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Collapsing Legitimacy: How the Crime of Aggression could affect the ICC's legitimacy

ABSTRACT

The ICC will gain the capacity to prosecute the crime of aggression in 2017. The Amendments to the Rome Statute are the product of a political compromise and have a complex legal structure with a high definitional threshold for an act of aggression alongside a bespoke jurisdictional arrangement. This legal structure is likely to mean that very few acts of aggression are considered crimes. Even when acts of aggression pass the threshold set out in the amendments, it is highly likely that any such prosecution would not succeed. This paper argues that this is likely to significantly impact the legitimacy of the ICC as an organization. To understand this, it is necessary to look at the different meanings of legitimacy before examining how the way in which the law is configured could undermine the political legitimacy of the organization as a whole.

1. Introduction

In 2017, the Kampala amendments to the Rome Statute will come into force, giving the International Criminal Court (ICC) jurisdiction over the crime of aggression. On the face of it, this seems a logical step in the ICC's development, as whilst it can currently prosecute crimes perpetrated during wars, it lacks the power to prosecute those bearing the greatest responsibility for starting conflicts. The ICC's exercise of jurisdiction in Africa, in particular in Sudan, Libya, and Kenya, has caused significant controversy and whilst part of this hostility is the result of political double standards on the part of some states, it has had a wider impact on the legitimacy of the court as an institution.¹ The ability of the court to prosecute the causes of the conflict could contribute to addressing these legitimacy problems,

¹ See Lyla Sunga, 'Has the ICC unfairly targeted Africa or has Africa Unfairly targeted the ICC?', in Triestino Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity* (Routledge, 2014) pp. 147-173.

and bring to justice those who are responsible for starting conflicts. Yet, there have been some concerns about the crime of aggression in the Rome Statute. Sean Murphy, in a commentary on the drafting of the Amendments to the Rome Statute on the crime of aggression prior to their adoption at the 2010 Kampala Conference, argued there was a danger that a lack of clarity in the provisions could lead to the ‘compliance pull’ of the law being weakened.²

The legitimacy of the ICC as an organization has been the subject of some considerable attention in recent years. Early discussions of the ICC’s legitimacy focused on institutional and legal questions, such as the scope of prosecutorial discretion.³ After the controversy surrounding the indictment of Sudanese President Omar Al-Bashir, there was a closer debate about the extent of the organization’s powers and its role as an international actor, with some of these discussions revolving around questions of bias and politicization.⁴ More recently, there have been attempts to examine both the philosophical grounding of the court’s legal framework and its ability to produce efficacious outcomes.⁵ The announcement by the Kenyan and South African governments that they are considering or are withdrawing from the ICC has triggered a wider legitimacy crisis for the court. The universalist notions the court sought to project have been undermined by functional problems of legitimacy, such as its focus on Africa and the non-cooperation by major states. This paper argues that these

² Sean D. Murphy, ‘Aggression, Legitimacy and the International Criminal Court’, 20 *European Journal of International Law* (2009) 1147, 1148.

³ See Alison Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’, 97 *AJIL* (2003) 510.

⁴ Elise Keppler, ‘Managing setbacks for the International Criminal Court in Africa’, 56 *Journal of African Law* (2012) 1-14. See also: Abdul Tejan-Cole, ‘Is the icc’s Exclusively African Case Docket a Legitimate and Appropriate Intervention or an Unfair Targeting of Africans?’, *Contemporary Issues Facing the International Criminal Court* (Brill, 2016), pp 366-379, www.booksandjournals.brillonline.com/content/books/b9789004304451s043, 27 September 2016.

⁵ See respectively, Antonio Franceschet, ‘The International Criminal Court’s Authority Crisis and Kant’s Political Ethics’, 16 *International Criminal Law Review* (2016) 201 and Kay Sheffield, ‘Speak Softly and Carry a Sealed Warrant: Building the International Criminal Court’s legitimacy in the wake of Sudan’, 18 *Appeal: Review of Current Law and Law Reform* (2013) 1.

existing problems of legitimacy will be actively worsened by ICC's acquisition of jurisdiction over the crime of aggression.

