

The Anatomy of an International Crime: Aggression at the International Criminal Court

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Abstract

In 2010 in Kampala, Uganda, the States Parties to the International Criminal Court (ICC) adopted a set of amendments to the Rome Statute that define the elements and trigger mechanisms of the crime of aggression. However, significant questions remain as to what was actually agreed upon in Kampala, including with respect to the parameters of the crime itself. These questions, which include the applicability of exceptions for humanitarian intervention and anticipatory self-defence, affect not only the potential criminal responsibility of individuals charged with the crime of aggression, but also the interests of States in whether their acts are considered to amount to aggression or not. This article explores the anatomy of the crime of aggression and highlights issues that remain to be resolved.

Keywords

aggression; International Criminal Court (ICC); Rome Statute; humanitarian intervention; anticipatory self-defence

1. Introduction

An attack on the foundations of international relations cannot be regarded as anything less than a crime against the international community, which may properly vindicate the integrity of its fundamental compacts by punishing aggressors. We therefore propose to charge that a war of aggression is a crime, and that modern International Law has abolished the defense that those who incite or wage it are engaged in legitimate business. Thus may the forces of the law be mobilized on the side of peace.²

Late in the evening on Friday 11 June 2010 in Kampala, Uganda, the States Parties to the International Criminal Court (ICC) adopted a set of amendments to the Rome Statute that define the parameters and trigger mechanisms of the crime of aggression. This momentous decision, reached by consensus, means that the international community will have a tribunal competent to prosecute aggressive uses of military force for the first time since the post-Second World War tribunals in Nuremberg and Tokyo. Although the

¹ The author was also a member of the New Zealand delegation to the Review Conference of the International Criminal Court in 2010. The views expressed in this article are those of the author alone and do not necessarily reflect the views of the United Nations or the New Zealand Government. The author would like to thank Manuel Ventura and Matthias Schuster for their insightful comments. All errors remain those of the author [gillettm@un.org].

² Robert Jackson, 'Report to the President on the Atrocities and War Crimes', *United States Department of State Bulletin*, (Government Printing Office) (1945), <<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>, 24 September 2012.

aggression amendments will not enter into force until 2017 at the earliest, the significance of the agreement reached in Kampala for the long-term development of the rule of law should not be underestimated. Adopting the prohibition against aggression provides a significant tool in the fight against the impunity that has so frequently been enjoyed by the architects of war. In this way, the international community has come closer to achieving the hope of lead Nuremberg Prosecutor, Justice Robert Jackson, that a firmer enforcement of international laws will “make war less attractive to those who have governments and the destiny of peoples in their power.”³

Nonetheless, significant questions remain as to what was actually agreed upon in Kampala. These questions concern not only the procedural steps required to prosecute aggression at the ICC but also the elements and parameters of the crime itself. While considerable discussion has been dedicated to the procedural issues surrounding the trigger mechanisms for the prosecution of aggression, there is a relative paucity of analyses of the substantive crime of aggression. Accordingly, the following analysis addresses the elements of the crime of aggression systematically. In doing so, it highlights issues that will require further clarification in order to establish a functional definition of the crime of aggression under international criminal law.

2. Background

In 1998 the drafters of the Rome Statute were unable to agree on the definition of the crime of aggression or the jurisdictional prerequisites for its prosecution at the ICC. Nonetheless, many States were eager to maintain the momentum towards bringing the crime of aggression into the ICC’s fold. As a compromise, a stopgap solution was arrived at whereby aggression was listed under article 5 as a crime within the ICC’s jurisdiction but was not defined:

Article 5.2: The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Having included a placeholder for the crime of aggression in the Rome Statute, the Final Act of the Rome Conference directed the Court’s Preparatory Commission to “prepare proposals for a provision on aggression, including the definition and Elements of Crimes of Aggression and conditions under which the ICC shall exercise its jurisdiction with regard to this crime”.⁴ The aim was to present a set of pre-packaged aggression amendments to the States Parties at the Court’s first Review Conference, scheduled for seven years after the entry into force of the Rome Statute in 2002.⁵ Over the ensuing years, the Preparatory Commission (1999-2002), as well as Special Working Groups (2003-2009) and informal gatherings (2004-2007) worked on the details of the aggression provisions.⁶

³ *Ibid.*

⁴ ‘Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court’, Annex I, Resolution F, para.7, U.N. Doc. A/CONF.183/10 (1998), at 8-9.

⁵ See Rome Statute, Article 123(1).

⁶ Roger S. Clark, ‘Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May – 11 June 2010’, 2 *Göttingen J of Int’l L* (2010) 689-711, pp. 693-695.

The task of designing feasible aggression amendments was no simple affair. Although the idea of prosecuting individuals launching aggressive attacks had long been proposed,⁷ the record of such prosecutions remained short. After the First World War, the victorious allies and associated powers included article 227 in the Treaty of Versailles, which provided a potential basis to prosecute Kaiser Wilhelm II for initiating a war of aggression. However, the provision was vaguely worded, referring only to “a supreme offence against international morality and the sanctity of treaties”.⁸ The definition was never judicially developed, as the Kaiser avoided justice after receiving refuge from Queen Wilhelmina of the Kingdom of the Netherlands.⁹

Following the Second World War, the victorious allies resurrected the idea of prosecuting the waging of aggressive war. German and Japanese leaders faced charges of “crimes against the peace” alongside charges of war crimes and crimes against humanity at the Nuremberg and Tokyo Tribunals. The Nuremberg Judges explained that they considered aggression the paramount crime:

[T]o initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.¹⁰

It is questionable whether aggression should be classed as the “supreme” crime. Indeed, it is doubtful whether ranking the seriousness of crimes according to category, rather than based on a case-by-case assessment of the relevant facts, is a productive exercise.¹¹ However, the gravity of the crime of aggression is underscored by the fact that it frequently creates the conditions of conflict and upheaval in which other atrocity crimes are likely to be perpetrated.

As international criminal law has continued to develop, it is another passage of the Nuremberg Judgement that has become its most significant legal legacy. The Judges observed that “crimes are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹² In this way, they confirmed that aggression entails individual criminal responsibility and that it is not exclusively an inter-state issue.

The Charter of London, which set up the Nuremberg Tribunal, codified the substantive crime of aggression (under the title of Crimes Against Peace) and specified that the crime entailed individual criminal responsibility:

Article 6: The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a)

⁷ Beth Van Schaack, ‘Negotiating at the Interface of Power & Law: The Crime of Aggression’, 49 *Columbia Journal of Transnational Law* (2011) 505-601, pp. 509-510.

⁸ See Treaty of Versailles, article 227; *ibid.*, p.3.

⁹ Geoffrey Robertson, *Crimes against Humanity*, (Penguin Group, Australia, 2008), p. 243.

¹⁰ Nuremberg Judgement, 1 ‘Trial of the Major War Criminals Before the International Military Tribunal’, Nuremberg 14 November 1945 – 1 October 1946, at 186 (1947); reprinted in 172 *Am. J. Int’l L.* (1947) 186 (“Nuremberg Judgement”).

¹¹ *Prosecutor v. Radoslav Krstić*, Case No. IT-98-33-T, Trial Judgement, 2 August 2001, para.700; *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, 1 June 2001, Appeal Judgement, para.367. *But see Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1, Appeal Judgement, 21 July 2000, Declaration of Judge Lal Chand Vohrah (arguing that there is a hierarchy among the categories of crimes and that genocide and crimes against humanity are inherently more serious than war crimes).

¹² Nuremberg Judgement, pp. 220-221.

Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;...

The various forms of participation in aggression contained in article 6 (“planning, preparation, initiation or execution of a war of aggression”) have been largely replicated in the definition of aggression agreed at Kampala, with the exceptions of participation in a common plan and conspiracy.¹³ Moreover, the Nuremberg trial demonstrated the application of individual criminal responsibility for the crime of aggression was applicable in practice. Twelve of the Nazi leaders were found guilty of participation in a common plan or conspiracy for the accomplishment of a crime against peace or planning, initiating and waging wars of aggression and other crimes against peace.¹⁴

Nonetheless, criticism of the weak or non-existent foundations in international criminal law for the crime of aggression led to efforts to provide a more comprehensive definition.¹⁵ Given the political ramifications of a universally applicable codified crime of aggression, efforts to define it more precisely moved slowly. Initial attempts by the International Law Commission ultimately stalled.¹⁶ In turn, the UN General Assembly took to the task of defining acts of aggression at the inter-State level. In this respect, States’ views eventually coalesced around the definition of aggression set out in Resolution 3314 (XXIX), which was adopted in 1974.¹⁷ Resolution 3314 (XXIX) annexed a definition of an act of aggression, which was composed of a general part (“Aggression is 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, as set out in this Definition”) and a list of specific examples of aggressive acts.¹⁸ Both these parts have been adopted in the aggression amendments agreed at Kampala, as discussed below.

Little to no judicial precedent or elaboration concerning the crime of aggression emerged during the Cold War. Nor did this situation change significantly following the collapse of the Berlin Wall. Jurisdiction over the crime of aggression was not included in the statutes of the *ad hoc* UN tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR). Similarly, it was left out of the jurisdiction of the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Court for Sierra Leone (SCSL), and the Special Tribunal for Lebanon (STL). Although the Statute of the Iraqi High Tribunal included a prohibition against misuse of office leading to the threat of war or use of force against an Arab country, this provision is of little relevance to the development of aggression as an international crime. It focuses more on the actions of public officials than on the illegality

¹³ Participation in a common plan is addressed in article 25(3) of the Rome Statute, as discussed below under the heading “modes of liability”. Conspiracy to commit aggression is not covered by the Rome Statute as conspiracy was not included for any of the crimes within the International Criminal Court’s purview.

¹⁴ See Nuremberg Judgement (findings in relation to Karl Dönitz, Wilhelm Frick, Walther Funk, Hermann Göring, Rudolf Hess, Alfred Jodl, Wilhelm Keitel, Baron Konstantin von Neurath, Erich Raeder, Joachim von Ribbentrop, Alfred Rosenberg, Arthur Seyss-Inquart).

¹⁵ For criticisms of the foundations of the definition of aggression in international law, see Matthias Schuster, ‘The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword’ 14 *Criminal Law Forum* (2003) 1-57, p. 1.

¹⁶ Van Schaack, *supra* note 7, p. 510-511.

¹⁷ ‘Definition of Aggression’, G.A. Res. 3314 (XXIX), annex, U.N. Doc. A/9631 (Dec. 14, 1974) (hereinafter “Resolution 3314”).

