Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict

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ABSTRACT:

The crime of aggression will soon become reality when the International Criminal Court adopts an operational definition to the Rome Statute in 2010. Criminalizing force in this manner will add to the body of law regulating the initiation of armed force – *jus ad bellum*. Regime elites and policy makers must ask which applications of force will fall within the jurisdictional parameters of this new offense. Will it apply to humanitarian intervention? Will the Prosecutor initiate an investigation into actions taken to combat terrorism? These issues are resolved by answering the threshold question for the crime of aggression.

The draft definition, Article 8 bis, provides that only manifest violations of the U.N. Charter will cross the threshold of criminal aggression. This requires a two part analysis. Initially, one must determine whether the underlying armed attack is inconsistent with the U.N. Charter, and, if so, whether this violation is of the character, gravity, and scale of a *manifest* violation. Breaking from the anachronistic paradigms of conflicts involving two States, this analysis must be put in the context of modern conflict.

Applying the threshold analysis to examples of humanitarian intervention and actions to combat terrorism, specifically pre-emptive self-defense and targeting non-State actors, it becomes clear that borderline cases will be excluded from the Court’s jurisdiction. In determining the magnitude of State acts, the mental state of the architects of military force will likely prove dispositive. This article looks beyond whether a particular act is lawful under the U.N. Charter and provides an analytical framework that will guide decision-makers when contemplating the use of force, assist the Court in punishing and preventing criminal aggression, and allow the Prosecutor the discretion required to pursue only the most serious violations of international concern.
I. Introduction

The Rome Statute of the International Criminal Court (ICC) will soon become another instrument used to regulate the use of armed force. In 2010 the Assembly of State Parties to the Rome Statute is expected to adopt a definition of the crime of aggression.\textsuperscript{2} Armed conflict in the post-U.N. Charter era, however, is not easily defined or regulated under the existing legal regime. While traditional wars between two sovereign States are limited by the U.N. Charter and customary international law, uncertainty surrounds the legal nature of humanitarian intervention, preemptive self-defense, and actions against non-State actors. When, if ever, do these contemporary applications of military force cross the threshold of unlawful aggression?

Consider, for example, the legality of the armed intervention in Kosovo in 1999 by NATO forces. Many argue that, although not technically lawful under the U.N. Charter, it was morally defensible for the humanitarian purpose of protecting the Kosovo Albanian population from slaughter. The legality of actions to combat terrorism is also worth considering in the post-9-11 era. When U.S.-led forces toppled Saddam Hussein’s Iraq in 2003 under the guise of preemptive self-defense, ostensibly to prevent terrorist groups from gaining access to Saddam’s mythic weapons of mass destruction, many in the international community cried foul. Similarly, U.S. drone attacks on suspected Taliban strongholds in Pakistan in 2008 and 2009 are based on self-defense, a principle typically reserved for responding to attacks by a State, not non-State armed groups. The adoption of the crime of aggression by the Assembly of State Parties should give pause to decision makers before engaging in questionably lawful uses of force.

The changing nature of armed conflict requires a two-step analysis in order to determine whether the threshold of unlawful aggression has been crossed. The first step is determining whether the use of force violates the U.N. Charter. If the answer is yes, then the analysis shifts to whether the unlawful use of force is a manifest violation of the Charter. Only after resolving these questions can individuals be held responsible before the ICC for the crime of aggression.

This article examines the draft definition of the crime of aggression and how this definition will be applied to certain uses of armed force, ultimately identifying whether these actions constitute “manifest violations” of the U.N. Charter. Section II establishes the analytical framework of criminal aggression. Initially, the threshold question is explained in detail, followed by an examination of the Charter’s prohibition of the unlawful use of force and the magnitude test required to determine manifest violations of the Charter. The threshold question is then applied to humanitarian intervention in Section III. In Section IV, certain measures against terrorism, preemptive self-defense and attacks against non-State armed groups, are examined by the terms of the draft definition of aggression. Ultimately, whether cases of criminal aggression go forward at the ICC will be an issue of intent as addressed in Section V. The article concludes in Section VI with a brief summary of issues that will hopefully be resolved by an operational crime of aggression.

\textsuperscript{2} Article 123 of the Rome Statute provides that a Review Conference is to take place 7 years after entry into force of the Statute, which happened in July 2002. See also, \url{http://www.iccnow.org/?mod=review}. 
It would be unrealistic to attempt to enumerate every possible manifest violation of the U.N. Charter for the purposes of criminal aggression in the confines of this article. Nevertheless, it is a worthy endeavor to establish a preliminary framework for analyzing the threshold of aggression, both for prosecutors at the ICC and regime elites considering the use of force.

II. The Threshold Question & The Prohibition of Unlawful Force

a. The Threshold in the Draft Definition of Aggression

The International Criminal Court will have a limited mandate to initiate proceedings into alleged acts of aggression. The “threshold question” in the draft definition of aggression exists to eliminate less significant instances of the use of armed force from the Court’s jurisdiction. Ultimately, the question is whether specific instances of armed force rise to the level of criminal aggression. The issue is framed in terms of the gravity of the State conduct. When alleged acts of unlawful force reach a certain level of severity, then they have crossed the threshold of criminal aggression.

The current draft definition of the crime of aggression, Article 8 bis of the Rome Statute, requires that certain factual findings be made prior to the initiation of an investigation and prosecution of alleged aggression. Initially, in order for the International Criminal Court (ICC) to exercise jurisdiction over the offense, an outside body must determine that a State has committed an aggressive act. Most commentators agree that this determination will fall either to the U.N. Security Council, or to another U.N. body if the Security Council fails to act.


4 Articles 13-15 of the Rome Statute outline the circumstances under which the Court may exercise jurisdiction. Article 13 provides that the Court may exercise jurisdiction over the crimes listed in Article 5 if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with Article 14;
(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

5 The draft jurisdictional requirements for the crime of aggression add an additional element to this analysis. Article 15 bis will require that an outside body, likely the Security Council, determine that an act of aggression has occurred prior to the Court’s exercise of jurisdiction over the crime of aggression. See Int’l Crim Ct., Assembly of States Parties, Resumed seventh session, Annex I, Report of the Special Working Group on the Crime of Aggression, at 12-13, Article 15 bis, ICC-ASP/7/SWGCA/2, (February 9-13, 2009).

In addition to the determination of State acts of aggression, the Prosecutor must conclude that there is a reasonable basis to proceed with an investigation.\(^7\) In order to satisfy this objective jurisdictional requirement, the Prosecutor must resolve the issue whether the use of armed force rises to the level of criminal aggression. The threshold clause provides some guidance in this respect, and is intended to prevent borderline cases from going forward.\(^8\)

The threshold clause has taken several forms during the negotiations of the Special Working Group on the Crime of Aggression. The most recent draft of Article 8 \(bis\) provides:

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.\(^9\)

This provision places an emphasis on the nature of acts which constitute criminal aggression. The delegates to the Special Working Group on the Crime of Aggression recognized that in order for criminal responsibility to attach, the State act in question must not be a casual violation of the U.N. Charter.\(^10\)

Previous drafts of the crime of aggression included language similar to the “manifest violation” requirement, including draft definitions by the International Law Commission\(^11\) and the United Nations Preparatory Commission for the ICC.\(^12\) This language is also consistent with


the Rome Statute’s establishment provision, which limits the courts reach to only “the most serious crimes of international concern.”

The threshold clause, however, does not find universal support among delegates to the Special Working Group. Previous drafts of the crime included an “object or result” test, which some argue is more consistent with the language of the U.N. Charter. This option clarifies that a manifest violation of the Charter includes State acts such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof.14

Proponents of this option maintain that inquiring into the “object or result” follows the language of article 2(4) of the Charter prohibiting the use of force in violation of the territorial integrity or political independence of another State.15 Since the early days of the Charter, aggression has been defined as the use of force that seriously endangers a State’s territorial integrity or political independence.16 As such, it is argued, a State act should be judged in terms of whether it was intended to or actually results in “a military occupation of, or annexing, the territory of another State or part thereof” – a clear breach of article 2(4).17

Critics of the “object or result” approach argue that it is unjustifiably restrictive.18 Limiting the scope of prosecutable actions further than “manifest violations” of the Charter would have the absurd result of rendering the crime of aggression virtually meaningless and unenforceable.19 In addition, there is concern that the “object or result” test would run afoul of the principle of legality, nullum crimen sine lege.20 It is also worth noting that the “object or result” option was removed from the most recent draft definition.21

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13 Rome Statute of the International Criminal Court, art. 1, July 17, 1998, U.N. Doc. A/CONF.183.9. Some delegates argue that the “manifest violation” requirement in the draft definition is redundant with the ICC’s mission of only prosecuting the most serious crimes. Similarly, the limited use of the term “aggression” in the U.N. Charter does not require that the definition for aggression specify that the State act be a manifest violation of the Charter. 


15 U.N. Charter art. 2, para. 4. See Section II.b., infra, for a more detailed analysis.


19 See Id.

20 Id. at 11, ¶ 18. See Article 22, Rome Statute. See also International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) at art. 15(1), 1496th plen. Mtg. (Dec. 16, 1966) (stating “No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed.”). See also Yoram Dinstein, War, Aggression and Self-Defence 130-31 (Cambridge University Press, 2nd ed., 1994).

Beyond the “object or result” approach, another alternative to the draft definition has taken shape. Some delegates and experts argue that the threshold clause should be omitted from Article 8 bis altogether. They reason that the clause is unnecessary because any act of aggression is inherently a manifest violation of the U.N. Charter. Requiring an analysis into the magnitude of aggression adds an additional and unnecessary layer to the pre-trial determination – not to mention the elements that must be proven at trial. As such, the Prosecutor should consider only whether the listed acts of aggression contained in Article 3 of General Assembly Resolution 3314 have occurred.