This is due to the structure of the law itself which defines the new crime in a manner which significantly limits the types of action that may be classed as aggression and has a jurisdictional regime even more restrictive than the Rome Statute currently has. The Kampala Amendments will severely limit the number of actual instances of armed intervention the court is able to prosecute and it is quite possible that the ICC will not be able to bring a successful prosecution for the crime of aggression at all. Recent scholarship has identified a link between the pragmatic legitimacy of the ICC, that is its ability to relate to stakeholders and appear legitimate in their eyes, and its overall legitimacy as an organization.⁶ This link is likely to be severed as the ICC will gain jurisdiction over the crime of aggression but be practically unable to utilise this newly acquired power, calling the wider authority of the organization into question and contributing to existing concerns about the court's lack of legitimacy.

The first part of this article analyses the nature of the ICC's legitimacy as an organization and how the assumption of the responsibility for the crime of aggression changes it. In this context, it becomes important to distinguish between the original legitimacy of an organization, which relates to a normative claim to legitimacy, and its functional legitimacy, which concerns the institutional ability produce results. With respect to the crime of aggression, the latter form of legitimacy is likely to affect the former, as the failure of the ICC to successfully prosecute acts of aggression will weaken the legitimacy of the organization as a whole. The reasons for this are explored in the second and third sections of this article, which analyses the structure of the Kampala Amendments. In section two, the

⁶ Janine Natalya Clark, 'International Criminal Courts and Normative Legitimacy: An Achievable Goal?', 15 *International Criminal Law Review* (2015) 763.

definition of the crime of aggression under the Amendments is unpacked to show just how limited a definition of aggression they contain. Within this narrow definition, however, one act of aggression which could be prosecuted is illegal humanitarian intervention. Yet, as the third section demonstrates, due to the jurisdictional provisions of the Amendments and the procedural regime at the ICC, it is highly unlikely that a successful prosecution will take place in such circumstances.

2. The Legitimacy of the ICC and the Crime of Aggression

The concept of legitimacy, David Hurd argues, is the ‘normative belief by an actor that a rule of institution ought to be obeyed.’⁷ It is important to emphasise the ‘ought’ in this statement, as this is not a description of an empirical condition of compliance or obedience. Rather, it is a description of a type of belief in a source of authority that an actor may hold.⁸ International institutions do not have coercive powers in the same way that domestic institutions are able to compel compliance. In any event, as scholars have pointed out, coercing individuals into obedience is distinct from the normative belief that such obedience ought to happen.⁹ In the international system, as Jutta Brunnée and Stephen Toope argue, legitimacy is best understood as the capacity of an institution or legal regime ‘to generate fidelity to the rule of law itself’.¹⁰ This does not mean that there will be universal compliance with the law but does mean that there is a shared understanding that a particular institution issues decisions that are fair and ought to be followed. This is the broad definition of the word legitimacy adopted in this article.

⁷ Ian Hurd, ‘Legitimacy and Authority in International Politics’, 53 *International Organization* (1999) pp. 379-381.

⁸ On the issue of authority and legitimacy, see Joseph Raz ‘Introduction’, in Joseph Raz (ed.), *The Authority of the Law* (New York University Press, 1990).

⁹ See Allen Buchanan, ‘The Legitimacy of International Law’ in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, (Oxford University Press, 2010).

¹⁰ Jutta Brunnée and Stephen Toope *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) 53.

