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CRIMINALIZING HUMANITARIAN INTERVENTION

Sean D. Murphy*

The States Parties of the International Criminal Court (ICC) will likely vote in 2010 on whether to amend the Rome Statute to allow the ICC to prosecute the crime of aggression. If a robust amendment is widely ratified by states, and if the mechanism for triggering ICC jurisdiction in a particular situation is the ICC itself, then the ICC may emerge as an important voice in the debate over the legality of humanitarian intervention taken without Security Council authorization. Prosecutions, or at least indictments, of leaders of those interventions would considerably strengthen the hand of those who regard such intervention as illegal. Yet an unwillingness on the part of the ICC to indict and prosecute those leaders—an outcome that seems likely for incidents of true humanitarian intervention—may lend considerable credence to the view that such intervention is lawful, as well as define the conditions that characterize such intervention.

INTRODUCTION

The doctrine of “humanitarian intervention” essentially contemplates the use of military force by one state (or a group of states) against another state not in self-defense but, rather, to prevent the widespread deprivation of human rights. While such use of force might occur pursuant to authorization of the Security Council, the doctrine’s principal relevance is to serve as a potential legal justification for a state or states to act without Security Council authorization, conduct sometimes referred to as “unilateral” humanitarian intervention.

As discussed in Part I below, the dominant belief among states and scholars of international law is that unilateral humanitarian intervention is *not* a valid legal justification for using force. Security Council authorization must be obtained for any such intervention; where such consent is not forthcoming, the values served by maintaining a strong normative system against transnational uses of force must prevail over values advanced in attempting to thwart human rights abuses. Some states and scholars, however, see international law as permitting such intervention, and some incidents of state practice—such as NATO’s 1999 intervention in Serbia to protect Kosovar

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Albanians from the anticipated infliction of atrocities by their own government—lend credence to that position. On this account, since human rights are now an integral component of international law, the failure of a sovereign to uphold its obligations to protect its nationals concomitantly diminishes that sovereign's right to rely on the principle of non-intervention to protect it from other states. Further, even some observers who reject the notion that unilateral humanitarian intervention is presently lawful nevertheless recognize that the law may be changing, or that the international community will tolerate deviations from the law when unilateral humanitarian intervention occurs.

Scholars attempting to resolve this debate have looked to various sources as a means of supporting one position or the other. When assessing incidents of state practice that arguably constitute unilateral humanitarian intervention, one approach has been to scrutinize the formal and informal reactions to those incidents by important organs, such as the Security Council, the General Assembly, or the International Court of Justice, since these entities might be seen as serving as a "jury" for the global community about the legality of the conduct. This jurying function might be performed before the intervention takes place (*ex ante* jurying) or, more likely, after the intervention takes place (*ex post* jurying). To date, the above-mentioned organs have been unable or unwilling to consistently assess incidents of alleged humanitarian intervention, thus undermining their ability to forcefully condemn, support, or support with caveats the legality of unilateral humanitarian intervention.

One jury, however, "remains out" in the sense that it has not yet weighed in on the issue of humanitarian intervention. As discussed in Part II, the Assembly of States Parties to the Rome Statute, which created the International Criminal Court (ICC), will likely vote in 2010 on whether to amend the Rome Statute so as to allow the ICC to investigate and prosecute the crime of aggression. The language to be adopted is not yet settled, but it seems *unlikely* that unilateral humanitarian intervention will be expressly included or excluded from the Rome Statute's definition of aggression, or from the associated "elements of the crime" that will likely be crafted before entry into force of the amendment. While the amendment (and associated elements) may provide some openings for the argument that unilateral humanitarian intervention implicitly does not fall within the scope of such a crime, it seems more likely that the acts that typically underlie such intervention (large-scale deployment of troops or delivery of bombs across a border against a non-consenting government) *will* implicitly fall within the scope of the crime of aggression for purposes of the ICC. If that is the case, this article argues that there is an ironic chance (but not certainty) that the ICC, over time, will serve as a "jury" that results in the crystallization of a norm *permitting* unilateral humanitarian intervention.

Numerous hurdles must be overcome before the ICC could serve such a function, hurdles that should not be minimized. An amendment to the Rome Statute does need to be adopted by the Assembly, most of the states parties must then ratify the amendment to bring it into force, the amendment must be crafted so as not to allow states parties to opt out of its reach in any significant ways, and the amendment must be applied in a manner that reaches the conduct of states generally, including non-parties that use force against the territory of states parties.

Even if those hurdles are overcome, the mere fact that the ICC mandate is broad enough to potentially encompass prosecutions of leaders who engage in unilateral humanitarian intervention will likely not affect the debate about the legality of humanitarian intervention; such an effect would occur only if the Rome Statute expressly included (or excluded) such intervention as part of the crime of aggression. Further, if the mechanism for triggering ICC investigation of a crime of aggression is solely the Security Council, or perhaps the General Assembly or the International Court of Justice, then the ICC's adoption of this jurisdiction likely will not affect the debate over the legality of unilateral humanitarian intervention, since it is unlikely that those institutions will consistently, impartially, and apolitically "pull the trigger" for ICC jurisdiction over a given situation, conditions necessary for clarifying the law in this area.

However, if a relatively robust amendment is widely ratified by states, and if the mechanism for triggering an ICC investigation is the ICC itself (the prosecutor acting alone or in conjunction with the Pre-Trial Chamber), then this article maintains that there may well be a significant effect on the debate over the legality of humanitarian intervention, driven by how the ICC responds when incidents of unilateral humanitarian intervention arise over which it has jurisdiction. Prosecutions, or at least indictments, of leaders of those interventions would considerably strengthen the hand of those who oppose unilateral humanitarian intervention. Yet an unwillingness on the part of the ICC to indict and prosecute those leaders—an outcome that seems quite likely for incidents of true humanitarian intervention—may lend considerable credence to the view that unilateral humanitarian intervention is lawful, as well as define the conditions that characterize such intervention.

To demonstrate that likelihood, this article revisits NATO's 1999 intervention to protect Kosovar Albanians. Having reached that incident's tenth anniversary, it is worth asking whether such action, had it arisen at a time when there existed an ICC with jurisdiction over the crime of aggression, would have resulted in the indictment of NATO leaders by the ICC. If not, then it may unfold that true humanitarian interventions—interventions generally recognized as largely altruistic acts to protect those facing extreme peril—will be viewed as lawful even in the absence of Security Council authorization. If so, then the ICC will have assumed a very signifi-

cant role in altering the perceptions of the international community concerning the use of force, potentially in a manner that significantly diminishes the role of the U.N. Security Council. Assumption of such a role may propel the ICC to significant heights as the “go-to” arbiter on the legality of the use of force, or may result in extraordinary criticism of its work and concerns about its fidelity to strict construction of the law.

Part I of this article briefly explains the conflicting views among states and in the academy about the legality of the doctrine of humanitarian intervention, and why several possible avenues for “jurying” legality to date have proven unhelpful. Part II then considers the likely approach of granting the ICC jurisdiction over the crime of aggression, with a focus on the ratification process for the amendment, and on the substance and procedure of that jurisdiction as it relates to humanitarian intervention. If various important hurdles can be overcome (which may well *not* be the case), this part tentatively concludes that such jurisdiction most likely will result, over time, in the crystallization of a norm that *permits* unilateral humanitarian intervention. Part III tests that conclusion by revisiting the Kosovo incident, which is probably the strongest precedent to date in favor of the legality of humanitarian intervention, to assess whether it would have provoked ICC indictments had there existed, at that time, an ICC with jurisdiction over a crime of aggression. Part IV concludes with some speculations on how inclusion of a robust crime of aggression within the ICC’s jurisdiction might affect views not just on the legality of unilateral humanitarian intervention, but also on what is meant by such intervention, and further the potential benefits and risks for the ICC in assuming such a role.

I. THE (IL)LEGALITY OF HUMANITARIAN INTERVENTION

A. *Conflicting Views on the Legality of Unilateral Humanitarian Intervention*

Virtually all states, key non-state actors, and scholars agree that humanitarian intervention may proceed when authorized by the U.N. Security Council.¹ While it is true that the drafters of Chapter VII of the U.N.

¹ See, e.g., Jennifer M. Welsh, *The Security Council and Humanitarian Intervention*, in *THE UNITED NATIONS SECURITY COUNCIL AND WAR* 535, 535–36 (Vaughn Lowe et al. eds., 2008) (“[W]hile the Council initially was reluctant to authorize force in circumstances involving the mistreatment of a state’s civilians, it has gradually asserted its competence through an expanded definition of what constitutes a threat to international peace and security.”); THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 137 (2002) (“Each of the instances in which the Council has used, or authorized coalitions of the willing to use collective measures . . . against regimes engaged in egregious human rights violations can be fitted in to the Charter text.”); SEAN D. MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* 287–88 (1996) (reflecting on U.N. practice in the 1990’s and noting that a “threat to the peace”

Charter probably envisaged some kind of transnational threat to or breach of the peace prior to Security Council action, the Charter does not expressly require such an act, nor does it preclude viewing the transnational agitation that typically arises from widespread deprivations of human rights within a state from being within the scope of Chapter VII. In any event, the consistent interpretation of Chapter VII by the Security Council—particularly with respect to the recent interventions authorized in Haiti, Rwanda, and Somalia—makes clear that widespread deprivations of human rights can serve as the basis for authorizing the use of military force under the authority of Chapter VII.²

The more contentious issue is the legality of humanitarian intervention without U.N. Security Council authorization. The remainder of this article is concerned with such unauthorized or “unilateral” humanitarian intervention. Most states and scholars view unilateral humanitarian intervention as unlawful, finding no basis in the U.N. Charter or state practice in support of the doctrine.³ Only rarely have incidents occurred that might be viewed as unilateral humanitarian intervention, and, when they do occur, they are often criticized or condemned by states and sometimes other relevant actors, such as the Security Council or the General Assembly. Writing in the immediate aftermath of the Kosovo intervention, Adam Roberts explained the resistance of states to unilateral humanitarian intervention as follows:

Several large and powerful states (China, India and Russia) have expressed strong opposition to the principle of humanitarian intervention. Equally important, large numbers of post-colonial states, particularly in Africa and Asia, have opposed it. Many such states have a healthy suspicion of the proposition that the motives of would-be intervenors are, and will remain, purely humanitarian. Also, many such states see themselves as vulnerable to foreign intervention, and are understandably sensitive about threats to their newly-won sovereignty. In some cases, other and less creditable considerations are involved, including the desire of oppressive regimes to stop

triggering Security Council jurisdiction under Chapter VII is now regarded as encompassing internal conflict, including humanitarian crises).

² See MURPHY, *supra* note 1, at 145–281.

