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First Do No Harm: Interpreting the Crime of Aggression to Exclude Humanitarian Intervention

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Abstract:
The yet to be implemented Article 8 *bis* of the Rome Statute criminalizes, as the crime of aggression, acts of aggression which by their "character, gravity and scale" constitute a "manifest violation" of the Charter of the United Nations. This article argues that Article 8 *bis* must be construed so as to exclude from the International Criminal Court's jurisdiction uses of force, which are facial violations of the UN Charter, but which nonetheless comport with the principles and purposes of the Charter, such as bona fide humanitarian intervention unauthorized by the Security Council. This article examines and applies the Vienna Convention on the Law of Treaties, state practice, and opinion juris to conclude that such humanitarian intervention is not a use of force per se prohibited by Article 2(4) of the UN Charter, despite widespread belief to the contrary. Even if Article 2(4) prohibits bona fide humanitarian interventions, humanitarian interventions will not be—by their "character, gravity and scale"—"manifest" violations of the UN Charter, and therefore are not crimes within the competency of the International Criminal Court to punish.

Abstract:

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> More and more, we all confront difficult questions about how to prevent the slaughter of civilians by their own government, or to stop a civil war whose violence and suffering can engulf an entire region. I believe that force can be justified on humanitarian grounds, as it was in the Balkans, or in other places that have been scarred by war. Inaction tears at our conscience and can lead to more costly intervention later.
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> --President Barack Obama upon receipt of the Nobel Peace Prize[1]

I. INTRODUCTION

On June 12, 2010, the States Parties to the International Criminal Court (ICC or the Court) meeting in Kampala, Uganda adopted by consensus a new Article 8 *bis* for the Rome Statute.[2] Doing so, they defined the crime of aggression for the purposes of the ICC's statute and addressed the Court's future jurisdiction over that crime.[3] Article 8 *bis* (1) defines "the crime of aggression" as:

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[1] Barack H. Obama, Nobel Lecture by Barack H. Obama: A Just and Lasting Peace (Dec. 10, 2009), *available at* nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html.

[2] *See generally* Matthew Gillett, *The Anatomy of an International Crime: Aggression at the International Criminal Court*, 13 INT'L CRIM. L. R 829 (2013).

[3] *See* Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, May 31-Jun. 11, 2010, U.N. Doc. R/Con./Res.6 [hereinafter RC/Res.6]; *see also* Robert Heinsch, *The Crime of Aggression After Kampala: Success or Burden for the Future?*, GOETTINGEN J. INT'L. L. 713, 715 (2010). Thirty member States must ratify Article 8 *bis* and the Member States must take further action after January 1, 2017 before the ICC can assert jurisdiction over the crime of aggression. *See* Rome Statute of the International Criminal Court art. 8 *bis*, 15 *bis*(2-3), 15 *ter*, July 17, 1998, 37 I.L.M. 1002 [hereinafter Rome Statute].The decision by the Member States to confer on the Court this jurisdiction must be taken by the same majority which is required for the adoption of an amendment to the Statute. As of this writing, only five states have now ratified the Article 8 *bis* amendment. *See* UN Treaty Collection, 2013-04-11.

> [T]he planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[4]

Article 8 *bis* (2) defines "act of aggression" as, "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."[5] Article 8 then specifies examples of acts of aggression.[6] Undefined terms such as "character," "gravity," "scale," and "manifest" at first appear ambiguous. Properly construed, however, these terms exclude bona fide humanitarian intervention from the scope of the crime.[7] Beth Van Schaack has argued that:

> The crime of aggression is expansively drafted in a way that implicates all uses of force that might be construed to constitute a 'manifest' violation of the U.N. Charter . . . As a result, the codification of the crime of aggression and the eventual threat of prosecution may chill those uses of force that are protective in nature, such as interventions pursuant to

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[4] Rome Statute, *supra* note 3, at art. 8 *bis*(1).
[5] *Id.* at art. 8 *bis*(2).
[6] *See id.* at art. 8 *bis*(2)(a)-(g) (these acts include invasion, bombardment, blockade, etc.)
[7] *See* Beth Van Schaack, *The Crime of Aggression and Humanitarian Intervention on Behalf of Women*, 11 INT'L CRIM. L. REV. 477, 491 (2011). ("[S]ome elements that would be required for any valid intervention . . . include: action by a legitimate authority; pursuit of a right intention (the advancement of good or the avoidance of evil); abuses that exceed some gravity threshold; the use of force as a last resort after efforts at diplomacy, negotiation and other sanctions had failed; a proportional response; and a reasonable prospect of success. In terms of legitimate power, a prioritising of Security Council action, or at a minimum multilateral or regional action, is a central feature of modern theorising about humanitarian intervention . . . [a]n additional requirement would be that such an intervention would result in the diminution rather than escalation of violence.").

> the nascent doctrine of responsibility to protect [and humanitarian intervention.][8]

This article shows that a reading of Article 8 *bis* construing humanitarian intervention as a crime before the ICC is unwarranted and unwise. Part I of this article argues that Article 2(4) of the UN Charter should be interpreted in accordance with the Vienna Convention on the Law of Treaties (Vienna Convention) in light of the UN Charter's human rights provisions, especially Articles 1, 55, 56, and the Preamble.[9] By doing so, it becomes tenable to interpret Article 2(4) so as not to proscribe bona fide acts of humanitarian intervention per se. Part II examines Article 8 *bis* and shows that excluding humanitarian intervention from the crime of aggression is fully warranted by the Rome Statue, and is even required by its terms. In order for a violation of the UN Charter to be a crime under Article 8 *bis* it must be a manifest violation.[10] This threshold excludes uses of force, such as humanitarian interventions, that may be facial violations of the UN Charter, but which nonetheless comport with its principles.[11] Further, this article will show that the qualifiers "character" and "gravity" must be construed so as to exclude humanitarian intervention from the crime of aggression's scope, thereby precluding humanitarian intervention from being a manifest violation of the UN Charter. A discussion of *nullum crimen sine lege* and a conclusion follows.

II. INTERPRETING THE UN CHARTER'S PROHIBITION OF THE USE OF FORCE

Humanitarian intervention is "the use of armed force for the prevention or discontinuation of massive violations of human rights in a foreign State."[12] The crime of aggression requires an act of aggression

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[8] *Id.* at 478-79.

[9] *See* Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; U.N. Charter art. 2, para. 4, art. 1, art. 55, art. 56.

[10] *See infra* Part III.

[11] *See infra* Part III.

[12] THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 130 (BRUNO SIMMA ed., 2nd ed., 2002) (citing Michael Reisman & Myres S. McDougal, *Humanitarian Intervention to Protect the Ibos*, *in* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS, 167-96, 178, 192-93 (Richard B. Lillich ed., 1973); *see* Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 FORDHAM

which in turn necessitates the use of force.[13] Any discussion on the legality of the use of force, including force used for humanitarian purposes, begins with the UN Charter's prohibition on the use of force contained in Article 2(4); however, this must not end there. That article provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[14] There are two provisions where the UN Charter expressly authorizes the use of force despite Article 2(4). The first is force used in self-defense (Article 51) and the second is the use of force pursuant to a Security Council resolution under its Chapter VII (Articles 43-48) powers.[15] There is no provision specifically addressing humanitarian intervention, and at first blush, the two explicit exceptions appear to be the only lawful uses of force under the UN Charter framework. Upon closer examination; however, it becomes clear that not all other uses of force are *per se* prohibited by Article 2(4) or any other provision.[16] Unlike self-defense, the argument

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INT'L. L. J. 794, 794-805 (1995); *see* Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L. L. 866, 866-76 (1990); HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 18 (J.L. Holzgrefe and Robert O. Keohane eds., 2003) (defining humanitarian intervention as "the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied."); *see also* Gillett, *supra* note 2, at 851 quoting SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 11-12 (1996) (defining humanitarian intervention as "the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights.").

[13] *See generally* Reisman & McDougal, *supra* note 12 at 192-93.

[14] U.N. Charter art. 2, para. 4.

[15] *See id.* arts. 39-51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . . ") *Id.* art. 51.

[16] *But see* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 72 (5th ed. 2011) ("[T]he Charter forbids the use of inter-State force, except in the exercise of self-defence or as a measure of collective security decided upon by the Security Council, [and] any professed

here is not that humanitarian intervention is affirmatively authorized by the UN Charter; rather, the argument is simply that humanitarian intervention is not prohibited. Since states are free to engage in any conduct they wish so long as it does not violate a proscription of international law, that is all which must be proven.[17]

Pursuant to Article 2 of the Vienna Convention, which is customary international law, the UN Charter is a treaty and is thus subject to the rules of treaty interpretation.[18] The Vienna Convention provides that provisions of a statute should be interpreted with "ordinary meaning . . . given to the term[s]" in the text.[19] The terms of Article 2(4) seem clear enough, but as International Court of Justice (ICJ or World Court) Judge Simma explained, "[t]he ordinary meaning of a term can only be determined by looking at the context in which it is used."[20] The ICJ emphasized this point in the Inter-Governmental Maritime Consultative Organization (IMCO) advisory opinion.[21] The relevant context of Article 2(4) is that it is contained in the UN Charter, itself a human rights document (drafted as the full magnitude of the

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dispensation from this prohibition would be contradictory to the Charter.").

