

LAWFARE AND THE DEFINITION OF AGGRESSION: WHAT THE SOVIET UNION AND RUSSIAN FEDERATION CAN TEACH US

*Christi Scott Bartman, MPA, JD, PhD**

One might ask why the Soviet Union so adamantly promoted a definition of aggression and aggressive war while, as many have noted, conducting military actions that appeared to violate the very definition they espoused in international treaties and conventions. Using treaties, the Soviet Union and Russian Federation practiced a program of lawfare long before the term became known. "Lawfare," as used by the Soviet Union and Russian Federation, is the manipulation or exploitation of the international legal system to supplement military and political objectives legally, politically, and equally as important, through the use of propaganda. Lawfare was not the sole domain of the Soviet Union or the Russian Federation. What makes the Soviet Union and the Russian Federation stand out is their use of lawfare earlier and with a greater degree of consistent strategic implementation than others. They also continued to operate on a dual front, both legally in international bodies and through international law, and illegally or quasi-legally, when they manipulated the system to supplement their military agenda. With a consistent definition of aggression and aggressive war in place, a degree of predictability could be achieved in regard to future actions of other states and international bodies such as the United Nations. The Soviet Union proves the perfect case study to demonstrate the use of lawfare. The Council on Foreign Relations claimed lawfare was a "somewhat of a new phenomenon, the full effects of its application are yet unknown."¹ I argue that this is not a somewhat new phenomenon and has been practiced by the Soviet Union for decades. In order to preclude further actions, such as the ones demonstrated by the Soviet Union time and again,

* Dr. Bartman is currently an Instructor of Public Law/Judicial Process in the Political Science Department at Bowling Green State University. She also teaches International Relations, Western Political Thought, and European Politics. Her research asks why the Soviet Union so adamantly promoted the definition of aggression and aggressive war while, as many have noted, conducting military actions that appeared to violate the very definition they espoused in international treaties and conventions. Her recently published work, *LAWFARE: USE OF THE DEFINITION OF AGGRESSIVE WAR BY THE SOVIET AND RUSSIAN GOVERNMENTS*, demonstrates that through the use of treaties and propaganda the Soviet Union and Russian Federation practiced a program of "lawfare" long before the term became known.

¹ *Lawfare, the Latest in Asymmetries*, COUNCIL ON FOREIGN RELATIONS (Mar. 18, 2003), http://www.cfr.org/publication/5772/lawfare_the_latest_in_asymmetries.html.

enforcement will be the key. Without solid enforcement mechanisms, this case study is only a demonstration of the weakness of the system. The lessons learned from the Soviet experience of the use of the definition of aggression as a form of lawfare should be considered by all as the discussions continue on the application and the execution of the definition. And, as for the concept of lawfare as applied through the use of the definition of aggression, one need only look to the Soviet Union to see the successful use of an old concept with a new name.

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I. INTRODUCTION

On June 11, 2010, the Review Conference of the Rome Statute, which was held in Kampala, Uganda between May 31 and June 11, 2010, adopted, by consensus, amendments to the Rome Statute that defined the crime of aggression. Article 8, which contains the most relevant text, states:

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

c) The blockade of the ports or coasts of a State by the armed forces of another State;

d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.²

Most do not realize, however, that the Soviet Union was the standard bearer for this definition. The wording is almost a verbatim transcript of the July 3, 1933 Convention on the Definition of Aggression signed by the Soviet Union, Romania, Afghanistan, Estonia, Latvia, Persia, Poland, and Turkey. One might ask why the Soviet Union so adamantly promoted a definition of aggression and aggressive war while, as many have noted, conducting military actions that appeared to violate the very definition they espoused in international treaties and conventions. Using treaties, the Soviet Union and Russian Federation practiced a program of lawfare long before the term became known. "Lawfare," as used by the Soviet Union and Russian Federation, is the manipulation or exploitation of the international legal system to supplement military and political objectives legally, politically, and equally as important, through the use of propaganda.

Lawfare was not the sole domain of the Soviet Union or the Russian Federation. What makes the Soviet Union and the Russian Federation stand out is their use of lawfare earlier and with a greater degree of consistent strategic implementation than others. They also continued to operate on a dual front, both legally in international bodies and through international law, and illegally or quasi-legally, when they manipulated the system to supplement their military agenda. With a consistent definition of aggression and aggressive war in place, a degree of predictability could be achieved in regard to future actions of other states and international bodies such as the United Nations.

The strategic implementation of non-aggression treaties to set the stage for future military action by the Red Army or to restrict action from other armies was practiced repeatedly by the Soviet Union with states such as Finland, Latvia, Estonia, Poland, and others. Preconceived binding of other countries, such as those of the Warsaw Pact, enabled the Soviet Union to intervene militarily and at least auspiciously, claim it was in adhe-

² Int'l Criminal Court [ICC], *The Crime of Aggression*, ICC Doc. RC/Res. 6. (June 16, 2010).

rence to international law and treaty obligations. This demonstrated the dominion the Soviet Union had over the use of lawfare as a true supplement to military action. Scenarios such as the use of the definition of aggression and aggressive war by the jurists at Nuremberg and continuing propagation before international bodies such as the United Nations were not, taken by themselves, uses of lawfare. They were examples of strategic employment, within a legal context, to set the stage for their use later to supplement military strategy. No state was more consistent in this dual application than the Soviet Union, and later, the Russian Federation.

The combination of lawfare with propaganda or media manipulation was also perfected by the Soviet Union as evidenced in both Korea and the Vietnam War. Since the definition includes manipulation of the international legal system for both political and military objectives, it is possible to utilize the international legal system for political purposes not associated with imminent or future deployment of troops.

The Soviet Union proves the perfect case study to demonstrate the use of lawfare. The Council on Foreign Relations claimed lawfare was a “somewhat of a new phenomenon, the full effects of its application are yet unknown.”³ I argue that this is not a somewhat new phenomenon and has been practiced by the Soviet Union for decades, only under the auspices of aggression and crimes against peace rather than humanitarian law. To demonstrate, I begin with a short background on the term lawfare. This is followed by the primary focus of the article, the Soviet era. Ample evidence is presented that the concept, if not the terminology, was in use by the Soviet Union long before the term became known. Finally, a short update on the current use of the definition of aggression by the Russian Federation, its incorporation into Russian Criminal Law, and the new emphasis on humanitarian law is put forth. This article will demonstrate that without a solid enforcement mechanism, in this case for those that commit aggressive war, the use of lawfare is likely to continue despite the consensus definition.

