



9-13-2010

'The Grass that Gets Trampled When Elephants Fight': Will the Codification of the Crime of Aggression Protect Women?

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**“The Grass That Gets Trampled When Elephants Fight”:
Will the Codification of the Crime of Aggression Protect Women?**

Beth Van Schaack*

Forthcoming: 15 UCLA Journal of International Law & Foreign Affairs __ (2011)

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I. Introduction

* B.A. Stanford University, J.D. Yale Law School. I served on the United States delegation to the International Criminal Court Review Conference in 2010 in Kampala, Uganda. Needless to say, the views expressed herein (and any errors) are entirely my own and do not at all reflect the position of the United States government. All material contained in here is available in the public record or derives from my notes of the Conference. I am indebted to Diane Marie Amann, Meg DeGuzman, Judith Gardam, Susana SáCouto, and Jaya Ramji-Nogales and all of the participants of the “Creation of International Law” conference at the University of Oslo for their valuable comments on this draft. My sincere thanks also go to Adam Birnbaum, Martin Guerbadot, and Nicola Gladitz for their expert research assistance and to Mary Sexton for her valuable and tireless assistance gathering materials. Some of this research is also featured in the series on the crime of aggression on IntLawGrrls, <http://intlwgrrls.blogspot.com/search/label/Crime%20of%20aggression%20series>.

The law struggles to contain violence, whether interpersonal or international. There is a gendered component to many forms of violence: men commit most violent crimes,¹ and men initiate² and fight³ most armed conflicts. This is not to say, of course, that women are not responsible for violence as criminals,⁴ combatants,⁵ terrorists,⁶ or as aiders, abettors, enablers, or supporters of various forms of violence. Indeed, over the years,⁷ a handful of women have been

¹ The crime statistics for perpetrators of assault, serious assault, rape, and homicide compiled by the United Nations Economic Commission for Europe illustrate this claim. See <http://w3.unece.org/pxweb/DATABASE/STAT/30-GE/07-CV/07-CV.asp>. See also similar statistics by the U.S. Department of Justice, <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus/previous/cvus38.pdf>

² Women serve as heads of state of about eighteen countries with Slovakia and Brazil recently joining this group. Only seventy women from more than fifty countries have ever been elected or appointed to serve as president, prime minister, or chancellor in recent history. See Equal Representation in Government, <http://ergd.org/Premiers.htm>; Female World Leaders Currently in Power, http://www.filibustercartoons.com/charts_rest_female-leaders.php; Worldwide Guide to Women in Leadership, *Woman Elected or Appointed Heads of State and Government*, http://www.guide2womenleaders.com/Female_Leaders.htm. To date, about sixty-five women have served as Minister of Defense. See Worldwide Guide to Women in Leadership, *Female Ministers of Defense*, http://www.guide2womenleaders.com/Defence_ministers.htm. To be sure, nations led by women have resorted to armed force. To provide just two examples, Prime Minister Margaret Thatcher launched the Falklands War after Argentina invaded the islands, and Indira Gandhi was Prime Minister during the 1971 wars that resulted in the formation of Bangladesh. See Linda Malone, *Woman and War*, 12 WILLIAM & MARY J. OF WOMEN & LAW 297, 297 (2005-6) (“The historical prominence of Golda Meir, Indira Gandhi, Margaret Thatcher, Condoleeza Rice or ... Madeleine Albright only accentuates how women with such power are few and far between.”).

³ In the United States, about fourteen percent of military personnel are women. Women In Military Service For America Memorial Foundation, *Statistics on Women in the Military*, <http://www.womensmemorial.org/PDFs/StatsonWIM.pdf>. Women are underrepresented in the most senior ranks in the officer and noncommissioned officer corps. Only eleven percent of women in the British armed forces are officers. Ministry of Defense, *Fact Sheet*, <http://www.mod.uk/defenceinternet/factsheets/womeninthearmedforces.htm>. Even in the Israeli military, one of the few that conscripts women, “[w]omen account for less than 5% of the senior ranks.” CBS News, *Women in the Military — International* (May 30, 2006), <http://www.cbc.ca/news/background/military-international/>. It was only in 1993 that Sheila Widnall was appointed U.S. Secretary of the Air Force—the first woman to lead a branch of the U.S. military. In most national militaries, women are excluded from certain combat functions by law. See generally ELIZABETH LUTES HILLMAN: DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT—MARTIAL (2005) (discussing the evolving roles of women in the military). The military is one sector of society that has remained steadfastly impervious to demands for formal equality (although in light of the evolution of modern warfare, this is an area where *de facto* equality is ahead of *de jure* equality). But see *Navy Welcomes Women to Serve in Submarines*, http://www.navy.mil/search/display.asp?story_id=52990 (announcing February 2010 policy change in the U.S. Navy allowing women to serve on submarines).

⁴ See *supra* note ___ (providing domestic statistics).

⁵ See generally MIRANDA ALISON, *WOMEN AND POLITICAL VIOLENCE: FEMALE COMBATANTS IN ETHNO-NATIONAL CONFLICT* (2009); Ernest Harsch, *Women: Africa’s Ignored Combatants*, 19(3) AFRICA RENEWAL 17 (October 2005), available at <http://www.un.org/ecosocdev/geninfo/afrec/vol19no3/193women.html>; VICTIMS, PERPETRATORS OR ACTORS? GENDER, ARMED CONFLICT AND POLITICAL VIOLENCE (Caroline N.O. Moser & Fiona Clark, eds., 2010); Miranda Alison, *Women as Agents of Political Violence: Gendering Security*, 35 SECURITY DIALOGUE 447 (2004) (challenging the idea that women are more peaceful than men with reference to liberatory nationalist movements that may provide more space for women to participate as combatants than institutionalized armed forces). For a profile and academic sources on girl soldiers, see Waltraud Queiser Morales, *Girl Child Soldiers: The Other Face of Sexual Exploitation and Gender Violence*, <http://www.airpower.au.af.mil/apjinternational/apj-s/2008/Itri08/moraleseng.htm>.

⁶ LOUISE RICHARDSON, *WHAT TERRORISTS WANT: UNDERSTANDING THE ENEMY, CONTAINING THE THREAT* 120-128 (2006) (discussing female terrorists).

⁷ In the Nuremberg era, for example, Dr. Herte Oberheuser was a defendant in the so-called Doctor’s Trial, which was brought under Control Council Law No. 10 and focused on charges involving nonconsensual medical experimentation and the euthanistic extermination of patients. See *United States v. Brandt, et al.*, Indictment,

prosecuted for the commission of international crimes.⁸ But, when a woman is maimed, battered or killed, it is generally at the hands of a man, be it a family member, community member, or combatant. The baseline vulnerability of women is enhanced in situations of armed conflict.⁹ Even today, when violence against women is clearly unlawful under international humanitarian law,¹⁰ such conduct is often employed as a deliberate “tactic of war to humiliate, dominate, instill fear in, disperse, and/or forcibly relocate civilian members of a community or ethnic group.”¹¹ Major General Patrick Cammaert, a former U.N. peacekeeping commander, testified before the Security Council in 2008 that “[i]t has probably become more dangerous to be a woman than a soldier in an armed conflict.”¹² Indeed, in a series of landmark resolutions, the United Nations Security Council recognized that violence against women in situations of armed conflict—a phenomenon that has reached pandemic proportions and “appalling levels of brutality”—is an issue of international peace and security within the Council’s purview.¹³

Although international law historically overlooked gender-based violence,¹⁴ international criminal law now penalizes many forms of violence against women when such acts rise to the level of war crimes, crimes against humanity, or genocide.¹⁵ The most recent addition to this pantheon of international offenses is the crime of aggression.¹⁶ In June 2010, representatives

available at http://www.loc.gov/frd/Military_Law/pdf/NT_Indictments.pdf. See also Diane Marie Amann, *Portraits of Women at Nuremberg*, in Proceedings of the Third International Humanitarian Law Dialogs (forthcoming, American Society of International Law), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654732; Diane Marie Amann, *Women at Nuremberg: Defendants*, Sept. 20, 2007, <http://intlwgrrls.blogspot.com/2007/09/women-at-nuremberg-defendants.html>; *The Trial of Ilse Koch*, <http://www.scrapbookpages.com/Dachauscrapbook/DachauTrials/IlseKoch.html> (discussing another Nuremberg-era female defendant).

⁸ More recently, women have been or are being prosecuted at three of the ad hoc tribunals. See Beth Van Schaack, *Not Our Sisters*, INTLAWGRRLS, July 31, 2007, <http://intlwgrrls.blogspot.com/2007/07/not-our-sisters.html> (describing female defendants before the modern *ad hoc* tribunals).

⁹ SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 31-113 (1975).

¹⁰ See Theodore Meron, *Rape as a Crime under International Humanitarian Law*, 87 A.J.I.L. 424 (1993); Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217 (2000).

¹¹ S.C. Res. 1820 (2008).

¹² Kate Snow, Christina Romano & Imaeyen Ibanga, *Rice: Rape Shouldn’t Be War Weapon U.N. Calls for End to Sexual Violence Against Women During Conflicts*, ABC NEWS, <http://abcnews.go.com/GMA/rice-rape-war-weapon/story?id=5364523>.

¹³ S.C. Res. 1820. Resolution 1820 followed on the heels of Resolution 1325—the most important Council resolution on women, peace and security. Resolution 1820 focuses more concretely on sexual violence as an issue of international security. See generally Sam Cook, *Security Council Resolution 1820: On Militarism, Flashlights, Raincoats, And Rooms With Doors—A Political Perspective On Where It Came From And What It Adds*, 23 EMORY INT’L L. REV. 125 (2009). It was followed by Resolution 1888, which mandates that peacekeeping missions protect women and girls from sexual violence and better integrate a gender perspective in peacekeeping operations. S.C. Res. 1888 (2009), <http://www.un.org/News/Press/docs/2009/sc9753.doc.htm>.

¹⁴ See generally Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288 (2003).

¹⁵ See Navanethem Pillay, *Protection Of The Health Of Women Through International Criminal Law: How Can International Criminal Law Contribute To Efforts To Improve The Health Of Women?*, 22 EMORY INT’L L. REV. 15 (2008).

¹⁶ In Kampala, delegates adopted on the following definition of aggression:

“crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of

from the international community completed marathon negotiations over a definition of the crime of aggression to be inserted in the Statute of the International Criminal Court (ICC or the Court).¹⁷ In so doing, they completed a task that the original drafters of the treaty were unable to accomplish the first time around and with which the international community has been struggling for decades. The negotiations surrounding the crime of aggression focused on two major issues: a definition of the crime and a jurisdictional regime to enable its prosecution. The latter issue turned on what role, if any, the Security Council would play in prosecuting the crime of aggression in light of its central role in responding to threats to and breaches of the peace under the U.N. Charter system. Both issues proved to be contentious, on their own and in their interaction. In May and June of 2010, delegations from ICC states parties, as well as many observer states and non-governmental organizations, converged in Kampala, Uganda, to complete the negotiations.¹⁸ Those in attendance succeeded in adopting a definition of the crime of aggression with several important understandings. Significant progress was made on the jurisdictional regime, but delegates left the operationalization of the crime to a future decision of the Assembly of States Parties to take place no sooner than 2017.¹⁹

This Article analyzes the outcome of the Kampala process with an eye toward the rarely-considered gender aspects of the crime of aggression on the assumption that rules that aim to constrain violence should benefit women. In so doing, it discusses whether or not the provisions adopted represent an advancement for women, and how feminist theory might interpret the new regime.²⁰ The insertion of the crime of aggression in the Rome Statute fills what many perceived as a lacuna in international criminal law that has existed since the World War II era. Any impact of the provisions will inevitably be limited by gaps and ambiguities in the definition of the crime and the jurisdictional regime, which is premised on state consent and exempts non-party states altogether.²¹ These compromises on definitional precision and jurisdictional comprehensiveness were instrumental in achieving consensus in Kampala. On the hopeful side, the definition of aggression enables the prosecution of a wider range of acts and actors that cause harm to women. It also potentially makes actionable harm to women that may not rise to the level of war crimes or crimes against humanity and that has historically been rendered juridically invisible by the collateral damage euphemism. The option to grant amnesty for the crime of aggression also suggests a unique utility when international negotiators must balance the competing imperatives of peace and justice.

At the same time, indirect negative effects may flow from the interaction of the Court's

an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

Resolution RC/Res.6, The Crime of Aggression (June 11, 2010), available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf [herein after "Resolution RC/Res.6"].

¹⁷ Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183.9 [hereinafter "ICC Statute"].

¹⁸ The list of speakers on the first day of General Debate at the Review Conference provides examples of the range of delegations in attendance in Kampala. See http://www.icc-cpi.int/Menus/ASP/ReviewConference/GENERAL+DEBATE+_+Review+Conference.htm

¹⁹ See Articles 15bis(3), 15ter(3), Resolution RC/Res.6; Annex III, Understanding 3.

²⁰ Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 836, 837 (1990) (advocating that feminists ask "the woman question" to "expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups" and to "identify the gender implications of rules and practices which might otherwise appear to be neutral or objective.").

²¹ See *infra* Part ____.

potential to prosecute the crime of aggression and the long-standing *jus in bello*, the body of rules that governs *how* war is waged rather than evaluating *why* war is waged, which is the purview of the *jus ad bellum*. By penalizing the resort to armed force, the threat of prosecution of the crime of aggression may undermine incentives to comply with key doctrines within international humanitarian law that serve to protect civilians and other vulnerable groups—distinction and proportionality. It also remains to be seen whether the codification of the crime of aggression will serve any deterrent purpose whatsoever when governmental leaders contemplate using force offensively or defensively in their international relations. To the extent that the new provisions exert a restraining effect, the expansive way in which the crime has been defined may end up chilling those uses of force that are protective, that do not implicate exigent sovereign threats, and that are more discretionary, such as uses of force employed pursuant to the nascent doctrine of responsibility to protect. The existence of the crime on the books may thus result in *ex post* prosecutions at the expense of *ex ante* efforts at preventing and repressing violence.²² Whether this over-deterrence argument should be raised on behalf of women, however, requires an acceptance of the legitimacy, if not lawfulness, of humanitarian intervention with or without Security Council approval. Raising concerns about chilling humanitarian intervention also requires a coming to terms with a certain valorization of militarism and its inherent masculinities—a perspective that is alien to much feminist thinking.²³

The Court has yet to demonstrate that it can fulfill its current mandate to prosecute war crimes, crimes against humanity and genocide—deemed “the most serious crimes of international concern.”²⁴ Operationalizing the crime of aggression without allocating additional resources to enable the Court to prosecute this controversial, largely unprecedented,²⁵ and qualitatively different crime may distract the Court from responding effectively to the “atrocities crimes” that now finally address gender-based violence more directly. Giving the Court the power to prosecute the crime of aggression may also encourage the Court to focus on leaders in capital cities rather than the warlords next door, whom victims more directly associate with atrocities. It may be impossible to achieve meaningful justice for women absent the prosecution of these direct perpetrators. Given the potential to reach top political leaders, the crime may be also subject to abuse. The amendments approved in Kampala will eventually permit states parties to refer each other to the ICC as alleged violators of the prohibition against aggression.²⁶ Misuse of this referral authority could render the Court little more than just another forum for states to manipulate and exploit in order to advance their interests. Such an outcome would politicize and

²² Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT’L L. 331, 333 (2009) (noting how international criminal law has emerged as an alternative to intervention).

²³ See, e.g., SARA RUDDICK, *MATERNAL THINKING TOWARDS A POLITICS OF PEACE* 141-159 (1995); *id.* at xviii-xx (discussing potential for nonviolent action in the face of atrocities). *But see infra* note ___ (citing authorities that challenge the link between feminism and pacifism).

²⁴ Article 1, ICC Statute. *See infra* Part ___.

²⁵ Despite the centrality of crimes against the peace in the post-WWII proceedings, none of the post-Cold War international tribunals included the crime of aggression within its subject matter jurisdiction, even though the crime was arguably relevant to the Yugoslavian, Sierra Leonean, and East Timorese contexts, at a minimum. Only the Statute of the Iraqi High Tribunal includes an aggression-like prohibition drawn from domestic law. *See* Iraqi High Criminal Court Law, available at http://law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf. As a pan-Arabist gesture, Article 14 renders the following crime prosecutable: “The abuse of position and the pursuit of policies that were about to lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958.” *Id.* Saddam Hussein was executed before any Kuwait-related charges against him could either be lodged or adjudicated.

²⁶ *See* Article 15bis, Resolution RC/Res.6.

de-legitimize the Court.

At this early stage in the life of the Court and in the absence of any concrete experience investigating or prosecuting the new crime of aggression, these bases for criticism and praise are inherently speculative. Applying a feminist perspective to the codification of the crime of aggression yields no easy conclusions. Rather, reasoning through the central question of whether enabling the prosecution of the crime of aggression by the ICC will be good for women produces a dizzying spiral of dialectical reasoning. As a feminist,²⁷ I thus approach the crime with a profound ambivalence.

II. War is Bad for Women

It goes without saying that conflict conditions are almost uniformly bad for women and harm women in particular gender-specific ways,²⁸ although the precise manifestations of harm may differ according to the particulars of history and culture.²⁹ Civilian casualties in war have grown exponentially over time³⁰ driven by a multitude of factors: increases in the destructive potential of military technology; the prevalence and intensification of air warfare; the proliferation of small arms; the increase in non-international armed conflicts that are no longer confined to formal battle lines but rather extend deeply into civilian communities; and the concomitant prevalence of irregular and undisciplined fighters, who receive little training in the law or practice of war and are not subject to a rigorous chain of command.³¹ The harrowing statistics of civilian deaths in modern warfare merely hint at the suffering experienced by non-combatants in war. While women are harmed alongside men when civilians are the direct or indirect targets of violence, women experience armed conflict and repression in ways that are different from men.³² As Catharine A. MacKinnon has written, “women are violated in ways that men are not, or rarely are.”³³

²⁷ Bartlett, *supra* note ___, at 833 (defining a feminist approach as one that adopts “a self-consciously critical stance toward the existing order with respect to the various ways it affects different women ‘as women.’”).

²⁸ My goal here is not to engage in “competitive vulnerability” by suggesting that women uniformly suffer more than men in conflict, but to think about the impact of war on women as a distinct phenomenon of any armed conflict. See Hilary Charlesworth, *Are Women Peaceful? Reflections on the Role of Women in Peace-Building*, 16 FEMINIST LEGAL STUDIES 347, 358 (2008) (critiquing view that women suffer more in conflict and have more to gain with peace). See also LAURA SHEPHERD, GENDER, VIOLENCE AND SECURITY 116 (2008) (arguing that the claim that women suffer in war more than men is both counter-productive and empirically unverifiable).

²⁹ See generally FIONNUALA NI AOLÁIN, DINA HAYNES & NAOMI CAHN, GENDER, WAR AND THE POST-CONFLICT PROCESS (2010) (forthcoming) (discussing gendered dimensions of war).

³⁰ See S.C. Res. 1265 (1999) (“Noting that civilians account for the vast majority of casualties in armed conflicts and are increasingly targeted by combatants and armed elements, gravely concerned by the hardships borne by civilians during armed conflict, in particular as a result of acts of violence directed against them, especially women, children and other vulnerable groups, including refugees and internally displaced persons, and recognizing the consequent impact this will have on durable peace, reconciliation and development.”). For compiled statistics on deaths in the twentieth century’s wars, see *Death Tolls For Major Wars and Atrocities in the Twentieth Century*, <http://users.erols.com/mwhite28/warstat2.htm>.

³¹ Peter Herby, *Arms Availability and the Situation of Civilians in Armed Conflict*, 835 INT’L REV. OF THE RED CROSS 669 (Sept. 30, 1999), <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQ3L> (“Civilian casualties outnumber those of combatants in many internal and ethnic conflicts and have increased throughout the century in parallel with the development of new military technologies.”). See generally MARY KALDOR, NEW AND OLD WARS: ORGANIZED CONFLICT IN A GLOBAL ERA (2006) (discussing changing patterns of violence throughout history).

³² See S.C. Res. 1325 (2000). Resolution 1325 marks “the first time the Security Council addressed the disproportionate and unique impact of armed conflict on women; recognized the under-valued and under-utilized

Indeed, it is virtually inevitable that women will be subjected to gender-based and sexual violence in war.³⁴ For most of human history, the rape and sexual abuse of women by the enemy was an expected spoil, inevitable by-product, or legitimate tactic of war.³⁵ Such acts are now subject to prosecution before international and domestic tribunals as war crimes and crimes against humanity, but they continue unabated in today's armed conflicts.³⁶ In conflicts of all kinds, but especially those motivated by nationalism or ethnic animosity, women may experience multiple and intersectional forms of gender- and identity-based violence by virtue of being perceived as idealized symbols of a people or repositories of culture.³⁷ Such attacks on women work violence at two levels—that of the individual victim and that of the collective to which the victim belongs. By exemplifying the debility and subjugation of a society's male protectors,³⁸ such attacks may exacerbate conflicts and instigate gender-based retaliation.³⁹

contributions women make to conflict prevention, peacekeeping, conflict resolution and peace-building[; and] stressed the importance of their equal and full participation as active agents in peace and security.” See Peace Women, *Security Council Resolution 1325*, <http://www.peacewomen.org/un/UN1325/1325index.html>. See also Secretary General, Report to the Security Council on Women, Peace and Security, U.N. Doc. No. S/2002/1154 (Oct. 16, 2002) (outlining the differential and disproportionate effect of war on women).

