



Case Western Reserve Journal of International Law

Volume 41 | Issue 2

2009

A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention

Elise Leclerc-Gagne

Michael Byers

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>

 Part of the [International Law Commons](#)

Recommended Citation

Elise Leclerc-Gagne and Michael Byers, *A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention*, 41 Case W. Res. J. Int'l L. 391 (2009)

Available at: <https://scholarlycommons.law.case.edu/jil/vol41/iss2/7>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

A QUESTION OF INTENT: THE CRIME OF AGGRESSION AND UNILATERAL HUMANITARIAN INTERVENTION

Elise Leclerc-Gagné* & Michael Byers†

While the question of the crime of aggression has prompted a number of publications and discussions pertaining to its preferable modalities of inclusion in the Rome Statute, surprisingly few scholars have considered contemporary events and debates on the use of force. Examining developments like the right of unilateral humanitarian intervention (UHI) is crucial for ensuring that amendments to the Rome Statute, meant to allow for the prosecution of aggression, are compatible with the current international environment. This paper engages the issue of UHI and argues for the need to include, in the conditions of jurisdiction over the crime of aggression by the ICC, an exception for those engaged in a bona fide unilateral humanitarian intervention.

INTRODUCTION

The criminal nature of aggression is now beyond question. The twentieth century has witnessed an increasing commitment to recognizing and condemning aggression, as exemplified by the renunciation of the recourse to war by the State Parties to the 1929 Kellogg-Briand Pact¹ and the 1945 United Nations (U.N.) Charter, which includes among its primary purposes suppressing “acts of aggression” and preventing the “threat or use of force” by Member States in their international relations.² The criminal prosecution of individuals for Crimes Against Peace,³ by the International Military Tribunals (IMT) of Nuremberg and the Far East following World War

* Ph.D. Student, Department of Political Science, University of British Columbia.

† Canada Research Chair in Global Politics and International Law, University of British Columbia.

¹ Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact]. The Kellogg-Briand Pact refers to ‘war’ and not to any specific type of territorial intervention or aggression. *Id.* The ambit of this wording is subject to debate. *See, e.g.,* Richard L. Griffiths, *International Law, the Crime of Aggression and the Ius ad Bellum*, 2 INT’L CRIM. L. REV. 305–06 (2002).

² U.N. Charter art. 1, para. 1; U.N. Charter art. 2, para. 4.

³ London Charter of the International Military Tribunal art. 6, Aug. 8, 1945 (defining Crimes Against Peace as “namely, planning preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”).

II, and the adoption of a consensual definition of “aggression” by the U.N. General Assembly in 1974,⁴ constitute other examples of international efforts to limit and outlaw aggression.

Efforts to recognize aggression as an offense under international criminal law, which were made over half a century, bore fruit in 1996 when the crime of aggression was included in the Draft Code of Crimes adopted by the International Law Commission (ILC).⁵ The Draft Code served as a basis for the plenipotentiary negotiations in Rome where the European Union and approximately thirty countries of the Movement of the Non-Aligned Countries (NAC) made inclusion of the crime of aggression an absolute condition for their support of the Rome Statute of the International Criminal Court (ICC).⁶ Given the sensitive nature of the crime of aggression, and particularly the prospect that high ranking officials of a State could face prosecution, the crime was included in the Statute but left undefined and without conditions of jurisdiction.⁷

Articles 121 and 123 of the Rome Statute prescribe a seven-year delay before a State Party may propose an amendment,⁸ meaning that changes defining and providing conditions of jurisdiction for aggression will soon be permitted. However, exercising this potential requires reaching agreement on these matters in light of the events of the past decade. One such event was NATO’s intervention—“Operation Allied Force” (OAF)—in Kosovo, Serbia and Montenegro in 1999. Although the Kosovo War did not generate an uncontested right of unilateral humanitarian intervention (UHI),⁹ its unique character, and the fact that it was tolerated by many countries, introduced new elements into discussions of the recourse to force in international affairs.¹⁰

In this article, we argue that an agreement on the definition and conditions of jurisdiction for aggression is needed, but that these provisions must include an exception for those engaged in a *bona fide* unilateral huma-

⁴ G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974).

⁵ *Draft Code of Crimes Against the Peace and Security of Mankind*, [1996] 2 Y.B. Int'l L. Comm'n., ch. 2, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part. 2).

