UNILATERAL HUMANITARIAN INTERVENTION: A CRIME OF AGGRESSION UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT?

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"History teaches that wars begin when governments believe the price of aggression is cheap."[1]

ABSTRACT

The Article addresses how international law has developed with respect to humanitarian interventions and discusses the importance of the activation of jurisdiction over the crime of aggression by the International Criminal Court as well as their interrelationship. The overarching question posed in the Article will be: Does any humanitarian intervention, planned, organized and carried out by State leaders constitute a crime of aggression under the Rome Statute? What types of use of force are prohibited and what types are legal? Despite the problems associated with the exercise of jurisdiction, the International Criminal Court will have to clarify sooner or later the scope of Article 8 *bis* of the Rome Statute on "acts of aggression". In conclusion, the Article will try to answer the question of the potential consequences of the activation of the ICC jurisdiction on the doctrine of humanitarian interventions and *jus ad bellum* in general.

Keywords: Crime of Aggression; Rome Statute; Humanitarian Intervention; International Criminal Court (ICC); *Jus ad Bellum*; Use of force

INTRODUCTION

On 15 December 2017, the 16th Assembly of States Parties to the Rome Statute of the International Criminal Court[2] ("Rome Statute", "Statute") adopted a historic decision activating the jurisdiction of the International Criminal Court ("ICC", "Court") over the crime of aggression, which entered into force on 17 July 2018.[3] Despite the huge significance of this historic moment, opinions of scholars are divided. Some of them consider that the criminalization of aggression is an important step towards accountability and the reduction of armed conflicts around the world, while others believe that it could possibly

[1] Ronald Reagan, 40th President of the United States.

[2] Rome Statute of the International Criminal Court, 2187 UNTS 3 (adopted on 17 July 1998, entered into force on 1 July 2002).

[3] Resolution ICC-ASP/16/Res.5, 14 December 2017, https://asp.icccpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf [accessed 27.12.2019].

have a "chilling effect" on armed interventions that serve a legitimate purpose.[4]

As the jurisdiction of international courts primarily derives from "State consent", up to date there have seldom been any inter-State proceedings, where States were held accountable for the violations of *jus ad bellum*. States, however, have used other mechanisms to show their condemnation of unlawful armed interferences, such as sanctions, severing diplomatic relations or damaging the State's reputation in the international arena. It is likely that individual criminal responsibility of State leaders will have more important implications and will be a better preventive factor than State liability in general.[5] According to the former Nuremberg Prosecutor Robert Jackson, who consistently advocated for increased liability in respect of aggressive wars, enforcement of international law would "make war less attractive to those who have governments and the destiny of peoples in their power.".[6]

The definition contained in the Rome Statute and other primary sources of the ICC do not provide a clear-cut answer on the relationship between the crime of aggression and unilateral humanitarian intervention.[7] Does the intervention planned, prepared, initiated and carried out by State leaders fall within the scope of Article 8 *bis* of the Statute? In case military intervention serves the purposes of the UN Charter, but at the same time does not meet the criteria for being considered as a lawful use of force, should it be treated as aggression? The humanitarian intervention authorized under Chapter VII by the Security Council clearly does not represent aggression; the purpose of this Article is to assess whether unauthorized interventions qualify as such. One of the best-known examples of such interventions is the NATO intervention in Kosovo, which was assessed by the relevant Independent International Commission as "unlawful, but legitimate".[8] After the mid-20th century, the opinion, which supports use of limited and proportionate force strictly for the purpose of the prevention of genocide and crimes against humanity, evolved.[9] The example of Rwanda, where the international community was completely ineffectual in times of great crisis, is often cited in support of the policy of humanitarian intervention.

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[4] Tom Ruys, "Criminalizing Aggression: How the Future of the Law on the Use of Force Rests in the Hands of the ICC", The European Journal of International Law 29 (2018): 889; Michael Reisman., "Reflections on the Judicialization of the Crime of Aggression", Yale Journal of International Law 39 (2014): 73; Leslie Esbrook., "Exempting Humanitarian Intervention from the ICC's Definition of the Crime of Aggression: Ten Procedural Options for 2017", Virginia Journal of International Law 53 (2015): 802.

[5] Yoram Dinstein, War, Aggression and Self-Defense (Cambridge: Cambridge University Press, 2017), 132.

[6] Robert Jackson, "Report to the President on the Atrocities and War Crimes", United States Department of State Bulletin, (Government Printing Office) (1945).

[7] Vaughan Lowe and Antonios Tzanakopoulos, Humanitarian Intervention, Max Planck Encyclopaedia of International Law, para. 8. Unilateral humanitarian intervention can be distinguished from "collective humanitarian intervention" as the latter represents use of force without prior UN Security Council authorization under Chapter VII. 'Unilateral humanitarian intervention', even if it is undertaken by a group of states, will still be treated as "unilateral", because it is not authorized by Security Council. Therefore, the term "unilateral" in this context is not an opposite of "multilateral". The intervention is not collective, because it does not fall within the procedure established by the United Nations Charter.

[8] Independent International Commission on Kosovo, The Kosovo Report (2000), 4.

[9] Sean D. Murphy, Humanitarian Intervention: The United Nations in an Evolving World Order (Pennsylvania: University of Pennsylvania Press, 1996), 366; Ryan Goodman, "Humanitarian Intervention and Pretexts for War", American Journal of International Law 10 (2006): 107-112.

After the events in Rwanda, UN member states vowed that such heinous acts would not be repeated and in 2005, the General Assembly, in its High-level Segment, issued the World Summit resolution that peaceful civilians would be protected from genocide, crimes against humanity and war crimes.[10] To what extent the international community has managed to fulfill this promise is another issue. If we look at the events of the past decade in Syria where half a million people died, in Yemen where 20 million people are in dire need of humanitarian assistance, and at recent events in Myanmar, where 600,000 people have been forced to flee to Bangladesh, the answer is bleak.[11]

In cases where the UN Security Council is prevented from taking action and to fulfill its primary functions due to the lack of consensus between its permanent members, one of the alternatives is to use force unilaterally against another state that would be "legitimately" necessary for the prevention of massive human rights violations. In 2014, many countries supported the use of force in Syria in order to put an end to the grave human rights violations committed by the Assad regime, including the United Kingdom, the United States, France, Denmark and Turkey.[12] However, it is debatable whether existing state practice and *opinion juris* is sufficient for the establishment of a new norm of customary international law and whether the emergence of new customary rule is sufficient to create an exception to the prohibition of the use of force. And if humanitarian intervention is unlawful, does it *ipso facto* represent a "manifest" breach of the UN Charter and therefore the crime of aggression?

To answer these and other topical questions, the Article will first provide a brief overview of the recent inclusion of a novel crime in the ICC Statute and its key elements. The subsequent chapters will analyze modern examples of humanitarian intervention and will critically assess whether they are sufficient to crystalize into customary law. In the next chapter of the Article, each element of the Kampala Amendments will be reviewed in light of the preparatory works to and the practice of the International Court of Justice and scholarly opinions. The Article will also attempt to draw the line between *bona fide* humanitarian intervention and the use of force, which leads to the occupation and annexation of another country's territory. Finally, despite the limitations to the exercise of the Court's jurisdiction, the Article will provide a legal assessment on whether the intervention carried out by Russia on the territory of Georgia in 2008 can qualify as a crime of aggression under the Rome Statute.

1. ADOPTION OF THE KAMPALA AMENDMENTS AND INTERPRETATION OF THE NOVEL CRIME OF AGGRESSION

At the Kampala Conference of June 2010, the international community came one step closer to the eradication of impunity and the protection of future generations from the

[10] UNGA Res 60/1 (16 September 2005) UN Doc A/RES/60/1.