II. LAWFARE BACKGROUND

The first use of the term “lawfare” is attributed to John Carlson and Neville Yeomans in “Whither Goeth the Law—Humanity or Barbarity.” While examining the demise and re-emergence of humanitarian law, they concluded, “[I]lawfare replaces warfare and the duel is with words rather than swords.”⁴ The concept was recently picked up by the U.S. military as

³ *Lawfare, the Latest in Asymmetries*, COUNCIL ON FOREIGN RELATIONS (Mar. 18, 2003), http://www.cfr.org/publication/5772/lawfare_the_latest_in_asymmetries.html.

⁴ John Carlson & Neville Yeomans, *Whither Goeth the Law - Humanity or Barbarity*, in *THE WAY OUT - RADICAL ALTERNATIVES IN AUSTRALIA* (Margaret Smith & David John Crossley eds., Lansdowne Press 1975), available at <http://www.laceweb.org.au/whi.htm>.

one of the greatest potential threats against the United States.⁵ Colonel Charles J. Dunlap Jr. clarified the term as the use of law as a weapon of war.⁶ Dunlap placed the argument in the context of the use of humanitarian law, or his preference, the law of armed conflict, against the United States. This angle has been pursued further by the Council on Foreign Relations, which defined “lawfare,” and specifically its use as an asymmetrical weapon, as “a strategy of using or misusing law as a substitute for traditional military means to achieve military objectives.”⁷

Professors Chadwick Austin and Antony Barone Kolenc examined this concept further, applying it directly to the International Criminal Court (ICC). For their purposes, they defined “lawfare” as “exploiting judicial processes to achieve political or military objectives.”⁸ They focused on asymmetric methods used by others to exploit the ICC in relation to the United States, specifically, misusing the investigative process, filing questionable or fraudulent complaints, and manipulating the mass media.⁹

The media was often used, either legitimately or illegitimately, to propose to the public that a state was fighting illegally or immorally and to damage the public support needed to wage war. Although frequently called “media warfare” by Austin and Kolenc, it was also mentioned in the Chinese book *Unrestricted Warfare*.¹⁰ The authors, two Chinese People’s Liberation Army colonels, explained that use of alternative forms of warfare by a weaker country against a stronger one amounted to asymmetric warfare. They concluded about asymmetry, “of all rules, this is the only one which encourages people to break rules so as to use rules.”¹¹ Use of the media,

⁵ Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts* 5 (2001), (unpublished working paper on file with the Harvard Kennedy School, Carr Center for Human Rights Policy) <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>; See also Charles J. Dunlap, Jr., *Lawfare amid Warfare*, THE WASH. TIMES, Aug. 3, 2007, at A19(focusing on the use of lawfare by international groups claiming violations of humanitarian law by the United States).

⁶ *Id.*

⁷ COUNCIL ON FOREIGN RELATIONS, *supra* note 2; see also RADHIKA WITHANA, POWER, POLITICS, LAW: INTERNATIONAL LAW AND STATE BEHAVIOUR DURING INTERNATIONAL CRISES (2008) (looking at the relationship between international law and state behavior when an international crisis involves the threat or use of force, suggesting that the influence of international law on state behavior involving the possibility of the use of force plays a decisive role).

⁸ W. Chadwick Austin & Antony Barone Kolenc, *Who’s Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT’L L. 291 (2006).

⁹ *Id.* at 291–92.

¹⁰ See QIAO LIANG AND WANG XIANGSUI, UNRESTRICTED WARFARE (Pan Am. Publ’g Co. 2002) (1999).

¹¹ *Id.* at 212.

however, is simply a prominent part of old-fashioned propaganda, which arguably was perfected by the Soviet Union.

Propaganda, for our purposes, is “the attempt to transmit social and political values in the hope of affecting people’s thinking, emotions, and thereby behavior.”¹² My discussion of propaganda is limited to its use by the Soviet Union to proliferate the concept of lawfare as it relates to aggression and aggressive war.

The key to lawfare is its use in a manipulative or exploitive fashion. Simply utilizing the international legal system to enforce valid laws would also not be considered lawfare for my purposes. The article by Dunlap and the transcript from the Council on Foreign Relations both seem to express the greatest concern for valid legal claims of a humanitarian nature brought by a state or even a few individuals that could undercut American objectives. The state that claims the United States violated international law under a given valid circumstance would be making a legal claim, therefore not manipulating the system, but simply seeking redress for a legal wrong.¹³ Although there may be political motives, this does not reach the level of lawfare used by the Soviet Union and Russian Federation. They do not demonstrate the preemptive strategic use of the international law system as evidenced in this article. After applying these various definitions to the scenarios presented following this introduction, it became evident that lawfare, at least as deployed by the Soviet Union, was primarily a supplement to military strategy and was used with a strategic intent and political motivation to manipulate the legal system, international bodies and other states.

A. *The Soviet Era*

Grigorii Ivanovich Tunkin, in a paper presented at the III Anglo-Soviet Symposium on Public International Law held at the University of London on March 20 through 22, 1989, summed up the Soviet interpretation of international law. “The creation of norms of international law is the process of bringing the wills of States into concordance. The content of the will of a State is its international legal position, which constitutes part of the

¹² PETER KENEZ, *THE BIRTH OF THE PROPAGANDA STATE: SOVIET METHODS OF MASS MOBILIZATION, 1917–1929* 4 (Cambridge University Press) (1985).

¹³ Craig H. Allen, *Command of the Commons Boasts: An Invitation to Lawfare*, 83 *Int'l L. Stud. Ser. U.S. Naval War Coll.* 30, 49 (2007) (noting at the 2006 Naval War College International Law Department conference on Global Legal Challenges: Command of the Commons, Strategic Communications, and Natural Disasters that concern for lawfare had found its way into U.S. National Defense Strategy, he laid out a possible asymmetric scenario where a much less powerful state utilized the U.N. General Assembly to restrict access to, in his scenario, control of the sea, which had been claimed by a more powerful state. This tactic could be used whether the less powerful state had a legitimate claim or, as in his scenario, was used as a legal “pushback” in response to a public assertion by the more powerful state regarding its command of the sea).

foreign policy position of the State. In the course of forming new norms of international law there occurs the bringing into concordance of the international legal positions of States, bringing their wills into concordance relative to the content of rules of behavior and recognizing them to be legally binding.”¹⁴ Tunkin went on to remind us that international law served as a means to program the behavior of states. It made up a “normative system making it possible to foresee the reaction of other actors in the inter-States system to particular actions of a State.”¹⁵

A primary tool of the Soviet Union to control the behavior of these states was the treaty. The progenitor of this form of lawfare as it concerns aggression and aggressive war is the definition put forth by Maxim Maximovich Litvinov at the 1933 Conference for the Reduction and Limitation of Armaments. The definition declared the aggressor as the state that was first to declare war, invade via armed forces, bomb, or blockade another state. Specifically, it described situations that could not be used as justification: the internal situation of a given state, which included political or economic issues, alleged mal-administration, danger to foreign residents, revolutionary or counter-revolutionary movements, strikes, or the establishment or maintenance of a political, economic or social order.

