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Remodeling the Fruitless Link Between the Security Council and the International Criminal Court: Why Amending the UN Charter Could be the Greatest Tribute International Politics Has Ever Paid to International Law

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Remodeling the Fruitless Link Between the Security Council and the International Criminal Court: Why Amending the UN Charter Could be the Greatest Tribute International Politics Has Ever Paid to International Law

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ABSTRACT

Established in 2002, the International Criminal Court ("ICC") has become a symbolic cornerstone of international criminal jurisprudence—prosecuting and convicting individuals for the commission of genocide, crimes against humanity, war crimes, and crimes of aggression—collectively referred to as *atrocity crimes*.

One way the ICC can lawfully exercise jurisdiction is by referral—in the form of a resolution—from the UN Security Council. The language of Charter of the United Nations and the Rome Statute collaborate to provide an avenue for the Security Council to grant the ICC jurisdiction over atrocity crime situations. Such resolutions grant the ICC *full* jurisdiction over the suspected criminal individual(s), regardless of whether the party has per se accepted ICC jurisdiction.

But, there is a problem. The ICC has been accused to be "all bark, no bite" by some, and as being "a giant without limbs" by others because of its scant conviction record. This has induced calls to amend or abolish the ICC. Even more troublesome is the ICC's less-than-fruitful association with the Permanent Five members of the Security Council: China, France, Russia, the United Kingdom, and the United States. The incessant disagreement among the Permanent Five has, in effect, tied the jurisdictional hands of the ICC, permitting dozens of perpetrators of atrocity crimes to go without proper adjudication by the ICC.

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International law is inherently political, and it can be difficult, if not impossible, to separate Security Council political interests from legal analysis. Therefore, a dramatic reform of pertinent articles of the UN Charter must be considered in an effort to both resolve Security Council paralysis and foster greater influence of the ICC.

The Security Council's damaging influence on the utility of the ICC has its roots in two sources: (1) the political motives of the Permanent Five and (2), the permissive text of the UN Charter. In statutory terms, those sources are Article 27 of the UN Charter, which empowers each of the Permanent Five with an *unrestricted veto* when the Security Council is voting to pass a resolution, and Article 41, which affords great deference to the Security Council in determining if an atrocity crime situation is worthy of considering jurisdiction to the ICC. As a result, the Security Council has consistently neglected to draft resolutions—let alone vote on them—concerning alleged crimes and proposing ICC jurisdiction, harmfully keeping the ICC on the sidelines.

This Note proposes additions to the statutory language of Articles 27 and 41 of the UN Charter, aiming to reduce the impact of the political wills of the Permanent Five, and thereby strengthening the link between the Security Council and the ICC. The proposed amendments below may be regarded as improbable or idealistic. However, it is impossible to suggest new language to the UN Charter without some degree of far-reaching optimism—a confidence that the objectivity of the law will eventually prevail over the subjectivity of geopolitics.

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I. INTRODUCTION

"To condemn a crime yet provide no impartial institution to try the offenders is to mock the victims and encourage more criminality. The time has come for human rights to prevail over human wrongs–for international law to prevail over international crime."[1]

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1 Tom Hofmann, *Introduction* to BENJAMIN FERENCZ, NUREMBERG PROSECUTOR AND PEACE ADVOCATE 5, 9 (2014).

Since its formation in 2002, the International Criminal Court ("ICC") has become one of the most prominent international organizations in the history of mankind.[2] It holds the power to prosecute and convict individuals for the commission of genocide, crimes against humanity, war crimes, and crimes of aggression—collectively referred to as *atrocity crimes*.[3] Prior to the ICC, the establishment of ad hoc international criminal tribunals in the 1990's via the United Nations Security Council ("Security Council") resolutions demonstrates that the international community has, at least generally speaking, agreed that the commission of *atrocity crimes* can be so heinous to humanity, that, at times, it is necessary to create tribunals with explicit jurisdiction to prosecute the individuals responsible for such crimes.[4] The creation of such decisive courts of justice—albeit with finite jurisdiction—was rooted in the sentiment that *atrocity crimes* require heightened political and legal recourse, because the commission of such crimes has proven to destroy communities, tear societies apart, and take decades to repair.[5]

Since then, scholars, human rights attorneys, and diplomats alike have endeavored to establish a more-definite forum to prosecute *atrocity crimes*.[6] Enter: the ICC—a

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[2] *See* Olympia Bekou, *The Independent Expert Review of the ICC: What Next for Cooperation?*, 21 WASH. U. GLOB. STUD. L. REV. 15, 17 (2022) ("The adoption of the Rome Statute of the International Criminal Court (ICC) in 1998 was an historic moment for the international community."); *see also* Ahmed Isau, *The International Criminal Court (ICC): Jurisdictional Basis and Status*, NNAMDI AZIKIWE U. J. INT'L L. & JURIS. 34, 38 (2015) ("Determined to put an end to impunity of the perpetrators of [atrocity] crimes and thus to contribute to the prevention of such crimes, the State Parties to the Rome Statute affirmed that, the perpetrators of the most serious crimes of concern to the international community as a whole must not go unpunished.").

[3] *See* Rome Statute of the International Criminal Court art. 5–8, July 17, 1998, 2187 U.N.T.S. 3–4 [hereinafter Rome Statute]; *see also infra* Section III.A.

[4] *Ad Hoc Tribunals*, INT'L COMM. OF THE RED CROSS (Oct. 29, 2010), https://www.icrc.org/en/document/ad-hoc-tribunals.

[5] *See Accountability for Atrocity Crimes*, UNITED NATIONS, https://www.un.org/en/genocideprevention/accountability.shtml (last visited Apr. 7, 2024) (discussing the factors and considerations that led to the creation of international criminal courts). *See generally* Nikolina Zenovic, *The Lasting Impact of the Breakup of Yugoslavia*, EUROPE NOW (June 3, 2020), https://www.europenowjournal.org/2020/06/02/the-lasting-impact-of-the-breakup-of-yugoslavia/; *The Facts: What You Need to Know About the South Sudan Crisis*, MERCY CORPS (June 24, 2019), https://www.mercycorps.org/blog/south-sudan-crisis.

[6] *See, e.g.*, *A New Court to Prosecute Russia's Illegal War?*, INT'L CRISIS GRP. (Mar. 29, 2023), https://www.crisisgroup.org/global-ukraine/new-court-prosecute-russias-illegal-war ("Soon after Russia launched its unlawful, full-scale invasion of Ukraine in February 2022, international lawyers, former government officials, scholars and others began advocating for the establishment of a new tribunal to prosecute the Russian leadership for the crime of aggression."); Jennifer Trahan, *The Need to*

treaty-based court established by the Rome Statute with the power to exercise its jurisdiction in qualified scenarios.[7] Put more directly, the ICC can only prosecute *atrocity crimes* if a state has agreed to accept the jurisdiction of the ICC.[8]

Otherwise, in situations where *atrocity crimes* have been committed outside the immediate jurisdiction of the ICC, the only way the ICC can lawfully exercise jurisdiction is by referral–in the form of a resolution from the Security Council. Which, operating in accordance with its stated purpose to maintain international peace and security, a Security Council resolution has the authority to refer an *atrocity crime* situation to the ICC.[9] Both the Charter of the United Nations ("UN Charter") (the treaty establishing and governing the Security Council) and the Rome Statute offer collaborating avenues for the Security Council to grant the ICC jurisdiction over *atrocity crime* situations.[10] Perhaps this goes without saying, but the power of the Security Council to permit the ICC with jurisdiction to prosecute an individual(s) for commission of an *atrocity crime* is crucial because such a resolution grants the ICC *full* jurisdiction over the individual(s), regardless if the party of interest has ratified the Rome Statute—and therein lies the situation which fostered the drafting of this Note.

In theory, the ICC is an idyllic cog in the international judicial system. But the ICC has been accused as "all bark, no bite" by some, and of "African bias" by others for its scant record of successful investigations and convictions, and regular attention on African situations.[11] Even more troublesome is that the ICC has had a less-than-fruitful association with the Permanent Five members of the Security Council: China, France, the Russian Federation ("Russia"), the United Kingdom, and the United States

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Reexamine the Crime of Aggression's Jurisdictional Regime, JUST SEC. (Apr. 4, 2022), https://www.justsecurity.org/80951/the-need-to-reexamine-the-crime-of-aggressions-jurisdictional-regime/ (discussing experts' calls for the need for an amendment to the U.N. Charter to create more jurisdiction for crimes of aggression).

[7] *See* Rome Statute, *supra* note 3, at art. 1.

[8] *See infra* Section III.B.

[9] U.N. Charter art. 39; *see infra* Section IV.A.

[10] *See* U.N. Charter, *supra* note 9, at art. 41; *see also* Rome Statute, *supra* note 3, at art. 13(b) (providing that the Security Council can refer a situation to the court where one or more crimes appear to have been committed); *infra* Part III.

[11] *See* Stephen Eliot Smith, *Is The International Criminal Court Dying? An Examination of Symptoms*, 23 OR. REV. INT'L L. 73, 78 (2022) ("Seven completed cases and five convictions in nineteen years is not by any means a healthy output for a court of the ICC's stature and importance."); *see also* Joe Oloka-Onyango, *Unpacking the Africa Backlash to the International Criminal Court (ICC): The Case of Uganda and Kenya*, 4 STRATHMORE L.J. 41, 42 (2020) ("In many different respects, the relationship between African countries and the [ICC] could be equated to a marriage turned sour. . . . How is it that an institution which started off being viewed with a degree of acceptance and even favor, has ended up being so vilified?").

(collectively "the Permanent Five").[12] For a Security Council draft resolution to become a "resolution," *each* of the Permanent Five *must* vote in the affirmative to pass it.[13] Needless to say—the Permanent Five don't agree on much. Despite dozens of Security Council draft resolutions calling for the Security Council to grant the ICC jurisdiction to prosecute *atrocity crime* situations, the Permanent Five has only agreed to grant the ICC jurisdiction on two occasions since the ICC's inception.[14] Consequently, the incessant disagreement among the Permanent Five has, in effect, tied the jurisdictional hands of the ICC and permitted dozens of perpetrators of *atrocity crimes* to go without proper adjudication by the ICC.[15] Not only that, despite over one hundred nations that have chosen to do so, two of the Permanent Five—Russia and

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[12] In a bit of irony, the International Criminal Military Tribunals at Nuremberg in 1945 were made up by four of the five permanent members of the Security Council. Nonetheless, since the post-WWII era, the geopolitical relationship between the United States and Russia in particular has not been consistent with the principles established at Nuremberg. Also of note, the Russian Federation is not explicitly named as a permanent member of the Security Council, rather, the Union of Soviet Socialist Republics. But Russia has de-facto taken the place of the Soviet Union in its Security Council capacity. *See* U.N. Charter, *supra* note 9, at art. 23, ¶ 1.