Proposals to eliminate the threshold clause overlook several key considerations. First, GA Res. 3314 was adopted to guide the Security Council in making determinations of aggression. It was not adopted for the purpose of attaching individual criminal responsibility to a crime. Second, basing a definition of aggression on acts alone fails the nullum crimen sine lege requirement in criminal law. There must be a mental element – mens rea – to accompany criminal acts. Otherwise at least part of the definition is impermissibly ambiguous. Finally, looking to acts alone without any reference to possible exceptions undermines the purpose of the threshold clause altogether – to remove borderline cases from the jurisdiction of the Court.

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24 At the February meeting of the Special Working Group on the Crime of Aggression, delegates raised the issue of the Elements of Crimes. Discussion to date has not been conclusive, but it was expressed that the Elements should be presented at the Review Conference for simultaneous adoption to the amendments on aggression. See INT’L CRIM CT., Assembly of States Parties, Resumed seventh session, Report of the Special Working Group on the Crime of Aggression, at 10, ¶ 42-44, ICC-ASP/7/SWGCA/2, (February 9-13, 2009).
   Article 3 – Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as 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 castes 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.
28 See, e.g., Rome Statute, art. 22. See also, ICCPR, art. 15(1).
29 Rome Statute, article 30.
The Chairman to the Special Working Group has noted that the magnitude test contained in the threshold clause finds strong support among the delegates over the possible alternatives. Many are confident the “manifest violation” language will serve the purpose of excluding questionable cases, those not surpassing the threshold of aggression, from prosecution. The analysis in this article, therefore, proceeds under the assumption that the definition of aggression will retain the threshold clause present in the February 2009 draft.

The current state of Article 8 bis sets out a definition of the “crime of aggression” as well as a definition of “act[s] of aggression.” The distinction – between a crime and acts constituting part of the crime – clearly establishes a hierarchical analysis. Before a crime of aggression can be established, there must be an act of aggression. If this act is a “manifest violation” of the U.N. Charter, then it may be a crime within the jurisdiction of the ICC.

Therefore, there will inevitably be a two-step analysis. First, it must be determined whether a State act of aggression has occurred. As discussed above, it is likely that this initial determination will be made by the Security Council as a condition precedent to the Prosecutor initiating an investigation. The Court will likely rely upon any Security Council finding of aggression as non-binding but highly persuasive evidence that aggression has occurred. Once this initial determination is made, then the Prosecutor must determine whether there is a reasonable basis to believe that the act of aggression constitutes a manifest violation of the U.N. Charter.

The following sections discuss the two-step analysis in detail. State acts of aggression are analyzed in Section II.b. in the context of the prohibitions and legal exceptions to the use of

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36 It is notable that the definition for an “act of aggression” is very broad. The scope is any use of armed force against another State’s a.) sovereignty, b.) territorial integrity, c.) political independence, or d.) any other manner inconsistent with the UN Charter. The manifest violation of para. 1 to article 8 bis is intended to narrow the possible violations to only those of sufficient gravity to warrant investigation and prosecution into alleged aggression.
force as found in the UN Charter and GA Res. 3314. The second step, determining what a “manifest violation” of the Charter entails, is discussed in Section II.c. Ultimately, resolution to the threshold question may reside in the intent of the aggressor State’s decision makers. These sections provide the legal framework for the discussion in Sections III and IV – whether humanitarian intervention and certain measures against terrorism cross the threshold of aggression.

b. The Use of Force & State Acts of Aggression

The first issue that must be resolved prior to initiating an investigation into the crime of aggression, is determining whether an *act* of aggression occurred.\(^{40}\) This determination necessarily requires an analysis of the lawfulness of the use of force, referred to as the *jus ad bellum*.\(^{41}\) Centuries of the just war tradition,\(^{42}\) custom,\(^{43}\) and treaties\(^{44}\) resulted in the legal framework prohibiting the use of aggressive force, which was first prosecuted at the International Military Tribunal of Nuremberg.\(^{45}\) Where the Rome Statute provides for *individual* accountability for “the most serious crimes of international concern,”\(^{46}\) the U.N. Charter prohibits States from using aggressive force.\(^{47}\)

i. The Prohibition on the Aggressive Use of Force

The overall purpose of the United Nations is unmistakable – to maintain peace and security among nations.\(^{48}\) The Preamble to the U.N. Charter reaffirms the members’ goal that “armed force shall not be used, save in the common interest.”\(^{49}\) Article 2(3) states that “All Members shall settle their international disputes by peaceful means in such a manner that

\(^{41}\) For a detailed discussion of the origins of *jus ad bellum*, 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. 531, 533-34 (2008).
\(^{43}\) The ICJ Nicaragua case noted that article 2(4) of the UN Charter reflects custom. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, ICJ Reports 1986, para. 190. Moreover, some maintain that the prohibition on the use of force is a non-derogable, peremptory norm, otherwise known as *jus cogens*. See *id.*, para. 190. See also ILC Commentaries to Articles on State Responsibility, Commentary to Article 40(4).
\(^{45}\) Charter of the International Military Tribunal, art. 6(a). Individual criminal responsibility attached to “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.” Id.
\(^{46}\) Rome Statute, Article 1.
\(^{47}\) UN Charter, article 2(4).
\(^{48}\) UN Charter, article 1, para. 1.
\(^{49}\) U.N. CHARTER Preamble.
international peace and security, and justice, shall not be compromised.” The bedrock of any
discussion on the use of force, however, is article 2(4) of the U.N. Charter. Article 2(4) states:

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

Therefore, when the U.N. Security Council, and later the Prosecutor of the ICC, determines
whether an aggressive act has occurred, they will look first to article 2(4) of the Charter.

In order to guide the Security Council in this determination, General Assembly
Resolution 3314 (XXIX) of 14 December 1974 was adopted. GA Res. 3314 sets out a series of
specific acts by States, or non-State actors on behalf of States, which, if used to violate the
territorial integrity or political independence of a State, will constitute aggression. For the
purposes of the ICC, these acts serve as an illustrative list of State acts of aggression and are
incorporated directly into Article 8 bis of the draft definition.

Article 8 bis, paragraph 2 defines “act of aggression” as it relates to the underlying crime. It provides:

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 13 December 1974, qualify as an act of
aggression [the individual acts are listed].

This paragraph is followed by seven sub-paragraphs, (a)-(g), which list specific acts of
aggression taken directly from article 3 of GA Res. 3314. This provision is the starting point
for the Prosecutor when any alleged acts of aggression have been referred to the Court. As
previously discussed, there are some who argue that the list of acts in article 3 of GA Res. 3314

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50 U.N. CHARTER art. 2, para. 3.
51 U.N. CHARTER art. 2, para. 4.
52 U.N. CHARTER art. 2, para. 4.
53 G.A. Resolution 3314
54 For these specific acts, see GA Res. 3314, art. 3.
the Crime of Aggression, Annex I, at 11-12, Article 8 bis, ¶ 2, ICC-ASP/7/SWGCA/2, (February 9-13, 2009). The
Special Working Group has specifically raised concerns, and the Group has responded, that this list is not to be
considered closed. It is merely a non-exhaustive list of possible ways that acts of aggression can be committed. Id.
at 4, ¶ 17.
56 INT’L CRIM CT., Assembly of States Parties, Resumed seventh session, Report of the Special Working Group on
the Crime of Aggression, Annex I, at 11-12, Article 8 bis, ¶ 2, ICC-ASP/7/SWGCA/2, (February 9-13, 2009).
57 See supra, note 23.
should be the only consideration in a determination of aggression.\textsuperscript{58} This however, fails to take into account lawful uses of force, including the right to self defense, discussed below.\textsuperscript{59}

\textbf{ii. Lawful Uses of Force}

The prohibition on the use of force is not absolute. That there is a threshold question at all in the definition of aggression is strong evidence that the use of force is lawful in certain circumstances and criminalized in others. Only unlawful uses of coercive force violate the U.N. Charter, and, as such, only the most serious of those violations constitute aggression. Under the Charter, the use of force is permissible for self-defense purposes under article 51\textsuperscript{60} or when the Security Council authorizes coercive force under its Chapter VII authority.\textsuperscript{61}

The Charter provides clear examples of the lawful use of force. First, the Security Council might authorize State action.\textsuperscript{62} Second, self-defense, as recognized in Article 51 of the Charter is the most relied upon justification for the use of force. Article 51 of the Charter states that:

\begin{quote}
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.\textsuperscript{63}
\end{quote}

As the lawful use of force applies to aggression, any definition may not expand or restrict the scope of the lawful uses of force under the Charter.\textsuperscript{64}

The definition of aggression does not appear to limit the lawful uses of force in the current draft. Specifically, in paragraph 2 of article 8 \textit{bis}, the phrase “in any other manner inconsistent with the Charter of the United Nations” appears to (a) maintain the consistency of Article 2(4) of the Charter (also seen in article 1 of GA Res. 3314),\textsuperscript{65} and (b) allow for the criminalization of acts of aggression not anticipated by the drafters of the Charter or GA Res. 3314. Moreover, this provision does not restrict uses of force that are consistent with the U.N. Charter, such as actions authorized by the Security Council’s Chapter VII power and the inherent right of self defense enumerated in Article 51.\textsuperscript{66}

Determining whether an act of aggression has occurred may be the most straight forward step in the analysis. When Iraqi tanks rolled over the Kuwait border in 1990, or when NATO bombs drop in Kosovo there is little doubt whether one of the enumerated acts in G.A. Res. 3314

\begin{footnotes}
\textsuperscript{58} See text and accompanying notes, supra Section II.a.
\textsuperscript{59} See infra Section IV.
\textsuperscript{60} UN Charter art. 51.
\textsuperscript{61} UN Charter art. 42.
\textsuperscript{62} UN Charter art. 42.
\textsuperscript{63} U.N. \CHARTER\ art. 51.
\textsuperscript{66} See Section III, infra, discussing the use of humanitarian intervention and its consistency with the UN Charter.
\end{footnotes}
has occurred. The second step – determining that these acts are a manifest violation of the U.N. Charter, and, therefore, a crime of aggression – will prove the most difficult to even a skilled prosecutor.