Both preceding and subsequent to this the Soviet Union negotiated several non-aggression treaties with neighboring states. The treaty with Finland, signed January 21, 1932, contained language forbidding aggressive action against each other. It also restricted either party from becoming a party to a treaty hostile to the other. The treaty with Latvia, signed February 5, 1932, also contained these prohibitions, but further codified that neither state was to take part in treaties aimed at economic or financial boycott against the other. The pact of non-aggression with Poland, signed July 25, 1932, further added that should one of the parties be attacked by a third state, the other party to the treaty agrees not to aid the aggressor or become party to an agreement openly hostile to the other. The most prevalent and often cited treaty culminated in London in 1933.

The Convention for the Definition of Aggression was signed in London on July 3, 1933. The Soviet Union joined Romania, Afghanistan, Estonia, Latvia, Persia, Poland, and Turkey in an agreement that read in part:

Article II.

Accordingly, the aggressor in an international conflict shall, subject to the agreements in force between the parties to the dispute, be considered to be that State which is the first to commit any of the following actions:

¹⁴ G.I. TUNKIN, *On the Primacy of International Law in Politics*, in PERESTROIKA AND INTERNATIONAL LAW 5–6 (William E. Butler ed., 1990).

¹⁵ *Id.* at 7.

- (1) Declaration of war upon another State;
- (2) Invasion by its armed forces, with or without a declaration of war, of the territory of another State;
- (3) Attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State;
- (4) Naval blockade of the coasts or ports of another State;
- (5) Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection.

Article III.

No political, military, economic or other considerations may serve as an excuse or justification for the aggression referred to in Article II. (For examples, see Annex.)

Article IV.

The present Convention shall be ratified by each of the High Contracting Parties in accordance with its laws.¹⁶

This Convention includes the following Annex:

ANNEX TO ARTICLE III OF THE CONVENTION RELATING TO THE DEFINITION OF AGGRESSION.

The High Contracting Parties signatories of the Convention relating to the definition of aggression,

Desiring, subject to the express reservation that the absolute validity of the rule laid down in Article III of that Convention shall be in no way restricted, to furnish certain indications for determining the aggressor,

Declare that no act of aggression within the meaning of Article II of that Convention can be justified on either of the following grounds, among others:

A. *The internal condition of a State:* e.g., its political, economic or social structure; alleged defects in its administration; disturbances due to strikes, revolutions, counter-revolutions, or civil war.

B. *The international conduct of a State:* e.g., the violation or threatened violation of the material or moral rights or interests of a foreign State or its nationals; the rupture of diplomatic or economic relations; economic or financial boycotts; disputes relating to economic, financial or other obli-

¹⁶ Convention for the Definition of Aggression, July 3, 1933, 147 L.N.T.S. 67. See also 148 L.N.T.S. 211 and 148 L.N.T.S. 79. The Convention was signed by Maxim Litvinov on the same date with subsequent ratifications by all parties and accession by Finland January 31, 1934.

gations towards foreign States; frontier incidents not forming any of the cases of aggression specified in Article II.

The High Contracting Parties further agree to recognise that the present Convention can never legitimate any violations of international law that may be implied in the circumstances comprised in the above list.¹⁷

The treaties themselves were intentionally crafted to provide a measure of predictability to the actions of the other countries. Specifically, non-aggression treaties with the surrounding countries of Latvia, Estonia, Lithuania, Poland, and most notably, Finland, were implemented not so much to influence those countries' actions as they applied to the Soviet Union, but to provide a barrier against the Germans, British, and French.¹⁸ Not knowing how the tide would turn during the lead-up to the Second World War, the Soviet Government hedged its bets. The most blatant example of this was the Molotov-Ribbentrop Pact.¹⁹ Whether one believes it was a cunning plan on Stalin's part or extreme naiveté, it certainly appears to continue to follow the trend put in place in the 1930s by the Soviets of penning these treaties in an attempt to control the surrounding territories and allow itself time to build its military forces.

Immediately after Red Army troops answered the German invasion of Poland in September of 1939, declaring it a collapsed government, Finland became the next state with a non-aggression pact with the Soviet Union to see it violated by the Red Army during the Winter War from November

¹⁷ *Id.*

¹⁸ For further study on this period of collective security, see also JIRÍ HOCHMAN, *THE SOVIET UNION AND THE FAILURE OF COLLECTIVE SECURITY, 1934—1938*, Cornell Studies in Security Affairs. (Ithaca: Cornell University Press, 1984); JONATHAN HASLAM, *THE SOVIET UNION AND THE STRUGGLE FOR COLLECTIVE SECURITY IN EUROPE, 1933-39* (New York: St. Martin's Press, 1984) Hochman noted that the reason the Soviet Union entered these treaties was to "enmesh expansionist Germany in a web of multilateral guarantees and, failing this, the creation of an alliance system to contain Hitler's wild ambitions." *Id.* at 2. He also explained that many of the treaties signed by the Soviets at the time, particularly the initial peace treaties of 1920, were primarily a means of creating a pause. *Id.* at 15. The general task of Soviet foreign policy of this time was to secure safe external conditions in order to facilitate Stalin's policies to remodel Russia. *Id.* at 172. The primary goals were to prevent formation of a hostile combination of foreign powers and to keep the Soviet Union out of international conflict while she was growing militarily. Hochman contends that the Soviet Union's special relationship with Germany was the main focus of this policy until 1934 and that the international conventions and protocols were not a preparatory step in another direction but to further promote foreign recognition and improve advantages drawn from foreign trade. *Id.* at 16 & 28. Russians, with several non-aggression pacts, specifically that with Poland, sought consent from Berlin before finalizing them. *Id.* at 35. In summary, Hochman was critical overall of the Soviet policy during this period and questioned if the desire for collective security was truly the goal. *Id.*

¹⁹ Molotov-Ribbentrop Pact of 1939, Aug. 23, 1939, Germany-U.S.S.R., reprinted in *Nazi-Soviet Relations, 1939-1941*, at 76-77 (Raymond J. Sontag & James S. Beddie eds., 1948).

