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**Humanitarian Intervention and the Crime of Aggression:  
The Precarious Position of the “Knights of Humanity”**

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### **Table of Abbreviations**

ICC	International Criminal Court
ICJ	International Court of Justice
IMT	International Military Tribunal
ILC	International Law Commission
NATO	North Atlantic Treaty Organisation
SWGCA	Special Working Group on the Crime of Aggression
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

## Introduction

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On 11 June 2010, at the Kampala Review Conference, the Assembly of States Parties of the International Criminal Court (ICC) adopted the crime of aggression.<sup>1</sup> The crime of aggression criminalizes the use of armed force by a state against another state which is a manifest violation of the Charter of the United Nations (UN).<sup>2</sup> This marks an historic occasion, since state leaders may now be held accountable for what was condemned half a century ago as the “supreme international crime”.<sup>3</sup> However, it is unclear from the face of the definition whether controversial uses of force, such as *bona fide* humanitarian intervention undertaken to protect victims of severe human rights violations without the authorisation of the United Nations Security Council (UNSC), will be encompassed within the crime of aggression.<sup>4</sup> This dissertation will examine whether leaders of humanitarian intervention, dubbed the “knights of humanity”,<sup>5</sup> are at risk of being prosecuted for the crime of aggression and any consequences which may result from this.

At the beginning of the Kampala Conference, Harold Koh, the legal advisor to the United States State Department, argued that:<sup>6</sup>

If Article 8*bis* [the proposed crime of aggression definition] were to be adopted, understandings would need to make clear that those who undertake efforts to prevent war crimes, crimes against humanity or genocide – the very crimes the Rome Statute was designed to deter – do not commit “manifest” violations of the UN Charter within the meaning of Article 8*bis*. Regardless of how states may view the legality of such efforts, those who plan them are not committing the “crime of aggression” and should not run the risk of prosecution.

This proposed understanding, however, was not adopted. A few academics had also proposed means to exclude humanitarian intervention from the crime of aggression prior to the Review Conference: Christopher DeNicola asserted that a specific exclusion for humanitarian

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<sup>1</sup> Review Conference *Resolution RC/Res.6: The Crime of Aggression*, available <[www.icc-cpi.int](http://www.icc-cpi.int)> (2010) [Review Conference resolution]; references to arts 8*bis*, 15*bis* and 15*ter* without further specification are those of Annex I of the resolution. See attached Appendix.

<sup>2</sup> For the full definition of the crime of aggression, see art 8*bis* in attached Appendix.

<sup>3</sup> International Military Tribunal (Nuremberg trial) Judgment (1946), 1 IMT 171, at 186.

<sup>4</sup> [Hereafter “humanitarian intervention” will be referring to an unauthorised humanitarian intervention undertaken for purely humanitarian reasons and not as an excuse for regime change, land grab or any illegitimate reason].

<sup>5</sup> Yoram Dinstein *War, Aggression and Self-Defence* (4th ed, Cambridge University Press, Cambridge, 2005) at 71; O Ramsbotham and T Woodhouse *Humanitarian Intervention in Contemporary Conflict: A Reconceptualization* (Polity Press, Cambridge, 1996) at 228; Christopher P DeNicola "A Shield for the 'Knights of Humanity': The ICC Should Adopt a Humanitarian Necessity Defence to the Crime of Aggression" (2008) 30 U PA J Int'l L 641 at 641.

<sup>6</sup> Harold Koh “Statement by Harold Koh to the Conference” (2010) *U.S Department of State Diplomacy in Action* <[www.state.gov/](http://www.state.gov/)>.

intervention should be included in the crime of aggression definition,<sup>7</sup> and Elise Leclerc-Grange and Michael Byers proposed the inclusion of a special intent requirement<sup>8</sup> to ensure humanitarian intervention would not be caught in the scope of the crime of aggression. Neither of these proposals was implemented however, and no one has examined humanitarian intervention under the newly adopted definition of the crime of aggression.

Unauthorised humanitarian intervention involves the use of (proportionate) military force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave genocide, crimes against humanity or war crimes, perpetrated against individuals other than its own citizens,<sup>9</sup> where the UNSC has not authorised such action under the UN Charter.<sup>10</sup> The legality of humanitarian intervention has been highly debated among academics for decades, but particularly since the North Atlantic Treaty Organisation's (NATO) intervention in Kosovo in 1999. The problematic nature of discovering if humanitarian intervention will come within the crime of aggression is that humanitarian intervention is difficult to distinguish from an act of aggression. If humanitarian intervention is captured in the crime of aggression and deters states from undertaking humanitarian intervention, who will "respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity", where the UNSC fails to act.<sup>11</sup>

Chapter One of this dissertation will examine whether humanitarian intervention could come within the crime of aggression definition of an "act of aggression". First, it will assess whether humanitarian intervention is covered by the generic definition of an act of aggression. This involves analysis of the legality of humanitarian intervention at international law. Advocates of humanitarian intervention assert that it is legal under the UN Charter and at customary international law. The persuasiveness of their arguments will be analysed. Second, the first chapter looks at whether humanitarian intervention would fall within one of the listed acts in the definition. The meaning of the reference in the definition to United Nations General Assembly (UNGA) Resolution 3314 (XXIX) of 14 December 1974 (Resolution 3314) will be examined so as to ascertain whether it applies in its entirety and it will be considered whether the list is exhaustive.

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<sup>7</sup> DeNicola, above n 5, at 641.

<sup>8</sup> Elise Leclerc-Gange and Michael Byers "A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention" (2009) 41 Case W Res J Int'l L 379 at 379-388.

<sup>9</sup> JL Holzgrefe "The Humanitarian Intervention Debate" in JL Holzgrefe and Robert O Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, Cambridge, 2003) 15 at 18; Fernando R Teson *Humanitarian Intervention: An Inquiry Into Law and Morality* (3rd ed, Transnational Publishers Inc, New York, 2005) at 6.

<sup>10</sup> Charter of the United Nations, art 39 states "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with arts 41 and 42, to maintain or restore international peace and security."

<sup>11</sup> Kofi Annan *Millennium Report: We the Peoples of the United Nations in the 21<sup>st</sup> Century* at 7, A/54/2000 (2000).

In Chapter Two, the threshold requirement of the crime of aggression will be examined in order to determine whether humanitarian intervention would come under it. The justification for the threshold requirement will be considered, before its scope is determined. The “understandings” concerning the meaning of the threshold requirement attached to the Review Conference resolution will be examined in terms of their status and content. It will also look at the *travaux préparatoires* in order to shed light on the intended scope of the threshold provision. Lastly, this chapter will outline the elements involved where an individual is to be prosecuted for the crime of aggression.

After considering whether humanitarian intervention would come within the definition of the crime of aggression, the third chapter of this dissertation will consider whether jurisdiction of the ICC would be invoked for a humanitarian intervention, both in terms of whether it could legally be invoked, and also from a practical point of view whether a situation involving humanitarian intervention would be likely to come before the Court. First, I will outline the requirements for the amendment to enter into force. Next, I will consider whether situations of humanitarian intervention would be likely to be referred to the Court by the UNSC, a state party or by the Prosecutor on their own motion. Within this analysis, particular attention will be paid to the contentious opt-out provision as it determines the number of states which will come within the jurisdiction of the Court under art 15*bis*.<sup>12</sup>

The final chapter outlines the implications of the findings of my research and examines a hypothetical scenario to test the conclusions reached.

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<sup>12</sup> See attached Appendix.



## Chapter One

### Is Humanitarian Intervention an “Act of Aggression”?

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For leaders of humanitarian intervention to be punished for the crime of aggression, it must first be found that a humanitarian intervention is an “act of aggression”. The definition of an “act of aggression” in art 8bis(2) is a combination of arts 1 and 3 of the Resolution 3314 definition of state aggression.<sup>13</sup> First, an act must come within the generic definition which requires that there is a “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”. Second, the act must fall within a list of acts which “in accordance with United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, qualify as acts of aggression”. This chapter will examine whether humanitarian intervention would fall within this definition.

#### *I. Does Humanitarian Intervention Come Within the Generic Definition of the Crime of Aggression?*

Whether humanitarian intervention is a “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” under art 8bis(2), involves essentially the same issue as to the legality of humanitarian intervention at international law. This is because art 8bis(2) states that any use of force inconsistent with the UN Charter will be an act of aggression. For humanitarian intervention to be legal under the UN Charter, it must either be permitted under the Charter or established as an international customary norm.<sup>14</sup> As stated in the introduction, the legality of humanitarian intervention has been highly debated for decades. This section will examine the legality of humanitarian intervention so as to determine whether it would come

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<sup>13</sup> *Resolution on the Definition of Aggression* GA Res 3314, UN GAOR, 29th sess, 2319th plen mtg, (1974) [Resolution 3314].

<sup>14</sup> Statute of the International Court of Justice, art 38(1), is widely accepted as the authoritative statement of the sources of international law (see Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, New York, 2008) at 4-5). It states that “international norms are legally binding if they are incorporated into the law in: a. International conventions, whether general or particular, establishing rules expressly recognised by the contesting state; b. International custom as evidence of a general practice accepted as law”. This approach was reaffirmed by the International Court of Justice (ICJ) in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, at 109 [Nicaragua].

under the scope of the definition of an “act of aggression”. First, this section will examine arguments to the status of humanitarian intervention under the UN Charter. Second, it will scrutinize its status at customary international law. Before this, however, it must be considered whether humanitarian intervention involves “the use of armed force by a State”.

#### ***A. Is Humanitarian Intervention the “Use of Armed Force by a State”?***

It is unlikely that humanitarian intervention would be undertaken without the use of armed force;<sup>15</sup> however, it is often assumed by a group of states. Hence the question arises whether an act of aggression undertaken by a collective group under a regional organisation such as the African Union<sup>16</sup> or a defence organisation such as NATO, is armed force by a “State”? The phrase “use of armed force by a State” in art 8bis is identical to Resolution 3314 which stated in an explanatory note that the definition of the term “State” includes “the concept of a group of states where appropriate”.<sup>17</sup> Therefore humanitarian intervention undertaken by a group of states would come within the definition of art 8bis.

#### ***B. Status of Humanitarian Intervention under the Charter of the United Nations***

The use of force is governed under art 2(4) of the UN Charter which states:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.

There are only two narrow exceptions to art 2(4) under the UN Charter: self defence under art 51 or with authorisation of the UNSC under its Chapter VII and VIII powers. Unauthorised humanitarian intervention does not come within either of these exceptions and many interpret art 2(4) strictly in terms of the words’ ordinary meaning<sup>18</sup> to prohibit unauthorised humanitarian intervention.<sup>19</sup>

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<sup>15</sup> Majority of the past examples of humanitarian intervention have involved armed force, for example, NATO’s operation in Kosovo involved an extensive bombing campaign, ECOWAS’s operations in Sierra Leone and Liberia involved bombing and extensive fighting between ECOWAS troops and the rebels; see Susan Breau *Humanitarian Intervention: The United Nations and Collective Responsibility* (Cameron May Ltd, London, 2005) at 78-81, 108-109, 126-136.

<sup>16</sup> The African Union (AU) could in the future be in a situation of undertaking unauthorised humanitarian interventions. Article 5(2) of the Constitutive Act of the AU provides for the creation of peace and security structures and created the Peace and Security Council which has a Protocol allowing it to recommend intervention in a member state without requiring UN authorisation; see Timothy Murithi *The African Union –Pan-Africanism, Peacebuilding and Development* (Ashgate Publishing, Aldershot, 2005) at 97.

<sup>17</sup> Resolution 3314, above n 13, art 1.

<sup>18</sup> Since the UN Charter is a treaty, the principles of treaty interpretation can be used to discover whether humanitarian intervention is legal under it. The principles are laid down in arts 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). One first looks at the ordinary meaning of the words in their context and in the light

Julius Stone, however, argues that the use of force is only prohibited under art 2(4) of the UN Charter when it goes against “territorial integrity and political independence”.<sup>20</sup> As a “genuine humanitarian intervention does not result in territorial conquest or political subjugation...it is a distortion to argue that [it] is prohibited by article 2(4)”.<sup>21</sup> However, the *travaux préparatoires* reveal that the terms “territorial integrity” and “political independence” are not intended to restrict the scope of the prohibition on the use of force in art 2(4).<sup>22</sup> The two terms were not included in the original prohibition as part of the Dumbarton Oaks Proposals but were instead included at the later San Francisco Conference at the insistence of several smaller states wanting to *emphasise* the protection of territorial integrity and political independence by means of the prohibition of the use of force, not to narrow the scope of the provision.<sup>23</sup> Therefore, the expression “territorial integrity or political independence” in art 2(4) of the UN Charter does not restrict the scope of the prohibition on the use of force and humanitarian intervention cannot be excluded because of this. Similarly, the terms “sovereignty, territorial integrity or political independence”, are not intended to restrict art 8*bis* of the crime of aggression definition.

Commentators, such as Fernando Tesón, assert that the reference in art 2(4) to the “[p]urposes of the United Nations”, excludes any prohibition on humanitarian intervention as a *bona fide* humanitarian intervention is consistent with the purposes of the UN.<sup>24</sup> Article 1(3) of the UN Charter states one of the purposes is “to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms”. As humanitarian intervention is not contrary to these purposes, it is arguably still consistent with art 2(4). However, the paramount purpose of the Charter according to art 1(1) is to maintain international peace and

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of the object and purpose, and secondly one may resort to supplementary means of interpretation: the *travaux préparatoires* and the original intent of the drafters. Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 17 January 1980), art 31 and 32.

<sup>19</sup> See Simon Chesterman *Just War or Just Peace?* (Oxford University Press, Oxford, 2001) at 45-52; Dinstein, above n 5, at 70-73; Ann Orford *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, Cambridge, 2003) 203-219; Michael Byers and Simon Chesterman "Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law" in JL Holzgrefe and Robert O Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, Cambridge, 2003) 177 at 177-203; Allen Buchanan "Reforming the International Law of Humanitarian Intervention" in JL Holzgrefe and Robert O Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, Cambridge, 2003) 130 at 130-174.

<sup>20</sup> Julius Stone *Aggression and Word Order: A Critique of United Nations Theories of Aggression* (Stevens & Sons Limited, London, 1958) at 43. See also Cherif Bassiouni and Benjamin Ferencz "The Crime Against Peace" in Cherif Bassiouni (ed) *International Criminal Law Vol I* (2nd ed, Transnational Publishers, New York, 1999) 313 at 321; Teson, above n 9, at 189-192.

<sup>21</sup> Tesón, above n 9, at 193; Michael Reisman and Myes S McDougal "Humanitarian Intervention to Protect the Ibos" in RB Lillich (ed) *Humanitarian Intervention* (University Press of Virginia, Charlottesville, 1973) 167 at 177.

<sup>22</sup> Ian Brownlie *International Law and the Use of Force By States* (Oxford University Press, Oxford, 1963) at 265-267; Bruno Simma *The Charter of the United Nations: A Commentary Vol I* (2nd ed, Oxford University Press, Oxford, 2002) at 123-124; Chesterman, above n 19, at 49.

<sup>23</sup> *Ibid*, Brownlie at 265-267; Simma, above n 22, at 123-124.

<sup>24</sup> Teson, above n 9, at 193-196. See also Reisman, above n 21, at 167; Bassiouni and Ferencz, above n 20, at 321; Stone, above n 20, at 43.

security, and the Charter makes clear its intention to give the UNSC primary responsibility for maintaining international peace and security where it states:<sup>25</sup>

The UNSC shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or shall decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace.

This negates the argument made by Tesón and others that the reference in art 2(4) to the purposes permits humanitarian intervention under the UN Charter.

Richard Lillich argued that humanitarian intervention is permissible where the UN fails to fulfil its task of safeguarding human rights, as surely the drafters of the Charter did not intend states to merely do nothing where serious human rights violations are occurring.<sup>26</sup> This is viewed as an emergency mechanism argument where “there is a need for humanitarian intervention exactly because the UNSC has been immobilised by the veto power of the permanent members” and presupposes that humanitarian intervention is to be deactivated should the UNSC ever begin to run smoothly.<sup>27</sup> However, there is not the slightest hint within the UN Charter that the validity of art 2(4) is in any way conditional to the effectiveness of the collective mechanisms for the protection of human rights.<sup>28</sup>

David Scheffer has suggested that the Genocide Convention (1948)<sup>29</sup> which states that parties must “prevent and punish” the “crime of genocide” allows for humanitarian intervention where genocide is being committed.<sup>30</sup> It can be asserted using Wesley Hohfeld’s jural correlative that given the positive duty upon states to prevent genocide, which was reiterated in the *Genocide Convention Case*,<sup>31</sup> there must be a correlative right of peoples to be protected, and in the case of genocide where there is no realistic means of exercising this right, the right to intervene must be

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<sup>25</sup> Charter of the United Nations, art 39. The Charter also makes clear this intention in art 24 which states: “(1) In order to ensure prompt and effective action by the UN, its Members confer on the UNSC primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the UNSC acts on their behalf. Chapters VI, VII and VIII all grant the UNSC primary responsibility for maintenance of peace and security.” The reference to the maintenance of peace and security throughout the UN Charter makes it clear that the primary purpose of the UN is to maintain international peace and security by way of the UNSC, not to uphold human rights.

<sup>26</sup> R Lillich "Humanitarian Intervention: A Reply to Brownlie and a Plea for Constructive Alternatives" in John Norton Moore (ed) *Law and Civil War in the Modern World* (John Hopkins University Press, Baltimore, 1974) 229 at 238-241.

<sup>27</sup> *Ibid*, at 240.

