
Criminalizing Aggression: How the Future of the Law on the Use of Force Rests in the Hands of the ICC

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Abstract

The activation of Articles 8bis, 15bis and 15ter of the Rome Statute in July 2018 has once again fuelled debates over the prosecution of the crime of aggression. While various flaws and imperfections of the Kampala Amendments have attracted scholarly attention in recent years, the present article focuses on one particular source for concern – that is, the implications that the activation of the International Criminal Court’s (ICC) jurisdiction may have for the legal regime governing the use of force between states. It is assumed at the outset that, even if investigations into alleged crimes of aggression may not occur on a frequent basis, sooner or later the ICC will inevitably be called upon to apply Article 8bis of the Rome Statute. Indeed, even if the majority of situations dealt with by the Court pertain to non-international armed conflicts, there have also been a number of situations involving an international/interstate element. In essence, each such situation potentially raises jus contra bellum concerns and may accordingly lead to allegations that the crime of aggression has been committed. Even if the lion’s share of these allegations is unlikely to make it past the preliminary examination or investigation phases, the way in which the ICC prosecutor and the Pre-Trial Chambers play their role as gatekeepers with regard to the crime of aggression is bound to have strong repercussions for the interpretation and compliance pull of the law on the use of force. This article first addresses the possible impact of the ICC’s jurisdiction over the crime of aggression on the recourse to, and acceptance of, unilateral humanitarian intervention, before addressing other ways in which it may influence the international legal framework governing the use of force.

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1 Introduction

Some 70 years after the first and, so far only, criminal prosecutions pertaining to the crime took place,¹ the activation of the jurisdiction (long dormant) of the International Criminal Court (ICC) over the crime of aggression has finally become a reality. With over 30 ratifications of the Kampala Amendments on the Crime of Aggression (Kampala Amendments),² and in accordance with the resolution adopted by the Assembly of States Parties in December 2017,³ the activation finally took place on 17 July 2018.

In recent years, the impending activation of Articles 8bis, 15bis and 15ter of the Rome Statute has once again fuelled debates over the prosecution of the crime of aggression.⁴ While various flaws and imperfections of the Kampala Amendments have attracted scholarly attention, the present paper focuses on one particular source for concern, viz. the implications which the activation of the Court's jurisdiction may have for the legal regime governing the use of force between States. It is assumed at the outset that, even if investigations into alleged crimes of aggression may not occur on a frequent basis, and even if it may take several years for the first such situation to occur, sooner or later the ICC will inevitably be called upon to apply its jurisdiction over the crime of aggression under Article 8bis of the Rome Statute. Indeed, even if the majority of situations dealt with by the Court pertain to non-international armed conflicts, there have also been a number of preliminary examinations and investigations into situations with an international/interstate element.⁵ In essence, each such situation potentially raises *jus contra bellum* concerns and may accordingly lead to allegations – founded or unfounded – that the crime of aggression has been committed. For the

¹ See G. Werle and F. Jeßberger, *Principles of International Criminal Law* (3rd edn, 2014), at 1445; Clark, 'The Crime of Aggression', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015) 778, at 795.

² See Kampala Amendments on the Crime of Aggression (Kampala Amendments), Resolution RC/Res.6, 11 June 2010, reprinted in S. Barriga and C. Kreß (eds), *The Travaux Préparatoires of the Crime of Aggression* (2012), at 101–107.

³ Resolution ICC-ASP/Res.5 on the Activation of the Jurisdiction of the Court over the Crime of Aggression (New York ASP Resolution), 14 December 2017 (adopted by consensus at the ICC Assembly of States Parties).

⁴ Rome Statute of the International Criminal Court (Rome Statute) 1998, 2187 UNTS 90. See, e.g., Koh and Buchwald, 'The Crime of Aggression: The United States Perspective', 109 *American Journal of International Law (AJIL)* (2015) 257; Pellet, 'Response to Koh and Buchwald's Article: Don Quixote and Sancho Panza Tilt at Windmills', 109 *AJIL* (2015) 557.

⁵ See, e.g., Decision on the Prosecutor's Request for Authorization of an Investigation, *Situation in Georgia* (ICC-01/15), Pre-Trial Chamber I, 27 January 2016. Reference can also be made to the preliminary examination concerning Iraq/United Kingdom (UK) and the preliminary examination relating to the Israeli raid on the so-called 'Gaza flotilla' (now closed). See International Criminal Court (ICC), 'Preliminary Examinations', available at www.icc-cpi.int/Pages/Preliminary-Examinations.aspx. Consider also the 2006 'Response to Communications Received Concerning Iraq', available at www.icc-cpi.int/Pages/item.aspx?name=otp-response-iraq-06-02-09, where the Office of the Prosecutor (OTP) noted that, while 'many of the communications received related to concerns about the legality of the armed conflict', the Court did not (yet) have competence to exercise jurisdiction in respect of the crime of aggression (at 4/10).

reasons discussed below, it is likely that the lion's share of these allegations will not make it past the preliminary examination or investigation phases. In spite thereof, the way in which the ICC prosecutor and the Pre-Trial Chambers play their role as gatekeepers with regard to the crime of aggression is bound to have strong repercussions for the interpretation and compliance pull of the law on the use of force.

This article first addresses the possible impact of the ICC's jurisdiction over the crime of aggression on the recourse to, and acceptance of, unilateral humanitarian intervention (section 2), before addressing other ways in which it may influence the international legal framework governing the use of force (section 3). Section 4 concludes.

2 Aggression and Humanitarian Intervention: Winter Is Coming

A The 'Chilling Effect'

It is clear that the expansion of the ICC's jurisdiction to crimes of aggression, as defined in Article 8bis of the Rome Statute,⁶ is inspired by the determination 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.⁷ In other words, it is inspired in part by the idea that the prospect of ICC prosecution will serve as a deterrent *vis-à-vis* (some) potential aggressors and make them think twice before embarking upon military adventures abroad. At the same time, several scholars have warned that there is a downside to all of this, in that the risk of prosecution by the ICC could actually deter political and military leaders from launching military interventions serving a legitimate goal and promoting community interests. In particular, a number of scholars have argued that it may produce a 'chilling effect' *vis-à-vis* (unilateral but) 'genuinely humanitarian' interventions and could lead states to stand aside and allow horror to unfold.⁸ Thus, in the run-up to the Kampala Review Conference, several scholars insisted that states parties to the Rome Statute ought to agree on an exception for those engaged in *bone fide* unilateral humanitarian interventions.⁹

During the conference, the USA effectively put forward a draft 'understanding' that held that 'an act cannot be considered to be a manifest violation of the [UN] Charter

⁶ Rome Statute, *supra* note 4, Art. 8bis(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'. Art. 8bis(2) subsequently defines 'act of aggression' in wording largely similar to the prohibition on the use of force under Art. 2(4) of the UN Charter, while copying *in extenso* the list of acts included in Art. 3 of the UN General Assembly's definition of aggression.

⁷ Rome Statute, *supra* note 4, fifth preambular paragraph.

⁸ See, e.g., Reisman, 'Reflections on the Judicialization of the Crime of Aggression', 39 *Yale Journal of International Law* (2014) 66, at 73; Koh and Buchwald, *supra* note 4, at 271–272; Esbrook, 'Exempting Humanitarian Intervention from the ICC's Definition of the Crime of Aggression: Ten Procedural Options for 2017', 53 *Virginia Journal of International Law* (2015) 791, at 802.

⁹ See, e.g., Leclerc-Gagne and Byers, 'A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention', 41 *Case Western Reserve Journal of International Law (CWRJIL)* (2009) 391.

unless it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith, and thus an act undertaken in connection with an effort to prevent the commission of any of the crimes contained in Articles 6, 7 or 8 of the Statute would not constitute an act of aggression'.¹⁰ The proposal failed to garner sufficient support. In the wake of the conference, several scholars have continued to call for additional guarantees that leaders will not be prosecuted for launching (genuine) humanitarian interventions, occasionally insisting – in vain – that further negotiations ought to be held on the matter prior to the activation of the Court's jurisdiction.¹¹ One suggestion that has surfaced in scholarly debate, and which remains relevant, is the possibility for states to declare a partial 'opt-out' from the ICC's jurisdiction under Article 15bis(4) of the Rome Statute with regard to humanitarian interventions.¹²

As a preliminary remark, it is probably safe to say that the risk of being found responsible for a breach of the prohibition on the use of force by an international court or tribunal has not played a determining role in state decisions pertaining to military operations abroad. Thus, it is doubtful that in the run-up to Operation Allied Force in 1999 member states of the North Atlantic Treaty Organization (NATO) were heavily preoccupied with the prospect that Serbia might hire the late Ian Brownlie and institute proceedings in The Hague. This is related to the fact that there have been few proceedings in which states were found responsible for breaches of the *jus contra bellum* and to the consensual nature of interstate judicial dispute settlement.¹³ In all, the 'legal exposure' at the state level is probably less of a factor inducing compliance than other elements, such as the concern with world public opinion and the desire to be perceived as a rule-abiding member of the international community, the likelihood of sanctions or the risk of a downturn in diplomatic relations with other states.

Of course, state responsibility is one thing, individual criminal responsibility is quite another. In particular, fears of being individually held liable for the crime of aggression may weigh more heavily in the hearts and minds of leading government figures than the mere prospect of state responsibility.¹⁴ There has so far been limited research into the deterrent impact of the ICC.¹⁵ As for the crime of aggression, it is all the more

¹⁰ Quoted in C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (2013), at 120.

¹¹ See, in particular, Esbrook, *supra* note 8; see also Scheffer, 'Amending the Crime of Aggression under the Rome Statute', in C. Kreß and S. Barriga (eds), *The Crime of Aggression: A Commentary*, vol. 2 (2017) 1480, at 1486–1487 (suggesting an amendment of the crime of aggression, in particular, to expand the concept to non-state attacks and cyberattacks as well as with a view to inserting an exception related to the 'responsibility to protect').

¹² Esbrook, *supra* note 8; see also the references at 793, n. 7.

¹³ Even though the Ethiopia-Eritrea litigation shows that the financial liability may be significant. See Eritrea Ethiopia Claims Commission, *Final Award Ethiopia's Damages Claims*, 17 August 2009, reprinted in (2009) 26 UNRIIAA 631.

¹⁴ In this sense, see Y. Dinstein, *War, Aggression and Self-defence* (6th edn, 2017), at 132.

¹⁵ See, e.g., Grono and de Courcy Wheeler, 'The Deterrent Effect of the ICC on the Commission of International Crimes by Government Leaders', in Stahn, *supra* note 1, at 1236: '[I]t is currently too early to trace any longer-term deterrent effect. Nevertheless, anecdotal evidence ... indicates cause to be hopeful.' Further, see M. Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* (2016).

difficult to foretell what its deterrent impact will be. It would certainly be interesting to conduct a survey with legal advisers at the national level to inquire about the (potential) deterrent effect of Article 8bis of the Rome Statute. In the meantime, it appears at least plausible that, following the activation of the Court's jurisdiction, the ICC will occasionally be dealing with allegations of aggression. At the same time, notwithstanding the theoretical possibility of a United Nations (UN) Security Council referral,¹⁶ the deterrent impact of the ICC¹⁷ remains *a priori* limited to nationals of states that have ratified the Kampala Amendments.¹⁸ It is no secret that some countries with a historical record of military intervention abroad are unlikely to accept the ICC's jurisdiction over the crime of aggression or have no intention of ratifying the Rome Statute in the first place.

Still, although it remains to be seen to what extent states will make use of the opt-out mechanism under Article 15bis(4) of the Rome Statute, the list of countries that have ratified the amendments includes several countries that have participated in controversial military interventions in the past – for example, Belgium and Spain in NATO's Operation Allied Force in 1999 or Spain, Poland and the Netherlands in the US-led 2003 Iraq intervention. For the leaders of these countries, the prospect of being brandished aggressors, and facing sentencing by the ICC, may well be a source of concern, influencing their proclivity for intervention. In the case of collective military operations (by a regional organization or a coalition of the willing), there may also be a spill-over effect; even if leaders of states that have not consented to the ICC's jurisdiction face no risk of prosecution at the ICC level, the investigation of a leader of a state that has consented implies that the ICC will make findings on the legality of the operation as a whole. This could also indirectly impact on the position of the former states (including non-states parties to the Rome Statute) on whose international responsibility the ICC will *de facto* be pronouncing.