⁶ See Benjamin B. Ferencz, *Can aggression be deterred by law?*, EQUIPO NIZKOR [HUMAN RIGHTS], <http://www.derechos.org/nizkor/doc/articulos/ferencz1.html> (last visited Mar. 13, 2009).

⁷ See Theodor Meron, *Defining Aggression for the International Criminal Court*, 25 SUFFOLK TRANSNAT'L L. REV. 1,3 (2001–2002).

⁸ Rome Statute of the International Criminal Court arts. 121, 123, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

⁹ The authors are conscious that the exactness of the term unilateral humanitarian intervention is subject to debate but it will be used in the present article given its preponderance in the literature studied. See e.g., Griffiths, *supra* note 1, at 338.

¹⁰ *Id.* at 338–39.

nitarian intervention. The applicability and validity of this exception should include a mental element that is analogous—but not identical—to that set out in Article 30 of the Rome Statute.¹¹ Our argument does *not* intend to reopen debates on the strengths and weaknesses of a possible right to UHI. Rather, we are merely suggesting a way in which the definition and conditions of jurisdiction over aggression can accommodate circumstances where gross human rights violations do occur, the Security Council is not always prepared to act, and individual states or groups of states sometimes intervene on what are—at least purportedly—humanitarian grounds.

We follow a tripartite approach that begins with a brief explanation of the crime of aggression and why it should be included in the ICC Statute. We then outline the downfalls of prosecuting aggression in the absence of a UHI exception. Finally, we set out some conditions for invoking the exception that might usefully be included so as to preclude its abuse.

I. THE PROSECUTION OF AGGRESSION BY THE ICC

Numerous official declarations and publications have already explained why the International Criminal Court should be able to prosecute the crime of aggression. First, it is necessary to bring an end to the impunity of individuals who perpetrate aggression, which was characterized by the Nuremberg Tribunal as “the supreme international crime . . . [which] contains within itself the accumulated evil of the whole.”¹² Second, a capacity to prosecute individuals for aggression should—when coupled with appropriate punishments—create a deterrent for would-be perpetrators.¹³ Finally, and in any event, a continued inability to prosecute aggression on the part of the first permanent International Criminal Court constitutes a backwards step in the development of international law, given the jurisprudence supporting such prosecutions and the many, sometimes decades-old documents, treaties, and declarations outlawing and condemning aggression.¹⁴

Article 5(2) of the Rome Statute requires only that the eventual definition and conditions of ICC jurisdiction over the crime of aggression be “consistent with the relevant provisions of the Charter of the United Na-

¹¹ Rome Statute, *supra* note 8, art. 30.

¹² Benjamin B. Ferencz, *Enabling the International Criminal Court to Punish Aggression*, 6 WASH. U. GLOBAL STUD. L. REV. 551, 552 (2007) (citing The Avalon Project: Judgment: The Nazi Regime in Germany, <http://avalon.law.yale.edu/imt/judnazi.asp> (last visited March 5, 2009)).

¹³ Jennifer Trahan, *Defining “Aggression”*: *Why the Preparatory Commission for the International Criminal Court Has Faced Such a Conundrum*, 24 LOY. L.A. INT’L & COMP. L. REV. 439, 467 (2002).

¹⁴ See Linda Jane Springrose, *Aggression as a Core Crime in the Rome Statute Establishing an International Criminal Court*, ST. LOUIS-WARSAW TRANSATLANTIC L. J. 151, 163 (1999).

tions.”¹⁵ Not surprisingly, State Parties, scholars and organizations have advanced a variety of different proposals. Given the specific purpose of our analysis and the already existing corpus of writings addressing this specific issue, only the most prominent proposals are considered here.¹⁶

In contrast to the other core crimes over which the ICC has jurisdiction, an individual's responsibility for perpetrating the crime of aggression must be determined in conjunction with a State act, namely the commission of an act of aggression. Any definition of the “crime of aggression” must therefore include both these distinct but related elements of individual responsibility and the *state-committed* act of aggression.¹⁷ But most of the definitional debate has, to date, concerned the state-committed act and not the question of individual responsibility. The latter is usually assumed—following the precedent set by the Nuremberg Charter—on the basis of the individual's position as a leader, organizer, instigator, or accomplice in the formulation or execution of the state-committed act.¹⁸