<sup>28</sup> Simma, above n 22, at 130; Ian Brownlie "Thoughts on Kindhearted Gunmen" in RB Lillich (ed) *Humanitarian Intervention and the United Nations* (University Press of Virginia, Charlottesville, 1973) 139 at 145-6.

<sup>29</sup> United Nations Convention on the Prevention and Punishment of the Crime of Genocide (opened for signature 9 December 1948, entered into force on 12 January 1951), art VIII.

<sup>30</sup> David J Scheffer "Towards a Modern Doctrine of Humanitarian Intervention" (1992) 23 *University of Toledo Law Review* 253 at 289. See also Julie Mertus "The Legality of Humanitarian Intervention: Lessons from Kosovo" (2000) 41 *Wm & Mary L Rev* 1773 at 1775.

<sup>31</sup> *Genocide Convention Case (Bosnia-Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 91.

vested in other states.<sup>32</sup> However, the Convention itself states that states must do so by calling upon the “competent organs of the United Nations to take such action as they consider appropriate”.<sup>33</sup> Therefore no right to unauthorised humanitarian intervention under this convention exists.

While no right of humanitarian intervention exists under the UN Charter (or other international conventions), if it could be proved that humanitarian intervention is a customary norm, it would not be inconsistent with the UN Charter.

### *C. Humanitarian Intervention under Customary International Law*

Some scholars argue for the existence of a right of humanitarian intervention at customary international law. The two main elements of international custom are state practice and *opinio juris et necessitatis (opinio juris)*.<sup>34</sup> State practice includes consideration of duration, uniformity of and consistency of the practice.<sup>35</sup> *Opinio juris* (accepted as law) requires that there is recognition that there is a legal entitlement (or duty) to act in a certain way.<sup>36</sup> There are two main arguments under this umbrella: that pre-Charter right survived the UN Charter, and that post-Charter practice has created a custom.

Academics such as Michael Reisman and Myes McDougal, argue that state practice from the eighteenth and nineteenth centuries established a right that was neither “terminated nor weakened” by the creation of the UN.<sup>37</sup> However, there is a strong argument that there was no genuine case of humanitarian intervention before 1945, with the exception of the French occupation of Syria,<sup>38</sup> and consequently no customary right was established.<sup>39</sup> As Ian Brownlie notes, the doctrine was “inherently vague” and took a variety of forms.<sup>40</sup> While states at the time may have claimed a “right of humanitarian intervention”, an evaluation of this status is difficult given that war itself was not prohibited at international law at the time.<sup>41</sup> Therefore, justification

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<sup>32</sup> Wesley Hohfeld *Fundamental Legal Conceptions As Applied In Legal Reasoning* (revised ed, Greenwood Press, Westport, 1978) at 36.

<sup>33</sup> United Nations Convention on the Prevention and Punishment of the Crime of Genocide, above n 29.

<sup>34</sup> Malcom N Shaw *International Law* (6th ed, Cambridge University Press, Cambridge, 2008) at 72-93.

<sup>35</sup> Brownlie, above n 14, at 6-8. In *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 4 at 42, the Court stated there need only be “general” practice, not “universal” practice.

<sup>36</sup> Brownlie, above n 14, at 8.

<sup>37</sup> Reisman and McDougal, above n 21, at 171.

<sup>38</sup> France intervened in Syria (1860-61), see Brownlie, above n 22, at 339; Chesterman, above n 19, at 32.

<sup>39</sup> Other examples often cited are: Russia, Britain and France in Greece (1827-30), Russia in Bosnia and Herzegovina (1877-78), United States in Cuba (1898), and Greece, Bulgaria and Serbia in Macedonia (1903-08, 1912-13), however, all of these are at best questionable humanitarian motives if not blatant examples of “benevolent imperialism”; see, Brownlie, above n 22, at 339-41; Chesterman, above n 19, at 22-35.

<sup>40</sup> *Ibid*, Brownlie at 338.

<sup>41</sup> *Ibid*; Chesterman, above n 19, at 35.

falls upon post-Charter practice as establishing the *opinio juris* and state practice requirements of a customary norm.

In proving that a customary right of humanitarian intervention as an exception to art 2(4) has developed since the creation of the UN Charter, proponents of humanitarian intervention point to cases of it since 1945.<sup>42</sup> However, the *opinio juris* required for a custom is lacking.<sup>43</sup> First, very few of the intervening states justified their interventions on the doctrine of humanitarian intervention: India claimed self-defence for its invasion of East Pakistan (1971); Vietnam claimed it was responding to a “large-scale aggressive war” being waged by Cambodia (1978-9); Tanzania claimed it was responding to Uganda’s invasion the previous year (1978-9); the Economic Community of West African States (ECOWAS) claimed it was invited to intervene in Liberia (1990) and Sierra Leone (1997-8) by the legitimate governments of those states; only one of the three states which created the no-fly zones in Iraq (1991-) justified it on a new right of unilateral humanitarian intervention; and the majority of NATO states defended its invasion of Kosovo (1999) as being “consistent with” UNSC Resolutions 1160, 1199 and 1203.<sup>44</sup> The fact that these states felt they could not appeal to the right of unauthorised humanitarian intervention is a strong indication that *opinio juris* is not present.

There are also a number of statements by international bodies stating that no right of unauthorised humanitarian intervention exists. The UNGA rejected the right of humanitarian intervention in a number of resolutions, including the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States* (1965),<sup>45</sup> the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* (1970),<sup>46</sup> and the *Declaration on the Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations* (1991).<sup>47</sup> While

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<sup>42</sup> See, Teson, above n 9, at 225-278.

<sup>43</sup> See Chesterman, above n 19, at 63-87.

<sup>44</sup> JL Holzgrefe, above n 9, at 48-9. Particularly regarding NATO’s invasion of Kosovo: see NJ Wheeler *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, Oxford, 2000) at 275-81; Jane Stromseth "Rethinking Humanitarian Intervention: The Case For Incremental Change" in JL Holzgrefe and Robert O Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (University of Cambridge, Cambridge, 2003) 232 at 234-45; Bruno Simma "NATO, the UN and the Use of Force: Legal Aspects" (1999) 10 Eur J Int'l L 1 at 12; Chesterman, above n 19, at 71-86.

<sup>45</sup> *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States* (1965) GA Res 2131, UN GOAR, 20<sup>th</sup> sess, 1408<sup>th</sup> plen mtg, (1965): “No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State”.

<sup>46</sup> *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* GA Res 2625, UN GOAR, 25<sup>th</sup> Sess, 1883<sup>rd</sup> plen mtg, (1970): “Armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law”.

<sup>47</sup> *Declaration on the Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations* (1991) GA Res 46/182, UN GOAR, 46<sup>th</sup> sess, 78<sup>th</sup> plen mtg, A/RES/46/182 (1991): “The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United

some commentators have, interpreted the decision in the *Nicaragua* case narrowly,<sup>48</sup> the International Court of Justice (ICJ) clearly rejected the notion that the United States could employ force against Nicaragua in order to ensure respect for human rights in that country.<sup>49</sup>

In the *Legality of Use of Force* cases, where Serbia and Montenegro took ten NATO states to the ICJ over the legality of the humanitarian intervention in Kosovo, Belgium put forward the defence of state necessity at customary international law as an excuse for humanitarian intervention.<sup>50</sup> The defence of necessity appeared in the International Law Commission's (ILC) 1980 and 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts where it is the only way for the state to safeguard an "essential interest" against a "grave and imminent peril", and it does not seriously impair an "essential interest" of the state or states towards which the obligation exists, or of the international community as a whole.<sup>51</sup> Whether this defence exists as a customary norm is doubtful, though, as there is limited state practice or *opinion juris* supporting it.<sup>52</sup> Even if the necessity defence was established, it is unlikely that humanitarian intervention could be excused under it. While protecting the people may constitute an "essential interest",<sup>53</sup> and the situation may involve a "grave and peril interest", it is highly unlikely that a humanitarian intervention would be found to "not seriously impair an essential

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Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country".

<sup>48</sup> Teson, above n 9, at 331-72.

<sup>49</sup> *Nicaragua*, above n 14, at 134-5 the Court states, "the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or...the training, arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States". See also Dinstein, above n 5, at 72.

<sup>50</sup> *Legality of Use of Force (Yugoslavia v Belgium) (Provisional Measures)* [1999] ICJ Pleadings CR99/15 at 13.

<sup>51</sup> International Law Commission, *Report of the International Law Commission on the Work of Its Thirty-Second Session*, A/35/10 (1980); International Law Commission *Draft Articles on Responsibility for Internationally Wrongful Acts with Commentaries*, art 25, at 80, A/56/10 (2001)). The necessity defence was acknowledged by the ICJ in 1997 in the *Gabcikovo-Nagymaros Project (Hungary v Slovakia)(Merits)* [1997] ICJ Rep 7 at 39-40 where it stated that "the state of necessity is a ground recognised by customary international law" that can be "invoked under certain strictly defined conditions". Repeated in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, at 123.

<sup>52</sup> Beyond the ILC Draft Codes including necessity as a defence, it has only been acknowledged by the ICJ on two occasions, neither of which the defence was upheld. There are limited examples of state practice of invoking necessity to demonstrate this defence as an established customary norm.

<sup>53</sup> The ILC commentaries stated that whether an interest is "essential" depends on the circumstances, but may include "preserving the very existence of the State and its people as well as of the international community as a whole... or ensuring the safety of a civilian population," thus implying that protecting another state's citizens may be "essential"; see International Law Commission *Draft Articles*, above n 51, at 83, para [14]-[15]. Some commentators have argued that for these reasons, humanitarian intervention can come within this defence, see DeNicola, above n 5, at 675-9.

interest” of the victim state.<sup>54</sup> Also, necessity cannot be used as a defence for a breach of a peremptory norm and as some would argue that the prohibition against the use of force in violation of the UN Charter is a peremptory norm, necessity cannot be used to excuse humanitarian intervention.<sup>55</sup> Therefore, humanitarian intervention cannot be excused under international law by the defence of necessity.

While the *Legality of Use of Force* cases provide some evidence to support the case of humanitarian intervention with Belgium expressly referring to humanitarian intervention as a legal doctrine,<sup>56</sup> the majority of international opinion was that the intervention was not legal. Although several NATO states referred to “humanitarian objectives” in the preliminary hearings, they were careful not to expressly defend their action on any legal doctrine and instead emphasized the unique factual circumstances.<sup>57</sup> It is unfortunate that the Court never decided the case on its merits as this would have provided some clarity as to the status of humanitarian intervention at international law.<sup>58</sup>

Despite the Secretary-General and Britain leading efforts to develop a more far-reaching legal doctrine of humanitarian intervention after 1999,<sup>59</sup> the overwhelming majority of states opposed this in the absence of UNSC authorisation.<sup>60</sup> The statement by 131 states in 1999, repeated in 2002, when the Group of 77 adopted declarations directly rejecting any doctrine of unilateral

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<sup>54</sup> There are no precedent cases applying the requirement that the act “does not seriously impair an essential interest of the state”, however, NATO’s intervention involving a 78 day air campaign surely would have been considered to seriously impair Yugoslavia’s “essential interests” in regards to its sovereignty and territorial independence.

<sup>55</sup> International Law Commission *Draft Articles*, above n 51, at 207. It must be noted, however, that some commentators distinguish humanitarian intervention from “aggressive” uses of force which have peremptory norm status, see Lauri Hannikainen *Peremptory Norms (Jus Cogens) in International Law: Historical development, Criteria, Present Status* (Finnish Lawyers’ Publishing Co, Helsinki, 1988) at 336-337.

<sup>56</sup> *Legality of Use of Force (Yugoslavia v Belgium)* above n 50, at 12.

<sup>57</sup> *Legality of Use of Force (Yugoslavia v Germany) (Provisional measures)* [1999] ICJ Pleadings CR 99/18 at 7; *Legality of Use of Force (Yugoslavia v United Kingdom) (Provisional measures)* [1999] ICJ Pleadings CR 99/23 at 13; *Legality of Use of Force (Yugoslavia v Canada) (Provisional measures)* [1999] ICJ Pleadings CR 99/16 at 17; *Legality of Use of Force (Yugoslavia v Netherlands) (Provisional measures)* [1999] ICJ Pleadings CR 99/20 at 14. See also Breau, above n 15, at 266-267.

<sup>58</sup> It was found that the ICJ did not have jurisdiction to hear the case given that Serbia and Montenegro were not members to the UN at the time of the NATO intervention. The ICJ only has jurisdiction over “states” under art 34 of the Statute of the ICJ. If the case had proceeded to be examined on its merits, this would have provided an authoritative ruling on the matter in a judicial sense that would have been extremely helpful for the purposes of act of aggression under the crime of aggression within the ICC.

<sup>59</sup> Kofi A Annan *The Question of Intervention: Statements by the Secretary-General* (United Nations Department of Public Information, New York, 1999) at 33. Tony Blair on 29 April 1999 stated “Under international law a limited use of force can be justifiable in support of purposes laid down by the UNSC but without the Council’s express authorisation when that is the only means to avert immediate and overwhelming human catastrophe,” Tony Blair *Written Answer for House of Commons* (1999) Hansard, Col 245 in Stromseth, above n 44, at 236-7.

<sup>60</sup> For example United States Secretary of State Madeleine Albright stated that Kosovo was “a unique situation *sui generis* in the region of the Balkans” concluding that it was important “not to overdraw the various lessons that come out of it”, see Byers and Chesterman, above n 19, at 199; Jane Stromseth, David Wippman and Rosa Brooks *Can Might Make Rights? Building the Rule of Law After Military Interventions* (Cambridge University Press, Cambridge, 2006) at 38.



humanitarian intervention, is a strong demonstration of the lack of *opinio juris*, given that this represents over two-thirds of the world's states.<sup>61</sup> A similar expression was made by the UNGA when it denounced the NATO intervention by a vote of 107-7 (48 abstentions).<sup>62</sup> This displays a lack of uniform state practice and *opinio juris* which is required for customary international law.

Some commentators point out that the UNSC decisively rejected a resolution, supported by Russia and China, which called NATO's intervention a flagrant violation of the UN Charter and a threat to the peace and security.<sup>63</sup> However, a clear distinction must be made between the willingness to avoid a condemnation of NATO members and the acceptance that the intervention was in conformity with the UN Charter.<sup>64</sup> Also, while some argue that UNSC Resolution 1244,<sup>65</sup> authorising a NATO-led peace-keeping force after the intervention, was a "quasi ratification" of NATO's campaign, it in no way validated NATO's actions in the former Yugoslavia, just as Resolution 687 did not validate Iraq's invasion of Kuwait.<sup>66</sup>

While NATO's intervention was viewed as unlawful under international law, international consensus was that the intervention was nevertheless legitimate.<sup>67</sup> The Independent International Commission on Kosovo found the unauthorised humanitarian intervention "unlawful but legitimate",<sup>68</sup> and the UN Secretary-General Kofi Annan also stated that "there are times when the use of force may be legitimate in the pursuit of peace".<sup>69</sup> Many commentators and states regarded NATO's intervention as "excusable" or "morally permissible",<sup>70</sup> and others have stated that the legitimacy of Kosovo "pardoned" or at least "mitigated" illegality.<sup>71</sup> In very narrow circumstances humanitarian intervention seems to be treated as an "excusable breach".<sup>72</sup> Bruno Simma stated, "[o]nly a thin red line separates NATO's action in Kosovo from international

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<sup>61</sup> Group of 77 is an intergovernmental organization of developing states in the United Nations established by 77 states on 15 June 1964, today with 131 member states. Group of 77, "Declaration on the occasion of the Twenty-third Ministerial Annual Meeting of the Group of 77, New York" (1999) Group of 77 at [69] <<http://www.g77.org/>>; reiterated in, Group of 77 "Declaration of the South Summit and Havana Programme of Action, Cuba" (2000) Group of 77 at [54] <<http://www.g77.org/>>.

<sup>62</sup> GA Res 54/172, A/RES/54/172 (1999).

<sup>63</sup> SC Draft Res 328 at [6] S/1999/328 (1999); see also Stromseth, Wippman and Brooks, above n 60, at 36-7.

<sup>64</sup> Peter Hilpold "Humanitarian Intervention: Is There a Need for a Legal Reappraisal?" (2001) 12 EJIL 437 at 450.

<sup>65</sup> SC Res 1244, S/RES/1244 (1999).

<sup>66</sup> Byers and Chesterman, above n 19, at 182.

<sup>67</sup> Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press, Oxford, 2000) at 4. See also Wheeler, above n 44, at 281-299; Mertus, above n 30, at 1743; Thomas M Franck "Interpretation and Change in the Law of Humanitarian Intervention" in JL Holzgrefe and Robert O Keohane (eds) *Humanitarian Intervention: Ethical Legal and Political Dilemmas* (Cambridge University Press, Cambridge, 2003) 204 at 226; Simma, above n 22, at 20.

<sup>68</sup> Ibid, Independent International Commission, at 4.

<sup>69</sup> Kofi Annan, *The Question of Intervention: Statements by the Secretary-General* (United Nations Department of Public Information, New York, 1999) at 33; Stromseth, Wippman and Brooks, above n 60, at 37.

<sup>70</sup> Simma, above n 22, at 1.

<sup>71</sup> Franck, above n 67, at 226.

<sup>72</sup> Stromseth, above n 44, at 244-55.

legality,” although he argued that it should remain exceptional.<sup>73</sup> Both the Kosovo intervention and the intervention to protect the Iraqi Kurds in the immediate aftermath of the 1991 Gulf War were viewed internationally as legitimate and were not condemned by the UNSC nor were there any repercussions on the intervening states. Despite the legitimacy of humanitarian intervention in extreme circumstances, states clearly continue to reject any broad right of humanitarian intervention under the UN Charter.

