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What is Aggression?

Comparing the *Jus ad Bellum* and the ICC Statute

Mary Ellen O'Connell* and Mirakmal Niyazmatov*

Abstract

Under the international law on resort to force, the jus ad bellum, any serious violation of the United Nations Charter prohibition on the use of force amounts to aggression. Despite a close connection for over a century between the prohibition on aggression by states and the crime of aggression for which individuals may be held accountable, delegates to the 2010 International Criminal Court Review Conference in Kampala, Uganda felt compelled to bifurcate the two prohibitions and reach a compromise. Today, the ICC Statute contains a detailed provision on the crime of aggression, but with a byzantine procedure for entry into force of the amendments in place and absent a much narrower standard for mens rea of the crime, the authors doubt the likelihood of successful prosecution. This conclusion underscores that the Kampala compromise does not in fact restate the law against the use of force binding on states; it underlines the importance of supporting and revitalizing the law that has as its purpose protecting the right to life of millions of people.

1. Introduction

International law has always had as a central concern the control of inter-communal violence. The treaties that gave rise to the state system and modern international law at the end of the 30 Years War in Europe, known as the Peace of Westphalia of 1648, included a mandate that states must first attempt to resolve disputes peacefully before resorting to war.¹ The first significant attempt to hold an individual accountable for unlawful resort to major military force occurred after the First World War. The Versailles Treaty of 1919 provided in Article 227 for a special tribunal to try the German Kaiser for

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1 See The Articles of the Treaty of Peace, Signed and Sealed at Munster, in Westphalia, 24 October 1648. Relevant provisions of the treaty are reprinted in M.E. O'Connell, *International Law and the Use of Force: Cases and Materials* (2nd edn., Foundation Press, 2009), at 127–129.

‘a supreme offence against international morality and the sanctity of treaties.’² The Covenant of the League of Nations, concluded as part of the Versailles Treaty, expressly committed states for the first time to protect and preserve other states from ‘external aggression’.³ At the Nuremberg Tribunal, established after the Second World War, ‘aggression’ was declared to constitute the ‘supreme international crime’.⁴ Today, the prohibition on aggression is widely considered a *jus cogens* norm — a standard of international law that may not be changed by a contrary treaty provision or the development of a new rule of customary international law.⁵ As recently as 2006, the United Kingdom House of Lords in *R v. Jones and Others* declared aggression a crime under international law.⁶

Despite this close connection for over a century between the prohibition on aggression by states and the crime of aggression for which individuals may be held accountable, in June 2010 states parties to the Rome Statute of the International Criminal Court (hereinafter, ‘ICC’ and ‘ICC Statute’) bifurcated the two prohibitions. When delegates to the ICC Review Conference came together in Kampala, Uganda, they confronted two strongly opposed positions with respect to adding the crime of aggression to the ICC Statute. On one side was the position, represented by Harold Koh of the United States, that the ICC Statute should not include a crime of aggression.⁷ Koh held that prosecuting aggression would be too difficult because of the political issues involved. On the other side were those who believed it made little sense to have an international criminal court with no jurisdiction over a crime long categorized with the other atrocity crimes included in the ICC Statute: genocide, war crimes and crimes against humanity.⁸ For some in this group, the crime of

2 The Treaty of Versailles, 28 June 1919. Relevant provisions of the treaty are reprinted in O’Connell, *ibid.*, at 142.

3 The Covenant of the League of Nations is reprinted in O’Connell, *ibid.*, at 139–141. See also, R.L. Griffiths, ‘International Law, the Crime of Aggression and the *Ius Ad Bellum*’, 2 *International Criminal Law Review* (2002) 301, at 303.

4 ‘International Military Tribunal (Nuremberg), Judgment and Sentences, 1 October 1946’, 41 *American Journal of International Law* (1947) 172, at 186.

5 The International Court of Justice noted that both the United States and Nicaragua had referred to the United Nations Charter prohibition on the use of force in Art. 2(4) as a *jus cogens* norm. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, ICJ Reports (1986) 14, at 100–101 (§ 190). For more on the prohibition on aggression as a *jus cogens* norm, see generally, M.E. O’Connell, ‘*Jus Cogens*, International Law’s Higher Ethical Norm’, in D. Earl Childress III (ed.), *The Role of Ethics in International Law* (Cambridge University Press, 2011) 78, available online at <http://ssrn.com/abstract=1815155> (visited 27 October 2011).

6 *R v. Jones* [2006] UKHL 16, §§ 12–19 (Lord Bingham), § 59 (Lord Hoffman) and § 99 (Lord Mance).

7 See H.H. Koh, ‘Statement Regarding Crime of Aggression at the Resumed Eighth Session of the Assembly of States Parties of the International Criminal Court’, 23 March 2010, available online at <http://usun.state.gov/briefing/statements/2010/139000.htm> (visited 27 October 2011).

8 Benjamin Ferencz, a prosecutor at Nuremberg, has over the years argued eloquently for including the crime of aggression in the ICC Statute:

The most important accomplishment of the Nuremberg trials was the condemnation of illegal war-making as the supreme international crime. That great step forward in the evolution of international humanitarian law must not be discarded or allowed to

aggression remains, as proclaimed by the Nuremberg Tribunal, the 'supreme international crime'.⁹

The delegates in Kampala managed to draft amendments to the ICC Statute that respond to both positions. Today, the Statute includes a detailed provision on the crime of aggression, but the likelihood that any person will ever be prosecuted for it appears minute. The procedure for the entry into force of the aggression amendments is byzantine,¹⁰ and the substantive provision leaves experts unclear as to what the prosecutable crime even is.¹¹ The compromise reached at Kampala may have been the best political outcome possible under the circumstances. Nevertheless, it is imperative that what international law prohibits as aggression not be undermined by the political realities of the Review Conference.

Under the international law on resort to force — the *jus ad bellum* — any serious violation of the United Nations Charter (UN Charter) prohibition on the use of force is aggression.¹² In contrast, the ICC Prosecutor, when and if the aggression amendments ever enter into force, will be restricted to prosecuting an individual for committing aggression of a very special type.¹³ Indeed, the only individuals who come to mind who would clearly have met the ICC threshold are Adolf Hitler for invading Poland in 1939 and Saddam Hussein for invading Kuwait in 1990.¹⁴

This article will consider next the definition of aggression in the *jus ad bellum*, then turn to the new crime of aggression as adopted in Kampala. The third section will contrast the two versions of the proposed amendments and

with. Insisting that wars cannot be prevented is a self-defeating prophecy of doom that repudiates the rule of law. Nuremberg was a triumph of Reason over Power. Allowing aggression to remain unpunishable would be a triumph of Power over Reason.

