

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

Keith A. Petty[†]

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 States Parties to the Rome Statute is expected to adopt a definition of the crime of aggression.¹ Armed conflict in the post-U.N. Charter era, however, is not easily defined or regulated under the existing legal regime. Aggression has been defined in terms of violations of Article 2(4) of the U.N. Charter, when a State uses force that violates another State's territorial integrity or political independence. 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 1999-armed intervention in Kosovo 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

[†] LL.M. Georgetown University Law Center; J.D. Case Western Reserve University, School of Law; B.A. Indiana University. Currently serving in the U.S. Army Judge Advocate General's Corps as a prosecutor in the Office of Military Commissions. The author has previously served as a law of war advisor in Baghdad, Iraq, and worked in the Trial Chambers of the International Criminal Tribunal for the Former Yugoslavia. Any errors or omissions are solely attributable to the author.

1. Article 123 of the Rome Statute provides that a Review Conference is to take place seven years after the Statute entered into force, which happened in July 2002. Rome Statute of the International Criminal Court art. 123, July 17, 1998, 37 I.L.M. 999, 1068 [hereinafter Rome Statute]. See also Coalition for the International Criminal Court, Review Conference of the Rome Statute, <http://www.iccnw.org/?mod=review> (last visited July 30, 2009).

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 were based on self-defense, a principle typically reserved for responding to attacks by a State, not non-State armed groups.

The changing nature of armed conflict—from the traditional war between two States to the modern humanitarian intervention or action against non-State armed groups—requires a two-step analysis 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. Part 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 Part III. In Part IV, certain measures against terrorism, preemptive self-defense, and attacks against non-State armed groups, are examined under 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 Part V. The article concludes in Part VI with a brief summary of issues that will hopefully be resolved by an operational definition of the crime of aggression.

It would be unrealistic to attempt to enumerate every possible manifest violation of the U.N. Charter for the purposes of criminal aggression. Thus, this article establishes a preliminary framework for analyzing the threshold of aggression, both for prosecutors at the ICC and regime elites considering the use of force. The Assembly of States Parties' adoption of the crime of aggression should give pause to decision makers before engaging in questionably lawful uses of force.

II. THE THRESHOLD QUESTION AND 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 ICC’s jurisdiction.² 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, they cross 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.³ Before the ICC can exercise jurisdiction over an offense, an outside body must determine that a State has committed an aggressive act.⁴ 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

2. See INT’L CRIM. CT., Assembly of States Parties, Resumed seventh session, *Report of the Special Working Group on the Crime of Aggression*, at 3, ¶ 13, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009). For previous discussions, see INT’L CRIM. CT., Assembly of States Parties, Resumed fifth session, Annex II, *Report of the Special Working Group on the Crime of Aggression*, at 11, ¶ 16, ICC-ASP/5/35 (Jan. 29–Feb. 1, 2007). See also Kevin Jon Heller, *Progress on Defining the Crime of Aggression—But at What Price?*, *Opinio Juris*, Feb. 27, 2007, <http://opiniojuris.org/2007/02/27/progress-on-defining-the-crime-of-aggression-but-at-what-price>.

3. Articles 13–15 of the Rome Statute outline the circumstances under which the ICC may exercise jurisdiction. Article 13 provides that the ICC may exercise jurisdiction over the crimes listed in Article 5 in the following circumstances:

- (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.

Rome Statute, *supra* note 1, art. 13.

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 ICC’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 (Feb. 9–13, 2009).

4. 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).

fails to act.⁵ Following a determination that a State act is aggression, the prosecutor must conclude that there is a reasonable basis to proceed with an investigation.⁶ 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 jurisdictional guidance and is intended to prevent borderline cases from going forward.⁷ 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:

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*.⁸

This provision emphasizes the nature of acts that 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 be more than a casual violation of the U.N. Charter.⁹

Previous drafts of the crime of aggression included language similar to the “manifest violation” requirement, including draft definitions by the International Law Commission¹⁰ and the United Nations Preparatory

5. See *id.*; see also 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, 536–42 (2008).

6. See Rome Statute, *supra* note 1, art. 53(1)(a); see also 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, Article 15 *bis*, ¶ 2, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009).

7. See INT'L CRIM. CT., Assembly of States Parties, Resumed seventh session, *Report of the Special Working Group on the Crime of Aggression*, at 3, ¶ 13, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009); see also INT'L CRIM. CT., Assembly of States Parties, Resumed fifth session, Annex II, *Report of the Special Working Group on the Crime of Aggression*, at 11, ¶ 16, ICC-ASP/5/35 (Jan. 29–Feb. 1, 2007) (including earlier discussions of the threshold question and aggression generally); see also Heller, *supra* note 2.

8. 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 11, Article 8 *bis*, ¶ 1, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009) (emphasis added).

9. See *id.* at 3, ¶ 13. For previous discussions, see INT'L CRIM. CT., Assembly of States Parties, Resumed fifth session, Annex II, *Report of the Special Working Group on the Crime of Aggression*, at 11, ¶ 16, ICC-ASP/5/35 (Jan. 29–Feb. 1, 2007); see also Heller, *supra* note 2.

10. Compare INT'L CRIM. CT., Assembly of States Parties, Resumed seventh session, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009), with INT'L LAW COMM'N, Draft Code of Crimes against the Peace and Security of Mankind, with commentaries, reprinted in Y.B. INT'L L. COMM'N, vol. II (2), para. 50, U.N. Doc. A/CN.4/L.532 and Corr. 1 and 3 (1996) [hereinafter Draft Code].

Commission for the ICC.¹¹ This language is also consistent with the Rome Statute's establishment provision, which limits the ICC's reach to only "the most serious crimes of international concern."¹²

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 Article 2(4) of the U.N. Charter prohibiting the use of force in violation of the territorial integrity or political independence of another State.¹³ This option clarifies that a manifest violation of the U.N. Charter includes State acts such as, "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

Since the early days of the U.N. Charter, aggression has been defined as the use of force that seriously endangers a State's territorial integrity or political independence.¹⁵ 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).¹⁶

Critics of the "object or result" approach argue that it is unjustifiably restrictive.¹⁷ Limiting the scope of prosecutable actions further than "manifest violations" of the U.N. Charter would have the absurd result of rendering the crime of aggression virtually meaningless and unenforceable.¹⁸ In addition, there is concern that the "object or result" test would run afoul of the principle of legality (*nullum crimen sine lege*) because

11. The Preparatory Commission would have required a State act to reach the threshold of a "flagrant" violation of the U.N. Charter. See U.N. Preparatory Comm'n for the ICC, *Report of the Preparatory Commission for the International Criminal Court* (continued), Addendum Part II, Proposals for a provision on the crime of aggression, U.N. Doc. PCNICC/2002/2/Add.2 (July 24, 2002) [hereinafter PrepComm Report].

12. Rome Statute, *supra* note 1. Some delegates argue that the "manifest violation" requirement in the draft definition is redundant with the ICC's mission of prosecuting only 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. See INT'L CRIM. CT., Assembly of States Parties, Resumed fifth session, Annex II, *Report of the Special Working Group on the Crime of Aggression*, at 11, ¶ 17, ICC-ASP/5/35 (Jan. 29–Feb. 1, 2007).

13. U.N. Charter art. 2, para. 4. See Part II.B, *infra*, for a more detailed analysis.

14. INT'L CRIM. CT., Assembly of States Parties, Resumed fifth session, Discussion Paper Proposed by the Chairman, at 3, ICC-ASP/5/SWGCA/2 (Jan.–Feb. 1, 2007) [hereinafter Discussion Paper Proposed by Chairman].

15. See, e.g., DR. C.A. POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 106 (The Hague, Martinus Nijhoff 1953).

16. Discussion Paper Proposed by Chairman, *supra* note 14, at 3.

17. *Id.* at 11.

18. See *id.*

this test was not required in previous legal interpretations of aggression.¹⁹ It is also worth noting that the “object or result” option was removed from the most recent draft definition.²⁰

Beyond the “object or result” approach, some delegates advocate an alternative to the draft definition, arguing that the threshold clause should be omitted from Article 8 *bis* altogether.²¹ They reason that the clause is unnecessary because any act of aggression is inherently a manifest violation of the U.N. Charter.²² Requiring an analysis of 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.²³ As such, the Prosecutor should consider only whether the listed acts of aggression contained in Article 3 of General Assembly Resolution 3314 (“GA Resolution 3314”) have occurred.²⁴

19. *Id.* at 11, ¶ 18. See Rome Statute, *supra* note 1, art. 22. See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 15(1), 1496th plen. mtg. (Dec. 16, 1966) (“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, 2d ed. 1994).

20. 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 11, Article 8 *bis*, ¶ 1, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009).

21. Report of the Cleveland Experts Meeting, The International Criminal Court and the Crime of Aggression, September 25–26, 2008, at 6 [hereinafter Report of Cleveland Experts Meeting].

22. See INT’L CRIM. CT., Assembly of States Parties, Resumed seventh session, *Report of the Special Working Group on the Crime of Aggression*, at 3, ¶ 13, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009).

23. 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 some 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 (Feb. 9–13, 2009).

24. G.A. Res. 3314 (XXIX), art. 3, U.N. Doc. A/9631 (Dec. 14, 1974). Article 3 states the following:

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 coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars

Proposals to eliminate the threshold clause overlook several key considerations. First, GA Resolution 3314 was adopted to guide the Security Council in making determinations of aggression.²⁵ It was not adopted for the purpose of attaching individual criminal responsibility to a crime.²⁶ Second, basing a definition of aggression on acts alone fails the *nullum crimen sine lege* requirement in criminal law.²⁷ There must be a mental element—*mens rea*—to accompany criminal acts.²⁸ Otherwise at least part of the definition is impermissibly ambiguous, failing to provide adequate notice to would-be violators. 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 ICC.²⁹

Many delegates to the Special Working Group are confident that the “manifest violation” language will serve the purpose of excluding questionable cases, those not surpassing the threshold of aggression, from prosecution.³⁰ The Chairman to the Special Working Group has also noted that the magnitude test contained in the threshold clause finds strong support among the delegates.³¹ 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.³²

The current draft of Article 8 *bis* sets out a definition of the “crime of aggression”³³ as well as a definition of “act[s] of aggression.”³⁴ The distinction—between a crime and acts constituting part of the crime—clearly establishes a hierarchical analysis. Before a crime of aggression

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.