¹⁸ Resolution 3314, articles 1 and 3.

of the threat or use of force. Moreover it is a domestic crime,¹⁹ and the main figure tried by the court, Saddam Hussein, never faced charges for committing any form of aggression by invading Kuwait.

Definitions of aggression in domestic statute books do not provide a consistent pattern sufficient to form a clear set of parameters of the crime of aggression as a matter of international law. Few states at present have a crime of aggression in their penal codes.²⁰ Where such crimes exist in domestic statute books, they are broadly worded and lack precision as to the elements of the crime.²¹

Faced with a bleak legal landscape in relation to the crime of aggression, the Preparatory Commission and Special Working Groups focused its efforts on two tracks – first the substantive definition of the crime of aggression, and second, the pre-conditions necessary for the ICC to exercise jurisdiction over the crime. The efforts of the Preparatory Commission, Special Working Group and informal gatherings were largely successful on the first track – the substantive definition of the crime of aggression. Conversely, results were mixed on the second track – the conditions in which the ICC will be able to exercise its jurisdiction over the crime.²² It suffices for present purposes to note that the trigger mechanism for the ICC’s jurisdiction over aggression remained a key sticking point jeopardizing the adoption of the aggression amendments.²³

Despite several potentially paralyzing points of disagreement that still persisted at the outset of the ICC’s first review conference, the negotiators at Kampala managed to

¹⁹ Article 14 renders the following crime prosecutable: “The abuse of position and the pursuit of policies that were about to lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958.” Iraqi High Criminal Court Law, <http://law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf>, 20 September 2012. Saddam Hussein was executed without any Kuwait-related charges being adjudicated against him.

²⁰ See Astrid R. Coracini, ‘Evaluating Domestic Legislation on the Customary Crime of Aggression Under the Rome Statute’s Complementarity Regime’, *The Emerging Practice of the International Criminal Court* 725-754, p. 725 (Carsten Stahn and Göran Sluiter, eds., 2009) and Astrid R. Coracini, ‘National Legislation on Individual Responsibility for Conduct Amounting to Aggression’, *International Criminal Justice: Law and Practice from the Rome Statute to Its Review*, (R. Bellelli, ed., 2010), pp. 547-578.

²¹ See, e.g., the relevant German provision: Under section 80 of the German Criminal Code, anyone who “prepares a war of aggression [. . .] in which the Federal Republic of Germany is supposed to participate and thereby creates a danger of war for the Federal Republic of Germany, shall be punished with imprisonment for life or for not less than ten years.”

²² Other key stumbling blocks facing the delegates coming to Kampala included the question of aggressor State consent; in other words whether it would be necessary for the aggressor State to have accepted the Court’s jurisdiction over the crime of aggression or whether it would suffice if the victim State had ratified the amendment, as is the case for the other crimes in the Court’s jurisdiction, and the question of whether the amendment should be adopted under Article 121(4) or Article 121(5). During the Kampala conference itself the issue of delaying the entry into force of the aggression amendment assumed a surprising prominence, particularly in the final hours of negotiations late on the final evening. This issue centered on delaying the commencement of the aggression amendment and whether that commencement should be automatic or require a further decision of the State Parties, and in the latter case, the appropriate proportion of the State Parties that would have to decide.

²³ The position favoured by members of the UNSC was, unsurprisingly, that such a determination should lie exclusively with the UNSC in line with its responsibility to ensure international peace and security. This approach was championed by the two ICC State Parties that are permanent UNSC members – the UK and France. The major alternative, favoured by many ICC States Parties, advocated upholding the independence of the Court by allowing it a residual power to determine that an act of aggression had occurred where the UNSC was unable to do so. At the extreme end of the spectrum, some States would have removed any UNSC involvement in the process altogether. Ultimately the States Parties agreed to provide the Court with an independent power to approve investigations for alleged crimes of aggression. Consequently, even if the UNSC declines to refer a situation of aggression to the Court, it will still be open to the Prosecutor to apply to the Pre-Trial Chamber for approval to launch an investigation into such conduct.

agree to a set of amendments covering the substantive definition and the jurisdictional pre-requisites of the crime of aggression. This was a remarkable achievement that will reverberate through the coming decades and contribute to the fight against impunity for waging aggressive war. Nonetheless, the amendment package is not a solution in and of itself. The prohibition of aggression must be explained to governments and those in command of armed forces throughout the world in order to deter them from breaching its terms and to use the force of law in the pursuit of peace.

3. The Definition of Aggression under the Rome Statute

The definition of the crime of aggression that was ultimately agreed at Kampala is multi-layered. It describes the core elements of the crime, circumscribes the categories of persons who may be held responsible for it, and lists various specific acts that will qualify as aggression. Nonetheless, fundamental questions concerning the contours of this crime and its constituent elements are left unanswered by the definition. These questions, which include the applicability of exceptions for humanitarian intervention and anticipatory self-defence, affect not only the potential criminal responsibility of individuals charged with the crime of aggression, but also the interests of States in whether their acts are considered to amount to aggression or not. This article addresses the explicit and implicit aspects of the definition of aggression discussing issues that will arise in its application. The aim is to provide an anatomy of the crime of aggression in its current state while at the same time highlighting the issues that remain to be resolved.

The core amendment setting out the substantive crime of aggression is the introduction of article *8bis* to the Rome Statute:

Article *8bis*

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.

The amendment package also augments the elements of the crime, with the following elements for 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 person²⁴ 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.

For analytical purposes, the definition of aggression set out in article 8bis can be divided into two parts— (i) the act of aggression, and (ii) the crime of aggression. Whereas an act of aggression is a form of State conduct, the crime of aggression focuses on individual criminal responsibility.²⁵ In order to prosecute an individual for the crime of aggression, it must first be demonstrated that there was an aggression by a State.

The following analysis commences with an examination of the legal requirements to establish an act of aggression. It then looks to the elements of the crime of aggression. Subsequently it addresses the interaction between aggression and the modes of liability applicable under the Rome Statute before finally surveying the defences available to an accused charged with aggression.

In carrying out the analysis, the relevant interpretive principles include the Rome Statute’s primordial goal of ending impunity for the most serious crimes of concern to the international community.²⁶ Equally important is the principle of *nullum crimen sine lege*, which prohibits any person from being held criminally responsible for conduct that was not criminalized and within the jurisdiction of the Court at the time it occurred, and the correlative principle of lenity, which requires that the relevant provisions be construed strictly and not extended by analogy and any persistent ambiguity be interpreted in favour of the accused.²⁷

²⁴ With respect to an act of aggression, more than one person may be in a position that meets these criteria.

²⁵ See Stefan Barriga, ‘Against the Odds: The Results of the Special Working Group on the Crime of Aggression’, *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the crime of Aggression, 2003-2009* (The Liechtenstein Institute on Self-Determination at Princeton University, 2009, Barriga, S., Danspeckgruber, W., and Wenaweser, C., eds), p.6.

²⁶ “Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,...

²⁷ Rome Statute, article 22(1).

3.1. Act of Aggression

The first requirement of the definition of aggression is the occurrence of an act of aggression. Article 8bis(2) defines an act of aggression in two sub-parts. The opening sentence of article 8bis(2) sets out the general definition (“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”). The second sentence of article 8bis(2) provides a non-exhaustive list of examples of conduct that will qualify as acts of aggression.

The framers of the aggression amendments ultimately agreed upon an amalgamation of article 6 of the Nuremberg Statute (crimes against the peace) and the definition of aggression contained in UNGA Resolution 3314. This composite definition imports the dual benefits of the historical pedigree of the Nuremberg definition and the hard-gained consensus arrived at in Resolution 3314.²⁸

3.1.1. Armed force

Under article 8bis, the initial requirement is a use of “armed force”. The term “armed force” in article 8bis appears to bear its normal meaning: kinetic force directed against the opponent through military weaponry or blockades backed up by such weaponry.²⁹ It does not include non-kinetic attacks, such as economic embargoes or cyber warfare.³⁰ The few instances in which operations have been called aggression by significant portions of the international community support this interpretation as they have all involved physical armed confrontation.³¹ For example, the Nuremberg Tribunal referred to “the seizure of Austria and Czechoslovakia” by Nazi Germany through the invasion of armed forces across borders as examples of aggression.³² Subsequently, the rare occasions where the UNSC has referred to events as acts of aggression have also all involved the use of military forces in foreign territory.³³ Consequently, the demonstration of the use of armed force in the military sense will stand as a condition precedent for any charge of aggression before the ICC.

The elements of the crime of aggression require that the act of aggression be committed.³⁴ Consequently, threats of aggressive acts will not be covered by the aggression amendments, no matter how serious or sinister.³⁵

²⁸ See also Barriga, *supra* note 25, p.9.

²⁹ See, e.g., Resolution 3314, Article 1; *Case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Judgment of 27 June 1986 (Merits), 1986 ICJ Reports 14, para.163 (implicitly accepting that “cross-border military attacks” could constitute aggression).

³⁰ See Report of the Special Working Group on the Crime of Aggression (ICC-ASP/6/20/Add.1/Annex II), para.35.

³¹ Tom Ruys, *‘Armed Attack’ and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, (Cambridge University Press: Cambridge, 2010).

³² See Grant Dawson, ‘Defining Substantive Crimes within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression’, 19(3) *New York Law School Journal of International and Comparative Law* (1999-2000) 413-452, p. 427 citing Office of the United States Chief of Counsel for Prosecution of Axis Criminality, 1 *Nazi Conspiracy and Aggression* 5 (1946), p.16.

³³ See, e.g., UNSC Resolution 326, 1973 (indicating *inter alia* the UNSC’s concern at the intensified military intervention of South Africa in Southern Rhodesia...and also by the deployment of South African armed forces on the border with Zambia...); UNSC Resolution 387, 1976 (expressing the UNSC’s concern at South Africa’s use of “invading forces” and the “seizure of Angolan equipment and materials”).

³⁴ Element 3.

³⁵ Note that attempted aggression can potentially be prosecuted, as discussed below under heading 3.3.5. However, attempted aggression requires more than a mere threat to commit aggression; it requires a concrete step towards the implementation of the aggressive act.

3.1.2. “By a State,” and against a State?