B.B. Ferencz, 'Ending Impunity for the Crime of Aggression', 41 *Case Western Reserve Journal of International Law* (2009) 281, at 290. See also, Idem, 'Enabling the International Criminal Court to Punish Aggression', 6 *Washington University Global Studies Law Review* (2007) 551, at 565–566.

9 Ferencz, 'Ending Impunity', *ibid.*

10 For a detailed discussion of the procedures adopted for the entry into force of the amendments and their scope, see B. Van Schaack, 'Negotiating at the Interface of Power & Law: The Crime of Aggression', 49 *Columbia Journal of Transnational Law* (2010–2011) 505.

11 See *infra*, Section 2.

12 See Preamble, GA Res. 3314 (XXIX), 14 December 1974. Scholars regularly debate what constitutes a serious violation of Art. 2(4). Indeed, they debate the entire content of the *jus ad bellum*, but often such debate is not focused on the substance of the law. Rather, it is advocacy for more expansive rights to resort to military force. See e.g. C. Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States Upon the "Jus ad Bellum" in the Post-Cold War Era* (Ashgate, 2010). It is the view of the authors that the *jus ad bellum* as found in treaties, customary international law, and general principles is not as unclear or as open to debate as some authors argue today and that it is possible, certainly for purposes of this article, to state basic principles of the *jus ad bellum* to compare it with the ICC crime of aggression.

13 See *infra*, Section 3.

14 These are the two examples cited in C. Krefß, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus', 20 *European Journal of International Law (EJIL)* (2009) 1129, at 1142.

consider why delegates in Kampala accepted such a narrow definition of the crime. The conclusion will emphasize that what was agreed in Kampala does not in fact restate the law against the use of force binding on states and underline the importance of supporting law that has as its purpose protecting the fundamental right to life of millions of people.

2. Overview of the *Jus ad Bellum*¹⁵

The place to begin any consideration of today's law against aggression in the *jus ad bellum* is the Charter of the United Nations. The general prohibition on the use of force by states is found in Article 2(4), which also provides two exceptions to the prohibition.¹⁶ Article 51 permits individual and collective self-defence,¹⁷ and Articles 39 and 42 provide for the Security Council's right to authorize force to restore international peace in the face of a 'threat to the peace, breach of the peace or act of aggression'.¹⁸

A US delegate to the 1945 San Francisco drafting conference made clear that 'the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; ... there should be no loopholes'.¹⁹ The overall structure of the Charter that emerged in San Francisco underscores the broad scope of Article 2(4). The Security Council has extensive authority to authorize force against threats in Articles 39 and 42. In contrast, states acting without Security Council authority have only a narrow explicit right to resort to force as provided in Article 51, which permits the use of force in individual and collective self-defence when an armed attack occurs until such time when the Security Council takes measures necessary to maintain the peace.

The request that Article 51 be included came from Latin American delegates, who were concerned that the Rio Treaty arrangements for collective self-defence would be eliminated by Article 2(4).²⁰ Article 51 in fact presents a

15 This part draws on M.E. O'Connell, 'Preserving the Peace: The Continuing Ban on War Between States', 38 *California Western International Law Journal* (2007) 41.

16 Art. 2(4) UN Charter provides as follows: '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.'

17 Art. 51 UN 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. 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.'

18 Arts 39 and 42 UN Charter.

19 *United Nations Conference on International Organization*, Vol. 6 (United Nations Information Organizations, 1945), at 334–35.

20 O'Connell, *International Law and the Use of Force*, *supra* note 1, at 238.

limited exception to Article 2(4) allowing self-defence in a situation where it can be shown by the tangible evidence of an armed attack that a state must respond. The response is limited to defence and lasts only until defence is achieved or the Security Council acts.²¹

The drafters at San Francisco had the Axis powers in mind, and the excuse those states had used for resorting to force in violation of the League Covenant and Kellogg–Briand Pact. Both powers had made self-defence claims: *Lebensraum* in the case of Germany, and access to natural resources in the case of Japan. The new United Nations organization would thus permit unilateral self-defence only in cases where objective evidence of an emergency existed for the entire world to see, namely, an actual armed attack. Other less tangible or less immediate threats would be submitted to the collective scrutiny of the Security Council before the use of force would be permitted. The collective deliberation of the Council would be a better process for determining threats to the peace than the unilateral decision of the potential victim.

Since the drafting of the Charter, numerous decisions of the International Court of Justice (ICJ), resolutions of the Security Council and General Assembly and official government statements have confirmed the binding nature of these rules and their meaning. Indeed, the international community has repeatedly confirmed its support for the regime of peace and the prohibition on the use of force. The most recent and significant reaffirmation came with the overwhelming vote of confidence in the Charter during the 2005 World Summit in New York.²² We often hear these days that the rules prohibiting force were effected by NATO's military intervention in the Kosovo Crisis or the terrorist attacks in the United States on 9/11, but it was in 2005 — four years after the 9/11 attacks and six years after Kosovo — that the world re-affirmed the Charter provisions as written.

It is also evident in the Charter that not all unlawful uses of force amount to aggression. The Charter provides in Article 39 authority for the Security Council to take measures in response to threats to the peace, breaches of the peace *and* acts of aggression. Article 51 states clearly that the right of a state to respond in self-defence is triggered by an armed attack, and not by every violation of Article 2(4). The ICJ has built on this aspect of the Charter in finding that not even every armed attack but only serious or significant ones trigger Article 51. Presumably, if an armed attack is too insignificant to trigger the right of self-defence, it is unlikely to constitute aggression. In the 1986 *Nicaragua Case*, for example, the ICJ held that 'the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces'.²³ The Court also refers to acts that

²¹ *Ibid.*

²² GA Res. A/60/L.1, 15 September 2005, at 22–23.