Id.

25. INT’L CRIM. CT., Assembly of States Parties, Resumed seventh session, *Report of the Special Working Group on the Crime of Aggression*, at 4, ¶ 17, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009).

26. *Id.*

27. See, e.g., Rome Statute, *supra* note 1, art. 22; see also ICCPR, art. 15(1).

28. Rome Statute, *supra* note 1, art. 30.

29. INT’L CRIM. CT., Assembly of States Parties, Resumed seventh session, *Report of the Special Working Group on the Crime of Aggression*, at 3, ¶ 13, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009).

30. INT’L CRIM. CT., Assembly of States Parties, Resumed fifth session, Annex II, *Report of the Special Working Group on the Crime of Aggression*, at 11, ¶ 16, ICC-ASP/5/35 (Jan. 29–Feb. 1, 2007); see also Heller, *supra* note 2.

31. Press Conference by Chairman of Working Group on Crime of Aggression (Jan. 31, 2007), http://www.un.org/News/briefings/docs/2007/070131_Wenaweser.doc.htm.

32. INT’L CRIM. CT., Assembly of States Parties, Resumed seventh session, *Report of the Special Working Group on the Crime of Aggression*, at 11, Article 8 *bis*, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009).

33. *Id.*

34. *Id.*; see also G.A. Res., *supra* note 24, art. 3.

can be established, there must be an act of aggression.³⁵ 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, this initial determination will likely be made by the Security Council as a condition precedent to the prosecutor initiating an investigation.³⁶ The ICC will likely consider a Security Council finding of aggression as non-binding but highly persuasive evidence that aggression has occurred.³⁷ Once this initial determination is made, 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.³⁸

The following parts discuss the two-step analysis in detail. State acts of aggression are analyzed in Part II.B in the context of the prohibitions and legal exceptions to the use of force as found in the U.N. Charter and GA Resolution 3314. The second step, determining what a “manifest violation” of the U.N. Charter entails, is discussed in Part II.C. Ultimately, resolution of 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 Parts III and IV concerning whether humanitarian intervention and certain measures against terrorism cross the threshold of aggression.

B. The Use of Force and State Acts of Aggression

The first issue that must be resolved prior to initiating an investigation into the crime of aggression is to determine whether an act of aggression occurred.³⁹ This determination necessarily requires an analysis

35. It is notable that the definition for an “act of aggression” is very broad. The scope covers 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 U.N. Charter. The manifest violation requirement of paragraph 1 to Article 8 *bis* is intended to narrow the possible violations to only those of sufficient gravity to warrant investigation and prosecution of alleged aggression.

36. 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, Article 15 *bis*, ¶ 2, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009).

37. See, e.g., 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 (2008); Dr. Troy Lavers, *[Pre]determining the Crime of Aggression: Has the Time Come to Allow the International Criminal Court its Freedom?*, 71 ALB. L. REV. 299 (2008); Mark S. Stein, *The Security Council, The International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council’s Power to Determine Aggression?*, 16 IND. INT’L & COMP. L. REV. 1 (2005).

38. 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, Article 15 *bis*, ¶ 2, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009).

39. *Id.*

of the lawfulness of the use of force, referred to as the “jus ad bellum.”⁴⁰ Centuries of the just-war tradition,⁴¹ custom,⁴² and treaties⁴³ resulted in the legal framework prohibiting the use of aggressive force. The U.N. Charter is the most recent treaty-based prohibition of State aggression.⁴⁴ While State acts of aggression have been historically prohibited, it was not until the International Military Tribunal of Nuremberg that individuals were held responsible for the crime of aggression.⁴⁵ Following the precedent of Nuremberg, the Rome Statute provides for individual accountability for “the most serious crimes of international concern.”⁴⁶ The interplay between the U.N. Charter’s prohibition of certain State conduct and the Rome Statute’s prohibition of individual conduct is essential to understanding the two-part analysis of criminal aggression.

1. The Prohibition on the Aggressive Use of Force

The overall purpose of the United Nations is unmistakable—to maintain peace and security among nations.⁴⁷ The preamble to the U.N. Charter reaffirms the members’ goal that “armed force shall not be used, save in the common interest.”⁴⁸ Article 2(3) states that “[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, shall not be compromised.”⁴⁹ The bedrock of any discussion on the use of force, however, is Article 2(4) of the U.N. Charter.⁵⁰ Article 2(4) states:

40. 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).

41. POMPE, *supra* note 15; ANTHONY CLARK & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 11-16 (Routledge 1993); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 5 (Oxford University Press, 1993).

42. The *Nicaragua* case noted that Article 2(4) of the U.N. Charter reflects custom. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 100 (June 27). 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).

43. Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

44. U.N. Charter, art. 2, para. 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, *supra* note 1, art. 1.

47. U.N. Charter, art. 1, para. 1.

48. *Id.* at pmb1.

49. *Id.* art. 2, para. 3.

50. *Id.* art. 2, para. 4.

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.⁵¹

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

G.A. Resolution 3314 (XXIX) of December 14, 1974 was adopted to guide the Security Council in this determination.⁵² The Resolution 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 another State, will constitute aggression.⁵³ 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.⁵⁴

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

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.⁵⁵

This paragraph is followed by seven sub-paragraphs, (a)–(g), which list specific acts of aggression taken directly from Article 3 of GA Resolution 3314.⁵⁶ This provision is the starting point for the prosecutor when an alleged act of aggression has been referred to the ICC. As previously discussed, there are some who argue that the list of acts in Article 3 of GA Resolution 3314 should be the only consideration in a determination

51. *Id.*

52. G.A. Res. 3314, *supra* note 24.

53. For these specific acts, see G.A. Res. 3314, *supra* note 24, art. 3.

54. 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 11–12, Article 8 *bis*, ¶ 2, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009). Some members of the Special Working Group were concerned that listing the acts of aggression would be too restrictive. Ultimately, the Group decided to consider the list of acts as a non-exhaustive list of possible ways that acts of aggression can be committed. *Id.* at 4, ¶ 17.

55. *Id.* at 11–12, Article 8 *bis*, ¶ 2.

56. See excerpt, *supra* note 22.

of aggression.⁵⁷ This, however, fails to take into account lawful uses of force, including the right to self-defense, discussed below.⁵⁸

2. Lawful Uses of Force

The prohibition on the use of force is not absolute. That there is a threshold question in the definition of aggression makes obvious 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 51⁵⁹ or when the Security Council authorizes coercive force under its Chapter VII authority.⁶⁰

The Charter provides clear examples of the lawful use of force. First, the Security Council might authorize State action.⁶¹ 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:

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.⁶²

As the lawful use of force applies to aggression, no definition may expand or restrict the scope of the lawful uses of force under the U.N. Charter.⁶³

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 *bis*, the phrase, “in any other manner inconsistent with the Charter of the United Nations,” both maintains the consistency of Article 2(4) of the U.N. Charter (also seen in Article 1 of GA Resolution 3314),⁶⁴ and allows for the criminalization of acts of aggression not anticipated by the drafters of the U.N. Charter or GA Resolution 3314. Moreover, this provision does not restrict uses of force that are consistent with the U.N. Charter, such as actions authorized under the Security Council’s Chapter

57. See text and accompanying notes, *supra* Part II.A.

58. See *infra* Part IV.

59. U.N. Charter art. 51.

60. *Id.* art. 42.

61. *Id.*

62. *Id.* art. 51.

63. G.A. Res. 3314, *supra* note 24, art. 6.

64. INT’L CRIM. CT., Assembly of States Parties, Resumed seventh session, *Report of the Special Working Group on the Crime of Aggression*, at 4, ¶ 15, ICC-ASP/7/SWGCA/2, (February 9–13, 2009).

VII power and the inherent right of self-defense enumerated in Article 51.⁶⁵

Determining whether an act of aggression has occurred may be the most straightforward step in the analysis. When Iraqi tanks rolled over the Kuwait border in 1990, or when NATO bombs dropped in Kosovo, there was little doubt whether one of the enumerated acts in GA Resolution 3314 had 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 more 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 clear by the use of the term “manifest,” meaning clear, apparent, evident.⁶⁶ Besides the plain language,⁶⁷ 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.”⁶⁸

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 ICC.⁶⁹ The prosecutor must also weigh the gravity of an alleged offense prior to initiating an investigation or prosecution.⁷⁰

With respect to determining whether aggression has occurred, Article 2 of GA Resolution 3314 provides the Security Council with guid-

65. See *infra* Part III (discussing the use of humanitarian intervention and its consistency with the UN Charter).

66. INT'L CRIM. CT., Assembly of States Parties, Special Working Group on the Crime of Aggression, fifth session, *Report of the Special Working Group on the Crime of Aggression*, at 8, ICC-ASP/5/SWGCA/1 (Nov. 29, 2006).

67. Vienna Convention on the Law of Treaties, art. 31, para. 1, May 23, 1969, 1155 U.N.T.S. 31, 8 I.L.M. 679 [hereinafter Vienna Convention] (“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.”).

68. Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT'L L. J. 161, 186 (2008). Contrary to the prevalent view that the threshold should be high, some delegates to the Special Working Group would prefer 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. Resolution 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 Cleveland Experts Meeting, *supra* note 21, at 6.

69. Rome Statute, *supra* note 1, art. 17(d).

70. *Id.* art. 53.

ance on weighing the acts in question to determine whether aggression has occurred as follows:

[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.⁷¹

However, the current draft definition does not include Article 2 of GA Resolution 3314.⁷² 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.⁷³ Moreover, the exclusion of Article 2 may be justified because the consideration of the gravity of the offense is captured in other articles of the Rome Statute relating to admissibility (Article 17) and initiating investigations and prosecutions (Article 53).

The magnitude analysis required for other offenses within the jurisdiction of the ICC is instructive when determining whether the “character, gravity, and scale” of the act of aggression is a “manifest violation” of the U.N. Charter. Crimes against humanity and war crimes each require a magnitude analysis before they come within the jurisdiction of the ICC. In his seminal work, *International Criminal Law*, Antonio Cassese describes the *Tadic* case at the International Law Tribunal for the former Yugoslavia (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.’⁷⁴

71. G.A. Res. 3314, *supra* note 24, art. 2.

72. 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 11-12, Article 8 *bis*, ¶ 2, ICC-ASP/7/SWGCA/2 (Feb. 9-13, 2009). 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. See discussion *supra* notes 31–35. 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 to determine whether a case is admissible. Rome Statute, *supra* note 1, art. 17(d).