c. The Magnitude Analysis: The Crime of Aggression

The “manifest violation” element in the draft definition of aggression requires an inquiry into the magnitude of the unlawful use of force. That the act must be more than an illegal application of force is evident by the use of the term “manifest,” meaning clear, apparent, evident.\(^{67}\) Besides the plain language,\(^ {68}\) there is further evidence that the magnitude test of acts of aggression was intended to exclude mere facial violations of the U.N. Charter. For example, States “wishing to raise the threshold yet higher—some intending to distinguish humanitarian intervention from aggression—continue to promote the “manifest” or “flagrant” qualifier.”\(^ {69}\)

The requirement to weigh the severity of acts is prominent in the Rome Statute. Article 17(d) requires the Pre-trial Chamber to weigh the gravity of any alleged offense in order to determine whether a case is admissible before the Court.\(^ {70}\) The Prosecutor must also weigh the gravity of an alleged offense prior to initiating an investigation or prosecution.\(^ {71}\)

With respect to determining whether aggression has occurred the Security Council has guidance on weighing the acts in questions. According to article 2 of GA Res. 3314:

[T]he Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.\(^ {72}\)

The current draft definition does not include article 2 of GA Res. 3314.\(^ {73}\) This may be because the consideration of the gravity offense is captured in other articles of the Rome Statute relating to admissibility (Article 17) and initiating investigations and prosecutions (Article 53).

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\(^{68}\) Vienna Convention on the Law of Treaties, article 5, para. 1, (1969): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

\(^{69}\) Noah Weisbord, Prosecuting Aggression, 49 Harv. Int’l L. J. 161, 186 (2008). Many delegates to the Special Working Group would have had no threshold at all. Id. at 186. Some experts agree, arguing that the commission of one of the listed acts set out in G.A. 3314 is sufficient, and that there does not need to be a further analysis into the “magnitude” of these acts raising them to the level of aggression. Report of the Cleveland Experts Meeting, The International Criminal Court and the Crime of Aggression, September 25-26, 2008, at 6.

\(^{70}\) Rome Statute, article 17(d).

\(^{71}\) Rome Statute, article 53.


\(^{73}\) See INT’L CRIM CT., Assembly of States Parties, Resumed seventh session, Report of the Special Working Group on the Crime of Aggression, Annex I, at 11-12, Article 8 bis, ¶ 2, ICC-ASP/7/SWGC2A/2, (February 9-13, 2009). Even if this provision is not incorporated into the definition of aggression, experts agree that the Security Council may still sanction the use of force after the fact. See Report of the Cleveland Experts Meeting, at 6. This issue involves the trigger mechanism of jurisdiction more than the threshold question. Nonetheless, the Security Council’s determination will likely factor into which cases are deemed crimes of aggression by the ICC Prosecutor.
The magnitude analysis required for other offenses within the jurisdiction of the Court is instructive when determining whether the “character, gravity, and scale” of the act of aggression is a “manifest violation” of the Charter. Crimes against humanity and war crimes each require a magnitude analysis before they come within the jurisdiction of the Court. In his seminal work, International Criminal Law, Antonio Cassesse describes the Tadic case at the ICTY. In discussing the interlocutory appeal ruling, he states:

[W]ar crimes must consist of ‘a serious infringement’ of an international rule, that is to say ‘must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim,’….and ‘the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.’

It may be sufficient for an act to constitute a war crime if that act, a specific breach of the law of war, has been considered a war crime by national or international courts in the past.

Crimes against humanity also require a magnitude test. The alleged criminal acts must be “widespread or systematic” in order for the Court to exercise jurisdiction. In the Jelisic Trial Judgment at the ICTY, the Court held that factors to consider when determining whether acts were “widespread or systematic” includes “the number of victims” and “the employment of considerable financial, military or other resources and the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population.”

Similarly, the crime of aggression will not apply to uses of force on a smaller scale. For example, “border skirmishes, cross-border artillery, armed incursions, and similar situations should not fall under the definition of aggression.”

David Scheffer proposes a substantiality test for determining when an “atrocity crime” occurs. The first part of his test is:

The crime must be of significant magnitude, meaning that its commission is widespread or systematic or occurs as part of a large-scale commission of such crimes. The crime must involve a relatively large number of victims…or impose other very severe injury upon noncombatant populations…or subject a large number of combatants or prisoners of war to violations of the laws and customs of war.

See discussion supra at 6, note 32-36. While some question remains as to the ability of the Prosecutor to proceed with a case in light of a Security Council determination of non-aggression, there can be no doubt that the Pre-trial Chamber must similarly weigh the gravity of the alleged offense in determining whether a case is admissible. Rome Statute, article 17(d).


Cassesse, International Criminal Law at 51.

Rome Statute, article 7.


David Scheffer, Atrocity Crimes Framing the Responsibility to Protect, 40 Case W. Res. J. Int’l L. 111, 118 (2008). Scheffer’s discussion takes place in the context of determining when humanitarian intervention, or the
Acts of aggression must be analyzed in the context of their severity like the magnitude or substantiality tests applied to the other crimes within the jurisdiction of the Court. But in contrast to the weight given to the number of casualties or the involvement of the State for crimes against humanity or war crimes, the threshold of criminal aggression may ultimately depend on the mental state of the alleged aggressor. Simply put, armed intervention may be on a very large scale for the purposes of humanitarian intervention, but the aggressor may not intend to violate the territorial integrity of the target State. Rather the intent is to end an atrocity crime. The application of the threshold question to specific instances of military force is discussed in the following sections.

III. Application of draft definition to Humanitarian Intervention

Having established the various principles regulating the use of force, the issue becomes whether certain uses of armed force cross the threshold of unlawful aggression in the context of modern conflict. In recent years, humanitarian intervention and actions to combat terrorism have stretched the boundaries of the lawful use of force. This section addresses the issues raised by humanitarian intervention. In light of the forthcoming adoption of a definition of aggression, one must consider whether it is possible for humanitarian intervention to be a “manifest violation” of the U.N. Charter. While not every “unauthorized” use of force is sufficiently serious to amount to criminal aggression, where is the line drawn?\(^\text{80}\)

The use of humanitarian intervention has been the subject of great debate – let alone whether it rises to the level of a manifest violation of the Charter – and remains a legal uncertainty. Competing theories argue that humanitarian intervention is a.) unlawful unless authorized by the U.N. Security Council,\(^\text{81}\) b.) lawful with sufficient cause,\(^\text{82}\) and c.) unlawful, but justifiable on other, non-legal grounds.\(^\text{83}\)

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.”\(^\text{84}\) This definition is to be applied “whether or not the intervention is authorized by the target state

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\(^{80}\) Nicaragua at para. 195.


\(^{84}\) SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 11-12 (University of Pennsylvania Press, 1996). Note that this definition does not include humanitarian actions taken to protect a State’s own nationals. An example of this would be Israel’s commando operation in Entebbe, Uganda in 1976 to rescue Israeli hijack victims. See id. at 15. See also Duffy at 178 (citing Chesterman, Just War or Just Peace 26). [SC 1940th meeting, in Chesterman, Just War or Just Peace 26.]
or the international community.” Such actions have been pivotal to the discussion of the threshold question during various phases of drafting the definition of aggression. For example, in the 1990s the Prepcom discussed humanitarian intervention and other exceptions to the prohibited uses of force. More recently, the delegates to the Special Working Group were “confident [the manifest violation requirement] will prevent borderline cases from going before the Court.”

Determining whether humanitarian intervention falls safely within the “borderline cases” or whether such actions are unlawful aggression hinges on the outcome of the two-step analysis for manifest violations of the UN Charter discussed above. Initially, prior to the attachment of criminal responsibility, the act itself must be determined to be unlawful. Once this is determined, then the character, gravity, and scale of the violation of the Charter must be weighed in order to assess the potential criminality of the use of force.

a. The Questionable Legality of Humanitarian Intervention

That humanitarian intervention is a prima facie violation of article 2(4) of the UN Charter is not controversial. Humanitarian intervention, as defined above, necessarily requires the use of force by a State or group of states in violation of the territorial integrity or political independence of another State. Moreover, “the explicit language of the U.N. Charter, as repeatedly and authoritatively construed, does not allow actions to prevent or arrest mass killings without Security Council authorization.”

Severe human rights violations and atrocity crimes within a State have been linked to the Security Council’s responsibility to maintain international peace and security. Among the first internal incidents to garner the attention of the UN Security Council was the rebellion in Southern Rhodesia of 1966. During the 1990’s, the SC turned to issues of humanitarian concern more often, including the Iraq/Kuwait situation, the Somalia intervention, and the

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88 See Section II.a, supra.
89 Duffy at 179-80. See also, SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 12 (University of Pennsylvania Press, 1996).
91 UN Charter, article 2(1).
mission in Haiti. Even in the Resolution on Bosnia and Herzegovina, the Security Council linked the humanitarian crisis to a threat to regional peace and security. These examples underscore that the authority for actions related to grave human rights violations remains with the U.N. Security Council under its Chapter VII powers. There is otherwise “no consensus on a right of unilateral “humanitarian intervention” to protect victims of large-scale human rights violations, including genocides and mass killings.”

The International Court of Justice has traditionally supported the position that States may not unilaterally use force against other States for the purposes of humanitarian intervention. Rather any use of coercive force must be sanctioned by the Security Council or qualify as self-defense. In the Corfu Channel case, the Court interpreted the Charter to preclude implicit exceptions to the prohibition on the use of force in Article 2(4). In Nicaragua, the Court held that the prohibition on the use of force was a customary international law norm independent of the Charter paradigm. Furthermore, the Court added, the use of force is not the appropriate mechanism to prevent human rights violations in another State. The Court confirmed in the Nuclear Weapons case that self-defense under Article 51 and the Security Council’s Chapter VII authority are the only two exceptions to the general prohibition on the use of force. The line was drawn even more brightly in DRC v. Uganda, where the Court stated that in spite of the Security Council’s recognition of States’ responsibility for peace in the region, Uganda was not authorized to use military force in the Democratic Republic of the Congo.