³³ Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993 83, 85 (Stephen Shute and Susan Hurley eds., 1993). See also Charlotte Lindsey, *The Impact of Armed Conflict on Women*, in LISTENING TO THE SILENCES: WOMEN AND WAR (Helen Durham and Tracey Gurd, eds., 2005) and Judith Gardam and Michelle Jarvis, WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW, Ch. 2 (2001). But see Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L. J. 605 (2009) (discussing invisibility of sexual violence committed against men); Shepherd, *supra* note ___, at 115 (noting that the attention made to women victims overshadows the extent to which men are also the victims of sexual violence).

³⁴ For example, a World Health Organization study in Liberia revealed that seventy-five percent of women surveyed were raped during the country's civil war. World Health Organization, Marie-Claire O. Omanyondo, *Sexual Gender-Based Violence And Health Facility Needs Assessment (Montserrado And Bong Counties) Liberia* (Sept. 6 - 21, 2004), http://www.who.int/hac/crises/lbr/Liberia_GBV_2004_FINAL.pdf. Statistics suggest that 40,000 women were raped during war in Bosnia and Herzegovina in early 1990s. In Sierra Leone, combatants sexually assaulted between 50,000-64,000 internally displaced women in Sierra Leone. See U.N. Family Planning Association, *Sexual Violence Against Women and Girls in War and Its Aftermath: Realities, Responses and Required Resources*, available at <http://www.unfpa.org/emergencies/symposium06/docs/finalbrusselsbriefingpaper.pdf>. See generally Report of the Secretary-General pursuant to Security Council resolution 1820 (2008), U.N. Doc. S/2009/362 (July 15, 2009); Congressional Research Service, Alexis Arieff, *Sexual Violence in African Contexts* (Nov. 25, 2009), <http://www.fas.org/sfp/crs/row/R40956.pdf>.

³⁵ Matthew Lippman, *Humanitarian Law: War On Women*, 9 MSU-DCL J. INT'L L. 33 (2000) (recounting the invisibility of violence against women until the establishment of the *ad hoc* criminal tribunals in the 1990s).

³⁶ The statistics from the Democratic Republic of Congo, where a third world war is raging, are harrowing. See World Health Organization, *Responding to Sexual and Gender-Based Violence in the Democratic Republic of Congo*, available at <http://www.who.int/hac/crises/countries/cod/2pager.pdf>; Harvard Humanitarian Initiative & Oxfam Int'l, “Now, The World Is Without Me”: *An Investigation of Sexual Violence in Eastern Democratic Republic of Congo* (April 2010), available at http://www.oxfam.org.uk/resources/policy/conflict_disasters/sexual-violence-drc.html. An average of forty women are raped every day in South Kivu in the Democratic Republic of Congo. See Stop Rape Now, *Security Council Resolution 1820: Women, Peace & Security*, available at <http://www.stoprapenow.org/pdf/Security%20Council%20Resolution%201820.pdf>.

³⁷ Wars of national liberation are rarely liberating for women, especially when women are asked to subordinate their demands to the demands of their polity. See generally Christine Chinkin, *A Gendered Perspective to the International Use of Force*, 12 AUSTR. Y.B. INT'L L. 279, 285 (1988-89).

³⁸ Brownmiller, *supra* note ___, at 38 (noting that the “body of a raped women becomes a ceremonial battlefield, a parade ground for the victor's trooping of the colors. The act that is played out upon her [is] vivid proof of victory for one and loss and defeat for the other.”).

³⁹ Doris Buss, *Rethinking Rape as a Weapon of War*, 17 FEM. LEG. STUDIES 145, 148 (2009) [hereinafter “Buss, *Rethinking*”] (noting that the reciprocal rapes in war constitute a message of victory or defeat passed between men).

Violence against women in war does not come only from military opponents. In wars of liberation, women may join, or be forcibly conscripted into, rebel armies in which they may serve as combatants,⁴⁰ domestic servants, spies, sexual slaves, and “bush wives.”⁴¹ History has shown that peacekeepers are not necessarily the benign protectors they are deployed to be.⁴² In addition, women often experience the time of war as an extension of a pre-existing “peacetime” continuum of violence in which they experience wrongs such as intimate violence, sexual harassment, and other forms of private or communal violence.⁴³ Many forms of this everyday violent behavior are exacerbated in wartime.⁴⁴ When societies are under stress, the rule of law is shattered, and cruelty becomes normalized if not legitimated.⁴⁵ These multifarious sources of violence against women hold entire communities hostage and prevent women’s full access to schools, markets, social services, and other necessities of life.⁴⁶

War also harms women in nonviolent ways too. Militarism in general—and war in particular—consumes resources that might otherwise go to different priorities of the state, such as education, healthcare, and improving the societal infrastructure.⁴⁷ As detailed in a recent study of gender and war,⁴⁸ it cannot be gainsaid that some women may enjoy some economic benefits during a conflict. For example, in the mythic tradition of Rosie the Riveter, they may be invited to fill positions vacated by men. Yet due to their second class citizenship and lack of enforceable legal rights, women cannot fully capitalize on the black and grey markets that replace formal markets in war.⁴⁹ Moreover, they are often reduced to becoming camp-followers to survive,⁵⁰ dependent on false and temporary conflict economies that offer marginalized employment as cooks, housekeepers, and runners. Their employers frequently extract paid or unpaid sexual exploitation.⁵¹

⁴⁰ For a study in Liberia, see Kirsten Johnson, et al., *Association of Combatant Status and Sexual Violence With Health and Mental Health Outcomes in Postconflict Liberia*, 300, J. AM. MED. ASSOC. 676 (2008), available at <http://jama.ama-assn.org/cgi/content/full/300/6/676> (noting that one-third of former combatants were women, one-fourth of whom participated in combat).

⁴¹ See generally CHRIS COULTER, *BUSH WIVES AND GIRL SOLDIERS: WOMEN’S LIVES THROUGH WAR AND PEACE IN SIERRA LEONE* (2009) (detailing the informal survival relationships entered into by women during the armed conflict in Sierra Leone).

⁴² See generally Muno Ndulo, *The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions*, 27 BERKELEY J. INT’L L 127 (2009) (detailing abuses by peacekeepers). See also S.C. Res. 1888 (2009) (calling for more women to be deployed in peacekeeping operations).

⁴³ See Report of the Secretary-General, *In Depth Study of All Forms of Violence Against Women*, U.N. Doc. No. A/61/122/Add.1 (July 6, 2006), <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WPS%20A61122Add1.pdf>. See also Buss, *Rethinking*, at 145 (arguing that the hypervisibility of wartime sexual violence renders other forms of violence against women invisible); THE PUBLIC NATURE OF PRIVATE VIOLENCE (Martha Albertson Fineman & Rozanne Mykitiuk eds., 1994).

⁴⁴ Naomi Cahn & Fionnuala Ní Aoláin, *Gender, Masculinities and Transition in Conflicted Societies*, 44 NEW ENGL. L. REV. 1, 2 (2009).

⁴⁵ Chinkin, *supra* note ____, at 255.

⁴⁶ Cook, *supra* note ____, at 128.

⁴⁷ Charlesworth & Chinkin, *supra* note ____, at 166.

⁴⁸ Cahn & Ní Aoláin, *supra* note ____.

⁴⁹ *Id.*

⁵⁰ *Id.* at 3.

⁵¹ See *Prosecutor v. Brima*, Case No. SCSL-2004-16-A, Judgment (Feb. 22, 2008) (acknowledging crime against humanity of forced marriage).

The aftermath of armed conflicts does not necessarily bring relief. Women and children make up the majority of refugees and internally displaced persons,⁵² many of whom are fleeing the world's armed conflicts. Once some measure of peace is achieved, women are often pushed into traditional gender roles in a collective effort to return to a condition of "normalcy" (unless they are ostracized for having been raped or for their affiliation with combatants during the war). Levels of gender-based violence may remain high in the immediate post-conflict period as combatants are demobilized and resocialized to conditions of peace⁵³ and as men reassert the patriarchal control mechanisms that may have eroded or been suspended during the conflict. As the African proverb entitling this piece suggests,⁵⁴ war—its destructiveness, its culture of hypermasculinity, and its deep societal consequences—is bad for women as civilians but also for women as women.

III. Deconstructing the Crime of Aggression

The codification of the crime of aggression and its complex jurisdictional regime is one potential response to the truism that war is bad for women. The definition of the crime of aggression and its jurisdictional regime contain several notable features in need of a careful deconstruction. The descriptive material in this part will serve as the basis for the gendered analysis that follows.

A. Acts of Aggression and Crimes of Aggression

The definition of the crime of aggression will be inserted within the Rome Statute as Article 8bis, just following the war crimes provisions that comprise Article 8.⁵⁵ The crime of aggression has been defined as follows:

1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of

⁵² Women represent very close to half of the United Nations High Commission for Refugees "persons of concern", which includes refugees, internally displaced persons, and stateless persons. Forty-five percent are children. UNHCR, 2009 GLOBAL TRENDS: REFUGEES, ASYLUM-SEEKERS, RETURNEES, INTERNALLY DISPLACED AND STATELESS PERSONS 14 (June 15, 2010).

⁵³ Kimberly Theidon, *Reconstructing Masculinities: The Disarmament, Demobilization, and Reintegration of Former Combatants in Colombia*, 31 HUM. RTS. Q. 1 (2009); Cahn & Ní Aoláin, *supra* note ___ at 18 n.47.

⁵⁴ The title of this article is derived from an African proverb: "When elephants fight the grass gets hurt." See Afriprov.org, *African Proverb of the Month* (November 2001), <http://www.afriprov.org/index.php/african-proverb-of-the-month/27-2001proverbs/172-nov2001.html>.

⁵⁵ The aggression amendments have been denominated Article 8bis (definition), Articles 15bis and 15ter (jurisdiction), and Article 25(3) (the leadership clause). All other Articles referenced herein appear within the ICC Statute as adopted at Rome in 1998.

another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression.⁵⁶

The definition then goes on to provide a list of “acts of aggression” (such as invasion, bombardment, etc.),⁵⁷ which are drawn verbatim from Article 3 of General Assembly Resolution 3314⁵⁸ drafted in 1974 to guide the Security Council in determining, in accordance with the U.N. Charter, the existence of an act of aggression.⁵⁹

⁵⁶ Article 8bis, Resolution RC/Res.6. The Elements of Crimes are as follows:

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression—the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations—was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

Id. at Annex II. The Elements of Crime are meant to “assist the Court in the interpretation and application of” the crimes within its jurisdiction. *See* Article 9, ICC Statute.

⁵⁷ These acts are:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Id. at Article 8bis(2).

⁵⁸ *See* G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/9631 (Dec. 14, 1974). Other aspects of that Resolution are not reproduced in the aggression amendments, such as the recognition that acts of aggression constitute the “most serious and dangerous form of the illegal use of force” (Preamble) and that the Security Council may decline to declare an act of aggression notwithstanding the commission of an enumerated act (Article 2). It is unclear if this list

The amendment to the Rome Statute that drafters designated Article 8bis defines two phenomena: a crime of aggression, set out in subsection 1 of the Article 8bis, and an act of aggression, set out in subsection 2. These two inquiries are considered in reverse order. The act of aggression committed by a state serves as a predicate for the prosecution of an individual for the crime of aggression. Thus, an individual will be held liable when he or she plans, prepares, initiates, or executes one or more acts of aggression through the machinery of a state. The enumerated acts of aggression reflect their historical origins; absent are acts that might be considered contemporary forms of aggression, such as embargos, cyber attacks or deliberately inflicted environmental degradation, although such acts may be assimilated into the provisions adopted.⁶⁰

Like General Assembly Resolution 3314, which preceded it, various draft definitions of the crime of aggression were consistently state-centric; specifically, they envisioned acts of aggression as phenomena of states, formal military organizations, and international borders.⁶¹ That said, one of the amendments adopted at Kampala, Article 8bis(2)(g), may facilitate prosecutions for aggression in ostensibly non-international conflicts by designating the sending of armed bands into another state to carry out acts of armed force as a prosecutable act of aggression. In addition, although the amendments do not address the question directly, it is foreseeable that standard principles of attribution and state responsibility could be applied in a way that extends the reach of the prohibition and satisfies the jurisdictional precondition of state action.⁶²

B. The Jurisdictional Regime

Delegates adopted a two-tiered filter structure for undertaking the determination of whether a state committed an act of aggression. The operation of the filter depends on the source of the referral of the situation in question.⁶³ When an investigation is triggered either by a state party referral or by the prosecutor acting *proprio motu*, pursuant to Articles 13(a) and (c) of the Statute respectively, efforts to prosecute the crime will be subject to two filters operating in tandem.⁶⁴ Pursuant to the new Article 15bis(6), the prosecutor will first determine whether the

is exhaustive. See Claus Kress & Leonie von Holtendorff, *The Kampala Compromise on the Crime of Aggression*, 8(5) J. OF INT'L CRIM. JUSTICE 1179, 1191 (2010) (suggesting that other forms of state conduct might also qualify as acts of aggression and opining that other aspects of Resolution 3314 may be relevant to the aggression inquiry).

⁵⁹ In 1967, the General Assembly delegated the task of defining aggression to a U.N. Special Committee on the Question of Defining Aggression, which was composed of thirty-five members chosen for their geographic and legal diversity. It took seven sessions of the Special Committee for the Committee to come up with a consensus definition that it could recommend to the General Assembly for adoption. Resolution 3314 was adopted by consensus, an amazing feat given its Cold War provenance. See generally Benjamin B. Ferencz, *The United Nations Consensus Definition of Aggression: Sieve or Substance*, 10 J. OF INT'L L. & ECON. 701 (1975) (detailing history of Resolution 3314).

⁶⁰ In the negotiations, the need to prove an act of state in connection with an aggression prosecution gave rise to extensive negotiations over which body—the Security Council, the General Assembly, the International Court of Justice, or the Court itself—would be empowered to make the predicate determination.

⁶¹ See Barriga, *supra* note ____ (setting forth draft definitions of aggression).

⁶² See *infra* note ____ (discussing applicable standards).

⁶³ See Article 15bis and 15ter of Resolution RC/Res.6.

⁶⁴ Article 15bis of Resolution RC/Res.6 reads:

Security Council has made a determination as to whether the putative aggressor state has committed an act of aggression. If so, the prosecutor will be entitled to include aggression charges in the indictment pursuant to Article 15bis(7) of the amendments. The Security Council's determination is not binding on the Court,⁶⁵ which will determine the existence of an act of aggression anew under the terms of the Statute and the beyond-reasonable-doubt burden of proof.⁶⁶ The Council's determination, however, will undoubtedly exert a considerable evidentiary pull at trial. If, on the other hand, the Council has not made the necessary determination in six months, the prosecutor can request permission from the Pre-Trial Division (composed of all the pre-trial judges) to bring such charges pursuant to the new Article 15bis(8). This request is subject to the procedures set out in Article 15 of the Statute—the same provision that governs the Prosecutor's request to launch an investigation *proprio motu*. Investigations triggered by the Security Council pursuant to Article 13(b) are not subject to any filter within Article 15ter of the amendments. Following the activation of any of the three trigger mechanisms, the Security Council may exercise authority under Article 16 of the Rome Statute, and adopt a resolution pursuant to Chapter VII of the U.N. Charter to defer the case for a renewable period of one year.⁶⁷

The crime of aggression may not be prosecuted pursuant to a state referral or *proprio motu* investigation in situations involving states that are not party to the ICC Statute. According to Article 15bis(5): “In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.” This blanket exclusion arguably applies to both aggressor and aggressed states. In addition, pursuant to Article 15bis(4), states parties can choose to opt out of the aggression provisions prior to their ratification or acceptance of the aggression amendments.⁶⁸

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article. ...

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

Article 15bis, Resolution RC/Res.6.

⁶⁵ Resolution RC/Res.6, Article 15bis(9)(“A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.”).

⁶⁶ ICC Statute, Article 66.

⁶⁷ Article 16, ICC Statute.

⁶⁸ That provision reads: “The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.”

C. The Gravity Threshold Applicable to the Act of Aggression Determination

Article 8bis(2) is worded in such a way⁶⁹ that an act of aggression encompasses any violation of the territorial integrity, political independence, or sovereignty of another state as well as any use of armed force that is inconsistent with the U.N. Charter.⁷⁰ Accordingly, the mere crossing of an international border by military forces without the consent of the neighboring state, for example, could be condemned an act of aggression regardless of the circumstances, the consequences of the state's actions, or the motive or intent behind the operation.⁷¹ Such an act could then serve as the predicate to a prosecution for the crime of aggression, if the act satisfies the requirements set forth in Article 8bis(1).

Although the statutory language is quite broad, and makes no express reference to codified or uncodified exceptions to the Charter's prohibition on the use of armed force, the new Elements of Crime for aggression clarify that only breaches of the Charter constitute acts of aggression.⁷² In addition, understandings adopted in connection with the aggression amendments make clear that a gravity threshold applies to the preliminary determination of the existence of an act of aggression by the Security Council or Pre-Trial Division.⁷³

D. The Leadership Clause

⁶⁹ Resolution RC/Res.6, Article 8bis(2) (defining "act of aggression" as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations").

⁷⁰ This language, with the exception of the added reference to "sovereignty" and the deletion of the concept of a threat to the peace, is drawn from Article 2(4) of the U.N. Charter ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

⁷¹ Although it may be argued that the reference to consistency with the Charter might prevent a bona fide humanitarian intervention or act of self-defense from being considered an act of aggression, the "any other manner" language technically qualifies "the use of armed force" and not "sovereignty, territorial integrity or political independence." This "any other manner" language thus appears to broaden, rather than narrow, the prohibition contained in both Articles 2(4) of the Charter and Article 8bis.

⁷² The fourth element of the crime of aggression dictates that "[t]he perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations." Resolution RC/Res.6 at 5.

⁷³ Understandings 6 and 7 clarify the methodology for determining the existence of an act of aggression:

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.

Once the determination has been made that an act of aggression has been committed, the analysis shifts to determine whether a crime of aggression has been committed. The crime of aggression is subject to a leadership clause, which provides that only those individuals occupying the top policy-making echelons of a military or civilian hierarchy⁷⁴ can be prosecuted for the crime of aggression.⁷⁵ A footnote to the corresponding Elements of Crimes makes clear that more than one person may be criminally liable for a particular act of aggression.⁷⁶ The crime of aggression will be subject to all the forms of responsibility set forth in Article 25.⁷⁷

E. Mens Rea

In terms of mens rea, the first element of the crime is a conduct element subject to a heightened mental state of intent according to the Elements of Crimes. Subsequent circumstantial elements, such as the defendant's occupation of a leadership position, are subject to the lower mental state of knowledge.⁷⁸ This formulation seems to exclude a constructive knowledge, or "should have known," standard. The elements of the crime encompassing the commission of an act of aggression in manifest violation of the Charter is subject to "knowledge of fact" mental state, which requires a showing that the defendant was aware of the factual circumstances that rendered the applicable state's use of force inconsistent with the U.N. Charter.⁷⁹ The perpetrator is not required to have knowledge of the precise legal doctrines governing uses of force.⁸⁰

⁷⁴ A similar approach was taken in the post-WWII period when tribunals convicted only those individuals at the policy-making level. *See, e.g., United States v. Von Leeb* (The High Command Case), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 462, 488 (1949) (holding that defendants must "be in a position to shape or influence the policy that brings about [the] initiation or ... continuation" of an aggressive war). This excluded "commanders and staff officers below the policy level responsible for planning campaigns, preparing means for carrying them out, moving against a country on orders and fighting a war after it has been instituted." *Id.* at 490-91. Individuals deemed "policy makers" included civilian industrials with considerable influence over the government. *United States v. Krauch* (I.G. Farben), 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1081, 1124-5 (1949) ("To depart from the concept that only major war criminals—that is, those persons in the political, military and industrial fields, for example, who were responsible for the formulation and execution of policies—may be held liable for waging wars of aggression, would lead far afield. Under such circumstances there could be no practical limitation on criminal responsibility that would not include, on principle, the private soldier on the battlefield, the farmer who increased his production of foodstuffs to sustain the armed forces...").

⁷⁵ The text, "In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State" will be inserted after Article 25, paragraph 3 of the Statute. Resolution RC/Res.6, Foot soldiers will not be subject to such charges before the ICC; however, they can still be prosecuted pursuant to Article 8 of the Rome Statute for any war crimes committed in connection with an act of aggression. The Rome Statute abrogates all immunities at Article 27.