73. See Report of Cleveland Experts Meeting, *supra* note 21, at 6.

74. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 47 (2003) (citing *Tadic* Interlocutory Appeal, at 94).

An act that is a specific breach of the law of war may be sufficient to constitute a war crime if similar breaches have been considered a war crime by national or international courts in the past.⁷⁵

Crimes against humanity also require a magnitude test. The alleged criminal acts must be “widespread or systematic” in order for the ICC to exercise jurisdiction.⁷⁶ In the *Jelusic* Trial Judgment at the ICTY, the ICC 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.”⁷⁷

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.”⁷⁸ David Scheffer proposes a substantiality test for determining when an “atrocious crime” occurs. The first part of his test is as follows:

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.⁷⁹

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 ICC’s jurisdiction. 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 hu-

75. *Id.* at 51.

76. Rome Statute, *supra* note 1, art. 7.

77. Prosecutor v. Jelusic, Case No. IT-95-10-T, Judgment, para. 53 (Dec. 14, 1999), cited in David Scheffer, *Atrocious Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT’L L. 111, 122 (2008).

78. Silvia A. Fernandez de Gurmendi, *Completing the Work of the Preparatory Commission: The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*, 25 FORDHAM INT’L L.J. 589, 597 (2002).

79. Scheffer, *supra* note 77, at 118. Scheffer’s discussion takes place in the context of determining when humanitarian intervention, or the responsibility to protect, is appropriate. As such, his substantiality test is a threshold for applying force to combat atrocious crimes. In the context of the threshold of aggression, however, this test can be readily applied to the analysis of manifest violations of the U.N. Charter.

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 parts.

III. APPLICATION OF THE 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 Part 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. If not every “unauthorized” use of force is sufficiently serious to amount to criminal aggression, where is the line drawn?⁸⁰

The use of humanitarian intervention and whether it rises to the level of a manifest violation of the U.N. Charter has been the subject of great debate and remains a legal uncertainty. Competing theories state that humanitarian intervention is (1) unlawful unless authorized by the U.N. Security Council,⁸¹ (2) lawful with sufficient cause,⁸² and (3) unlawful, but justifiable on other, non-legal grounds.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.”⁸⁴ This definition is to be applied “whether or not the intervention is authorized

80. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103–04 (June 27).

81. See, e.g., Jianming Shen, *The Non-Intervention Principle and Humanitarian Interventions Under International Law*, 7 INT’L LEGAL THEORY, 1, 6 (2001).

82. See, e.g., Amy Eckert, *The Non-Intervention Principle and International Humanitarian Interventions*, 7 INT’L LEGAL THEORY, 27 (2001).

83. See, e.g., Louis Henkin, *Kosovo and the Law of ‘Humanitarian Intervention,’* 93 AM. J. INT’L L. 824, (1999).

84. SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 11–12 (1996). Note that this definition does not include humanitarian actions taken to protect a State’s own nationals. An example of this is Israel’s commando operation in Entebbe, Uganda in 1976 to rescue Israeli hijack victims. See *id.* at 15; see also HELEN DUFFY, THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW 178 (2005) (citing CHESTERMAN, JUST WAR OR JUST PEACE: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 26 (2001)).

by the target state or the international community.”⁸⁵ Acts of humanitarian intervention have been central to the discussion of the threshold question during various phases of drafting the definition of aggression. For example, in the 1990s, the ICC Preparatory Committee, the U.N. group responsible for drafting the statute for the ICC, discussed humanitarian intervention and other exceptions to the prohibited uses of force.⁸⁶ More recently, the delegates to the Special Working Group were “confident [the manifest violation requirement] will prevent borderline cases from going before the [ICC].”⁸⁷

Determining whether humanitarian intervention falls safely within the “borderline cases” and therefore outside the ICC’s jurisdiction, or whether such actions are unlawful aggression hinges on the outcome of the two-step analysis for manifest violations of the U.N. Charter.⁸⁸ Before the attachment of criminal responsibility, the act itself must be determined to be unlawful. Once this is determined, the character, gravity, and scale of the violation of the U.N. 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 U.N. Charter is not controversial.⁸⁹ 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.”⁹⁰

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.⁹¹ Among the first internal incidents to garner the attention of the Security Council was the 1966 rebellion in

85. MURPHY, *supra* note 84, at 3–4.

86. Preparatory Committee on the Establishment of an International Court, U.N. Doc. A/AC.249/1997/WG.1/DP.20 (Dec. 11, 1997).

87. INT’L CRIM. CT., Assembly of States Parties, Resumed fifth session, Annex II, *Report of the Special Working Group on the Crime of Aggression*, at 11, ¶ 16, ICC-ASP/5/35 (Jan. 29-Feb. 1, 2007); *see also* Heller, *supra* note 2; Petty, *supra* note 5, at 543.

88. *See* discussion, *supra* Part II.C.

89. DUFFY, *supra* note 84, at 179–80. *See also* MURPHY, *supra* note 84, at 12.

90. W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT’L L. 57, 78 (2008).

91. U.N. Charter, art. 24, para. 1.

Southern Rhodesia.⁹² During the 1990s, the Security Council turned to issues of humanitarian concern more often, including the Iraq-Kuwait situation,⁹³ the Somalia intervention,⁹⁴ and the mission in Haiti.⁹⁵ Even in the Resolution on Bosnia and Herzegovina, the Security Council linked the humanitarian crisis to a threat to regional peace and security.⁹⁶ These examples underscore that the authority for actions related to grave human rights violations remains with the 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.”⁹⁷

The International Court of Justice (ICJ) 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 ICJ interpreted Article 2(4) of the U.N. Charter to preclude implicit exceptions to the prohibition on the use of force.⁹⁸ In *Nicaragua*, the ICJ held that the prohibition on the use of force was a customary international law norm independent of the U.N. Charter paradigm.⁹⁹ Furthermore, the ICJ added that the use of force is not the appropriate mechanism to prevent human rights violations in an-

92. Sec. Council Res. 232, para. 1, U.N. Doc. S/RES/232 (Dec. 16, 1966); *see also* Reisman, *supra* note 90, at 71.

93. On August 2, 1990, Iraq invaded and annexed Kuwait, ostensibly over an oil drilling dispute. The United Nations responded with Security Council Resolution 688. Sec. Council Res. 688, para. 1, U.N. Doc. S/RES/688 (Apr. 5, 1991), *cited in* Reisman, *supra* note 90, at 72 (citing SUSAN BREAU, HUMANITARIAN INTERVENTION: THE UNITED NATIONS & COLLECTIVE RESPONSIBILITY 238 (2005)). Reisman indicates that as far as the Security Council is concerned, the Iraq/Kuwait crisis marked the “first clear link between human rights violations within a state and international peace and security.” Reisman, *supra* note 90, at 72 n.47; *see also* DUFFY, *supra* note 84, at 180 (citing the Statement of the United Kingdom Foreign and Commonwealth Office, justifying the action on humanitarian grounds, reported in GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 30 (2004)).

94. The United Nations established the Unified Task Force (UNITAF) to stabilize the civil breakdown and humanitarian crisis in Somalia caused by a civil war between rival warlords and their factions. Sec. Council Res. 794, para. 10, U.N. Doc. S/RES/794 (Dec. 3, 1992), *cited in* Reisman, *supra* note 90, at 72.

95. In 2004, the United Nations authorized a peacekeeping force to respond to large scale civil unrest in Haiti following a coup d'état that led to the premature resignation of President Aristide. *See* DUFFY, *supra* note 84, at 184.

96. Sec. Council Res. 713, U.N. Doc. S/RES/713 (Sept. 21, 1991), *cited in* Reisman, *supra* note 90, at 72.

97. Reisman, *supra* note 90, at 78.

98. *Corfu Channel Case (Alb. v. U.K.)*, 1949 I.C.J. 4 (Apr. 9) (rejecting the U.K.'s self-defense argument in clearing minefields near the Albanian coast when the Security Council was unable to resolve the matter), *cited in* Reisman, *supra* note 90, at 77.

99. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (finding that the United States violated international law by supporting guerilla forces attempting to overthrow the Nicaraguan government and by mining Nicaragua's harbors), *cited in* Reisman, *supra* note 90, at 77.

other State.¹⁰⁰ The ICJ 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.¹⁰¹ The ICJ drew the line drawn even more brightly in *DRC v. Uganda*, stating 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.¹⁰²

The draft definition of aggression does not provide an exception for humanitarian intervention. The acts prohibited by Article 3 of GA Resolution 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 aggression. Thus, the black letter of the law would prohibit humanitarian interventions.

GA Resolution 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 referenced.¹⁰³ 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*."¹⁰⁴ 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 give pause to considerations of exceptions to the general prohibition against the use of armed force in Article 2(4).¹⁰⁵ As indicated by the ICJ in the *Nicaragua* case: "while the

100. *Id.*

101. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (Jul. 8) (responding to a U.N. General Assembly request for an advisory opinion to the question, "Is the threat or use of nuclear weapons in any circumstances permitted under international law?"), cited in Reisman, *supra* note 90, at 77.

102. Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda) (Judgment of Dec. 19, 2005) para. 152, available at <http://www.icj-cij.org/docket/files/116/10455.pdf> (where the ICJ held that Uganda violated Article 2(4) of the U.N. Charter and international human rights and humanitarian law when it conducted military operations in the DRC between 1998 and 2003), cited in Reisman, *supra* note 90, at 78.

103. 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 11-12, Article 8 bis, ¶ 2(a)-(g), ICC-ASP/7/SWGCA/2 (Feb. 9-13, 2009).

104. *Id.* at 11 (emphasis added).

105. DUFFY, *supra* note 84, at 178 n.155 (citing Swedish representative to Security Council debating the Israeli Entebbe incident in Uganda, at Sec. Council 1940th meeting, in CHESTERMAN, JUST WAR OR JUST PEACE: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 26 (2001)).

