

COMMENTS

A SHIELD FOR THE “KNIGHTS OF HUMANITY”: THE ICC SHOULD ADOPT A HUMANITARIAN NECESSITY DEFENSE TO THE CRIME OF AGGRESSION

CHRISTOPHER P. DENICOLA*

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* J.D. Candidate, 2009, University of Pennsylvania Law School; B.A. Political Science, 2005, Williams College. I would like to thank Ambassador J. Clint Williamson and Professor William W. Burke-White for their inspiration and guidance.

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1. INTRODUCTION

Imagine the following scenario: former President Bill Clinton sits in a damp cell in The Hague. He shifts uneasily on his mattress, hearing loud footsteps at the end of his cell block. Two armed guards approach and inform him that he must proceed to the courtroom. After shuffling out of his cell, the guards lock the former president in handcuffs and lead him to the Pre-Trial Chamber. Upon entering, the judge states that this hearing of the International Criminal Court ("ICC") has convened to inform the defendant of the charge against him: one count of aggression. The

Prosecutor alleges that Clinton committed the crime of aggression because he directed NATO's 1999 bombing of Serbia without grounds of self-defense or authorization from the U.N. Security Council.¹ Unfortunately for the former president, he cannot easily raise a humanitarian necessity defense, which might legally justify his campaign against ethnic cleansing, because no such defense currently exists in the Court's statute.

In 1998, the United Nations promulgated the Rome Statute of the ICC, declaring that the Court would have jurisdiction over the crime of aggression.² Because the Rome Statute did not define the crime,³ the ICC cannot prosecute anyone for aggression until the Statute's state parties agree on a definition.⁴ Currently, an ICC working group is developing a draft definition of the crime that it will submit to member states at their first Review Conference of the Rome Statute in 2010.⁵ One category of military force that will probably fall within the working group's definition of aggression is humanitarian intervention lacking U.N. Security Council

¹ For the sake of this hypothetical, we will assume that the ICC has jurisdiction over NATO's 1999 action. In fact, it does not because the Court only has jurisdiction over crimes that occurred after the Rome Statute of the International Criminal Court, which established the Court, entered into force in 2002. Rome Statute of the International Criminal Court art. 11, para. 1, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (entered into force July 1, 2002), available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf.

² International Criminal Court [ICC], Establishment of the Court, <http://www.icc-cpi.int/about/ataglance/establishment.html> (last visited Nov. 25, 2008); Rome Statute of the International Criminal Court, *supra* note 1, art. 5, paras. 1(d), 2.

³ Rome Statute of the International Criminal Court, *supra* note 1, art. 5, paras. 1(d), 2. The Rome Statute of the International Criminal Court states that "[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime." *Id.*, art. 5, para 2. It adds that "[s]uch a provision shall be consistent with the relevant provisions of the Charter of the United Nations." *Id.*

⁴ COAL. FOR THE INT'L CRIM. CT. [CICC], THE ICC AND THE CRIME OF AGGRESSION, (May 2008) http://www.iccnw.org/documents/CICCFS_Crime_of_Aggression_Factsheet_FINAL_eng_1May07.pdf (last visited Nov. 28, 2008).

⁵ International Criminal Court-Assembly of States Parties [ICC-ASP], ICC-ASP Res. 1/1 (Sept. 9, 2002). Originally scheduled for 2009, the Conference probably will not occur until early 2010. ICC-ASP, Informal-Intersessional Meeting of the Special Working Group on the Crime of Aggression, ICC-ASP/6/SWGCA/INF.1, paras. 59-65, (June 11-14, 2007), http://www.icc-cpi.int/library/asp/ICC-ASP-6-SWGCA-INF.1_English.pdf.

approval.⁶ Intense debate exists over whether such interventions are legal,⁷ and if the group does not develop a defense for this type of action, leaders of unauthorized but legitimate humanitarian interventions like former President Clinton will face convictions for the crime of aggression at the ICC.⁸

This Comment argues that the ICC should adopt a humanitarian necessity defense so individuals who direct interventions to end atrocities—the “knights of humanity”—will not fear aggression convictions.⁹ Section 2 contends that today, aggression is an international crime for which courts may hold individuals responsible. Section 3 examines the legal history of humanitarian intervention and argues that although a right to intervene likely existed before World War II, the U.N. Charter outlawed the practice, except when authorized by the Security Council. Despite this shift, a customary right of unilateral humanitarian intervention is reemerging, although it has not yet crystallized into a clear U.N. Charter exception. Section 4 argues that the ICC working group will probably recommend a definition of aggression that criminalizes unilateral humanitarian interventions. Section 5 recommends that the working group build on recent customary developments to draft a definition of aggression that includes a necessity defense for these unauthorized, but arguably legitimate, incursions. Finally, Section

⁶ See Benjamin B. Ferencz, *Enabling the International Criminal Court to Punish Aggression*, 6 WASH. U. GLOBAL STUD. L. REV. 551, 558 (2007) (observing that U.S. and U.K. representatives at the 1998 Rome Conference worried that a broad definition of aggression would interfere with their countries' ability to conduct unilateral humanitarian interventions); Benjamin P. Ferencz, *Deterring Aggression by Law – A Compromise Proposal*, html (Jan. 11, 2001), <http://www.benferencz.org/arts/44> (last visited Nov. 29, 2009) (suggesting a compromise proposal for a definition of the crime of aggression that explicitly identifies humanitarian intervention as an exception to the crime).

⁷ See, e.g., A. Mark Weisburd, *International Law and the Problem of Evil*, 34 VAND. J. TRANSNAT'L L. 225, 233–41 (2001) (noting fierce disagreement among scholars about the legality of NATO's 1999 bombing campaign to end Serbian atrocities in Kosovo).

⁸ See Kriangsak Kittichaisaree, *The NATO Military Action and the Potential Impact of the International Criminal Court*, 4 SING. J. INT'L & COMP. L. 498, 527–28 (2000) (recognizing that high-level policy makers in states that engage in humanitarian interventions could face prosecution for the crime of aggression at the ICC).

⁹ See OLIVER RAMSBOTHAM & TOM WOODHOUSE, *HUMANITARIAN INTERVENTION IN CONTEMPORARY CONFLICT: A RECONCEPTUALIZATION* 228–29 (1996) (arguing that just war concepts provide theoretical support for humanitarian intervention and referring to humanitarian intervenors as “knights of humanity”).

6 concludes that if the parties to the Rome Statute adopt a humanitarian necessity defense, they will enhance international legal protections for human rights and will reduce the likelihood that leaders who use military force to prevent atrocities will face ICC convictions.

2. THE CRIME OF AGGRESSION: TOWARD INDIVIDUAL ACCOUNTABILITY

To end the bloodshed of the Thirty Years War, European powers signed the Peace of Westphalia, a treaty that protected heads of state with sovereign immunity and declared states sovereign over their own internal affairs.¹⁰ Paradoxically, many leaders began to claim that a right to wage war inhered in this concept of sovereignty.¹¹ In the twentieth century, the international community became increasingly frustrated by aggressors' ability to hide behind sovereign immunity, especially after the slaughter of the two World Wars.¹² In 1945 and 1946, the Allies launched the landmark International Military Tribunals ("IMTs") in Nuremberg and Tokyo to prosecute aggressors and end the cycle of impunity.¹³ Although resting on a weak legal foundation, the IMTs' prosecutions quickly gained international approval and initiated a decades-long process that has culminated in the ICC's drafting of the crime of aggression.¹⁴ Section 2.1 will examine the failed attempts to criminalize aggression in the early

¹⁰ Michael J. Kelly, *Pulling at the Threads of Westphalia: Involuntary Sovereignty Waiver—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT'L L. & FOREIGN AFF. 361, 372–83 (2005).

¹¹ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 75 (Cambridge Univ. Press 2005) (1988).

¹² See Kelly, *supra* note 10, at 9 (explaining that the Peace of Westphalia's sovereignty package for states included immunity for heads of state or government); Jonathan A. Bush, "The Supreme . . . Crime" and Its Origins: *The Lost Legislative History of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324, 2338–39, 2363–66 (2002) (describing popular anti-Nazi literature in Allied countries that imagined prosecutions of Axis leaders for aggression and momentum within the U.S. government to try these leaders for crimes against peace).

¹³ See Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute*, 2 J. INT'L CRIM. J. 38, 38–39 (2004) (discussing the legal effects of the IMT Charter and the additional provisions of crimes against peace and humanity unique to pre-existing occupation law).

¹⁴ See *infra* notes 27–36 and accompanying text (describing IMTs' vague crimes, possible violations of *nullum crimen sine lege*, and the international community's support for the legality of the IMTs).

20th century, Section 2.2 will explain how the IMTs introduced a framework for individual liability for aggression, and Section 2.3 will assess the international community's subsequent efforts to refine the IMTs' approach.

2.1. *Early Attempts to Criminalize Aggression*

After the devastation of the First World War, the victorious Allies tried and failed to hold individuals accountable for aggressive violations of state sovereignty. Although the Allies publicly arraigned Kaiser Wilhelm II for engaging in "a supreme offence against the international morality and the sanctity of treaties,"¹⁵ their own war responsibility commission determined that waging aggressive war was not an international criminal offense.¹⁶ As a result, the Netherlands, a neutral power, refused to extradite him for prosecution.¹⁷ The war responsibility commission nevertheless suggested that world powers should develop criminal penalties for aggression so future aggressors would not escape prosecution.¹⁸

Shortly thereafter, the world community tried and failed to prohibit interstate war with the 1928 Kellogg-Briand Pact.¹⁹ The treaty purported to ban war between contracting parties except in cases of self-defense and when war was an instrument of international policy, in other words, directed by the League of Nations.²⁰ Although some commentators claim that the treaty criminalized aggression for states,²¹ the text of the treaty made no

¹⁵ Treaty of Peace Between the Allied and Associated Powers and Germany art. 227 June 28, 1919, 3 Malloy 3329, 3418.

¹⁶ Comm. on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference*, 14 AM. J. INT'L L. 95, 118 (1920).

¹⁷ See JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 98 (1982) (describing the tense exchange between British and Dutch authorities and the eventual agreement regarding the Kaiser's internment in the Netherlands).

¹⁸ William A. Schabas, *Origins of the Criminalization of Aggression: How Crimes Against Peace Became the "Supreme International Crime,"* in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 17, 20 (Mauro Politi & Giuseppe Nesi eds., 2004).

¹⁹ Richard L. Griffiths, *International Law, the Crime of Aggression and the Ius Ad Bellum*, 2 INT'L CRIM. L. REV. 301, 304-06 (2002).

²⁰ DINSTEIN, *supra* note 11, at 83-85.

²¹ See *id.* (contending that under the Kellogg-Briand system state aggression was illegal). *But see* James Nicholas Boevig, Note, *Aggression, International Law,*

mention of individual criminal responsibility.²² Initially, many considered it a success because more than sixty countries joined, including the world's major powers.²³ However, when the Second World War broke out, the worthlessness of the German, Italian, and Soviet signatures discredited it.²⁴

2.2. *The IMTs Convict Individuals of Committing "Crimes Against Peace"*

After the Kellogg-Briand Pact failed to prevent the carnage of the Second World War, the Allies established International Military Tribunals in Germany and Japan to try Axis leaders for "Crimes Against Peace."²⁵ The IMTs sought to deter future aggressors by holding individuals accountable for the "planning, preparation, initiation, or waging" of wars of aggression.²⁶

The IMTs' jurisdiction over "Crimes Against Peace" was shaky due to vague terminology and potential violations of the principle of *nullum crimen sine lege*.²⁷ While each IMT's Charter declared that high-level policy makers committed crimes against peace when they engaged in wars of aggression, neither Charter defined the

and the ICC: An Argument for the Withdrawal of the Aggression from the Rome Statute, 43 COLUM. J. TRANSNAT'L L. 557, 563 n.35 (2005) (arguing that because international law treats state wrongs as delicts, for which the only penalty is damages, Kellogg-Briand merely made aggression a delict and not a crime).

²² Boeving, *supra* note 21, at 563.

²³ Bush, *supra* note 12, at 2334.

²⁴ *Id.* at 2336.

²⁵ Charter of the International Military Tribunal art. 6(a), 3 Bevens 1238, 1241 [hereinafter Nuremberg Charter]; Charter of the International Military Tribunal for the Far East Charter art. 5(a), Jan. 19, 1946, 4 Bevens 20, 22 [hereinafter Tokyo Charter].

²⁶ Tokyo Charter, *supra* note 25, art. 5(a); Griffiths, *supra* note 19, at 306. The Nuremberg IMT declared that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 221 (1947); see also GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE* 176-77 (2000) (describing Justice Jackson's view that prosecuting Axis leaders would end any doubt that aggression and war-time atrocities are international crimes rather than national rights).

²⁷ The principle of *nullum crimen sine lege* requires that there be "no penalty without a law," meaning that a court can only punish an individual if he has violated a law. Winston P. Nagan & Craig Hammer, *Communications Theory and World Public Order*, 47 VA. J. INT'L L. 725, 730 n.6 (2007).

term "war of aggression."²⁸ Justice Jackson, the Chief U.S. Prosecutor at Nuremberg, acknowledged this defect in his opening speech before the Tribunal, lamenting that, "[i]t is perhaps a weakness in this Charter that it fails itself to define a war of aggression."²⁹

Further, several defendants argued that the Tribunals could not try them for aggression because no such crime existed when they directed high Axis policy.³⁰ In response, the Nuremberg IMT claimed that its Charter did reflect international law in 1939 because of the widespread acceptance of the Kellogg-Briand Pact's prohibition on the use of force.³¹ This contention is dubious because the Pact did not discuss individual criminal responsibility and consensus does not even exist as to whether it criminalized aggression for states.³²

In spite of the uncertainty surrounding the Tribunals' jurisdiction over "Crimes Against Peace," the IMTs successfully pierced the veil of state sovereignty and convicted Axis leaders of engaging in aggressive warfare.³³ Soon thereafter, the U.N. General Assembly endorsed the principle of individual accountability when it affirmed the Nuremberg Charter.³⁴ Thus, even if the IMTs convicted defendants of engaging in aggressive war with an *ex post facto* law, thereby violating the principle of *nullum crimen sine lege*,³⁵ the U.N. affirmation, along with the actual

²⁸ Nuremberg Charter, *supra* note 25, art. 6(a); Tokyo Charter, *supra* note 25, art. 5(a).