⁷⁶ Footnote 1 reads: "With respect to an act of aggression, more than one person may be in a position that meets these criteria." Resolution RC/Res.6, *supra* note ____.

⁷⁷ Although there had been some discussion about identifying separate forms of responsibility applicable only to the crime of aggression, this proposal was not pursued. *See* Keith A. Petty, *Sixty Years In The Making: The Definition of Aggression for the International Criminal Court*, 31 HASTINGS INT'L & COMP. L. REV. 531, 548-9 (2008) (recounting forms of responsibility options).

⁷⁸ By the terms of Article 30(3) of the Rome Statute, knowledge "means awareness that a circumstance exists or a consequence will occur in the ordinary course of events." Article 30, ICC Statute.

⁷⁹ These include the occurrence of an armed attack against another state, the absence of Security Council authorization, and the absence of a prior attack by the putative victim state.

⁸⁰ A similar knowledge-of-fact formulation is contained in Article 8 of the ICC Statute on war crimes, which clarifies that it need not be shown that the defendant undertook a legal evaluation as to the existence of an armed

F. The Gravity Threshold Applicable to the Crime of Aggression Determination

Not every act of aggression will support a prosecution for the crime of aggression. Rather, only those acts of aggression that by their “character, gravity and scale” constitute a “manifest violation” of the Charter when viewed objectively⁸¹ can give rise to the crime of aggression. The term “manifest,” which was never defined,⁸² emerged as a compromise term to bridge the gap between two camps. The first camp included delegates who wanted no threshold at all, on either the theory that every act of aggression should be subject to prosecution⁸³ or the theory that the Statute already applied only to “the most serious crimes of international concern.”⁸⁴ The second camp included delegates who wanted a higher threshold than signified by the term “manifest;” that is, they wanted to limit prosecutions to “flagrant” breaches of the Charter,⁸⁵ wars of aggression,⁸⁶ “unlawful” uses of force, or acts of aggression geared toward occupying or annexing territory.⁸⁷

The term “manifest” was perennially controversial during the negotiations in light of its ambiguity of meaning. To some, the word referred to the degree of legal clarity or ambiguity surrounding the illegality of the act of aggression. To others, the word denoted some level of seriousness in terms of the impugned act’s scale, consequences or willfulness. These semantic debates in turn revealed conflicting goals underlying the threshold element. Although the concept of “borderline” case was often employed, there was no consensus on exactly which types of situations should not be subject to prosecution. Some states seemed intent on precluding

conflict, its classification as international or non-international, or the status of the victims as protected persons. *See* Elements of Crime, U.N. Doc. No. ICC-ASP/1/3(part II-B) (Sept. 9, 2002), http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf.

⁸¹ The Elements of the Crime of Aggressions state: “The term ‘manifest’ is an objective qualification.” *See* Annex II, Resolution RC/Res.6.

⁸² Article 46 of the 1969 Vienna Convention on the Law of Treaties suggests one useful definition in connection with provisions governing treaty ratifications in violation of domestic law. “A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.” Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980), Art. 46 [hereinafter “Vienna Convention”].

⁸³ Iran, for one, insisted until the final days of the Kampala Conference that any act of aggression would constitute a “manifest violation” of the U.N. Charter that should give rise to individual criminal responsibility.

⁸⁴ Rome Statute, *supra* note ___, art. 1.

⁸⁵ *See* Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression (June 2006—ICC-ASP/5/SWGCA/INF.1), *reprinted in* THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 2003-2009, 141, 143-44 (Stefan Barriga et al., eds. 2009) (summarizing debates over the term “flagrant” versus “manifest.”). Early draft texts employed the term “flagrant,” but this term disappeared in 2007, apparently because it was considered too high a barrier to prosecution. *See* Report of the Special Working Group on the Crime of Aggression (January 2007—ICC-ASP/5/SWGCA/1), *reprinted in* BARRIGA, *supra* note ___, at 131, 133 (discussing term “manifest”).

⁸⁶ *See, e.g.,* Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression (June 2007—ICC-ASP/6/SWGCA/INF.1), *reprinted in* BARRIGA, *supra* note ___, at 109, 199 (discussing debates over including reference to “war of aggression”).

⁸⁷ Germany, for example, supported a high threshold for the crime, namely that the act of aggression had “the object or result of establishing a military occupation of, or annexing, the territory of such other State or part thereof by the armed forces of the attacking State.” *See, e.g.,* Preparatory Commission for the International Criminal Court, *Proposal Submitted by Germany*, U.N. Doc. PCNICC/1999/DP.13 (July 30, 1999), available at U.N. Doc. PCNICC/1999/DP.13.

the assertion of jurisdiction over minor acts of aggression, such as frontier scuffles⁸⁸ or cross-border coast guard incursions; others wanted to exclude cases in which there was or would be no clear international consensus as to whether the state had committed an unlawful act. Some argued that the modifier “manifest” accomplishes neither of these two goals, but rather threatens to permit prosecutions of both low-level uses of force and potentially lawful or beneficial *casus belli*, such as bona fide humanitarian interventions; armed responses to terrorist attacks by non-state actors;⁸⁹ actions in ex post or anticipatory self-defense; assistance to wars of national liberation, peacekeeping or stability missions; actions to enforce no fly zones; actions in defense of nationals or to rescue hostages; and exercises of hot pursuit or the abduction of fugitives.⁹⁰ Supporters of the term argued in turn that the list of acts in Article 8bis(2) would ensure that minor incursions across an international border would not be prosecuted as the crime of aggression.

G. Defenses to the Crime of Aggression

Delegates did not seriously consider amending the Rome Statute provisions addressed to available defenses.⁹¹ As a result, the crime of aggression is not subject to any special justifications or excuses.⁹² In theory, individual defendants can invoke all of the existing

⁸⁸ The Libyan-Egyptian War of July 21-24, 1977 provides an example. A group of Libyan civilians protesting Egypt’s impending peace treaty with Israel marched to the Egyptian border. They were stopped and turned back by the Egyptian Army. Libya responded by firing artillery over the border. On July 21, it sent a tank battalion over the border to conduct a raid against an Egyptian army position in Sallum. The Egyptians expected the incursion, and a much larger force ambushed the Libyans, harrying them back across the border. The following three days saw repeated Egyptian air and commando strikes against targets within Libya. Egypt maintained ground and air superiority until an armistice was brokered by Algeria and the Palestinian Liberation Organization.

⁸⁹ The International Court of Justice has opined that the Charter authorization of self-defense applies only to attacks by states. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 131, 194 (July 9), *available at* <http://www.icj-cij.org/docket/files/131/1671.pdf>. *But see* Sec. Council Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001), 40 I.L.M. 1277(2001) (invoking the right of individual or collective self-defence in response to 9/11 attacks in preamble).

⁹⁰ On March 1, 2008, for example, the Colombian military crossed the border into Ecuador and targeted elements of the FARC 48th Front, which was suspected of harboring Raúl Reyes, a senior FARC commander. The Colombians launched a combined air and ground assault on FARC positions on the Ecuadorian side of the border; when they met resistance, the Colombians launched an artillery strike on the encampment, killing some 20 fighters from the Revolutionary Armed Forces of Colombia (FARC), including Reyes. The regional uproar over the incursion was settled at the March 7, 2008, Rio Group meeting in Santo Domingo. *See* Council on Foreign Relations, *FARC, ELN: Colombia’s Left-Wing Guerrillas*, <http://www.cfr.org/colombia/farc-eln-colombias-left-wing-guerrillas/p9272> (August 19, 2009).

⁹¹ *See, e.g.*, Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression (June 2005—ICC-ASP/4/32), *reprinted in* BARRIGA, *supra* note ___, at 167, 173 (compiling discussion as to whether Article 33 addressing superior orders should be amended by, or referred to in, the aggression amendments); Stefan Barriga, *Against the Odds: The Results of the Special Working Group on the Crime of Aggression*, *in* BARRIGA, *supra* note ___, at 1, 5 (noting that drafters endeavored to insert the aggression amendments into the ICC Statute as smoothly as possible without disturbing the provisions on defenses).

⁹² Some commentators, such as the former Ambassador-At-Large for War Crimes David Scheffer, proposed that the amendments include special exclusions to the crime of aggression, such as with respect to uses of armed force or deployments of armed forces made pursuant Security Council authorization, the “Uniting for Peace” Resolution (Res. 377 (1950)), or the inherent right of self-defense acknowledged in Article 51 of the U.N. Charter. *See* David Scheffer, *A Pragmatic Approach to Jurisdictional and Definitional Requirements for the Crime of Aggression in the Rome Statute*, 41 CASE WESTERN RESERVE J. INT’L L. 397, 409 (2009).

defenses subject to whatever adaptations are necessary set out in the ICC Statute.⁹³ According to Article 31(1)(c)—the only provision that implicates the aggression determination directly—neither self-defense nor the defense of others is automatically proven in situations in which the defendant is acting on behalf of a state engaged in self-defense.⁹⁴ At trial, the Trial Chamber may consider additional defenses pursuant to Article 31(3)⁹⁵ and the applicable Rules of Procedure and Evidence.⁹⁶

Although delegates ostensibly adopted these complex provisions by consensus, the above analysis reveals the existence of a high degree of disagreement, controversy, and concerted silence that belies true agreement among states as to the definition and reach of the crime. It also begs the normative question of whether the Rome Statute should include the crime of aggression at all. To a certain extent, of course, this question has become a moot one; important and influential blocs of states (including the interlocking members of the Non-Aligned Movement, the Group of Latin American and Caribbean Countries, the Union of South American Nations, the so-called African Group of States Parties to the ICC, the Arab League, and the European Union) invested considerable energy in achieving the adoption of the aggression amendments. To varying degrees, these states are committed to seeing this project come to fruition. That said, the Court cannot exercise jurisdiction over the crime of aggression until a year after thirty states parties have ratified the amendments.⁹⁷ Even then, the ability to prosecute the crime is not automatic; the Assembly of States Parties must decide in 2017 whether and how to activate the various trigger mechanisms.⁹⁸ At that time, the operationalization of the crime of aggression could conceivably be delayed, amended, or even abandoned.

IV. Is the Codification of the Crime of Aggression Good For Women?

These preliminary observations on the definition of the crime of aggression lead to the central question posed by this article: how will the codification and eventual prosecution of the crime of aggression in the Rome Statute impact the lives of women? As the analysis that follows reveals, many central elements of the final package adopted in Kampala cut two ways. A number of considerations commend the inclusion of the crime of aggression in the Rome Statute in

⁹³ These include the defenses of mental disease or defect, intoxication, self-defense, the defense of others, and duress (Article 31(1)); mistake of fact or law (Article 32); and superior orders (Article 33). The defense of property may be raised only with respect to war crimes charges and only when force is employed proportionately to protect essential property against an unlawful use of force. Article 31(1)(c), ICC Statute. In particular, Article 31(1)(c) reads: “in the case of war crimes, [the self-defense and the defense of others is available to protect] property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.”

⁹⁴ This provision states: “The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.” *Id.*

⁹⁵ That Article reads: “At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21.”

⁹⁶ See Rule 80, Rules of Procedure and Evidence (setting forth procedures for raising a defense under Article 31(3)), ICC-ASP/1/3 (Part.II-A) (Sept. 9, 2002), available at http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf.

⁹⁷ Resolution RC/Res.6, Article 15bis(2) (“The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.”); Resolution RC/Res.6, Article 15ter(2) (same).

⁹⁸ *Id.* at Articles 15bis(3) and 15ter(3).

theory. Most of the concerns anticipate how the crime might be invoked and prosecuted in practice. Without any firm practice on which to rely, all that remains is speculation, yielding both cautious potential and potential cautions.

A. Definitional Limitations and Advantages

Unlike the other core crimes within the ICC Statute, there are no gender-specific charging elements in the definition of the crime. An obvious substantive limitation to the aggression amendments is the fact that they are confined to acts of aggression committed by states against other states, an approach that serves to reinforce the statist orientation of international law.⁹⁹ There is no notion of a crime of aggression that may be committed by non-state actors, such as insurgents or terrorists, or by states against their own citizens.¹⁰⁰ These blind spots significantly discount the diversity of threats to international peace and security in contemporary international relations¹⁰¹ and guarantee that the prohibition on aggression will apply to only a fraction of the armed conflicts endured by women. In this way, the crime of aggression is not coextensive with the modern taxonomy of conflict classification under international humanitarian law.¹⁰² It is only when the aggressive acts of non-state actors may be attributed to another state according to general principles of state responsibility that the crime of aggression may apply more broadly.¹⁰³ These principles of attribution may enable aggression charges to be brought in armed conflicts that on their surface appear to be internal, but which may in fact sufficiently involve other states

⁹⁹ This statist approach is arguably retrograde given the increased application of international law to non-state actors, such as terrorist groups, indigenous peoples, multinationals, non-governmental organizations, etc. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 159-165 (1989) (discussing deprivations of women's rights attributed to elements of civil society); Jan Arno Hessbruegge, *Human Rights Violations Arising From Conduct Of Non-State Actors*, 11 *BUFF. HUM. RTS. L. REV.* 21 (2005).

¹⁰⁰ See Frédéric Mégret, *Beyond "Freedom Fighters" and "Terrorists": When, if Ever, is Non-State Violence Legitimate in International Law?*, available at <http://ssrn.com/abstract=1373590>.

¹⁰¹ Mark A. Drumbl, *The International Criminal Court and the Crime of Aggression: The Push to Criminalize Aggression: Something Lost Amid the Gains?*, 41 *CASE WESTERN RES. J. INT'L L.* 291, 306 (2009). See also Carston Stahn, *The "End", the "Beginning of the End" or the "End of the Beginning"? Introducing Debates and Voices on the Definition of "Aggression"*, 23 *LEIDEN J. INT'L L.* 875, 876-77 (2010) (noting that the "very concept of aggression remains centred on interstate violence" and is thus more focused on protecting state interests rather than individual rights).

¹⁰² Not without controversy, Protocol I to the Geneva Conventions re-conceptualized wars of national liberation, wars against colonial domination, and wars against racist regimes as international armed conflicts under international law. Article 1(4), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, (June 8, 1977) (applying rules on international armed conflicts to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.") [hereinafter "Protocol I"]. See Judith Gardam, *A Feminist Analysis of Certain Aspects of Humanitarian Law*, 12 *AUST. Y.B. INT'L L.* 265, 270 (1988-1989) (critiquing the elevation of liberation conflicts to international status and the extension of combatant immunity at the expense of protection for civilians).

¹⁰³ See, e.g., Article 8, International Law Commission, Responsibility of States for Internationally Wrongful Acts ("the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, the State in carrying out the conduct.").

acting through non-state proxies.¹⁰⁴ Because gender-based violence is often viewed as a phenomenon of the private sphere, attributing such crimes to state actors has proved difficult over the years. Similar problems of attribution may arise where the acts of non-state actors must be attributed to states parties to the ICC for the purpose of an aggression prosecution. If we believe prosecutions for the crime of aggression will improve the lives of women—by deterring uses of armed force or providing a vector for retribution—the fact that the definition of the crime has been drafted to address only a narrow class of armed conflicts will limit its impact considerably.

The leadership element of the crime has both commendable and worrisome aspects. On the one hand, the focus of the aggression amendments on leaders, rather than followers, may facilitate the prosecution of the architects of aggression. It may be difficult to connect individuals sitting at the pinnacle of a chain of command far from the events in question to the commission of war crimes or crimes against humanity through principles of derivative or superior liability, either because they can hide behind lawful rules of engagement or otherwise evade responsibility through raising reasonable doubt about their knowledge of abuses¹⁰⁵ or ability to exercise effective control over subordinates.¹⁰⁶ That said, the ad hoc tribunals have enjoyed some success in prosecuting the caliber of political leaders who might eventually be indicted for the crime of aggression: Slobodan Milošević,¹⁰⁷ Momcilo Krajišnik, Biljana Plavšić,¹⁰⁸ and Radovan Karadžić (before the International Criminal Tribunal for the former Yugoslavia); Theoneste Bagasora and Jean Kambanda (before the International Criminal Tribunal for Rwanda); Charles Taylor (before the Special Court for Sierra Leone); and Ieng Sary and Khieu Samphan (before the Extraordinary Chambers in the Courts of Cambodia). These leaders, however, hailed from

¹⁰⁴ Because the acts of non-state actors would be attributed to a state as a jurisdictional precondition, the effective control test of *Nicaragua* would likely be applicable rather than the overall control test developed by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić* to determine conflict classification. Compare *Case Concerning Military And Paramilitary Activities In And Against Nicaragua* (Nicaragua v. United States of America), Merits, Judgement of 27 June 1986, 1986 ICJ Report 1986 14, para. 115 (“For this conduct [by the contras] to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”) with *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, para. 137 (July 15, 1999) (finding that the former Yugoslavia exercised sufficient overall control over the Bosnian Serb forces to internationalize the conflict and holding that the “control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the party to the conflict) has a role in organizing, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.”).

¹⁰⁵ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, paras. 407-8 (July 29, 2004) (finding accused was not aware of abuses perpetrated by subordinates).

¹⁰⁶ *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, paras. 197, 266 (Feb. 20, 2001) (confirming effective control standard of subordination in adjudicating the superior responsibility doctrine).

¹⁰⁷ The ICTY confirmed three omnibus indictments against Milošević concerning the wars in Bosnia-Herzegovina, Croatia, and Kosovo. Milošević died, however, before the close of the defense case, thus robbing the Tribunal and victims of a verdict. Nonetheless, the indictment alone set an important precedent as one of the first against a sitting head of state. See ICTY, *Case Information Sheet, Slobodan Milošević*, http://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan.pdf.

¹⁰⁸ The ICTY convicted Biljana Plavšić, former President of the Republika Srpska. The Prosecutor had indicted her for genocide, complicity in genocide, and the crimes against humanity of persecution, extermination, killing, deportation, and inhumane acts for her role in planning, instigating, ordering, and aiding and abetting, and jointly executing ethnic cleansing. Plavšić pled guilty to Count 3 of the indictment—persecution. The ICTY sentenced her to 11 years’ imprisonment, though she was granted early release for “good behavior” and “substantial evidence of rehabilitation.” *Prosecutor v. Plavšić*, Case No. IT-00-39 & 40/1-T, Sentencing Judgement (Feb. 27, 2003).

weak, vanquished, obsolete, or pariah regimes. The ICC arrest warrants against President Al-Bashir of the Sudan provide a first test for whether the ICC will be able to follow suit.¹⁰⁹ Even with ostensible Security Council backing, Al-Bashir remains at large, although he is increasingly marginalized internationally if not domestically.¹¹⁰ If the likes of Al-Bashir cannot be apprehended for the commission of crimes against humanity and genocide against his own people, mustering the political will to capture leaders charged with the more controversial crime of aggression will be difficult.

On the other hand, no one has systematically asked women whether they would prefer for those who initiate the armed conflicts that unleash other international crimes to be prosecuted if it is at the expense of the local warlords whom victims might more directly associate with abuses.¹¹¹ While the prosecution of such higher ups for the crime of aggression may bring international attention to a region and a conflict, it may also absorb the limited capacity of the Court, leaving lower-level offenders to be prosecuted locally, if at all. Where gender-specific violence is at issue, women may assign primary responsibility to the direct perpetrators for the crimes committed in their communities and against them specifically, rather than the leaders. The current tendency of the ICC to focus on militia leaders demonstrates the importance of positive complementarity, the promise of which has not yet been fulfilled in the situations currently under investigation or indictment by the ICC.¹¹² Indeed, the domestic prosecution of gender-based violence lags in a number of jurisdictions under consideration by the ICC, so leaving such prosecutions to domestic courts may amount to impunity for the individuals whom women would most want to see prosecuted.

B. Jurisdictional Hurdles

Assuming the aggression amendments do eventually become operational, it remains to be seen whether they will ever be invoked given the complex jurisdictional regime. There are many ways in which the architects of war and lesser forms of state violence may be insulated from

¹⁰⁹ See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 (July 12, 2010).

¹¹⁰ Although Al Bashir has travelled to ICC member states, he has had to curtail his international travel and each trip generates intense international controversy. See CNN, *Kenya, African Union Defend Bashir Visit* (Aug. 31, 2010), http://edition.cnn.com/2010/WORLD/africa/08/31/kenya.bashir.visit/#fbid=s6-vAC-_af9&wom=false.

¹¹¹ Population-based surveys are inconclusive as to the preferences of affected communities for prosecutions of big versus little fish. These diverse attitudes likely reflect the nature of the conflict and the sources of violence. See HUMAN RIGHTS CENTER, ET AL., *BUILDING PEACE, SEEKING JUSTICE: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT ACCOUNTABILITY AND SOCIAL RECONSTRUCTION IN THE CENTRAL AFRICAN REPUBLIC* 26 (August 2010), http://hrc.berkeley.edu/pdfs/BuildingPeace-SeekingJustice-CAR_August2010.pdf (noting that approximately a third of respondents in the Central African Republic called for the prosecution of the top political leaders). For example, studies in the Democratic Republic of Congo more frequently suggested that militia members were a higher prosecutorial priority than political leaders. See HUMAN RIGHTS CENTER ET AL., *LIVING WITH FEAR: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE, AND SOCIAL RECONSTRUCTION IN EASTERN DEMOCRATIC REPUBLIC OF CONGO* 41, 43 (August 2008), <http://hrc.berkeley.edu/pdfs/LivingWithFear-DRC.pdf>. In Uganda, by contrast, respondents favored prosecution of the leaders of the Lord's Resistance Army rather than followers, who may have been recruited against their will. HUMAN RIGHTS CENTER, *NEW POPULATION-BASED DATA ON ATTITUDES ABOUT PEACE AND JUSTICE*, 6 (2007), <http://hrc.berkeley.edu/pdfs/Uganda-survey-research-note.pdf>.