Since NATO’s intervention in Kosovo, a new doctrine called the “responsibility to protect” has emerged in place of the right to intervene, and is an attempt to get past humanitarian intervention’s challenge to sovereignty.<sup>74</sup> This calls attention to each state’s duty to protect its own population from genocide, war crimes and crimes against humanity.<sup>75</sup> Under this doctrine, where a state fails to protect its citizens from massive human rights violations, it forfeits a degree of sovereignty and the responsibility falls upon the international community, so that an intervention in that state does not breach that state’s sovereignty.<sup>76</sup> This notion fundamentally reconceptualises the classic post-Westphalian sense of sovereignty as free from external interference, and is similar to the concept of *erga omnes*, which refers to a state’s obligations to the international community as a whole.<sup>77</sup>

Some academics point to statements emphasising the responsibility to protect doctrine in the Independent Commission on Intervention and State Sovereignty (ICISS) report, *The Responsibility to Protect*,<sup>78</sup> by the UN Secretary-General in his *Millennium Report*,<sup>79</sup> and the High Level Panel on Threats, Challenges and Change report, *A More Secure World*,<sup>80</sup> to argue that humanitarian intervention can be legal as an option of last resort. However, these statements

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<sup>73</sup> Simma, above n 44, at 22.

<sup>74</sup> Mehrdad Payandeh "With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking" (2010) 35 YJIL 469 at 470; George A Critchlow "Stopping Genocide Through International Agreement When The UNSC Fails To Act" (2009) 40 Geo J Int'l L 311 at 313.

<sup>75</sup> The doctrine was coined by the ICISS in, International Commission on Intervention and State Sovereignty “The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty” (2001) The Responsibility to Protect <www.iciss.ca/> [ICISS report].

<sup>76</sup> Payandeh, above n 74, at 471.

<sup>77</sup> DeNicola, above n 5, at 670.

<sup>78</sup> The ICISS Report emphasised that in all cases UNSC authorisation must be sought for intervention. Where UNSC authorisation is not forthcoming, the alternative would be to seek United Nations General Assembly’s (UNGA) support under Uniting for Peace Resolution 1950. If latter option is not possible, intervention should be carried out by regional agencies. If neither UN nor regional agency takes action, one or more states may act unilaterally. ICISS report, above n 75.

<sup>79</sup> The Secretary-General stated that although an armed intervention must always be an option of last resort, in the face of mass murder the option could not be relinquished. Annan, above n 11, at [47]-[48]. This view was repeated in 2003 before the UNGA.

<sup>80</sup> The High Level Panel endorsed collective international “responsibility to protect” as an “emerging norm.” High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change*, at [202], A/59/565 (2004).

spoke of the doctrine as *de lege ferenda*, an “emerging” norm, not a crystallised one.<sup>81</sup> The ICISS recommended that the UNGA adopt a declaration embodying the principles or that the UNSC agree to a code of conduct for humanitarian crisis situations. No such action, however, was pursued. Moreover, while the UNGA endorsed the ICISS “responsibility to protect” principle, that each state has a responsibility to protect its own citizens, in its 2005 World Summit Outcome document, it took a far narrower approach than the ICISS, and the doctrine is very much based on collective action in terms of the UN Charter regime, not unauthorised humanitarian intervention.<sup>82</sup> This was emphasised in the report:<sup>83</sup>

The international community, *through the United Nations*, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, *in accordance with Chapters VI and VIII of the Charter*, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity...in a timely and decisive manner, *through the Security Council, in accordance with the Charter*.

In conclusion, while there is considerable debate on the legality of humanitarian intervention, state practice and *opinio juris* reflected in recent statements of the UNGA, the Group of 77, and other official bodies, demonstrate that humanitarian intervention cannot be “legal” without prior authorisation of the UNSC, even though it may be widely accepted as “legitimate” in some circumstances. There may be an emerging doctrine of unauthorised humanitarian intervention (or through the responsibility to protect notion) in extreme circumstances, but it has not yet crystallized into customary international law.<sup>84</sup> Therefore, it must be concluded that humanitarian intervention is inconsistent with the UN Charter, and consequently possibly constitutes an “act of aggression” for the purposes of the generic definition in art 8*bis*(2).

## *II. Does Humanitarian Intervention come within the List of “Acts of Aggression”*

To be an act of aggression, humanitarian intervention would have to fulfil the second part of art 8*bis*(2) which states:<sup>85</sup>

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<sup>81</sup> ICISS report, above n 75.

<sup>82</sup> 2005 *World Summit Outcome* GA Res 60/1, at [138]-[139], A/Res/60/1 (2005). See also William A Schabas "Kampala Diary 8/6/10" The ICC Review Conference: Kampala 2010 <<http://iccreviewconference.blogspot.com/>>; Andreas Paulus "Second Thoughts on the Crime of Aggression" (2010) 20(4) EJIL 1117 at 1121.

<sup>83</sup> *Ibid*, 2005 *World Summit Outcome*, at [139] (emphasis added).

<sup>84</sup> Breau, above n 15, at 274.

<sup>85</sup> Article 8*bis*(2), see attached Appendix, Annex I.

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 of 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 or another State;
- (c) The blockade of the ports or coasts of a State against the territory 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, group, 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.

The list in subparagraphs (a) to (g) is identical to the list in art 3 of Resolution 3314.<sup>86</sup> Inclusion of the Resolution 3314 definition was controversial as it was intended as a guide to the UNSC to determine inter-state aggression under art 39 of the UN Charter, not individual criminal liability.<sup>87</sup> There are two issues which arise from this section of the definition. First, what does the reference to Resolution 3314 mean? And secondly, is the list exhaustive?

#### ***A. What are the Consequences of the Reference to Resolution 3314?***

The reference to Resolution 3314 is problematic as it is unclear on the face of it whether it imports Resolution 3314 in its entirety or simply refers to it to indicate that the definition reflects current customary law, increasing the legitimacy of the crime of aggression. If Resolution 3314 was included in its entirety this may mean humanitarian intervention comes within the act of aggression as art 5(1) of Resolution 3314 states that “[n]o consideration of whatever nature,

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<sup>86</sup> Resolution 3314, above n 13.

<sup>87</sup> Yoram Dinstein "Aggression" in R Wofrum (ed) *The Max Planck Encyclopedia of Public International Law* (online ed, Oxford University Press, 2008) at [14]; Claus Kress "Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus" (2010) 20(4) EJIL 1129 at 1136.

whether political, economic, military or otherwise, may serve as a justification for aggression”.<sup>88</sup> While this does not specifically mention humanitarian considerations as not being a justification, it can be inferred from the drafting process that the words “of whatever nature” and “or otherwise” were intended to encompass humanitarian intervention.<sup>89</sup> This clause suggests that humanitarian motives would not be a justification.<sup>90</sup>

However, art 8*bis* cannot intend to import Resolution 3314 in its entirety, as this would lead to several inconsistencies that would not be acceptable to the International Criminal Court. Article 2 creates a presumption of guilt when it states: “[t]he first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression...” This can hardly be reconciled with the fundamental guarantee of the accused not to have imposed on them any reversal of the burden of proof enshrined in art 67(1)(i) of the Rome Statute.<sup>91</sup> Article 5(2) states that only “a war of aggression is a crime against international peace...aggression gives rise to international responsibility”. This distinguishes between “wars” of aggression which lead to individual accountability and other acts of aggression which do not and would be clearly contrary to art 8*bis* which criminalises individuals for “acts” of aggression. Lastly, art 4 reserves the power of the UNSC to determine what other acts are tantamount to aggression,<sup>92</sup> which would be contrary to the principle of legality (*nullum crimen sine lege*) as expressed in art 22 of the Statute.<sup>93</sup> The prosecutors and judges are, therefore, likely to interpret the reference in paragraph 2 of art 8*bis* in line with the accepted principles of criminal law and procedure and not apply Resolution 3314 in its entirety.<sup>94</sup> Hence the reference appears to be intended to emphasise the customary nature of the crime of aggression.

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<sup>88</sup> Resolution 3314, above n 13, art 5.

<sup>89</sup> *Official Records*, UN GOAR, 9th sess, 6th Committee, 409th plen mtg at [23]; *Official Records*, UN GOAR, 6<sup>th</sup> sess, 6<sup>th</sup> Committee, 292nd plen mtg at [7] in Brownlie, above n 22, at 341. During the discussions on defining aggression for Resolution 3314 in the Sixth Committee of the UNGA the idea that humanitarian intervention would be acceptable to prevent genocide in a neighbouring state after appealing in vain to the UN organs was raised but was rejected.

<sup>90</sup> Dinstein, above n 87, at [17]; DeNicola, above n 5, at 666.

<sup>91</sup> Claus Kress, above n 87, at 1136.

<sup>92</sup> Resolution 3314, above n 13, art 4.

<sup>93</sup> Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute], art 22, states “a person shall not be criminally responsible under this statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the court”. That including Resolution 3314 in its entirety would be contrary to art 22 was stated in the Special Working Group on the Crime of Aggression *Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States, from 11 to 14 June 2007* at [50], ICC-ASP/6/SWGCA/INF.1 (2007); Kress, above n 87, at 1136.

<sup>94</sup> *Ibid*, Kress, at 1136.

### *B. Is the List Exhaustive?*

The definition uses the non-exhaustive phrase, “[a]ny of the following acts”, which may be interpreted as making the list open-ended<sup>95</sup> and allowing other “act[s] of aggression” that are not in the list but are *ejusdem generis* with it.<sup>96</sup> This interpretation is consistent with the reference to Resolution 3314, which would otherwise be superfluous. Commentators, such as Roger Clark, take this interpretation.<sup>97</sup> Therefore the list is at most semi-exhaustive and acts of humanitarian intervention must come within the list of acts or be along similar lines as the list of “acts of aggression”.

It is more than likely that humanitarian intervention would come within the list, with most cases, if not all, falling under subparagraph (a) as involving the invasion or attack by the armed forces of a state of the territory of another state, if not also (b) – (f).<sup>98</sup> Therefore, humanitarian intervention would be an act which qualifies as an “act of aggression” for the purposes of art 8bis(2).

### *III. Conclusion*

Humanitarian intervention involves the use of armed force, and is inconsistent with the UN Charter as the legality of humanitarian intervention cannot be supported at international law. A humanitarian intervention is also likely to involve an act which qualifies as an act of aggression.

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<sup>95</sup> The principle of legality is not so strict as to prevent the list in para 2 from being non-exhaustive. There are comparable non-exhaustive lists in art 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, (SC Res 827, S/RES/827 (1993)) which had a non-exhaustive list for the laws or customs of war where it is stated, “[s]uch violations shall include, but are not limited to...”. Rome Statute, above n 93, also has a comparable “open” clause in art 7(1)(k) which includes “[o]ther inhumane acts of a similar character...”.

<sup>96</sup> Special Working Group on the Crime of Aggression *Report of the Special Working Group on the Crime of Aggression* at [34], ICC-ASP/6/20/Add.1 (2008) [SWGCA Report 2008]. The SWGCA in its paper reiterates this interpretation where it stated “the right balance had been struck in the Chairman’s paper by including a generic definition in the chapeau of para 2, along with the *non-exhaustive* listing of acts of aggression. Furthermore, art 22(2) of the Statute had to be applied in the interpretation of this provision, requiring that the definition of a crime be strictly construed” (emphasis added).

<sup>97</sup> Roger S Clark “The Review Conference on the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010” (2010) 2(2) *GoJIL* 689, at 696. See Kress, above n 87, at 1136; Devyani Kacker “Coming Full Circle: The Rome Statute and the Crime of Aggression” (2010) 33 *SFKTLR* 257 at 265.

<sup>98</sup> For example, NATO’s intervention in Kosovo and ECOWAS’s interventions in Sierra Leone and Liberia both involved armed forces entering the territory of the victim states and would be covered by (a). So too would Operation Provide Comfort in northern Iraq in 1991 which involved armed troops being stationed in Iraq. NATO’s intervention in Kosovo also involved the bombardment of Yugoslavia and so would also qualify as (b). See Chesterman, above n 19, at 134-36, 155-56, 198-99, 210-14.

Therefore, as Larry May states, “the State that has engaged in humanitarian intervention has itself engaged in an ‘act of aggression’” for the purposes of art 8bis(2).<sup>99</sup>

But the question remains, what would happen if a future situation like Kosovo were to arise, where a *bona fide* humanitarian intervention was the only course of action to stop a humanitarian catastrophe and was internationally accepted as “legitimate”, in terms of the crime of aggression? There are no provisions in art 8bis allowing legitimate cases of humanitarian intervention to be excused.<sup>100</sup> Perhaps one further case of humanitarian intervention would be enough for it to be considered as established as a customary norm, and the Court would exclude the case on this ground. However, it is unlikely that states will ever accept a broad right of humanitarian intervention as legal for fear it will be used as a justification for powerful states to meddle in what states perceive as their sovereignty. Therefore, despite being accepted in exceptional circumstances, “humanitarian intervention” will remain “illegal”, and will fall within paragraph 2 of the crime of aggression as constituting an “act of aggression”. Chapter 2 will continue to examine whether humanitarian intervention as a legitimate use of force, can be exempt from the crime of aggression through the threshold requirement in paragraph 1 that the act of aggression must be a “manifest” violation of the UN Charter.

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<sup>99</sup> Larry May “The International Criminal Court and the Crime of Aggression: Aggression, Humanitarian Intervention, and Terrorism” (2009) 41 Case W Res J Int’l L 321 at 334.

<sup>100</sup> Christopher P DeNicola, above n 5, at 666, argued that the ICC should adopt a humanitarian defence to the crime of aggression, however, it did not.

## Chapter Two

# Is Humanitarian Intervention a “Manifest Violation” of the UN Charter?

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The next requirement for leaders of humanitarian intervention to be prosecuted for a crime of aggression is that the intervention must reach the threshold requirement of being a “manifest” violation of the UN Charter as required in art 8*bis*(1), which states:<sup>101</sup>

Crime of aggression means...an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

The meaning of “manifest” is somewhat ambiguous. It may mean simply an “obvious” breach where it requires more than just a technical breach of the UN Charter, or it could require something more than that, such as that the act must be indisputably illegal.<sup>102</sup> These differing interpretations have a huge impact on whether humanitarian intervention would reach the threshold; under the first interpretation humanitarian intervention would be a manifest violation, whereas under the second it would not. The explanatory terms “character, gravity and scale” in art 8*bis*(1) help determine whether an act reaches the manifest violation threshold, however, one could not definitively exclude humanitarian intervention from the literal reading of these components as they are too broad. This chapter will examine the justifications of the threshold requirement, the “understandings” attached to the amendment document as well as the *travaux préparatoires* to determine whether humanitarian intervention would be found to be a manifest violation of the UN Charter.

### *I. Justifications of the Threshold Requirement*

The threshold requirement of being a “manifest violation” of the UN Charter for the crime of aggression was highly debated in the drafting process. Some delegations argued for its deletion, reasoning that, “any act of aggression was grave and constituted a manifest violation of the

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<sup>101</sup> Article 8*bis*(1), see attached Appendix, Annex I.

<sup>102</sup> Elizabeth Wilmshurst “The International Criminal Court: Reviewing the Review Conference” (2010) Chatham House <[www.chathamhouse.org.uk](http://www.chathamhouse.org.uk)>; Dapo Akande “What Exactly was Agreed in Kampala on the Crime of Aggression?” (2010) EJIL: Talk! Blog of the European Journal of International Law <<http://www.ejiltalk.org/>>.



Charter of the United Nations”.<sup>103</sup> There was no threshold in the 1974 Definition of Aggression in Resolution 3314. Having the threshold in para 1, however, was a way to move away from the Nuremberg language of “wars of aggression” towards a definition that referred to “acts of aggression”, reflecting more contemporary uses of force, while maintaining consistency with the historical precedents of limiting individual criminal liability to the most serious aggressive crimes.

A gravity threshold is also applicable to all crimes under the Rome Statute under arts 1, 5 and 17. Article 1 states that the ICC shall exercise its jurisdiction for only the “most serious crimes of international concern”; art 5 confines jurisdiction to only four crimes: genocide, crimes against humanity, war crimes and aggression; and art 17 declares a case inadmissible where it is determined the case is not of sufficient gravity to justify further action. The threshold clause for the use of force is also consistent with other international bodies on use of force. The ICJ in its *Nicaragua*<sup>104</sup> and *Oil Platforms*<sup>105</sup> decisions distinguish “most grave forms of the use of force” which are tantamount to an armed attack before self-defence is justified, from “lesser forms”.<sup>106</sup> The ILC Draft Code of Crimes Against the Peace and Security of Mankind noted in its commentary that individual criminal responsibility for the crime of aggression is contingent on “a *sufficiently serious* violation of the prohibition contained in art 2(4) of the Charter of the UN”.<sup>107</sup>

## II. Character, Gravity and Scale

As stated above, the terms “character, gravity and scale” are of little assistance in deciding whether humanitarian intervention is a “manifest violation”. It is difficult to distinguish humanitarian intervention from an act of aggression on its “scale” as it can involve armed force to a similar extent as an aggressive use of force.<sup>108</sup> Moreover, it is difficult to judge whether a humanitarian intervention could come under the “gravity” component as it would depend on what factors one takes into account, as well as their interpretation. Oxford dictionary defines “gravity” as seriousness, nature, significance or consequences.<sup>109</sup> While some may consider these

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<sup>103</sup> SWGCA Report 2008, above n 96, at [26]; Special Working Group on the Crime of Aggression *Report of the Special Working Group on the Crime of Aggression* at [13], ICC-ASP/7/20/Add.1 (2009) [SWGCA Report 2009].

