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# Systemic Lessons from Ukraine:
## *A new framework of global law and governance*

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## ABSTRACT

The Ukraine crisis has become one of the most dangerous security issues of our time. How, then, to get the crisis into historical perspective? Is the Ukraine crisis a unique or simply an extreme case? What does it say about the contemporary framework of international law and governance that might offer insight into its systemic weaknesses and the possible need for a new framework?

This research report first summarises the events of the crisis from 2014 to 2022. The main section reviews the contemporary legal framework for international peace and security and the extent to which UN Member States, in particular the five permanent members of the Security Council (P-5), have met their obligations. It is comprised of three parts, focusing on the main components of the framework: use of force, regulation of armaments, and resort to pacific settlement. Part 1 asks what are the relevant concepts for determining the lawful and unlawful use of force? It notes the distinction between an 'act of aggression' and a 'war of aggression', although the latter has never been formally defined. And it notes the differentiation between geostrategic considerations underlying the various crises and a disputant's justification in legal argumentation. The focus is exclusively on violations *ad bellum* (resort to force); the article does not cover acts *in bello* (war crimes or genocide). Part 2 addresses the status of nuclear weapon ownership in treaty and customary law. Part 3 explores the strength of commitment by Member States to resort to pacific settlement of disputes. On the basis of the analysis, conclusions are drawn to these questions.

With regard to the use of force, it is concluded that while the Ukraine invasion (2022) is perhaps the most egregious action in the seven decades of the contemporary multilateral order, it is not unique. While it appears to comprise a 'war of aggression', other invasions would also meet a definition as formulated in the article – principally Iraq (2003) described as such by the International Commission of Jurists, and perhaps Egypt (1956). A number of invasions are considered without final conclusions being drawn. Other operations qualify as a lesser 'act of aggression' although the UN's history of determining state responsibility for aggression is quixotic. Separately, any judgement by the ICC over individual liability for a 'manifest act of aggression' by any Member State's leader (a crime *ad bellum* as opposed to *in bello*) will be an issue for the future, since the opposition of the major powers to ratifying the relevant instrument remains steadfast.

Regarding regulation of armaments, it is concluded that all P-5 States maintain comparable policies on nuclear weapon possession and strategy, opposing their complete elimination within an agreed specified time-frame, and perhaps becoming persistent objectors to an merging customary norm of nuclear weapon non-possession. Russia, in particular, has violated the multilateral agreement on nuclear security assurances that provided the basis on which Ukraine surrendered the nuclear weapons that were on its territory.

With respect to pacific settlement, the lack of commitment by all P-5 States to the concept of binding law is noted, with only one of the P-5 States accepting compulsory jurisdiction of the ICJ, and two renouncing it during contentious cases against them. All have opposed juridical or arbitral settlement in specific cases.

The review thus shows a series of Charter violations by P-5 Member States which had accorded themselves the primary responsibility for international peace and security. In fact the P-5 have, individually and collectively, been the principal block to making the UN system work effectively. More broadly, the series of ongoing crises since 1945 demonstrates the underlying flaws of the UN framework: a global collective security system undermined by sub-global self-defence arrangements, with associated misuse of the veto; selective 'ownership' and retention of nuclear weapons; and an insipid commitment to pacific settlement.

Contemporary international law is a primitive version of the concept of law. At the domestic level, obligations are established through legitimate representation and are effectively enforced through executive and judicial action. At the international level, the system is essentially a transactional rules-manual with loose guidance for, and general exhortation of, good behaviour. It falls short of any kind of constitutional framework for legal standards of obligatory behaviour that might encompass the most powerful among us. There is a need for a third, qualitatively new, framework.

**Contents**

## Introduction
## The Ukraine Crisis: A summary review

The political tension between Russia and Ukraine is one of a series of bilateral disputes among nation-states within Europe over a long period of time. In the course of the UN era, Ukraine and Belarus at the insistence of the USSR each acted as a Member State from 1945 to '92, enjoying the Charter's first principle of sovereign equality, despite being integral parts of the Soviet state. With the dissolution of the USSR, they continued as Member States with name changes to suit, fulfilling the Charter's second purpose of respect for self-determination of peoples, taking 'appropriate measures for universal peace'. For its part, Belarus remains in a loose integration with Russia,[1] while Ukraine has pursued a separate path.

The current Ukraine crisis, with roots back to 2005, commenced in 2014. The six major turn of events, as dealt with in international law, are the following:

- the 'integration' / 'annexation' of Crimea into Russia in February-March 2014 and the UN reaction;
- the downing of the Malaysian Airlines flight over the Donbass region in April, followed by the UN reaction and international criminal investigation;
- the two Minsk agreements of 2014 and 2015 for political cooperation, endorsed by the UN;
- the institution, in October 2021, of proceedings at the ICJ by Ukraine against Russia concerning terrorism and race relations;
- the renunciation by Russia of the Minsk Agreements on 22 February 2022 followed by the Russian invasion of Ukraine on the 24th, the Security Council's reaction and the General Assembly's 11th Emergency Special Session;
- the institution of proceedings at the ICJ, on 26 February 2022, by Ukraine against Russia concerning the latter's accusations of genocide by Ukraine, and the ICJ's provisional measures of 16 March.

These events raise nuanced and sensitive issues of contemporary international law and governance that are today causing deep concern and apprehension. Parts 1 to 3 below seek to place the crisis in historical perspective, assessing its implications for the three main components of the contemporary framework: the use of force, the regulation of armaments with special focus on nuclear weapons, and resort to pacific settlement of disputes.

## Part 1
## The Use of Force

### *(a) The contemporary legal framework*

The UN Charter makes no explicit reference to the lawful or unlawful use of force, but the concept is logically derivative from its provisions. The Charter identifies, as the first of the UN's four purposes, the maintenance of international peace and security through two primary means: collective enforcement measures involving the economic and/or military force as authorised by the Security Council; and peaceful adjustment or settlement of international disputes or situations in conformity with the principles of justice and international law. What is the conceptual framework to achieve this?

#### *(i) The central concepts: threat, breach, aggression*

The use of armed force is confined in the Charter to two cases: military action authorised by the Security Council in response to a threat to or breach of the peace, or an act of aggression;[2] and self-defence in advance of Council action.[3]

The Charter itself is inconsistent in its terminological construct. Whereas Article 1 refers to the 'suppression and removal of acts of aggression or other breaches of the peace', Article 39 empowers the Security Council to determine any one of three categories: a threat to the peace, a breach of the peace 'or' an act of aggression. While Article 1 clearly establishes that a breach of the peace includes, but is not confined to, an act of aggression, Article 39 establishes that a breach of the peace and an act of aggression are separate situations.

The three situations are distinguishable in a temporal sense – between the Council 'preventing' a threat to the peace, and 'suppressing' a breach to the peace or an act of aggression. A 'threat' implies a potential future action that is to be prevented

[1] Treaty on the Creation of a Union State of Russia and Belarus (1997). https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280090377&clang=_en The Union State is designed to ensure total integration in the future.
[2] Articles 39 to 42, and 52 to 54
[3] Article 51

proactively through Chapter VI measures; a 'breach' or 'aggression' is an occurrence, something to be dealt with reactively through Chapter VII.

The situations which the Council has determined to be a threat to the peace can be specific or generic. A specific situation is an inter-state conflict or internal conflict within a member State. Generic threats have extended to international terrorism, proliferation of weapons of mass destruction, and illicit trafficking in small arms and light weapons.[4]

The context in which the Council determines a situation as giving rise to breaches of the peace is narrower. The Council has determined a breach only in situations involving the use of armed force but it has been more disposed far more often to determine a 'breach' than 'aggression', thereby avoiding the challenge of identifying a responsible actor.

The concept of aggression has been a source of continuous debate and contention. It has two dimensions, state responsibility and individual liability, which are qualitatively different. In the former, a country's armed forces are pushed back to within its own territory while its leaders remain free to fulminate, resign or be removed. In the latter case, the leaders go to prison, which more effectively concentrates the mind during policy-planning.

The concept of state responsibility for aggression in international law preceded the UN Charter. In 1919 the Versailles Treaty accorded Germany and its allies responsibility for the war that arose from 'aggression'.[5] The League Covenant required its Members to respect and preserve as against 'external aggression' the territorial integrity and existing political independence of its Members. In the case of such aggression or any threat or danger thereof, the Council would advise on the means by which the obligation was to be fulfilled.[6] Neither instrument, however, defined 'aggression'.

In 1933-4 by way of assistance, two separate conventions for the definition of aggression were signed by twelve States and registered with the League of Nations Treaty Series, to be used as guidance for deliberation by the League's Assembly.[7] The definition was comprised of: a declaration of war; invasion (with or without such declaration); attack on armed forces; naval blockade; and support for foreign armed bands. In an historical irony, the only country to be found responsible for aggression (USSR against Finland in 1939) and expelled from the League was the instigator and drafter of the definition six years previously.[8]

In 1945 the term 'aggression' was inserted in the UN Charter in virtually identical wording to the Covenant but, again, the Charter did not define its constituent acts. During the preparatory conference, several delegations had proposed that 'aggression' be defined, but a majority judged that this would go beyond the scope of the Charter and that the modern techniques of warfare rendered any definition 'very difficult'.[9]

Nonetheless, the General Assembly laboured towards a definition, involving first the International Law Commission (1950), then the Secretary-General (1952), then four special committees of its own (1952-73). The saga is not without its poignancy. In the original Assembly debate, two definitions were considered; one from the US, one from USSR. Criticising the American draft, Ukraine offered the following insight half a century ago:

> *"[T]his resolution speaks only of a State which becomes engaged in armed conflict with another State or States, without making any distinction between the aggressor and the victim. This formula is based on a concept which is mistaken, vicious and dangerous as far as the victim of aggression is concerned; according to that concept, the two parties to a conflict are treated in the same way, in other words, the aggressor who has prepared for war and the victim who resists aggression are placed on the same footing. It is easy to see that such an attitude towards the two parties to the conflict would give the aggressor an advantage over the victim and would encourage him to further conquest. In the second place …. it may rather be assumed that the aggressor will make full use of his advantage under this resolution and will try to finish off the country he has attacked as swiftly and completely as he can to seize as much of its territory as possible, disrupt its internal organization and force It to capitulate as soon as possible. ….. [Ukraine thus] … supports the draft resolution submitted by the Soviet Union …. . We feel that in the present state of international tension it is particularly important to have a definition of aggression which is precise, indisputable and recognized by the UN. Such a definition will be a powerful tool with which the Security Council will be able swiftly and unerringly to determine the party guilty of aggression, that is, the aggressor; this in turn will enable it to take rapid and decisive action to halt aggression."*[10]

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[4] https://www.un.org/securitycouncil/content/repertoire/actions

[5] Treaty of Versailles, Art. 231

[6] League of Nations Covenant, Art. 10

[7] The Convention for the Definition of Aggression was signed on two separate occasions in July 1933 and July 1934.

[8] Many nations, including Germany, Italy and Japan had previously withdrawn, but none had been expelled.

[9] *Report of Mr. Paul-Boncour, Rapporteur, on Chapter VIII, Section B.* Doc. 881 (III/3/46) UN Conference on International Organization, Vol. 12, p. 505). 10 June 1945

[10] General Assembly doc. UNGA Vth Session 308th meeting (17 Nov. 1950); Duties of States in the event of the outbreak of hostilities: Report of 1st Committee A/1500

In 1974 after three decades, the Assembly agreed on a definition relating to state responsibility for aggression: *The use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations*[11] The first use of armed force by a State in contravention of the Charter constitutes *prima facie* evidence of an act of aggression, but the Council may determine that the acts concerned and their consequences are not of sufficient gravity to justify being labelled as such. No territorial acquisition or special advantage resulting from aggression is to be recognized as lawful.[12]

The definition is comprised of a 'non-exhaustive' list of seven acts, namely: (a) invasion, armed attack, military occupation, annexation by use of force; (b) bombardment; (c) blockade of ports or coasts; (d) armed attack against another's forces; (e) armed force in another's territory beyond agreed provisions; (f) use of a Member State's territory by another's forces for aggression against a third state; and (g) sending armed bands, groups, mercenaries or irregulars into another state, involving the same acts of gravity as any of the above.[13]

The Assembly's definition contains problems of logic. With regard to the fifth action, it is not impossible for a bilateral agreement to contain a provision that envisages the use of force against the partner or third State that involves any of the other six actions. Secondly, the sixth action is circuitous, involving the act that is being defined.

The definition is a political declaration, with the status of a General Assembly resolution that is not binding in treaty law. It has, moreover, had little discernible effect on Security Council determinations over the past five decades. Yet the 'prohibition of aggression' is one of the eight peremptory norms of general international law (*jus cogens*) adopted by the ILC at its 73rd Session.[14]

Individual liability for aggression is, as noted, entirely different from state responsibility. It took half a century to have an applicable definition in international criminal law, after the 1945 London Charter of the International Military Tribunal identified three crimes: crimes against peace; war crimes and crimes against humanity. A 'crime against peace' was adopted rather than 'aggression' since it was questioned whether the latter existed at the time as a crime in international law, whether through treaty or custom. In 1950 the Nuremburg Tribunal subsequently defined a crime against peace as: the '*planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances.*'[15] Yet Nuremburg was criticised, even from within, on the ground that "*Law was created ex post facto, to suit the passion and clamour of the time*".[16]

An effort by the Assembly to establish a permanent criminal court failed in the early 1950s. The issue was re-introduced in 1989 and in short time the Rome Statute (1998) was finalised, establishing the International Criminal Court (ICC) which became operational in 2002. The Statute is the principal mechanism for holding individuals accountable for 'the most serious crimes of concern to the international community'. The Statute identifies four crimes for which individuals may be liable. Three crimes *in bello* (genocide, war crimes, crimes against humanity) became justiciable on 1 July 2002.