[17] *See* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7), ("Restrictions upon the independence of States cannot therefore be presumed.").

[18] VCLT, *supra* note 9, at art. 2(1)(a) ("'[T]reaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation"); s*ee also* Gabčikovo-Nagymaros Project, (Hung. v. Slovk.) 1997 I.C.J. 7, 72 (May 23) (Where the ICJ applied the Vienna Convention to the dispute, even though neither state party was a member of the convention, because the convention reflects customary international law; *see also, Frequently Asked Questions About Vienna Convention on Law of Treaties,* U.S. DEP'T OF STATE, http://www.state.gov/s/l/treaty/faqs/70139.htm.

[19] VCLT, *supra* note 9, art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

[20] SIMMA, *supra* note 12, at 20.

[21] *See* Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 I.C.J. 150, 158-60 (June 8).

Holocaust was coming to light), and must be read in that context.[22] Human rights are expressly provided for in Articles 55 and 56. UN Charter Article 55 states that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all . . . ."[23] Article 56 further provides that "[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."[24]

Further, Article 31(1) of the Vienna Convention provides that treaty provisions "shall [be interpreted in] light of [the treaty's] object and purpose."[25] This is a crucial point often missed by strict constructionists. "Shall" indicates an imperative; it is not optional.[26] Article 31(2) of the Vienna Convention then explains that the object and purpose of a treaty are determined, *inter alia*, by looking at the treaty's preamble.[27] The preamble of the UN Charter provides that its members "reaffirm faith in fundamental human rights . . . ."[28] In his dissent to the *Nuclear Weapons* advisory opinion, ICJ Judge Weeramantry noted that "dignity and worth of the human person" are keynote principles of the UN Charter.[29] More palpably, UN Charter Article I reads: "The Purposes of the United Nations Are [the achievement of] (3) "international co-operation in solving international problems of . . . humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all . . . ."[30]

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[22] *See* Katarina Mansson, *Reviving the 'Spirit of San Francisco': The Lost Proposals on Human Rights, Justice and International Law to the UN Charter,* 6 NORDIC J. INT'L L. 217 (2007).
[23] U.N. Charter art. 55.
[24] U.N. Charter art. 56.
[25] VCLT, *supra* note 9, at art. 31(1).
[26] *See* BLACK'S LAW DICTIONARY 1499 (9th ed. 2009) (defining the verb "shall" as "[h]as a duty to; more broadly, is required to . . . This is the mandatory sense that drafters typically intend and that courts typically uphold.").
[27] VCLT, *supra* note 9, at art. 31(2).
[28] U.N. Charter pmbl.
[29] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 441-42 (July 8) (dissenting opinion of Judge Weeramantry).
[30] U.N. Charter art. 1, para 3.

Pursuant to the Vienna Convention, the provisions of the UN Charter (including Article 2(4)'s prohibition on the use of force) *must* be interpreted in conformity with the purposes of the UN Charter. These purposes specifically include the promotion and protection of human rights. Commentators support this position;[31] additionally, so do the terms within the UN Charter. It is important to note that Article 2(4) speaks of conduct inconsistent with the *purposes* of the Charter, not necessarily with the provisions of the Charter.[32] Additionally, under the doctrine of *effet-utile* when a treaty provision is subject to multiple interpretations, "the one that best serves the recognizable purposes of the treaty and its various provisions must be chosen."[33] In his dissenting opinion in the ICJ's *South-West Africa* advisory opinion, Judge de Visscher made it clear that this principle is applicable to the UN Charter:

> It is an acknowledged rule of interpretation that treaty clauses must not only be considered as a whole, but must also be interpreted as to avoid as much as possible depriving one of them of practical effect for the benefit of others. This rule is particularly applicable to the interpretation of a text of a treaty of a constitutional character like the United Nations Charter.[34]

Article 2(4) cannot be interpreted to abrogate the very purposes of the Charter, especially its human rights provisions, or to deprive Articles 1, 55, 56 and the Preamble of any meaning. Therefore, the article cannot be construed to prohibit *bona fide* humanitarian intervention necessary

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[31] *See e.g.,* Keith A. Petty. *Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict*, 33 SEATTLE U. L. REV. 105, 125 (2009); Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT'L L. 57, 78 (2007-2009).

[32] U.N. Charter art. 2, para. 4.

[33] *See* SIMMA, *supra* note 12, at 31.

[34] International Status of Southwest Africa, Advisory Opinion, 1950 I.C.J., 187 (July 11) (dissenting opinion of Judge De Visscher); *see also,* Reparation for Injuries Suffered in the Service of The United Nations, Advisory Opinion, 1949 I.C.J.,174 (April 11).

to enforce the principles of the Charter even if force is unauthorized by the Security Council.

There is ample support for the position that a customary rule of international law allowing for just uses of force under Article 2(4) has emerged.[35] The General Assembly carved out an exception for aggression in Resolution 3314, when it defined aggression for the purposes of assisting the Security Council in interpreting the UN Charter.[36] Although adopted by consensus, the General Assembly does not legislate, and therefore Resolution 3314 is not binding on the Security Council.[37] However, the importance for this resolution cannot be ignored. General Assembly resolutions can have great normative effect and at a minimum, Resolution 3314 is expectation-forming and evidence of *opinio juris*.[38] Crucially, Article 8 *bis* of the Rome Statute explicitly incorporates Resolution 3314 making it part of the governing law of the ICC.[39] Article 6 of Resolution 3314 states that "[n]othing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions

[35] *See, e.g.,* Fernando R. Tesón, *Kosovo: A Powerful Precedent for the Doctrine of Humanitarian Intervention,* 1 AMSTERDAM L. F. 2, 42-48 (2009); Lee F. Berger, *State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone*, 11 IND. INT'L & COMP. L. REV. 605, 605-632 (2001).
[36] *See* G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., U.N. Doc. A/RES/3314 (Dec. 14, 1974) [hereinafter G.A. Res. 3314].
[37] *See* Yoram Dinstein, *Aggression in* THE MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW 203, (Rüdiger Wolfrum ed., 2012).
[38] *See e.g.*, Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts,* 1983 DUKE L. J. 876, (1983) (for more on how General Assembly resolutions can create soft-law); Tullio Treves, *Customary International Law*, *in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 937, 946 (Rüdiger Wolfrum ed., 2012); Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUROPEAN J. INT'L L. no. 5, 879, 879-906 (2005).
[39] *See* Rome Statute, *supra* note 3, at 5 (stating, "Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression . . . ").

concerning cases in which the use of force is lawful."[40] However, the resolution also explains that its provisions on the definition of aggression are "interrelated and each provision should be construed in the context of the other provisions."[41] Therefore, Article 6 must be read alongside Article 7, which effectively endorses the use of force in support of wars of national liberation and the right of self-determination.[42] Article 7 of the consensus definition of aggression states:

> Nothing in this Definition, and in particular article 3 [giving examples of aggressive conduct, which has been reproduced in Article 8 *bis*], could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right . . . in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; *nor the right of these peoples to struggle to that end and to seek and receive support* in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.[43]

The point here is that Resolution 3314—and therefore Article 8 *bis*—endorses a use of force, at least in some circumstances that are not provided for in the UN Charter. Article 2(4) is not a shibboleth. As reasoned by the General Assembly in the consensus definition of aggression, there are times when the use of force not in self-defense, and not under the aegis of the Security Council, may nevertheless be lawful.[44]

Professor Yoram Dinstein argues that "[p]ursuant to the Charter, the Security Council—and the Security Council alone—is legally competent to undertake or to authorize forcible 'humanitarian

[40] G.A. Res. 3314, *supra* note 36, at 144.
[41] *Id.*
[42] *Id.* at art. 7; *see also,* DINSTEIN, *supra* note 16, at 72.
[43] G.A. Res. 3314, *supra* note 36, art. 7 (emphasis added); *see also* DINSTEIN, *supra* note 16, at 71-72.
[44] *See* DINSTEIN, *supra* note 16, at 72.

intervention.'"[45] Ironically, this ignores the fact that Chapter VII does not provide for humanitarian intervention. Chapter VII does not confer onto the Security Council the power to authorize force to prevent massive human rights violations or to initiate regime change. Instead, it empowers the Security Council to authorize, or compel, military interventions in the cases of threats to peace, breaches of peace, and acts of aggression—conflicts between states—but only so as to "restore international peace and security."[46] This grant of authority is narrow. It is Chapter VI, not VII, which vests the Security Council with broad powers to address human rights violations internal to states but of international concern.[47] Chapter VI, however, addresses the "pacific" settlement of conflicts and limits the Security Council's powers of addressing these matters to undertaking investigations and making recommendations.[48] Nothing in Chapter VI speaks to the authorization of force. When writers like Dinstein argue that the only lawful form of humanitarian intervention is that which is enforced under a Chapter VII mandate, they have already read into the Charter an exception to Article 2(4).[49] This interpretation of Chapter VII is fully warranted, however, because it gives effect to the principals and purposes of the UN Charter.