<sup>104</sup> *Nicaragua*, above n 14, at [191].

<sup>105</sup> *Oil Platforms Case (Islamic Republic of Iran v United States of America) (Judgement)* [2003] ICJ Rep 161 at [51].

<sup>106</sup> Wilmschurst, above n 102. The distinction was based on UNGA Resolution 2625, above n 46.

<sup>107</sup> International Law Commission “Draft Code of Crimes against the Peace and Security of Mankind” (1996) 2(2) Yearbook of the International Law Commission 17 at [43] (emphasis added).

<sup>108</sup> Sean Murphy “Criminalizing Humanitarian Intervention” (2009) 41 Case W Res J Int’l L 341 at 362.

<sup>109</sup> Lesley Brown (ed) *Shorter Oxford English Dictionary* (6<sup>th</sup> ed, Oxford University Press, Oxford, 2007).

factors as distinguishing humanitarian intervention from acts of aggression, others could argue that these factors can equally arise in both. For example, in judging the consequences of a humanitarian intervention, one could focus on the devastation and loss of life caused by the armed force used by the interveners in their campaign, whereas another could focus on the good consequences for those people and the surrounding region the interveners went in to protect.

The “character” component is quite similar to gravity, in that it largely relates to the nature of the act, and hence is difficult to assess. Some proponents of humanitarian intervention strongly attest that the nature of such an intervention is humanitarian in contrast to aggressive. Others, however, point out that they both involve armed force and hence cannot be distinguished;<sup>110</sup> as Gandhi states, “...liberty and democracy become unholy when their hands are dyed red with innocent blood”.<sup>111</sup> Thus, it is difficult to determine whether humanitarian intervention could be distinguished from an “act of aggression” based solely on these components, and one must look at the understandings attached to the Review Conference resolution and *travaux préparatoires*.

### *III. Understandings*

The meaning of the threshold requirement is addressed in understandings attached to the text of the amendment in Annex III. The understandings were included during the Review Conference after the insistence of the United States. The United States had been absent during the drafting process of the definition in art 8*bis*, which had been decided prior to the Review Conference.<sup>112</sup> The status of the understandings, however, is not entirely clear. Thus before examining their content, it is important to consider their significance and status in relation to the definition of the crime of aggression in art 8*bis*.

#### *A. Status of the Understandings*

The status of the understandings in Annex III of the Review Conference resolution is unclear.<sup>113</sup> They are not going to be adopted into the Rome Statute, unlike the amendment to the crime of

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<sup>110</sup> May, above n 99, at 329.

<sup>111</sup> MK Gandhi *Non-Violence in Peace and War* (Navajivan Publishing House, Ahmedabad, 1943) vol 1 at 357.

<sup>112</sup> William A Schabas "Kampala Diary 7/6/10" The ICC Review Conference: Kampala 2010 <<http://iccreviewconference.blogspot.com/>>; Joanna Harrington "The Aggression Negotiations at the ICC Review Conference" (2010) EJIL: Talk! Blog of the European Journal of International Law <<http://www.ejiltalk.org/>>. The inclusion of the understandings was a compromise the States Parties were willing to make in the hope that the United States would become less hostile towards the court and join the ICC in the future. The compromise seems worthwhile given that they have changed their position towards the ICC from “hostile” to “polite cooperation”.

<sup>113</sup> Understandings as an interpretative aid are used in a similar way in the United Nations Convention on Jurisdictional Immunities of States and Their Property (GA Res 59/38, A/59/49 (2004)) where they also appear in an Annex. This Convention can be distinguished from the crime of aggression, however, as the understandings are

aggression in Annex I.<sup>114</sup> Hence, they will not form part of the “Applicable Law” under art 21(1)(a) of the Rome Statute.<sup>115</sup>

Reservations to the Rome Statute are prohibited.<sup>116</sup> Thus the understandings can only be taken to be interpretative understandings to the crime of aggression amendment to the extent that they do not seek to limit that state’s obligations under the Statute.<sup>117</sup> As interpretative understandings, they are limited to the individual state which lodges it, and are not binding.<sup>118</sup> If, however, enough States Parties adopt the understandings, they may be taken into account as “context” under art 31(2) Vienna Convention on the Law of Treaties (VCLT),<sup>119</sup> reflecting the parties’ general understanding of the scope of the amendment definition.<sup>120</sup> Under art 31(1) VCLT “a treaty must be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

While the understandings were “adopted by consensus” at the Review Conference, this does not indicate that all the parties intended to have the scope of the definition qualified by them. As is usual with multilateral treaty conferences, the understandings were added at the eleventh hour and for many states it was a matter of accepting them to get the amendment through so as to avoid delaying the progress.<sup>121</sup> Moreover, not all the States Parties were present at the time of the

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directly referred to by an article within the Convention. In contrast the understandings in Annex III are not and will not be attached to the Rome Statute and nor are they referred to in the crime of aggression.

<sup>114</sup> This is made clear as there is no ratification process set out for Annex III as there is for Annex I in para 1 of the Review Conference resolution, see attached Appendix.

<sup>115</sup> Rome Statute, above n 95, art 21(a), states “The Court shall apply: [i]n the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence”. The understandings do not come within any of these. Article 21(1)(b) states, “The Court shall apply, [i]n the second place, where appropriate, applicable treaties and the principles and rules of international law...” Therefore, the VCLT can be applied as an “applicable treaty” to establish the status of the understandings.

<sup>116</sup> Ibid, art 120 states, “No Reservation may be made to this Statute”. Despite this, interpretative declarations have been lodged with the Registrar of the ICC.

<sup>117</sup> William Schabas *An Introduction to the International Criminal Court* (3<sup>rd</sup> ed, Cambridge University Press, Cambridge, 2007) at 187. While reservations are formally recognised under the VCLT in arts 2, 19-23, interpretative declarations or understandings are not recognised under the VCLT, see Frank Horn *Reservations and Interpretative Declarations to Multilateral Treaties* (Elsevier Science Publishers BV, Amsterdam, 1988) at 237-8.

<sup>118</sup> As interpretative declarations and understandings are not legally recognised the Court is not bound by them; see *ibid*, Horn.

<sup>119</sup> Vienna Convention on the Law of Treaties, above n 18.

<sup>120</sup> Ibid, art 31(2) states, “[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; or (b) any instrument made by one or more of the parties which is “accepted by the other parties” in connection with the treaty”.

<sup>121</sup> William A Schabas "Success (12 June 2010)" The ICC Review Conference: Kampala 2010 <<http://iccreviewconference.blogspot.com/>>; Interview with Kampala Review Conference Delegate who wished to remain anonymous (Laurie O’Connor, personal communication, 27 September 2010) [Interview with Delegate]. Four new papers were circulated during the final day of the Conference (11 June 2010) and many of the decisions were made behind closed doors between the large players of the ICC. It must also be noted that it was the United States, a non-State Party with no voting rights at the Assembly of States Parties or Review Conference, which pushed to have the understandings included.

consensus vote.<sup>122</sup> Thus, the fact that the understandings were adopted by consensus at the Review Conference does not mean that they can be included as “context” in the interpretation of the crime of aggression, as it does not fulfil the requirements of art 31(2) VCLT.<sup>123</sup>

It is at the point of ratification that the intentions of the parties regarding the understandings may be made clear. In ratifying the amendment, a state may lodge an interpretative declaration regarding the understandings: it may expressly reject them, expressly accept them, or stay silent on the matter altogether. If enough states were to accept the understandings explicitly, then this may be taken into account as casting light on the purpose. If they are rejected, the understandings will have no effect on the scope of the crime of aggression.<sup>124</sup> If states were to ratify the amendment without indicating their views on the understandings, however, it is unclear what their status would be.

In determining the status of the understandings, the Court may consider the adoption by consensus and the fact that states did not explicitly reject the understandings as evidence supporting the understandings as “context” in interpreting the amendment. However, the *travaux préparatoires*,<sup>125</sup> indicate that those pressing for the inclusion of the understandings at the Conference were non-States Parties and that many of the States Parties did not necessarily agree with the understandings. This would support the argument that the understandings should not be regarded as “context”.<sup>126</sup>

It is uncertain what status the understandings will have on the meaning of the manifest threshold. While they are not legally binding, there is still value in examining their content, as if enough states accept them to reflect the States Parties’ general understanding or the provision then they will be taken into account.

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<sup>122</sup> While the understandings were adopted by consensus, there were only about 80 of the 111 States Parties present at the consensus vote; *ibid*, Schabas.

<sup>123</sup> The understandings as adopted at the Review Conference cannot come within art 31(2) VCLT. The understandings were not an agreement made between “all the parties” under (a) as not all the States Parties to the ICC were present at the consensus vote, and nor have they been “accepted by the other parties” under (b) as “approval of an interpretative declaration shall not be inferred from the mere silence of a state...” (Guidelines on Reservations to Treaties *International Law Commission* Guideline 2.9.9 para 3, A/CN.4/L.744 (2009)). See Kevin Jon Heller "Why the VCLT Does Not Save Understanding Seven" (2010) *Opinio Juris* <<http://opiniojuris.org/>>; Kevin Jon Heller "Are the Aggression ‘Understandings’ Valid?" (2010) *Opinio Juris* <<http://opiniojuris.org/>>. Contrast, Marko Milanovic "Response to Kevin Jon Heller 'Why the VCLT Does Not Save Understanding Seven'" (2010) *Opinio Juris* <<http://opiniojuris.org/>>; Harrington, above n 112.

<sup>124</sup> It appears that many states do not agree with the understandings and hence this is a likely possibility. Schabas above n 121; Interview with Delegate, above n 121.

<sup>125</sup> Vienna Convention on the Law of Treaties, above n 18, art 32, states “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work or the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of art 31...”

<sup>126</sup> Israel insisted at the resolution’s adoption that the “understandings” are an “integral part of the definition itself”. Israel, like the US, is also not a State Party to the ICC. Most states were against the idea of the understandings proposed by the US, see Schabas, above n 121; Interview with Delegate, above n 121.

## ***B. Content of Understandings***

The content of Understandings Six and Seven help interpret the threshold requirement in art 8bis and are important when determining whether humanitarian intervention would come within the “manifest” threshold. While in their original drafts they would have significantly raised the threshold, they were diluted considerably at the Review Conference.

Understanding Six states:<sup>127</sup>

It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

The scope of Understanding Six was intended by the United States to be much wider: it originally stated that the determination of whether an act of aggression has been committed “requires consideration of all the circumstances of each particular case, *including the purposes for which force was used...*” This would have allowed humanitarian motive to be taken into account and would have excluded bona fide humanitarian intervention from the scope of the crime of aggression. This section of the understanding was dropped, however, after the United States failed to justify its inclusion on existing international law.<sup>128</sup>

The United States proposal also originally stated “*only the* most serious and dangerous forms of illegal use of force constitute aggression” which would have raised the threshold of the crime of aggression considerably.<sup>129</sup> This was changed to more accurately reflect Resolution 3314: “aggression is the most serious and dangerous illegal use of force”, which is consistent with the distinction from the *Nicaragua* case that some uses of force are more “grave” than others.<sup>130</sup> This does not assist in discovering whether humanitarian intervention reaches this threshold, though, as it does not distinguish what the most serious and dangerous uses of force are.

The reference to the “gravity of the acts concerned and their consequences”, could potentially exclude humanitarian intervention. As stated above, it is possible to view the consequences of a humanitarian intervention as positive, given that it puts an end to widespread genocide and crimes against humanity (the very crimes that the Rome Statute aims to punish and prevent).<sup>131</sup> However, the inclusion of the last phrase: “in accordance with the Charter of the United Nations”

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<sup>127</sup> Understandings, see attached Appendix, Annex III.

<sup>128</sup> Schabas, above n 82.

<sup>129</sup> Ibid, (emphasis added).

<sup>130</sup> *Nicaragua*, above n 14, at [191].

<sup>131</sup> Rome Statute, above n 95, preamble, states one of the aims of the ICC is to “contribute to the prevention of such crimes”. Humanitarian intervention does not only prevent the crimes that the Rome Statute aims to prevent and punish, but it also helps bring the perpetrators of those crimes to justice by helping detain and arrest them.

implies that these factors can only be taken into account to the extent that the act is allowed under the UN Charter.<sup>132</sup> This last phrase was added to the United States proposal by other States Parties to narrow the scope of the understanding and widen the Court's jurisdiction. As humanitarian intervention is not allowed under the Charter, it will not be excluded under this understanding.<sup>133</sup>

Understanding Seven also relates to the threshold and states:<sup>134</sup>

It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.

There is debate whether two of the three criteria of character, gravity and scale would suffice or whether all three are required. While the first sentence of Understanding Seven suggests that all three criteria must be at work, some commentators believe that the second sentence suggests that two will do.<sup>135</sup> It is questionable whether the three criteria can really be separated in practice given their inter-relatedness which indicates that the first interpretation requiring all three components to be sufficient, should be taken. The original United States proposal stated that "each of the three components of character, gravity, and scale must *independently* be sufficient to justify a 'manifest' determination".<sup>136</sup> While it may be suggested that the exclusion of the words "each of" and "independently" from the final text implies that not all three components are required, the drafting of art 8*bis* demonstrates that the manifest violation is intended to be reached by the cumulative effect of the components and such an interpretation of the understanding would be inconsistent with this.<sup>137</sup> The Chatham House also noted that the indication that all three are required is the "better view".<sup>138</sup>

Whilst the understandings purport to make clearer the meaning of the "manifest" violation threshold, it is doubtful as to whether they actually assist in the interpretation of art 8*bis*.

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<sup>132</sup> The inclusion of this last phrase "in accordance with the Charter of the United Nations" was included at the insistence of Iran to limit its scope back to what is permitted under the UN Charter; William A Schabas "Kampala Diary 10/6/10" The ICC Review Conference: Kampala 2010 <<http://iccreviewconference.blogspot.com/>>.

<sup>133</sup> See Chapter 1.

<sup>134</sup> Understandings, see attached Appendix, Annex I.

<sup>135</sup> William A Schabas "Kampala Diary 9/6/10" The ICC Review Conference: Kampala 2010 <<http://iccreviewconference.blogspot.com/>>; Akande, above n 102.

<sup>136</sup> Ibid, Schabas (emphasis added); John Cerone "The Definition of Aggression and the US 'Understandings'..." (2010) American Society of International Law (ASIL) Blog - the International Criminal Court Review Conference <<http://iccreview.asil.org/>>.

<sup>137</sup> During discussions at the Review Conference one delegation argued that requiring all three of the components to be independently sufficient, was inconsistent with the actual definition in art 8*bis* as from its drafting it was intended that the manifest threshold would be reached by the cumulative effect of the components; *ibid*, Cerone.

<sup>138</sup> Elizabeth Wilmshurst, above n 102.

Therefore, one must turn to the *travaux préparatoires* to shed some light on whether humanitarian intervention is within the scope of the threshold.

#### *IV. Travaux Préparatoires*

While the *travaux préparatoires* are a “supplementary means of interpretation” under the VCLT,<sup>139</sup> no interpreter of a treaty would deliberately ignore any material which can usefully serve as a guide in establishing the meaning of the text of which they are confronted.<sup>140</sup> Given that the meaning of the threshold requirement is not clear from the text of art 8*bis* or from the understandings, the *travaux préparatoires* must be examined to establish whether humanitarian intervention would reach the manifest threshold.

The *travaux préparatoires* confirm that the threshold requirement involves consideration as to the legal character of the act of aggression, in the sense that the act must be of a character that is indisputably an act of aggression.<sup>141</sup> This was reiterated on several occasions in the Special Working Group on the Crime of Aggression (SWGCA) where participants expressed the wish to exclude “borderline cases”.<sup>142</sup> This reference to “borderline” refers to legally borderline or controversial cases, where uses of force are arguably permissible under international law. This interpretation is confirmed by the SWGCA’s reference to the exclusion of cases “where there might be a degree of uncertainty (legality of the action)”,<sup>143</sup> and on several occasions it referred to situations that “could fall within a legal grey area”.<sup>144</sup> This interpretation is further confirmed where the SWGCA stated that a mistake of law would not be easily put forward as a defence:<sup>145</sup>

[M]istake of law arguments would be very difficult to advance...given that only “manifest” Charter violations, and no borderline cases, would fall under the Court’s jurisdiction due to the threshold requirement in article 8*bis*, paragraph 1.

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<sup>139</sup> Vienna Convention on the Law of Treaties, above n 18, art 32.

<sup>140</sup> IM Sinclair *The Vienna Convention on the Law of Treaties* (Manchester University Press, Manchester, 1973) at 72.

<sup>141</sup> Andreas Paulus "Second Thoughts on the Crime of Aggression" (2010) 20(4) EJIL 1117 at 1121; James Potter "The Threshold in the Proposed Definition of the Crime of Aggression" (2008) 6 New Zealand Yearbook of International Law 155 at 161.

<sup>142</sup> Special Working Group on the Crime of Aggression *Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression* at 6, ICC-ASP/5/SWGCA/INF.1 (2006) [SWGCA Informal 2006]; Special Working Group on the Crime of Aggression *Report of the Special Working Group on the Crime of Aggression* at 22, ICC-ASP/7/20/Add.1 (2009) [SWGCA Report 2009].

<sup>143</sup> ICC-ASP/4/32, Annex II.D at [3] in Potter, above n 141, at 166.

<sup>144</sup> Special Working Group on the Crime of Aggression *Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8 to 10 June 2009* at [24] ICC-ASP/8/SWGCA/INF.2 (2009) [SWGCA Informal 2009]; SWGCA Report 2008, above n 96, at [24].

<sup>145</sup> *Ibid*, SWGCA Informal 2009, at [21].