However, this does not say much about how legitimacy is generated. Thomas Franck's view was that legitimacy in international law is created by the perception that rules were constructed 'fairly' by a transparent system.¹¹ This, as Brunnée and Toope point out, is a highly positivist conception of how legitimacy comes into being, and, they argue, that legitimacy is constructed by the interaction of actors in the international system.¹² It is the latter view of legitimacy's origin that is taken in this article, since this appears to be the case in relation to the ICC. The Rome Statute has 124 state parties making the ICC, from a positivist perspective, a legitimate actor, but as shown below, the ICC's actions as a political agent have gradually destabilized its authority as an organization. To understand the legitimacy of the ICC, it is necessary firstly to unpack the different types of legitimacy, before looking at what changes may occur after the court assumes jurisdiction for the crime of aggression.

2.1 Original and Functional Legitimacy

It is important to distinguish between normative legitimacy, whether an institution has a right to rule in a moral or philosophical sense, and descriptive legitimacy, whether as a matter of fact it enjoys 'a reservoir of support that makes people willing to defer' to the institution even when it issues 'unpopular decisions.'¹³ The institutional authority which enables an organization to deliver judgments that are regarded authoritative irrespective of their content, is sometimes called 'content independent legitimacy'.¹⁴ Another way of framing this categorization is offered by Jean D'Aspermont and Eric De Barabandre, who outline a distinction between the 'legitimacy of origin' of an institution and its functional legitimacy

¹¹ Thomas Franck *Fairness in International law and Institutions* (Oxford University Press 1995) pp.7-8.

¹² Brunnée and Toope *Supra* Note 10

¹³ Daniel Bodansky, 'Legitimacy in International Law and International Relations' in Jeffery Dunoff and Mark Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013) 327.

¹⁴ Stephen Wheatley, 'On the legitimacy of international Human Rights Bodies' in Andreas Føllesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (Cambridge University Press, 2015), 141.

which is based on its exercise of power. D'Aspermont and De Barabandre argue that although consideration of the legitimacy of an international organization has 'classically been based on the legitimacy of exercise', this has been increasingly supplanted by arguments about the legitimacy of origin.¹⁵ Hitomi Takemura differentiates the normative legitimacy of the ICC, which concerns questions of 'the authority of law', from the sociological legitimacy, which concerns attitudes towards that authority.¹⁶ This suggests the existence of a relationship of the sort described by D'Aspermont and De Barabandre as the classic theory of organizational legitimacy, where the legitimacy of exercise informs the debate about the legitimacy of origin.¹⁷

Debates about the ICC's legitimacy have to date been focused the other way round, with the legitimacy of origin being seen as vital to the legitimacy of exercise. For example, the criticism that the ICC is imperialist because of principally targeting African defendants is predicated in part on the relative marginalization of states from the global South in the construction of the ICC.¹⁸ Therefore, in the case of the ICC, it seems that there is a stronger connection between the two forms of legitimacy. In view of the academic literature on the subject, this paper suggests that the jurisdiction over aggression if not accompanied by practical results, will undermine what can be described as the functional legitimacy (referred to above as legitimacy of exercise and descriptive legitimacy) of the ICC as an organization. This, in turn, has the potential to weaken the original legitimacy of the ICC (referred to above as normative or legitimacy of origin), compromising its ability to command authority which is essential for a tribunal. The ICC is already experiencing this process with the withdrawal of

¹⁵ Jean d'Aspremont and Eric De Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise', 34 *Fordham International Law Journal* (2011) 190-192.

¹⁶ Hitomi Takemura, 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court', 4 *Amsterdam Law Forum* (2012) 3-5.

¹⁷ D'Aspermont and De Barabandre, *supra* note 15.

¹⁸ See Immi Tallgren 'Who are 'we' in International Criminal Law? On critics and membership' in Christine Schwöbel (ed.) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2013).

South Africa and other states. In these cases, the criticism of the ICC has revolved around problems of functional legitimacy – Deputy South African President Cyril Ramaphosa described South Africa’s withdrawal as a ‘critique of the manner in which the institution has functioned.’¹⁹ However, this has the effect of undermining elements of the original legitimacy of the ICC, in particular the idea that the court is an institution that can promote universal justice.