²⁹ Justice Robert H. Jackson, Chief of Counsel for the United States, Opening Address for the United States (Nov. 25, 1945), in 1 OFFICE OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY, AND AGGRESSION 114, 166.

³⁰ *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences*, *supra* note 26, at 217.

³¹ *Id.* at 217-20.

³² Boeving, *supra* note 21, at 563; *see generally supra* note 21 (reflecting debate between scholars as to whether the Kellogg-Briand Pact made aggression an international crime or merely a delict).

³³ John J. Merriam, Comment, *Kosovo and the Law of Humanitarian Intervention*, 33 CASE W. RES. J. INT'L L. 111, 122 (2001); *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences*, *supra* note 26, at 220-21.

³⁴ Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95(I), at 188, 1st Sess., 55th plen. mtg., U.N. Doc. A/64/Add.1 (Dec. 11, 1946).

³⁵ *See* Schabas, *Origins of the Criminalization of Aggression: How Crimes Against Peace Became the "Supreme International Crime," supra* note 18, at 29 (quoting R.V.A. Röling, the Dutch judge at the Tokyo IMT, who stated that "aggressive war was

IMT trials and governments' recognition of their legality, has produced a customary legal ban on aggression for which courts may hold individuals accountable.³⁶

2.3. *International Judicial Bodies Struggle to Define the Crime of Aggression*

In the ensuing decades, U.N. bodies attempted to define aggression while Cold War gridlock prevented their efforts from gaining much traction. In 1949, the General Assembly instructed the International Law Commission ("ILC") to develop a code of crimes for a future international criminal court, which led the ILC to produce a draft definition of the crime of aggression in 1954.³⁷ Unfortunately, by the time the ILC created its definition, Cold War international relations had transformed "aggression" into a mere

not a crime under international law at the beginning of the war"). However, the "Nuremberg clause" in Article 15(2) of the International Covenant on Civil and Political Rights ("ICCPR") acknowledges *nullum crimen sine lege* as a human right but notes that exceptions may exist when individuals violate "the general principles of law recognized by the community of nations." International Covenant on Civil and Political Rights art. 15(2), *adopted* Dec. 19, 1976, 999 U.N.T.S. 171 (ratified by United States June 8, 1992). This formulation has its share of critics. *See, e.g.*, Christoph Burchard, *The Nuremberg Trial and Its Impact on Germany*, 4 J. INT'L CRIM. JUST. 800, 813, 815 (2006) (referring to Art. 15(2) of the ICCPR as the "Nuremberg clause" because it enables prosecutions in violation of the principle of *nullum crimen sine lege*).

³⁶ *See* Theodor Meron, *Defining Aggression for the International Criminal Court*, 25 SUFFOLK TRANSNAT'L L. REV. 1, 6 (2001) (stating that most international lawyers agree that U.N. activities concerning the crime of aggression, along with the Nuremberg trials and governments' conduct, have contributed to establishing aggression as a crime in customary international law). Governments have expressed their recognition of the criminality of aggression by incorporating the Nuremberg offenses into their military codes (as the United States did in 1956) and, occasionally, into their criminal codes. *See, e.g.*, Bush, *supra* note 12, at 2389 n.211 (citing U.S. Dep't of the Army, Field Manual 27-10, The Law of Land Warfare para. 498 (1956)); Andreas L. Paulus, *Peace through Justice? The Future of the Crime of Aggression in a Time of Crisis*, 50 WAYNE L. REV. 1, 25 (2004) (citing § 80 of the German Criminal Code, criminalizing aggression for leaders of the Federal Republic of Germany); Claus Kress, 2 J. INT'L CRIM. JUST. 347, 348 (2004) (citing Article 14(c) of the Iraqi Special Tribunal Statute criminalizing aggressive action by Iraqi leaders against other Arab states).

³⁷ Bush, *supra* note 12, at 2391; Int'l Law Comm'n, *Draft Code of Offences Against the Peace and Security of Mankind*, [1954] 2 Y.B. Int'l L. Comm'n 150, U.N. Doc. A/CN.4/SER.A/1954/Add.1, available at untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_3_1954.pdf.

political epithet, and the ILC shelved the code.³⁸ The ILC's chief contribution was its assertion that Nuremberg's "Crimes Against Peace" are equivalent to the crime of aggression, a notion that has received broad scholarly approval.³⁹

The U.N. General Assembly also created a Special Committee in 1952 to work out a definition of state aggression. More than twenty-two years later, the Committee completed its definition.⁴⁰

The General Assembly adopted the Special Committee's definition in 1974 with Resolution 3314.⁴¹ This non-binding resolution provides a generic definition of state aggression and a non-exhaustive enumeration of specific acts that meet its criteria.⁴² It proclaims that aggression is "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."⁴³ Among the acts that meet this definition are "invasion," "bombardment," and "blockade[s]."⁴⁴ The resolution does not identify conduct by individuals that might enable courts to prosecute them for the state's act of aggression.⁴⁵

As the Cold War thawed and the creation of a permanent international criminal court became increasingly likely, the ILC resumed work on its draft international criminal code and produced a revised definition of the crime of aggression in 1996.⁴⁶ However, critics derided this draft definition as circular because it asserts that an individual commits the crime of aggression if he or she "actively participates in or orders . . . aggression."⁴⁷ Therefore,

³⁸ See Bush, *supra* note 12, at 2390-91 (pointing out that by 1950, "aggression" had been reduced to a political allegation lobbied back and forth by Cold War diplomats).

³⁹ Boeving, *supra* note 21, at 565.

⁴⁰ *Id.* at 568-69.

⁴¹ Definition of Aggression, G.A. Res. 3314, at 142, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9630 (1974) [hereinafter "Resolution 3314"].

⁴² *Id.* art. 3.

⁴³ *Id.* art. 1.

⁴⁴ *Id.* art. 3, para. (a)-(c).

⁴⁵ Boeving, *supra* note 21, at 569.

⁴⁶ Ferencz, *Enabling the International Criminal Court to Punish Aggression*, *supra* note 6, at 554, 556-57; Bush, *supra* note 12, at 2395.

⁴⁷ Boeving, *supra* note 21, at 568; Int'l Law Comm'n, Draft Code of Crimes Against the Peace and Security of Mankind, in Report of the International Law Commission on the Work of its Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996), reprinted in [1996] 2 Y.B. Int'l L. Comm'n

it does not add clarity to the vague “Crimes Against Peace” concept contained in the IMT Charters.⁴⁸

When negotiators met at the 1998 Rome Conference to hammer out a treaty establishing a permanent international criminal court, they used the ILC’s 1996 draft code as a basis for discussion but ultimately failed to reach consensus on the crime of aggression.⁴⁹ As a result, although negotiators constructed a treaty defining genocide, crimes against humanity, and war crimes, while simultaneously elucidating the conditions for the International Criminal Court’s jurisdiction over these crimes, the Rome Statute did not define aggression or provide its jurisdictional basis.⁵⁰

The earliest date that the ICC can adopt a definition for the crime of aggression is 2009, the year its member states initially designated for their first Review Conference of the Rome Statute.⁵¹ The ICC’s Assembly of State Parties (“ASP”) created the Special Working Group on the Crime of Aggression (the “Working Group”) to formulate a comprehensive proposal in time for this conference, but the Working Group’s slow pace has pushed the meeting back until 2010.⁵²

Although the crime of aggression has had a slow and halting birth, even without a clear definition its position as an international crime is secure. IMT trials, U.N. activities, and the conduct of

para. 50, available at untreaty.un.org/ilc/texts/instruments/English/draft%20articles/7_4_1996.pdf (emphasis added).

⁴⁸ Paulus, *supra* note 36, at 18.

⁴⁹ Ferencz, *Enabling the International Criminal Court to Punish Aggression*, *supra* note 6, at 557–58.

⁵⁰ The Rome Statute entered into force in 2002 but its section concerning the crime of aggression, Article 5(2), merely states that the Court will have jurisdiction over it “once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction.” Rome Statute of the International Criminal Court, *supra* note 1, art. 5, para. 2.

⁵¹ *See id.* art. 121 para. 1 (stating that the first Review Conference where state parties may vote on amendments to the Rome Statute may occur seven years after the statute entered into force).

⁵² Coal. for the Int’l Crim. Ct., *The ICC and the Crime of Aggression: Resumed Sixth Session 2008*, (May 2008), http://www.iccnw.org/documents/CICCFs_Crime_of_Aggression_Factsheet_eng_ASP_6_resumed.pdf; ICC-ASP/1/Res. 1, *supra* note 5, at 328; ICC-ASP, ICC-ASP/6/SWGCA/INF.1, *supra* note 5, at 12–13. Section 4 will analyze the Working Group’s current efforts to define the crime of aggression and will explore its potential impact on the use of force for humanitarian ends. *See infra* notes 113–46 and accompanying text (arguing that the Working Group will probably recommend a definition of the crime of aggression that criminalizes unilateral humanitarian intervention).

governments have confirmed aggression's status as a customary international crime for which courts may disregard sovereign immunity and hold individuals accountable.⁵³ As a result, international lawyers generally do not debate aggression's criminalization and instead dispute the details of its potential codification at the ICC.⁵⁴ The following section will examine the parallel growth of another area of customary international law governing military force—the law of humanitarian intervention.

3. HUMANITARIAN INTERVENTION: A LEGAL HISTORY

Unlike the crime of aggression, which international lawyers confidently regard as fixed within customary international law, the existence of a legal right of humanitarian intervention is doubtful. Theoretical arguments in favor of human rights-based military actions date back to the seventeenth century, with the writings of Grotius.⁵⁵ From the nineteenth century until the mid-twentieth, international lawyers could make a strong case that this legal right of humanitarian intervention had materialized.⁵⁶ However, the

⁵³ See *supra* note 36 and accompanying text (noting consensus among international lawyers on the existence of the crime of aggression in customary international law due to IMT trials, U.N. activities, and governments' behavior).

⁵⁴ See DINSTEIN, *supra* note 11, at 121 (declaring that "[i]t is virtually irrefutable that . . . international law reflects the [Nuremberg] Judgment"); cf., e.g., 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, 12 (2005) (suggesting that the ICC's definition of aggression should be enumerative and exhaustive so it does not violate the principle of *nullum crimen sine lege*); Griffiths, *supra* note 19, at 317–18 (contending that the definition of aggression should be generic rather than enumerative because any list that claims to be exhaustive will quickly become outdated as technological advances create new forms of warfare).

⁵⁵ See HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 1161–62 (Richard Tuck ed., Liberty Fund 2005) (1625) (arguing that when tyrants commit massive atrocities against their own subjects which the international community widely perceives as outrageous, other states may intervene on behalf of the victims).

⁵⁶ See FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 225–27 (3rd ed. 2005) (concluding that a customary rule of humanitarian intervention existed before the adoption of the U.N. Charter); David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 258–59 (1992) (arguing that a right of humanitarian intervention existed in customary international law prior to World War II); Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203, 235 (1974) (declaring that before the Charter, the existence of a customary right of intervention was not in doubt and only its outer limits remained unclear). *But see* Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824, 824 (1999)

international order created by the United Nations in 1945 prohibits the use of force outside two narrow circumstances: self-defense and Security Council authorization.⁵⁷ Under this regime, the Security Council may authorize force to achieve humanitarian goals, but if it fails to do so, all other uses of force are “unilateral,” and thus illegal.⁵⁸ Nonetheless, recent events indicate that a right of humanitarian intervention is reemerging,⁵⁹ although at present it has not yet gelled into customary international law.⁶⁰

3.1. Humanitarian Intervention in the pre-U.N. Charter Era

From the nineteenth century until the U.N. Charter period, European powers repeatedly relied on a customary right of humanitarian intervention to protect Christian minorities.⁶¹ The

(contending that before World War II, international law outlawed military intrusion into another state’s territory without its assent); Simon Chesterman, *Legality Versus Legitimacy: Humanitarian Intervention, the Security Council, and the Rule of Law*, 33 SECURITY DIALOGUE 293, 297–98 (2002) (characterizing the idea that a legal right of humanitarian intervention existed before the Charter regime as a fallacy, and claiming that, more accurately, the purported right had as many detractors as supporters).

⁵⁷ U.N. Charter art. 2, para. 4., arts. 39–51. Although the Charter does not expressly consider the invitation by a state of a foreign military presence as a third exception to its prohibition on the use of force, international lawyers widely regard it as such. Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT’L L. REV. 321, 387–88 (1998).

⁵⁸ Henkin, *supra* note 56, at 826 (defining a “unilateral” intervention as an action that lacks authorization from the U.N. Security Council and stating that such acts are unlawful under the Charter, even if led by a regional organization or coalition of states).

⁵⁹ See Antonio Cassese, *A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 EUR. J. INT’L L. 791, 798 (1999) (arguing that because many states acknowledged the moral and political necessity of NATO’s 1999 intervention in Kosovo, the psychological element needed to make humanitarian intervention legal under customary international law exists).

⁶⁰ For a customary rule to exist, state practice must generally conform to a rule out of a belief that such behavior is legally required. SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 80–81 (2006); see, e.g., Cassese, *supra* note 59, at 798 (stating that even if a legal right of humanitarian intervention is forming, widespread state practice is not yet present); INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 15 (2001) (concluding that no customary legal rule permitting humanitarian intervention currently exists, despite recent state practice that might support such law) [hereinafter THE RESPONSIBILITY TO PROTECT].