²³ *Nicaragua v. United States of America*, *supra* note 5, at 103 (§ 195).

involve ‘grave’ or ‘less grave’ uses of force.²⁴ The United Nations General Assembly, in paragraph 3 of its Resolution 3314 adopting the Definition of Aggression (hereinafter, ‘the Definition of Aggression’ or ‘Definition’), distinguishes between ‘aggression’ and other forms of unlawful force when calling on states to ‘refrain from all acts of aggression and other use of force contrary to the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations’.

A. The Definition of Aggression

In 1974, in the Preamble to the Definition of Aggression, the General Assembly expressed the view that ‘aggression is the most serious and dangerous form of the illegal use of force’. In defining what this most dangerous form of illegal force is, the General Assembly incorporated two approaches. First, it provided a generic, general-purpose description without examples in Article 1. The Article 1 description is based on Charter Article 2(4). According to Article 1, aggression is ‘the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations’. In this respect, it is noteworthy that, pursuant to Article 2 of the Definition of Aggression, any first use of force in violation of the UN Charter is *prima facie* evidence of an act of aggression. Secondly, Article 3 provides a list of examples, although they are not meant to exclude other acts that may amount to aggression.²⁵ Article 4 underscores this, stating that the acts listed in Article 3 ‘are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter’. Despite this invitation by the General Assembly, the Security Council has only rarely made a finding of aggression,²⁶

24 *Ibid.*, at 103; see also *Oil Platforms (Iran v. U.S.)*, 6 November 2003, ICJ Reports (2003) 161, at 187.

25 Art. 3 of the Definition of Aggression lists the following acts: (a) the invasion, attack, military occupation or annexation by the armed forces of one State of the territory of another State; (b) bombardment or the use of any weapons by a state against the territory of another State; (c) blockade of the ports or coasts of a State by the armed forces of another State; (d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

26 See e.g. O. Solera, *Defining the Crime of Aggression* (Cameron May, 2007), at 201; for a general discussion of the Security Council’s attitude towards finding aggression, see B. Broms, ‘The Definition of Aggression’, 154 *Recueil des cours de l’Académie de droit international de La Haye* (1977) 299, at 373–384.

and when it has done so, it has not referred to Resolution 3314.²⁷ Rather than making any statement with respect to aggression, the Security Council more commonly refers to violations of international peace and security.²⁸ The General Assembly, in contrast, has relied on its Definition in characterizing a number of conflicts.²⁹ The Security Council's failure to refer to the Definition is more likely due to the Council's political nature and not to any flaw in the General Assembly's formulation. As Broms notes, the 'merits [of Resolution 3314] cannot be measured in terms of the number of times its content have been cited in the Security Council or in terms of the number of times that an act of aggression has been mentioned either in a defeated draft resolution or in an adopted resolution'.³⁰ The permanent members of the Security Council, as members of the General Assembly, agreed to the adoption of Resolution 3314 and the Definition of Aggression.³¹ They are aware of it, and it is likely to influence the work of the Council. The Definition confirms several points that were well accepted by 1974. Acts that constitute aggression involve armed measures, not economic coercion, ideological pressure or similar conduct.³² The Definition also underscores that 'a few stray bullets across a boundary' do not constitute an act of aggression.³³ One part of the Definition, however, has led to some confusion in understanding what constitutes aggression. Article 5(2) of the Definition has a reference to 'war of aggression' as something apparently distinct from 'aggression'. Article 5(2) provides that '[a] war of aggression is a crime against international peace. Aggression gives rise to international responsibility'. Because of the reference to 'crime' in Article 5(2), some have argued that the crime of aggression for which an individual may be held accountable must be a 'war' of aggression.³⁴ Germany, for example, has emphasized that Article 5(2) of the Definition uses the concept of 'crime' together with 'war of aggression', as opposed to 'acts of aggression' asserting

27 See e.g. SC Res. 387, 31 March 1976 (after expressing grave concern at the acts of aggression committed by South Africa against Angola, the SC '[c]ondemned South Africa's aggression ...'). For a useful compilation of Security Council resolutions that have used the term 'aggression', see R. Bellelli, *International Criminal Justice: Law and Practice From the Rome Statute to Its Review* (Ashgate, 2010), at 507–510.

28 See e.g. SC Res. 660, 2 August 1990.

29 See e.g. GA Res. ES-9/1, 5 February 1982, at § 2; GA Res. 42/14 A, 6 November 1987, at § 2 (qualifying Israel's occupation of the Golan Heights as an act of aggression within the meaning of the GA Res. 3314); see also, GA Res. 37/233, 20 December 1982, at § 7; GA Res. 43/26 A, 17 November 1988, at § 4 (qualifying South Africa's occupation of Namibia an act of aggression within the meaning of the GA Res. 3314).

30 Broms, *supra* note 26, at 386.

31 *Ibid.*, at 373.

32 *Ibid.*, at 386.

33 *Ibid.*, at 346.

34 J. Hogan-Doran and B.T. van Ginkel, 'Aggression as a Crime under International Law and the Prosecution of Individuals by the Proposed International Criminal Court', 43 *Netherlands International Law Review* (1996) 321, at 335; for main arguments if Art. 5(2) gives rise to individual criminal responsibility during the drafting period, see Broms, *supra* note 26, at 356–357; see also, T. Meron, 'Defining Aggression for the International Criminal Court', 25 *Suffolk Transnational Law Review* (2001–2002) 1, at 7.

that individual criminal responsibility only attaches to the most flagrant violations of international law.³⁵

This assertion overlooks, however, the fact that ‘war’ has not been a significant legal term in international law since the adoption of the UN Charter in 1945.³⁶ Certainly, by 1974, when the Definition of Aggression was adopted, states were not treating ‘war’ as a distinctive category in international law. By then the relevant term was ‘armed conflict’, which involves fighting of some intensity by two or more organized armed groups.³⁷ It is difficult to conceive that any act of aggression, as defined in Articles 1 and 3 of the Definition, would not amount to an armed conflict. Moreover, the Definition of Aggression is aimed at obliging states to refrain from aggression, not at individual criminal responsibility. This fact is plain from the negotiating history of the Definition. Indeed, the debate around Article 5(2) was over whether there should be any reference to the consequences of committing aggression or not. Some delegates maintained that the goal was to define aggression, nothing more.³⁸ They pointed out that the International Law Commission (ILC) was at work on the law of state responsibility and a code of offences against the peace.³⁹ The ILC would return to the code of offences when the General Assembly finished its definition of aggression.⁴⁰ The General Assembly, therefore, had no need to consider the consequences of aggression.