2.2 *The original legitimacy of the ICC*

The debates on the ICC’s original legitimacy are best understood by acknowledging that the court is caught between two different conceptions of its institutional role. Firstly, there is the ‘court of last resort argument’. Cherif Bassiouni argues that the ICC was ‘never intended to be a supra-national legal institution’ and that its purpose was to act as some form of juridical ‘safety net’ which, under the terms of the Rome Statute, would complement national and regional jurisdictions.²⁰ This interpretation holds that the ICC’s original legitimacy is largely based on the notion of state consent, although consenting to join an organization does not automatically make it legitimate.²¹ It also ignores the difficult balancing act that being a court of last resort entails. As Thomas Hansen notes, the ICC has often experienced tensions between its ‘universalist’ mission and the necessity to engage in ‘realpolitik’ to build trust as an organization.²² In general terms, consent based arguments for the legitimacy of the ICC do not fully account for the way that the court has evolved, nor does it address the differences among its various institutional bodies, such as the independent Office of the Prosecutor, which constitute an actor within the ICC system in its own right.

¹⁹ Gay Davis ‘Ramphosa Defends South Africa’s Withdrawal From ICC’ Eyewitness News 9 November 2016 <http://ewn.co.za/2016/11/09/ramaphosa-defends-south-africa-s-withdrawal-from-icc>

²⁰ M Cherif Bassiouni, ‘The ICC — Quo Vadis?’, 4(3) *Journal of International Criminal Justice* (2006) 421.

²¹ See Samantha Besson, ‘The Authority of International Law –Lifting the State Veil’, 31(3) *Sidney Law Journal* (2009) 343.

²² Tomas Hansen, ‘The International Criminal Court and the Legitimacy of Exercise’, in Per Andersen et al. (eds.), *Law and Legitimacy* (DJOEF Publishers, 2015).

A second conception of the ICC's institutional identity is that it is a supranational organization designed to override national jurisdictions in order to protect fundamental human rights and safeguard the international community. This view of the ICC is defended by Aaron Fichtelberg, who claims that the court possesses a 'normative legitimacy' which justifies its overriding the decisions of sovereign states.²³ Such an understanding makes an appeal to the transcendent authority of human rights, and provides an alternative basis for the court's legitimacy. This cosmopolitan form of argument assumes that the ICC's institutional power is vested above the existing constraints of statehood in the international system, empowering it to enforce international law in the interests of humanity itself. Also, there is the notion that the ICC gains a crucial component of its legitimate authority over state parties because it is an institution that acts for the welfare of people at large and protects individuals from international crimes.²⁴ Some state parties to the ICC have openly endorsed this view, with the German and Polish delegates at the Seventh Session of the Assembly of State Parties praising the court for its role in strengthening the 'rule of law all over the world' and describing international criminal justice as a cause in and of itself.²⁵

2.3 *The Original Legitimacy of the Crime of Aggression*

It is also important in the context of the argument in this article to illustrate the difference between the legitimacy of an organization and the legitimacy of the international law that an organization intends to enforce. The two questions are often related and have been considered as one and the same. Thomas Franck identified four key indicators of legitimacy in his 1990 work *The Power of Legitimacy Among Nations* that would contribute to an international institution or legal regime being believed to be legitimate: symbolic validation, determinacy,

²³ Aaron Fichtelberg, 'Democratic Legitimacy and the International Criminal Court: A Liberal Defence', 4 *Journal of International Criminal Justice* (2006) 765.

²⁴ For an explanation of this form of legitimacy, see Jean-Marc Coicaud, 'Deconstructing International Legitimacy', in Hilary Charlesworth & Jean-Marc Coicaud (eds.), *Fault Lines of International Legitimacy* (Cambridge University Press 2010) pp. 52- 57.