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.¹⁰⁶

However, in spite of a lack of consensus on the legality of humanitarian intervention without Security Council authorization, there is a growing body of scholarship that supports humanitarian intervention on both legal and policy grounds.¹⁰⁷ As discussed below, this would remove humanitarian intervention from cases that could be considered manifest violations 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

Despite numerous attempts by scholars to create an operational framework, the lawfulness of humanitarian intervention is not well-settled.¹⁰⁸ Nonetheless, at least two primary arguments have emerged to justify the use of humanitarian intervention.¹⁰⁹ First, humanitarian intervention is not inconsistent with the purposes of the U.N. Charter. Second, the right of unilateral humanitarian intervention, like the right of self-defense, is part of customary international law (emerging or realized). Although the debate about the legality of humanitarian intervention will continue, the legitimacy of such actions tends to preclude individual criminal responsibility for aggression.

1. Fundamental Principles of the U.N. Charter

Humanitarian intervention and the protection of human rights are consistent with at least one of the underlying purposes of the United Nations.¹¹⁰ The fundamental principles of the U.N. Charter are the regula-

106. GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 28 (2004). Note, however, that the ICJ tacitly approved of armed intervention at the request of another State for the purposes of collective self-defense. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. at 60–61 (June 27).

107. See generally, Reisman, *supra* note 90.

108. See Paul R. Williams & Meghan E. Stewart, *Humanitarian Intervention: The New Missing Link in the Fight to Prevent Crimes Against Humanity and Genocide?*, 40 *CASE W. RES. J. INT'L L.* 97, 102–06 (2008) (citing SEAN D. MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN THE EVOLVING WORLD ORDER* (1996)); Paul Williams & Michael Scharf, *NATO Intervention on Trial: The Legal Case that was Never Made*, 1 *HUM. RTS. REV.* 103 (2000); Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS* 232, 241–42 (J.L. Holzgrefe & Robert O'Keohane eds., 2003).

109. NEIL FENTON, *UNDERSTANDING THE UN SECURITY COUNCIL* 14 (2004).

110. The U.N. Charter Preamble and Articles 1, 55, and 56 reflect the human rights emphasis of the U.N. Charter.

tion of the use of force,¹¹¹ the protection of sovereignty,¹¹² and the promotion of human rights.¹¹³ Far from a manifest violation of the U.N. Charter, the use of force in furtherance of humanitarian principles, in certain circumstances, is in accord with the general purpose of the United Nations because such actions would appear to comport with the human-rights priorities of the Charter.¹¹⁴

Additionally, it is instructive to examine the subsequent practice of U.N. Member States (and organs of the United Nations) when interpreting the general prohibition of unlawful force. The subsequent practice of parties to an agreement is taken into account when interpreting a treaty.¹¹⁵ As such, many believe the U.N. Charter to be a living instrument responsive to “the new challenges of the contemporary world.”¹¹⁶ There are numerous examples of how the evolving practice of humanitarian intervention is transforming the boundaries of the prohibition of the unlawful use of force. For example, since 1990 there have been at least seventeen instances of humanitarian intervention.¹¹⁷

In this context, States’ use of force to prevent or arrest large scale atrocities, without the Article 51 self-defense rationale or Security Council authorization, does not have the “character” of a manifest violation of the U.N. Charter.¹¹⁸ The reason for this is apparent, even though any intervention could be classified under the prohibited acts of aggression in GA Resolution 3314. In launching an attack against a government that is undertaking a genocidal campaign against a segment of its population, the attacking State does not have as its purpose the violation of the targeted State’s territorial integrity or political independence. Rather, the

111. U.N. Charter pmbl, art. 1, para. 1, art. 2, para. 4.

112. *Id.* art. 2, para. 1.

113. *Id.* at pmbl.

114. See DUFFY, *supra* note 84 at 147–49. See also Vienna Convention, *supra* note 67, art. 31, para. 1 (“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 U.N. 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 ILC Articles on State Responsibility, art. 50.

115. Vienna Convention, *supra* note 67, art. 31, para. 3(a)-(b) (“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, 1949 I.C.J. 174, 180.

116. DUFFY, *supra* note 84, at 149 (citing FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS*, 5–9 (2002); G. Ress, “Interpretation,” in *CHARTER OF THE UNITED NATIONS, A COMMENTARY* 13, 27 (Brunno Simma et al. eds. 2002).

117. Williams & Stewart, *supra* note 108, at 98.

118. FENTON, *supra* note 109, at 14 (citing Michael L. Burton, *Legalising the Sublegal: A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention*, 85 GEO L.J. 427 (1996)).

attacking State seeks to protect the rights of genocide victims. 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 would neither be “against the sovereignty, territorial integrity or political independence of another State,” nor, arguably, would it be conducted in “any other manner inconsistent with the Charter of the United Nations.”¹¹⁹

2. 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.¹²⁰ 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.¹²¹ Some maintain that, in this instance, international law allows States to intervene to avert a “grave humanitarian crisis”¹²² or “humanitarian catastrophe.”¹²³ This unilateral assertion of humanitarian intervention is not to be confused with the use of U.N.-sanctioned force for humanitarian purposes.¹²⁴

More compelling than claims of a pre-existing right to intervene are the arguments that a customary norm is emerging.¹²⁵ Under this theory, a State loses its right to sovereign integrity when it fails to maintain a min-

119. 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 11, Article 8 bis, ¶ 1, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009) (emphasis added).

120. 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, rather than customary international law, is the primary source of law for the ICC (Article 21), and it frames the crime of aggression in terms of manifest violations of the U.N. Charter.

121. FENTON, *supra* note 109, at 14.

122. Christine Gray, *From Unity to Polarization: International Law and the Use of Force against Iraq*, 13 EUR. J. INT’L L. 1, 9 (quoting House of Commons Hazard Debates, 26 February 2001 (justifying the UK enforcement of Iraq no-fly zones)).

123. DUFFY, *supra* note 84, at 179 (citing W.M. Reisman, *Coercion and Self Determination: Construing Charter Article 2(4)*, 78 AM J. INT’L L. 64 (1984)); F. TESON, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY*, (2d ed. New York, 1997). See generally David Scheffer’s discussion of “atrocities crimes,” in Scheffer, *supra* note 77.

124. DUFFY, *supra* note 84, at 179 (explaining that the U.N. Security Council authorized coercive force under Chapter VII against apartheid in South Africa, Sec. Council Res. 418 (1977), 4 November 1977, UN Doc. S/RES/418 (1977), and white minority rule in Rhodesia, Sec. Council Res. 232 (1966), 16 December 1966, UN Doc. S/RES/232 (1966)); see also Mohammed Ayoob, *State Making, State Breaking, and State Failure*, in *LEASHING THE DOGS OF WAR: CONFLICT MANAGEMENT IN A DIVIDED WORLD* 110 (Chester A. Crocker et al. eds., 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).

125. Reisman, *supra* note 90, at 78–9.

imum standard of conduct toward its citizens.¹²⁶ 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, a group of West African States sent a military peacekeeping force (ECOMOG) to intervene in a civil war in Liberia notable for large-scale human rights abuses.¹²⁷ Although the Security Council did not authorize ECOMOG's actions, U.N. Member States treated the intervention favorably.¹²⁸ In 1995, recognizing that States had the tool of humanitarian intervention available to them, then Secretary-General Boutros Boutros-Ghali 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"¹²⁹

The latest incarnation of humanitarian intervention is now discussed in terms of the responsibility to protect.¹³⁰ Under this theory, the norm of non-intervention must give way when a State commits genocide or crimes against humanity on its own territory.¹³¹ This approach was first reflected in a report by the International Commission on Intervention and State Sovereignty (ICISS). The Commission recognized that

the *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.¹³²

126. The right to intervene is now referred to as the "responsibility to protect." See Williams & Stewart, *supra* note 108, at 105; see also Scheffer, *supra* note 77.

127. Reisman, *supra* note 90, at 78–9.

128. *Id.*

129. U.N. Secretary-General, Report of the Secretary-General on the Work of the Organization, para. 23, Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fifteenth Anniversary of the United Nations, U.N. Doc. A/50/60-S/1995/1 (Jan. 3, 1995), cited in Reisman, *supra* note 90, at 76.

130. Williams & Stewart, *supra* note 108, at 105.

131. Ambassador Richard N. Haass, Sovereignty, Existing Rights, Evolving Responsibilities: Remarks Presented at Georgetown University, School of Foreign Service, 14 January 2003, in STEINER, ALSTON, ET AL., HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 698 (Oxford 2008). See also, Richard Falk, Sovereignty and Human Dignity: The Search for Reconciliation reprinted in STEINER, ALSTON, ET AL., HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 696 (Oxford 2008).

132. Bruce W. Jentleson, Humanitarian Intervention and the Challenges of "Never Again," in LEASHING THE DOGS OF WAR: CONFLICT MANAGEMENT IN A DIVIDED WORLD 277, 280 (Chester A. Crocker et al. eds., 2007) (citing International Commission on Intervention and State Sovereignty

In 2004, the Secretary-General scaled back the scope of unilateral action 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.”¹³³ This signified a return to the strict interpretation of authorization of the use of force found in the U.N. Charter framework, which would trend toward limiting military actions for humanitarian purposes to those with explicit Security Council authorization.

The General Assembly found a middle option when it voted on the declaration for the *2005 World Summit Outcome*. The declaration provides that “[e]ach 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.*”¹³⁴

The most promising indication of an emerging norm is the ICJ’s 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*)—the “Genocide Case.”¹³⁵ With respect to the crime of genocide, the ICJ 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.”¹³⁶ This decision suggests that States not only have legal authority to unilaterally use force to pre-

(ICISS), *The Responsibility to Protect* at 69 (Ottawa: International Development Research Centre, 2001) (italics added). For further discussion of the ICISS Report, see Scheffer, *supra* note 77, at 113. See also, Williams & Stewart, *supra* note 108, at 105–06.

133. Chair of the High-Level Panel on Threats, Challenges & Change, Transmittal Letter from the Chair of the High-Level Panel on Threats, challenges and Change, para. 203, addressed to the Secretary-General, UN Doc. A/59/565 (Dec. 1, 2004), *cited in* Williams & Stewart, *supra* note 108, at 106 (2008). See also, Scheffer, *supra* note 77, at 114.

134. G.A. Res. A/RES/60/1, para. 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (emphasis added); see also Sec. Council Res. 1674, para. 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (“[The Security Council] reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”), *cited in* Scheffer, *supra* note 77, at 112. Scheffer also explains that then Secretary-General Kofi Annan seemed to endorse the broader intervention policy when he stated “if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations.” The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All, delivered to the General Assembly*, para. 134, U.N. Doc. A/59/2005 (Mar. 21, 2005), *cited in* Scheffer, *supra* note 77, at 114.

135. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 2007 I.C.J. 169 (Feb. 26), *available at* <http://www.icj-cij.org/docket/index.php?p1=3&k=f4&case=91&code=bhy&p3=4> [hereinafter *Genocide Case*], *cited in* Reisman, *supra* note 90, at 81.

136. *Id.* ¶ 430.

vent atrocities, but they may even have an obligation to do so.¹³⁷ 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 that 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 1971,¹³⁸ Vietnam's cross-border incursion into Cambodia in 1978,¹³⁹ and Tanzania's actions against Idi Amin's Uganda in 1979.¹⁴⁰ 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.¹⁴¹

The NATO intervention in Kosovo in 1999 is a particularly cogent example of States' reluctance to rely exclusively on humanitarian justifications to use force to stop widespread human rights violations.¹⁴² 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.¹⁴³ The United Kingdom came the closest to using a strictly humanitarian basis for action prior to the intervention,¹⁴⁴ but seemed to take a more cautious position after NATO's

137. David Scheffer suggests that the Genocide Case "may well be the starting point for the modern enforcement of [the responsibility to protect]." Scheffer, *supra* note 77, at 117.

138. Initially justifying its actions on human rights grounds, India later amended its argument to include self-defense. See U.N. SECURITY COUNCIL, 1606th Session December 4, 1971, U.N. Doc. S/PV 1608 (1971); U.N. SECURITY COUNCIL, 1608th Session December 6, 1971, U.N. Doc. S/PV 1608 (1971).

139. While Vietnam's military actions were based on self-defense following Cambodian attacks, the Vietnamese victory and occupation resulted in the ouster of Pol Pot's genocidal Khmer Rouge regime. See FENTON, *supra* note 109, at 16.

140. See *id.* (citing AREND AND ROBERTS, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM 124 (1993)). Rather than rely on humanitarian grounds, Tanzania justified its intervention in Uganda to overthrow Idi Amin's regime on self-defense grounds.

141. DUFFY, *supra* note 84, at 181 n. 166; *but see* Reisman, *supra* note 90, at 68–69.

142. DUFFY, *supra* note 84, at 180 (citing statement of U.K. to Security Council, justifying "an exceptional measure to prevent an overwhelming humanitarian catastrophe," S.C.O.R. 3988th meeting, Mar. 24, 1999, at 12). The U.K. and the Netherlands are often singled out as having asserted the legal justification of humanitarian intervention. *Id.* (citing GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 33 (2004)); *but see* Reisman, *supra* note 90, at 80 (indicating that Belgium may have been the only State to rely primarily on humanitarian grounds for intervention).

143. See Reisman, *supra* note 90, at 79–80; Sean Murphy, *Legal Regulation of the Use of Force*, 93 AM. J. INT'L L. 628, 631 (1999).

144. Reisman, *supra* note 90, at 80 (citing Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND

involvement.¹⁴⁵ Only Belgium appeared to rely primarily on humanitarian grounds to justify its use of force.¹⁴⁶

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 expanding authority, including the ICJ's Genocide Case and the responsibility-to-protect doctrine. Second, although the U.N. has generally condemned any deviation from the prohibition of non-intervention, even in light of strong evidence of human rights abuses,¹⁴⁷ it is highly unlikely that the U.N. will refer a case of humanitarian intervention to the ICC 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, is consistent with the U.N. Charter 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 legitimate,"¹⁴⁸ it would be difficult to argue that there is a reasonable basis to believe that humanitarian intervention "by its character, gravity and scale, constitutes

POLITICAL DILEMMAS 236 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) (quoting U.K. Foreign and Commonwealth Office note of Oct. 7, 1998 330 Parl. Deb., H.C. (6th ser.) (1999) 240 (arguing that force could be justified "on the grounds of overwhelming humanitarian necessity" without Security Council authorization)).

145. One month after NATO intervention, Prime Minister Tony Blair stated the following: 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. 330 Parl. Deb., H.C. (6th ser.) (1999) 240, *quoted in* Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 236 (J.L. Holzgrefe & Robert O. Keohane eds., 2003), *cited in* Reisman, *supra* note 90, at 80.

146. 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* Reisman, *supra* note 90, at 80.

147. See FENTON, *supra* note 109, at 16.

148. Williams & Stewart, *supra* note 108, at 104.

a manifest violation of the Charter of the United Nations.”¹⁴⁹ The use of military force to prevent gross human-rights violations does not rise to the level of a manifest violation of the U.N. Charter, and therefore, it will not constitute criminal aggression. This assumes, of course, that the humanitarian concerns are not pretext for other unlawful uses of force.¹⁵⁰ The danger for pretext is even more pronounced in certain actions to combat terrorism discussed in detail in the next section.

IV. ACTIONS AGAINST TERRORISM

After the attacks on September 11, 2001, robust national security strategies have given rise to questions concerning the legality of certain applications of force to combat terrorism. This debate centers largely on self-defense measures. This section discusses the re-emergence of preemptive self-defense and whether actions taken under the so-called “Bush Doctrine” crossed the threshold from lawful self-defense into unlawful aggression.¹⁵¹ Also, because the draft definition of aggression imputes individual responsibility only to State acts, and States now face the threat of terrorism, the question arises of how target States are to respond to aggressive acts committed by non-State armed groups like terrorist organizations. In other words, if self-defense is permitted only 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 Part addresses the scope of the right to self-defense, the lawfulness of preemptive measures and attacks against non-state armed groups, and whether such actions are manifest violations of the U.N. Charter for the purposes of criminal aggression.

A. *The Scope of Self-Defense*

The U.N. Charter expressly permits the use of force for self-defense purposes,¹⁵² unlike humanitarian intervention, which finds no enumerated authorization. In light of recent attempts to expand the limits of the

149. 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 11, Article 8 *bis*, ¶ 1, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009).

150. 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 and of sufficient magnitude. See Scheffer, *supra* note 77, at 133.

151. None of these actions would fall within the jurisdiction of the ICC. The Rome Statute will not be amended until after the review conference in 2010, after which any amendments must enter into force, including the adoption of the crime of aggression in Article 8 *bis*. Nevertheless, the underlying policies of the post 9/11 era are worth examining in order to determine which State acts to combat terrorism in the future could fall within the definition of aggression.

152. U.N. Charter art. 51.

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 Part II.C above, one must first determine the lawfulness of the act and then determine whether the act is of the character, gravity, and scale to constitute a manifest violation of the U.N. Charter.

The right to self-defense is not absolute. The U.N. Charter imposes limits on its application. For example, when a State uses force according to Article 51, it must report to the Security Council.¹⁵³ Moreover, it is widely understood that customary international law imposes limits on the “inherent” right listed in the U.N. Charter. Specifically, self-defense measures must be necessary and proportional to the initial attack.¹⁵⁴

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.¹⁵⁵ For others, self-defense is an inherent right of every State and is integral to a successful national security strategy.¹⁵⁶ 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.¹⁵⁷

In the *Nicaragua* case, the International Court of Justice set some parameters for the types of actions that warrant defensive measures.¹⁵⁸ 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.¹⁵⁹ 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 within the territory of another State was sufficient.¹⁶⁰

153. *Id.* (“Measures taken by Members in the exercise of this right of self defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

154. See DUFFY, *supra* note 84, at 150 n. 27 (citing *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103 (June 27)).

155. See *id.* at 150 (citing OPPENHEIM’S INTERNATIONAL LAW 421 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (“[The self defense exception] is to be strictly applied.”)).

156. Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL’Y 539, 558 (2002).

157. See DUFFY, *supra* note 84, at 150 (citing GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 85 (2004); ANTONIO CASSESE, INTERNATIONAL LAW 306 (Oxford 2001)).

158. *Military and Paramilitary Activities (Nicar. v. U. S.)*, 1986 I.C.J. 14, 103-04 (June 27).

159. *Id.*

160. *Id.*

The use of force in response to isolated or sporadic attacks is consistently discouraged by commentators and the international community.¹⁶¹ Two examples are worth noting. 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, acts that targeted U.S. nationals.¹⁶² The U.S. response was widely condemned as a reprisal action and was not justified under Article 51 of the U.N. Charter.¹⁶³ Second, under a similar "accumulation of effects" justification, Israel bombed a Palestinian Liberation Organization target in Tunisia in October 1985, also to the condemnation of the international community.¹⁶⁴ According to critics of this action, repeated terrorist attacks against Israel did not constitute a legal justification for the use of force for self-defense purposes.¹⁶⁵

Self-defense exercised in reaction to an armed attack, whether it is 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). Preemptive actions taken without an underlying attack raise more significant issues. This is particularly true when such acts are analyzed for the purpose of attaching criminal responsibility to aggression.

B. Preemptive Self-Defense

The right to self-defense is not unlimited, and preemptive 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,

161. DUFFY, *supra* note 84, at 152 (citing A. Cassese, *The International Legal Community's "Legal" Response to Terrorism*, 38 INT'L & COMP. L.Q. 589, 596 (1989)); *see also* L.M. Campbell, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067 (2000).

162. Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L. L. 319, 325 (2004). *See also*, Campbell, *supra* note 161, at 1080.

163. *See* Louis Henkin, *Use of Force: Law and U.S. Policy*, in RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 46 (1989) (describing General Assembly condemnation of the U.S. bombings of Libyan targets, as well as a Security Council condemnation that was ultimately blocked by the United States, United Kingdom, and France); Campbell, *supra* note 161, at 1080 (citing Wallace F. Warriner, *The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986*, 37 NAVAL L. REV. 49, 67 (1988)).

164. Campbell, *supra* note 161, at 1079 (citing Wallace F. Warriner, *The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986*, 37 NAVAL L. REV. 49, 67 (1988)).

165. *Id.*

or preemptive, self-defense.¹⁶⁶ At issue is whether a state may respond with coercive force to acts that 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.¹⁶⁷ While certain preemptive actions will violate the U.N. Charter, it is another matter altogether whether such unlawful uses of force constitute a manifest violation for the purposes of criminal aggression.