35 Preparatory Commission for the ICC, Proposal submitted by Germany, PCNICC/2000/WGCA/DP.4, 13 November 2000, at paras 19–21. See also N.H.B. Jorgensen, *The Responsibility of States for International Crimes* (Oxford: Oxford University Press, 2003), at 240: ‘In Article 5(2) the General Assembly confirmed a distinction between wars of aggression, which were considered to have a criminal status, and other acts of aggression short of war. All acts of aggression are international delicts entailing state responsibility.’

36 See generally, International Law Association, Committee on the Use of Force, *Final Report on the Meaning of Armed Conflict in International Law*, August 2010, available online at <http://www.ila-hq.org/en/committees/index.cfm/cid/1022> (visited 28 October 2011).

37 *Ibid.*

38 *Report of the Special Committee on the Question of Defining Aggression*, UN Doc. A/C.6/SR.1471, 8 October 1974, Annex at 19, 20, 22, 26, 32, 35, and 39.

39 Draft Code of Crimes Against the Peace and Security of Mankind, *Report of the Commission on the work of its forty-eighth session* (1996), Vol. II, Part 2, *Yearbook of the International Law Commission*, UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), at 15–56.

40 Broms, the Finnish delegate and a Chairman of the Special Committee, noted that Art. 5(2) should not be interpreted in such a way that

aggression would not in the future lead to any criminal responsibility. That question had been left open-after a debate which to a certain extent had unfortunately been semantic-bearing in mind that fact that the Special Committee had originally been set up to draft a definition of aggression to be used in the work of drafting a code of offences against the peace and security of mankind.... The General Assembly had subsequently adopted resolution 897 (IX) of 4 December 1954, wherein consideration of the report of the International Law Commission on the draft Code had been postponed until the General Assembly had taken up the report of the Special Committee on the Question of Defining Aggression.... The legal consequences of an act of aggression would thus be dealt with by the General Assembly in due course, once the definition of aggression had been adopted,....

See, *Report of the Special Committee on the Question of Defining Aggression*, *supra* note 38, Annex, at 42–43.

Yet, others wanted some reference to the Nuremberg Charter's provision on aggression, which referred to a 'war of aggression' within the category of 'crimes against the peace'.⁴¹ In the 1970 Declaration on Friendly Relations the General Assembly had included this sentence: 'A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.' In the Declaration the sentence was plainly aimed at states *qua* states. In the Definition of Aggression some of the delegations that wanted inclusion of the consequences of aggression also wanted to update the terminology from Nuremberg. They wanted no reference to 'war of aggression' or to 'crime'.⁴² These states simply wanted a reference to state responsibility — a state's responsibility flows from aggression — period. In the end both sentences were included to please both groups,⁴³ but that led to understandable criticism that the Article would give rise to confusion with respect to whether there were two forms of aggression.⁴⁴ What is clear is that the delegations were focused on the consequences for states in Article 5(2), and not on individual accountability.

Moreover, at the time of the drafting of the definition, international lawyers still referred to 'crimes of state'. The reference to 'crime' in Article 5(2) and in the Declaration on Friendly Relations is consistent with the reference to 'crime' in the ILC's former Article 19 of the Articles on State Responsibility. The ILC for many years took the position that committing aggression or some other 'state crime' triggered an especially high form of state responsibility.⁴⁵ Members of the ILC finally decided that international law had only one form

41 *Ibid.*, at 20, 26.

42 *Ibid.*, at 22. Indeed, the Soviet and Mexican delegates stated expressly that there was no distinct category of a 'war of aggression' separate from aggression. *Ibid.*, at 37, 39. No state offered an argument in favour of two forms of aggression.

43 The view that the Definition of Aggression supported individual responsibility only for waging a 'war' of aggression seems to be drawn not from the drafting history of the Definition of Aggression but from an ambiguous reference in an article by Broms (*supra* note 26, at 357). But in his chair report to the General Assembly on the work of the Special Committee on the Question of Defining Aggression Broms explained the compromise behind Art. 5(2) and cleared up any misimpression that states recognized two different types of aggression, one for individual accountability and one for states:

The second paragraph of article 5 seemed to trouble some representatives. The first sentence of that paragraph stated that a war of aggression was a crime against international peace and the second sentence included a provision to the effect that aggression gave rise to international responsibility, but that should not be interpreted so as to imply that aggression would not in future lead to any criminal responsibility.

See *Report of the Special Committee on the Question of Defining Aggression*, *supra* note 38, at 42.

44 *Ibid.*, at 19, 29.

45 The ILC included a provision on state crimes in many drafts of the articles on state responsibility:

[A]n international crime may result, *inter alia*, from:

- a. a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

of state responsibility and dropped Article 19 and the reference to ‘crime’ from the Articles.⁴⁶ France had already foreshadowed this outcome during the drafting of the Definition of Aggression in its opposition to using the word ‘crime’ in Article 5(2) of the Definition because, it argued, ‘crime’ is a penal matter, not relevant to state responsibility.⁴⁷

The historical record and the weight of authority demonstrate that within the *jus ad bellum* aggression is any serious violation of the prohibition on the use of force. A violation of Article 2(4) of the UN Charter is a *prima facie* act of aggression. Acts serious enough to trigger the Article 51 right of self-defence will constitute aggression. There is no distinct category of ‘war of aggression’ in the *jus ad bellum* and, therefore, no basis on which to establish individual criminal accountability on something other than the *jus ad bellum* prohibition of aggression.

3. Overview of the Rome Statute

The ICC Statute was adopted in Rome on 17 July 1998 and entered into force on 1 July 2002. Article 5(1)(d) of the Statute provides that the ICC has jurisdiction over, among other serious crimes, the crime of aggression. Because the states parties were not able to reach agreement as to what constitutes the crime of aggression during the Rome Conference, it was decided that the ICC would not have authority to exercise jurisdiction over the crime until after amendments to the Statute defining the crime of aggression were adopted.⁴⁸

The work of defining the crime of aggression had, of course, begun before the Rome Conference. The topic was included in the work of the Ad Hoc Committee established by the UN General Assembly in 1994 working on

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- b. a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
 - c. a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as that prohibiting slavery, genocide and apartheid;
 - d. a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the environment or of the seas.