There are three main approaches: (1) a generic approach, based on customary international law, in which the act of aggression would be defined generally; (2) an enumerative approach following the model of U.N. General Assembly Resolution 3314 in which those specific acts that could amount to aggression would be listed; and (3) a “Security Council approach” in which a specific, individual act of aggression would only be defined and determined by the Security Council.¹⁹ The first approach, sometimes coupled with elements of the second approach as a means of illustration, has garnered the most support.²⁰ Although various elements are still under discussion (e.g., the criminalization of threats or attempts to commit aggression, the adoption of a *de minimis* threshold, the terminology to be used),²¹ a definition based on customary international law is consistent with the approach taken for the other core crimes in the Rome Statute.²² It is preferable to the second approach, which potentially constrains the ongoing evolution of international criminal law, and greatly preferable to the third approach, since leaving the matter to *ad hoc* determinations by the Security Council risks arbitrary decision-making based on non-legal factors. Such a

¹⁵ Rome Statute, *supra* note 8, art. 5(2).

¹⁶ For a thorough presentation of the different propositions, see Ferencz, *supra* note 12; Meron, *supra* note 7; Daniel D. Ntanda Nsereko, *Aggression under the Rome Statute of the International Criminal Court*, 71 NORDIC J. INT'L L. 497–521 (2002); Trahan, *supra* note 13.

¹⁷ See Griffiths, *supra* note 1, at 309–310; Trahan, *supra* note 13, at 448.

¹⁸ London Charter of the International Military Tribunal, *supra* note 3, art. 6.

¹⁹ Trahan, *supra* note 13, at 450–53.

²⁰ Trahan, *supra* note 13, at 456–459; Ntanda Nsereko, *supra* note 16; Meron, *supra* note 7 at 8–15.

²¹ Trahan, *supra* note 13, at 449.

²² See Meron, *supra* note 7, at 8.

practice would not only be inconsistent with the conditions under which the other core crimes of the Statute are determined, it would also render it difficult for judicial bodies to use the Security Council determinations as a basis for appeals and the establishment of a lasting, guiding jurisprudence.²³

Yet the Security Council must play something of a role, since the Rome Statute's clauses regarding aggression must be made consistent with the U.N. Charter's provisions—especially Article 39, which reads: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression”²⁴ While this provision could indicate an exclusive role for the Council in identifying acts of aggression, many authors and State Parties of the ICC have instead interpreted Article 39 as giving the Council *primary* responsibility only.²⁵ Four possibilities have been advanced. First, the Security Council could be the sole entity entitled to make determinations of the existence of an act of aggression.²⁶ Second, in the case of inaction by the Security Council, the issue could be referred to the General Assembly.²⁷ Similarly, third, in the case of inaction by the Security Council, the General Assembly could request a determination from the International Court of Justice (ICJ).²⁸ Lastly, in the case of inaction by the Security Council, the ICC could itself rule on the existence of an act of aggression.²⁹ This determination could then be used in prosecutions of individuals without being binding on States.

The advantages and disadvantages of these different approaches have been widely analyzed. Suffice it to say that providing the possibility for determinations by other bodies—and especially courts—reduces the risk of politically-motivated determinations or, perhaps more likely, politically-motivated blockings of determinations. An avenue around the Security Council and the veto power of its five permanent members could be an essential precondition for ICC prosecutions of the crime of aggression.

II. SHORTCOMINGS OF “CLASSIC” PROSECUTIONS FOR AGGRESSION

If the definition of the crime of aggression were based solely on the exceptions in the U.N. Charter and General Assembly resolution 3314, the ICC could initiate prosecutions whenever there was an established *actus reus* (in this case, an act of aggression), a *mens rea* confirming the intention

²³ See *id.* at 8.

²⁴ U.N. Charter art. 39.

²⁵ Ferencz, *supra* note 12, at 562; Meron, *supra* note 7, at 14; Nsereko, *supra* note 16, at 511–13.

²⁶ Ferencz, *supra* note 12, at 562.

²⁷ *Id.* at 562–63.

²⁸ *Id.* at 563.

²⁹ *Id.* at 563–64.

and knowledge of the State's leaders to commit that *actus reus*, and a failure on the part of the State to exercise jurisdiction. This is not necessarily problematic since similar avenues to prosecutions are, in the broader context, relatively common. Moreover, the legitimacy of the body that determines aggression, the process of determination itself, and the capacity of determinations to provide a forward-looking deterrent would all be enhanced by a clear definition.