B Guarantees Excluding Prosecution/Sentencing in Cases of 'Genuine' Humanitarian Interventions

1 The 'Character' Element in Article 8bis of the Rome Statute

Is the fear of a 'chilling effect' *vis-à-vis* genuine humanitarian interventions well founded or not? The more plausible answer is that, even if the US understanding

¹⁶ Note that this possibility is of course excluded not only with regard to the permanent members themselves but also with regard to any (close) allies of the five permanent members.

¹⁷ Note that whether the prospect of domestic prosecutions may have a deterrent effect is a different matter altogether.

¹⁸ See Rome Statute, *supra* note 4, Arts 15bis(4), 15bis(5), 121(5). Note that, in the aftermath of the Kampala conference, there was considerable debate as to whether the ICC would be able to prosecute nationals of countries that had ratified the Rome Statute, but not the Kampala Amendments, and which had not opted out of jurisdiction over the crime of aggression pursuant to Art. 15bis(4). The activation resolution adopted in December 2017 (New York ASP Resolution, *supra* note 3) appears to settle the debate by '[confirming] ... that in the case of a State referral or *proprio motu* investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments'. See further Akande and Tzanakopoulos, 'Treaty Law and ICC Jurisdiction over the Crime of Aggression', in this issue, 939; Blokker and Barriga, 'Conditions for the Exercise of Jurisdiction Based on State Referrals and *Proprio Motu* Investigations', in C. Kreß and S. Barriga (eds), *The Crime of Aggression: A Commentary*, vol. 1 (2017) 652.

providing for an express exemption for humanitarian interventions was not adopted, the Rome Statute contains several guarantees ensuring that leaders initiating such interventions will not normally be sentenced in The Hague.¹⁹ Indeed, even if a humanitarian intervention will necessarily take the form of one or several of the acts enumerated in Article 8bis(2) of the Rome Statute (for example, a ground invasion or aerial bombardment),²⁰ Understanding 6 annexed to the Kampala Amendments stresses that a determination of whether an act of aggression has been committed ‘requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences’. The reference to ‘consequences’ has been understood by some to exempt interventions that have the beneficial effect of putting an end to large-scale human rights violations.²¹ More importantly, Article 8bis(1) itself additionally limits the concept of ‘crime of aggression’ to those acts of aggression that, by their ‘character, gravity and scale’, constitute a manifest violation of the UN Charter. This qualification is contained in Annex II on the Amendments to the Elements of Crime, which emphasizes that the term ‘manifest’ ‘is an objective qualification’.²²

Inasmuch as these criteria are primarily ‘quantitative’ in nature, humanitarian interventions can undoubtedly be of sufficient ‘gravity and scale’ in the sense of Article 8bis(2) of the Rome Statute.²³ The NATO operation in Serbia is a case in point; Operation Allied Force took the form of a 78-day bombing campaign, with 38,000 combat missions and between 2,500 and 5,000 casualties, including some 500 civilian deaths.²⁴ The key question then is to what extent an intervention of this type is also of a ‘character’ to amount to a manifest violation of the UN Charter. Contrary to ‘gravity and scale’, ‘character’ suggests a qualitative test. In particular, the preparatory works make clear that the concept was intended to exclude ‘borderline cases’

¹⁹ Proposals for additional understandings were informally circulated by the USA at the Review Conference on 6 June 2010.

²⁰ *Pro memorie*, Rome Statute, *supra* note 4, Art. 8bis(2), copies the list of acts of aggression listed in Art. 3 of the UN General Assembly’s definition of aggression.

²¹ E.g., Van Schaack, ‘The Crime of Aggression and Humanitarian Intervention on Behalf of Women’, 11 *International Criminal Law Review* (2011) 477, at 484–485; but see McDougall, *supra* note 10, at 121.

²² Kampala Amendments, *supra* note 2, Annex II: Amendments to the Elements of Crime.

²³ Further, see, e.g., Trahan, ‘Defining the “Grey Area” Where Humanitarian Intervention May Not Be Fully Legal, but Is Not the Crime of Aggression’, 2 *Journal on the Use of Force and International Law (JUFIL)* (2015) 42, at 57–59.

²⁴ The situation may be less straightforward when dealing with one-off strikes such as the US missile strikes against the Shayrat airbase in Syria on 7 April 2017 or the series of air and missile strikes against Syria by the USA, France and the United Kingdom (UK) on 14 April 2018. On both occasions, the strikes were inspired, at least in part, by humanitarian considerations – albeit that the UK was the only participating state to explicitly put forward a legal justification based on the humanitarian intervention doctrine. While both operations were far more limited than the North Atlantic Treaty Organization (NATO) operation in Serbia, they nonetheless involved a significant projection of armed force upon a third state’s territory. In the 2017 strike, for instance, the USA reportedly fired 58 cruise missiles, taking out 20 per cent of the Syrian airforce. See US White House, ‘Statement by President Trump on Syria’, 13 April 2018, available at www.whitehouse.gov/briefings-statements/statement-president-trump-syria/. On the gravity threshold, see further section 3.B, below.

or cases of ‘ambiguous’ legality or falling within a ‘grey area’ of legality.²⁵ For all of its indeterminacy, the ‘character’ component accordingly reinforces the reservation enshrined in Article 22 of the Rome Statute, dealing with the *nullum crimen* principle, where it is stated that ‘[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted’.²⁶

Admittedly, there is some debate as to whether the three components mentioned above all need to be present to determine a crime of aggression. The immediate cause for this is the assertion in Understanding 7 that ‘the three components of character, gravity and scale must be sufficient to justify a “manifest” determination. No one component can be significant enough to satisfy the manifest standard by itself’.²⁷ The latter phrase has been interpreted by some as suggesting that it is sufficient that ‘two out of three elements must be present’.²⁸ If this logic were followed through, an intervention of considerable ‘gravity and scale’ – such as NATO’s intervention in Serbia – would arguably qualify as a ‘crime of aggression’, regardless of its ‘character’. The idea that one of the three components (and, specifically, the ‘character’ element) can be ignored altogether, however, does not find support in the *travaux* of Understanding 7.²⁹ More importantly, the use of the word ‘and’ in Article 8bis(2) of the Rome Statute and in the first sentence of Understanding 7 affirms that the components of ‘character, gravity and scale’ must be construed cumulatively rather than disjunctively.³⁰

This brings us to the question whether humanitarian interventions indeed fall within the ‘grey area’ for which the ‘character’ component was ostensibly introduced.

²⁵ In this sense, see *ibid.*, at 59–61; Barriga, ‘Negotiating the Amendments on the Crime of Aggression’, in S. Barriga and C. Kreß (eds), *supra* note 2, 3, at 29. See, e.g., 2008 Special Working Group on the Crime of Aggression Report, reprinted in Barriga and Kreß, *supra* note 2, 602, para. 24; 2009 Special Working Group on the Crime of Aggression Report, reprinted in Barriga and Kreß, *supra* note 2, 648, para. 13; 2009 Princeton Report, reprinted in Barriga and Kreß, *supra* note 2, 692, para. 24.

²⁶ Rome Statute, *supra* note 4, Art. 22(2). See further Coracini and Wrange, ‘The Specificity of the Crime of Aggression’, in Barriga and Kreß, *supra* note 18, 307, at 328–329.

²⁷ Kampala Amendments, *supra* note 2, Annex III: Understandings Regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Understanding 7. Note that while some have questioned the legal value of the understandings attached to the Kampala definition of aggression (see, in particular, Heller, ‘The Uncertain Legal Status of the Aggression Understandings’, 10 *Journal of International Criminal Justice (JICJ)* (2012) 229, at 246), it is submitted that they constitute a relevant tool of interpretation in the sense of Art. 31(2) of the Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331, and that it is unthinkable that the ICC prosecutor would interpret Art. 8bis(2) in a manner contrary to that suggested by Understanding 7. Also in this sense, see Pellet, *supra* note 4, at 559; McDougall, *supra* note 10, at 113–119.

²⁸ In this sense, see K. Ambos, *Treatise on International Criminal Law* (2014), vol. 2, at 189; McDougall, *supra* note 10, at 129–130.

²⁹ The language used resulted from a compromise between two views. On the one hand, there was the Canadian position that, when a use of force was ‘almost manifestly illegal with respect to one component, but definitely manifestly illegal with respect to the other two components’, such use of force would still meet the threshold of Art. 8bis of the Rome Statute. On the other hand, the USA insisted on adding the final sentence of Understanding 7 in order to exclude the determination of manifest illegality in a case where only one component is most prominently present, but the other two not at all. See further McDougall, *supra* note 10, at 128–130; Kreß *et al.*, ‘Negotiating the Understandings on the Crime of Aggression’, in Barriga and Kreß, *supra* note 2, 81, at 96–97.

³⁰ E.g., Werle and Jeßberger, *supra* note 1, para. 1475.

In his analysis of the negotiations within the Special Working Group on the Crime of Aggression (SWGCA) in the run-up to the Kampala Review Conference, Stefan Barriga stresses how '[a] Kosovo-style scenario of a humanitarian intervention without Security Council authorization could arguably constitute such a debatable case' and how '[t]he question of such humanitarian interventions was an underlying current of this discussion'. At the same time, the author acknowledges that the question was 'not openly addressed' in the SWGCA.³¹ As mentioned earlier, the issue did come up in the course of the final debates at Kampala, as the USA sought agreement on a draft understanding excluding from the definition of the crime of aggression acts 'undertaken in connection with an effort to prevent the commission of any of the crimes contained in Articles 6, 7 or 8 of the Statute' (that is, war crimes, genocide and crimes against humanity). Although a majority rejected the draft understanding, Claus Kreß and others explain this attitude by reference to 'the widespread concern that it would be inappropriate to deal with key issues of current international security law in the haste of the final hours of diplomatic negotiations'. By contrast, the authors continue, the rejection of the USA's draft understanding 'must not be interpreted as widespread rejection of their content'.³² While it has been argued that the reluctance to accept the US understanding pertaining to humanitarian intervention was inspired by opposition to a veiled 'legalization' of the concept of humanitarian intervention,³³ several participants and scholars have similarly concluded that it did not imply that states regarded individual conduct related to humanitarian intervention as being covered by the crime of aggression.³⁴

Even if the preparatory works ultimately contain little by way of express evidence that genuine humanitarian interventions are exempt from Article 8bis(1) of the Rome Statute, interventions of this type have been repeatedly cited in legal doctrine as prime examples of border-line cases that fail to meet the 'character' criterion of that provision.³⁵ A number of scholars have indeed long defended the view that humanitarian interventions are permissible under international law or, alternatively, that there is an 'emerging' norm permitting such recourse to force.³⁶ Reference is often made in this context to the mantra, first set forth in a 1984 document of the Planning Staff of the British Foreign Office,³⁷ that genuine (unilateral) humanitarian interventions cannot

³¹ Barriga, *supra* note 24, at 29, n. 149; but see, however, Clark, *supra* note 1, at 783.

³² Kreß *et al.*, *supra* note 29, at 95.

³³ Pellet, *supra* note 4, at 560.

³⁴ E.g., Kreß and Holtendorff, 'The Kampala Compromise on the Crime of Aggression', 8 *JICJ* (2010) 1179, at 1205; Trahan, *supra* note 23, at 66–67; Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment', 11 *JICJ* (2013) 955, at 972.

³⁵ E.g., Ambos, *supra* note 28, at 198; Werle and Jeßberger, *supra* note 1, para. 1475; Kreß, 'The State Conduct Element', in Kreß and Barriga, *supra* note 18, 412, at 524–526; consider also Wrangle, 'The Crime of Aggression, Domestic Prosecutions and Complementarity', in Kreß and Barriga, *supra* note 18, 704, at 741–742.

³⁶ E.g., Greenwood, 'Humanitarian Intervention: The Case of Kosovo', 10 *Finnish Yearbook of International Law* (2002) 141. For extensive references, see Rodley, 'Humanitarian Intervention', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015) 775, at 776, nn. 3, 4.