[11] Rebecca Barber, "Uniting for Peace Not Aggression: Responding to Chemical Weapons in Syria Without Breaking the Law", Journal of Conflict & Security Law 24 (2018): 72.

[12] Leslie Esbrook, "Exempting Humanitarian Intervention from the ICC's Definition of the Crime of Aggression: Ten Procedural Options for 2017", Virginia Journal of International Law 53 (2015): 802.

scourge of war. This was not a simple process. Delegates expressed conflicting opinions and consensus was nowhere in reach. In the middle of heated debates, Benjamin Ferencz, who had prosecuted Nazi leaders at the International Military Tribunal in Nuremberg for aggressive wars, took the stage. He addressed the heads of state and diplomats, highlighting that criminalization of aggression would end impunity for leaders, who used force aggressively and illegally. He also stated that the International Court's jurisdiction over this crime was important for the "conscience of humanity" and urged delegates to leave their disagreements behind in order not to allow the "license to kill" to remain unpunished.[13]

On 4 June 2010, the U.S. delegate at the Conference expressed dissatisfaction over the initial definition of the crime of aggression contained in Article 8 *bis* since it contained two main risks: the possibility of criminalizing the lawful use of force and a diversion from current customary international law. However, according to the delegate, it was not necessary to change the wording of Article 8 *bis,* but to clarify certain issues by way of introducing Understandings; and on 7 June 2010, she proposed a comprehensive text of Understandings.[14]

The 3rd Annex to the Kampala Amendments contains seven understandings, which will play an important role in judicial interpretation. Understandings 1 to 5 cover procedural and jurisdictional issues. Understandings 4 and 5 clarify that the definition of the act and the crime of aggression is solely one for the purpose of the International Criminal Court and does not limit, or is without prejudice to, current and evolving norms of customary international law norms. Understandings 6 and 7 concern the definition of the crime.[15]

Based on the formulation of the jurisdictional clauses in the Rome Statute, it is inevitable that the Court will face serious problems in the exercise of its mandate, besides those cases where investigation commences after a UN Security Council referral. Jurisdiction over the crime of aggression generally only arises with respect to citizens of those states that have ratified the Kampala Amendments. It is noteworthy that the States that participated in the 1999 NATO operation in Kosovo (Belgium and Spain) and in the 2003 Iraqi intervention headed by the U.S. (Spain, Poland and Netherlands) have ratified the Kampala Amendments.[16]

For the purpose of the present Article, it is necessary to consider the requisite elements of the crime of aggression and determine what implications they could have on the legality of unilateral humanitarian interventions. Article 8 *bis* consists of 3 parts. Firstly, it defines the crime of aggression; secondly, it provides a definition of the "act of aggression"; and thirdly, it identifies different modalities of the "crime of aggression" and limits the circle

[13] Excerpts of the speech delivered by Ben Ferencz during the plenary session on 8 June 2010, during the Rome Statute Review Conference in Kampala, reproduced from Marieke de Hoon, "The Crime of Aggression's Show Trial Catch-22", The European Journal of International Law 29 (2018): 932.

[14] Claus Kreß et al., "Negotiating the Understandings on the Crime of Aggression", in The Travaux Préparatoires of the Crime of Aggression, eds. Stephen Barriga and Clauss Kreß (Cambridge: Cambridge University Press, 2012), 92.

[15] Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Annex III of Resolution RC/Res.6 adopted on the 13th plenary meeting, on 11 June 2010, by consensus.

[16] Tom Ruys, "Criminalizing Aggression: How the Future of the Law on the Use of Force Rests in the Hands of the ICC", European Journal of International Law 29 (2018): 891.

of perpetrators. According to Article 21(1)(a) and 9 of the Rome Statute, the Court also considers the elements of the crime for the purpose of interpretation. Additionally, the Court relies on the *Travaux Preparatoires* and Understandings as provided in Article 31(2)(a) and 32 of the Vienna Convention on the Law of Treaties.

The 6th and 7th Understandings of the crime of aggression provide:

> *"(6). It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.*
>
> *(7). It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself."*

The adjective "manifest" contained in the above definition of the crime of aggression serves a double purpose: "character" or the qualitative criterion excludes the use of force, which falls into the so-called grey area of legality; whereas, the "scale" and "gravity" or the quantitative criteria implies that the use of force must reach a certain intensity threshold.[17] The inclusion of this minimum threshold of severity ensures that only such use of force is criminalized that is of a similar nature to other international crimes, *i.e.* genocide, crimes against humanity and war crimes committed in pursuit of a policy or on a widespread basis. In this way, the Court will be able to avoid pronouncing on the legality of interventions that fall into the grey area; however, the crime of aggression clearly includes all those unlawful acts, whose only aim it is to occupy and annex another country's territory.

By setting the high threshold, the definition of the crime of aggression in the Rome Statute is also in harmony with customary international law. In the Charters of the Nuremberg and Tokyo tribunals the "State conduct" element was established with reference to *wars* and arguably, the customary international criminal law with respect to this crime has not developed any further afterwards.[18] In the process of negotiations, some delegates considered that a "threshold of severity" was not necessary, while the U.S. delegation insisted repeatedly that only aggressive wars constituted crimes against international peace.[19] The United Kingdom also supported this position:

> *"If we adopted this proposal or anything along similar lines, we would be bringing within the Court's jurisdiction individual participation in any unlawful use of force*

[17] Carrie McDougall, The Crime of Aggression under The Rome Statute of The International Criminal Court (Cambridge: Cambridge University Press, 2013): 127-28.

[18] Robert Cryer et al., An Introduction to International Criminal Law and Procedure (Cambrdige: Cambridge University Press, 2014): 320.

[19] Claus Kreß, "The State Conduct Element" in The Crime of Aggression: A Commentary, eds. Claus Kreß and Stephen Barriga (Cambridge: Cambridge University Press, 2017), 515.

> *by a State. But there is nothing in international law to say that participation in any such use of force by an individual amounts to the crime of aggression. An act of aggression which is not part of an aggressive war (whether declared or undeclared) may give rise to State responsibility. But my delegation remains to be convinced that it constitutes a crime for an individual under international law. Certainly we have not found convincing international authority for that proposition. "*[20]

The practice of the International Court of Justice reveals that "intensity "of the use of force can be divided in three forms of gradation: 1) Article 2(4) of the UN Charter contains the lowest intensity threshold; 2) "Armed attack" and "act of aggression" according to Articles 51 and 39 of the UN Charter are at the intermediate level; 3) The highest level of intensity is required in connection with the definition of aggression in international customary law on state responsibility. According to this model, we can classify the "act of aggression" contained in Article 8 *bis* of the Rome Statute together with the 6th Understanding to come within the intermediate category, whereas the "State conduct" element together with the gravity threshold would fall into the highest level of gravity.[21] Some scholars have expressed concern that in certain scenarios the ICC may determine the commission of an act of aggression for the purpose of Article 8 *bis*, whereas the Security Council may not find that there was an act of aggression engaging Article 39. This does not represent a problem, given the Security Council's political nature,[22] and the express acknowledgment in paragraph 2 of Article 8 *bis* that any determination concerning an act of aggression is solely made for the purpose of Article 8 *bis* of the Statute.[23]

Sovereignty, territorial integrity, and political independence does not restrict the parameters of the prohibition on the use of force. Both General Assembly Resolution 3314 and Article 2 of the UN Charter prohibit the use of force, which is "in any other manner inconsistent with the purposes of the United Nations", which shows the general nature of the prohibition of the use of force.[24] Additionally, Resolution 3314 and Article 8 *bis* of the Rome Statute state that use of force should not be directed against the '*sovereignty*' of States, which excludes the legality of the use of force even for underlying benevolent purposes.[25]

The list of acts enumerated in the second part of Article 8 *bis* is not exhaustive.[26] According

[20] Ibid. 516: The declaration of the delegate of the United Kingdom on 12 June 2000 at the preparatory commission of the International Criminal Court.