Nevertheless, a predicament arises when the Security Council fails to act in the face of gross human rights violations, either because of a political stalemate or a widespread absence of political will. In such a situation, a unilateral humanitarian intervention may be the only option available for stopping mass atrocities, even if such interventions remain illegal under the U.N. Charter and customary international law.³⁰ Given this predicament, the definition of aggression must preserve international stability by maintaining the existing rules on the use of force while, at the same time, allowing the occasional *bona fide* humanitarian intervention to take place. To reach the proper balance between maintaining existing rules on the use of force and allowing appropriate humanitarian intervention to take place, we build on the writings of Thomas Franck, Simon Chesterman and Michael Byers, extending their ideas on "exceptional illegality" into the sphere of international criminal law.³¹

Franck points to the 1999 NATO bombing campaign in the former Yugoslavia as a prime example of how illegal state actions are sometimes excused or mitigated by the response of other states:

Was the NATO action unlawful? Yes and no. *Yes*, in the sense that the prohibition in Article 2(4) cannot be said to have been repealed in practice by the system's condoning of NATO's resort to force without the requisite armed attack on it or prior Security Council authorization. Such a repeal is not supported by the members of the global system at this time. *No*, in the sense that no undesirable consequences followed on NATO's technically illegal initiative *because, in the circumstances as they were understood by the large majority of UN members*, the illegal act produced a result more in keeping with the intent of the law (i.e. "more legitimate")—and more moral—than would have ensued had no action been taken to prevent

³⁰ See Ian Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 217 (John Norton Moore ed., 1974); Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 *AM. J. INT'L L.* 824, 824–28 (1999); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 *EUR. J. INT'L L.* 1 (1999).

³¹ Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DIMENSIONS* 204 (J.L. Holzgrefe & Robert O. Keohane eds., 2003); Michael Byers & Simon Chesterman, *Changing the Rules about Rule? Unilateral Humanitarian Intervention and the Future of International Law*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DIMENSIONS* 177 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

another Balkan genocide. In other words, the unlawfulness of the act was mitigated, to the point of exoneration, in the circumstances in which it occurred.³²

And as Byers and Chesterman explain:

States are not champing at the bit to intervene in support of human rights around the globe, prevented only by an intransigent Security Council and the absence of clear criteria to intervene without its authority. The problem, instead, is the absence of the will to act at all. In such circumstances, the primary goal must be to encourage states to see widespread and systematic human rights violations as their concern too—as part of their “national interest”—and to act and act early to prevent them, stop them, or seek justice for them.³³

In the absence of some kind of exception for unilateral humanitarian intervention, defining and providing ICC jurisdiction over the crime of aggression could deter those very few unilateral interventions that are, in fact, principally aimed at protecting fundamental human rights. Decision-makers pondering such a benevolent operation would risk international criminal prosecution in addition to the possibility of diplomatic condemnation, economic sanctions, or even a military response.

Unilateral humanitarian interventions have been condemned as generally illegal by over 130 countries through unilateral or joint statements such as the Declaration of the South Summit of Havana and the final document of the Movement of the Non-Aligned Countries in Cartagena.³⁴ Nevertheless, NATO’s intervention in Kosovo was widely tolerated—even by those countries most opposed to the war—in the sense that no economic or military actions were taken against the intervening states.³⁵ The juxtaposition of diplomatic condemnation and an absence of economic or military follow-up might seem inconsistent, though at one level it merely reflects substantial power disparities between the intervening and condemning states. In any event, international reaction to the Kosovo intervention raises the possibility that UHI could be regarded as legitimate (rather than legal) in certain limited and exceptional circumstances. By legitimacy, we mean “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of

³² Franck, *supra* note 311, at 226.

³³ Byers & Chesterman, *supra* note 311, at 202.

³⁴ Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT’L L. 107, 108–12 (2006).

³⁵ Aaron Schwabach, *Kosovo Virtual War and International Law*, 15 LAW AND LITERATURE 1, 11 (2003).

norms, values, beliefs, and definitions.”³⁶ In a world redefined since 1945 by the U.N. Charter, its affirmation of “faith in fundamental human rights and in the dignity and worth of the human person,”³⁷ and the subsequent human rights revolution, creating some space for purely humanitarian action within the rules and power politics governing the use of force is a noble—if risky and controversial—exercise.