If controversial cases of use of force, such as humanitarian intervention, were to potentially reach the threshold, surely the possibility of a defence based on mistake of law would be available. Given the controversy surrounding the legality of humanitarian intervention, this would appear to be a justified defence to put forward. That the SWGCA make clear that mistake of law would be difficult to advance, implies that a situation of humanitarian intervention (or any controversial use of force) would not meet the threshold.

This interpretation is parallel with the origin of the threshold clause, which comes from a German proposal.<sup>146</sup> When introducing the proposal, Germany explained that the definition should be focused on the “obvious and indisputable cases”, citing aggression committed by Hitler and by Saddam Hussein.<sup>147</sup> It was also noted that attacks should be “clearly without any justification under international law”.<sup>148</sup> There is a strong argument that humanitarian intervention does have some justification under international law given the international consensus on its legitimacy.<sup>149</sup> At the very least, it would not be viewed as an “obvious or indisputable case” of aggression.

A number of commentators have also interpreted the amendment and *travaux préparatoires* as demonstrating the intent that the crime of aggression embraces only nontrivial and clear-cut violations of the UN Charter.<sup>150</sup> Some have even specifically stated that humanitarian intervention would not meet the threshold requirement of art 8bis.<sup>151</sup> During an informal Panel Discussion at the Kampala Review Conference, Michael Scharf stated that cases of true humanitarian intervention would not come within the “manifest” qualifier.<sup>152</sup> A member of the SWGCA, Claus Kress, has also stated “a genuine humanitarian intervention, such as the 1999 NATO air campaign in Kosovo, is also open to genuine debate and is thus excluded from the scope of the draft of art 8bis”.<sup>153</sup>

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<sup>146</sup> *Proposal by Germany: The Crime of Aggression A further Informal Discussion Paper* PCNICC/200/WGCA/DP.4 (2000).

<sup>147</sup> *Compilation of Proposals on the Crime of Aggression submitted at the Preparatory Committee on the Establishment of an International Criminal Court (1996-1998), the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998) and the Preparatory Commission for the International Criminal Court (1999)*, at [6], PCNICC/1999/INF/2 (1999).

<sup>148</sup> *Ibid.*

<sup>149</sup> See Chapter 1.

<sup>150</sup> Michael J Glennon "The Blank-Prose Crime of Aggression" (2010) 35 YJIL 71 at 98; Kress, above n 87, at 1138; Potter, above n 141, at 166; Michael Scharf "Live from Kampala: The Aggression Debate and the "Manifest" Qualifier" (2010) American Society of International Law (ASIL) Blog - The International Criminal Court Review Conference <<http://iccreview.asil.org/>>; Jennifer Trahan "Remarks on Kampala as observer" in William A Schabas "Aftermath of Kampala (22 June 2010)" The ICC Review Conference: Kampala 2010 <<http://iccreviewconference.blogspot.com/>>; Robert Heinsch "The Crime of Aggression After Kampala: Success of Burden for the Future?" (2010) 2(2) GoJIL 713 at 730.

<sup>151</sup> *Ibid.*, Scharf, Trahan, Potter; Kress, above n 87, at 1138.

<sup>152</sup> *Ibid.*, Scharf.

<sup>153</sup> Kress, above n 87, at 1140-1141.



Some commentators argue that the term “character” is so indeterminate that it is almost meaningless and will lead to the determination of what warrants treatment as an individual crime to be entirely in the eye of the beholder (in this case, the Prosecutor and judges of the ICC).<sup>154</sup> They question how a court of law is meant to weigh up political motives in considering the qualitative threshold, let alone prevent abuse.<sup>155</sup> However, “manifest” is an “objective” qualification as set out in para 3 of the special introduction to the Elements of Crimes and Elements 5 and 6.<sup>156</sup> This is a “reasonable leader” standard similar to “reasonable soldier” in the concept of manifestly unlawful orders in art 33 of the Rome Statute.<sup>157</sup> So whether the act of aggression constituted, by its character, gravity and scale, a “manifest” violation is decisive rather than the perpetrator’s subjective legal assessment.<sup>158</sup> Also, the qualitative threshold is to prevent the “grey areas” of international law being prosecuted, and any reasonable international lawyer can easily identify those instances which fall within this and those which do not.<sup>159</sup> Identification of whether a use of force is within the grey areas is matter of fact and does require questions of motive. One notable commentator, Elizabeth Wilmshurst, has compiled a list of what constitutes the “grey area” of international law and included genuine humanitarian intervention along with anticipatory self-defence, forcible reactions to a “minor” uses of force by another state, armed intervention to rescue nationals abroad, and extraterritorial use of force against a massive non-state armed attack.<sup>160</sup>

There was a further understanding proposed by the United States which would have explicitly excluded humanitarian intervention from the crime of aggression which read:<sup>161</sup>

It is understood that, for the purposes of the Statute, an act cannot be considered to be a manifest violation of the United Nations Charter unless it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith, and thus an act undertaken in connection with an effort to prevent the commission of any of the crimes contained in Articles 6, 7 or 8 of the Statute would not constitute an act of aggression.

This understanding clearly would have protected humanitarian intervention. It did not, however, make it to the discussion table as it was met with “significant reluctance”.<sup>162</sup> But what are the

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<sup>154</sup> Paulus, above n 141, at 1121.

<sup>155</sup> Ibid, at 1124.

<sup>156</sup> Element 3 states: “[t]he term “manifest” is an objective qualification”, see attached Appendix.

<sup>157</sup> SWGCA Informal 2009, above n 144, at [25]. See also, Gerhard Kemp *Individual Criminal Liability for the International Crime of Aggression* (Hart Publishing Ltd, Oxford, 2010) at 237.

<sup>158</sup> Ibid, SWGCA Informal 2009. A parallel can be found in the “special” introduction of Elements of Genocide.

<sup>159</sup> Kress, above n 87, at 1140.

<sup>160</sup> Elizabeth Wilmshurst “Aggression” in R Cryer and others (eds) *An Introduction to International Criminal Law and Procedure* (2007) at 268; Kress, above n 87, at 1140.

<sup>161</sup> Schabas, above n 112.

implications of this understanding being proposed and dropped at the Review Conference on whether humanitarian intervention would come under the threshold? The answer is that there are none. It is likely that many states feared that such an understanding would be prone to abuse, with states claiming they were trying to stop crimes against humanity as a justification to intervene for other purposes such as to change the regime.<sup>163</sup> It is recalled by many states that Hitler claimed to be engaged solely in humanitarian efforts in Germany's invasion of Czechoslovakia.<sup>164</sup> William Schabas also used the example where he thought the United States and United Kingdom would claim they were trying to prevent crimes against humanity by the Saddam regime to justify their invasion of Iraq.<sup>165</sup> A genuine humanitarian intervention would be excluded via the threshold anyway, and therefore such an understanding is unnecessary. This reinforces the interpretation that the threshold excludes legally controversial uses of force such as humanitarian intervention.

## V. *Individual Requirements*

The crime of aggression is a leadership crime.<sup>166</sup> This is reflected in art 8*bis* where it states that to be liable, the crime must be committed “by a person in a position effectively to exercise control over, or to direct the political or military action of a State”.<sup>167</sup> The leader must have undertaken either the, “planning, preparation, initiation or execution”<sup>168</sup> of an act of aggression as under art 8*bis*.<sup>169</sup> A person could not be prosecuted for simply planning an act of aggression (conspiracy) as art 8*bis* requires that the act of planning or preparation must be followed by an

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<sup>162</sup> It is difficult to comprehend the determination of the “purpose” of an act of aggression being “objectively evident”. So too is it difficult to judge if a state is conducting itself in “good faith”. These were just some of the reasons many delegates disagreed with this understanding, see Cerone, above n 136; Schabas, above n 135.

<sup>163</sup> Schabas, above n 112.

<sup>164</sup> Brownlie, above n 22, at 339-340.

<sup>165</sup> Schabas, above n 112.

<sup>166</sup> Mohammad M Goma "The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime" in Mauro Politi and Giuseppe Nesi (eds) *The International Criminal Court and the Crime of Aggression* (Ashgate Publishing Limited, Hants, 2004) 55 at 64, 66; Dinstein, above n 87, at [5]. The leadership nature was reflected in the International Military Tribunals (IMT) which held that individual liability for crimes against peace can only be incurred by high-ranking officials; it was reflected in the *High Commands Case* at [488] which states that criminality is contingent on the actual power of an individual ‘to shape or influence’ the policy of his/her country; it was also embedded in art 16, 1996 Draft Code of Crimes against the Peace and Security of Mankind, above n 107.

<sup>167</sup> It was noted by the SWCGA that the language is sufficiently broad to include persons who are not formally part of the relevant government, such as industrialists: see SWGCA Report 2009, above n 142, at [25].

<sup>168</sup> Article 8*bis*(2), see attached Appendix. The words are very similar to art 6(a) of London Charter of IMT which stated “planning, preparation, initiation or waging of war of aggression”, and the ILC 1996 Draft Code which also encompassed concepts of “planning, preparation, initiation or waging of aggression”. The different stages apply to different stages of criminal course of action. Dinstein, above n 5, at 132.

<sup>169</sup> Article 8*bis*, attached Appendix, Annex I.

*actual* act of aggression.<sup>170</sup> Nor could an attempt of the crime of aggression be prosecuted as this would not reach the manifest threshold.<sup>171</sup>

There is no specific mental element (*mens rea*) within the amendment for the crime of aggression and therefore art 30 of the Rome Statute applies.<sup>172</sup> This requires that the perpetrator intended to “plan, prepare, initiate or execute” the act of aggression.<sup>173</sup> They must also have knowledge as to the factual situation;<sup>174</sup> however, there is no requirement to prove that the perpetrator made a legal evaluation as to whether the use of armed force was inconsistent with the UN Charter<sup>175</sup> or to the “manifest” nature of the violation.<sup>176</sup> Hence no specific “aggressive intent” is required and humanitarian intervention could not be excluded on this ground.

## VI. Conclusion

On the face of the definition of art 8*bis*, it is unclear whether a humanitarian intervention would reach the “manifest violation” threshold. The reference to “character, gravity and scale” are particularly vague on their face and hence examination of the understandings and *travaux préparatoires* is further required to find out the scope of the threshold of the crime of aggression. The understandings in Annex III are not legally binding but will possibly be considered by the Court as part of the context in interpreting the definition if it is found that they reflect the general understanding of the States Parties of the provision. These understandings, however, do not raise the manifest threshold as was originally intended by the United States nor do they help determine whether humanitarian intervention would come within the threshold. Therefore an examination of the *travaux préparatoires* is necessary to discover the intended scope of the threshold requirement. This demonstrates that the “grey areas” of law are not intended to reach the

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<sup>170</sup> SWGCA Report 2008, above n 96, at [32].

<sup>171</sup> Rome Statute, above n 95, art 25(3)(f); SWGCA Informal 2007, above n 93, at [13]; SWGCA Informal 2006, above n 142, at [9].

<sup>172</sup> *Ibid*, art 30 states, “1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge; 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events; 3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”

<sup>173</sup> Element 1 of the Elements of Crimes sets out that the crime of aggression is a conduct crime where it states, “[t]he perpetrator planned, prepared, initiated or executed an act of aggression” and therefore the mental element from art 30(2)(a) applies; see attached Appendix, Annex II.

<sup>174</sup> This is laid out in element 4 which states, “[t]he perpetrator was aware of the factual circumstances that established such a use of armed force was inconsistent with the Charter of the United Nations.” Also in Element 6, which states, “[t]he perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations”; see attached Appendix, Annex II.

<sup>175</sup> Introduction to the Elements of Crimes, para 2, see attached Appendix, Annex II.

<sup>176</sup> *Ibid*, para 4, see attached Appendix, Annex II.

manifest threshold. Therefore, it is highly unlikely that a true case of humanitarian intervention would reach the “manifest” threshold and come under the scope of art 8*bis*(1).

The interpretation of the threshold clause will ultimately be for the Court’s judges to decide. On the plain reading of the text, it could be read that any obvious violation of the UN Charter would reach the manifest threshold. Given the possibility that the judges of the Court may take this interpretation, the next chapter will go on to investigate whether jurisdiction would arise for a case of humanitarian intervention.

## Chapter Three

### Jurisdiction

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Even if humanitarian intervention is found to be an “act of aggression” under art 8*bis*(2), and a “manifest violation” of the UN Charter under art 8*bis*(1), jurisdiction must first be invoked before leaders of humanitarian intervention could be prosecuted for the crime of aggression. There are three main routes which enable the Court to exercise jurisdiction in the ICC: UNSC referrals, state referrals and *proprio motu* (Prosecutor initiated investigations).<sup>177</sup> This chapter will examine these different routes available under art 15*bis* and art 15*ter* of the Review Conference resolution. In doing so, it will make practical assessments as to whether situations of humanitarian intervention are likely to lead to an invocation of jurisdiction and come before the Court. Before the ICC can exercise jurisdiction over the crime of aggression, however, the amendment must enter into force. Therefore, this chapter will first examine the hurdles which must be passed for the amendment to enter into force.

#### I. Entry into Force

Leading up to the Review Conference there was much discussion about the correct amendment provision of the Rome Statute to apply to the amendment of the crime of aggression: art 121(4) or art 121(5).<sup>178</sup> Article 121(4), requires that seven eighths of States Parties ratify or accept the amendment before it enters into force; however, once it comes into force, the Court has jurisdiction over all States Parties (including those which have not ratified).<sup>179</sup> In contrast, art 121(5) states:<sup>180</sup>

Any amendment to articles 5, 6, 7 and 8 of this Statute *shall enter into force for the States Parties which have accepted the amendment* one year after the deposit of their instruments of ratification or acceptance. *In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction* regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.

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<sup>177</sup> Rome Statute, above n 95, art 13.

<sup>178</sup> SWGCA Informal 2009, above n 144, at 21; SWGCA Report 2009, above n 142, at [32]-[43]; DM Ferencz “Bringing the Crime of Aggression within the Active Jurisdiction of the ICC” (2009) 42 *Case W Res J Int’l L* 531 at 533.

<sup>179</sup> Rome Statute, above n 95, art 121(4) states, “*Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments or ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them*” (emphasis added).

<sup>180</sup> (Emphasis added); the last sentence of art 121(5) was poorly drafted as it is contrary to art 12 of the Rome Statute. It was an anomaly resulting from the rushed drafting process at Rome.

Under strict treaty interpretation, amendments to any article other than the subject matter jurisdictional arts (5, 6, 7, and 8) should fall under the art 121(4) ratification process. While the crime of aggression amends arts 5 and 8, it also entails amendments to other arts in the Rome Statute, including, arts 9, 15, 20, and 25<sup>181</sup> and the Elements of Crimes.<sup>182</sup> Therefore, under strict construction, art 121(4) applies and there must be seven eighths of States Parties to ratify the amendment before it comes into force. This was stressed repeatedly by the Japanese delegation during the Review Conference, stating that any amendment of the jurisdictional filters of the Treaty should adhere to the high bar of art 121(4).<sup>183</sup> In contrast, the States Parties indicated that art 121(5) was the applicable provision for entry into force when they stated in para 1 of the Review Conference resolution:<sup>184</sup>

The Review Conference...Decides to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court...the amendments to the Statute contained in Annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force *in accordance with article 121 paragraph 5...*

There is good justification behind applying art 121(5). Given that all the amendments were to bring a “new treaty crime” amendment into force, they should all be clumped together into one package to be covered by art 121(5) without requiring seven eighths of States Parties to ratify.<sup>185</sup> This was the intention of the art 121(5).<sup>186</sup> From a practical approach, any amendment to arts 5, 6, 7, or 8 would necessarily require amending other provisions within the Rome Statute to make it a coherent document, and therefore if the first interpretation above were to be taken, it would make 121(5) redundant.<sup>187</sup> Consequently, the interpretation that (parts of) the amendment of the crime of aggression are subject to art 121(4) appears unsound.<sup>188</sup>

Despite the clear intention of the States Parties at the Review Conference that art 121(5) is to apply, this is unlikely to prevent some states which are unhappy with the crime of aggression from arguing over the next several years that the Review Conference resolution is not binding,

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<sup>181</sup> See attached Appendix, Annex I.

<sup>182</sup> Ibid, Annex II.

<sup>183</sup> William A Schabas "An Assessment of Kampala: the Final Blog (17 June 2010)" The ICC Review Conference: Kampala 2010 <<http://iccreviewconference.blogspot.com/>>; Akande, above n 102; while art 121(4) requires a high bar of seven eighths of States Parties to ratify before it comes into force, art 121(5) does not require this and so is much faster in application, however, it has limited application. While Japan strongly opposed the decision to adopt the crime of aggression in accordance with art 121(5), it obviously did not feel so strongly as to block the consensus. It did, however, make several speeches as to this point.

<sup>184</sup> Hence, at no point requiring seven eighths of States Parties to ratify the Amendment before it comes into force.

<sup>185</sup> David Scheffer "Adoption of the Amendments on Aggression to the Rome Statute of the International Criminal Court" (2010) American Society of International Law (ASIL) Blog - The International Criminal Court Review Conference <<http://iccreview.asil.org/>>; Akande, above n 102.

<sup>186</sup> Schabas, above n 117, at 190-1 states that art 121(5) is intended for “new treaty crimes”.

<sup>187</sup> Scheffer, above n 185.