⁶¹ See sources cited *supra* note 56 (citing scholars who argue that a right of humanitarian intervention likely existed before the U.N. Charter’s general prohibition on the use of force); Ravi Mahalingam, Comment, *The Compatibility of*

most emblematic example occurred in 1860 to 1861, when the French led a multinational coalition into Lebanon to protect Maronite Christians from persecution.⁶² Many in the international community regarded this intervention, as well as several similar operations, as legal.⁶³

3.2. *The U.N. Charter Outlaws Unilateral Humanitarian Intervention*

The adoption of the U.N. Charter in 1945 effectively abolished any prior right to intervene because Article 2(4) prohibits member states from using force “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁶⁴ Exceptions do exist however. In particular, Article 51 permits self-defense and Chapter VII enables the Security Council to authorize force.⁶⁵ Although the drafters of the Charter could have endorsed humanitarian intervention as another exception to its ban on force, they chose not to do so.⁶⁶ A potential reason for its omission is the fear that

the Principle of Nonintervention with the Right of Humanitarian Intervention, 1 UCLA J. INT'L L. & FOREIGN AFF. 221, 237-38 (1996) (asserting that the goal of most human rights-based interventions during the nineteenth century, such as the French action in Lebanon, was to halt the maltreatment of Christian minorities).

⁶² Although the Ottoman government that controlled Lebanon negotiated a treaty with the European powers permitting them to enter, thus potentially making this situation an example of invitation rather than humanitarian intervention, the weak Ottoman Sultan only signed the treaty after intense coercion from France, Britain, and Russia. See Merriam, *supra* note 33, at 119 (noting that European powers exerted heavy pressure on the Sultan to convince him to sign the treaty authorizing their intervention to Lebanon).

⁶³ *Id.*; see sources cited *supra* note 56 (citing international law scholars who contend that the pre-Charter interventions were legal). The other humanitarian interventions on behalf of Christian religious minorities that received widespread legal approval were the interventions by Britain, France, and Russia to Greece from 1827-30, by Russia to the Ottoman Empire in 1877-78, and by Greece, Bulgaria, and Serbia to Macedonia in 1903. Merriam, *supra* note 33, at 119.

⁶⁴ U.N. Charter, art. 2, para. 4.

⁶⁵ See U.N. Charter, art. 51, ch. VII (listing the provisions in the U.N. Charter that acknowledge self-defense and Security Council authorization as exceptions to its prohibition on force); see also Nowrot & Schabacker, *supra* note 57, at 387-88 (noting invitation as a third exception).

⁶⁶ See Nowrot & Schabacker, *supra* note 57, at 372-73 (noting that the Charter did not recognize humanitarian intervention as an exception to its prohibition on force, thereby terminating any prior customary right of humanitarian intervention). Indeed, the U.N. drafters rejected a French proposal that would have allowed member states to use force “in the interest of peace, right and justice” if the Security Council failed to act. Nico Krisch, *Unilateral Enforcement of*

leaders might use a humanitarian intervention exception as a pretext for aggression, as Hitler did in Czechoslovakia in 1938.⁶⁷ Thus, humanitarian interventions that lack Security Council approval, even if conducted by a broad coalition of states, qualify as state aggression.⁶⁸

Although the U.N. Charter recognizes the need to respect human rights, it subordinates human rights concerns to its goal of upholding state sovereignty.⁶⁹ The Charter articulates its support for sovereignty in Article 2(7), which states that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”⁷⁰ A textual analysis of the Charter’s priorities reveals that both the Preamble and Article 1 place the goals of preserving international security and preventing aggression—two items that guarantee states’ sovereignty—before human rights objectives.⁷¹ Further, the Charter’s references to human rights are vague and much less vigorous than those concerning sovereignty.⁷² The overall effect of the Charter’s

the Collective Will: Kosovo, Iraq, and the Security Council, 3 MAX PLANCK Y.B. U.N. L. 59, 87 (1999).

⁶⁷ See Barry M. Benjamin, Note, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT’L L.J. 120, 135 (1992) (recalling Hitler’s dubious claim that force was necessary in Czechoslovakia to curtail its persecution of ethnic Germans).

⁶⁸ Indeed, Article 5 of G.A. Resolution 3314 states that “[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.” Resolution 3314, *supra* note 41.

⁶⁹ INDEPENDENT INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT 167–68 (2000) [hereinafter THE KOSOVO REPORT]. Article 1(3) of the Charter merely states that the United Nations seeks to “promot[e] and encourag[e] respect for human rights” and does not state that the organization’s mission is to enforce human rights. U.N. Charter, art. 1, para. 3.

⁷⁰ U.N. Charter, art. 2, para. 7.

⁷¹ Nowrot & Schabacker, *supra* note 57, at 342; *cf.* U.N. Charter, art. 1, para. 1 (relating to the maintenance of security and suppression of aggression), art. 1, para. 3 (concerning respect for human rights).

⁷² THE KOSOVO REPORT, at 167–68; *cf.* U.N. Charter, *supra* note 57, art. 1, para. 3 (stating that the United Nations seeks to promote “respect” for human rights); *id.* art. 1, para. 1 (declaring that the first purpose of the United Nations is to “maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression,” i.e., to guarantee the sovereignty of member states); *id.* art. 2, para. 7 (reassuring members of their exclusive jurisdiction over their internal affairs with the exception of force authorized by the Security Council under Chapter VII).

primary emphasis on sovereignty is a strong endorsement of the principle of non-intervention.⁷³

3.3. *Arguments that a Right of Unilateral Humanitarian Intervention Exists despite the U.N. Charter*

In spite of the U.N. Charter's ban on unilateral humanitarian intervention, many international lawyers contend that a customary right to intervene exists today. Some argue that this right survived the adoption of the Charter because the document advocates for human rights and obligates members to support human rights principles.⁷⁴ Proponents also suggest that because the U.N. system has increased the weight of individual rights in international law, states can no longer shelter their violations by labeling them internal affairs.⁷⁵

Some boosters of the right to intervene support their position with creative interpretations of the Charter's text. They argue that Article 2(4)'s ban on force "against the territorial integrity or political independence of any state" means that if a humanitarian intervention does not aim to meddle with a state's territory or independence, the intervention is legal.⁷⁶ Further, they claim that an incursion designed to protect human rights would not be "inconsistent with the Purposes of the United Nations," in light of other provisions in the Charter that back human rights.⁷⁷

Others argue that the U.N. Security Council's actions have contributed to a new customary right of intervention. They contend that the Security Council has stretched the Charter by determining states' internal dilemmas to be external threats to

⁷³ Mahalingam, *supra* note 61, at 222 (arguing that non-intervention inherently accompanies the right of sovereignty).

⁷⁴ Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 171 (Richard B. Lillich ed., 1973); U.N. Charter art. 2, para. 2 (requiring members to fulfill their obligations assumed by ratification of the Charter, of which Article 1(3), concerning human rights, is one).

⁷⁵ Merriam, *supra* note 33, at 121.

⁷⁶ Merriam, *supra* note 33, at 122; Benjamin, *supra* note 67, at 149-50.

⁷⁷ See TESÓN, *supra* note 56, at 191 (concluding that Article 2(4) is not a total ban on humanitarian interventions); *but see* Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 2-3 (1999) (analyzing Article 2(4)'s history and concluding that drafters intended the phrase "or in any manner inconsistent with" to tighten, rather than loosen, the Charter's prohibition on force).

peace and security, thus interpreting Article 2(7) liberally.⁷⁸ For instance, the U.N. Security Council made this broad assessment with respect to Saddam Hussein's domestic repression of Iraqi Kurds in 1991.⁷⁹ Further, while the Council provided explicit approval for humanitarian relief efforts in Iraq, it did not grant the United States and its allies permission to use violence to establish no-fly zones.⁸⁰ Assuming that the creation of the no-fly zones was therefore a unilateral effort to enforce Kurdish human rights,⁸¹ the international community's general approval, or tolerance, of this action suggests that it may have been one of several post-1945 examples of unauthorized interventions that have contributed to the customary right's return.⁸²

Indeed, the state practice and *opinio juris* associated with these post-Charter interventions may have revived the right of humanitarian intervention. For example, in 1971, India based its use of force in Eastern Pakistan on a stated desire to end human rights violations and several states signaled their approval by recognizing Bangladesh.⁸³ Additionally, at the close of the 1970s, Vietnam and Tanzania overthrew murderous regimes in Cambodia and Uganda.⁸⁴ Although both states raised questionable self-

⁷⁸ Peter R. Baehr, *Humanitarian Intervention*, in INTERNATIONAL INTERVENTION IN THE POST-COLD WAR WORLD: MORAL RESPONSIBILITY AND POWER POLITICS 23, 25–27 (Michael C. Davis et. al., eds. 2004); Mahalingam, *supra* note 61, at 246, 257.

⁷⁹ Thomas M. Franck, *Lessons of Kosovo*, 93 AM. J. INT'L L. 857, 857–58 (1999); see S.C. Res. 688, U.N. Doc. S/Res/688 (Apr. 5, 1991) (condemning Iraq's repression of its civilians, which "threaten[s] international peace and security"). The Security Council also deemed Haiti's local coup to be an international security threat. S.C. Res. 841 119, 119 U.N. Doc. S/RES/841 (June 16, 1993) (determining that the Haitian crisis "threatens international peace and security").

⁸⁰ Peter Hilpold, *Humanitarian Intervention: Is There a Need for a Legal Reappraisal?*, 12 EUR. J. INT'L L. 437, 445 (2001); Krisch, *supra* note 66, at 77–78; S.C. Res. 688, *supra* note 79.

⁸¹ Krisch, *supra* note 66, at 77–79.

⁸² See *id.* (noting that although Russia and China, and to a lesser extent the Arab League, protested the no-fly zones in 1998 and 1999, objections were more muted in the preceding seven years); Memorandum submitted by Christopher Greenwood, Queen's Counsel, to the Select Committee on Foreign Affairs (Nov. 22, 1999), <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmcaff/28/0020802.htm> (arguing that the no-fly zones demonstrate the legality of unilateral humanitarian intervention under customary international law).

⁸³ Mahalingam, *supra* note 61, at 242–43.

⁸⁴ Hilpold, *supra* note 80, at 444–45. The Khmer Rouge came to power in 1975, quickly unleashing a Maoist campaign against the bourgeoisie that killed as many as two million people. As a result of a territorial dispute, Vietnam invaded Cambodia in 1978, overthrowing the Khmer Rouge regime. SAMANTHA POWER, "A

defense claims without mentioning any human rights concerns, the international community's response was often muted, suggesting relief that Pol Pot and Idi Amin's tyrannical governments were gone.⁸⁵ In 1990, the Economic Community of West African States ("ECOWAS") acted without Security Council authorization to halt atrocities in Liberia to similar quiet approval, thus adding to the body of customary precedent for a modern right of humanitarian intervention.⁸⁶

Some supporters of this right to intervene reevaluate the premise that sovereignty derives from states and instead claim that sovereignty comes from states' citizens.⁸⁷ This Kantian notion that individuals are the true subjects of international law enables proponents of humanitarian intervention to argue that when a state mistreats its people and loses their consent, it forfeits its sovereignty.⁸⁸ Thus, when states commit massive violations of their citizens' rights, foreign powers may intercede on their behalf.⁸⁹ Despite the appeal of this "moral forfeiture" argument, many scholars consider it inapposite for a legal inquiry given its lack of grounding in objective law.⁹⁰

Advocates of humanitarian intervention also argue that the Genocide Convention has created an *erga omnes* obligation for states to intervene militarily to prevent massive human rights

PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 87-88, 117-21, 141-42 (2003). During his rule from 1971 to 1979, Ugandan dictator Idi Amin ordered the execution of as many as 500,000 of Uganda's people and sent troops across the Tanzanian border in 1979, prompting Tanzania's invasion. Patrick Keatley, *Obituary: Idi Amin*, *GUARDIAN*, Aug. 18, 2003, available at <http://www.guardian.co.uk/news/2003/aug/18/guardianobituaries>.

⁸⁵ See, e.g., Keatley, *supra* note 84.

⁸⁶ See Dino Kritsiotis, *The Kosovo Crisis and NATO's Application of Armed Force against the Federal Republic of Yugoslavia*, 49 *INT'L & COM. L.Q.* 330, 353-54, n.112 (2000) (noting the lack of criticism of ECOWAS's actions in Liberia and the subsequent endorsement of the intervention by the Security Council with Resolution 788).

⁸⁷ W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 *AM. J. INT'L L.* 866, 866-76.

⁸⁸ See Mahalingam, *supra* note 61, at 235 (crediting Immanuel Kant with shifting emphasis to the individual in international society); Michael L. Burton, Note, *Legalizing the Sublegal: A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention*, 85 *GEO. L.J.* 417, 435-36 (1996) (suggesting that unilateral humanitarian interventions are legal based on states' moral forfeiture).

⁸⁹ TESÓN, *supra* note 56, at 16-17.

⁹⁰ Hilpold, *supra* note 80, at 453.

abuses.⁹¹ The Convention obligates states to use force to stop genocide, and some seek to extend this duty to other atrocities.⁹² Proponents of the right to intervene have also claimed that states have a broad “responsibility to protect” citizens of other states from mass murder, rape, and starvation when their own states refuse to do so.⁹³ Nonetheless, most scholars consider these notions to be essentially political in nature and not yet binding in international law.⁹⁴

Supporters of humanitarian intervention ultimately argue that, in spite of the U.N. Charter’s prohibition on force, customary international law has created an exception permitting states to use military power to prevent atrocities. They argue that while the Charter’s prohibition on force may have evolved into *jus cogens* according to the International Court of Justice (“ICJ”), the ICJ has also stated that customary exceptions to this rule may arise.⁹⁵ Proponents of intervention contend that not only has such a departure occurred, but that this exemption is consistent with the

⁹¹ *Id.* at 453. The concept of *erga omnes* is that states have certain duties toward the international community as a whole. *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5).

⁹² Hilpold, *supra* note 80, at 453.

⁹³ Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 *Am. J. Int’l L.* 99, 99 (2007); THE RESPONSIBILITY TO PROTECT, *supra* note 60, at 16. The International Commission on State Sovereignty preferred the term “responsibility to protect” to the notion of a “right to intervene,” claiming that the latter focuses too much on concerns of the intervenors rather than those of the victims. *Id.* at 16. However, the intervenors are the ones that the ICC will try, so this Comment will refer to an emerging “right to intervene.”

