

Aggression in Law's Clothing: Does Might Still Make Right?

Rachel López

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/mjil>

Recommended Citation

Rachel López, *Aggression in Law's Clothing: Does Might Still Make Right?*, 38 Md. J. Int'l L. (2024).
Available at: <https://digitalcommons.law.umaryland.edu/mjil/vol38/iss1/5>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Aggression in Law’s Clothing: Does Might Still Make Right?

RACHEL LÓPEZ†

I. INTRODUCTION

Most of us are familiar with the story of the wolf in sheep’s clothing. According to the fable, a wolf cloaked itself in sheep’s clothing to hide among a shepherd’s flock so that it could slowly eat the shepherd’s sheep one by one each day. From the story, we are meant to learn that the true nature of something is revealed not by how it looks on the outside, but its actions. Much like the sheep’s clothing in this fable, I fear that the cover of international law may be obscuring the true nature of aggression as it operates today. The traditional story, retold by Oona Hathaway and Scott Shapiro in their groundbreaking book, *The Internationalists*, casts the Old World order of “might is right” as behind us—a bygone of the past, not applicable today.¹ I question whether we have fully left this adage behind. Distressingly, a closer look at the accountability gaps for Russia’s invasion of Ukraine might reveal what has been hidden in plain sight. Though aggression is increasingly cloaked in law’s clothing, the vestiges of a world where “might is right” lurk underneath. Whereas under the Old World Order all states could resort to war to vindicate rights, in this “modern” world

©2023 Rachel López

† Associate Professor, Thomas R. Kline School of Law, Drexel University. This chapter was greatly enriched by feedback, encouragement, and insights from Ricardo Arredondo, Christopher Borgen, Tom Dannenbaum, Rebecca Hamilton, Kevin Jon Heller, Owiso Owiso, Tamsin Paige, and Matiangai Sirleaf. I would also like to express my gratitude to all of the organizers and participants of the Maryland Journal of International Law and UM Carey’s International & Comparative Law Program’s 2022 Annual International and Comparative Law Symposium on Aggressive War.

1. OONA HATHAWAY & SCOTT SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017).

order, only powerful states may do so, buttressed by the enforcement gaps in international law. That is not to say that the old and new are the same, but rather that they are more similar than international lawyers want to admit. In this new world order, while war is nominally prohibited, it is tolerated if undertaken by the mighty. Moreover, while in the past, states justified their violence as warranted under natural law, today they do the same under the guise of positive law. Even when these justifications are deeply flawed, the inability to punish powerful countries who use force reveals the fragility of international law in dealing with the world's most pressing problems.

Much like the wolf, the nature of aggression—how it truly operates today—can be seen more clearly if we look at the aggressive actions of powerful states, or more precisely, when their aggression goes unpunished, rather than solely at the applicable law. We can better understand how “might makes right” in the New World Order, relying on both economic and military might to shield accountability, and most importantly, how the international order can be made more just by accounting for this transmutation.

II. THE CLASSIC STORY OF THE OLD-WORLD ORDER BECOMING NEW

According to most accounts of the “Old World Order,” that is the legal order that guided relations between European states from the seventeenth century until World War I, international law was marked by a central axiom: war was a legitimate means of righting wrongs.² At the time, as articulated by Carl von Clausewitz, war was considered “simply the continuation of politics by other means.”³ International legal theorist Hugo Grotius did not invent, but rather documented the long tradition of “just war theory” in his seminal book, *On the Law of War and Peace*.⁴ He distinguished between those who went to war for a “good cause” under the “law of nature” and those without one.⁵ Under this theory, when a state could not go to court to vindicate wrongful acts, it could go to war.⁶

According to the traditional account, this system of enforcement via violent countermeasures which existed prior to World War I had a fatal flaw that would result in its undoing. In the absence

2. *Id.* at xv.

3. *Id.* at xv.

4. *Id.* at 10; HELMUT PHILIPP AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* 16–17 (2011).