³ See, e.g., CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 49 (2d ed. 2004) (2000) (finding that “the doctrine is far from firmly established in international law”); Michael Byers & Simon Chesterman, *Changing Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS* 177, 177–203 (J. L. Holzgrefe & Robert O. Keohane eds., 2003); SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* 45–87 (2001); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 *EUR. J. INT’L L.* 1, 5 (1999).

the emergence of a new norm that might upset their monopoly of power within their states.⁴

Either in the context of specific incidents or looking more broadly at the legality of uses of military force, the General Assembly historically has disfavored intervention, even for noble purposes, as amply demonstrated by the three prominent General Assembly resolutions on non-intervention passed in the 1960s and 1970s.⁵ Indeed, the General Assembly's 1974 "Definition of Aggression" enumerated various acts that constitute "aggression," including the "invasion or attack by the armed forces of a State of the territory of another State," and provided that no "consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression."⁶ Those resolutions were passed in an era when newly emerging states were reacting to the abuses of colonialism, and to the fear of Cold War interference by the major powers, but many of those suspicions linger today.⁷ When foreign ministers of the non-aligned movement met in Catagena in 2000, they reiterated a "firm condemnation of all unilateral military actions including those made without property authorisation from the United Nations Security Council" and rejected "the so-called 'right' of humanitarian intervention, which has no legal basis in the

⁴ See Adam Roberts, *The So-Called "Right" of Humanitarian Intervention*, 2000 Y.B. INT'L HUMANITARIAN L. 3, 32.

⁵ See Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and their Independence and Sovereignty, G.A. Res. 2131 (XX), U.N. Doc. A/6014 (Dec. 21, 1966) ("No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are condemned. . . . The strict observance of these obligations is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter of the United Nations but also leads to the creation of situations which threaten peace and security."); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), annex, U.N. Doc. A/8028 (Oct. 24, 1971) ("No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.").

⁶ G.A. Res. 3314 (XXIX), annex, U.N. Doc. A/9631 (Dec. 14, 1975).

⁷ Drawing in part upon the General Assembly's views, the International Court in the *Nicaragua/U.S. Military and Paramilitary Activities in and against Nicaragua* case cast doubt on the ability of states to use force to protect human rights, (*Nicar. V. U.S.*), Merits, Judgments, 1986 I.C.J. 14, at 134-35 (June 27), or to bring about regime change, *id.* at 133, ¶ 263, though in that case the facts and arguments pled to the Court were not directly on those issues.

UN Charter or in the general principles of international law.”⁸ Most recently, in its 2005 World Summit Outcome document, the General Assembly considered the problem of responding to major human rights crises through military force and appeared to contemplate only action through the U.N. Security Council.⁹

Generally speaking, opponents of unilateral humanitarian intervention favor the strictest of controls on transnational uses of force, distrusting the creation of loopholes that aggressors will seek to exploit. Some opponents, however, are open to the possibility of humanitarian intervention, but simply do not see existing treaties or state practice as supporting it. Especially in the wake of the Kosovo incident, some of these scholars¹⁰ and former U.N. Secretary General Kofi Annan¹¹ became more open to seeing a

⁸ MOVEMENT OF THE NON-ALIGNED COUNTRIES, XIII Ministerial Conference, Cartagena, Colombia, FINAL DOCUMENT, ¶ 11, 263 (Apr. 8-9, 2000), available at <http://www.nam.gov.za/xiiiminconf/index.html>.

⁹ 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (“In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council . . . on a case-by-case basis . . . should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.”); *but see* Stahn, *infra* note 19, at 120 (arguing that “states did not categorically reject the option of (individual or collective) unilateral action in the Outcome Document. This discrepancy leaves some leeway to argue that the concept of responsibility to protect is not meant to rule out such action in the future.”).

¹⁰ *See, e.g.*, INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 172 (2000) [hereinafter Kosovo Report] (“[T]he current fluidity of international law on humanitarian intervention, caught between strict Charter prohibitions of non-defensive uses of force and more permissive patterns of state practice with respect to humanitarian interventions and counter-terrorist use of force.”); Christine Chinkin, *The Legality of NATO’s Action in the Former Republic of Yugoslavia (FRY) Under International Law*, 49 INT’L & COMP. L.Q. 910, 920 (2000) (acknowledging that there may be an “emerging concept of humanitarian intervention based upon the purposes of the Charter, the growing commitment to the active protection of human rights and limited State practice”); Vaughan Lowe, *International Legal Issues Arising in the Kosovo Crisis*, 49 INT’L & COMP. L.Q. 934, 941 (2000) (“[I]n my view there is no clear legal justification for the NATO action in Kosovo, but it is desirable that such a justification be allowed to emerge in customary international law.”).

¹¹ In his annual report to the General Assembly in 1999, Secretary-General Kofi Annan stated:

This developing international norm in favour of intervention to protect civilians from wholesale slaughter will no doubt continue to pose profound challenges to the international community. Any such evolution in our understanding of State sovereignty and individual sovereignty will, in some quarters, be met with distrust, skepticism, even hostility. But it is an evolution that we should welcome. Why? Because, despite its limitations and imperfections, it is testimony to a humanity that cares more, not less, for the suffering in its midst, and a humanity that will do more, and not less, to end it.

nascent trend toward acceptance of humanitarian intervention, but did not go so far as to find that a new rule had crystallized.

By contrast, some scholars and a few states, notably the United Kingdom¹² and Belgium,¹³ have claimed that there already exists a legal norm in favor of unilateral humanitarian intervention, based on interpretations of the U.N. Charter or on a generous reading of limited state practice, including the interventions of ECOWAS in Liberia in 1990 and in Sierra Leone in 1998, the tripartite intervention in northern Iraq in 1991 and southern Iraq in 1992, and the Kosovo incident, all of which were largely accepted or at least tolerated by the global community.¹⁴ While they place

Press Release, The Secretary-General, *Annual Report to the General Assembly*, U.N. Doc. SG/SM7136 (Sept. 20, 1999), reprinted in KOFI ANNAN, *THE QUESTION OF INTERVENTION: STATEMENTS BY THE SECRETARY-GENERAL* 44 (1999). For sharp criticism of the Secretary-General's position, see Edward Luttwak, *Kofi's Rule: Humanitarian Intervention and Neocolonialism*, 58 NAT'L INT. 60 (Winter 1999–00).

¹² The United Kingdom justified its participation in the intervention relating to Kosovo as follows:

We are in no doubt that NATO is acting within international law. Our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe. Those circumstances clearly exist in Kosovo. The use of force . . . can be justified as an exceptional measure in support of the purposes laid down by the UN Security Council, but without the Council's express authorization, when that is the only means to avert an immediate and overwhelming humanitarian catastrophe.

U.K. Defence Secretary George Robertson, 328 PARL. DEB., H.C. (6th ser.) (1999) 616–17; see also U.N. SCOR, Fifty-Fourth Sess., 3988 mtg. at 12, U.N. Doc. S/PV.3988 (Mar. 23, 1999) (comments of U.K. Ambassador Sir Jeremy Greenstock explaining that: "In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable"); Verbatim Record, Oral Proceedings, *Legality of Use of Force (Serb. & Mont. v. U.K.)*, at 13 (May 11, 1999), available at <http://www.icj-cij.org/docket/files/113/4573.pdf> (U.K. Attorney-General John Morris repeating such language); Prime Minister Tony Blair, Written Answer for House of Commons, 330 PARL. DEB., H.C. (6th ser.) (1999) 239–40; MICHAEL BYERS, *WAR LAW* 99 (2005) (discussing the U.K. position). It should be noted that the U.K. House of Commons Foreign Affairs Committee rejected the U.K. position, finding that international law did not allow unilateral humanitarian intervention. See HOUSE OF COMMONS COMMITTEE ON FOREIGN AFFAIRS, *FOURTH REPORT ON KOSOVO, 1999–2000*, ¶ 128, available at <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmffaff/28/2802.htm> ("Our conclusion is that *Operation Allied Force* was contrary to the specific terms of what might be termed the basic law of the international community—the UN Charter."); see also Steven Wheatley, *The Foreign Affairs Select Committee Report on Kosovo: NATO Action and Humanitarian Intervention*, 5 J. CONFLICT & SEC. L. 261 (2000).

¹³ See *Legality of Use of Force (Serb. & Mont. v. Belg.)*, Verbatim Record, Oral Proceedings at 7 (May 10, 1999), available at <http://www.icj-cij.org/docket/files/105/4515.pdf>.

¹⁴ See, e.g., GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* (2008); CHRISTOPHER GREENWOOD, *HUMANITARIAN INTERVENTION: LAW AND POLICY* (2001); see also Richard Lillich, *Humanitarian Interven-*

some emphasis on positive law (as evidenced by treaties, state practice, and other forms of state consent), proponents of unilateral humanitarian intervention often advance arguments that are essentially grounded in morality, natural law, or political theory.¹⁵ Indeed, to a certain extent one can view the legal debate on this issue as one between “positivists” (opposing unilateral humanitarian intervention) and “naturalists” (favoring such intervention by adhering closely—even if not explicitly—to natural law, derived from the rudimentary values held by the “global society”). For the proponents of humanitarian intervention, international law exists only in part to preserve the sanctity of states; the dignity of persons is of equal value and in some situations “trumps” the values protected by strict rules on non-intervention.

In between these two positions may be found a few scholars or institutions that view humanitarian intervention as unlawful, but accept or at least acknowledge that such action may be *legitimate* and hence will be tacitly accepted by the global community when it occurs. For example, Professor Thomas Franck states that it is “difficult conceptually to justify in Charter terms the use of force by one or several states acting without prior Security Council authorization, even when such action is taken to enforce human rights and humanitarian values,” but that contemporary practice “suggests either a graduated reinterpretation by the United Nations itself of Article 2(4) or the evolution of a subsidiary adjectival international law of mitigation, one that may formally continue to assert the illegality of state recourse to force but which, in ascertainable circumstances, mitigates the consequence of such wrongful acts by imposing no, or only nominal, consequences on states which, by their admittedly wrongful intervention, have demonstrably prevented the occurrence of some greater wrong.”¹⁶ Along

tion: A Reply to Dr. Brownlie and a Plea for Constructive Alternatives, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229 (John Norton Moore ed., 1974).

¹⁵ See, e.g., FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (3d ed. 2005) (advancing an argument largely grounded in Kantian philosophy); NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 295 (2000) (advancing an “solidarist” conception of international society in which states must accept a moral responsibility to protect their citizens).