30, 1939 to March 13, 1940. When the Finnish Government refused to negotiate terms that the Soviet Government thought necessary to secure their defense against possible invasion, the Red Army moved in. The result was the first time the League of Nations branded a state the aggressor. The Report of the Assembly outlined a list of the treaties to which both states were a party, primarily, the Pact of Paris of 1928, the Convention for the Definition of Aggression to which Finland acceded in 1934, the Treaty of Non-aggression and Pacific Settlement of Disputes concluded between Finland and the U.S.S.R. in 1932 and extended until 1945, and the Covenant of the League of Nations.²⁰ The Special Committee noted that the original request for Finland to cede territory was a violation of the Non-aggression Treaty of 1932 and the Pact of Paris, which set the territories of each as inviolable.²¹ It went on to note the definition of aggression that was applied to this instance was that which was codified in Articles I, II, and III of the Convention for the Definition of Aggression signed at London on July 3, 1933.²² Specifically, it found "Finland and the Union of Soviet Socialist Republics are bound by the Convention for the Definition of Aggression signed at London on July 3, 1933. According to Article II of this Convention, the aggressor in an armed conflict shall be considered to be that State which is the first to invade by its armed forces, with or without declaration of war, the territory of another State or to attack by its land, naval or air forces, with or without declaration of war, the territory, vessels or aircraft of another State." It stated further that under the terms of Article III, no political, military, economic, or other consideration may serve as an excuse or justification for this aggression. "The order to enter Finland was given to the Soviet troops on the ground of 'further armed provocation'. The reference was to frontier incidents or alleged frontier incidents. In the Annex, however, to Article II of the Convention, it is declared that no act of aggression within the meaning of Article II of the Convention can be justified by frontier incidents not forming any of the cases of aggression specified in Article II."²³ The Report went on to note that the Government of Finland recognized by the League was freely elected and based on respect for democratic agreements. The Soviet Government could not create a "so-called" government, either *de jure* or *de facto*, and regard it as the Government of Finland, thus justifying its action under Article 15 of the Covenant.²⁴ The Special Committee then

²⁰ See Report of the Assembly, provided for in art. 15, paras. 4, 10 of the Covenant, submitted by the Special Committee of the Assembly, 20 LEAGUE OF NATIONS O.J. 531, 532-33, 535 (1939), reprinted in BENJAMIN B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION*, 70 (1975).

²¹ *Id.* at 537, para. 5.

²² *Id.* at para. 7.

²³ *Id.* at 539, para 6.

²⁴ *Id.* at 540, para 7.

resolved to condemn the action taken by the U.S.S.R. against Finland, resulting in expulsion of the U.S.S.R. on December 14, 1939.

Contrary to placing the Soviet Union in a less favorable position, less than a year later the Soviet Union ended up with what it sought at the beginning. On March 12, 1940, the Moscow Peace Treaty was signed between the U.S.S.R. and Finland. As part of the peace treaty, the Karelian Isthmus and the city of Vyborg were ceded to the Soviet Union, along with the lease of the Hanko Peninsula. The Soviet Union, though formally labeled the aggressor and expelled from the League of Nations, ended up with what they wanted initially, possibly re-enforcing a valuable lesson in the art of lawfare. On the one hand, the determination of the Soviet Union as the aggressor clearly stated the actions taken which placed it in that category. On the other hand, however, with no enforcement mechanism, the label proved inconsequential to the Soviet Union. Instructive in this scenario is the justification put forth by the Soviet Union; self-defense of Leningrad and a "request" by the "government" of Finland, as well as the use of a non-aggression treaty in the first place. This scenario will be played out again and again by the Soviet Union in an attempt to manipulate the international legal system on both the front end with a nonaggression treaty and the back end with justification for military intervention.

Undaunted, the Soviet Union took the lead in the next phase of the use of the definition of aggression, this time against the individual. The target was the Nazi leadership at the International Military Tribunal at Nuremberg, also referred to as the Nuremberg Trial, from November 14, 1945 to October 1, 1946. Years prior to the trial at Nuremberg, the Soviets set the stage through domestic prosecution. The Soviet Union held trials in Krasnodar, Khar'kov, Briansk, Leningrad, Riga, Minsk, and other venues from 1943 to the early 1950s. These trials served as "the original introduction to the Nuremberg Trial, paving the way for the application and effectuation of many norms and principles which later constituted the basis of Nuremberg Law."²⁵ Though not defined, aggression and aggressive war were elements of the charge of Crimes Against Peace as detailed below:

(a) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy.²⁶

²⁵ Irina Andreevna Lediakh, *The Application of the Nuremberg Principles by Other Military Tribunals and National Courts*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 263 (George Ginsburgs & V. N. Kudriavtsev eds., 1990).

²⁶ Charter of the International Military Tribunal, art. 6, II. Jurisdiction and General Principles. Aug. 8, 1945, 59 Stat. 544, 82 U.N.T.S. 279, *reprinted in* INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946 11 (AMS Press 1971) (1947).

Justice Robert Jackson, in his opening statement, addressed the weakness of the lack of a definition for a war of aggression. He stated directly that the reason the lack of a definition was not a problem was because of the firmly established international law in the Convention for the Definition of Aggression signed by the Soviet Union and seven other states. Based on this Convention, he suggested that the

'aggressor' should generally be held to be that state which is the first to commit any of the following actions:

- 1) Declaration of war upon another state;
- 2) Invasion by its armed forces, with or without a declaration of war, of the territory of another state;
- 3) Attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another state; and
- 4) Provision of support to armed bands formed in the territory of another state, or refusal, notwithstanding the request of the invaded state, to take in its own territory, all the measures in its power to deprive those bands of all assistance or protection.²⁷

He went on to add "that no political, military, economic, or other considerations shall serve as an excuse or justification for such actions; but exercise of the right of legitimate self-defense, that is to say, resistance to an act of aggression, or action to assist a state which has been subjected to aggression, shall not constitute a war of aggression."²⁸ This incorporated the previous Soviet definition in its full form to be used as the test to determine if the wars begun by the Nazi leaders were "unambiguously aggressive."²⁹ As a result, not only was the individual charge of Crimes Against Peace codified, the stature of Soviet influence on international law took a leap forward.