Justiciability over the fourth crime *ad bellum* ('aggression' which alone is a 'leadership crime') was deferred until two conditions were met: a legal definition of aggression, and agreement on the respective competencies of the Court and the Security Council. Both preconditions were achieved at the ICC Review Conference of 2010 (Kampala), but the Parties decided to require an affirmative decision after seven years before entry into force. This was done in 2017 and, on 17 July 2018, aggression became a justiciable crime in international law. Unlike the previous three, however, it is justiciable only for the Parties to the Statute that ratify this amendment.

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[11] Resolution 3314 Annex: Definition of Aggression, Art. 1
[12] Ibid. Art. 6
[13] Ibid, Art. 3
[14] See 5th *report on peremptory norms of general international law (jus cogens): Recommendations of the Special Rapporteur.* UNGA doc. A/CN.4/747, 24 January 2022 (paras. 225-227); and
*Peremptory norms of general international law (jus cogens) (Texts of the draft conclusions and Annex adopted by the Drafting Committee on 2nd reading) Identification and legal consequences of peremptory norms of general international law (jus cogens).* ILC doc. A/CN.4/967, 11 May 2022; and
17 May 2022: The Chair of the Drafting Committee presented the report of the Drafting Committee on the topic (A/CN.4/967). The Commission considered the report and adopted the text of the draft conclusions 1 to 23 and annex and the title on 2nd reading. https://legal.un.org/ilc/
[15] https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf
[16] Judge William O. Douglas, cited in *Doenitz at Nuremburg, a reappraisal: war crimes and the military professional,* H. Thompson & H. Strutz (Institute for Historical Review, Torrance; 1983)

The ICC definition contains a list of acts identical to those in the UN's definition, but there is a higher prosecution threshold (a 'manifest act of aggression'), and it is procedurally complex in terms of the relationship between the Court and the Security Council

Thus the international community took three decades to achieve a political definition for state responsibility over an 'act of aggression' (1946-74), and seven decades to achieve a legal definition on individual liability for a 'manifest act of aggression' (1946-2018). The critical difference is that the political definition was conveyed to the Council for its application to the entire UN membership,[17] whereas the legal definition exists only for those few States that have domestically ratified the amendment (currently 44). Yet both definitions (the UN's resolution 3314 and the ICC's resolution RC/Res. 6) were adopted by consensus.

The only other concept in the Charter concerning the use of force, beyond the three in Article 39, is an 'armed attack'. Article 51 provides that nothing will impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member State until the Security Council has acted. This gives rise to a further difficulty of logic. It implies that the right of self-defence is restricted to an armed attack whereas in the Assembly's definition of aggression, an armed attack is cited in only two of the seven actions that can be taken against another country. Such a critique borders on the pedantic, but on matters of life and death with state responsibility and/or individual liability incurred, clarity of terminology is essential.

*(ii)* *The status of 'war'*

Where does contemporary legal theory leave the issue of 'war'? Through the 20th century, war was steadily circumscribed to the point of illegality. In 1920 the League Covenant introduced the concept of collective security as a replacement to the 19th c. balance-of-power strategy.[18] War, however, was not rendered completely illegal: Members were required to resort to a judicial or arbitral decision but could, if unsatisfied with the outcome, 'resort to war' three months after such a decision.[19]

In 1928, a complete renunciation of war was achieved in treaty law. Parties condemned recourse to war for the solution of international controversies and renounced it as an instrument of national policy in their relations with one another.[20] Strictly the instrument remains in effect but it has been ratified by only fifteen States.[21] It did not, moreover, explicitly state that war was illegal.[22]

In 1945 'resort to war' was expunged from any status in international law. The UN Charter makes no reference to war beyond acknowledging prior historical events.[23] The primary obligation on UN Member States is to refrain from the threat or use of force against the territorial integrity or political independence of any state.[24] As noted earlier, there is only authorised collective action and legitimate self-defence.[25] The provisions of international law in the Charter, moreover, prevail over any other legal instrument.[26] Thus there is only the lawful or unlawful use of force, and no such thing as 'war' can be declared.

And that is the theory. In fact, the lobotomy has failed. To this day 'war' remains the popular term for military conflict – whether the armed force is legally-sanctioned or not. The semantic and psychological failure is evident in both domestic

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[17] Resolution 3374 (XXIX) was adopted on 14 December 1974 by consensus; see A/PV.2319, p. 1480
[18] 1915 Congress of Vienna
[19] Ibid. Art. 12
[20] General Treaty for the Renunciation of War as an Instrument of National Policy, 1928 (Articles I and II)
[21] *I am advised by the Foreign and Commonwealth Office that the General Treaty for the Renunciation of War as an Instrument of National Policy (also known as the Kellogg-Briand Pact) remains in force and that the United Kingdom remains a party.* UK Solicitor-General, 16 December 2013
https://publications.parliament.uk/pa/cm201314/cmhansrd/cm131216/text/131216w0004.htm#131216w0004.htm_wqn20
States Parties are: Australia, Belgium, Canada, Czechoslovakia, France, Germany, India, Ireland, Italy, Japan, New Zealand, South Africa, Poland, UK, USA
[22] See Sellars, K., *'Crimes against Peace' and International Law'* (Cambridge UP; 2013) p. 28
[23] The first words in the Charter, in fact, express the determination of we the peoples of the United Nations to *'save succeeding generations from the scourge of war'.*
[24] UNC, Art. 2(4)
[25] No provision exists in international law for an automatic formal assessment of claims of self-defence advanced in UN debates.
[26] Art. 103

and international law. Many UN Member States retain the term 'war' in their national constitutions, including the right to declare it:

- Brazil, France, Israel, Ireland, Mexico, Netherlands, Spain, Sweden and the USA explicitly empower their executive head, usually with prior legislative endorsement, to 'declare war' and to 'make peace'.[27]
- Italy 'rejects war as an instrument of aggression' against the freedom of other peoples and as a means for the settlement of international disputes.[28] Yet it empowers itself the same right to 'declare war' [29]
- Finland and Russia are more coy with their constitutional language; each empowers itself to decide on matters (Finland) or questions (Russia) of 'war and peace', without explicit reference to any declaratory process.
- The Member States whose constitutional empowerment to armed force is most concordant with the multilateral UN framework are China, Germany, Australia and Canada. China makes no reference to 'war', simply empowering its armed forces to 'resist aggression'.[30] Germany is similarly self-restrained, empowering its combined legislature to make a 'declaration of a state of defence' in the event that its territory is 'under attack'.[31] Australia makes no reference to 'war', simply empowering the national legislature to make laws with respect to the 'naval and military defence' of the country, and to protect its state territories 'against invasion'.[32] The Canadian Constitution makes no reference to any declaration of war, but provides for its Parliament to be extended in 'In time of real or apprehended war, invasion or insurrection'.[33]
- For its part, New Zealand lacks formal codification of a written constitution but its primary legislation appears to have a unique reference to an 'enemy.[34] It makes provision for various eventualities 'in time of war or other like emergency'.[35] No other UN Member State appears to use the term 'enemy' in its constitution or primary legislation.

Even some modern instruments of international law, completed post-1945, use the concept of 'war', at least pertaining to actions *in bello*:

- The Third Geneva Convention concerns treatment of prisoners of war; the fourth concerns the protection of civilians in time of war.[36] The 1977 Protocols, however, refer to 'international armed conflict' rather than 'war'.
- Of the four crimes in the Rome Statute, the third concerns war crimes.[37] A 'manifest act of aggression' is the fourth, defined as any one of seven actions 'regardless of a declaration of war'.[38]
- The 5th Protocol (2003) to the Chemical Weapons Convention concerns the explosive remnants of war.
- The Treaty on the Prohibition of Nuclear Weapons states that 'the right of parties to an armed conflict to choose methods or means of warfare is not unlimited'.[39]

Although the Charter makes no operational reference to 'war', the General Assembly does. Evoking the distinction recognised at Nuremburg three decades prior, its 1974 resolution makes the critical distinction between an act of aggression and a war of aggression. But whereas an 'act' is defined in some detail as comprising the seven components, the resolution simply states that a war of aggression is a 'crime against international peace', without defining what a 'war of aggression' actually is.[40] In fact, there is no definition of a 'war of aggression' in treaty law. As noted earlier, both the Nuremburg and

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[27] Brazil: Art. 84(XIX); France: Art. 35; Israel: Art. 40; Ireland: Art. 28(3); Mexico: Art. 73(XII); Netherlands: Art. 96; Spain: Art. 63; Sweden: Art. 14; USA: Art. 1(8)

[28] Art. 11

[29] Art. 78 and Art. 87

[30] Art. 29(1)

[31] Art. 115.a(1)

[32] Art. 51(6) and 119

[33] Art. 4(2)

[34] The Defence Act 1990 (Art. 2) defines 'enemy' as "any country, or any armed force, or any authority or government controlling any such force, with which New Zealand, or any force acting in cooperation with any part of the Armed Forces of New Zealand, is at war or is engaged in armed combat operations".

[35] Art. 26

[36] The 1968 Convention on Statutory Limitation on war crimes committed by individuals during WWII refers to the pre-1945 period.

[37] The Statute of Rome, Art 8.2(b) refers to:
"(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; … and
(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;"

[38] Art. 8 bis., para 2 (1)

[39] It is open to (semantic) contention that the right of any UN Member State to choose a method or means of warfare does not exist.

[40] UNGA resolution S/RES/3314 (XXIX), Annex, Art. 5(2)

Tokyo tribunals focused on the crime of war of aggression as a crime against peace. In the words of one of the prosecutors: "*War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime….*"[41] Yet neither tribunal defined the concept.

What, then, comprises a 'war of aggression'? There are few attempts at identifying and listing them over the seven decades of the contemporary order.[42] This is explored further below (section b(iv)). For its part, the UN Secretariat proved its allegiance to the principle of neutrality of the international civil service. In March the Dept. of Global Communications advised UN staff not to refer to the situation in Ukraine as a 'war' or 'invasion' but rather to use the terms 'conflict' or 'military offensive' to describe Russia's actions towards its neighbour.'[43]

The international community is thus conflicted over what precisely 'war' is, and whether it is a valid action, *ad bellum*, in the context of the UN Charter. How, then, has the United Nations, and in particular the P-5, handled these issues? And within that historical context, how is it handling the Ukraine crisis?

*(iii) Regional organizations and self-defence*

Perhaps the most problematic issue in the contemporary order is the Charter's duality between international (essentially global) security and regional security. The relationship is consistent with respect to collective security through enforcement action, but it is fraught on the issue of self-defence.

The potential role for regional organizations in international peace and security, consistent with the UN's purposes and principles, is recognized in the Charter.[44] Consistent with the Security Council's dual responsibility, their role covers both pacific settlement and enforcement action. Chapter VI acknowledges that UN Member States may resort to 'regional arrangements or agencies' for the pacific settlement of local disputes,[45] and in fact they should make every effort to do so before referring them to the Council.[46] The Council may utilise regional arrangements or agencies for enforcement action, but no such action can be taken without its authorisation.[47] The Charter makes no definitional distinction between an 'arrangement' and 'agency', and in practice the UN has tended to refer to 'regional organizations and arrangements'.

The 'pure' form of intended global collective security was originally outlined in the Charter, which envisaged collaboration to that end from regional bodies. Article 47 authorised the Military Staff Committee, comprised of P-5 personnel, in advising the Security Council, to establish regional sub-committees in consultation with 'appropriate regional agencies', 'regional arrangements' being omitted. But the Cold War, particularly with NATO and the Warsaw Pact confronting each other in Europe, spelled the demise of the MSC.

On the issue of collective enforcement action, the distinction between a unified region and a bifurcated one is critical. A unified regional organization covers the whole of a region and 'regional collective security' is therefore a natural default. The clearest examples are Africa (AU) and America (OAS). A 'bifurcated' region, in contrast, is split into competing, and potentially or even purposefully adversarial, organizations, where regional collective security, envisaged in Article 53, cedes to 'collective self-defence under Article 51. Europe, and its extension into Eurasia, is the time-honoured problem. In any region, moreover, the problem is exacerbated when sub-regional agencies are also involved.

In this subtle yet profound way is the UN Charter undermined. Global collective security, which theoretically rests on a framework of regional collective security, in practice gives way to regional collective self-defence. The Ukraine crisis is the latest, and most dangerous, symbol of the problem.

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[41] Alternate Judge Norman Birkett, International Military Tribunal for Germany (1946-09-30) https://avalon.law.yale.edu/imt/judnazi.asp#common

[42] The only evident attempt is found in *'The Crime of Aggressive War',* M. Walzer, Washington University Global Studies Law Review Vol. 6(3), January 2007

[43] https://www.irishtimes.com/news/world/united-nations-advises-staff-against-using-war-or-invasion-regarding-ukraine-1.4821438
See, also: '*Values in Paradox: Conflicting concepts in the international civil service*', Graham, K. (Fletcher School of Law & Diplomacy, Tufts University; 1973); available in VUW e-catalogue

[44] An entire chapter (CH. VIII) is devoted to regional organizations (Articles 52 to 54).