By defining an act of aggression as “the use of armed force by a State”, the amendments exclude uses of force by non-State entities. Violent attacks committed by terrorist groups, insurgents, criminal factions, mercenaries, or dissident groups will not *per se*³⁶ satisfy the definition, even if committed on a large-scale with grave effects equivalent to an attack by State forces.³⁷

Whilst it is unlikely that States will interfere with the substantive definition of aggression prior to the aggression amendments entering into force,³⁸ consideration should be given to extending the definition of aggression to include the use of armed force by non-State entities.³⁹ The designers and leaders of acts of aggression should be condemned and punished at the international level irrespective of whether they direct the machinery of States or non-State entities. The world has witnessed non-State entities perpetrate large-scale armed attacks in recent years, most notably when Al-Qaeda struck the World Trade Center and other targets on 11 September 2001. Follow-up attacks such as the bombings on 7 July 2005 on public transport vehicles in London and other strikes including the bombing of Domodedovo airport in Russia by Chechen rebels in 2011 show the ability of non-State organisations to unleash violent and grave attacks of an aggressive nature. Nonetheless, in their current form, the aggression amendments do not extend to such attacks. This means that Osama Bin Laden, for example, would have been immune from prosecution for the crime of aggression. Although he was the head of Al-Qaeda, he was not in a position to effectively control a state or direct the military or political action of a state and so would not fulfil the elements of the definition of the crime of aggression. Thus, even if the Taliban were found to have sufficient control⁴⁰ over Al-Qaeda to be held responsible for the attacks and its leaders were prosecuted, the self-declared mastermind behind the attacks would have escaped any conviction for aggression.

Avoiding this anomalous outcome could be achieved by extending the aggression amendments to cover attacks carried out by non-State actors. The language of the leadership clause would have to be amended to read “...in a position effectively to exercise control over or to direct the political or military action of a State *or non-State actor*”.

Whilst there is no jurisdiction over acts of non-State actors in isolation, the Court will have jurisdiction if an armed attack by a non-State actor can be attributed to a

³⁶ If one or more States are sufficiently implicated in the attack then the use of force may qualify as an act of aggression, as discussed below in this section.

³⁷ Beth Van Schaack, ‘The Grass that Gets Trampled when Elephants Fight: Will the Codification of the Crime of Aggression Protect Women?’, *Santa Clara Univ. Legal Studies Research Paper No.10-10* (2010) 1-47, p.19 citing Frédéric Mégret, *Beyond “Freedom Fighters” and “Terrorists”: When, if Ever, is Non-State Violence Legitimate in International Law?*, <<http://ssrn.com/abstract=1373590>>, 10 September 2012.

³⁸ The aggression amendments can at the earliest enter into force in 2017, subject to a decision by the same majority as approved the amendments and upon the 30th ratification of the amendment by an ICC State party.

³⁹ Michael Anderson, ‘Reconceptualising Aggression’, *60 Duke Law Journal* (2010) 411-451, pp.412-413, 418; Antonio Cassese, ‘On Some Problematical Aspects of the Crime of Aggression’, *20 Leiden Journal of International Law* (2007), 841-849, p. 846.

⁴⁰ See below in this section, for a discussion of the level of control required for the attribution of responsibility for armed attacks.

State.⁴¹ In determining attribution, the Court will have to decide whether to adopt the narrower “effective control” test espoused by the ICJ in *Nicaragua* and referred to with some approval in the Draft articles on State Responsibility produced by the International Law Commission, or the more inclusive “overall control” test established by the Appeals Chamber of the ICTY in the seminal case of *Prosecutor v. Duško Tadić*.⁴² The language of the aggression amendments is more closely aligned to the ICJ’s approach, as article 8bis(2) essentially reproduces the ICJ’s test by prohibiting “[t]he 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.” However, the object of the aggression amendments - holding accountable those individuals who unleash large-scale armed violence in breach of the UN Charter - weighs in favour of the ICTY’s broader approach to attribution. That test will ensure that States that send armed groups to carry out violent acts on their behalf will be held to account and will not be able to avoid liability on the basis that they did not direct the specific acts that constituted aggression. Whichever approach is ultimately favoured, there is also a third option that can coexist with either of the above approaches. This applies where a State acknowledges and adopts the acts of a non-State actor as its own.⁴³

On the question of which entities may be victims of an act of aggression, the definition is slightly ambiguous. It reads “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*.” The question arises, does this leave room for attacks against non-State entities to qualify as aggression? Read as whole, article 8bis suggests not. The enumerated examples of aggression in article 8bis (2)(a)-(g) all refer to acts committed against another State as does the *chapeau*. Moreover, the question is largely theoretical because an attack against a non-State entity is likely to also constitute an attack against the territorial State where the entity is based. Such an attack would qualify as aggression under the plain terms of the amendments – provided that the State has not given its consent to such acts.

3.1.3. *The Qualifiers (“against the Sovereignty, Territorial Integrity or Political Independence of Another State, or in any other Manner Inconsistent with the Charter of the United Nations”)*

The use of armed force will only satisfy the general definition of aggression in article 8bis if used against the “sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.” The inclusion of these qualifiers mirrors the definition in Resolution 3314 and

⁴¹ The requirement that the attack be committed by or attributable to a State will force the Court to address the perennial question of the elements of statehood. In this respect, see the Montevideo Convention on the Rights and Duties of States, 1933.

⁴² Note that the Commentaries to the International Law Commission Draft Articles on State Responsibility (2001) do not exclude the application of the “overall control” test espoused by the ICTY Appeals Chamber in *Tadić* but rather sought to distinguish it from *Nicaragua* on the basis of the difference in the ICTY’s mandate which is of individual criminal responsibility rather than state responsibility; see International Law Commission Draft Articles on State Responsibility (2001), Article 8, para.4. Despite this, the ICJ has opined that the Articles on State Responsibility adopt its “effective control” test rather than the ICTY’s “overall control” test; *Bosnian Genocide Case (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro))*, Judgment (merits), ICJ Reports 2007, 43 (“*Bosnian Genocide Case*”), paras.399-403.

⁴³ See Article 11 of the International Law Commission Draft Articles on State Responsibility (2001).

largely matches the terms of article 2(4) of the U.N. Charter (“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 other manner inconsistent with the Purposes of the United Nations.”).⁴⁴

The qualifiers do not *per se* limit the definition of aggression to any significant degree. The UN Charter requires states to settle disputes peacefully.⁴⁵ Thus, the use of force to settle an inter-state dispute, even on the high seas or in space with no impact on the territory (in the sense of land and territorial seas) of a state, for example, would be inconsistent with the Charter. Consequently, almost any use of armed force by a state that is objected to by another state will potentially meet one or more of the qualifiers, as demonstrated by the broad-ranging list of examples in article 8*bis* (2). During negotiations, Germany sought to add an additional qualifier to the crime which would have restricted it to armed attacks which have the “object or result of establishing a [military] occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.”⁴⁶ The German proposal was rejected – indicating that the seizure of territory is not a necessary feature of aggression.

It is unclear whether the qualifiers concern the subjective purpose for which the force is used (to the extent a state may have a subjective will), or the objective results of the use of force. Although the distinction may seem fine, it could be dispositive in certain circumstances. For example, if a State attack was directed against a target not fulfilling any of the qualifiers (such as against a terrorist group operating within the State’s own borders) but the attack had unintended but grave effects in another State (such as if missile strikes against the terrorist group also caused damage outside the State’s borders, whether due to inaccurate targeting or simply the magnitude of the strikes),⁴⁷ could those unintended consequences constitute an act of aggression? The conventional notion of aggression would suggest not, thus predicating the act of aggression on a malevolent purpose or *animus malus* held by the attacking State, rather than the mere objective responsibility for damage to another State. However, there is room for flexibility in this respect. Concepts of recklessness and negligence are not unfamiliar to public international law and could conceivably provide a basis for finding a State responsible for an act of aggression.⁴⁸ By way of analogy, in the *Corfu Channel* case, the ICJ held that it was sufficient, in order to establish Albanian responsibility for a wrongful act, that it knew, or must have known, of the presence of mines in its territorial waters and did nothing to warn third states of their presence.⁴⁹ Accordingly, the first part of article 8*bis* (2) could be read to extend to acts of aggression caused by recklessness. This would not necessarily result in over-criminalization, as criminal responsibility for an act of aggression requires the demonstration of *mens rea* that the act is committed with intent and knowledge, as discussed below.

⁴⁴ Van Schaack, *supra* note 7, pp. 515-516 (noting the added reference to “sovereignty” and the deletion of the concept of a threat to the peace).

⁴⁵ UN Charter, Articles 1(1) and 2(3).

⁴⁶ Oscar Solera, ‘The Definition of the Crime of Aggression: Lessons Not-Learned’, 42 *Case Western Reserve Journal of International Law* (2009) 801-824, p.807.

⁴⁷ Note that the issue of whether such unintended consequences could satisfy the *mens rea* for the crime is a separate question, addressed below under the heading 3.3.4.

⁴⁸ See also *Draft articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, Article 2, Commentary paras.3-4, noting that different obligations in public international law have intention, knowledge, or even inadvertence standards to attribute responsibility.

⁴⁹ *Corfu Channel Case (United Kingdom v. Albania)*; *Assessment of Compensation*, 15 XII 49, International Court of Justice (ICJ), 15 December 1949, I.C.J. Reports 1949, p. 4, pp. 22–23.

3.1.4 The enumerated list of examples: invasions, blockades, and other acts of aggression

The list of acts of aggression in article 8bis (2) set out the typical means by which armed force is used aggressively in international relations.

- article 8bis (2)(a) clarifies that any invasion, attack, military occupation or annexation of a State's territory by another State will qualify as aggression. There is no minimum duration of the attack, although short-lived attacks may not ultimately meet the threshold requirement of a manifest violation of the UN Charter.⁵⁰ That an invasion is met with no armed resistance does not automatically preclude a finding of an act of aggression.
- Bombardment of the territory of another state would qualify under article 8bis(2)(b). However, the question of collateral damage or unintended damage remains unsettled, as least in so far as determining that an act of aggression has occurred.⁵¹
- Blockades of the ports or coasts of another State by the armed forces of a State are included in article 8bis(2)(c). A definition and some guiding parameters of the term "blockade" are set out in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea 1994.⁵² Nonetheless, questions persist as to the legality of various types of blockades, as demonstrated by the dispute between Israel and Turkey over the killing of peace activists on a Turkish vessel bringing supplies into Palestine.⁵³
- Attacks on the armed forces of another state are included in article 8bis(2)(d). The various public international law exceptions to aggression, such as self-defence and United Nations authorization, which are discussed below, would have to be addressed before determining that any such use of force was an act of aggression.⁵⁴
- article 8bis(2)(e) makes the use of armed forces in the territory of a State beyond the consent of the territorial State a form of aggression. As joint military operations and military assistance operations become more common, the possibility of scenarios falling under article 8bis(2)(e) will increase. It is not difficult to imagine foreign military presence transitioning from welcome assistance to unwelcome interference and even aggression, as demonstrated by the ICJ's finding in the Case Concerning Armed Activities on the Territory of the Congo (*Democratic of Congo v. Uganda*).⁵⁵
- article 8bis(2)(f) essentially covers a form of safe haven aggression. If a State allows its territory to be the launching point for forces of an aggressor State against a third State, then it may be considered to have committed aggression. In particular, the use of military bases on foreign soil to launch aggressive attacks on

⁵⁰ See discussion of the "manifest" violation requirement below.