Moreover, as Slye and Van Schaack note, "it is generally accepted at the international level that treaties are to be treated as living documents. In other words, they are to be interpreted in the context of the time in which they are being applied, and not as they would have been interpreted at the time of their drafting."[50] The UN Charter must

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[45] *Id.* at 94. *See also id.* at 73 (Arguing that "[n]othing in the Charter of the United Nations substantiates a unilateral right of one State to use force against another under the guise of securing the implementation of human rights"); SIMMA, *supra* note 12, at 131 (stating "Under the UN Charter, forcible humanitarian intervention can no longer, therefore, be considered lawful").

[46] U.N. Charter art. 39.

[47] Chapter VI of the UN Charter addresses the "pacific settlement of disputes." U.N. Charter art. 33.

[48] U.N. Charter arts. 34, 36.

[49] *See* note 43, *infra*.

[50] RONALD C. SLYE AND BETH VAN SCHAACK, ESSENTIALS: INTERNATIONAL CRIMINAL LAW 92 (2009); s*ee also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 633 (7th ed., 2008) ("[T]he language of the treaty must be interpreted in the light of the

be read in light of state practice, contemporary notions of sovereignty and *opinio juris*, such as that provided by the General Assembly with the nascent Responsibility to Protect doctrine (R2P).[51] The UN Charter, in fact, anticipates the continued development of international law. The Preamble provides that an additional purpose of the Charter is "to establish conditions under which justice and respect for the obligations arising from treaties *and other sources of international law* can be maintained."[52] The R2P norm, which is one of those other sources, having emerged in the last decades, holds that states have a fundamental duty to protect their people from serious and systematic human rights abuses.[53] The General Assembly, offering strong evidence of *opinion juris*, explained that, "each individual state has the responsibility to protect [people] from genocide, war crimes, ethnic cleansing and crimes against humanity . . . through appropriate and necessary means."[54] Pursuant to this doctrine, "if a state cannot or will not prevent the occurrence of such abuses, then intervention by other actors in the international community, including through the use of force, is justified, subject to certain limitations."[55] Many states embrace this principle. Article 4 of the Constitutive Act of the African Union, which entered into force in 2001, provides that the Union has a "right . . . to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[56] The "Assembly" noted in this provision is

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rules of general international law in force at the time of its conclusion, and also in the light of the contemporaneous meaning of terms.").

[51] *See generally* G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Oct. 7, 2009); Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm,* 101 Am. J. Int'l L. 99 (2007); Int'l Comm'n on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001, at 11; U.N. Secretary-General, *Report of the High Level Panel on Threats, Challenges, and Change*, ¶¶ 201-03, U.N. Doc. A/59/565 (Dec. 2, 2004); G.A. Res. 60/2, ¶¶ 138-9, U.N. Doc. A/RES/60/1 (Oct. 24, 2005); Paul Williams and Michael Scharf, *NATO Intervention on Trial: The Legal Case that was Never Made,* Human Rights Review 1(2): 103, at 105.

[52] U.N. Charter pmbl.

[53] *See* 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

[54] *Id.*

[55] Gillett, *supra* note 2, at 851.

[56] Organization of African Union, *Constitutive Act of the African Union*, July 1, 2000, art. 4, ¶ h.

composed of the heads of state of the African Union constituency, and not the Security Council.[57] Since the African Union Constitutive Act evidently takes "due account of the Charter of the United Nations," the fifty-three African states which agreed to this document believe that humanitarian intervention and R2P are compatible with the UN Charter in the absence of a Security Council resolution.[58]

It must be conceded that the ICJ has held in several instances that forcible humanitarian intervention, without Security Council authorization is unlawful.[59] In the *Nicaragua* case, the court held that the use of force was not an appropriate means of addressing human rights violations in the Central American state.[60] The ICJ further held in the *Nuclear Weapons* advisory opinion that there were only two exceptions to the prohibition on the use of force: self-defense and that pursuant to Ch. VII authorization.[61] In the *DRC* case, the court noted that despite the atrocities ongoing in the Democratic Republic of the Congo, Uganda was not authorized to use military force within the DRC.[62] On the other hand, in *Armed Activities on the Territory of the Congo*, the ICJ held that States are obligated "to employ all means reasonably available to them so as to prevent genocide so far as possible"[63] The bona fide nature of the humanitarian interventions in both *Nicaragua* and *DRC* were dubious. If a case were to come before the World Court whose facts more strongly suggested the humanitarian intervention was invoked in good faith, the ICJ might rule very differently. Indeed, the ICJ had the opportunity to reiterate the

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[57] *Id.* at art. 1 ("'Assembly'" means the Assembly of Heads of State and Government of the Union").
[58] *See id.* at pmbl, art. 3, (listing the heads of State adopting the Constitutive Act in 2000).
[59] Petty, *supra* note 31, at 121.
[60] *See* Military and Paramilitary Activities In and Against Nicaragua, Merits, Judgments (Nicar. v. U.S.), 1986 I.C.J. 146-49 (June 27); DINSTEIN, *supra* note 16, at 74 (citing N.S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 INTL. & COMP. L.Q. 321, 332 (1989)).
[61] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 227, 266 (July 8).
[62] Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Uganda), Provisional Measures, 2000 I.C.J. 124-25 (July 1).
[63] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 221, ¶ 430 (Feb. 26).

(perceived) incompatibility of humanitarian intervention with the UN Charter in the *Kosovo* advisory opinion and chose not to.[64]

Moreover, Article 2(4)'s prohibition on the use of force must be considered in light of state practice. In 1990, a West African peacekeeping force—under the auspices of the Economic Community of West African States (ECOWAS)—was militarily involved in Liberia without Chapter VII Security Council authorization.[65] The UN did not condemn the action and member states largely applauded the intervention.[66] The Security Council even adopted a resolution commending the effort and affirming its support.[67] This favorable treatment can be largely explained by the humanitarian purposes of the intervention and the ongoing civil war in Liberia that was resulting in large-scale human rights atrocities.[68] ECOWAS again intervened in Sierra Leone in 1997 without Chapter VII authorization, with much the same result.[69] Most notably, NATO bombed Yugoslavia for a period of seventy-eight days in 1999 without a Security Council mandate, an action unrelated to self-defense.[70] The United States-led NATO bombing of the former Yugoslavia was intended to protect the repressed ethnic Albanian population in the Kosovo province from an "overwhelming humanitarian catastrophe."[71] Again, the UN did not

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[64] *See* Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22).

[65] *See generally* Anthony Chukwuka Ofodile, *The Legality of ECOWAS Intervention in Liberia,* 32 COLUM. J. TRANSNAT'L L., 381 (1994).

[66] *Id.*

[67] *See* Kofi Oteng Kufour, *Developments in the Resolution of the Liberian Conflict,* 10:1 AM. U. J. INT'L L. & POL'Y 373, 384, (1994); *see also* S.C. Res. 788, ¶12, U.N. Doc. S/RES/788 (Nov. 18, 1992).

[68] *See generally* REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS (M. Weller, ed.1994).

[69] *See generally* Daniel Doktori, *Minding the Gap: International Law and Regional Enforcement in Sierra Leone*, 20 FLA. J. INT'L L. 329 (2008).

[70] BROWNLIE, *supra* note 50, at 742.

[71] As the British Permanent Representative to the United Nations, Sir Jeremy Greenstock, put it in March 24th 1999: "The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo there is convincing evidence that such a catastrophe is imminent. . . Every means short of force has been tried to avert this

condemn the campaign, though admittedly, it was not uncontroversial.[72] State practice is actually much more consistent and widespread than these few examples suggest. For example, Russia, one of the archetypical states trumpeting the uncompromising language of Article 2(4), nonetheless invoked humanitarian intervention when it intervened

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situation . . . military intervention is legally justifiable . . . ." quoted in BROWNLIE, *id.* at 743; *See also* MALCOLM N. SHAW, INTERNATIONAL LAW 1156 (6th ed.) (2008); UKMIL, 70 British Yearbook of International Law, 1999, p. 586, where the UK Secretary of State for Defense stated, "In international law, in exceptional circumstances and to avoid a humanitarian catastrophe, military action can be taken and it is on that legal basis that military action was taken."