¹⁶ Franck, *supra* note 1, at 137, 139 (emphasis added); see also Thomas M. Franck, *Humanitarian and Other Interventions*, 43 *COLUM. J. TRANSNAT’L L.* 321, 325 (2005) (suggesting that “a violation of the law is not always deplorable and may even be a good thing”); Allen Buchanan, *Reforming the International Law of Humanitarian Intervention*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* 130 (J. L. Holzgrefe & Robert O. Keohane eds., 2003); ADVISORY COUNCIL ON INT’L AFFAIRS AND ADVISORY COMM. ON ISSUES OF PUB. INT’L LAW, *HUMANITARIAN INTERVENTION* (2000), available at http://cms.web-beat.nl/ContentSuite/upload/aiv/doc/AIV_13_Eng.pdf (report by non-governmental Dutch advisory council which endorses the “illegal but legitimate” concept); Ige F. Dekker, *Illegality and Legitimacy of Humanitarian Intervention*, 6 *J. CONFLICT & SEC. L.* 115 (2001) (discussing the Dutch report); DANISH INST. OF INT’L AFFAIRS, *HUMANITARIAN INTERVENTION: LEGAL AND POLITICAL ASPECTS* 103 (1999) (“Despite the

this line, an Independent International Commission on Kosovo, initiated by Sweden shortly after the Kosovo incident and chaired by former South African Justice Richard Goldstone, issued a report stating that the NATO military intervention was illegal under international law, because it did not have the consent of the Security Council, but was “legitimate,” both from a political and moral point of view.¹⁷ Similarly, an International Commission on Intervention and State Sovereignty (ICISS) (established by the Government of Canada) issued a December 2001 report, entitled *The Responsibility to Protect*, which sought to provide a legal and ethical foundation for humanitarian intervention.¹⁸ The report asserted that a responsibility to protect (or “R2P”)¹⁹ exists under international law. Further, the report stated that in circumstances when the Security Council fails to discharge that responsibility, “in a conscience-shocking situation crying out for action,” then it “is a real question in these circumstances where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by.”²⁰

By contrast, a 2005 U.N. high-level panel convened by Secretary-General Kofi Annan, writing in the wake of the 2003 U.S. intervention in Iraq, agreed with the ICISS that there existed an “emerging norm that there is a collective international responsibility to protect,” but concluded that armed force may be used to ensure fulfillment of that the responsibility only if so authorized by the Security Council.²¹ Further, the high-level panel identified five criteria of “legitimacy” when engaging in such intervention,

lack of a legal basis for humanitarian intervention without Security Council authorisation in existing international law, it is hardly realistic in the foreseeable future that states should altogether refrain from such intervention if it is deemed imperative on moral and political grounds.”); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 118, 125-26 (1991) (finding that while unilateral humanitarian intervention is illegal, if supported generally by states it should be pardoned).

¹⁷ KOSOVO REPORT, *supra* note 10, at 4, 163–98 (2000).

¹⁸ INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* (2001), available at <http://www.iciss.ca/report2-en.asp> [hereinafter *THE RESPONSIBILITY TO PROTECT*].

¹⁹ For a discussion of the emergence of this concept, see Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 *AM. J. INT'L L.* 99 (2007); Carlo Focarelli, *The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine*, 13 *J. CONFLICT & SEC. L.* 191 (2008); see also Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, 83 *FOREIGN AFF.*, Jan.–Feb. 2004, 136, 137 (“Like the responsibility to protect, the duty to prevent begins from the premise that the rules now governing the use of force, devised in 1945 and embedded in the UN Charter, are inadequate.”).

²⁰ *THE RESPONSIBILITY TO PROTECT*, *supra* note 18, ¶ 6.37.

²¹ The Secretary-General, *Report of the High-level Panel on Threats, Challenges and Change*, ¶ 203, U.N. Doc. A/59/565 (Dec. 2, 2005); see also *id.* ¶¶ 196, 272.

including to the seriousness of the threat, the proper purpose of the interveners, the exhaustion of other means, proportionality, and a balancing of the ensuing consequences.²² The U.N. Secretary-General thereafter generally endorsed the high-level panel's approach,²³ though without expressly adopting the five criteria or expressly ruling out unilateral humanitarian intervention.

An important component in the diversity of views on this issue concerns the role of the Security Council. Proponents of unilateral humanitarian intervention view the Council as an unreliable arbiter of the legality of uses of force, since some permanent members have been willing to block actions that a majority on the Security Council sees as appropriate. Again, the Kosovo incident presents the dilemma; many Security Council members favored armed intervention to protect Kosovar Albanians, but Russia (along with China) opposed doing so. By contrast, opponents of unilateral humanitarian intervention argue that the whole point in drafting the U.N. Charter was to create a system that—unlike the League of Nations system—would attract participation by the major powers by according them a special status for determining when non-defensive uses of force should be deployed and when they should not. By moving away from that system, the special status of the permanent members of the Security Council is degraded, thereby introducing a level of instability in the system by making it less attractive to the major powers. For opponents of unilateral humanitarian intervention, the solution to the problem of Security Council inaction is not to abandon the existing system, but instead to remain faithful to the Charter as written, with the hope that the permanent members will generally act in unison when situations truly requiring humanitarian intervention arise. Indeed, opponents of unilateral humanitarian intervention point out that Security Council unwillingness to authorize intervention often arises from the reluctance of any state to step forward with the resources needed to respond to a humanitarian crisis, a problem that is not solved by altering the focal point for authorizing intervention.

Another important component in the debate over unilateral humanitarian intervention concerns the current status of the United States in international affairs. The United States is the preeminent military, diplomatic, economic, political, and cultural power in the world. The United States can marshal the resources needed for humanitarian intervention around the globe in a way that is largely not available to any other state. At least in the short run, many opponents of humanitarian intervention are not very worried about lots of other states aggressively invoking the doctrine of humani-

²² *Id.* ¶ 207.

²³ The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005).

tarian intervention, at least no more so than they are worried about those states invading neighbors on spurious grounds of self-defense. Instead, many worry about an unchecked United States—in conjunction with its allies—deploying military force to protect human rights when it wishes to do so, and refraining in situations where it prefers inaction. They would like to see more global supervision of the U.S. decision to intervene and perhaps even a global ability to prod the United States into action when it would otherwise stay home.

B. Looking for an Arbiter of Legality

States and scholars participating in this debate have emphasized different sources as a means of supporting one position or the other. When assessing incidents of state practice that arguably constitute unilateral humanitarian intervention, one approach has been to scrutinize the formal and informal reactions of important organs, such as the Security Council, the General Assembly, or the International Court of Justice, since these entities might be seen as serving as a “jury” for the global community about the legality or legitimacy of the conduct. As Thomas Franck, who coined the term in this context, indicated:

Pronouncing on the validity of claims advanced in mitigation of an unlawful but justifiable recourse to force is the task of those decision-makers. Some of this fact-and-context-specific calibration goes on in international tribunals, but most of it occurs in the political organs of the UN system, which constitutes something approximating a global jury; assessing the facts of a crisis, the motives of those reacting to the crisis, and the bona fides of the pleas of extreme necessity. This jurying goes on not only in instances of humanitarian intervention but whenever there is a confrontation between the strict, literal text of the Charter and a plea of justice and extenuating moral necessity.²⁴

This jurying function might be performed before the intervention takes place (*ex ante* jurying) or, more likely, after the intervention takes place (*ex post* jurying). For Professor Franck, these organs have “demonstrated their ability and readiness, when faced with states’ recourse to force, to calibrate their responses by sophisticated judgment, taking into account the full panoply of specific circumstances.”²⁵ Consequently, after analyzing eight incidents of possible unilateral humanitarian intervention, Franck concludes that the “jurors” have regarded such actions as being justified.²⁶

²⁴ FRANCK, *supra* note 1, at 186.

²⁵ *Id.*

²⁶ *See id.* at 135–73.

Professor Franck's approach has intuitive appeal. The original meaning of the U.N. Charter can change in light of subsequent U.N. practice, even on core issues relating to the Security Council. The U.N. Charter is, after all, a multilateral treaty ("albeit a treaty having certain special characteristics")²⁷ one that is subject to the customary rules of treaty interpretation, which take account of both the object and purpose of the treaty and of subsequent state practice.²⁸ There is ample World Court jurisprudence supporting the use of subsequent state practice when interpreting the charters or constitutions of international organizations, as well as supporting the use of a principle of effectiveness, whereby the Court seeks to determine the purposes and objectives of the organization and to give to the words in question an interpretation which is most conducive to the achievement of those ends.²⁹ To a certain extent, the entire history of Security Council conflict management is one that finds no clear textual support in the U.N. Charter: the numerous U.N. peacekeeping deployments have no express or even strongly implied basis in the Charter; and Security Council authorization of forcible deployments—such as authorization of the coalition of states that expelled Iraq from Kuwait—are not firmly anchored in the original scheme of Articles 43-49, which contemplated national contingents being made available to the United Nations "on its call" for deployment under U.N. command and control.³⁰

At the same time, Professor Franck's approach has been criticized for failing to explain certain methodological choices that are implicit in his analysis.³¹ Most of the analysis turns on the conduct of the Security Council, rather than other organs, which is an important methodological choice, since it favors "jurying" by just fifteen states, including the five powerful permanent members, rather than the broader community of states. Further, it is not clear how Franck's methodology weighs the reluctance of intervenors to explicitly base their action upon a right of humanitarian intervention, nor why the failure of an organ to act should be construed as tacit approval of an intervention.

In fact, the above-mentioned U.N. organs have been unable or unwilling consistently either to authorize or to prohibit recourse of humanitarian intervention *ex ante*, or to scrutinize incidents of alleged humanitarian

²⁷ Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151, 157 (July 20).

²⁸ See Vienna Convention on the Law of Treaties, art. 5, May 23, 1969, 1155 U.N.T.S. 331.

²⁹ See generally Elihu Lauterpacht, *Development of the Law of International Organization by the Decisions of International Tribunals*, 152 RECUEIL DES COURS 414-65 (1976-IV).

³⁰ Charter of the United Nations, June 26, 1945, art. 43, 59 Stat. 1031, TS 993 [hereinafter U.N. Charter].

³¹ See Michael Byers, Book Review, 97 AM. J. INT'L L. 721 (2003).

intervention after they have arisen, thus undermining those organs' ability to forcefully condemn, support, or support with caveats the legality of unilateral humanitarian intervention. *Ex ante* authorization by the Security Council sometimes has been possible (thereby obviating any need to resort to unilateral humanitarian intervention), but no other organ has acted *ex ante* either to authorize or to prohibit unilateral humanitarian intervention. Some have speculated that, after Kosovo, perhaps Security Council practice would evolve into use of an "inverted veto" on issues of humanitarian intervention, whereby any collective intervention would be deemed permissible unless the Security Council passed a resolution precluding the action.³² No apparent consensus has formed among states regarding the acceptability of such an approach, perhaps because it opens a rather wide loophole. Any group of states, perhaps as small as just a few, could declare themselves a "collectivity" and proceed with an intervention, so long as they are confident that they have the support of at least one permanent member (thereby avoiding a resolution cutting off the intervention). Further, any permanent member could conduct humanitarian interventions without worry, since it could always veto a Security Council resolution to the contrary.

The problem with *post hoc* reactions by these organs is that they are unpredictable (sometimes formal reactions are made and sometimes they are not) and can be viewed as political in nature (it is not always clear that the members of the institution are reacting based on their perception of what international law requires, as opposed to each member's political preferences). Thus, opponents and proponents of unilateral humanitarian intervention, looking at the same practice of these institutions, will draw quite different conclusions about the meaning and relevance of the institutional conduct.

Consider, for example, the possibility of looking to the General Assembly for *ex ante* or *post hoc* authorization or prohibition of an intervention. This possibility is already available, under the General Assembly's 1950 "Uniting for Peace Resolution,"³³ which contemplates General Assembly "recommendations" for military measures in response to breaches of the peace or acts of aggression. Under this resolution, any member state may request that the General Assembly convene an emergency session, which occurs promptly if a majority of U.N. members inform the Secretary-

³² Louis Henkin speculated that "the likely lesson of Kosovo is that states, or collectivities, confident that the Security Council will acquiesce in their decision to intervene, will shift the burden of the veto; instead of seeking authorization in advance by resolution subject to veto, states or collectivities will act, and challenge the Council to terminate the action." Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention,"* 93 AM. J. INT'L L. 824, 827 (1999).

³³ G.A. Res. 377 (V), U.N. Doc. A/RES/377 (V) (Nov. 3, 1950). The resolution was adopted by a vote of 52-5, with 2 abstentions.