²⁵ Emilia Justyna Powell 'Two Courts Two Roads: Domestic Rule of Law and Legitimacy of International Courts', 9 *Foreign Policy Analysis* (2013) 349-357.

coherence, and adherence.²⁶ Franck did not distinguish between the law and the organization but the legitimacy of the two has become distinct as the relative power and autonomy of international organizations have increased in the mid-late 1990s. The capacity of institutions to generate their own internal law and use their own precedents to shape the interpretation of international law has to some extent redefined the substance of state obligations in international law.²⁷ This means that while the original substance of a law may have broad legitimacy, it is possible that the specific institution interpreting this law lacks legitimacy. On the face of it, this has been the thrust of some of the AU's criticism of the ICC, which acknowledged the importance of ending impunity and taking action against the perpetrators of international crimes, but questioned whether the ICC is the appropriate forum.²⁸ Whilst this position has often been associated with a broader political rhetoric attacking international law, it provides an illustration of how the legitimacy of the law and the legitimacy of international institutions can be distinguished from one another.²⁹

The crime of aggression as a concept in international criminal law has a slightly different original legitimacy than that of the ICC. It can be split into two parts: the origin of the concept of individual criminal accountability and the enhancement of the international rule of the law. Individual criminal liability for aggression dates back to shortly before the drafting of the Treaty of Versailles, when the British and the French discussed the possibility of putting Kaiser Wilhelm II on trial for starting the First World War. Yet, it was only after the next world war, at the Nuremberg International Military Tribunal (IMT) in 1945, that this was actually put into practice against Nazi leaders, with the IMT Charter describing

²⁶ Tomas Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990).

²⁷ Basak Çali, 'The Legitimacy of international interpretative authorities for human rights treaties: an indirect instrumentalist defence' in Andreas Føllesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (Cambridge University Press, 2015) 141.

²⁸ See Kurt Mills, 'Bashir is Dividing Us: Africa and the International Criminal Court' 34 *Human Rights Quarterly* (2012) 404.

²⁹ The political context of the criticism of the ICC from some states is analysed in Rowland Cole, 'Africa's Relationship with the International Criminal Court with the International Criminal Court: More Political than Legal' 14 *Melbourne Journal of International Law* (2013) 670.

aggression as the supreme crime since it ‘contains within itself the accumulated evil of the whole’.³⁰ This is based on the notion of projecting a form of public morality within the international order by locating and identifying individual enemies against the community.³¹

The other source of the crime of aggression origins lies in Article 2 of the UN Charter, which is aimed at prohibiting armed intervention against another state in order to maintain the international rule of law. As William Schabas notes, this is also reflected in the UN Declaration of Human Rights as well as in a number of other international instruments.³² The specific internationally prohibited practice, considered *jus cogens*, is interference in another state using illegal force, and while some scholars have argued that this is a narrow or contradictory principle, the general rule of non-use of force has become a central component of the international legal order.³³ The General Assembly Resolution on Aggression follows this approach, describing aggression as ‘a crime against international peace’ which gives ‘rise to international responsibility’. However, the Resolution does not spell out criminal sanctions nor does it create a regime of enforcement for the crime.³⁴ The main difference between this source and the criminalisation approach is that this focuses on strengthening existing institutions and the promotion of norm adherence, rather than on individual punishment for the act.

2.4 Normative expectations upon the assumptions of the crime of aggression

The ICC has acquired jurisdiction for a specific version of the crime of aggression defined by the Kampala Amendments. Nevertheless, in light of the above discussion on the original

³⁰ ‘Judgment of the Nuremberg International Military Tribunal’, 41 *American Journal of International Law* (1946) pp. 147-172.

³¹ David Luban ‘Jurisdiction, Legality and the Legitimacy of International Criminal Law’ (2008) *Georgetown Public Law Research Paper N. 1154117*.

³² William Schabas, ‘Aggression and International Human Rights Law’ (2015) forthcoming, e-print available at <www.eprints.mdx.ac.uk/20127/1/9781107165922c12_p351-372%20copy.pdf> 27 September 2016

³³ See Niki Aloupi ‘The Right To Non-intervention and Non-interference’, 4 *Cambridge Journal of International And Comparative Law* (2015) 566; and Ulf Linderfalk, ‘The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?’, 18 (5) *European Journal of International Law* (2008) 853.