[13] *Voting System*, UNITED NATIONS SEC. COUNS., https://www.un.org/securitycouncil/content/voting-system (last visited Apr. 7, 2024).

[14] *See, e.g.*, *Darfur, Sudan*, INT'L CRIM. CT., https://www.icc-cpi.int/darfur (last visited Apr. 7, 2024) ("Sudan [was] not a State Party to the Rome Statute. . . . The [Security Council] determined that 'the situation in Sudan continue[d] to constitute a threat to international peace and security,' and referred this situation to the ICC in March 2005 . . . . '[A]ccording to United Nations estimates there [were] 1.65 million internationally displaced persons in Darfur, and more than 200,000 refugees from Darfur in neighboring Chad.'"); S.C Res. 1706, ¶ 1 (Aug. 31, 2006); *Libya*, INT'L CRIM. CT., https://www.icc-cpi.int/libya (last visited Apr. 7, 2024) ("[O]n 26 February 2011, the United Nations Security Council unanimously referred the situation in Libya . . . to the ICC . . . . The [Security Council] referred this situation to the ICC, 'condemning the violence and use of force against civilians, deploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government' . . . ."); S.C. Res. 1970, ¶ 1 (Feb. 26, 2011).

[15] *See Called to Account? The Permanent Five and the Veto*, IIEA (May 23, 2022), https://www.iiea.com/blog/called-to-account-the-permanent-five-and-the-veto (discussing how the veto power has prohibited effective responses in recent global crises).

the United States—have further cast doubt on the legitimacy of the ICC by abstaining from ratifying the Rome Statute and denouncing the ICC's significance altogether.[16]

Historically, much of the criticism of the ICC has been rooted in a disapproval of the innate biases of international tribunals.[17] Admittedly, there is some truth to the criticism—international law is inherently political, and it can be difficult to separate international law from geopolitics. Regardless, this Note will argue that the ICC has done its best to address these historical pathologies and that, instead, it is the dysfunction of the Security Council that is the impetus for the persistence of the ICC's thin success record and perceived failures. Therefore, comprehensive reform of the UN Charter—the statute governing the Security Council—as opposed to amending the Rome Statute, would resolve Security Council paralysis and foster greater ICC influence. Although international justice laid upon the perpetrators of *atrocity crimes* by way of the ICC may not result in a utopia of human rights and democracy, an unimpeded ICC is nevertheless essential to preserving international legal norms of

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16 The ICC is in the midst of a two-decade long effort to obtain widespread international acceptance from *inter alia*, Russia and the United States. While each country initially signed onto the Rome Statute, both held short of ratifying the treaty and have since withdrawn their respective signatures. *See* Shaun Walker & Owen Bowcott, *Russia Withdraws Signature from International Criminal Court Statute*, GUARDIAN (Nov. 16, 2016, 9:14 AM), https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute (discussing how Russia initially signed but refused to ratify the Rome Statute before formally withdrawing its signature altogether in 2016); Thomas Thompson-Flores, *The International Criminal Court: Will It Succeed or Fail? Determinative Factors and Case Study on this Question*, 8 LOY. U. CHI. INT'L L. REV. 57, 64 (2010) ("[B]ecause of the United States' position today as the sole world power, and with its military extended into conflicts around the world . . . its exposure to the ICC's jurisdiction is much greater than any other country. Consequently, the U.S. is consistently opposed to the idea of universal jurisdiction."); Anthony Dworkin, *Why America is Facing Off Against the International Criminal Court*, EURO. COUNC. ON FOREIGN RELAT. (Sept. 8, 2020), https://ecfr.eu/article/commentary_why_america_is_facing_off_against_the_international_criminal_cou/.

17 *See, e.g.*, Marco Vöhringer, *Critiques of International Criminal Law Revisited in the Light of the Rome Statute: What More Can We Do?*, VÖLKERRECHTSBLOG (Oct. 1, 2022), https://voelkerrechtsblog.org/critiques-of-international-criminal-law-revisited-in-the-light-of-the-rome-statute/ ("Historically, [reservations about international criminal justice] came in the form of accusations of victor's justice. For instance, the tribunals at Nuremberg and Tokyo were concerned only with crimes committed by the Axis [powers] . . . . Modern criticisms which see the ICC's prosecutorial focus on Africa as evidence of a racial bias within [international criminal law] can be considered the contemporary version of this selectivity reproach."); *see also* Oloka-Onyango, *supra* note 11, at 41.

crime and punishment, while at the same time, upholding international peace and security.[18]

The problem of the Security Council's sustained self-restraint from referring situations to the ICC has its roots in two sources: First, the political motives of the Permanent Five; and second, the permissive text of the UN Charter. It is reasonable to presume that the relevant political motives are not going to change—see the mistrust between Russia and the United States (1917 – present).[19] Fortunately, the statutory text of the UN Charter is malleable. And pertinent to this discussion are two specific articles therein that need reform.

First up: Article 27, which empowers each of the Permanent Five with an *unrestricted veto* when the Security Council is voting to pass a resolution.[20] This permits each of the Permanent Five the power to halt *any* Security Council draft resolution from coming to fruition, irrespective of bad-faith or ulterior motives.[21] History has shown that, for a multitude of political reasons, at least one of the Permanent Five is likely to veto a proposed resolution when it concerns legal scrutiny against an ally, a politically aligned state, and of course, itself.[22]

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[18] *See The Tribunal Welcomes the Parties' Commitment to Justice. Joint Statement by the President and the Prosecutor*, IRMCT (Nov. 24, 1995), https://www.icty.org/en/press/tribunal-welcomes-parties-commitment-justice-joint-statement-president-and-prosecutor ("Justice is an indispensable ingredient of the process of national reconciliation. It is essential to the restoration of peaceful and normal relations between people who have had to live under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution.").

[19] *See generally* Coleman P. Anderson, Bridging the Gap: Analyzing the History of U.S.-Russian Relations Throughout History and the Actions that Would Improve Them (2021) (B.S. thesis, Liberty University) (explaining the mistrust between Russia and U.S. from early 1900 until present).

[20] *Voting System*, *supra* note 13.

[21] *See infra* Section IV.B; *see, e.g.*, BRIAN D. LEPARD, RETHINKING HUMANITARIAN INTERVENTION: A FRESH LEGAL APPROACH BASED ON FUNDAMENTAL ETHICAL PRINCIPLES IN INTERNATIONAL LAW AND WORLD RELIGIONS 362 (2002) (noting that Security Council members' vetoes have blocked humanitarian interventions in the past).

[22] In the wake of the violence at the hands of the Bashir al-Assad government in Syria in 2014, the Security Council attempted to legally intervene, but due to Russia's friendly relationship with Syria, Russia and China threatened to veto any resolution calling for action against Syria. *See* Louis Charbonneau & Michelle Nichols, *U.N. Security Council Powers Meet Again on Syria; No Outcome*, REUTERS (Aug. 29, 2013, 5:39 PM), https://www.reuters.com/article/idUSBRE97S17R/. Since 1990, the United States has cast a veto on Security Council resolutions concerning the ICC nineteen times. Russia has done so thirty-one times. *See* S.C. Draft Res. 2007/14 (Jan. 12, 2007) (showing Russia and China's veto of a Security Council Draft Resolution calling on the government of Myanmar to cease military attacks against civilians in ethnic

Second, the text of Article 41 affords great deference to the Security Council in determining if an *atrocity crime* situation is worthy of considering jurisdiction to the ICC.[23] The Security Council has taken a rather laissez-faire approach when it comes to its willingness to intervene with state sovereignty or bad actors on the international scale.[24] As a result, the Security Council has consistently neglected to draft resolutions—let alone vote on them—concerning alleged crimes and proposing ICC jurisdiction.[25] Such neglect has, at times, rendered the ICC a toothless lion.

The Security Council on its own serves as a mere forum that requires a corresponding legal institution to serve as a force to accomplish its resolution goals[26] Therefore, the Security Council—as a forum—should be statutorily required to permit the ICC (serving as a force) to hold accountable those who threaten international peace and security. This Note proposes additions to the statutory language of the aforementioned UN Charter Articles 27 and 41, aiming to reduce the power of the Permanent Five, and thereby strengthening the link between the Security Council and the ICC.[27]

But first, a couple of caveats. First, this Note does not offer a solution to the practical impossibilities of passing an amendment to the UN Charter—an entirely complex political issue on its own. Rather, this Note serves only as a source of suggested, amended language to the UN Charter as presently written. Second, the author of this Note is mindful that a majority of scholars have identified the

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minority regions); *see also* S.C. Draft Res. 2015/508 (July 8, 2015) (showing Russia's 2015 veto of the Security Council Draft Resolution to investigate crimes in Bosnia and Herzegovina); S.C. Draft Res. 2018/321 (Apr. 10, 2018) (showing Russia's veto to investigate allegations of chemical weapons use in Syria); S.C. Draft Res. 2018/516 (June 1, 2018) (showing the United States' veto of the Security Council Draft resolution to investigate the crimes of violence and deterioration of the situation in the Occupied Palestinian Territory).

23 For a detailed discussion of pertinent articles of the U.N. Charter, see *infra* Section IV.C.

24 *See, e.g.*, Maximillian Bertamini, *United in What? Some Reflections on the Security Council's Sovereignty Rhetoric in the Latest Syria Resolutions*, EJIL:TALK! (Oct. 21, 2020), https://www.ejiltalk.org/united-in-what-some-reflections-on-the-security-councils-sovereignty-rhetoric-in-the-latest-syria-resolutions/.

25 *UN Security Council and the Responsibility to Protect*, GLOB. CTR. RESP. PROTECT (May 30, 2023), https://www.globalr2p.org/calling-for-a-unsc-code-of-conduct/ (discussing the undermining of the UNSC's legitimacy due to veto power and failure to pass resolutions regarding atrocity crimes).