³⁷ Publicly released in 1986 as UK Foreign Policy Document no. 148, reprinted in 57 *British Yearbook of International Law (BYIL)* (1986) 614, II.18–22.

be said to be ‘unambiguously illegal’.³⁸ In recent years, some states, most notably the United Kingdom (UK), have, moreover, explicitly embraced the legality of humanitarian intervention.³⁹

On the other hand, without revisiting at length the debate on the legality of unilateral humanitarian intervention, the application of a traditional positivist methodology leads to the almost inescapable conclusion that the drafters of the UN Charter intended Article 2(4) to be construed broadly in a manner leaving no room for unilateral interventions⁴⁰ and that practice throughout the UN Charter era has not (yet) come to support a re-interpretation/modification of Article 2(4) allowing for unilateral humanitarian interventions.⁴¹ By way of reminder, it is noted that most NATO countries participating in Operation Allied Force, including, for that matter, the USA,⁴² refrained from explicitly relying on the humanitarian intervention doctrine,

³⁸ Note, however, that those defending the permissibility of humanitarian intervention tend to ignore the highly critical position in the 1984 document *vis-à-vis* humanitarian intervention. E.g., the document finds that ‘state practice to which advocates of the right of humanitarian intervention have appealed provides an uncertain basis on which to rest such a right’, while acknowledging that ‘the overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention’. Further, [the] doubtful benefits [of accepting humanitarian intervention] would be heavily outweighed by its costs in terms of respect for international law.’ *Ibid.*, at II.22.

³⁹ See, e.g., ‘Chemical Weapon Use by Syrian Regime: UK Government Legal Position’, reprinted in 84 *BYIL* (2013) 526, at 806–807; UK Government, Prime Minister’s Office, ‘Policy Paper: Syria Action – UK Government Legal Position’, 14 April 2018, available at www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position.

⁴⁰ The dominant view in legal doctrine indeed holds that the reference to 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’ should not be understood as restricting the scope of the prohibition on the use of force. This dominant view finds support, *inter alia*, in the UN Charter’s *travaux préparatoires*. In this sense, see, e.g., Randelzhofer and Dörr, ‘Article 2(4)’, in B. Simma *et al.* (eds), *The Charter of the United Nations: A Commentary*, vol. 1 (3rd edn, 2012) 200, at 215–216, 222 (with references). Even a cautious supporter of unilateral humanitarian intervention such as Kreß acknowledges that the prohibition of Art. 2(4) was intended not to leave room for exceptions in cases of a use of force pursuing a benign purpose and that, accordingly, ‘one must turn to the practice of states to see whether the use of force to avert a humanitarian catastrophe has entered the grey area under consideration’. Kreß, *supra* note 35, at 431, 490–491.

⁴¹ In this sense, see, e.g., Randelzhofer and Dörr, *supra* note 40, at 224 (with references at n. 131); see also the International Law Association (ILA), Committee on the Use of Force, Final Report on Aggression and the Use of Force (2018), available at www.ila-hq.org/images/ILA/DraftReports/DraftReport_UseOfForce.pdf, which finds that ‘there exists only a limited amount of State practice and opinio juris that even potentially could be seen as underpinning a legal basis for unilateral humanitarian intervention’ and that admits that a majority view in legal doctrine is that such interventions remain unlawful (at 23–24). For a cautious dissent, see, e.g., Kreß, *supra* note 35, at 492ff (but note that Kreß acknowledges that the majority of scholars are of the view that state practice since 1945 does not render support to the legality of unilateral humanitarian interventions (at 499)).

⁴² See, e.g., the following statement from the 2015 US *Law of War Manual* (United States, Department of Defense, *Law of War Manual* (June 2015), at para. 1.11.4, available at http://www.dod.mil/dodge/images/law_war_manual15.pdf): ‘Although the United Kingdom and certain other States have argued that intervention for humanitarian reasons may be a legal basis for the resort to force, the United States has not adopted this legal rationale. Consistent with this view, the United States did not adopt this theory as a legal rationale for NATO’s military action [during the Kosovo crisis].’

with several stressing that it should ‘not become a precedent’.⁴³ At the same time, the ‘Group of 77’, the Non-Aligned Movement and the Islamic Conference all issued statements rejecting ‘the so-called right of humanitarian intervention, which had no basis in the UN Charter or in international law’.⁴⁴ This picture does not appear to be fundamentally altered by the recent strikes against Syria in April 2017 (by the USA) and in April 2018 (by the USA, the UK and France) in response to chemical weapon attacks imputed to the Syrian regime.⁴⁵ The majority of legal doctrine remains of the opinion that state practice and *opinio juris* do not support – at least *de lege lata* – the legality of unilateral humanitarian interventions.⁴⁶ Olivier Corten goes as far as to conclude that the illegality of humanitarian intervention is actually ‘one of the least complex’ issues of contemporary international law.⁴⁷

Still, many sympathize with the idea that, from a *lege ferenda* perspective, unilateral interventions to halt a situation of ongoing ethnic cleansing ought to be permissible, and they accept that, if not legal, they are nonetheless ‘legitimate’.⁴⁸ Furthermore, it

⁴³ See, e.g., Deutscher Bundestag, *BT Plenarprotokolle*, Case no. 13/248, 16 October 1998, at 23127, reprinted in H. Krieger (ed.), *The Kosovo Conflict and International Law* (2001), at 398. In a similar vein, see Verbatim Record of a Plenary Meeting of the General Assembly (54th Session, 8th Plenary Meeting), UN Doc. A/54/PV.8, 22 September 1999, at 12; see also Verbatim Record of a Plenary Meeting of the General Assembly (54th Session, 14th Plenary Meeting), UN Doc. A/54/PV.14, 25 September 1999, at 17 (Belgium). For similar French statements, see Corten, *Droit contre la guerre* (2014), at 865.

⁴⁴ Ministerial Declaration delivered at the 23rd Annual Meeting of the Ministers for Foreign Affairs of the Group of 77, New York, 24 September 1999, available at www.g77.org/doc/Decl1999.html. The Heads of State and Government of the Group of 77 and China reiterated this position in the Declaration of the South Summit, Annex to UN Doc. A/55/74, 5 May 2000, para. 54; Final Document, Ministerial Conference, Cartagena, 8–9 April 2000, available at www.nam.gov.za/xiiiminconf/minconf.pdf, para. 11; Final Communiqué of the Ninth Session of the Islamic Summit Conference, Doha, 12–13 November 2000, para. 88, available at www.oic-oci.org/english/conf/is/9/9th-is-sum-final_communique.htm; Final Communiqué of the 27th Session of the Islamic Conference of Foreign Ministers, Kuala Lumpur, 27–30 June 2000, para. 79.

⁴⁵ It is, e.g., significant that, contrary to the UK, the USA refrained from justifying these strikes on the basis of the humanitarian intervention doctrine (instead placing considerable emphasis on US national interests). Equally relevant is the fact that, while several third states expressed (political) support for the strikes, most refrained from confirming the legality of the operations, which was in fact rejected by a number of states. See further, e.g., A. Gurmendi Dunkelberg *et al.*, ‘Mapping States’ Reactions to the Syria Strikes of April 2018: A Comprehensive Guide’, *Just Security* (7 May 2018), available at www.just-security.org/55835/mapping-states-reactions-syria-strikes-april-2018-a-comprehensive-guide/. For overviews of the official positions of the protagonist states and third states, see also the ‘Digests of State Practice’ in the *Journal on the Use of Force and International Law*, especially issues 4(2) and 5(2).

⁴⁶ Consider, e.g., Gray, ‘The Use of Force for Humanitarian Purposes’, in N. White and C. Henderson (eds), *Research Handbook on International Conflict and Security Law* (2013) 229, at 253; Lowe and Tzanakopoulos, ‘Humanitarian Intervention’, *Max Planck Encyclopedia of Public International Law*; Independent International Fact-Finding Mission on the Conflict in Georgia, Report (2009), vol. 2, at 284, available at www.mpil.de/files/pdf4/IIFFMCG_Volume_II.pdf; D. Akande, ‘Opinion: The Legality of the UK’s Air Strikes on the Assad Government in Syria’, 16 April 2018, available https://d3n8a8spro7vhmx.cloudfront.net/campaigncountdown/pages/2243/attachments/original/1523875290/Akande_Opinion_UK_Government%27s_Legal_Position_on_Syria_Strike_April_2018.pdf?1523875290.

⁴⁷ Corten, *supra* note 43, at 799.

⁴⁸ The idea that genuine humanitarian interventions are ‘illegal, but legitimate’ was adopted most prominently by the Independent International Commission on Kosovo. Independent International Commission on Kosovo, *The Kosovo Report* (2000), at 4.

has been argued that a genuine humanitarian intervention can only result in a 'mitigated' form of international responsibility, leading at most to a declaratory finding of a breach of the law, yet without further consequences attached,⁴⁹ even if the precise role and impact of the concept of mitigation in this context nonetheless remains uncertain and under-explored.⁵⁰

In the end, the persistent support of part of the legal doctrine that genuine humanitarian interventions ought to be regarded as lawful *de lege ferenda* or that (according to a minority view) it is part of *lex lata*, the strong moral imperative underlying such interventions and the fact that they precisely seek to halt and/or prevent the very crimes of atrocity that the ICC was set up to punish make it plausible that the ICC will regard them as falling within the 'legal grey' area that the 'character' component was intended to exempt from Article 8 bis of the Rome Statute.⁵¹ To support such a conclusion, the ICC may additionally find useful support in the preparatory works of the Kampala Amendments, the reference to 'consequences' in Understanding 6 annexed to that resolution, the *nullum crimen* principle and, more generally, the object and purpose of the Rome Statute.

2 Other 'Escape Routes'

Several other elements and principles enshrined in the Rome Statute have been claimed to provide further safeguards against the prosecution or sentencing of leaders involved in genuine humanitarian interventions.⁵² These include, for instance, the presumption of innocence and the requirement of proof 'beyond a reasonable doubt',⁵³ the various provisions insisting that the ICC shall prosecute only 'the most serious crimes',⁵⁴ the need for a '*mens rea*',⁵⁵ the possibility of recourse to duress or other grounds for excluding criminal responsibility⁵⁶ or the concepts of mistake of fact

⁴⁹ See, e.g., T. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (2002), at 174–191; Stahn, 'Between Law-Breaking and Law-Making: Syria, Humanitarian Intervention and "What the Law Ought to Be"', 19 *Journal of Conflict and Security Law (JCSL)* (2014) 25, at 41–42.

⁵⁰ It is recalled that responsibility under international law does not normally require some form of *culpa* or (malicious) intent on the part of the state. See J. Crawford, *Brownlie's Principles of Public International Law* (2012), at 556–559. At the same time, the Commentary to Art. 31 of the International Law Commission (ILC), Articles on State Responsibility makes clear that the failure on the part of the 'victim' to mitigate the damage flowing from the wrongful act affects the scope of reparation. In addition, Art. 39 recognizes the relevance of the victim's 'contributory fault'. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement no. 10, Doc. A/56/10, November 2001, vol. 2, at 93, Commentary to Art. 31, para. 11.

⁵¹ Consider also the draft final report of the ILA's Committee on the Use of Force of 2018. ILA, *supra* note 41, at 24: 'The existence of such minority positions means, at least, that is difficult to conclude that a right of humanitarian intervention is unquestionably unlawful, a point that may well be of relevance with respect to the question whether a humanitarian intervention amounts to an "act of aggression, which by its character ... constitutes a manifest violation of the charter of the United Nations".'

⁵² For a good overview, see, in particular, Trahan, *supra* note 23, at 62–64; Esbrook, *supra* note 8, at 827–833; Dinstein, *supra* note 14, at 155ff.

⁵³ Rome Statute, *supra* note 4, Art. 66(3).

⁵⁴ *Ibid.*, Art. 1, preambular para. 4, Art. 5, Art. 17(3).

⁵⁵ *Ibid.*, Art. 30.

⁵⁶ *Ibid.*, Art. 31.

or mistake of law.⁵⁷ Some of these suggestions appear far-fetched. Thus, contrary to the *nullum crimen* principle, the presumption of innocence of Article 66 of the Rome Statute is concerned with the evidentiary threshold for establishing an individual's liability for a certain crime, rather than with ascertaining the scope of the crimes for which the Court has jurisdiction. Mistake of fact may exceptionally be relevant where a decision to launch a military intervention was undertaken in the erroneous, yet honest, belief that a situation of ethnic cleansing was imminent (see later discussion in this article). However, it is irrelevant for the broader question as to whether humanitarian interventions may come within the ambit of Article 8bis of the Rome Statute.