³⁴ GA Res 3314 (XXIX) 14 December 1974.

legitimacy of both the ICC as an organization and the crime of aggression as a concept in international law, the activation of jurisdiction over aggression tends to create normative expectations for the ICC, which will then have an effect on the court's original legitimacy.

Three factors can explain this process.

Firstly, the role of the ICC in enforcing the international rule of law, which falls under the second conception of the ICC's original legitimacy detailed in 2.2 of this paper, will be enhanced by its authority to adjudicate on issues of aggression. The court is now being expected to rule on the causes of armed conflict, giving it a greater role in the promotion of the international rule of law, one which international criminal law has been reluctant to undertake since the 1950s because of the political complexities involved in such cases.³⁵ As McCabe notes, the evolution of the crime of aggression post 1945 has focused on 'political pariahs', which are often relatively 'soft' cases, politically speaking.³⁶ Although the fact that the jurisdictional regime under Article 15 *bis* of Amendments has the potential to exclude a large number of states was noticed in Kampala –as Japanese delegate claimed, the jurisdictional regime adopted 'unjustifiably solidifies blanket and automatic impunity of nationals of non-State Parties' to the amendments on the crime of aggression,³⁷ there is clearly expectation that the Amendments will improve the ICC's existing role in enforcing the rule of law –Ban Ki Moon, the then UN Secretary General, declared in a press release at the time that the crime of aggression in the ICC would strengthen the 'fight against impunity.'³⁸

³⁵ Sergey Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (Springer, 2014).

³⁶ A. McCabe, 'Balancing "Aggression" and Compassion in International Law: The Crime of Aggression and Humanitarian Intervention', 83 (2) *Fordham Law Review* (2014) pp.991 -992.

³⁷ Patrycja Grzebyk, *Criminal Responsibility for the Crime of Aggression* (Routledge, 2013) p.127.

³⁸ UN News Centre 'After years of debate, ICC Member States agree on definition of aggression' 14 June 2010 <http://www.un.org/apps/news/story.asp?NewsID=35018#.WBy3K9WLSig> accessed 4 November 2016.

Secondly, the ICC, having assumed the jurisdiction over the crime of aggression, has undertaken the specific function of cementing the norm prohibiting the use of force in international relations in its institutional framework. As Luban notes, one crucial function of international criminal tribunals is ‘their role in norm projection’.³⁹ Therefore, through taking responsibility for the crime of aggression, the ICC is expressly assuming the duty to promote norm adherence in the realm of state’s use of force. Nevertheless, this may be problematic in practice since the prohibition on the use of force is a norm that is subject to a range of contradictory practices.⁴⁰ For example, as John Strawson notes, the Indian invasion of Goa in 1961 to enforce the right to self-determination was in a strict reading of the law, illegal, since the UN Declaration on the Granting of Independence to Colonial Countries and Peoples did not provide a regime for enforcement; yet, at the time, there were few doubts that the Indian government’s actions would be considered a legitimate use of force.⁴¹ Given the complex, and often contradictory interpretation of this norm, the court will have to make difficult political choices when deciding to initiate investigations into acts of aggression. In an Opinion Piece written shortly before the Kampala Conference, Richard Goldstone, the former prosecutor at the International Criminal Tribunal for the former Yugoslavia, noted the risk that this would give ‘ammunition to critics who claim it is a politicized institution.’⁴²

Thirdly, with the existence of a crime comes the expectation of punishment for the perpetrators of that crime. As Schabas notes, if aggression is viewed ‘as the supreme crime’ then it becomes the channel whereby other international crimes find ‘their place’.⁴³

Acquiring jurisdiction for the crime of aggression can be seen either as an enhancement of the ICC’s existing legitimacy of origin or the creation of an alternate basis for this form of

³⁹ Luban, *supra* note 31, p. 9.

