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Political Will to Amend the International Criminal Court’s Aggression Regime After Russia’s Invasion of Ukraine

YVONNE DUTTON†

I. INTRODUCTION

The international community is broadly aligned in condemning Russia’s February 2022 invasion of Ukraine and acknowledging it as an act of aggression in violation of the UN Charter.¹ Indeed, 141 states voted in favor of a UN General Assembly Resolution² deploring the “aggression” by Russia “in violation of Article 2(4) of the Charter.”³ Only five states, including Russia, voted against the resolution.⁴ The UN Security Council previously considered a draft resolution which,

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1. One study conducted by Professor Alonso Gurmendi concluded that as of April 3, 2022, 143 states had gone on record recognizing Russia’s February 2022 invasion of Ukraine as an act of aggression. See Alonso Gurmendi, *Tracking State Reactions to Russia’s Invasion of Ukraine: A Resource for Research*, OPINIOJURIS (Apr. 3, 2022), <http://opiniojuris.org/2022/03/04/tracking-state-reactions-to-russias-invasion-of-ukraine-a-resource-for-research/>.

2. G.A. Res. ES-11/1, Voting Summary (Mar. 2, 2022), <https://digitallibrary.un.org/record/3959039?ln=en>.

3. G.A. Res. ES-11/1, Aggression Against Ukraine (Mar. 2, 2022), <https://digitallibrary.un.org/record/3959039?ln=en>. At paragraph two, Article 2(4) requires states to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” *Id.* See U.N. Charter art. 2, para. 4.

4. Voting Summary, *supra* note 2.

among other things, similarly deplored Russia's aggression against Ukraine as a violation of the Charter. Although it garnered the support of eleven members of the Council, Russia wielded its veto, while China, India, and the United Arab Emirates abstained.⁵

In addition, the international community is broadly supporting a leading role for the International Criminal Court (ICC)⁶ in holding perpetrators accountable for the many crimes committed because of that invasion. For example, a record-breaking forty-three states⁷ referred the situation in Ukraine to the ICC for investigation.⁸ States have also lent unprecedented support to the Court, providing it with additional funding and investigative resources, including personnel, to assist it in collecting evidence to be used in prosecuting individuals responsible for crimes committed in connection with Russia's invasion.⁹ Even the United States, a state that has had a long and

5. 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).

6. The ICC was created in July 2002 after the required 60 states ratified the Rome Statute creating the Court. *International Criminal Court – Some Questions and Answers*, U.N. DEP'T OF PUB. INFO. (Oct. 1998), <https://legal.un.org/icc/statute/iccq%26a.htm>.

7. Referring countries included many in Europe, but also Australia, Canada, Costa Rica, and Colombia. *Ukraine: Countries Request ICC War Crimes Inquiry*, HUM. RTS. WATCH (Mar. 2, 2022, 4:42 PM), <https://www.hrw.org/news/2022/03/02/ukraine-countries-request-icc-war-crimes-inquiry>.

8. See *Ukraine*, INT'L CRIM. CRT., <https://www.icc-cpi.int/ukraine> (last visited Feb. 6, 2022).

9. See, e.g., Press Release, Ministry Just., Foreign, Commonwealth & Dev. Off., Rt. Hon. Dominic Raab MP & Rt. Hon. James Cleverly MP, International Coalition to Support ICC Russian War Crimes Investigation (Mar. 24, 2022), <https://www.gov.uk/government/news/international-coalition-to-support-icc-russian-war-crimes-investigation> (referencing the UK's pledge to the ICC of an additional £1 million in funding, as well as war crimes investigators); AFP, *EU states give 2.5 mn euros to ICC for Ukraine war crimes*, THE GUARDIAN (Apr. 11, 2022, 1:47 PM), <https://guardian.ng/news/eu-states-give-2-5-mn-euros-to-icc-for-ukraine-war-crimes/> (including a €2.5 million contribution from Germany, the Netherlands, and Sweden); Press Release, Dep't Foreign Affs. (Ir.), Minister for Foreign Affairs Simon Coveney Announces €3 million for the ICC (Apr. 14, 2022), <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2022/april/minister-for-foreign-affairs-simon-coveney-announces-3-million-for-the-icc.php> (referencing Ireland's €3 million contribution to aid the ICC); Press Release, Eur. Union Agency for Crim. Just. Coop., ICC Participates in Joint Investigation Team Supported by Eurojust on Alleged Core International Crimes in Ukraine (Apr. 25, 2022), <https://www.eurojust.europa.eu/news/icc-participates-joint-investigation-team-supported-eurojust-alleged-core-international-crimes> (referencing a partnership between Eurojust and a group of European countries to share evidence and resources to facilitate prosecutions of crimes committed in Ukraine); Press Release, Int'l Crim. Ct., 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 (May 17, 2022), <https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-qc-announces-deployment-forensics-and->

contentious history with the Court,¹⁰ has seemingly changed its stance. In March 2022, the U.S. Senate unanimously passed a resolution encouraging ICC member states to petition the ICC to investigate and prosecute Russian atrocities committed in Ukraine.¹¹ The United States also indicated that it was considering various ways to assist the Court without violating legislation that purports to limit the country's ability to support the ICC.¹² In December 2022, the United States backed these statements of support with action: President Biden signed legislation amending prior restrictive laws to allow support and funding to the ICC for the Ukraine situation as long as the investigation and prosecution do not involve any U.S. servicemembers or citizens.¹³