See *Report of the Commission to the General Assembly on the Work of Its Thirtieth Session* (1978), Vol. II (Part 2), *Yearbook of the International Law Commission*, UN Doc. A/CN.4/SER.A/1978/Add.1 (Part 2), Art. 19, at 80. See also D.W. Bowett, ‘Crimes of State and the 1996 Report of the International Law Commission on State Responsibility’, 9 *European Journal of International Law* (1998) 163.

46 J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge University Press, 2001), at 36–37.

47 *Ibid.*, at 22.

48 Art. 5(2) ICCSt.

establishing the ICC.⁴⁹ In Rome, the delegates adopted 'Resolution F' providing for the establishment of a Preparatory Commission to work on the draft proposals on aggression.⁵⁰ The Preparatory Commission was mandated to 'prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the [ICC] shall exercise its jurisdiction with regard to this crime.'⁵¹ By July 2002, the Preparatory Commission had proposals prepared.⁵² In September 2002, to facilitate further work on the proposals, the assembly of states parties to the ICC established a Special Working Group on the Crime of Aggression (SWGCA).⁵³ After numerous meetings between 2003 and 2009,⁵⁴ the SWGCA presented a set of draft amendments in February 2009.⁵⁵

The SWGCA's draft amendments were based on General Assembly Resolution 3314's Definition of Aggression,⁵⁶ but the SWGCA added qualifiers that significantly narrowed the conduct constituting aggression. At the Kampala Review Conference, the SWGCA's draft amendments were discussed as 'Article 8 *bis*'. Article 8*bis*(1) defines 'the crime of aggression' as

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.⁵⁷

Article 8*bis*(2) then defines 'act of aggression' as referred to in Article 8*bis*(1) as

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.

49 GA Res. 49/53, 9 December 1994. Among other things, it provided for the establishment of an ad hoc committee 'open to all States Members of the United Nations or members of specialized agencies, to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries' (at § 2).

50 *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN Doc. A/CONE.183/10, 17 July 1998, Annex I, Resolution F, § 7.

51 *Ibid.*

52 *Report of the Preparatory Commission for the International Criminal Court, Part II: Proposals for a Provision on the Crime of Aggression*, UN Doc. PCNICC/2002/2/Add.2, 24 July 2004.

53 *Resolution on Continuity of Work in Respect of the Crime of Aggression*, ICC-ASP/1/Res.1, 9 September 2002.

54 On the work of the SWGCA, see generally, S. Barriga, W. Danspeckgruber, and C. Wenaweser (eds), *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003-2009* (Lynne Rienner Publishers, 2009).

55 *Report of the Special Working Group on the Crime of Aggression*, Annex I, ICC-ASP/7/SWGCA/2, 20 February 2009.

56 For a discussion of contentious issues relevant to using the definition from GA Res. 3314 (XXIX), see Barriga et al., *supra* note 54, at 9–10.

57 *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, Res. RC/Res.6, Annex I, 11 June 2010.

Notably, Article 8bis(2) also includes the Definition of Aggression's Article 3 list of examples of aggression.⁵⁸

Claus Kreß has expressed the view that Article 8bis(2) should not have referred to Resolution 3314. He explains that negotiators with a background in public international law insisted on the reference, which he finds unfortunate.⁵⁹ Yet, public international law experts are right to be concerned about the rise of two competing definitions of aggression in public international law.⁶⁰ They especially need to be concerned about the newer ICC definition eclipsing the *jus ad bellum* definition. Since the adoption of the ICC Statute, the ICC has received an exceptionally high level of attention from human rights scholars, organizations like the International Committee of the Red Cross, and almost every government in the world, whether of a state party to the ICC Statute or not. In the face of this dynamic focus on the ICC, the reference to Resolution 3314 in the aggression amendments should help to preserve for the *jus ad bellum* the understanding that aggression is any serious violation of the UN Charter, irrespective of the ICC Statute's definition of the crime.

Even with the reference to Resolution 3314, defending the UN Charter prohibition on the use of force will require effort. Kreß, for example, believes that '[i]t may be doubted whether the acts described in [the Definition of Aggression's Article 3] letters (c) [blockade]⁶¹ and (e) [failing to remove troops] will, as a rule, reach the gravity threshold required for the crime of aggression.'⁶² ICC Article 8bis(1) requires that the conduct by its 'character, scope and gravity' constitutes a 'manifest' violation of the UN Charter to constitute aggression. Yet, the General Assembly has already made a determination that the examples in Article 3 of its Definition *are* serious violations of the Charter. In other words, Article 3 acts *are* 'manifest' violations. International law experts will need to emphasize this point so that government leaders do not come to think that leaving troops on the territory of another state, as Uganda did in Congo, or other conduct is not a violation of the UN Charter because it is not a 'manifest' violation for the ICC Statute.⁶³

⁵⁸ See *supra* note 25.

⁵⁹ Kreß, *supra* note 14, at 1136.

⁶⁰ Competing rules, contradictory judicial decisions, and similar developments are a growing concern in international law commonly referred to as fragmentation of the law. See M. Koskeniemi, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682, 13 April 2006.

⁶¹ It is not clear to the authors that placing obstacles in the way of shipping would be a violation of Art. 2(4). The shipping would have to be stopped by the use of force. So in the case of the famous Cuban Missile Crisis, US Navy ships took up positions between the island of Cuba and approaching Soviet ships. The Soviet ships turned back rather than face the potential of an armed confrontation. Arguably, United States violated the Soviet right of passage under the law of the sea and threatened the peace. It did not, however, violate Art. 2(4). For details of the incident, see A. Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (Oxford University Press, 1974), at 64–66.

⁶² Kreß, *supra* note 14, at 1137.