[72] *See* Mary E. O'Connell & Mirakmal Niyazmatov, *What is Aggression? Comparing the Jus ad Bellum and the ICC Statute,* 10 J. INT'L CRIM. JUST. 189, 202-03 (2012) (referencing, Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999); Mary Ellen O'Connell, *The UN, NATO, and International Law After Kosovo*, 22 HUM. RTS. Q. 57 (2000); Martti Koskenniemi, '*The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159 (2002)); *See also,* SHAW, *supra* note 71, at 1157; Gillett, *supra* note 2, at 851; BROWNLIE, *supra* note 50, at 744 (noting a "Ministerial Declaration produced by the meeting of Foreign Ministers of the Group of 77 held in New York on 24 September 1999, three months after the NATO action against Yugoslavia had ended." There, the "Ministers stressed the need to maintain clear distinctions between humanitarian assistance and other activities of the United Nations. They rejected the so-called right of humanitarian intervention, which has no basis in the UN Charter or international law."). *Id.* at 744; *See also* DINSTEIN, *supra* note 16, at 338 (stating, the "[f]ailure by the Council to act in the face of 'ethnic cleansing' in Kosovo was distressing. Still, the 'cure' for that failure – opening the sluices for unilateral forcible intervention in a manner wreaking havoc on the Charter's system prohibiting the use of inter-State force save for self-defense or collective security – appears to the present writer worse than the disease." He further states that "[t]he question whether the situation in Kosovo in 1999 was so agonizing hat it warranted humanitarian intervention from the outside should have been resolved by the Security Council and not unilaterally by NATO.").

in Georgia in 2008.[73] The fact that few observers would find this conduct to be an example of bona fide humanitarian intervention does nothing to refute the fact that even Russia believes unauthorized humanitarian intervention may be lawful in some circumstances. Some commentators worry that if humanitarian intervention is deemed lawful it will be raised as a convenient excuse by states to advance their own political agendas.[74] "The pitfall," Dinstein writes, in granting license to unauthorized humanitarian intervention, "is that there can be countervailing subjective opinions as to whether a course of action is just, and there is too much room for abuse of the law in the name of justice."[75] These concerns are valid. To address those concerns, the international community and the court can apply rigorous guidelines clarifying which forms of humanitarian intervention will be treated as unlawful and which will not be, rather than sticking to the dogmatism that Article 2(4) is absolute. More exacting guidelines, either offered through judicial decisions of the court or through the Elements of Crimes, on the meaning of "character" in Article 8 *bis* would be an appropriate way of addressing these concerns (see below).

In sum, Article 2(4) must be interpreted so as not to undermine the principles of the UN Charter. Article 2(4) cannot be construed to prohibit bona fide humanitarian intervention necessary to prevent massive human rights atrocities from being perpetrated. A state cannot engage in massive human rights violations in contravention of the UN Charter's principles, and then, with unclean hands, invoke that very same Charter to argue that its political independence and territorial integrity–necessary to continue committing human rights atrocities–are offended by humanitarian interveners. Nevertheless, this issue will remain contentious, and for the purposes of the Rome Statute, the complete contours of Article 2(4) need not be resolved here. Even if accepting, *arguendo*, that UN Charter Article 2(4) cannot be harmonized with humanitarian intervention, it does not mean that such a use of force will constitute the crime of aggression. An act of

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[73] O'Connell & Niyazmatov, *supra* note 72, at 206; *see also* Gregory Hafkin, *Russio-Georgian War of 2008: Developing the Law of Unauthorized Humanitarian Intervention After Kosovo*, 28 B.U. INT'L L.J. 219 (2010).

[74] *See, e.g.,* DAVID CHANDLER, FROM KOSOVO TO KABUL AND BEYOND: HUMAN RIGHTS AND INTERNATIONAL INTERVENTION (2nd ed. 2005); STEPHEN A. GARRETT, DOING GOOD AND DOING WELL: AN EXAMINATION OF HUMANITARIAN INTERVENTION 3 (1999).

[75] DINSTEIN, *supra* note 16, at 74.

aggression—an illegal use of armed force—while a necessary ingredient for the crime of aggression, is not sufficient to trigger the ICC's jurisdiction. The Rome Statute requires more.

III. MANIFEST VIOLATIONS OF THE UN CHARTER

It may be superfluous to point out that the crime of aggression requires an act of aggression. An act of aggression, however, is not enough to trigger the Court's jurisdiction under Article 8 *bis*.[76] This reflects the pedigree of the consensus definition found in Resolution 3314. Article 5(2) of that resolution states: "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility."[77] The Resolution therefore differentiates "aggression" on the one hand, which gives rise to international state responsibility, and a "war of aggression" on the other, which is criminal.[78] The General Assembly clearly signaled that not every act of aggression should constitute a crime, even if one believes that all acts of aggression violate the UN Charter. Acts of aggression that fall short of wars of aggression will not result in individual criminal responsibility, though they might trigger the rules of state responsibility (not dealt with here).[79]

Where Article 8 *bis*(1) of the Rome Statute defines the "crime of aggression," Article 8 *bis*(2) defines "act of aggression."[80] The Rome Statute, therefore, like the consensus definition, bifurcates crimes and *mere* acts of aggression. Where Resolution 3314 delineates criminal conduct and state responsibility, Article 8 *bis* distinguishes crimes adjudicable by the Court and acts of aggression, which are beyond the Court's jurisdiction to punish.[81] Since Article 8 *bis*(2) defines "act of aggression" as a "use of armed force by a State against the sovereignty,

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[76] Gillett, *supra* note 2, at 855

[77] G.A. Res. 3314, *supra* note 36, at art. 5(2).

[78] *See* DINSTEIN, *supra* note 16, at 135.

[79] *See generally* Dinstein, *supra* note 37, at ¶ 12; DINSTEIN, *supra* note 16, at 135. For more on State responsibility, *see also* ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC GAOR, 53rd Sess., Supp. No. 10, ILC A/56/10 (2011).

[80] Rome Statute, *supra* note 3, art. 8 *bis*(2).

[81] *See id.*, at art. 5 (The Court only has the competency to punish the crimes listed in Article 5 of the Rome Statute. Article 5(d) speaks of the crime of aggression, and does not contain a provision for acts of aggression).

territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations," the "crime of aggression" must be something different.[82] Not all acts of aggression will rise to the level of the crime of aggression. The dividing line between acts and crimes of aggression is provided for in Article 8 *bis*.[83] In order to constitute the crime of aggression under the Rome Statute, "as a threshold requirement" the act of aggression must "by its character, gravity and scale, constitute a manifest violation of the Charter of the United Nations."[84]

The terms in the threshold qualifier are catnip for lawyers. They appear ambiguous at first and are (mostly) undefined in the Rome Statute.[85] Some commentators have expressed their dissatisfaction with the qualifiers and plentiful ink has been spilled attempting to interpret the language used in this provision.[86] This section spills a little more ("manifest" is discussed here, "character, gravity and scale" are dealt with in order below). As the Dictionary of Modern Legal Usage acidly puts it, "[t]he adjective 'manifest' often functions in suspect ways in legal writing . . . This word is one of those vague terms by which lawyers create an appearance of continuity, uniformity and definiteness that does not in fact exist."[87] Before ultimately settling on "manifest," the drafters of Article 8 *bis* considered using "flagrant" or "serious" as triggering thresholds.[88] Reportedly, the reason "flagrant" was not adopted is that it was believed the term would "establish a very high

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[82] *Id.*

[83] *See* Rome Statute, *supra* note 3, at art. 8 *bis*.

[84] M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW: SECOND REVISED EDITION 636 (2013) (citing Rome Statute, *supra* note 3, art. 8 *bis*).

[85] *See* Van Schaack, *supra* note 7, at 486 (noting that the "[d]rafters did not consider how these factors should be defined, leaving it to the Court for interpretation").

[86] *See e.g.,* O'Connell and Niyazmatov, *supra* note 72, at 200; *See* G.A. Res. 3314, *supra* note 36, art. 3; *See* O'Connell and Niyazmatov, *supra* note 72, at 204.

[87] BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE, 547 (Oxford, 2nd ed. 1995).

[88] *See* O'Connell and Niyazmatov, *supra* note 72, at 204; *see also*, Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression 6, ICC-ASP/5/SWGCA/INF.1 2006.

threshold, apparently too high."[89] "Manifest," on the other hand, was thought to establish a threshold higher than that found in Resolution 3314, but not too high.[90] Nomenclature is a lawyer's stock-in-trade, but there is probably no real difference between "flagrant" and "manifest." According to the Burton Legal Thesaurus, the two words are synonymous.[91]

At the Kampala Review Conference, some delegations wished to define "manifest violations" as "an obvious illegal violation."[92] Other delegations interpreted the phrase to mean "a violation with serious consequences."[93] A third group interpreted "manifest" to mean that the violation must be both obviously illegal and one with serious consequences.[94] No interpretation was agreed upon, but commentators have put forward various suggestions for the meaning of "manifest."[95] In an attempt to define the terms, Paulus refers to the Oxford English Dictionary, which notes that manifest is "clearly revealed to the eye, mind or judgment; open to view or comprehension; obvious."[96] He goes on to state that this definition is of not much help in that, "what, after all is obvious for one, is completely obscure to the other, in particular in international law."[97] Echoing that sentiment, Potter suggests that "manifest" adds nothing to the definition of the crime "but confusion."[98]

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[89] O'Connell & Niyazmatov, *supra* note 72, at 204 (*quoting* Stefan Barriga, *Against the Odds: The Results of the Special Working Group on the Crime of Aggression*, *in* INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 621-43 (Roberto Bellelli, ed., 2010).
[90] *Id.*
[91] *See* WILLIAM C. BURTON, LEGAL THESAURUS, 325, (Steven C. DeCosta, ed., Deluxe ed., 1980).
[92] *See* Johan D. der Vyver, *Prosecuting the Crime of Aggression in the International Criminal Court*, 1 NAT'L SEC. & ARMED CONFLICT L. REV. 1, 27 (2010-2011).
[93] *Id.*
[94] *Id.*
[95] *See, e.g.*, Andreas Paulus, *Second Thoughts on the Crime of Aggression,* 20 EUR. J. INT'L L. 1117 (2009); Drew Kostic, *Whose Crime is it Anyway? The International Criminal Court and the Crime of Aggression,* 22 DUKE J. COMP. & INT'L L. 109 (2011-2012); O'Connell & Niyazmatov, *supra* note 72.
[96] Paulus, *supra* note 95, at 1121.
[97] *Id.*
[98] O'Connell and Niyazmatov, *supra* note 72, at 204.