Though the coordination between the U.S. and Soviet jurists at Nuremberg was generally good, the Cold War placed them at odds. The Korean War (June 25, 1950–July 27, 1953) was the first and most blatant instance of the Soviet use of lawfare to generate propaganda against an opponent. Initially, the Soviet Government took aim at the U.N. Security Council that had allowed the "police action" into what they termed an internal conflict in their absence. The Soviet Union continued its efforts to declare the United States the aggressor for interfering in internal affairs of a state in the world media. As we see by the rhetoric both at home and abroad, through international political bodies and public propaganda, the Soviet Union worked exhaustively to place the face of the aggressor on the United States. By utilizing both the definition proposed for the state by earlier treaties and the definition proposed for the individual at Nuremberg, the Soviet Union

²⁷ *Id.* at 148.

²⁸ *Id.*

²⁹ *Id.*

repeatedly placed the terms of aggression and aggressive war onto the world stage to undermine the actions of a major opponent, the United States. Phrases such as intervention into the internal affairs of another country, action in disregard of the obligations of the United States to the UN, invasion by armed naval and air forces, and planning, preparing and carrying out hostile acts, were repeated often by the Soviet Union to clearly place the United States in violation of the current public definition, even if it was not a strictly legal one.

During this period the definition remained consistent, it was the frequency with which it was espoused that increased. Still we see the combination of lawfare and propaganda as a weapon, in lieu of major military commitment, used to discredit an opponent. However, possibly more to the future understanding of how lawfare can be technically manipulated to one's advantage was the Soviet deliberation regarding the initial advice to North Korea not to invade. The Soviet Government looked not only at North Korea's military readiness but at the ramifications of U.S. involvement. We will see this type of deliberation again regarding Hungary and Czechoslovakia. Another feature of these deliberations was a description of what the Soviet Government was looking for in a state that would justify intervention. It would need partisan movements, liberated districts and people willing to participate in an armed uprising. The Soviet Government would also seek this situation in Hungary and Czechoslovakia, not only in order to increase the odds of success, but also to provide justification for actions that fall directly under the definition of aggression and aggressive war.

Despite the propaganda and lawfare practiced in the early 1950s, in 1956 the Soviet Union used the treaty it signed with Hungary and the Warsaw Pact as justification to intervene to keep a political regime in place and quell an internal revolution, both clearly codified by the Soviet Government as reasons that do not amount to justification for aggression. The Soviet Government used the Warsaw Pact as justification to say that its troops were allowed to be used for collective defense at the request of the Hungarian Government on October 23, 1956.

It is important to look at the full explanation for the invasion because it gives justification for the actions of the Soviet Government from their perspective. It shows that they were concerned that the events in Hungary not spread to other Warsaw Pact countries. Having just allowed Poland a bit of latitude in handling their workers' rebellion, the spread might establish a trend they did not want to start. Soviet leader Nikita Sergeevich Khrushchev also expressed concern with the international situation. Initially Khrushchev explained that the Soviet military had been asked to intervene by the Hungarian Government. He then finally expressed concern that the Americans not be given an opportunity to approach Russian borders. Taken together, the reason given to intervene, an invitation, with the reasons given above, demonstrate that the Soviet Government made a calculated effort to

manipulate the circumstances that preceded the intervention while having previously taken advantage of the control that the original nonaggression agreement provided.

The matter was brought to the attention of the General Assembly on December 12, 1956. General Assembly Resolution 1131 (XI) declared that "by using its armed force against the Hungarian people, the Government of the Union of Soviet Socialist Republics is violating the political independence of Hungary."³⁰ Resolution 1132 (XI) recommended a Special Committee be formed to study this problem.³¹

In the *Report of the Special Committee on the Problem of Hungary* to the U.N. General Assembly, Eleventh Session in 1957, the Committee gave their findings on the situation created by the intervention of the U.S.S.R. in the internal affairs of Hungary.³² It appeared, the Committee noted, that although the whole uprising was spontaneous, the Soviet military had taken steps in as early as October to plan for armed intervention in case of an uprising.³³ No clause in the Warsaw Pact provided for Soviet military intervention due to political developments within a signatory state.³⁴ Further, it was still uncertain as to who issued the request to the Soviet authorities to assist to stop the uprising and to its legal validity.³⁵

An international group of jurists that advised the Committee suggested that Soviet action in Hungary "would probably be open to condemnation under the Soviet Government's own definition of aggression."³⁶ It referenced the U.S.S.R.'s submission to the United Nations 1956 Special Committee on the Question of Defining Aggression, specifically, the language that the state was the aggressor which first invaded "by its armed forces, even without a declaration of war, ... the territory of another State."³⁷ Further, "[a] State would be declared to have committed an act of aggression if it 'promotes an internal upheaval in another State or a change of policy in favor of the aggressor.'"³⁸ It went on to state, as we have seen many times before submitted by the Soviet Government, that the internal situation of the state such as revolutionary or counter-revolutionary move-

³⁰ G.A. Res. 1131 (XI), U.N. GAOR, 11th Sess., U.N. Doc. A/1131 (Dec. 12, 1956).

³¹ G.A. Res. 1132 (XI), U.N. GAOR, 11th Sess., U.N. Doc. A/1132 (Jan. 10, 1957).

³² Report of the Special Committee on the Problem of Hungary, U.N. Doc. A/3592; GA, 11th Sess., Supp. No. 18 (1957).

³³ *Id.* at 245.

³⁴ *Id.*

³⁵ *Id.* at 246.

³⁶ *Id.* at 99, para. 324.

³⁷ *Id.*

³⁸ *Id.*

ments, disorder or strikes, or establishment or maintenance of any political, economic, or social system were not justification.³⁹

The Committee concluded that the reason for the Soviet intervention was to “save a political regime, and retain a military ally within its area of economic dominance.”⁴⁰ The Soviet Union had done this during the period from October 29 to November 4 via a definite plan for conquest and military subjugation of Hungary by the Soviet military.⁴¹ Notice the language of “a definite plan.” Not only did the Committee note the violation of the state definition of aggression, it also implicated the individual participation in the act of aggression from Nuremberg. The lessons learned in Finland were reinforced in Hungary, however. Despite the general consensus that the Soviet Union’s actions were aggressive, the Security Council veto allowed it to stay clear of that body and the General Assembly was unable to put action behind its resolution. The communist party was restored in Hungary and its alliance to the Warsaw Pact confirmed.