Much of the resistance to UHI is rooted in a concern that any such right could be used as a pretext for inappropriate interventions motivated by non-humanitarian goals.³⁸ Although we believe the concern is well-founded,³⁹ we also believe it could be assuaged by the development of strict criteria for a UHI exception in the Rome Statute, as well as a reminder that the presence of such an exception does not amount to the general legalization of UHI. An accused individual’s invocation of the exception would not shield the state from condemnation or enforcement action by the U.N., diplomatic or economic countermeasures by other countries, or legal actions in the ICJ. It would simply maintain some space for “exceptional illegality”—a concept that seeks to augment efforts to preserve the peace *and* prevent mass atrocities while maintaining traditional rules and institutions.⁴⁰

III. THE UHI EXCEPTION

Given the individual basis on which the UHI exception should be granted and the *bona fide* motivation behind the intervention that should be demonstrated, the criteria for having recourse to this exception should include a mental component analogous to the one set out in Article 30 of the Rome Statute:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;

³⁶ IAN HURD, *AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL 30* (2007).

³⁷ U.N. Charter preamble.

³⁸ Goodman, *supra* note 344, at 107–08 (citing Franck, *supra* note 311, at 229–31).

³⁹ See Simon Chesterman & Michael Byers, *Has US power destroyed the UN?*, LONDON REV. OF BOOKS, Apr. 29, 1999; The credibility of this fear of interventions with ulterior motives in case of legalization of a right to UHI is contested by Ryan Goodman who argues that the presence of a legal right to UHI would instead discourage such pretext wars. See Ryan Goodman, *supra* note 344, at 107–41.

⁴⁰ While some may claim that only legal matters should have bearing—given the legal nature of the ICC—we believe that some account should be taken of the deeply political and moral origins of the law.

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.⁴¹

Of course, the test in Article 30 concerns whether a person intends to engage in the particular, proscribed action. The test we are proposing is different. Rather than concerning intent, it asks whether the person’s principal motivation for deciding to use force is a genuine humanitarian desire to prevent gross human rights violations. If the ICC determines that this particular mental element existed, individual criminal responsibility for aggression would not be assigned.

Given the exceptional nature of our proposed exemption, invoking the UHI exception would be an affirmative defense. The prosecution would retain the burden of proof to establish that the defendant committed the crime of aggression; at that point, if the defendant wished to invoke the exception, it would be up to him to establish the facts discharging criminal responsibility. And so, while Article 66(2) of the Rome Statute states “the onus is on the prosecutor to prove the guilt of the accused,” consistent with the presumption of innocence, the proposed exception would come in after that point—and expunge the criminal nature of an otherwise illegal act of aggression.⁴² This arrangement is in line with the maxim *necessitas probandi incumbit ei qui agit*. As with the defense of necessity, it is the defendant wishing to be discharged of criminal responsibility who at the second stage—and that stage only—carries the evidentiary burden.

We recommend that the evaluation of the mental element be made with regard to the individual leaders of the acting states, since the acting states are answerable before the ICC for the alleged crime. We do not believe the *mens rea* test should be applied to the state or coalition of states involved, or to the collective leadership of those countries. Rather, it is necessary to discern the mental element of each individual accused, as part of their personal criminal responsibility. And it is possible that different individuals leading the same intervention could have different principal motivations. For example, the leader of one State could be principally motivated by a desire to stop genocide, while another leader within the same coalition could be principally motivated by geopolitical or natural resource-related concerns. That said, as part of his or her discretion, the prosecutor may de-

⁴¹ Rome Statute, *supra* note 8, art. 30.

⁴² Rome Statute, *supra* note 8, art. 66(2).

cide that evidence of a substantial humanitarian motive on the part of a coalition is sufficient reason not to pursue any the leaders involved.

An accused seeking to prove humanitarian intent could rely on various kinds of evidence, including documents related to the planning of the operation, diplomatic communications with coalition partners, special rules of engagement designed to avoid civilian casualties, and even decisions taken after military operations ceased. Did the accused, for instance, order that forces be withdrawn as quickly as possible? Or did he keep those forces in place to secure long-term military bases or a favourable resource-exploitation regime? Assessing the mental element behind an intervention requires an in-depth examination of events, decisions, and actions—on the part of the individual accused, his government, and the leaders and governments of allied states. The threshold for the UHI exception will necessarily be high, and again, the burden of proof rests with the accused individual.