At present, however, the ICC's jurisdiction over the situation in Ukraine is confined to three of the four crimes defined within the

investigative-team-ukraine (quoting ICC Prosecutor Karim Khan as stating 21 states declared they would second national experts to assist the Office of the Prosecutor's (OTP) work in Ukraine, while 20 states committed to contributing financially to the OTP in the wake of Russia's invasion).

10. For example, in 2002 when the Court came into being, the United States responded by passing the American Service-Members' Protection Act of 2002 (ASPA), which prohibits the U.S. from providing various forms of assistance to the Court. *See* 22 U.S.C. § 7421 et seq. (2002). The Trump Administration was openly hostile to the Court and even sanctioned some of those in leadership positions. *See, e.g.,* Laurel Wamsley, *Trump Administration Sanctions ICC Prosecutor Investigating Alleged U.S. War Crimes*, NPR (Sept. 2, 2020, 6:27 PM), <https://www.npr.org/2020/09/02/908896108/trump-administration-sanctions-icc-prosecutor-investigating-alleged-u-s-war-crim> (reporting on the sanctions leveled by the U.S. government against the ICC's Chief Prosecutor, Fatou Bensouda, who was investigating alleged war crimes committed in Afghanistan).

11. Press Release, Sen. Lindsey Graham, Graham War Crimes Resolution Unanimously Passes Senate (Mar. 15, 2022), <https://www.lgraham.senate.gov/public/index.cfm/press-releases?ID=37BA157B-FDF3-4298-9F3D-FB1B313A54CC>. *See also* Ryan Goodman, *Top Cover: Congressional Republicans Pave Way for US Policy Shift on International Criminal Court*, JUST SEC. (Apr. 13, 2022), <https://www.justsecurity.org/81093/top-cover-congressional-republicans-pave-wave-for-us-policy-shift-on-intl-criminal-court> (collecting statements of support for the ICC by members of Congress).

12. Ryan Goodman, *How Best to Fund the International Criminal Court*, JUST SEC. (May 27, 2022), <https://www.justsecurity.org/81676/how-best-to-fund-the-international-criminal-court/> (referencing the several laws that restrict funding the ICC).

13. *See* Consolidated Appropriations Acts, 2023, H.R. 2617, 117th Cong. § 7073 (b)(a) (2023), available at <https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf> ("Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity, or from rendering assistance to the International Criminal Court to assist with investigations and prosecutions of foreign nationals related to the Situation in Ukraine, including to support victims and witnesses.").

Rome Statute: genocide, crimes against humanity, and war crimes.¹⁴ States that have ratified the Rome Statute agree that the ICC can exercise jurisdiction over any of those three crimes if committed by the state's nationals or in their territory.¹⁵ Under Article 12(3) of the Rome Statute, non-State Parties may submit to the Court's jurisdiction over these three crimes on an *ad hoc* basis.¹⁶

In the case of crimes committed by Russians in Ukraine, the ICC can exercise jurisdiction over genocide, crimes against humanity, and war crimes even though neither Russia nor Ukraine are ICC member States. This is because Ukraine took advantage of Article 12(3) and filed declarations¹⁷ accepting the Court's jurisdiction over crimes committed in its territory starting from February 20, 2014.¹⁸ Despite these Article 12(3) declarations, however, the ICC cannot exercise jurisdiction over the crime of aggression because, as discussed in more detail below, the ICC's jurisdictional regime over aggression is significantly more limited than its jurisdiction over the other three crimes. In other words, the fact that Ukraine has accepted the jurisdiction of the Court over crimes committed in its territory since 2014 is not sufficient to grant the ICC jurisdiction over the crime of aggression.

14. The ICC has jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and aggression. See Rome Statute of the International Criminal Court, art. 6 (genocide), 2187 U.N.T.S. 90, 17 July 1998, entry into force Jul. 1, 2002 [hereinafter, "Rome Statute"]. *Id.* at art. 7 (crimes against humanity). *Id.* at art. 8 (war crimes). *Id.* at art. 8*bis* (aggression).

15. Rome Statute, *supra* note 14, art. 12(1)–(2).

16. Rome Statute, *supra* note 14, art. 12(3). As discussed below in this Article, Ukraine filed just such a declaration accepting the jurisdiction of the Court. See *infra* note 17.