Whether the *mens rea* requirement and the notion of mistake of law render support for the view that humanitarian interventions cannot qualify as crimes of aggression is debatable. The preparatory works of the Kampala Amendments make it clear that states rejected the need for some form of specific 'aggressive intent' or purpose (*animus aggressionis*) aimed at (long-term) occupation, subjugation or annexation⁵⁸ – a move that has been perceived (and deplored) by some scholars as a departure from the customary crime of aggression.⁵⁹ As a result, Article 30 of the Rome Statute applies as a default rule, implying essentially that it is sufficient that the alleged aggressor 'intended' to engage in the conduct that qualifies as a manifest breach of the UN Charter, without there being any need to inquire into the underlying 'motives'.⁶⁰ This is in line with Article 5(1) of the UN General Assembly's definition of aggression, according to which '[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression'.⁶¹ Thus, while the accidental firing of a missile or trespassing into foreign land would lack the required mental element, the same cannot be said with respect to a premeditated humanitarian intervention. Furthermore, the Elements of Crime leave little room for a plea based on a mistake of law.⁶² The Elements of Crime indeed stress that there is 'no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the [UN Charter]' nor as to the manifest nature of the violation.⁶³ Rather, it is sufficient that the perpetrator was 'aware of the factual circumstances' that established that the recourse to force amounted to a manifest violation of the UN Charter.⁶⁴ In addition, the Elements of Crime stress that

⁵⁷ *Ibid.*, Art. 32.

⁵⁸ E.g., Ambos, *supra* note 28, at 199–200; Weisbord, 'The Mens Rea of the Crime of Aggression', 12 *Washington University Global Studies Law Review* (2013) 487, at 492–493.

⁵⁹ See, e.g., Ambos, *supra* note 28, at 201; Werle and Jeßberger, *supra* note 1, paras 1455, 1464; A. Cassese and P. Gaeta (eds), *Cassese's International Criminal Law* (3rd edn, 2013), at 142.

⁶⁰ In this sense, see also Dinstein, *supra* note 14, at 156.

⁶¹ GA Res. 3314(XXIX), 14 December 1974.

⁶² In this sense, see, e.g., Clark, *supra* note 1, at 785.

⁶³ Kampala Amendments, *supra* note 2, Annex II: Amendments to the Elements of Crime, paras 2, 4; see further Anggadi, French and Potter, 'Negotiating the Elements of the Crime of Aggression', in Barriga and Kreß, *supra* note 2, 58, at 71–72. In a similar vein, see the 2009 Non-Paper on the Elements of Crimes by the Chairman of the Special Working Group on the Crime of Aggression (Non-Paper on Elements of Crime), reprinted in Barriga and Kreß, *supra* note 2, 677, at 680.

⁶⁴ Kampala Amendments, *supra* note 2, Annex II: Amendments to the Elements of Crime, paras 4, 6.

the term ‘manifest’ is an ‘objective qualification’.⁶⁵ The underlying rationale is that political and military leaders should not be encouraged to be ‘wilfully blind as to the legality of [their] actions, or to rely on disreputable advice supporting the legality of State acts even if that advice is subsequently shown to have been incorrect’.⁶⁶ Carrie McDougall goes as far as to conclude that even ‘[h]olding an honest and reasonable belief that a use of force was not unlawful would be irrelevant to the satisfaction of *mens rea*’.⁶⁷ Francis Anggadi, Greg French and James Potter similarly observe that making out a persuasive defence of mistake of law would be difficult, while nonetheless highlighting that such defence is not needed ‘because the “manifest violation” threshold already excludes cases of *bona fide* legal uncertainty about which a state leader could reasonably be mistaken’.⁶⁸ This was also the position expressed in the 2009 Non-Paper on the Elements of Crime by the chairman of the SWGCA.⁶⁹

This leaves the various grounds for excluding criminal responsibility enumerated (non-exhaustively) in Article 31(1) of the Rome Statute. While these do not appear to have attracted renewed attention in the context of the Kampala Review Conference,⁷⁰ two such grounds might be relevant for present purposes. In particular, Articles 31(1) (c) and (d) exclude criminal responsibility, *inter alia*, where:

[t]he person acted reasonably to defend ... another person ... against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person ... protected

or

[t]he conduct which is alleged to constitute a crime ... has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.

A genuine humanitarian intervention could be construed as involving the defence of non-nationals ‘against imminent and unlawful use of force’.⁷¹ Whether humanitarian intervention may be considered as a form of duress is open to debate,⁷² inasmuch as ‘duress’ is normally limited to a situation where a person is compelled into acting in a certain way due to circumstances beyond his or her control⁷³ – even if some may argue that in the face of a grave humanitarian catastrophe no ‘moral choice’ is in fact possible.⁷⁴

⁶⁵ *Ibid.*, para. 3.

⁶⁶ See, e.g., Non-Paper on Elements of Crime, *supra* note 63, at 677, para. 18; see also Anggadi, French and Potter, *supra* note 63, at 71; Weisbord, *supra* note 58, at 495.

⁶⁷ McDougall, *supra* note 10, at 197.

⁶⁸ Anggadi, French and Potter, *supra* note 63, at 73.

⁶⁹ Anggadi, French and Potter, *supra* note 63, at 68, para. 21. Non-Paper on Elements of Crime, *supra* note 63.

⁷⁰ Clark, ‘General Principles of International Criminal Law’, in Kreß and Barriga, *supra* note 18, 590, at 614.

⁷¹ In this sense, e.g. Weisbord, *supra* note 58, at 500.

⁷² Critical, e.g., Esbrook, *supra* note 8, at 829; Dinstein, *supra* note 14, at 158.

⁷³ Further, see E. van Shiedregt, *Individual Criminal Responsibility in International Law* (2012), at 258–290.

⁷⁴ International Military Tribunal (Nuremberg), Judgment and Sentences, 1 October 1946, reprinted in 41 *AJIL* (1947) 172, at 221.

In light of a paucity of practice,⁷⁵ little is known about the operation and impact of these grounds.⁷⁶ Accordingly, it is difficult to foretell if and how the ICC would apply them to situations of humanitarian intervention. In theory at least, they provide further ammunition to make sure that political and military leaders involved in the launching of such intervention will not be prosecuted, or condemned, by the ICC for having committed a ‘crime of aggression’. To these elements must of course be added factors of prosecutorial prudence⁷⁷ and concern for the institutional credibility of the ICC, which may counsel against an over-inclusive interpretation of Article 8bis of the Rome Statute.

C How ICC Jurisdiction over the Crime of Aggression May Support the Humanitarian Intervention Doctrine

In light of the foregoing, it appears highly improbable that the ICC would prosecute/sentence leaders involved in the launching of a large-scale military intervention on humanitarian grounds. Having regard to the preparatory works of the Kampala Amendments, the more obvious approach to reach such an outcome would be to rely on the ‘character’ component of Article 8bis, possibly read in conjunction with Article 22(2) of the Rome Statute (rather than on consideration of *mens rea* or mistake of law). This approach also appears more attractive than a reliance on the grounds excluding criminal responsibility, in that it makes it possible for the ICC prosecutor to throw out sensitive cases at an earlier stage and to limit the time and resources spent on the investigation.

Paradoxically, the unanticipated implication is that, rather than having a ‘chilling effect’ on envisaged humanitarian interventions, the activation of the ICC’s jurisdiction over the crime of aggression may actually pave the way for a broader acceptance and consolidation of the humanitarian intervention doctrine.⁷⁸ Indeed, a finding by the prosecutor or the chambers that a humanitarian intervention does not give rise to a manifest violation of the UN Charter in the sense of Article 8bis of the Rome Statute will undoubtedly strengthen the perception that such interventions are not ‘unambiguously unlawful’ and give further impetus to the doctrine. This can be expected to be the case even if the prosecutor (or the Court) would refrain from taking an express position on the legality of humanitarian intervention under general international law (and simply find there to be no manifest breach of the UN Charter), which appears plausible. As Sean Murphy observes:

a distinction of this type will likely be lost in the public domain; when the ICC determines that the leaders of an intervention will not be investigated or indicted for aggression, the natural perception is that the ICC believes the intervention to be legal. Arguing that an intervention might still be a violation of Article 2(4) but just is not within the scope of the

⁷⁵ See, e.g., Esbrook, *supra* note 8, at 827 (observing that these defences ‘are still in their infancy’).

⁷⁶ It is noted that under Rome Statute, *supra* note 4, Art. 67(1)(i), the burden of persuasion to such negative defences lies with the prosecution.

⁷⁷ Under *ibid.*, Art. 53(1)(c), in deciding whether to initiate an investigation, the prosecutor shall consider whether there are ‘substantial reasons to believe that an investigation would not serve the interests of justice’.

⁷⁸ See also in this sense Murphy, ‘Criminalizing Humanitarian Intervention’, 41 *CWRJIL* (2009) 341.

ICC's jurisdiction is the type of position that will likely gain little traction in the realm of political and popular discourse, which tends to approach such issues in more a black/white (legal/illegal) fashion.⁷⁹

Thus, a decision of this type would probably leave its mark on state practice and *opinio juris*, possibly leading a growing number of states to (more) explicitly embrace the doctrine, for example, in national military doctrines and potentially leading to a shift in the justificatory discourse at the international level, from which the legal regime on the use of force derives much (if not most) of its compliance pull.

Of course, even if the ICC (prosecutor) is unlikely to open investigations *vis-à-vis*, or indict, persons responsible for launching humanitarian interventions, this does not imply a hall pass for any leader that draws the humanitarian intervention card. Indeed, the mere fact that a state has claimed to have undertaken a humanitarian intervention will not *ipso facto* shield its leaders from scrutiny. Rather, the ICC (prosecutor) can be expected to inquire as to whether the operation reasonably meets the requirements of a 'genuine' humanitarian intervention or whether the humanitarian argument constitutes a mere pretext. In this context, the ICC (prosecutor) will accordingly have the opportunity, and responsibility, to clarify – and monitor compliance with – (some of) the criteria that distinguish 'genuine' humanitarian interventions from those that are 'unambiguously' unlawful and, accordingly, to further shape, and consolidate, the humanitarian intervention doctrine. The implication is that leaders considering launching an intervention will need to take these criteria into account in the decision-making process, including in drafting the mandate for the operation, so as to minimize the risk of prosecution at the ICC level.

A second implication is that, by (indirectly) consolidating the criteria for 'genuine' humanitarian intervention under general international law, the ICC (prosecutor) may actually achieve a certain *rapprochement* between those states that support the permissibility of humanitarian intervention, on the one hand, and some of those that have traditionally proven more reluctant, primarily because of concerns over the risk of abuse of the humanitarian intervention doctrine, on the other hand. These concerns are not unfounded. Indeed, history suggests that alleged humanitarian aspirations are sometimes used as a fig leaf to cover up more selfish motives for intervention.⁸⁰ By way of illustration, it is worth recalling the German reference to 'assaults on the life and liberty of minorities' as a justification for the occupation of Bohemia and Moravia by Nazi Germany in 1939.⁸¹ Concerns over possible abuse may to some extent be alleviated by the consolidation by the ICC of the criteria for intervention and the prospect of some form of judicial scrutiny (at least with respect to leaders from countries that have ratified the Kampala Amendments).⁸²

⁷⁹ *Ibid.*, at 369.

⁸⁰ See, e.g., I. Brownlie, *International Law and the Use of Force by States* (1963), at 338–341.

⁸¹ See *ibid.*, at 340. Note that, more recently, Russia's references to the 'threats of violence ... against the security, lives ... of ... Russian-speaking peoples' as a (subsidiary) argument to justify its intervention in Ukraine in 2014 (Meeting Record of the 7125th Meeting of the UN Security Council, UN Doc. S/PV.7125, 3 March 2014, at 3/20) have also raised eyebrows (to put it mildly).

⁸² Consider also Leclerc-Gagne and Byers, *supra* note 9, at 386, 389.

Before turning to the criteria characterizing ‘genuine’ humanitarian intervention, some reservations are due. First, the scenario discussed above presupposes that the ICC is presented with an opportunity, or is called upon, to apply its jurisdiction in a situation where a state claims to have intervened in a third country to prevent or avert a humanitarian catastrophe. The paucity of precedents where states have effectively and explicitly invoked the humanitarian intervention doctrine and the limited number of states consenting to ICC jurisdiction over the crime of aggression suggests that this may take a number of years.

Second, the situation described above would be quite different in the – arguably less likely⁸³ – scenario where the ICC would deem an alleged humanitarian intervention to constitute a manifest breach of the UN Charter in the sense of Article 8bis(1) of the Rome Statute, but would rely on one of the grounds listed in Article 31 of the Rome Statute (for example, defence of others) to ultimately find that the alleged aggressors should not be held criminally responsible.⁸⁴ Such a scenario involving an authoritative finding by an international judicial organ affirming the illegality of humanitarian intervention under international law, yet without attaching consequences thereto in terms of individual criminal responsibility, is less likely to have an erosive impact on the international legal framework on the use of force and is more likely to keep intact the majority view (among states and scholars) that unilateral humanitarian interventions contravene the prohibition on the use of force.