¹¹² See Focal Points' *Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes*, RC/ST/CM/INF.2 (May 30, 2010) (discussing ways to promote positive complementarity), http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-CM-INF.2-ENG.pdf.

prosecution for the crime of aggression. At the procedural level, and as is the case with all the crimes within the Court's jurisdiction, states parties and the Security Council may decline to exercise their authority to refer aggression situations to the Court.¹¹³ In the exercise of prosecutorial discretion, the Prosecutor may decide not to launch investigations *proprio motu* pursuant to Article 15 or may decline to go forward with referred cases in "the interests of justice" per Article 53(1)(c). The Pre-Trial Chamber may not confirm any aggression charges as it must pursuant to Article 61. The Security Council may use its Article 16 deferral powers to delay cases indefinitely; this virtually ensures that nationals of the Council's five permanent members, or their close allies, will never come before the Court even if they should be implicated in international crimes. The two jurisdictional filters may not render the necessary determination that a state committed an act of aggression.

Beyond these baseline procedural hurdles, however, lie more fundamental limitations to the reach of the aggression amendments. In the absence of a Security Council trigger, there are gaping holes in the crime's jurisdictional regime. It excludes non-party states altogether,¹¹⁴ and it allows states parties to opt out of the aggression provisions.¹¹⁵ In this way, the Court's jurisdictional reach over the crime of aggression is stunted. By way of contrast, the other core crimes (war crimes, crimes against humanity and genocide) may be prosecuted so long as either the state of nationality of the accused or the territorial state is a party to the Statute.¹¹⁶ This differential regime stemmed from the fact that delegates viewed the crime of aggression as implicating state sovereignty more concretely and acutely than the other atrocity crimes given that the crime has at its core the action of a sovereign state,¹¹⁷ which under international law enjoys certain prerogatives of agency, autonomy, and self-determination.

C. State Consent

The aggression regime is consent-based. The principle of consent, as a manifestation of agency, plays a central role in both public international law and feminist theory. In the former, state consent has historically provided the basis for the formation and binding nature of international norms (as when states voluntarily join treaties, engage in state practice, and articulate *opinio juris*) as well as for the jurisdiction of international institutions.¹¹⁸ Indeed, the classical theory that international law is solely consent-based¹¹⁹ gives rise to one of its most

¹¹³ Any state party as well as the Security Council can trigger a prosecution before the ICC pursuant to Articles 14 and 13(b), respectively.

¹¹⁴ Resolution RC/Res.6, Article 15bis(5).

¹¹⁵ Resolution RC/Res.6, Article 15bis(4).

¹¹⁶ Rome Statute, Article 12(2).

¹¹⁷ *But see* Diane Marie Amann, *The International Criminal Court and the Sovereign State*, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 185,191-93 (Ige F. Dekker & Wouter G. Werner eds., 2004) (arguing that the three original ICC crimes implicate state sovereignty as well).

¹¹⁸ According to the *Monetary Gold* case, an international tribunal is not competent to pronounce upon the rights and duties of states absent their consent such that a state cannot be forced to submit to international jurisdiction. *Case of the Monetary Gold Removed from Rome in 1943* (Italy v. United States, United Kingdom & France), 1954 I.C.J. Rep. 19, available at <http://www.icj-cij.org/docket/files/19/4761.pdf>.

¹¹⁹ *See S.S. Lotus*, PCIJ Ser. A, No. 10, at 18 (1927) ("the rules of law binding on states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law. ... Restrictions upon the independence of states cannot therefore be presumed.").

fundamental and enduring criticisms.¹²⁰ Consent is also at the root of the perennial debate between positivists and natural law theorists, the latter of whom insist that international law contains normative content independent of state consent and that morality is essential to law.¹²¹ State consent remains salient within international law notwithstanding the trend toward other more institutional or parliamentary norm-setting processes.¹²² In feminist theory, consent functions as an analog to sovereignty in international law as an attribute and entitlement of personhood often denied to women.¹²³

Allowing potential aggressor states to choose whether or not to be bound to the penal prohibition of aggression warps the privilege of consent, which in many areas of the criminal law belongs to the victim if it is relevant at all.¹²⁴ To be sure, the opt-out is theoretically available to both potential aggressor and potential victim states. It is clear, however, that the opt-out provision is primarily oriented toward potential aggressor states.¹²⁵ Nonetheless, there may be valid reasons why aggressed states may not want acts of aggression perpetrated on their territories to be the subject of prosecution before the ICC, as when such proceedings might exacerbate—rather than defuse—a situation, hamper the ability of warring parties to reach political or diplomatic solutions, undermine efforts at reconciliation between embattled societies, or risk the revelation of state secrets or sensitive intelligence.¹²⁶ If states parties choose to avail themselves of the opt-out, it will insulate particular territories and conflicts from prosecution for the crime of aggression. In making the decision to join the aggression amendments or to exercise the right to opt out of them, states will not necessarily consult women and other vulnerable segments of their populace.

¹²⁰ See generally J. Shand Watson, *State Consent and Sources of International Obligation*, 86 AM. SOC'Y INT'L L. PROC. 112 (1992) (defending classical theory against its critics).

¹²¹ See Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

¹²² Catherine Brölmann, *The Decline of the Subject's Individual Consent*, presentation in THE CREATION OF INTERNATIONAL LAW: AN EXPLORATION OF NORMATIVE INNOVATION, CONTEXTUAL APPLICATION, AND INTERPRETATION IN A TIME OF FLUX (August 6-7, 2010) (noting trends indicating the decline in the role of consent in other areas of international law formation). See also Catherine Brölmann, *International Organizations and Treaties: Contractual Freedom and Institutional Constraint*, in RESEARCH HANDBOOK ON INTERNATIONAL ORGANIZATIONS (J. Klabbers, ed., 2010).

¹²³ See generally Christina M. Tchen, Comment, *Rape Reform and a Statutory Consent Defense*, 74 J. CRIM. L. & CRIMINOLOGY 1518 (1983).

¹²⁴ There are certain crimes to which a victim cannot consent, such as murder, although consent at times can give rise to mitigation where, for example, the victim engaged in the criminal conduct that resulted in his death. See, e.g., *State v. Ryan*, 534 N.W.2d 766, 784-85 (Neb. 1995) (victim consent mitigator inapplicable where victim—a member of a cult group—allegedly initially consented to corporal punishment inflicted by the group leader, but was later killed). See also Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Annex II, art. 3, Dec. 12, 2000, G.A. Res. 55/25, U.N. Doc. A/55/383 (2000) (providing that the apparent consent of the victim of trafficking is irrelevant where the trafficker threatened or used force, employed forms of coercion, abused his or her power, or exploited a position of vulnerability). See generally Kara Abramson, Note: *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT'L L.J. 473 (2003).

¹²⁵ The opt-out provision reads: “the Court may ... exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, *unless that State Party has previously declared that it does not accept such jurisdiction...*” Article 15bis(4) (emphasis added),

¹²⁶ Once the Court's jurisdiction is triggered, it can only be halted by the Security Council (Article 16), the Pre-Trial Chamber (by failing, for example, to confirm the charges pursuant to Article 61), or by the exercise of prosecutorial discretion (pursuant to Article 53 and 61, which set forth when the prosecutor can decline to pursue or withdraw charges). ICC Statute, *supra* note ____.

Of course, it is not inevitable that states parties will act to exit the aggression provisions. A genuine faith in the crime, the power of inertia, and contrary pressure from domestic and international civil society may make it undesirable or politically difficult for states parties to avail themselves of the opt out option set out in the Kampala package.¹²⁷ At the same time, by premising the provisions' entry into force and jurisdictional reach on exercises of consent, the drafters of the aggression regime created opportunities for the exercise or withholding of consent to be coerced, which feminist theory has long demonstrated is an inevitable consequence of power differentials. Both the ratification process and the opt-out regime threaten a ratification "cold war" among the Assembly of States Parties as strong states or blocs of states try to coerce parties to either join or reject the aggression provisions. Potential victim states—the feminized party in any aggression dyad—in particular may find themselves under pressure to opt out of the aggression amendments and thus to immunize their territory from aggression charges.

The ability of the Security Council to refer situations to the Court under Article 15ter without reference to state consent (and to serve as a primary filter for aggression cases brought under Article 15bis) will become that much more important, assuming the Assembly of States Parties decides to activate this trigger mechanism over the crime.¹²⁸ Ensuring a central role for the Council in aggression prosecutions provides an opening for the principles set forth in Security Council Resolutions 1325, 1820, and 1888¹²⁹—which recognized that wartime gender-based and sexual violence against women constitutes a threat to international peace and security that may exacerbate conflicts—to contribute a gender perspective to the penal enforcement of the prohibition against aggression.¹³⁰ Indeed, the Darfur referral¹³¹ has already demonstrated the way in which Council action can promote accountability for gender-based and sexual violence.¹³²

¹²⁷ Very few states parties availed themselves of the war crimes opt out available in Article 124. See Beth Van Schaack, *Article 124: To Be or Not To Be?*, INTLAWGRRLS, <http://intlwgrrls.blogspot.com/2010/05/article-124-to-be-or-not-to-be.html>. The Assembly of States Parties decided in Kampala to retain this opt out provision, notwithstanding that it has been controversial and little used. See Resolution RC/Res.4 (16 June 2010 13:00), available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.4-ENG.pdf.

¹²⁸ There is a risk, however, that the lack of a Security Council filter for the crime of aggression in Council-referred situations will chill referrals of other situations. See Article 15ter. The concern is that without a filter control mechanism to eliminate aggression charges, the Council may not refer situations when it is concerned that the prosecutor may bring improvident aggression charges.

¹²⁹ See *supra* notes ____.

¹³⁰ But see Dianne Otto, *Exile of Inclusion: Reflections on Gender Issues in International Law*, 10 MELBOURNE J. INT'L L. 11, 19-25 (2009) (exploring some of the feminist critiques of Resolutions 1325 and 1820); Sahla Aroussi, *Women, Peace & Security: Moving Beyond Feminist Pacifism* (2009) <http://www.psa.ac.uk/journals/pdf/5/2009/Aroussi.pdf> (arguing that Resolution 1325 institutionalized affirmative yet stereotypical views of women and pacifism that may ultimately contribute to women's subordination, marginalization in decision making, and exclusion from positions of power).

¹³¹ S.C. Res. 1593 (2005).

¹³² See, e.g., *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman*, Case No. ICC-01/05-01/07, Warrant of Arrest for Ahmad Harun (Apr. 27, 2007) (finding reasonable grounds to believe that the Sudanese Armed forces and the *Janjaweed* committed, inter alia, rape and outrages upon the personal dignity of women and girls), available at <http://www.icc-cpi.int/iccdocs/doc/doc279813.PDF>; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05 – 01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009) available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (July 12, 2010) (finding reasonable grounds to believe that the defendant is criminally responsible for crimes against humanity and genocide based on the fact that government of Sudan forces subjected "thousands of civilian women ... to acts of rape"), available at <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>.

Those resolutions may also enable advocates to argue that military interventions in situations involving gender-based violence should receive Council approval.

D. The Crime's Reach: Collateral Damage

These observations about the fundamental responsibility of the architects of aggression point to a rationale advanced in support of the inclusion of the crime of aggression in the Rome Statute. From the perspective of women, prosecuting the crime of aggression suggests a way that much of the harm experienced by women in war can be captured by international criminal law in a way it is not currently.¹³³ In particular, so-called collateral damage—incidental harm to civilians that occurs in the pursuit of a lawful military objective—will become the evidentiary foundation for many charges of aggression that might be pursued.

Adding the crime of aggression to the Rome Statute has filled what many have viewed as a lacuna in the pantheon of international crimes.¹³⁴ In the words of the Nuremberg Tribunal in its Judgment: “To initiate a war of aggression . . . is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”¹³⁵ The theory is that once the peace is breached by the commission of an act of aggression or the launching of a war of aggression, conditions exist that unleash other forms of violence. Troops are deployed, arms proliferate, detention centers are established, human groups are vilified, and brutality becomes normalized.

At the doctrinal level, war crimes cannot be committed outside of a state of armed conflict or occupation, and violence perpetrated by a military force can constitute crimes against humanity when the civilian population is attacked on a widespread or systematic basis.¹³⁶ The Rwandan tragedy demonstrates that an armed conflict can serve as a pretext for genocide.¹³⁷ A state of war thus enables, encourages, and exacerbates multiple forms of violence, including gender-based violence. Given the demonstrated causal relationship between acts of aggression and other atrocities, a prosecution for the crime of aggression has the potential to empower the Court to tell a fuller story of a particular dispute, expose root causes, and assign legal responsibility—not just moral opprobrium or diplomatic ire—to those who would unleash violence on the globe.¹³⁸

¹³³ See Benjamin Ferencz, *Can Aggression Be Deterred By Law?*, 11 PACE INT’L L. REV. 341, 342 (1999) (“War is the soil from which the worst human rights violations invariably grow.”); Drumbl, *supra* note ____ (arguing for a more expansive definition of the crime); Linda Jane Springrose, *Aggression as a Core Crime in the Rome Statute Establishing an International Criminal Court*, 1999 ST. LOUIS-WARSAW TRANS’L L. J. 151, 163 (1999) (setting forth arguments in favor of the inclusion of aggression into the ICC Statute).

¹³⁴ See *supra* note ____.

¹³⁵ Judgment of October 1, 1946, International Military Tribunal Judgment and Sentence, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL at 498, *reprinted in* 41 AM. J. INT’L L. 172, 186 (1947) [hereinafter “Nuremberg Judgment”].

¹³⁶ See, e.g., *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment (Jan. 14, 2000) (convicting defendants of crimes against humanity in connection with the conflict in central Bosnia-Herzegovina).

¹³⁷ *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, para. 607 (21 May 1999) (discussing how the prosecutor’s allegations showed “that the armed conflict had been used as pretext to unleash an official policy of genocide.”).

¹³⁸ Neil Boister, *The Application of Collective and Comprehensive Criminal Responsibility for Aggression at the Tokyo International Military Tribunal: The Measure of the Crime of Aggression?*, 8 J. INT’L CRIM. JUSTICE 425, 425 (2010) (“To judge conventional war crimes while ignoring the fundamental decision to initiate war is like punishing

It is clear that the crime of aggression may be the only charge that can be brought in the wake of a clean, but unlawful, war or in response to an armed attack by a national armed force that does not rise to the level of an armed conflict or target protected persons.¹³⁹ It is often assumed that aggressive operations will be more brutal and indiscriminate than other uses of force, and this is often borne out in practice. In such conflicts, a comprehensive war crimes indictment will go far toward assigning responsibility for the horrors of war. But, even a cleanly fought but aggressive war harms civilians, societies, and the international community. Under these circumstances, aggression may be the only charge that can be leveled against responsible leaders, thus increasing the retributive potential of international criminal law.

Where the aggression charge is at the forefront of an indictment, the conceptualization of the crime will inevitably not be confined to the singular act of crossing an international border with guns drawn, but rather will encompass a consideration of a host of consequential harms to the victim state and its populace. Thus, an aggression charge can indirectly condemn conduct that would otherwise escape penal sanction because it is not a war crime, a crime against humanity, or an act of genocide. These consequential harms can include the killing of privileged combatants *dans le combat*, the quintessential act of war; the use of proportionate force against lawful targets; and even so-called collateral damage. All such acts may become indirectly actionable through an aggression prosecution. Most importantly, the daily harms experienced by women in war, whose fate is so often concealed behind the notion of collateral damage, can serve as an evidentiary basis for, and gain greater visibility through, the crime of aggression. Without such consideration of the concrete consequences or effects of an act of aggression, the Court would be unable to evaluate the gravity threshold, and the crime of aggression would be reduced to a mere abstraction.

The potential of the codification and prosecution of the crime of aggression to condemn the consequences of war was recognized during the post-World War II era, when the Allies first prosecuted crimes against the peace, although this theory of expansive responsibility never

a petty thief while letting a murderer escape.”) (quoting Yasuaki Ōnuma, *Beyond Victor’s Justice*, XI JAPAN ECHO 63, 68 (1984)).

¹³⁹ The March 26, 2010, torpedo attack on the South Korean Warship “Cheonan” provides a useful example. Eye witness accounts, an examination of the damage to the vessel, an analysis of seabed evidence, and the recovered torpedo all led a joint military/civilian international investigation to conclude that the ship was sunk by a North Korean torpedo. There was no “other plausible explanation.” Nick Loader, *Investigation concludes North Korean missile sunk the Cheonan killing 46*, ASIAN CORRESPONDENT (May 21, 2010), available at <http://us.asiancorrespondent.com/video/investigation-concludes-north-korea.htm>. The attack thus appears to be a classic case of bilateral aggression, with a clear victim state and a clear aggressor state without all of the messiness of most modern armed conflicts, which involve heightened tensions evolving into gradual escalations, border incidents and incursions, shots over the proverbial bow, etc. without a clear “prime mover” contemplated by Article 2 of Resolution 3314 (“The First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression ...”). The victims of the Cheonan attack were 46 crew members, all male, and no civilians were injured. Assuming the attack exceeds the necessary threshold with respect to “character, gravity, and scale” in Article 8bis(1), which it may not on its own unless the long history of tensions between the two nations are taken into account, aggression would be the only chargeable crime. See Democracy Now!, *Historian Bruce Cumings: US Stance on Korea Ignores Tensions Rooted in 65-Year-Old Conflict; North Korea Sinking Could Be Response to November ‘09 South Korea Attack* (May 27, 2010), <http://www.democracynow.org/2010/5/27/nk> (quoting historian’s comment that the attack was part of a “continuing war that has never ended”). The attack could not be charged as a war crime (for lack of an armed conflict or victim with protected person status) or crime against humanity (for lack of an attack against a civilian population). Given that men predominate in national forces, prosecutions for such acts of aggression are not likely to involve significant numbers of women victims. See *supra* note ____.

received the full blessing of either international tribunal.¹⁴⁰ Lawyers within the U.S. delegation developed the legal position that those who initiated unlawful wars of aggression were therefore responsible for all the wrongs that then ensued.¹⁴¹ This argument found particular expression in the Tokyo proceedings before the International Military Tribunal for the Far East (IMTFE), in which the defendants were charged in one set of counts with murder and mayhem in addition to crimes against the peace.¹⁴² A number of these counts focused on conventional war crimes, such as the killing of prisoners of war and the literal and figurative rape of Nanking. Counts thirty-seven through forty-three, however, focused on the killing of members of the armed forces during Japan's aggressive actions. For example, Count thirty-eight of the indictment charged a number of defendants with participation in a common plan or conspiracy the object of which was to "kill and murder ... both members of the armed forces ... and civilians."¹⁴³ Count thirty-nine

¹⁴⁰ See *United States v. Altstötter et al.* ("The Justice Trial"), UNITED NATIONS WAR CRIMES COMMISSION, VI LAW REPORTS OF TRIALS OF WAR CRIMINALS 52 (1947-9) (dismissing the view that "by reason of the fact that the war was a criminal war of aggression, every act which would have been legal in a defensive war was illegal in this one" on the ground that otherwise, "the rules of land warfare upon which the prosecution has relied would not be the measure of conduct, and the pronouncement of guilt in any case would become a mere formality."); *United States v. William List et al.*, XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, 1247-8 (1950) ("whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other. ... The rules of international law apply to war from whatever cause it originates.") (citations removed).

¹⁴¹ Jonathan Bush, *"The Supreme ... Crime" and its Origins: The Lost Legislative History of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324, 2377 (2002). The British were also on board with this proposition. In an opening statement, the British Prosecutor, Sir Hartley Shawcross, reasoned that: "The killing of combatants in war is justifiable, both in international and in national law, only where the war is legal. But where the war is illegal... there is nothing to justify the killing, and these murders are not to be distinguished from those of any other lawless robber band." Walter Gary Sharp, Sr., *Revoking An Aggressor's License To Kill Military Forces Serving The United Nations: Making Deterrence Personal*, 22 MD. J. INT'L L. & TRADE 1, 1 (1998). But see Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L L. 206, 217 n.4 (surmising that Shawcross was "referring not to the responsibility of the individual members of the armed forces of the aggressor but only to the liability of those guilty of planning and instigating the war.").