⁵¹ See discussion of the assessment of unintentional damage above under heading 3.1.3.

⁵² The San Remo Manual is a non-binding document but is designed to reflect the existing customary international law in this area. See Louise Doswald-Beck, 'San Remo Manual on International Law Applicable to Armed Conflicts at Sea', 309 International Review of the Red Cross (1995) <<http://www.icrc.org/eng/resources/documents/misc/57jmst.htm>>, 30 November 2012.

⁵³ See Report of the Secretary-General's Panel of Enquiry on the 31 May 2010 Flotilla Incident, September 2011, <http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf>, 1 September 2012.

⁵⁴ See discussion of the public law exceptions to aggression below under heading 3.2.

⁵⁵ See *Case Concerning Armed Activities on the Territory of the Congo (Democratic of Congo v. Uganda)*, Judgement on Merits, 19 December 2005, I.C.J. Reports 2005, p. 168, paras.42-54.

third States could fall within this prohibition. This provision does not specify whether the level of knowledge of the haven State is full knowledge and consent, knowledge of a risk, or willful blindness. The ambit of this provision will largely depend on which of those tests is adopted. It is also notable that a State will not be considered to have committed an act of aggression merely by allowing its territory to be used by a non-State armed group that carries out an attack on a third State. Providing safe havens for terrorists will thus not qualify unless the terrorist group is under the control of the haven State, which will depend on the test for attribution to a state.⁵⁶

- article 8bis(2)(g) includes the ICJ formulation for attribution of non-State acts to a State in the *Armed Activities in Nicaragua* case,⁵⁷ which is discussed above. Notably, this provision is sufficiently broad so as to encompass a situation similar to the attacks on the United States of America on 11 September 2001 when there was no conclusive evidence that the Taliban sent Al-Qaeda terrorists to strike the World Trade Centre but there were strong indications that it was substantially involved in Al Qaeda's operations and adopted the attacks as though they were its own after they had occurred.

3.1.5 Article 8bis (2): an exhaustive or exemplary list?

The list of acts of aggression analysed above is not exhaustive.⁵⁸ Inclusion of the list was a matter of drafting compromise⁵⁹ and does not preclude the Court finding that other uses of armed force fitting the general definition in the first sentence constitute acts of aggression.⁶⁰ Some commentators argue that prosecuting acts that are not specified in the list would breach the principle of *nullum crimen sine lege*, enshrined in article 22(2) of the Rome Statute, as it would extend the enumerated definition of acts of aggression by analogy. Moreover, they suggest that the ambiguity as to whether the list constitutes an exhaustive definition should be interpreted in favour of the accused.⁶¹

However, the drafters intended an open-ended list, as discussed above, and the wording of the first two sentences of article 8bis(2) supports the open-ended approach. The first sentence establishes the governing definition of an act of aggression, using the same formula used to define the other crimes in the Court's jurisdiction in articles 6, 7, and 8, (i.e. “‘war crimes’ means ...”, “‘act of aggression’ means...”). The second sentence then sets out examples that “shall” qualify under that definition without commenting on other acts which may also qualify. As noted by Kress, this approach “does not contradict the principle of legal certainty under international law because the general definition ensures a sufficient degree of legal certainty”.⁶² The threshold requirement in article 8bis(1) (that the act of aggression be one that by its “character,

⁵⁶ See discussion on attribution above under heading 3.1.2.

⁵⁷ *Nicaragua v. USA*, *supra* note 29.

⁵⁸ See Report of the Special Working Group on the Crime of Aggression (ICC-ASP/6/20/Add.1/Annex II), para.34 (noting that “Those delegations that supported the drafting of paragraph 2 [Article 8 bis (2)] expressed their understanding that the list of crimes was, at least to a certain extent, open. Acts other than those listed could thus be considered acts of aggression, provided that they were of a similar nature and gravity to those listed and would satisfy the general criteria contained in the chapeau of paragraph 2.”)

⁵⁹ Noah Weisbord, ‘Prosecuting Aggression’, *Harvard International Law Journal* (2008) 161-220, p. 182.

⁶⁰ Roger Clark, *supra* note 6, p. 696.

⁶¹ See, e.g., Kai Ambos, ‘The Crime of Aggression after Kampala’, 53 *German Yearbook of International Law* (2011) 463-509.

⁶² Claus Kress, ‘The ICC Review Conference at Kampala: Mission Accomplished or Unfulfilled Promise?’, 8 *Journal of International Criminal Justice* (2011) 1179-1217, p.1191.

gravity and scale, constitutes a manifest violation of the Charter of the United Nations”) provides additional protection to an accused against being convicted for conduct that could not reasonably be seen as being prohibited by law.⁶³

An example of an unlisted act that could potentially be considered an act of aggression is the systematic targeting of the nationals of a certain state. Arguably, the killing of political leaders or scientists of a state in a systematic manner could qualify as the use of force by a state against another state in a manner inconsistent with the Charter of the United Nations. Of course, if the killings occurred within the targeted state or were perpetrated in conjunction with attack on sensitive buildings within the targeted state then they could amount to an attack on the territory of the targeted state, in breach of article 8bis (2)(a). However, even if the attacks occurred in disparate locations outside of the targeted state, when taken collectively they could potentially satisfy the definition under article 8bis (2) and amount to acts of aggression in and of themselves. Faced with potential responsibility for the crime of aggression, the state (or leaders thereof) responsible for the attacks would have the opportunity to present justifications for their acts, such as self-defence, the prevention of proliferation of weapons of mass destruction, and counter-terrorism operations. The validity of these justifications is discussed below under the heading “Exceptions (uses of armed force not qualifying as acts of aggression).”

3.1.6 Declarations of War and the qualifier: “In accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974”

The enumerated list of examples in article 8bis(2) is preceded by two clarifications. First, the provision specifies that an act of aggression may occur regardless of whether a declaration of war has been issued by the aggressor or victim State or States. Declarations of war are somewhat of an anachronism in modern times and the absence of such a declaration should not prevent the prohibition of aggression from applying. This accords with the approach taken in the Geneva Conventions of 1949, which expressly de-link their application from the existence of a declared war.⁶⁴

Second, article 8bis (2) clarifies that the examples specifically listed shall qualify as aggression “(i)n accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.” While this clarification identifies the source of the listed examples discussed above, it is less clear whether it also imports the guiding principles from Resolution 3314. Certain of those guiding principles will assist in determining that an act of aggression had occurred.⁶⁵ For example, according to UNGA Resolution 3314, the first use of armed force is a relevant consideration, as it *prima facie* distinguishes the aggressor state from the victim entity. However, it is just one consideration and would not automatically be dispositive of the issue.

Other aspects of Resolution 3314 should not be directly transposed to the ICC setting. Examples include article 2, which allows the UNSC to refrain from making a determination of an act of aggression if it considers such a determination unjustified in

⁶³ See *Jorgić v. Germany*, ECtHR, Application no. 74613/01, Judgement, 12 July 2007, § 101 (noting that Article 7 of the European Convention of Human Rights, which contains the guarantee of *nullum crimen sine lege*, “cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.”).

⁶⁴ See, e.g., Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, article 2.

⁶⁵ Barriga, *supra* note 25, p.10.

the circumstances.⁶⁶ That untethered political discretion does not fit well with the ideal of the equal application of the law to all states. That approach has been effectively neutered with respect to ICC proceedings by adopting amendments on aggression that allow the Prosecutor to initiate proceeding irrespective of whether the UNSC determines that aggression has occurred.⁶⁷

3.2 Exceptions (uses of armed force not qualifying as acts of aggression)

Of all the unresolved issues surrounding the substantive definition of the crime of aggression, the applicability of exceptions to the prohibition on the use of force is likely to be the most intractable. It was the elephant in the room at the Kampala Review Conference and will re-emerge as an issue when the aggression amendments are brought into force and when the first aggression case is heard by the Court.

Why is this issue so important? Because the availability of exceptions to the prohibition on the use of force will be determinative as to whether an act of aggression has occurred. An act of aggression is a necessary precursor to establishing liability for the crime of aggression and thus the applicability of an exception to the prohibition on the use of force may preclude such liability. In this way, the exceptions to the general prohibition against the threat or use of force will distinguish lawful conduct from criminal aggression.⁶⁸

The issue is all the more contentious due to the uncertainty surrounding the range and status of the available exceptions under public international law. This may explain why no exceptions are explicitly mentioned in the amendments; the inclusion of some would have raised further questions about the applicability of others.

In terms of the textual fit of the exceptions within the framework of the aggression amendments, they could be introduced into the analysis in several ways. The definition is predicated on an act inconsistent with the “sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.” Consequently, acts that are consistent with the Charter will, by definition, not qualify as aggression. This covers self-defence and acts authorized by the UNSC. Moreover, the requirement that the conduct be a ‘manifest’ violation of the UN Charter leaves room for the more controversial potential exceptions, such as implicit authorization or the defence of nationals abroad. The existence of one of these claims may be sufficient to convince the judiciary that the violation in question was not a manifest violation and so should not result in a conviction. Looking at the Rome Statute more generally, the exceptions could be introduced through the operation of article 32 of the Rome Statute, which provides that “at trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from [international] law.” Alternatively, the aggression provisions could be read to import an implicit negative element, whereby the Prosecution must prove the absence of a legal justification for the use of armed force.⁶⁹ Given this range of

⁶⁶ Although the Article refers explicitly to the rationale of insufficient gravity, which is consistent with the definition of aggression adopted by the ICC (due to the “manifest breach” requirement), it also leaves open the possibility of the UNSC determining whether or not a prosecution for aggression should proceed based on political considerations.

⁶⁷ See Article 15bis(8). The UNSC could still defer the investigation under article 16, but that would be subject to the vetoes of each of the permanent members of the UNSC and would abate after 12 months unless renewed.