D Defining ‘Genuine’ Humanitarian Intervention

Over the past years, numerous catalogues of criteria have been put forward to distinguish humanitarian interventions that ought to be deemed permissible from those that should be denounced. Three essential criteria figure in the large majority of catalogues as a well-established *minimum minimorum* and should arguably also provide the basic point of departure from an ICC perspective.⁸⁵ The first requirement concerns the existence of a grave and large-scale humanitarian crisis, which is the product ‘either of state action, or state neglect or inability to act, or a failed state situation’.⁸⁶

⁸³ Several factors may lead the ICC (prosecutor) to rely on the manifest threshold rather than on a ground excluding criminal responsibility, including, for instance, the desire not to take an express position on the legality of humanitarian intervention under international law, the desire not to invest time and resources in an investigation that will ultimately not lead to a conviction anyway or a desire not to create a precedent for greater reliance on various grounds excluding criminal responsibility in other cases.

⁸⁴ This is similar to the approach suggested by Leclerc-Gagne and Byers, *supra* note 9, at 386–387.

⁸⁵ See, e.g., *Kosovo Report*, *supra* note 48, at 192–198; International Commission on Intervention and State Sovereignty (ICISS), Responsibility to Protect, UN Doc A/57/303, December 2001, Annex, at xi–xii, 32ff; High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, annexed to UN Doc A/59/565, 2 December 2004, para. 207; UN Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc. A/59/2005, 21 March 2005, para. 126; ‘Chemical Weapon Use by Syrian Regime’, *supra* note 39, at 806–807; Rodley, *supra* note 36, at 788ff; Lowe and Tzanakopoulos, *supra* note 46, paras 39ff.

⁸⁶ ICISS, *supra* note 85, at xi–xii, paras 4.18–4.31. In a similar vein, see *Kosovo Report*, *supra* note 48, at 193–194; High-Level Panel on Threats, Challenges and Change, *supra* note 85, para. 207; UN Secretary-General, *supra* note 85, para. 126.

This requirement poses little difficulty where the UN Security Council has recognized the existence of grave human rights violations or crimes against humanity. Yet, even absent such recognition, leaders may of course have good reason to believe in good faith that this requirement has been fulfilled. A second requirement concerns the need for military intervention to be a 'last resort', justifiable only when other alternatives have been reasonably exhausted.⁸⁷ Third, humanitarian intervention is subject to a proportionality test (similar to the proportionality test for defence of persons under Article 31(1)(c) of the Rome Statute). The implication here is that the scale, duration and intensity of the planned military intervention should not exceed what is necessary to secure the defined objective.

To the aforementioned core requirements are often added additional preconditions. Two substantive criteria that figure prominently – and that find their origins in the *bellum justum* doctrine – concern the need for a 'right intention' and a 'balance of consequences'. 'Right intention' presupposes that the primary purpose of military action is to end human suffering, not to further the intervening state's political (or economic) agenda.⁸⁸ The 'balance-of-consequences' concept implies that there should be a reasonable chance of success in halting or averting the suffering that justifies the intervention, with the consequences of action not likely to be worse than the consequences of inaction.⁸⁹

While it is impossible, within the scope of this article, to fully do justice to the debate, several of the suggested preconditions – in particular, the final two – pose complex challenges. Modern-day *jus contra bellum* has traditionally steered clear from inquiring into the motives underlying military intervention. This is evident, for instance, from the International Court of Justice's (ICJ) assertion that, when the requirements of Article 51 of the UN Charter are met, self-defence can be legally invoked 'even though there may be a possibility of an additional motive, one perhaps even more decisive'.⁹⁰ The Kampala Amendments' affirmation that the manifest nature of a breach of the UN Charter is an 'objective' qualification points in the same direction.⁹¹ The more prudent view would seem to be that a state's motive can only impact the analysis if it is evident from the state's conduct that it is not pursuing humanitarian aims. Alternatively, it could be argued that the proportionality requirement offers a sufficient, and more objective, guarantee against abuse by states manifestly pursuing

⁸⁷ See, e.g., ICISS, *supra* note 85, paras 4.37–4.38; High-Level Panel on Threats, Challenges and Change, *supra* note 85, para. 207; UN Secretary-General, *supra* note 85, at para. 126. The implication is that serious peaceful solutions must have been attempted before force is employed, including, for instance, economic sanctions. As with the exercise of self-defence, however, this requirement must arguably be construed with a degree of flexibility, having regard, for example, to the urgency of the situation, the territorial state's unwillingness to consent to an impartial peacekeeping operation, and so on.

⁸⁸ E.g., ICISS, *supra* note 85, paras 4.33–4.36; High-Level Panel on Threats, Challenges and Change, *supra* note 85, para. 207; UN Secretary-General, *supra* note 85, para. 126.

⁸⁹ E.g., ICISS, *supra* note 85, paras 4.41–4.43; High-Level Panel on Threats, Challenges and Change, *supra* note 85, para. 207; UN Secretary-General, *supra* note 85, para. 126.

⁹⁰ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 127.

⁹¹ Kampala Amendments, *supra* note 2, Annex II: Amendments to the Elements of Crime, para. 3.

other aims. Furthermore, the ‘balance-of-consequences’ criterion presupposes a degree of predictability that is often lacking in the context of military intervention abroad. Thus, while it is possible in the context of a specific targeting decision during an armed conflict to verify whether the person ordering the attack reasonably knew that the collateral damage would be ‘clearly excessive’ in relation to the concrete and direct anticipated military advantage,⁹² this exercise cannot easily be transplanted to the *jus contra bellum* sphere.

The outcome of an intervention cannot be tested against a counter-factual scenario as it would have occurred absent military action. NATO’s 1999 air campaign is a case in point. In particular, the Independent International Commission on Kosovo notes how ‘NATO believed that a relatively short bombing campaign would persuade Milošević to sign the Rambouillet agreement. That was a major mistake.’⁹³ As mentioned before, it eventually took a 78-day bombing campaign, causing between 2,500 and 5,000 casualties, for Milošević to give in. In addition, there is room for debate as to whether the campaign achieved its stated aim and what its impact was beyond the stated aim.⁹⁴ Limiting the impact of an intervention to the halting of a humanitarian catastrophe proper, without further ripple effects, is not evident. As NATO’s operations in Serbia and Libya illustrate, the line between the protection of civilians and fostering regime change or secession may indeed be thin.⁹⁵ In the end, it appears more appropriate to either drop the ‘balance of consequences’ as an autonomous criterion or to at least construe it narrowly, along the lines of the duress provision in Article 31(1)(d) of the Rome Statute, as requiring that leaders should not ‘*intend to cause a greater harm than the one sought to be avoided*’ (emphasis added).

In all, the ICC prosecutor should arguably confine herself or himself to verifying that, having regard to the planning and implementation,⁹⁶ the operation does not manifestly exceed what is necessary to put an end to the humanitarian catastrophe that triggered it. By way of illustration, where an intervention would be inspired by large-scale attacks against a minority living in a defined part of a country, systematic offensive operations against military targets far removed from the region concerned would arguably fail the proportionality test. If attacks against civilians were carried out primarily by means of attack helicopters, this could – from a proportionality perspective – justify the installation of a no-fly zone or, possibly, targeted air strikes aimed at destroying the helicopter fleet of the regime concerned. Yet a much broader offensive campaign, or a large-scale ground invasion, would *prima facie* seem incompatible

⁹² In the sense of Rome Statute, *supra* note 4, Art. 8(2)(b)(iv).

⁹³ *Kosovo Report*, *supra* note 48, at 4.

⁹⁴ Again, in the words of the *Kosovo Report* (*ibid.*, at 5), ‘the NATO war was neither a success nor a failure; it was in fact both. ... [T]he intervention failed to achieve its avowed aim of preventing mass ethnic cleansing. ... The Serbian people were the main losers. Kosovo was lost. Many Serbs fled or were expelled from the province. Serbia suffered considerable economic losses and destruction of civilian infrastructure’.

⁹⁵ See note 150 below.

⁹⁶ See, e.g., Leclerc-Gagne and Byers, *supra* note 9, at 388. The authors point at various kinds of evidence, ‘including documents related to the planning of the operation, diplomatic communications with coalition partners, special rules of engagement designed to avoid civilian casualties’.

with the proportionality test. The challenges related to the proportionality assessment are amply illustrated by the NATO operation in Libya in 2011, where several states accused NATO of overstepping the UN Security Council's authorization to use force 'to protect civilians and civilian populated areas under threat of attack'.⁹⁷

Apart from the foregoing substantive criteria, additional procedural preconditions have also been put forward. A common suggestion holds that humanitarian intervention is possible only when the UN Security Council is blocked by the veto of one or more permanent members and that states should first seek to acquire Security Council authorization under Chapter VII of the UN Charter. A more flexible interpretation holds that humanitarian intervention is equally possible when it is evident – for example, from statements issued by a permanent member – that a draft resolution would be vetoed (in other words, that a 'hidden veto' suffices).⁹⁸ Construing this as an autonomous requirement may put the ICC (prosecutor) on thin ice from the perspective of the principle of legal certainty. At the same time, having regard to the primary role of the Security Council for the maintenance of international peace and security, it appears desirable to maintain a strong incentive for states to first attempt to secure UN authorization for enforcement action, before going down the road of a unilateral intervention. By analogy to the ICJ's treatment of the reporting requirement under Article 51 of the UN Charter in the *Nicaragua* case, it could be argued that the failure to seek support from the Security Council constitutes 'one of the factors indicating whether the State in question was itself convinced' that it was conducting a genuine humanitarian intervention.⁹⁹ *Mutatis mutandis*, a similar approach appears commendable with regard to the claims that humanitarian interventions ought to be permissible only when undertaken on a 'collective' basis,¹⁰⁰ particularly under the aegis of a regional or sub-regional organization.¹⁰¹ Again, the 'collective' nature of an operation could be construed as a relevant subsidiary factor in assessing the 'genuinely humanitarian' nature of an intervention rather than a separate precondition.

In the end, the possibility of having to assess whether leaders responsible for an allegedly humanitarian intervention have committed a 'crime of aggression' may put the ICC prosecutor in the delicate position of having to indirectly formalize and legalize the humanitarian intervention doctrine. In such a setting, the ICC prosecutor will need to identify the main requirements of the doctrine and assess whether these were reasonably complied with. If the requirements are set very high, it is not excluded that even operations comparable to NATO's Kosovo campaign would be regarded as

⁹⁷ SC Res. 1973 (2011), 17 March 2011, para. 4. See, e.g., Deeks, 'The NATO Intervention in Libya-2011', in T. Ruys and O. Corten (eds), *The Use of Force in International Law: A Case-based Approach* (2018) 749, at 754–755. Consider also the critique of Milanovic, who argues that the air strikes against Syria in April 2018 failed to meet the requirements for humanitarian intervention set forth by the UK government itself. M. Milanovic, 'The Syria Strikes: Still Clearly Illegal', *EJIL:Talk!* (15 April 2018), available at www.ejiltalk.org/the-syria-strikes-still-clearly-illegal/.

⁹⁸ E.g., Rodley, *supra* note 36, at 790. In a similar vein, see Leclerc-Gagne and Byers, *supra* note 9, at 388.

⁹⁹ *Nicaragua*, *supra* note 90, para. 200.

¹⁰⁰ E.g., *Kosovo Report*, *supra* note 48, at 195.

¹⁰¹ E.g., ICISS, *supra* note 85, para. 6.34.

a manifest act of aggression.¹⁰² Conversely, if the requirements are set very low, this may result in an undesirable erosion of the prohibition on the use of force and of the Chapter VII prerogatives of the UN Security Council. The application of the proportionality principle, in particular, will require advanced tightrope walking on the part of the ICC.