¹⁴² See International Military Tribunal for the Far East Indictment, Annex 6 to Judgment, available at <http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-A6.html>. Count 37 read:

The following Counts charge the crimes of murder, and conspiracy to murder, being acts for which it is charged that the persons named and each of them are individually responsible, being at the same time Crimes against Peace, Conventional War Crimes, and Crimes against Humanity, contrary to all the paragraphs of Article 5 of the said Charter, to International Law, and to the domestic laws of all the countries where committed, including Japan, or to one or more of them.

Id. See also Boister, *supra* note ____ at 439.

¹⁴³ The Count charged the defendants with endeavoring to:

unlawfully to kill and murder the persons described below, by initiating unlawful hostilities against the United States of America, the Commonwealth of the Philippines, the British Commonwealth of Nations, the Kingdom of the Netherlands and the Kingdom of Thailand, and unlawfully ordering, causing and permitting the armed forces of Japan to attack the territory, ships and airplanes of the said nations or some of them at times when Japan would be at peace with the said nations. The persons intended to be killed and murdered were all such persons, both members of the armed forces of the said nations and civilians, as might happen to be in the places at the times of such attacks. The said hostilities and attacks were unlawful ... and the accused and the said armed forces of Japan could not therefore, acquire the rights of lawful belligerents.

similarly charged the attack on Pearl Harbor, at a time when Japan and the United States were at peace, and the deaths of members of the naval and military forces of the United States. In support of these charges, it was argued that the Japanese defendants could be charged with murder simpliciter in connection with all civilian and combatant deaths in the Pacific theater, even if they would otherwise have been lawful killings under the jus in bello. The theory was that the illegality of the war rendered Japanese defendants unprivileged combatants and thus vitiated any defense of combatant immunity.¹⁴⁴ For their part, the defendants argued that “killings in the course of belligerent operations except in so far as they constituted violations of the rules of warfare or the laws and customs of war are the normal incidents of war and are not murder.”¹⁴⁵

Notwithstanding that the case was teed up to challenge the conceptual divide between the jus ad bellum and the jus in bello, the Tokyo Tribunal ultimately dismissed those counts addressed to a conspiracy to commit any crimes other than crimes against the peace¹⁴⁶ and addressed the harms alleged in the murder counts in connection with the omnibus crimes against the peace counts.¹⁴⁷ The Tribunal seemed to recognize that the theory of comprehensive liability suggested by the murder counts would swallow all the other particulars of the indictment¹⁴⁸ when it held: “In all cases the killing is alleged as arising from the unlawful waging of war. ... If ... the war, in any particular sense, is held to have been unlawful, then this involves unlawful killings not only upon the dates and at the places stated in these counts [of murder] but at all places in the theatre of war and at all times throughout the period of the war.”¹⁴⁹

The Allies’ attempt to hold Japanese defendants liable for all the harm caused by their aggressive war reflects the enduring intuitive appeal of the proposition that an otherwise lawful act of war, such as a proportionate attack on a military objective, committed within the context of an unlawful war is itself ipso facto unlawful even if no identifiable war crime has been committed. This proposition is, while appealing, doctrinally flawed. The long-standing distinction between the jus ad bellum and the jus in bello reflects the understanding that an unlawful war can be fought lawfully and a just war can be fought unlawfully. Thus, considerations of the right to use force are detached from considerations of how force is used or its consequences,¹⁵⁰ and “once the primary rules prohibiting the use of force (*i.e.*, the ius ad

Id.

¹⁴⁴ Bush, *supra* note ___, at 2403, citing Letter of 19 Dec. 1944 by U.S. War Department lawyer William C. Chanler (“If [the war is illegal] must it not follow that when Hitler and his cohorts entered Czechoslovakia etc., ‘*vi et armis*’ [“with force and arms”] they were not lawful belligerents under international law and therefore have no defense to a criminal charge or murder and banditry? For I take it that ‘Lawful Belligerency’ is a soldier’s only defense to a charge of murder.”). Indeed, charging straight murder would have avoided the ex post facto problems posed by charging crimes against the peace. Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, 59 HARV. L. REV. 397, 455-56 (1945-1946).

¹⁴⁵ Judgment, 101 THE TOKYO MAJOR WAR CRIMES TRIAL 48,436a (R. John Pritchard, ed. 1998) [hereinafter “IMFTE Judgment”].

¹⁴⁶ *Id.* at 48,450.

¹⁴⁷ “No good purpose is to be served ... in dealing with these parts of the offenses by way of counts for murder when the whole offence of waging those wars unlawfully is put in issue upon the counts charging the waging of such wars.” *Id.* at 48,452-48,453.

¹⁴⁸ Boister, *supra* note ___, at 427.

¹⁴⁹ IMFTE Judgment, *supra* note ___, at 48,452.

¹⁵⁰ That the consequences of war are not taken into effect in determining its lawfulness gives rise to a perennial feminist critique of the law of war. See Dianne Otto, *Integrating Questions of Gender into Discussions of the “Use of Force” in the International Curriculum*, 6 LEGAL EDUC. REV. 219, 221-2 (1995).

bellum) have been violated, the subsidiary rules of *ius in bello* must apply.”¹⁵¹ This acoustic separation is pragmatic as well as philosophical: the goal is to ensure compliance with humanitarian law regardless of which party is responsible for breaching international peace in the first place.¹⁵² Pursuant to the parity or symmetry thesis of international humanitarian law (IHL), the many protective principles of the *ius in bello* apply equally to all sides of a conflict, without reference to reciprocity and regardless of whether the *ius ad bellum* has been violated.¹⁵³ The severability and independence of the two sets of doctrines also reflects states’ contractual obligations; once the Geneva Conventions achieved universal ratification, all states of the world became equally bound by the core *ius in bello* prohibitions contained in those treaties, which apply regardless of the origins or causes of the conflict.¹⁵⁴

E. International Humanitarian Law Repercussions

Adding the crime of aggression to the jurisdiction of the ICC and enabling the prosecution of the deployment of armed force for unlawful ends has the potential to create bridges across the conceptual divide between the *ius ad bellum* and *ius in bello*. The apparent untraversability of these bodies of law exists for a reason, however. As such, their linkage may create negative consequences vis-à-vis the efficacy of some of the core protective doctrines of humanitarian law that apply to all combatants, regardless of which side started the conflict in the first place. Now that the *ius ad bellum* and the *ius in bello* will intersect in the ICC, labeling one side to a conflict “the aggressor” and the other side “the aggressed” may undermine support for IHL on both sides, weakening a source of protection in international law for women and other vulnerable groups. The predicate aggression determination may also lead to differential liability for other crimes within the jurisdiction of the ICC among combatants affiliated with the aggressor and aggressed states.

Enabling the prosecution of the crime of aggression may undermine support for the *ius in bello* among belligerents representing the putative aggressor state. Governmental support at the highest level—where rules of engagement are drafted, targets identified, and military strategy developed—is crucial to ensure compliance with humanitarian law more broadly. If leaders and policy-makers are susceptible to the threat of an aggression prosecution, an institutional commitment to adhere to humanitarian law may flag and weaken incentives to ensure that acts of

¹⁵¹ Marco Sassòli, *Ius ad Bellum and Ius in Bello—the Separation between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?*, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 241, 244 (M.N. Schmitt & Jelena Pejic (eds.) 2007). Sassòli notes that the secondary rules, which inure to the benefit of individuals rather than states, are particularly important because the primary rules have historically been controversial. *Id.*

¹⁵² Lauterpacht, *supra* note ___, at 211-213 (“Unless hostilities are to degenerate into a savage contest of physical forces freed from all restraints of compassion, chivalry, and respect for the dignity of man, it is essential that the accepted rules of war in that—humanitarian—sphere should continue to be observed.”).

¹⁵³ Sassòli, *supra* note ___, at 246 (noting that promising not to look at who was at fault for initiating the conflict in the first place preserves incentives for compliance with humanitarian law).

¹⁵⁴ *See, e.g.*, Article 1, Convention (IV) relative to the Protection of Civilian Persons in Time of War (Aug. 12, 1949) (“The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”); Protocol I, *supra* note ___, at pmb1 (“Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.”).

war are implemented in accordance with humanitarian law. Potential defendants may legitimately fear that there will be a thumb on the scale against them in any war crimes prosecution when the conflict itself has been declared aggressive and their state determined to be the aggressor.¹⁵⁵ Indeed, at the most radical of levels, does the principle of military necessity—which requires that armed attacks be designed and implemented to defeat the opponent militarily—have any meaning in the context of an unjust war?¹⁵⁶ Unless judges rigorously cordon off the aggression and war crimes analyses,¹⁵⁷ the proportionality analysis and other applications of IHL may differ among combatants depending on which side of the conflict they represent.¹⁵⁸ This may create perceptions of bias and unfairness among accused individuals from different sides to a conflict.

Paradoxically, the threat of prosecution for the crime of aggression may weaken the enforcement of humanitarian law by those deemed to be the aggressed party as well. Combatants hailing from the aggressed state may feel a lesser incentive to adhere to these rules, because they have been deemed to be engaged in a just war.¹⁵⁹ Prosecutors, judges and other observers for that matter may be more forgiving of breaches in such conflicts and cut combatants some slack—consciously or unconsciously.¹⁶⁰ In the context of criminal proceedings, this bias

¹⁵⁵ See Amann, *Against Aggression*, *supra* note ____ (“the villainization of 1 side via an aggression prosecution could diminish a prosecutor’s appetite to pursue perpetrators of atrocities on all sides.”). Professor Amann continues: “[a]ny such risk compounds the problems of randomness and selectivity ... that are endemic to international criminal justice.” *Id.* See also Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT’L CRIM. L. REV. 93, 116 (2002) (discussing the way in which selectivity and randomness undermine any deterrent effect of the criminal law).

¹⁵⁶ A military commission following World War II in the Ministries Case so wrote:

By resorting to armed force, Germany violated the Kellogg-Briand Pact. It thereby became an international outlaw and every peaceable nation had the right to oppose it without becoming an aggressor, to help the attacked and join with those who had previously come to the aid of the victim. The doctrine of self-defence and military necessity was never available to Germany as a matter of international law, in view of its prior violation of that law.

UNITED NATIONS, HISTORICAL REVIEW OF DEVELOPMENTS RELATING TO AGGRESSION 111 (2003) (quoting *United States v. Weizsäcker et al.* (“The Ministries Case”)). See also Jeff McMahon, *The Ethics of Killing in War*, ETHICS 693 (July 2004). But see Jasmine Moussa, *Can the Jus ad Bellum Override the Jus in Bello? Reaffirming the Separation of the Two Bodies of Law*, 90 INT’L REV. OF THE RED CROSS 963, 982 (Dec. 2008) (“the doctrine of military necessity, which belongs to the domain of *jus in bello*, should apply irrespective of [the] determination” of German aggression).

¹⁵⁷ Michael Bothe, *Terrorism and the Legality of Pre-Emptive Force*, 14 EUR. J. INT’L L. 227, 234 (2003) (“The individual military action undertaken within the framework of the conflict can only be judged in light of the *ius in bello*, but not by the yardstick of the *ius ad bellum* independently from the question of which party violated the *ius ad bellum* by starting the conflict.”). See also Sassòli, *supra* note ____, at 249 (“*Ius ad bellum* not only has no impact upon the applicability of IHL, but it also may not be used to interpret a provision of IHL.”); *id.* at 258 (noting that an admixture of *ius in bello* and *ius ad bellum* may render the cause for which belligerent fight significant in establishing differential legal standards, canons of interpretation and guidelines for adjudication) (citing William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISSISSIPPI L. J. 639, 860 (2004)).

¹⁵⁸ To a certain degree, Protocol I, *supra* note ____, already sets forth differential duties on attackers and defenders in Articles 57-58.

¹⁵⁹ Sassòli, *supra* note ____, at 257.

¹⁶⁰ *Id.* at 247.

may have an impact on the charges that are brought, the convictions that are handed down, and the sentences that are imposed.¹⁶¹

This potentiality arose in the Sierra Leonean context in the case against the surviving leaders of the Civilian Defense Forces, pro-government militia that formed to assist the government in resisting the Revolutionary United Front/Armed Forces Revolutionary Council rebel juntas and restoring the democratically-elected government.¹⁶² In a case involving charges of war crimes and crimes against humanity, the Trial Chamber rejected the defendants' defense of necessity,¹⁶³ but determined that the fact that the defendants were fighting for a just cause was a mitigating factor at sentencing.¹⁶⁴ In fact, one judge would have acquitted the defendants altogether.¹⁶⁵ Over a dissent,¹⁶⁶ the Appeals Chamber reversed, ruling that allowing consideration into the political motives behind the defendants' participation in the conflict would provide "implicit legitimacy to conduct that unequivocally violates the law—the precise conduct this Special Court was established to punish."¹⁶⁷ The sentences were increased to 15 and 20 years.¹⁶⁸

Adherence to IHL may also deteriorate when individuals lower down the chain of command are subject to prosecution for the crime of aggression. There may be no threat of prosecution for aggression before the ICC for those below the highest ranks, since the crime of aggression is framed as a leadership crime.¹⁶⁹ If, however, states parties incorporate the crime of aggression into their domestic penal codes,¹⁷⁰ as they have often done with respect to the other

¹⁶¹ The failure of the ICTR to indict members of the Tutsi-led Rwandan Patriotic Front may reflect this bias. Indeed, Prof. Ruth Wedgwood has argued that the ICTY's one-sided prosecutions, traceable in part to political pressure from Rwanda's allies, has contributed to the establishment of a repressive government. See Ruth Wedgwood, *Paul Kagame and Rwanda's Faux Democracy*, THE NEW REPUBLIC (Aug. 5, 2010) (arguing that the "West's failure to address Tutsi violations of the laws of war has allowed [Rwandan President] Kagame to conclude, justifiable, that he can do nearly anything with impunity.").

¹⁶² See Danny Hoffman, *The Meaning of a Militia: Understanding the Civil forces of Sierra Leone*, 106 AFRICAN AFFAIRS 636 (Dec. 8, 2010).

¹⁶³ *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, para. 74 (Oct. 9, 2007).

¹⁶⁴ *Id.* at paras. 79-91. The Special Court imposed a sentence of six and eight years of imprisonment compared to sentences of 45 and 50 years meted out to rebel defendants.

¹⁶⁵ *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute, para. 90 (Aug. 2, 2007), http://www.haguejusticeportal.net/Docs/SCSL/The%20CDF%20Judgment_3_2-8-2007.pdf ("[T]here can be little doubt that in the context of the intensely conflictual situation prevailing at the material time in Sierra Leone dominated by bitter chaos, fear, alarm and despondency, fighting for the restoration of democracy and constitutional legitimacy could be rightly perceived as an act of both patriotism and altruism, overwhelmingly compelling disobedience to a supranational regime of proscriptive norms."). See also *id.* at paras. 68-92 (arguing that defendants are entitled to the defense of necessity).

¹⁶⁶ *Prosecutor v. Moinina Fofana & Allieu Kondewa*, Case No. SCSL-01-14-A, Partially Dissenting Opinion of Honourable Justice George Gebaga King, paras. 26-31 (May 28, 2008).

¹⁶⁷ *Prosecutor v. Moinina Fofana & Allieu Kondewa*, Case No. SCSL-01-14-A, Judgment, paras. 530-34 (May 28, 2008).

¹⁶⁸ *Id.* at para. 565.

¹⁶⁹ See text accompanying note ____.

¹⁷⁰ Very few states at present have a crime of aggression in their penal codes. A few provisions exist in the codes of Central Asia, Eastern Europe and elsewhere; most predate the ICC. To the extent that they include a definition at all, these code provisions are loosely based on the WWII definitions and penalize only a "war of aggression," or are predicated on violations of international treaties. See Astrid Reisinger Coracini, *Evaluating Domestic Legislation on the Customary Crime of Aggression Under the Rome Statute's Complementarity Regime*, in THE EMERGING

ICC crimes,¹⁷¹ national legislators may reformulate the definition of the crime to reach lower-level perpetrators, such as officers with operational or tactical command,¹⁷² as opposed to those with strategic command, or even foot soldiers. The rationale for prosecuting leaders for initiating an act of aggression is not always easily contained to the highest leadership circle.¹⁷³ At a minimum, if taken to its natural conclusion, and in keeping with the maxim *ex injuria jus non oritur* (“a right cannot arise from a wrong”), all officers and foot soldiers down the chain of command could be stripped of the defense of combatant immunity¹⁷⁴ for participating in an act of aggression absent some theory that the rank and file were acting under duress or were non-culpable innocent agents entitled to assume they were fighting a lawful war.¹⁷⁵ Without the promise of combatant immunity, combatants may lose tangible incentives to adhere to the *jus in bello*,¹⁷⁶ although may still comply for deontological reasons. IHL, perhaps more than any other body of law, is based on carefully balanced privileges and responsibilities; remove a privilege and the commitment to respect the corresponding prohibitions wanes.¹⁷⁷

It remains to be seen whether states incorporate the crime of aggression into their penal codes. The aggression amendments do not oblige states parties to do so. The final text contains several important interpretive “understandings” addressed to the customary international law status of the definition of aggression adopted¹⁷⁸ and denying any right or obligation on the part of

PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 725 (Carston Stahn & Göran Sluiter, eds., 2009) (compiling domestic statutes on aggression).

¹⁷¹ States are not strictly obliged to harmonize their domestic codes with the Rome Statute or to enable the exercise of universal jurisdiction over ICC crimes. The only mandatory language in the Statute obliging states parties to enact domestic legislation concerns state cooperation (Part 9) and the obligation to assert jurisdiction over offenses against the administration of justice (Article 70(4)). There is preambular language recalling pre-existing obligations for all states (not just states parties) to prosecute international crimes. In practice, however, many states parties have amended their domestic law to mirror the ICC Statute in order to enjoy the privilege of complementarity. See Coalition for an International Criminal Court, *Implementation of the Rome Statute*, <http://www.iccnw.org/?mod=romeimplementation> (compiling statutes).

¹⁷² Campaigns and major operations to achieve strategic objectives in theaters or operational areas are planned at the operational level of war. Battles and engagements are planned and executed at the tactical level of war. The crime of aggression, as it has been formulated within the ICC amendments, is prosecutable at the strategic level of war—that echelon in which a nation’s leadership deploys military resources to achieve strategic security objectives. See DEPT. OF DEFENSE, *DICTIONARY OF MILITARY TERMS*, http://www.dtic.mil/doctrine/dod_dictionary/.

¹⁷³ See generally David Rodin, *Two Emerging Issues of the Jus Post Bellum: War Termination and the Liability of Soldiers for Crimes of Aggression*, in C. Stahn & J.K. Kleffner (eds): *JUS POST-BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE* 53, 61 (2008) (arguing that there are strong reasons to extend aggression liability to ordinary line soldiers).

¹⁷⁴ See Sharp, *supra* note ___ (arguing that the criminality of aggression should be extended beyond the senior leadership of a state to encompass all of those persons who kill in furtherance of an illegal use of force).

¹⁷⁵ Boister, *supra* note ___, at 443.

¹⁷⁶ François Bugnion, *Just Wars, Wars of Aggression and International Humanitarian Law*, 84 INT’L REV. RED CROSS 523, 541 (2002) (“It is a delusion to expect a soldier to respect the laws and customs of war if he himself is declared an outlaw by the mere fact of belonging to a State designated an aggressor. No amount of legal argument will persuade a combatant to respect the rules when he himself has been deprived of their protection.”).

¹⁷⁷ Lauterpacht, *supra* note ___, at 211-213 (considering this bald tradeoff a feature of the “defective” nature of international law).

¹⁷⁸ The customary law status of the crime of aggression was central to the British House of Lords case of *R. v. Jones*, [2006] UKHL 16, one of the few domestic cases to consider the crime of aggression. The issue arose in *Jones* as a defense to charges of aggravated trespass and criminal damage when the defendants attempted to disrupt activities at British military bases to impede British involvement in the Operation Iraqi Freedom (2003). The defendants argued that they were entitled to use reasonable force to prevent the commission of a crime (*viz.*, the crime of aggression). The House of Lords determined that although the crime of aggression existed under customary international law, no

states parties to incorporate the definition of aggression into their penal codes.¹⁷⁹ These understandings may be instrumental in discouraging states from internalizing the crime of aggression, drafting their own idiosyncratic definitions of the crime, or subjecting the crime to expansive bases of jurisdiction, such as universal jurisdiction.¹⁸⁰

F. The Two Sides of Deterrence

As is the goal of any penal prohibition, advocates for the crime of aggression hope that in addition to dispensing retribution for past acts of violence, the existence of the crime of aggression in the Rome Statute will contribute to the deterrence of future acts of aggression. The theory is that the threat of prosecution and the assignment of individual criminal responsibility will raise the cost of resorting to armed force in international relations, in a way that recourse only to principles of state responsibility for breaches of the U.N. Charter's prohibition on the use of force arguably has not. Needless to say, it would be a singular achievement if the crime of aggression were able to reduce the incidence of conflict in the world and to make real the "right to peace" for which so many women (and men) yearn.¹⁸¹ And yet, the counter-fear exists that the

such crime existed in British law so the defense was unavailable. See Beth Van Schaack, *Adjudicating Aggression in Domestic Courts*, INTLAWGRRLS, <http://intlwgrrls.blogspot.com/2010/04/adjudicating-aggression-in-domestic.html>.