[45] Art. 33

[46] Art. 52(2)

[47] Art. 53(1)

### *(b) Historical perspective*

Understanding the major cases of unlawful force over seven decades is a far-reaching exercise. This section first reviews the UN determinations of state responsibility for the lawful and unlawful uses of force, and the P-5 record in this respect, including the exercise of the veto and the distinction between their geo-strategic motives and their separate legal justifications advanced at the UN and ICJ. In doing so, it categorises the unlawful use of force according to some of the seven acts listed in the UN definition of aggression, then reviews the record of any 'wars of aggression', and has particular regard to the case of Ukraine.

(i) Lawful force: UN-authorised collective action

With the difficulties thus encountered of determining 'aggression' in advance of a formal definition (1946 to '74), the UN has proved reluctant to make any determination along those lines.

- Throughout the seven decades, the Security Council has determined an 'act of aggression' in respect of only two crises: Southern Rhodesia – South Africa (1979, twice) and Israel-neighbour actions (1985, 1988).
- Although the primary role for determining aggression falls to the Council, the General Assembly has, on certain occasions when the Council failed to meet its responsibility, performed the task. The Assembly has declared an 'act of aggression' on four occasions – against China (PRC) in 1951, Israel in 1980, South Africa in 1981, and Russia in 2022.

As noted earlier, the Council has on some occasions determined a 'breach of the peace', and authorised military force to restore peace and security. Such enforcement action has been authorised by the UN in the name of collective security on five occasions – in 1950 (to repel North Korea from South Korea), in 1960 (to ensure the withdrawal of Belgium from DR Congo), in 1990 (Iraq from Kuwait); and more broadly in 2001 (counter-terrorism and nation-building in Afghanistan) and 2011 (civilian protection and nation-building in Libya).[48]

It is instructive, however, to review the precise terminology employed, whether by the Council or the General Assembly. With the original Korean crisis (1950), the Council determined that an 'armed attack' by North Korea constituted a 'breach of the peace'. In the Suez crisis (1956), the Assembly noted that Israel's armed forces had 'penetrated deeply' into Egypt and that UK and France had undertaken 'military operations against Egyptian territory'. With the Congo (1960), the Council called on Belgium to 'withdraw its troops' that were already stationed in the country. With the Dominican Republic, the Council simply referred to 'grave events' and 'hostilities'. With the Middle East crisis of 1967, the Council simply referred to an 'outbreak of fighting'. In 1990, it was explicitly clear over the 'invasion of Kuwait by Iraq'. With more recent events (Afghanistan in 2001; Georgia in 2003-08; Libya and Yemen in 2011, Syria in 2014), the focus has been on internal conflict within a Member State, whether or not a major power has been involved in some way – until Ukraine in 2014 and 2022.

(ii) Unlawful force: Aggression and other breaches

Depending on the criteria used, there have been between 70 and 80 unlawful 'invasions' during the UN era – roughly one each year, and it is beyond the scope of this article to explore each one. There have been perhaps ten major invasions.[49] Other invasions reflect varied rationales: intent to liberate territory;[50] post-colonial opposition to self-determination;[51] ongoing regional disputes;[52] a request of another country.[53]

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[48] Many other resolutions have authorised 'all necessary measures' including military force to achieve certain specified mission objectives in UN peacekeeping and peace-building, but this falls short of UN collective enforcement action.

[49] 1950 North Korea's invasion of South Korea; 1956 Israel, France and UK invasion of Egypt (UAR); 1985, USA's invasion of Dominican Republic; 1979, USSR's invasion of Afghanistan, 1979, China's invasion of Vietnam; 1980 Iraq's invasion of Iran; 1990, Iraq's invasion of Kuwait; 1994, USA's invasion of Haiti; 2003, the US and UK (with Australia and Poland) invasion of Iraq; 2022 Russia's invasion of Ukraine

[50] 1961 invasion by India of Goa (Portuguese State of India), the 1971 Indian invasion of East Pakistan, the Russian invasion of Ukraine/Crimea

[51] 1945 invasion by The Netherlands in Indonesia, France in Vietnam in 1946 and Algeria in 1954, and Belgium in the Congo in 1960

[52] In the Middle East: in 1948, Egypt, Jordan, Iraq, Syria against Israel; in 1967, Israel against Egypt, Jordan, Syria; 1973, Egypt, Syria against Israel; 2014, Israel into Palestine (Gaza); 2016, Turkey into Syria. Equally, in Africa: 1978/79 Uganda into Tanzania followed by Tanzania into Uganda; 1998 Eritrea into Ethiopia; 1998 Uganda, Burundi, Rwanda into DR Congo; and 2006 Ethiopia into Somalia.

[53] 1965 USA into Vietnam; 2014 Russia into Syria

As noted, an invasion of simply the first of seven 'acts of aggression'. Other acts include bombardment,[54] blockade,[55] attack on another's forces,[56] use of force stationed in another State *ultras vires* a bilateral or multilateral agreement[57] and support for irregular forces in another State.[58] There are, of course, others.
In every case pertaining to the use of force by a P-5 Member State, a distinction is found between its geo-strategic motive, usually articulated for its own public consumption, and its legal rationale advanced at the UN. Some of these are illustrated below.

- *Legal rationales for use of force: Record of the P-5*

The legal justification advanced at the UN or the ICJ by a P-5 State for its use of force is usually distinct from its geo-strategic considerations, evidenced by the following major situations.

*Article 3(a) Invasion*

1. France, UK into Egypt (UAR) (1956)

During the Security Council debate over the Suez crisis, Israel advised that the 'security measures' which it had felt bound to take were in the exercise of its inherent right of self-defence, namely elimination of Egyptian *fedayeen* bases in the Sinai.[59] France and UK argued that Israel's incursion "*made it imperative to take very speedy and effective measures to prevent a war between Israel and Egypt.*" They also argued that the Council referral of the crisis to an Emergency Assembly Session was not legally within the 1950 'Uniting for Peace' mandate.[60]

2. USA, UK into Iraq (2003)

The invasion of Iraq in 2003 by the US and UK, with the involvement of Australia and Poland was not authorised by the UN. In November 2002, the Council had unanimously judged that Iraq was in material breach of the ceasefire terms of 1991 relating, among others, to long-range missiles and weapons of mass destruction. It had therefore decided to afford Iraq a 'final opportunity' to comply with its disarmament obligations and would remain 'seized of the matter'.[61] The debate thereafter revolved around the question of 'automaticity of force' deriving from this resolution. As the US stated in the Council: *"As we have said on numerous occasions to Council members, this resolution contains no 'hidden triggers' and no 'automaticity' with respect to the use of force."*[62]
By early 2003 the US and UK indicated that military force might be required. In response, China, France and Russia issued a Joint Statement, noting that, in case of Iraq's failure to comply with its obligations, this would be reported to the Council for it to take a position.[63] On 24 February the Council, meeting in closed session, had before it alternative approaches to the crisis. The UK-US-Spain draft simply decided that Iraq had *"failed to take the final opportunity afforded to it in resolution 1441 (2002)".*[64] France, Germany and Russia, opposing the 'logic of war',[65] submitted a Memorandum with three principles: priority for a peaceful outcome with the military option only as a 'last resort'; Security Council unity; and 'reinforced' inspections with a specified timeline.[66] The Council next met on 7 March, in possession of its latest inspection report. A revised UK-US-Spain draft would have the Security Council decide that: *"Iraq will have failed to take the final opportunity afforded by Resolution 1441 (2002) unless, on or before 17 March 2003, the Council concludes that Iraq has demonstrated full, unconditional, immediate, and active cooperation."*[67] Faced with a majority of nine Council members indicating opposition to it, the draft was withdrawn. On 19 March the US, UK, Australia and Poland invaded Iraq.

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[54] 1970, USA over Cambodia; and 1999, NATO over Kosovo (FR Yugoslavia)
[55] 1962 USA around Cuba; 1982 USA around Nicaragua
[56] Israel against xxxx
[57] 1956, USSR at the request of Hungary; 1968, USSR at the request of Czechoslovakia; 1983, USA into Grenada at the request of OECS; 1989, USA's invasion of Panama
[58] 1961, USA's support for the invasion of Cuba
[59] UNSC doc. S/PV.749, 10 Oct. 1956, p. 8
[60] UNSC doc. S/PV.961, 1 November 1956, p. 5
[61] UNSC doc. S/RES/1441, 8 November 2002
[62] S/PV.4644, 8 Nov. 2002, p. 3. The UK made an identical statement (pp. 4-4)
[63] UNSC doc. S/2002/1236, 8 November 2002
[64] https://news.un.org/en/story/2003/02/60102-two-plans-presented-security-council-next-steps-disarming-iraq; and https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03Cib16
[65] https://www.irishtimes.com/news/united-nations-rift-deepens-over-second-resolution-1.463594
[66] UNSC doc. S/PV.214, 24 February 2002
[67] http://archive.boston.com/news/packages/iraq/misc/un_resolution2.htm

On the brink of the invasion, the International Commission of Jurists expressed its deep dismay that a small number of states were: "*poised to launch an outright illegal invasion of Iraq, which amounts to a war of aggression. … The present regime in Iraq is certainly responsible for widespread and systematic human rights violations over the years. However, this reprehensible human rights record does not by itself provide a legal basis for resort to war."* The Commission urged the US and UK to "*reconsider their policy choices and desist from the unlawful use of force...*"[68] In September 2004, the UN Secretary-General stated in an interview that: *"I have indicated it was not in conformity with the UN charter. From our point of view and from the Charter point of view, it was illegal.*"[69] In July 2016, the UK Parliament received its own expert report on the 2003 invasion.[70] The Inquiry concluded that at the time of the invasion, Iraq had not posed an urgent threat to British interests, the intelligence relied upon was presented with unwarranted certainty, peaceful alternatives to force had not been exhausted, the UK and US had undermined the authority of the UN Security Council, the process of identifying the legal basis for the planned action was 'far from satisfactory', and a war had been 'unnecessary'.[71] The US Secretary of State subsequently acknowledged that ""*It turned out, as we discovered later, that a lot of sources that had been attested to by the intelligence community were wrong."*[72]

3. Russia into Ukraine (2014; 2022)

In the 2014 Security Council debate on Crimea, addressing the draft resolution which it vetoed, Russia invoked self-determination as justification of its action, with philosophical comment about international law: "*The philosophy of the sponsors of the draft resolution runs counter to one of basic principles of international law, the principle of equal rights and self-determination of peoples … It is also understandable that the enjoyment of the right to self-determination involving separation from an existing State is an extraordinary measure, applied when further coexistence within a single State becomes impossible. … It should also be noted that generally agreed principles of international law are closely interlinked and that each should be considered in the light of the others, the relevant political context and historic specificities. The political, legal and historic backdrop of the events of today in Ukraine is extremely complicated."* For its part, the US offered reflections of its own, at presidential level, on the relationship between geo-strategic politics and international law: *"That is not how international law is supposed to operate. Russia's actions violate international law but [its President] seems to have a different set of lawyers making a different set of interpretations, but I don't think that's fooling anybody."*[73]

In 2022, announcing the 'special military operation', the Russian President explained the geo-strategic situation as background: an eastward expansion by NATO 'closer to the Russian border' in disregard of the principle of equal and indivisible security in Europe; NATO's contempt for international law in Yugoslavia, Iraq, Libya and Syria; and genocide in Donbass. Various speeches by Russian leaders (the President, the Foreign Minister and the UN ambassador) were cited: *"to stop that atrocity, that genocide of the millions of people who live there and who pinned their hopes on Russia*"; that "*[t]he goal of this special operation is protection of people who have been victimized and exposed to genocide by the Kiev regime … To ensure this, we will seek demilitarization and denazification of Ukraine."*[74]

The contemporary official statements by the Russian President can be unofficially sourced in his continuing engagement with Russia's leading think-tank since 2004 – the most recent being his address of 27 October 2022.[75]

> *Now this historical period of boundless Western domination in world affairs is coming to an end. The unipolar world is being relegated into the past. We are at a historical crossroads. We are in for probably the most dangerous, unpredictable and at the same time most important decade since the end of World War II. The West is unable to rule humanity single-handedly and the majority of nations no longer want to put up with this. This is the main contradiction of the new era.*[76]

At the United Nations, Russia advanced the legal justification for the operation as two-fold: the right of self-determination for Donbass in the UN Charter (Art. 1); plus Russia's right of individual self-defence and Russian-Donbass right of

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[68] http://www.icj.org/news.php3?id_article=2770&lang=en

[69] *'Iraq war was illegal and breached UN charter, says Annan'*, The Guardian, 16 September 2004 https://www.theguardian.com/world/2004/sep/16/iraq.iraq

[70] *Report of the Iraq Enquiry – Executive Summary: Report of the Committee of Privy Counsellors,* 6 July 2016 https://www.gov.uk/government/publications/the-report-of-the-iraq-inquiry

[71] https://www.telegraph.co.uk/news/2016/07/06/chilcot-report-2003-iraq-war-was-unnecessary-and-invasion-was-no/

[72] https://www.aljazeera.com/news/2021/10/18/stain-on-powells-record-lies-to-the-un-about-iraqs-weapons

[73] https://www.washingtonpost.com/news/post-politics/wp/2014/03/04/obama-putins-moves-are-not-a-sign-of-strength/

[74] https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf

[75] Valdai Discussion Club: speeches and comments by Vladimir Putin:
24 October 2014: http://en.kremlin.ru/events/president/news/46860 and
22 October 2020: http://en.kremlin.ru/events/president/news/64261