This is unpersuasive. There is a presumption in treaty interpretation that the drafting parties did not intend ambiguity, and that each word has been included for a reason.[99] The reason the "manifest" language was adopted was clearly to limit the scope of the crime of aggression. At the Kampala Review Conference, several States leading the effort to include the "manifest" qualifier were involved in NATO's 1999 Kosovo campaign.[100] Some delegates were concerned about the crime of aggression's potential chilling impact on humanitarian interventions.[101] It was, supposedly, the "elephant in the room."[102] At Kampala, the US delegation's "single most sensitive proposal was on excluding humanitarian intervention from the scope of draft Article 8 *bis*."[103] O'Connell and Niyazmatov note that other NATO States supported a high threshold for individual criminal responsibility, and that "[t]he delegations supporting the high threshold of 'manifest' by 'character, gravity and scale' were also those advocating that the ICC's jurisdiction over aggression be narrow."[104] No explicit exception for humanitarian intervention was agreed upon, but the "manifest" language was, and it must be read with the understanding that

[99] COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 726 (Otto Triffterer ed., 2d ed.).
[100] *See* O'Connell and Niyazmatov, *supra* note 72, at 202-03.
[101] *Id.* at 202-03 (referencing Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999); Mary Ellen O'Connell, *The UN, NATO, and International Law After Kosovo*, 22 HUM. RTS. Q. 57 (2000); Martti Koskenniemi, '*The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159-75 (2002)).
[102] Gillett, *supra* note 2, at 846. *See also* O'Connell & Niyazmatov, *supra* note 72, at 202 ("During the Preparatory Commission's meeting in 1996, the US representative had already expressed specific concerns about humanitarian intervention. He tried to argue that because the drafters of the UN Charter did not know about humanitarian intervention, the ICC crime of aggression would have to specially provide for it.").
[103] Claus Kreß & Leonie von Holzendorff, *The Kampala Compromise on the Crime of Aggression,* 8 J. INT'L CRIM. JUST. 1179, 1205 (2010).
[104] O'Connell and Niyazmatov, *supra* note 72, at 202-03.

humanitarian intervention is the very sort of conduct the qualifier was intended to exclude.[105]

There is textual support for this argument. Although the "manifest" threshold is found in neither the UN Charter nor Resolution 3314, it is elaborated upon in the Vienna Convention.[106] Article 46(2) of the Vienna Convention states that "a violation of domestic law can be invoked as manifest if it would be *objectively* evident to any State conducting itself in the matter in accordance with normal practice and in good faith."[107] That provision is used in the context of the validity of treaties, but the presumption is that terms should be used consistently unless provided for otherwise.[108] "Manifest" is also used in two other locations of the Rome Statute.[109] It is elaborated upon once. Rome Statute Article 33 addresses the defense of obedience to superior orders[110]. Subsection 2 explains that "orders to commit genocide or crimes against humanity are manifestly unlawful."[111] This language is "[f]or the purposes of [Article 33]"[112], but this is simply an

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[105] The American delegation attempted unsuccessfully to have the following understanding explicitly exclude humanitarian intervention adopted at Kampala:

> It is understood that, for purposes of the Statute, an act cannot be considered to be a manifest violation of the United Nations Charter unless it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith, and thus an act undertaken in connection with an effort to prevent the commission of any of the crimes contained in Articles 6, 7 or 8 of the Statute would not constitute an act of aggression.

See Van Schaack, *supra* note 7, at 483.
[106] *See* Heinsch, *supra* note 3, at 726.
[107] VCLT, *supra* note 9, art. 46(2) at 343. (emphasis added). S*ee also id.*
[108] VCLT, *supra* note 9, *a*rt. 46 at 343; *see also, id.* at art. 31(1) at 340 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").
[109] Rome Statute, *supra* note 3, arts. 33(1)(c)(2), 85(3).
[110] *Id.* art. 33.
[111] *Id.*
[112] *Id.*

acknowledgement that such orders can never reasonably be interpreted as lawful.[113] "Manifest" is used here as a reasonableness standard and there is no indication that it should be used any differently in Article 8 *bis*.[114] In fact, the Elements of Crimes, adopted contemporaneously with Article 8 *bis,* states: "The term 'manifest' is an objective qualification."[115] Objectivity is applied by the reasonableness standard: what a typical person in the actor's circumstance would understand to be reasonable behavior is objectively reasonable as a matter of law.[116]

It is the position here that interpreting the UN Charter so as to allow bona fide humanitarian intervention in the face of serious human rights atrocities is reasonable, despite the lack of Security Council authorization even if it is in technical violation.[117] If it is not a manifest violation, it is not criminal.[118] According to the late Cassese, "[t]he requirement of 'manifest' violations of the UN Charter excludes borderline or gray-area cases in an area of law with a lot of blurry regions and focuses on conduct that warrants criminal condemnation."[119] The "manifest threshold," indicates that clearly not all aggression will fall within the jurisdiction of the ICC, and thus the threshold will filter out borderline cases.[120] The "manifest violation" qualifier should, in other words, be interpreted to exclude uses of force

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[113] For more on the reasonableness standard in an international criminal law context, see Jessica Liang, *Defending the Emergence of the Superior Orders in the Contemporary Context,*2 GOETTINGEN J. INT'L L. 871-891, 884 (2010).
[114] *Id.*
[115] The crime of aggression, RC/RES.6, Annex II, intro. ¶ 3 (June 11, 2010).
[116] VCLT, *supra* note 9, at art 31.
[117] ANTONIO CASSESE ET AL., CASSESE'S INTERNATIONAL CRIMINAL LAW, 139 (Oxford University Press 3rd ed., 2013).
[118] *Id.*
[119] *Id.*; *See also February 2009: Final Meeting of the Special Working Group on the Crime of Aggression Meeting*, *in* THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 2003-2009, 51 (Stefan Barriga, et al. eds., 2009) [hereinafter THE PRINCETON PROCESS].
[120] Assembly of States Parties, Special Working Group on the Crime of Aggression, Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression, ICC-ASP/5/SWGCA/INF.1, at ¶19 (5 Sept. 2006).

from the ambit of the Court's jurisdiction, which facially violate the UN Charter, but nonetheless comport with its principles and purposes. The reader need not yet be convinced. Even if humanitarian intervention is a violation of Article 2(4) of the UN Charter, and even if humanitarian intervention is a "manifest violation" of the Charter, it is still not necessarily the crime of aggression under the Rome Statute. This is because Article 8 *bis* further qualifies "manifest" by requiring the act of aggression to have a "character, gravity and scale" which makes it a manifest violation.[121] These parameters are specific and set a high threshold for individual criminal culpability.[122] Specifically, it is not any manifest violation, but only violations which are manifest because of their "character, gravity and scale[123]" that are crimes of aggression under the Rome Statute. Thus, to determine whether an aggressive act is both a "manifest violation" and criminal, one must first define these other qualifiers and apply them accordingly. As we will see, a reasonable interpretation of these qualifiers will exclude humanitarian interventions.

Before interpreting the qualifiers, the issue of which combination of the qualifiers need be satisfied must first be addressed. At Kampala, Understanding No. 7, intended to aid the Court in interpreting Article 8 *bis*, was adopted by resolution.[124] Understanding No. 7 provides that, [i]n establishing whether an *act* of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a 'manifest' determination. "No one component can be significant enough" to satisfy the manifest standard by itself.[125] This Understanding reflects the view that prosecutions at the ICC for the crime of aggression will be confined to only the most serious and dangerous armed interventions. Yet Understanding No. 7 also adds a degree of confusion.[126] A plain, "strictly grammatical reading" of

[121] Rome Statute, *supra* note 3, at art. 8(1).
[122] *See* DINSTEIN, *supra* note 16, at 136.
[123] Rome Statute, *supra* note 3 at art. 8(1).
[124] *See generally* David Scheffer, *The Complex Crime of Aggression Under the Rome Statute*, 43 STUD. TRANSNAT'L LEGAL POL'Y 173, 179 (2011).
[125] Rome Statute, *supra* note 3, at Annex III; *See also* BARRIGA, *supra* note 89, at 629.
[126] *See* Heinsch, *supra* note 3, at 728 (suggesting that the new Rome Statute provision "actually might have been more easily interpreted without [the Understandings]").