General (or seven members of the Security Council) that they concur in the request.³⁴ By doing so whenever a situation has arisen where unilateral humanitarian intervention seems imminent, or has already occurred, the General Assembly could serve as the definitive “juror” on the legality of the matter. (Alternatively, the General Assembly might adopt an entirely new organic resolution specifically on the subject of humanitarian intervention, either flatly prohibiting it or in some fashion supporting it. In the latter case, such a resolution could conceivably contain an “inverse” authorization, meaning that a proposed humanitarian intervention, once notified to the General Assembly, can proceed unless there is an affirmative General Assembly vote that the intervention should not occur.)

For political, formal, and practical reasons, the General Assembly has not assumed this mantle. Politically, there is disagreement among states on what to do about the issue of humanitarian intervention; there would likely not be a uniform position on either condemning or approving such action, or approving it subject to certain conditions. Formally, the U.N. Charter Chapter IV makes clear that the General Assembly plays a secondary role to the Security Council on matters relating to peace and security,³⁵ which generally chills the General Assembly from taking a lead on such matters. Even if the Security Council is not exercising its “functions” in respect of a particular dispute or situation, the General Assembly is only supposed to make “recommendations” to the Security Council about how to proceed, which can be construed as supporting military deployments consented to by the host state (the prototypical peacekeeping scenario), but not the deployment of military units for an enforcement action.³⁶

Moreover, as a practical matter, the General Assembly’s arrogation of power through the Uniting for Peace Resolution never fully developed during the Cold War despite constant deadlock at the Security Council. The problem was that, to conduct any significant military intervention, the financial and military support of one or more of the major powers was needed, and those states did not wish to see the General Assembly take the lead in this area, since it would clearly detract from the power and significance of the Security Council.³⁷ For the United States, this became especially true as the General Assembly mutated over time from something relatively within the control of the Western states to a body entirely outside their control. Consequently, if the General Assembly were to attempt an *ex ante* or

³⁴ Rules of Procedure of the General Assembly, Rule 8(b), U.N. Doc. A/520/Rev.17 (2008), available at <http://www.un.org/ga/ropga.shtml>.

³⁵ U.N. Charter, *supra* note 30, art. 12(1).

³⁶ See, e.g., N.D. WHITE, THE UNITED NATIONS SYSTEM: TOWARD INTERNATIONAL JUSTICE 150-51 (2002).

³⁷ *Id.*

post hoc role for unilateral humanitarian interventions, it would likely face situations where (1) it votes in favor of military action, but finds no support among those states expected to conduct the action; (2) it votes in favor of a military action, and certain states prove willing to conduct that action, but those states neither wanted nor sought General Assembly approval; or (3) it votes against a military action, and one or more powers go forward anyway on grounds that the General Assembly cannot arrogate to itself this power. Any of these scenarios would weaken the authority of the General Assembly, and inhibits this organ from venturing into the arena.

The International Court of Justice also faces difficulty in serving as a reliable “juror” for either *ex ante* or *post hoc* authorization/prohibition of unilateral humanitarian intervention. In some ways, the International Court could be an ideal surrogate for a deadlocked Security Council; like the Council, the Court consists of fifteen members (judges), traditionally consisting of five judges from each of the permanent members of the Security Council and ten judges from the different regions of the world. However, unlike the Security Council, there is no veto power in the International Court; judges from the major powers can and have been outvoted by the other judges. Although regarded by some as a bit ossified, the Court is a serious institution; there is a gravity to the work of the Court that garners respect in the legal world and there is a fair amount of fidelity by states to the Court’s rulings.³⁸ Further, as a judicial institution its pronouncements are generally regarded as driven by law not politics.

The Court, however, does not have jurisdiction simply to assume the role of deciding *ex ante* or *post hoc* the legality of a proposed/actual exercise of unilateral humanitarian intervention; the matter must be properly placed before the Court. The most likely manner for this to occur would be through a request for an advisory opinion from the General Assembly. Probably for the same reason that the General Assembly is resistant to serving itself as a “juror” of a proposed intervention, the General Assembly has declined to place potential incidents of humanitarian intervention, such as Kosovo, before the International Court for consideration. As for contentious cases, since the Court’s inception, jurisdiction over the lawfulness of forcible action has arisen in only a handful of cases; states do not habitually resort to the court when force has been used against them, and when states do, they are often constrained in the jurisdictional basis that they can plead. Such jurisdictional limitation is amply demonstrated in Georgia’s recent case against Russia for the movement in August 2008 of extensive Russian troops into Georgia—a case predicated on an alleged Russian violation of Article 2(4), but instead on a violation of a human rights treaty concerning

³⁸ See generally CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (2004).

racial discrimination.³⁹ Hence, the Court's capability for "jurying" on this subject is quite limited.⁴⁰

Regional organizations also face difficulty in serving as an *ex ante* or *post hoc* "juror" of the legality of recourse to humanitarian intervention. Chapter VIII of the Charter clearly contemplates the ability of states, operating regionally, to deal "with such matters relating to the maintenance of international peace and security as are appropriate for regional action."⁴¹ Yet while that language in Article 52(1) is not conditioned upon authorization of the Security Council, in Article 53(1),⁴² where reference is made to "enforcement action," Security Council authorization is required. Moreover, the credibility associated with non-defensive actions of regional organizations derives from the consent granted by their member states to help promote peace and security *within the region*; that theory breaks down when the regional organization is operating outside the region, such as NATO did in Serbia.

In short, while various existing international entities above might serve as "jurors" of the legality of a proposed or actual resort to unilateral humanitarian intervention, there are formal, practical, political, and institutional difficulties in any one of them serving that function consistently. For that reason, the emergence of the ICC, and its anticipated jurisdiction over the crime of aggression, might portend a significant development for assessing the legality of humanitarian intervention. As discussed in the next section, that role would not entail approving in advance an act of unilateral humanitarian intervention; an *ex ante* ICC approval process is not contemplated as part of the amendment of the Rome Statute. Rather, the ICC's role will arise in the course of its reactions *post hoc* to instances of unilateral

³⁹ See Application Instituting Proceedings, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.) 2008 I.C.J. __ (Aug. 12), available at <http://www.icj-cij.org>. The treaty at issue is the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

⁴⁰ If the Court were asked to provide an opinion *ex ante*, the Court likely would resist any association with the unleashing of military power, in part out of a general preference for the pacific settlement of disputes and in part from a concern of blessing an intervention that goes badly. Moreover, as a legal institution, the Court is not especially well-positioned, prior to an intervention, to weigh complex non-legal variables, such as the motives of intervening states, the efficacy of further diplomatic efforts, or the ramifications to regional security if an intervention goes forward. A *post hoc* assessment of an act of humanitarian intervention, if rendered, might well be hostile to the intervention, since to date the Court in *post hoc* interpretations concerning the use of force has eschewed progressive interpretations of the law. See *The Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9); *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); *Land and Maritime Boundary* (Cameroun v. Nig.; Eq. Guinea intervening), 2002 I.C.J. 303 (Oct. 2002); *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6).

⁴¹ U.N. Charter, *supra* note 30, art. 52(1).

⁴² *Id.* art. 53(1).

humanitarian intervention, which might—if certain hurdles can be overcome—have a very different impact than the irregular and politicized *post hoc* reactions of the institutions discussed above.

II. CRIMINALIZING HUMANITARIAN INTERVENTION AT THE ICC

Article 5(1)(d) of the Rome Statute includes the “crime of aggression” as one of the crimes under the jurisdiction of the Court.⁴³ Yet the actual exercise of that jurisdiction was made conditional. According to Article 5(2), the Court shall only exercise jurisdiction over the crime of aggression once an amendment to the Rome Statute is adopted, which would define the crime and set forth the conditions under which the Court can exercise its jurisdiction in this regard.⁴⁴ It is anticipated that the Assembly of States Parties, formed after the entry into force of the Rome Statute, will vote at their review conference in 2010 to amend the Rome Statute so as to allow ICC exercise of jurisdiction over the crime of aggression. In considering the effect, if any, of such jurisdiction on the legality of unilateral humanitarian intervention, three core issues must be considered: (1) the hurdles that must be overcome in the process of amending the Rome Statute; (2) whether substantively the act of unilateral humanitarian intervention will be within the scope of the new jurisdiction; and (3) what decision-maker will “trigger” the application that jurisdiction for any given incident.

A. *Hurdles for Amending the Rome Statute*

As is the case whenever one prognosticates about the possible effects of a new treaty (or, as in this case, amendment to an existing treaty), there are certain procedural hurdles that must be overcome before any possible effects can unfold. First, the Assembly of States Parties does have to vote at its review conference in 2010 to amend the Rome Statute. At least a two-thirds majority is needed to adopt an amendment;⁴⁵ it is possible that the matter will be deferred and it is even possible that no amendment ever occurs. Second, once adopted, it is generally thought that seven-eighths of the existing member states must ratify or otherwise accept the amendment before, after one year, it can enter into force.⁴⁶ As of July 2008, there were

⁴³ See Rome Statute of the International Criminal Court, art. 5(1)(d) July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

⁴⁴ *Id.* art. 5(2); see Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 10 (1999) (discussing the treatment of the crime of aggression in the negotiation of the Rome Statute).

⁴⁵ Rome Statute, *supra* note 43, art. 121(3).

⁴⁶ *Id.* art. 121(4). Some delegations at the negotiations have argued that Article 5(2) of the Rome Statute only requires *adoption* of the crime at the review conference, with no further need for ratifications. See International Criminal Court, Assembly of State Parties, *Report of*

110 parties to the Rome Statute, which means at least 97 states would need to ratify any amendment, a process that could take many years.

Third, normally once an amendment of the Rome Statute enters into force; it binds all the states parties, even those parties that have not yet ratified the amendment.⁴⁷ In this case, however, since the amendment is expected to alter Article 5 of the Rome Statute, there is a special provision in the Rome Statute that results in the amendment only binding those states who have ratified or accepted the amendment. As such, it is generally thought that any state party who does not accept the amendment may avoid exercise of the Court's new jurisdiction with respect to acts committed by that state's nationals or on its territory.⁴⁸ If this is correct, then states that are currently parties to the Rome Statute—including those most likely to engage in acts of humanitarian intervention, such as France or the United Kingdom—could decline to accept the Court's jurisdiction over the crime of aggression, which would then preclude the Court from addressing their conduct. Therefore, even if the amendment enters into force, if the powerful states parties take advantage of the opt-out clause, the ICC's jurisdiction over this crime will be seriously diminished.

Fourth, while there are 110 parties to the Rome Statute, there are some 82 states that have not yet ratified the Statute and are not bound by it, whether amended or not. As such, the conduct of a significant percentage of states worldwide (43%) are outside the scope of the ICC—including certain major powers that might engage in future interventions (China, Russia, the United States)—leaving the ICC with little ability to address all incidents of potential humanitarian intervention whenever they arise. This problem may be overcome by continuing the gradual adherence by states to the Rome Statute; it is not yet clear whether a plateau in membership has been reached or whether ratifications will continue apace. Alternatively, it is possible that the ICC states parties will craft or interpret the ICC's new jurisdiction so as to cover acts of humanitarian intervention by non-party states whenever they are directed against party states. If so, the ICC may regard itself as capable of exercising its jurisdiction by virtue of the aggressive act being

the Special Working Group, Seventh Session (second resumption), ¶ 10, ICC Doc. ICC-ASP/7/SWGCA/2 (Feb. 20, 2009) [hereinafter 2009 Special Working Group Report]. If such a view were to prevail, it would remove a significant hurdle to the activation of this crime.