3 Aggression before the ICC – Warning: Speculation Alert!

A *Looking the Wrong Way?*

As mentioned earlier, the activation of the ICC's jurisdiction over the crime of aggression will inevitably give rise to occasions where the ICC will be required to examine instances involving interstate recourse to force. If and when this happens, it is clear that the work of the ICC will have an (indirect, but no less significant) impact on the law on the use of force – just as the work of the ICC and the ad hoc criminal tribunals has left its mark on the development of the law of armed conflict. So far, attention has focused primarily on the possible 'chilling effect' *vis-à-vis* unilateral humanitarian interventions. By contrast, the application of the ICC's jurisdiction to other uses of armed force has received scant attention. Yet it appears that scholars have been looking the wrong way, overstating the risk of such 'chilling effect', while ignoring more far-reaching repercussions for the *jus contra bellum*. This is partly because unilateral humanitarian interventions remain a rare phenomenon. Throughout the UN Charter era, only a handful of unilateral interventions were inspired (at least partly) by a humanitarian agenda. Far fewer were actually justified by reference to the humanitarian intervention doctrine. Claims of self-defence or intervention by invitation are indeed far more common. Yet, the impact of the crime of aggression in such scenarios remains under-explored. A comprehensive *tour d'horizon* of possible scenarios is beyond the scope of this article. A number of observations can nonetheless be made. Warning: speculation alert!

B *Gravity and Scale*

First, it is hardly disputable that the lion's share of interstate uses of force that take place around the globe are excluded from the scope of Article 8bis of the Rome Statute, not because they do not involve one of the acts copied from Article 3 of the UN General Assembly's definition of aggression but, rather, because, having regard to the 'circumstances of [the] case, including the gravity of the acts concerned and their consequences',¹⁰³ they lack the required 'gravity and scale' to constitute a manifest violation of the UN Charter. These two qualifiers were indeed inserted to exclude uses of force that were deemed too 'minimal' to warrant the Court's attention,¹⁰⁴ an

¹⁰² After identifying various criteria, Lowe and Tzanakopoulos conclude that '[a]ll of the instances of humanitarian intervention claimed so far would fail on at least one of these criteria'. Lowe and Tzanakopoulos, *supra* note 46, para. 43.

¹⁰³ Kampala Amendments, *supra* note 2, Annex III: Understandings Regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Understanding 6.

¹⁰⁴ Further, see, e.g., Trahan, *supra* note 23, at 57–59.

approach that is fully in line with the Court's jurisdiction being limited to 'the most serious crimes of concern to the international community as a whole'.¹⁰⁵ Analogies can be drawn with the ICJ's distinction between 'less grave' uses of force, which should not be qualified as 'armed attack' in light of their 'scale and effects'.¹⁰⁶ Relevant factors could include the amount of force and the means used, the resulting loss of life and damage to infrastructure and the duration of the episode.¹⁰⁷

Other relevant variables concern the premeditated or 'on-the-spot' character of the recourse to force (the former being more likely to give rise to a manifest breach).¹⁰⁸ A related factor is the level at which the decision to use force was taken as well as the identity of the authors. Forcible acts by police units, for instance, will not normally come in the scope of Article 8bis. This also follows from the 'leadership' element, which stipulates that aggression can be committed only 'by a person in a position effectively to exercise control over or to direct the political or military action of a State' (Article 8bis(1) of the Rome Statute). The wording does not refer to 'police action'. Nor is it conceivable that a local border guard opening fire across the border would meet the leadership criterion.

Various examples have been put forward in legal doctrine of uses of force that would fail to meet the gravity and scale threshold. The most obvious and important example relates to border skirmishes¹⁰⁹ (or what the ICJ has (controversially) labelled 'mere frontier incidents'¹¹⁰) between neighbouring states, which are regrettably rife in various parts of the world. To this may be added isolated military encounters between military units on land, at sea or in the air (such as the downing of a Russian warplane by Turkish F-16s late 2015).¹¹¹ Small-scale non-combatant evacuation operations would also seem exempted from the scope of Article 8bis of the Rome Statute.¹¹² The same is arguably true for other types of operations that are sometimes thought – rightly or wrongly – not to attain an alleged *de minimis* threshold to qualify as uses of force in the sense of Article 2(4) of the UN Charter¹¹³ and that are sometimes labelled

¹⁰⁵ Rome Statute, *supra* note 4, Arts. 1, 5(1), 17(1)(d).

¹⁰⁶ *Nicaragua*, *supra* note 90, paras 191, 195.

¹⁰⁷ McDougall mentions 'geographic breadth, intensity or duration of a use of force' as possible factors. McDougall, *supra* note 10, at 131.

¹⁰⁸ Consider, by analogy, Rome Statute, *supra* note 4, Art. 8(1), stating that the Court shall have jurisdiction in respect of war crimes 'in particular when committed as part of a plan or policy' of a large-scale commission of such crimes.

¹⁰⁹ See, e.g., Barriga, *supra* note 25, at 29; Ambos, *supra* note 30, at 198; Werle and Jeßberger, *supra* note 1, para. 1475; Murphy, *supra* note 78, at 362. According to McDougall, 'border incidents' constituted one of the few factual examples that were cited during the debates in the Special Working Group on the Crime of Aggression. McDougall, *supra* note 10, at 131.

¹¹⁰ *Nicaragua*, *supra* note 90, para. 195.

¹¹¹ See further Ruys, Ferro and Verlinden, 'Digest of State Practice: 1 July–31 December 2015', 3 *JUFIL* (2016) 126, at 157–158.

¹¹² E.g., Trahan, *supra* note 23, at 58; Murphy, *supra* note 78, at 369.

¹¹³ Supporting the existence of a *de minimis* threshold. Corten, *supra* note 43, at 67–140. For a rebuttal, see Ruys, 'The Meaning of "Force" and the Boundaries of the Jus ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?', 108 *AJIL* (2014) 159.

as ‘extra-territorial law enforcement’¹¹⁴ – that is, targeted killings of single individuals and other small-scale counter-terrorist operations abroad, forcible abductions of individual persons or limited ‘hot-pursuit’ operations across a state’s border.¹¹⁵ Furthermore, most cyberattacks would not normally amount to a manifest violation of the UN Charter.¹¹⁶

If it is relatively safe to assume that the foregoing acts will not be regarded as manifest breaches of the UN Charter for lack of gravity and/or scale, other cases pose far more complex problems. First, what about premeditated, yet isolated, air strikes that result in considerable damage as well as several fatalities and that may be strictly ‘punitive’ reprisals or lack a clear defensive basis? An example that comes to mind is the 1993 US missile attack against the Iraqi intelligence service, two months after the USA thwarted a plot to assassinate former President George Bush Sr.¹¹⁷ And what about the Israeli air strike against the Iraqi nuclear reactor of Osiraq in 1981?¹¹⁸ Second, it remains uncertain how the ICC might deal with so-called ‘bloodless’ invasions, where a state invades and occupies foreign territory without such acts giving rise to actual fatalities (the Russian intervention in Crimea early in 2014 comes to mind). Admittedly, the Nuremberg *acquis* lends support to the view that ‘bloodless’ invasions (such as Germany’s invasions of Austria and Czechoslovakia) may amount to aggression.¹¹⁹ Yet ‘bloodless’ invasions may also be much more small-scale – for example, involving the occupation of a contested, yet uninhabited, islet. Third, how will the ICC handle small-scale operations that form part of a broader pattern of recurrent attacks, such as a campaign of drone strikes or of state-sponsored terrorist attacks?

With respect to the latter issue, evidence in the case law of the ICJ and in state practice appears to support the view (although not entirely uncontested) that different minor attacks may be accumulated to determine whether there exists an ‘armed attack’ triggering the right of self-defence, at least inasmuch as these attacks are linked in time, cause and source.¹²⁰ *Mutatis mutandis*, the same approach appears appropriate for purposes of asserting the existence of a crime of aggression.¹²¹ The challenge, however, in such a situation would be to demonstrate that the attacks form part of a broader and premeditated campaign.

¹¹⁴ See, e.g., Dinstein, *supra* note 14, at 289–298.

¹¹⁵ E.g., Trahan, *supra* note 23, at 59.

¹¹⁶ Ambos, ‘Individual Criminal Responsibility for Cyber Aggression’, 21 *JCSL* (2016) 495, at 495–496 (noting also that individual hackers will not normally meet the leadership criterion). However, it cannot *a priori* be excluded that the effects of a state-directed cyberattack would be such as to bring them within the scope of Art. 8bis of the Rome Statute. In this sense, e.g., Scheffer, *supra* note 11, at 1488.

¹¹⁷ See further Kritsiotis, ‘The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law’, 45 *International and Comparative Law Quarterly* (1996) 162.

¹¹⁸ Further, see, e.g., Fisher, ‘Le bombardement par Israël d’un réacteur nucléaire irakien’, 27 *Annuaire français de Droit international* (1981) 147.

¹¹⁹ See Kreß, *supra* note 35, at 522–523.

¹²⁰ See further T. Ruys, ‘Armed Attack’ and Article 51 of the UN Charter (2010), at 168–175.

¹²¹ Note that McDougall similarly finds that ‘the leader of a State that deliberately instigates an international armed conflict by engaging in frontier incidents could readily be held accountable for subsequent conduct or a course of conduct under Article 8bis(1)’. McDougall, *supra* note 10, at 134.

Otherwise, one might look for guidance in the application by the prosecutor and the Pre-Trial Chambers of the gravity threshold as an admissibility requirement (as per Article 17(1)(d) of the Rome Statute) and as a case selection criterion. Some precedents appear to suggest that a limited number of victims may result in a finding that the required situational or case gravity is lacking. Thus, with regard to the Israeli raid against the M/V *Mavi Marmara*, the prosecutor found that 'the total number of victims [that is, 10 casualties as well as around 50–55 injured passengers] reached relatively limited proportions'.¹²² The prosecutor also concluded that the incident had had a limited impact in that the interception of the flotilla '[could not] be considered to have resulted in blocking the access of Gazan civilians to any essential humanitarian supplies on board the vessels in the flotilla'.¹²³ In light of these and other factors, the situation was deemed not to meet the gravity threshold.¹²⁴

The former case *prima facie* suggests that a single air strike, resulting in a small number of casualties only, does not possess the required situational gravity and will, *a fortiori*, not be of sufficient gravity to qualify as a manifest breach of the UN Charter.¹²⁵ At the same time, it follows from the ICC's practice that the gravity element comprises both a quantitative and a qualitative dimension.¹²⁶ In particular, in accordance with Article 29(2) of the Regulations of the Office of the Prosecutor, in assessing the gravity of the crimes allegedly committed, the prosecutor will 'consider various factors including their scale, nature, manner of commission, and impact'.¹²⁷

¹²² OTP, Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report, 6 November 2014, para. 138, available at [www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov2014Eng.pdf](http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf).

¹²³ *Ibid.*, para. 141.

¹²⁴ Contrast this to the authorization from the Pre-Trial Chamber to proceed with an investigation into the situation in Georgia with regard to the hostilities in and around South Ossetia in 2008 in light of the considerable scale and impact of the crimes. Decision on the Prosecutor's Request, *infra* note 127, para. 54; see also Request for an Authorisation, *infra* note 126, para. 325ff.

¹²⁵ Note that the Pre-Trial Chamber disagreed with the prosecutor's treatment of the gravity threshold and held that the number of victims of the flotilla raid should have been regarded as 'militating in favour of sufficient gravity, rather than the opposite'. Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision Not to Initiate an Investigation, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (ICC-01/13), Pre-Trial Chamber I, 16 July 2015, para. 26. For the OTP's rebuttal, see OTP, Situation on Registered Vessels of Comoros, Greece and Cambodia, Notice of Prosecutor's Final Decision under Rule 108(3), Doc. ICC-01/13-57, 29 November 2017, paras 73–80 (holding that the Pre-Trial Chamber failed to consider the qualitative aspect and considering it inappropriate 'to depart from its original determination').

¹²⁶ E.g., Request for an Authorisation of an Investigation Pursuant to Article 15, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* (ICC-01-15), Office of the Prosecutor, 17 November 2015, para. 326. Consider also the case brought against Abu Garda and others. Decision on Confirmation of Charges, *In the Case of the Prosecutor v. Bahar Idriss Abu Garda* (ICC-02/05-02/09), Pre-Trial Chamber I, 8 February 2010, where an attack resulting in the killing of 12 African Union peacekeepers was deemed to possess the required case gravity, in light of the qualitative dimension of the crimes (compare the fact that the attacks were committed against peacekeepers and resulted in a disruption of peacekeeping activities).

¹²⁷ ICC, Regulations of the Office of the Prosecutor, Doc. ICC-BD/05-01-09, 23 April 2009. In a similar vein, see Decision on the Prosecutor's Request for Authorization of an Investigation, *Situation in Georgia* (ICC-01/15), Pre-Trial Chamber I, 27 January 2016, para. 51 (with further references). Note that 'scale' is mentioned here as an element of 'gravity', whereas Rome Statute, *supra* note 4, Art. 8bis(1) speaks of 'scale and gravity'.