17. For the first declaration, see Declaration of Verkhovna Rada of Ukraine, No. 61219/35-673-384, INT'L CRIM. CT. (Apr. 9, 2014), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf>. Ukraine filed a second declaration on September 8, 2015, accepting the *ad hoc* jurisdiction of the ICC with respect to alleged crimes committed in eastern Ukraine and Crimea since February 20, 2014. See Declaration of Verkhovna Rada of Ukraine, No 145-VIII, INT'L CRIM. CT. (Sept. 8, 2015), https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine.

18. *Id.* The declarations were filed in the wake of Russia's illegal annexation of Crimea and its occupation of Eastern Ukraine. For more information on these conflicts, see Steven Pifer, *Crimea: Six years after the illegal annexation*, BROOKINGS (Mar. 17, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/03/17/crimea-six-years-after-illegal-annexation/> (discussing Crimea); Rob Picheta, *Russia's war is ravaging Donbas, Ukraine's beleaguered heartland. Here's what the region means to Putin*, CNN (Apr. 15, 2022, 8:54 AM), <https://www.cnn.com/2022/04/15/europe/donbas-region-ukraine-war-russia-explainer-intl/index.html> (discussing the Donbas).

In this essay, I argue that while the restrictions on the ICC's exercise of jurisdiction over the crime of aggression are unfortunate and allow for impunity, states likely do not have the political will—at least in the near term—to broaden the ICC's ability to prosecute crimes of aggression. To support this point, I first explain how the crime of aggression is defined in the ICC's Rome Statute and the jurisdictional regime that was agreed upon by States Parties. I then explain some of the negotiating history of the aggression amendments to demonstrate that not only the permanent members of the Security Council, but other states as well, wanted to constrain the ICC's ability to exercise jurisdiction over aggression. I suggest that although the great majority of states have condemned in words and actions Russia's aggressive acts against Ukraine, powerful states likely will continue to advance various reasons why the ICC's jurisdiction over aggression should not be broadened. They certainly may want to see Russia held accountable for aggression, but they still may not wish to commit to a regime that might in the future seek to hold them accountable for committing that same crime.

II. THE ICC'S AGGRESSION DEFINITION AND JURISDICTIONAL REGIME

At the 1998 Rome Diplomatic Conference, states met to negotiate a treaty establishing a permanent international criminal court but could not agree on a definition of aggression or how the ICC might be able to exercise jurisdiction over the crime.¹⁹ States thus agreed to hold the matter over, listing the crime within the Court's jurisdiction, but leaving it to be negotiated at a later Review Conference, which was convened in Kampala in 2010.²⁰ Although negotiations at Kampala were intense, states ultimately reached consensus agreements on the definition of the crime and the jurisdictional regime that would govern it.²¹

19. See, e.g., Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L.J. 358, 361 (2012) (stating that although several country delegations supported the inclusion of the crime of aggression, its potential inclusion was deferred until a later Review Conference).

20. See Beth Van Schaack, *Negotiating at the Interface of Power and Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT'L L. 505, 512 (2011) (reporting that at the 1998 Rome Conference states could not agree on the definition of aggression or the jurisdictional regime over it and agreed to reconsider it at a later Review Conference).

21. See, e.g., Jennifer Trahan, *From Kampala to New York - The Final Negotiations to Activate the Jurisdiction of the International Criminal Court over the Crime of Aggression*, 18 INT'L CRIM. L. REV. 197, 201–02 (2018) (describing the adoption of the aggression amendments at the Kampala Review Conference).

First, as to the definition, Article 8*bis* of the Rome Statute defines the crime of aggression as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”²² Article 8*bis* further explains that an act of aggression “means the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations.”²³ The Article thereafter lists some specific acts which constitute the act of aggression, including invasions, bombardments, and attacks.²⁴

As to the jurisdictional regime, states at Kampala eventually agreed on a regime that essentially ensured that the ICC would rarely if ever find itself in a position to investigate and prosecute the crime of aggression.²⁵ First, consider Article 15*bis* which provides that States Parties to the Rome Statute can opt out of the Court’s exercise of jurisdiction over the crime of aggression by lodging a declaration to that effect.²⁶ As to states that have not ratified the Rome Statute, the combined effect of Articles 15*bis* and 15*ter* is that absent a Security Council referral “the Court shall not exercise its jurisdiction over the crime of aggression when committed by that state’s nationals or on its territory.”²⁷ In other words, absent a Security Council referral, the Court has jurisdiction over aggression only when a State Party

22. Rome Statute, *supra* note 14, art. 8*bis*(1). Professor Jennifer Trahan has described the definition of the crime as “conservative,” because (1) it only covers a limited number of perpetrators who qualify as military or political leaders and (2) it only covers “manifest” violations of the Charter. Jennifer Trahan, *Revisiting the History of the Crime of Aggression in Light of Russia’s Invasion of Ukraine*, ASIL (Apr. 19, 2022), https://www.asil.org/insights/volume/26/issue/2#_edn30.