⁹⁴ THE RESPONSIBILITY TO PROTECT, *supra* note 60, at 13; Hilpold, *supra* note 80, at 453; Bruno Simma, *Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations Erga Omnes?*, in *THE FUTURE OF INTERNATIONAL LAW ENFORCEMENT: NEW SCENARIOS—NEW LAW?* 125, 125–26 (Jost Delbrück ed., 1993).

⁹⁵ International laws that are *jus cogens* are so fundamental that states may not deviate from them. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 100, 108–09 (June 27) (stating that the Charter prohibition on force is *jus cogens* but that customary exceptions to this rule might develop); MURPHY, *supra* note 60, at 81–85. Further, ICJ opinions are only binding on the parties in each particular dispute before the Court so the relevance of this decision to other parties and/or disputes is merely persuasive. Statute of the International Court of Justice art. 59, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>; LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 134–35 (4th ed. 2001).

U.N. system because the Charter champions human rights without explicitly banning humanitarian intervention.⁹⁶

3.4. *The Kosovo Crisis and Unilateral Humanitarian Intervention Today*

The biggest test thus far of the alleged right of humanitarian intervention was NATO's 1999 campaign to end Serbian atrocities in Kosovo.⁹⁷ Those who claim that NATO acted legally cite modern precedents like India's 1971 intervention in Eastern Pakistan.⁹⁸ They also rely on liberal constructions of Charter law, especially in connection with the process that the Security Council used to authorize force.⁹⁹ They argue that NATO did not act "against the territorial integrity or political independence" of Serbia and so did not breach Article 2(4) of the Charter.¹⁰⁰ They also point to the Security Council's overwhelming rejection of a resolution condemning NATO's actions, and its subsequent ratification of the alliance's conduct with Resolution 1244.¹⁰¹ In

⁹⁶ Benjamin, *supra* note 67, at 142, 149.

⁹⁷ The Kosovo Report characterized the former Federal Republic of Yugoslavia's actions in Kosovo as "a war (against civilians) of ethnic cleansing." KOSOVO REPORT, *supra* note 69, at 2.

⁹⁸ Although most NATO members did not claim they were acting in conformity with international law, Belgium did, basing its argument in part on recent precedents such as India's 1971 intervention in Eastern Pakistan, Vietnam's 1978 incursion into Cambodia, Tanzania's 1979 operation in Uganda, and ECOWAS's military actions in Liberia in 1990 and Sierra Leone in 1998. Oral Proceedings, Legality of Use of Force (Serb. & Mont. v. Belg.), CR 1999/15 (May 10, 1999), available at <http://www.icj-cij.org/docket/files/105/4515.pdf> (citing recent humanitarian interventions beginning with Eastern Pakistan as precedent); see also Griffiths, *supra* note 19, at 348 (noting that when Serbia accused NATO members of illegally using force against it at the ICJ, Canada, France, Italy, and Portugal did not provide any legal justification for their actions; and Germany, the Netherlands, Spain, the U.K., and the U.S. claimed a right to use force based on humanitarian grounds without offering any legal support for their position).

⁹⁹ See Richard Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847, 848 (1999) (arguing that a textual analysis is insufficient to resolve the dissonance between the United Nations' goals of promoting human rights and prohibiting unauthorized force and instead an examination of context is necessary).

¹⁰⁰ See Oral Proceedings, Legality of Use of Force (Serb. & Mont. v. Belg.), CR 1999/15 (May 10, 1999), available at <http://www.icj-cij.org/docket/files/105/4515.pdf> (arguing that Belgium's actions were consistent with Article 2(4) of the Charter because they were "not an intervention against the territorial integrity or independence of the former Republic of Yugoslavia").

¹⁰¹ See Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828, 830-31 (1999) (suggesting that the Security Council's twelve to three vote

addition, proponents of NATO's Kosovo intervention make normative arguments about the enhanced role of human rights in contemporary international law, contending that this shift has provided the necessary legal grounding for NATO's actions.¹⁰²

Although legal arguments in favor of NATO's effort to end massive human rights abuses are morally attractive, the Kosovo campaign was probably illegal because it violated the U.N. Charter at a time when no customary right of humanitarian intervention existed. Indeed, one of the most authoritative sources on the Kosovo conflict, the Independent International Commission on Kosovo,¹⁰³ determined that the intervention was illegal, although it acknowledged the moral and political legitimacy of NATO's actions.¹⁰⁴ Other prominent international lawyers have followed similar lines of reasoning, contending that without grounds for

against a resolution condemning NATO's Kosovo action as well as Resolution 1244 provide legitimacy, which translates into legality); Belarus, India, and Russian Federation Draft Resolution, U.N. Doc. S/1999/328 (Mar. 26, 1999); Press Release, Security Council, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, U.N. Doc. SC/6659 (Mar. 26, 1999) (authorizing an international security and civil presence in Kosovo after the conclusion of NATO's 1999 bombing campaign).

¹⁰² See Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1723, 1740 (2000) (arguing that because the main purpose of the expansion of international human rights law over the past fifty years has been to protect individuals from fundamental rights violations, NATO's action was not patently illegal); W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 15 n.29 (2000) (arguing that human rights law has attained the status of *jus cogens*, not in the sense of the Vienna Convention's definition of the term, but in the sense that it has become a super-custom not requiring state practice to be binding).

¹⁰³ The Independent International Commission on Kosovo was an initiative of Swedish Prime Minister Göran Persson and the Swedish government. Former South African president Nelson Mandela called its report, the Kosovo Report, "an independent assessment of conflict and intervention that can assist in advancing dialogue amongst all leaders, scholars, and interested parties." KOSOVO REPORT, *supra* note 69, at 4, 15.

¹⁰⁴ In its report to the Secretary-General of the United Nations, the Commission concluded that the intervention was illegal because "it did not receive prior approval from the United Nations Security Council" but legitimate because "all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule." KOSOVO REPORT, *supra* note 69, at 4. Its criteria for a "legitimate humanitarian intervention" were "serious violations of human rights or international humanitarian law, a failure by the UNSC to act, multilateral bases for the action undertaken, only necessary and proportionate force used, and 'disinterestedness' of the intervening states." *Id.* at 192-93.

self-defense or a Security Council resolution authorizing force, NATO's operation violated international law.¹⁰⁵

Even if NATO's intervention in Kosovo was illegal, it has contributed to the ongoing reemergence of the customary right of humanitarian intervention.¹⁰⁶ NATO's campaign provided the most serious boost for proponents of unilateral humanitarian intervention in the post-U.N. Charter era.¹⁰⁷ Although NATO's members stressed that they did not consider their conduct to have precedential value, inevitably Kosovo, along with its precursors like Eastern Pakistan, has become precedent.¹⁰⁸ Indeed, some scholars deem single events like Kosovo to be capable of transforming customary international law.¹⁰⁹ While sovereignty had consistently prevailed over human rights concerns in the past, NATO's Kosovo mission may represent a shift toward granting these competing values equal stature in the Charter system, with human rights occasionally trumping sovereignty.¹¹⁰ Still, ardent debate about the legal ramifications of NATO's effort continues. Thus, the customary right of humanitarian intervention has not yet

¹⁰⁵ DINSTEIN, *supra* note 11, at 313-15; Henkin, *supra* note 56, at 824-26; Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834, 834-36 (1999). Among those who argue that NATO's action was illegal there is some disagreement as to whether the Charter restrictions on the use of force in Article 2(4) are *jus cogens*. See, e.g., Charney at 837 (stating that the Charter limitations on the use of force are *jus cogens*); but see SELECT COMM. ON FOREIGN AFFAIRS, Fourth Report, 1999-2000, app. 2, paras. 36-80, 96-98 (denying that the Charter regime governing the use of force is *jus cogens*).

¹⁰⁶ See Cassese, *supra* note 59, at 797-98 (arguing that the psychological element needed to make humanitarian intervention customary law exists but the necessary state practice is not present); Henkin, *supra* note 56, at 824, 827-28 (acknowledging the possibility that a new customary right of unilateral, collective intervention may be forming, although denying that humanitarian intervention was legal before the Charter).

¹⁰⁷ William A. Schabas, *The Unfinished Work of Defining Aggression*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT 139-40 (Dominic McGoldrick et al. eds., 2004).

¹⁰⁸ Mahalingham, *supra* note 61, at 243.

¹⁰⁹ See, e.g., W. Michael Reisman, *International Incidents*, in INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 3, 3-24 (Reisman & Andrew R. Willard eds., 2007) (contending that customary law can develop after a single international incident depending on how the international community responds). But see Cassese, *supra* note 59, at 797 (denying that a single incident can cause customary international law to evolve in this case).

¹¹⁰ Jeffrey S. Morton, *The Legality of NATO's Intervention in Yugoslavia in 1999: Implications for the Progressive Development of International Law*, 9 INT'L L. STUDENTS ASS'N J. INT'L & COMP. L. 75, 101 (2002); see also Brown, *supra* note 102, at 1706-09 (portraying the Charter as a living constitution capable of evolution).

decisively returned—although the evidence indicates that it is making a rapid comeback.

4. THE ICC'S DEFINITION OF THE CRIME OF AGGRESSION AND HUMANITARIAN INTERVENTION

The ICC's Working Group has not yet completed its comprehensive proposal defining the crime of aggression and setting out the preconditions for the Court's jurisdiction.¹¹¹ While an in-depth discussion of the jurisdictional issue is beyond the scope of this Comment, the central problem is that the Working Group has not yet agreed on what role, if any, various international bodies such as the U.N. Security Council, the U.N. General Assembly, the ICJ, and the ICC itself should play in determining the existence of aggression.¹¹² As for the definitional issue—the focus of this section—the Working Group's proclivities suggest that it will submit a definition of the crime of aggression that sweeps in unauthorized, but legitimate, humanitarian interventions like NATO's Kosovo operation.

4.1. *The Elements of the Working Group's Definition of the Crime of Aggression*

To define the crime of aggression, the Working Group has based its discussions around a definition with four main elements—(1) leadership, (2) individual conduct, (3) intent, and (4)

¹¹¹ See Report of the Special Working Group on the Crime of Aggression, ICC-ASP, 6th Sess., at 87-94, ICC-ASP/6/20 [hereinafter 2007 Report of the Working Group], http://www.icc-cpi.int/library/asp/OR_Vol_I_Annexes_English.20-12-07.1438.clean.pdf (noting the Working Group's outstanding areas of disagreement as of December 2007 on definitional and jurisdictional issues related to the crime of aggression).

¹¹² *Id.* at 91-93. Some argue that the Security Council should have primary responsibility for determining aggression because Article 39 of the U.N. Charter states that the Council "shall determine the existence of any . . . act of aggression." Stein, *supra* note 54, at 1-2; U.N. Charter art. 39. Others contend that if the Security Council fails to make a determination, the General Assembly should step in based on the Uniting for Peace Resolution. Saeid Mirzaee Yengejeh, *Reflections on the Role of the Security Council in Determining an Act of Aggression*, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 128-29 (2004); Uniting for Peace Resolution, G.A. Res. 377, U.N. Doc.A/RES/377 (Nov. 3, 1950). Still others claim that the ICJ has authority in this circumstance. Buhm-Suk Baek, *The Definition and Jurisdiction of the Crime of Aggression and the International Criminal Court* 49-51, 53 (Cornell Law School LL.M. Papers Series, Paper No. 19, 2006).

state aggression.¹¹³ For the first element, leadership, consensus exists that the Court may only hold state leaders accountable for aggression.¹¹⁴ The Working Group broadly agrees on language requiring individuals to be “in a position effectively to exercise control over or to direct the political or military action of a State.”¹¹⁵ For the second element, individual conduct, widespread support exists for a differentiated approach that emulates the language of Nuremberg by stating that violators must engage in “planning, preparation, initiation or execution” of aggression.¹¹⁶ The Working Group has not devoted much time to discussing the third element, intent, presumably because Article 30 of the Rome Statute already requires individuals to have intent to commit the material elements of the Statute’s crimes;¹¹⁷ Articles 30(2)(a)–(b) state that individuals must mean “to engage in the conduct” and must “cause [the] consequence or [be] aware that it will occur.”¹¹⁸

Defining the fourth element, a state’s act of aggression, has proven to be the most difficult challenge. The first controversy concerns whether the definition of state aggression should be generic, enumerative, or a combination of both, meaning a “general chapeau” followed by a list of specific acts.¹¹⁹

¹¹³ Preparatory Commission of the International Criminal Court, *Proposals for a Provision on the Crime of Aggression*, ICC-ASP, 2nd Sess., at 236–36, ICC-ASP/2/10, 235–36 (Jul. 24, 2002), http://www.iccpi.int/library/about/officialjournal/basicdocuments/ICCASP2_EN.pdf [hereinafter 2002 Coordinator’s Paper]; Discussion Paper Proposed by the Chairman, ICC-A.S.P., 5th Sess., at 4–5 I.C.C.-ASP/5/SWGCA/2, (Jan. 16, 2007), http://www.icc-cpi.int/library/asp/ICC-ASP-5-SWGCA-2_English.pdf [hereinafter 2007 Chairman’s Paper].

¹¹⁴ ICC-ASP, Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression, Princeton, NJ, June 8–11, 2006, ICC-ASP/5/SWGCA/INF.1, 15, http://www.icc-cpi.int/library/asp/ICC-ASP-5-SWGCA-INF1_English.pdf.

¹¹⁵ 2007 Report of the Working Group, *supra* note 111, at 5 n.5.

¹¹⁶ *Id.*; cf. Nuremberg Charter, *supra* note 25, art. 6(a) (deeming those who engage in “planning, preparation, initiation or waging” wars of aggression to have committed Crimes Against Peace).

¹¹⁷ See, e.g., 2007 Chairman’s Paper, *supra* note 113, at 4 n.6 (noting that the working group has not specifically discussed the elements section from the 2002 Coordinator’s Paper, which refers to intent); Rome Statute, *supra* note 1, art. 30, paras. 1–2.

¹¹⁸ Rome Statute, *supra* note 1, art. 30, para. 2.

¹¹⁹ See, e.g., ICC-ASP, *supra* note 114, at 5 (describing debate over whether the definition of the act of aggression should be generic, enumerative, or a combination).