[21] Dapo Akande and Antonios Tzanakopoulos, 'The International Court of Justice and the Concept of Aggression', in The Crime of Aggression: A Commentary, eds. Kreß and Barriga (Cambridge University Press, 2017) 515.

[22] Ketevan Khutsishvili, "Complementary Competences of the UN Security Council and the International Criminal Court" (Tbilisi: Tbilisi State University Press), 124.

[23] Claus Kreß, "The State Conduct Element" in The Crime of Aggression: A Commentary, eds. Claus Kreß and Stephen Barriga (Cambridge: Cambridge University Press, 2017), 428.

[24] Oliver Dörr and Albercht Randelzhofer A., 'Purposes and Principles, Article 2 (4)' in The Charter of the United Nations: A Commentary, Volume, ed. Bruno Simma et al. (Oxford: Oxford University Press, 2012): paras. 37,39.

[25] Claus Kreß, "The State Conduct Element" in The Crime of Aggression: A Commentary, eds. Claus Kreß and Stephen Barriga (Cambridge: Cambridge University Press, 2017), 431.

[26] Roger S. Clark, "Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May–11 June 2010", Goettingen Journal of International Law 2 (2010): 696.

to subparagraph "a" any military occupation as a result of a military attack also constitutes an act of aggression, irrespective of how long it lasts. At the preparatory stage of GA Resolution 3314 it was discussed whether to qualify military occupation as an act of aggression.[27] The International Court of Justice held in its *Armed Activities case* that Uganda breached the prohibition of use of force regarding the occupation of the Ituri region in the Democratic Republic of the Congo.[28] It should also be pointed out that the addition of the alternative of annexation next to occupation does not entail a different legal result, as the acquisition of another state's territory whether through annexation or occupation is prohibited and does not affect the legal status of the respective territory. If an occupying power wishes to annex another State's territory the situation of occupation will continue legally.[29]

2. EXAMPLES OF HUMANITARIAN INTERVENTION: CRYSTALLIZATION OF A NEW RULE OF CUSTOMARY INTERNATIONAL LAW?

The International Court of Justice held in the case of *Nicaragua:* "*Reliance by a State on a novel right or an unprecedented exception to the principle, if shared in principle by other States, tends towards a modification of customary international law*."[30] Based on this statement, scholars consider that the Court does not in fact exclude the possibility that a new exception to the use of force may emerge at some point in the future.[31] Therefore, the following question arises: has the practice of states developed in such a way as to create a new rule of customary international law?

Among the examples of humanitarian intervention are often considered: the intervention of India in Bangladesh in 1977; the intervention of Vietnam in Cambodia in 1978; the intervention of Tanzania in Uganda in 1979; and the intervention of the U.S. in Grenada in 1983. To crystalize a new norm of customary law, the States themselves must assert and invoke humanitarian intervention as a justification for a certain course of action. The ICJ has confirmed that no one has the authority to ascribe to States legal positions, which they do not themselves advance.[32] In the abovementioned examples, the States primarily invoked self-defense as a justification for their actions whether for violation of State border or the threat of use of force. Therefore, these examples do not indicate a development of

[27] Claus Kreß, "The State Conduct Element" in The Crime of Aggression: A Commentary, eds. Claus Kreß and Stephen Barriga (Cambridge: Cambridge University Press, 2017), 440.

[28] ICJ, Armed Activities Case, para. 345; Additionally, the Court interpreted Article 41 of the Hague Regulations and held in paragraph 173: "In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an "occupying power" in the meaning of the term as understood in the jus in bello, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government."

[29] Rainer Hofmann, 'Annexation', in The Max Planck Encyclopaedia of Public International Law, vol. I, ed. Rudiger Wolfrum, (Oxford: Oxford University Press, 2012), 411.

[30] ICJ, Nicaragua Case, para. 207.

[31] Michael Scharf, "Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Interventions", Chicago Journal of International Law 19 (2019), 594.

[32] ICJ, Nicaragua Case, para. 207.

practice in support of humanitarian intervention. Besides, the international community has not accepted these interventions as legal. The German Minister of Foreign Affairs declared on 16 October 1998 in the federal parliament that the decision of NATO to carry out aerial bombardments in the Former Republic of Yugoslavia should not have become a precedent.[33]

Another precedent sometimes invoked as an example of humanitarian intervention, is an aerial and land intervention by the coalition of the UK, USA, France, Italy, and The Netherlands in Iraq in order to give the Kurdish population the possibility to flee. Special no-fly zones were established in connection with this intervention. However, it is sometimes questioned whether this particular use of force can be treated as an example of a practice in support of humanitarian intervention, because the USA invoked UNSC resolution 688, although this resolution did not envisage the use of force *per se*. According to the declarations of the British, French and US Governments it was not necessary for each conduct to be authorized by that resolution, if it did not violate international law, whereas international law recognizes humanitarian necessity and they had strong legal and humanitarian reasons for the introduction of no-fly zones.[34]

One of the most highly debated cases of humanitarian intervention is the NATO operation carried out on 31 March 1999 in Kosovo in order to stop the ethnic cleansing campaign by Serbians. NATO was acting on the assumption that it would be impossible to obtain authorization in the UNSC due to the Russian veto and indeed, Russia had already prepared a resolution blocking the intervention, which was not adopted. [35] The United Kingdom relied on humanitarian intervention and argued at a Security Council meeting: "*The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo, there is convincing evidence that such a catastrophe is imminent. Renewed acts of repression by the authorities of the Federal Republic of Yugoslavia would cause further loss of civilian life and would lead to displacement of the civilian population on a large scale and in hostile conditions.*"[36] In the ICJ only Belgium invoked humanitarian intervention as a basis for the use of force.[37] However, the Court did not assess the legality of the use of force in Kosovo in 1999, because it did not have the jurisdiction over this dispute.[38] The attempt of Russia to declare the intervention as unlawful failed by 12 votes against 3. The foreign ministers of the "Group of 77" issued a declaration to the effect that so-called humanitarian intervention does not have a basis in the UN charter and in international law.[39]

As of August 2013, more than 100,000 people had been killed in Syria and there were

[33] Oliver Dörr and Albercht Randelzhofer A., 'Purposes and Principles, Article 2 (4)' in The Charter of the United Nations: A Commentary, Volume, ed. Bruno Simma et al. (Oxford: Oxford University Press, 2012): 55.

[34] The statement is reprinted in the British Yearbook of International Law, 63 (1992), 824.

[35] UN Doc S/PV.3989 (1999) 3, 5.

[36] UN Doc. S/PV. 3988, 24 March 1999, 12.

[37] ICJ, Legality of Use of Force (Serbia and Montenegro v. Belgium), ICJ, Oral Pleadings of Belgium, CR 99/15, paras. 11, 16.

[38] ICJ, Case Concerning Legality of Use of Force (Serbia and Montenegro v. Belgium), ICJ Reports (2004), 279, para. 129.