[76] https://valdaiclub.com/events/posts/articles/vladimir-putin-meets-with-members-of-the-valdai-club/

collective self-defence (Art. 51).[77] In 2022, the Council's draft resolution was labelled 'Russian aggression against Ukraine'.[78] Russia denied any act of aggression: *"… we are not waging a war against Ukraine or the Ukrainian people. We are carrying out a special operation against nationalists to protect the residents of Donbas and for the purposes of denazification and demilitarization. Those objectives will soon be achieved and the Ukrainian people will gain an opportunity to once again independently determine their future and in so doing live in peace, good neighbourliness and cooperation with all their neighbours".*[79]

The UK's rejection was forthright: *Russia claims that its invasion of Ukraine is in self-defence. That is absurd. Russia's only act of self-defence is the vote that they have cast against today's draft resolution",* while France judged that "*Russia flouts the responsibilities conferred on it as a permanent member of the Security Council."*

Both China and India, which abstained on the draft resolution, proposed a middle path of negotiation. In China's view: "A*gainst the backdrop of five successive rounds of NATO expansion, Russia's legitimate security aspirations should receive attention and be addressed properly. Ukraine should become a bridge between the East and the West, not an outpost for confrontation between major powers."* For its part, India observed that "*The contemporary global order was built upon the Charter of the UN, international law and respect for the sovereignty and territorial integrity of States. All Member States need to honour those principles in finding a constructive way forward."*

*Article 3(b) Bombardment*

4. USA, UK, NATO in Kosovo (1999)

In March 1999, NATO commenced a bombing campaign against FR Yugoslavia. The stated justification was to avert a 'looming humanitarian disaster' pursuant to Council resolution 1199. Russia argued that such 'attempts' were not recognised in international law, and that the '*virus of a unilateral approach could spread'*. China viewed the strikes as a 'blatant violation' of the Charter. India agreed, citing Article 53: *"No country, group or arrangement can take arbitrary and unilateral military action against others. That would mean a return to anarchy"*. The most objective judgement came from the UN Secretary-General who pointed out that Chapter VIII assigns an important role to regional organizations but the fact that the Security Council has the primary role is explicitly recognised in NATO's own Treaty. A private independent commission, established after the conflict by Sweden, concluded the operation to be '*illegal but legitimate'* which attributes primacy to subjective political judgement over objective legal obligation.

*Article 3(c) Blockade*

5. USA around Cuba (1962)

The 1962 Cuban missile crisis ranks alongside Ukraine 2022 as the two most dangerous moments of the contemporary order. Following the US 'quarantine' against Soviet vessels approaching its territorial waters, Cuba requested an urgent Council meeting "*to consider the act of war unilaterally committed by the US in ordering the naval blockade of Cuba.*[80] USSR argued that the US was "*taking a step towards the unleashing of a world thermonuclear war."* The US argued the opposite: *"[T]he Soviet action in Cuba has created a new and dangerous situation by sudden and drastic steps which imperil the security of all mankind."* The US defended its nuclear missiles in Turkey: *"Missiles which help a country to defend its independence, which leave the political institutions of the recipient countries intact, which are not designed to subvert the territorial integrity or political independence of other States, which are installed without concealment or deceit-assistance in this form and with these purposes is consistent with the principles of the UN. But missiles which introduce a nuclear threat into an area now free of it, which are installed by clandestine means, which result in the most formidable nuclear base in the world outside existing treaty systems – assistance in this form and with these purposes is radically different. … The missile sites in NATO countries were established in response to missile sites in the Soviet Union directed at the NATO countries. The NATO States had every right and necessity to respond to the installation of these Soviet missiles by installing missiles of their own. These missiles were designed to deter a process of expansion already in progress. Fortunately, they have helped to do so."*[81]

The argumentation between the two major powers of the time, sixty years ago, demonstrates the futility of the nuclear deterrence theory,[82] with equal relevance to today's Ukraine crisis.

*Article 3(e) Ultra-vires a host agreement*

6. USSR into Hungary (1956)

Facing allegations of aggression against Hungary, the USSR advanced an argument that also indicates an historical precedent to Ukraine 2022: "*Soviet forces have been and remain on Hungarian territory pursuant to the Warsaw Pact … [serving] the common interest of the security of all the countries parties to the Pact. It was a measure taken to counter the militarization of Western Germany and the conclusion*

[77] https://www.bloomberg.com/news/articles/2022-02-24/full-transcript-vladimir-putin-s-televised-address-to-russia-on-ukraine-feb-24
[78] UNSC doc. *S/2022/155,* 25 February 2022
[79] UNSC doc. S/PV.8979, 25 February 2022, pp. 12-14
[80] S/5183, 22 Oct. 1962
[81] S/PV.1022, 23 Oct. 1962, p. 12
[82] The theory is globally known as MAD, for 'mutually assured destruction'.

*of military agreements of an aggressive nature between the UK, France, the US and West Germany."* The issue did not concern the UN and *"Any intervention by the UN and the Western Powers in the further course of events in Hungary can only lead to complications, and would in any event be illegal and incompatible with the Charter.*[83]

7. USSR into Czechoslovakia (1968)

The legal argumentation was almost identical to 1956. The USSR and other allied States had "*decided to meet the Czechoslovak Government's request for military assistance in conformity with mutual treaty obligations and on the basis of the relevant provisions of the UN Charter. Any consideration of the question by the Security Council "would serve the interests of certain foreign circles, which represent forces of aggression."*

The US argued: *If the Security Council does not seize itself of this gross violation of the Charter and deal with it promptly and incisively, its vitality and integrity, its very seriousness of purpose, will be subject to serious question. Rarely has a situation come before the Council where the ugly facts of aggression have been written so large and in such unmistakable characters."* The USSR responded: *"The war being waged by the United States in Vietnam is a real example of repulsive aggression. … [The US] tries, by mean slander, fabrications and insinuations against the socialist countries, to camouflage the truly repulsive aggressive deeds of American imperialism in Vietnam and the Middle East.*

8. USA into Grenada (1983)

In 25 October 1983 following internal disruption in Grenada and the assassination of the Prime Minister, the US and the Regional Security System (RSS), a coalition of six Caribbean States (OSCE plus Jamaica) invaded Grenada. On the eve of the invasion ('Operation Urgent Fury'), the British Prime Minister had informed the US President in direct communication that "*This action will be seen as intervention by a Western country in the internal affairs of a small independent nation, however unattractive its regime."*[84] On 27 October, a draft resolution was submitted to the Security Council which would "*deplore the armed intervention in Grenada which constitutes a flagrant violation of international law".* Following a US veto, the issue was considered by the General Assembly in regular session which overwhelmingly adopted an identical resolution (108 for including China, France, USSR; 9 against; and 27 abstaining.[85] The US informed the Assembly: "*We believe that the use of force by the task force was lawful under international law and the Charter of the UN, because it was undertaken to protect American nationals from a clear and present danger, because it was a legitimate exercise of regional collective security, because it was carried out with due concern for lawful procedures and in the service of values of the Charter, including the restoration of the rule of law, self-determination, sovereignty, democracy and respect for the human rights of the people of Grenada. … The test of law lies not in the assertion of abstract principles but in the application of universal norms to specific situations. A court that cannot distinguish between lawful and criminal use of force, between force used to protect the innocent and force used to victimize the innocent, is not worthy to sit in judgement on anyone. The failure to preserve such distinction does not preserve law as an instrument of justice and peace but erodes the moral and legal foundations of civilized existence."*[86]

9. USA into Panama (1989)

Defending its invasion of Panama in December 1989, the US justification again placed political aspiration above legal obligation: "*It was not too long ago that many Governments and régimes usurped the sovereign right of their peoples in the name of all-encompassing ideologies. Those pretensions have now been unmasked for the fraud that they are. Democracy today is synonymous with legitimacy the world over. It is, in short, the universal value of our time. … we acted for legitimate reasons of self-defence and to protect the integrity of the Canal treaties".* The actions, the US asserted, were in conformity with the UN Charter (Article 51) and OAS Charter (Article 21).[87]

- *The P-5 and the veto*

In the course of the UN's seven decades, the Security Council has adopted 2,630 resolutions (as at 19 May 2022). The P-5 Member States have cast 263 vetoes in Council decisions on 212 cases. Of these, 41 have blocked admission of a potential UN Member State, from 1946 to 1976 – an abuse of the political power of the veto yet seemingly tolerated in the Charter.[88] The rest have focused on security issues. This section focuses primarily on the occasions when the veto has been applied to the issue of the use of force.

While many vetoes have been cast by one country, many have been vetoed by two or three countries casting negative votes together. Notable features of the veto-casting are the following:

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[83] UNSC doc. S/PV.754, p. 9-10

[84] Thatcher Memoirs (Margaret Thatcher Foundation) https://www.margaretthatcher.org/document/109427

[85] A/PV/38.43, para 93. China, France and USSR (Australia) for; USA (Israel) against; UK (Canada, NZ) abstaining.

[86] A/PV/38.43, para 175 ff.

[87] UNSC doc. S/PV.2902, 23 December 1989

[88] The Charter's Article 4(2) and Article 18 provide for admission of new members by a two-thirds majority of the General Assembly upon the recommendation of the Security Council. The argument has not prevailed that the Council's recommendation should be regarded as a procedural issue under Article 27(2) and thus open to a majority vote.

- For the first ten years (1946-55), the USSR was the only country to cast a veto (57 times), giving effective voice to its stated determination to apply the brake to a perceived Western influence (numerical majority) in both the General Assembly and Security Council.
- For the next 17 years (1956-72),[89] the USSR cast an additional 26 vetoes, while the P-3 cast 10 vetoes on seven occasions covering two crises. In 1956 France and UK twice cast joint vetoes to block condemnation of their military incursion into Egypt; between 1963 and 1972, the UK cast five vetoes over Southern Rhodesia with the US casting a joint veto (its first) in March 1970.
- In August 1972 the People's Republic of China, having been admitted as a UN Member State the previous year, cast its first veto, blocking the admission of Bangladesh. It was not to cast another veto for 15 years.
- For the next five years (Sept. 1972 to Oct. 1977), the P-3 (France, UK, USA) cast 35 vetoes to one veto by USSR and none by China. Single vetoes were cast by US over Vietnam and the Middle East, by France over Comoros, and UK over Southern Rhodesia.

Over the 77 years:

- Triple P-3 vetoes by France, UK and USA have been cast on 13 occasions (from 1974 to 1989), covering situations in Namibia, South Africa, Libya and Panama.
- Dual vetoes were cast by UK and US on nine occasions (from 1970 to 1987) covering Southern Rhodesia, Falklands/Malvinas, Namibia, Southern Africa and South Africa.
  Dual vetoes have been cast by China and Russia (from 2007 to 2022) on thirteen occasions covering Myanmar, Zimbabwe, Syria, Middle East and Venezuela.

Vetoes by a P-5 State concerning allegations of its own unlawful use of force have been the following:

- USSR/Russia: Berlin (1948), Hungary (1956), Czechoslovakia (1968), Ukraine (2014, 2022)
- USA: Nicaragua (1982, 1984, 1986, 1990), Grenada (1983), Panama (1989).
- UK: Egypt/Suez (1956), Falklands/Malvinas (1982), Grenada (1983), Syria (1986),
- France: Egypt/Suez (1956), Comoros (1976)
- China: none

Perhaps the most complicated veto cast was that by USSR in March 1979, on the ASEAN draft regretting two conflicts: the 'armed intervention' in Kampuchea and the 'armed attack against Vietnam – without naming the 'aggressor' in each case.[90] The first case had been Vietnam's invasion of Kampuchea, the latter China into Vietnam. Yet China voted for the resolution, on the grounds that its action had been in self-defence, whereas USSR vetoed in opposition to the allegations against Vietnam.[91]

Table 1 summarises the major conflicts of the contemporary order, identified according to five of the seven acts in the General Assembly's definition, showing the voting pattern by the P-5, along with the total vote. Table 2 does the same for the occasions in which the Assembly has itself identified 'aggression'.

[89] Until 24 August 1972
[90] UNSC doc. S/13162, 13 March 1979
[91] UNWSC doc. S/PV.2129, 16 March 1979

**Table 1**
**Security Council voting on 'aggression'**

| Crisis | Alleged violator | | P-5 Vote | | Total Vote |
|---|---|---|---|---|---|
| | | For | Against | Abstain | |
| ***Invasion*** | | | | | |
| Korea 1950 | DPRK, PRC | China, France, UK, US | USSR | | 9-1-1 |
| Suez 1956 | UK, France | China, USSR, USA | UK, France | | 7-2-2 |
| Vietnam | China | | | | |
| Iraq 2003 (draft) | UK, USA | China, France, Russia | majority | | withdrawn |
| Ukraine 2022 | Russia | France, UK, USA | Russia | China | 11-1-3 |
| ***Bombardment*** | | | | | |
| Kampuchea | USA | | | | |
| FRY-Kosovo 1999 | France, UK, USA | China, Russia | majority | | 3-12-0 |
| ***Blockade*** | | | | | |
| Cuba 1962* | USA | | | | No vote |
| Nicaragua 1982 | USA | China, France, USSR | USA | UK | 12-1-2 |
| Nicaragua 1984 | USA | China, France, USSR | | UK | 13-1-1 |
| Nicaragua 1986 | USA | China, USSR | USA | France UK | 11-1-3 |
| Nicaragua 1990 | USA | China, France, USSR | USA | UK | 13-1-1 |
| ***Ultra vires agrmt*** | | | | | |
| Hungary 1956 | USSR | China, France, UK, USA | USSR | | 9-1-1 |
| Dom. Rep. 1965 | USA/OAS | | | | |
| Czechosl. 1968 | USSR/Warsaw | China, France, UK, USA | USSR | | 10-2-3 |
| Grenada 1983 | USA/OECS | China, France, USSR | USA | UK | 11-1-3 |
| Panama 1989 | USA | China, USSR | France, UK, USA | | 10-4-1 |
| ***Irregulars*** | | | | | |
| Cuba 1961* | USA | | | | No vote |

* In the 1961 invasion of Cuba by a US-based militia with US support, no resolution was put forward in the Assembly or the Security Council. In the 1962 Cuban missile crisis, the Council closed its discussion without putting any of the draft resolutions to the vote. The critical, and successful, role of the Acting UN Secretary-General as intermediary between the American and Soviet presidents has subsequently been acknowledged.