5. AUST, *supra* note 4, at 16–17; HATHAWAY & SHAPIRO, *supra* note 2, at 11.

6. HATHAWAY & SHAPIRO, *supra* note 1, at 11.

of international courts or institutions, states themselves were unilaterally responsible for deciding whether a violation was grave enough to warrant punishment across state lines.⁷ Often, the most powerful or victorious state prevailed in imposing its version of what was just and good, usually based on its own national interest. Oona Hathaway and Scott Shapiro dubbed this “the might is right” principle.⁸ In their view, one feature of this era was that those who waged war were “*necessarily* immune from criminal prosecution.”⁹ Hathaway and Shapiro portray these rules as differing starkly from the ones that govern today. By their account, the signing of the Kellogg-Briand Pact “marked the beginning of the end [of war between states]—and, with it, the replacement of one international order with another.”¹⁰ It precipitated a fundamental change to the nature of conflict.¹¹ According to them, the “might is right” principle was roundly rejected after World War I, first in the Kellogg Briand Pact—the so-called Peace Pact—and then subsequently in the UN Charter. They thus describe the current New World Order as a world in which “aggressive wars are illegal” and “economic sanctions are not only legal, but the standard way in which international law is enforced.”¹² They measured this progress by the rate of territorial annexation, documenting how “in the century before 1928, states seized territory equal to eleven Crimeas a year on average.”¹³

Under this view, the Peace Pact did not take full effect at first because it was not backed by institutions that could enforce its prohibition on war.¹⁴ After the atrocities of World War II, however, states became more willing to limit their sovereign rights in the interest of maintaining peace and security, delegating some of that authority to intergovernmental institutions, particularly with respect to grave violations that threaten peace and security.¹⁵ In the modern post-war era, unilateral countermeasures, especially unilateral military

7. *Id.* at 23 (“Indeed, any right that could be enforced by courts could also be enforced by war if courts were unavailable.”); *see also* HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE INCLUDING THE LAW OF NATURE AND OF NATIONS* 247 (1901 ed.) (describing the right of powerful states to punish because they are “subject to the control of no earthly power”).

8. HATHAWAY & SHAPIRO, *supra* note 2, at 23.

9. *Id.* at xvi.

10. *Id.* at xiii.

11. *Id.* at xiv (describing how “the nature of conflict has changed fundamentally” following the adoption of these agreements).

12. *Id.* at xvii.

13. *Id.*

14. *Id.* at xviii.

15. *See generally* William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963 (2004).

intervention, have become increasingly suspect, and in many cases, illegal. Now, instead of acting unilaterally, states act through inter-government institutions to maintain peace and security. Moreover, in contrast to the pre-war period when war was a foreign relations tool, aggressive war became criminalized first before the International Military Tribunal in Nuremberg,¹⁶ and then the International Criminal Court.¹⁷ As Hathaway and Shapiro put it, now “[i]t is difficult to imagine war serving any legitimate function other than a defensive one. Today, war is regarded as a departure from civilized politics.”¹⁸

III. INSTITUTIONAL LOOPHOLES

However, this triumphant account of the outlawing of aggressive war in the modern age does not present a complete understanding of the ways in which war is still employed by powerful states in our world today. It does not explain, for instance, why no state has been held to account for their aggression since 1946, despite notable examples of uses of force widely perceived to constitute state aggression, including Russia’s annexation of Crimea and the United States’ invasion of Iraq.¹⁹ Indeed, what is not always recognized is how the international institutions and laws that outlawed war continue to make might right, allowing the powerful to operate by their own rules.

As a starting point, the power of the mighty has been baked into the New World Order through the structure of the United Nations. Nominally, the United Nations was created “to maintain international peace and security” by undertaking “collective measures for the prevention and removal of threats to the peace.”²⁰ Under the U.N. Charter, the use of force is prohibited except under very limited circumstances. Specifically, states can only use force when they do so in self-defense, if a state consents to foreign intervention (for example, through a status of forces agreement), or the Security Council

16. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis art. 6(a), Aug. 8, 1945, U.N.T.S 251.

17. Rome Statute of the International Criminal Court, art. 5(d), 2187 U.N.T.S. 90, 17 July 1998, entry into force Jul. 1, 2002 [hereinafter, “Rome Statute”].