¹⁷⁹ These Understandings read:

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

The United States in particular advocated for these provisions to emphasize that the amendments would be adopted solely for the purpose of prosecutions under the Rome Statute and that there is a divergence of views among states as to whether the definitions of "crime of aggression" in Article 8-bis(1) and "act of aggression" in Article 8-bis(2) reflect statements of customary international law. The ultimate goal was to undermine any tendency to refer to these definitions as evidence of the progressive development of customary international law and to signal that states are not obliged to incorporate the crime of aggression into their domestic codes, or launch domestic prosecutions for the crime, upon ratification or acceptance of the aggression amendments. The concern was that such prosecutions would wreak havoc on the international scene were states to incorporate the definition of aggression in their domestic penal codes and then indict world leaders in municipal courts, especially if based on expansive principles of extraterritorial jurisdiction. See Beth Van Schaack, *Understanding Aggression*, INTLAWGRRLS, <http://intlwgrrls.blogspot.com/search?q=understanding+aggression>.

¹⁸⁰ The Princeton Principles list crimes against the peace as among the international crimes subject to universal jurisdiction. Article 2, Princeton Principles on Universal Jurisdiction 29 (2001), available at <http://www1.umn.edu/humanrts/instree/princeton.html>. The commentary indicates that the issue was discussed at length and that while many argued that the crime "constitutes the most serious international crime, others contend[ed] that defining the crime of 'aggression' is in practice extremely difficult and divisive. In the end, 'crimes against the peace' were included, despite some disagreement, in part in order to recall the wording of Article 6(a) of the Nuremberg Charter." *Id.* at 47.

¹⁸¹ See G.A. Res. 33/73, Declaration on the Preparation of Societies for Life in Peace (Dec. 15, 1978); Philip Alston, *Peace as a Human Right*, in HUMAN RIGHTS IN THE WORLD COMMUNITY 198 (Richard Pierre Claude & Burns H. Weston, eds., 1980).

codification of the crime of aggression, given that the text is broadly and ambiguously worded, will over-deter some uses of force that may be beneficial to civilians and women in particular, such as humanitarian interventions.

Though we are almost twenty years into the renaissance of the field, the deterrent effect of international criminal law remains speculative.¹⁸² Although they will undoubtedly be high-profile, aggression cases may prove to be too episodic to exert a general deterrent effect in the classical sense in which world leaders weigh the costs of injury against the perceived benefit of the prohibited activities.¹⁸³ Assuming the most robust enforcement, international criminal law involves extreme conduct that is perhaps less susceptible to formal processes of deterrence. Even the crime's most avid supporters likely do not anticipate that the crime will bring about a Kantian perpetual peace.¹⁸⁴ Yet, the threat of suit for the crime of aggression will undoubtedly register some impact, especially on political leaders, who are concerned about preserving their political viability domestically and abroad and are more likely to calculate the costs and benefits of a particular course of action.¹⁸⁵ The reverberations generated by a single indictment against a world leader for aggression may be enough to compel other governmental officials to think twice before resorting to force. In the long run, the hope is that political elites will eventually internalize more robust inhibitions against resorting to the use of force in their international relations.¹⁸⁶

The deterrent potential of the crime of aggression gives rise to a counter-fear that the new provisions will over-deter and, in effect, chill lawful, beneficial, or otherwise legitimate uses of force,¹⁸⁷ such as: multilateral, regional,¹⁸⁸ or unilateral peacekeeping missions and humanitarian

¹⁸² See generally David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT'L L. J.* 473 (1999) (questioning the deterrent effect of international criminal law); Amann, *Group Mentality*, *supra* note ___, at 115-117 (questioning goal of deterrence in international criminal law). Indeed, it remains speculative in domestic penal law as well.

¹⁸³ See Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 *U. PA. L. REV.* 949, 960-1 (1966) (noting difficulty of proving deterrence empirically).

¹⁸⁴ Emmanuel Kant, *Perpetual Peace* (1795), in *THE MORALITY OF WAR: CLASSICAL AND CONTEMPORARY READINGS* 110 (Larry May et al., eds. 2006).

¹⁸⁵ Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 *AM. J. INT'L L.* 7, 11 (2001) ("Where leaders engage in some form of rational cost-benefit calculation, the threat of punishment can increase the costs of a policy that is criminal under international law. Leaders may be desperate, erratic, or even psychotic, but incitement to ethnic violence is usually aimed at the acquisition and sustained exercise of power.").

¹⁸⁶ See generally Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621 (2004) (discussing processes of acculturation, persuasion, and coercion at work in the international legal system).

¹⁸⁷ Louis Henkin, *Kosovo and the Law of 'Humanitarian Intervention'*, 93 *AM. J. INT'L L.* 824, (1999) (arguing that the Kosovo intervention was legitimate).

¹⁸⁸ In 1990, then-President Samuel Doe asked Nigeria for assistance in repelling Charles Taylor in the First Liberian Civil War. Nigeria, in turn, brought in the Economic Community of West African States (ECOWAS), which deployed the Economic Community of West African States Monitoring Group (ECOMOG). Well after the fact, the U.N. Security Council approved the intervention via Chapter VII. See S.C. Res. 788 (Nov. 19, 1992) (welcoming ECOMOG involvement in Liberia). It is thus unclear if ECOMOG was operating in Liberia with the full consent of President Doe; it was certainly not acting with U.N. endorsement from 1990 until the passage of Resolution 788. In any case, ECOWAS members could not have counted on receiving retroactive blessing from the Council at the time they felt compelled to act. See generally Christopher Tuck, *Every Car or Moving Object Gone" ECOMOG Intervention in Liberia*, 4 *AFR. STUD. Q.* 1, available at <http://web.africa.ufl.edu/asq/v4/v4i1a1.htm>. The primary focus of international criticism of the intervention concerned misconduct by ECOMOG troops. *Id.* See generally,

interventions;¹⁸⁹ rescue operations;¹⁹⁰ or even military responses to acts of terrorism that might incapacitate terrorist organizations and prevent future attacks.¹⁹¹ The potential for over-deterrence stems from the fact that amendments to the Rome Statute do not include any express exceptions for such uses of force. Although supporters of this definition tout its Resolution 3314 pedigree, the amendments to the Statute depart from that instrument in subtle yet significant ways. Most importantly, Resolution 3314—and the U.N. Charter for that matter¹⁹²—envision a continuum of unlawful uses of force, only some of which rise to the level of aggression. Indeed, the Resolution’s preamble states that “aggression is the most serious and dangerous form of the illegal use of force.”¹⁹³ Article 8bis standing alone, by contrast, envisions that every violation of Article 2(4) of the U.N. Charter as well as violations of a state’s sovereignty, a concept left undefined, constitute acts of aggression that may give rise to prosecution for the crime of aggression. Uncertainties surrounding the definition of the crime, coupled with the checkerboard jurisdictional regime and the concomitant unequal threat of prosecution among states, will no doubt impede coalition-building, adherence to military alliances, and other multilateral responses to global threats. States that have joined the aggression amendments may have different tolerance levels for the degree of uncertainty inherent to the reach of the aggression amendments. This difficulty in mobilizing joint action may paradoxically lead to more unilateral actions by states not subject to the moderating effects of joint action.

1. Chilling Humanitarian Intervention

Whereas the concept of self-defense is well established under international law, the right to use force in defense of others is less so. Advocates of an emerging, or surviving, norm in favor of humanitarian intervention raise a host of inter-related arguments. One textual argument

HUMAN RIGHTS WATCH, WAGING WAR TO KEEP THE PEACE: THE ECOMOG INTERVENTION AND HUMAN RIGHTS (June 1993), <http://www.hrw.org/reports/1993/liberia/#2>.

¹⁸⁹ See International Commission on Intervention and State Sovereign (ICISS), *The Responsibility to Protect* 69 (International Development Research Centre 2001) (“the *responsibility to protect* its people from killing and other grave harm was the most basic and fundamental of all the responsibilities that sovereignty imposes—and if a state cannot or will not protect its people from such harm, then coercive intervention for human protection purposes, including ultimately military intervention, by others in the international community may be warranted in extreme cases.”); 2005 World Summit Outcome, G.A. Res. A/RES/60/1, para. 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (“Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.”); S.C. Res. 1674, para. 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (“[The Security Council] reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”). *But see* Chair of the High-Level Panel on Threats, Challenges & Change, Transmittal Letter from the Chair of the High-Level Panel on Threats, challenges and Change, para. 203, addressed to the Secretary-General, U.N. Doc. A/59/565 (Dec. 1, 2004) (envisioning the responsibility to protect doctrine as limited to action by the Security Council).

¹⁹⁰ See, e.g., *Security Council Debate and Draft Resolutions Concerning the Operation to Rescue Hijacked Hostages at the Entebbe Airport*, 15 I.L.M. 1224 (1976).

¹⁹¹ Keith A Petty, *Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression*, 33 SEATTLE U. L. REV. 105 (2009) (considering the legality of responding to terrorist attacks with armed force under the prohibition of aggression) [hereinafter, Petty, *Criminalizing Force*].

¹⁹² Article 39 of the U.N. Charter envisions three prohibited uses of force: “threat[s] to the peace, breach[es] of the peace, or act[s] of aggression.”

¹⁹³ Resolution 3314, *supra* note ____.

attempts to carve out an implicit exception for humanitarian intervention from the language of Article 2(4) of the Charter by noting that states engaging in humanitarian interventions do not seek territorial aggrandizement or to undermine the target state's political independence—the sovereign values protected by the Charter.¹⁹⁴ Advocates also raise moral arguments drawing on historical just war and natural law theory¹⁹⁵ and argue that the post-WWII period ushered in a new normative conception of sovereignty by which adherence to human rights values is now constitutive of statehood,¹⁹⁶ and a state that fails to respect these rights forfeits the right to enjoy non-intervention.¹⁹⁷ By this view, sovereign prerogatives of non-intervention and monopolistic territorial power are contingent upon states manifesting respect for human rights. Advocates also point to state practice (such as the 1999 Kosovo intervention) and *opinio juris* (such as the Responsibility to Protect initiative¹⁹⁸ and the African Union Charter¹⁹⁹) to support an emerging customary international law norm in favor of interventions on purely humanitarian grounds when grave violations are at issue and other efforts (diplomacy, sanctions, etc.) have failed.

Nonetheless, the legality and desirability of humanitarian intervention remains contested, and the aggression amendments have done little to clarify the law in this area. Indeed, even the Kosovo intervention of 1999 (Operation “Allied Force”)—arguably the best example of a *bona fide*, i.e. non-pretextual, humanitarian intervention—would at first glance meet all the elements of the crime of aggression as they have been defined in Article 8bis.²⁰⁰ Specifically, the intervention was an air war consisting of an attack or bombardment by the armed forces of a State against the territory of another State.²⁰¹ Although NATO possessed no territorial ambitions, the intervention did violate the territorial integrity of Yugoslavia and, arguably, sought to undermine the political independence of the state (if not ultimately effectuate regime change). Most, although not all, scholars concede that the intervention was illegal under the Charter framework. Many, however, concluded that it was nonetheless legitimate and justifiable under the circumstances,²⁰² as evidenced by the fact that it generated little in the way of overt censure

¹⁹⁴ Article 2(4) states: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

¹⁹⁵ See generally THE MORALITY OF WAR: CLASSICAL AND CONTEMPORARY WRITINGS (Larry May et al., eds. 2006) (compiling excerpts from just war theorists throughout history).

¹⁹⁶ See W. Michael Reisman, *Sovereignty And Human Rights In Contemporary International Law*, 84 AM. J. INT’L L. 866 (1990).

¹⁹⁷ FERNANDO TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 16 (2005).

¹⁹⁸ See *supra* note ____.

¹⁹⁹ In particular, Article 4 on foundational Principles states that:

The Union shall function in accordance with the following principles: ... (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances namely: war crimes, genocide and crimes against humanity.

²⁰⁰ African Union Charter, http://www.africa-union.org/About_AU/Constitutive_Act.htm#Article4. The full impact of this provision on the legality of humanitarian intervention is unclear given that this text appears alongside an articulation of the principles of sovereign equality of nations, the peaceful resolution of conflicts, the prohibition of the use of force or threat to use force among Member States of the Union, and non-interference.

²⁰¹ See Sean Murphy, *Criminalizing Humanitarian Intervention*, 41 CASE WESTERN RESERVE J. INT’L L. 341 (2009).

²⁰² See Article 8bis(2), Resolution RC/Res.6.

²⁰² See INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO: THE KOSOVO REPORT, available at <http://www.reliefweb.int/library/documents/thekosovoreport.htm> (“The Commission concludes that the NATO military intervention was illegal, but legitimate.”).

from other members of the international community.²⁰³ At the same time, for that matter, the intervention did not receive uniform praise. Many post-colonial states remain understandably wary of endorsing a broad right of humanitarian intervention. The intervention was a “manifest” violation of the Charter if measured by scale and consequences insofar as it wrecked considerable damage on Yugoslavia; however, it was not necessarily an errant or flagrant violation given lingering debates over its legality, morality, and wisdom.²⁰⁴

Delegates drafting the definition of aggression were not unaware of the potential conflict between the contested doctrine of humanitarian intervention and the crime of aggression. Indeed, the Kosovo intervention occurred just as the Preparatory Commission was starting its work on issues left unfinished at the 1998 Rome Conference. Up until the discussions in Kampala, delegates largely preferred to adopt a concerted silence on this point, so as to not jeopardize their forward progress in defining aggression by getting bogged down in already intractable debates over the legality or propriety of humanitarian intervention.

Nonetheless, in Kampala, the United States addressed the issue head on in connection with its objections to the definition of the crime of aggression contained in Article 8bis. In prior diplomatic meetings and again in Kampala, the United States made overtures to reconsider the definition of aggression, but achieved little traction.²⁰⁵ Delegates were simply too invested in the definition and its provenance to reopen the debate at such a late date. In the United States’ second formal intervention in Kampala, Harold Hongju Koh, the Department of State Legal Advisor, stated the United States’ view that the definition itself was “flawed,” and that the apparent consensus on the definition of the crime might actually mask significant disagreements over what types of conduct would constitute the crime of aggression.²⁰⁶ At the same time, the United States acknowledged that it might be possible to address these concerns without revisiting the definition itself.²⁰⁷ The United States thus focused on having key text inserted into the amendment package at Annex III, which was slated to contain a number of other interpretive

²⁰³ Compare Jianming Shen, *The Non-Intervention Principle and Humanitarian Interventions Under International Law*, 7 INT’L LEGAL THEORY 1 (2001) (arguing that such interventions are a violation of Article 2(4) of the Charter absent Security Council authorization) with Amy Eckert, *The Non-Intervention Principle and International Humanitarian Interventions*, 7 INT’L LEGAL THEORY 27 (2001) (arguing that they are lawful so long as they are sufficiently justified). This non-rejoinder may also be explained, of course, by disparities of power and a wariness to criticize NATO.

²⁰⁴ See Petty, *Criminalizing Force*, *supra* note ___, at 119-130 (arguing that the law regarding humanitarian intervention is too uncertain to satisfy the “manifest” threshold requirement).

²⁰⁵ The United States was put in a difficult position to challenge the definition of the crime. Under the administration of President George W. Bush, the United States did not participate in any of the sessions of the Working Group of the Crime of Aggression, even though it was entitled to. Once President Barack Obama took office, it took some time to reformulate the U.S. policy toward the Court, and so the United States missed the Seventh Session of the Assembly of States Parties held in January 2009. The U.S. finally began participating in subsequent sessions, but by then, the definition enjoyed significant momentum and delegates were loath to allow a latecomer—and a non-state party at that—to reopen the negotiations.

²⁰⁶ Harold H. Koh Intervention, June 4, 2010, available at <http://www.state.gov/s/l/releases/remarks/142665.htm> (“Although we respect the considerable effort that has gone into the Princeton Process [the intersessional aggression negotiations], we believe that without agreed-upon understandings, the current draft definition remains flawed. We are concerned that the apparent consensus on the wording of Article 8bis masks sharp disagreement on particular points regarding the meaning of that language that must be addressed before the amendments on the crime of aggression can enter into force.”).

²⁰⁷ *Id.* (noting that the proposals “introduce the idea of addressing concerns through understandings or other documents, without the need for disturbing the language of Article 8bis itself.”).

“understandings.”²⁰⁸ The United States’ proposed its understandings for a number of purposes: to reshape the definition and its future interpretation, to tie the definition more closely to Resolution 3314 and to the U.N. Charter framework governing lawful uses of force, and to preserve an opening for claims about the legality of humanitarian interventions and other arguably legitimate yet potentially unlawful uses of force.²⁰⁹

One set of proposed understandings attempted to tether the definition of aggression and its interpretation more closely to certain aspects of General Assembly resolution 3314. In particular, the United States proposed threshold language to the effect that “it is understood that, consistent with the principles set forth in General Assembly resolution 3314, only the most serious and dangerous forms of illegal use of force are considered to constitute aggression”²¹⁰ and “it is only a war of aggression that is a crime against international peace.”²¹¹ As an interpretive guide, the United States proposed language stating that “it is understood that in determining whether an act is manifest, all three components of character, gravity, and scale must be sufficient to justify a ‘manifest’ determination.”²¹²

With a second set of understandings, the United States sought to gain acknowledgement that the U.N. Charter recognizes that certain uses of force remain lawful, notwithstanding Article 2(4) of the Charter. Accordingly, one proposed understanding read:

[N]othing in this resolution or the [aggression] amendments ... should be interpreted or applied in any manner inconsistent with General Assembly resolution 3314, nor should they be construed as in any way enlarging or diminishing the scope of the Charter of the United Nations, including its provisions concerning cases in which the use of force is unlawful.

More pointedly, another proposed understanding stated:

It is understood that, for purposes of the Statute, an act cannot be considered a manifest violation of the United Nations Charter absent a showing that it was undertaken without the consent of the relevant state, was not taken in self-defense, and was not within any authorization provided by the United Nations Security Council.

A third set of understandings attempted to carve out an exception for the doctrine of

²⁰⁸ See Christian Wenaweser, *Reaching the Kampala Compromise on Aggression: The Chair’s Perspective*, 23 LEIDEN J. INT’L L. 883, 883 (2010) (noting that states parties were “willing to address legitimate concerns outside the definition itself” through the understandings “adopted in Kampala as part of the package on the crime of aggression.”).

²⁰⁹ The United States circulated a set of proposed understandings during the Review Conference that served as the basis for breakout negotiations chaired by Claus Kress of the University of Cologne and a member of the German delegation. See Proposed U.S. Understandings, on file with the author.

²¹⁰ The Preamble of Resolution 3314 notes that “aggression is the most serious and dangerous form of the illegal use of force.”

²¹¹ See *supra* note ____ [GA 3314 discussion re: war of aggression]. See also Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2526 (1970), available at <http://www.hku.edu/law/conlawhk/conlaw/outline/Outline4/2625.htm> (proclaiming that a “war of aggression constitutes a crime against the peace, for which there is responsibility under international law.”).

²¹² Proposed U.S. Understandings, *supra* note ____.

humanitarian intervention. First, the United States sought recognition of the fact that “a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the purposes for which force was used and the gravity of the acts concerned or their consequences.” The reference to “purposes” provided a potential opening to argue for the legality of humanitarian interventions. Another proposed understanding drew upon the definition of “manifest” from the Vienna Convention on the Law of Treaties.²¹³ This proposed understanding was more explicit in addressing humanitarian intervention:

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

These proposals were repackaged into two draft understandings for consideration by delegates in informal negotiations.²¹⁴ The first proposal considered, Understanding X, combined the reference to the most serious and dangerous uses of force and the need to consider all of the circumstances including the purpose for which forces was used. Understanding X proved to be controversial. In particular, a few states led by Iran argued that the introduction of the subjective element of “purpose” in considering the legality of uses of force threatened to compromise the entire process and effectively amend the U.N. Charter by the back door. Detractors questioned what purposes other than self-defense were lawful under the Charter. The United States at first acceded to the removal of the term “purpose,” but later reserved on the record the right to reopen the question of a more explicit mention of humanitarian intervention, although it did not ever do so in a formal setting. Additional bilateral meetings were held, at which time consensus was reached on Understanding X.²¹⁵ The second, Understanding Y, mandated the cumulative interpretation of the factors of character, gravity, and scale. Eventually, the two Understandings appeared in the final text of the amendments²¹⁶ as follows:

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”

²¹³ See *supra* note ____.

²¹⁴ After a series of informal discussions, Professor Kress brought forward only some of the proposals for further consideration and debate in a special working group session on June 9, 2010, explaining his “minimalist” approach on the fact certain the other understandings “met with significant reluctance.”

²¹⁵ Ironically, these meetings involved negotiations between the United States and Iran, two nonparty states who have gone head-to-head over allegations of aggression. See *Oil Platforms* (Islamic Rep. of Iran v. U.S.), Judgment of 6 November 2003, 2003 I.C.J. 161.