Article 8 *bis*(1) would require all three qualifiers to be satisfied.[127] The qualifiers are written conjunctively. Understanding No. 7, however, suggests only two metrics need to be met. Rather than limit Article 8 *bis* as the United States intended, Understanding No. 7 may actually expand it.[128] Further, the Understanding erroneously refers to an act of aggression, but Article 8 *bis*(2)—defining acts of aggression—does not require any determination of "manifest violation" or of satisfaction of the three qualifiers. Those requirements deal with the crime of aggression and are contained in Article 8 *bis*(1), where, as Schafer notes, "there already exists the triple-hitter standard of 'character, gravity, and scale' . . . ."[129] Simply, Understanding No. 7 refers to the wrong section of Article 8.

The Court could simply disregard Understanding No. 7 as being patently erroneous. Elsewhere, however, the ICC has read "and" in the Rome Statute to mean "or" and could do so again even if it disregards the Understanding.[130] Regardless of whether the Court will read Article 8 *bis* as requiring all three metrics to be satisfied or just some combination of two, humanitarian intervention should be excluded from the crime of aggression.[131] The most logical interpretation of both character and gravity will exclude humanitarian interventions from constituting manifest violations of the UN Charter.[132]

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[127] Scheffer, *supra* note 124, at 179.

[128] Scheffer concludes that it is doubtful that the ICC judges will create any such magnitude standard anyway based on the erroneous formulation of Understanding No. 7. The simple fact is, "the Rome Statute, as amended, requires no such determination for 'acts of aggression,'" but only for the crime of aggression. *See id.* at 180*; See also,* Heinsch, *supra* note 3, at 729.

[129] Scheffer, *supra* note 124, at 179.

[130] For example, article 30 of the Rome Statute states that "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent *and* knowledge." (emphasis added) There is little doubt that the Court interprets this "and" as "or." Rome Statute, *supra* note 3, at art. 30.

[131] Van Schaack, *supra* note 7, at 484.

[132] *See, e.g.,* Paulus, *supra* note 95, at 1120.

A. **Character**

Resolution 3314 does not use the term "character" to differentiate between acts of aggression or crimes of aggression, nor for any other purpose.[133]. "Character" is not defined in Article 8 *bis*. Consequently, Paulus has suggested that the term is so indeterminate as to be "almost meaningless."[134] This author respectfully disagrees. As one of three qualifiers it is self-evident that "character" must mean something other than "gravity" and "scale". The term suggests a qualitative analysis as opposed to quantitative.[135] A good faith interpretation of the "character" qualifier will exempt uses of force that may be found to be technical acts of aggression or unlawful uses of force, but which are executed for laudable motives. This qualifier could be the acid test for distinguishing between bona fide unilateral humanitarian intervention and criminal aggression masquerading as humanitarianism.

The "character" qualifier provides an opportunity for the Court to apply the crime of aggression flexibly enough to exclude bona fide but unauthorized humanitarian intervention. The relevant character of an act of aggression should be construed as its motive. In other words, the motive of humanitarian intervention affects the character of aggression. As Van Schaack notes, the term "character" is "elastic" and provides "an opening to argue that an act of aggression was not committed with hostile intent or for aggressive purposes."[136] The German delegation to the Preparatory Committee highlighted the relevance of intent.[137] The importance of intent in aggression has been recognized by scholars.[138] Glaser, for example, argues that there must

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[133] *See* Van Schaack, *supra* note 7, at 486.
[134] Paulus, *supra* note 95, at 1121.
[135] Van Schaack, *supra* note 7, at 486.
[136] *Id.*
[137] Preparatory Comm. on the Establishment of an Int'l Court, Proposals for Definition of the War Crime Aggression, 5th Sess., Dec.1-12, 1997, U.N. Doc. A/AC.249/1997 (Dec. 11, 1997).
[138] *See, e.g.*, Elise Leclerc-Gagné & Michael Byers, *A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention,* 41 CASE W. RES. J. INT'L L. 381 (2009); Michael P. Scharf et al., *Rep. of Cleveland Experts Meeting: The Int'l Criminal Court and the Crime of Aggression* 41 CASE W. RES. J. INT'L L. 436 (2009) (citing reports of the Spec. Comm. in U.N. GAOR, 23rd Sess., U.N. Doc. A/7185/Rev. 1 (1968)); U.N. GAOR, 24th Sess., Supp. No.

be a special intent (an aggressive purpose) for the crime of aggression to attach in customary international law.[139] Under this view, a military incursion for the sole purpose of humanitarian intervention would not constitute aggression.[140] Cassese initially disagreed and argued that customary international law prohibits aggression regardless of motive, but later changed his view to agree with Glaser.[141] Although a specific intent is not explicitly provided for in the definition of the crime in Article 8 *bis*, a specific intent element is arguably implicated by the "character" qualifier. Reaching the same result by a different interpretive technique, Gillett suggests "the aggression provisions could be read to import an implicit negative element, whereby the Prosecution must prove the absence of a legal justification for the use of armed force."[142] In other words, the Court could shift the burden to the prosecution.[143]

If the Court interprets "character" differently, motive could still be raised as a defense once the Court has determined it has jurisdiction over humanitarian interventions. The Court is empowered with the ability to entertain a defense of motive, for example, as part of a defense based on lack of *mens rea*. Article 31(3) of the Rome Statute provides that "At trial, the Court may consider a ground for excluding criminal responsibility other than those [specifically provided for in the Rome Statute] where such a ground is derived from [international] law."[144] Motive can play a role in international crimes.[145] This provision of the Rome Statute "opens the possibility of uncodified defenses being

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20, U.N. Doc. A/7620 (Feb. 14, 1970); U.N. GAOR, 25th Sess., Supp. No. 19, U.N. Doc. A/8019 (July 13–Aug. 14, 1970); U.N. GAOR, 26th Sess., Supp. No. 19, U.N. Doc. A/8419 (Feb. 1-Mar. 5, 1971); U.N. GAOR, 27th Sess., Supp. No. 19, U.N. Doc. A/8719 (Jan. 31–Mar. 3, 1972).

[139] Jens Ohlin, *Aggression, in* The Oxford Companion to International Criminal Justice 238 (Antonio Cassese ed., 2009).

[140] *Id.*

[141] *Id.* (referencing Antonio Cassese, *On some Problematical Aspects of the Crime of Aggression,* 20 LJIL (2007) 841-849).

[142] Gillett, *supra* note 2, at 847.

[143] *See id.*

[144] Rome Statute, *supra* note 3, art. 31(3).

[145] *See, e.g.*, Paul Behrens, *Genocide and the Question of Motives*, 10 J. INT. CRIM. JUST., July 2012, at 501, 23.

considered by the Court."[146] It is to be read broadly. As Eser notes, "defenses" denote "all grounds which, for one reason or another, hinder the sanctioning of an offence – despite the fact that the offence has fulfilled all definitional elements of a crime."[147] Schabas concludes that Article 31(1) "provides the Court with a relatively free hand to consider other defenses, to the extent that they have some basis in the sources of applicable law," so long as the provision's procedural rules are complied with.[148] Such a ground could be a motive related to a use of force, which causes less harm than that anticipated by inaction.[149]

B. **Gravity**

A threshold requirement is not something new to international criminal law, or even to the Rome Statute.[150] Crimes against humanity and war crimes both contain threshold requirements. Crimes against humanity must be "widespread and systematic."[151] War crimes must constitute a "serious infringement."[152] Similarly, the Geneva Conventions contain the "grave breaches" standard for criminal responsibility.[153] Both Resolution 3314 and the UN Charter envision a

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[146] WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 484 (Oxford University Press 2010).

[147] *Id.* at 484 (*quoting* Albin Eser, *Defenses' in War Crimes Trials, in* WAR CRIMES IN INTERNATIONAL LAW, 251, 251 (Yoram Dinstein and Mala Tabory eds., 1996).).

[148] *Id.* at 492 (discussing the procedures relating to Rule 80 of the Rules of Procedure and Evidence in accordance with article 31(3)).

[149] *See* Rome Statute, *supra* note 3, art. 31(3). Article 31(3) allows the Court to exclude criminal responsibility if the conduct is permissible under applicable law. That applicable law could be R2P.

[150] *See generally* Susana SáCouto & Katherine Cleary, *The Gravity Threshold of the International Criminal Court*, 23 AMERICAN UNIVERSITY INT'L. LAW REV. 807, 807 (2008).

[151] *See, e.g.,* Rome Statute, *supra* note 3, art. 7.

[152] *Id.* art. 8.