18. HATHAWAY & SHAPIRO, *supra* note 2, at xiv.

19. Yassin A M’Boge, *The Council and the Court: Shared Objectives or Opposing Views on the Crime of Aggression* (U. College Dublin, UCD Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No. 31, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1641142 (quoting ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 112 (2003)); Rebecca Hamilton, *Ukraine’s Push to Prosecute Aggression: Implications for immunity ratione personae and the crime of aggression*, 55 *CASE WESTERN RESERVE J. OF INT’L L.* (forthcoming 2023).

20. U.N. Charter art. 1, para. 1.

sanctions it in the name of collective security.²¹ In theory, if a state's use of force does not meet these requirements, it is an aggressor and no U.N. member may provide aid to it.²² However, in practice, powerful states are able to flout the rules without consequences, often justifying their actions by distortions of these very rules.

Part of the problem is that the U.N. Charter consolidates much of the United Nations' power in the hands of the five permanent members that have veto power over non-procedural decisions at the Security Council (Russia, China, France, the United States, and the United Kingdom).²³ Acting through the Security Council, these five members have outsized power to authorize violence as well as shield themselves and their allies from accountability when they breach the prohibition on the use of force. Notably, under international law, the Security Council is the only UN organ with the power to authorize the use of force.²⁴ In contrast, the General Assembly, made up of all state parties to the Charter, only has the power to adopt non-binding resolutions that operate as recommendations.²⁵ The General Assembly may discuss and recommend actions to its Members or the Security Council that it believes will promote international peace and security.²⁶ Ultimately, however, the Security Council is the U.N. organ that has "primary responsibility for the maintenance of international peace and security."²⁷ Consequently, the General Assembly must defer to the Security Council if any concrete action is needed.²⁸

Likewise, as in the Old World Order described by Hathaway and Shapiro, many of the most powerful states are immune from punishment for their aggressive acts. Though aggression was nominally criminalized after World War II, and the crime of aggression was later codified in the Rome Statute, which established

21. Peter Tzeng, *Humanitarian Intervention at the Margins: An Examination of Recent Incidents*, 50 VAND. J. TRANSNAT'L L. 415, 420-21 (2017).

22. AUST, *supra* note 4, at 28-29.

23. U.N. Charter art. 27, para. 3.

24. Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT'L L. 469, 504 (2010). ("The High-Level Panel, the Secretary-General, and the World Summit unequivocally confirm that the Security Council is the sole organ that can authorize the use of force."); Tzeng, *supra* note 21, at 425 (citing U.N. Secretary-General, *Implementing the Responsibility to Protect*, para. 11(c), U.N. Doc. A/63/677 (Jan. 12, 2009)) (emphasis added); AUST, *supra* note 4, at 31-32.

25. Chelsea Koester, *Looking Beyond R2P for an Answer to Inaction in the Security Council*, 27 FLA. J. INT'L L. 377, 396 (2015).

26. U.N. Charter art. 11, paras. 1-2.

27. *Id.* art. 24, para. 1.

28. *Id.* para. 2.

the ICC, this crime was left inoperable until 2018 largely due to push back from the United States.²⁹ Even now, due to carve outs insisted upon by the United States, France, and the United Kingdom, the crime of aggression is not prosecutable against the nationals of the states with the most significant military capabilities, such as the United Kingdom, China, the United States, France, and Russia.³⁰ First, whereas charges of genocide, crimes against humanity, and war crimes can be brought against nationals of a State that has not assented to the ICC's jurisdiction if the crimes occurred on the territory of a state party, due to an amendment to the Rome Statute agreed upon at the Review Conference in Kampala, Uganda in 2010, the same is not true for the crime of aggression.³¹ Pursuant to this amendment, nationals from powerful countries, like Russia, China, and the United States, cannot be charged with the crime of aggression because they are not parties to the Rome Statute. The only way that a national of a non-state party can be charged with the crime of aggression is via a referral from the Security Council, which Russia, China, and the United States would most certainly exercise their permanent veto power to quash.³² Second, even for those states that have ratified the Rome Statute, the ICC only has jurisdiction over the crime of aggression when a state party has specifically consented to its jurisdiction over that crime.³³ While many states favored a reading of the amendment that would make the ICC's jurisdiction over the crime of aggression the default rule, a far narrower

29. Celestine Nchekwube Ezennia, *The Modus Operandi of the International Criminal Court System: An Impartial or a Selective Justice Regime?*, 16 INT'L CRIM. L. REV. 448, 471-72 (2016).