26 *See, e.g., United Nations Charter*, UNITED NATIONS, https://www.un.org/en/about-us/un-charter (last visited Jan. 27, 2024) ("[T]he UN Charter is an instrument of international law, and UN Member States are bound by it. The UN Charter codifies the major principles of international relations . . . .").

27 U.N. Charter, *supra* note 9, at art. 41; *see also id.* at art. 27.

dissemination of power to the Permanent Five by Article 39 of the UN Charter and Article 98 of the Rome Statute as the major sources for many of the problems to be discussed in this Note.[28]

Nevertheless, this Note attempts to approach the issues from a different angle, choosing to critique Articles 27 and 41 of the UN Charter instead.[29] The proposed amendments below may be regarded as improbable or idealistic. However, it is impossible to suggest new language to the UN Charter without some degree of far-reaching optimism—a confidence that the objectivity of the law will eventually prevail over the subjectivity of geopolitics.

To properly contextualize the significance of the ICC and the incremental progression of international law that has led to its formation, it is necessary to start with a brief history of international criminal tribunals. Accordingly, Part II will briefly discuss two watershed moments in international criminal law: The International Military Tribunals at Nuremberg ("Nuremberg Tribunals" or "Nuremberg") at the close of World War II, and the two Security Council-created ad tribunals: the International Criminal Tribunals for the former Yugoslavia and Rwanda (respectively "ICTY" and "ICTR," collectively "ad hoc Tribunals"), established in 1993 and 1994, respectively. Although nearly fifty years apart from each other, both Nuremberg and the ad hoc Tribunals serve as cornerstones of modern international criminal law and demonstrates the symbolic importance of an impartial international court. Part III will detail the ICC's jurisdiction over crimes and defendants. Part IV will address how the problem of international politics stifles the Security Council, and in turn the ICC, and will critique the explicit shortcomings of the text of UN Charter Articles 27 and 41. Part V will analyze the continuing war in Ukraine[30] as a brief case study to illustrate the deficiencies of Articles 27 and 41 as presently written.[31] Naturally, Russia has utilized the privileges of occupying a permanent seat on the Security Council and

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28 *See generally* Aly Mokhtar, *The Fine Art of Arm-Twisting: The US, Resolution 1422 and Security Council Deferral Power Under the Rome Statute*, 3 INT'L CRIM. L. REV. 295 (2003). *See also* Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities*, 7 J. INT'L CRIM. JUST. 333, 337 (2009).

29 *See infra* Sections IV.B–C.

30 *See* Ctr. for Preventative Action, *Conflict in Ukraine*, GLOB. CONFLICT TRACKER (Sept. 12, 2022), https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine ("On February 24, 2022 . . . Putin announced the beginning of a full-scale land, sea, and air invasion of Ukraine . . . ."); *see, e.g.*, Milena Sterio, *The Russian Invasion of Ukraine: Violations of International Law*, JURIST (Jul. 12, 2022, 8:45 AM), https://www.jurist.org/commentary/2022/07/milena-sterio-russia-war-crimes-ukraine/ ("[T]he Russian invasion of Ukraine has been [accused of] various international humanitarian law violations, such as the intentional targeting of civilian objectives, torture, rape and sexual violence. Russian actions may have given rise to several atrocity crimes, such as war crimes, crimes against humanity, genocide, and aggression.").

31 *See generally* U.N. Charter, *supra* note 9, at art. 41; *id.* at art. 27.

exercised its veto power to stymie any proposed resolution pertaining to its unlawful acts of aggression in Ukraine.[32] Finally, Part VI will offer a solution each of the two articles by proposing amended language to the articles. As mentioned above, the first proposes Article 27 to contain a statutory prohibition on subjected parties from voting on Security Council resolutions.[33] And the second proposes that Article 41 statutorily obligate the Security Council to draft resolutions which consider granting the ICC jurisdiction when an *atrocity crime* situation—which otherwise falls outside the ICC's jurisdiction—calls for investigation and adjudication.[34]

II. BUILDING A FOUNDATION: WATERSHED MOMENTS IN INTERNATIONAL CRIMINAL LAW

A. *Nuremberg: Establishing Individual Criminal Responsibility*

Like nearly all international criminal law discussions, this Note begins its discussion in Germany, where the Nuremberg Tribunals were assembled immediately after World War II.[35] There, the prosecution and judges were made up of jurists from the victorious Allies: the United States, the United Kingdom, France, and the Soviet Union.[36] On the other side, the defendants were the remaining, high-ranking Nazi Party officials.[37] Each of whom bureaucratically organized and efficiently carried out the mass murder of over six million European Jews.[38] Furthermore, the defendants orchestrated the almost-complete annihilation of Europe's gypsy population, and killed thousands political opponents of Nazism.[39] Prosecutor Benjamin Ferencz

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[32] *See* Michelle Nichols & Humeyra Pamuk, *Russia Vetoes U.N. Security Action on Ukraine as China Abstains*, REUTERS (Feb. 25, 2022, 10:13 PM), https://www.reuters.com/world/russia-vetoes-un-security-action-ukraine-china-abstains-2022-02-25/; Anne Peters, *The War in Ukraine and the Curtailment of the Veto in the Security Council*, GROUPE D'ÉTUDES GÉOPOLITIQUES, https://geopolitique.eu/en/articles/the-war-in-ukraine-and-the-curtailment-of-the-veto-in-the-security-council/ (last visited Apr. 7, 2024).

[33] *See* U.N. Charter, *supra* note 9, at art. 27.

[34] *See id.* at art. 41.

[35] *The Nuremberg Trial and Its Legacy*, NAT. WWII MUSEUM (Nov. 17, 2020), https://www.nationalww2museum.org/war/articles/the-nuremberg-trial-and-its-legacy.

[36] *Id.*

[37] *See id.*

[38] *See* MARY FULBROOK, A CONCISE HISTORY OF GERMANY 200 (2d ed. 2010).

[39] *Id.* ("[P]olitical opponents of Nazism or others deemed 'unworthy of life,' [varied] from a whole range of cultural, political and national backgrounds, including communists, Social Democrats, Conservatives, Protestants, Catholics, Jehovah's Witnesses and others . . . .").

declared in his opening remarks to the court that "the defendants in the dock were the cruel executioners, whose terror wrote the blackest page in human history."[40]

Even more influential than dramatic quotes, as moving as they may be, is the tribunals improvised assertion of jurisdiction. Prior to the hearings, the prosecuting nations issued a decree known as the Nuremberg Charter, which established rules by which the Nuremberg Tribunals were to be conducted.[41] The Nuremberg Tribunals aimed to establish an accepted, international standard of justice by prosecuting substantive charges and applying formal and impartial trial procedures.[42] Sound familiar? Further, the Nuremberg Charter stipulated and defined categorized crimes that the defendants would be tried for: (a) crimes against peace; (b) war crimes; and (c) crimes against humanity.[43] Normally, criminal law may not assign guilt for acts not considered crimes when committed: *nullum crimen sine lege*.[44]

But the Allies were not concerned with Latin legal principles. For example, "crimes against peace" was not codified in any national or international statute prior to Nuremberg, but the victorious, prosecuting nations were determined to craft new legal arrangements encompassing all humanitarian violations committed by the

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[40] Hofmann, *supra* note 1, at 8.

[41] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, United Nations, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter London Agreement]; *see* Hon. Stephen J. Sfekas, *A Court Pure and Unsullied: Justice in the Justice Trial at Nuremberg*, 46 U. BALT. L. REV. 457, 475 (2017) ("The London Charter authorized judges to develop rules of procedure to govern [the Nuremberg Tribunals]. The rules of procedure, as in civil law practice at the time, provided for: (1) the right to counsel of the defendant's choice; (2) the appointment of counsel if the defendant did not have one; (3) the right of the defendant to compulsory process; (4) the right of the defendant to receive copies of all the documents made a part of the indictment and have access to other documents in the prosecution's possession translated into German.").

[42] *See* Sfekas, *supra* note 41, at 460 ("[The Nuremberg] trials in general . . . were procedurally and substantively fair. Indeed, the German defendants were in some cases afforded procedural protections that would not be constitutionally required under American law until the criminal law decisions of the Supreme Court almost two decades later.").

[43] *See* London Agreement, *supra* note 41, at 286–88 (enumerating and defining the crimes within the jurisdiction of the Tribunal as Crimes against peace, War Crimes, and Crimes against humanity).

[44] "*Nullum crimen sine lege*[,] . . . 'no crime without law' . . . [is] the principle in criminal law and international law that a person cannot or should not face criminal punishment except for an act that was criminalized by law before [he/she] performed the act." *Nullum crimen sine lege*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/nullum_crimen_sine_lege (last visited Jan. 27, 2024).

defendant Nazi perpetrators. As a result, the international legal order was reimagined, almost instantaneously, to include individual accountability for those who violated the sanctity of human rights, regardless of the legal notion of retroactivity.[45] In the end, 161 Nazi defendants were convicted for their crimes,[46] providing at least some sense of justice to the survivors and, more importantly, laying a framework for international tribunals to come.

The Nuremberg Tribunals were a revolutionary moment in international law in more ways than one. Substantively, the hearings expanded international law from merely protecting state sovereignty, to including a genuine effort to protect human rights by establishing designations of offenses.[47] Functionally, the Nuremberg Tribunals implemented prosecutorial formulas to be applied in subsequent international criminal law trials.[48] In the years that followed, a slew of multilateral treaties establishing clear definitions to new crimes, and updated humanitarian standards, were ratified.[49]

Although independent nations holding diverse traditions cannot be expected to have identical views on every point of a complicated legal statute or process—

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45 *See, e.g.*, KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 3 (2011) ("[Nuremberg] is justly celebrated for establishing that '[c]rimes against international law are committed by men, not by abstract entitles, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.' The tribunal also gave birth—perhaps through immaculate conception—to crimes against peace, crimes against humanity, and the crime of criminal membership.").

46 *The Nuremberg Trials*, NAT'L WWII MUSEUM, https://www.nationalww2museum.org/war/topics/nuremberg-trials (last visited Apr. 7, 2024).

47 *See, e.g.*, Mark S. Ellis, *The Academy and International Law: A Catalyst for Change and Innovation: Keynote Lecture: The Arc of Justice: From Nuremberg to the Fall of the Berlin Wall*, 54 CASE W. RES. J. INT'L L. 7, 10 (2022).