If the definition includes an enumeration of specific acts, another issue is whether the list should purport to be exhaustive or non-exhaustive of all acts of aggression.¹²⁰ Proponents of an exhaustive list argue that it would better fit the principle of *nullum crimen sine lege*, while supporters of an open-ended list claim that it would better capture future forms of aggression.¹²¹ A related question is whether the definition of aggression should explicitly refer to or draw from Resolution 3314, the General Assembly's 1974 definition of the act of aggression that includes a general chapeau with a non-exhaustive list of examples of state aggression.¹²²

Currently, the Working Group favors Resolution 3314 as the basis for its definition of state aggression because it prefers the Resolution's general chapeau approach. However, the Working Group does not agree on whether the list that accompanies this chapeau should be exhaustive or non-exhaustive, nor on whether it should explicitly refer to Resolution 3314 in the text of the crime of aggression.¹²³

Another difficulty related to state aggression is whether the drafters should create a threshold by inserting qualifying language that rules out minor uses of force.¹²⁴ Since early 2007, the group has deliberated between two proposals, one which says that the act of aggression must "by its character, gravity and scale, constitute[] a manifest violation of the Charter of the United Nations," and the other which requires an act "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."¹²⁵ The Working Group broadly supports the first

¹²⁰ See, e.g., 2007 Report of the Working Group, *supra* note 111, at para. 18 (recounting discussion of whether an enumerative list should be closed or open-ended).

¹²¹ See, e.g., *id.* at para. 20 (describing debate over the pros and cons of non-exhaustive and exhaustive lists).

¹²² See, e.g., *id.* at para. 15-16 (considering whether to include a specific reference to Resolution 3314 and whether to copy its text); Resolution 3314, *supra* note 41. For an overview of Resolution 3314, see *supra* notes 40-45.

¹²³ 2007 Report of the Working Group, *supra* note 111, para. 18.

¹²⁴ *Id.* para. 25.

¹²⁵ 2007 Chairman's Paper, *supra* note 113, at 3.

proposal but has not yet reached consensus on whether to withdraw the second from its consideration.¹²⁶

4.2. *The Working Group Will Probably Propose a Definition of the Crime of Aggression that Criminalizes Unilateral Humanitarian Intervention*

The Working Group's current preferences suggest that it will probably submit a definition of the crime of aggression to the Review Conference of the Rome Statute that is broad enough to ensnare unilateral humanitarian interventions. This conclusion follows from the shortcomings inherent in the group's treatment of the intent and state aggression elements.

The Working Group's handling of the intent element implies that humanitarian intervenors will be liable for aggression because the group does not propose that the Court assess why the intervenor acted.¹²⁷ Although Article 30 of the Rome Statute requires the individual to purposefully undertake the proscribed conduct while knowing the consequences that will result,¹²⁸ the Working Group does not intend to create a further mens rea requirement to evaluate *why* the perpetrator engaged in that conduct.¹²⁹ Some international lawyers argue that if such an analysis revealed that the intervenor sought to end atrocities rather than alter the balance of power between his or her state and the target, such actions should not permit convictions for aggression, even if technically illegal under the U.N. Charter.¹³⁰ So far, the Working Group has not adopted this approach and has therefore failed to secure a potential mens rea defense for humanitarian intervenors.

¹²⁶ ICC-ASP, Revised Discussion Paper on the Crime of Aggression Proposed by the Chairman, 6th Sess., at 3 n.3 I.C.C.-ASP/6/SWGCA/2 (May 14, 2008), http://www.iccnw.org/documents/ICC-ASP-6-SWGCA-2_English.pdf [hereinafter 2008 Revised Chairman's Paper] (noting that the second proposal "remains on the table").

¹²⁷ See *supra* note 117 and accompanying text (noting the Working Group's lack of attention to the intent element).

¹²⁸ Rome Statute, *supra* note 1, art. 30.

¹²⁹ Garth Schofield, *The Empty U.S. Chair: United States Nonparticipation in the Negotiations on the Definition of Aggression*, 15 HUM. RTS. BRIEF 20, 23 (2007) (noting that the possibility of adding a mens rea requirement for the crime of aggression has not been seriously discussed).

¹³⁰ OSCAR SOLERA, *DEFINING THE CRIME OF AGGRESSION* 424-27, 446 (2007).

As for state aggression, regardless of whether the Working Group adopts a definition of state aggression that contains an exhaustive or non-exhaustive list of specific acts that constitute aggression, its favored basis for the act, Resolution 3314, prohibits humanitarian intervention.¹³¹ Resolution 3314 states in Article 5 that, “[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.”¹³² It defines aggression in Article 1 as any use of force in violation of Article 2(4) of the U.N. Charter.¹³³ Because unilateral interventions are currently unlawful under Article 2(4) of the Charter,¹³⁴ a “political” justification such as humanitarian necessity would not absolve leaders of criminal responsibility for such actions.¹³⁵

Also, while supporters of the two threshold proposals for state aggression seek to limit the types of military conduct under ICC review, neither of the suggested phrases is sufficient to shield humanitarian intervenors. The apparent rationale for these proposals is not to prevent the Court from convicting humanitarian intervenors, but rather to preclude the Court from reviewing border skirmishes.¹³⁶

Indeed, the first threshold option refers to an act’s “gravity and scale,” thus suggesting that a limited humanitarian action might not cross it.¹³⁷ However, this option obligates an analysis from the perspective of the international community rather than the

¹³¹ Resolution 3314, *supra* note 41, art. 1.

¹³² *Id.* at art. 5.

¹³³ *See id.* at art. 1 (defining 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”); *cf.* U.N. Charter, *supra* note 57, art. 2, para. 4 (declaring that, “[a]ll 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”).

¹³⁴ *See supra* notes 103–05 and accompanying text (citing the Independent International Commission on Kosovo and international lawyers who argue that the Kosovo humanitarian intervention was illegal under Article 2(4) of the Charter despite any potential moral or political legitimacy).

¹³⁵ Resolution 3314, *supra* note 41, art. 5.

¹³⁶ CICC, *Report of the CICC Team on Aggression*, at 41 (Jul. 25, 2007), available at http://www.iccnw.org/documents/CICC_Princeton_Team_Report_2007.pdf.

¹³⁷ 2007 Chairman’s Paper, *supra* note 113, at 3.

perpetrator.¹³⁸ Thus, this approach would enable the Court to convict an intervenor who had pure intentions based on outsiders' ex post facto perceptions of the act's gravity.¹³⁹ Moreover, it would be difficult to show how an intervention unauthorized by the Security Council was not a "manifest violation of the Charter of the United Nations," given the illegal status of all such interventions in contemporary international law.¹⁴⁰

Even the second threshold option, which would trigger scrutiny of the intervenor's "object," is too weak to adequately protect those who use force to end atrocities.¹⁴¹ In addition to the fact that the Working Group will probably soon drop this option from its agenda,¹⁴² the proposal does not define the phrase "war of aggression," thus leaving substantial room to convict unilateral humanitarian intervenors.¹⁴³

At present, the Working Group is laying the groundwork for the ICC to convict leaders of unauthorized humanitarian interventions of the crime of aggression, particularly because it does not propose to include a mens rea defense.¹⁴⁴ At present, the Rome Statute does not offer any defenses that would explicitly protect humanitarian intervenors. Although Article 31(1)(d) presents a quasi-necessity defense of duress that potentially applies to humanitarian emergencies, it is insufficient because the Statute considers necessity a mere subset of duress rather than its own

¹³⁸ See SOLERA, *supra* note 130, at 387-88 (arguing that assessments of an act's gravity and scale are subjective and stressing that an analysis should delve into the mental state of the intervenor rather than the international community's ex post facto determination).

¹³⁹ *Id.*

¹⁴⁰ See 2007 Chairman's Paper, *supra* note 113, at 3; see also *supra* notes 103-05 and accompanying text (explaining consensus that unilateral humanitarian interventions violate Article 2(4) of the U.N. Charter and are thus illegal).

¹⁴¹ 2007 Chairman's Paper, *supra* note 113, at 4-5.

¹⁴² See 2007 Report of the Working Group, *supra* note 111, para. 26 (noting that a number of the delegations have requested the deletion of the "object" threshold option); 2008 Revised Chairman's Paper, *supra* note 126, at 3 n.3 (suggesting that although the second threshold option is still "on the table," it is less favored than the first threshold option because while the first option appears in the current draft text of Article 8 bis, the second option only appears in a footnote).

¹⁴³ See sources cited *supra* note 142 (failing to define "war of aggression").

¹⁴⁴ See *supra* notes 127-43 and accompanying text (arguing that current trends indicate that the Working Group will submit a definition criminalizing unauthorized humanitarian interventions).

distinct defense.¹⁴⁵ Articles 31(3) and 21 of the Statute, which permit judges to hear defenses contained in the general principles of law as derived from relevant national laws, are also insufficient because they do not set out an explicit necessity defense.¹⁴⁶ To truly ensure that leaders like President Clinton do not face convictions for operations like Kosovo, the Working Group should recommend that the Court adopt a humanitarian necessity defense to the crime of aggression, as Part 5 argues.

5. THE ICC SHOULD ADOPT A HUMANITARIAN NECESSITY DEFENSE TO THE CRIME OF AGGRESSION

After the horrors of the last century, from the mass killings of Armenians in 1915 to the current slaughter in Darfur, human beings must intensify their efforts to prevent massive atrocities.¹⁴⁷ The moral imperative to end gross human rights abuses spurred NATO to act in Kosovo and leading authorities later affirmed the legitimacy of the alliance's conduct, even if it technically violated international law.¹⁴⁸ If the world community largely shares this perception that interventions to end atrocities are legitimate, why should international law be at odds with justice?¹⁴⁹ Moreover, why should the International Criminal Court convict those who seek to end atrocities of the crime of aggression? Indeed, the Kosovo

¹⁴⁵ Ilias Bantekas, *Defences in International Criminal Law*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT, *supra* note 107, at 274-76; Rome Statute, *supra* note 1, art. 31(1)(d); Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism*, 43 COLUM. J. TRANSNAT'L L. 337, 360-66 (2005).

¹⁴⁶ Rome Statute, *supra* note 1, arts. 21, 31(3). *See also* Bantekas, *supra* note 145, at 276-77 (noting that courts may in some circumstances decide to apply the principles of a particular legal system when taking into account the divergence of national legislation on necessity between common and civil law systems). Further, Bantekas claims that an analysis of domestic laws on necessity would not enable the court to develop a general rule given the variance between common and civil law systems on this defense. *Id.*

¹⁴⁷ *See* SAMANTHA POWER, *supra*, note 84, at 1-16 (outlining the "race murder" of Armenians and the surrounding events); Q&A: *Sudan's Darfur Conflict*, BBC NEWS (Nov. 15, 2007), available at <http://news.bbc.co.uk/1/hi/world/africa/3496731.stm> (estimating that no less than 200,000 people have died in the Darfur conflict in Sudan).

¹⁴⁸ *See* KOSOVO REPORT, *supra* note 69, at 4 (noting that "the NATO military intervention was illegal but legitimate").

¹⁴⁹ *See* Mona Fixdal & Dan Smith, *Humanitarian Intervention and Just War*, 42 MERSHON INT'L STUD. REV. 283, 289-90 (1998) (faulting the international legal order for taking an unjust approach to humanitarian intervention).

Report recommended closing this gap between law and legitimacy, and if the ICC adopts a humanitarian necessity defense, it will contribute to this process.¹⁵⁰ By acknowledging an escape route for unilateral humanitarian intervenors, the ICC will add to the growing body of customary law favoring humanitarian intervention, thereby enhancing human rights protections and supplying a more sophisticated concept of aggression. Section 5.1 will further develop this rationale, Section 5.2 will assess the legal status of necessity as a defense, and Section 5.3 will propose a specific humanitarian necessity defense for the ICC's adoption.

5.1. *The Moral and Political Rationale for a Humanitarian Necessity Defense*

Although legal arguments in favor of unilateral humanitarian intervention cannot currently overcome the U.N. Charter's prohibition on force, powerful moral and political imperatives recommend that the ICC grant the "knights of humanity" a shield to defend themselves from aggression charges.¹⁵¹ Supporting this conclusion are (1) practical circumstances of U.N. Security Council gridlock, (2) *erga omnes* principles, and (3) traditional just war theory.

First, humanitarian intervenors should ideally operate with U.N. Security Council approval. However, when a permanent member of the Security Council such as Russia or China threatens to veto a resolution authorizing force to end atrocities—thereby paralyzing the body's decision making process—unilateral intervention should still be available.¹⁵² U.S. Supreme Court Justice Robert Jackson wisely stated that a constitution is not "a suicide pact," meaning that when legal procedures produce absurd results, actors may circumvent them.¹⁵³ Here, this logic suggests that states may use unilateral force to end grave rights abuses even though their actions technically violate the U.N. Charter.¹⁵⁴

¹⁵⁰ KOSOVO REPORT, *supra* note 69, at 10.

¹⁵¹ RAMSBOTHAM & WOODHOUSE, *supra* note 9, at 229.

¹⁵² See Merriam, *supra* note 33, at 123 (noting that "[s]upporters of intervention argue that the right to intervene should remain a stopgap measure to be used when the Security Council is deadlocked and immediate action is required").

¹⁵³ *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

¹⁵⁴ W. Michael Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860, 860-62 (1999).

Second, the concept of *erga omnes*, which refers to states' obligations to the international community as a whole, urges states to end atrocities even without a Security Council mandate.¹⁵⁵ The International Commission on Intervention and State Sovereignty concurred with this approach, arguing that members of the international community have a "responsibility to protect" citizens of other states from gross rights violations if their own governments refuse to do so.¹⁵⁶

Third, although some have claimed that after the adoption of the U.N. Charter there are no just or unjust wars, "only legal or illegal ones," just war theory still carries significant weight in the international order.¹⁵⁷ The world community's positive moral evaluation of NATO's illegal intervention provides evidence for this assertion.¹⁵⁸ Although the Charter limits *jus ad bellum*, or states' right to wage war, to situations of self-defense and Security Council authorization,¹⁵⁹ classical just war theory encompasses a broader spectrum of force.¹⁶⁰ Traditional just war theorists widely recognize the protection of the innocent as a legitimate basis for using force, thereby endorsing humanitarian intervention.¹⁶¹ This concept is in harmony with moral forfeiture—the idea that when a sovereign commits gross rights abuses against its own citizens, the sovereign loses their consent and triggers a right of foreign powers to intervene on their behalf.¹⁶²

¹⁵⁵ Simma, *supra* note 94, at 125.