⁶⁸ Keith Petty, ‘Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict’, 33 *Seattle University Law Review* (2009) 105-150, p.120.

⁶⁹ Kress, *supra* note 62, p.1192.

mechanisms to introduce public international law exceptions, fears that no exceptions to the prohibition to the use of force will apply at the ICC are largely exaggerated.⁷⁰

3.2.1 UNSC Approval

The definition of an act of aggression is founded on the UN Charter system. Accordingly, any armed attack that is covered by UNSC approval will not qualify as an act of aggression. UNSC approval is expressed by way of Chapter VII UNSC resolution.⁷¹ The key phrase that signals authorization for the use of force is “all necessary means”. Language short of this usually only justifies non-military interventions, such as sanctions and diplomatic pressure.

Because UNSC consent is signaled by resolution, statements by individual member States or the President of the Security-Council would not be sufficient to constitute such approval. Such statements could serve as provisional cover to legitimize a use of force pending retrospective UNSC approval. UNSC approval after the fact would also, in most circumstances, preclude a charge of aggression.⁷² Nonetheless, because the ICC is independent, it is conceivable that the Prosecutor and Judges could disagree with the UNSC’s *post hoc* approval. For example, if the UNSC approval occurred long after the incident and appeared to be politically motivated and not reflecting the factual and legal situation, the ICC may reject the UNSC view and find that an act of aggression occurred.

3.2.1.1 Implicit authorization

Whilst UNSC authorization provides an established justification for the use of armed force, the status of the related concept of “implicit authorization” is murkier. “Implicit authorization” means interpreting UNSC resolutions to authorize the use of force even when they do not do so explicitly. The doctrine emerged as a purported legal justification for the invasion of Iraq in 2003. Its British and US proponents argued that the forceful invasion of Iraq was implicitly authorized by UNSC Resolution 678, which authorized the 1991 allied action against Iraq.⁷³ They contended that although the authorization pursuant to Resolution 678 had been suspended when a conditional cease-fire was established by Resolution 687, the authorization was not terminated. Accordingly, they asserted that the UN authorization was revived when Saddam Hussein breached the various disarmament and weapons inspections requirements imposed by the UN.⁷⁴

⁷⁰ For example Van Schaack notes that “from the moment it began participating in the negotiations on aggression in 2009 (under the Obama administration), the US vocalized its concerns about the draft definition of the crime.” Van Schaack explains that “The central problem was that Article 8bis(2) is worded in such a way that it deems any violation of the territorial integrity, political independence, or sovereignty of another state, as well as any use of armed force that is inconsistent with the U.N. Charter, to be an “act of aggression.” Van Schaack, *supra* note 7, p. 515-516.

⁷¹ The Security Council may act under Chapter VII of the Charter to authorize member states to use such force “as may be necessary to maintain or restore international peace and security.” UN Charter, article 42. See generally Christine Gray, ‘From Unity to Polarization: International Law and the Use of Force Against Iraq’, 13(1) *European Journal of International Law* (2002) 1-19, p. 1.

⁷² Petty, *supra* note 68, p. 112 (“experts agree that the Security Council may still sanction the use of force after the fact”).

⁷³ See Letter from U.N. Ambassador John Negroponte to Ambassador Mamady Traore, President of the Security Council (Mar. 20, 2003), <http://www.usembassy.it/file2003_03/alia/A3032109.htm>, last accessed 12 November 2012.

⁷⁴ See Jay Bybee, ‘Authority of the President Under Domestic and International Law to Use Military Force Against Iraq,’ *Opinions of the Office of Legal Counsel in Volume 26*, 23 October 2002, pp.17-30;

The strenuous efforts made by the US and its allies in 2003 to obtain a new UNSC resolution authorizing the invasion of Iraq significantly weakened the argument that authorization was already implicit in pre-existing resolutions. Most commentators concluded that the argument was legally unsustainable in relation to the 2003 invasion of Iraq.⁷⁵ The “implicit authorization” argument in the context of the Iraq invasion should be seen for what it was – an attempt to justify the use of force on the basis of UNSC consent when there was no such consent.⁷⁶

On the question of which party has the onus of dis/proving UNSC authorization, the amendments are silent. Because the existence of UNSC authorization precludes a finding of an act of aggression, which in turn precludes a finding of guilt for the crime of aggression, it could be argued that the absence of UNSC authorization is a negative element that must be proved by the Prosecution.⁷⁷ However, a US Government sponsored understanding that would have put the onus squarely on the Prosecution to disprove UNSC authorization to the amendment was rejected.⁷⁸ As a result, while the Prosecution must always prove that the violation of the UN Charter is “manifest”, there is no additional element requiring the Prosecution to show that the act fell outside any possible implicit authorization of the UN.

Despite the fact that the implicit-authorisation argument never crystallized as a principle of public international law, it may nonetheless impact on a criminal prosecution for aggression. The possibility that a military action was within the reasonable bounds of an UNSC authorization could undermine the showing of a “manifest” violation of the UN Charter.⁷⁹ In this way, the doctrine of implicit authorization may continue to impact international criminal law despite its lack of standing under public international law.

Christopher Greenwood, ‘The Legality of Using Force Against Iraq’, *Memorandum to Select Committee on Foreign Affairs*, 24 October 2002, <<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaaff/196/2102406.htm>>, 26 September 2012, (“I do not believe that a new resolution expressly authorizing military action is necessary as a matter of international law. In my opinion, the authorization to use “all necessary means” contained in Resolution 678 (1990) ... has not been terminated by the Security Council.”).

⁷⁵ See Mary Ellen O’Connell, ‘Addendum to Armed Force in Iraq: Issues of Legality’, *American Society of International Law Insight*, April 2003; Christine Gray, *supra* note 72, pp.12-13; Harold Koh, ‘Foreword: On American Exceptionalism’, 55 *Stanford Law Review* (2002) 1479-1527, p. 1480 (“In my view, the Iraq invasion was illegal under international law.”); Kofi Annan, ‘Excerpts: Annan Interview’, with BBC journalist Owen Bennett-Jones, 16 September 2004, <http://news.bbc.co.uk/2/hi/middle_east/3661640.stm>, 24 September 2012; See also Marko Milanović, ‘The OLC Memoranda on Iraq: Revisiting the Case for War’ <<http://www.ejiltalk.org/the-olc-memoranda-on-iraq-revisiting-the-case-for-war/>>, 25 April 2012. Some prominent scholars including Ruth Wedgwood and Yoram Dinstein have expressed support for the concept of implicit consent in relation to the Iraq invasion.

⁷⁶ There could not be a prosecution at the ICC for the 2003 invasion of Iraq under the amendments in their current form because it was agreed at an early stage that the provision on aggression to be adopted would be prospective in nature and not have any retroactive effect. See Report of the Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression (Princeton University, USA, 21-23 June 2004), para.9.

⁷⁷ See Kress, *supra* note 62, p.1192.

⁷⁸ Van Schaack, *supra* note 37, p. 36. The US understanding would have stated: “It is understood that, for purposes of the Statute, an act cannot be considered a manifest violation of the United Nations Charter absent a showing that it was undertaken without the consent of the relevant state, was not taken in self-defence, and was not within any authorization provided by the United Nations Security Council.”

⁷⁹ Commentators disagree on whether the “implicit authorization” argument would have counter-acted the “manifest” violation requirement in relation to the 2003 Iraq invasion. Compare Kress, ‘Time For Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus’, 20 *European Journal of International Law* (2009), 1129-1146, p.1142 (suggesting no finding of an act of

3.2.2 Self-defence

Whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.⁸⁰

Virtually every use of force in international relations is accompanied by a claim of self-defence in some form or another. From Hitler to Hussein, the architects of aggressive campaigns have always sought to shroud their actions in the language of victimhood. Self-defence will inevitably be invoked in any future prosecution for aggression and the Court will have to address the parameters of this notion under public international law. Self-defence is a well-established exception to the prohibition on the threat or use of force contained in article 2(4) of the UN Charter, as set out in article 51 of the Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

Self-Defence is also firmly grounded in customary international law.⁸¹

Under the Charter and under customary international law actions taken pursuant to a claimed right of self-defence must accord with the twin precepts of necessity and proportionality.⁸² So long as a use of force in international relations adheres to these requirements, it will not qualify as an act of aggression. Consequently, the amorphous concepts of necessity and proportionality will likely be disputed and the determination will turn on whether the action is considered sufficiently excessive to constitute a manifest violation of the Charter. Again, the term “manifest” will act as a filter to exclude events that do not clearly constitute culpable criminal behaviour.

3.2.2.1 Anticipatory self-defence

Self-defence is not limited to responding to attacks that have already impacted on the victim State. Under customary international law, anticipatory self-defence is lawful in response to imminent attacks. For anticipatory attacks to be lawful, the underlying attack

aggression would be made) with Petty, *supra* note 68, p.136 (suggesting that the ICC would have found the 2003 Iraq invasion illegal).

⁸⁰ David Kaye, ‘Adjudicating Self-Defense: Discretion, Perception, and the Resort to Force in International Law’, 44 *Columbia Journal of Transnational Law* (2011), 134-184, p. 149.

⁸¹ *Nicaragua v. USA*, para.176.

⁸² It is generally accepted that the conditions required to raise this customary right were contained in Daniel Webster’s comments in relation to the *Caroline* incident of 1837. The *Caroline* incident involved the British destroying a ship that was being used by Canadian rebels, while it was harboured in America. The American Secretary of State, Daniel Webster, eventually agreed that a State would be justified in acting in self-defence to preempt an imminent attack, where there was a “necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.” Since that incident these conditions have been interpreted as necessity, proportionality and immediacy. In the *Nicaragua* case it was confirmed that these customary criteria provide substantive guidelines with regards to the right of self-defence under Article 51. Stanimir Alexandrov, *Self-Defence Against the Use of Force in International Law*, (The Hague: Kluwer Law International, 1996) at 19.

must be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."⁸³ In such circumstances that attacking State will not have committed an act of aggression.

On the other hand, preventive self-defence is not lawful. Preventive self-defence means attacks designed to remove mere abstract threats or potential threats.⁸⁴ While the line between anticipatory self-defence and preventive self-defence is not yet definitively settled, the essence of the test is whether the threats have concretised into plans for specific operations (anticipatory action is justified) or whether they remain mere possibilities that are not in the process of concrete preparation (preventive action does not justify forceful action against the potential aggressor State's). Any judicial determination of such issues would be a highly fact-sensitive endeavour.