30. Jennifer Trahan, *The Need to 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/>.

31. See Rome Statute, *supra* note 17, art. 15 *bis*, para. 5 (prohibiting the ICC Prosecutor from exercising jurisdiction over crimes of aggression committed by the nationals of non-state parties or in those states' territory) and art. 13 (authorizing the ICC to exercise jurisdiction when the ICC Prosecutor initiates an investigation *proprio motu* or when a situation has been referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations); See also Dapo Akande & Antonios Tzanakopoulos, *Treaty Law and ICC Jurisdiction over the Crime of Aggression*, 29 EUR. J. OF INT'L L. 939, 954 (2018) ("A crime of aggression allegedly committed by a national of a non-party on the territory of a state party, however, is excluded from the jurisdiction of the Court under Article 15bis(5).").

32. Akande & Tzanakopoulos, *supra* note 31, at 953 ("In the case of referrals of situations by the UN Security Council, the Court will have jurisdiction over persons within the situation referred to the Court. They may be nationals of ICC states parties that have ratified the Kampala Amendments; nationals of ICC states parties that have not ratified those amendments or, indeed, nationals of non-parties.").

33. ICC-ASP/16/Res.5, para. 2 (Dec. 14, 2017) (confirming "that in the case of a State referral or *proprio motu* investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments...").

reading of the Kampala amendment requiring that states take additional steps to “opt-in,” pushed for by the United Kingdom and France, won out.³⁴ Thus, powerful state parties, like the United Kingdom and France, are still immune to prosecution for the crime of aggression, because they have not adopted the amendment.³⁵ Again, though the Security Council could refer such situations to the ICC, the veto power held by these countries at the Security Council makes referrals of them nearly impossible.³⁶ In sum, because the United Kingdom, China, France, and Russia have not assented to the ICC’s jurisdiction over the crime of aggression, nationals from those countries can never be charged with that crime. The mighty have managed to carve out exceptions to the prohibition against aggression for themselves, once again making might right.

IV. AS APPLIED TO THE RUSSIAN INVASION OF UKRAINE

In the wake of Russia’s invasion of Ukraine, international lawyers held fast to the prohibition of aggression as binding law. A common refrain from international lawyers was that Russia’s invasion did not render international law’s prohibition on the use of force moot. Even though enforcement of it was weak, the law outlawing war remains strong. While this is correct as a matter of law, this refrain has obscured how aggression operates by law—that is, that aggression by the strong is still tolerated today. Russia’s invasion of Ukraine might be an extreme example, but it made visible the *modus operandi* of how powerful states use their might to avoid accountability for breaching the prohibition on the use of force. More troublingly still, it brought in sharp focus how powerful states use international law as a shield for their violent actions. Might still makes right when the world order is stacked in your favor.

First, Russia’s invasion of Ukraine put the inadequacy of the United Nations in dealing with the use of force by its most powerful members on full display. Days after Russia launched its attack on Ukraine, several countries introduced a draft resolution before the Security Council condemning Russia’s aggression and ordering

34. Trahan, *supra* note 30.

35. For a list of the states who have adopted the amendments on the crime of aggression to the Rome Statute of the International Criminal Court, see *Chapter XVIII 10 B. Penal Matters*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en (last visited Mar. 4, 2023).