Czechoslovakia saw the same reaction on August 20, 1968 when it attempted to implement a series of reforms during the Prague Spring. In violation of the non-aggression pact between the Soviet Union and Czechoslovakia signed on July 4, 1933 and the Warsaw Pact, the Soviet Union again tried to couch the invasion in terms of an invitation by the Czech Government. This led to the Brezhnev Doctrine, which gave a name to the policy of intervention when a socialist country attempted to leave the fold.

The Vietnam War, fought 1959–1975, was another example of limited Soviet military involvement and huge Soviet use of propaganda branding its opponent the aggressor for intervening in the internal affairs of another state. Of primary importance during this period for our purposes, was the December 14, 1974 adoption of General Assembly Resolution 3314 (XXIX), defining aggression. It adopted the London Convention language to a large part, listing the acts that qualify as aggression and those that do not qualify as justification for aggression. Unfortunately, as a resolution it did not have the force of law.

Article 3 of General Assembly Resolution 3314 (XXIX) of December 14, 1974 on the Definition of Aggression, with Special Regard to Indirect Aggression reads:

³⁹ *Id.* The conference took place on March 2, 1957 and was headed by Sir Hawtley Shawcross of Nuremberg fame. For the conference publication, *see* INTERNATIONAL COMMISSION OF JURISTS (1952–), THE HUNGARIAN SITUATION AND THE RULE OF LAW (1st ed. 1957). Documents were presented, however, arguing the opposite as well. In an interview on Legal Aspects of Soviet Intervention, G.P. Zadorozhnyi noted that the Soviet forces were there legally and at the request of the Hungarian regimes of Nagy and Kádár. He went on to say that Nagy’s regime could not annul the Warsaw Pact, only the state body that ratified it could.

⁴⁰ Report of the Special Committee on the Problem, *supra* note 32, at 99.

⁴¹ *Id.* at 67.

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression;

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.⁴²

Article 5 reads:

1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.⁴³

Julius Stone analyzed General Assembly Resolution 3314 (XXIX). He countered the notion that claims were being made that the Soviet theme of depriving a potential aggressor of "loopholes and pretexts to unleash aggression" had been accomplished with this "consensus definition."⁴⁴ He refuted those claims with a host of reasons why the text actually "codified

⁴² Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974), available at <http://www.un.org/documents/ga/res/29/ares29.htm>.

⁴³ *Id.*

⁴⁴ Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT'L L. 224 (1977).

into itself” all these loopholes.⁴⁵ He made the point that any resolution of the General Assembly was impotent because of its inability to impose legal obligations over and above those already in the Charter or other treaties. Because of differing state interpretations of the language of the resolution, “we face the paradox that the closing off of ‘loopholes’ and ‘pretexts’ hailed by the Soviet Union as the great achievement is precisely what the definition did *not* achieve.”⁴⁶

The weakened position of the United States after the Vietnam War combined with a strong belief in the Brezhnev Doctrine and culminated in the Soviet invasion of Afghanistan on December 24, 1979. A treaty of Friendship, Good-neighborliness and Cooperation was signed between the Soviet Union and Afghanistan December 1978. It contained the now familiar language of respect for national sovereignty, territorial integrity, and noninterference in internal affairs, as well as agreements to fight aggression and support a just struggle of the people.⁴⁷ This was another example of the intentional use of lawfare to support follow-on warfare. Henry S. Bradsher⁴⁸ reaffirmed that prior to this invasion, the Soviet Government was looking for a cover story. Specifically, they needed a small group of Afghans clothed in a claim of legitimacy, who would move against the current president and request “Soviet help as a legal response to a treaty obligation.”⁴⁹ Bradsher, as this study does, drew parallels to Finland, Hungary, and Czechoslovakia.

Yuri Vladimirovich Andropov opened the Politburo session on March 18, 1979 with a summary of the situation in Afghanistan. The following exchange addressed the Politburo’s concern regarding military force in Afghanistan and international opinion:

ANDROPOV. Comrades, I have considered all these issues in depth and arrived at the conclusion that we must consider very, very seriously, the question of whose cause we will be supporting if we deploy forces into Afghanistan. It's completely clear to us that Afghanistan is not ready at this time to resolve all of the issues it faces through socialism. The economy is backward, the Islamic religion predominates, and nearly all of the rural population is illiterate. We know Lenin's teaching about a revolutionary situation. Whatever situation we are talking about in Afghanistan, it is not

⁴⁵ *Id.*

⁴⁶ *Id.* at 225. See also JULIUS STONE, *CONFLICT THROUGH CONSENSUS: UNITED NATIONS APPROACHES TO AGGRESSION* (1977).

⁴⁷ Treaty of Friendship, Good-Neighborliness, and Cooperation, USSR-Afg., Dec. 5, 1978.

⁴⁸ Henry S. Bradsher was the Associated Press bureau chief in Moscow from 1964–68. He worked in Afghanistan as an Associated Press correspondent in the early 1960s, visiting the country again in the 1970s for the *Washington Star*. He has also published in the *Economist*, *Foreign Affairs* and other publications.

⁴⁹ HENRY S. BRADSHER, *AFGHAN COMMUNISM AND SOVIET INTERVENTION* 93 (1999).

that type of situation. Therefore, I believe that we can suppress a revolution in Afghanistan only with the aid of our bayonets, and that is for us entirely inadmissible. We cannot take such a risk.

KOSYGIN.⁵⁰ Maybe we ought to instruct our ambassador, Comrade Vinogradov, to go to Prime Minister of Iran [Mehdi] Bazargan and inform him that interference in the internal affairs of Afghanistan cannot be tolerated.

GROMYKO.⁵¹ I completely support Comrade Andropov's proposal to rule out such a measure as the deployment of our troops into Afghanistan. The army there is unreliable. Thus our army, when it arrives in Afghanistan, will be the aggressor. Against whom will it fight? Against the Afghan people first of all, and it will have to shoot at them. Comrade Andropov correctly noted that indeed the situation in Afghanistan is not ripe for a revolution. And all that we have done in recent years with such effort in terms of detente, arms reduction, and much more—all that would be thrown back. China, of course, would be given a nice present. All the nonaligned countries will be against us. In a word, serious consequences are to be expected from such an action. There will no longer be any question of a meeting of Leonid Ilych with Carter, and the visit of [French President] Giscard d'Estaing at the end of March will be placed in question. One must ask, and what would we gain? Afghanistan with its present government, with a backward economy, with inconsequential weight in international affairs. On the other side, we must keep in mind that from a legal point of view too we would not be justified in sending troops. According to the U.N. Charter a country can appeal for assistance, and we could send troops, in case it is subject to external aggression. Afghanistan has not been subject to any aggression. This is its internal affair, a revolutionary internal conflict, a battle of one group of the population against another. Incidentally, the Afghans haven't officially addressed us on bringing in troops. In a word, we now find ourselves in a situation where the leadership of the country, as a result of the serious mistakes it has allowed to occur, has ended up not on the high ground, not in command of the necessary support from the people.⁵²

