sideline vetoing members of the Security Council and thus discourage such activity.

There could be concern that enforcing the abstention obligation presents new definitional issues to the U.N., namely, that enforcing the obligation would require defining what it means to be "party" to a "dispute," as clarity on such definitions would be necessary for U.N. members to determine when abstention is required.<sup>147</sup> These are real, substantive questions that would be presented to the Security Council. However, these present a no-more complicated question than defining a "breach" or "threat" to international peace

143. See *Procedural Vote*, SEC. COUNCIL REP. (Nov. 23, 2020), <https://www.securitycouncilreport.org/un-security-council-working-methods/procedural-vote.php> [<https://perma.cc/CAD9-8M93>].

144. See John Chappell & Emma Svoboda, *Must Russia Abstain on Security Council Votes Regarding the Ukraine Crisis?*, LAWFARE (Feb. 11, 2022, 9:01 AM), <https://www.lawfareblog.com/must-russia-abstain-security-council-votes-regarding-ukraine-crisis> [<https://perma.cc/4JDN-XWHK>].

145. See *id.* There also exist further efforts to restrict the use of vetoes in other scenarios, especially in the face of atrocity crimes. See TRAHAN, *supra* note 126, at 102-18.

146. See SEC. COUNCIL REP., SECURITY COUNCIL DEADLOCKS AND UNITING FOR PEACE: AN ABRIDGED HISTORY (2013).

147. U.N. Charter art. 27, ¶ 3.

and security, the difficulty of which has not prevented the functioning of the Security Council to this point.<sup>148</sup> Regardless of the approach taken, both “party” and “dispute” are well within the competence of the international community to define.

There are immediate steps available to restrict some of the worst abuses of the veto power by the P5. Enforcing the abstention obligation is by no means simple, but by leveraging an already existing provision of the U.N. Charter, the case for doing so is much stronger than any other charge that might require a formal amendment to the U.N. Charter. However, enforcing the abstention obligation is not sufficient to curb the Security Council’s ability or proclivity to work in violation of its mandate.

### *B. Expand the Abstention Obligation*

To further strengthen the enforcement capacity of the international system, the abstention obligation should also be expanded. As it is written, the abstention obligation only requires members to abstain from votes regarding “dispute[s]” in decisions under Chapter VI—Pacific Settlement of Disputes—and paragraph 3 of Article 52 of the U.N. Charter—referring matters to regional bodies in pacific settlements.<sup>149</sup> This limitation to pacific settlements was a concession to the “great powers” after World War II—who became the P5—on the assumption that, in any enforcement action undertaken by the Security Council, the members of the P5 would be responsible for supplying the majority of arms and personnel and that the ability to veto such a responsibility should follow.<sup>150</sup> These assumptions no longer accurately reflect the world, as more and more nations become active global participants and supply resources to the U.N. when needed.<sup>151</sup>

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148. *See id.* art. 39.

149. *See id.* art. 27, ¶ 3; *see generally id.* art. 52, ¶ 3.

150. *See Wilcox, supra* note 116, at 944.

151. Currently, the top contributing nations to police and armed forces for the U.N. are Nepal (6,247), Bangladesh (6,197), Nepal (6,299), and India (6,073); the P5 currently contribute as follows: China at 2,267, France at 587, the U.K. at 282, Russia at 88, and the U.S. at 35. *See Uniformed Personnel Contributing Countries by Ranking*, U.N. PEACEKEEPING 1-3 (Nov. 30, 2023), [https://peacekeeping.un.org/sites/default/files/02\\_country\\_ranking\\_68\\_november\\_2023\\_revision\\_1.pdf](https://peacekeeping.un.org/sites/default/files/02_country_ranking_68_november_2023_revision_1.pdf) [<https://perma.cc/FHL7-UQLW>].

The abstention obligation should therefore remove the qualifying language “in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.”<sup>152</sup> Paragraph 3 of Article 27, governing the abstention, should instead read “in *all* substantive decisions by the Security Council, a party to a dispute shall abstain from voting.”

Further, effort should be made to define exactly who is a “party” to a “dispute.” Clear cases should include those in which a nation’s military, law enforcement, or similar coercive entity is directly involved in the situation. An exception for humanitarian functions might also be appropriate, depending upon the context. Definitions could perhaps be extrapolated from existing customary international law; for example, utilizing the definitions of international and non-international armed conflict provided by the Geneva Conventions as a springboard to define both “party” and “dispute.”<sup>153</sup> The contours of these definitions would rely on a case-by-case approach to fully develop.