⁴⁷ *Id.*

⁴⁸ *Id.* art. 121(5). Once seven-eighths of the parties ratify or accept the amendment, any party who has not accepted it may also withdraw completely from the Rome Statute. *Id.* art. 121(6). The anomaly presented by Article 121(5) has led to extensive discussion in the negotiations over alternative possibilities for entry into force, to preclude parties from opting out of the Court's jurisdiction over this crime. *See* 2009 Special Working Group Report, *supra* note 46, ¶¶ 6–9. Again, if any of these proposals were to prevail, it would remove one of the hurdles to activation of this crime.

inflicted upon one of its parties, thus expanding the range of acts encompassed by the new jurisdiction.

In short, there are several important, threshold hurdles that must be overcome before the ICC will have robust jurisdiction over the crime of aggression. If any of these hurdles are not surmounted, then the effects of this jurisdiction on the debate over legality or illegality of humanitarian intervention will be severely reduced if not eliminated, because the ICC's jurisdiction will not be applicable to the wide range of state conduct within which such interventions may arise.

B. Whether the New Jurisdiction Will Encompass Acts of Unilateral Humanitarian Intervention

Assuming that the ICC jurisdiction over the crime of aggression is established, and is applicable to a wide range of states, then an important question is whether that jurisdiction will encompass acts of unilateral humanitarian intervention. Prior to the adoption of the Rome Statute, the United States opposed inclusion of the crime of aggression in part because it believed deployment of force for "humanitarian purposes" had transformed the issue of aggression into a far more complicated concept than was the case at Nuremberg or Tokyo.⁴⁹ That position, obviously, did not prevail, suggesting that the states negotiating the Rome Statute ultimately decided that, whatever complications might exist in either including or excluding humanitarian intervention, the matter could be addressed as part of the process of defining the crime. The Preparatory Commission established following the Rome Conference did not squarely address the issue of humanitarian intervention,⁵⁰ nor to date has the Assembly of States Parties or its Special Working Group on the Crime of Aggression, which was created in 2002 to discuss the definition, elements, and jurisdictional conditions of the crime of aggression. While some external observers have suggested express treatment of this issue, such as by carving out unilateral humanitarian intervention from the crime of aggression,⁵¹ so far no language to that effect has

⁴⁹ See Press Release, International Criminal Court Preparatory Committee on the Establishment of an International Criminal Court, Legal Prosecution of Aggression Required Agreed Definition, Preparatory Committee on International Criminal Court Told, at 2, U.N. Doc. L/2765 (Mar. 27, 1996) (recounting position taken by the United States).

⁵⁰ See Roger S. Clark, *Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court*, 15 LEIDEN J. INT'L L. 859 (2004) (discussing background on the work of the Preparatory Commission on the crime of aggression).

⁵¹ See Benjamin B. Ferencz, *Deterring Aggression by Law - A Compromise Proposal* (Jan. 11, 2001), available at <http://www.benferencz.org/arts/44.html> (unpublished paper). Former Nuremberg prosecutor Ben Ferencz proposed that the amendment include the following:

emerged publicly in the working group's proposed articles on the crime of aggression.

Attention has been given, however, to only covering acts of aggression that are especially grave in nature. Indeed, several states have indicated a preference for a definition of aggression that is not co-terminus with Article 2(4) of the Charter,⁵² viewing aggression as an especially serious violation of Article 2(4). For that reason, some states proposed to the Preparatory Commission that the crime of aggression encompass only conduct involving "aggressive" or "large-scale" attacks on territorial integrity that are of a "particular magnitude and dimension and of a frightening gravity and intensity."⁵³ The United States, in its status as an observer, agreed that "the crime of aggression be reserved for acts of a certain magnitude and not include all uses of force that are inconsistent with article 2, paragraph 4."⁵⁴ This preference has remained in the discussions within the Special Working Group. At the December 2007 meeting, there was broad support for retaining, after the term "act of aggression," the phrase "which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."⁵⁵ Some lesser support was expressed for further qualifying "act of aggression" by language stating, "such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof."⁵⁶

[H]umanitarian intervention by the use of force without prior authorization by the Security Council shall not constitute an act of aggression if it is shown that the intervention was a last resort after other available means had been exhausted, that the intervention was for purely humanitarian purposes and not motivated by the self-interest of the intervening party, and to the maximum extent possible, was carried out in a manner designed to protect the human rights of all persons concerned.

Id.; see also Jennifer Trahan, *Defining "Aggression": Why the Preparatory Commission for the International Criminal Court Has Faced Such a Conundrum*, 24 LOY. L.A. INT'L & COMP. L. REV. 439, 449 (2002).

⁵² U.N. Charter art. 2, para. 4.

⁵³ See, e.g., Proposal Submitted by Germany: The Crime of Aggression, ¶ 10, PCNICC/2000/WGCA/DP.4 (Nov. 13, 2000); see also Theodor Meron, *Defining Aggression for the International Criminal Court*, 25 SUFFOLK TRANSNAT'L L. REV. 1, 4 (2001) ("The second benchmark the crime should satisfy is the principle of gravity or seriousness. Aggression is the 'mega' crime . . . It should not be trivialized or made banal by including in its definition lesser violations of states' territory integrity.")

⁵⁴ United States, Statement by the United States to the ICC Preparatory Commission on the Crime of Aggression, at 2 (Sept. 26, 2001) (on file with author).

⁵⁵ International Criminal Court, Assembly of State Parties, *Report of the Special Working Group on the Crime of Aggression*, Sixth Session, ¶ 25, ICC Doc. ICC-ASP/6/SWGCA/1 (Dec. 13, 2007) [hereinafter 2007 Special Working Group Report]; see also 2009 Special Working Group Report, *supra* note 46, at 11 (repeating this language in draft Article 8 bis, ¶ 1).

⁵⁶ 2007 Special Working Group Report, *supra* note 55, ¶ 26.

At first glance, the inclusion of such “threshold” language might be thought to implicitly carve out unilateral humanitarian intervention from the scope of the crime, since this intervention has as its objective humanitarian concerns not territorial aggrandizement. Yet the act of unilateral humanitarian intervention can be just as violent and intrusive as any other large-scale use of force, involving extensive aerial bombardment and the deploying of extremely large numbers of armed forces from one state to another. The “character, gravity, and scale” of Vietnam’s intervention in Cambodia in 1978, the tripartite intervention in northern Iraq in 1991, or NATO’s bombing of Serbia in 1999, is comparable in nature or scale to other uses of force that presumably are to be encompassed in the ICC’s jurisdiction over this crime. Even the more restrictive threshold language defining “aggression” as “an act which has the object or result of establishing a military occupation” does not appear to exclude all humanitarian interventions; in all three of the arguably humanitarian interventions noted above, foreign forces remained in the targeted territory for extended periods of time as they accomplished their claimed humanitarian objectives. Rather than carve out humanitarian intervention, the purpose of the threshold language now being discussed in the Special Working Group seems to be to eliminate minor incidents of armed force from the crime of aggression, such as frontier incidents involving border patrols or coast guards. While the final language is not settled, it does not appear that humanitarian intervention will be either expressly or implicitly excluded from the ICC’s definition of the crime of aggression.

A further important development related to defining the crime of aggression may be the drafting of the detailed “elements” of the crime by the Assembly of States Parties. Article 9 of the Rome Statute provided for the adoption by two-thirds of the Assembly of “elements” for the crime of genocide, crimes against humanity, and war crimes, which now serve to guide the ICC judges in their interpretation of such crimes.⁵⁷ While the Rome Statute does not require the adoption of such “elements” for the crime of aggression, the Special Working Group was assigned this task, though at present it appears unlikely that such elements will be drafted in time for the 2010 Review Conference (the elements for the other crimes were also not completed when the Rome Statute was adopted; they were only completed thereafter by the Preparatory Commission prior to entry into force of the Rome Statute). Assuming that an amendment to the Rome Statute activating the crime of aggression is adopted in 2010, the elements for the crime may be developed thereafter and adopted by the Assembly at some point prior to entry into force of the amendment. If so, the language of the “elements” of the crime of aggression might be quite significant for indicating whether the

⁵⁷ See Rome Statute, *supra* note 43, art. 9.

States Parties believe that humanitarian intervention is regarded as within or outside the scope of “aggression” (as well as for indicating whether other forms of conduct, such as rescue of nationals, falls within aggression). Alternatively, like the amendment itself, detailed resolution of what constitutes aggression might not be possible, leaving the matter ambiguous on the matter. If the latter, then any effect on the debate over the legality of humanitarian intervention will turn on the ICC’s response to incidents of intervention as they arise.

C. *The “Trigger” for Applying Jurisdiction over Aggression When a Situation Arises*

The Rome Statute requires that one of three conditions must first be met prior to the exercise of ICC jurisdiction. For any given crime, the ICC may only investigate and prosecute acts that were: (1) committed on the territory of, or by a national of, a state party to the Rome Statute; (2) committed on the territory of, or by a national of, a state that has consented *ad hoc* to the jurisdiction of the ICC; or (3) referred to the ICC by the Security Council.⁵⁸ For the crime of aggression, it is anticipated that there will be an additional “trigger” or “filter” before the ICC may exercise its jurisdiction.

Some of the current proposals before the Special Working Group envisage jurisdiction being triggered *only* if the Security Council has determined that an act of aggression was committed by a state or, at least, has adopted a resolution asking the Prosecutor to proceed with the investigation (the latter is sometimes referred to as a “strong green light” by the Security Council).⁵⁹ Such proposals are supported by the permanent members of the Security Council and by a few other states, but to date are not supported by most states parties to the Rome Statute.

Other proposals envisage allowing the matter, in the first instance, to be addressed by the Security Council. However, in the absence of Security Council action, these proposals envisage the prosecutor after a period of time (e.g., six months) proceeding with the investigation on the prosecutor’s own initiative or, alternatively, proceeding if authorized by a “filter” other than the Security Council. These filters include: (1) when authorized by the ICC Pre-Trial Chamber; (2) when the General Assembly has “determined that an act of aggression has been committed”; or (3) when the International Court of Justice makes such a determination, presumably in the form of an

⁵⁸ *Id.* arts. 12–13.

⁵⁹ See 2009 Special Working Group Report, *supra* note 46, at 12 (draft Article 15 bis, ¶¶ 1–3 & 4 (alternative 1)). For arguments in opposition to the Security Council being the exclusive trigger for ICC jurisdiction over this crime; see Troy Lavers, *[Pre]Determining the Crime of Aggression: Has the Time Come to Allow the International Criminal Court its Freedom?*, 71 ALB. L. REV. 299 (2008).

advisory opinion after a request by the General Assembly, though possibly in the course of a contentious case as well.⁶⁰

If the crime of aggression in a particular situation may only be pursued upon a finding by the Security Council that an “act of aggression” has occurred, then the ICC’s jurisdiction over this crime may not have any significance whatsoever, let alone have an impact on the legality of humanitarian intervention. The Security Council virtually never declares that transboundary uses of force are acts of aggression; even North Korea’s attack on South Korea in 1950 and Iraq’s 1990 invasion of Kuwait were characterized by the Security Council as a “breach of international peace,” not an act of “aggression.”⁶¹ As such, if the triggering mechanism is a Security Council finding of “aggression,” then the ICC’s jurisdiction over this crime may well be still-born.