The draft definition of aggression does not provide an exception for humanitarian intervention. The acts prohibited by article 3 of GA Res. 3314 would cover even those acts taken for humanitarian purposes. GA Resolution 3314 specifically treats occupation of any duration (even if to stand in the way of a genocidal armed force or militia) as an act of rights violations within a state and international peace and security.” Id. at 72, n. 47. See also Duffy at 180 (citing the Statement of the United Kingdom Foreign and Commonwealth Office, justifying the action on humanitarian grounds, reported in Gray, International Law 30.)

93 See Duffy at 180.
100 Id.
101 Id.
aggression. The black letter of the law would prohibit humanitarian interventions of this nature as unlawful aggression.

GA Res. 3314 is significant for each component of the threshold analysis. First, it serves as a guide to the Security Council in determining whether a State committed an act of aggression. Second, and more importantly, the prohibited acts in 3314 will likely be adopted directly into the definition of aggression, if not implicitly referred to. Specifically, the current draft definition provides that “acts of aggression” include the use of force “against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.” This can be read broadly to capture any outlying instances of the use of force not contemplated by the general prohibition on the use of force in article 2(4).

For some, geo-political concerns must be factored into the analysis. Carving out exceptions to the general prohibition on the use of armed force in article 2(4) could be easily abused. As indicated by the ICJ in the Nicaragua case: “while the USA might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect.”

In spite of a lack of consensus on the legality of humanitarian intervention without Security Council authorization, there is a growing body of scholarship which supports humanitarian intervention on both legal and policy grounds. As discussed below, this would seem to remove humanitarian intervention from cases that could be considered a manifest violation of the U.N. Charter, and, therefore, preclude individual responsibility for criminal aggression.

b. Humanitarian Intervention as a Non-Manifest Violation of the U.N. Charter

The lawfulness of humanitarian intervention is not well settled in spite of numerous attempts by scholars to create an operational framework. Nonetheless, at least two primary

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105 Duffy at 178, n.155 (citing Swedish representative to SC debating the Israeli Entebbe incident in Uganda, at SC 1940th meeting, in Chesterman, Just War or Just Peace 26).
106 Gray, International law at 28. Note, however that the ICJ tacitly approved of armed intervention at the request of another State for the purposes of collective self-defense. See Nicaragua at paras. 104-05.
arguments have emerged to justify the use of humanitarian intervention. First, many argue that humanitarian intervention is not inconsistent with the purposes of the U.N. Charter. Second, the right of unilateral humanitarian intervention, like self-defense, is part of customary international law (emerging or realized). Even though the debate about the legality of humanitarian intervention will continue, the legitimacy of such actions tends to preclude individual criminal responsibility for aggression.

i. Fundamental Principles of the U.N. Charter

Humanitarian intervention and the protection of human rights is consistent with at least one of the underlying purposes of the United Nations. The fundamental principles of the UN Charter are regulating the use of force, sovereignty, and human rights. Far from a manifest violation of the Charter, the use of force in furtherance of humanitarian principles, in certain circumstances, is in accord with the general purpose of the United Nations. Interpreting the Charter according to its object and purpose, such actions would appear to comport with the human rights priorities of the Charter. Additionally, examining the subsequent practice of U.N. Member States (and organs of the United Nations) when interpreting the general prohibition on unlawful force is instructive. It is well established that subsequent practice of parties to an agreement is taken into account when interpreting a treaty. As such, many believe the U.N. Charter to be a living instrument responsive to “the new challenges of the contemporary world.”

Therefore, the use of force by States to prevent or arrest large scale atrocities, without the Article 51 self-defense rationale or Security Council authorization, does not have the “character”

10 UN Charter Preamble, and Articles 1(3), 55, and 56 reflect the human rights emphasis of the Charter.
111 UN Charter Preamble, and Articles 1(1), 2(4).
112 UN Charter, article 2(1).
113 UN Charter art. 2(3).
114 See discussion in Duffy, at 147-49.
115 VCLT, art. 31, para. 1 (1969): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Even though humanitarian intervention appears consistent with the human rights aspect of the Charter, there is a significant contingent of experts and scholars that would preclude the use of force as a counter measure against international wrongs. See ILCs Articles on State Responsibility, article 50.
116 VCLT, art. 31(3)(a) and (b) (1969): “There shall be taken into account…any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions [and] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” See also, Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949, p. 174, at 180.
117 Helen Duffy, The ‘War on Terror’ and the Framework of International Law 149 (citing Franck, Recourse to Force, at 5-9; G. Ress, “Interpretation,” in B. Simma et al., Commentary, p. 13, at p. 27).
of a manifest violation of the U.N. Charter.\textsuperscript{119} The reason for this is apparent, even though any intervention could be classified under the prohibited acts of aggression in GA Res. 3314. In launching an attack against a government undertaking a genocidal campaign against a segment of its population, the attacking State does not have as its purpose the violation of territorial integrity or political independence of the targeted State. Rather, it is the rights of victims of genocide that are being protected. As such the “character” of the campaign would not amount to a manifest violation of the U.N. Charter. More specifically, the nature of the attack is not “against the sovereignty, territorial integrity or political independence of another State,” and is arguably not conducted in “any other manner inconsistent with the Charter of the United Nations.”\textsuperscript{120}

### ii. Customary “Right” of Intervention

Humanitarian intervention has also been justified on the basis of either a pre-existing or an emerging customary right to intervene.\textsuperscript{121} Where the U.N. Security Council fails to authorize action, it is argued, the pre-Charter customary right of humanitarian intervention may supersede Charter limits on the use of force.\textsuperscript{122} Some maintain that in this instance international law allows States to intervene to avert “grave humanitarian crisis”\textsuperscript{123} or “humanitarian catastrophe.”\textsuperscript{124} This unilateral assertion of humanitarian intervention is not to be confused with the use of U.N. sanctioned force for humanitarian purposes.\textsuperscript{125} More compelling are the arguments that a customary norm is emerging.\textsuperscript{126} Under this theory, a State loses its right to sovereign integrity when it fails to maintain a minimum standard

\textsuperscript{121} It is worth considering, but beyond the scope of this article, whether customary international law is the appropriate analytical framework to discuss criminal aggression. The Rome Statute, as the primary source of law for the ICC (Article 21) frames the crime of aggression in terms of manifest violations of the U.N. Charter, not customary international law.
\textsuperscript{122} Neil Fenton, Understanding the UN Security Council 14 (2004).
\textsuperscript{123} House of Commons Hazard Debates, 26 February 2001, in Gray, From Unity to Polarisation 9 (justifying the UK enforcement of Iraq no-fly zones).
\textsuperscript{125} Duffy at 179 (The UN SC authorized coercive force under Chapter VII against apartheid in South Africa, SC Res. 418 (1977), 4 November 1977, UN Doc. S/RES/418 (1977), and white minority rule in Rhodesia, SC Res. 232 (1966), 16 December 1966, UN Doc. S/RES/232 (1966)). See also Mohammed Ayoob, State Making, State Breaking, and State Failure, in CHESTER A. CROCKER, FEN OSLER HAMPSON, ET AL., LEASHING THE DOGS OF WAR: CONFLICT MANAGEMENT IN A DIVIDED WORLD 110 (2007) (arguing that cases of U.N. sanctioned interventions of the 1990’s in Haiti, Bosnia, and East Timor differ from cases such as Kosovo in 1999 (authorized only by NATO, not the Security Council) and unilateral intervention in Iraq in 2003, which undermine the authority of the Security Council).
of conduct toward its citizens. Over the past twenty years, several practical examples as well as official reports and statements lend credibility to this approach, further precluding criminal responsibility for humanitarian intervention.

In 1990, in order to stop a civil war in Liberia notable for large-scale human rights abuses, a group of West African States sent a military peacekeeping force (ECOMOG) to intervene. Although the Security Council did not authorize the actions of ECOMOG, the intervention was treated favorably among U.N. Member States. In 1995, recognizing that States had the tool of humanitarian intervention available to them, then Secretary-General Boutros Boutros-Gali stated that:

The United Nations does not have or claim a monopoly of any of these instruments. All can be, and most of them have been, employed by regional organizations, by ad hoc groups of States or by individual States…

The latest incarnation of humanitarian intervention is now discussed in terms of The Responsibility to Protect. Under this theory, the norm of non-intervention must give way when a State commits genocide or crimes against humanity on its own territory. This approach was first reflected in a report by the International Commission on Intervention and State Sovereignty (ICISS). The Commission recognized:

[T]he responsibility to protect its people from killing and other grave harm was the most basic and fundamental of all the responsibilities that sovereignty imposes – and if a state cannot or will not protect its people from such harm, then coercive intervention for human protection purposes, including ultimately military intervention, by others in the international community may be warranted in extreme cases.

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The scope of unilateral action was scaled back by the Secretary-General in 2004, in the report by the High Level Panel on Threats, Challenges and Change, which stated that military intervention in furtherance of the responsibility to protect was “exercisable by the Security Council.” This is a return to the strict interpretation of authorization for the use of force found in the U.N. Charter framework.

The General Assembly seemed to find a middle way when it voted on the declaration for the 2005 World Summit Outcome. It provides:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.\(^{135}\)

The most promising indication of an emerging norm is the ICJ opinion in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). With respect to the crime of genocide, the Court held that “the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible.” Based on this decision, there seems not only to be legal authority for States to unilaterally use force to prevent


\(^{137}\) Genocide Case at para. 430.
atrocities, but there may even be an obligation to do so. In spite of pronouncements like this by the ICJ, proponents of humanitarian intervention, and its cousin the Responsibility to Protect, must still argue against a history of State interventions which did not fully embrace the legal basis behind such actions.