⁶³ In the *Congo* case, the ICJ found that Uganda had committed a 'grave breach' of Art. 2(4) when its troops used force on the territory of Congo after Congo withdrew its consent to the presence

A. Manifest by its Character, Gravity and Scale

Plainly not all aggression is subject to the ICC's jurisdiction. As noted above, however, at the time of the adoption of the ICC Statute, international law did not contain two categories of aggression — one for states and one for individual accountability. What the ICC negotiators produced in Kampala is a new definition for purposes of the ICC. This may call into question in the future the legitimacy of prosecutions for aggression but, as those are highly unlikely, the immediate concern is the potential to dilute the *jus ad bellum*. Apparently, the narrowing of aggression for inclusion in the ICC Statute through the phrase 'manifest' by its 'character, scope and gravity' was intended to 'exclude some borderline cases' from the scope of the crimes ICC can adjudicate.⁶⁴ Kreß cites Elizabeth Wilmshurst as giving a 'fair account' of the 'grey areas'. She includes: 'anticipatory self-defence, forcible reactions to a "minor" use of force of another state, armed interventions to rescue nationals, the extraterritorial use of force against a massive non-state armed attack, and genuine humanitarian intervention'.⁶⁵

A number of these examples are not, in fact, 'grey areas' when it comes to aggression. By now there is sufficient authority to conclude that 'minor' uses of force, including rescue of nationals involving minor force, are not even violations of Article 2(4), let alone serious violations amounting to aggression.⁶⁶ In addition, no state has confronted a 'massive non-state armed attack'. If a state were to confront such an attack, it would inevitably be by a non-state group in control of enough territory to be able to stage such an attack. In that case, the attack would fit the Article 51 paradigm and would be a serious violation of the Charter.⁶⁷ Thus, the only 'grey areas' would appear to be anticipatory self-defence and humanitarian intervention.

of Ugandan troops. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, ICJ Reports (2005) 168, at 227.

64 Informal Inter-Sessional Meeting of the SWGCA, ICC-ASP/5/SWGCA/INF.1, 5 September 2006, at § 19.

65 Kreß, *supra* note 14, at 1140, citing R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (2nd edn., Cambridge University Press, 2010), at 326–327.

66 State practice and decisions of the ICJ indicate that some inter-state uses of force might violate the principle of non-intervention or constitute unlawful countermeasures but do not come within the prohibition of Art. 2(4). Police-type operations used to arrest pirates, to stop a vessel by shooting across the bow, or to rescue hostages, for example, may involve the use of force but are treated as too minimal to come within Art. 2(4). Art. 2(4) prohibits armed force of more than a minor or *de minimis* nature. See M.E. O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (Oxford University Press, 2008), at 229–230 (hereinafter, 'O'Connell, *Power and Purpose*'). As discussed above, if a use of force does not violate Art. 2(4), it is not aggression. Even a violation of Art. 2(4) will not constitute aggression if it is too minor. Aggression is a serious violation of Art. 2(4).

67 The ICJ indicated in the *Congo* case that Uganda might have had the right to intervene in Congo if the attacks had been more significant — presumably of a kind that could only be carried out if the militant groups were the *de facto* government of an area. *Democratic Republic of the Congo v. Uganda*, §§ 146, 301. See also, J. Thuio Gathii, 'Irregular Forces and Self-Defense Under

Leading experts on the *jus ad bellum* do not consider either anticipatory self-defence or humanitarian intervention to be ‘grey areas’,⁶⁸ but certainly there is plenty of evidence that ICC negotiators were concerned about humanitarian intervention. The concern was not really that it is a ‘grey area’, but rather that several states leading the ICC effort were involved in NATO’s 1999 use of force against Serbia during the Kosovo Crisis. This intervention is consistently described by *jus ad bellum* experts as a serious violation of the UN Charter.⁶⁹ During the Preparatory Commission’s meeting in 1996, the US representative had already expressed specific concerns about humanitarian intervention.⁷⁰ He tried to argue that because the drafters of the UN Charter did not know about humanitarian intervention, the ICC crime of aggression would have to specially provide for it. Kreß has observed that at Kampala, the US delegation’s ‘single most sensitive’ proposal was on excluding humanitarian intervention from the scope of draft Article 8bis.⁷¹ It was not just the United States, however. Kreß indicates that other NATO states supported a higher threshold for individual criminal responsibility while a different group ‘favoured a more inclusive definition that referred to the list of acts contained in Article 3 of the annex to Resolution 3314 without any additional threshold.’⁷² The delegations, supporting the high threshold of ‘manifest’ by ‘character,

the UN Charter’, in M.E. O’Connell, *What is War? An Investigation in the Wake of 9/11* (Martinus Nijhoff/Brill, forthcoming 2012). The situation the ICJ seems to be referring to would be like the Taliban’s control of most of Afghanistan in 2001 or the Kurds control of Northern Iraq, which in late 2007 gave rise to the right of Turkey to use military force in self-defence under Art. 51.

68 Following the 2005 UN World Summit in New York, there is little doubt that international law demands strict compliance with the Charter terms, meaning that there is no right of ‘humanitarian intervention’ without Security Council authorization or a right of self-defence in the absence of an armed attack occurring for which the territorial state is responsible. GA Res. 60/L.1, 15 September 2005, at 22–23; see also, O’Connell, *Power and Purpose*, *supra* note 66, ch. 4, and Y. Dinstein, *War, Aggression, and Self-Defense* (4th edn., Cambridge University Press, 2005), at 90, 182–187, 315.

69 B. Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’, 10 *EJIL* (1999) 1; M.E. O’Connell, ‘The UN, NATO, and International Law After Kosovo’, 22 *Human Rights Quarterly* (2000) 57; M. Koskeniemi, ‘“The Lady Doth Protest Too Much”: Kosovo, and the Turn to Ethics in International Law’, 65 *The Modern Law Review* (2002) 159–175.

70 At the end of the Second World War, she continued, the concept of aggression had been relatively simple. National liberation and humanitarian intervention had not been factors, as they were in many modern uses of force. The crime of aggression turned on highly political questions — that was why the Security Council must have a central role. If it did not, the criminal court would be faced with a situation in which individuals with backgrounds in criminal law were taking testimony regarding competing territorial claims.’ See *Press Release, Legal Prosecution of Aggression Required Agreed Definition, Preparatory Committee on the International Criminal Court Told*, UN Doc. L/2765, 27 March 1996.

71 C. Kreß and L. von Holtzendorff, ‘The Kampala Compromise on the Crime of Aggression’, *Journal of International Criminal Justice* (2010) 1179, at 1205.