If a possible crime of aggression may be investigated simply upon a request of the Security Council to the ICC (without a Security Council finding of “aggression”), then the ICC’s jurisdiction over this crime might also be severely curtailed. The willingness of the Security Council to issue such a request may be just as unlikely as a finding of “aggression.” Certainly, such a request will not be issued in situations where any of the permanent members is the state (or is closely allied with the state) allegedly perpetrating the aggression. Hence, under this approach the ICC’s jurisdiction might be reduced solely to instances where a relatively isolated or “outlaw” state has engaged in the conduct (e.g., Iraq in 1990), such that there is sufficient support on the Security Council and among the permanent members for issuing the request. If so, the erratic nature of the ICC’s jurisdiction over the crime of aggression likely would have little effect in clarifying the legality of unilateral humanitarian intervention, for the failure to prosecute such conduct as a crime could be interpreted as the result of major power politics, rather than a belief that the underlying conduct is permissible.

A similar outcome may be likely if the amendment only allows the ICC to proceed, in the absence of Security Council action, whenever the General Assembly or the International Court has “determined that an act of aggression has been committed.” Like the Security Council, the General Assembly has only rarely found “aggression” to have occurred, letting pass by fairly momentous incidents of forceful action within any such condem-

⁶⁰ 2009 Special Working Group Report, *supra* note 46, at 13 (draft Article 15 bis, ¶ 4 (alternative 2)).

⁶¹ See S.C. Res. 660, U.N. S/RES/660 (Aug. 2, 1990); S.C. Res. 665, U.N. Doc. S/RES/665 (Aug. 25, 1990). In a few instances, some relatively minor in nature, the Security Council has declared conduct to be “aggressive” or “acts of aggression.” See UNITED NATIONS, HISTORICAL REVIEW OF DEVELOPMENTS RELATING TO AGGRESSION 225–36 (2003) (noting instances relating to Benin, South Africa, Southern Rhodesia and Tunisia).

nation.⁶² A General Assembly request to the International Court for an advisory opinion⁶³ on whether “aggression” has occurred seems equally unlikely; certainly no such request has been made to the International Court over the past sixty years even in situations where blatant aggression has occurred. Moreover, when on the rare occasion that the legality of acts of force have arisen on the merits in a contentious case, the Court has limited itself to finding a violation of the principle of “non-use of force” expressed in Article 2(4) of the Charter (or its counterpart in customary international law),⁶⁴ not a finding of an “act of aggression.”⁶⁵

One might speculate that an amendment to the Rome Statute will change the practice of the Security Council, General Assembly, or International Court. Arguably, once those institutions know that their determinations concerning aggression will have a collateral consequence for the work of the ICC, then those institutions may be more apt to focus on the issuance of such a determination. If the amendment has that effect, then perhaps the discussion outlined below concerning a triggering mechanism involving just the ICC will be relevant for a triggering mechanism that turns on Security Council, General Assembly or ICJ action. But if the amendment does not

⁶² See HISTORICAL REVIEW OF DEVELOPMENTS RELATING TO AGGRESSION, *supra* note 61, at 242–50; see also CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 21 (2d ed. 2004) (citing as examples Turkey’s incursion into Cyprus, Iran’s attack on commercial shipping during the Iran-Iraq War, and the United States in Grenada and Nicaragua).

⁶³ While the Security Council could also ask for such an advisory opinion, the presumption here is that the Security Council is unwilling or unable to act. Certain specialized agencies of the United Nations have also been empowered to ask advisory opinions of the International Court, so long as the matter is within the scope of the organization’s mandate. In this instance, it seems likely that no specialized agency would be found competent to ask such a question. For the Court’s conclusion that the World Health Organization was not competent to ask a question about the legality of nuclear weapons see *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, Advisory Opinion, 4 (1996).

⁶⁴ See *Corfu Channel Case (U.K. v. Alb.)*, 1949 I.C.J. 4, 35 (Apr. 9); *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 92 (June 27); *Land and Maritime Boundary (Cameroon v. Nig.; Eq. Guinea intervening)*, 2002 I.C.J. 303, 450 (Oct. 10); *Armed Activities on the Territory of the Congo (Dem. Repub. Congo v. Uganda)*, 2005 I.C.J. 168, 227 (Dec. 19).

⁶⁵ At best, one might try to argue that the Court’s findings in these cases are the functional equivalent of a finding of “aggression.” See Mark S. Stein, *The Security Council, The International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council’s Power to Determine Aggression?*, 16 IND. INT’L & COMP. L. REV. 1, 18–25 (2005). That argument is unpersuasive, given the care with which the Court (like the Security Council) chooses its language, as well as the Court’s refusal to find “aggression” even when specifically requested to do so by a party in the case. It is especially unpersuasive in the context of *Oil Platforms*, given that, while the Court did find that the U.S. actions could not be justified as measures “necessary to protect the essential security interests,” the Court nevertheless found no violation of international law within the scope of the Court’s jurisdiction. *Oil Platforms (Iran v. U.S.)* 98 AM. J. INT’L L., 554 (July 2004).

change existing practice, then it seems that any approach to the triggering of ICC jurisdiction that requires action by those institutions would have little effect in clarifying the legality of unilateral humanitarian intervention.

If, however, the language ultimately adopted in amending the Rome Statute allows for the prosecutor to proceed in the absence of Security Council action, either on the prosecutor's own initiative or after authorization by the Trial Chamber, then there may well be significant ramifications over the long term for the debate on the legality of unilateral humanitarian intervention. In such circumstances, the mere fact that the ICC mandate is broad enough to allow the prosecution of leaders that engage in humanitarian intervention will likely not affect the debate about the legality of humanitarian intervention. Only if the Rome Statute were amended so as to expressly identify unilateral humanitarian intervention as a form of aggression would the position of opponents of the legality of humanitarian intervention be strengthened, just as an express exclusion of such intervention as a form of aggression would strengthen the position of humanitarian intervention's proponents. What *will* count is how the ICC responds when incidents of unilateral humanitarian intervention arise. Prosecutions, or at least indictments, of leaders of those interventions will considerably strengthen the hand of those who oppose unilateral humanitarian intervention. Yet an unwillingness on the part of the ICC to indict and prosecute those leaders—an outcome that seems quite likely for incidents of true humanitarian intervention—will lend considerable credence to the view that unilateral humanitarian intervention is either lawful or tolerated by the international community.

An ICC prosecutor (or prosecutor in conjunction with the Pre-Trial Chamber) is extremely unlikely to indict the leader of a state who has embarked on a transboundary use of force that is truly designed to end a widespread deprivation of human rights. If the intervention is conducted in a manner approximating the kinds of criteria that have been identified for "true" humanitarian intervention—such as the five criteria of "legitimacy" formulated by the Secretary-General's High-level Panel on Threats, Challenges and Change⁶⁶—both legal and political dynamics will push the prosecutor away from indictment. The legal dynamics include the general discretion the prosecutor has not to indict in situations where it would appear unjust to do so, which undoubtedly will exist when the intervening state is attempting to stop a very seriousness threat to human lives, has exhausted other available means, and is limiting the intervention to what is necessary and appropriate to remove the threat. The Rome Statute provides that the prosecutor, when deciding whether it initiate an investigation, shall consider

⁶⁶ *Report of the High-level Panel on Threats, Challenges and Change*, *supra* note 21, ¶ 207.

whether, “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”⁶⁷ Further, to the extent that there is uncertainty about the criminality of a particular kind of conduct, the Rome Statute provides that the “definition of a crime shall be strictly construed” and that in “case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”⁶⁸ Finally, the Rome Statute provides that a person shall not be criminally responsible if the person is acting to reasonably defend other persons,⁶⁹ or in circumstances where the conduct was caused by “duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against” persons, so long as the person “acts necessarily and reasonable to avoid this threat” and “does not intend to cause a greater harm than the one sought to be avoided.”⁷⁰ Provisions of that sort provide a prosecutor with ample ability to engage in a nuanced assessment of whether in a given situation the overall interests of justice have been served by conduct that might technically fall within the scope of aggression, but that should not be sanctioned.⁷¹

Moreover, the legal dynamics may include certain benefits secured by the Prosecutor from the intervention, since the target state might well be one harboring persons already under indictment by the ICC and the intervening states can assist in bringing those persons into ICC custody (an initiative they will be less enthusiastic about if their leaders are themselves facing indictment). The political dynamics include the difficulty for the ICC of condemning an intervention that is either popular or largely tolerated by states and the broader global community, particularly if intervenors are a collective of states that are generally supportive of the ICC, perhaps including major financial supporters. Even if the intervenor is just a single state, if the objective is to oust a horrific regime, one that has committed extensive war crimes, crimes against humanity, and perhaps even genocide (Idi Amin in Uganda or the Khmer Rouge in Cambodia), the ICC’s political stature may suffer considerably if it is perceived as protecting that regime.

⁶⁷ Rome Statute, *supra* note 43, art. 53(1)(c). On the interplay between prosecutorial discretion to make decisions based on “interests of justice” and the traditional prerogatives of the Security Council under Chapter VII, see Jens David Ohlin, *Peace, Security, and Prosecutorial Discretion*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* (Carsten Stahn & Göran Sluiter eds., 2008).

⁶⁸ Rome Statute, *supra* note 43, art. 22(2).

⁶⁹ *Id.* art. 31(1)(c).

⁷⁰ *Id.* art. 31(1)(d).

⁷¹ For an argument on why “necessity” should excuse state responsibility for humanitarian intervention (as opposed to excusing criminal responsibility of state leaders), see Ian Johnstone, *The Plea of “Necessity,” in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, 43 *COLUM. J. TRANSNAT’L L.* 337, 357–566 (2005).

Could the Prosecutor find a way to avoid indicting the leaders of the intervening state(s) without establishing any precedent for the legality of the intervention? As is the case for statements by public officials of states, it is certainly possible for the ICC Prosecutor to be silent or at least vague about the reasons for not initiating a prosecution, or to announce that lack of evidence exists on certain points necessary to pursue a criminal case against government leaders.⁷² Obfuscation can go a long way in making it difficult for a clear legal precedent to emerge. At the same time, there may be considerable pressure upon the prosecutor to indicate clearly the position being taken by the ICC, just as there was when various states, human rights organizations, and others charged that NATO's conduct of the 1999 bombing campaign against Serbia violated the laws of war. In that instance, the chief prosecutor for the International Criminal Tribunal for the former Yugoslavia (ICTY) felt compelled to establish a committee within the Office of the Prosecutor to examine the allegations. After receiving and reviewing the committee's detailed report (which was subsequently made public), she informed the U.N. Security Council that there was no basis to open a criminal investigation into any aspect of the NATO campaign.⁷³ Similarly, in a situation where the ICC has declined to investigate or prosecute the leaders of a campaign of unilateral humanitarian intervention, the ICC prosecutor may be expected to report to the Assembly of States Parties to the Rome Statute on the factors that led to that decision, including specific reasons why the intervention is considered "humanitarian."⁷⁴

⁷² Defendants before the ICC are presumed innocent, with the onus on the prosecutor to prove guilt. Rome Statute, *supra* note 43, art. 66. Not only must the material elements of the crime be proven, but also that the defendant committed those acts with intent and knowledge, *id.* art. 30, with no mistake of fact or law negating that mental intent. *Id.* art. 32.