Further expansion of the abstention obligation to Chapter VII resolutions could raise a potential paradoxical situation in which a nation, abstaining from voting, is then asked to supply peacekeepers for a conflict to which they are a party. To avoid this, abstaining nations whose abstention is *obligatory*, not voluntary, should be automatically excluded from any obligations to supply personnel for any adopted enforcement measures. This comports with the stipulations in the U.N. Charter that require a state’s active consideration and cooperation in providing “armed forces, assistance, and facilities.”<sup>154</sup>

Limiting the abstention obligation to Chapter VI actions severely undermines the Security Council’s ability to employ coercive measures against any member of the Security Council. This is because the abstention obligation grants even participating parties a vote or a veto, for non-permanent members and permanent members,

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152. See U.N. Charter art. 27, ¶ 3.

153. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S.; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

154. U.N. Charter arts. 43-44.

respectively. This creates the possibility that a permanent member of the Security Council can veto a Chapter VII action for use of force against it if Chapter VI measures have already failed. Russia did precisely this in both 2014 in Crimea and presently in Ukraine, rapidly initiating armed conflict, ignoring any entreaties for pacific settlement, and vetoing any actions that arise in the Council to restrain it.<sup>155</sup>

The challenge of expanding the abstention obligation is that doing so requires amendment of the U.N. Charter. The difficulty of amending the Charter is evident in the fact that the U.N. Charter has only been amended five times in almost 80 years.<sup>156</sup> The challenge is further evinced in the fact that four of the five amendments involved only increasing the membership of various councils.<sup>157</sup>

The procedure for amending the U.N. Charter is described in Article 108.<sup>158</sup> Amendments require adoption by two-thirds of the members of the General Assembly, ratification by two-thirds of the members of the U.N., and the ratification of every permanent member of the Security Council.<sup>159</sup>

Expanding the abstention obligation and thereby curtailing the power of the P5 seems largely impossible in the face of the amendment procedures. However, France and the United Kingdom have shown that even self-interested nations can act for the common good and cede some measure of power to provide better effect on the international stage.<sup>160</sup> This example follows a trend that has redefined sovereignty to account for the necessity of an effective international legal order.<sup>161</sup> Such a system requires states to relinquish some

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155. See, e.g., Security Council Meeting Records, U.N. Doc. S/PV.7138 (Mar. 15, 2014) (Russia vetoes action by the Security Council regarding Crimea); Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto, U.N. Press Release SC/14808 (Feb. 25, 2022) (Russia vetoes action by the Security Council condemning the invasion of Ukraine).

156. *Can the UN Charter Be Amended, and How Many Times Has This Occurred?*, DAG HAMMARSKJÖLD LIBR. (July 20, 2022), <https://ask.un.org/faq/140440> [<https://perma.cc/9UK7-R39K>].

157. See *id.*

158. U.N. Charter art. 108.

159. See *id.*

160. See TRAHAN, *supra* note 126, at 103, 109-14.

161. See generally Samantha Besson, *Sovereignty*, OXFORD PUB. INT'L L., <https://opil.oup.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1472?print=pdf>

measure of power and certainty in ordering their own affairs to create the power necessary for the global community to provide active and effective oversight.<sup>162</sup> The fear that leads the P5 to cling to their veto power is precisely the fear that inhibits any truly effective enforcement measures and it is a fear that must be set aside. Extending the abstention obligation to include Chapter VII measures could vastly improve the coercive power of the Security Council and thus the effectiveness of international enforcement mechanisms overall.

### CONCLUSION

Russia's invasion of Ukraine is a "flagrant violation of ... international law[s]" and has prompted a war that has only proliferated violence and loss and an unknown number of international violations.<sup>163</sup> In engaging in his war of choice, Putin has continued a cycle of unfounded allegations and propaganda in order to seize land he claims rightfully belongs to Russia.<sup>164</sup> While the international community has displayed admirable cohesiveness in addressing the issue thus far, the lack of effect on Russia's behavior shows the weakness that pervades the international system—a lack of coercive power.

The options for enforcement on the global stage seem endless. Yet a peek behind the curtain shows that each of the available mechanisms leads back to one entity: the U.N. Security Council.

The unique coercive power available to the Security Council provides the best opportunity for constraining Russia and punishing its continuing violation of the most basic tenets of international law. However, the Council's present practice and structure prevent it from doing so. Enforcing and expanding the abstention obligation under the U.N. Charter, while itself insufficient, is a good first step to achieving an international system with the ability to prevent and

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[<https://perma.cc/H9TX-V55S>] (Apr. 2011).

162. *See id.* ¶¶ 38, 83.

163. Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto, U.N. Press Release SC/14808 (Feb. 25, 2022).

164. *See* Michael Schwirtz, Maria Varenikova & Rick Gladstone, *Putin Calls Ukrainian Statehood a Fiction. History Suggests Otherwise.*, N.Y. TIMES (Aug. 27, 2022), <https://www.nytimes.com/2022/02/21/world/europe/putin-ukraine.html> [<https://perma.cc/Z6DL-LW8E>].

punish international crimes. While these changes demand concessions by the United States and other permanent Security Council members, they are a small price to pay to begin to build a system that can actually serve the international legal order that it seeks to uphold.

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