<sup>188</sup> Ibid.

and that seven eighths of States Parties are required before the crime of aggression enters into force.<sup>189</sup> It is also possible that defence counsel in the first case of aggression before the ICC will raise the argument that seven eighths of States Parties are required as under art 121(4) before the amendment enters into force and therefore, the Court does not have jurisdiction.<sup>190</sup> The Court is, however, likely to follow the Review Conference resolution given the clear indication of the States Parties' intentions.<sup>191</sup>

Assuming that all the amendments enter into force in accordance with art 121(5), jurisdiction will be exercised "one year after the ratification or acceptance of the amendments by 30 States Parties".<sup>192</sup> It is likely that this will be achieved by 2017.<sup>193</sup> It is also "subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to this Statute".<sup>194</sup> This means that the jurisdiction will be delayed for at least seven years, and is conditional upon 30 States Parties accepting the amendment and a further adoption by at least two thirds of the States Parties.<sup>195</sup> This chapter will continue on the assumption that these hurdles are overcome and the crime of aggression enters into force.

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<sup>189</sup> Akande, above n 102. Arguably, all that happened at Kampala was that a text was adopted (as under art 9 of the VCLT), and the adoption of a text does not usually create obligations on States, or indeed on the Court, that allows the bypassing of the binding text of art 121 as it exists. Japan is just one example which is likely to take this position.

<sup>190</sup> Scheffer, above n 185.

<sup>191</sup> Not only does para 1 of the Review Conference resolution state that the amendment enters into force in accordance with art 121(5), but para 4 of art 8*bis* and art 15*bis* would not be consistent with the amendment coming into force under art 121(4). This is because para 4 states that the jurisdiction shall be exercised after the ratification or acceptance of the amendment by 30 States Parties, which would not be consistent with the seven eighths required under art 121(4). Therefore, art 121(5) must be the amendment provision to apply for the entry into force of the crime of aggression.

<sup>192</sup> Article 15*bis*(2) and art 15*ter*(2), see attached Appendix, Annex I.

<sup>193</sup> At the Review Conference, before it was settled the number of States Parties that would be required before the Amendment would enter into force, there was an unofficial indication by states to the Chair of the Conference. Hence it may be concluded that it is likely that 30 States Parties will ratify the Amendment. Commentators present at the Review Conference are also confident that this hurdle will be surpassed, see Schabas, above n 183; Scheffer, above n 185; Delegate Interview, above n 121.

<sup>194</sup> Article 15*bis*(3) and art 15*ter*(3), see attached Appendix, Annex I. Adoption of an amendment requires consensus or where this cannot be reached, two-thirds majority of States Parties as stated in art 121(3) Rome Statute, above n 93.

<sup>195</sup> While some states and commentators saw this as an unnecessary delay on criminalising an offence which had already taken an additional decade to be added into the Statute (see Ferencz above n 178, at 281-2; Schabas, above n 183); others saw it as beneficial in allowing States Parties time to comply with complementarity and to give the Court more time to establish itself before introducing this new, more controversial and political, crime (see Heinsch, above n 150, at 738).

## II. United Nations Security Council Referral

Article 15*ter* gives the UNSC the power to refer situations to the Court, in accordance with art 13(b) of the Rome Statute.<sup>196</sup> Article 13(b), empowers the UNSC acting under Chapter VII of the UN Charter, to refer a situation in any state to the Court regardless of whether it has signed the Rome Statute or not.<sup>197</sup> To refer a situation, the Council need not have determined that an act of aggression has taken place, but must have a majority, including the votes of all the five permanent members.

From a practical approach, however, obtaining consensus to refer a situation to the Court for a case of aggression, let alone a case of humanitarian intervention, will be no mean feat. Firstly, any situation involving any one of the permanent members of the UNSC will never be referred to the Court as they retain the ability to veto such action.<sup>198</sup> Similarly, they could veto a resolution referring a situation involving one of their allies.<sup>199</sup> Given the political nature of an act of aggression - because it involves inter-state conflict in contrast to the other crimes within the ICC's jurisdiction which are typically intra-state - it will be difficult to gain the consensus needed.<sup>200</sup> Members of the UNSC will take sides according to their alliances and their national interests. History has demonstrated that the UNSC has seldom made determinations of aggression. It has only passed 31 resolutions expressly condemning aggression since its inception,<sup>201</sup> whereas there have been many *prima facie* acts of aggression.<sup>202</sup> Akin to the lack of determinations of aggression, there are likely to be few cases of aggression referred to the Court by the UNSC.

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<sup>196</sup> Article 15*ter*(1) states, “[t]he Court may exercise jurisdiction over the crime of aggression in accordance with article 13(b), subject to the provisions of this article”, see attached Appendix, Annex I.

<sup>197</sup> Rome Statute, above n 95, art 13(b) states, “The Court may exercise its jurisdiction with respect to a crime referred to in art 5 in accordance with the provisions of this Statute if: (b) A situation in which one or more crimes appears to have been committed is referred to the Prosecutor by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations.”

<sup>198</sup> Kacker, above n 97, at 275-6. Given that the five permanent members of the UNSC are some of the most powerful and wealthy countries in the world, they are likely to have the resources to commit their armed forces to a humanitarian intervention and so a future humanitarian intervention may well involve one of these states.

<sup>199</sup> An example of this was Russia threatening to veto humanitarian action in Kosovo given the alliance it had with Serbia (the permanent member of the UNSC need not veto, it need only threaten to (or indicate it would) veto which would prevent the resolution being put to a vote).

<sup>200</sup> Of the five situations which the Court has prosecuted to date, all involved internal conflict: Uganda, Darfur, Democratic Republic of Congo, Central African Republic and Kenya.

<sup>201</sup> Noah Weisbord “Prosecuting Aggression” (2008) 49(1) Harv Int'l LJ 161, at 169. Nineteen condemning South Africa for aggression against several African States (between 1976 and 1987); six condemning the minority regime of Southern Rhodesia for aggression against various African States (between 1973 and 1979); two condemning acts of aggression perpetrated against Seychelles (in 1981 and 1982); two condemning Israel for aggression against Tunisia (in 1985 and 1988); one condemning aggression against Benin (in 1977); and one condemning Iraq for aggression against diplomatic premises in Kuwait (in 1990).

<sup>202</sup> Iran-Iraq War, Korean War, Falklands War, and operations by Israel, just to name a few.



Similarly, it would be unlikely that the UNSC would refer a *bona fide* humanitarian intervention to the Court. Such intervention, while not attracting consensus as to its legality, generally achieves international consensus as to its legitimacy.<sup>203</sup> Because of this legitimacy, it is unlikely that the UNSC would garner consensus to refer a case of humanitarian intervention to the ICC. UNSC failures to condemn past cases of humanitarian intervention support this conclusion. The proposed resolution by Russia and China condemning NATO's actions in Kosovo was rejected by all but themselves and Namibia.<sup>204</sup> The UNSC never condemned the ECOWAS interventions in Sierra Leone in 1997-8 or Liberia in 1990-2, where it instead validated its actions by retroactively authorizing the ECOWAS operation in Sierra Leone under Chapter VII and "commend[ing]" intervention in Liberia in a speech by the President of the UNSC and two UNSC resolutions.<sup>205</sup> The UNSC did not condemn Tanzania's intervention in Uganda in 1978-9 or the French intervention in the Central African Republic in 1979 to depose of the Bokassa Regime and end the mass atrocities.<sup>206</sup> No resolution was adopted by the UNSC condemning India's action in Pakistan in 1971.<sup>207</sup> A Soviet Union resolution condemning the United States intervention in the Dominican Republic in 1965 was rejected by all but the Soviet Union.<sup>208</sup> There has only been one case where the UNSC did adopt a resolution to condemn a humanitarian intervention, when it adopted a 1990 resolution regarding Vietnam's intervention in Cambodia (in 1979). However, Vietnam's motives were at best only partly humanitarian, and the resolution was aimed primarily at Vietnam's nineteen year occupation of Cambodia rather than the intervention itself.<sup>209</sup> Hence, it is very unlikely that the UNSC would condemn a future *bona fide* humanitarian intervention, let alone refer the case to the ICC to criminalise the leaders of such action.

As jurisdiction is highly unlikely to be invoked under art 15*ter*, a situation of humanitarian intervention would have to be invoked under art 15*bis* in order to reach the Court.

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<sup>203</sup> See discussion in Chapter 1.

<sup>204</sup> SC Draft Res 328, above n 63, at [6].

<sup>205</sup> Breau, above n 15, at 111-112; Chesterman, above n 19, at 134-6, 155-6. The President of the UNSC on the 26 February 1998, stated that the "UNSC commends the important role that the Economic Community of West African States (ECOWAS) has continued to play towards peaceful resolution of this crisis" UN Doc. S/PRST/1999/5; SC Res 1162 of 17 April 1998 and SC Res 1171 of 5 June 1998 also specifically commended ECOWAS's actions in Sierra Leone when it authorised the deployment of UN troops in Sierra Leone.

<sup>206</sup> Ibid, Chesterman, at 78, 81-82.

<sup>207</sup> Ibid, at 74-5.

<sup>208</sup> Ibid, at 70.

<sup>209</sup> Ibid, at 80-81.

### III. State Referral, *Proprio Motu*

For a long time during the drafting of the crime of aggression it was thought that the UNSC would be the only trigger mechanism of jurisdiction.<sup>210</sup> This was because of the UNSC's inherent powers under Chapter VII of the UN Charter to make determinations of the existence of an act of aggression. This was definitely the stance that the permanent members of the UNSC preferred given that their veto power would essentially shield their leaders from ever being prosecuted. Many smaller states, however, did not want the crime of aggression to be limited by the politics of the UNSC and pushed to have state referrals and *proprio motu* prosecutions included as an available path of jurisdiction, as it is for the other crimes under the ICC.<sup>211</sup> This would give states (and the Prosecutor) a potential avenue for referring cases, particularly where the politics of the UNSC would have prevented jurisdiction being invoked. While state referrals and *proprio motu* prosecutions were included in the final amendment, they are subject to some procedural hurdles.

Under art 15*bis* the Court may exercise jurisdiction in accordance with art 13(a), which allows state referrals, and art 13(c) which allows for *proprio motu* prosecutions.<sup>212</sup> This means that a State Party can refer a case or the Prosecutor can investigate a case on their own initiative where the case satisfies the Preconditions to the Exercise of Jurisdiction under art 12 of the Rome Statute.<sup>213</sup> These preconditions require that the crime was committed on the territory of a State Party or by the national of a State Party.<sup>214</sup> There are, however, additional requirements for the amendment. First, as mentioned above, States Parties can only be prosecuted if they have accepted the amendment as stated in art 121(5).<sup>215</sup> Second, there is added immunity for non-States Parties in the crime of aggression where the Court does not have jurisdiction under art 15*bis* over their nationals *or* for crimes committed on their territory.<sup>216</sup> Lastly, under para 4 of art 15*bis* the Court cannot exercise jurisdiction over a State Party that has “previously declared that

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<sup>210</sup> Special Working Group on the Crime of Aggression *Report of the Special Working Group on the Crime of Aggression* at [35]-[38], ICC-ASP/6/SWGCA/1 (2007).

<sup>211</sup> *Ibid.*

<sup>212</sup> Article 15*bis*(1) states “[t]he Court may exercise jurisdiction over the crime of aggression in accordance with art 13, paras (a) and (c), subject to the provisions of this art”, see attached Appendix, Annex I.

<sup>213</sup> Article 15*bis*(4) states “The Court may, in accordance with art 12, exercise jurisdiction over a crime of aggression...”, see attached Appendix, Annex I.

<sup>214</sup> Rome Statute, above n 95, art 12(2).

<sup>215</sup> See above n 184 and accompanying text.

<sup>216</sup> Article 15*bis*(5) states, “[I]n respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory”, see attached Appendix, Annex I. This is different to the ICC’s jurisdiction over other crimes in arts 6, 7 and 8 where it may have jurisdiction over a non-State-Party if a crime was committed on a State Party’s territory or to a State Party’s nationals. Article 15*bis*(5) was unsurprisingly included at the insistence of the United States.

it does not accept such jurisdiction by lodging a declaration with the Registrar”.<sup>217</sup> This has been more commonly referred to as the opt-out provision.<sup>218</sup> The effect of this opt-out provision on the jurisdiction of the Court has been debated by commentators. Accordingly, it is important to examine these arguments so as to establish who will come within the scope of art 15*bis*.

### ***A. Opt-Out Provision***

While the conclusion that a State Party must accept the amendment before the Court can exercise jurisdiction over it appears to be clear from the plain reading of art 121(5),<sup>219</sup> the inclusion of an opt-out provision has led to debate that this may not be the case.

If the interpretation consistent with the plain reading of art 121(5) was taken of art 15*bis*(4), then the ICC will only have jurisdiction under art 15*bis* over States Parties which have accepted the amendment, unless that State Party opts out.<sup>220</sup> This begs two questions. Firstly, what is the point of having an opt-out provision if not all States Parties are bound? Secondly, why would a state bother ratifying the amendment if it was only going to opt out?<sup>221</sup> There is a possible answer to the second question: there may be states which want the UNSC mechanism for the crime of aggression to be enacted, and therefore ratify, but do not want art 15*bis* to be operative for themselves.<sup>222</sup> However, it is not entirely clear whether a state which ratifies but opts out would make up one of the required 30 states parties.<sup>223</sup> It would also be highly unusual for a provision to operate in this manner, and hence this reasoning is wholly unconvincing.

There is evidence to support the interpretation that once the amendment enters into force, it will bind *all* States Parties unless they have opted out. Article 15*bis*(4) speaks of exercising jurisdiction committed by a “State Party”, with no reference to the requirement that the State Party has accepted or ratified the amendment.<sup>224</sup> Indeed, there is no mention anywhere in art 15*bis* of the requirement that a State Party must have accepted the amendment before jurisdiction arises.<sup>225</sup> This indicates that the Court has jurisdiction over any State Party regardless of whether

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<sup>217</sup> Article 15*bis*(4), see attached Appendix, Annex I. While State Parties which have opted out are immune from prosecution, if they were a victim of an act of aggression (and the aggressor state was a State Party) then the Court would have jurisdiction to investigate the situation.

<sup>218</sup> See Schabas, above n 183; Heller, above n 123; Akande, above n 102.

<sup>219</sup> This is normal practice at international law, see complaints jurisdictions in international human rights treaties for example.

<sup>220</sup> Kevin Jon Heller “Opt-Ins and Opt-Outs” (2010) *Opinio Juris* <<http://opiniojuris.org/>>.

<sup>221</sup> Akande, above n 102.

<sup>222</sup> Heinsch, above n 150, at 739.

<sup>223</sup> For a State Party which opts out to make up one of the 30 required for the amendment to enter into force, would be unusual. There are no treaties which have an equivalent process.

<sup>224</sup> Clark, above n 97 at 704.

<sup>225</sup> The requirement that it only applies to a State Party which has accepted the amendment could have been easily inserted into the text, for example art 15*bis*(4) could have said: “which has ratified or accepted the Amendment” or “in accordance with article 121, paragraph 5”.

it has accepted the amendment or not.<sup>226</sup> The Review Conference resolution also states that a State Party may only opt out “*prior* to ratification or acceptance” of the amendment.<sup>227</sup> This could simply mean that once a state has accepted the amendment it can no longer opt out. It could, however, refer to the acceptance of the amendment “in the decision to be taken after 1 January 2017” where it enters into force for *all* States Parties and at this point a State Party may no longer opt out.<sup>228</sup> Thus, States Parties which do nothing before entry into force of the amendment will be bound. This interpretation has been adopted by two renowned commentators on the ICC, Roger Clark and William Schabas, after attending the Review Conference.<sup>229</sup> Therefore, this appears to be the true reflection of the States Parties’ intention from the Review Conference.

This interpretation may be viewed by some as an implicit amendment to art 121(5), as it seems contrary to the plain wording of art 121(5) by binding a State Party which has not explicitly accepted the amendment where they fail to opt out before entry into force.<sup>230</sup> However, it does satisfy art 121(5) somewhat, as States Parties will have ample opportunity to opt out and hence will not be bound by the amendment if they do not accept it. Thus, the latter sentence of art 121(5) is fulfilled, even if in a *sui generis* approach than was perhaps originally intended for the provision.<sup>231</sup>

Therefore, all States Parties which have not opted out will be subject to state referrals and *proprio motu* prosecutions once the amendment enters into force. It is difficult to predict how many states this article will apply to. William Schabas and David Scheffer believe that there would be a high political price to pay for any government that considers making an opt-out declaration, and that it is one many will prefer not to pay.<sup>232</sup> Therefore, art 15*bis* could possibly apply to quite a number of states.

Once a State Party has opted out, it may opt in at any time, and is required to reconsider its decision after three years.<sup>233</sup> The effect of the opt-out provision prevents the ICC from

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<sup>226</sup> Heinsch, above n 150, at 739; Clark, above n 97, at 704.

<sup>227</sup> Review Conference resolution, para 1, states “any State Party may lodge a declaration referred to in art 15*bis* *prior* to ratification or acceptance” and art 15*bis*(4) states “...unless that State Party has *previously* declared it does not accept such jurisdiction...”, see attached Appendix, Annex I.

<sup>228</sup> Clark, above n 97, at 704.

<sup>229</sup> Ibid, at 703-5; William A Schabas “The Result: Prosecuting Aggression at the International Criminal Court (12 June 2010)” The ICC Review Conference: Kampala 2010 <<http://iccreviewconference.blogspot.com/>>; see also Akande, above n 102.

<sup>230</sup> Heller, above n 220.

<sup>231</sup> Commentators have accepted that the Amendment satisfies art 121(5): see Schabas, above n 229; Clark, above n 97 at 703-5; Akande, above n 102.

<sup>232</sup> Schabas, above n 185; Scheffer, above n 185.