72 *Ibid.*, at 1190–1191.

gravity and scale' were also those advocating that the ICC's jurisdiction over aggression be narrow.⁷³

The high threshold states won the day, but to accommodate their concerns, the negotiators had to add qualifiers to the understanding of what constitutes aggression in the *jus ad bellum*. In distinction to most other tasks confronting the founders of the ICC, however, creating a narrower crime of aggression than the one found in the *jus ad bellum* had no precedent.⁷⁴ At the Nuremberg and Tokyo Trials, crimes against the peace were based on the *jus ad bellum* of the time. The ILC in its commentary to the Draft Code of Crimes against the Peace and Security of Mankind took the position that individual criminal responsibility for the crime of aggression depends on 'a sufficiently serious violation of the prohibition contained in Article 2(4)' of the UN Charter.⁷⁵ A similar position was taken during the drafting of the crime of aggression prior to the Rome Conference for the ICC. Since then, no international court has adjudicated the crime. The ICC negotiators preparing for Kampala had to work by analogy and on the basis of policy preferences. The negotiators evidently preferred the policy of including the crime of aggression within the ICC's jurisdiction, even if it meant diluting the crime to gain sufficient support.⁷⁶ The particular form of the dilution — through the high threshold qualifiers — did not escape criticism, however, even by those who accepted the need for qualifiers. Delegations to Kampala expressed concern that the threshold provision was ambiguous.⁷⁷ Each word raised concerns. Some of the concerns will be reviewed briefly here, starting with the 'manifest' requirement.

Article 8bis requires that an act of aggression must be 'a manifest violation of the UN Charter'. Delegations to Kampala and outside commentators objected that any act of aggression already constituted a 'manifest' violation of the UN Charter, and thus was sufficiently grave to trigger the ICC's jurisdiction.⁷⁸ Paulus, referring to the definition of 'manifest' in the Oxford English Dictionary ('clearly revealed to the eye, mind, or judgment; ... obvious'), pointed out that '[w]hat ... is obvious for one is completely obscure to the other, in particular in international law'.⁷⁹ Potter commented that 'manifest' refers to clear or obvious violations and that the obvious nature of the violation can be

73 *Report of the Special Working Group on the Crime of Aggression*, Annex II, ICC-ASP/6/20/Add.1, 6 June 2008, at § 24; *Report of the Special Working Group on the Crime of Aggression*, Annex II, ICC-ASP/7/20/Add.1, 13 February 2009, at § 13.

74 For a different view, see R. Heinsch, 'The Crime of Aggression after Kampala: Success or Burden for the Future?' 2 *Göttingen Journal of International Law* (2010) 713.

75 Draft Code of Crimes against the Peace and Security of Mankind, at 43.

76 *Report of the SWGCA*, Annex II, ICC-ASP/6/20/Add.1, 6 June 2008, § 24; *Report of the SWGCA*, Annex II, ICC-ASP/7/20/Add.1, 13 February 2009, § 13.

77 *Report of the SWGCA*, 6 June 2008, *supra* note 76, § 26.

78 See *Report of the SWGCA*, 13 February 2009, *supra* note 76, § 13; see also S.D. Murphy, 'Aggression, Legitimacy and the International Criminal Court', 20 *EJIL* (2010) 1147, at 1151.

79 A. Paulus, 'Second Thoughts on the Crime of Aggression', 20 *EJIL* (2010) 1117, at 1121.

established by looking at the scale, gravity and character of the violation.⁸⁰ ‘Manifest’ adds nothing, therefore, but confusion.

Delegates also drew attention to the redundancy of the requirement that the violation be ‘manifest’.⁸¹ Indeed, the ICC is already mandated to prosecute only the most serious crimes under international law,⁸² and the preamble of Resolution 3314 already provides that aggression is the most serious and dangerous form of the illegal use of force. The SWGCA had considered other terms in place of ‘manifest’, such as ‘flagrant’.⁸³ Barriga writes that the reason for not adopting ‘flagrant’ was that it would establish a very high threshold — apparently too high.⁸⁴ ‘Manifest’, on the other hand, would establish a threshold higher than Resolution 3314, but not too high. Resolution 3314, of course, refers to the use of armed force in a ‘manner inconsistent with the Charter of the United Nations’. Yet, some believe that Article 8bis now contains two contradictory thresholds — ‘manifest’ violation of the Charter, and ‘manner inconsistent with the Charter’, because Article 8bis(2) refers to Resolution 3314, thereby incorporating the Resolution’s lower threshold.⁸⁵

Apparently, ‘manifest’ aggression is to be determined by the aggression’s ‘character, gravity and scale’. Of these qualifiers, ‘character’ is likely the most problematic. Resolution 3314 makes clear that the relevant ‘character’ of a use of force is that it violates the UN Charter. Since we know that the qualifiers were intended to limit the meaning of aggression in Article 8bis, ‘character’ was likely intended to mean something other than a violation of the Charter. Potter seems to suggest that ‘character’ may exempt uses of force that are not clearly in violation of the Charter but surely that would be a question of fact not requiring a different threshold to reach aggression.⁸⁶ For Paulus, the term ‘character’ is the most indeterminate one in Article 8bis and thus ‘almost meaningless’, leaving it to the total discretion of the Court to decide whether the character of the crime warrants prosecution under Article 8bis.⁸⁷

Like ‘character’, it is not at all clear what the qualifier ‘gravity’ means. Is it a reference to the amount of force used, to the destruction caused, the level of disregard of relevant international law rules or something else?⁸⁸ Equally opaque is ‘scale’. If there is a serious violation of the UN Charter prohibition on force, the legally relevant ‘scale’ of force will have been reached.

80 J. Potter, ‘The Threshold in the Proposed Definition of the Crime of Aggression’, 6 *New Zealand Yearbook of International Law* (2008) 155, at 165.

81 *Report of the SWGCA*, Annex II, ICC-ASP/5/35, 29 January–1 February 2007, § 17.

82 Art. 1 ICCSt.

83 See e.g. *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, ICC-ASP/5/SWGCA/INF.1, 5 September 2006, §§ 18–20.

84 S. Barriga, ‘Against the Odds: The Result of the Special Working Group on the Crime of Aggression’, in R. Bellelli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to Its Review* (Ashgate, 2010) 621–643.

85 *Report of the SWGCA*, 6 June 2008, *supra* note 76, § 27.