3.2.3 Humanitarian intervention

The most contentious potential exception to the prohibition on the use of force is the doctrine of humanitarian intervention. Humanitarian intervention has been defined as "the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights."⁸⁵ Humanitarian intervention is closely related to the concept of responsibility to protect ("R2P"), which holds that the responsibility to protect its people from serious and systematic human rights abuses is a fundamental requirement imposed by sovereignty. According to R2P, if a state cannot or will not prevent the occurrence of such abuses, then intervention by other actors in the international community, including through the use of force, is justified, subject to certain limitations.⁸⁶

The doctrine of humanitarian intervention finds discernible support in customary international law. For example, the Kosovo intervention of 1999 (Operation "Allied Force") was seen by several commentators as legitimate and justifiable under the circumstances, even though it clearly fell outside the terms of the UN Charter.⁸⁷ The UN did not condemn NATO intervention in Kosovo afterwards, although claims that it therefore approved the attack are overly optimistic.⁸⁸

While the concept of humanitarian intervention is a necessary tool to justify the use of military action to limit human suffering, it brings with it the risk of aggressive acts carried out under the pretext of humanitarian action.⁸⁹ In light of this concern, the ICJ has indicated a negative disposition towards humanitarian intervention. In *Nicaragua*, the ICJ held that the use of force is not the appropriate mechanism to prevent human rights violations in another State.⁹⁰ Moreover, in *DRC v. Uganda*, the ICJ held that

⁸³ Petty, *supra* note 68, p.133-134 referring to the *Caroline Incident*.

⁸⁴ See Cassese, *supra* note 39, at 844.

⁸⁵ Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, (Philadelphia: University of Pennsylvania Press, 1996), pp.11-12.

⁸⁶ International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, (Ottawa: International Development Research Centre, 2001), at p.69; UNGA 2005 World Summit Outcome, G.A. Res. A/RES/60/1, para. 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005). See also Sec. Council Res. 1674, para.4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

⁸⁷ Van Schaack, *supra* note 37, p. 33; See Independent International Commission on Kosovo: The Kosovo Report <<http://www.reliefweb.int/library/documents/thekosovoreport.htm>>, 24 September 2012.

⁸⁸ See Johan D van der Vyver, 'Ius contra bellum and American Foreign Policy', 28(1) *S. Afr. Y.B. Int'l L.* 2003, 1-29, p. 11.

⁸⁹ Van Schaack, *supra* note 37, p. 34, citing Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 *Am. J. Int'l. L.* 107 (2006).

⁹⁰ *Nicaragua v. United States*.

notwithstanding the Security Council's statement that States in the region were responsible for ensuring peace, Uganda's use of military force in the Democratic Republic of the Congo was not justified.⁹¹

The negotiating States at Kampala were unable to ultimately determine the status of humanitarian intervention and were wary of even attempting the exercise and risking re-opening the intractable debates surrounding the doctrine. A US sponsored understanding would have provided significant support for the doctrine. It stated "It is understood that, for 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."⁹² However, that was rejected, leaving the determination to the Judges.⁹³

In making the determination, the Judges will not benefit from a united position in the academic literature. Various commentators position themselves along the continuum from legality to illegality. At one end Julius Stone argues that the literal terms of article 2(4) only prohibit uses of force for specific purposes, such as altering the territory of a state, and do not prohibit uses of force for humanitarian purposes.⁹⁴ The teleological approach adopted by Michael Reisman holds that the UN Charter must be read in light of the human rights protections it enshrines, and thus allow actions directed to uphold those values.⁹⁵ A more cynical view is that the dysfunctionality of the UNSC justifies humanitarian intervention to fill the void.⁹⁶ Others, such as Sir Ian Brownlie argue that humanitarian intervention is illegal, albeit morally defensible in certain circumstances.⁹⁷

The range of views suggests the Judges will enjoy a wide choice in deciding on the ambit of acceptable humanitarian intervention at the ICC. Van Schaack expresses concern that "the expansive way in which the crime has been defined may end up chilling those uses of force that are protective and thus more discretionary, such as uses of force employed pursuant to the nascent doctrine of responsibility to protect...the crime may thus result in more *ex post* prosecutions at the expense of *ex ante* efforts at preventing and repressing violence".⁹⁸ However, the requirements of the aggression provisions are structured to minimize the fear of over-criminalization. Specifically, the requirement that the violation of the UN Charter be "manifest" will provide room for arguments based on doctrines of uncertain legal standing, such as humanitarian intervention and pre-emptive self-defence to preclude liability.⁹⁹ Given the difficulty of proving the elements of the crime beyond reasonable doubt, the Prosecutor is unlikely to bring charges of aggression

⁹¹ *Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda)* (Judgment of Dec. 19, 2005), para. 152.

⁹² Van Schaack, *supra* note 37, p. 36.

⁹³ *See ibid.*, p. 37, citing Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 *Va. J. Int'l. L.*, 631, 643 (2005) (discussing tendency of states to delegate decision-making to international judges when consensus cannot be obtained).

⁹⁴ Van der Vyver, *supra* note 88, p.6 citing Julius Stone, *Aggression and World Order* (1958) 95.

⁹⁵ *See ibid.*, p.6 citing Michael Reisman 'Humanitarian intervention to protect the Ibos', in Richard B Lillich (ed.) *Humanitarian intervention and the United Nations* (1973) 177-8.

⁹⁶ *See ibid.*, p.6 citing *inter alia* Richard B Lillich, 'A United States policy of humanitarian intervention' in Donald P Kommers and Gilbert D Loescher (eds) *Human rights and American foreign policy* (1979) 278 at 288-9.

⁹⁷ *See ibid.*, p.6 citing Ian Brownlie, 'Humanitarian intervention' in John Norton Moore (ed) *Law and Civil War in the Modern World* (1974) 217, 226.

⁹⁸ Van Schaack, *supra* note 37, pp. 4-5 citing Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 *Eur. J. Int'l. L.*, 331, 333 (2009).

⁹⁹ *See* Kress, *supra* note 62.

for actions founded on humanitarian motives and the Judges are unlikely to approve such charges.¹⁰⁰

3.2.4 *Struggling for or assisting self-determination*

Military actions undertaken in support of self-determination movements may fall outside the prohibition on aggression. Indeed, the explanatory notes appended to the 1974 UNGA Resolution on Aggression, which is in large-part the basis for the ICC's definition of aggression, suggest a broad carve-out for the right to struggle for or assist self-determination.¹⁰¹ This possible exception raises highly complex issues surrounding the scope of the right to self-determination and the scope of the actions justified in pursuit of that right. This feature of Resolution 3314 was an important factor motivating States to interpret the aggression amendment in light of 3314 as a whole.¹⁰² Numerous other UNGA resolutions recognise the legitimacy of armed liberation struggles.¹⁰³ Consequently, States assisting groups seeking self-determination will have a strong justification for their actions that is likely to preclude a finding of "manifest" illegality sufficient to qualify under article 8bis(2). However, it must be noted that the present political milieu is far different than at the time when the principle of self-determination was established: colonialism is over and the apartheid system in South Africa is thankfully behind us. With the exception of Palestine, the peoples and parts of the world that were at the forefront of the self-determination struggle have now largely achieved their aims. Thus, the contemporary application of the principle and its evolution and application to modern ethnic and political tensions remains an open question, a question that was expressly avoided by the ICJ in its *Kosovo Advisory Opinion*.¹⁰⁴

3.2.5 *Other possible exceptions*

Additional exceptions that may act to preclude a finding that an act of aggression has occurred, and thus preclude liability for the crime of aggression, include the defence of necessity; the claim of defense of nationals or to rescue hostages or embassies under siege;¹⁰⁵ exercises of hot pursuit or the abduction of fugitives across borders;¹⁰⁶ and an action authorised or approved by a UNGA determination pursuant to the "Uniting for Peace" Resolution.¹⁰⁷ Finally, an argument can be made that exceptions should also exist for counter-terrorism operations and operations to prevent the proliferation of nuclear weapons or other weapons of mass destruction. Although a full discussion of these final two potential justifications goes beyond the scope of this article, the preliminary view of this author is that exceptions for counter-terrorism operations and operations to prevent the proliferation of weapons of mass destruction have not crystallized under customary

¹⁰⁰ See Petty *supra* note 68, p.129.

¹⁰¹ U.N.G.A. Res. 3314 (XXIX), art. 1, 4-8, U.N. Doc. A/9631 (Dec. 14, 1974).

¹⁰² Barriga, *supra* note 25, p.10.

¹⁰³ Van der Vyver, *supra* note 88, p.8

¹⁰⁴ See *Re Secession of Quebec* [1998] 2 S.C.R. 217 at para.138.

¹⁰⁵ This was most famously invoked during the rescue of Israeli passengers on a high-jacked airlift in Entebbe airport, Uganda.

¹⁰⁶ Such actions will often not be sufficiently large-scale and/or serious to qualify as acts of aggression. Nonetheless, in the theoretically possible case where such an action did meet the other criteria of the aggression amendments, assessing the "manifest" illegality of any such act would depend on the necessity and proportionality of the pursuit and damage caused.

¹⁰⁷ See Clark, *supra* note 6.

international law and, in any event, are unnecessary in light of the well-established justifications of UNSC approval and self-defence, which are discussed above.

To the extent any of these exceptions are evoked by states as justifications for uses of armed force against or in the territory of other states, it will be important to assess the proportionality of the measures taken and whether less harmful options were available. For example, a pin-prick incursion into foreign territory by special forces to rescue a downed pilot would be unlikely to constitute aggression whereas a full scale invasion by the armed forces or air force of the pilot's state of nationality without recourse to more tailored methods would likely exceed the bounds of the doctrine of rescue of nationals abroad.

The range and status of the exceptions to the prohibition on the use of force is unsettled. Given that the exceptions will act as a preliminary filter to prevent dubious cases proceeding before the Court, greater legal certainty as to the applicability of these doctrines is needed.