¹⁵⁶ THE RESPONSIBILITY TO PROTECT, *supra* note 60, at 16.

¹⁵⁷ Eduardo Mendieta, *America and the World: A Conversation with Jürgen Habermas*, 3 LOGOS 101, 110 (2004).

¹⁵⁸ See, e.g., KOSOVO REPORT, *supra* note 69, at 4 (affirming the legitimacy of NATO's action in Kosovo); Press Release, U.N. Secretary-General, Secretary-General Deeply Regrets Yugoslav Rejection of Political Settlement; U.N. Doc. SG/SM/6938, (Mar. 24, 1999) (quoting U.N. Secretary-General Kofi Annan, after NATO's Kosovo intervention, who said that "there are times when the use of force may be legitimate in the pursuit of peace").

¹⁵⁹ MURPHY, *supra* note 60, at 439–41; see also Nowrot & Schabacker, *supra* note 57, at 387–88 (noting that although the U.N. Charter only refers to self-defense and authorization by the Security Council, international law also supports invitation as a third legal basis for using force).

¹⁶⁰ See Gregory Reichberg & Henrik Syse, *Humanitarian Intervention: A Case of Offensive Force?*, 33 SECURITY DIALOGUE 309, 311 (2002) (noting that classical just war theory acknowledged "self-defense (individual or collective), protection of other peoples, retaking stolen goods or territory, and punishment of evildoing").

¹⁶¹ *Id.* at 313–14.

¹⁶² See *supra*, notes 87–90 and accompanying text (describing moral forfeiture theory).

In light of humanitarian intervention's moral righteousness, the ICC should provide a necessity defense so those who lead such actions will not fear ICC convictions for aggression. Previously, the international commissions on Kosovo and State Sovereignty recommended that the United Nations pass resolutions in favor of rights-based interventions.¹⁶³ Although weak states are nervous about such measures because they worry that strong states, like the United States and Russia, will use them as pretexts for aggression,¹⁶⁴ the Security Council has repeatedly expressed its support for the burgeoning "responsibility to protect."¹⁶⁵

The ICC should build on these supranational developments by adopting a humanitarian necessity defense for unilateral intervenors. This defense would help align international law with legitimacy by confirming the world community's respect for human rights in the Rome Statute. It would also guard against ICC overreaching by constraining the Court's ability to convict justified users of force. This more nuanced approach to aggression is essential to ensure that the crime of aggression does not hinder the world's efforts to eradicate the most dangerous and abhorrent human rights abuses.

5.2. *The Status of Necessity as a Defense in National and International Law*

Although Article 5(2) of the Rome Statute requires that the crime of aggression be consistent with the U.N. Charter,¹⁶⁶ thus implying that the ICC should not establish a defense for those who violate its prohibition on force, Articles 21(1)(b)-(c) of the Rome Statute also permit the Court to consider general principles of national law and customary international law.¹⁶⁷ Within these two

¹⁶³ THE KOSOVO REPORT, *supra* note 69, at 166-76, 190-91 (describing the development of humanitarian based military intervention in international law); THE RESPONSIBILITY TO PROTECT, *supra* note 60, at 74-75 (listing the Commissions recommendations).

¹⁶⁴ Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107, 107 (2006).

¹⁶⁵ See S.C. Res. 1674, ¶4, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (declaring that the international community has a responsibility to "protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity"); see also S.C. Res. 1706, ¶2, U.N. Doc. S/RES/1706 (Aug. 31, 2006) (affirming Resolution 1674 in the context of the Sudan conflict).

¹⁶⁶ Rome Statute, *supra* note 1, art. 5(2).

¹⁶⁷ Rome Statute, *supra* note 1, arts. 21(1)(b)-(c).

legal realms, necessity is well established as a defense available to both individuals and states.

5.2.1. *Necessity as an Individual Defense in Domestic Criminal Law*

Although common law and civil law systems take somewhat different approaches to necessity, both legal systems typically recognize a necessity defense.¹⁶⁸ On the common law side, the U.S. legal community has generally acknowledged necessity's existence, as the Model Penal Code's inclusion of a necessity defense illustrates.¹⁶⁹ Civil law systems overwhelmingly support the necessity defense, usually with national legislation.¹⁷⁰

Necessity results from situations in which an individual faces a choice of evils and chooses the lesser one, even though doing so violates the letter of the law.¹⁷¹ The effect of this defense is societal acceptance of the idea that "sometimes the greater good . . . will be accomplished by violating the literal language of the criminal law."¹⁷²

The elements of the necessity defense in the United States, a country that takes a relatively conservative approach to the defense, are (1) harm avoided; (2) harm done; (3) intention to avoid harm; (4) relative value of harm avoided and harm done; (5) no third course of action/imminence; and (6) no fault in bringing about the situation.¹⁷³ The harm avoided includes threatened harm to others and need not be physical.¹⁷⁴ The harm done can be any kind of harm including intentional homicide, and encompasses the

¹⁶⁸ Massimo Scaliotti, *Defences Before the Int'l Crim. Ct.: Substantive Grounds for Excluding Crim. Responsibility*, 1 INT'L CRIM. L. REV. 1, 142-45 (2001).

¹⁶⁹ MODEL PENAL CODE § 3.02(1) (Proposed Official Draft 1962). However, some U.S. jurisdictions do not allow a defense of necessity. See George K. Walker, *Principles for Collective Humanitarian Intervention to Succor Other Countries' Imperiled Indigenous Nationals*, 18 AM. U. INT'L L. REV. 35, 49 (2002) (observing that not all U.S. jurisdictions admit a necessity defense).

¹⁷⁰ Scaliotti, *supra* note 168, at 144.

¹⁷¹ WAYNE R. LAFAYE, PRINCIPLES OF CRIMINAL LAW 395 (2003).

¹⁷² *Id.* at 395-96.

¹⁷³ *Id.* at 399-402; cf. Scaliotti, *supra* note 168, at 144-45 (noting that some jurisdictions such as Germany require a substantial difference between the harm done and the harm avoided while others, such as France, merely impel a "disproportion" between the two harms).

¹⁷⁴ LAFAYE, *supra* note 171, at 399.

damage reasonably expected to occur.¹⁷⁵ The defendant must also have acted believing that he would avoid a greater harm.¹⁷⁶ The defendant must not have had a third option that would have created less harm than the harm done, or in other words, the harm avoided must have been an imminent emergency.¹⁷⁷ Finally, the defendant must not have contributed to the situation giving rise to the necessity.¹⁷⁸

One conceptual stumbling block that divides common and civil law approaches to necessity is whether to frame the defense as a justification or an excuse. Civil law countries typically consider the defense a justification, meaning that actions that would otherwise be illegal are accepted by society, and thus fail to merit criminal liability.¹⁷⁹ However, common law theories of the defense diverge, with some countries, such as the United States, considering it a justification, and others, like Canada, deeming it an excuse.¹⁸⁰ The excuse approach proposes that even though the harm done was illegal, courts should forgive the actor of the wrong, often because of the individual's condition.¹⁸¹ The chief difference between these two concepts is that for justification, the act was just and never illegal, whereas with excuse, the act was illegal, but courts will nevertheless permit it legally.¹⁸²

5.2.2. *Necessity as an Individual Defense in International Criminal Law*

In international law, judicial bodies have recognized the existence of a customary necessity defense for both individuals and states, although the law is ambiguous as to whether the justification or excuse conception applies. In international criminal law, the Nuremberg Charter neglected to include an individual

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 400.

¹⁷⁷ *Id.* at 401–02.

¹⁷⁸ *Id.* at 402.

¹⁷⁹ See Scaliotti, *supra* note 168, at 144 (affirming the civil law conception of necessity as a justification); LAFAVE, *supra* note 171, at 333 (defining the term justification).

¹⁸⁰ Cf. LAFAVE, *supra* note 171, at 335–36 (asserting the American classification of necessity as a justification); Scaliotti, *supra* note 168, at 145 (noting the Supreme Court of Canada's opinion that necessity is an excuse).

¹⁸¹ LAFAVE, *supra* note 171, at 334.

¹⁸² Johnstone, *supra* note 145, at 350–51.

necessity provision.¹⁸³ Even so, the American Military Tribunal in Germany, which succeeded the Nuremberg IMT, recognized necessity as a defense on numerous occasions.¹⁸⁴ For example, in the Krupp trial it said necessity was available “when the act charged was done to avoid an evil, severe and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil.”¹⁸⁵

As in domestic law, consensus does not exist among international criminal lawyers as to whether necessity is a justification or an excuse. When the Preparatory Committee on the ICC’s Rome Statute initially considered the necessity defense in 1996, it left this issue open to discussion.¹⁸⁶ Ultimately, it decided to circumvent the question by collapsing necessity into duress and using the term “exclusion of criminal responsibility” to avoid protracted debates on whether each criminal defense in the Rome Statute was a justification or excuse.¹⁸⁷

5.2.3. *Necessity as a Defense for States in International Law*

Just as international legal experts determined that necessity is a defense for individuals without deciding if it should be a justification or an excuse,¹⁸⁸ so the International Law Commission affirmed necessity as a customary defense for states without settling the justification/excuse debate.¹⁸⁹ The ILC’s necessity

¹⁸³ See Jescheck, *supra* note 13, at 47. The Nuremberg IMT also rejected a plea from several high-ranking German officials accused of aggression arguing that they had acted in “presumed self-defense” out of “presumed necessity.” Nevertheless, in this case, the Court only considered necessity as a component of self-defense. Because self-defense and necessity are two distinct pleas, this decision does not reflect an IMT rejection of necessity as its own defense. Nuremberg Judgment, 1 I.M.T. 172, 206–07. See DINSTEIN, *supra* note 11, at 246–47 (noting how self-defense and necessity are “subjects of two separate provisions”).

¹⁸⁴ See, e.g., The Flick Trial, 9 U.N. War Crimes Comm’n Law Reports of Trials of War Criminals 20 (1949) (finding a factual scenario in which the defense of necessity was appropriate).

¹⁸⁵ The Krupp Trial, 10 U.N. War Crimes Comm’n Law Reports of Trials of War Criminals 147, 149 (1948). This definition of necessity conforms to the modern American definition although it leaves out element (6), the no fault requirement.

¹⁸⁶ Scaliotti, *supra* note 168, at 151.

¹⁸⁷ *Id.* at 118.

¹⁸⁸ *Id.* at 118, 148.

¹⁸⁹ Int’l Law Comm., Draft Articles on Responsibility for Int’lly Wrongful Acts with Commentaries, art. 25, at 80, U.N. Doc. A/56/10 (2001), available at

defense for states appeared in its 1980 and 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts.¹⁹⁰ The ICJ later affirmed the ILC's formulation of the necessity defense without deciding whether it applied to NATO's intervention in Kosovo.¹⁹¹

The elements of the ILC's 2001 definition of necessity are: (1) essential interest; (2) grave peril; (3) no alternative; (4) balancing of interests; (5) no violation of a peremptory norm or treaty; and (6) no fault of the state undertaking the intervention in bringing about the humanitarian crisis.¹⁹² The State must have acted to protect an "essential interest" from a "grave and imminent peril" with no other option available.¹⁹³ The ILC has stated that whether an interest is "essential" depends on the circumstances but may include "preserving the very existence of the State and its people . . . or ensuring the safety of a civilian population," thus implying that protecting another state's citizens may be "essential."¹⁹⁴ At the same time, the ILC claimed not to address the question of whether unilateral humanitarian interventions are legal if based on necessity.¹⁹⁵

The "balancing of interests" element requires that the state's act not seriously harm an essential interest of the state(s) to which the perpetrator's obligation exists.¹⁹⁶ In other words, the state that acts in violation of international law cannot "seriously impair" the competing essential interests of the states affected by its infraction.¹⁹⁷ The balancing may take into account damage to

http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [hereinafter "Draft Articles"].

¹⁹⁰ Report of the Int'l L. Comm'n on the Work and Its Thirty-Second Session, U.N. Doc. A/35/10 (1980), reprinted in 2 Y.B. INT'L L. COMM'N 1, 26-34, U.N. Doc. A/CN.4/Ser.A/1980/Add.1 (Part 2); Draft Articles, *supra* note 189, art. 25 at 80.

¹⁹¹ Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, at 39-40 (Sept. 25); Legality of Use of Force (Serb. & Mont. v. Belg.), 2004 I.C.J. 15 (Dec. 15).

¹⁹² Draft Articles, *supra* note 189, art. 25, at 80.

¹⁹³ *Id.* at 80.

¹⁹⁴ *See id.* 83 (noting that states have raised the necessity defense in situations where its survival is at risk and in the protection of civilian populations) (emphasis added).

¹⁹⁵ *Id.* at 84.

¹⁹⁶ *Id.* at 83-84.

¹⁹⁷ *Id.*

essential interests of “the international community as a whole,”¹⁹⁸ thus suggesting a weighing of *erga omnes* considerations.¹⁹⁹

Further, if the alleged necessity violates a peremptory norm or treaty obligation with the opposing state(s), the defense cannot apply.²⁰⁰ If the perpetrator contributed to the state of necessity, the defense is also invalid.²⁰¹ The ILC apparently wrestled with the question of whether or not the defense was a justification or excuse but did not make a decision either way.²⁰²

In the *Gabčíkovo-Nagymaros* case, the ICJ confirmed that necessity is a customary defense for states and approved of the ILC’s formulation of the plea.²⁰³ The Court affirmed that an “essential interest” can be broader than a state’s interest in its own survival, stating that Hungary’s environmental emergency was an essential interest. However, the Court ultimately rejected the defense because other, less harmful means of averting the disaster were available to Hungary.²⁰⁴ The ICJ again upheld the existence of the necessity defense in its advisory opinion on the legality of the Israeli wall in occupied Palestine but again rejected it because Israel could have used less injurious means to achieve its security goals.²⁰⁵

¹⁹⁸ *Id.*

¹⁹⁹ See Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J. 1, 41–42 (2000) (arguing that the ILC should adopt a proposed provision adding consideration of the interests of the international community as a whole); cf. Draft Articles, *supra* note 189, art. 25(1)(b), at 80 (containing the *erga omnes* language for which Boed had advocated).