36. Rome Statute, *supra* note 17, art. 15 *ter*.

immediate withdrawal.³⁷ As the Security Council met to consider the resolution, Russia doubled-down on its military attack of Ukraine in flagrant disregard for the proceedings.³⁸ The Russian ambassador, who was serving as president of the Security Council at the time, vetoed the resolution, calling it “anti-Russian,” with China, India, and the United Arab Emirates abstaining from the vote.³⁹ Shortly thereafter, the General Assembly adopted a resolution demanding that Russia immediately end its military operations and withdraw from Ukraine, but this resolution had no binding authority under international law.⁴⁰

Second, adding insult to injury, Russia seemingly thumbed its nose at the international community by evoking international law to justify its waging of aggressive war against Ukraine. Namely, Russia alleged that its use of force was legal because it was done in self-defense, making a completely unsubstantiated claim that Ukraine was committing genocide against people of Russian origin in the eastern regions of Luhansk and Donetsk.⁴¹ Skeptics could not help but remember how the United States made similar resort to international law to justify its invasion of Iraq in 2003 without Security Council authorization, claiming that it was acting in anticipatory self-defense because Iraq harbored nuclear weapons—a claim that later proved to be false.⁴² In an attempt to hold Russia to account for its baseless allegations of genocide, Ukraine lodged a case before the International Court of Justice, challenging Russia’s justification for the use of force under the Genocide Convention.⁴³ Some might point to the provisional measures handed down by this Court as evidence of international law’s strength in the face of aggression; indeed, the ICJ did issue an order affirming Ukraine’s “plausible right not to be subjected to military

37. Taiyler Simone Mitchell, *Ukraine’s ambassador says Russia’s ‘words have less value than a hole in the New York pretzel’ at a UN meeting*, BUS. INSIDER (Feb. 26, 2022), <https://www.businessinsider.com/ukraine-russia-words-holes-pretzel-nazi-united-nations-2022-2>.

38. Michelle Nichols & Humeyra Pamuk, *As U.N. Security Council met, Russia attacked Ukraine*, REUTERS (Feb. 24, 2022), <https://www.reuters.com/world/europe/un-security-council-met-russia-attacked-ukraine-2022-02-24/>.

39. Mitchell, *supra* note 37.

40. G.A. Res. 11/1 (Mar. 2, 2022).

41. Kevin Jon Heller, *Options for Prosecuting Russian Aggression Against Ukraine*: A Critical Analysis, J. OF GENOCIDE RES. 3 (2022).

42. For a summary of the debate on the legality of the invasion of Iraq before the Security Council, see TAMSIN PHILLIPA PAIGE, PETULANT AND CONTRARY: APPROACHES BY THE PERMANENT FIVE MEMBERS OF THE UN SECURITY COUNCIL TO THE CONCEPT OF ‘THREAT TO THE PEACE’ UNDER ARTICLE 39 OF THE UN CHARTER 177-82 (2019).

43. Jaime Lopez & Brady Worthington, *What’s the Status of Ukraine’s Case Against Russia at the ICJ?*, LAWFARE (Apr. 21, 2022), <https://www.lawfareblog.com/whats-status-ukraines-case-against-russia-icj>.

operations” by Russia on the basis of alleged genocide and concluding that Russia must immediately cease all military attacks on Ukraine.⁴⁴ But upon closer examination of the consequences that Russia faces as a result, this case is just another illustration of how the law covers the aggressive acts of the powerful. Enforcement of ICJ decisions, both preliminary decisions and those on the merits, rests with the Security Council.⁴⁵ Thus, yet again, Russia’s veto power at that body prevents international law from having full effect. In summation, instead of evoking a higher power under the law of nature to justify war as they did in the “just war” era, powerful states now rely on positive law. True, their arguments might be profoundly flawed as a matter of law, but in a world where “might is right” and powerful states decide for themselves whether their actions warrant punishment, it might not matter very much. At least to those who suffer as a result, it might just be aggression cloaked in law’s clothing.

Finally, despite widespread consensus that Russia’s invasion of Ukraine constituted aggressive war, the ICC is prohibited by law from prosecuting any Russian nationals for their involvement in Russia’s aggressive war against Ukraine.⁴⁶ Even though Ukraine assented to the ICC’s jurisdiction in 2015 through a procedure outlined in article 12(3) of the Rome Statute, because of the aforementioned carve out insisted upon by the U.S., now codified in Article 15*bis*(5), nationals from Russia, which is not party to the Rome Statute, cannot be prosecuted for the crime of aggression at the ICC, including for their aggressive acts on Ukrainian territory.⁴⁷ These accountability gaps created a

44. Allegation of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russian Federation), Order, 2022 I.C.J. No. 182, at para. 60 & 81 (Mar. 16).