²¹⁶ Resolution RC/Res.6, *supra* note ____, at 6.

determination. No one component can be significant enough to satisfy the manifest standard by itself.²¹⁷

Together, the understandings make clear that any gravity determination applies at the time the predicate act of aggression is under consideration, not just when the charges for the crime of aggression are contemplated.

It remains to be seen whether and how the adopted understandings will influence prosecutions before the Court in light of their uncertain legal authority.²¹⁸ The proposed but unadopted understandings no doubt served some pedagogical purpose among delegations, but their impact on the *travaux préparatoires* remains ambiguous.²¹⁹ Some delegations supported the content or impulse behind the rejected understandings, but deemed them unnecessary or superfluous; others expressed concerns as to their very content. Given this ambiguous record, it will be for the various organs and constituencies of the ICC—including the prosecutor exercising prosecutorial discretion—to determine whether to investigate future humanitarian interventions.²²⁰ By virtue of this *de facto* delegation of interpretive authority,²²¹ the ICC is thus poised to play a role as arbiter on the legality of humanitarian interventions. At a minimum, the

²¹⁷ Res 6, Annex III.

²¹⁸ Article 21 of the Rome Statute, which sets forth sources of law for the Court, does not mention understandings. Likewise, Article 120 prohibits reservations. Nor can the Rome Statute be amended through the adoption of understandings. Rather, the understandings constitute an agreement among those States present in Kampala as to how the aggression amendments should be interpreted and what meaning should be ascribed to certain terms. As such, while not binding *per se*, such an agreement among negotiating states is certainly useful as an interpretive tool and should be considered highly persuasive. For a discussion, see this thread: Kevin Jon Heller, *Are the Understandings Valid?*, OPINIO JURIS, <http://opiniojuris.org/2010/06/16/are-the-aggression-understandings-valid/> (arguing that they should be ignored by the judges); Kevin John Heller, *Why the VCLT Does Not Save Understanding Seven*, OPINIO JURIS, <http://opiniojuris.org/2010/06/16/why-the-vclt-does-not-save-understanding-seven/> (arguing that the understandings are not “a subsequent agreement” among parties within the meaning of Article 31 of the Vienna Convention on the Law of Treaties); Marko Milanovic *on Understandings*, OPINIO JURIS, <http://opiniojuris.org/2010/06/16/marko-milanovic-on-understandings/> (arguing that the Court must consider the understandings as part of the interpretive framework for the treaty).

²¹⁹ Understandings were also employed in connection with the United Nations Convention on Jurisdictional Immunities of States and their Property. U.N. Doc. A/RES/59/38. See David P. Stewart, *Current Development: The UN Convention On Jurisdictional Immunities Of States And Their Property*, 99 AM. J. INT’L L. 194, 209 (2005) (“These understandings formed a critical component of the negotiated solution to various substantive difficulties. In interpreting the convention, the annexed understandings therefore need to be given careful attention.”). See generally ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 237 (2007) (discussing the validity of agreements relating to a treaty made at the conclusion of the negotiations).

²²⁰ Stahn, *supra* note ___, at 879 (noting that the understandings were designed “to enable the court to dismiss frivolous, or politically motivated allegations of aggression and to protect military missions based on self-defence, humanitarian intervention, or other legitimate purposes consistent with the UN Charter.”); Roger 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*, 2 GÖTTINGEN J. OF INT’L L. 689, 698 (2010) (noting that the gravity threshold will apply in “a (rare) case of principled humanitarian intervention or a case more generally where the legality of the action was definitely in doubt.”).

²²¹ See Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT’L L. 631, 643 (2005) (discussing tendency of states to delegate decision-making to international judges when consensus cannot be obtained).

equivocal record suggests that the Court should consider both potential meanings of “manifest”—seriousness and legal certainty—in the aggression context.²²²

One avenue for creating an opening for humanitarian interventions and other potentially lawful or legitimate uses of force that was not fully explored would have been to tinker with the *mens rea* element of the crime of aggression either with respect to the definition of the crime of aggression or even the state act of aggression.²²³ As it stands, the definition of the crime of aggression contains an objective intention/knowledge formulation: the defendant must intend to commit an enumerated act of aggression (bombardment, etc.) and must have knowledge of the factual circumstances that render the act a manifest violation of the Charter.²²⁴ The defendant need not, however, have knowledge of legal doctrine concerning the use of force. If drafters in Kampala had followed much of the Nuremberg jurisprudence²²⁵ and required proof of a heightened mental state—such as a specific intent or motive element to achieve an illegitimate territorial acquisition or political aim or even require some showing of bad faith, malice, willfulness, or hostile intent—they might have provided an additional element to enable the Court to avoid entering into the humanitarian intervention fray and potentially altering the debate through its jurisprudence.²²⁶ As an alternative to a *mens rea* element addressed to the defendant, the amendments could have focused on the state’s intent in engaging in the purported act of aggression, bearing in mind the difficulty of attributing an “intention” to an artificial entity like a state.²²⁷ This was the impulse behind the United States’ proposal to include reference to the state

²²² Kress & von Holtendorff, *supra* note ___, at 1193 n.55 (noting that any use of armed force giving rise to a prosecution for the crime of aggression should be “sufficiently serious” and “its illegality [should be] reasonably uncontroversial.”).

²²³ See Elise Leclerc-Gagné & Michael Byers, *A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention*, 41 CASE WESTERN RESERVE J. INT’L L. 379 (2009).

²²⁴ See *supra* note ___.

²²⁵ In the *High Command Case*, adjudicated pursuant to CCL 10, the tribunal stated that the lawful or unlawful character of a war turns on its purpose: “Whether a war be lawful, or aggressive and therefore unlawful under international law, is and can be determined only from a consideration of factors that entered into its initiation. In the intent and purpose for which it is planned, prepared, initiated, and waged is to be found its lawfulness or unlawfulness.” *Von Leeb*, *supra* note ___, at 486.

²²⁶ The issue of whether some element of specific hostile intent is inherent to the crime of aggression arose in German legal proceedings in connection with the Kosovo intervention. The German Penal Code at Article 80 penalizes “crimes against the peace” and states: “Whoever prepares a war of aggression . . . in which the Federal Republic of Germany is supposed to participate and thereby creates a danger of war for the Federal Republic of Germany, shall be punished with imprisonment for life or for not less than ten years.” Criminal Code (Strafgesetzbuch, StGB) (Nov. 13, 1998) (Ger.), available at <http://www.iuscomp.org/gla/statutes/StGB.htm>. Claims brought under these code sections to prevent Germany’s participation in the Kosovo intervention were rejected on the ground that the purpose of that intervention was to halt crimes against humanity, whereas those code sections were concerned with the preservation of the peace. One commentator, later appointed a Judge of the Federal Constitutional Court of Germany, noted:

Aggressive war was distinguished from a mere violation of the prohibition on the use of force by the specific intent required, namely to disturb the peaceful coexistence of peoples. Thus, the benign motives of NATO action were deemed to be sufficient to exculpate the German government—an argument usually not sustained under German criminal law.

Andreas L. Paulus, *Peace through Justice? The Future of the Crime of Aggression in a Time of Crisis*, 50 WAYNE L. REV. 1, 27 (2004).

²²⁷ See Int’l Crim. Ct., Assembly of States Parties, Resumed fifth session, Discussion Paper Proposed by the Chairman, p. 3, ICC-ASP/5/SWGCA/2, (January 29–Feb. 1, 2007) (defining the threshold as follows: “[An act] which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations . . .

“purpose” in engaging in the impugned conduct. A prior but abandoned German proposal, for example, would have defined an act of aggression with reference to a state policy’s willfulness or hostile intent.²²⁸ In the alternative, the definition could have listed a series of prohibited purposes, such as conquest, establishing a military occupation in the victim state, launching a war of aggression, achieving the annexation of the other state’s territory, acquiring the other state’s material resources, undermining the political independence of the state, ousting a state leadership, or violating a state’s neutrality.²²⁹

Another avenue to address these concerns would have been to rework the defenses to more clearly allow for a consideration of whether the individual or state was motivated by the defense of others at the time of the act of aggression. Although self-defense and the defense of others appear in Article 31 of the Rome Statute,²³⁰ these articles do not easily accommodate “defenses” that might be raised by the putative aggressor state at the stage in the proceedings at which the state act of aggression is under consideration. Presumably, that the predicate state action was in fact a lawful use of force could be raised by the defendant at trial pursuant to Article 31(3), assuming the absence of conflicts of interest between the defendant and the aggressor state government. It is unclear procedurally, however, whether either the impugned state or the victim state would have standing to participate in the aggression determination by the Pre-Trial Division absent amendment to the Statute or Rules of Procedure.²³¹

As it stands, the only way for any party to address potentially unlawful but nonetheless legitimate uses of force is with reference to the tripartite factors of character, gravity, and scale. Drafters did not consider how these quantitative and qualitative factors should be defined or applied, leaving it to the Court for interpretation. Both gravity and scale seem to refer to the severity, magnitude, and consequences of a particular use of force. The term “character,” as a more qualitative term, is the most elastic of the three factors and might provide an opening to argue that an act of aggression was not committed with hostile intent or for aggressive purposes. This, of course, presumes that these arguments are not foreclosed by the rejection of the United States’ proposed understandings on humanitarian intervention.

such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof.”).

²²⁸ See, e.g., Preparatory Commission for the International Criminal Court, Proposal Submitted by Germany, UN Doc. PCNICC/1999/DP.13 (July 30, 1999).

²²⁹ See, e.g., Appendix II, Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression (June 2006—ICC-ASP/5/SWGCA/INF.1) (setting forth various proposals containing such purposes), reprinted in BARRIGA, *supra* note ___, at 141, 158, 160. See also Giorgio Gaja, *The Long Journey Toward Repressing Aggression*, in I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 427, 435-436 (Antonio Cassese et al. eds. 2002) (discussing German and Russian proposals pre-Rome to assert jurisdiction over wars of aggression only).

²³⁰ See *supra* note ___.

²³¹ Delegates did not consider how the extant procedures governing the initiation of *proprio motu* investigations in Article 15 will need to be adapted to the aggression determination by the Pre-Trial Division. Most importantly, as it now stands, Article 15 does not give any participatory rights to states, although subsection 3 permits victims to make representations, and subsection 2 invites the Prosecutor to seek additional information and testimony from states, U.N. organs, non-governmental organizations, and other reliable sources in order to determine the “seriousness” of the information received. By contrast, states are entitled to challenge the jurisdiction of the Court pursuant to Article 19(2)(b), but only on complementarity grounds. The Article 15 process is designed to occur prior to the identification of particular defendants; accordingly, there is no provision for an accused to participate in this process. Absent some amendment or procedural rule to govern the aggression context, it appears that there will be no opportunity for an accused to raise arguments on behalf of the supposed aggressor state at the time of the initial aggression determination.

2. Intervening on Behalf of Women

For those of us concerned about augmenting international law's ability to protect women, should we care about over-detering humanitarian interventions and other uses of force that do not rise to the level of an aggressive war or hostile attack?²³² Many strains of feminism are closely tied to pacifism in rejecting the masculinist impulse to resort to arms in the face of conflict. This approach is alternatively based on an affirmative essentialism or premised on theories of differential socialization.—²³³ Feminists may reject humanitarian intervention on the ground that resorting to armed force may limit our ability to imagine, design, and implement other non-violent forms of conflict resolution.²³⁴ There is also the symbolic concern that the idea of humanitarian intervention furthers a victim narrative by portraying women as in need of a male savior. While humanitarian interventions are ostensibly protective, they are—after all—guarantees of more violence, at least in the short term if not longer.²³⁵ Such operations still valorize militarism and entail the use of armed force, which can cause great destruction, injure civilians, and destroy societies.²³⁶ Doing so in the name of humanitarianism or women does not negate the harm caused.²³⁷ All that said, anyone who is the innocent victim of violence deserves

²³² For a discussion, see Karen Engle, “*Calling in the Troops*”: *The Uneasy Relationship Among Women’s Rights, Human Rights, and Humanitarian Intervention*, 20 HARV. HUM. RTS. J. 189 (2007) (“I am uneasy with the idea that destroying life and infrastructure is a way to demonstrate concern for a particular place or situation, especially when most of history has shown that such intervention—regardless of motivation—rarely improves the lives of the individuals who are the stated subjects of intervention.”). I consider this subject further at Beth Van Schaack, *The Crime of Aggression and Humanitarian Intervention on Behalf of Women*, 3 INT’L CRIM. L. REV. ____ (forthcoming 2011).

²³³ Mary Caprioli, *Gendered Conflict*, 37 J. OF PEACE RES. 51 (2000) (positing with data that domestic gender equality has a pacifying effect on state foreign policy decisions); BETTY REARDON, *SEXISM AND THE WAR SYSTEM* (1985) (portraying woman as inherently peaceful and anti-militaristic). *But see* Charlesworth, *supra* note ____, at 349, 359 and Carolyn M. Stephenson, *Feminism, Pacifism, Nationalism, and the United Nations Decade for Women*, 5 WOMEN’S STUDIES INT’L FORUM 5-6 (1982) (1982) (critiquing the determinative linkage between women and peace).

²³⁴ See Strategic Objective E.3, Beijing Declaration and Platform for Action, Fourth World Conference on Women, U.N. Doc. A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995) (Sept. 15, 1995) (calling on the international community to “[p]romote non-violent forms of conflict resolution and reduce the incidence of human rights abuse in conflict situations.”).

²³⁵ See Peach, *supra* note ____ at 158-9 (critiquing just war theories as overly abstract by overlooking the inevitable suffering and destruction that comes with any use of military force).

²³⁶ Gardam, *supra* note ____, at 265 (noting that the use of force is the “most overly destructive expression of the power of the state”).

²³⁷ The Kosovo intervention, for example, resulted in multiple incidents of “collateral damage” that may have risen to the level of war crimes. After a preliminary examination, the Prosecutor of the ICTY, Louise Arbour, ultimately declined to launch a formal investigation into these incidents—a decision that was not without controversy. See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf [hereinafter “NATO Bombing Report”]; Paolo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 12 EUR. J. INT’L L. 503 (2001) (criticizing Prosecutor’s methodology and results). Her reasoning for not prosecuting was somewhat ambiguous, premised as it was on a complex set of conclusions that “[i]n all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences.” NATO Bombing Report, *supra* note ____, at para. 90. No

to be rescued from her predicament, and encouraging women to exercise their autonomy and agency is simply folly when they are looking down the barrel of a gun.²³⁸ Given these considerations, it is unlikely that feminist thinkers will ever universally come to terms with the idea of a just war.²³⁹

Notwithstanding this ambivalence, many feminists have fought for a more robust intervention in previous conflict zones where women were at risk.²⁴⁰ These calls began anew when the Taliban began imposing a form of gender apartheid²⁴¹ in Afghanistan.²⁴² It was not until the attacks of September 11th, however, that the United States mobilized an intervention in Afghanistan, which was accused of harboring elements of Al Qaida. At that time, the rhetoric surrounding the intervention appropriated feminist concerns about the plight of women under the target government in the service of garnering the support of domestic and international constituencies for the military response.²⁴³ Never, however, has the substantial denial of women's rights—whether civil, political, economic, social, or cultural—served as the sole or primary basis for a humanitarian intervention.²⁴⁴ To be sure, situations in which interventions

doubt power politics also impacted her decision, as prosecutions would not have been politically feasible, given the Tribunal's Security Council provenance.

²³⁸ See Engle, *supra* note ___ at 217-224 (discussing debates among human rights organizations and feminists about the need to intervene militarily in the face of atrocities).

²³⁹ Of course, the feminist perspective on many areas of law is not monolithic, is multifaceted, and is constantly evolving. See Doris Buss, *Is International Criminal Law Feminist?*, in *THE CREATION OF INTERNATIONAL LAW: AN EXPLORATION OF NORMATIVE INNOVATION, CONTEXTUAL APPLICATION, AND INTERPRETATION IN A TIME OF FLUX* (Cecilia M. Bailliet, ed. 2010) (providing a feminist critique of existing doctrines and methodologies of international criminal law) [hereinafter "Buss, *Feminist*"]. For two feminist perspectives on just war theory, see Catharine A. MacKinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT'L L. J. 1 (2006); Lucinda Peach, *An Alternative to Pacifism? Feminism and Just-War Theory*, 9 HYPATIA 152 (1994).

²⁴⁰ See MacKinnon, *supra* note ___.

²⁴¹ See Nancy Gallagher, *The International Campaign Against Gender Apartheid in Afghanistan*, 5 UCLA J. INT'L L. & FOREIGN AFF. 367 (2000). See also Human Rights Watch, *Afghanistan—Humanity Denied* (October 2001), available at <http://www.hrw.org/en/reports/2001/10/29/humanity-denied>; Physicians for Human Rights, *The Taliban's War on Women: A Health and Human Rights Crisis in Afghanistan* (1998).

²⁴² See, e.g., Feminist Majority Foundation, *Stop Gender Apartheid in Afghanistan*, available at http://www.helpafghanwomen.com/Global_Petition_Flyer.pdf. But see Ann Russo, *The Feminist Majority Foundations Campaign to Stop Gender Apartheid: Intersections of Feminism and Imperialism in the United States*, available at <http://www2.hawaii.edu/~dasgupta/RussoFMF.pdf> (arguing that the Feminist Majority Foundation was complicit in the Bush Administration's appropriation of feminist ideas to justify interventions).

²⁴³ See Faiza Hirji, *The War for Women's Freedom: Orientalist Imaginaries of Rescue in Afghanistan* (2005), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/0/1/4/7/9/p14796_index.html (arguing that the rhetoric surrounding the Afghanistan war portrayed Afghan women as in need of salvation to render the intervention more palatable to Western eyes); Ratna Kapur, *Un-Veiling Women's Rights In The 'War On Terrorism'*, 9 DUKE J. OF GENDER L. & POL'Y 211 (2002). The plight of women has also been employed to justify keeping troops in Afghanistan. See Aryn Baker, *What Happens If We Leave Afghanistan*, TIME (Aug. 9, 2010). The magazine has been criticized for cynically using violence against women as propaganda in support of the continued engagement in Afghanistan and presenting a falsely dichotomous dilemma—women remain safe if the foreign troops stay on or women are left to be mutilated if the troops leave. See Derrick Crow, *TIME's Epic Distortion of the Plight of Women in Afghanistan*, RETHINKING AFGHANISTAN (July 31, 2010), <http://rethinkafghanistan.com/blog/2010/07/times-epic-distortion-of-the-plight-of-women-in-afghanistan/>. For more on the propaganda value of rape, see BROWNMILLER, *supra* note ___, at 40-48.

²⁴⁴ Chinkin, *supra* note ___, at 290 ("Oppression and acts of brutality towards women have never been regarded in the same light as slavery, genocide and apartheid") and 291 ("The invisibility of women in any legal justifications for the use of force is striking."). See also MacKinnon, *supra* note ___, at 25 (noting that "it is so far never suggested that brutal systematic violence against women, even with official impunity or participation, could legally justify resort to force unless it occurs as part of a conflagration in which men are also attacking other men.").

have been launched or considered involved violations of women's rights that might have been alleviated with a halt to violence or a change of regime.²⁴⁵ That said, interventions that did go forward have not necessarily benefited women across the board.²⁴⁶ Given this history, it is difficult to support a feminist vision of humanitarian intervention on behalf of women under contemporary conditions, when women are so often excluded from decisions about uses of force.²⁴⁷ Humanitarian intervention may be more palatable to feminists, and ultimately more beneficial to women, were women included in their design and implementation.²⁴⁸

G. Ending Conflicts

In addition to enabling the prosecution of the architects of acts of aggression, the crime of aggression may serve another useful purpose in providing a crime for which amnesties could be strategically offered to exact peace from warring parties and to encourage leaders to order their subordinates to lay down their arms.²⁴⁹ Specifically, promising top leaders amnesty from potential prosecution for the crime of aggression may provide a carrot for peace talks and negotiations,²⁵⁰ assuming of course these individuals are not at risk of being prosecuted for other atrocity crimes within the Court's jurisdiction. In this way, the ability to charge potential defendants for the crime of aggression may reduce conflict not via deterrence, but more indirectly as a tool for negotiators once conflict has already begun. All civilians will benefit if such amnesties can shorten armed conflicts.

Although controversial, amnesties have proved to be useful in effectuating processes of

²⁴⁵ The rapes of women in Bosnia-Herzegovina galvanized the global women's rights movement, which lobbied for the investigation and prosecution of the crimes. See ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE* 178 (1998) (noting that gender crimes abroad became a domestic political issue for United States women). See also *Symposium: Rape as a Weapon of War in the Former Yugoslavia*, 5 HASTINGS WOMEN'S L.J. 1, 1-315 (1994). This movement contributed to the establishment of the ICTY, which was criticized at the time for being a "consolidation prize" in lieu of a more robust military response to atrocities.