²⁰⁰ See Draft Articles, *supra* note 189, art. 25(2)(a) (stating that necessity may not be invoked if the international obligation in question excludes the possibility of invoking necessity).

²⁰¹ *Id.* art. 25(2)(b).

²⁰² Johnstone, *supra* note 145, at 353–54.

²⁰³ *Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, at 39–40 (Sept. 25). The dispute in this case arose from a Soviet era treaty between Hungary and Czechoslovakia to construct a dam and hydroelectric plants along their shared border on the Danube River. After the fall of communism in 1989, increased environmental concerns led both countries’ leaders to denounce the still incomplete project and in 1992, Hungary gave notice of withdrawal from the treaty. Hungary and Slovakia, which now controlled the former Czechoslovakia’s territory along the Danube, asked the I.C.J. to decide whether Hungary could exit the treaty and stop work on the project. *Id.* at 17–37.

²⁰⁴ *Id.* at 44–45.

²⁰⁵ This case came to the ICJ after the U.N. General Assembly requested an advisory opinion on the legality of the Israeli wall in occupied Palestine. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Req. for Advisory Op.)*, 2004 I.C.J. 136, 144–45. Israel said it designed the wall to

With respect to NATO's humanitarian intervention in Kosovo, representatives of the United Kingdom and Belgium raised the necessity defense before the United Nations and the ICJ. The United Kingdom's Permanent Representative to the U.N. Security Council told the body that NATO's actions were legal because "[e]very means short of force ha[d] been tried" and military force was only used out of "overwhelming humanitarian necessity."²⁰⁶ Belgium's legal counsel formally invoked the necessity defense before the ICJ, arguing that a "state of necessity" preceded NATO's campaign.²⁰⁷ Relying on the ILC's Draft Articles, Belgium's counsel came to this conclusion because a "grave and imminent peril" to human rights values existed and NATO responded with military force proportionate to the danger and less damaging than the prospect of allowing massive rights abuses to continue.²⁰⁸ The Court never decided the case on the merits, however, because it found that it did not have jurisdiction to even hear it.²⁰⁹

Although some have put forth critiques of the Belgian legal counsel's reasoning, these appraisals are not convincing. One criticism is that the Belgian representative's definition of necessity differed from that of the ILC's Draft Articles in that it replaced the term "essential interest" with "values."²¹⁰ However, the ILC Draft Articles state that essential interests may include values.²¹¹

protect its civilians from Palestinian violence. *Id.* at 195. The ICJ stated that the wall unduly restricted Palestinian rights to movement, work, health, and education as enumerated in the ICCPR; the International Covenant on Economic, Social and Cultural Rights; and the U.N. Convention on the Rights of the Child. *Id.* at 191-94. In its opinion, the ICJ affirmed Israel's right to invoke a necessity defense but rejected the plea because Israel could have used an alternative route for its wall that would have achieved its security aims with less damage to Palestinian human rights. *Id.* at 195.

²⁰⁶ Sir Jeremy Greenstock, Permanent Representative of the United Kingdom to the United Nations, Remarks made at the U.N. SCOR 54th Sess., 3988th mtg., (Mar. 24, 1999) at 12, U.N. Doc. S/PV.3988 (1999).

²⁰⁷ Oral Proceedings, Legality of Use of Force (Serb. & Mont. v. Belg.), CR 1999/15 (May 10, 1999), available at <http://www.icj-cij.org/docket/files/105/4515.pdf>.

²⁰⁸ *Id.*

²⁰⁹ See Legality of Use of Force (Serb. & Mont. v. Belg.), 2004 I.C.J. 15, 32 (Dec. 15) (holding that the former Yugoslavia was not a U.N. member state when it filed its suit against NATO countries and thus was not a party to the ICJ).

²¹⁰ Andreas Laursen, *The Use of Force and (the State of) Necessity*, 37 VAND. J. TRANSNAT'L L. 485, 503-04 (2004).

²¹¹ *Id.*

Some also argue that NATO's humanitarian intervention violated element (5) of the necessity defense, the requirement that the action not contravene a peremptory norm or treaty. Here that peremptory norm is the prohibition on force, which many scholars consider *jus cogens*.²¹² However, the Special Rapporteur for the 1980 Draft Articles stated that although the Charter outlawed all force outside of self-defense and Security Council authorization, only the ban on aggression was *jus cogens*, thus making humanitarian intervention illegal, but not a violation of a *jus cogens* norm.²¹³ At present, the ILC has not renounced these comments and has instead expressly declined to address the issue.²¹⁴ In light of this tacit support, or at least tolerance, for the former Special Rapporteur's position, as well as the common classification of human rights norms as themselves *jus cogens*,²¹⁵ NATO's humanitarian intervention did not clearly violate a peremptory norm.

Critics also contend that necessity cannot apply because NATO contributed to the situation by refusing to negotiate in good faith with Serbia before resorting to force.²¹⁶ This assertion is unpersuasive because the Independent International Commission on Kosovo found no conclusive evidence that diplomacy could have averted Serbia's gross rights violations. In fact, many who attended the talks believe that Serbia was using the discussions to stall NATO in advance of fresh assaults on the Kosovars.²¹⁷

As discussed above, the Rome Statute of the ICC does not contain an explicit necessity defense for humanitarian intervention.²¹⁸ Further, the ICC's Working Group will probably not recommend a definition of the crime to the Review Conference

²¹² See Charney, *supra* note 105, at 837-41 (characterizing the U.N. Charter's prohibition on force as *jus cogens*).

²¹³ Laursen, *supra* note 210, at 509-14.

²¹⁴ *Id.* at 513-14.

²¹⁵ Walker, *supra* note 169, at 104-05.

²¹⁶ See, e.g., Griffiths, *supra* note 19, at 351 (arguing that NATO added to the necessity by bullying Serbia during final negotiations in Rambouillet, France and by supporting the Kosovar Liberation Army).

²¹⁷ KOSOVO REPORT, *supra* note 69, at 152, 168.

²¹⁸ See *supra* notes 144-46 and accompanying text (noting the lack of an explicit humanitarian necessity defense in the Rome Statute).

of the Rome Statute that includes this defense.²¹⁹ In light of the tremendous support for a necessity defense in national and international law, as well as the overwhelming moral and political legitimacy of unilateral humanitarian interventions, the absence of this defense is both glaring and troubling.²²⁰ To ensure that humanitarian intervenors do not receive convictions for the crime of aggression, the ICC should adopt an express humanitarian necessity defense. The following section expands on this recommendation by providing a detailed proposal for this defense of humanitarian necessity.

5.3. *A Humanitarian Necessity Defense for the ICC*

The ICC's state parties should adopt a humanitarian necessity defense so leaders of humanitarian interventions have a shield to protect themselves against aggression charges. The ICC has the power to adopt this defense even though it might exceed established customary law because defining the vague crime of aggression is inherently a creative process.²²¹ In drafting its proposal, the Working Group should conceptualize the humanitarian necessity defense as a justification, because acting to end atrocities is morally justified. The humanitarian necessity defense should only be available to leaders when they have acted to protect populations against the ongoing threat of genocide, crimes against humanity, or war crimes. While certain voices favor a broader right to intervene, no consensus exists that lesser rights violations could enable intervention.²²² To assess whether a leader should be criminally liable for directing a state's allegedly aggressive actions, the Court's analysis should not turn on the "who" of intervention, but rather the "why." Ultimately, the Working Group should craft a humanitarian necessity defense to the crime of aggression based on the ILC's necessity defense but

²¹⁹ See *supra* notes 127–43 and accompanying text (arguing that current trends indicate that the Working Group will submit a definition criminalizing unauthorized humanitarian interventions).

²²⁰ See *supra* notes 152–65 and accompanying text (contending that situations of Security Council gridlock, *erga omnes* principles, and traditional just war theory make unilateral humanitarian intervention morally and politically legitimate).

²²¹ Schabas, *supra* note 18, at 21; see also Meron, *supra* note 36, at 8 (noting the argument that Articles 7 and 8 of the Rome Statute concerning crimes against humanity and war crimes exceeded customary law, causing some to claim that the ICC can make new law).

²²² Brown, *supra* note 102, at 1727.

with an added mens rea element characteristic of the necessity defense in domestic law and appropriate for an evaluation of individual criminal responsibility.

5.3.1. *The Working Group Should Conceptualize the Humanitarian Necessity Defense as a Justification*

The Working Group should deem the humanitarian necessity defense a justification because humanitarian interventions undertaken to end “conscience shocking situations,” such as NATO’s action in Kosovo, are consistent with classical just war theory and the normative paradigm of the “responsibility to protect.”²²³ Framing the defense as a justification will ensure the intervention’s normative justness and its ex ante legality.²²⁴ The Working Group should not frame the humanitarian necessity defense as an excuse because doing so would make the intervention illegal ex ante, thus potentially deterring those who seek to end atrocities.²²⁵

Even though the drafters of the Rome Statute purportedly declined to take a side in the justification/excuse debate,²²⁶ in fact, the text of the Rome Statute explicitly refers to justification concepts by using the word “justified” three times in Article 8.²²⁷ For instance, it classifies military necessity as a justification for war crimes, suggesting that “[e]xtensive destruction and appropriation of property” may be “justified by military necessity” if carried out lawfully and not wantonly.²²⁸ This textual precedent, combined

²²³ Reichberg, *supra* note 160, at 317; *see supra* notes 152–65 and accompanying text (contending that situations of Security Council gridlock, *erga omnes* principles, and traditional just war theory render unilateral humanitarian intervention morally and politically legitimate).

²²⁴ *See* Johnstone, *supra* note 145, at 349–52 (discussing the differences and implications of classifying the necessity defense as one of justification or excuse in domestic law).

²²⁵ *See id.* at 365–66 (arguing that characterizing the defense as an excuse creates doubt about whether the court will absolve the illegal act, thus potentially deterring would-be intervenors).

²²⁶ Scaliotti, *supra* note 168, at 118 (noting that the drafters of the Rome Statute “decided to disregard the issue”).

²²⁷ *See* Rome Statute, *supra* note 1, arts. 8(2)(a)(iv) (suggesting that military necessity can justify the extensive destruction and appropriation of property), 8(2)(b)(x) (implying that doctors may mutilate a patient or subject him to medical experiments if justified by his medical needs and interests), 8(2)(e)(xi) (using the same words as Article 8(2)(b)(x)).

²²⁸ *Id.* art. 8(2)(a)(iv).

with the unusual significance of the crime of aggression—the “supreme . . . crime” in the words of the Nuremberg IMT—support the notion that the Working Group can and should deem humanitarian necessity a justification.²²⁹

5.3.2. *The Humanitarian Necessity Defense Should Only Apply to Unilateral Interventions to Stop Genocide, Crimes against Humanity, or War Crimes*

The range of situations giving rise to humanitarian necessity must be narrowly tailored to preserve the criminalization of aggression. Specifically, it should only encompass genocide, crimes against humanity, and war crimes because consensus does not exist that states can unilaterally use force to uphold lesser rights.²³⁰ Although many debate the universality of human rights values,²³¹ human beings must have a right to be free from genocide, crimes against humanity, and war crimes.²³² Thus, the Working Group should only enable states to raise the humanitarian necessity defense in these narrow circumstances.

The humanitarian necessity defense should not apply to the unauthorized use of military force for other purposes, such as the installation or restoration of democracy, because the emerging customary right of intervention only embraces unilateral force to end genocide, crimes against humanity, and war crimes.²³³ Any purported right of pro-democratic intervention is conceptually distinct from a right of humanitarian intervention and state practice and *opinio juris* deny the emergence of the former “right” even more forcefully than the latter.²³⁴ Normatively, genocide, crimes against humanity, and war crimes also present a more urgent threat to human life than democracy deficits because the costs of inaction are far more immediate and severe. Thus, the Working Group should not draft the humanitarian necessity

²²⁹ 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946, at 171, 186 (1947).

²³⁰ See Brown, *supra* note 102, at 1726-28 (discussing the line-drawing problems implicated by exclusively including serious human rights violations to justify humanitarian intervention and the need to prevent pretextual interventions motivated by baser objectives).

²³¹ Weisburd, *supra* note 7, at 263-66.

²³² Brown, *supra* note 102, at 1727.

²³³ Nowrot & Schabacker, *supra* note 57, at 369-72.

²³⁴ *Id.* at 370-71.

defense to shelter those who wield force unilaterally to install or restore democracy.²³⁵

By focusing on the underlying human rights violations that give rise to a situation of humanitarian necessity – genocide, crimes against humanity, and war crimes – the ICC will shift the legal analysis from the entity undertaking the intervention to the purposes behind the intervention. Since the adoption of the U.N. Charter, international law has focused on “who” violated its prohibition on force to determine if an actor is exempt from the rule.²³⁶ In particular, victims of aggression can currently use force in self-defense and agents of the Security Council can act militarily to implement U.N. objectives, if authorized.²³⁷ By transferring the analytical emphasis from the identity of the actor to the actor’s reasons for using force, the Court will exclude leaders of humanitarian interventions from criminal liability. Because this approach mirrors that of just war theorists, a greater analytical stress on the aims of the intervenor will more closely align international law with morality, at least as conceived by these theorists.²³⁸

5.3.3. *The Humanitarian Necessity Defense Should Include the Elements of the State Necessity Defense Plus an Individual Intent Element*

The ICC’s humanitarian necessity defense should be available to state leaders charged with the crime of aggression for conducting human rights-based interventions. As a starting point, the Working Group should recall that the Court can only convict individuals of the crime of aggression if both the individual and the state have committed the requisite acts.²³⁹ The conduct of the individual, as a state leader, produces the state’s aggression, but the state’s act is nevertheless analytically and physically distinct

²³⁵ In any event, the U.N. Security Council will retain the ability to authorize pro-democratic interventions if necessary, as it did in Haiti in 1993. S.C. Res. 841, *supra* note 79.