An excerpt from Konstantin Ustinovich Chernenko further clarified the understanding that they were violating their own definition of aggression. He stated, “[i]f we introduce troops and beat down the Afghan people

⁵⁰ Alexei Nikolaevich Kosygin, Member of Soviet Union Politburo, Central Committee of the Communist Party of the Soviet Union Politburo Discussions on Afghanistan (Mar. 17, 1979) (transcript available at http://www.wilsoncenter.org/index.cfm?topic_id=1409&fuseaction=va2.document&identifier=5034DBB8-96B6-175C9823CBCE6162CEDA&sort=Collection&item=Soviet%20Invasion%20of%20Afghanistan).

⁵¹ *Id.*

⁵² *Id.*

then we will be accused of aggression for sure. There's no getting around it here.⁵³

Andropov, Gromyko, and Chernenko clearly discussed their understanding of armed intervention and its predicted international reprisals. The Soviet Government was very adept at manipulating the concept of aggression by this time and here we see the thought process clearly.

Of particular relevance in the above exchange was the emphasis of relations being based on the U.N. Charter. Again, though, despite this treaty and the reasoned arguments otherwise, the Soviets invaded. In opposition to the logical reasoning against invasion outlined above, the public justification for invasion defended their ultimate actions:

Thus, the intervention from without and the terror unleashed by Amin within the country have actually now created a threat to liquidate what the April Revolution brought Afghanistan. . . . Considering all this and the request of the new Afghan leadership for aid and assistance in repelling foreign aggression, the Soviet Union, guided by its international duty, has decided to send limited Soviet military contingents to Afghanistan which will be withdrawn from there after the reasons which occasioned the necessity of this action disappear. In undertaking this temporary forced action we are explaining to all governments with whom the Soviet Union maintains diplomatic relations that are responding to the request of the newly formed leadership of the government of Afghanistan which turned to the Soviet Union for aid and assistance in a struggle against foreign aggression. The Soviet Union thereby is proceeding from a commonality of interests of Afghanistan and our country in issues of security recorded in the 1978 Treaty of Friendship, Good-Neighborliness, and Cooperation and the interests of maintaining peace in this region. The favorable reaction of the Soviet Union to this request of the leadership of Afghanistan also proceeds from the provision of Article 51 of the U.N. Charter stipulating the inherent right of countries to collective and individual self-defense in order to repel aggression and restore peace.⁵⁴

Note the familiar terminology—struggle against foreign aggression, reference to a treaty and the U.N. Charter, and self-defense. The Soviet Union continued to couch its position in the terms of lawfare that were acceptable, that they were the aggressor notwithstanding. The Afghanistan war did not go as the others had and the troops withdrew in 1989 without gaining a firm hold on the government or policies of Afghanistan. Although the United Nations considered the actions on many occasions, there was no formal designation of aggression against the Soviet Union.

⁵³ *Id.*

⁵⁴ Politburo Decree, Central Committee of the Communist Party, 1979, P177/151(Ru.)(regarding the placement of military detachments in Afghanistan by the Soviet Union).

The collapse of the Soviet Union and establishment of the Russian Federation redirected attention inward. Using the logic that Chechnya was part of the Russian Federation, therefore something to be handled internally, troops moved in on December 1, 1994. The first Russian intervention into Chechnya lasted almost two years. The invasion of Chechnya, like that of Korea and Afghanistan, occurred after much dissention within the Politburo and the Department of Defense. As with Hungary and Czechoslovakia, where there was concern that they would leave the Warsaw Pact, there was a concern that Chechnya would secede. And, as with Afghanistan, despite denunciation by the international community, Russia's internal economic and political situation would ultimately drive their decision to pull out.

B. The Russian Federation Era

The 1994–1996 conflict, generally known as the First Chechen War, though outwardly appearing similar to Russia's invasion of Hungary or Afghanistan, was labeled by the Russian Federation and the world as an “internal” matter, not an international event falling under the definition of aggression. It was cited by the United Nations as a violation of human rights and humanitarian law.⁵⁵ This introduced the beginning of a subtle shift away from a focus on aggression to a focus on humanitarian issues. It has yet to be determined if this shift will continue or revert back to the language of aggression and aggressive war now that a consensus definition is available. Its success will hinge, however, on the ability to enforce the definition. If enforceability and public opinion favor the humanitarian language, focus may continue to shift that way.

Over this same period, the definition of aggression was being considered in documentation both internationally and domestically. The Draft Code of Crimes Against Peace and Security of Mankind was finally adopted by the International Law Committee (ILC) and submitted to the General Assembly in 1996. The Russian Federation adopted a new Constitution in 1993 and a new Criminal Code in 1996, containing expanded application of international law, and in the case of the Criminal Code, a specific listing of the crime of aggression.

Following major national upheaval, the Constitution of the Russian Federation was adopted by national referendum on December 12, 1993 (hereafter the 1993 Constitution).⁵⁶ It provided increased presidential and judi-

⁵⁵ Commission on Human Rights Res. 2001/24, *Situation in the Republic of Chechnya of the Russian Federation* 57th Sess., U.N. Doc. E/CN.4/2001/L.24 (Apr. 20, 2001).

⁵⁶ KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] Dec. 25, 1993 (Russ.). See also George Ginsburgs, *The Struggle for Law in Post-Soviet Russia, in WESTERN RIGHTS? POST-COMMUNIST APPLICATION* 53 (András Sajó ed. 1996). Ginsburgs noted that in Article 2, a person's rights and freedoms were of supreme value. He saw this as

cial powers among many other pertinent areas, but for our purposes, the most important was incorporation of international law. Article 15(4) of the 1993 Constitution stated that international law and international treaties made up an integral part of the Russian legal system. It further stated, “if an international treaty of the Russian Federation establishes rules other than those stipulated by the law, the rules of the international treaty shall apply.”⁵⁷

The Criminal Code of the Russian Federation (hereafter 1996 Criminal Code), which took effect on January 1, 1997, produced changes in the new version as well.⁵⁸ The specific reference to aggression and aggressive war in the Criminal Code read as follows:

Article 353. Planning, Preparing, Unleashing, or Waging an Aggressive War

1. Planning, preparing, or unleashing an aggressive war shall be punishable by deprivation of liberty for a term of seven to fifteen years.