48 *See* HELLER, *supra* note 45, at 22 (noting that a "U.S.-initiated effort to terminate the London Charter would 'be most unfortunate from the standpoint of general international jurisprudence.'").

49 The aim of the treaties was to protect persons who are not or no longer taking part in hostilities, i.e., civilians, the wounded, the sick and prisoners of war. Among others, some of the most notable multilateral treaties enacted on the heels of Nuremberg include the Fourth Geneva Convention, the Genocide Convention, and the Vienna Convention. *See generally* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

oftentimes referred to as *cultural relativism*[50]—Nuremberg demonstrated that decisive international legal compromises are feasible, particularly in the wake of widespread human rights violations.[51] The crimes and criminals tried at Nuremberg further demonstrated the dangers of letting perpetrators go unhindered because of holes in international criminal law. And finally, the lasting impact of the judgments at Nuremberg is that "aggressive war is not a national right, but an international crime."[52]

B. *UN Ad Hoc Tribunals: Shaping Modern-Day Condemnation of Atrocity Crimes*

After World War II, fifty-one sovereign states, roughly half of the world's sovereign states, established the United Nations to promote the well-being of all people around the world.[53] Fast forward fifty years to the 1990's: the United Nations membership had grown to 184 members, and the power of the Security Council to uphold international peace and security was put to the test in two separate situations in the former Yugoslavia and Rwanda.[54] The ethnic and armed conflicts in both the

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[50] Charlotte Nickerson, *Cultural Relativism: Definitions & Examples*, SIMPLYPSYCHOLOGY (Sept. 29, 2023), https://www.simplypsychology.org/cultural-relativism.html.

[51] In a speech at the Rome Conference in 1998, Benjamin Ferencz conceded that independent nations cannot be expected to have identical views on every point of a complicated legal statute, but argued that, "[e]ver since the judgment at Nuremberg, it has been undeniable that aggressive war is not a national right but an international crime. Aggression is the soil from which the worst human rights violations invariably grow . . . . Universal condemnation and the certainty of punishment for major transgressors can be a powerful deterrent." Hofmann, *supra* note 1; *see also* James L. Cavallaro & Stephanie E. Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT. L. 768, 770 (2008) ("[I]n states where respect for human rights is not entrenched, supranational tribunals are unlikely to enjoy the automatic implementation of their decisions, particularly when these decisions call for a significant political or financial commitment or implicate endemic human rights problems.").

[52] Hofmann, *supra* note 1; *see, e.g.*, Robert H. Jackson, Opening Statement at the International Military Tribunal (Nov. 21, 1945) (transcript available at https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/) ("The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.").

[53] *See Founding Member States*, UNITED NATIONS: DAG HAMMARSKJÖLD LIBR., https://research.un.org/en/unmembers/founders (last visited Apr. 7, 2024).

[54] *See Growth in United Nations Membership*, UNITED NATIONS, https://www.un.org/en/about-us/growth-in-un-membership#1990s (last visited Apr. 7, 2024); *Yugoslavia and Successor States: Bosnia and Herzegovina, Croatia,*

former Yugoslavia[55] and the Rwandan Civil War[56] were collectively responsible for millions of civilian casualties.[57] In the absence of a permanent international criminal court, the Security Council—under its authority granted by Chapter VII of the UN Charter—established two ad international criminal tribunals: the ICTY in the former Yugoslavia, and the ICTR in Rwanda.[58]

In the leadup to the creation of the ICTY, a United Nations' investigative commission's findings revealed that the fighting that followed the breakup of the former Yugoslavia in 1992 included "horrific crimes" and "grave breaches" of international law, such as mass killings, ethnic cleansing, torture, and rape.[59] In May of 1993, the Security Council unanimously voted to pass Resolution 827, thereby establishing the ICTY to try individuals believed responsible for grave breaches of international humanitarian and criminal law during the conflict.[60] After it was all said

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Montenegro, North Macedonia, Serbia, Slovenia, UNITED NATIONS, https://www.un.org/en/about-us/member-states/yugoslavia (last visited Apr. 7, 2024).

55 For a detailed review of the rise of nationalist movements within Yugoslavia and the failure of Yugoslavia's federal structure, see PETER RADAN, THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW 55 (2002).

56 *See, e.g.*, SYDNEY D. BAILEY, THE UN SECURITY COUNCIL AND HUMAN RIGHTS 87 (1994) (regarding the establishment of the ICTY, Bailey notes, "[t]he Secretary-General's proposals for an international tribunal were issued on 3 May [1993]. He suggested that such a tribunal should be established by the Security Council acting under Chapter VII of the UN Charter . . . . The tribunal should have jurisdiction over natural persons and not entities such as associations or organizations . . . . The tribunal should have primacy over national courts.").

57 It is estimated that more than 100,000 civilians were killed, and two million people were forced to flee their homes as a result of the Yugoslav war. *See The Conflicts*, ICTY: IRMCT, https://www.icty.org/en/about/what-former-yugoslavia/conflicts (last visited Apr. 7, 2024). During the genocide in Rwanda, nearly one million Tutsi and Hutu were killed. *See Holocaust and Genocide Studies*, UNIV. OF MINN., https://cla.umn.edu/chgs/holocaust-genocide-education/resource-guides/rwanda (last visited Apr. 7, 2024).

58 *See* S.C. Res. 827 (May 25, 1993); S.C. Res. 955 (Nov. 8, 1994); *see, e.g.*, BAILEY, *supra* note 56, at 87–88.

59 *See, e.g.*, BAILEY, *supra* note 56, at 86. In the Bosnian town of Srebrenica, members of the Bosnia Serb Army executed between 5,000–8,000 individuals. The "Srebrenica massacre" constitutes the largest single atrocity in Europe since World War II. *See* Ed Vulliamy, *Ukraine Matters, But So Did Bosnia 30 Years Ago. Where Was the Outcry Then?*, GUARDIAN (Apr. 3, 2022, 2:00 PM), https://www.theguardian.com/commentisfree/2022/apr/03/ukraine-matters-so-did-bosnia-30-years-ago-where-was-outcry-then.

60 *See* S.C. Res. 827, *supra* note 58.

and done, the ICTY prosecuted 161 individuals for war crimes—the largest number of people ever prosecuted by a single international court.[61] Further, the ICTY built upon the foundation set at Nuremberg regarding indirect culpability when it held that a crime being committed by a subordinate soldier did not relieve their superior of criminal responsibility if the superior knew, or had reason to know, the subordinate was about to commit such crimes and the superior failed to take the necessary preventative measures—a legal concept now defined as "command responsibility."[62]

Liken the situation in the former Yugoslavia with the events that led to the Rwanda's ICTR establishment in 1994. There, the dominating Hutu regime used competing ethnic variances as reason to avoid bipartisan power with the minority regime, the Tutsis.[63] Consequently, a war broke out between the Hutu and the Tutsis, fostering a vulnerable public environment that culminated with massacres where civilians were targeted solely based on their membership to a particular group, regardless of their age or attenuation from the armed conflict.[64] The Hutus inflicted the bulk of the violence, but the Tutsis themselves, under the leadership of Paul Kagame, were not without blood on their hands either. In the end, "[b]etween 800,000 and one million men, women[,] and children were massacred by Hutu extremists.[65] Senior Appeals Counsel at the ICTR, George William Mugwayna, admitted that "[i]t is difficult to 'simplify all the ingredients that serve as a basis for killing on such a

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61 *See Infographic: ICTY Facts & Figures*, UNIRMCT, https://www.icty.org/en/content/infographic-icty-facts-figures (last visited Apr. 7, 2024).

62 Scholars have pointed out that most individuals who commit war crimes do so under the command of a military or civilian commander. In such situations, the superior who orders a subordinate to command an atrocity is as guilty as the person carrying out his or her orders. Consistent with this opinion, the statutes of both the ICTY and ICTR have endorsed the rule that a commander is responsible if he or she orders the abuses, but also if he or she knew or should have known that subordinates committed abuses and failed to prevent them or punish those responsible. *See* S.C. Res. 827, *supra* note 58, at art. 7; S.C. Res. 955, *supra* note 58, at art. 6; *see also* ICTY art. 7(1).

63 *See, e.g.*, GEORGE WILLIAM MUGWANYA, THE CRIME OF GENOCIDE IN INTERNATIONAL LAW: APPRAISING THE CONTRIBUTION OF THE UN TRIBUNAL FOR RWANDA 31 (2007) ("[In the] decades of discrimination since Rwanda's colonial times throughout the post-colonial era until the 1994 carnage—discrimination that was motivated, mainly by greed for political power and concomitant economic, social among other privileges—culminat[ing] into the emergency and concretization of the [Hutu and Tutsis] in Rwanda.").

64 *See id.*

65 *The Genocide*, UNIRMCT, https://unictr.irmct.org/en/genocide (last visited Apr. 7, 2024).

scale' as those which took place in Rwanda in 1994."[66] Nonetheless, the ICTR, holding power granted by the Security Council, collected enough evidence to indict ninety-three individuals deemed responsible for the violations of international law, including high-ranking military; religious and government officials; politicians; businessmen; militia; and media leaders.[67]

Together, the ad hoc Tribunals provided a blueprint for modern norms of criminal culpability in post conflict adjudication,[68] not to mention, the demonstrated power of the Security Council and the Permanent Five, if not impeded by ulterior motives. The logistical framework used by the Tribunals was the first of its kind.[69] Tens of thousands of hours of video recordings, and millions of pages of documents from the investigations and trials provided an undeniable and positive legacy for generations of international legal scholars, practitioners, and jurists.[70] The factual findings of the ad Tribunals highlighted the importance of making a historical record regarding *atrocity crimes*. Moreover, the ad Tribunals established that leaders and commanders alike shall be criminally responsible for crimes committed by forces under their effective command and control. In the grander scheme, the ad hoc Tribunals carried the standard established by the Nuremberg Tribunals into the later years of the Twentieth Century: individuals can and will be held accountable by international criminal courts, regardless of their position or status.[71]

As a result of the progress of the ad hoc Tribunals, legal questions of culpability—on an international scale—progressed from "should leaders be held accountable?" to "how best can they be held accountable?"[72] The effectiveness of the ad hoc Tribunals

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66 *See* MUGWANYA, *supra* note 63, at 34.