[39] 'Ministerial Declaration of the twenty-third Annual Meeting of Ministers of Foreign Affairs of the Group of 77', 24 September 1999, para. 69 www.g77.org/doc/Decl1999.html [accessed 12.03.2020].

more than 2 million refugees as a result of the actions of Bashar Al-Assad's regime.[40] This situation was exacerbated by the use of chemical weapons on 21 August 2013 in the heavily settled territory near Damascus.[41] After an unsuccessful attempt of the United Kingdom to adopt a resolution due to the resistance of China and Russia, on 29 August the UK issued a statement that as an exceptional measure military intervention in Syria, in order to neutralize concrete military targets and in order to prevent further attacks, would be necessary, proportionate and legally justified.[42] According to an assessment, the statement of the UK lacked a legal basis, because the prohibition of the use of force in the UN Charter has *jus cogens* character, and according to Article 53 of the Vienna Convention on the Law of Treaties, an imperative norm can be modified only by another norm of *jus cogens*. Consequently, the existing customary international law does not provide the possibility to conclude that humanitarian intervention is one of the exceptions to the prohibition of the use of force.[43]

In May 2013, subsequent to the lobbying of the UK and French Governments, the Ministers of Foreign Affairs of EU States decided not to extend the embargo on providing arms to opposition teams of Syria.[44] This decision was made with the motive to ensure that Syrian armed groups would have weapons and resources 'to protect the civilian population', which would not breach EU law.[45] The ICJ considers that arming non-State armed groups in an ongoing armed conflict constitutes a use of force.[46] Therefore, it can be assumed that the EU Council of Ministers was acting in the conviction that in the case of Syria there existed an exception from the prohibition of the use of force.

It is important to note that to justify the 2018 April attacks in Syria, the US, UK and French Governments relied on the need to prevent future use of chemical weapons by the Assad regime. Russia was repeatedly blocking UNSC resolutions which condemned the unlawful actions of Assad against civilian populations. Russia was also refusing to authorize the investigation into the use of chemical weapons and referral of the situation to the ICC.[47] President Obama declared at the UN General Assembly in 2013: "*[S]overeignty cannot be a shield for tyrants to commit wanton murder, or an excuse for the international community to turn a blind eye. While we need to be modest in our belief that we can remedy every evil, while we need*

[40] UNHCR: Two million Syrians are Refugees, 3 September 2013 http://www.unhcr.org/522484fc9.html [accessed 12.03.2020].

[41] United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, Report on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013, https://www.un.org/zh/focus/northafrica/cwinvestigation.pdf [accessed 12.03.2020].

[42] Chemical Weapon Use by Syrian Regime: UK government Legal Position, 29 August 2013, https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version [accessed 12.03.2020].

[43] Manisuli Ssenyonjo, "Unilateral Military Action in the Syrian Arab Republic: A right to Humanitarian Intervention or a Crime of Aggression?", International Human Rights Law Review 2 (2013): 337.

[44] Council Declaration on Syria, 3241st Foreign Affairs Council Meeting, 27 May 2013.

[45] Tom Ruys, "Of Arms, Funding and "Non-lethal Assistance": Issues Surrounding Third State Intervention in the Syrian Civil War", Chinese Journal of International Law 13 (2014): para.17. It is noteworthy that before the adoption of the declaration by the Council on 17 May 2013, Austria expressed the concern that providing arms to Syrian opposition groups would breach Article 2(4) of the UN Charter.

[46] Nicaragua Case, para. 228.

[47] U.N. SCOR, 73d Sess., 8233d mtg. at 2, U.N. Doc. S/PV.8233 (14 April 2018).

to be mindful that the world is full of unintended consequences, should we really accept the notion that the world is powerless in the face of a Rwanda or Srebrenica?"[48]

In response to the chemical attack in Khan Shaykhun with the use of sarin gas resulting in the deaths of 72 people including children, on 7 April 2017 the U.S. carried out an attack using 49 Tomahawk missiles. In 2018, in the eastern part of Damascus more than 80 civilians were killed by chlorine gas, as a response to which the US, France and UK carried out attacks against Syria.

The United Kingdom once again relied on the theory of humanitarian intervention and pointed out that every State has the right under international law to exceptionally take measures to reduce humanitarian suffering. The United Kingdom designed a three-pronged test according to which humanitarian intervention would be justified: (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief; (ii) it must be objectively established that there is no practicable alternative to the use of force if lives are to be saved; and (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).[49]

More than 70 states publicly expressed their views concerning the aerial attack carried out on 14 April 2018, and only a small number of states, including Russia and Syria, considered that these attacks violated international law. Russia did not question the legality of humanitarian intervention *per se,* but stated that there was no evidence, which would prove that Syria carried out chemical attacks.[50]

Nowadays, many states express concern that the doctrine of humanitarian intervention can be abused and has the potential of destroying the system created by the Charter. Additionally, the majority of scholars consider that State practice which developed after 1945 is insufficient to recognize the doctrine of humanitarian intervention, even if it would

[48] Text of Obama's Speech at the UN' (24 September 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/09/24/remarks-president-obama-address-united-nations-general-assembly [accessed 12.03.2020].

[49] Prime Minister's Office, Syria Action- U.K. Government Legal Position, 14 April 2018, http://perma.cc/8C9X HUY4 [accessed 12.03.2020]; The similar position was also voiced by UK in relation to 31 August 2013 chemical attack by Syrian government: 'Chemical Weapon Use by Syrian Regime – UK Government Legal Position', 29 August 2013, www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version [accessed 12.03.2020].

[50] Dunkelberg A. et al.., "Mapping States' Reactions to the Syria Strikes of April 2018", Just Security (7 May 2018), https://www.justsecurity.org/55835/mapping-states-reactions-syria-strikes-april-2018-a-comprehensive-guide/ [accessed 12.03.2020].

satisfy the test proposed by the UK Government.[51] However, many scholars consider that if particular preconditions are complied with, humanitarian intervention would fall into the "grey area of legality".[52] In the *Tadic case* the ICTY pointed out in relation to internal armed conflicts: *"[A]fter the adoption of the Universal Declaration of Human Rights in 1948, it has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law hominum causa omne jus constitutum est (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well"*.[53] There is one very important policy question surrounding humanitarian interventions, which was voiced by the International Commission on Intervention and State Sovereignty: "*But that may still leave circumstances when the Security Council fails to discharge what this Commission would regard as its responsibility to protect, in a conscience-shocking situation crying out for action. It is a real question in these circumstances where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by*."[54]

3. LEGAL OXYMORON: IS USE OF FORCE TO PREVENT A HUMANITARIAN CATASTROPHE AN AGGRESSION?

The Article already touched upon the parameters of the crime of aggression and issues surrounding the legality and legitimacy of humanitarian interventions. This part will address whether the purpose of the Kampala Amendments to the Rome Statute was to criminalize force that is directed at preventing a humanitarian catastrophe and how wide the margin for action is under Article 8 *bis*. Humanitarian intervention and aggression may be perceived as an oxymoron or apparently contradictory in terms by those who do not have the legal knowledge of the relevant doctrines; additionally, the lawfulness of humanitarian interventions is often debated, as this article has already demonstrated. Despite its legality or illegality, another more important question arises when we are discussing the crime of aggression: do humanitarian interventions reach the threshold of intensity of the crime of aggression? According to Stephen Barriga, delegates at the Kampala Conference in 2010 did not officially address the issue of humanitarian interventions, even though this was

[51] Peter Hilpold, "Humanitarian Intervention: Is There a Need for a Legal Reappraisal?", European Journal of International Law 12 (2001): 437–67; Christian Henderson, "The UK Government's Legal Opinion on Forcible Measures in Response to the Use of Chemical Weapons by the Syrian Government", International and Comparative Law Quarterly 64 (2015): 194; Ian Brownlie, "Humanitarian Intervention", in Law and Civil War in the Modern World, ed. John Norton Moore (1974), (Baltimore, MD: Johns Hopkins University Press): 217–28; Michael Byers and Simon Chesterman, "Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law", in Humanitarian Intervention. Ethical, Legal, and Political Dilemmas, eds. J. L. Holzgrefe and Robert O. Keohane, (Cambridge: Cambridge University Press, 2003), 202–3.