In practice, military interventions with a human rights component are often based on other legal grounds, such as enforcement of Security Council Resolutions or self defense. Examples include India’s involvement in East Pakistan in 1971, Vietnam’s cross border incursion into Cambodia in 1978, and Tanzania’s actions against Idi Amin’s Uganda in 1979. These and other humanitarian actions did not receive consistent condemnation. But rather than express an emerging legal norm, the non-condemnation of humanitarian intervention may be the result of non-legal, moral justifications, or even the inadequacy of international enforcement mechanisms in prohibiting the use of unlawful force.

The NATO intervention in Kosovo in 1999 is a particularly cogent example of the reluctance of States to rely exclusively on humanitarian justifications to use force to stop widespread human rights violations. Most States, including the United States, relied on enforcement of Security Council Resolutions 1199 and 1203 even though these Resolutions did not authorize armed intervention. The United Kingdom came the closest to using a strictly humanitarian basis for action prior to the intervention, but seemed to take a more cautious position after NATO’s involvement. Only Belgium appeared to rely primarily on humanitarian grounds.

138 David Scheffer suggests that the Genocide Case “may well be the starting point for the modern enforcement of [the Responsibility to Protect].” David Scheffer, Atrocity Crimes Framing the Responsibility to Protect, 40 Case W. Res. J. Int’l L. 111, 117 (2008).
139 Although at first arguing on the grounds of human rights, India later amended its argument on the grounds of self defense. See UN DOC S/PV. 1606, 4 December 1971 and S/PV.1608, 6 December 1971.
140 Neil Fenton 16.
141 See Neil Fenton 16 (citing Arend and Roberts, International Law and the Use of Force 124). Rather than rely on humanitarian grounds, Tanzania justified its intervention in Uganda to overthrow Idi Amin’s regime on self defense grounds.
143 Duffy at 180 (citing statement of UK to Security Council, justifying “an exceptional measure to prevent an overwhelming humanitarian catastrophe,” SCOR 3988th meeting, 24 March 1999 at 12.) The UK and the Netherlands are often singled out as having asserted the legal justification of humanitarian intervention. Id. (citing Gray, International Law 33). But see W. Michael Reisman, Acting Before Victims Become Victims: Preventing and Arresting Mass Murder, 40 Case W. Res. J. Int’l L. 57, 80 (2008), indicating that Belgium may have been the only State to rely primarily on humanitarian grounds for intervention.
146 One month after NATO intervention, Prime Minister Tony Blair stated:
Two trends are evident from these examples. First, States that were reluctant to rely on humanitarian grounds for intervention may be more inclined today to rely on growing authority, including the ICJ’s Genocide Case and the Responsibility to Protect Doctrine. Second, even though the U.N. generally condemned any deviation from the prohibition of non-intervention, even in light of strong evidence of human rights abuses, it is highly unlikely that the U.N. will refer a case of humanitarian intervention to the International Criminal Court as criminal aggression under article 8 bis of the Rome Statute. It is even more doubtful that the Prosecutor will initiate an investigation or prosecution into uses of force that appear to be humanitarian in nature. The reasons for this are clear.

Humanitarian intervention, while not expressly authorized by the U.N. Charter, is consistent with its principles of respecting and protecting human rights. When a State uses military force to respond to severe human rights atrocities it operates on a good faith basis that such actions are part of a growing body of customary international law, and that it has an affirmative obligation to stop atrocity crimes under the Responsibility to Protect. In any event, even if humanitarian intervention will forever be recognized as “illegal but not illegitimate,” it would be difficult to argue that there is a reasonable basis to believe that humanitarian intervention “by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” The use of military force to prevent gross human rights violations does not rise to the level of a manifest violation of the Charter, and therefore will not constitute criminal aggression. This assumes, of course, that the humanitarian concerns are not pretext for other unlawful uses of force.

Under international law a limited use of force can be justifiable in support of purposes laid down by the Security Council but without the Council’s express authorization...Any such case would in the nature of things be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decision of the Security Council bearing on the situation in question.


The representative of Belgium stated that NATO’s actions were “lawful armed humanitarian intervention” taken according to jus cogens principles to prevent humanitarian catastrophe. Legality of Use of Force at 13 (Serb. & Mont. V. Belg.) (transcript of Oral Argument May 10, 1999), cited in W. Michael Reisman, Acting Before Victims Become Victims: Preventing and Arresting Mass Murder, 40 Case W. Res. J. Int’l L. 57, 80 (2008).

See Neil Fenton at 16.


David Scheffer emphasizes that in order to lawfully resort to coercive force under the responsibility to protect doctrine, the atrocity at issue must be accurately identified as well as be of sufficient magnitude. See David Scheffer, Atrocity Crimes Framing the Responsibility to Protect, 40 Case W. Res. J. Int’l L. 111, 133 (2008).
IV. Actions Against Terrorism

After the attacks of September 11, 2001, robust national security strategies have called into question the legality of certain applications of force to combat terrorism. This debate centers largely on self-defense measures. In this context, this section discusses the re-emergence of pre-emptive self-defense and whether actions taken under the so-called “Bush Doctrine” crossed the threshold from lawful self-defense into unlawful aggression. Also, since the draft definition of aggression imputes individual responsibility only to State acts, how are target States to respond to aggressive acts committed by non-state armed groups such as terrorist organizations? In other words, if self-defense is only permitted in reaction to aggression by States, do all uses of force in response to attacks by non-state armed groups constitute aggression by the target State? This section addresses the scope of the right to self-defense, the lawfulness of pre-emptive measures and attacks against non-state armed groups, and whether these actions are a manifest violation of the U.N. Charter for the purposes of criminal aggression.

a. The Scope of Self-Defense

The U.N. Charter specifically permits the use of force for self-defense purposes, unlike humanitarian intervention which finds no enumerated authorization. In light of recent attempts to expand the limits of the right to self-defense, the question remains: when does defensive action go beyond that authorized by the Charter and customary international law and cross the threshold of aggressive force? Applying the two step analysis discussed in Section II.c. above, one must first determine the lawfulness of the act followed by a determination of whether these acts are of the character, gravity and scale to constitute a manifest violation of the Charter.

The right to self-defense is not absolute. The Charter imposes limits on its application. For example, when a State uses force according to article 51, it must report to the Security Council. Moreover, it is widely understood that customary law imposes limits on the “inherent” right listed in the Charter. Specifically, any self-defense measures must be necessary and proportional to the initial attack.

The lawfulness of self-defense is a matter of context and degree. Two competing views have emerged regarding the appropriate circumstances for coercive self-defense measures. For some, self-defense is a limited exception to a broad prohibition on the use of force. For others, self defense is an inherent right of every State and is integral to a successful national security
strategy. Critics of the latter, permissive approach are quick to point out instances where the self-defense justification for using force has been abused, particularly by great powers.

The International Court of Justice in the *Nicaragua* case set some parameters to the type of actions warranting defensive measures. The most precise standard set out in the *Nicaragua* case was that the “armed attack” must be of sufficient “scale and effect” to trigger the right to self-defense. In that case, supplying arms and providing logistical support to an armed group was not sufficient to constitute an armed attack, while in contrast sending an armed group to attack in the territory of another State is.

The use of force in response to isolated or sporadic attacks is consistently discouraged by commentators and the international community. Two examples are worth noting in this regard. First, on April 14, 1986 the United States bombed five Libyan military targets as a response to Libya’s involvement in the bombing of two airports in Rome and Vienna in 1985, as well as the bombing of a West Berlin nightclub in 1986 targeting U.S. nationals. This action was widely condemned as a reprisal action and not justified under Article 51 of the Charter. Second, under a similar “accumulation of effects” justification, Israel targeted a Palestinian Liberation Organization target in Tunisia in October 1985 to the condemnation of the international community. According to those critical of this action, repeated terrorist attacks against Israel did not constitute a legal justification for the use of force for self-defense purposes.

Self-defense exercised in reaction to an armed attack, whether it be an attack on nationals abroad or a direct attack on a State’s territory, must be judged in terms of lawful exceptions to the prohibition of the use of force under Article 2(4). Pre-emptive actions taken without an

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158 See Duffy at 150 (citing Gray, International Law, at 85; A. Cassesse, International Law 306 (Oxford, 2001)).
159 Nicaragua para. 195.
160 Nicaragua para. 195.
161 Nicaragua para. 195.
166 Id.
underlying attack raise more significant issues. This is particularly true when such acts are analyzed for the purpose of attaching criminal responsibility for aggression.

**b. Pre-emptive Self-Defense:**

It is clear that the right to self-defense is not unlimited. Pre-emptive actions taken prior to an armed attack are subject to even more restrictions. The discussion in recent years has focused on the U.S. National Security Strategy of 2002 and its broader implications for the use of anticipatory or pre-emptive self defense. At issue is whether a state may respond with coercive force to acts which fall short of an “armed attack.” While this term is undefined, many consider article 2(4) to be the starting point – an “armed attack” must be against the territorial integrity or political independence of a State. While certain pre-emptive actions will violate the U.N. Charter, it is another matter altogether whether these unlawful uses of force constitute a manifest violation for the purposes of criminal aggression.

In order to engage in pre-emptive action prior to an “armed attack,” there is authority that suggests there must be at least preparatory acts coupled with a clear intent to attack. The *Caroline* case of 1837 establishes the authoritative standard for anticipatory defense. During the Canadian rebellion of 1837, British forces boarded an American vessel – *The Caroline* – believed to be supporting rebel troops, set it on fire, and sent it over Niagara Falls. U.S. Secretary of State Daniel Webster said Britain’s attack did not constitute self-defense. As a result, the standard set by Secretary Webster and agreed to by the British was that for anticipatory attacks to be lawful the underlying attack must be “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” Ultimately, under the *Caroline* test, the threat must be real and imminent in order for the use of force to be justified in anticipatory self defense. This standard has been cited by the Nuremberg Tribunal and the ICJ in the *Nicaragua* case and is considered by many to be customary international law.