67 *The ICTR in Brief*, UNIRMCT, https://unictr.irmct.org/en/tribunal (last visited Apr. 7, 2024).

68 *See About the ICTY*, UNITED NATIONS, https://www.icty.org/en/about (last visited Apr. 7, 2024).

69 *See, e.g.*, *United Nations International Criminal Tribunal for the Former Yugoslavia, Achievements*, UNIRMCT, https://www.icty.org/en/about/tribunal/achievements (last visited Apr. 7, 2024) ("Since its establishment, the Tribunal has consistently and systematically developed international humanitarian law. The Tribunal's work and achievements have inspired the creation of other international criminal courts, including the [ICTR], the Special Court for Sierra Leone and the International Criminal Court.").

70 *The Prosecution's Evidence Collection, What It Is and What It Contains*, UNIRMCT, https://www.irmct.org/specials/prosecution-evidence-collection/en/ (last visited Apr. 7, 2024).

71 *See United Nations International Criminal Tribunal*, *supra* note 69.

72 *See id.*

proved that a modern-day international court is a viable forum for adjudication.[73] Moreover, the establishment and effectiveness of the ad Tribunals demonstrated that the Security Council *is capable* of supporting international criminal courts when the collective political will is provoked. Such achievement inspired scholars and diplomats alike to envision the creation of a permanent criminal court with the sole purpose to try the world's most culpable criminal actors.

III. THE ROME STATUTE: GOVERNING THE ICC

The ratification of the ICC's founding statute, the Rome Statute, came less than ten years after the establishment of the ad hoc Tribunals.[74] It was a momentous moment for the international legal community, marking the first time in human history that nations of the world came to an agreement on the significance of opening a permanent court serving international criminal justice.[75] The ICC, permanently located in The Hague,[76] operates under the jurisdictional principle of complementarity, meaning, deference must first be given to national courts to adjudicate *atrocity crimes* before the ICC can act. In other words, it is intended to serve as a court of last resort.[77] Of importance to this discussion are the articles of the

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[73] While the ICTY and the ICTR were temporary tribunals which only addressed atrocity crimes committed in the two aforementioned conflicts, they provided a logistical and legal framework for a future permanent international court. *See, e.g.*, BAILEY, *supra* note 56, at 112–13 ("[P]erpetrators normally live an underground existence, beyond the reach of law . . . . One innovation that might have had a marginal deterrent effect would be the establishment of a permanent international criminal court or tribunal, before which individuals could be brought who were alleged to have committed violations of existing international law."); *see also Mandate and Crimes Under ICTY Jurisdiction*, ICTY, https://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction (last visited Apr. 7, 2024) ("The [ICTY] has authority to prosecute and try individuals on four categories of offenses: grave breaches of the 1949 Geneva conventions, violations of the laws or customs of war, genocide and crimes against humanity . . . [T]he Tribunal has jurisdiction over persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The ICTY Statute also states that the official position of an accused, whether as Head of State or Government or as a responsible Government official, does not relieve him of criminal responsibility nor mitigate punishment.").

[74] *See* Bekou, *supra* note 2.

[75] *Id.*

[76] Rome Statute, *supra* note 3, at art. 3(1) (establishing the seat of the ICC shall be at The Hague in the Netherlands).

[77] *Id.* at art. 1 (establishing that the ICC shall be complementary to national criminal jurisdictions).

Rome Statute, which concern the enumerated crimes and explicit methods by which situations may fall under the ICC's jurisdiction.

A. *Crimes as Defined by the Rome Statute*

Article 5 of the Rome Statute lays out the crimes over which the ICC has jurisdiction. These include: (a) genocide; (b) crimes against humanity; (c) war crimes; and, (d) the crime of aggression.[78] First, the crime of genocide, otherwise referred to as the crime of all crimes,[79] was codified in the Rome Statute pursuant to the definition established in the Genocide Convention as the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group [by] killing its members [or by other means]; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [or] forcibly transferring children of the group to another group."[80] Unfortunately, the statutory language of the crime of genocide has demonstrated the dissonance between pursuing the crime in theory and pursuing the crime from a practical perspective. Although there can be great symbolism in the gravity of a situation by charging a defendant with the crime of all crimes, oftentimes challenge of establishing the proper *mens rea*: "the intent to destroy in whole or in part."[81] So instead, prosecutors pursue charges that they know can be proven.

Second is a relic of the Nuremberg Tribunals: crimes against humanity; the nature of which are serious violations committed as part of a large-scale attack against civilian populations. There are fifteen forms of crimes against humanity listed in the Rome Statute, including *inter alia*, murder, rape, imprisonment, enforced disappearances, sexual slavery, torture, apartheid, and deportation.[82] One of the most recent indictments brought under this crime at the ICC is the indictment of former President of Sudan, Omar al-Bashir, who is accused of being responsible for the widespread killing of civilians in Darfur through the use of government forces and militia groups. As of the drafting of this Note, al-Bashir has continued to evade arrest.[83]

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78 *Id.* at art 5.

79 *See, e.g.*, NICOLE RAFTER, THE CRIME OF ALL CRIMES: TOWARDS A CRIMINOLOGY OF GENOCIDE 25 (2016).

80 Rome Statute, *supra* note 3, at art. 6.

81 NPR Morning Edition, *Why Genocide is Difficult to Prove Before an International Criminal Court*, NPR (Apr. 12, 2022, 7:15 AM), https://www.npr.org/2022/04/12/1092251159/why-genocide-is-difficult-to-prove-before-an-international-criminal-court (quoting international law professor Leila Sadat).

82 Rome Statute, *supra* note 3, at art. 7.

83 Press Release, Amnesty International, Why Former Sudan President Omar al-Bashir Must Not Escape Justice (Apr. 17, 2019),

Third, the ICC is permitted to enforce judgments for the commission of war crimes, such as substantial breaches of the Geneva Conventions, including the use of child soldiers; the killing or torture of prisoners of war; or intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, or sciences.[84] Nuremberg Prosecutor Ben Ferencz has argued that "the rule of law should govern human behavior" and to that end, the ICC should put perpetrators of crimes against humanity on trial because such a trial shows that humankind, in addition to the rule of law, is ashamed that such crimes occur.[85]

Lastly, Article 8 *bis* of the Rome Statute defines the most nuanced crime falling within the ICC's jurisdiction: the crime of aggression. This is a leadership crime defined as "the use of armed force by a State against the sovereignty . . . integrity or . . .independence of another State."[86] The statutory definition of the crime of aggression was not agreed upon in 2010, and it was not until 2018 that it came into force under the Rome Statute—sixteen years after the ICC's inception.[87] And even then, the crime of aggression was added to the Rome Statute and requires States to expressly "opt in" to the ICC's subject-matter jurisdiction of the crime.[88]

Arguably, the crime of aggression is the most important crime for the ICC to prosecute. This is because once aggression occurs, any subsequent military act by the infracting party is a war crime or crime against humanity. Take, for example, the United States invasion of Iraq in 2003 or the Russian invasion of Ukraine in February 2022.[89] But-for the initial act of aggression commanded and ordered by their respective Heads of State and military brass (the invasion into the countries in-an-of themselves), there would not have been an opportunity for subsequent war crimes and

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https://www.amnesty.org/en/latest/press-release/2019/04/why-former-sudan-president-omar-al-bashir-must-not-escape-justice (last visited Apr. 7, 2024).

84 Rome Statute, *supra* note 3, at art. 8.

85 NPR Morning Edition, *The Last Nuremberg Prosecutor Has 3 Words of Advice: 'Law Not War'*, NPR (Oct. 18, 2016, 4:42 AM), https://www.npr.org/sections/parallels/2016/10/18/497938049/the-last-nuremberg-prosecutor-has-3-words-of-advice-law-not-war.

86 Rome Statute, *supra* note 3, at art. 8.

87 *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/.

88 *See, e.g.*, Milena Sterio, *The Trump Administration and the International Criminal Court: A Misguided New Policy*, 51 CASE W. RES. J. INT'L L. 201, 202–04 (2019).

89 *The Iraq War*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/timeline/iraq-war (last visited Apr. 7, 2024); *War in Ukraine*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine (Oct. 17, 2023).

crimes against humanity. That said, there are jurisdictional challenges exclusive to the crime of aggression. Those challenges will be discussed later in this Note.

To sum it all up, if the ICC finds an actor guilty of committing one or more of the above-mentioned crimes, the judgments handed down by the ICC serve not only as a deterrence to future actors who threaten peace, but also provide a sense of justice and finality to the victims' families and survivors of *atrocity crimes*.

B. *Jurisdiction of the ICC*

States who ratify the Rome Statute necessarily accept the ICC's subject-matter jurisdiction to the *atrocity crimes* referred to in the Part above when such crimes occur on the territory of said state, or by a national of said state.[90] This is fairly straightforward and not the subject of this Note. It becomes more complicated when *atrocity crimes* are committed by a national or on a territory of a state which has not prospectively and voluntarily availed itself to ICC jurisdiction. But, if a state has not ratified the Rome Statute and would like the ICC to exercise its jurisdiction over some issue, there remain two additional, but problematic, ways in which the ICC may acquire jurisdiction.

First, under Article 12(3) of the Rome Statute, a state which is not party to the Rome Statute may accept the ICC's jurisdiction on a temporary, ad hoc basis, if the state has determined that it is unable to properly prosecute on its own.[91] Important here, is that the state can accept the ICC's jurisdiction over certain situations, retroactively. And second, as mentioned in the Introduction, the Security Council, operating pursuant to Article 13(b) of the Rome Statue, may, by way of resolution refer a situation to the ICC, thereby granting it jurisdiction.[92] How the ICC acquires jurisdiction in situation where the parties have not ratified the Rome Statute is important because it dictates the breadth of the ICC's authority to prosecute the most nuanced crime: crime of aggression. Aside from situations concerning State parties to the Rome Statute, a situation in which an act of aggression appears to have occurred can *only* be prosecuted by the ICC if the crime was referred to the ICC by the Security Council. In the absence of a State Party or Security Council resolution, the ICC cannot lawfully exercise its jurisdiction regarding the crime of aggression.[93] Meaning, if a state accepts the ICC's jurisdiction on a temporary basis—as we will likely see in the

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90 Rome Statute, *supra* note 3, at art. 12(1–2) (noting the Court may exercise its jurisdiction on situations where the crime occurred on "[t]he State on the territory of which the conduct in question occurred . . .").