[153] *See* Heinsch, *supra* note 3, at 727 (noting that "not all violations of international humanitarian law entail individual criminal responsibility but only those listed in the respective articles of the Geneva Conventions or Additional protocol I"); *see also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 3 U.S.T. 3114, 75 U.N.T.S. 31; *See also* Geneva Convention for the Amelioration of the

"continuum of unlawful uses of force, only some of which rise to the level of aggression."[154] Resolution 3314 provides a further example in this respect: in order to determine whether a sanctionable act of aggression has occurred, the Security Council may "conclude that such a determination would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity."[155] "Gravity" as a threshold matter represents nothing new.

This qualifier could be read either as a quantitative measure of the kinetic potency of the use of force, or as qualitative consideration of the seriousness of a legal infraction.[156] Van Schaack suggests it is the former.[157] She writes that "gravity" refers to the "severity, magnitude, and consequences of a particular use of force."[158] That is how the World Court has used the term. The "gravity" metric traces its roots to dicta from the ICJ's *Nicaragua* judgment (and the *Oil Platforms* case).[159] In *Nicaragua,* the ICJ alluded to "measures which do not constitute an armed attack but may nevertheless involve a use of force."[160] The ICJ found it "necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms."[161] The World Court further explained that an armed attack

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Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; *See also* Geneva Convention relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *See also* Geneva Convention relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *See also* Protocol Additional to the Geneva Conventions of 12 August 1949 art. 85, Dec. 12, 1977, 1125 U.N.T.S. 3.

[154] Van Schaack, *supra* note 7, at 483.

[155] G.A. Res. 3314, *supra* note 36, art. 2.

[156] Van Schaack, *supra* note 7, at 486 (for a suggestion that consequences are qualitative).

[157] *Id.*

[158] *Id.*

[159] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 14, ¶¶ 195, 247, 249, (Nov. 26); Oil Platforms (Islamic Republic of Iran v. U.S.), 2003 I.C.J. 161, ¶¶ 62, 72 (Nov. 6); *See also* DINSTEIN, *supra* note 16, at 136.

[160] Nicar., *supra* note 159, at ¶ 210; *see also*, DINSTEIN, *supra* note 16, at 208.

[161] DINSTEIN, *supra* note 16, at 208.

differed from "a mere frontier incident," inasmuch as an armed attack must have sufficient "scale and effects."[162] Similarly, in determining the scope of "gravity," the office of the prosecutor, which at the time was directed by Luis Moreno-Ocampo, reasoned that several factors must be considered: "the number of persons killed, number of victims of other crimes, especially crimes against physical integrity and the impact of the crimes."[163] "Gravity" in this sense is a quantitative metric of the scale of force employed, and therefore incorporates the distinction of acts of aggression that warrant close international scrutiny from less significant uses of force.

This is arguably not the correct application of the gravity qualifier in Article 8 *bis*. Quantitative measurements are already captured by the scale metric, which is discussed below. In fact, the ICJ used the same terminology ("systematic" and "large scale") to explain "scale" in the *Situation in the Democratic Republic of Congo (Application for Warrants of Arrest)*.[164] Logically, "gravity" here must

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[162] *Id.* at 210. (Dinstein points out that "The assumption that 'a mere frontier incident' can have no 'scale and effects' is quite bothersome.)

[163] LUIS MORENO-OCAMPO, INFORMAL MEETING OF LEGAL ADVISORS OF MINISTRIES OF FOREIGN AFFAIRS 6 (2005), *available at* http://www.icccpi.int/iccdocs/asp_docs/library/organs/otp/speeches/LMO_20051024_English.pdf. (Although it is arguably not the Prosecutor's prerogative to be interpreting the Rome Statute the Pre-Trial chamber in *Lubanga* did limit the scope of "gravity" by requiring the conduct to be either "systematic" or "large scale." Pre Trial Chamber, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 29, January 2007 at 46).

[164] *See* Situation in the Democratic Republic of Congo, Case No. ICC-01/04-01/07, Application for Warrants of Arrest, ¶ 64 (Feb. 10, 2006); *but see* Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-169, Appeal of Case No. ICC-01/04-125-Us-Exp, ¶ 82 (July 13, 2006) (noting that this definition of gravity is flawed, albeit in *obiter dicta*); *see also* MORENO-OCAMPO, *supra* note 163, at 6 (stating, "We are currently in the process of refining our methodologies for assessing gravity. In particular, there are several factors that must be considered. The most obvious of these is the number of persons killed – as this tends to be the most reliably reported. However, we will not necessarily limit our investigations to situations where killing has been the predominant crime. We also look at number of victims of other crimes, especially

mean something different than systematic, widespread, or large scale. Interpreting Article 8 *bis* to exclude legal grey areas or *de minimus* infractions of the UN Charter would be in conformity with a number of provisions of the Rome Statue. Article 5(1), for example, provides that "[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole."[165] The Preamble has a similar provision.[166] This reflects the language of Resolution 3314, which provides that aggression is "the most serious and dangerous form of the illegal use of force."[167] Echoing this, the U.S. was successful in obtaining the following Understanding at Kampala:

> It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.[168]

By signaling out "gravity" the Understanding seems to elevate its significance above character and scale.

The "gravity" metric should be used, therefore, as an analysis of the degree to which a use of force is unlawful. If humanitarian interventions are deemed violative of the UN Charter, the question

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crimes against physical integrity. The impact of the crimes is another important factor.").

[165] *See* Rome Statute, *supra* note 3, at pmbl. ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished…"); *see also id.* art. 66(3) (which requires the Court to be "convinced of the guilt of the accused beyond reasonable doubt.").

[166] Rome Statute, *supra* note 3, art. 1.

[167] G.A. Res. 3314, *supra* note 36, at pmbl.; *see also* Van Schaack, *supra* note 7, at 484.

[168] THE PRINCETON PRESS, *supra* note 119, at 8; Resolution RC/Res.6, The Crime of Aggression, 13th plenary meeting, June, 11, 2010; Resolution RC/Res.6, The Crime of Aggression, 13th plenary meeting, June 11, 2010; *see* Resolution RC/Res.6, June 28, 2010, Annex III, ¶ 7; *see* Depositary Notification, Nov. 29, 2010, C.N.651.2010 Treaties-8; *see generally* Van der Vyver, *supra* note 92.

becomes: how grave is the violation? This interpretation of gravity—the seriousness of a legal breach—is how it is used elsewhere in the Rome Statute. Article 17(d) requires the Pre-trial Chamber, when assessing admissibility of a case, to ensure that those before the Court are of "sufficient gravity to justify further action by the court."[169] The prosecutor is also required to make such a determination before initiating investigations.[170] Although reading article 17(d) and the "gravity" metric together could appear to create a redundancy, this is not the case. There are two separate gravity tests here, but that does not militate in construing "gravity" in Article 8 *bis* any differently than as it is used in Article 17(d). The tests are not duplicative. The "gravity" of the use of force, measured to determine if the crime of aggression is punishable, is higher than the gravity of the situation necessary to warrant the Court's attention and resources as a general matter. A corollary of this is that the gravity test cannot be lower than the Court's general threshold for hearing only highly important cases, and it cannot be the same standard. The "gravity" qualifier should be employed to exclude the *malum prohibitum* infractions of the UN Charter, which are not *malum in se* (for example, humanitarian interventions).

C. **Scale**

The scale metric is quantitative. It can also be traced to the *Nicaragua* case, where, as noted above, the ICJ held that a use of force must have some "scale and effects" to constitute an armed attack for the purposes of the UN Charter.[171] Dinstein notes that there is "no doubt that minor acts of aggression – even if enumerated in Paragraph 2 [of 8 *bis*] – would not pass muster as crimes within the jurisdiction of the Court."[172] In other words, the acts may be patently unlawful, but they are qualitatively insignificant enough to (judicially) ignore. There is

[169] Rome Statute, *supra* note 3, art. 17 (Clearly, the question is whether the case is important enough to warrant the Court's attention. After all, a nuclear detonation which violates a crime will be important enough for the Court's attention even though it is a one-time event and not widespread.).
[170] *Id.* at art. 53.
[171] *See* Military and Paramilitary Activities In and Against Nicaragua, Merits, Judgments (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 92 (June 27); *see* DINSTEIN, *supra* note 16, at 210 (noting that "[t]he assumption that 'a mere frontier incident' can have no 'scale and effects' is quite bothersome").
[172] DINSTEIN, *supra* note 16, at 136.

sufficient authority to confidently posit that relatively minor uses of force—for example, a warning shot across the bow of a ship or the rescue of nationals abroad from airplane hijackers—do not even violate Article 2(4).[173] The "scale" metric recognizes this and makes its satisfaction an explicit requirement for an act of aggression to be a crime under the Rome Statute. Any humanitarian intervention substantial enough to curb atrocities will probably be of a "scale" sufficient to trigger this metric.[174] This qualifier will not exclude humanitarian interventions but it is important, again, to note that both "gravity" and "scale" cannot be read to mean the same thing. "Scale" clearly refers to the level of force used, either in an individual armed attack or in aggregate, and so gravity must mean something different: an analysis how significantly a use of force is a violation of the UN Charter.