[52] Adam Roberts, "The So-Called Right of Humanitarian Intervention", Yearbook of International Humanitarian Law 3 (2000): 51.

[53] ICTY, Prosecutor v. Tadić, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ICTY-94-1-AR72, 2 October 1995, para. 97.

[54] International Commission on Intervention and State Sovereignty (ICISS), Responsibility to Protect, UN Doc A/57/303, December 2001, para. 6.37, http://responsibilitytoprotect.org/ICISS%20Report.pdf [accessed 12.03.2020].

the subtext of all discussions.[55] The understandings reached on the Kampala Amendments clarify that in order to establish aggression all relevant circumstances, such as gravity and results of the crime must be considered. We may consider that humanitarian intervention has positive results if it serves to end grave human rights violations. According to Article 8 *bis,* the crime of aggression represents an act of aggression, which by its "character, gravity and scale" constitutes a "manifest" breach of the UN Charter. Gravity and scale are quantitative requirements, while character is a qualitative one. Therefore, the principle question would be whether humanitarian intervention by its *character* can constitute a manifest breach of the Charter. The following chapters will try to answer and elucidate these legal questions.

3.1 "Manifest" violation of the Charter

Scholars have unanimously expressed concern regarding the overly high threshold of the crime of aggression. For example, Andreas Paulus notes that this is a very demanding and ambiguous standard, because what sometimes is "manifest" for one party is less obvious for another, which is often the case in international law.[56] Dapo Akande agrees with Paulus and states that with the "manifestly illegal" criterion error of law can easily be used as a means to escape liability, which is not the case for other crimes.[57] Sean Murphy considers that this is an unprecedented development in international law, because according to this norm, some acts of aggression maybe considered criminal, while others do not represent a "manifest" breach of the Charter, while in the UN Charter an act of aggression is the basis for triggering collective measures.[58]

The International Criminal Court will be faced with a fundamental dilemma to shed the light on the parameters of the "manifest breach" criteria, which is the subject of hot debates on international law and global politics. Consequently, the existence of the crime of aggression goes beyond the legality or illegality of the use of force and the question arises concerning the legitimacy of such use of force, and whether the use of force serves a legitimate purpose (protection, restoration of stability) even if it is illegal.[59] The ICJ Judge Peter Kooijmans declared in his separate opinion in relation to the intervention of Uganda in the *Armed activities* case: *"[T]o explain the intervention of one State into the affairs of another is rarely simple or uncontroversial . . . To maintain objectivity in the face of confusing and contradictory evidence is particularly difficult . . . Moreover, the results are likely to be tentative,*

[55] Stephen Barriga, "Negotiating the Amendments on the Crime of Aggression", in The Travaux Préparatoires of the Crime of Aggression, eds. Stephen Barriga and Claus Kreβ (Cambrdige: Cambridge University Press, 2012): 10–1229.
[56] Andreas Paulus., "Second Thoughts on the Crime of Aggression", European Journal of International Law 20 (2009), 1121.
[57] Dapo Akande, "Prosecuting Aggression: The Consent Problem and the Role of the Security Council", Oxford Legal Studies Research Paper no. 10/2011 (2010), http://ssrn.com/abstract=1762806 [accessed 12.03.2020].
[58] Sean Murphy, "Aggression, Legitimacy and the International Criminal Court", European Journal of International Law 20 (2009), 1150–1151.
[59] Marieke de Hoon, "The Crime of Aggression's Show Trial Catch-22", The European Journal of International Law 29 (2018): 919-937.

partial and complex, and therefore less than totally satisfying".[60]

Professor Marieke de Hoon also expresses concern that the contours of the crime of aggression are wide and give room to develop possibly conflicting arguments on whether the use of force represents the crime of aggression or not. Such possibility of a wide interpretation of the crime threatens the principle of legality and the danger that process may be transformed into a spectacle. She noted that every crime has a political element, but this is especially visible with respect to aggression, because often national security, humanitarian reasons and States will try to find political justifications for the use of force.[61]

Claus Kreß suggests that the "Manifest" criterion will lead the Court to conclude that *bona fide* humanitarian intervention poses difficult questions and the newly developed practice must be assessed against the existing international legal order. This should not be taken as recognizing the legality of such interventions; the Court would simply have to recognize that in certain cases individual criminal responsibility under the Rome Statute does not arise to *jus contra bellum*.[62] A number of scholars share this view and consider that such interpretation would be consistent with the purpose and goals of the Rome Statute, which aims to prevent and punish massive human rights violations.[63]

According to Understandings nos. 6 and 7, aggression is the most serious and dangerous form of the unlawful use of force and in order to establish the act of aggression each particular circumstance surrounding the case and their gravity must be assessed. To establish the "manifest" element, all three components – "character, gravity and scale" must be met. None of these components taken alone are sufficient to reach the "manifest" threshold. The text of the 6th Understanding largely resembles the definition of aggression in article 8 bis of the Rome Statute, with the important according to Understanding the authority under SC Council resolution 3314 is transferred to the Court.

As the 6th Understanding makes it clear, to satisfy the threshold of the *crime* of aggression a two-fold test needs to be met. Firstly, the existence of an act of aggression needs to be established and secondly, this act must represent a "manifest" violation of the Charter. Therefore, it is difficult to establish what different criteria need to be satisfied to prove an *act* of aggression on the one hand and the *crime* of aggression on the other. The 6th understanding also refers to the *consequences* of the *act*.

The 7th understanding concerns the interrelationship between the three criteria. The formulation of a sentence in the understanding is unclear whether 2 criteria would be sufficient to satisfy the threshold requirement of a *crime* or all three criteria need to be met cumulatively. During the negotiations, conflicting views were expressed. The U.S., even though it is not a party to the Statute, favored a cumulative approach and exempted

[60] Armed Activities Case, para. 2; Separate Opinion of Judge Kooijmans, quoting Clark J., "Explaining Ugandan Intervention in Congo: Evidence and Interpretations", 39 Journal of Modern African Studies (2001), 262.

[61] Marieke de Hoon, "The Crime of Aggression's Show Trial Catch-22", The European Journal of International Law 29 (2018), 920.

[62] Claus Kreβ, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus', European Journal of International Law 20 (2010): 1129, 1140.

[63] Elise Leclerc-Gagné E. and Michael Byers, "A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention", Case Western Reserve Journal of International Law 41 (2009), 379, 390.

humanitarian intervention from the ambit of Article 8 *bis*. The delegation of Iran considered it satisfactory that only two criteria would be sufficient to reach the threshold of aggression. Finally, as a compromise the 7th Understanding reflects the proposition of the U.S. and Canada.[64] If we follow the rules of the Vienna Convention on the Law of Treaties, the use of "and" indicates that all three criteria need to be met cumulatively.

3.2 "CHARACTER" OF THE ACT OF AGGRESSION

The "character" criterion is one of the main reasons why the use of force for the purposes of preventing a humanitarian catastrophe can be excluded from the parameters of the crime of aggression. As we can conclude from the *Travaux Préparatoires*, the "character" criterion excludes those cases which fall into the 'grey area of illegality' i.e. the legality of which are unclear. The history of the negotiations further makes it clear that "character" concerns the subjective motivation of those carrying out the crime: Are they trying to occupy and annex territories of other States or are they trying to protect the fundamental human rights of civilians? The Court can play a deterrent role in order for the doctrine of humanitarian intervention not to be "abused" when it would serve the political agenda of the aggressor state.