91 *Id.* at art. 12(3) ("If the acceptance of a State which is not a Party to [the Rome Statute] is required. . . . That State may . . . [a]ccept the exercise of jurisdiction by the Court with respect to the crime in question.").

92 *Id.* at art. 13(b) ("A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. . . ."); *See supra* note Part I.

93 *See How the Court Works*, INT'L CRIM. CT., https://www.icc-cpi.int/about/how-the-court-works (last visited Apr. 7, 2024).

case of Ukraine—pursuant to Article 12(3), the ICC is not granted jurisdiction over the crime of aggression.

To recap, a Security Council referral is meaningful because it grants the ICC jurisdiction over all four *atrocity crimes*, irrespective as to whether it involves state parties or non- state parties to the Rome Statute. In the bigger picture, this distinction demonstrates the importance and influence of Security Council cooperation with the ICC. Without Security Council cooperation, the ICC is often forced to operate with one arm tied behind its back as it pertains to subject-matter jurisdiction. In a narrower sense, the distinction between Security Council referral and an Article 13(b) ad hoc acceptance of jurisdiction is important to keep in mind for the case study of the Russian invasion of Ukraine in Part V of this Note.[94]

IV. THE PROBLEM: THE UN CHARTER PERMITS THE SECURITY COUNCIL TO DISREGARD THE ICC

The apparent "*amour impossible*" between the Security Council and the ICC demonstrates the eternally imperfect relationship between law and politics.[95] But, international peace is both a legal and political notion. To repeat, the Security Council must maintain international peace and security. At the same time, the ICC holds the capacity to prosecute the individuals who threaten international peace. Logically, the two organizations should operate in harmony. But the political friction between Security Council and the ICC demonstrates that the link between politics and law is a fragile one. This Part demonstrates that the root cause of ICC futility is in the permissible political gamesmanship—by way of the UN Charter—played by the Permanent Five of the Security Council.

A. *The Immortal Game of International Politics*

The UN Charter is a multilateral treaty establishing the United Nations, which was entered into force in the wake of World War II.[96] Functionally, the United Nations is a global stage for diplomacy, a platform for international politics, and an indicator of world affairs.[97] Given its primary function under the UN Charter to preserve

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94 *See infra* Part V.

95 ALEXANDRE SKANDER GALAND, UN SECURITY COUNCIL REFERRALS TO THE INTERNATIONAL CRIMINAL COURT: LEGAL NATURE, EFFECTS AND LIMITS 203, 223 (2020).

96 *See Preparatory Years: UN Charter History*, UNITED NATIONS, https://www.un.org/en/about-us/history-of-the-un/preparatory-years (last visited Apr. 7, 2024).

97 *See, e.g.*, PAUL R. WILLIAMS, LAWYERING PEACE 11 (2021) ("[T]he UN Charter grants broad authority for both the peaceful and the forceful resolution conflicts that threaten international peace and security."). The UN has four main purposes: to keep peace throughout the world; to develop friendly relations among nations; to help nations work together to improve the lives of poor people, to conquer hunger, disease and illiteracy, and to encourage respect for each other's rights and freedoms; to be a

international peace and security, the Security Council has an important role in its capacity to identify crimes that warrant resolutions granting the ICC jurisdiction. [98]

However, political motives and biases of the Permanent Five have proven to be a serious hurdle for the effectiveness of the ICC.[99] Consequently, the political decisions of the Permanent Five have had a profoundly negative impact on the perception of the ICC's legitimacy and credibility. The ICC has been called a "shadow court," "ineffective," "a giant without limbs," and accused of singling out Africa.[100] This Note takes the position that much of the constant criticism of the ICC is misguided,[101]

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center for harmonizing the actions of nations to achieve these goals. *See* Somini Sengupta, *The United Nations Explained: Its Purpose, Power and Problems*, N.Y. TIMES (Sept. 17, 2017), https://www.nytimes.com/2017/09/17/world/americas/united-nations-un-explainer.html; *see also* U.N. Charter, *supra* note 9, at art. 1.

98 U.N. Charter, *supra* note 9, at art. 39–51; *see* BAILEY, *supra* note 56, at 88 ("The [UN] Charter empowers the Security Council to take coercive action against States if this is necessary in order to maintain or restore international peace and security . . . . If violations of [international humanitarian law] are so extensive as to threaten the peace, Council is empowered to order non-military or military measures of coercion.").

99 *See, e.g.*, Milena Sterio, *Humanitarian Intervention Post-Syria: Legitimate or Legal?*, 40 BROOK. J. INT'L. L. 109, 117–18 (2014) (stating that the victors of World War II (the permanent five) "preserved their political, military, and economic advantage through the structure of the Security Council, where [the] five permanent members maintained veto power.").

100 *See, e.g.*, Claire Klobucista & Mariel Ferragamo, *The Role of the International Criminal Court*, COUNCIL ON FOREIGN RELS. (Aug. 24, 2023, 10:15 AM), https://www.cfr.org/backgrounder/role-international-criminal-court; *see also* Dr. Ewelina U. Ochab, *As the International Criminal Court Faces More Challenges, We Need It More Than Ever*, FORBES (Sept. 13, 2020, 2:39 PM), https://www.forbes.com/sites/ewelinaochab/2020/09/13/as-the-international-criminal-court-faces-more-challengs-we-need-it-more-than-ever/?sh=68ad65d31468; *Allegations of Bias of the International Criminal Court Against Africa: What Do Kenyans Believe?*, UNIVERSITEIT LEIDEN (Jan. 20, 2020), https://www.leidensecurityandglobalaffairs.nl/articles/allegations-of-bias-of-the-international-criminal-court-against-africa-what-do-kenyans-believe; Bouwknegt, T.B., Cross-examining the Past: Traditional Justice, Mass Atrocity Trials and History of Africa (2017) (Ph.D. thesis, University of Amsterdam) https://dare.uva.nl/search?identifier=27b4f924-2740-4903-97ca-f363296bb12e/. *See generally* Jackson Nyamuya Maogoto, *A Giant Without Limbs: The International Criminal Court's State-Centric Cooperation Regime*, 23 UNIV. QUEENSLAND L.J. 102 (2004).

101 For further critiques of the ICC, see Nidal Nabil Jurdi, *The Domestic Prosecution of the Crime of Aggression After the International Criminal Court Review*

and that the apparent shortcomings of the ICC are more indicative of the complex geopolitical issues caused by the Permanent Five of the Security Council.[102]

B. *Article 27 of the UN Charter*

In total, there are fifteen Security Council member states. The Permanent Five, and ten additional rotating State members, elected by the UN General Assembly on two-year terms.[103] Functionally, the Security Council takes votes by a show of hands "in favor," "against," or "abstentions" of proposed resolutions.[104] And again, those resolutions that do get passed Decisions of the Security Council not only require nine votes "in favor by the Security Council at large," but also require a unanimous "in favor" vote by the Permanent Five.[105] This process is laid out in Article 27(3) of the UN Charter, which expressly permits a permanent member to singlehandedly veto a draft resolution, an authority known as "veto power."[106] In its entirety, Article 27 reads:

Each member of the Security Council shall have one vote.

> *Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.*
>
> *Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.*[107]

Conference: Possibilities and Alternatives, 14 MELB. J. INT'L L. 129 (2013); Rowland J. V. Cole, *Africa's Relationship with the International Criminal Court: More Political Than Legal*, 14 MELB. J. INT'L L. 670 (2013); Maogoto, *supra* note 100.

102 The political pull of the permanent five was demonstrated in 2005 when there was no ICC investigation into alleged war crimes and crimes against humanity committed in Afghanistan by U.S. soldiers and CIA officers. Although the crimes at issue were clearly within the ICC's jurisdiction, the prospects of a successful investigation and prosecution were extremely limited. *See* James A. Goldston, *Don't Give Up on the ICC*, FOREIGN POL'Y (Aug. 8, 2019, 4:18 AM), https://foreignpolicy.com/2019/08/08/dont-give-up-on-the-icc-hague-war-crimes/#.

103 U.N. Charter, *supra* note 9, at art. 23, ¶1.

104 *Id.* at art. 27.

105 *Id.*

106 *Id.*

107 *Id.*

> *Practically speaking, the language of 27(3) permits a permanent member to veto any substantive resolution it so chooses.*[108]

To date, the Security Council has shielded one of its own on several occasions by refraining from passing a resolution when atrocity crimes have been suspected to have been committed by one of the Permanent Five.[109] In step with this problem, Nuremberg prosecutor Ben Ferencz has claimed that, "[s]tates that commit crimes against peace will not punish themselves and excluding aggression from international judicial scrutiny is to grant immunity to malevolent leaders responsible for 'the supreme international crime.'"[110] This belief has been evidenced by the Security Council's past inaction in condemning one of its own. And as the Security Council presently stands, it is hard to envision a scenario where the Permanent Five would ever unanimously agree to pass a resolution permitting the ICC to investigate one of their own, for fear that the same action could be taken against them.[111]

C. *Article 41 of the UN Charter*

Article 41 of the UN Charter concerns the extent of the Security Council's power and assigns it the authority to take measures "*not involving the use of armed force*" to maintain or restore international peace and security.[112] Therefore, it is Article 41 of the UN Charter which statutorily permits—but does not oblige—the Security Council the authority to pass resolutions granting jurisdiction to the ICC. In its entirety, Article 41 reads:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraph,

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[108] *Id.*

[109] *See id.*; *see also* Sengupta, *supra* note 97 ("The Security Council's job is to maintain international peace. Its ability to do so has been severely constrained in recent years . . . . The Council has been feckless in the face of major conflicts, particularly those in which permanent members have a stake.").

[110] Hofmann, *supra* note 1.

[111] *See, e.g.*, *In Hindsight: The Security Council and the International Criminal Court*, SEC. COUNCIL REP. (July 21, 2018), https://www.securitycouncilreport.org/monthly-forecast/2018-08/in_hindsight_the_security_council_and_the_international_criminal_court.php ("The role of the Council vis-à-vis the ICC and the complexities of implementing its referrals have been widely debated among Council members. Among the areas of controversy has been the failure to refer some situations in which mass crimes were allegedly committed.").