There is authority that suggests there must be at least preparatory acts, coupled with a clear intent to attack, in order to engage in preemptive action prior to an “armed attack.”¹⁶⁸ The *Caroline* case of 1837 establishes the authoritative standard for anticipatory defense.¹⁶⁹ During the Canadian rebellion of 1837, British forces boarded an American vessel—*The Caroline*—believed to be supporting rebel troops. The British then set it on fire and sent it over Niagara Falls.¹⁷⁰ U.S. Secretary of State Daniel Webster said Britain’s attack did not constitute self-defense.¹⁷¹ 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.”¹⁷² Ultimately, under the *Caroline* test, the threat must be real and imminent in order for the use of force to be justified as anticipatory self-defense. This standard has been

166. President George W. Bush, “The National Security Strategy of the United States of America,” Sept. 17, 2002, available at <http://www.informationclearinghouse.info/article2320.htm> (last visited July 31, 2009) [hereinafter U.S. National Security Strategy].

167. DUFFY, *supra* note 84, at 151 n. 38. Others believe that attacks against nationals are sufficient to create a right to self-defense. See *id.* at 152 (citing GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 108–09 (2004), as a source rejecting the right to protect nationals abroad, and D.W. BOWETT, SELF DEFENSE IN INTERNATIONAL LAW at 93 (New York, 1958), as a source accepting that protecting nationals abroad is permissible in some circumstances). Of particular note is Michael Byers, *Terrorism, International Law and the Use of Force*, 51 INT’L & COMP. L. Q. 401, 406 (2002), indicating that most States tacitly approved of the Entebbe incident when Israel used force to extract Israeli nationals from a plane hijacked in Uganda.

168. DUFFY, *supra* note 84, at 155 (citing M.E. O’Connell, *Debating the Law of Sanction*, 13 EUR. J. INT’L L. 63 (2002); M. Bothe, *Terrorism and the Legality of Preemptive Force*, 14 EUR. J. INT’L L. 227, 229–30 (2003).

169. The correspondence between U.S. and British governments was reproduced in twenty-nine British and Foreign State Papers 1127–1130 (1841) and thirty British and Foreign State Papers 195–196 (1842).

170. Campbell, *supra* note 161, at 1076–77 (citing Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations’ Emerging Role*, 45 NAVAL L. REV. 217, 220–21 (1998)).

171. Guiora, *supra* note 162, at 323.

172. Letter dated Apr. 24, 1841 from the U.S. Secretary of State Webster to the Government of the United Kingdom, Fox, reprinted in D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 895 (1979).

cited by the Nuremberg Tribunal¹⁷³ and the ICJ in the *Nicaragua* case and is considered by many to be customary international law.¹⁷⁴

Since the development of the *Caroline* doctrine, the customary norm of preemptive self-defense has been significantly reduced by Article 51 of the U.N. Charter.¹⁷⁵ Proponents of a strict adherence to Article 51 argue that self-defense measures are unlawful unless an armed attack “occurs.”¹⁷⁶ They argue that a mere threat is insufficient to permit coercive self-defense measures.¹⁷⁷ As evidence, proponents cite the absence of the term “threat” in Article 51, contrasted with the inclusion of the term “threat” in Articles 2(4) and 39.¹⁷⁸ Furthermore, proponents of strict adherence to Article 51 frequently cite the risk in allowing preemptive strikes based on a State’s own risk assessment. This expanded theory of self-defense, it is argued, would erode the U.N. Charter’s general prohibition of the use of force.¹⁷⁹

The use of preemptive 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.¹⁸⁰ 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.”¹⁸¹ Would Austria have acted unlawfully if it had 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.¹⁸² Although the annexation occurred “without the use of armed force[,] internal subversive actions and the immediate threat of

173. U.S. v. Goering et al., reprinted in 6 F.R.D. 69, 99 (1946).

174. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 110 (June 27), cited in DUFFY, *supra* note 84, at 151.

175. Guiora, *supra* note 162, at 323; but see DUFFY, *supra* note 84, at 155 n. 55 (discussing whether there should be a set of customary rights—emanating from *Caroline*—running parallel but contrary to the standard in the U.N. Charter under Article 51).

176. Guiora, *supra* note 162, at 323 (citing Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State’s Duty to Protect its Citizens*, 15 TEMP. INT’L & COMP. L. J. 195, 211 (2001)).

177. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. at 110, cited in DUFFY, *supra* note 84, at 151 (“States do not have a right of . . . armed response to acts which do not constitute an ‘armed attack.’”).

178. See Bothe, *supra* note 168, at 228-29, cited in DUFFY, *supra* note 84, at 153.

179. DUFFY, *supra* note 84, at 154.

180. O. Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1629, 1634 (1984); see also T.M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U.J.L. & POL’Y 51, 59–60 (2001).

181. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACK 98 (2002).

182. U.S. v. Goering et al., reprinted in 6 F.R.D. 69, 91 (1946).

extreme violence assured in these cases the ‘peaceful co-operation’ of the governments concerned.”¹⁸³ Surely if criminal aggression existed under those circumstances, preemptive self-defense measures would have been warranted.

Examination of post-Charter uses of preemptive force further illustrates that this is a decidedly gray area of the law.¹⁸⁴ Take, for example, Israel’s preemptive strike on Egypt that initiated the 1967 Six-Day War.¹⁸⁵ Israel’s attack was based on threats made by President Nasser and his closure of the Straits of Tiran.¹⁸⁶ The attack received general support as a valid use of anticipatory defense. However, the reaction to Israel’s preemptive strike against Iraq’s nuclear reactor in Isirik in 1981 was not as favorable.¹⁸⁷ The Security Council, with U.S. support, condemned that action, stating that in the absence of an attack from Iraq, Israel did not need to destroy the reactor.¹⁸⁸

Even the U.S. bombardment of Libya in 1985 had an element of preemptive 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.”¹⁸⁹ More recently, the U.S. 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 preventing “the imminent threat of further terrorist attacks against U.S. personnel and facilities.”¹⁹⁰

The U.S. National Security Strategy of 2002 had the potential to be a game changer, had it not been so recklessly applied.¹⁹¹ This policy allowed for a much more permissive application of preemptive 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 preemptive defense, arguing that Saddam Hussein’s desire to possess weapons of

183. C.A. POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 21 (1953).

184. For a discussion of State practice post-Charter, see GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 112 (2004). See also ANTONIO CASSESE, *INTERNATIONAL LAW* 309 (Oxford 2001) (condemning past practices of anticipatory defense); J. Paust, *Legal Responses to International Terrorism*, 22 HOUS. J. INT’L L. 17 (1999).

185. Guiora, *supra* note 162, at 325.

186. *Id.*

187. *Id.* See also Campbell, *supra* note 163, at 1079.

188. Sec. Council Res. 487 (1981), UN Doc. S/RES/487 (1981); see also Guiora, *supra* note 162, at 325; Campbell, *supra* note 161, at 1079.

189. Guiora, *supra* note 162, at 325 (citing Lucy Martinez, *September 11th, Iraq, and the Doctrine of Anticipatory Self-Defense*, 72 U. MO. KAN. CITY L. REV. 123, 140 (2003) (quoting U.N. Ambassador Vernon Walters)).

190. Lucy Martinez, *September 11th, Iraq, and the Doctrine of Anticipatory Self-Defense*, 72 U. MO. KAN. CITY L. REV. 123, 143 (2003), cited in Guiora, *supra* note 162, at 325–26.

191. U.S. National Security Strategy, *supra* note 166.

mass destruction was an immediate threat particularly in the post-9/11 “war on terror” climate.¹⁹² 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 *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.¹⁹³

There is little consensus on the scope of the legality of preemptive self-defense. Oppenheim’s International Law states that “while anticipatory action in self-defence is normally unlawful, it is not necessarily unlawful in all circumstances.”¹⁹⁴ Therefore, whether an unlawful act of preemptive self-defense is a manifest violation of the U.N. Charter must be determined on a case-by-case basis. Israel’s action against Egypt would not likely 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 ICC would likely find the U.S. invasion of Iraq to be unlawful.¹⁹⁵ The U.S. justification for applying defensive measures appears so far removed from the *Caroline* standard, not to mention from the heightened requirement under Article 51 (that an armed attack actually occur), that it is difficult to reconcile the overt violation of Article 2(4). Therefore, in practice, even though preemptive 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: Uncertain Adversaries

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

192. George W. Bush, Remarks by the President to Troops and Families of the 10th Mountain Division (July 19, 2002) (“America must act against these terrible threats before they’re fully formed.”) available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/07/20020719.html> (last visited August 17, 2009); see also William H. Taft IV & Todd F. Buchwald, *Pre-emption, 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).

193. See DUFFY, *supra* note 84, at 150 (citing GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 85 (2004); CASSESE, INTERNATIONAL LAW 306 (Oxford, 2001)). See generally, Thomas M. Franck, *What Happens Now? The United Nations after Iraq*, 97 AM. J. INT’L. L. 607 (2003).

194. OPPENHEIM’S INTERNATIONAL LAW 421 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

195. See generally Franck, *What Happens Now? The United Nations After Iraq*, *supra* note 193.

aggression reflects this standard.¹⁹⁶ 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.¹⁹⁷ This was so during the Spanish Civil War when General Franco led Germany's fascist allies against the Soviet-backed Republicans in Spain.¹⁹⁸ Second, States' use of non-State armed groups to launch external attacks against another State's territory. In 1977, the Security Council condemned the "aggression" of mercenaries who attacked the territory of Benin without naming the State that backed them.¹⁹⁹ Finally, some non-State actors operate independent of significant State backing. Such is the case with the Maoist rebels in Nepal.²⁰⁰ And, even though the Taliban permitted al Qaeda to use Afghanistan as a launching point for attacks, it did not exercise 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

196. See generally INT'L CRIM. CT., Assembly of States Parties, Resumed seventh session, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009).

197. According to a study in armed conflict, States have intervened in internal conflicts on at least thirty-two occasions since 1946. See Nils Petter Gleditsch et al., *Armed Conflict 1946-2001: A New Dataset*, 39 J. PEACE RES. 615, 620 (2002). Version 4-2006 of the data set is based on changes described in Lotta Harbom et al., *Armed Conflict and Peace Agreements*, 43 J. PEACE RES. 617, 617-31 (2006). Another report found that States have supported approximately forty-four insurgencies from 1991–2000. See DANIEL L. BYMAN ET AL., TRENDS IN OUTSIDE SUPPORT FOR INSURGENT MOVEMENTS 23 (2001).