3.3 Crime of Aggression

Whereas an act of aggression is a form of State conduct, the crime of aggression entails individual criminal responsibility. Once it has been established that an act of aggression has occurred, the Court will look at the additional elements in article 8*bis* and related articles to determine whether an individual can be held responsible for the crime of aggression.¹⁰⁸

3.3.1 Actus Reus: “*planning, preparation, initiation or execution (...) of an act of aggression.*”

Consistent with the other crimes under the Rome Statute, the drafters opted for a ‘differentiated’ approach, whereby the mental element and the various forms of participation applying to the crime of aggression are not included within the specific provisions on aggression but instead are contained in the general provisions under the Rome Statute.¹⁰⁹ The alternative “monistic” approach, which had been favoured early in negotiations, would have included the mental element and the forms of participation applying to aggression within the specific aggression provisions. It would have excluded the general provisions under the Rome Statute on intent and forms of participation in the crime.¹¹⁰

While the ‘differentiated’ approach that was adopted is preferable in terms of consistency, the drafters did not manage to avoid all ambiguity. The text of the amendments states that the “crime of aggression” “means the planning, preparation, initiation or execution [...] of an act of aggression.” This varies from the definitions of war crimes, crimes against humanity, and genocide, as it refers to the ways in which an individual may participate in the crime rather than just defining the objective crime itself.¹¹¹

¹⁰⁸ The package adopted at Kampala was the product of negotiation and is limited to prosecutions before the ICC. It cannot be automatically said to reflect the customary international law definition of the crime of aggression, even if it may well end up forming the basis of the agreed definition.

¹⁰⁹ Barriga, *supra* note 25, p.7.

¹¹⁰ See *ibid.*, p.7.

¹¹¹ Compare Rome Statute, articles 6, 7, and 8.

The reference to planning, preparation, initiation or execution reproduces the terms of the Charter of the International Military Tribunal at Nuremberg (article 6(a)).¹¹² However, questions will arise as to how the reference to “planning” and “preparation” impacts on the applicability of the attempt provision in article 25. Would attempting to plan or prepare an act of aggression be sufficient to attach liability to an individual? And will these parts of the definition of aggression be cumulative with or disjunctive from article 25 of the Rome Statute which sets out the generally applicable modes of liability? Will the Prosecution have to show that an accused planned, prepared or initiated an act of aggression and also that the accused fulfils the elements of a mode of liability under article 25? Or will it suffice to show any of the various ways of participating in an act of aggression set out in either article *8bis* or article 25 in order to establish liability? Where an accused is centrally involved in the act of aggression at the leadership level there will be no practical impact as the elements of modes of liability in both articles *8bis* and 25 would be satisfied. However, for state leaders that play more ancillary roles, the textual ambiguity between articles *8bis* and 25 could become determinative of the individual’s liability under the Rome Statute.

In addition to the difficulties entailed by their inclusion in article *8bis*, the specific terms – “planning, preparation, initiation or execution” – largely overlap. Under normal usage, planning merges with preparation which in turn merges with initiation and execution.¹¹³ Consequently, these terms should be used as descriptives rather than mutually exclusive ways in which the crime of aggression can be carried out. The essential factor in any case will be to ensure that at least one of these descriptives is met on the facts of the case – if not then there will have been no crime of aggression.

There is a discrepancy between the terms of the Statute and the elements of the crime of aggression as adopted at Kampala. Article *8bis* states that the crime aggression means the “planning, preparation, initiation or execution” of an act of aggression. However, the elements of the crime of aggression indicate that even if a State leader has planned or prepared an act of aggression meeting the requirements of article *8bis*, this will not be sufficient for a conviction: the act of aggression must actually be committed and not merely planned or prepared or initiated.¹¹⁴ If the Judges are called on to address this discrepancy, they will not be bound by the elements of crimes, which merely provide interpretive guidance and do not supplant the plain terms of the Statute.¹¹⁵

3.3.2 Threshold Requirements

Article *8bis* limits criminal responsibility for acts of aggression to those uses of force, which due to their character, gravity and scale constitute manifest violations of the UN Charter. This was considered a necessary addition in order to avoid the over-criminalization of uses of force considered minor, such as border skirmishes, or less grave, such as minimal property destruction not resulting in physical harm to persons, which are not of a patently illegal character.¹¹⁶

3.3.2.1 Manifest

¹¹² The phrasing is slightly different in article *8bis*(2).

¹¹³ See, Dawson, *supra* note 32, p. 428 (noting that in the Judgement at Nuremberg, the Tribunal noted that the Nazis initiated the war because it had been “carefully prepared”).

¹¹⁴ Elements of Crimes, article *8bis*, element 3.

¹¹⁵ Article 9.

¹¹⁶ Kress, *supra* note 79, p.1138.

The requirement that the act of aggression constitute a “manifest” violation of the Charter in order for criminal liability to arise is the fulcrum of the aggression definition. The inclusion of the term “manifest” was a matter of considerable debate during the negotiations on the aggression amendments. This term “emerged as a compromise modifier to bridge the gap between those delegates who wanted no threshold at all, on the theory that every act of aggression should be subject to prosecution, and those who wanted a higher threshold that would limit prosecutions to “flagrant” breaches of the Charter, wars of aggression, “unlawful” uses of force, or acts of aggression geared toward occupying or annexing territory.”¹¹⁷ Nonetheless, the term “manifest” remains unclear. It may be seen as referring to the degree of clarity or ambiguity surrounding the illegality of the act of aggression or else as relating to the level of seriousness or even the willfulness of the attack.

In determining whether the existence of a “manifest violation” is a legal or a factual question, we must consider that it is clear that a mistake of law is not defence under the Rome Statute under article 32(2) (except if it negates a mental element of the offence) and that “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.”¹¹⁸ The preceding discussion of the parameters of an act of aggression show that the “manifest” threshold will act as a filter to exclude conduct that is technically unlawful but not gravely unlawful from the Court’s consideration. In this light, perhaps the best approach is to avoid classifying the “manifest” requirement as either factual or legal and instead conceptualise it as a requirement that must be met after taking into account both factual and legal considerations. In this way, it may be met on a legal or factual basis or a mix of the two, so long as the necessary requirements set out in article 8*bis* are met.

3.3.2.2 *Scale, Gravity and Character*

The “manifest violation” requirement is based on an assessment of the scale, gravity and character of the act of aggression. Because ambiguity remains as to the parameters of these terms,¹¹⁹ they will have to be interpreted and substantiated in the ICC’s jurisprudence, in a similar manner to how the chapeau elements of crimes against humanity and war crimes have been distilled and defined. Until then, questions will continue to arise concerning the interaction between the factors of scale, gravity and character. Are these conjunctive? Do all the factors have to be fulfilled? And does each factor have to rise to a sufficiently serious level to independently constitute manifest aggression?

The negotiators at Kampala withstood concerted US efforts to have make the three qualifiers of scale, gravity and character all conjunctively necessary requirements – so that they would individually and collectively had to have been sufficient to constitute a manifest violation of the UN Charter. This approach would have been overly restrictive and may have excluded cases meriting international attention from the Court’s jurisdiction. For example, a small-scale military incursion to assassinate a state leader would likely be considered a serious act of aggression, even though it would not satisfy the scale element. Similarly, the destruction of a large but empty military barracks could be considered large-scale but not necessarily grave and nonetheless many would consider it as qualifying.¹²⁰

¹¹⁷ Van Schaack, *supra* note 37, p. 10.

¹¹⁸ Paragraph 4 of the elements of crimes of Aggression.

¹¹⁹ Solera, *supra* note 46, p.808.

¹²⁰ *See ibid*, p.808.

Instead of adopting the US proposal that would have expressly made the three conditions jointly necessary, the States Parties adopted a more nuanced approach, adding the following understanding to Annex II of the Resolution:¹²¹

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.

In light of the negotiating history of the amendments, the most accurate reading of the provision is that the three qualifiers may satisfy the 'manifest breach' requirement in combination. Thus, if two qualifiers are strongly established but the third is less clear, this may be sufficient to establish the crime of aggression. At the same time, it will be insufficient if only one qualifier is established at the requisite level.¹²²

It is clear that the qualifiers do not require the purpose of the attack to be (partial) annexation of territory or subjugation of the victim state. That additional factor was included in some drafts of article 8*bis* but was not ultimately retained. Because of this, it cannot be read as implicit in the expressly listed qualifiers.

Scale

This factor refers to the magnitude of the aggressive act. The quantitative assessment may encompass the number and type of troops, munitions and military assets used by the aggressor state, the geographical ambit of the operation, and its duration. However, the aggression amendments provide no indication of a minimum scale necessary for an act to qualify as a manifest violation of the Charter. Accordingly, it will fall to the Judges to determine whether the scale, in conjunction with the gravity and character of the attack, satisfies the threshold for criminal responsibility.

Gravity

This factor refers to the severity of the impact of the aggressive act. It is a mixed quantitative and qualitative assessment. The aggression amendments provide no further indication of the requisite gravity. Destruction from a nuclear attack would be sufficiently grave, whereas a cross-border incursion by a small number of troops to capture a fleeing criminal suspect without any further damage to the cross-border state would not usually be of sufficient gravity.

Character

¹²¹ For an explanation of the nature of the understandings introduced at the Kampala Conference and the uncertain legal status of these understandings, see Kevin J Heller, 'The Uncertain Legal Status of the Aggression Understandings', 10 *Journal of International Criminal Justice* (2012) 229-248.

¹²² Kress, *supra* note 62, p.1206 ("The idea behind this sentence is to exclude the determination of manifest illegality in a case where one component is most prominently present, but the other two are completely absent. It was thought that the use of the word 'and' in the formulation of the threshold requirement in draft Article 8 bis (1) precluded a determination of manifest illegality in such a case.")

This factor refers to the nature of the attack or the motivation behind it. It is a qualitative assessment that could encompass a broad range of considerations and may be duplicative of the scale and gravity considerations to a certain degree. Attacks motivated by aspirations for territorial expansion would clearly be of a manifestly unlawful character, whereas incursions to rescue nationals of the attacking state abroad are less likely to be considered manifestly unlawful.¹²³ As there is no bright dividing line set out in the aggression amendments, the character of an attack will form one part of the qualitative and somewhat subjective assessment.

3.3.3 Leadership Clause

Article 8*bis* limits the range of people that can be prosecuted for aggression to those in leadership positions, namely, any person in a position to effectively exercise control over or to direct the political or military action of a State.¹²⁴ This requirement is repeated in the amendments to the elements of crimes relevant to aggression and article 25 on the modes of liability that apply at the Court.¹²⁵ Consequently, common foot soldiers cannot and will not be charged for aggression before the ICC.¹²⁶

While the leadership clause would ordinarily be considered to cover the high level military and political leadership, questions will arise as to the boundaries of this group. Would any member of cabinet in a western parliamentary democracy be able to effectively exercise control over the political or military action of a state? And who could be considered to have sufficient control in a dictatorship other than the dictator him or herself? The inclusion of the term “effectively” indicates that mere *de jure* power over the political or military action of a state will not be sufficient and that a real capacity to exercise this power must be shown. An example of a figurehead with *de jure* powers but no actual control is the British Queen in relation to the political and military establishments in Canada, Australia and New Zealand. If the leaders of any of these former colonies were prosecuted for aggression, the Queen would not face any potential liability as she lacks sufficient power or control to qualify under the leadership clause in relation to these countries. With respect to the level of control required, the aggression amendments do not provide any further explanation. The leadership analysis will consequently depend on the circumstances of each specific case.