[112] U.N. Charter, *supra* note 9, at art. 41.

radio, and other means of communication, and the severance of diplomatic relations.[113]

Ironically, the text of Article 41 has arguably ended up doing more harm than good, in that its vague language has allowed the Security Council to abstain from soliciting the service of the ICC to help maintain international peace and security.[114] The employment of the term "may" as opposed to something more sound such as "shall," has permitted the Security Council to interpret Article 41 to ignore the ICC as a resource, while still being in compliance with the UN Charter.[115] Although there are several examples of Article 27 and Article 41 being abused in harmony, perhaps the most obvious example of abuse is exemplified in the context of Russia's unprovoked invasion of Ukraine in February 2022.[116]

V. CASE STUDY: THE RUSSIAN INVASION OF UKRAINE

A. *The Situation in Ukraine*

On February 24, 2022, Russia commenced a full-scale military invasion of Ukraine.[117] The Russian military used force against Ukrainian cities with both ground troops and air strikes,[118] most notably against Kharkiv, Kherson, and Donetsk.[119]

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[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] Notably, the Security Council has not exercised its power under Article 41 and has, in fact, blocked itself from exercising its power by way of Article 27 in failing to grant the ICC jurisdiction to investigate and/or prosecute atrocity crimes committed by *inter alia*, Bashir al-Assad regime in Syria since 2011, or crimes committed by Houthi rebels in Yemen since 2014. Press Release, Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, U.N. Press Release SC/11407 (May 22, 2014); Mike Corder, *Lawyers Seek ICC Probe into Alleged War Crimes in Yemen*, ASSOCIATED PRESS (Aug. 30, 2021, 6:40 AM), https://apnews.com/article/middle-east-crime-war-crimes-yemen-fefba6965cecdde71ff76f7a05c95798.

[117] *See, e.g.*, Sterio, *supra* note 30.

[118] *See* Ctr. for Preventative Action, *supra* note 30.

[119] *See generally Dozens of Russian Missiles Hit Multiple Ukrainian Cities*, ALJAZEERA (Oct. 10, 2022), https://www.aljazeera.com/news/2022/10/10/explosions-rock-ukraine-capital-kyiv-in-apparent-missile-strikes; *War in Ukraine: Where Has Russia Attacked?*, GUARDIAN (Feb. 24. 2022, 2:54 PM), https://www.theguardian.com/world/2022/feb/24/war-ukraine-kyiv-map-where-has-russia-attacked.

Although roughly 200,000[120] casualties is worthy of a moral critique, of greater significance to international humanitarian law and this Note is the 6,595 and counting Ukrainian civilians who have died as a result of Russian aggression, crimes against humanity, and war crimes.[121] Millions of Ukrainian civilians have been displaced within Ukraine, and millions more have been forced to leave their homeland entirely.[122] What's more, Russian troops are accused of the summary execution of dozens of civilians in the Ukrainian town of Bucha.[123]

By blatantly attacking Ukraine, a sovereign country, Russia has violated international law's basic prohibition on the use of force, which is the underlying principle of the crime of aggression.[124] In short, Russia has broken every norm of contemporary international relations.[125] Ukrainian leaders have held that there is no room left for negotiation.[126] Therefore, the Security Council and the ICC occupy one of the last lines of adjudicative defense for Ukrainian civilians.

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120 *See Ukraine War: US Estimates 200,000 Military Casualties on All Sides*, BBC (Nov. 10, 2022), https://www.bbc.com/news/world-europe-63580372 (quoting General Mark Milley, chairman of the US Joint Chiefs of staff: "You're looking at well over 100,000 Russian soldiers killed and wounded . . . same thing probably on the Ukrainian side.").

121 *Number of Civilian Casualties in Ukraine During Russia's Invasion Verified by OHCHR as of November 20, 2022*, STATISTA (Nov. 22, 2022), https://www.statista.com/statistics/1293492/ukraine-war-casualties.

122 Chris Galarza, *Into the Valley of the Shadow of Death: War Crimes Committed in Service of Russia's Crusade to Destroy Ukraine*, 13 AM. U. NAT'L SEC. L. BRIEF 35, 69 (2023).

123 *Ukraine: Russian Forces' Trail of Death in Bucha*, HUM. RTS. WATCH (Apr. 21, 2022, 12:00 PM), https://www.hrw.org/news/2022/04/21/ukraine-russian-forces-trail-death-bucha ("[Bucha] funeral home worker, . . . who helped collect bodies, said that he had personally collected about 200 bodies from the streets since the Russia invasion began on February 24, [2022]. Most of the victims were men, he said, but some were women and children. Almost all of them had bullet wounds, he said, including around 50 whose hands were tied and whose bodies had signs of torture. Bodies found with hands tied strongly suggest that the victims had been detained and summarily executed.").

124 One of the most important principles of international law is the prohibition against the use of force codified in Article 2(4) of the UN Charter, which provides that a UN member state cannot threaten or use force against another UN member state. U.N. Charter, *supra* note 9, at art. 2(4).

125 Galarza, *supra* note 122, at 63–74.

126 *See* Agence France Presse, *Ukraine Will Not Negotiate with Russia as Long as Putin Is in Power: Zelensky*, BARRON'S (Sept. 30, 2022), https://www.barrons.com/news/ukraine-will-not-negotiate-with-russia-as-long-as-putin-is-in-power-zelensky-01664548507; *see also* Ira Cohen, *Practicing Law During*

B. *The Diplomatic and Legal Issues*

The ICC does not have per se jurisdiction over Ukraine nor Russia because neither has ratified the Rome Statute. But, prior to the February 2022 invasion, Ukraine accepted the ICC's jurisdiction on a temporary basis under Article 12(3) of the Rome Statute.[127] As mentioned in Part III, this method of triggering ICC jurisdiction is problematic because situations referred to the ICC by way of Article 12(3) of the Rome Statute do not permit the ICC jurisdiction to prosecute for the crime of aggression[128]—a crime that not only has clearly been committed by Russia and its leaders, but also serves as a gateway to the commission of the other *atrocity crimes* in Ukraine.[129] A Security Council resolution granting the ICC jurisdiction, on the other hand, would remedy this issue, but due to the interested parties and the obvious automatic veto by Russia, the Security Council has stayed silent on the issue.[130] Moreover, the political motives of China have also been assumed to surely stimy any proposed resolution against Russia, anyway.[131]

This is the first time since the beginning of the United Nations that a "big power" has engaged in a war such as the one in Ukraine. Mindful of the United States 2003

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a War: The Trials and Tribulations of Ukraine and Its Legal Professionals, 69 FED. LAW., no. 5, 2022, at 43–44. When asked what do the majority of Ukrainians feel about the ultimate outcome of the war, Ukrainian lawyer Oleksandra Syniakovska asserted: "I would like to let anyone know about the Ukrainians that we are the people who never give up on fighting for our homes, for our freedom, and peace on our land, even if we should pay the ultimate price for this. All Ukrainians strongly believe that we must and will win this war."

127 *See Ukraine*, INT'L CRIM. CT., https://www.icc-cpi.int/ukraine (last visited Apr. 7, 2024) ("Ukraine is not a State Party to the Rome Statute, but it has . . . accept[ed] the Court's jurisdiction over alleged crimes under the Rome Statute occurring on its territory, pursuant to article 12(3) of the Statute . . . on an open-ended basis to encompass ongoing alleged crimes committed throughout the territory of Ukraine from 20 February 2014.").

128 *See supra* Part III.

129 Galarza, *supra* note 122, at 72–73.

130 *See Russia Vetoes Security Council Resolution Condemning Attempted Annexation of Ukraine Regions*, UNITED NATIONS (Sept. 30, 2022), https://news.un.org/en/story/2022/09/1129102.

131 *See, e.g.*, Jaime Lopez & Brady Worthington, *The ICC Investigates the Situation in Ukraine: Jurisdiction and Potential Implications*, LAWFARE (Mar. 10, 2022, 10:08 AM), https://www.lawfareblog.com/icc-investigates-situation-ukraine-jurisdiction-and-potential-implications ("[A] . . . manner of [the ICC] exercising jurisdiction is by referral . . . to the court by the U.N. Security Council . . . . This avenue is almost certainly a dead end, as Russia (and likely China) would be inclined to use their veto powers to halt any such referral.").

invasion of Iraq, this Russian invasion is nevertheless distinguishable because Russia has done so with the intention of expanding its borders—a pure "land grab."[132] So, to recap: Russia, whose mission as a permanent member of the Security Council should be to maintain international peace, has invaded a sovereign bordering nation for territorial gain—a blatant infraction of international law in and of itself—regardless of the crimes committed on the ground once the invasion occurred.[133]

This unlawful undertaking by Russia has put the Security Council at a crossroads. Does the Security Council, in effect, turn a blind eye, knowing that any resolution pertaining to the Russian invasion will be vetoed? Or does it recognize the flaws of its makeup as playing out in real time, and initiate a change?

This Note advocates for the latter. Recognizing that it often takes time for international customary law to evolve, sometimes a "violent shock" is necessary to get the ball rolling to change the psychology of the international community.[134] The Russian invasion of Ukraine must serve as a "violent shock" to the conscious of the international community which initiates change that challenges the sensibility of the operation of the Security Council as it pertains to Articles 27 and 41 of the UN Charter.[135]

VI. THE SOLUTION: PROPOSING A FRAMEWORK OF OBJECTIVITY

International Law Professor Martti Koskenniemi has argued that it is impossible to completely distinguish legal and political undertakings.[136] The proposed amendments in this Part address the two most fundamental issues and principles that bind the Security Council together with international law: (1) a good-faith efforts to preserve international peace and security, and (2) the utilization of the ICC. The Permanent Five oppose the mission of the Security Council and principles of international law, either by failing to refer situations of *atrocity crimes* to the ICC or by vetoing proposed resolutions for subjective political reasons.

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[132] Galarza, *supra* note 122, at 73.

[133] *Id.* at 63.

[134] This notion is inspired, in part, by the writings of John F. Kennedy. *See* JOHN F. KENNEDY, WHY ENGLAND SLEPT 5 (1940) ("[I]t takes time to change men's minds, and it takes violent shocks to change an entire nation's psychology.").

[135] *Id.*

[136] *See, e.g.*, MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW 156–57 (2011) ("In an ideological age, the advocates of human rights may be able to project rights as non-ideological, outside politics. They appear as pure facts, objective, true and self-sufficient. But what is there, beyond the political system, and how do we find access to it? . . . Whatever philosophers might say, the social meaning of rights is exhausted by the content of legal rights, by the institutional politics that gives them meaning and applicability. From a condition or limit of politics, they turn into an effect of politics.").