⁷³ For the prosecutor's statement to the Security Council, see U.N. SCOR, 4150th mtg., at 2–6, U.N. Doc. S/PV.4150 (June 2, 2000). For the committee's report, see ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 39 I.L.M. 1257 (2000).

⁷⁴ While the Rome Statute provides that the Office of the Prosecutor shall act independently, the Assembly of States Parties is mandated to provide management oversight to the Prosecutor. Rome Statute, *supra* note 43, art. 112(2)(b). At each meeting of the Assembly, the Prosecutor addresses the Assembly, providing a detailed update of the situations and cases he is handling. See, e.g., Prosecutor of the International Criminal Court, Address to the Assembly of States Parties (Nov. 30, 2007). Further, the ICC Secretariat prepares annual reports to the Assembly on the work of the major organs of the ICC, including the Office of the Prosecutor. See, e.g., International Criminal Court, *Report on Programme Performance of the International Criminal Court for the Year 2007*, ICC Doc. ICC-ASP/7/8 (May 26, 2008). In instances where a situation has been referred to the ICC by the U.N. Security Council, the Prosecutor reports directly to the Council on the matter. See, e.g., Prosecutor of the International Criminal Court, *Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)* (June, 5 2008), available at http://www.icc-cpi.int/NR/rdonlyres/C4584AF2-6A72-4BB0-94E6-45F43CE18F68/277787/UNSC_2008_En.pdf.

The ICC might also try to argue that its failure to condemn an intervention as “aggression” does not necessarily mean that the ICC regards the intervention as a lawful use of force, since the ICC’s concept of aggression aims at the most grave of forcible acts. For two reasons, however, that distinction may not prove significant. First, while the current drafts on the definition of aggression do contemplate a narrower class of forcible actions than those covered by Article 2(4), the forcible actions being excluded seem relatively insignificant, such that the term “aggression” is an inexact but close approximation of Article 2(4). Indeed, the proposed amendment leans heavily on the General Assembly’s 1974 resolution on the definition of aggression, which begins by stating that “[a]ggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”⁷⁵—language that mimics Article 2(4). As such, it will not seem very credible for the ICC to argue that an act of humanitarian intervention falls outside the scope of its crime of aggression, unless the intervention is of a very minor nature (e.g., a speedy rescue of hostages that involves no loss of life). Second, 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 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.

Establishing the unlikelihood of the ICC indicting the leaders of states who embark on unilateral humanitarian intervention is difficult, given the embryonic status of the ICC. In an attempt to at least sketch out this point, however, the next section considers what would have happened if an ICC with jurisdiction over the crime of aggression had existed at the time of NATO’s intervention with respect to Kosovo.

⁷⁵ G.A. Res. 3314, *supra* note 6, art 1.

III. WOULD THE ICC HAVE INDICTED NATO'S LEADERS FOR THE CRIME OF AGGRESSION FOR THE KOSOVO INTERVENTION?⁷⁶

A. *Effect of ICC Jurisdiction Prior to the Kosovo Intervention*

The underlying facts of NATO's 1999 intervention in Serbia (then known as the Federal Republic of Yugoslavia or FRY) on behalf of Kosovar Albanians has been amply recounted elsewhere and will not be repeated here.⁷⁷ Needless to say, given that the intervention seemed largely directed at protecting an ethnic group from its own government (a government that had unleashed considerable strife in the Balkans in the first half of the 1990s), the intervention stirred an extensive debate about its legality, with considerable attention focusing on whether the doctrine of humanitarian intervention was a viable component of contemporary international law.⁷⁸

Assuming the existence of an ICC at the time with jurisdiction over the crime of aggression, would that fact alone have inhibited NATO states from engaging in such intervention? Article 2(4) of the Charter itself is broad enough in scope to be viewed by many states and scholars as precluding humanitarian intervention, yet that fact alone did not inhibit NATO from proceeding. Rather, most NATO states asserted that their conduct was lawful without reliance on the doctrine of humanitarian intervention for support.

For example, the United States relied upon various factors that, when taken together, the United States believed justified the action. These factors included: (1) the commission by the FRY military and police of serious and widespread violations of international law in the FRY province of Kosovo against Kosovar Albanians; (2) the threat that FRY actions in Kosovo could lead to a wider conflict in Europe; (3) the FRY's failure to comply with agreements with NATO and the Organization for Security and Cooperation in Europe regarding FRY actions in Kosovo; (4) the FRY's failure to comply with Security Council resolutions regarding FRY actions in Kosovo; (5) the FRY's failure to cooperate with the International Crimi-

⁷⁶ Comments in Part II on the Kosovo incident draw in part upon reflections made by the author at the annual meeting of the American Society of International Law in 2000. See Sean D. Murphy, *The Intervention in Kosovo: A Law-Shaping Incident?*, 94 AM. SOC'Y INT'L L. PROC. 302, 302 (2000).

⁷⁷ See, e.g., THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT (2000); TIM JUDAH, KOSOVO: WAR AND REVENGE (2000); IVO H. DAALDER & MICHAEL E. O'HANLON, WINNING UGLY: NATO'S WAR TO SAVE KOSOVO (2000).

⁷⁸ See, e.g., Louis Henkin, *Editorial Comments: NATO's Kosovo Intervention*, 93 AM. J. INT'L L. 824 (1999).

nal Tribunal for the former Yugoslavia; and (6) the FRY's failure to abide by its own unilateral commitments.⁷⁹

Would the additional factor of the ICC possibly indicting NATO leaders have altered the situation? The answer to that question would seem to turn on whether NATO leaders would have anticipated the ICC indicting them, for only then might NATO leaders have been deterred. Since the ICC is a new institution, there is no track record for understanding its practice for issuing indictments in such situations and, until that practice settles, the ability to deter may be weak. The next sub-section concludes that the ICC likely would *not* have indicted NATO leaders for their intervention in Kosovo. If that assessment is correct, and if NATO leaders would have predicted a similar outcome, then the existence as of early 1999 of an ICC with jurisdiction over the crime of aggression likely would not have had any effect in deterring the Kosovo intervention.

B. Likelihood of ICC Prosecution after the Kosovo Intervention

After conducting an investigation, a prosecutor considering whether to indict leaders of NATO for the Kosovo intervention would likely have begun with the text of the Rome Statute and the elements of the crime of aggression. The analysis would have continued by noting that the U.N. Charter prohibits the use of force (Article 2(4)) absent Security Council authorization (under Chapters VII or VIII) or when acting in self-defense (Article 51). Although there were certain Security Council resolutions passed in advance of the intervention relating to Kosovo, which in part recognized the situation as a "threat to international peace and security," those resolutions did not authorize the use of force.⁸⁰ And, although some assertions were made that Europe as whole was threatened by the conflict in Kosovo (since other states such as Turkey and Greece might become involved), those assertions seemed thin at the time and even thinner today. In any event, NATO and its member states did not report the intervention to the Security Council as provided for in Article 51. State practice since enactment of the Charter has not altered these basic provisions of the Charter.⁸¹ As such, at first glance it seems that a prosecutor would have viewed

⁷⁹ See SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW: 1999-2001, 392-94 (2002).

⁸⁰ S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999); see S.C. Res. 1160, S/RES/1160 (Mar. 31, 1998); S.C. Res. 1199, S/RES/1199 (Sept. 23, 1998); S.C. Res. 1203, S/RES/1203 (Oct. 24, 1998); S.C. Res. 1239, S/RES/1239 (May 14, 1999).

⁸¹ On pre-Kosovo practice, compare MURPHY, *supra* note 1, at 83-144, and Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention*, 4 CAL. W. INT'L L.J. 203 (1974) (finding little support in state practice for unilateral humanitarian intervention), with TESÓN, *supra* note 15 (finding support).

the decision by NATO leaders to unleash the intervention as a crime of aggression.⁸²

At the same time, the prosecutor would have been confronted with a constellation of other factors weighing against indictment. First, the prosecutor would have presumably seen some significance in the types of factors that animate the natural law tradition. Under that tradition, rather than just parse the language of the Charter and related state practice, the natural law theorist would emphasize the moral necessity of acting to prevent the widespread deprivation of human rights. This tradition emphasizes that any international rule focused on the preservation of order at the expense of justice is destined to fail, and thus the law must allow for intervention in extreme cases. Since intervention to protect human rights seeks neither to alter territorial boundaries nor to depose existing governments, it does not endanger the core attributes of sovereignty that Article 2(4) seeks to protect territorial sovereignty. While everyone would prefer the original Charter scheme of a well-functioning Security Council capable of deploying forces, the unfortunate reality is that the Security Council has no such forces at its disposal and, due to political exigencies, at times is paralyzed from even authorizing individual states to act on its behalf, such as occurred with respect to the crisis in Kosovo. In such situations, states cannot be expected to stand by while people die; the Charter was not a suicide pact.⁸³ If the prosecutor perceived such factors to be present, then it would weigh against indictment; for all prosecutors, their discretion not to indict turns not solely on the formal content of the law, but on extraneous factors that are more contextual in nature.

Second, a prosecutor would no doubt be influenced by the fact that this “unilateral” humanitarian intervention involved sixteen NATO countries—fully democratic and therefore fully accountable to their people—collectively deciding that the intervention was justified as a matter of international law and policy. Thirteen of those countries actually engaged in the bombing campaign. Further, while some non-NATO states asserted that the

⁸² See, e.g., Ian Brownlie & C. J. Apperley, *Kosovo Crisis Inquiry: Memorandum on the International Law Aspects*, 49 INT'L & COMP. L.Q. 878 (2000), & *Further Memorandum*, 49 INT'L & COMP. L.Q. 905 (views by counsel for the FRY as to why the intervention was neither legal nor “humanitarian”); Jonathan Charney, *NATO's Kosovo Intervention*, 93 AM. J. INT'L L. 834, 834 (1999) (“Indisputably, the NATO intervention through its bombing campaign violated the United Nations Charter and international law.”); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999) (examining the legality of the threat or use of force just prior to the bombing campaign). A few positivists believe that prior to the intervention in Kosovo there was sufficient state practice to support humanitarian intervention in extreme cases. See, e.g., Christopher Greenwood, *International Law and the NATO Intervention in Kosovo*, 49 INT'L COMP. L.Q. 926 (2000).

⁸³ See W. Michael Reisman, *Editorial Comments: NATO's Kosovo Intervention: Kosovo's Antinomies*, 93 AM. J. INT'L L. 860 (1999).

intervention should not have gone forward without Security Council authorization, many non-NATO states supported the intervention.