²³⁶ Reichberg, *supra* note 160, at 317-18.

²³⁷ *Id.* at 315, 317-18.

²³⁸ *Id.* at 310, 318-20.

²³⁹ Griffiths, *supra* note 19, 309-10; *see* sources cited *supra* note 113 and accompanying text (listing the elements of the crime of aggression, including individual conduct and state aggression).

because only the state as a collective entity can produce aggression.²⁴⁰

Given that the crime of aggression invokes an analysis of this collective entity's military actions, the necessity defense from a typical American jurisdiction that focuses solely on individual conduct and intent is insufficient.²⁴¹ Instead, the Working Group should base its necessity plea on the state necessity defense from the ILC.²⁴² The ILC approach is essential because it includes an element that the individual necessity plea lacks—the requirement that the state's act not violate any peremptory norms or treaties.²⁴³

While the Working Group should base its defense on the ILC's formulation of necessity, the state necessity defense alone is also insufficient because only states, and not individuals, may invoke it.²⁴⁴ Thus, the humanitarian necessity defense will only be complete if the Working Group adds another element to the state necessity defense—that of individual motive. The inclusion of this individual intent element will enable the Court to examine the particular leader's reasons for resorting to military force, thereby evaluating the purpose of the alleged aggression and linking the state's conduct to the individual. No other elements are necessary; if the ICC's Prosecutor cannot show that the individual was a leader who directed the state's military operations, the Prosecutor will have already failed to prove that the defendant committed the crime of aggression.

The elements of the Working Group's proposed humanitarian necessity defense to the crime of aggression should therefore include (1) essential interest; (2) grave peril; (3) no alternative; (4) balancing of interests; (5) no violation of a peremptory norm or treaty; (6) no fault of the state undertaking the intervention in bringing about the humanitarian crisis; and (7) individual motive. Here, the essential interests are the protection of civilian life and human rights values, two aims consistent with the ILC conception

²⁴⁰ Alberto L. Zuppi, *Aggression as International Crime: Unattainable Crusade or Finally Conquering the Evil?*, 26 PENN. ST. INT'L L. REV. 1, 29–31 (2007).

²⁴¹ See *supra* notes 173–78 and accompanying text (describing the requirements of the standard American approach to individual necessity).

²⁴² See *supra* notes 192–202 and accompanying text (explaining the elements of the ILC's necessity defense for states).

²⁴³ See Draft Articles, *supra* note 189, arts. 25(2)(a), 26.

²⁴⁴ See *id.* at 31, para. 1 (stating that the Draft Articles seek to articulate “the basic rules of international law concerning the responsibility of States”) (emphasis added).

of the term “essential interest.”²⁴⁵ The “grave peril” need not apply directly to the intervening state because the ILC text suggests that it may belong to the international community as a whole.²⁴⁶ The “no alternative” element means that the peril must be imminent and that the state must have exhausted all other options, including diplomacy. The “balancing of interests” requires that the harm of the humanitarian intervention not seriously impair the interests of the target state or the international community.²⁴⁷ While a military campaign would ordinarily cause severe harm to the target state’s essential interests by posing a threat to its very survival, if the intent of the intervenor is limited to ending atrocities, the incursion will not impair the target’s essential interests. For elements (5) and (6), which are elements of limitation that could foreclose the possibility of a necessity defense, the same arguments from Section 5.2, *supra*, apply.²⁴⁸

The final individual motive element of the necessity defense requires an evaluation of the leader’s purpose to ensure that he or she truly used state power to defuse a humanitarian emergency. Limiting the investigation of the defendant’s motive to whether the leader acted to end grave human rights abuses will prevent the defense from becoming too expansive and thus encompassing a wide range of “good” motives that could erode the criminalization of aggression.²⁴⁹

To assess whether the leader indeed acted to prevent atrocities and uphold human rights, the Court should examine official statements from his or her government, as well as relevant

²⁴⁵ See *id.* at 83 para. 14 (noting that states have raised the necessity defense in situations where their survival is at risk and in the protection of civilian populations); Laursen, *supra* note 210, at 503-04 (noting the ILC’s apparent acceptance of the idea that values can be an essential interest).

²⁴⁶ See Draft Articles, *supra* note 189, art. 25(1)(a) (stating that necessity will preclude wrongfulness for breaking an international obligation if the state acts to “safeguard an essential interest against a grave and imminent peril”); *id.* at 83 para. 15 (stating that an essential interest can pertain to “the international community as a whole”).

²⁴⁷ *Id.* at 83-84 paras. 17-18.

²⁴⁸ See *supra* notes 192-202 and accompanying text (providing these elements within the ILC’s definition); *supra* notes 212-15 and accompanying text (arguing that humanitarian intervention based on necessity would not violate the prohibition on force which may be *jus cogens*).

²⁴⁹ See Whitley R. P. Kaufman, *Motive, Intention, and Morality in the Criminal Law*, 28 CRIM. JUST. REV. 317, 320 (2003) (worrying that judicial inquiry into motive gives rise to a slew of allegedly benign motives that could nullify criminal law if accepted).

classified information.²⁵⁰ An evaluation of governments' classified information—and the Court's ability to draw an inference against the defendant for a failure to produce it—will enable ICC judges to look beyond officials' potentially mendacious public statements to ensure that they do not exonerate pretextual aggressors.²⁵¹

If a defendant accused of the crime of aggression can show that the state's act met the first six elements of the humanitarian necessity defense and that he or she had the motive required by the seventh element, the defendant will have properly invoked the defense. In this situation, the outcome should be a determination by the Court that the Prosecutor failed to show that the state's act constituted aggression, thus failing to meet the state aggression element of the crime of aggression. Although the act will still be a violation of Article 2(4) of the U.N. Charter, and thus illegal under international law, this defense will shield humanitarian intervenors from ICC aggression convictions. The defense will not provide cover for aggressors because if the defendant violated a peremptory norm or treaty, contributed to the necessity, or had an invidious motive, he or she will fail to defeat the aggression charge.

This defense is valuable because it will help prevent the ICC from deeming humanitarian intervenors "aggressors," thus squaring law with morality. The humanitarian necessity defense will also enhance customary legal protections for human rights by inching the world ever closer toward recognition of a legal right of unilateral intervention to end conscience-shocking atrocities.

²⁵⁰ See Antonio Cassese, *Ex iniuriis oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 25 (1999) (implying that public statements are the primary means to determine states' motives behind their interventions); W. Chadwick Austin & Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT'L L. 291, 338 n.266 (2006) (noting that the ICC Prosecutor may request classified information in the course of his or her investigations); Rome Statute, *supra* note 1, art. 54(3)(e)-(f) (stating that the Prosecutor may request confidential information during investigations and that the Prosecutor has a concomitant duty to maintain the secrecy of this information); Asa W. Markel, *The Future of State Secrets in War Crimes Prosecutions*, 16 MICH. ST. J. INT'L L. 411, 412, 421-23 (2007) (noting that Article 93 of the Rome Statute enables the ICC to request assistance from state parties in terms of document production and that while a government may resist production by using a national security defense under Article 72, the ICC may draw a negative inference at trial based on the withheld documents).

²⁵¹ Markel, *supra* note 250, at 421-23.

6. CONCLUSION

In the tradition of the Nuremberg Charter, the Preamble to the Rome Statute declares that the International Criminal Court will prosecute the most serious crimes, including aggression, in order to end impunity for those who perpetrate them.²⁵² It also proclaims the ICC's determination to "contribute to the prevention of such crimes."²⁵³ In addition, the Preamble reaffirms "the Purposes and Principles of the Charter of the United Nations," which include human rights promotion.²⁵⁴ The Preamble also specifically articulates its support for Article 2(4) of the Charter's prohibition on force and tacitly acknowledges Article 2(7) by "[e]mphasizing" that the Statute does not authorize any state "to intervene in an armed conflict or in the internal affairs of any State."²⁵⁵ Although the humanitarian necessity defense to the crime of aggression would seem to conflict with the ICC's goals of prohibiting force and protecting sovereignty, it does not undercut the Court's values overall because human rights-based interventions contribute to ending impunity and preventing the world's most monstrous crimes – the prime objectives of the ICC.

A textual analysis of the Preamble to the Rome Statute reveals that the ICC prioritizes holding perpetrators accountable and preventing atrocities over prohibiting force and maintaining states' sovereignty. To begin with, the Statute's drafters placed the goals of ending impunity and averting atrocities in the fourth and fifth paragraphs of the Preamble while the text does not mention the use of force or sovereignty until the seventh and eight paragraphs.²⁵⁶ Moreover, while the Statute opens the impunity and atrocities prevention paragraphs with the words "Affirming" and "Determined," it merely uses the word "Emphasizing" in the eighth paragraph on force and sovereignty, thus suggesting that, in

²⁵² Rome Statute, *supra* note 1, pmb., at 1; *cf.* Nuremberg Charter, *supra* note 25, art. 1 (stating that the tribunal exists "for the just and prompt trial and punishment of the major war criminals of the European Axis").

²⁵³ Rome Statute, *supra* note 1, pmb., at 1.

²⁵⁴ *Id.*; see U.N. Charter, *supra* note 57, art. 1, para. 3 (stating the United Nations' desire to promote and encourage respect for human rights and fundamental freedoms); *id.* art. 2, para. 2 (requiring members to fulfill their obligations assumed by ratification of the Charter, including art. 1(3) concerning human rights).

²⁵⁵ Rome Statute, *supra* note 1, pmb., at 1.

²⁵⁶ *Id.*

the eyes of the Court, punishing human rights abusers and deterring future violators takes precedence over upholding states' sovereignty.²⁵⁷

This textual dichotomy, which flips the U.N. Charter's sequencing of its own objectives,²⁵⁸ reflects a general shift over the past sixty years toward a greater balance between the international community's two competing values of prohibiting inter-state war and enforcing human rights.²⁵⁹ This transition began almost immediately after the creation of the United Nations, when the U.N. General Assembly affirmed the principles of the Nuremberg Charter in its first session.²⁶⁰ This affirmation declared that courts may hold individuals responsible for crimes against humanity, war crimes, and crimes against peace.²⁶¹ True, the last offense reinforces the ban on inter-state war, but its emphasis on individual criminal liability brazenly upended the centuries-old concept of Westphalian sovereign immunity and was a major step toward retooling international law to protect human rights. The growing characterization of human rights norms as *jus cogens*,²⁶² combined with the impending reemergence of the right of humanitarian intervention, shows that human rights law has nearly reached a legal status equal to that of the prohibition on the use of force in the modern international legal order.²⁶³

While the ICC's adoption of a humanitarian necessity defense to the crime of aggression may limit its ability to try those who use

²⁵⁷ *Id.*

²⁵⁸ *Cf.* U.N. Charter, *supra* note 57, art. 1, para. 1 (relating to the maintenance of security and suppression of aggression), art. 1, para. 3 (concerning respect for human rights).

²⁵⁹ *See* Merriam, *supra* note 33, at 121–23 (discussing the tension between the two competing goals of Article 2(4)); Morton, *supra* note 110, at 101 (“If the international community is willing to sacrifice classic principles of immunity in order to uphold emerging principles of human rights, sacrificing state sovereignty to uphold the same principles is a matter of degree and does not represent a fundamental shift in legal thinking.”).

²⁶⁰ Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95/1, *supra* note 34.

²⁶¹ Nuremberg Charter, *supra* note 25, art. 6(a)–(c).

²⁶² *See, e.g.,* Reisman, *supra* note 102, at 15 n.29 (arguing that human rights law has attained the status of *jus cogens*, not in the sense of the Vienna Convention's definition of the term but in that it has become a “super-custom” not requiring state practice to be binding); Walker, *supra* note 169, at 104–05 (suggesting that human rights and humanitarian law have gained *jus cogens* status).

²⁶³ Morton, *supra* note 110, at 101.

force illegally, by permitting this defense, the Court will refine its approach to the crime. Many international lawyers and state leaders recognize that while humanitarian interventions lacking Security Council approval may be technically illegal, they are just, and the world should not condemn them as aggression. Even among those critics of NATO's Kosovo campaign who castigated the alliance's intervention as illegal, few called the operation "aggression."²⁶⁴ To reconcile this break between law and morality, the ICC should adopt the humanitarian necessity defense to reinforce the idea that humanitarian interventions, even when unilateral, can be distinct from aggression.

In so doing, the Court will ensure that the "knights of humanity" have a shield against aggression charges.²⁶⁵ Instead of deterring such potential humanitarian intervenors, this defense will help the ICC achieve its goal of "contribut[ing] to the prevention" of atrocities—brutal acts that it calls "the most serious crimes of concern to the international community."²⁶⁶ By adopting the humanitarian necessity defense, the International Criminal Court will reject the idea that international law should be limited to fashioning a negative peace, defined by a lack of inter-state conflict, and instead forge a positive peace, in which justice triumphs over sovereignty.²⁶⁷

²⁶⁴ See, e.g., DINSTEIN, *supra* note 11, at 313–15 (concluding that NATO violated the law without calling its conduct aggression); Charney, *supra* note 105, at 834–35 (labeling NATO's intervention illegal without using the word aggression); KOSOVO REPORT, *supra* note 69, at 4, 70 (calling NATO's actions "illegal but legitimate" without labeling them as aggression and instead characterizing Serbia's actions against Kosovo as "aggression"). *But see, e.g.,* Griffiths, *supra* note 19, at 348 (suggesting that NATO committed an act of aggression "albeit possibly for very good reasons").

²⁶⁵ RAMSBOTHAM & WOODHOUSE, *supra* note 9, at 4–7, 215 (describing justifications for Tanzania's 1979 military intervention to end the brutal rule of Ugandan President Idi Amin).

²⁶⁶ Rome Statute, *supra* note 1, pmb., at 1.

²⁶⁷ See Cassese, *supra* note 250, at 26–27 (distinguishing positive peace from negative peace by arguing that the former is based on justice while the latter is grounded in state sovereignty).