45. U.N. Charter art. 94(2) (“If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.”).

46. Jennifer Trahan, *Revisiting the History of the Crime of Aggression in Light of Russia’s Invasion of Ukraine*, ASIL INSIGHTS (Apr. 19, 2022), https://www.asil.org/insights/volume/26/issue/2#_ednref16. However, in a notable departure from the usual immunity afforded to powerful states, the ICC has opened investigations in war crimes, crimes against humanity, and genocide committed on any part of the territory of Ukraine since Ukraine assented to its jurisdiction via a declaration in 2015, pursuant to article 12(3) of the Rome Statute. See Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have decided to proceed with opening an investigation.” (Feb. 28, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>. See also Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation (Mar. 2, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

47. Trahan, *supra* note 46.

situation where in a world supposedly characterized by the outlawing of war, Russia's extreme aggression fell into a legal loophole of the New World Order. Its war is technically illegal, but operationally permitted.

Under the existing international criminal law regime, the only way for Russia to be held accountable for the crime of aggression is through the creation of a new tribunal.⁴⁸ While a multitude of proposals for a court that could prosecute the crime of aggression have emerged, every one is narrowly focused on punishing Russian aggression alone.⁴⁹ Thus, rather than a vindication of the New World Order's prohibition on war, if based on current proposals, the establishment of a new tribunal would mark a radical departure from the rules on immunity established under modern-day international law and likely only constitute a narrow one-time, *ad hoc* exception in the case of Russia, widely considered to be the enemy of the West.⁵⁰ Instead of

48. *Id.*

49. See, e.g., STATEMENT AND DECLARATION CALLING FOR THE CREATION OF A SPECIAL TRIBUNAL FOR THE PUNISHMENT OF THE CRIME OF AGGRESSION AGAINST UKRAINE (2022), <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>; *A Criminal Tribunal for Aggression Against Ukraine*, CHATHAM HOUSE (Mar. 4, 2022), <https://www.chathamhouse.org/events/all/research-event/criminal-tribunal-aggression-ukraine>; Oona Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)*, JUST SEC. (Sept. 20, 2022), <https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/>; Larry D. Johnson, *United Nations Response Options to Russia's Aggression: Opportunities and Rabbit Holes*, JUST SEC. (Mar. 1, 2022), <https://www.justsecurity.org/80395/united-nations-response-options-to-russias-aggression-opportunities-and-rabbit-holes/>; *Joint Motion for a Resolution on the establishment of a tribunal on the crime of aggression against Ukraine*, EUR. PARLIAMENT (Jan. 18, 2023), https://www.europarl.europa.eu/doceo/document/RC-9-2023-0063_EN.html.

50. Hamilton, *supra* note 19 (discussing how a tribunal that would prosecute Russian officials for aggression could only be established in contravention of the usual legal requirement of a direct authority waiving state immunity). Some commentators have suggested that an agreement between the U.N. General Assembly and Ukraine could overcome the personal immunity hurdle, pointing to the Extraordinary Chambers in the Courts of Cambodia and Special Court for Sierra Leone as precedent. See Oona Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)*, JUST SEC. (Sept. 20, 2022), <https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/>; Jennifer Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part III)*, JUST SEC. (Sept. 26, 2022), <https://www.justsecurity.org/83238/tribunal-crime-of-aggression-part-three/>. Yet in both instances, the tribunals were established with the assent of the U.N. Security Council, which will not occur in this case because of Russia's veto power. S.C. Res. 1315 (Aug. 14, 2000). See also Kevin Jon Heller, *Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis*, J. OF GENOCIDE RES. 8-10 (2022); Molly Quell, *ICC prosecutor opposes EU plan for special Ukraine tribunal*, AP NEWS (Dec. 5, 2022), <https://apnews.com/article/russia-ukraine-war-crimes-netherlands-the-hague-ursula-von-der-leyen->

evidence of international law working to outlaw war, these developments are more aptly attributed to what Robert Knox has called “inter-imperialist rivalry,” that is, an effort of imperial powers to use international law to cast their rivals as rogue states, while at the same time dodging accountability for their own aggressive acts.⁵¹ Thus, the establishment of such a court *solely* focused on Russian aggression would only be further proof that “might makes right.”