*General Assembly*
The Assembly has declared an 'act of aggression' on four occasions – against China (CPR) in 1950, Israel in 1980, South Africa in 1981, and Russia in 2022. Table 2 shows the voting for these crises.

**Table 2**
**General Assembly voting on 'aggression'**

| Crisis | Alleged violator | | P-5 Vote | | Total Vote |
|---|---|---|---|---|---|
| | | For | Against | Abstain | |
| Korea 1951 | China (PRC) | China France UK US | USSR (+ India) | Egypt Sweden | 44-7-9 |
| Lebanon 1982 | Israel | China USSR | US (+ Israel) | France UK | 120-2-20 |
| Angola 1982 | South Africa | China USSR | | France UK US | 117-0-25 |
| Ukraine 2022 | Russia | France UK US | Russia +Belarus | China (+ India) | 141-5-35 |

*Note:* On the Korean crisis, the Assembly vote was in its regular Annual (5th) Session. On the other crises, the debate and votes were in Special Emergency Session (respectively, 7th, 8th, 11th).
141 to 5 (Belarus, DPRK, Eritrea, Russia, Syria), with 35 abstentions (including China, India and South Africa

(iii) The case of Ukraine

The day after the Russian invasion, the Security Council considered a draft resolution submitted by the US. It endorsed the Secretary-General's call to Russia to stop its 'offensive against Ukraine', condemned the 'special military operation', deplored

Russia's 'aggression against Ukraine', decided that it 'shall immediately cease its use of force' and refrain from 'any further unlawful threat or use of force' against any Member and completely and unconditionally withdraw, deplored its decision over Donetsk and Luhansk as a violation of Ukraine's sovereignty, and decided that the decision will be 'reversed'.[92] The draft was rejected by Russia's veto, with the matter being referred to the General Assembly.[93]

Meeting in its 11th Special Emergency Session within three days of the Council's referral, the General Assembly adopted a resolution entitled 'Aggression against Ukraine'. it contained the same substantive component paragraphs but also deplored the involvement of Belarus in the unlawful use of force, called upon all parties to abide by the Minsk Agreements and urged an immediate peaceful resolution through, *inter alia*, dialogue, negotiation and mediation. Significantly, in its preamble, it also recalled its 1974 definition of 'aggression'.[94] The resolution was adopted by 141 to 5 (Belarus, DPRK, Eritrea, Russia, Syria), with 35 abstentions (including China, India and South Africa).[95] Since its referral to the Assembly on 27 February, the Security Council has discussed the Ukraine issue on eight occasions without any resolution being adopted.[96]

(iv) *Determination of 'wars of aggression'*

The critical question that begs an answer from the above review is whether any of the unlawful uses of force over the seven decades of the contemporary order qualifies as a 'war of aggression'. As noted earlier, this is not helped by the fact that there is no formal definition, from the international military tribunals, subsequent treaty law (including the Rome Statute), or the General Assembly definition. On no occasion has the Council or the Assembly determined a 'war of aggression' (not even with regard to Ukraine in 2022). As noted above, however, the International Commission of Jurists explicitly labelled the 2003 Iraq invasion as a 'war of aggression'.

For heuristic purposes therefore, a 'war of aggression' is defined here *as an intervention by a Member State's armed forces into another country with the intent of overtaking its whole territory for the purpose of annexation, political control, or change of government.*[97]

On this basis, of the seven 'acts of aggression' identified in the UN resolution, probably the first (invasion and annexation) only would qualify as a 'war of aggression' – and not all of those. In fact, a credible case can be advanced that only the 2022 invasion of Ukraine and the 2003 invasion of Iraq qualify as 'wars of aggression'.
Equally credible, however, is the contention that two earlier situations also qualify: Korea (1950) and Egypt (1956).

*Individual liability*

There are currently 123 States Parties to the Statute and thus members of the ICC. What of the P-5 Member States?

France and UK acceded early (June 2000, and October 2001 respectively).[98] The EU developed a 'Common Position' on the ICC in 2001, expressing full support for the International Criminal Court, and encouraging all UN Member States to accede.[99] With regard to the work underway to make the crime of aggression justiciable, it agreed that EU Member States *"shall contribute to the finalisation of the work underway and shall support solutions which are consistent with the letter and spirit of the Rome Statute and of the UN Charter."*[100] Despite this, neither the UK nor France has ratified the Rome Statute's Kampala amendment on aggression as a leadership crime.

The other three P-5 States remain outside the Statute and its Court. China has participated in ICC preparatory and Statute review conferences as an observer, but has never signed the Statute, primarily over concern that the definitions of the crimes, particularly 'aggression' and 'crimes against humanity' are discordant with its view on the relationship between international law and domestic jurisdiction.[101] For their parts, Russia and the US signed the Statute in 2000 but both subsequently withdrew their signatures.

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[92] S/2022/155, 25 Feb. 2022
[93] S/RES/2623, 27 February 2022
[94] A/RES/ES-11/1, 2 March 2022
[95] UNGA doc. A/ES-11/PV.5, 2 March 2022, pp. 14-15 https://digitallibrary.un.org/record/3968824?ln=en
[96] As at 7 May 2022
[97] This phrasing is the proposal of the author, and has no status in international law.
[98] https://asp.icc-cpi.int/states-parties/states-parties-chronological-list
[99] EU Common Position on the International Criminal Court: documents 2001/443/CFSP on the ICC (11 June 2001); 2002/474/CFSP (20 June 2002); 2003/444/CFSP (16 June 2003); 4th Consult/ICC (2006) 02, (25 August 2006)
[100] 2003/444/CFSP (16 June 2003), Article 7
[101] *'China, the International Criminal Court and Global Governance'*, D. Zhi, in Australian Outlook, 10 January 2020 https://www.internationalaffairs.org.au/australianoutlook/china-the-international-criminal-court-and-global-governance/

In 2000, the US signed the Rome Statute but, on 6 May 2002 with the Statute about to enter into force, it advised the UN Secretary-General that it was not bound by its signature and did not intend to become a Party.[102] Its public explanation was that the Court would 'undermine US judicial authority'.[103] It then undertook measures to exempt its military personnel and its citizenry from the Court's jurisdiction. On 30 June in the Security Council it vetoed an extension of the UN's peacekeeping mission in Bosnia after failing to secure immunity from prosecution in the ICC for its own peacekeepers. It suggested that some nations' peacekeepers be given ICC immunity for a year; and that the P-5 members of the Security Council should be given the right to veto any prosecution by the ICC. The proposal was rejected by the Council. In response, the UN Secretary-General expressed the view that the US proposal 'flew in the face of treaty law', risked undermining the Rome Statute and could ultimately discredit the Security Council.[104] On 12 July, however, the Council finally agreed to a US proposal and, acting under Chapter VII, agreed that, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a UN-established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.[105] This policy was renewed the following year,[106] but in June 2004 following news of US maltreatment of Iraqi prisoners and advised by the Secretary-General, the Council rejected any further extension.[107] Separately, the US concluded bilateral agreement with approximately 100 UN Member States which agreed to send any US national under investigation by the ICC to the USA rather than to the Court.[108]

In 2016 Russia announced that it would reconsider its attitude after the Court opened an investigation, *propio motu*, into alleged war crimes during the Russia-Georgia conflict. On 16 November, following the ICC Prosecutor's report on Russia's armed entry into Crimea in 2014,[109] Russia nullified its signature, stating that the Court had 'inspired high hopes' but had "*failed to meet the expectations to become a truly independent, authoritative international tribunal"* and was *'ineffective and one-sided."*[110]

So, after virtually a century of effort, aggression is a criminal offence for leaders in one-fifth of the world's countries. Not one of the permanent members of the Security Council is within the group.[111] There are, however, major countries within the group – Argentina, Germany, Italy, Netherlands, Portugal, Spain, Sweden and Switzerland. Indeed, 17 of the 43 States Parties accepting the crime of aggression by individual leaders are NATO States, which acts as a rigorous brake on anything other than the lawful use of force (through collective self-defence) under the UN Charter. To date, New Zealand has refused to ratify.[112]

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[102] https://news.un.org/en/story/2002/05/34332-us-says-it-will-not-become-party-rome-statute-international-criminal-court

[103] http://news.bbc.co.uk/1/hi/world/americas/1970312.stm

[104] http://news.bbc.co.uk/1/hi/world/americas/2091832.stm

[105] UNSC res. 1422, 12 July 2002

[106] UNSC res. 1487, 12 June 2003

[107] https://www.bbc.com/news/world-11809908

[108] https://www.hrw.org/sites/default/files/related_material/2003.06_US_Bilateral_Immunity_Agreements.pdf

[109] The situation had developed into an international armed conflict in which "*Russia had deployed members of its armed forces to gain control over parts of the Ukrainian territory without the consent of the Ukrainian Government.* ICC Report on Preliminary Examination Activities, 14 November 2016, paras 146-191.
https://s3.documentcloud.org/documents/3220719/ICC-Crimea-Nov2016.pdf

[110] https://www.ejiltalk.org/russias-withdrawal-of-signature-from-the-rome-statute-would-not-shield-its-nationals-from-potential-prosecution-at-the-icc/

[111] The group of 43 States parties includes, among large countries: Germany,

[112] In 2009, the NZ Parliament debated the '*International Non-Aggression and Lawful Use of Force Bill*' (Bills Digest No. 1703)
https://www.legislation.govt.nz/bill/member/2009/0062/latest/whole.html
The Bill was voted down in 1st reading by 64 votes against to 58 for. (NZ Hansard, Vol. 657, p. 6818
https://www.parliament.nz/en/pb/hansard-debates

## Part 2
## Regulation of Armaments: Nuclear weapons

### *(a) The contemporary legal framework*

The UN Charter provides that the General Assembly may consider the principles governing disarmament and make recommendations to its Members and/or the Security Council. The Council has the responsibility for developing plans for a system for the regulation of armaments. It is, or was, the job of the Military Staff Committee to advise the Council on the military requirements for international peace and security, the employment and command of forces at its disposal, the regulation of armaments, and possible disarmament.[113] What has occurred over seven decades?

*(i) The UN Charter and other treaty law*

The ultimate feature of the use of force in the contemporary order is the nuclear weapon, which was known in advance during the planning for the United Nations and literally burst over the planet barely six weeks after the Charter was concluded. Other weapons of mass destruction exist, but they do not comprise the basis of the global geo-strategic military balance that nuclear weapons do.

After seven decades, the legal premise has strengthened that the use or threat of nuclear weapons is essentially unlawful. A minority of States, however, contend that in extreme circumstances their use is indeed lawful. How did the international community arrive at this point?

The NPT (1968/70) was designed to ensure that nuclear weapon possession did not proliferate. The mutual understanding struck was, and remains, that non-nuclear weapon States undertake never to acquire nuclear weapons and the 'recognised' nuclear-weapon States to negotiate in good faith effective measures for nuclear disarmament.[114] At present, 186 non-nuclear-weapon States are parties, plus the P-5.[115] The four other nuclear-weapon-states, however, remain outside the Treaty.

In 1978 the General Assembly, expressing, its alarm over the threat 'to the very survival of mankind' posed by the existence of nuclear weapons, judged that "the accumulation of weapons, particularly nuclear weapons, today constitutes much more a threat than a protection for the future of mankind. The time has therefore come to put an end to this situation…"[116]

In 1996 the ICJ gave its Advisory Opinion, requested by the General Assembly,[117] on whether the threat or use of nuclear weapons is permitted under international law. The Court judged that there was "n*o comprehensive and universal prohibition of the threat or use of nuclear weapons as such, in either customary or conventional international law.*[118] *The threat, or use, of nuclear weapons was "generally contrary to the rules of international law applicable in armed conflict; in particular the principles and rules of humanitarian law.* However: *In view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.*[119] *Obligation to pursue in good faith and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.*[120] The Court noted an increasing concern in the international community with these weapons, and associated existing treaties, which was seen as *"foreshadowing a future general prohibition of the use of such weapons".*[121]

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[113] UN Charter, Articles 11, 26, 47
[114] Treaty on the Non-Proliferation of Nuclear Weapons, 1968, Articles I and VI
[115] https://www.un.org/disarmament/wmd/nuclear/npt/. The NPT was initiated by USA, UK and Russia, with China and France subsequently acceding in 1992
[116] Final Document of the 10th Special Session of the General Assembly, A/RES/S/10.2, 30 June 1978, Preamble, 1st para, and Introduction, para 1. https://www.un.org/disarmament/publications/library/10-special-session/
[117] UNGA resolution A/RES/49/75 K (15 Dec. 1994). The vote was 78 in favour (New Zealand), 43 against, with 38 abstentions and 26 not voting. A/49/PV.90, pp. 35, 36
[118] The vote was 11 for, with 3 judges dissenting.
[119] The vote was split (7-7), with the decision made by the President's affirming vote). Three dissenting opinions expressed the view that there were '*no circumstances at all*' in which it was legal.
[120] By unanimity (14-0)
[121] ICJ opinion, para 62. See also para 98

In 2016 pursuant to the Humanitarian Pledge which expressed dissatisfaction with the lack of progress by the P-5 towards nuclear disarmament under the NPT, and based on the ICJ 'foreshadowing' of a general prohibition, the General Assembly resolved to negotiate a complete prohibition in international law.[122] The Treaty on the Prohibition of Nuclear Weapons was adopted by the Assembly on 4 December 2017,[123] and entered into force on 22 January 2021 upon the 50th ratification, but the international community remains divided over the legality of nuclear weapons.