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168 Duffy at 151, n. 38. Others believe that attacks against nationals are sufficient to create a right to self-defense. See Duffy at 152 (citing Gray, International Law at 108-9 as a source rejecting the right to protect nationals abroad, and D.W. Bowett, Self Defense in International Law at 93 (New York, 1958), noting that protecting nationals abroad is permissible in some circumstances). Of particular note is Byers, “Terrorism, International Law and the Use of Force,” at 406, indicating that most states tacitly approved of the Entebbe incident when Israel used force to abstract Israeli nationals from a plane hijacked in Uganda.

169 Duffy at 155 (citing M.E. O’Connell, Debating the Law of Sanction, 13 EJIL 63 (2002); Bothe, Preemptive Force at 229-30).

170 Correspondence between US and British Government reproduced in 29 British and Foreign State Papers 1137-1130 (1841), and 30 British and Foreign State Papers 195-196 (1842).


173 Letter dated 24 April 1841 from the US Secretary of State Webster to the Government of the United Kingdom, Fox, reprinted in Harris, Cases and Materials, at 895.

174 Judgement of the Military Tribunal at Nuremberg in the trial of Goering.

175 Nicaragua at 110. (cited by Duffy at 151).
Since the issuance of the *Caroline* doctrine, the customary norm of pre-emptive self-defense has been significantly reduced by Article 51 of the U.N. Charter. Proponents of a strict adherence to Article 51 argue that self-defense measures are unlawful unless an armed attack “occurs.” They argue that a mere threat is insufficient to permit coercive self-defense measures. As evidence, the absence of the term “threat” in Article 51 is compared to the inclusion of the term “threat” in Articles 2(4) and 39. Furthermore, opponents of a more flexible right to self defense frequently cite the risk in allowing pre-emptive strikes based on a State’s own risk assessment. This expanded theory of self-defense, it is argued, would erode the Charter’s general prohibition on the use of force.

The use of pre-emptive self-defense, however, is not prohibited in every circumstance. Those who would not wait to be attacked first argue that it is unreasonable to require a state to be decimated prior to defending itself. As recognized by one commentator, “no law…should be interpreted to compel the *reductio ad absurdum* that states invariably must await a first, perhaps decisive, military strike before using force to protect themselves.” Would Austria have acted unlawfully if it would have preemptively attacked German forces prior to the Anschluss in 1938? After all, the Nuremberg Tribunal decided that Nazi-leaders were guilty of aggression vis-à-vis Austria even though there was no armed attack against Austria. Although the annexation occurred “without the use of armed force[,] internal subversive actions and the immediate threat of extreme violence assured in these cases the ‘peaceful-co-operation’ of the governments concerned.” Surely if criminal aggression exists under these circumstances, then pre-emptive self-defense measures would have been warranted.

Examining post-Charter uses of pre-emptive force further illustrates that this is a decidedly gray area of the law. Take for example Israel’s pre-emptive strike on Egypt initiating the 1967 Six-Day War. Israel’s attack was based on threats toward it by

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176 Amos Guiora, Targeted Killing as Active Self-Defense, 36 Case W. Res. J. Int’l. L. 319, 323 (2004). But see Duffy at 155, n. 55, discussing whether there can/should be parallel set of customary rights – emanating from *Caroline* – running parallel but contrary to the standard in the Charter under Article 51.


178 States do not have a right of…armed response to acts which do not constitute an ‘armed attack.” Nicaragua at 110. (cited by Duffy at 151).


180 Duffy at 154.


182 Franck, Recourse to Force at 98.


184 DR. C.A. POMPE, AGGRESSIVE WAR AN INTERNATIONAL CRIME 21 (1953).

185 For a discussion of State practice post-Charter, see Gray, International Law, at 112. See also Cassese, International Law at 309 (condemning past practices of anticipatory defense). And see J. Paust, Legal Responses to International Terrorism, 22 Houston Journal of International Law 17 (1999).

President Nassar and his closing of the Straits of Tiran.\textsuperscript{187} Contrast the general support for the use of anticipatory defense in this instance with the reaction to Israel’s pre-emptive strike against Iraq’s nuclear reactor in Isirik in 1981.\textsuperscript{188} The U.N. Security Council, with U.S. support, condemned the action, stating that in the absence of an attack from Iraq, Israel did not need to destroy the reactor.\textsuperscript{189}

Even the U.S. bombardment of Libya in 1985 had an element of pre-emptive self-defense. In addition to the defense of U.S. personnel abroad, the actions against Libyan military targets were supposed to be “designed to disrupt Libya’s ability to carry out terrorist acts and to deter future terrorist acts by Libya.”\textsuperscript{190} More recently, the United States responded to the East African embassy bombings in 1998 by targeting suspected al Qaeda strongholds in Sudan and Afghanistan. This too served a dual purpose of self-defense under Article 51 and to prevent “the imminent threat of further terrorist attacks against U.S. personnel and facilities.”\textsuperscript{191}

The issuance of the U.S. National Security Strategy of 2002 had the potential to be a game changer, if only it had not been so recklessly applied.\textsuperscript{192} This policy allowed for a much more permissive application of pre-emptive force. In March 2003, the United States invaded Iraq in furtherance of this strategy. The U.S.-led coalition acted initially on the basis of pre-emptive defense, arguing that Saddam Hussein’s desire to possess weapons of mass destruction was an immediate threat particularly in the post-9-11 “war on terror” climate.\textsuperscript{193} The non-existence of weapons of mass destruction, however, proved the need to stay defensive measures until the threat is imminent and real – as required under \textit{Caroline}. Many consider the U.S. occupation of Iraq to be one of many examples of the misuse of anticipatory defense by a great power.\textsuperscript{194}

There is little consensus on the scope of legality of pre-emptive self defense. Oppenheimer’s International Law states that “while anticipatory action in self-defence is

\textsuperscript{193} Remarks by the President to Troops and Families of the 10\textsuperscript{th} Mountain Division (July 19, 2002) (“America must act against these terrible threats before they’re fully formed.”). See also, William H. Taft IV and Todd F. Buchwald, Preemption, Iraq, and International Law, 97 Am. J. Int’l. L. 557, 562-63 (2003) (arguing that the invasion of Iraq was a lawful extension of a longer, protected conflict dating back more than a decade).
normally unlawful, it is not necessarily unlawful in all circumstances." Therefore, determining whether an unlawful case of pre-emptive self-defense is a manifest violation of the U.N. Charter must be examined on a case-by-case basis. Israel’s action against Egypt would likely not have formed a reasonable basis to believe that aggression was committed due to Israel’s legitimate anticipation of an attack aimed at its very existence. On the other hand, the U.S. invasion of Iraq would likely have been found to be unlawful by the Court. The U.S. justification for applying defensive measures appear so far removed from the Caroline standard, not to mention the heightened requirement under Article 51 that an armed attack actually occur, it is difficult to reconcile the overt (manifest?) violation of Article 2(4). Therefore, in practice, even though pre-emptive defense is lawful in some circumstances, it is likely to come within the purview of the ICC’s investigative responsibilities into aggression more frequently than humanitarian based intervention.

c. Non-State Armed Groups: An Uncertain Adversary

International law regulating the use of force, including self-defense, was developed on the assumption that States, or armed groups acting on behalf of States, are the parties to armed conflict. The draft definition of aggression reflects this standard. Only States can commit acts of aggression, whether carried out by the State itself or by an armed group controlled by the State.

Historically, there have been at least three distinct types of conflict involving non-state actors. First, States engage in proxy-wars where two States employ non-state groups to fight on their behalf on a third State’s territory. So it was during the Spanish Civil War when General Franco led Germany’s fascist allies against the Soviet-backed Republicans in Spain. Second, non-state armed groups are used by States to launch external attacks against another State’s territory. In 1977 the U.N. Security Council condemned the “aggression” of mercenaries that attacked the territory of Benin, without naming the State that backed them. Finally, some non-
state actors operate independent of significant State backing. Such is the case with the Maoist rebels in Nepal. And even though al Qaeda was permitted by the Taliban to use Afghanistan as a launching point for attacks, there was no effective control as is otherwise seen with States and armed groups.

Each type of conflict involving non-state actors raises significant legal issues under the jus ad bellum. These issues become more complex when analyzed in the context of potential responsibility for unlawful aggression. For example, what level of control must a State exercise over an armed group in order to be held responsible for that group’s armed attacks? Moreover, if a non-state actor initiates an attack against a State, and it does so with no significant outside support, does the target State potentially commit aggression when it responds with coercive force?

i. State Control Requirements

The use of non-state armed groups by States to commit aggressive acts was a concern to the international community even before the inception of the United Nations. At the San Francisco Conference, China proposed that the Charter include the following element to the definition of aggression: “Provision of support to armed groups, formed within [a state’s] territory, which have invaded the territory of another state; or refusal, notwithstanding the request of the invaded state, to take in its own territory all the measures in its power to deprive such groups of all assistance or protection.” This proposal, even though not adopted in the Charter, proved to have merit as the use of non-state groups increased during the U.S.-Soviet proxy conflicts of the Cold War era.

The General Assembly previously defined aggression in terms of States’ support of armed groups in 1974. Article 3 of General Assembly Resolution 3314 – adopted in the current definition of aggression – explains that States commit aggression by:

- 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 ICJ had the opportunity to address this issue in the Nicaragua case. The Court held that a State must exercise “effective control” over a non-state armed group in order for its actions to amount to aggression.