⁴⁰ Linderfalk, *supra* note 33.

⁴¹ John Strawson, ‘Provoking international law: war and regime change in Iraq’, in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds.), *Events: The Force of International Law* (Routledge, 2011) 260.

⁴² Richard Goldstone ‘Prosecuting Aggression’ New York Times 26 May 2010
<http://www.nytimes.com/2010/05/27/opinion/27iht-edpoint.html> accessed 4 November 2016.

⁴³ Schabas, *supra* note 32.

legitimacy that is contingent on the court actually contributing to the process of peace-making. The crucial element behind criminalization of conduct in International Criminal Law, as Kai Ambos puts it, is the existence of a '*ius puniendi* ... the right or authority to punish' in law.⁴⁴ Thus, the entire process of criminalizing a practice presupposes punishment and the normative effects of punishment, such as deterrence. Indeed, there was a strong presumption during the process leading to the adoption of the Kampala Amendments that the ICC's ability to prosecute individuals for illegal war-making would, as Claus Kress notes, 'increase the pressure on state leaders to refrain from aggression'.⁴⁵ Clearly, such an authority can easily be considered an enhancement of the cosmopolitan justification for the ICC's original legitimacy.

The above considerations provide an outline of how the ICC's original legitimacy would be affected by the activation of its jurisdiction on the crime of aggression. However, as the next section shows, these normative expectations are likely to be frustrated by the structure of the law itself, thus creating a functional legitimacy problem for the ICC.

3. The Crime of Aggression under Article 8 *bis*

The definition of the crime of aggression under Article 8 *bis* of the Kampala Amendments imposes three basic requirements for an inter-state use of force to qualify as an offence under the Rome Statute. The first condition is that there is an act of aggression which Article 8 *bis* describes as 'the use of force by a State against the sovereignty, territorial integrity or political independence of another State'.⁴⁶ The second requirement is that there is the 'planning, preparation and initiation' of the act of aggression by an individual who could

⁴⁴ Kai Ambos 'Ius puniendi and individual criminal responsibility in international criminal law' in Róisín Mulgrew and Denis Abels, *Research Handbook on the International Penal System* (Edward Elgar, 2016) 58.

⁴⁵ Claus Kress, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus', 20 *European Journal of International Law* (2009) 1129-1135.

⁴⁶ *Amendments to the Rome Statute of the International Criminal Court on the crime of aggression*, Resolution (RC/Res.6, 17-22).

exercise control over state forces. This provides a definition of aggression with reference to actions and modes of participation instead of an indication as to the objectives of the crime, leaving open the prospect of prosecuting a head of government.⁴⁷ During the drafting of the Kampala Amendments, states decided not to include considerations of purpose to establish the mental element of the crime; thus, for an act of aggression to be considered culpable under the Amendments, it must be committed with simple intent and knowledge.⁴⁸ The third requirement, and probably the most limiting one, is that there must be a ‘manifest violation’ of the UN Charter, to be assessed by the act’s character, gravity and scale. This constitutes a threshold clause to the crime of aggression and as the handbook on the implementation of the Kampala Amendments makes clear, it is intended to confine prosecutions to ‘unambiguously illegal instances of the use of force.’⁴⁹

Overall, the definition of the crime adopted in Kampala imposes a high threshold of illegality which will exclude military interventions falling within the grey zone that permeates the law on resort to force. As the law on the use of force as applied to state practice is ambiguous and the absence of express legality does not necessarily mean absolute illegality, most cases of inter-state violence will not qualify as crimes of aggression. Applying the Kampala Amendments to instances of past interventions reveal that the adopted definition of the crime of aggression is both over-inclusive and under-inclusive and, as such, it will be difficult for the ICC to exercise its new jurisdiction in a coherent manner, hence leading to wider legitimacy problems for the court.

3.1 Military Interventions Likely to Qualify as Crimes of Aggression

⁴⁷ Sayapin, *supra* note 35, p. 255.