2. Waging an aggressive war shall be punishable by deprivation of liberty for a term of 10 to 20 years.

Article 354 Public Appeals to Unleash an Aggressive War

1. Public appeals to unleash an aggressive war shall be punishable by a fine in the amount of 500 to 700 minimum wages, or in the amount of the wage or salary, or any other income of the convicted person for a period of a five to seven months, or by deprivation of liberty for a term of up to three years.

2. The same deeds, committed with the use of the mass media or by a person who holds a state post of the Russian Federation or a state post of a subject of the Russian Federation, shall be punishable by a fine in the amount of 700 to 1,000 minimum wages, or in the amount of the wage or salary, or any other income of the convicted person for a period of seven to twelve months, or by deprivation of liberty for a term of two to five years, with disqualification to hold specified offices or to engage in specified activities for a term of up to three years.⁵⁹

a change in thought from the state being higher than the law, to the law being higher than the state.

⁵⁷ KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF] [CONSTITUTION] Dec. 25, 1999, art. 15(4) (Russ.).

⁵⁸ Anatolyi V. Naumov, *The New Russian Criminal Code as a Reflection of Ongoing Reforms*, 8 CRIM. L. F. 191, 192 (1997).

⁵⁹ UGOLOVNIY KODEKS ROSSIYSKOI FEDERATSII [UK RF] [Criminal Code] art. 353–354 (Ru.), available at <http://www.russian-criminal-code.com/PartII/SectionXII/Chapter34.html>. Interestingly, however, article 353 does not seem to determine who can be prosecuted. Article 354 states that if the crime is performed by a person holding a state post in the Russian Federation, they will be held accountable in such a way. Article 353 shows no such restric-

Having incorporated international law into its national law, regarding the crime of aggression, complementarity applies. Complementarity, in this case, refers to the concept that allows state jurisdiction over a crime that is listed in the Rome Statute, such as Crimes Against Peace, unless the state is unable or unwilling to proceed or is conducting the investigation in bad faith.⁶⁰

The Russian Federation has already spoken on this issue by adoption of the crime of aggression into its national law. The general nature of the definition allows it to define the crime and thus the causation and leadership question as it see fit. This places the Russian Federation in a position to argue that it is able and willing to proceed in the investigation of a crime under the Rome Statute so as not to fall under its jurisdiction. The Russian Federation took a page out of the Soviet playbook. This preemptive inclusion positioned it to take full advantage of international law, once again. It could also lead to a number of the problems Pål Wrangle outlined in the Turin report, particularly shielding a potential leader from prosecution and basing their jurisdiction not solely on state boundaries but allowing for territorial or security issues to make national law applicable to a broader audience.⁶¹

The Soviet approach to defining aggression has changed little since 1933, and as Robert M. Cassidy found, the “Soviet and Russian Federation forces exhibited more continuity than change” as well.⁶² These premises confirm the consistent, continuous, and calculated use of international law, and particularly treaties, as a form of asymmetrical lawfare used to manipu-

tion. Also under this section, the Code lists manufacturing and dissemination of weapons of mass destruction, use of prohibited means or methods of conducting warfare, genocide, ecocide, use of mercenaries, and attacks on persons or institutions under international protection as crimes against peace and security of mankind.

⁶⁰ For a more thorough study of the concept of complementarity, see Assembly of States Parties, International Criminal Court, Nov. 30, 2007–Dec. 14, 2007, ICC-ASP/6/INF.2, 6th Sess (Aug. 21, 2007). See also Astrid REISINGER, *National Legislation on Individual Responsibility for Conduct Amounting to Aggression*, in CONFERENCE ON INTERNATIONAL CRIMINAL JUSTICE 55, (May 14, 2007–May 18, 2007); PAL WRANGLE, *The Principle of Complementarity Under the Rome Statute and its Interplay With the Crime of Aggression*, in CONFERENCE ON INTERNATIONAL CRIMINAL JUSTICE 57 (May 14, 2007–May 18, 2007); Complementarity, RC/Res.1, I.C.C. Doc. RC/Res.1 (June 8, 2010).

⁶¹ WRANGLE, *supra* note 60, at 37.

⁶² For another review of the period of the 1920s through 1969, see William E. Butler, *Soviet Concepts of Aggression*, in A TREATISE ON INTERNATIONAL CRIMINAL LAW, VOL. 1 CRIMES AND PUNISHMENT 182–197 (M. Cherif Bassiouni and Ved P. Nanda eds., 1973). ROBERT M. CASSIDY, *Russia in Afghanistan and Chechnya: Military Strategic Culture and the Paradoxes of Asymmetric Conflict* 50 (2003) (noting that the same officer that commanded the invasion of Czechoslovakia led the initial invasion of Afghanistan. Cassidy’s premise was that the Russian forces failed to adapt to a different type of warfare from the Soviet period into the later years).

late or exploit the international legal system to supplement military and political objectives from 1933 to the present.

Though the excuse to support interventions to suppress counter-revolution in other socialist countries no longer exists, the primary reasons used during Soviet times such as an invitation by the government, self-determination of a nation's people, and self-defense are still viable today. The Russian Federation, as did the Soviet Union, continues to use the international system to their advantage, particularly by positioning itself at the forefront of defining aggressive war, both internally and through international bodies.

Given the new definition of aggression recently amended to the Rome Statue, there is hope that a consensus definition will put an end to the wars of aggression. However, the International Criminal Court will not be able to exercise its jurisdiction over the crime until after January 1, 2017 when a decision is to be made by States Parties to activate the jurisdiction. Until that time, it will be no more relevant than General Assembly Resolution 3314 (XXIX). The ability of the Security Council to refer an act of aggression to the Court is a step in the right direction but the veto has been used in the past to circumvent this effort. The ability of the Prosecutor to initiate an investigation on his own is a positive step as well. The inability to prosecute non-State Parties or their nationals will continue to limit the applicability of the definition.

In order to preclude further actions, such as the ones demonstrated by the Soviet Union time and again, enforcement will be the key. Without solid enforcement mechanisms, this case study is only a demonstration of the weakness of the system. The lessons learned from the Soviet experience of the use of the definition of aggression as a form of lawfare should be considered by all as the discussions continue on the application and the execution of the definition. And, as for the concept of lawfare as applied through the use of the definition of aggression, one need only look to the Soviet Union to see the successful use of an old concept with a new name.