The U.S. delegation even proposed an understanding, which would exclude from the scope of the crime acts undertaken to prevent genocide, crimes against humanity and war crimes. However, this understanding failed to be adopted. According to the proposed understanding:

> *"It is understood that, for the purposes of the Statute, an act cannot be considered to be a manifest violation of the United Nations Charter unless it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith, and thus an act undertaken in connection* ***with an effort to prevent the commission of any of the crimes contained in Articles 6, 7 or 8 of the Statute*** *would not constitute an act of aggression..."*[65]

We may therefore conclude that because delegates rejected the proposition of the U.S., humanitarian intervention would fall within the scope of the crime of aggression. Some delegations were indeed favoring this view.[66] However, Professor Kreβ, who led the process of the adoption of the Understandings, notes that use of force in order to prevent a humanitarian catastrophe would not meet the "State conduct" element of the crime. He considers that the main reason behind the non-adoption of the otherwise reasonable US proposal was not a clash of views surrounding this issue but that States did not want to decide on the fundamental legal issue of an international security law.[67]

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[64] Claus Kreß C. et al.., "Negotiating the Understandings on the Crime of Aggression" in: The Travaux Préparatoires of the Crime of Aggression, eds. Stephen Barriga and Claus Kreβ (Cambridge: Cambridge University Press, 2012), 81, 96 et seq.

[65] Untitled, undated text, distributed by the US delegation after the meeting of the Working Group on the Crime of Aggression on 7 June 2010, reprinted in Barriga and Kreß, supra note 1, at 751 (emphasis supplied).

[66] Carrie McDougall, The Crime of Aggression under The Rome Statute of The International Criminal Court, (Cambridge: Cambridge University Press, 2013), 162.

[67] Claus Kreβ and Leonie von Holtzendorff, "The Kampala Compromise on the Crime of Aggression", Journal of International Criminal Justice 8 (2010), 1179, 1205.

Professor Kreβ further considers that the exclusion of the use of force from the parameters of the crime of aggression was in line with the teleological interpretation of international criminal law. According to the General Assembly's World Summit Outcome, the modern understanding of sovereignty entails the idea that it is the main responsibility of a State to protect its civilians from the commission of international crimes; but that a secondary duty of international protection arises when a State is unable to fulfill its obligations of protection.[68] Use of force is directed against most serious crimes that pose a threat to, or breach peace and security within the meaning of Article 39 of the Charter. Of course, use of force to prevent a humanitarian catastrophe contains an inherent risk of loss of life, but it also has the potential of saving more lives than losing. This issue is closely intertwined with morality but should nevertheless be considered by international criminal lawyers when interpreting the elements of the crime.[69]

3.3 CRITERIA OF *BONA FIDE* HUMANITARIAN INTERVENTIONS

The US delegate at the Kampala Conference, Beth Van Schaack, notes that the adopted resolution in its final form should be interpreted in such a way as to exclude *bona fide* humanitarian interventions from the scope of aggression. Scholars have identified various criteria to determine whether the intervention can be *genuinely* classified as humanitarian. As a result of the analysis of different documents, three principal criteria of humanitarian intervention can be identified: the existence of a widespread humanitarian crisis, which is the result of "State conduct" or omission; force must be a measure of last resort and that all other diplomatic alternatives of resolving the situation have been exhausted; and that humanitarian intervention must satisfy the proportionality test. The scale, duration and intensity of the planned military action should not exceed what is required to attain the specific legitimate aim.[70]

The International Criminal Court's Prosecutor will have to assess whether the parameters of the operation and its implementation exceeded the measures which were necessary to halt the humanitarian catastrophe - for example, if the operation exceeds the limits of a region or an area, where widespread attacks against civilians took place.

Besides the substantive criteria that *bona fide* humanitarian interventions must satisfy, scholars consider that certain procedural measures also need to be in place. Humanitarian intervention is allowed if one or more permanent members of the UN Security Council veto the resolution proposed under Chapter VII. Another less stringent test envisages that humanitarian intervention will be permissible if it is evident from the views or statements of one or more permanent members of the Security Council that a veto will be inevitable, or that there exists a "hidden veto" – *i.e.* a threat that one of the permanent members might block the resolution.[71]

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[68] General Assembly, 2005 World Summit Outcome, 16 September 2005, UN Doc. A/RES/60/1, paras. 138–39.

[69] Claus Kreß, "The State Conduct Element" in The Crime of Aggression: A Commentary, eds. Claus Kreß and Stephen Barriga, (Cambridge: Cambridge University Press, 2017) 525, 526.

[70] International Commission on Intervention and State Sovereignty (ICISS), Responsibility to Protect, UN Doc A/57/303, December 2001, Annex, xi–xii.

[71] Nigel Rodley, "Humanitarian Intervention", in The Oxford Handbook of the Use of Force in International Law, ed. Marc Weller, (Oxford: Oxford University Press, 2015), 775, 790.

Consequently, the International Criminal Court will have to decide between two approaches as to how principles and purposes of the UN Charter should be interpreted. If we consider that the primary purpose of the UN Charter is the prevention of war and protection of future generations from the scourge of war, then the intervention in Kosovo could be considered as a "manifest" violation.[72] But if we consider that one of the primary objectives of the UN is the protection of human rights and that the "Belgrade campaign" served this purpose, the intervention will have to fall outside the definition of aggression.[73]

4. A LEGAL ASSESSMENT OF THE 2008 RUSSIAN INTERVENTION ON THE TERRITORY OF THE TSKHINVALI REGION, GEORGIA, IN THE LIGHT OF THE KAMPALA AMENDMENTS

4.1 The 2008 Armed Conflict between Georgia and the Russian Federation

On 8 August 2008, the then Russian President Dimitri Medvedev stated that Georgian soldiers committed the "act of aggression" against Russian peacekeepers and the civilian population.[74] Medvedev classified this as "*a grave violation of an international mandate bestowed upon Russia by the international community in the peacekeeping process*". He noted that a large portion of victims were Russian citizens. A week later, Medvedev invoked humanitarian reasons in order to justify the use of force and noted: "*Ossetians only trust Russian peacekeepers, because over the last 15 years, they have seen that only Russian peacekeepers can protect their interests and lives*".[75] He also noted later: "*we had to intervene in order to protect people and protect their right to exist as an ethnic group in order to prevent a humanitarian catastrophe. Our intervention was limited and absolutely necessary. We were acting in accordance with international law, including based on the right of self-defense contained in the UN Charter*".[76]

On the other hand, many Western states condemned the Russian intervention and considered it unlawful. The British Foreign Secretary noted in late August that Russia far exceeded the peacekeeping mandate. He also distinguished the NATO intervention in Kosovo and the Russian intervention in Georgia: "*NATO's actions in Kosovo followed a dramatic and systematic abuse of human rights, culminating in ethnic cleansing on a scale not seen in Europe since the Second World War. NATO acted over Kosovo only after intensive negotiations in the Security Council and determined efforts at peace talks at Rambouillet. Special Envoys were sent to warn Milosevic in person of the consequences of his actions.*"[77]

On 11 August the U.S. ambassador to the UN criticized Russia in asking if it was Russia's intention to restore the *status quo ante* in South Ossetia; why it started a second front in Abkhazia; why it attacked the rest of Georgian territory and Georgian infrastructure; why

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[72] Erin Creegan, "Justified Uses of Force and the Crime of Aggression", Journal of International Criminal Justice 10 (2012): 59.

[73] Charter of the United Nations, (adopted 26 May 1945, entered into force 24 October 1945), Preamble and Article 1(3).

[74] Gregory Hafkin, "The Russo-Georgian War of 2008: Developing the Law of Unauthorized Humanitarian Intervention After Kosovo", Boston University International Law Journal 28 (2010): 226.