23. Rome Statute, *supra* note 14, art. 8*bis*.

24. *Id.* at art. 8*bis*(2) (listing acts of aggression).

25. See text *infra* at footnotes 38–47.

26. Rome Statute, *supra* note 14, art. 15*bis*(4) (“The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.”)

27. Article 15*bis*(5) provides that the Court cannot exercise jurisdiction over the crime of aggression as to states that have not ratified the Rome Statute. *Id.* at art. 15*bis*(5). Article 15*ter*(1) provides that the Court can exercise jurisdiction over the crime of aggression if the Security Council refers the matter to the Court in accordance with Article 13(b) (referencing the Security Council’s powers under Chapter VII of the United Nations Charter). *Id.* at art. 15*ter*(1).

commits the crime of aggression against another State Party, provided both states also affirmatively ratify the aggression amendment and do not also opt-out of jurisdiction.²⁸ Also, even though the Security Council can refer situations involving both States Parties and non-States Parties,²⁹ any of the Council's permanent members—which includes Russia—have the power to veto any such referral.³⁰ This means that powerful countries and their allies are not likely to find themselves defending an aggression prosecution at the ICC unless they essentially consent to being tried for the crime.³¹

These are significant limits on the ICC's ability to exercise jurisdiction over the crime of aggression, but also worth noting is that pursuant to Article 16 of the Rome Statute, the Security Council can suspend aggression investigations and prosecutions at the ICC for a period of 12 months in a resolution adopted under Chapter VII of the Charter of the United Nations. The Security Council can renew those suspensions under the same conditions.³²

28. See discussion *infra* of the negotiations regarding the opt-out and the need to ratify the amendment. See *Infra* Part III.

29. The Security Council has the power to refer matters to the ICC for investigation and prosecution without any consent requirement of the states involved because of the powers granted to it under Chapter VII of the United Nations Charter. See Rome Statute, *supra* note 14, art. 13(b); *International Criminal Court – Some Questions and Answers*, *supra* note 6.

30. See, e.g., Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, JUST SEC. (Mar. 10, 2022), <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/> (explaining that the reason the Security Council is unable to refer Russia's aggression to the ICC is because of Russia's veto power). See also Jennifer Trahan, *Revisiting the Role of the Security Council Concerning the International Criminal Court's Crime of Aggression*, 17 J. OF INT'L CRIM. JUST. 471, 474 n. 16 (2019) (explaining how Russia's veto power would have prevented the referral to the ICC of any potential crimes of aggression committed by Russia in connection with its November 2018 seizure of Ukrainian ships off the coast of Crimea).

31. See, e.g., Tom Dannenbaum, *The ICC at 20 and the Crime of Aggression*, TUFTS (July 14, 2022), <https://sites.tufts.edu/fletcherussia/the-icc-at-20-and-the-crime-of-aggression/?web=1&wdLOR=c2212EF1F-B744-954C-9D8B-B1C16EF6E229> (arguing that powerful states intentionally negotiated to limit the ICC's jurisdiction over aggression “so that the Court would be unable to sit in judgment of an aggressive war perpetrated by a permanent member of the Security Council”).

32. Rome Statute, *supra* note 14, art. 16 (“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”).

III. NEGOTIATING TO LIMIT THE ICC'S JURISDICTION OVER AGGRESSION

How is it that the ICC's jurisdiction over the crime of aggression is so curtailed? One big reason is that States Parties to the Court agreed that the aggression amendments to the Rome Statute should be adopted by consensus rather than through a contested vote,³³ even though the rules would have permitted adoption by two-thirds of the full membership of the Assembly of States Parties.³⁴ Essentially, States Parties concluded that consensus was necessary to ensure the legitimacy of the amendments and any future prosecutions of the crime of aggression before the Court. Thus, the provisions reflect the interests of a variety of states—including powerful states.³⁵

Generally uncontroversial was the idea that the Security Council would be able to refer situations involving the crime of aggression to the Court, just as it is able to refer situations involving the three atrocity crimes even as to non-States Parties.³⁶ Also, it was accepted that the Security Council would be able to suspend investigations and prosecutions over aggression pursuant to its Chapter VII powers, just as the Rome Statute similarly provided for the three atrocity crimes over which the ICC already had jurisdiction.³⁷

On the other hand, a major issue in Kampala was selecting the appropriate jurisdictional filter for state referrals or *proprio motu*

33. See Van Schaack, *supra* note 20, at 516 (stating that “the threat of a contentious vote in Kampala was ultimately defused” because, among other things, states concluded that “adding such a controversial crime to the ICC Statute should be accomplished by consensus or not at all”). Van Schaack—now Ambassador-At-Large for Global Criminal Justice—served on the U.S. delegation to the ICC 2010 Review Conference in Kampala as the Academic Advisor. *Biographies: Beth Van Schaack*, U.S. DEP'T OF STATE, <https://www.state.gov/biographies/beth-van-schaack/> (last visited Feb. 7, 2022).