<sup>233</sup> Article 15*bis*(4) states, “[t]he withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years”, see attached Appendix, Annex I. In reality, the requirement that a

prosecuting a national of a state which has opted out. It does not, however, prevent the ICC prosecuting for a crime of aggression committed against a State Party which has opted out. This is because para 4 of art 15*bis* only refers to a crime of aggression “*committed by a State Party*, unless that State Party has previously declared that it does not accept such jurisdiction...”, and does not mention a crime of aggression committed *against* a State Party.<sup>234</sup> Thus where the state party which has opted out is the victim of the crime of aggression, the ICC will still have jurisdiction over that perpetrator state’s nationals (subject to the perpetrator-state being a State Party which has not opted out).<sup>235</sup> Hence, there is an incentive for non-States Parties to join the ICC.<sup>236</sup>

The following table demonstrates the situations where jurisdiction would arise under art 15*bis* (“OO” refers to a State Party that has opted out):

Table 1

State committing aggression (state of nationality)	State against whom aggression is committed (territorial state)	Jurisdiction
State Party	State Party	Jurisdiction
State Party	State Party OO	Jurisdiction
State Party	Non-State Party	No Jurisdiction
State Party OO	State Party	No Jurisdiction
State Party OO	State Party OO	No Jurisdiction
State Party OO	Non-State Party	No Jurisdiction
Non-State Party	State Party	No Jurisdiction
Non-State Party	State Party OO	No Jurisdiction
Non-State Party	Non-State Party	No Jurisdiction

This chart indicates that there will be few situations which come within the Court’s jurisdiction. It must be recalled, however, that there are 113 States Parties, and given the political pressure to refrain from opting out, it is possible that the Court will have jurisdiction over many of these

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state must “consider” its declaration does not put much obligation or pressure upon the state to withdraw it. A state can easily state it has “considered” its declaration in a simple policy statement without giving reasons for this.

<sup>234</sup> (Emphasis added).

<sup>235</sup> Heller, above n 220.

<sup>236</sup> Schabas, above n 229. There have already been three states, Saint Lucia (18 August 2010), Seychelles (10 August 2010) and Moldova (12 October 2010) that acceded to the Rome Statute since the Review Conference for this reason.

under art 15*bis*. In the words of Roger Clark, however, “one should never underestimate the acrobatic ability of the diplomatic mind in construing the national interest”.<sup>237</sup>

From a practical perspective in relation to a case of humanitarian intervention, those states which are willing to send their forces into a foreign state to prevent genocide and crimes against humanity are generally states which adhere to international law and like to be perceived as complying with their international obligations. For example, in the case of the NATO intervention in Kosovo, nine of the 10 states which intervened<sup>238</sup> are States Parties to the ICC.<sup>239</sup> Following this logic, the states which are likely to be involved in a future humanitarian intervention are likely to be States Parties which have not opted out of the crime of aggression amendment and hence will come within art 15*bis*. This, however, is mere speculation.

### ***B. Further Hurdles to Exercise of Jurisdiction under Article 15bis***

There are further hurdles under art 15*bis* which may lead to fewer cases of crimes of aggression coming within the jurisdiction of the Court, which in turn suggests that humanitarian intervention would not come within the jurisdiction of the Court. Under art 15*bis*(6), after the state referral or Prosecutor’s *proprio motu* and the Prosecutor concludes there is a reasonable basis to proceed with an investigation, he or she must first ascertain whether the UNSC has made a determination of an act of aggression by the state concerned. If it has, then the Prosecutor may proceed,<sup>240</sup> but where it has not, the Prosecutor must wait six months and have the case authorized by the Pre-Trial Division before he or she may proceed with the investigation.<sup>241</sup> In practice, it is unlikely that the UNSC would make a determination of aggression for a humanitarian intervention for the reasons referred to above,<sup>242</sup> and therefore, a situation of humanitarian intervention that has been referred by a State Party or Prosecutor’s *proprio motu* will only go to the Court if the Prosecutor

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<sup>237</sup> Clark, above n 97, at 705.

<sup>238</sup> The ten states are those which Serbia and Montenegro took to the ICJ in the *Legality of Use of Force* cases, see above n 57.

<sup>239</sup> States Parties included: United Kingdom, Belgium, Germany, France, Italy, Canada, Spain, Netherlands and Portugal with the only non-State Party being the United States.

<sup>240</sup> Article 15*bis*(7), see attached Appendix, Annex I.

<sup>241</sup> Article 15*bis*(8), see attached Appendix, Annex I. Note that it requires the Pre-Trial Division which involves the full panel of judges in contrast to the usual process for *proprio motu* investigations under art 15 Rome Statute which only requires approval by the Pre-Trial Chamber.

<sup>242</sup> As discussed above in *III. UNSC Referral*. The UNSC also retains its “red light” power under art 16 of the Rome Statute under art 15*bis*(8) to defer any case before the Court, however, it is unlikely that it would use this. For a humanitarian intervention to have been unauthorised in the first place, there would have had to be a permanent member of the UNSC opposed to humanitarian action being taken. This permanent member of the UNSC would be likely to veto any resolution to use its power under art 16 to defer a case. Thus, the UNSC would unlikely halt a case by using its “red light” power under art 16.

decides to proceed with the investigation after the six month period.<sup>243</sup> The decision to proceed with an investigation remains within the Prosecutor's discretion.<sup>244</sup>

There are political reasons why the Prosecutor (and Pre-Trial Division) would decide not to prosecute a case of humanitarian intervention. The Prosecutor has been careful to not investigate politically sensitive cases so as to maintain the Court's neutrality and legitimacy.<sup>245</sup> An example of this was where the Prosecutor made assurances to the United States and the United Kingdom that it would not investigate the conflict in Iraq.<sup>246</sup> Deciding to investigate or proceed with an investigation into humanitarian intervention would be a highly political decision, particularly if the interveners were a collective of states which are generally supportive of the ICC.<sup>247</sup> Therefore, the Prosecutor would most likely decide to use their discretion to cease any investigation into a humanitarian intervention, just as the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) decided not to investigate NATO's Operation in Kosovo for crimes within the ICTY's jurisdiction.<sup>248</sup>

If the prosecutor were to proceed with an investigation of a humanitarian intervention, particularly an investigation without the UNSC behind it, it may not galvanize the necessary international support.<sup>249</sup> The ICC is reliant upon states for support to restrain or arrest those people indicted.<sup>250</sup> It is also reliant on the state from which the indicted individual is from, for evidence to facilitate the Prosecutor's case.<sup>251</sup> Given the perception of humanitarian intervention as legitimate, it is unlikely that a State Party would cooperate with the Court in providing evidence against their leaders for undertaking action which they perceive as justified. Nor would other states be willing to arrest and detain leaders of humanitarian intervention where they, too,

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<sup>243</sup> Article 15*bis*(8), see attached Appendix, Annex I. As stated above, the Prosecutor must also have authorisation from the Pre-Trial Division.

<sup>244</sup> Rome Statute, above n 95, art 53.

<sup>245</sup> This was also partly to alleviate states' fears, particularly those of the United States, that the Prosecutor will use his power as a tool to launch political investigations. While the Chief Prosecutor's term is almost over, it is unlikely that a new Prosecutor would take a different position given the importance for the Court to remain neutral and impartial in the eyes of the international community: see, Allison Marston Danner "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court" (2003) 97 AJIL 510, at 519.

<sup>246</sup> Luis Moreno-Ocampo "OTP Letter to Senders Re Iraq 9 February 2006" (2006) International Criminal Court Official Website <[www.icc-cpi.int](http://www.icc-cpi.int)>.

<sup>247</sup> Murphy, above n 108, at 366.

<sup>248</sup> Danner above n 245, at 539. When it came out that the ICTY Prosecutor had established a confidential internal committee to evaluate accusations against the NATO operation, there was much criticism from NATO members, especially the United States. While the Committee's report concluded that further investigation was not justified nor recommended, it is likely that the reaction of states at the possibility of investigating further had some impact on the Prosecutor's decision to cease the investigation.

<sup>249</sup> Kacker above n 97, at 276; Weisbord above n 201, at 209.

<sup>250</sup> Sean D Murphy "Aggression, Legitimacy and the International Criminal Court" (2010) 20(4) EJIL 1147 at 1148. This is not only important for the State which the indicted individual is from, but for other States Parties as they are under an obligation under the treaty to detain and arrest persons which the ICC has an arrest warrant for, if they enter or visit their country.

<sup>251</sup> *Ibid.*

view such intervention as legitimate. This would be a relevant legal consideration of the Prosecutor in their decision to proceed with an investigation of humanitarian intervention: in the preliminary phase of deciding whether to proceed with an investigation, the Prosecutor considers whether there is sufficient information available to them to provide a reasonable basis for a case.<sup>252</sup> As a practical matter, it is unlikely that the Prosecutor could gather sufficient evidence for the reasons alluded to above and hence would not proceed with an investigation into a humanitarian intervention on this ground.<sup>253</sup>

There are further legal grounds which the Prosecutor could use as a justification for discontinuing an investigation into a humanitarian intervention. The general gravity consideration under art 53 of the Rome Statute where cases must be comparable to those situations which are before the Court could be used.<sup>254</sup> Humanitarian intervention does not meet the threshold of the conflicts in five situations before the Court, all of which “involved thousands of wilful killings as well as intentional and large-scale sexual violence and abductions”.<sup>255</sup> It must also be recalled that the Prosecutor has limited resources and therefore can only prosecute the most serious crimes.<sup>256</sup> Further, the Prosecutor may cease an investigation on the ground that it “would not serve the interests of justice”.<sup>257</sup> These are all grounds on which a humanitarian intervention could be excluded from the jurisdiction of the Court. While the Pre-Trial Chamber has the ability to review the Prosecutor’s decision not to prosecute on the grounds above under art 53(3), it is unlikely it would push for the prosecution of leaders of humanitarian intervention for the same legal and political reasons as the Prosecutor.<sup>258</sup>

Therefore, for the reasons above, it is highly unlikely that the Prosecutor would use their *proprio motu* power to investigate a situation of genuine humanitarian intervention. Similarly, it is likely

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<sup>252</sup> Rome Statute, above n 95, art 53(1)(a). See also, Moreno-Ocampo, above n 246.

<sup>253</sup> Officer of the Prosecutor, *Criteria for Selection of Situations and Cases*, at 2, 4-6 (June 2006) in Weisbord above n 201, at 209. See also, Danner above n 245, at 539.

<sup>254</sup> Rome Statute, above n 95, art 53(1)(c). See also, Moreno-Ocampo, above n 246; The Prosecutor in a draft policy paper set out his guiding principles and approach to case selection, including relevant factors in assessing gravity. These factors include: scale (number of victims and the geographic and chronological spread of the crime), the nature (with deliberate killing and rape composing the highest level of gravity), the manner of the commission (“systematic, organized or planned course of action, elements of particular cruelty, crimes against particularly vulnerable victims, crimes involving discrimination on grounds referred to in art 21(3), and abuse of *de jure* or *de facto* power”), and the impact of the crimes (“on the community and on regional peace and security, including longer term social, economic and environmental damage”). A genuine humanitarian intervention clearly would not come within majority of the policy paper factors; however, these factors were intended for the three crimes already within the jurisdiction of the Court and are not necessarily suitable for crime of aggression given the different nature of the crime. See Officer of the Prosecutor, above n 253, at 2, 4-6.

<sup>255</sup> Moreno-Ocampo, above n 246.

<sup>256</sup> Danner, above n 245, at 539.

<sup>257</sup> Rome Statute, above n 95, art 53(1)(c).

<sup>258</sup> Murphy, above n 108, at 366. Note this is the Pre-Trial Chamber which may review the Prosecutor’s decision not to prosecute, in contrast to the Pre-Trial Division which must authorise any case under art 15*bis* for it to continue.



that if a humanitarian intervention was referred by a State Party, the Prosecutor would use their discretion to cease the investigation.<sup>259</sup>

One further barrier which may prevent the Court from exercising jurisdiction over the crime of aggression would be if complementarity was invoked where the perpetrator-state investigated the humanitarian intervention under art 17 of the Rome Statute.<sup>260</sup> It is fairly unlikely that a state which perceives their use of force as a legitimate humanitarian intervention, would undertake to prosecute the leaders of the intervention domestically as this may be viewed as an admission of guilt.<sup>261</sup> Thus humanitarian intervention is unlikely to be inadmissible for this reason and it is likely to be something for the Court to decide upon.

#### *IV. Conclusion*

Before any of the analysis surrounding whether a person could be responsible for humanitarian intervention under the crime of aggression can apply, the crime of aggression must first enter into force. It is uncertain whether this will occur, however, given the confidence of those who were present at the Conference that it will be reached by 2017, it appears unlikely that the quota of 30 was selected at random.<sup>262</sup> In the lead up to the Review Conference it was also believed that no consensus would be achieved and the fact that it was, demonstrates states' determination to place the crime of aggression under the jurisdiction of the ICC. This analysis is, however, merely speculative and depends wholly on the politics which play out over the next several years.

Assuming the crime of aggression enters into force, it will not necessarily follow from the conclusion that a humanitarian intervention does come within the scope of the crime of aggression, that leaders of humanitarian interventions will be prosecuted.<sup>263</sup> In light of the perception as to the legitimacy of humanitarian intervention,<sup>264</sup> it is likely that the UNSC will choose not to refer cases of humanitarian intervention to the Court under art 15*ter*, (or else fail to

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<sup>259</sup> The most likely situation for humanitarian intervention to be investigated under art 15*bis* is where the victim state of a humanitarian intervention refers the situation to the Court, similar to where Yugoslavia as the victim state of NATO's intervention took (10 of) the NATO states to the ICJ.

<sup>260</sup> Rome Statute, above n 95, art 17(1)(a) states "...the Court shall determine that a case is inadmissible where: [t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out investigation or prosecution".

<sup>261</sup> It is likely that the intervening states would point to other (unconvincing) justifications as has occurred in past cases of humanitarian intervention. See Chapter 1.

<sup>262</sup> Schabas, above n 183; Scheffer, above n 185.

<sup>263</sup> Although, chapter 2 demonstrates that it is highly unlikely that humanitarian intervention would come within the scope of crime of aggression, there is a possibility the definition could be read as encompassing it.

<sup>264</sup> See Chapter 1.

garner the necessary consensus to do so). While it is unclear how many states will come under the jurisdiction of art 15*bis* depending on how many states choose to opt out, there is every possibility that those states who undertake humanitarian interventions will be States Parties which have not opted out of the amendment and so a situation of humanitarian intervention could come within the jurisdiction of the Court via this path. It is, however, highly unlikely that the Prosecutor or Pre-Trial Division will proceed with investigations into politically sensitive matters such as humanitarian interventions under art 15*bis*, particularly without the approval from the UNSC.<sup>265</sup> There are many legal justifications which the Prosecutor could use in deciding not to proceed with (or initiate) an investigation into a humanitarian intervention. Therefore, no situation of humanitarian intervention is likely to reach the ICC, and leaders of such interventions will not be prosecuted for the crime of aggression.

The following chapter goes on to discuss the consequences the amendment to the crime of aggression will have on humanitarian intervention and make some comments about the overall outcome from the Review Conference before testing the conclusions reached by examining a hypothetical scenario.

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<sup>265</sup> By it first making a declaration of an act of aggression under art 15*bis*(7), see attached Appendix, Annex I.

## Conclusion

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This paper concludes that it is highly unlikely that leaders of humanitarian intervention will face prosecution before the ICC for the crime of aggression. This chapter will outline consequences which may result from this finding and will make some comments on the overall outcome from Kampala. Lastly, it will pose a hypothetical example, based on NATO's 1999 intervention in Kosovo, to demonstrate how a situation of humanitarian intervention would play out under the amendment.

### *I. Consequences*

The exclusion of situations of humanitarian intervention by way of the threshold clause was an appropriate outcome despite the vague language of the definition. Prior to the Conference, commentators had suggested alternatives as a means of accommodating humanitarian intervention, such as a specific exclusion provision for humanitarian intervention<sup>266</sup> or a special intent requirement in the crime of aggression.<sup>267</sup> Such methods, however, would be likely to be abused with states claiming they used force for humanitarian reasons when in fact they had a different agenda.<sup>268</sup> There is also insufficient consensus on the doctrine of humanitarian intervention in international law to have expressly excluded it under the amendment and it was vital that the amendment remain “within the confines of existing customary international law” in order to preserve the legitimacy of the ICC.<sup>269</sup>

The inclusion of the threshold requirement will offer a way for such intervention to be excluded while enabling the Court to refrain from “decid[ing] major controversies about the content of primary international rules of conduct through the back door of international criminal justice”.<sup>270</sup> The ICC is not the proper organ to decide the legality of such controversial cases and hence this outcome was probably the best option to ensure humanitarian intervention was excluded from

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<sup>266</sup> The proposed United States understanding which specifically excluded humanitarian intervention, see Schabas, above n 112; DeNicola, above n 5.

<sup>267</sup> Oscar Solera (Defining the Crime of Aggression, 2007, Cameron May, London) at 461-3; Leclerc-Gange and Byers, above n 8, at 385-388. Similar to the special intent requirement (*dolus specialis*) for genocide in art 6 of the Rome Statute, above n 93.

<sup>268</sup> Schabas, above n 165 and accompanying text; Tom J Farer “Humanitarian Intervention Before and After 9/11” in JL Holzgrefe and Robert O Keohane (eds) *Humanitarian Intervention: Ethical Legal and Political Dilemmas* (Cambridge University Press, Cambridge, 2003) 53 at 74-80.

<sup>269</sup> Kress, above n 87. Given that the ICC can only have jurisdiction over a state which decides to accept the Rome Statute, legitimacy is essential in ensuring states become and remain parties to the ICC.