To be clear, it is not that I believe that Russia shouldn't be held to account for its aggression against Ukraine. As Dr. Gaiane Nuridzhanian, a Ukrainian law professor with expertise in international criminal law, sets out, Russia's aggression has done greater damage to her country than all their war crimes taken together.⁵² Yet, in order to deter the aggressive wars of tomorrow as Professor Nuridzhanian hopes, I believe that we must rethink and challenge the foundational rules of the current world order, instead of creating one-time workarounds. Otherwise, especially to those living in countries regularly subjected to violence from Western powers, the court would just be another example of selective justice when it suits them.⁵³

V. CONCLUSION

This essay was born of frustration...at myself and at other international lawyers too. Russia's invasion of Ukraine should be a wake-up call for us. The current international legal order suffers from the same flaws of the past—that is, the powerful continue to wield their military might to make their own rules. They rely on their consolidated power under the New World Order's legal regime and loopholes they

9e83e1107064ef6e9c375576b998373a; Owiso Owiso, *An Aggression Chamber for Ukraine Supported by the Council of Europe*, OPINIO JURIS (Mar. 30, 2022), <http://opiniojuris.org/2022/03/30/an-aggression-chamber-for-ukraine-supported-by-the-council-of-europe/>.

51. Robert Knox, *Race, Racialisation and Rivalry in the International Legal Order*, in RACE AND RACISM IN INTERNATIONAL RELATIONS: CONFRONTING THE GLOBAL COLOUR LINE 175, 176 & 182-83 (A. Anievas, N. Manchanda, & R. Shilliam eds., 2014). See also Robert Knox, *Civilizing interventions? Race, war and international law*, 26 CAMBRIDGE REV. OF INTL AFFAIRS 111-129 (2013).

52. Gaiane Nuridzhanian, *Justice for the Crime of Aggression Today, Deterrence for the Aggressive Wars of Tomorrow: A Ukrainian Perspective*, JUST SEC. (Aug. 24, 2022), <https://www.justsecurity.org/82780/justice-for-the-crime-of-aggression-a-ukrainian-perspective/>.

53. See also Kevin Jon Heller, *Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis*, J. OF GENOCIDE RES. 6 (2022) (stating that “a court created for the sole purpose of prosecuting Russian aggression would likely be viewed as illegitimate by a significant number of states, particularly those in the Global South that are routinely subjected to unlawful use of force by powerful Northern states”).

have created to shield themselves from accountability for their violent acts. International law has aided and abetted this effort. The crime of aggression is inoperable, not by accident, but because major powers have made it that way, using international law as a cover for their aggression (with more or less success based on their relative power). By positioning arguments for a new aggression tribunal within the four corners of the existing international legal order, and thereby making Russian accountability an exception not the rule, international lawyers are implicitly accepting an order that cloaks the powerful with immunity and in the process making Swiss cheese out of international law through more loopholes and one-time exceptions.

Instead, let's put our energies into the hard work of universal enforcement. Several steps are needed. Most importantly, but also most ambitiously, we should start by uncloaking the aggressors at the Security Council of their veto power, which shields them from all levels of accountability for their aggressive acts. In addition, in line with a call from members of the Global Institute for the Prevention of Aggression, state parties to the ICC should urgently revisit the jurisdictional limits on the crime of aggression.⁵⁴ They are set to do so in 2025, but given our current realities, with China also demonstrating its willingness to engage in aggression, that reconsideration cannot wait. Only by removing the protective cloak of international law from aggressors from all corners of the globe can the outlawing of war fully be realized—thereby stripping the mighty of their power to continue to preserve their unilateral right to fight.

54. *Statement on Russian's Invasion of Ukraine: A Crime of Aggression, The need to amend the crime of aggression's jurisdictional regime*, GLOBAL INST. FOR THE PREVENTION OF AGGRESSION (Mar. 24, 2022), https://crimeofaggression.info/wp-content/uploads/GIPA-Statement_24-March-2022-7.pdf.