34. See Van Schaack, *supra* note 20 at 518 (explaining the two-thirds vote rule and how it would work).

35. See Scharf, *supra* note 19, at 362 (noting that the consensus reached at Kampala “was the result of four delicate compromises negotiated by the President of the Assembly of States Parties, Ambassador Christian Wenaweser of Liechtenstein, and his deputy, Stephen Barriga”); Van Schaack, *supra* note 20, at 517 (noting the arguments framing consensus agreement as “crucial to the court’s and the amendments’ very legitimacy”).

36. See Van Schaack, *supra* note 20, at 523 (explaining that it was assumed throughout the negotiations that all three trigger mechanisms, including Security Council referrals, would apply to the crime of aggression).

37. See *id.* at 533–34 (indicating that the assumed position was that the Security Council would maintain its ability under Article 16 of a renewable deferral of all cases before the Court, including those charging the crime of aggression).

prosecutor investigations involving the crime of aggression.³⁸ The states holding permanent membership on the Security Council (the P5) (two States Parties to the ICC—France and the United Kingdom—and three observer states—the US, China, and Russia) pushed to designate the Security Council as an exclusive filter.³⁹ They argued that because of the Security Council’s role under Chapter VII of the UN Charter in addressing threats to and breaches of international peace and security, only the Security Council was empowered to determine whether a state had committed an act of aggression. Given this exclusive power, the P5 therefore argued that only the Security Council should be able to decide whether an aggression prosecution could proceed before the ICC.⁴⁰ Opponents suggested other filters or back-up filters in the case of state referrals or *proprio motu* investigations—most preferring to give that role to the Court’s Pre-Trial Divisions.⁴¹ The P5 ultimately lost the battle on the exclusive Security Council trigger mechanism, with the role going to the Court’s Pre-Trial Divisions.

But the negotiations did not end there. Remaining on the table was the possibility of an opt-out provision, as well as a provision excluding non-States Parties from the aggression regime.⁴² Those in favor of these provisions grounded them in principles of state consent, arguing that the “crime of aggression implicated state sovereignty more than any of the other three crimes because a state’s act of aggression serves as a predicate for the prosecution of an individual for the crime of aggression.”⁴³ With the opt-out provision, any State Party would be able to file a declaration which would thereby prevent the ICC from applying the crime of aggression against their nationals.⁴⁴ As to non-States Parties, the ICC would only have jurisdiction over the crime of aggression if based on a Security Council referral (which

38. *See id.* at 524 (stating that a remaining contentious issue at Kampala was “the appropriate filter mechanisms for aggression prosecutions triggered by a state referral or the Prosecutor’s exercise of his *proprio motu* powers”).

39. *See* Scharf, *supra* note 19, at 363; Van Schaack, *supra* note 20, at 514 (noting the P5 position on its exclusive role in determining whether aggression had occurred) and 560–68 (discussing the arguments made by the P5 in favor of an exclusive Security Council filter).

40. *See* Van Schaack, *supra* note 20, at 554.

41. *See* Scharf, *supra* note 19, at 363 (noting that the P5 wanted an exclusive Security Council trigger, while “most of the other delegations preferred giving that role to the Court’s Pre-Trial Division”).

42. *See* Van Schaack, *supra* note 20, at 554.

43. *Id.* at 578.

44. *Id.* at 584 (referencing the opt-out provision now contained in the Rome Statute, art.15bis(4) and stating that it was part of the price that one coalition had to pay in exchange “for gaining the Pre-Trial Division filter in lieu of an exclusive Security Council filter”).

obviously would be under the control of the P5).⁴⁵ Both provisions clearly have the effect of narrowing the ICC's jurisdictional regime over the crime of aggression and were therefore viewed as concessions to the powerful states that had preferred an exclusive Security Council filter.⁴⁶

At Kampala, states also eventually agreed to another compromise that favored those opposed to the ICC's jurisdiction over the crime of aggression: they agreed to hold off activation of the aggression amendments until one year after a required thirty states had ratified the aggression amendments.⁴⁷

In the end, although the P5 still preferred an exclusive Security Council filter, they could accept a regime whereby states had to ratify the aggression amendments and could opt-out from the crime because it meant that they too could shield their nationals from an ICC aggression prosecution. They and others wary of authorizing the ICC to exercise jurisdiction over aggression could also agree to a process which pushed the date of activation off into the future.