[75] Ibid.

[76] Ibid.

[77] Ibid., 227.

Russia was attacking the civilian airport in Tbilisi?[78] The US Congress has recognized in numerous resolutions that the Russian intervention on the territory of Georgia was illegal: "*The United States condemns the attack on the sovereign territory of Georgia by the military of the Russian Federation in August 2008 in contravention of international law, including the United Nations Charter and the Sochi Agreement of 1992 that governed the conduct of Russian peacekeepers in . . . South Ossetia.*"[79]

At the Security Council meeting on 8 August 2008, the Russian representative stated that despite ongoing diplomatic steps Georgia had chosen war.[80] The Georgian diplomat noted at the next meeting that Russia carried out a pre-planned military intervention, to which the Russian representative replied that Georgia carried out an aggression in violation of the fundamental principles of the Charter, including the prohibition of the use of force.[81] The British representative noted that humanitarian assistance cannot be the argued basis of sending non-Georgian troops to Tskhinvali. The Russian representative evoked humanitarian objectives to prevent the destruction of a town with a civilian population of 70,000. At a 19 August meeting at the Security Council, Russia once again evoked humanitarian objectives to justify the intervention. The U.S. and French delegates rejected the Russian argument of self-defense and pointed out that the scale of the operation far exceeded the conflict zone.

4.2 Legal assessment

Even though the crime of aggression does not apply in relation to Georgia and Russia, since the Russian Federation is neither a party to the Statute and nor has ratified the Kampala amendments, it is nevertheless interesting to investigate whether the use of force by Russia can be qualified as a manifest violation of the Charter. President Putin used the identical terminology to justify Russia's intervention in Georgia and Ukraine that western States used to justify the independence of Kosovo. However, such parallel is entirely baseless since NATO action in Kosovo was a *sui generis* case and did not create a precedent; additionally, the Georgia, Ukraine and Kosovo situations were not similar in terms of gravity and scale of human rights violations, but since Russia, apart from the self-defense argument, also invoked humanitarian intervention as a justification, it is interesting for the purposes of this Article to analyze whether the Russian intervention in 2008 could be deemed to have reached the threshold of the crime of aggression.

However, before we discuss the aggression by Russia, it would first be appropriate to briefly touch upon the issue of legality of the use of force by *Georgia.* This question might seem a bit far-fetched, because the conflict took place on Georgian territory, but in order to dispel any doubts the present Article will comment on the assessment of the Independent International Fact-Finding Mission on the Conflict in Georgia that use of force between

[78] Nichol J., Congressional Research Service, Russia-Georgia Conflict in South Ossetia: Context and Implications for U.S. Interests (2008), 24-29, https://www.everycrsreport.com/files/20080813_RL34618_af7d22e7f33f1eadc090b329791f1bbc6fad71e4.pdf [accessed 12.03.2020].

[79] H.R. 6911, 110th Cong. para. 2(1) (2008).

[80] U.N. SCOR, 63rd Sess., 5951st mtg. at 2, U.N. Doc. S/PV.5951 (8 August 2008).

[81] U.N. SCOR, 63rd Sess., 5952d mtg. at. 2, U.N. Doc. S/PV.5952.

Georgia and South Ossetia was 'otherwise incompatible with the UN Charter' and that therefore, the prohibition of the use of force applies to this [internal] conflict.[82]

The author of this Article considers that the above assessment lacks any factual and legal basis and is in direct contradiction with the proper interpretation of Article 2(4) of the UN Charter. According to well-established practice and opinions, Article 2(4) addresses and protects only *States*.[83] Private persons and groups do not fall within the scope of the prohibition of the use of force neither according to Article 2(4) nor according to international custom, even if they would possess sufficient financial, military, and organizational capabilities, which would have the scale of inter-State use of force.[84] Article 2(4) uses the term "international relations", which further indicates that use of force within one State's territory does not constitute a breach of the principle. This norm does not as such prohibit rebels to start a civil war and therefore, does not deprive States of the opportunity to adopt relevant measures to deal with such groups.[85] Claus Kreß invokes, in particular, the Georgian example and notes: "*at least the first sentence of article 8 bis (2) of the Rome Statute must be interpreted restrictively, until state practice regarding article 2(4) of the UN Charter consolidates in the contrary direction. This interpretation cannot be avoided through an agreement between a state and a political entity short of statehood that provides for the application of article 2(4) of the UN Charter between the two parties. In such a case, the State Party to the agreement would violate the agreement if it uses force against the political entity concerned, but the direct applicability of article 2(4) of the UN Charter would remain an open question, so that the Court would have to refrain from the application of article 8 bis of the Rome Statute.*"[86]

As to the more important legal issue on whether Russian intervention on the territory of Georgia was legal, the Independent International Fact Finding Mission on the Conflict in Georgia goes on to analyze the Russian argument that Russia was using self-defensive force in order to protect Russian peacekeepers.[87] The Mission refers to UNGA resolution 3314 and notes that a State's armed forces are protected no matter on which territory they are located, and that Russia would have the right to self-defense if Georgia itself was not exercising the right to self-defense, and that the Mission was not able to corroborate that this was the case. Neither was the Mission able to establish that Georgians indeed attacked the Russian peacekeeping base.[88] While the Fact-Finding Mission – deployed specifically for the purpose to accurately establish the facts - could not come to a definitive decision, it notes that *if the Russian allegations were true*, Russia would have the right to self-defense under Article 51 and the attack would be justified if other conditions of self-defense were complied with.[89] The Report then assesses the "proportionality and necessity" criteria of

[82] Independent International Fact-Finding Mission on the Conflict in Georgia (2009), Volume II, 239.
[83] Oliver Dörr and Albercht Randelzhofer A., 'Purposes and Principles, Article 2 (4)' in The Charter of the United Nations: A Commentary, Volume, ed. Bruno Simma et al. (Oxford: Oxford University Press, 2012): para. 29.
[84] Ibid., para. 31.
[85] Ibid., para. 32.
[86] Claus Kreß, "The State Conduct Element" in The Crime of Aggression: A Commentary", eds. Claus Kreß and Stephen Barriga (Cambridge: Cambridge University Press, 2017), 435.
[87] Independent International Fact-Finding Mission on the Conflict in Georgia (2009), Volume II, 264.
[88] Ibid., 265.
[89] Ibid., 269.

self-defense and observes that the Russian reaction exceeded the alleged Georgian attack on the Russian peacekeeping base and that Russian military intervention was not necessary and proportionate to protect Russian peacekeepers in South Ossetia.[90] In conclusion the Report noted that Russia could not justify the use of force as part of its peacekeeping mandate,[91] that South Ossetia could not invite Russia in order to assist it militarily,[92] that Russian actions were not justified as collective self-defense,[93] and, finally, that the conduct of Russia was not justified as a humanitarian intervention and protection of nationals abroad.[94]