(ii) *Customary international law*

With the ICJ's foreshadowing in 1996 of a general prohibition of nuclear weapons and the entry into force in 2018 of the Prohibition Treaty, the questions arises whether nuclear weapon possession and threat of use has become, or is becoming, a norm in international customary law. There is inevitably some way to go. Whereas the other two WMD conventions have achieved effective universality (Biological Weapons Convention with 183 Parties; Chemical Weapons with 193 Parties), the Nuclear Prohibition Treaty has not yet done so (with 61 Parties plus 25 further signatories). The ILC's list of peremptory norms does not include the non-possession of any weapon of mass destruction but, given that the list is described as 'non-exhaustive', the issue remains open. Non-possession of the other two WMDs can perhaps be regarded as a nascent peremptory norm, but the steadfast opposition of the P-5 and the other four nuclear States would, for the foreseeable future, appear to block inclusion of nuclear weapon non-possession.

The justification for nuclear weapons-possession by the P-5 rests on the theory of 'mutual assured destruction', articulated clearly by the US to the United Nations in 1987: *"Under present circumstances, the West is uniquely dependent on nuclear weapons for deterrence".*[124]

International law recognises the concept of a 'persistent objector'. If a State has consistently objected to a customary norm, or a treaty obligation to which it is not a Party, and it makes it publicly clear that it does not consider itself to be bound, this effectively places it in the category of 'persistent objector'.[125]

### *(b) Historical perspective*

Nuclear weapons are currently possessed by nine UN Member States – the P-5 plus Israel, India, Pakistan, and North Korea. All have announced their acquisition with the exception of Israel which neither confirms nor denies. Maintaining secrecy over possession of nuclear weapons violates a UN Member State's obligations of the Charter, undermining the status of international law.[126]

Three other UN Member States worked purposefully for the acquisition of nuclear weapons before declaring that they would desist – South Africa in 1989,[127] Argentina in 1983 and Brazil in 1991.[128] Three others had nuclear weapons deployed on their territories but surrendered them back to the 'rightful owner' (USSR/Russia) in 1992 (Belarus, Kazakhstan, Ukraine). Ukraine's policy is addressed below.

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[122] UNGA res.: A/RES/71/258, 23 Dec. 2016. The vote was 113 for (New Zealand), 35 against, 13 abstaining, 32 non-voting.
[123] UNGA res.: A/RES/72/31, 4 Dec. 2017. The vote was 122 for (New Zealand), 1 against, 1 abstaining, 69 non-voting.
[124] Gist, US Dept. of State, 16 July 1987, p.1; and US Statement to Conference on Disarmament, Item 2, 16 July 1987 (Geneva) in Graham K, *National Security Concepts of States* (UNIDIR, Taylor & Francis, 1989), p. 84
[125] *Report of the ILC on the work of its 70th Session* (UNGA doc. A/73/556; 18 Nov. 2018, p. 19)
[126] Articles 11, 26, 47 indicate the Charter's original intent to ensure international cooperation in the regulation of armaments.
[127] South Africa is understood to have produced nuclear weapons by 1982 with six weapons in 1989, but subsequently destroyed them. It joined the NPT in 1991, the Treaty of Pelindaba (regional nuclear weapon-free zone) in 1996, and ratified the TPNW in 2019.
http://www.dirco.gov.za/docs/2020/un1026.htm
https://www.icanw.org/south_africa_from_nuclear_armed_state_to_disarmament_hero .
[128] In 1991 Argentina and Brazil concluded a bilateral agreement for mutual inspection of their nuclear material development. They acceded to the NPT in 1995 and 1998 respectively. Brazil's constitution permits only peaceful nuclear development. Brazil ratified the Tlatelolco Treaty (regional nuclear weapon-free zone) in 1968 and Argentina in 1994. Brazil was the first State to sign the TPNW but has not yet ratified; Argentina voted at the UN for adoption of the TPNW but has not signed it.
https://www.opanal.org/en/brazil/; https://www.opanal.org/en/argentina-2/
https://banmonitor.org/profiles/brazil; https://banmonitor.org/profiles/argentina

*(i) The record of the P-5*

The P-5 States have gone to great lengths to retain nuclear weapons themselves, ensuring that others do not. In the first instance, the NPT (1968) provides that each State Party shall, 'in exercising its national sovereignty', have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of the Treaty, have jeopardised its supreme interests. North Korea, having acceded in 1985, gave notice of its withdrawal in 2003.[129] The three depositary governments (Russia, UK, US) questioned within the Security Council whether its stated reasons for withdrawing constituted 'extraordinary events' related to the Treaty,[130] and the Council called on it to reconsider.[131] Given, however, that it remains for each UN Member State, in the exercise of its sovereign equality, to make that decision exclusively itself, North Korea remains a non-Party. Security Council sanctions against both North Korea and Iran, however, remain in force. This reflects a belief by the P-5 that the Security Council is empowered under the Charter to determine that possession of nuclear weapons by certain Member States constitutes a 'threat to international peace and security', but not in the case of other Members. INDIA/PAKISTAN

The Prohibition Treaty is regarded by the NATO P3 States (France, UK, USA) as inconsistent with the strategic policy of nuclear deterrence: "*Accession to the ban treaty is incompatible with the policy of nuclear deterrence, which has been essential to keeping the peace in Europe and North Asia for over 70 years."*[132] In 2017, in the context of the TPNW, the UK Secretary of Defence stated that the Prime Minister *"would fire UK's nuclear weapons as a 'first strike'. ….. We have made it very clear that you can't rule out the use of nuclear weapons as a first strike"*[133]

In 2018 the P-5 gave voice to a unified opposition to the Treaty: *"… the P5 opposes the TPNW. It contradicts and risks undermining the NPT … The P5 will not sign or ratify the Treaty which will not bind them. They do not accept any claim that it contributes to the development of customary international law."*[134] In 2022, the P-5 declared that: *"As nuclear use would have far-reaching consequences, we also affirm that nuclear weapons—for as long as they continue to exist—should serve defensive purposes, deter aggression, and prevent war."*[135]

*(ii) The case of Ukraine*

The dissolution of USSR in 1991 left nuclear weapons on three former Soviet republics in addition to Russia. Ukraine had on its territory about one-third of the USSR's nuclear arsenal (including 176 ICBMs) serving as nuclear deterrent against NATO.[136]

While Ukraine decided to accede to the NPT and not 'own' or 'control' any nuclear weapon, there was no legal obligation on its part under the NPT not to deploy nuclear weapons owned by a P-5 State, whether Russia or a NATO country. NATO nuclear weapons are, to this day, deployed in five non-nuclear-weapons States (Belgium, Germany, Italy, Netherlands and Turkey) under a 'dual control;' arrangement. In the case of Ukraine, the weapons remained in the country for three years, theoretically under the operational control of the CIS. It is not clear who operationally controlled the nuclear weapons during the two-year period 1993-94, but it is understood that by late 1994 Russia had withdrawn all the nuclear weapons.[137]

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[129] SC doc. S/2504, 12 March 1993
[130] SC doc. S/25515, 1 April 1993
[131] SC doc. S/RES/825, 11 May 1993
[132] https://news.un.org/en/story/2017/07/561122-un-conference-adopts-treaty-banning-nuclear-weapons ; https://usun.state.gov/remarks/7892
[133] Rob Merrisk, 24 April 2017 – http://www.independent.co.uk/news/uk/politics/theresa-may-nuclear-weapons-first-strike-michael-fallon-general-election-jeremy-corbyn-trident-a7698621.html
[134]Joint Statement by the permanent 5 members of the UN Security Council (released by UK Missions to the UN, New York, Geneva, 24 October 2018) https://www.gov.uk/government/news/p5-joint-statement-on-the-treaty-on-the-non-proliferation-of-nuclear-weapons
[135] https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/p5-statement-on-preventing-nuclear-war-and-avoiding-arms-races/
[136] *Norris, Robert S. (January–February 1992). "The Soviet Nuclear Archipelago". Arms Control Today. Arms Control Association.* ***22*** *(1): 24–31*
[137] See '*Ukraine and the NPT',* M. Budjeryn (Wilson Center; 15 Oct. 2018) https://www.wilsoncenter.org/blog-post/ukraine-and-the-treaty-the-non-proliferation-nuclear-weapons

In December 1994, Ukraine signed, along with Russia, UK and USA, the Budapest Memorandum,[138] which contained a declaration acknowledging Ukraine's accession to the NPT and giving 'security assurances to Ukraine by the three P-5 Security Council States. The security assurances were as follows:

- a commitment, in accordance with the CSCE principles, to respect the independence and sovereignty and the existing borders of Ukraine;
- an obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defence or otherwise in accordance with the UN Charter;
- a commitment, in accordance with the CSCE principles, to refrain from economic coercion designed to subordinate to their own interest the exercise by Ukraine of the rights inherent in its sovereignty and thus to secure advantages of any kind;
- a commitment to seek immediate UN Security Council action to provide assistance to Ukraine, as a NPT non-nuclear-weapon State, if Ukraine should become a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons are used;
- a commitment, in the case of Ukraine, not to use nuclear weapons against any NPT non-nuclear-weapon State except in the case of an attack on themselves, their territories or dependent territories, their armed forces, or their allies, by such a State in association or alliance with a nuclear-weapon State.

Finally, to consult in the event a situation arises that raises a question concerning these commitments.

France separately gave the same security assurance, but omitting any referral to the Security Council or obligation to consult.[139] For its part, China made the following statement: *" [China] has always maintained that under no circumstances will China use or threaten to use nuclear weapons against non-nuclear-weapon States or nuclear-weapon-free zones. This principled position also applies to Ukraine. The Chinese Government urges all other nuclear-weapon States to undertake the same commitment, so as to enhance the security of all non-nuclear-weapon States, including Ukraine.*[140]

More generally the Security Council adopted a resolution, in 1995, proposed collectively by the P-5 States which extended security assurances to all NPT non-nuclear weapon States. Adopted unanimously, it recognised that: *in case of aggression with nuclear weapons or the threat of such aggression against a non-nuclear-weapon State Party to the Treaty on the NPT, any State may bring the matter immediately to the attention of the Security Council to enable the Council to take urgent action to provide assistance, in accordance with the Charter, to the State victim of an act of, or object of a threat of, such aggression; and recognizes also that the nuclear-weapon State permanent members of the Security Council will bring the matter immediately to the attention of the Council and seek Council action to provide, in accordance with the Charter, the necessary assistance to the State victim.*[141]

The first State to speak in the Council debate, a quarter of a century ago, was Ukraine. It expressed the belief that the Budapest Memorandum could *"form the basis for elaborating a universal, legally-binding document on assurances."* For its part Russia described the resolution as "*an important step in response to the legitimate interest of the non-nuclear-weapon States, which have been trying to obtain agreed and binding security assurances in light of the fact that they themselves have renounced nuclear weapons under the NPT".*[142] The previous week, Russia had unilaterally declared that it: *"… will not use nuclear weapons against non-nuclear-weapon States parties to the NPT, except in the case of an invasion or any other attack on the Russian Federation, its territory, its armed forces or other troops, its allies or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State."*[143]

In 2014, following the Crimea invasion, the UK, USA and Ukraine met in Paris pursuant to the Budapest Memorandum, but Russia did not attend.[144] On 24 February 2022, as Russia launched the invasion of Ukraine, it issued a warning to

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[138] UN doc. S/1994/1399, 19 December 1994. See also
https://treaties.un.org/doc/Publication/UNTS/Volume%203007/v3007.pdf
https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280401fbb

[139] http://www.exportlawblog.com/docs/security_assurances.pdf

[140] Letter from Permanent Representative of China to UN Secretary-General, 12 December 1994, delivered through UN Office of Disarmament Affairs

[141] UNSC doc. S/RES/984, 11 April 1995

[142] S/PV.3514, 11 April 1995, p. 30. The statement was made by the then Russian Permanent Rep. to the UN, H.E. Sergey Lavrov who is currently Russia's Foreign Minister (appointed in 2004). The previous year he had signed the Budapest Memorandum for Russia.

[143] S/1995/261, p. 3

[144] Russia claimed that the Budapest memorandum had been signed with a 'different government', which falls short of international legal obligations. For its legal commitment to have been demonstrated, it would have need to renounce the Memorandum.

Ukraine and by implication to NATO States of "consequences greater than any you have faced in history" from any attempted interference in its 'Special Military Operation'.[145] In 2022 in the course of its 'Special Military Operation', Russia has announced an upgrade of its nuclear weapon arsenal to a 'special mode of combat duty', and indicated that, in the event that Finland and Sweden join NATO, its nuclear arsenal at Kaliningrad will be strengthened.[146] Russia is, however, simply the most recent major power to explicitly threaten the use of nuclear weapons. It is not the only one, and not the first. India and China have no-first-use policies; the other seven NWS retain first-use policy, including France, UK and USA.