In 2017, after the required thirty states had ratified the aggression amendments, states once again met to negotiate the decision to activate—with the negotiations again turning on the question of jurisdiction.⁴⁸ Here the divisive issue was whether the Court could exercise jurisdiction over the crime of aggression with respect to nationals of States Parties that do not ratify the aggression amendment or that also do not opt out. Some states, led by Liechtenstein, argued that the agreements reached at Kampala required in the case of a State Party referral or *proprio motu* investigation, that nationals of all States Parties would be subject to the ICC's jurisdiction over the crime of aggression unless they specifically had lodged an “opt out” declaration.⁴⁹ The United Kingdom and France offered a narrower view, whereby in the case of state referrals or *proprio motu*

45. *See id.* at 591 (discussing the exclusion of non-States Parties as another price that those against an exclusive Security Council filter had to pay).

46. *See id.* at 584, 591. *See also* Scharf, *supra* note 19, at 363–64 (explaining that the opt-out provision and the exclusion of non-States Parties reflected compromises related to the exclusivity of a Security Council trigger and were designed to appease the P5 negotiating states).

47. *See id.* at 554.

48. *See* Jennifer Trahan, *From Kampala to New York - The Final Negotiations to Activate the Jurisdiction of the International Criminal Court over the Crime of Aggression*, 18 INT'L CRIM. L. REV. 197, 202–03 (2018).

49. *Id.* at 207–10.

investigations, the ICC could only exercise jurisdiction over States Parties that had ratified the aggression amendment.⁵⁰

Because consensus was again the goal,⁵¹ and because the United Kingdom and France could not be persuaded to adopt a broader view of the ICC's jurisdiction over aggression,⁵² to activate the crime of aggression before the ICC, states agreed to the narrower view proposed: to be subject to aggression, the State Party must actively ratify the aggression amendment.⁵³ The result, of course, was that the ICC's jurisdiction over the crime of aggression was further curtailed at the prompting of powerful states.

IV. POWERFUL STATES LIKELY WILL CONTINUE TO OBJECT TO BROADENING THE ICC'S JURISDICTION OVER AGGRESSION

The evidence shows that although states agreed on a definition of the crime of aggression and agreed to include it as a crime over which the ICC has jurisdiction, the current jurisdictional regime is such that the ICC will likely rarely, if ever, be availed of in an aggression case.⁵⁴ While states could amend the Rome Statute and broaden the ICC's jurisdiction over the crime, states that opposed the broad jurisdictional regime over the course of the prior negotiations probably will not be persuaded to change their stances in the short term. This is the likely case even though the great majority of states, including some of the P5, have publicly pronounced that they wish Russia and its leaders to be held accountable for the crimes committed in Ukraine.⁵⁵

50. *Id.* at 205–07.

51. *Id.* at 214 (“One of the reasons the UK and France were able to so dominate these negotiations, and insist, without offering any concessions, that their reading be reflected in the resolution activating jurisdiction, was the desire of States Parties to activate jurisdiction through ‘consensus’. It was thought that ‘consensus’ would demonstrate undivided support, whereas resorting to a vote would have shown divided commitment by States Parties to activation.”).

52. *Id.* at 212 (noting that the United Kingdom and France took a “take it or leave it” approach during the negotiations and were not willing to compromise on their position).

53. *Id.* at 212–13.

54. See, e.g., Alex Whiting, *Crime of Aggression Activated at the ICC: Does it Matter?*, JUST SEC. (Dec. 19, 2017), <https://www.justsecurity.org/49859/crime-aggression-activated-icc-matter> (suggesting that given the narrowness of the aggression definition and the Court's jurisdiction over it, one should not “expect to see aggression prosecutions anytime soon”).

55. See, e.g., Julian Borger, *Macron declines to follow Biden and call Russian acts in Ukraine ‘genocide’*, THE GUARDIAN (Apr. 13, 2022), https://www.theguardian.com/world/2022/apr/13/emmanuel-macron-genocide-ukraine-russia-biden?utm_term=Autofeed&CMP=tw_tgu&utm_medium&utm_source=Twitter

I say this for several reasons. First, note that as of December 2022, only 44 states—out of 123 ICC member states—have ratified the aggression amendments.⁵⁶ Notably, the United Kingdom and France, both proponents of limiting the ICC’s jurisdiction over aggression, have not ratified the amendments.⁵⁷ And, of course, Russia, China, and the United States have not joined the ICC.

Second, the United States and other countries accused of having waged aggressive war in the past probably would like to ensure that their actions are not judged—unless they specifically want them to be. Indeed, many scholars have suggested that the invasion of Iraq in 2003 constituted an aggressive war that could have been, but was not, prosecuted.⁵⁸ There are no indications that the parties participating

(reporting that although French President Macron and Australian Prime Minister Morrison declined to call Russian actions in Ukraine genocide, as did President Biden, the three called for sanctions and an investigation by the ICC); Press Release, U.S. Dep’t of State, Secretary Antony J. Blinken at the United Nations Security Council Ministerial Meeting on Ukrainian Sovereignty and Russian Accountability (Sept. 22, 2022), <https://www.state.gov/secretary-antony-j-blinken-at-the-united-nations-security-council-ministerial-meeting-on-ukrainian-sovereignty-and-russian-accountability/> (recording that American Secretary of State, Antony Blinken, strongly criticized Russian actions and stressed the need for accountability at a meeting of the UN Security Council); Fergus Eckersley, U.K. Pol. Coordinator, Holding Russia accountable for its lies and aggression in Ukraine, Statement at the United Nations Security Council Arria-formula meeting (May 6, 2022), <https://www.gov.uk/government/speeches/holding-russia-accountable-for-its-lies-and-aggression-in-ukraine> (reporting that UK Political Coordinator Fergus Eckersley addressed the UN Security Council and pressed for accountability of Russian aggression in Ukraine).