198. Adel Darwish, *Hezbollah and Israel: The Proxy War*, MIDEASTNEWS.COM, July 2006, <http://www.mideastnews.com/Lebanon06july.html>. Darwish compares the Spanish Civil War to the July War of 2006 and he claims that the U.S. (through Israel) fought a proxy war against Syria (through Hezbollah). *Id.*

199. Sec. Council Res. 405, U.N. Doc. S/RES/405 (Apr. 14, 1977). See also Mohammed M. Goma, *The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime*, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 55, 65 n.32 (Mauro Politi & Giuseppe Nesi eds., 2004). Several other examples of State support for the insurgent takeover of another State include, but are not limited to, Uganda and Rwanda's support of insurgents to overthrow the Mobutu regime in the Congo, Pakistan's support of the Taliban to oust the Rabbani government in Afghanistan, and Russia's removal of the United Tajik Opposition-led government in Tajikistan. See BYMAN, *supra* note 197, at 33.

200. National Consortium for the Study of Terrorism and Responses to Terrorism, *Communist Party of Nepal-Maoist (CPN-M)*, http://www.start.umd.edu/start/data/tops/terrorist_organization_profile.asp?id=3531.

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 commit aggression when it responds with coercive force?

1. State Control Requirements

States' use of non-State armed groups 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 U.N. 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."²⁰¹ This proposal, although not adopted in the U.N. 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.²⁰²

In 1974, the General Assembly defined aggression in terms of States' support of armed groups. Article 3 of GA Resolution 3314—adopted in the current definition of aggression—explains that States commit aggression by "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."²⁰³

The ICJ addressed this issue in the *Nicaragua* case, holding that a State must exercise "effective control" over a non-State armed group in order for its actions to be attributable to the State.²⁰⁴ 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.²⁰⁵ Both the ICTY²⁰⁶ and ICJ²⁰⁷ have re-

201. Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 841 (2001) (citing Tentative Chinese Proposals for a General International Organization (Aug. 23, 1944), 1 FOREIGN RELATIONS OF THE UNITED STATES 718, 725)).

202. THOMAS P.M. BARNETT, *THE PENTAGON'S NEW MAP: WAR AND PEACE IN THE TWENTY-FIRST CENTURY* 43–46 (2004).

203. G.A. Res. 3314, *supra* note 24.

204. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 65 (June 27).

205. *Prosecutor v. Tadic*, Appeal of the Judgment, No. IT-94-1-A, ¶ 145 (July 15, 1999), 38 I.L.M. 1518, 1546 (1999).

206. *Id.*

207. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. at 65. For further analysis, see Umberto Leanza, *The Historical Background*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* 3, 7 (Mauro Politi & Giuseppe Nesi eds., 2004).

quired something more than mere logistical support for a State to be responsible for the acts of the attacking armed group.²⁰⁸

Beyond the control theory of responsibility, a State may also be held accountable for the conduct of non-State actors when the State openly acknowledges its participation in this conduct.²⁰⁹ The International Law Commission recognizes the “control” and “acknowledgment” basis for State responsibility as customary international law.²¹⁰

2. 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.²¹¹ The prevalent view is that prior to exercising self-defense, a State must be the victim of either aggression or an imminent attack. It seems anachronistic, however, to require a State contemplating defensive measures against a terrorist organization to first determine whether another State exerts “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.²¹² Nonetheless, the legality of such actions has been called into question under a formalistic approach to the use of force when dealing with non-State actors.²¹³

The ICJ Wall Opinion, an advisory opinion to the General Assembly on the legality of Israel’s construction of a security barrier on occupied Palestinian Territory, is the touchstone for the critics of States tar-

208. A strict “effective control” requirement for State responsibility seems to contradict at least part of GA Resolution 3314, which specifically addresses a State’s “substantial involvement” in the aggressive conduct of armed groups. See G.A. Res. 3314, *supra* note 24, 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.

209. See U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 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).

210. G.A. Res. 56/83, para. 8, 11, Annex, U.N. Doc. A/RES/56/83/Annex (Dec. 12, 2001). Antonio Cassese describes the State support required for non-state armed groups’ attacks to be attributable to that State as “major and demonstrable.” ANTONIO CASSESE, *INTERNATIONAL LAW* 312 (Oxford 2001).

211. See discussion, *supra* Section IV.A.

212. See generally Keith A. Petty, *Veiled Impunity: Iran’s Use of Non-State Armed Groups*, 36 DENV. J. INT’L L. & POL’Y 191 (2008).

213. Mary Ellen O’Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT’L L. 349, 356 (2004).

getting non-State actors on another State's territory. The ICJ reaffirmed the position that the right to self-defense arises only when an attack by or on behalf of a State occurs.²¹⁴ The ICJ 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."²¹⁵ Professor Mary Ellen O'Connell elaborates on the ICJ's opinion, stating that "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."²¹⁶

The United States' use of force 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.²¹⁷ 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.²¹⁸ 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)."²¹⁹ Duffy suggests that the intervention in Afghanistan does not represent an outright dismissal of the State responsibility paradigm, but rather, a lowering of the threshold required for an armed attack.²²⁰

There is no question 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."²²¹ 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

214. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 131, 194 (July 9), available at <http://www.icj-cij.org/docket/files/131/1671.pdf>.

215. *Id.* at 189, cited in O'Connell, *supra* note 213, at 356.

216. O'Connell, *supra* note 213, at 356–57.

217. DUFFY, *supra* note 84, at 191.

218. *Id.* at 189 n. 204.

219. *Id.* at 192.

220. *Id.* at 191.

221. Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT'L L. 905, 906 (2002) (citing Address to the Nation on the Terrorist Attacks (Sept. 11, 2001), 37 Weekly-comp. Pres. Doc. 1301, 1301 (Sept. 17, 2001)).

Qaeda] as a base of operation.”²²² Therefore, the United States attempted to expand the notion of justifiable 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,²²³ the ICTY in the *Tadic* appeal,²²⁴ and the ILC’s adoption of State responsibility principles.²²⁵ Furthermore, the draft definition of aggression does not presently allow exceptions for attacks by non-State actors.

On the other hand, the U.N.’s endorsement 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 9/11.²²⁶ In Resolution 1368, the Security Council stated that the attack against the United States on September 11, 2001, was “a threat to international peace and security.”²²⁷ 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 U.N. Charter.²²⁸

Resolution 1368 provides strong support for the principle that Article 51 self-defense measures can be triggered by armed attacks by terrorist groups.²²⁹ 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.²³⁰ Professor Amos Guiora notes that

[t]raditional or conventional international law based on the assumption that war is an armed conflict between two States is obviously

222. *Id.* at 907 (citing Letter dated Oct. 7, 2001, from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/2001/946, reprinted in 40 I.L.M. 1281 (2001)).

223. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 65 (June 27).

224. See *Prosecutor v. Tadic*, Appeal of the Judgment, No. IT-94-1-A, para. 145 (July 15, 1999), 38 I.L.M. 1518, 1546 (1999).

225. G.A. Res. 56/83, para. 8, 11, Annex, U.N. Doc. A/RES/56/83/Annex (Dec. 12, 2001). But see the ILC’s draft articles on state responsibility, which some interpret as holding a State responsible for allowing its territory to be used by non-State armed groups to attack another State. International Law Commission, *State Responsibility: Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading, General Principles*, pt. 1, Arts. 9, 11, 21, & pt. 2, Arts. 40, 49, 52, U.N. Doc. A/CN.4/L.602/Revs.1, 2 (2001). See also Guiora, *supra* note 162, at 330 (arguing that States must be able to respond to attacks by non-State armed groups even if in the territory of another State).

226. Sec. Council Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001), 40 ILM 1277(2001).

227. *Id.*

228. U.N. Charter arts. 41, 42; Sec. Council Res. U.N. Doc. S/RES/1368 (Sept. 12, 2001), 40 ILM 1277 (2001).

229. Sec. Council Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12 2001), 40 I.L.M. 1277 (2001).

230. 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 also Greenwood, *International Law and the War Against Terrorism*, 78 INT’L AFFAIRS 301, 303 (2002).

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.²³¹

The draft definition of aggression must be read in the context of modern conflict. Drawing upon previous interpretations of the U.N. 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 [non-State] actors.”²³²

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

Furthermore, even in circumstances where the lawfulness of a certain action against non-State actors is in doubt, the intent to violate the territorial integrity or political independence of a State is absent. For example, when the U.S. targets al Qaeda and Taliban elements in Pakistan, it is not a manifest violation of the U.N. Charter, even though it is a clear breach of Pakistan’s territorial integrity.²³³ The purpose of these bombardments is not to invade Pakistan or overthrow its government; rather, it is 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 such 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.”²³⁴ 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 arise as to the lawfulness of the action, resulting in a much better case for prosecution of criminal aggression. For instance, the invasion of Afghanistan and the overthrow of the Taliban regime were necessary to eliminate the com-

231. Guiora, *supra* note 162, at 330 (citing Liam G.B. Murphy, *A Proposal on International Legal Responses to Terrorism*, 2 *TOURO J. TRANSNAT’L L.* 67 (1991)).

232. Ratner, *supra* note 221, at 914.

233. Bill Roggio, *US Strike Kills 10 Taliban in South Waziristan*, *THE LONG WAR JOURNAL*, April 29, 2009, http://www.longwarjournal.org/archives/2009/04/us_strike_kills_8_ta.php.

234. Guiora, *supra* note 162, at 331.

bined 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 ICC’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 ICC’s jurisdiction. The Assembly of States 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 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 adoption of the crime of aggression is intended to 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 on the other hand, 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, then we must look at the rationale behind potential “exceptions” to unlawful force.