Questions will also arise regarding persons, such as businessmen and industrialists not formally situated in the power hierarchy but effectively able to exercise a significant amount of control over the political or military establishments of a State. At Nuremberg and the subsequent trials, where the aggression featured among the charges, several industrialists were charged for their involvement in the aggressive Nazi campaign, as well as for their involvement in the large-scale unlawful appropriation of property owned

¹²³ Silvia A. Fernandez de Gurmendi, ‘Completing the Work of the Preparatory Commission: The Working Group on Aggression at the Preparatory Commission for the International Criminal Court’, (2002) p. 597 (referring to “border skirmishes, cross-border artillery, armed incursions, and similar situations should not fall under the definition of aggression.”).

¹²⁴ See Van Schaack, *supra* note 7, pp. 518-520; K. J. Heller, ‘Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression’ 18(3) *European Journal of International Law* (2007) 477-497.

¹²⁵ The following text will be 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.

¹²⁶ However, foot soldiers and any other perpetrators could still be prosecuted pursuant to Article 8 of the Rome Statute, for any war crimes committed in connection with an act of aggression.

by victims of the Nazi aggression. It was understood during the work of the Special Working Group on the Crime of Aggression that the article 8*bis* language was not meant to be a retreat from the precedent established at Nuremberg in cases like Krupp and Farben, where industrialists were charged and tried for the same crime of aggression as the Nazi leaders.¹²⁷

3.3.4 Mens Rea

The amendments on aggression do not elaborate on the *mens rea* standard required, thus leaving article 30, the generally applicable provision on *mens rea* under the Rome Statute, as the operative provision.¹²⁸

According to article 30, the material elements of a crime must be committed with intent and knowledge. The amendments to the elements of crimes clarify that 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 Charter of the United Nations or as to the “manifest” nature of the violation of the Charter. It will be sufficient to show that 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 and the factual circumstances showing that the use of force was a manifest violation of the Charter. Consequently, ignorance of the law will not generally be an excuse to avoid responsibility. This is particularly important given the range of concepts and principles of public international law involved in establishing that an act of aggression has occurred and that an individual is responsible for that act, as set out herein.

Article 30 requires both intent and knowledge. Merely knowing that a State is preparing to carry out an act of aggression without showing that the accused also intentionally participated in those preparations would not be sufficient. However, there is no specific intent or motive requirement to prove aggression. Some commentators have suggested listing a series of prohibited purposes, such as territorial annexation or resource acquisition.¹²⁹ Given that the crime already requires intent and knowledge as well as a demonstration of a manifest violation of the UN Charter, this is sufficient to prevent less serious uses of force being criminalized.

3.3.5 Modes of Liability

Modes of liability are legal mechanisms by which individuals that contribute to the commission of crimes can be held criminally responsible. Under the Rome Statute, the applicable modes of liability include physical commission, joint commission, co-perpetration, ordering, soliciting, inducing, aiding and abetting, contributing to a group with a criminal purpose, and attempt.¹³⁰ All of these modes of liability apply to the crime of aggression.¹³¹ However, under article 25(3)*bis* only persons in leadership positions can

¹²⁷ Roger Clark, *supra* note 6, p.110. See also Barriga, *supra* note 25, p.8; K. J. Heller, *supra* note 124.

¹²⁸ Barriga, *supra* note 25, p.5.

¹²⁹ Van Schaack, *supra* note 37, p.38.

¹³⁰ Article 25(3). Directly and publicly inciting others to commit genocide is also included in article 25(3) but conspiracy is not.

¹³¹ See Keith A. Petty, *Sixty Years In The Making: The Definition of Aggression for the International Criminal Court*, 31 *Hastings Int'l. & Comp. L. Rev.* (2008) 531-566, 548-9 (noting that the possibility of identifying separate forms of responsibility applicable only to the crime of aggression, was not pursued). Footnote 1 of the Aggression Amendments on the Elements of Crimes reads: “With respect to an act of aggression, more than one person may be in a position that meets these criteria.” Resolution RC/Res.6, which makes clear that more than one person may be criminally liable for a particular act of aggression.

be held liable for aggression, irrespective of the applicable mode of liability.¹³² Consequently, foot soldiers cannot be charged for aiding and abetting aggression if they participate in offensive operations under the orders of their state leadership.

The modes of liability in the Rome Statute considerably extend the reach of the prohibition against aggression. Along with state leaders who order and plan aggressive operations, any other state leaders who participate or assist with the preparation or implementation of such an operation will potentially be held liable. Moreover, by including attempts at such aggressive operations, article 25(3)(f) allows for the punishment of state leaders who organize acts of aggression but are prevented from realizing them due to international policing efforts or other intervening factors. This is an extremely broad basis for liability and commentators intimately involved in the negotiations of the aggression amendments have expressed concerns about attempt applying to this crime.¹³³ Nonetheless, the Prosecutor has not thus far brought any charges of attempt under article 25(3)(f) for any crimes and it is likely that this cautious exercise of prosecutorial discretion will carry over into any proceedings involving charges of aggression.

3.3.5.1 Superior Responsibility

Under article 28, superiors may be held responsible for crimes committed by their subordinates if they fail to prevent and/or punish those crimes. This form of responsibility will apply in relation to the crime of aggression. Given the relatively low standard of knowledge required to trigger superior responsibility (that the accused knew or had reason to know of sufficiently alarming information that subordinates had committed, were committing, or were about to commit a crime)¹³⁴ and given the customarily public nature of the coverage of such an aggressive attack, it should not be difficult to prove the mental element of superior responsibility. However, the range of people eligible to be prosecuted under article 28 will be extremely limited since the accused would have to be a superior over perpetrators that were committing or were about to commit aggression. For an ordinary ICC crime this would not be an issue, but for aggression, only those people in a position to effectively control the political or military establishment of a State are capable of perpetrating aggression (according to the definition the aggression amendments). It is exactly such persons who would generally have superior responsibility over their subordinates who physically carry out aggression. Thus, pursuant to this mode of liability the accused would have to be a superior with effective command and control over an already very limited class of people.

3.3.6 General Criminal Defences

The defences that apply at the ICC are non-exhaustively set out in articles 31 to 33 of the Rome Statute. There was some concern leading up to Kampala that the article 31 defences would not function in the context of aggression as it is a crime of the State. However, a distinction must be drawn between an act of aggression and individual criminal responsibility for the crime of aggression. Public international law exceptions to the prohibition on the use of force, such as UNSC approval, apply to acts of aggression,

¹³² See Weisbord, *supra* note, 59, p. 194.

¹³³ See, e.g., Kress, *supra* note 62, p. 1200.

¹³⁴ *Prosecutor v. Pavle Strugar*, Case No.IT-01-42-A, Appeals Judgement, 17 July 2008, para.299.

which are state acts, as discussed above.¹³⁵ General criminal defences, as set out in articles 31 to 33, apply to the crime of aggression and so are assessed in relation to the specific individual charged with the crime.¹³⁶ However, the analysis of public international law justifications for acts of aggression should be kept separate from the analysis of grounds for excluding criminal liability at the individual level in order to avoid confusing the contours of public international law exceptions with general criminal defences.

At Kampala no special limits were put on the general criminal defences that will apply to the crime of aggression. Accordingly, the generally available grounds to exclude liability will apply, including mental disease or defect, intoxication, self-defence, defence of others,¹³⁷ and duress (all under article 31(1)).¹³⁸ Article 31(1)(c) provides that “the fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.” This is of no real impact on the present analysis because an operation undertaken in self-defence will not qualify as aggression.¹³⁹ Additionally, mistakes of fact and law that negate the mental element of the crime will prevent liability arising. Thus, if a government launched an attack on a terrorist organisation that it thought was located in its own territory but was in fact located across a border, the leaders of that government could potentially argue mistake of fact or possibly even mistake of law (if the error was due to a mistaken legal position that the area in question fell within the territory of the attacking state).¹⁴⁰ Although the defence of superior orders is not expressly excluded from applying to aggression, it is effectively precluded because of the requirement that the superior order not be “manifestly unlawful”. The crime of aggression is by definition a manifest violation of the UN Charter and thus manifestly unlawful. Moreover, because of the leadership element required for aggression, persons charged with this crime are likely to be the ones issuing orders rather than receiving them.

4. Conclusion

Although the significance of the adoption of the aggression amendments should not be underestimated, the motivating spirit behind the Kampala consensus demands the activation and implementation of this prohibition. When the ICC obtains jurisdiction over the crime of aggression a specific form of deterrence will exist that can be applied to individual state leaders. Some years stand between this vision and its realisation but in the meantime the legislative framework has been put in place by the international

¹³⁵ While the distinction between exceptions and defences should be maintained, the legislative porthole through which the public international law supporting those exceptions could be introduced to the Statute is Article 31(3), which provides “the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21.”

¹³⁶ There is potential for overlap, such as in the case of self-defence which may apply at the state level and at the individual level. For example, if a Head of State happened to be near a border and in response to an attack by soldiers of the neighbouring State ordered his body guards to counter-attack across the border, both public international law self-defence and individual self-defence may apply to negate the act of aggression and the crime of aggression respectively.

¹³⁷ See article 31(1)(c), which reads: “in the case of war crimes, [self-defence and the defence of others is available to protect] property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.”

¹³⁸ Van Schaack, *supra* note 7, p. 521-522.

¹³⁹ See discussion of self-defence as an exception to aggression above under heading 3.2.2.

¹⁴⁰ Article 32.

community for the future prosecution of the misuse of force in international relations. This analysis seeks to systematically address the elements of the crime codified in Kampala in order to contribute to the application of these provisions and also to highlight the areas in which further judicial or legislative attention and development is needed. It demonstrates that the amendments set forth a rudimentary but robust definition of the crime of aggression. While all the elements of a viable crime are present, significant gaps persist in relation to the exceptions that will exclude finding an act of aggression, and the defences that will preclude liability for the crime of aggression. Absent further legislative codification, these and the other open-ended aspects of the definition of aggression described above will leave critical issues to be developed on a case-by-case basis by the judges of the ICC.