The theory of nuclear deterrence, so strongly defended and promoted by the P-5 states, logically holds that, in international law, either no UN Member State should possess and threaten the use of nuclear weapons through the TPNW, or every sovereign Member State has the right to do so. If North Korea can withdraw from the NPT, albeit with Council sanctions, so can Cuba, Iran and Ukraine.

## Part 3
## Pacific Settlement

### *(a) The contemporary framework*

As required under the Charter, every UN Member State is automatically a party to the ICJ Statute. Each Member State undertakes to comply with the Court's decision in any case to which it is a party and, if it does not, the other party may have recourse to the Security Council which may take 'measures' to give effect to the judgement.[147] To date, the Court has considered 180 contentious cases and given 26 advisory opinions.[148]

While membership of the Court is universal, the lack of voluntary resort to its jurisdiction and the lack of enforcement by the Security Council of its rulings results in a legal framework that is demonstrably weak. Recognition of the ICJ's jurisdiction is complex and somewhat fraught. Disputant states may recognise jurisdiction in three ways – voluntarily by 'special agreement' over a particular dispute, recourse to the Court by 'general agreement' through provisions in separate treaties, or declaratory adherence to 'compulsory jurisdiction'.[149] Compulsory jurisdiction is nuanced, being compulsory only as long as a Member State chooses it to be, with the right of immediate withdrawal at any time.

### *(b) Historical perspective*

Currently, 73 of the UN's 193 Member States accept the Court's compulsory jurisdiction. A number of large UN Member States recognise compulsory jurisdiction,[150] but many have subsequently withdrawn.[151]

*(i) Compulsory jurisdiction and the P-5*

What is the strength of commitment by the P-5 States to accept the rule of law? As shown below, only one (UK) currently accepts compulsory jurisdiction. Three others (China, France, USA) have withdrawn their declarations, and one (USSR/Russia) has never accepted.

- The UK recognised compulsory jurisdiction in 1946, and has maintained this policy ever since.
- In 1946 the Republic of China (Taiwan) recognised compulsory jurisdiction,[152] but in 1972, the Peoples Republic of China indicated that it did not recognize the statement made by 'the defunct Chinese Government'.[153]
- In 1947 France recognised compulsory jurisdiction,[154] but terminated the declaration in 1974 during the ICJ case over its nuclear weapons testing.
- The USA recognised compulsory jurisdiction in 1946. In 1984 it lodged a Partial Declaration, stating that the ICJ jurisdiction *"shall not apply to disputes with any Central American state or arising out of or related to events in Central America, any*

[145] https://www.independent.co.uk/news/world/europe/putin-russia-ukraine-military-invade-b2022046.html
[146] Pavel Podvig, Bulletin of the Atomic Scientists, March 29, 2022
https://thebulletin.org/2022/03/why-and-how-the-world-should-condemn-putin-for-waving-the-nuclear-saber/
[147] UN Charter, Articles 92 - 96
[148] https://ijrcenter.org/universal-tribunals-treaty-bodies-and-rapporteurs/international-court-of-justice/
[149] ICJ Statute, Article 36
[150] In Western Europe: Germany, Italy, Spain, Netherlands. In Eastern Europe: Romania, Hungary, Poland – all adjacent to Ukraine. In Middle East: Egypt. In Asia-Pacific: India, Japan, Australia (and New Zealand). In Latin America: Mexico.
[151] In addition to France and USA: in Europe, Turkey and Serbia; in Middle East, Israel; in Asia-Pacific, Nauru, Thailand; in Africa, Kenya, South Africa, Swaziland; in Latin America, Brazil, Bolivia, Colombia, El Salvador, Guatemala.
[152] United Nations, *Treaty Series* , vol. 1, p. 35
[153] https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20I/i-4.en.pdf
[154] United Nations, Treaty Series, vol. 26, p. 93; and vol. 337, p. 65

*of which disputes shall be settled in such manner as the parties to them may agree. …. this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America."* In 1985 it terminated its recognition of compulsory jurisdiction entirely, during the ICJ case over its blockade of Nicaragua.

- At no stage has the USSR/Russia made a declaration of compulsory jurisdiction. In 1987 it proposed a variety of measures to strengthen the role of international law including through agreement among the P-5 to expand the Court's compulsory jurisdiction.[155] The US responded positively to the initiative and for several years bilateral and multilateral P-5 discussions occurred to extend the Court's jurisdiction.[156] In 1989, it announced the withdrawal of the reservations it had previously made to six human rights conventions, each of which contains a provision for referral to the Court.[157] This did not amount to compulsory jurisdiction under the ICJ Statute, Article 36(2); but rather by way of 'general agreement' deriving from other treaties as outlined in Art. 36 (1). With the collapse of the USSR in 1991, no further progress occurred from this initiative. For its part Russia, as successor State and P-5 member, has not recognised compulsory jurisdiction.

If a State withdraws recognition of the Court's jurisdiction, whether through withdrawal of its compulsory declaration or through a policy-change with respect to a 'special agreement', this does not violate international law. It does, however, politically undermine the status of the contemporary legal framework, given the Charter's injunction for due respect of international law.[158] A review of the major cases offers insight into the respect which the P-5 Members, enjoying sovereign equality, have shown to the World Court.

*(ii) Record of the P-5*

To what extent have P-5 States been engaged in judicial or arbitral settlement? In short, the P-5 act with sublime selectivity towards the Court, once condescendingly described by a US ambassador to the UN as a *"semi-legal, semi-judicial, semi-political body which nations sometimes accept and sometimes don't."*[159] In most cases in which another UN Member State has initiated proceedings against it, a P-5 State has opposed ICJ jurisdiction.

In its first contentious case over conflict situation, the Security Council recommended referral to the Court. In other cases, a P-5 State has initiated proceedings. In an unusual move early in the UN era, the Security Council recommended referral of the dispute between UK and Albania to the Court, and the UK duly complied.[160] The Court found that Albania had been responsible for the laying of mines in its own waters and that UK had been consistent with the right of innocent passage in international law. The UK had, however, violated Albanian sovereignty when it subsequently undertook a naval mine-clearing operation. Albania was ordered to pay reparations.[161]

In most cases, however, P-5 member States have opposed the Court's jurisdictions even in individual 'special cases'. In the 1950s the USSR (plus Hungary and Czechoslovakia) opposed jurisdiction over US allegations concerning 'aerial incidents' (1952-56) and the Court agreed, removing the case from its List.[162]

In 1973, Australia and New Zealand each instituted separate proceedings against France concerning its proposed atmospheric nuclear weapon testing in the South Pacific. France, as noted, renounced its acceptance of compulsory jurisdiction, then argued that the Court manifestly lacked jurisdiction. it refrained from appearing at the public hearings or

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[155] Mikhail Gorbachev, The Realities and Guarantees of a Secure World, 1987: USSR Mission to the UN: Press Release No 119 (Sept. 17, 1987), cited in Bilder, R., *Judicial Procedures Relating to the Use of Force* (Virginia JIL, Vol. 31 (2), 1991, pp. 249-279

[156] NY Times, March 9, 1989, A1, col 4

[157] Statement by the Presidium of the USST, 10 Feb.1989. See: *The Acceptance by the Soviet Union of the Compulsory Jurisdiction of the ICJ for Six Human Rights Conventions,* Theodor Schweisfurth, EJIL Vol 2(1), 1991, pp. 110-117 https://doi.org/10.1093/ejil/2.1.110. The conventions were: Genocide 1948 (Art. IX), Human Trafficking 1950 (Art. 22), Political Rights of Women, 1953 (Art. IX), Racial Discrimination, 1966 (Art. 22), Discrimination against Women 1970 (Art. 29) and Prohibition of Torture 1984 (Art. 30).

[158] In the Charter's preamble, 'we the peoples' are determined to establish conditions under which respect for obligations arising from international law can be maintained while Article 1 identifies, as one of the UN's four principles, conformity with the principles of international law for the maintenance of international peace and security.

[159] https://www.latimes.com/archives/la-xpm-1986-06-28-mn-25504-story.htmlv

[160] S/RES/19, 9 April 1947 (8 to 0; 2 abstentions – Poland, USSR)

[161] https://www.icj-cij.org/en/case/1

[162] https://www.icj-cij.org/en/case/40 See also ICJ cases 22, 25, 28, 54. A similar case arose with Israel and UK taking a case against Bulgaria, with the same decision by the Court.

filing any pleadings. In 1973 the Court indicated provisional measures to the effect, *inter alia* , that pending judgment France should avoid nuclear tests causing radioactive fall-out on Australian or New Zealand territory. Following an announcement by France that it had no intention of continuing atmospheric testing, the Court concluded that the complainants' objective had been achieved.[163] Underground testing, however, continued into the 1980s. In 1985, the bombing and sinking of a private protest vessel in Auckland Harbour was described the NZ Prime Minister initially as an 'act of terrorism', subsequently as a 'breach of international law involving state responsibility'. France initially denied involvement, but two French agents were arrested in New Zealand and pleaded guilty to manslaughter with a sentence of ten years imprisonment. Under pressure, New Zealand agreed through UN mediation to the release of the agents to serve their terms in French territory while France agreed to reparations. Upon transfer the agents were released by France shortly thereafter, and accorded national honours.[164]

In 1984 Nicaragua proceeded against the US over responsibility for military and paramilitary activities against it. The US contended that the Court lacked jurisdiction over the case. The ICJ ruled that it did possess jurisdiction, and issued provisional measures that the US should immediately to cease and refrain from any action restricting access to Nicaraguan ports, and, in particular, the laying of mines. In its final judgement the Court rejected the US justification of collective self-defence, and ruled that the US had violated the obligations imposed by customary international law not to intervene in the affairs of another State, or use force against another State, or infringe the sovereignty of another State, or interrupt peaceful maritime commerce. It further decided that the US was under a duty immediately to refrain from all acts constituting breaches of its legal obligations, and to make reparation for all injury caused to Nicaragua by the breaches of obligations under customary international law and its bilateral Treaty of 1956.

In 1989, Iran instituted proceedings before the Court against the USA concerning the destruction in the air by a US guided-missile cruiser of an Iran Air Airbus causing all 290 deaths of passengers and crew. The US objected to the jurisdiction of the Court. In February 1996 the Parties notified the Court that they had agreed to discontinue the case because they had entered into 'an agreement in full and final settlement.[165]

In 1999, Yugoslavia sought a proceeding against France, UK, USA and seven other NATO States for violation of the various obligations including, inter alia, non-use of force against another State.[166] The contention advanced was that these States 'took part in the acts of use of force against FR Yugoslavia by taking part in bombing targets' in that country. In a series of rulings the Court concluded that lacked jurisdiction.[167]

In 1992 Libya filed for proceedings against the USA and UK concerning the domestic trial Libya was conducting of two of its nationals over alleged responsibility for the Lockerbie bombing over the UK in 1988. In 1998 the ICJ rejected the UK and US claims that it lacked jurisdiction. In 2003 all three States notified the Court that they had agreed to discontinue the case.[168]

Also in 1992, Iran filed for proceedings against the US over the destruction by US warships of offshore oil-production complexes. The US objected to the ICJ's jurisdiction but in 1996 the Court ruled that it had jurisdiction. The US then submitted a counter-claim that Iran had attacked vessels in the Gulf and otherwise engaged in military actions dangerous and detrimental to commerce and navigation. In 2003 the Court rejected both disputants' claims for reparation.[169]

In other situations, a P-5 State has initiated proceedings, proposing ICJ jurisdiction. In 1981 the US instituted proceedings over occupation by Iranian militants of its Embassy and hostage-taking of diplomatic and consular staff. The Court ruled that Iran was violating obligations under its bilateral conventions and also rules of general international law, and was therefore bound to secure the immediate release of the hostages, restore the Embassy premises, and make reparation for the

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[163] https://www.icj-cij.org/en/case/58

[164] https://www.icj-cij.org/en/case/97 See also: M. Craven, International and Comparative Law Quarterly, Vol. 45, No. 3 (Jul., 1996), pp. 725-734 (Cambridge University Press). In 1995, in response to France's stated intention to conduct a new series of underground tests, New Zealand sought from the ICJ an Examination of the Situation in accordance with the Court's 1974 Judgement, but the request was dismissed since the French declaration of 1974 had been confined to atmospheric testing.