One may wonder whether, in assessing the scale and gravity of an act of aggression, the ICC will focus mostly on the quantitative aspect or will also factor in a qualitative dimension, taking into consideration the special nature of the ‘crime of aggression’ as the ‘supreme international crime’.¹²⁸ This question is closely related to the conundrum as to whether the crime of aggression should be thought of as a moral wrong against the aggrieved state, a political crime that ‘yields an abstract harm’ (as the dominant narrative holds)¹²⁹ or, rather, as a compound of wrongs against the individuals (whether combatants or civilians) who are the ultimate victims of the actual or latent violence by the aggressor.¹³⁰ If aggression is construed primarily as a crime against the state, then an invasion and occupation – even if ‘bloodless’ – of even a small part of its territory could still be of substantial ‘gravity’. Territorial annexation is indeed the gravest assault upon state sovereignty. As Thomas Grant puts it, when the use of force challenges the territorial settlement, the law ‘admits of no qualification’.¹³¹ In the alternative view, an act of aggression that produces little direct (physical) harm to individuals and little other impact on the population of the targeted state might be regarded as insufficiently grave.¹³²

Some have – understandably – questioned whether the ICC is properly equipped to evaluate the impact of an act of aggression on a state’s (abstract) interests (geopolitical or other), instead of employing death and destruction as the primary measuring sticks.¹³³ Still, as McDougall notes, ‘for all the reputational risks it might entail, there would seem to be little basis from a literal, teleological or intent interpretive point of view to exclude such factors from the consideration of the Court’.¹³⁴ Interestingly, the 2016 Office of the Prosecutor’s policy paper on case selection and prioritization indicates that the prosecutor will ‘give particular consideration to prosecuting ... crimes that ... result in, *inter alia*, ... the illegal dispossession of land’.¹³⁵ How the ICC prosecutor and the chambers will deal with the matter is impossible to predict with any degree of certainty. Ultimately, the *travaux* of the Kampala Amendments suggests that the Court ‘has been given very little guidance as to where to draw the line in the sand’.¹³⁶

¹²⁸ International Military Tribunal, *supra* note 74, at 186.

¹²⁹ In this sense, see M. Walzer, *Just and Unjust Wars* (1977), at 55ff; Luban, ‘Just War and Human Rights’, 9 *Philosophy and Public Affairs* 160, at 161; Creegan, ‘Justified Uses of Force and the Crime of Aggression’, 10 *JICJ* (2012) 59, at 59–68, 81–82.

¹³⁰ In this sense, see Dannenbaum, ‘Why Have We Criminalized Aggressive War?’, 126 *Yale Law Journal* (2016) 1242, at 1270ff; see also J. McMahan, *Killing in War* (2009).

¹³¹ T. Grant, *Aggression against Ukraine* (2015), at 153.

¹³² Thus, Dannenbaum finds that ‘military takings of uninhabited territory like the Senkaku/Diaoyu Islands would not be internationally criminal’. Dannenbaum, *supra* note 130, s 5.2. According to Kreß, whether or not a ‘bloodless invasion’ is covered by Rome Statute, *supra* note 4, Art. 8bis depends, *inter alia*, on its ‘spatial and temporal dimension’, ‘the number of armed forces’ deployed and the ‘extent [to which] the common life within the invaded state is disturbed and how many human beings are put at serious risk of being affected by the hostilities’. Kreß, *supra* note 35, at 523.

¹³³ McDougall, *supra* note 10, at 136–137.

¹³⁴ *Ibid.*, at 137.

¹³⁵ OTP, ‘Policy Paper on Case Selection and Prioritisation’, 15 September 2016, at para. 41, available at www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

¹³⁶ McDougall, *supra* note 10, at 132.

C Character

As explained above, the ‘character’ component was inserted with a view to exempting from Article 8bis of the Rome Statute certain categories of use of force of contested legality or, put differently, cases falling in a legal ‘grey area’. Again, the main example that has been cited in legal literature concerns the possibility of a genuine humanitarian intervention. Yet various other uses of force may similarly lack the required ‘character’ to constitute a manifest breach of the UN Charter in the sense of Article 8bis (read in conjunction with Article 22(2) of the Rome Statute).¹³⁷ By explicitly tasking the ICC with verifying the manifest character of alleged acts of aggression, the states parties to the Rome Statute have thus burdened the ICC with the heavy responsibility – which, moreover, is somewhat at odds with the traditional function of the judiciary¹³⁸ – of mapping (and, by so doing, consolidating) the uncertainties in the law (specifically, the *jus contra bellum*).

At least with regard to three types of recourse to force, it must be acknowledged that there is disagreement between states and scholars as to their legality, with some claiming that they are compatible with the UN Charter provisions on the use of force or have been accepted pursuant to developments in state practice and *opinio juris* and others contesting this. These categories – an in-depth discussion of which is beyond the scope of this article – include (i) operations aimed at the ‘protection of nationals’ abroad; (ii) anticipatory self-defence against ‘imminent’ attacks and (iii) self-defence against (cross-border) attacks by non-state actors (which are not imputable to a state).

For each of these categories, it is implausible that the ICC would indict, let alone sentence, political and military leaders of the state concerned. First, these incidents may not come before the Court in the first place. Thus, ‘non-combatant evacuation operations’ have frequently gone unprotested, and almost unnoticed, in the international community. States may have no interest in raising these cases before the ICC, and the ICC prosecutor is bound to have little appetite to start investigations *proprio motu*. The same appears likely for small-scale counter-terrorist operations abroad, such as the UK strike in Syria in August 2015 against a suspected terrorist alleged to be ‘planning and directing imminent armed attacks’ against the UK.¹³⁹ Even if they were to demand the ICC prosecutor’s attention, most of these cases involve uses of force that are relatively small-scale, making it likely that they would be deemed not to attain the required ‘gravity and scale’ in the sense of Article 8bis(1) of the Rome Statute. In the alternative, and particularly with regard to more large-scale operations (for example, operations similar to the 1967 Six-Day War or the US-led military operation against the ‘Islamic State’/Da’esh in Syria), it is plausible that the ICC will acknowledge that

¹³⁷ For an excellent overview of the various grey areas of the *jus ad bellum*, see Krefß, *supra* note 35, at 457–502.

¹³⁸ Consider, e.g., the debate on the permissibility of a ‘*non liquet*’. Bodansky, ‘Non Lique’, in *Max Planck Encyclopedia of Public International Law*, at 1669.

¹³⁹ Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/688, 8 September 2015.

these operations enter into the ‘grey area’ of the *jus contra bellum* and, accordingly, lack the required ‘character’ under Article 8bis(1) of the Rome Statute.¹⁴⁰

Similar to what was argued above with regard to the humanitarian intervention scenario, a finding by the ICC that operations of the types mentioned above do not constitute manifest breaches of the UN Charter is likely to indirectly influence the future evolution of the *jus contra bellum*, in that it may strengthen the perception of legality of such operations. Even if the ICC refrains from explicitly affirming their legality, this aspect may well be lost in translation. Precedents of this type are likely to have an impact on the exchanges of claims and counter-claims at the international level and contribute to a (further) shift of the justificatory discourse. States favouring the legality of these (controversial) uses of force may be stating their position more assertively and openly, while it will become more difficult for other states to insist on their illegality. At the same time, in applying the ‘character’ component, the ICC can be expected to further define the precise conditions under which uses of force of the types mentioned above are exempt from Article 8bis(1) of the Rome Statute.

With regard to the ‘protection of nationals’ operations, the ICC could have recourse to the criteria spelled out by Humphrey Waldock, according to which such operations ought to meet the following three cumulative conditions: (i) there should be an imminent threat of injury to nationals; (ii) there should be a failure or inability on the part of the territorial sovereign to protect them and (iii) the action of the intervening state must be strictly confined to the object of protecting its nationals against injury.¹⁴¹ With regard to anticipatory self-defence, the ICC could be expected to at least affirm the need for an ‘imminent’ threat, leaving ‘no moment for deliberation’ (along the lines of the *Caroline* formula), while rejecting the possibility of self-defence against ‘non-imminent’ threats.¹⁴² With regard to self-defence against attacks by non-state actors, the ICC might confirm that such actions should in principle be targeted only against the non-state actors responsible for the cross-border attack(s) giving rise to the action in self-defence. At the same time, the ICC might be in a position to put flesh, for example, on the concept of ‘imminence’ or the controversial ‘unable-or-unwilling’ doctrine.¹⁴³

In all, as with the case of humanitarian interventions, it is possible that, by mapping the uncertainties in the *jus contra bellum*, the ICC will shed greater clarity on its core and on the factors that distinguish between lawful uses of force and those that are ‘unambiguously’ unlawful. By so doing, the ICC may well contribute to a certain ‘erosion’ of the legal framework governing the use of force in that it will indirectly

¹⁴⁰ See, e.g., Werle and Jeßberger, *supra* note 1, paras 1454, 1475 (referring to the protection of nationals and pre-emptive self-defence).

¹⁴¹ Waldock, ‘The Regulation of the Use of Force by Individual States in International Law’, 81 *Recueil des Cours* (1952) 451, at 467.

¹⁴² On the *Caroline* formula and its origins, see Wood, ‘The Caroline Incident – 1837’, in Ruys and Corten (eds), *The Use of Force in International Law: A Case-based Approach* (2018) 5.

¹⁴³ Further, see, e.g., Lubell, ‘The Problem of Imminence in an Uncertain World’, in Weller, *supra* note 36, at 697; Starski, ‘Right to Self-Defense, Attribution and the Non-State Actor: Birth of the “Unable or Unwilling” Standard’, 75 *Zeitschrift für ausländisches und öffentliches Recht* (2015) 455.

lend credence to some of the more ‘expansionist’ claims in legal doctrine. Seen from such a perspective, the activation of the ICC’s jurisdiction over the crime of aggression will not be ‘cost-free’. At the same time, the ICC’s work could provoke a certain *rap-prochement* between divergent opinions as to the outer limits of the rules on the use of force, while nonetheless maintaining a deterrent *vis-à-vis* abusive applications of, for example, the protection-of-nationals doctrine, where states use this doctrine as a fig leaf for furthering their political agenda.¹⁴⁴

Again, the aforementioned scenario is predicated on the ICC being presented with, for instance, a situation of pre-emptive self-defence or protection of nationals and dismissing it as lacking the required manifest character for the purposes of Article 8bis(1) of the Rome Statute. No such impact on the law on the use of force would be forthcoming if the ICC were instead to approach these situations through the lens of the various grounds excluding criminal liability. While this possibility has been entertained by a number of scholars,¹⁴⁵ it would seem less likely to occur,¹⁴⁶ if only because the ‘character’ component was inserted precisely to make sure that the ICC would steer clear from troubled legal waters.

Another question that is subject to considerable controversy is the permissibility of the so-called ‘intervention by invitation’ in situations of civil war (consider, for example, the 2015 Saudi-led intervention in Yemen).¹⁴⁷ It is uncertain whether such a situation might find its way to the Court (the *de jure* regime inviting outside intervention is certainly unlikely to take the initiative to trigger ICC investigations). Even if it would, one possible approach would be to hold that, even if such interventions may well give rise to a breach of the non-intervention principle *juncto* the right of self-determination, they do not give rise to a use of force ‘by a State against ... another State’ ‘in their international relations’ in the sense of Article 2(4) of the UN Charter and Article 8bis(2) of the Rome Statute and are accordingly excluded from the scope of the crime of aggression (irrespective of their legality or illegality under international law).¹⁴⁸ In the end, as far as the ‘character’ component is concerned, there are few knowns and plenty of unknowns. What is clear is that – for better or worse – the states parties to the Rome Statute have made the ICC a key interpreter of the law on the use of force.

D Further Observations

If the ICC may have to tackle sensitive cases involving military operations that rest on a controversial legal basis, it may also be confronted with operations that *prima facie*

¹⁴⁴ It is worth recalling in this context that the opposition of states to the ‘protection of nationals’ doctrine, for instance, is inspired more by concerns over possible abuse, rather than by principled opposition to the doctrine as such. In this sense, see, e.g., Doswald-Beck, ‘The Legality of the United States Intervention in Grenada’, 31 *Netherlands International Law Review* (1984) 335.

¹⁴⁵ E.g., Weisbord, *supra* note 58, at 500 (suggesting that ‘defence of others’ might be relevant in an anticipatory self-defence context).

¹⁴⁶ See note 83 above.