There were, of course, states that quite openly opposed the intervention, notably China, India, and Russia, as well as states typically hostile to all major actions pursued by the United States, such as Cuba. And there were other states that were clearly uneasy with the intervention but fell short of formally condemning it. Public protests occurred in various states worldwide. Yet, while reasonable minds can differ, the intervention received relatively widespread acceptance—whether viewed as affirmative support or passive toleration—of a kind not seen in some prior incidents of unilateral humanitarian intervention. In light of this, for a prosecutor to claim that the intervention in Kosovo was unlawful would likely face considerable criticism from a variety of quarters.

Third, the prosecutor would have noted the reactions of key international organizations to the intervention. In particular, when a resolution condemning the air campaign was placed before the Security Council on March 26, 1999, the resolution was defeated by a vote of 12 to 3.⁸⁴ Among those 12 states were several non-NATO members, such as Argentina, Bahrain, Brazil, Gabon, Gambia, Malaysia, and Slovenia. Similarly, a Russian draft resolution before the U.N. Commission on Human Rights calling for “an immediate cessation of the fighting” and attributing “victims and casualties amongst the civilian population [to] missile strikes and bombings” failed by a vote of 11 to 24, with 18 states abstaining.⁸⁵

The prosecutor would have noted that the General Assembly did not condemn the intervention, as it did when Vietnam intervened in Cambodia in 1978 and when the United States intervened in Grenada and Panama in 1983 and 1989. Nor did the General Assembly even pass a resolution demanding a withdrawal of forces, as it did when India intervened in East Pakistan in 1971. Meanwhile, the Prosecutor would have noted that the Organization of the Islamic Conference declared that “a decisive international action was necessary to prevent humanitarian catastrophe and further violations of human rights” in Kosovo.⁸⁶

Fourth, the prosecutor would be influenced by the series of factors that ultimately led to the first deployment of war by NATO forces since its inception: (1) in Serbia, there was a government with a track record of brutal ethnic cleansing that was inflicting increasing levels of violence against a

⁸⁴ U.N. SCOR, 54th Sess., 3989th mtg., at 6, UN Doc. S/PV.3989 (Mar. 26, 1999).

⁸⁵ U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report on the Fifty-Fifth Session*, ¶¶ 35–36, U.N. Doc. E/CN.4/1999/167 (July 20, 1999).

⁸⁶ See Iran Ambassador Nejad Hosseinian, *Letter Dated 31 March 1999 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the President of the Security Council*, annex, delivered to the Security Council, U.N. Doc. S/1999/363 (Mar. 31, 1999).

civilian population in one of its historically autonomous regions; (2) the Security Council had expressly identified actions taken by the government as a threat to the peace which could lead to humanitarian catastrophe even if it had not yet; and (3) that government had refused to abide by the demands of the Security Council, including agreements that the government itself has made with the international community and that had been endorsed by the Security Council.

Fifth, the prosecutor would be influenced by the “end game” of the intervention: are the interveners seizing territory as part of their “humanitarian intervention” or is their conduct generally perceived as limited to what is necessary and proportionate in carrying out the humanitarian objective? In the case of Kosovo, the Security Council itself—with Russia’s affirmative vote—ultimately accepted the reality of the intervention by authorizing activities associated with the cease-fire agreement, an agreement negotiated fully with Russian involvement.⁸⁷ While Serb forces were basically expelled from Kosovo, Kosovo did not fall within the dominion of an aggressor; it was patrolled by a NATO-led multinational coalition, including Russian troops. Again, Security Council action to move forward with conflict management should not be viewed as a wholesale endorsement by all Security Council members of all preceding actions, but Russia’s and China’s willingness to support this new U.N. administered territory would likely have influenced the decision of an ICC prosecutor as to whether to indict.

Sixth, the prosecutor perhaps would be influenced by the broader scenario unfolding in terms of crimes *other* than the crime against aggression. In a situation of true humanitarian intervention, it is likely that the leaders of the targeted state have committed violations in the form of crimes against humanity, genocide, or widespread war crimes. As such, the ICC may well be focused on the leaders of the targeted state, just as the International Criminal Tribunal for the Former Yugoslavia (ICTY) at the time of the Kosovo intervention was already focused on Serbia’s leader, Slobodan Milošević, for his conduct in the former Yugoslavia during the 1990s. In May 1999, in the midst of the NATO bombing campaign in support of Kosovar Albanians, Milošević was indicted for 340 counts of murder, stemming from seven separate massacres, and some 740,000 forced deportations from Kosovo since the beginning of 1999.⁸⁸ For an international criminal

⁸⁷ S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999). For the debate and information on the vote of 14-0, with China abstaining, see U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/PV.4011 (June 10, 1999).

⁸⁸ See Prosecutor v. Milošević, Case No. IT-01-51-I, Indictment (Nov. 22, 2001), <http://www.un.org/icty/indictment/english/mil-ii011122e.htm>. After his surrender to the ICTY in 2001, Milošević was charged with additional atrocities involving more victims of the 1999 conflict in Kosovo. See Prosecutor v. Milošević, Case No. IT-99-37-I, Amended Indictment (June 29, 2001),

tribunal to declare, on the one hand, that the leaders of a country committed acts of violence against civilians but, on the other hand, it is a crime for others to stop them, would place the tribunal in a very awkward position.

Similarly, if the tribunal determines that the intervening states adhered to the *jus in bello* in the course of their intervention—as was determined by the ICTY in assessing NATO’s conduct in the Kosovo intervention⁸⁹—that too may influence the prosecutor’s decision regarding the crime of aggression. While as a theoretical matter, it is certainly possible to commit a violation of the *jus ad bellum* while committing no violations of the *jus in bello*, it might prove politically awkward to find the former but not the latter.

Finally, while a prosecutor may be somewhat insulated from external pressures, and is not a political entity such as the Security Council or General Assembly, only the most naive observer would reject the possibility of political influences on the prosecutor. A prosecutor would have had to possess a rather sturdy confidence to proceed with indictments for the crime of aggression against multiple leaders of Western democratic states, including U.S. President Bill Clinton, British Prime Minister Tony Blair, Canadian Prime Minister Jean Chrétien, German Chancellor Gerhard Schröder and the Italian Prime Minister Massimo D’Alema, especially when some of those countries are major financial supporters of the tribunal. Indeed, some observers believe NATO did commit *jus in bello* violations in the course of its bombing campaign,⁹⁰ such that one explanation for the lack of indictments with respect to *jus in bello* crimes is the old saw “don’t bite the hand that feeds you.”

IV. EFFECTS OF CRIMINALIZING HUMANITARIAN INTERVENTION

The ironic effect of activating a crime of aggression that is broad enough in scope to cover an act of unilateral humanitarian intervention may be to crystallize, over time, a norm that regards such intervention as lawful. Assuming that the crime of aggression (and associated elements) is drafted so as to neither expressly include nor exclude unilateral humanitarian intervention, and instead to simply criminalize large-scale transboundary uses of force, the definition will sweep within its range humanitarian interventions that take the form of bombing campaigns or deployment of military forces, such as was seen in NATO’s action against Serbia in 1999. Assuming further that the Security Council, General Assembly, or International Court of

<http://secint24.un.org/icty/indictment/english/mil-ai010629e.htm>.

⁸⁹ See ICTY, *Final Report*, *supra* note 68 (finding no evidence of law of war violations).

⁹⁰ See Amnesty Int’l, “*Collateral Damage*” or *Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force*, <http://www.amnesty.org/en/library/info/EUR70/018/2000> (last visited Feb. 24, 2009) (finding NATO violations of the laws of war).

Justice are not the sole triggering mechanisms for determining if an act of aggression has occurred, then considerable discretion will be accorded the ICC prosecutor (perhaps in conjunction with the Pre-Trial Chamber) to determine which forcible acts are lawful and which are not. As such, when the ICC is confronted in the years to come with an intervention that is not authorized by the Security Council but that is truly humanitarian, it seems likely that the ICC will not regard such conduct as aggression, resulting in a perception that unilateral humanitarian intervention is lawful. A further effect may be clarification by the ICC of what constitutes “true” humanitarian intervention. As indicated in Section II, when deciding not to investigate or prosecute the leaders of states that have engaged in such intervention, the ICC prosecutor may feel compelled to explain publicly why ICC action is not forthcoming. Presumably the prosecutor would focus on the kinds of criteria that have been previously suggested for humanitarian intervention, such as by the recent U.N. high-level panel or in the academic community.⁹¹

This article has focused on how activating the ICC’s jurisdiction over the crime of aggression may affect the doctrine of humanitarian intervention. However, if the analysis above is correct, then there may be a variety of other effects relating to other types of transnational uses of force, such as the use of military force by one state against another state to rescue its nationals or to restore to power a democratically-elected leader who was ousted by a military coup. Like humanitarian intervention, these other forms of transnational use of force have their critics and supporters when it comes to assessing legality. Were the ICC to begin weighing in on whether such forcible actions constitute aggression, it may considerably influence the legal debate, leading to crystallization and clarification of the relevant norm one way or the other.

If all this comes to pass, the result may be to place the ICC in a very significant position as the ultimate arbiter of lawful uses of military force, one that will shape the contours of the *jus ad bellum* over the next generation. Supporters of the ICC may welcome this development, applauding its ability to clarify a field of law that currently seems unstable and, at times, ineffective.⁹² If the Security Council remains unable to act because of major power resistance, the ICC—perceived as objective and non-political in nature—may emerge as the relevant voice in condemning or blessing transnational uses of force.

⁹¹ See *Report of the High-level Panel*, *supra* note 21, ¶ 207; MURPHY, *supra* note 1, at 382–87.

⁹² See Sean D. Murphy, *Protean Jus Ad Bellum*, 27 BERKELEY J. INT’L L. 22 (2009), http://www.boalt.org/bjil/docs/BJIL27.1_Murphy.pdf.

Yet such power would bring with it considerable risks. If the ICC is seen as the “go-to” arbiter for whether an intervention is permissible, and if the ICC blesses an intervention as humanitarian and not aggressive in nature, then considerable political repercussions may flow for the ICC if the intervention ultimately goes poorly, perhaps with the intervening state(s) mishandling relief operations, inadvertently provoking internal strife, failing to rebuild infrastructure destroyed by the intervention, or neglecting fundamental rule of law initiatives necessary to stabilize the targeted state. Conversely, the ICC might condemn, through the issuance of indictments, a use of force that ultimately proves extremely successful in replacing a tyrannical regime with one that is much more disposed toward representative democracy and human rights. Further, if there is insufficient consistency and practice in the role of the ICC in this area, broader adverse consequences might unfold as well. Unless the relevant lines are clearly drawn by the ICC, the core normative structure of the *jus ad bellum* might be weakened, especially if a belief emerges that some undefined forms of non-defensive force, undertaken without Security Council authorization, are acceptable. Moreover, to the extent that the ICC emerges as the central player in assessing the legality of recourse to force, it does so at the expense of the Security Council, which may harm the reputation and status of the global institution charged with maintaining international peace and security. (In order to recapture that role, the Security Council might be more inclined to address squarely the legality of uses of force when they occur, which would be a positive development for collective security.)

Potential “blowback” from decisions reached by the ICC are not fatal to its work, and will occur to some degree in any event for decisions reached by the ICC concerning the other types of crimes within its jurisdiction. Yet the stakes are considerably higher with respect to the crime of aggression, and while being at the center of attention has some benefits, it can also mean being at the center of a precarious and potentially damaging storm.