Humanitarian intervention is an example of an application of force that the Assembly of States Parties may not wish to prevent. Historically, the international community has been unsuccessful at preventing mass atrocities. This raises the following question: “[I]f 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?”²³⁵

The ICC, as an institution that seeks to hold individuals accountable for “the most serious crimes of international concern”²³⁶ and seeks to “contribute to the prevention of such crimes,”²³⁷ must not discourage the most useful tool to combat widespread human rights violations. Dr. Tay-

235. Reisman, *supra* note 90, at 59.

236. Rome Statute, *supra* note 1, art. 1.

237. *Id.* at pmb1.

lor 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.²³⁸ The possible chilling effect of humanitarian intervention based on the criminalization of aggression would be regrettable.²³⁹

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 as follows:

Multinational peacekeeping forces operating in a country that has joined the [Rome Statute] can be exposed to the [ICC'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.²⁴⁰

These concerns are not as widely shared when it comes to actions to combat terrorism.²⁴¹ The general disfavor of preemptive self-defense is acute since the U.S. invasion of Iraq in 2003.²⁴² The distinction between preemption and humanitarian intervention is self-evident. 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.²⁴³ That the crime of aggression will have a deterrent effect on preemptive 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:

238. TAYLOR B. SEYBOLT, HUMANITARIAN MILITARY INTERVENTION: THE CONDITIONS FOR SUCCESS AND FAILURE 270–73 (2007), cited in Williams & Stewart, *supra* note 108, at 108.

239. See Williams & Stewart, *supra* note 108, at 109–10 (suggesting that the creation of the crime of aggression may have a chilling effect on humanitarian intervention due to the potential for investigation and prosecution of lawful actions in order to demonstrate impartiality).

240. See David J. Scheffer, Ambassador-at-Large for War Crimes Issues, Testimony on Developments at Rome Treaty Conference before Senate Foreign Relations Committee, Washington, D.C., July 23, 1998, available at http://www.state.gov/www/policy_remarks/1998/980723_scheffer_ice.html.

241. See generally Campbell, *supra* note 161.

242. See DUFFY, *supra* note 84, at 150 (citing GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 85 (2004); ANTONIO CASSESE, INTERNATIONAL LAW 306 (Oxford, 2001)). See generally, Franck, *What Happens Now? The United Nations After Iraq*, *supra* note 194.

243. One notable exception is the case of Israel's preemptive strike initiating the Six-Day War in 1967. See Guiora, *supra* note 162, at 325.

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?²⁴⁴

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. How to reconcile 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

The draft definition of aggression contains no exceptions to the prohibition of the use of force; further, there are no exceptions for actions justified on humanitarian or national security grounds.²⁴⁵ At least one school of thought maintains that there should be no exceptions to the acts of aggression provided for in Article 8 *bis*, paragraph 2.²⁴⁶ This approach, first put forth by the Russians during the drafting of GA Resolution 3314 in 1973,²⁴⁷ considers the “first use of armed force . . . in contravention of the Charter” to constitute prima facie evidence of an act of aggression.²⁴⁸ Under this approach, 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.”²⁴⁹

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

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 unlaw-

244. Guiora, *supra* note 162, at 324.

245. 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 U.N. Charter.

246. 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 11-12, Article 8 *bis*, ¶ 2, ICC-ASP/7/SWGCA/2 (Feb. 9-13, 2009).

247. U.N. GAOR, 28th Sess., Supp. No. 19, U.N. Doc. A/8419 at 21 (Dec. 12, 1973).

248. *See* G.A. Res. 3314, *supra* note 24.

249. *See id.*

ful 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.*

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.²⁵⁰

This approach specifically incorporates lawful uses of force as exceptions to criminal aggression. These exceptions include actions authorized by the Security Council, the Uniting for Peace option,²⁵¹ and individual or collective self-defense measures. Moreover, Paragraph 2 allows the ICC to consider acts that are not specifically listed in GA Resolution 3314, but that have the character of aggression. This is consistent with the practice of the Security Council and the ICJ, which have never considered themselves bound by GA Resolution 3314.²⁵² While these changes to the draft definition do not explicitly preclude jurisdiction over actions such as humanitarian intervention, the ICC and prosecutor have room to argue that certain actions fall within an exception in the statute.

The Security Council's role in determining acts of aggression must be considered when discussing possible exceptions to the prohibition of the use of force. The Security Council's role typically factors into the issue of the trigger mechanism for the ICC's jurisdiction, but determining the lawfulness of a given act could also shape the threshold analysis. For example, some feel that as long as the Security Council is given exclusive authority to make determinations on aggression, there is no need to include exceptions within the definition.²⁵³ In cases of questionable lawfulness, the Security Council could adopt a subsequent resolution supporting a particular use of force.²⁵⁴ Under this approach, the ICC would not be able to exercise jurisdiction.

However, including a specific provision that creates an exception for humanitarian intervention or actions to combat terrorism would be

250. Report of Cleveland Experts Meeting, *supra* note 21, at 13 (emphasis added).

251. G.A. Res. 377, U.N. Doc. A/1775 (Nov. 3, 1950).

252. Report of Cleveland Experts Meeting, *supra* note 21, at 12.

253. *Id.* at 5.

254. *Id.* at 6.

unwise. This makes sense in light of the purpose of criminalizing aggression, and the purpose of the ICC generally, to prosecute “the most serious crimes of international concern.”²⁵⁵ Eventually, exceptions could 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.²⁵⁶ Self-defense is among these grounds, and while it 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 31.²⁵⁷ Moreover, paragraph 3 of Article 31 allows broader considerations to be taken into account for the purposes of excluding criminal liability. The considerations include international treaty obligations, customary international law, and other general principles of law,²⁵⁸ and may incorporate principles such as the responsibility to protect,²⁵⁹ or “active self-defense” to target non-State actors.²⁶⁰

The ICC’s pre-trial considerations will play a significant role in determining whether certain actions fall within the threshold of criminal aggression. The ICC weighs several factors when making a determination of admissibility. 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 [ICC].”²⁶¹ This is particularly relevant to the issue of “manifest violations” of the U.N. Charter because aggression occurs only in cases of sufficient “character, gravity, and scale.”²⁶² Where lawfulness is questionable, instances of humanitarian intervention or actions to combat ter-

255. Rome Statute, *supra* note 1, art. 1.

256. *Id.* at art. 31.

257. See Report of Cleveland Experts Meeting, *supra* note 21, at 10–11.

258. Rome Statute, Article 31, para. 3, provides the following:

At trial, the [ICC] 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.

Rome Statute, *supra* note 1, art. 31. 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, *supra* note 1, art. 21.

259. See Part III, *supra*.

260. Guiora, *supra* note 162, at 332–33.

261. Rome Statute, *supra* note 1, art. 17(1)(d).

262. 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 11–12, Article 8 *bis*, ¶ 2, ICC-ASP/7/SWGCA/2 (Feb. 9–13, 2009). See generally discussion, *supra* Part II.c.

rorism will not likely move beyond the pre-trial chamber when they legitimately seek only to 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 ICC's admissibility requirements. Borderline cases that move forward nonetheless may still be challenged by the ICC, an accused, a State that could exercise jurisdiction, or a State from which acceptance of jurisdiction is required for the ICC to proceed.²⁶³ The pre-trial procedures provide ample opportunity for challenges to the exercise of jurisdiction over alleged acts of aggression.

Assuming a borderline case is referred to the ICC, the prosecutor must consider all of the elements of the offense prior to initiating an investigation or prosecution, including the mens rea element.²⁶⁴ Under the intent theory, only a mens rea analysis could determine whether the use of force was legitimate.

The importance of mens rea in 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.²⁶⁵ The issue was later raised by the German delegation to the Preparatory Committee.²⁶⁶ Ultimately, the intent requirement was not included in previous draft definitions because the drafters felt that the Security Council could weigh the actors' intent, and accurately defining the object of intent proved difficult.²⁶⁷

More recently, the Preparatory Commission used an "intentionally and knowingly" standard.²⁶⁸ Similarly, a previous paper considered by the Special Working Group specified the requisite mental state in the "Elements of the crime of aggression" section.²⁶⁹ According to that working paper, the perpetrator must have "intent and knowledge" that

263. Rome Statute, *supra* note 1, art. 19.

264. *Id.* at art. 53.

265. Report of Cleveland Experts Meeting, *supra* note 21, at 8 (citing reports of the Special Committee in U.N. GAOR, 23d Sess., Agenda Item 86, A/7185/Rev. 1 (1968); U.N. GAOR, 24th Sess., Supp. No. 20 (A/7620) (Feb. 14, 1970); U.N. GAOR, 25th Sess., Supp. No. 19 (A/8019) (July 13–Aug. 14, 1970); U.N. GAOR, 26th Sess., Supp. No. 19 (A/8419) (Feb. 1–Mar. 5, 1971); U.N. GAOR, 27th Sess., Supp. No. 19 (A/8719) (Jan. 31–Mar. 3, 1972)).

266. Preparatory Committee on the Establishment of an International Court, U.N. Doc. A/AC.249/1997/WG.1/DP.20 (Dec. 11, 1997).

267. Report of Cleveland Experts Meeting, *supra* note 21, at 8. For example, Article 16 of the 1996 ILC Draft Code does not mention a mental state requirement. Draft Code, *supra* note 10, at 42–43.

268. U.N. Preparatory Comm'n for the ICC, *Report of the Preparatory Commission for the International Criminal Court (continued)*, Addendum Part II, Proposals for a provision on the crime of aggression, U.N. Doc. PCNICC.2002/2/Add.2 (July 24, 2002).

269. INT'L CRIM. CT., Assembly of States Parties, Resumed Fifth Session, *Discussion Paper Proposed by the Chairman*, ¶ 4, ICC-ASP/5/SWGCA/2 (Jan. 29–Feb. 1, 2007), at 4.

the act was a flagrant violation of the U.N. Charter.²⁷⁰ This mirrors the mental element of the other offenses within the jurisdiction of the ICC.²⁷¹

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 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 ICC may, however, question actions similar to the 2003 invasion of Iraq because the intent was, at least in part, to overthrow a government and occupy the country for at least some time. Therefore, 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 ICC must balance its obligations: on the one hand, it must prosecute criminal aggression, and on the other, it must not intrude on a State’s right to self-defense in combatting terror or deter interventions necessary to combat egregious human-rights violations. The threshold clause in the definition of aggression, requiring that State acts be manifest violations, will assist in precluding fringe cases from the ICC’s jurisdiction.

There are many who would add no limits to jurisdiction over acts of aggression. Critics of the threshold clause would criminalize all uses of force; however, this proposition is not only unrealistic, but contrary to the U.N. Charter and customary law. Nonetheless, Article 8 *bis* will, no doubt, 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. Non-State actors are now arguably the greatest threat to international peace and security. Once the definition of aggression is adopted into the Rome Statute, and the ICC and prosecutor have the op-

270. *Id.* at 5.

271. Rome Statute, *supra* note 1, art. 30.

portunity 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.