The author of the present article concurs with the assessment of the Mission that the Russian intervention was not justified under any of the above arguments, however, disagrees with the Mission that Russia would have the right to self-defense under Article 51. In order to show that under international law Russia could not lawfully intervene on Georgian territory and could not invoke self-defense under Article 51, three main reasons will be invoked: **Firstly**, general international law does not authorize states to use force to protect members of peacekeeping forces abroad and neither did any of the agreements in force between Russia and Georgia provide for such exceptions. On the contrary, according to Article 2 of the Sochi agreement, all forces that were not members of the peacekeeping force should have left the Georgian territory. Article 5 of the Agreement authorized the Joint Control Commission to settle disputes and not individual States, and this is why Russian position is especially hard to justify according to Roy Allison.[95] The Peacekeeping Mission should not be the pretext for instigating the act of aggression, but it should try to avoid the war that Russia started in August. Frederic Kirgis notes that the main principle of the operation is that it should not infringe upon the internal affairs of the host state and should not favor one side over the other."[96] Academician Levan Alexidze relies on the assessment of Roy Allison and notes that "peacekeepers have often suffered loss, and even more grave ones, but none of the "mother States" have carried out full-fledged invasions using thousands of soldiers against the State on whose territory the acts occurred.[97] **Secondly**, international protection bestowed upon peacekeepers applies as long as they remain neutral. Their status ceases to apply automatically as soon as they start *directly participating in hostilities.* According to the intercepts of communications between General Kulakhmetov, head of the Russian peacekeeping forces, and General Kurashvili, commander of the Georgian peacekeepers, at 00:23 on 8 August, Russian peacekeepers were providing the coordinates of Georgian troops to the South Ossetian artillery. At approximately 6 a.m. on the same day, Verkhniy Gorodok opened fire against Georgian troops. A return attack from that post was also being used to neutralize the artillery fire against Georgian forces.[98] It must be noted that force was used only against those peacekeepers that were

[90] Ibid., 275.
[91] Ibid., 276.
[92] Ibid., 280.
[93] Ibid., 283.
[94] Ibid., 284-289.
[95] Roy Allison, "Russia resurgent? Moscow's campaign to 'Coerce Georgia to Peace'", International Affairs 84 (2008), 1152.
[96] Frederic Kirgis, International Organizations in their legal setting (1993), 717.
[97] Levan Alexidze, "International Legal Aspects of the IFFMCG Report", International Law Journal (2010), 8.
[98] Independent International Fact-Finding Mission on the Conflict in Georgia (2009), Volume II, 265.

directly participating in hostilities and not against Russian peacekeeping posts that were not, which indicates that Georgian force was used in self-defense, whereas Russian force was not used in self-defense. **Thirdly**, Russian regular forces started intervening from Roki tunnel into Georgian territory (already in the early morning hours of 7 August), before any type of confrontation had taken place between Georgian forces and Russian peacekeepers (in the morning hours of 8th of August).

In this context, it is also important to refer to the former President of the International Criminal Tribunal of the Former Yugoslavia and Chairperson of the International Commission of Inquiry on Darfur Antonio Cassese, who noted in his article "The wolf that ate Georgia": "*Russia has set forth various reasons to justify its armed intervention in Georgia where the breakaway regions of Abkhazia and South Ossetia are nonetheless under Georgian sovereignty. Russia argues that its invasion was aimed at (1) stopping Georgia's aggression against South Ossetians; (2) ending ethnic cleansing, genocide, and war crimes committed by Georgia there; (3) protecting Russian nationals; and (4) defending South Ossetians on the basis of the peace-keeping agreement signed by Boris Yeltsin and Eduard Shevardnadze in 1992. None of these legal grounds holds water. By sending its troops to South Ossetia, Georgia no doubt was politically reckless, but it did not breach any international rule, however nominal its sovereignty may be. Nor do genocide or ethnic cleansing seem to have occurred; if war crimes were perpetrated, they do not justify a military invasion. Moreover, South Ossetians have Russian nationality only because Russia recently bestowed it on them unilaterally. Finally, the 1992 agreement authorizes only monitoring of internal tensions, not massive use of military force*." [99]

Therefore, in light of the overwhelming condemnation of Russian acts by international actors and scholars, it is clear that interference in the 2008 war had no justification which resulted in the occupation of 20% of Georgian territory, which is a "textbook" case of aggression. There is no doubt that Russian action both reached the threshold of Article 2(4) of the Charter and constituted an act of aggression in accordance with GA Resolution 3314.[100] Moreover, it can be observed with certainty that by its gravity and scale the Russian action constituted a *manifest* breach of the Charter under Article 8 *bis* and would therefore constitute a "crime of aggression".

CONCLUSION

The activation of jurisdiction regarding the crime of aggression is a truly landmark moment in the history of international justice. This process started at the end of the First World War and ended by adopting the 2010 Kampala Amendments to the Rome Statute. While the definition of the crime may not be flawless, the fact that consensus was reached and the jurisdiction activated, is a great moment in itself. Article 8 *bis* of the Rome Statute tries to reconcile two conflicting views: Some delegates considered that all types of unlawful force should be criminalized; while others wanted to bring the definition of the crime as

[99] Antonio Cassese, "The Wolf that Ate Georgia" (1 September 2008), https://www.theguardian.com/commentisfree/2008/sep/01/georgia.russia1 [accessed 12.03.2020].

[100] Levan Alexidze, "International Legal Aspects of the IFFMCG Report", International Law Journal (2010): 9.

close as possible to the practice of the Nuremberg and Tokyo Tribunals and to existing international criminal law. The existing "threshold" will ensure that cases of use of force, which do not reach the minimum scale and those which fall into the "grey area of legality", are exempted from the reach of Article 8 *bis*. At the same time, the threshold of gravity is not as strict as to exclude cases of aggression which result in occupation and annexation. To determine more clearly the parameters of the "gravity threshold", judicial practice will be essential, but existing international practice and methods of interpretation make it possible for us to establish the scope of Article 8 *bis* with sufficient certainty. Subsequent practice may further develop existing customary international law, which the Court will have to study and incorporate carefully.

Some scholars have expressed criticism that by setting a high threshold, examples of the use of force that do not reach the "gravity threshold" may be considered lawful, which would be used to diminish the scope of the prohibition of the use of force.[101] However, the definition, which was adopted as a result of a political compromise and for the purpose of individual criminal responsibility before an international tribunal, does not affect the general scope of the prohibition *per se*, which is governed by specific treaty or customary law. That the Rome Statute does not criminalize every violation of the prohibition of the use of force, is in compliance with the nature of international criminal law, which covers only the gravest violations of international humanitarian and human rights law and the *jus ad bellum*.[102]

As a result of the foregoing analysis, it can be established that the International Criminal Court will have to weigh carefully humanitarian objectives on one hand and sovereign interests of the State on the other, in order not to abuse the doctrine and protect the balance between competing interests as much as possible. The fact that the crime of aggression now forms part of the Rome Statute will be an important element in strengthening the prohibition of the use of force, notwithstanding the fact of how often individuals will be convicted for this crime. It will, no doubt, be carefully considered and assessed by State leaders before they decide to use force.[103] Extension by the ICC of its jurisdiction over aggression is a historic achievement of great importance as a further step to avoid suffering that accompanies armed conflicts in general.

A fierce advocate and proponent of the activation of jurisdiction over aggression, Benjamin Ferencz states: "*Consider the proposition that law, not war, should be your guide. If you could do that, those three words—law, not war—will save billions of dollars every day, not to say how many millions of lives will be saved. How can you do that? I will give you three more words and three sentences: Never give up. Never give up. Never give up.*"[104]

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[101] Andreas Paulus, 'Second Thoughts on the Crime of Aggression', European Journal of International Law 20 (2010): 1124.

[102] Astrid Coracini and Pal Wrange, "The specificity of the crime of aggression", in The Crime of Aggression: A Commentary, eds. Claus Kreß and Stephen Barriga (Cambridge: Cambridge University Press, 2017) 322.

[103] Benjamin Ferencz, "Can Aggression be Deterred by Law?" Pace International Law Review 11 (1999): 341.

[104] Dopplick R., "Interview - Benjamin Berell Ferencz, U.S. Chief Prosecutor at Nuremberg Trials" (5 June 2018) https://www.americanbar.org/groups/international_law/publications/international_law_news/2018/winter/benjamin-berell-ferencz/ [accessed 12.03.2020].