IV. NULLUM CRIMEN SINE LEGE

Following the adoption of the ICC's definition of the crime of aggression, the *New York Times* ran an editorial that posited, "What constitutes a 'manifest' violation of the charter? The truth is it's impossible to say."[175] The *Times* editorial is at least partially correct,

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[173] *Id.* (referencing, MARY E. O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT 229-230 (Oxford University Press, 2011). O'Connell and Niyazmatov suggest "there is sufficient authority to conclude that 'minor' uses of force, including rescue of nationals involving minor force, are not even violations of Article 2(4), let alone serious violations amounting to aggression." They point out that: "State practice and decisions of the ICJ indicate that some inter-state uses of force might violate the principle of non-intervention or constitute unlawful countermeasures but do not come within the prohibition of Art. 2(4). Police-type operations used to arrest pirates, to stop a vessel by shooting across the bow, or to rescue hostages, for example, may involve the use of force but are treated as too minimal to come within Art. 2(4). Art. 2(4) prohibits armed force of more than a minor or de minimis nature . . . As discussed above, if a use of force does not violate Art. 2(4), it is not aggression. Even a violation of Art. 2(4) will not constitute aggression if it is too minor. Aggression is a serious violation of Art. 2(4)."

[174] Barriga, *supra* note 89, at 629.

[175] Michael J. Glennon, Op-Ed., *The Vague New Crime of 'Aggression'*, N.Y. TIMES (Apr. 5, 2010),

and ultimately we won't know the meaning of "manifest" or "character, gravity, and scale" until the judges at the ICC tell us what they mean. After all, only they can interpret the Rome Statute.[176] Murphy has criticized the ICC's aggression definition because it provides no real guideposts for what the qualifiers require.[177] Hence, the Rome Statute suffers "from considerable indeterminacy on a central issue."[178] It would seem that in selecting such an ambiguous term, the drafters of Article 8 *bis* have vested the judges at the Court with broad discretion in interpreting the crime of aggression. But their discretion is not unfettered. If and when they do interpret the definition of the crime of aggression, they will be bound by the rule of *nullum crimen sine lege*.[179] This is "a fundamental principle of justice that applies to all criminal law systems, [and] requires that the penal law be clear and easily ascertained, and thus provide adequate notice to individuals that certain conduct may result in criminal liability."[180] As Schabas notes, the "canon of strict construction of penal law is a corollary of the principle of legality. Ambiguity or doubt is to be resolved in favor of the accused: *in dubio pro reo*."[181] The *nullum crimen sine lege* principle was codified in the Rome Statute in order to "reassure States as to the moderation with which the Court will interpret its Statute."[182] Pursuant to Article 22(2), "[t]he definition of a crime shall be strictly construed," and "[i]n case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted."[183]

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http://www.nytimes.com/2010/04/06/opinion/06ihtedglennon.html?_r=0.

[176] *See* Rome Statute, *supra* note 3, art. 21. Implicit here is the notion that only the judges on the ICC can interpret provisions of the Rome Statute.

[177] Sean D. Murphy, *Aggression, Legitimacy, and the International Criminal Court*, 20 EUR. J. INT'L L. 1147, 1151 (2010).

[178] *Id.*

[179] *See generally* THEODOR MERON, THE MAKING OF INTERNATIONAL CRIMINAL JUSTICE: A VIEW FROM THE BENCH, SELECTED SPEECHES 28, 110 (Oxford, 2011) (noting that *nullum crimen sine lege* translates to English as "no crime without law").

[180] SLYE AND VAN SCHAACK, *supra* note 48, at 85.

[181] SCHABAS, *supra* note 140, at 410 (referring to Rome Statute article 22(2)).

[182] *Id.* at 723.

[183] Rome Statute, *supra* note 3, art. 22(2); DINSTEIN, *supra* note 16, at 140. *See generally* COMMENTARY ON THE ROME STATUTE, *supra* note 98; Pre-Trial Chamber II used this canon of interpretation in *Bemba*

Article 22(2) of the Rome Statute will apply to Article 8 *bis,* and the qualifiers must be interpreted accordingly.[184] Answering what activity would be a manifest violation in terms of Article 8 *bis* at this point is speculative, and therefore works in favor of a narrow reading—one which excludes humanitarian interventions. Dinstein notes that "the penumbra of uncertainty, which is characteristic of some segments of the contemporary *jus ad bellum*, should not be exaggerated."[185] Shaw similarly suggests "the right of individual states to intervene by force in the territory of other states" pursuant to R2P and humanitarian intervention is *ambiguous*.[186] The adjective ambiguous is an antonym of manifest.[187] It follows then that even if an aggressive act purporting in good faith to be lawful as a matter of R2P or humanitarian intervention violates the UN Charter, it is by Shaw's use of terminology, not going to be a manifestly clear violation sufficient to trigger individual criminal responsibility under the Rome Statute.

V. CONCLUSION

This article has shown that bona fide humanitarian intervention is not per se prohibited by the UN Charter, and therefore will not necessarily be a violation of Article 2(4). That is not to say that humanitarian intervention is affirmatively authorized, but rather *ultra vires.* This is all that must be shown. Even if humanitarian intervention is found to facially violate the UN Charter, however, it will not be a manifest violation because bona fide humanitarian intervention comports with the Charter's principles. Even if it is found to be a manifest violation, however, a humanitarian intervention will not have the specific character and gravity necessary to be the punishable under Article 8 *bis*. This is so regardless of whether the Court interprets the qualifiers disjunctively or conjunctively (as shown above, both character and gravity can be understood to exclude humanitarian

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Gombo, when it construed Article 30's *dolus eventualis* (recklessness) exclusion. *Id.* at 410, (referencing *Bemba Gombo* (ICC-01/05-01/09), Decision Pursuant to Article 71(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 369).

[184] *See* COMMENTARY ON THE ROME STATUTE, *supra* note 95, at 410.

[185] DINSTEIN, *supra* note 16, at 148.

[186] SHAW, *supra* note 71, at 1158 (emphasis added).

[187] Thesauraus.com, http://thesaurus.com/browse/manifest (search antonyms "manifest").

interventions). Under each of these arguments, the Court lacks jurisdiction to punish an individual for the crime of aggression. The Court need only accept one of these arguments for its jurisdiction to fail.

To some extent, the debate on the crime of aggression is largely academic. The Court still does not have the power to try this crime and may not for a long time.[188] But the power of Article 8 *bis* lays in its ability to create the normative assumption that humanitarian intervention is not lawful, but criminal. If bona fide humanitarian intervention used as a last resort to protect fundamental human rights is deemed criminal, it would, as Simma puts it, create a split "between law and morality."[189] Even while arguing that humanitarian intervention is not provided for in customary international law, Simma notes that "[i]t becomes more and more intolerable to see grave violations of human rights within a State and to see other States being banned by public international law from intervening . . ."[190]

It would be self-immolating to construe the Rome Statute in such a way that it undermines human rights by chilling humanitarian intervention. In interpreting the Rome Statute, the judges at the ICC would be wise to heed the admonishment leveled at young medical students to "first, do no harm."[191] Van Schaack is correct when she says that a broad interpretation of Article 8 *bis* "may result in more *ex post* prosecutions of leaders launching aggressive campaigns at the expense of *ex ante* efforts to halt threatened or ongoing violence."[192] Without an interpretation of the crime of aggression that excludes humanitarian intervention, there exists a potential to "chill arguably beneficent uses of force."[193] Because bona fide humanitarian intervention advances few

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[188] *See supra* text accompanying note 3.
[189] SIMMA, *supra* note 12, at 131-132.
[190] *Id.*
[191] *See generally* FIRST DO NO HARM: LAW, ETHICS AND HEALTHCARE (Sheila A. M. McLean ed., 2006) (examining patients' rights and medical practitioners' duties in observance of those rights, balanced by a duty to meet statutory requirements in the medical field).
[192] Van Schaack, *supra* note 7, at 482 (citing Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT'L L. 331, 333 (2009)) (noting how international criminal law has emerged as an alternative to intervention).
[193] Van Schaack, *supra* note 7, at 487-488.

or only abstract national interests for the intervening state, they are the most likely forms of force to be chilled. Already states are not "chomping at the bit to intervene in support of human rights."[194] Lest we forget, "even in the face of a horrific genocide, the international community found a host of excuses for not intervening more robustly in Rwanda. The codification of a crime of aggression without any humanitarian exception provides one more excuse for inaction in the face of atrocities."[195] When the law protects states engaging in massive human rights abuses by criminalizing what may be the only remedy available, the law has failed. Fortunately, as has been shown, it is perfectly possible to interpret the UN Charter so as not to prohibit humanitarian intervention, and for Article 8 *bis* not to criminalize it. A contrary interpretation of these provisions would only strengthen the hand of states engaging in massive human rights violations and would undermine the very principles the ICC and the UN system seek to uphold.

[194] MICHAEL BYERS & SIMON CHESTERMAN, *Changing the Rules About the Rules? Unilateral Humanitarian Intervention and the Future of International Law*, *in* HUMANITARIAN INTERVENTION, *supra* note 12, at 177, 202.
[195] Van Schaack, *supra* note 7, at 488.