<sup>270</sup> *Ibid*, at 1144.

the crime of aggression's scope without writing customary law. As delegates at the SWGCA noted, "not all the issues needed to be explicitly addressed in the actual amendment because they would be reflected in the report of the Working Group or elsewhere in the *travaux préparatoires*".<sup>271</sup>

One fear expressed in the lead up to the Review Conference was that if the crime of aggression did not clearly exclude cases of legitimate humanitarian intervention, it could deter such intervention where it is necessary in the future.<sup>272</sup> While the amendment does not expressly exclude humanitarian interventions, it is apparent from the drafting of the amendment that humanitarian interventions are not intended to be encompassed within the crime of aggression.<sup>273</sup> Because leaders of humanitarian interventions are highly unlikely to be prosecuted, the crime of aggression is unlikely to discourage leaders from undertaking cases of *bona fide* humanitarian intervention in the future because of fear of prosecution. It is important that such action is not deterred so humanitarian intervention remains an option of last resort where absolutely necessary to protect the victims of severe tyranny or anarchy.

Some commentators feared that setting a high threshold standard so as to exclude legitimate uses of force like humanitarian intervention may lead to the undesirable consequence of legitimizing other objectionable acts of aggression by not capturing them in the threshold requirement.<sup>274</sup> It must be recalled, however, that the role of the ICC is to hold individuals accountable for the most serious international crimes, not to rule on the legality of action.<sup>275</sup> The standard for international criminal justice under the ICC is different from that of international law. Just because the ICC is not holding those responsible for lesser uses of force does not legalise nor legitimize them. Those responsible for uses of force that do not reach the threshold of the crime of aggression at the ICC may still be held accountable by measures invoked by other organs, such as the UNSC,<sup>276</sup> or the ICJ.<sup>277</sup>

Similarly, it is doubtful that as a consequence of the ICC not punishing leaders of humanitarian intervention that it will crystallise as a customary norm. As stated in the previous paragraph, the

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<sup>271</sup> SWGCA Report 2009, above n 142, at 33.

<sup>272</sup> Such as by the United States delegation to the Review Conference, Harold Koh, above n 6. See also, Murphy, above n 108; Weisbord, above n 201, at 220.

<sup>273</sup> See Chapter 2.

<sup>274</sup> Paulus, above n 141, at 1124; Weisbord, above n 201, at 220.

<sup>275</sup> Rome Statute, above n 95, preamble states "[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished..." and "[r]esolved to guarantee lasting respect for and the enforcement of international justice..."

<sup>276</sup> Under UNSC's Chapter VII powers of Charter of the United Nations.

<sup>277</sup> The Special Working Group stated that even if a use of force was not prosecuted under the ICC, the victim state may take the case to the ICJ; see SWGCA Informal 2009, above n 144, at 6. Note, however, that the ICJ only has jurisdiction over "contentious cases" by consent, and "advisory opinions" are not binding (however, they are very influential and widely respected).

ICC does not rule on the legality of action but instead is “an instrument for exceptionally grave assaults upon the international legal order to be applied with utmost restraint”.<sup>278</sup> Hence, it will have no such consequence on the doctrine of humanitarian intervention as has been suggested by some.<sup>279</sup>

While a case of genuine humanitarian intervention is unlikely to reach the Court, arguments for it may appear before the Court where a state uses humanitarian intervention as a pretext for aggression. Conduct subsequent to an intervention could cast doubt upon the legitimacy of the intervention; an example of this is Vietnam’s intervention in Cambodia. The intervention may have been legitimate in 1979 when it overthrew the ruthless dictator, Pol-Pot, and put an end to scores of atrocities by the Khmer Rouge, however, when Vietnam troops were still occupying Cambodia in 1990, the legitimacy of this intervention had been overshadowed by the subsequent conduct of Vietnam.<sup>280</sup> The distinction is based on the legitimacy of the intervention. While this is difficult to judge, it ultimately can be determined from international reactions to the intervention, not only at the time of the intervention, but also upon reflection after further facts and subsequent conduct has been revealed.<sup>281</sup> If a situation was claimed to be a humanitarian intervention but failed to gather the necessary consensus as to its legitimacy, then it may reach the manifest threshold to bring it within the crime of aggression.<sup>282</sup>

This paper revealed ambiguities in the amendment. In particular, these include the correct entry into force provision to be applied, the conflict between the opt-out provision in art 15*bis*(4) and art 121(5) as the amendment provision for entry into force, and the status of the understandings. Such inconsistencies are typical where international criminal law is undertaken in a public international law forum.<sup>283</sup> International criminal law requires detailed, clear and unambiguous legal regulation, which is crucial when the fundamental rights of suspects and accused persons are at stake.<sup>284</sup> The nature of public international law, however, involves state diplomats, and

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<sup>278</sup> Kress, above n 87, at 1144-42.

<sup>279</sup> Ibid, at 1140-41. Contrast Murphy, above n 5, at 342; Paulus, above n 141, at 1124.

<sup>280</sup> Breau, above n 15, at 48-53.

<sup>281</sup> Such subsequent conduct and reactions can take into account the reaction of the UNSC to the intervention. If the UNSC were to condemn the action then this could reflect lack of legitimacy of the intervention. Likewise, if the intervention were to be “commended” by the UNSC, as occurred with ECOWAS’s intervention in Liberia, this would be an indication that such an intervention was perceived as legitimate. Statements by individual states, other non-governmental organisations, such as the Group of 77, or other UN organs such as the ICJ or UNGA could also be taken into account in examining the legitimacy of the intervention. While the Amendment states that decisions by other UN organs will not be binding or influential on the ICC, it is likely that they will be influential as to the legitimacy of such interventions.

<sup>282</sup> The standard set for the crime of aggression at the SWGCA is a very high one, however, with those citing Hitler’s use of force and Saddam Hussein’s invasion of Kuwait and hence a situation in this circumstance may still not reach the threshold. It would largely depend upon the facts and the weighing up of the “character, gravity and scale” as to whether such an intervention would reach the threshold.

<sup>283</sup> Antonio Cassese *International Criminal Law* (2<sup>nd</sup> ed, Oxford University Press, New York, 2008) at 9.

<sup>284</sup> Ibid.

provisions are often added at the last minute as diplomats finally reveal their bottom line positions and acceptable concessions.<sup>285</sup> This need to reconcile conflicting state interests often leads to ambiguous provisions.<sup>286</sup> This was the case with the Rome Conference, and Kampala was no exception. As William Schabas noted:<sup>287</sup>

Legal academics like myself will be eternally grateful to the Review Conference for providing us with such complicated and at times incoherent provisions. They will provide us with fodder for journal articles, books and conferences for many years to come.

## II. Hypothetical Situation

This dissertation shall end with a hypothetical situation to test the conclusions that have been made in this study. I shall use the most recent example of a *bona fide* humanitarian intervention, NATO's 1999 intervention in the former Federal Republic of Yugoslavia,<sup>288</sup> assuming that the ICC had jurisdiction over the crime of aggression at the time in order to determine whether the leaders of this intervention would have been prosecuted.<sup>289</sup>

First, jurisdiction for NATO's intervention would have to arise. The case would not have been referred by the UNSC, as three permanent member states involved in the intervention would have blocked any resolution referring the situation.<sup>290</sup> Moreover, the 12 members of the UNSC at the time expressly rejected a resolution condemning the intervention.<sup>291</sup> Thus, the only path for ICC jurisdiction would have been through art 15*bis* (assuming for the sake of the hypothetical that all the parties involved were States Parties to the amendment).<sup>292</sup> While the Prosecutor would not want to open an investigation *proprio motu* because of the political nature of the situation, with majority of international consensus viewing the intervention as legitimate, Serbia and Montenegro, as the victim of the intervention, would be likely to refer the situation to the

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<sup>285</sup> There were four new drafts added in the final day of the Kampala Review Conference. There was not sufficient time to fully consider their consistency and coherency with the Rome Statute and the rest of the Amendment.

<sup>286</sup> Antonio Cassese, above n 283, at 9.

<sup>287</sup> Schabas, above n 229.

<sup>288</sup> The facts of the intervention in Kosovo have been amply recounted and hence this paper shall not repeat them. For a good rendition, see Independent International Commission on Kosovo, above n 67, at 4; Teson, above n 9, at 374-90

<sup>289</sup> This is also assuming that the ICC had jurisdiction under the Rome Statute at the time as it only entered into force in 2002.

<sup>290</sup> US, UK and France.

<sup>291</sup> SC Draft Res 328, above n 63, at [6].

<sup>292</sup> While the United States is unlikely to become a State Party to the ICC for quite some time, the other nine members of the intervention are States Parties and hence may well be parties to the amendment if they do not opt out; see Chapter 3.

Court.<sup>293</sup> Hence jurisdiction could have been invoked and the Prosecutor would have had to evaluate whether there was a reasonable basis to proceed with an investigation.

The analysis would first look at the intervention under the UN Charter, noting it is in contravention to the prohibition on the use of force and was lacking UNSC authorisation or a claim under self-defence.<sup>294</sup> Indeed, it was found by the Independent Commission that the intervention was “unlawful”, thus coming within the general definition of art 8bis(2).<sup>295</sup> The NATO intervention also involved an extensive bombing campaign from 24 March 1999 until 10 June 1999 which targeted communications installations, anti air-craft missile installations, tanks, artillery, command centres, industrial installations and also government buildings in Belgrade.<sup>296</sup> Thus, it would qualify as an act in paras (a), (b) and (d) within the list of art 8bis(2). Consequently, the NATO intervention would come within the definition of an “act of aggression” for the purpose of the crime of aggression.<sup>297</sup>

After establishing that the intervention comes within the definition of an “act of aggression”, it must be found to constitute a “manifest” violation of the UN Charter by its “character, gravity and scale” for a leader to be held accountable for the crime of aggression. As discussed in Chapter Two, these elements are vague and difficult to ascertain simply from their plain meanings. On just the qualification of “scale”, the NATO intervention would reach the threshold; however, it is unclear if the gravity and character of the intervention would. Looking to the SWGCA and *travaux préparatoires*, however, it is clear that the intervention would not reach the threshold standard. NATO’s intervention was heralded internationally as “legitimate” and as a *bona fide* humanitarian intervention,<sup>298</sup> and its legality was up for genuine debate. Therefore, as a legally “borderline” case, NATO’s intervention would not come within the “manifest” threshold.

That NATO’s intervention was a “legally borderline” case, intended to be excluded under the threshold, would most likely be enough of a reason for the Prosecutor not to proceed with an investigation.<sup>299</sup> The Prosecutor could also point to other considerations under art 53, such as the general lack of gravity,<sup>300</sup> and that prosecuting “would not serve in the interest of justice” given

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<sup>293</sup> The victim state of the “aggression” is able to refer the case if it is a State Party or a State Party which has opted out; see Chapter 3.

<sup>294</sup> While there had been three UNSC Resolutions, 1160 (SC Res 1160, S/RES/1160 (1998)), 1199 (SC Res 1199, S/RES/1199 (1998)) and 1203 (SC Res 1203, S/RES/1203 (1998)), one of which declared the situation in Kosovo to be a breach of the peace (Resolution 1199), none of these explicitly authorised the use of force under Chapter VII or VIII.

<sup>295</sup> Independent International Commission on Kosovo, above n 67, at 4.

<sup>296</sup> Breaux, above n 15, at 132-6; Chesterman, above n 19, at 210-15.

<sup>297</sup> Article 8bis(2), see attached Appendix, Annex I.

<sup>298</sup> See Independent International Commission on Kosovo, above n 67, at 4; Teson, above n 9, at 374-90.

<sup>299</sup> Rome Statute, above n 95, art 53(1)(a) states, “[t]he information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed”.

<sup>300</sup> See above n 254, and accompanying text.

the international perception that the intervention was justified. Lastly, the Prosecutor would be likely to take political considerations into account when making their decision.<sup>301</sup> These would include: maintaining the Court's neutrality; the fact that the Court was unlikely to get the cooperation of the NATO states in providing incriminating evidence of their leaders, or of the international community in detaining and arresting NATO leaders; and the possible long-term effects on the Court of getting off-side with some of the biggest financial contributors to the Court.

If, in the unlikely scenario that the Prosecutor were to continue with a case of humanitarian intervention, the interpretation of the threshold requirement will ultimately be up to the Court to decide. While the Court is not bound by the SWGCA or *travaux préparatoires*, it is unlikely that it would depart from the intent of the States Parties. Moreover, for the same reasons, it is likely the Pre-Trial Division would reject the case if the Prosecutor were to continue with the investigation.

Accordingly, NATO's humanitarian intervention in Kosovo would have been highly unlikely to have reached the Court, and hence the NATO leaders would not be prosecuted.<sup>302</sup> This hypothetical scenario is a typical humanitarian intervention situation which could arise in the future: the UNSC was paralysed to act because one of the permanent members threatened to veto action, the situation involved the persecution of a minority group by its own government, the intervention was undertaken by a group of states, and it was hailed as "legitimate" in the circumstances.

### *III. Conclusion*

This dissertation has found that the "knights of humanity" are highly unlikely to be prosecuted for the crime of aggression in the ICC. While there is insufficient evidence to support the legality of humanitarian intervention under current international law, and while it would qualify as an "act of aggression", humanitarian intervention is likely to be excluded as it is not in "manifest" violation to the UN Charter. It is possible that jurisdiction could be invoked for a humanitarian intervention where the victim state refers the situation to the Court. The Prosecutor is very

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<sup>301</sup> Taking political decisions into account are not a legal requirement under the Rome Statute, however, this would inevitably happen given that the Court relies on States Parties for the operation of the Court and hence must remain to be perceived as legitimate and not embarking upon political cases.

<sup>302</sup> Note that this research did not go into possible defences that may be asserted by an accused if a case were to reach the Court, given the conclusion found that a case is highly unlikely to ever reach this stage. There are, however, possible defences that may be put forward under art 31 Rome Statute if a case were to get to this stage, under self-defence (art 31(1)(c)), necessity (art 31(1)(d)), and any other defence at international law under art (31(3)) of the Rome Statute, above n 95.



unlikely to proceed with such an investigation in respect of a *bona fide* intervention given the threshold requirement and political considerations, and if they did, the Pre-Trial Division is likely to reject it given the States Parties intent to exclude “legally borderline” cases.

While the amendment definition is far from perfect with its vague terms and ambiguities, this is the nature of international law and one can console oneself in the knowledge that it was a remarkable achievement that consensus on the crime of aggression had been reached at Kampala. While there are still some hurdles to overcome before the Court can exercise jurisdiction, it is likely that in the future there will no longer be impunity for individuals who lead their states to commit aggression.

It is vital that *bona fide* humanitarian interventions cannot and will not be punished under the ICC crime of aggression, as they serve as a necessary avenue when the politics of the UNSC prevents action being taken to put a halt to grave human suffering of the worst kind. As DeNicola aptly sums up:<sup>303</sup>

While humanitarian interventions lacking Security Council approval may be technically illegal, they are just, and the world should not condemn them as aggression.

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<sup>303</sup> DeNicola, above n 5, at 688.

# Appendix

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*Advance version  
28 June 2010 18:00*

## **Resolution RC/Res.6**

*Adopted at the 13th plenary meeting, on 11 June 2010, by consensus*

### **RC/Res.6**

#### **The Crime of Aggression**

*The Review Conference,*

*Recalling* paragraph 1 of article 12 of the Rome Statute,

*Recalling* paragraph 2 of article 5 of the Rome Statute,

*Recalling* also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

*Recalling* further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,

*Taking note* of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

*Resolved* to activate the Court's jurisdiction over the crime of aggression as early as possible,

1. *Decides* to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: "the Statute") the amendments to the Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; and notes that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance;
2. *Also decides* to adopt the amendments to the Elements of Crimes contained in annex II of the present resolution;
3. *Also decides* to adopt the understandings regarding the interpretation of the abovementioned amendments contained in annex III of the present resolution;
4. *Further decides* to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction;
5. *Calls upon* all States Parties to ratify or accept the amendments contained in annex I.

## **Annex I**

### **Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression**

1. *Article 5, paragraph 2, of the Statute is deleted.*
2. *The following text is inserted after article 8 of the Statute:*

#### **Article 8bis**

#### **Crime of aggression**

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.

3. *The following text is inserted after article 15 of the Statute:*

**Article 15 bis**  
**Exercise of jurisdiction over the crime of aggression**  
**(State referral, *proprio motu*)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

*4. The following text is inserted after article 15 bis of the Statute:*

**Article 15 ter**

**Exercise of jurisdiction over the crime of aggression  
(Security Council referral)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

*5. The following text is inserted after article 25, paragraph 3, of the Statute:*

*3 bis.* In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

*6. The first sentence of article 9, paragraph 1, of the Statute is replaced by the following sentence:*

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 bis.

*7. The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:*

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

## Annex II

### Amendments to the Elements of Crimes

#### Article 8 bis Crime of aggression

##### Introduction

1. It is understood that any of the acts referred to in article 8 bis, paragraph 2, qualify as an act of aggression.
2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term “manifest” is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.

##### Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person<sup>1</sup> in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of 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 – was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

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<sup>1</sup> With respect to an act of aggression, more than one person may be in a position that meets these criteria.

## **Annex III**

### **Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression**

#### **Referrals by the Security Council**

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect to crimes of aggression committed after a decision in accordance with article 15 *ter*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.
2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

#### **Jurisdiction *ratione temporis***

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

#### **Domestic jurisdiction over the crime of aggression**

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.
5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

#### **Other understandings**

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.
7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.

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### **Interview**

Interview with Kampala Review Conference Delegate who wished to remain anonymous (Laurie O'Connor, personal communication, 27 September 2010).