The accused will have to establish that he knew gross human rights violations were taking place, for it would be impossible to have humanitarian intent in the absence of such knowledge. Also, the UHI exception should only be available with respect to certain, particular severe human rights violations. Christine Chinkin, for one, proposes allowing UHI for crimes against humanity only.⁴³ And finally, the accused will have to demonstrate a well-founded belief that the U.N. Security Council was unable or unwilling to respond to the crisis—and not because of his own actions or inactions. Otherwise, political leaders would be able to order military interventions whenever they saw fit, thus undermining the sovereignty of target states and destabilizing the international system. This is precisely the concern voiced by many opponents of UHI. Introducing a mental element with a high factual threshold helps alleviate this concern, while according some space for the concept of “exceptional illegality” as applied to unilateral, *bona fide* efforts to protect the most fundamental human rights.

Introducing a UHI exception that involves a mental element is consistent with established international criminal law—including Article 30 of the Rome Statute—which recognizes that the intent to commit a crime (such as, in this instance, aggression) should not be confounded with different intentions (such as, in this instance, the intent to save thousands of innocent lives). Just as importantly, such an exception does not detract from other provisions of the Statute, nor indeed the essence and purpose of that instrument. The primary responsibility of the Security Council with regards to international peace and security remains intact.

Indeed, introducing a nuanced, tightly constrained UHI exception could enhance the legitimacy and mutual compatibility of both the Security

⁴³ Christine Chinkin, *The Legality of NATO's Action in the Former Republic of Yugoslavia (FRY) under International Law*, 49 INT'L & COMP. L. Q. 920, 920–21 (2000).

Council and the ICC. It would, among other things, help to ensure that unilateral interventions do not take place with respect to lesser human rights violations, or on the basis of concocted justifications. The test we propose, which examines both the “subjective” element of a leadership’s intent and their more “objective” knowledge of the concurrent existence of gross human rights violations and international inaction, would hardly generate a rush toward greater unilateralism. Nor would it undermine efforts to have the ICC prosecute the crime of aggression, since successful invocations of the UHI exception are likely to be rare.

The UHI exception would simply recognize that violations of international law might very occasionally be excused—or their punishments mitigated—on the basis of “exceptional illegality.” In other words, the international community may decide not to punish the perpetrators of a particular intervention because their motivations were genuinely humanitarian. And it might decide this without wishing to cause, or even contemplate, any change in the rules.

CONCLUSION

An agreement on the definition and conditions of ICC jurisdiction over the crime of aggression is needed. This agreement, which must be reached amongst the States Parties to the Rome Statute, will help to end the culture of impunity that currently benefits those who perpetuate aggression. However, crafting these amendments requires more than a melding of customary international law and U.N. declarations. The definition and conditions of jurisdiction must be tailored to the present international environment in which the United Nations—and the U.N. Charter’s provisions on the recourse to force—have sometimes proven inadequate in situations of gross human rights violations. Very occasionally, a UHI may constitute the only means available to stop the atrocities, and a country or countries capable of acting may have the necessary political will. If the intervention is truly motivated by humanitarian concerns and not exploited for other purposes, the international community might then excuse the violation of international law by choosing not to apply countermeasures. In light of the possibility of this kind of “exceptional illegality,” any amendments to the Rome Statute’s provisions concerning the crime of aggression should contain an exception that provides accused individuals with the opportunity of proving that their personal decision-making (i.e., the actions for which they have been charged) was principally motivated by humanitarian concerns, and that no other alternatives existed for stopping the atrocities.

Again, the exception would not prevent other countries from choosing, individually or collectively, to punish the violation of international law diplomatically, economically or even militarily. It would simply shield from prosecution those political leaders who, when faced with gross human rights violations and a Security Council that is unable or unwilling to act, genuine-

ly decide to do the morally “right” thing and violate the U.N. Charter. In doing so, it would avoid the perverse situation where an individual could be prosecuted in the ICC for a decision the international community, at the level of inter-state relations, had chosen to overlook or otherwise excuse. And it would be entirely consistent with the intent and spirit of the Rome Statute which, at root, is aimed at preventing and punishing the very same gross human rights violations as a *bona fide* unilateral humanitarian intervention.