86 Potter, *supra* note 80, at 165.

87 Paulus, *supra* note 79, at 1121.

88 Solera, *supra* note 26, at 353–354.

B. *Mens rea*

Instead of adding a new definition of what counts as aggression, the SWGCA might have done more with the *mens rea* or mental element of the crime of aggression. *Mens rea* is a specific aspect of individual accountability that is not part of the prohibition on the state act of aggression. The German delegation, for example, did propose a specific *mens rea* provision for aggression. It provided that the crime of aggression consisted only of initiating or carrying out an armed attack 'with the object ... of establishing a [military] occupation'.⁸⁹ Of course, this would have established a very high threshold for the crime of aggression and might not have immunized Resolution 3314 from dilution. At any rate, the *mens rea* for aggression is the same as for other crimes and is found in Article 30 of the ICC Statute: the material elements of a crime must be committed with intent and knowledge.⁹⁰ The article further provides that in relation to conduct, a perpetrator has intent when he means to engage in the conduct. In relation to a consequence, a perpetrator has intent when he means to cause that consequence or is aware that it will occur in the ordinary course of events. The knowledge requirement means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

While the *mens rea* for the crime of aggression is the same as the other ICC crimes, the Amendments to the Elements of Crimes⁹¹ provide important interpretative guidance specific to the *mens rea* of aggression. Paragraph 2 of the Introduction states: '[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations'. Then, after specifying that the term 'manifest' is an objective qualification (paragraph 3 of the Introduction), it further provides that '[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to the "manifest" nature of the violation' of the UN Charter (paragraph 4 of the Introduction). Paragraph 4 of the Elements provides that '[t]he perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of

89 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Addendum, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, at 14.

90 Art. 30 ICCSt. is entitled as 'Mental element' and reads as follows:

- (1) Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
- (2) For the purposes of this article, a person has intent where:
 - a. In relation to conduct, that person means to engage in the conduct;
 - b. In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
- (3) For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

91 *Amendments to the Elements of Crimes*, Annex II, RC/Res. 6, 11 June 2010.

the United Nations'. Since it refers to the use of armed force inconsistent with the UN Charter, it arguably refers to Article 8bis(2) (acts of aggression). Paragraph 6 of the Elements adds that '[t]he perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations'.

It seems realistic to require the Court to find that a defendant was aware of the factual circumstance that the use of the armed force was inconsistent with the UN Charter, but it is hard to see how the Court will be able to find a defendant was also aware of the factual circumstances demonstrating the manifest violation of the UN Charter. The Nuremberg Tribunal required only a finding that a defendant intended to participate in aggressive war.⁹²

In addition to the limiting nature of *mens rea* respecting aggression, Yoram Dinstein has pointed out that the mistake of fact will be available to those charged with aggression.⁹³

[I]f it can be factually determined that — when launching hostilities against Atlantica (subsequently condemned as an aggressive war) — policy-makers in Patagonia mistakenly believed bona fide that they were acting in self-defence against an armed attack ..., this absence of *mens rea* should exonerate them from individual criminal responsibility.⁹⁴

Leclerc-Gagné and Byers have also proposed that the motivation behind using force should serve as an affirmative defence for the defendant.⁹⁵ They made this proposal in the context of unilateral humanitarian intervention and argued that the use of force with the benign motivation to prevent gross human rights violations should serve as a basis for acquittal.⁹⁶ But how can the ICC measure the level of benevolence with which State A occupies or attacks with armed force the territory of State B? Under this test, numerous incidents in the past decade would be subject to doubt as to whether they constituted aggression or not. For example, the 2008 armed conflict between Russia and Georgia over South Ossetia met the threshold of 'character, gravity and scale',⁹⁷ but Russia's leaders could argue that they intended to protect South-Ossetians, and thus the actions against Georgia should not be qualified as a manifest violation of the UN Charter. How would the ICC prosecutors establish that Russian leaders were aware of the factual circumstances

92 Cryer et al., *supra* note 65, at 327–328.

93 See Art. 32(1) ICCSt.: 'A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.'

94 Dinstein, *supra* note 68, at 138.

95 E. Leclerc-Gagné and M. Byers, 'A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention', 41 *Case Western Reserve Journal of International Law* (2009) 379, at 386–389.

96 *Ibid.*

97 See T. Bahrapour, 'An Uncertain Death Toll in Georgia-Russia War', *The Washington Post*, 25 August 2008 (alleging about 2,000 killed, 158,000 displaced during the armed conflict); see also, BBC News, 'S Ossetia "War Crimes" Condemned', 23 January 2009, available online at <http://news.bbc.co.uk/2/hi/europe/7847285.stm> (visited 30 October 2011) (alleging that violations of the laws of war committed by both Russian and Georgian military forces constituted war crimes).

demonstrating that such a use of force by the Russian Federation against Georgia constituted not just a violation, but a manifest violation of the UN Charter?

4. Conclusions

Public international law specialists have been concerned for some time about the impact of an ICC crime of aggression on the *jus ad bellum* prohibition on force. Some in this group have argued that the ICC should not have jurisdiction over the crime of aggression. Others feared omitting aggression would have weakened the prohibition. Aggression needed to be included but using the same definition as is found in the existing *jus ad bellum*. The crime of aggression has been included in the ICC Statute, but is based on a different definition than that found in the *jus ad bellum*.

This is regrettable. It was not necessary to alter the meaning of the crime of aggression to reach the political outcome sought by powerful states — a crime of aggression that would not implicate their leaders. For example, rather than alter the substance of the crime itself, the threshold for individual accountability could have been narrowed by adding an expressly narrow standard for the *mens rea* of the crime of aggression. Indeed, the interpretative guidance provided by the amendments to the Elements of Crimes indicates that the ICC should in the future take a very restrictive approach to the *mens rea* of aggression, in contrast to the *mens rea* used in Nuremberg and Tokyo. Such an approach could have been adopted expressly in the ICC Statute and not left to interpretative guidance. In addition to the *mens rea* provisions, the procedures for prosecuting the crime of aggression and the coming into force of the amendments appear to make it highly unlikely that anyone will be prosecuted for aggression, perhaps another reason why no one needed to fear using the *jus ad bellum* definition.

The deed is done, however. States will not return to Kampala to reconsider their agreements. This means *jus ad bellum* specialists must work diligently to maintain the vitality of the UN Charter prohibition on force, especially with respect to aggression, which is any serious violation of the Charter prohibition. It is hoped that this contribution to the special issue of the *Journal* is a step in that direction.