¹⁴⁷ See, e.g., De Wet, ‘The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force’, 26 *European Journal of International Law (EJIL)* (2015) 979.

¹⁴⁸ Of course, it is not excluded that specific acts by the intervening state could, for instance, amount to war crimes or crimes against humanity and lead to ICC prosecution.

rest on an uncontroversial legal basis but that do not comply with the relevant underlying parameters. For instance, a state intervening pursuant to a request for outside intervention by the de jure authorities of the territorial state may choose to overstep the modalities of that consent.¹⁴⁹ Or a state may be acting pursuant to a Chapter VII authorization but overstep the boundaries of its mandate.¹⁵⁰ Alternatively, a state may be acting in reaction to an actual ‘armed attack’ in the sense of Article 51 of the UN Charter, but it may do so in a manifestly disproportionate manner.

In each of these cases, the ICC should not content itself with establishing the existence of a valid legal basis for military action but should also verify compliance with the underlying parameters. For instance, manifest disregard for the proportionality requirement of Article 51 of the UN Charter – as was apparently the case in Israel’s intervention in Lebanon in 2006¹⁵¹ – may give rise to a ‘crime of aggression’, just as much as the conducting of a military intervention without a proper legal basis.¹⁵² A careful assessment is nonetheless needed. For instance, a state reaction to an armed attack may itself give rise to further military action from the other party, leading to a gradual escalation of the force being used. In such a setting, an in-depth investigation will need to establish to what extent one or more political or military leaders bear responsibility for the escalation. Evidence, for example, in the form of public statements or instructions to the military, may suggest that a state deliberately intended a manifestly disproportionate response in the aftermath of an ‘armed attack’ (the planning of such action may well have preceded the actual attack).¹⁵³ Absent such evidence, however, the mental element needed to establish a crime of aggression would appear to be lacking.¹⁵⁴

Finally, as mentioned above, the Elements of Crime suggest that there is little room for a ‘mistake of law’ in the context of the crime of aggression, separate from the ‘character’ component of Article 8bis of the Rome Statute, and that leaders cannot hide behind alleged ‘flawed’ (and possibly manipulated) input from their legal advisors. It stands to wonder, however, whether a ‘mistake of law’ may nonetheless play a role where the mistake relates to a law that is ‘collateral’ to the central criminal

¹⁴⁹ On the need for states to respect the modalities of consensual intervention, see, e.g., Art. 3(e); Institute of International Law, Tenth Commission, Military Assistance on Request, Resolution, 8 September 2011, Art. 6.

¹⁵⁰ Consider, e.g., the debate as to whether NATO’s aerial campaign against Libya in 2011 complied with the mandate spelled out in SC Res. 1973(2011), 17 March 2011. See note 97 above.

¹⁵¹ See, e.g., Meeting Record of the 5489th Meeting of the UN Security Council, UN Doc S/PV.5489, 14 July 2006.

¹⁵² In this sense, see, e.g., Kreß, *supra* note 35, at 521. Against this, see Cassese and Gaeta, *supra* note 59, at 143–144.

¹⁵³ Compare to Eritrea Ethiopia Claims Commission, *Partial Award: Jus ad Bellum – Ethiopia’s Claims 1–8*, 19 December 2005, reprinted in (2009) 26 UNRIAA 457, para. 18.

¹⁵⁴ Indeed, in such scenario, there would appear to be no intent to engage in the conduct that qualifies as a ‘manifest’ breach of the UN Charter. More controversially, some authors suggest that the same is true where a leader planned only a minor border skirmish (even if not responding to a prior ‘armed attack’), and the situation were to subsequently get out of control and result in a large-scale invasion of a neighbouring state. In this sense, see Anggadi, French and Potter, *supra* note 63, at 76; Weisbord, *supra* note 58, at 497.

proscription – for example, in cases of ‘intervention by invitation’ where the authority of the person requesting outside intervention to speak on behalf of the state is contested (for instance, because the person concerned has lost effective control over the territory or is not the internationally recognized leader of the state).¹⁵⁵ Delicate questions of this nature have come up in various interventions, including more recent ones (for example, the Russian intervention in Crimea (2014) or the Saudi-led intervention in Yemen (2015)). In cases where genuine doubt could reasonably exist as to a person’s competence to invite outside intervention, one can conceive of these questions being addressed either in the context of the ‘character’ component of Article 8bis(1) of the Rome Statute or, alternatively, from the perspective of a mistake of law in the sense of Article 32 of the Rome Statute.

Otherwise, the notion of a ‘mistake of fact’ may play a more substantial role in the ICC’s handling of alleged crimes of aggression. Several mistakes of fact are indeed conceivable that would negate the mental element required for the crime of aggression. One obvious example would consist in an accidental incursion of a state’s territory or airspace by troops or aircraft from a neighbouring state. In such scenario, however, there may be no need to address the mental element since an incident of this nature would not appear to meet the required ‘gravity and scale’ in the sense of Article 8bis(1) of the Rome Statute to begin with, nor is it likely to involve the responsibility of a person fulfilling the ‘leadership’ requirement. *Mutatis mutandis*, the mental element may also be lacking when an incident results from a targeting error (consider, for example, the US bombing of the Chinese embassy in Belgrade during NATO’s air campaign in Serbia – a targeting error that was explained by the use of an outdated map¹⁵⁶) or where a state mistakenly believes it is responding to an imminent attack. Reference can be made in this respect to the tragic shooting by the USS *Vincennes* of Iran Air Flight 655 in the Persian Gulf in 1988, killing all passengers on board – an investigation by the International Civil Aviation Organization notably supported the thesis that ‘[the] aircraft was perceived as a military aircraft with hostile intentions’.¹⁵⁷ The mental element may also be lacking where the leaders of a state acting in self-defence honestly believe they are pre-empting an imminent invasion by a neighbouring state (which may or may not have been the case in the context of the Six-Day War).¹⁵⁸

4 Conclusion: The Impact of the Crime of Aggression on the *Jus ad Bellum*

At least symbolically, the activation of the ICC jurisdiction over the crime of aggression is a defining moment in the development of the international legal order, completing a

¹⁵⁵ In this sense, see Clark, ‘The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences’, 12 *Criminal Law Forum* (2001) 291, at 310.

¹⁵⁶ See, e.g., 45 (1999) *Keesing’s* 42955.

¹⁵⁷ Report of the ICAO Fact-finding Investigation on the Destruction of Iran Airbus 300, November 1988, reprinted in (1989) 28 *ILM* 900, para. 3.2.1.

¹⁵⁸ For a critical account, see J.B. Quigley, *The Six-Day War and Israeli Self-Defense: Questioning the Legal Basis for Preventive War* (2013).

process that was started at the end of World War I and that reached its point of no return at the 2010 Kampala Review Conference. While it remains to be seen whether it will be the ICC's Trojan horse, a victory for the international rule of law or whether the crime of aggression will simply remain stillborn, this article has attempted to map some of the possible consequences for the interpretation, and compliance pull, of the law on the use of force. Other delicate questions, for example, pertaining to the collection of evidence, have been left aside. As discussed, several scholars have warned of a 'chilling effect', in that the prospect of ICC prosecution could deter leaders from sanctioning military interventions serving legitimate goals, chiefly unilateral humanitarian interventions. By contrast, others have warned that if the ICC were to adopt a narrow interpretation of Article 8bis(1) of the Rome Statute, the unintended consequence may be that the activation of the Court's jurisdiction over the crime of aggression will ultimately lower the threshold for states to have recourse to force and thus achieve the exact opposite of its deterrent aim.¹⁵⁹

While the prospect of individual criminal responsibility can have a stronger deterrent effect on decision-makers at the national level than the possibility of international responsibility on the part of the state,¹⁶⁰ it is difficult to predict the impact resulting from the activation of the ICC's jurisdiction over crimes of aggression. Many variables indeed come into play, including the likelihood that cases will be brought before the Court, the question whether states have ratified the Kampala Amendments (without making use of the opt-out mechanism) as well as, for instance, the possible use of the referral or deferral mechanisms by the UN Security Council. In any event, warnings of a 'chilling effect' on 'legitimate' interventions would seem greatly exaggerated in that the ICC is highly unlikely to indict, let alone sentence, leaders involved, for example, in a genuine humanitarian intervention or in a limited 'protection-of-nationals' operation. Conversely, whether decisions not to indict or convict alleged 'aggressors' would result in an erosion of the legal framework governing the use of force will depend by and large on the specific reasoning followed by the ICC in arriving at such a conclusion.

First, it is possible that certain uses of force are deemed not to possess the required 'gravity and scale' to qualify as manifest breaches of the UN Charter. The Kampala Amendments and its *travaux* provide little guidance on how these parameters ought to be interpreted. If the ICC were to adopt a very high threshold, the long-standing debate between those favouring a narrow definition of the crime of aggression (limited to 'wars of aggression') and those favouring a broader definition may ultimately have been 'much ado about nothing', although it cannot be ruled out that the ICC would over time embrace a more flexible interpretation. Still, such an approach is unlikely to undermine the *jus contra bellum* since it leaves unaffected the illegal status of the acts concerned – just as the failure to include certain breaches of the Geneva Conventions in the Rome Statute does not influence their status under international humanitarian law – without in any way legitimizing them.¹⁶¹

This is different were the ICC to conclude that certain interventions lack the required 'character' to qualify as manifest breaches of the UN Charter. Such explicit, and

¹⁵⁹ See Paulus, 'Second Thoughts on the Crime of Aggression', 20 *EJIL* (2010) 1117, at 1124.

¹⁶⁰ Dinstein, *supra* note 14, at 125.

¹⁶¹ Geneva Conventions 1949, 1125 UNTS 3.

authoritative, confirmation by an international judicial organ that, for instance, humanitarian interventions or cases of pre-emptive self-defence fall within the 'grey areas' of the *jus contra bellum* would indeed contribute to their legitimization and add to a shift in the justificatory discourse of states, in turn leading to an erosion of the law on the use of force.¹⁶² In light thereof, at least for small-scale uses of force, it would seem preferable to exempt these acts from Article 8bis(1) of the Rome Statute by reference to the 'gravity and scale' components rather than by reference to the 'character' component. With regard to more large-scale interventions of controversial legality, 'restrictionist' scholars may wish the ICC to rely on other avoidance techniques, in particular, on the various grounds excluding criminal liability listed in Article 31 of the Rome Statute (such as defence of others or, possibly, duress), while acknowledging that they are fully covered by Article 8bis(1) of the Rome Statute. At the same time, it appears less likely that the ICC would opt for such 'solution', partly because the 'character' component was introduced precisely for purposes of dealing with so-called borderline cases. By introducing this component, the states parties to the Rome Statute have indeed tasked the ICC (and, first and foremost, the ICC prosecutor) with the delicate responsibility of mapping, and clarifying, the grey areas of the law on the use of force.

Reliance on the 'character' component may be seen as a threat from a *jus contra bellum* perspective, yet it could also be seen as opportunity. Indeed, while it could result in a partial erosion of the legal regime on the use of force, embracing certain more-'expansionist' claims, the work of the ICC may also result in a clarification of the parameters that determine, for instance, when allegedly humanitarian interventions should or should not be regarded as manifest breaches of the UN Charter, while maintaining the Court's deterrent function *vis-à-vis* abusive applications of, for example, the humanitarian intervention or protection of nationals doctrines (at least with respect to leaders from countries that have accepted the ICC's jurisdiction for the crime of aggression).

The activation of its jurisdiction over the crime of aggression is bound to present the ICC with daunting challenges. Perhaps the most fundamental obstacle is the lingering taboo that envelops the 'crime of aggression'. This taboo is evident from the dominant perception that aggression is no more than a 'political' crime committed against the state rather than an evil committed against a collective of individuals, which should not be placed on equal footing with the atrocity crimes. Related to this is the perverse tendency on the part of those on the sidelines to surgically detach the political decision-making process leading up to the launch of a military intervention from the destruction, loss of life (among civilians and combatants) and other mayhem (for example, state failure, economic breakdown and so on) that frequently follows. It is only by picking up the Nuremberg legacy and implementing Article 8bis of the Rome Statute that the ICC will hopefully bring about a much-needed *changement d'esprit*.

¹⁶² Note that a similar effect might result if a substantial number of states ratifying the Kampala Amendments were to submit declarations (possibly in the context of the Rome Statute, *supra* note 4, Art. 15bis(4) opt-out mechanism), expressing the view that certain types of interventions are exempt from Article 8bis. At the time of writing, however, none of the states having ratified the Kampala Amendments have made a declaration to this end.