A. *Amendment to Article 27 of the UN Charter: Removing "Self-protecting" Vetoes*

This Subpart proposes amending Article 27 of the UN Charter. As it stands, the Permanent Five are free to veto any proposed resolution. The proposal below represents a somewhat dramatic shift in thinking, in that most prior amendment proposals have advocated for "voluntary veto restraint."[137] Here, the proposed addition to Article 27 seeks to statutorily *restrain* (emphasis added) veto power altogether when the proposed Security Council resolution concerns *atrocity crimes* committed on the territory of a Security Council member, or by a national of a Security Council member.[138] The proposed amendment is intended to remove any inherent biases that may derail objectively sensible Security Council resolutions. Put another way, the purpose of the new language is to eliminate vetoes from the permanent members that are, a conflict of interest with respect to resolution. Moreover, the proposed language also replaces the "muted" vote with a more representative, collective vote by the United Nations General Assembly.[139] Meaning that, once a permanent member's vote is sidelined from weighing in on a proposed resolution, it will be replaced by one, simple majority "at large" vote of the General Assembly.

A brief sidebar on the General Assembly: the General Assembly is made up of all 193 member States of the United Nations.[140] Like the Security Council, the General Assembly has the authority to propose and pass resolutions on pertinent issues brought before the assembly.[141] Unlike the Security Council, General Assembly resolutions do not serve as binding on member States. Rather, they serve as recommendations and provide an indication as to where the bulk of States stand on given issues.[142] And while the General Assembly is inclusive of representatives of the Security Council permanent member States, they are not afforded veto power in the General Assembly. Instead, each member State in the General Assembly casts a single vote, and resolutions are rejected or passed by a two-thirds majority vote.[143]

Applying the General Assembly model to the proposed amendment to Article 27, the theory behind replacing the "muted" permanent member's vote with a General Assembly at- large representative vote is that the replacing vote serves as a single vote

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137 *See generally* JENNIFER TRAHAN, EXISTING LEGAL LIMITS TO THE VETO POWER IN THE FACE OF ATROCITY CRIMES 102–41 (2020).

138 *See infra* Section VI.A.

139 *See infra* Section VI.A.

140 U.N. Charter, *supra* note 9, at art. 9; *see also General Assembly of the United Nations*, UNITED NATIONS, https://www.un.org/en/ga/ (last visited Apr. 7, 2024).

141 U.N. Charter, *supra* note 9, at art. 10–14.

142 *Id.* at art. 13.

143 *Id.* at art. 18.

taken to the Security Council by the General Assembly[144]. This representative vote will be considered a representation of the sentiment of humanity, or at least the sentiment of the majority of sovereign States, on a given issue. Such a replacement tracks with case precedent because, as held by the International Court of Justice in its *Certain Expenses* advisory opinion, "[t]he responsibilit[ies] conferred [on the Security Council] is 'primary, not exclusive'" and "the General Assembly [per the UN Charter,] is also to be concerned with international peace and security."[145]

In practice, when a member of the Permanent Five is suspected of *atrocity crimes* (as determined by ICC preliminary investigation) its vote will be replaced with a vote comprised from a two-thirds majority vote of the General Assembly. Of course, a two-thirds vote in the affirmative or negative will have contrasting effects. A two-thirds vote in the affirmative will give the proposed resolution a chance to be passed (assuming the required votes remaining parties in the Security Council are attained). And a two-thirds vote in the negative will act as a veto—quelling the proposed resolution.

Proposed language for Article 27 (italicized):

> *Each member of the Security Council shall have one vote.*
>
> *Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.*
>
> *If a decision of the Security Council pursuant to paragraph 1 of Article 41 concerns a Security Council Member, that Members vote shall be "muted" for the instant vote. The "muted" vote shall be replaced by a collective General Assembly vote. A two-thirds majority General Assembly vote will count as a single vote in the place of the "muted" party's vote. A vote in the affirmative will further the resolution, a vote in the negative will serve as a veto of the resolution.*
>
> *Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.*[146]

Applying this proposal to the Russian invasion of Ukraine, if the Security Council were to draft a resolution to refer the Russian situation to the ICC for criminal prosecutions of the supposed crimes committed at the direction of Russian leaders,

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[144] *See infra* Section VI.A.

[145] *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. Rep 151, 163–64 (July 20, 1962). They distinguished between matters that were exclusively within the purview of the Security Council and those that may also involve the General Assembly. The ICJ recognized that the Security Council, while having express authority, does not have exclusive authority as it pertains to maintaining international peace and security and that the General Assembly also has a role in that space.

[146] U.N. Charter, *supra* note 9, at art. 27.

Russia would not be afforded a vote in the resolution because its vote would certainly be a disingenuous veto. Instead, the remaining 193 Members of the General Assembly would collectively express their opinion on the situation by a collective replacement vote.

Indeed, the proposed amended language to Article 27 only solves one of the problems: the problem of a self-preservation veto. It does not solve the problem of a veto in defense of an ally, which is likely to occur in this case—China in defense of Russia. But it nonetheless serves as a momentous step in the right direction in that it removes the most significant layer of an insincere Security Council veto. That said, the proposed language to Article 27 will not work without also amending language to Article 41.

B. *Amendment to Article 41 of the UN Charter: Obligating the Security Council*

If the commission of atrocity crimes is suspected, it means that the supposed organizers and perpetrators have directed or actually committed systematic tortures, murders, and other brutalities against fellow human beings. The responsibilities, thus, imposed upon the Security Council and the ICC to hold those accountable for such crimes are critical and extraordinary. Ideally it is the responsibility of the Security Council, as an organizational voice of humanity, to set aside its political motives and refer crimes that meet the criteria to the ICC.[147]

But the present language of Article 41 is too deferential to the judgment of the Security Council, thus permitting the Security Council—in conflict with its stated purpose—to stay silent regarding situations that concern atrocity crimes and, further, serve as a barrier between the perpetrators and a prosecutorial process that rightfully belongs under the jurisdiction of the ICC. Below, additional language (italicized) is proposed, which statutorily obligates the Security Council to draft a resolution to refer atrocity crimes to the ICC and subsequently hold a vote on said resolution.

> *The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions and;*
>
> *In situations where the commission of atrocity crimes is suspected, the Security Council shall draft a resolution and vote to refer the situation to the ICC Prosecutor.*
>
> *[In all other matters, the Security Council] may call upon the Members of the United Nations to apply [certain] measures. [Such measures] may*

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147 As a result of Security Council stagnation in the context of chemical weapon use in Syria, journalists have cried out for Security Council reform: "[A]s global tensions rise, the UN stands on the sidelines doing virtually nothing, even after the use of chemical weapons . . . . The five nations with permanent places and power to wield the veto reflect the postwar world of 1945 . . . . This structure is anachronistic, insulting, unrepresentative and diminishes moral authority." Ian Birrell, *We Must End This UN 'Paralysis' on Syria*, GUARDIAN (Sept. 8, 2013, 3:30 PM), https://www.theguardian.com/commentisfree/2013/sep/08/un-paralysis-syria-security-council-russia.

> *include[:] complete or partial interruption of: [E]conomic relations[;] rail, sea, air, postal, telegraphic, radio and other means of communication[; or] severance of diplomatic relations*.[148]

This proposed language is as similarly momentous as that proposed in the previous Part. The use of the word "shall" places an unambiguous obligation on the Security Council to be insistent in defense of its mandate to ensure international peace and security by officially contemplating and drafting resolutions on international criminal prosecutions. Equally bold is the addition of express language calling for a referral to an adjudicative body (the ICC) which operates outside that of the United Nations—something that has never been done before, and is likely to be met with apprehension by states supplementary to the Permanent Five.

Applying this amendment to the instant case of Russia and the evidence of crimes committed, the Security Council would be duty-bound to draft a resolution proposing granting the ICC jurisdiction. Although the proposed language does not *guarantee* the Security Council would pass a resolution to grant the ICC jurisdiction, it would nonetheless *obligate* the Security Council to operate in coordination with both its stated purpose and the preemptory international norm of condemnation of *atrocity crimes*.[149]

In the bigger picture, the hope is that if such language were in place, it would remove one layer of insulation of bad actors from the ICC. First and foremost, it would discourage the commission of *atrocity crimes* in the first place, for fear of accountability. Secondly, the language takes some discretionary power out of the hands of the Permanent Five and obligates them to involve an unbiased tribunal, such that it is, to conduct proper investigations and proceedings. As mentioned above, that discretionary power has typically been influenced by geopolitical ties.[150] This Note argues that geopolitical dominance over international law in the long-term, is a losing proposition. These amendments, while hopeful and improbable, serve to advance a peaceful and diplomatic world order.

VII. CONCLUSION

Whether a situation should be referred to the ICC by the Security Council is a question for an impartial body of voting parties. And the Security Council must follow an objective standard which serves to protect civilians from tyranny. Although amending the UN Charter may remain a controversial subject, and implementation of

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[148] *See generally* U.N. Charter, *supra* note 9, at art. 41.

[149] Jennifer Trahan, *Why the Veto Power is Not Unlimited: A Response to Critiques of, and Questions About, Existing Legal Limits to the Veto Power in the Face of Atrocity Crimes*, 54 CASE W. RSRV. J. OF INT'L L. 112, 112 (2022) ("The prohibition of genocide, crimes against humanity, and war crimes are all recognized as peremptory norms protected at the level of *jus cogens*. Because the U.N. is bound to respect *jus cogens*, its principal peace and security organ, the Security Council, is similarly constrained.").

[150] *See infra* Section IV.A.

the amendments may appear doubtful, the fact remains that it is the Security Council's fundamental purpose to do what is in the interest of international peace and security.

The world looks to the Security Council and the ICC to uphold the right of all people to live in peace and dignity. It is a shared responsibility that can best be achieved by amending the UN Charter. Times of international conflict highlight the problematic routine of Security Council gridlock as it relates to the ICC. The question is valid: why should the Security Council care about the status of the ICC? Because the ICC and the Security Council alike give the illusion to the world that the law is fair, just, and ethical. Today, the illusion is wearing thin. If the Security Council will not fight to preserve legal standards in high stakes international politics, then legal standards should not be fought for at all.