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Similarly, the International Criminal Tribunal for the former Yugoslavia (ICTY) attributed the acts of the Bosnian Serb army to Serbia due to Serbia’s “overall control” over its Bosnian forces. Both the ICTY and ICJ have required something more than mere logistical support for a State to be responsible for the acts of the attacking armed group. Beyond the control theory of responsibility, States may also be held accountable for the conduct of non-state actors when the State openly acknowledges its participation in this conduct. The International Law Commission recognizes the “control” and “acknowledgment” basis for State responsibility as customary international law.

ii. Targeting Non-State Actors

The issue before the ICC will be whether a State commits aggression when it responds to attacks by non-State actors with armed force on the territory of another State. As previously discussed, self-defense or collective self-defense under the U.N. Charter paradigm is limited in scope. The prevalent view is that prior to exercising self-defense a State must be the victim of aggression, or an imminent attack. It seems anachronistic, however, to require a State contemplating defensive measures against a terrorist organization to first determine whether a State exerted “effective control” over the armed group. For example, Israel’s response to consistent rocket attacks by the Lebanon-based Hezbollah organization was justified on the principle of self-defense even though Lebanon certainly does not have effective control over Hezbollah. Nonetheless, the legality of actions such as these have been called into question under a formalistic approach to the use of force when dealing with non-State actors.

The ICJ Wall Opinion is the touchstone for critics of States targeting non-State actors on another State’s territory. In its advisory opinion to the General Assembly on the legality of Israel’s construction of a security barrier on occupied Palestinian Territory, the Court reaffirmed

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209 A strict “effective control” requirement for State responsibility seems to contradict at least part of GA Res. 3314, which specifically addresses a State’s “substantial involvement” in the aggressive conduct of armed groups. See G.A. Res. 3314, para. 3(g). This position is discussed in more detail in Leanza, at 7-8. Subsequent rulings at the ICJ and the ICTY, discussed above, appear to rely almost exclusively on the direct or effective control requirement.
210 See U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, at 35 (May 24) (Recognizing the “acknowledgment” basis for State responsibility where the Khomeini government of Iran adopted the conduct of non-state actors, who had taken hostage the American consular staff in Tehran.)
212 See section IV.a., supra.
the position that the right to self defense arises only when an attack by or on behalf of a State occurs.\textsuperscript{215} The Court stated that “Article 51 of the Charter...recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.”\textsuperscript{216} Professor Mary Ellen O’Connell elaborates on the Court’s opinion, stating “the right to use armed force is connected with territory – facts of fighting on the ground, not the presence of an individual suspected of being a terrorist. Since Israel is in control of the Occupied Palestinian Territory it cannot claim self-defense – that would be self-defense against itself.”\textsuperscript{217}

The use of force by the United States in Afghanistan in response to the terrorist attacks of 2001 has also been criticized on the basis of failing to adhere to the State responsibility paradigm.\textsuperscript{218} The United States based its actions on self-defense principles even though the Taliban regime did not maintain “effective control” over al Qaeda, the armed group responsible for the attacks.\textsuperscript{219} On this point Helen Duffy writes, “The use of force against terrorists in a state’s territory absent responsibility for their action raises questions as to the respect for the territorial integrity and political independence of the state, reflected in Article 2(4).”\textsuperscript{220} Duffy suggests that the intervention in Afghanistan does not represent an outright dismissal of the State responsibility paradigm, rather a lowering of the threshold required for an armed attack.\textsuperscript{221}

There is no argument that the United States attempted to readjust the formalistic interpretation of the right to self-defense against attacks by non-State actors post 9-11. President George W. Bush stated, “We will make no distinction between the terrorists who committed these acts and those who harbor them.”\textsuperscript{222} This decision was clearly based on an asserted right to self-defense because of “the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by [al Qaeda] as a base of operation.”\textsuperscript{223} Therefore, the United States attempted to expand the notion of self-defense by requiring little more than that a State “harbor” non-state armed groups that attack U.S. interests. This appears to be at odds with the “direct control” and other requirements espoused by the ICJ in the Nicaragua decision,\textsuperscript{224} the ICTY in the Tadic appeal,\textsuperscript{225} and the ILC’s adoption of State responsibility principles.\textsuperscript{226} Furthermore,

\textsuperscript{215} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, July 9, 2004, para. 139.
\textsuperscript{217} O’Connell at 357.
\textsuperscript{218} Duffy at 191.
\textsuperscript{219} Duffy at 189, n. 204.
\textsuperscript{220} Duffy at 192.
\textsuperscript{221} Duffy at 191.
\textsuperscript{222} Steven R. Ratner, Jus ad Bellum and Jus in Bello After September 11, 96 A.J.I.L. 905, 906 (2002) (citing Address to the Nation on the Terrorist Attacks (Sept. 11, 2001), 37 Weeklycomp. Pres. Doc. 1301, 1301 (Sept. 17, 2001)).
\textsuperscript{224} Military and Paramilitary Activities (Nicar. V. U.S.), 1986 I.C.J. 14, at 65 (June 27).
the draft definition of aggression does not presently allow exceptions for attacks against non-State actors.

On the other hand, the endorsement by the United Nations of self-defense measures against terrorist attacks tends to place this form of self-defense outside the aggressive acts prohibited by article 8 bis. The Security Council specifically endorsed U.S. actions in response to 9-11. In Resolution 1368, the Council stated that the attack against the United States on September 11th was “a threat to international peace and security.” This permitted the United States and others to take measures “to maintain or restore international peace and security” according to articles 41 and 42 of the Charter.

Resolution 1368 is strong support for the principle that article 51 self-defense measures can be triggered by armed attacks by terrorist groups. This calls into question whether the State responsibility requirement is still necessary to use force in self-defense against attacks by non-State armed groups. Professor Amos Guiora notes that:

Traditional or conventional international law based on the assumption that war is an armed conflict between two States is obviously inapplicable to what has been deemed a new form of armed conflict. This new form of armed conflict involves States and non-State actors, sometimes supported by States but not necessarily so. It would be illogical to expect the victim State not to respond.

The draft definition of aggression must be read in the context of modern conflict. Drawing upon previous interpretations of the Charter, the current draft – although not providing a specific exception – recognizes “that uses of force transcend the paradigmatic cross-border attack by armies to encompass the possibility of equally devastating raids by nonstate actors.”

Assuming for the moment that targeting non-State actors remains a Charter violation, these actions will likely not reach the level of criminal aggression. That these actions are

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229 UN Charter articles 41, 42. SC Res. 1368 (Sept. 12, 2001), 40 ILM 1277, 1277 (2001).
231 The frequent references to “self-defense” post 9-11, and in relation to the armed intervention in Afghanistan, support this argument. See NATO press release (2001) 124; see Greenwood, International Law and the War Against Terrorism, 78 Int’l Affairs 301, 303 (2002).
arguably lawful, noting the Security Council’s subsequent endorsement of U.S. actions following 9-11, seems to preclude discussion in terms of a “manifest” violation of the Charter.

Furthermore, even in circumstances where the lawfulness of a certain action against non-state actors is in doubt, the intent is not there to violate the territorial integrity or political independence of a State. For example, when the United States targets al Qaeda and Taliban elements in Pakistan this is not a manifest violation of the Charter even though it is a clear breach of Pakistan’s territorial integrity.234 The purpose of these bombardments is not to invade Pakistan or overthrow its government, rather to eliminate a specific threat to the United States and its allies in the region.

The legality and potential criminalization of actions against terrorism will be judged on the proportionality and necessity of these actions. On proportionality, Guiora notes, “Targeted killing can only be implemented against those terrorists who either directly or indirectly participate in terrorism in a fashion that is equivalent to involvement in armed conflict.”235 Similarly, under a necessity analysis, if a State engages in regime change or the acquisition of territory under the auspices of self-defense against non-State actors, significant questions will be raised as to the lawfulness of the action and a much better case for criminal aggression. For instance, the invasion of Afghanistan and the overthrow of the Taliban regime was necessary to eliminate the combined threat of the Taliban and al Qaeda. Conversely, the invasion of Iraq – based on the information we now know regarding weapons of mass destruction – was not necessary for any cognizable self-defense justification. The final draft of the crime of aggression may determine to what extent these actions should be excluded from the Court’s jurisdiction.

V. Accommodating Possible Exceptions

The threshold question of the definition of aggression will answer which applications of the use of force will be subject to the jurisdiction of the ICC. The Assembly of State Parties must necessarily consider the limits that criminalized aggression will set on the future use of force. The potential deterrent effect that the operational crime will have cannot be understated. As such, this section seeks to identify the merits or risks underlying humanitarian intervention and actions to combat terrorism, and identify the exceptions available to the drafters of article 8 bis to prevent these actions from being investigated and prosecuted.

a. The Double Edge of Deterrence

The crime of aggression is supposed to one day deter unlawful armed conflict. But is the hope of deterrence a double edged sword? On one hand the criminalization of the use of force may serve to deter adventurous military expeditions, but it may also give pause to States wishing to engage in humanitarian pursuits. If the starting point for the use of force is a general prohibition, followed by the permissible use of force under Security Council authorization or self-defense purposes under Article 51, then we must look at the rationale behind potential “exceptions” to unlawful force.

235 Guiora, Case Western at 331.
Humanitarian intervention is an example of an application of force that the Assembly of State Parties may not wish to prevent. Historically, the international community has been unsuccessful at preventing mass atrocities. This raises the following question: “If life is the most precious of things…should not acting to prevent before the fact, as opposed to acting to punish after the fact, be the primary technique of international law for dealing with mass murder?”

The ICC, as an institution that seeks to hold individuals accountable for “the most serious crimes of international concern” and seeks to “contribute to the prevention of such crimes,” must not discourage the most useful tool to combat widespread human rights violations. Dr. Taylor Seybolt conducted a study of humanitarian intervention and found that unilateral or collective humanitarian interventions had a much greater success rate in saving lives than did U.N.-led missions. The possible chilling effect of humanitarian intervention based on the criminalization of aggression would be regrettable.