²⁴⁶ See *Women Living Under Muslim Laws, Statement on Attacks on the USA* (Sept. 21, 2001), <http://www.wluml.org/node/644> htm (arguing that retaliation against Afghanistan may exacerbate rather than alleviate the situation of women).

²⁴⁷ Chinkin, *supra* note ___, at 279 ("The reality of who is making those decisions [on behalf of the state] and the effect of those decisions upon individuals within States may well take on a different perspective when examined from a gendered viewpoint."); Peach, *supra* note ___, at ("Women remain largely absent from ethical and policy debates regarding when to go to war, how to fight a war, and whether resorting to war is morally justifiable.").

²⁴⁸ Lucinda J. Peck, *An Alternative to Pacifism? Feminism and Just War Theory*, 9 HYPATIA 152 (1994) (noting that women are absent from legal and ethical inquiries about war). See S.C. Res. 1325 (mandating that women be more central to future peace and security initiatives).

²⁴⁹ The Allies did not, for example, prosecute Emperor Hirohito of Japan, notwithstanding that he was viewed by many as the architect of Japanese imperialism. There is speculation that General MacArthur thought the occupation would proceed more smoothly with the emperor in place, albeit with a renunciation of any claims to divinity. The President of the Tribunal (Judge Webb) and the French judge (Judge Bernard) objected in their dissents to the exclusion of the emperor and, as late as 1950, the Soviets advocated for the creation of a special court to try the emperor and other officials who had escaped indictment.

²⁵⁰ Recognizing a right to offer amnesty for this single crime would avoid the controversy surrounding the allegations by Radovan Karadžić that peace envoy orchard Holbrooke offered him immunity from prosecution during the 1996 peace negotiations. See Bruno Waterfield, *US Envoy Richard Holbrooke Did Offer Radovan Karadžić Immunity*, DAILY TELEGRAPH (Sept. 7, 2010), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/5039381/US-envoy-Richard-Holbrooke-did-offer-Radovan-Karadzic-immunity.html>.

transitional justice in formerly repressive regimes²⁵¹ and in demobilizing rebels in the context of non-international armed conflicts.²⁵² As a condition of relinquishing power, the government of General Augusto Pinochet, for example, granted its agents an amnesty in 1978 for any acts committed by government agents in Chile and abroad.²⁵³ Likewise, the amnesty-for-truth tradeoff was central to the negotiated solution in South Africa that enabled the dismantling of apartheid.²⁵⁴ Many human rights organizations oppose the use of amnesties for grave human rights violations under the majority of circumstances, arguing that they further impunity and undercut domestic and international efforts to deter gross violations of human rights.²⁵⁵ Most, but not all,²⁵⁶ domestic courts that have reviewed their own amnesties have upheld their legality.²⁵⁷ By contrast, all human rights bodies²⁵⁸ and international criminal tribunals²⁵⁹ have ruled that amnesties for war crimes, crimes against humanity or genocide violate fundamental principles of justice, including the right of victims to access to justice and truth before a court of law. In addition, other states and international tribunals are not obliged to respect amnesties awarded by domestic authorities.²⁶⁰

²⁵¹ See Carlos Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 Yale L.J. 2619 (1991). One clear exception is Article IX of the 1999 Lomé Peace Agreement in Sierra Leone which neither ended the civil war there nor deterred atrocities. See *Peace Agreement Between the Government Of Sierra Leone and the Revolutionary United Front Of Sierra Leone*, available at <http://www.sierra-leone.org/lomeaccord.html> (“To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF [various militia groups] in respect of anything done by them in pursuit of their objectives as members of those organizations since March 1991, up to the signing of the present Agreement.”).

²⁵² See Article 6(5), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (June 8, 1977) (“At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”). Such amnesties apply only to rebels’ participation in hostilities without the privilege of doing so; they do not apply to potential charges under international criminal law.

²⁵³ See Decree-Law No. 2.191, Diario Oficial No. 30.042 (Apr. 19, 1978) (Chile) stating that (“amnesty is granted to all persons who, as authors, accomplices or accessories, committed crimes during the period of the State of Siege, comprised between September 11, 1973 and Mar. 10, 1978”).

²⁵⁴ See Promotion of National Unity and Reconciliation Act 34 of 1995 (South Africa) [Act 95-34, 26 July 1995], available at http://www.fas.org/irp/world/rsa/act95_034.htm.

²⁵⁵ See, e.g., Amnesty International, *Peru: Proposal to Legalize Impunity Even Further is Unacceptable*, AI Index AMR 46/034/2000, Oct. 24, 2000 (arguing that 1995 Peruvian amnesty law violates international law).

²⁵⁶ See, e.g., Corte Suprema de Justicia [CSJN], 6/14/2005, “Simon, Julio Hector y otros s/ privacion ilegítima de la libertad, etc.,” S. 1767 (XXXVIII) (Arg.), available at <http://www.derechos.org/nizkor/arg/doc/nulidad.html> (invalidating Argentine amnesty scheme).

²⁵⁷ See, e.g., *Azapo v. President of the Republic of South Africa*, (4) SA 653 (1996) (upholding the amnesty law as valid under international law and mandated by the South African Constitution).

²⁵⁸ See e.g., *Almonacid Arellano and Others v. Chile*, Inter-Am. Ct. H.R., Ser. C, No. 154 (Sept. 26, 2006); *Garay Hermosilla v. Chile*, Case 10.843, Report No. 36.96, Inter-Am. C.H.R., OEA/Ser.L/V/II.95, doc. 7 rev. at P9, P66 (1997) (finding Chilean amnesty incompatible with Chile’s human rights obligations).

²⁵⁹ See Decision on Appeal against Provisional Detention Order of Ieng Sary, ECCC, Pre Trial Chamber, Case No. 002/19-09-2007-ECCC/OCIJ (PTC03) (October 17, 2008) (finding that the offenses applicable to amnesty under Cambodian law were not the equivalent of the crimes prosecutable before the ECCC); *Prosecutor v. Kallon*, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Mar. 13, 2004) (refusing to apply Sierra Leonean amnesty).

²⁶⁰ ANTONIO CASSESE INTERNATIONAL CRIMINAL LAW 315 (2003) (“if a court of another State having in custody persons accused of international crimes decide [sic] to prosecute them although in their national State they would benefit from an amnesty law, such court would not thereby act contrary to general international law, in particular to the principle of respect for the sovereignty of other States.”)

As it stands, amnesties for the core atrocity crimes—genocide, crimes against humanity, and war crimes—are generally considered unlawful under international law²⁶¹ and thus are foreclosed as an international negotiating tactic. Most studies on the legality of amnesties do not include the crime of aggression within the list of non-amnestiable crimes,²⁶² suggesting that this may be one ICC crime for which an amnesty might be employed by international negotiators and upheld by the ICC. Of course, this view reflects the fact that aggression has not been criminally charged since World War II. This apparent *opinio juris* may change once the crime becomes prosecutable before the ICC.

H. Distractions and Detractions

Human rights groups,²⁶³ international criminal law personnel,²⁶⁴ government representatives,²⁶⁵ and academics²⁶⁶ have raised concerns that adding the crime of aggression at

²⁶¹ See Ron Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173 (2002) (creating a taxonomy of amnesties and arguing that only amnesties that exchange truth for amnesty and that reflect some measure of democratic decision-making are legitimate).

²⁶² See, e.g., U.N. High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties* 11 (2009), U.N. Doc. No. HR/PUB/09/1, available at http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf (concluding that amnesties for war crimes, crimes against humanity, torture, enforced disappearances, and other gross violations of human rights would be unlawful under international law); U.N. Secretary General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. No. S/2004/616 (Aug. 3, 2004) (“United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.”).

²⁶³ Human Rights Watch, *Making Kampala Count: Advancing the Global Fight Against Impunity at the ICC Review Conference* 99 (2010), available at [http://www.reliefweb.int/rw/lib.nsf/db900sid/DNEO-85CCT2/\\$file/Full_Report.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/DNEO-85CCT2/$file/Full_Report.pdf?openelement). A consortium of human rights organizations, many based in Africa from which all of the current cases before the Court hail, expressed concerns about overburdening the Court with the addition of the crime of aggression to its subject matter jurisdiction. In a letter to foreign ministers circulated on the eve of the Review Conference, this group argued:

[A]sking the ICC to take on another category of crime at present risks overburdening the Court when it is still striving to prosecute and try those responsible for current crimes. Much work is needed to further improve the operation of the Rome Statute system in respect of cooperation, complementarity, the impact on victims and affected communities, and questions of peace and justice. ... Prudently declining to adopt an amendment on aggression at this time, when the Court has such urgent challenges to tackle, is the most effective way to strengthen an institution that is central to combating impunity, and ensuring accountability, for the most heinous international crimes.”

Open Society Institute Cautions Against ICC Review Taking on Aggression (May 10, 2010), http://www.soros.org/initiatives/justice/focus/international_justice/news/icc-aggres.

²⁶⁴ Richard Goldstone, Op-Ed, *Prosecuting Aggression*, INTERNATIONAL HERALD TRIBUNE (May 26, 2010) (“as a young institution, the Court still has much work to do in effectively investigating and prosecuting the crimes over which it already exercises jurisdiction. Cooperation from member states and the relationship between peace and justice are just two vital issues that require sustained attention at Kampala and beyond.”), available at http://www.nytimes.com/2010/05/27/opinion/27iht-edpoint.html?_r=1. Justice Goldstone was Chief Prosecutor of the ICTY in the early days of that institution’s life.

²⁶⁵ Stephen J. Rapp, *Statement to the Review Conference of the International Criminal Court* (June 1, 2010), available at http://www.state.gov/s/wci/us_releases/remarks/142520.htm.

this early stage in the Court's life will detract time and attention from the atrocity crimes, which routinely go unpunished both domestically and internationally and which more directly address gender-based violence. Many groups fear the Court will become bogged down in trying to understand the causes of war—inquiries deemed outside the Court's current institutional competency²⁶⁷—rather than in prosecuting war's consequences. Indeed, the crimes against the peace charge was the linchpin of the Nuremberg and Tokyo indictments and the centerpiece of the final judgments. Notwithstanding the enormity of the Holocaust, the majority of the Nuremberg judgment is devoted to condemning the aggressive acts of Germany—including the invasions of Poland, Czechoslovakia, Austria, and Belgium—in violation of the Kellogg-Briand Pact, various bilateral treaties and assurances of non-aggression, and declarations of neutrality.²⁶⁸ Likewise, the crimes against humanity and war crimes allegations at Tokyo received short shrift in the Tokyo judgment, leading to the invisibility of many crimes committed against civilians in general and women in particular.²⁶⁹

Although the Court has made important advances to date (especially in flushing out its procedural framework), it does not yet have much to show for its eight years of existence. There are, as of yet, no verdicts on the merits. The trials of only three of the six defendants in custody are ongoing, but troubled. Only a handful of defendants are in custody while others flout their arrest warrants. Indeed, none of the Ugandan defendants is in custody despite the fact that these were the first indictments issued.²⁷⁰ Further, an indictment was not confirmed in one of the Sudanese cases,²⁷¹ the high level defendants are at large, the African Union came out against the indictment of Al Bashir²⁷² (although it has been suggested that Libya hijacked the proceedings that generated the preliminary policy statement²⁷³), and aid groups find it difficult to reach those

²⁶⁶ Diane Marie Amann, *Against Aggression*, INTLAWGRRLS, <http://intlawgrrls.blogspot.com/2010/05/against-aggression.html>; Michael J. Glennon, *The Blank-Prosse Crime of Aggression*, 35 YALE J. INT'L L. 71 (2010); Andreas Paulus, *Second Thoughts on the Crime of Aggression*, 30 EUR. J. INT'L L. 1117 (2010).

²⁶⁷ Both the ICTY and the ICTR have included exhaustive historical discussions in their judgments. See *Prosecutor v. Tadić*, Opinion & Judgement, Case No. IT-94-1-T, paras. 53-126 (May 7, 1997) (discussing the history of the war in the former Yugoslavia). See generally Lawrence Douglas, *The Memory of Judgment: Making Law & History in the Trials of the Holocaust* (2001) (arguing that human rights trials should offer a forum for victim testimony and the creation of an "official" historical record). But see Stephen Whinston, *Can Lawyers and Judges Be Good Historians? A Critical Examination of the Siemens Slave Labor Cases*, 20 BERKELEY J. INT'L L. 160, 167-69 (2002) (arguing that errors of history underlie the dismissal of several World War II historical justices cases).

²⁶⁸ See Nuremberg Judgment, *supra* note ___, at 186-224.

²⁶⁹ Ustina Dolgopol, *Women's Voices, Women's Pain*, 17 HUM. RTS. Q. 127 (1995) (discussing invisibility of crimes committed against the so-called comfort women).

²⁷⁰ See Case Information Sheet—*The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo & Dominic Ongwen*, ICC-PIDS-CIS-UGA-001-001/10, available at <http://www.icc-cpi.int/NR/rdonlyres/E7F674DF-C2D8-4A86-98C1-4C9621050D4B/282225/KonyEtAllENG.pdf> (16 June 2010).

²⁷¹ *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges (Feb. 8, 2010) (concluding that the evidence presented did not establish substantial grounds to believe that the suspect committed the charged crimes). The Prosecutor's motion for leave to appeal—which argued that the Pre-Trial Chamber had applied incorrect methods and criteria for evaluating the evidence—was denied. *Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09-267, Decision on the "Prosecutor's Application for Leave to Appeal the 'Decision on Confirmation of Charges'" (Apr. 23, 2010).

²⁷² Fred Ojambo, *African Union Asks United Nations to Suspend Arrest Warrants for al-Bashir*, BLOOMBERG (July 27, 2010), available at <http://www.bloomberg.com/news/2010-07-27/african-union-asks-united-nations-to-suspend-arrest-warrants-for-al-bashir.html>.

²⁷³ The ICC Pre-Trial Chamber issued an arrest warrant for Al-Bashir in March 2009, two weeks before an AU Panel on Darfur was inaugurated. African Union, *Report of the Chairperson of the Commission on the Situation in Darfur*, AU Doc. No. PSC/PR/2(CXCVII) at ¶ 17 (July 21, 2009). The African Union responded by issuing a

in need in Darfur. The indictments themselves are of more limited scope than comparable indictments before the *ad hoc* tribunals,²⁷⁴ although almost all are commendable for their integration of charges of gender-based violence.²⁷⁵ This fear that the inclusion of the crime of aggression in its Statute will distract the Court is especially real given that the Assembly of States Parties has allocated no additional resources to the Court to prosecute this new, controversial, and qualitatively different crime. Arguably, to effectively prosecute the crime of aggression, the various organs of the Court will need to hire staff with appropriate experience and skill sets to evaluate aggression referrals and evidence. Depending on how often the Court faces aggression claims, it may also be necessary to alter the mix of judges to include more experts in public international law at the expense of experts in criminal law and procedure, human rights, humanitarian law (the *jus in bello*), or violence against women and children.²⁷⁶

In addition to overwhelming the Court, investigating and prosecuting the crime of aggression may further politicize the institution, undermining its ability to undertake its core mandate.²⁷⁷ One fear is that states will use their referral powers opportunistically to trigger investigations into inter-state grievances over territory, foreign policies, arms control, the drug trade, secessionist movements, and the like.²⁷⁸ The risk that states parties will manipulate the Court for their own ends is perhaps more acute now that delegates have decided not to allow an exclusive Security Council filter for state referral cases and to instead empower the Pre-Trial Division to approve aggression charges in the event of Security Council inaction.²⁷⁹ Even if indictments do not issue or the Court rejects the charges, the risk of destabilization is ever-present.²⁸⁰

formal decision that its member states would not cooperate with the execution of Al-Bashir's arrest warrant. African Union, *Decisions on the Meeting of African States Parties to the Rome Statute of the International Criminal Court*, AU Doc. No. Assembly/AU/13(XIII), ¶10 (July 3, 2009). It has since rejected the ICC's request to open a Liaison Office to the AU in Ethiopia. African Union, *Press Release: Decisions of the 15th AU Summit*, No. 104 (July 29, 2010). See generally *AU to Shelter al-Bashir from War Crimes Warrant*, MAIL & GUARDIAN ONLINE (July 4, 2009), <http://www.mg.co.za/article/2009-07-04-au-to-shelter-albashir-from-war-crimes-warrant>.

²⁷⁴ See Office of the Prosecutor, *Draft for Discussion: Criteria for Selection of Situations and Cases* 9-10 (June 2006) ("the OTP will bring a relatively limited number of cases that are representative of the overall scope of the crime, against those bearing the greatest responsibility for the most serious crimes").

²⁷⁵ See Beth Van Schaack, *Atrocity Crimes Litigation: 2008 Year-In-Review*, 7 NW. U. J. INT'L HUM. RTS. 170, 207-8 (2009) (canvassing cases).

²⁷⁶ Rome Statute, Article 36 (setting forth the qualifications of judges).

²⁷⁷ Human Rights Watch, *supra* note ___, at 99 ("Taking up prosecutions of aggression could link the ICC to highly politicized disputes, such as border incursions, territorial disputes, and secession movements supported by external state actors. Inserting the court into these disputes may well give rise to perceptions of political bias and instrumentalization—even if such perceptions are wholly unfounded. This, in turn, could damage the interested public's trust in the court's legitimacy and ability to address genocide, war crimes, and crimes against humanity.").

²⁷⁸ In this way, having an international court in which to initiate prosecutions for the crime of aggression against individuals may also diminish the invocation of principles of state responsibility in other fora, such as the International Court of Justice. Indeed, "[i]nternational criminal prosecutions enable the state to be rehabilitated through the criminalization of a particular regime." Buss, *Feminist*, *supra* note ___, at ___ (citing GERRY SIMPSON, *LAW, WAR AND CRIME: WAR CRIMES TRIAL AND THE REINVENTION OF INTERNATIONAL LAW* ch. 3 (2007)). This, in turn, may undercut claims for more broad-based reparations or more far-reaching structural reforms in the aggressor state. At the same time, a ruling by the ICC that a state committed an act of aggression may provide a precedential platform for such claims.

²⁷⁹ See *supra* note ___.

²⁸⁰ David Scheffer, *The Complex Crime of Aggression Under the Rome Statute*, 23(4) LEIDEN J. OF INT'L L. 897, 899-900 (2010).

The Council's five permanent members—Great Britain, China, France, Russia and the United States—and some of their close allies had favored a system that allowed the Security Council to serve as a gatekeeper to any prosecution for aggression. Detractors had worried that such an arrangement would undermine judicial independence, render the Court a tool for the Security Council, and lead to unequal justice.²⁸¹ At the same time, the Council might have been in a better position than the Pre-Trial Division to ferret out abusive or fallacious claims that are more likely to exacerbate international tensions than alleviate them. Indeed, externalizing the filter process to the Council may have actually decreased actual or potential politicization by allowing the Court to focus on the attribution of individual criminal liability rather than inserting it into political disputes that may give rise to the perception of bias.

V. Conclusion

Notwithstanding this hyper-visibility in the post-WWII period, crimes against the peace all but disappeared from the international criminal law pantheon in the Cold War period. The international community is now poised to recommit to prosecuting the crime, thus completing the Nuremberg legacy and fully adapting the Nuremberg Principles to the modern era.²⁸² If we care about what happens to women in war, we should do everything in our power to decrease the incidence of war in the first place. It is too early to tell whether the inclusion of the crime of aggression in the Rome Statute will be able to do this. Indeed, this Article has reached no firm conclusion on how feminists should think about whether the newly codified crime of aggression will improve the lives of women. Both the definition of the crime and the jurisdictional regime contain elements that may be helpful, neutral, or even harmful to the interests of women.

Certainly prosecuting the crime of aggression is not the only, or even best, way to decrease inter-state violence. But, it is the path that the international community is now on.²⁸³ Once again, we find ourselves asking the “woman question” in a reactive posture²⁸⁴ and engaging in a continuing task of determining how legal doctrines and frameworks—which women played little hand in generating—affect women. Although at this early stage I am left holding contradictory thoughts about the utility of codifying the crime of aggression, at a minimum, a number of pitfalls to incorporating the aggression amendments into the Rome Statute are already visible. These should be kept on the forefront of our minds and conversations as this crime is operationalized and a procedural regime is developed for its prosecution. Since this is a path that the international community is on, we should endeavor to make sure it goes in the right direction. Moreover, we should not lose sight of alternative solutions to ending violence as we imagine a more peaceful world. The world's women deserve nothing less.

²⁸¹ Amnesty International, *International Criminal Court: Making the Right Choices at the Review Conference*, IOR 40/008/2010, 11 (2010) (arguing that the Court should not be under the political control of the Council).

²⁸² Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (1950), available at <http://www.icrc.org/ihl.nsf/FULL/390?OpenDocument>.

²⁸³ Buss, *supra* note ___, at ___ (“When faced with an existing institutional apparatus ... feminist advocates often do not have the luxury of opting out. The realm of legal and political work for feminists has, to a degree, already been defined.”).

²⁸⁴ Bartlett, *supra* note ___, at 836, 837.