56. The ratifying countries include Andorra, Argentina, Austria, Belgium, Bolivia, Botswana, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Ecuador, El Salvador, Estonia, Finland, Georgia, Germany, Guyana, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mongolia, Netherlands, North Macedonia, Panama, Paraguay, Peru, Poland, Portugal, Samoa, San Marino, Slovakia, Slovenia, Spain, State of Palestine, Sweden, Switzerland, Trinidad and Tobago, and Uruguay. See *Chapter XVIII 10 B. Penal Matters*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en (last visited Mar. 4, 2023).

57. *Id.*

58. See, e.g., Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea*, OPINIOJURIS (July 3, 2022), <http://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/> (arguing that the invasion of Iraq by the United States, the United Kingdom, and a coalition of dozens of other states constituted “the most flagrant act of aggression since the Vietnam War”). See also Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine*, JUST SEC. (Mar. 10, 2022), <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/> (suggesting that there have been numerous illegal wars following World War II that might constitute acts of aggression, but that have gone unprosecuted).

in that invasion wish to allow an international tribunal to sit in judgment of their actions.

Third, one might expect that the United States and others will continue to argue that the Security Council—and not a judicial body—is better suited to determine whether certain acts of force amount to acts of aggression and what the appropriate response to those acts should be.⁵⁹ Here, arguments by the U.S. government are instructive. For example, in 2015, Sarah Sewell, Under Secretary for Civilian Security, Democracy, and Human Rights under President Obama explained why in the government’s view “the risks of the current [Kampala] amendments [on aggression] outweigh the benefits.”⁶⁰ Her overarching point focused on the role of the Security Council, arguing that the ICC’s aggression definition “stripped away the critical requirement that the assessment of a use of force ‘must be considered in light of all the circumstances of each particular case,’ and it shifted the role of applying this guidance and making these judgments—which inevitably involve political judgments—from the Security Council to a judicial body meant to remain above politics.”⁶¹

Under Secretary Sewell then outlined three specific concerns. First, she argued that the activation of the aggression amendment could have the deleterious effect of discouraging atrocity prevention, as states will be worried that the Court might conclude that humanitarian intervention is aggression.⁶² A second argument pointed to the international community’s need to be able to manage and resolve conflicts involving use of force, which could include in some circumstances taking the prosecution of leaders off the table if doing

59. The United States has consistently advocated this position about the primacy of the Security Council’s role as regards to what conduct constitutes an act of aggression. *See, e.g.*, Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT’L. L. 257, 256–57, 261 (2015) (referencing the United States’ long-held and consistent position as to the primary role of the Security Council in determining the existence of acts of aggression). Professor Koh was the co-head, and Mr. Buchwald was the co-deputy head, of the U.S. delegation to the 2010 ICC Review Conference in Kampala. *Id.* at 257.

60. Sarah Sewell, Under Sec’y for Civilian Sec., Democracy, and Hum. Rts., *The ICC Crime of Aggression and the Changing International Security Landscape*, Remarks at the Annual Meeting of the American Society of International Law (Apr. 9, 2015), <https://2009-2017.state.gov/j/remarks/240579.htm>.

61. *Id.*

62. *Id.* This argument concerning humanitarian intervention was also advanced by the U.S. representatives at the 2010 ICC Kampala Review Conference. *See* Koh and Buchwald, *supra* note 59, at 273 (referencing the United States’ proposed Understanding on humanitarian intervention that was offered at Kampala, but not adopted by states).

so could lead to a peaceful resolution.⁶³ Indeed, in this regard, it is noteworthy that some leaders have stated their preference for negotiating a peaceful resolution of Russia's war in Ukraine even if it would require granting some concessions to Russia.⁶⁴ Finally, Under Secretary Sewell suggested that "activation of the aggression jurisdiction will harm the Court's ability to carry out its core mission—detering and punishing genocide, crimes against humanity, and war crimes."⁶⁵ Of course, one need not agree with any of these arguments, but they do suggest that the United States, at least, may continue to advance reasons why the ICC's jurisdiction over the crime of aggression should not be broadened.