The United States has particular concerns about the role of its forces in multilateral peacekeeping operations, including humanitarian intervention. David Scheffer, the former U.S. Ambassador-at-large for War Crimes Issues, framed U.S. concerns in the following way:

Multinational peacekeeping forces operating in a country that has joined the [Rome Statute] can be exposed to the court’s jurisdiction even if the country of the individual peacekeeper has not joined the treaty…[this] could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives.

These same concerns are not as widely shared when it comes to actions to combat terrorism. The general disfavor of pre-emptive self-defense is acute since the U.S. invasion of Iraq in 2003. The distinction between preemption and humanitarian intervention is self-
The need for intervention on a humanitarian basis will in most circumstances be demonstrable prior to the application of force. Either a massive violation of human rights is underway or it is not. On the other hand, intervention prior to an actual armed attack based on subjective threats to national security will always be prone to error and abuse. That the crime of aggression will have a deterrent effect on pre-emptive actions vis-à-vis States may be a welcome enforcement mechanism.

Targeting non-State actors, however, will remain a challenge, both doctrinally and legally. Amos Guiora states:

From experience gained over the years, it has become clear that the State must be able to act preemptively in order to either deter terrorists or, at the very least, prevent the terrorist act from taking place. By now, we have learned the price society pays if it is unable to prevent terrorist acts. The question that must be answered – both from a legal and policy perspective – is what tools should be given to the State to combat terrorism?

Assuming the objective is to allow States to defend against terrorist attacks, the crime of aggression should be drafted in such a way that would not limit a State’s pursuit of lawful security measures. Reconciling humanitarian concerns and national security priorities with individual responsibility for criminal aggression is the focus of the next section.

b. Exceptions, Procedure, and Mens Rea

There are no exceptions to the prohibition of the use of force expressly provided for in the draft definition of aggression, including actions justified on humanitarian or national security grounds. At least one school of thought maintains that there should be no exceptions to the acts of aggression provided for in Article 8 bis, para. 2. This approach, first put forth by the Russians during the drafting of GA Res. 3314 in 1973, considers the “first use of armed force…in contravention of the Charter” to constitute prima facie evidence of an act of aggression. In that case, however, the Security Council may conclude that a determination of aggression “would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.”

Another approach is to include exceptions directly in the definition of aggression. Professor David Scheffer suggests a new Article 8 bis:

246 Note that measures taken with Security Council authorization under Chapter VII, and self defense measures under article 51 are not exceptions. They are lawful applications of the use of force. Only the unlawful use of force is prohibited by the UN Charter – not all uses of force.
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 (in whole or substantial part) of a State, of an unlawful military intervention by one State into the territory (land, sea, or air) of another State of such character, gravity and scale that it constitutes a manifest violation of the prohibition on the use of force under article 2(4) of the United Nations Charter, provided that the lawful deployment or use of armed force undertaken pursuant to Security Council authorization, United Nations General Assembly resolution 377(V) of 3 November 1950, or Article 51 of the United Nations Charter shall be excluded from such definition.

2. The elements of the crime of aggression shall draw, inter alia, from Articles 2 and 3 of United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974 to establish the character of an act of aggression for purposes of criminal responsibility under this Statute. This approach specifically incorporates lawful uses of force as exceptions to criminal aggression. These include actions authorized by the Security Council, the Uniting for Peace option, and individual or collective self-defense measures. Moreover, paragraph 2 allows the Court to consider acts that have the character of aggression beyond those specifically listed in GA Res. 3314. This is consistent with the practice of the Security Council and the ICJ, which have never considered themselves bound by GA Res. 3314. While these changes to the draft definition do not explicitly preclude jurisdiction over actions such as humanitarian intervention, it leaves the Court and Prosecutor room to argue that certain actions fall within an exception in the Statute.

The role of the Security Council in determining acts of aggression must be considered when discussing possible exceptions. The Security Council’s role typically factors into the issue of the trigger mechanism for the Court’s jurisdiction, but determining the lawfulness of a given act could also shape the threshold analysis. For example, some feel that so long as the Security Council is given exclusive authority to make determinations on aggression, then there is no need to include exceptions within the definition. In cases of questionable lawfulness, the Security Council could adopt a subsequent Resolution supporting a particular use of force. Under this approach, the Court would not be able to exercise jurisdiction.

It is unrealistic to expect a specific provision in the Statute that would create an exception for humanitarian intervention or actions to combat terrorism. This makes sense in light of the

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purpose of criminalizing aggression, and the ICC generally, to prosecute “the most serious crimes of international concern.” Eventually, exceptions could be said to swallow the prohibitive rules. Nonetheless, the procedural framework established in the Rome Statute provides for ample room to eliminate outlying cases of alleged aggression.

Article 31 of the Rome Statute provides specific grounds for excluding criminal responsibility. Self-defense is among these defenses. While this refers to an individual’s use of self-defense not typically associated with the initiation of an armed conflict, there is no reason why an individual accused of committing aggression under Article 8 bis could not avail himself of the protections of article 31. Moreover, paragraph 3 of Article 31 allows for broader considerations to be taken into account for the purposes of excluding criminal liability. This includes international treaty obligations, customary international law, and other general principles of law, and may incorporate principles such as the Responsibility to Protect, or “active self-defense” to target non-State actors.

The Pre-trial considerations of the Court will play a significant role in determining whether certain actions fall within the threshold of criminal aggression. Several factors go into a determination of admissibility before the Court. Among the most important is the gravity of the alleged offense. Article 17(1)(d) provides that a case is inadmissible where “[t]he case is not of sufficient gravity to justify further action by the Court.” This is particularly relevant to the issue of “manifest violations” of the Charter, since aggression only occurs in cases of sufficient “character, gravity, and scale.” Instances of humanitarian intervention or actions to combat terrorism, where the lawfulness is questionable, will not likely move beyond the pre-trial chamber when they legitimately do not seek to do more than prevent atrocity crimes or target non-State actors posing a threat to the attacking State. If these actions are carried out with due regard for proportionality and necessity requirements, they should fail the Court’s admissibility requirements. Borderline cases that move forward nonetheless may still be challenged by the Court itself, an accused, a State that could exercise jurisdiction, or a State from which acceptance

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256 Rome Statute, article 1.
257 Rome Statute, article 31.
259 Rome Statute, Article 31, para. 3 provides:

> 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 applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

260 Article 21 describes the applicable law to the ICC, and in the context of Article 3, para. 3 would permit a defense to rely on international treaties, customary international law, and general principles of law. See Rome Statute, Article 21.
262 Rome Statute, article 17(1)(d).
of jurisdiction is required for the Court to proceed. The pre-trial procedures provide ample opportunity for challenges to alleged acts of aggression.

Assuming a borderline case is referred to the Court, the Prosecutor must consider all of the elements of the offense prior to initiating an investigation or prosecution, including the mens rea element. Under the intent theory only a mens rea analysis could determine whether the use of force was legitimate, such as for self-defense purposes.

The importance of mens rea to determining whether certain actions cross the threshold of aggression cannot be understated. First introduced in a 1969 proposed definition of aggression, intent was a pivotal element to the offense. This issue was later raised by the German delegation to the Preparatory Committee. Ultimately, the intent requirement in previous draft definitions was not included, because the drafters felt the Security Council could weigh intent of the actors and accurately defining the object of intent proved difficult. For example, article 16 of the 1996 ILC Draft Code does not mention a mental state requirement.

More recently, the Preparatory Commission used an “intentionally and knowingly” standard. Similarly, a previous paper considered by the Special Working Group specifies the requisite mental state in the “Elements of the crime of aggression” section. In that working paper, the perpetrator is required to have “intent and knowledge” that the act was a flagrant violation of the U.N. Charter. This mirrors the mental element of the other offenses within the jurisdiction of the Court.

When the “intent and knowledge” standard is applied to humanitarian intervention and certain actions to target terrorists there is little doubt that truly borderline cases – those not intending to overthrow a government or seize territory – will be removed from consideration. The Prosecutor will have a difficult time justifying that there is a reasonable basis to initiate an investigation into actions similar to the NATO bombing of Kosovo, which was intended to protect the slaughter of Kosovo Albanians. Similarly, U.S. leaders will not be prosecuted for

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264 Rome Statute, article 19.
265 Rome Statute, article 53.
273 Rome Statute, article 30.
actions taken in self-defense, such as U.S. drone strikes on Taliban remnants in Pakistan, simply because they do not have the mental state required for a manifest violation of the U.N. Charter. The Court may, however, take an interest into actions similar to the 2003 invasion of Iraq simply because the intent was, at least in part, to overthrow a government and occupy the country for at least some time. Therefore, careful consideration of the mental state of alleged perpetrators of aggression will be the best indication of whether a specific act crosses the threshold of aggression.

VI. Conclusion

The ICC will have a fine line to walk when addressing alleged acts of aggression. The Court must balance the obligation to eliminate criminal aggression while not deterring interventions to combat egregious human rights violations, or intruding on States’ rights to self-defense in the context of combating terror. The threshold clause in the definition of aggression, requiring that State acts be manifest violations, will assist to preclude fringe cases from the Court’s jurisdiction.

There are many who would not add any limits to jurisdiction over acts of aggression. These critics of the threshold clause would criminalize all uses of force, which is not only unrealistic, but contrary to the Charter and customary law. Nonetheless, there can be no doubt that Article 8 bis will reign in “adventurous” military expeditions in the future, giving pause to decision-makers prior to using force.

Of the uses of force examined in this article, the most contentious and unresolved remains the role of non-State actors in the jus ad bellum framework. They are arguably the greatest threat to international peace and security, now that conflicts between two States rarely occur. Once the definition of aggression is adopted into the Rome Statute, and the Court and Prosecutor have the opportunity to initiate cases, one can only hope that the jurisprudence that follows will add clarity and legal guidance to regime elites and serve as a deterrent to potential aggressors.