[165] https://www.icj-cij.org/en/case/79

[166] Application instituting proceedings: Legality of Use of Force (Yugoslavia v USA) 1999, General List No. 114, 29 April 1999 https://www.icj-cij.org/en/case/114/institution-proceedings

[167] https://www.icj-cij.org/en/case/114

[168] https://www.icj-cij.org/en/case/88; https://www.icj-cij.org/en/case/89

[169] https://www.icj-cij.org/en/case/90

injury caused to the US. The Court made this ruling notwithstanding Iran's absence from the proceedings, and rejected Iran's contention that the Court could not and should not entertain the case.[170]

The P-5 have also been involved in advisory opinions, arbitral awards and even negotiated settlements. The most notable cases concern the ICJ advisory opinion on Chagos Island involving the UK and the UNLCOS Tribunal ruling involving China's action in the South China Sea

In June 2017 the General Assembly requested the ICJ for an advisory opinion on two questions: *"(a) Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968;*
*(b) What are the consequences under international law arising from the continued administration by the UK of the Chagos Archipelago?"*[171] The Assembly's request was based on an earlier resolution of 1965 in which it invited the UK to take no action which would 'dismember' Mauritius and violate its territorial integrity.[172] In 2017 the UK called for withdrawal of the draft resolution, adding that it would not consent to having a bilateral dispute submitted for judicial settlement and that referral to the Court could undermine its legitimacy.[173] The resolution was, nonetheless, adopted. In the course of the Court's proceedings, the UK argued that it should not give an advisory opinion: "… t*he giving of an advisory opinion would not be consistent with judicial propriety, (including because it would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent".*[174] The Court, however, judged that it had the discretion to hear the case. In February 2019 it concluded that "the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence" and that the UK was under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible. Respect for the right to self-determination was an obligation *erga omnes.*[175]

In separate arbitral cases, the UK has refused to acknowledge rulings against it. In 2015, the Permanent Court of Arbitration found the UK's establishment of a marine protected area around Chagos to contravene its obligations under the Convention on the Law of the Sea.[176] In 2021, the International Tribunal for the Law of the Sea, in a related maritime boundary dispute between Mauritius and Maldives, ruled that the UK lacked any sovereignty over Chagos.[177] In response, the UK stated that it "*has no doubt as to our sovereignty over the British Indian Ocean Territory (BIOT), which has been under continuous British sovereignty since 1814. Mauritius has never held sovereignty over the BIOT and the UK does not recognise its claim*."[178]

China has recently refused to acknowledge arbitral settlement. In 2013, the Philippines instituted proceedings against it concerning the role of historic rights and the source of maritime entitlements in the South China Sea alleged to be in violation of its UNCLOS obligations. China adopted a position of non-acceptance and non-participation in the proceedings, refusing to appoint an arbitrator. Notwithstanding, the Tribunal issued its Award in 2016,[179] concluding that China's 'historic rights' claims over certain maritime areas would have no lawful effect unless entitled under UNCLOS. In particular it found that *"China has, through its construction of installations and artificial islands at Mischief Reef without the authorisation of the Philippines, breached Articles 60 and 80 of the Convention with respect to the Philippines' sovereign rights in its exclusive economic zone and continental shelf".*[180] China rejected the ruling.[181]

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[170] https://www.icj-cij.org/en/case/64
[171] UNGA res. A/RES?71/292, 22 June 2017; vote 94 for, 15 against (including UK, USA, New Zealand), 65 abstaining.
[172] UNGA res. A/RES/2066 (XX), 16 Dec. 1965; vote 89 for, none against, 18 abstaining (A/PV.1398)
[173] UNGA doc. GA/11924, 22 June 2017. See also A/71/PV.88.
[174] UK Written Statement, 15 Feb. 2018, pp. 101, 116
[175] https://www.icj-cij.org/en/case/169 The Court's voting on the operative decisions was consistently 13 to 1, the sole dissenting judge being from the UK.
https://www.icj-cij.org/public/files/case-related/169/169-20190225-PRE-01-00-EN.pdf
[176] https://www.asil.org/blogs/permanent-court-arbitration-finds-uk-violation-convention-law-sea-chago-archipelago-case-march
https://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf
[177] https://www.itlos.org/en/main/cases/list-of-cases/dispute-concerning-delimitation-of-the-maritime-boundary-between-mauritius-and-maldives-in-the-indian-ocean-mauritius/maldives/
[178] https://www.bbc.com/news/world-africa-55848126#:~:text=The%20maritime%20law%20tribunal%20of,in%20the%20UN%20General%20Assembly.
[179] PCA Annual Report 2016, p. 21. See also:
https://docs.pca-cpa.org/2017/03/ONLINE-PCA-Annual-Report-2016-28.02.2017.pdf ; and
Award: "PCA case N° 2013-19 in the matter of the South China Sea arbitration" (Permanent Court of Arbitration; 12 July 2016) https://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf
[180] Award: "PCA case N° 2013-19 in the matter of the South China Sea arbitration" (Permanent Court of Arbitration; 12 July 2016), para. 1043 (p. 415)
https://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf

*(iii) The case of Ukraine*

On 26 February 2022, Ukraine instituted proceedings against Russia over a 'dispute relating to allegations of genocide'. Ukraine contended that Russia had falsely claimed that acts of genocide had occurred in the Luhansk and Donetsk oblasts of Ukraine, and on that basis Russia had recognized the 'so-called Donetsk People's Republic and Luhansk People's Republic', and then implemented its 'special military operation' with the express purpose of preventing and punishing purported acts of genocide that have no basis in fact.

On 26 February, Ukraine instituted proceedings against Russia concerning a dispute relating to the interpretation, application and fulfilment of the 1948 Genocide Convention. Ukraine requested the ICJ to adjudge and declare that:
*(a)* no acts of genocide had been committed in the Luhansk and Donetsk oblasts of Ukraine.
*(b)* Russia cannot lawfully take any action under the Genocide Convention in or against Ukraine aimed at preventing or punishing an alleged genocide, on the basis of its false claims of genocide.
*(c)* Russia's recognition of the independence of the oblasts on 22 February 2022 was based on a false claim of genocide and therefore has no basis in the Genocide Convention.
*(d)* the 'special military operation' declared and carried out by Russia on and after 24 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention.
*And to*
*(e)* require that Russia provide assurances and guarantees of non-repetition that it will not take any unlawful measures in and against Ukraine, including the use of force, on the basis of its false claim of genocide.
*(f)* order full reparation for all damage caused by Russia as a consequence of any actions taken on the basis of its false claim of genocide.

On 5 March Russia informed the ICJ that it judged the ICJ to lack jurisdiction over the case. In oral hearings of 7 March, Ukraine requested an indication of provisional measures. Russia asserted that, in reality, its 'special military operation' in Ukraine was based on Article 51 of the UN Charter relating to self-defence and also on customary international law, and that the Genocide Convention did not provide a legal basis for a military operation, which was beyond its scope.[182] On 16 March the Court concluded that, prima facie, it had jurisdiction pursuant to the Convention (Art. IX) to entertain the case.[183] Its provisional measures were three-fold:

1. Russia shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine;[184]
2. Russia shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point (1) above;
3. Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.[185]

Two dissenting opinions were lodged. In the opinion of Judge Gevorgian: *"…the dispute that Ukraine wants the Court to decide upon relates to the use of force. However, as the Court has held in previous cases, the use of force is not governed by the Genocide Convention. Therefore, he concludes that the Court lacks jurisdiction and cannot indicate the provisional measures sought by Ukraine."* In the opinion of Judge Xue: *Ukraine's contention is based on a mischaracterization of the Russian Federation's position on its military operations. She notes that the Russian Federation invokes Article 51 of the UN Charter on self-defence and customary international law as the legal basis for its military operations. Nowhere has the Russian Federation claimed that the Genocide Convention authorizes it to use force against Ukraine as a means of fulfilling its obligation under Article I thereof to prevent and punish genocide. Whether the Russian Federation may exercise self-defence as it claims under the circumstances is apparently not governed by the Genocide Convention.*[186]

On 23 March the Court issued an Order identifying the deadlines for written pleadings: Ukraine's Memorial would be required within six months (23 Sept. 2022) and Russia's Counter-Memorial within twelve months (23 March 2023).[187]

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[181] Also, the Republic of China (Taiwan) has rejected the ruling.
[182] ICJ Order, p. 8
[183] Para 44
[184] Decisions 1 and 2 were decided by 13 votes to 2 (dissenting judges were from Russia and China). Decision 3 was unanimous..
[185] Para 86
[186] https://www.icj-cij.org/public/files/case-related/182/182-20220316-SUM-01-00-EN.pdf
[187] https://www.icj-cij.org/public/files/case-related/182/182-20220323-ORD-01-00-EN.pdf

## Conclusions

To some extent the foregoing narrative speaks for itself. Some conclusions from the above analysis, however, are advanced below.

### *(a) Record of the P-5 during the second framework of law and governance*

Use of force

1. The permanent members of the Security Council, far from being the primary custodians of international peace and security in the contemporary order, have often engaged in the unlawful use of force. Some actions have been sufficiently blatant transgressions of international law as to trigger the resignation of national leaders, such as with the UK in 1956 and France in 1985. In particular, a 'war of aggression' has been undertaken at least twice: in 2003 against Iraq and in 2022 against Ukraine.

2. The contemporary multilateral order reflects an unwavering determination by the P-5 to engage in political action for conscious self-exoneration or avoidance of the application of international law. Specifically:
   - Adversarial debate in the Council, effectively taking turns to advance the argument of self-defence and/or self-determination as legal rationales for their use of force.
   - Continuation of vetoes in the Council that preclude effective collective measures;
   - Refusal by three P-5 States to be Parties to the Rome Statute and ICC; and refusal by the other two, as Parties, to ratify the amendment that makes aggression a leadership crime for them.

Nuclear weapons

3. Selective possession of nuclear weapons, continued adherence to nuclear deterrence theory, and persistent objection to new treaty law that renders nuclear weapons illegal;
4. Violation in particular by Russia of the nuclear weapon security assurance towards Ukraine

Pacific settlement

5. Acceptance of compulsory jurisdiction by only one of the P-5 States, withdrawal by three from compulsory jurisdiction, and subsequent objections to ICJ jurisdiction over cases involving them, often over-ruled by the Court.

### *(b) Systemic weaknesses of the second framework for 'international law and governance'*

Use of force

1. The Charter contains no explicit prescription about national political values beyond respect for human rights and fundamental freedoms. Its primary focus is on preventing threats to the peace and responding to breaches of the peace and acts of aggression between Member States. Its provisions make it clear that the maintenance of peace and security overrides adversarial views on how another State should be run its own affairs, yet most P-5 States have pursued adversarial political goals as their primary objective, advancing supporting legal rationales to that end. It is only when peace and security is reliably secured that a genuine dialogue will be possible over human rights and fundamental freedoms.

2. Regional self-defence arrangements are the antithesis of a global collective security system. The main focus has been on Europe, with NATO and Warsaw Pact members facing off over four decades with a directly adjacent border-line. Although the brief post-Cold War period engendered a degree of relaxation to this with the OSCE aspiring as a region-wide security cooperation agreement, with the recent hardening of regional tensions and Russia's concern over NATO expansion, the problem has resurfaced. The potential for two traditionally neutral States to join NATO in reaction to Russia's response is a regression in collective security for both sides within Europe, and thus for the world. In contrast, the Shanghai Cooperation Organization, also comprising adjacent borders between major powers, pursues a policy of cooperation towards regional and inter-regional security through dispute settlement, with the Shanghai Pact membership open to any State. More problematic is the situation of tiny sub-regional organizations associating with a major P-5 State in authorising invasions of neighbouring countries.

3. The Ukraine crisis demonstrates the inherent right of individual self-defence, and the dangers of regional collective self-defence with the undermining of global collective security measures through the veto. Collective self-defence, in reality, is simply proving to be the contemporary term for the 19th century's 'balance-of-power' strategy.

Pacific settlement

4. Although the UN Charter and the ICJ Statute form the foundation of the contemporary framework of international law, their application reflects a largely political-diplomatic procedure, and one that exclusively concerns state responsibility. The application of international criminal law at the individual level is confined to the relatively new, and challenged, International Criminal Court. While effort has been invested in applying the Charter's provisions for pacific settlement, the framework falls well short of the standards associated with a domestic jurisdictional process.

***(c) Insights towards a third framework for 'global law and governance'***

A third framework for international law and governance is outlined below, based on conclusions from the systemic weaknesses of the second framework that is the United Nations.

Use of force

1. The 'sovereign equality' of member states within a third framework would be subject to a global body whose legitimate authority extends beyond the single current issue (the use of force), extending to three other issues: the non-possession of weapons of mass destruction, mandatory resort to judicial rulings, and respect for ecological sustainability.
2. Membership of such a global Council would be drawn from an agreed grouping of regions, with the number of member states from each regional organization based on a formula reflecting their relative population size. Sub-regional organizations wold not be engaged.
3. A 'global collective security system', with no sub-global collective defence arrangements but the inherent right of individual self-defence respected and supported by the Council.
4. Decision-making by the Council based on two-thirds majority, with no veto right accorded.
5. The chief executive of the organization would be accorded responsibility for proposing collective measures using armed force, and authorised to implement and report on such measures, subject to binding decisions by the Council.
6. A standing military force under the Council, with a military component in each region.

Pacific settlement

7. Mandatory membership of both the International Court of Justice and International Criminal Court, involving compulsory jurisdiction for all Member States; enforcement of judicial and arbitral settlement rulings undertaken by the Council; and a *proprio motu* empowerment of the leadership in the Court – any use of force by a country being automatically subject to a Court advisory opinion as to its legality, even *post facto*.
8. Individual criminal liability and state responsibility for the unlawful use of force should be closely, and causally, related, within the same basic constitutional framework document.
9. If an issue is found to be a peremptory norm under CIL by the ILC, then the ICC should have authority to indict any individual, including a leader, for an alleged crime, whether or not its State has accede to the Rome Statute.

The final question is whether a transformation from the current framework to the next can be achieved proactively or, as in the past, will be retroactive in a post-collapse situation. The first framework for the international order lasted less than two decades while the second, seven decades on, is sclerotic and ineffective. A third and qualitatively new framework is required. Once the armed conflict in Ukraine terminates, the crisis should be taken as an opportunity for a reconstruction of the legal order to serve the global community of peoples. If it is not, the international community of states will continue to confront intensifying challenges that may undermine, if not destroy, the level of human civilization.