Finally, note that representatives of both the United Kingdom and France have called for the creation of a special aggression tribunal that would investigate and prosecute Russian leaders for acts of aggression against Ukraine.⁶⁶ One could pursue aggression amendments while one also pursues a special tribunal—a position advocated for by some scholars.⁶⁷ Nevertheless, that statements issued by representatives of the United Kingdom and France do not also mention amending the Rome Statute's jurisdictional regime for aggression as a salient option is telling. Unlike broadening the Rome

63. Sewell, *supra* note 60.

64. For example, although he offered no specifics, President Macron of France stated in September 2022 that the goal remained in place over obtaining a negotiated peace in the conflict between Russia and Ukraine. *French President Macron: goal is to obtain negotiated peace on Russia/Ukraine conflict*, REUTERS (Sept. 9, 2022), <https://www.reuters.com/world/europe/french-president-macron-goal-is-obtain-negotiated-peace-russiaukraine-conflict-2022-09-22/>. See also Samantha Jo-Roth, *House progressives call on Biden to negotiate with Russia to end war in Ukraine*, THE WASH. EXAMINER (Sept. 24, 2022), <https://www.washingtonexaminer.com/news/house-progressives-biden-negotiate-russia-end-war-ukraine> (reporting that a group of 30 House liberals were petitioning President Biden to pursue a negotiated settlement to Russia's war in Ukraine).

65. Sewell, *supra* note 60.

66. See Joint Statement, Rt. Hon. Gordon Brown et al., *Calling for Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine* (Mar. 4, 2022), <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf> (advocating for a Special Tribunal "to be constituted – on the same principles that guided the allies in 1942 – to investigate the acts of violence by Russia in Ukraine and whether they constitute a crime of aggression"); *The French Parliament advocated the creation of a special tribunal on the aggression of the Russian Federation*, FRONT NEWS UKR. (Dec. 1, 2022), <http://www.frontnews.ge/en/news/details/47513> (stating that the French Parliament adopted a resolution calling "for the creation of a special tribunal for the president of the Russian Federation and his closest entourage for the crime of aggression against Ukraine and beyond").

67. See Jennifer Trahan, *A Brief Exploration of the Need for a Special International Criminal Tribunal on the Crime of Aggression*, 1, 2–3 (2023) (unpublished manuscript) (on file with author) (advocating for the pursuit of aggression amendments and a special tribunal in the United Nations).

Statute's jurisdiction over aggression, a special tribunal focused only on Russia's acts of aggression would pose no threat to them.

V. CONCLUSION: THE ICC CAN PROSECUTE THE THREE CORE ATROCITY CRIMES COMMITTED IN UKRAINE

Even if States Parties to the ICC do not promptly amend the ICC's aggression regime to allow it to operate in a manner more consistent with that of the other three core crimes, all is not lost. As noted above, Ukraine filed a declaration agreeing to the Court's exercise of jurisdiction over any of the crimes of genocide, crimes against humanity, and war crimes that are committed in its territory since 2014. This means that although the ICC cannot charge Russian leaders (or leaders in Belarus) with the crime of aggression, it can bring charges against individuals who have perpetrated any of those three core atrocity crimes. It can also frame any charges it brings in a way that highlights the aggressive acts that were committed against Ukraine. In fact, only recently, the ICC's Office of the Prosecutor announced war crimes charges against Russian President Vladimir Putin and Maria Lvova-Belova (Putin's Commissioner for Children's Rights) for war crimes in connection with the forced deportation and transfer of children to Russia and has indicated that additional charges will likely be forthcoming.⁶⁸

The leaders who planned the aggression against Ukraine should be held accountable for their heinous acts that have led to the many atrocities being committed on the ground against so many innocent victims.⁶⁹ This author's view, however, is that the ICC will not likely be the forum in which those leaders will be prosecuted for the crime of aggression—at least in the near term. States agreed to significantly limit the ICC's jurisdiction over the crime of aggression, and the

68. See Press Release, Int'l Crim. Ct., Statement by Prosecutor Karim A. A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova (Mar. 17, 2023), <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin> (reporting on arrest warrants for the two defendants and also quoting Prosecutor Karim Khan saying that his office "continues to develop multiple, interconnected lines of investigation" and will not hesitate to submit further applications for warrants of arrest when the evidence requires us to do so").

69. The first report issued in September 2022 by the Independent International Commission of Inquiry on Ukraine set up at the request of member states of the Human Rights Council concluded that based on their investigation, numerous atrocity crimes had been committed in Ukraine since Russia's February 2022 invasion. *War crimes have been committed in Ukraine conflict, top UN human rights inquiry reveals*, UN NEWS (Sept. 23, 2022), <https://news.un.org/en/story/2022/09/1127691> (linking to and citing some of the findings in the first report).

evidence suggests that at present they are not likely to reach a consensus agreement that amends the Rome Statute in a way that would allow powerful states to be subjected to the Court's jurisdiction without their consent.