⁴⁸ Mathew Gillett, ‘The anatomy of an International Crime: Aggression at the International Criminal Court’, 13 (4) *International Criminal Law Review* (2013).

⁴⁹ Liechtenstein Institute on Self-Determination, *Handbook: Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC: Crime of Aggression, War Crimes* (Princeton, 2012) p.8.

The UN Charter prohibits recourse to force by states and invests the Security Council with the sole authority to regulate collective policies concerning international security. Chapter VII of the UN Charter contains two core exceptions to the prohibition of force: Article 42 allows the Security Council to take military action in order to ‘maintain or restore international peace and security’ and Article 51, preserves ‘the inherent right of individual or collective self-defense’ in the event of an armed attack.⁵⁰ Therefore, military actions of a non-defensive sort without UN authority cannot be legally justified and will be considered as acts of aggression under Article 8 *bis* of the Amendments to the Rome Statute.⁵¹

An obvious example of a military action that would qualify as aggression is the 1990 invasion of Kuwait by Iraq, which in spite of Iraqi protestations to the contrary, was condemned by the UN Security Council as an illegal use of force.⁵² The scale of the action, which involved the occupation of Kuwait, would almost certainly cross the manifest violation threshold envisaged by the Kampala Amendments. The US and UK invasion of Iraq in 2003, was not authorized by the UN Security Council and not justified on Article 51 grounds. Although the invading countries presented a ‘residual thesis’ according to which the violation of one Security Council Resolution could revive the authorization of the use of force in another Resolution, there are serious doubts as to whether this could provide any legal grounds for the operation.⁵³ The Chilcot Report into the causes of the 2003 Iraq War, treats this with considerable scepticism, concluding that there were no grounds for believing in the existence of a residual right for states to unilaterally enforce UN Security Council Resolutions.⁵⁴ Thus, in the event that an invasion like the 2003 invasion of Iraq occurs again, and the state in question is bound by the jurisdictional provisions under Article 15 *bis*, it is

⁵⁰ *Charter of the United Nations*, 26 June 1945, (1 UNTS XVI), Art 42 and Art 51.

⁵¹ Yoram Dinstein, *War Aggression and Self-Defence* (5TH ed., Cambridge University Press 2001) 87.

⁵² SC Res 670, UN Doc S/RES/688 (1990), 25 September 1990.

⁵³ Dino Kritsiotis, ‘Arguments of Mass Confusion’, 15(2) *European Journal of International Law* (2004) pp. 243-245.

⁵⁴ *The Report of the Iraq Inquiry* Volume 1, Section 1, 27, available at www.iraqinquiry.org.uk/media/246426/the-report-of-the-iraq-inquiry_section-1-1.pdf accessed 15 July 2016.

likely that this would constitute a manifest violation of the UN Charter and thus be considered a crime of aggression under the Kampala Amendments.⁵⁵

More controversial are the cases of forcible intervention with no express legality, but instead, a moral claim to authority is used as a substitute. The best example of illegal humanitarian intervention is the Kosovo War of 1999, when NATO acted to end the persecution of Kosovar Albanians by the government of former Yugoslavia.⁵⁶ Since China and Russia resisted the idea of military intervention, NATO started an extensive bombing campaign against the former Yugoslavia without authorization of the Security Council.⁵⁷ Yet, although in breach of the UN Charter provisions, NATO's action is today considered as 'illegal but legitimate'.⁵⁸ Legitimacy in these cases stems from the moral priority of preventing a humanitarian catastrophe and the necessity of introducing flexibility in the application of the law in extreme circumstances.⁵⁹ However, regardless of any claim of rightfulness, the definition of the crime of aggression as adopted in Kampala potentially includes instances of unlawful- but morally legitimate- uses of force.⁶⁰ In these circumstances, the term 'manifest violation' and the whole of the threshold clause are unlikely to automatically exclude instances of illegal humanitarian interventions.⁶¹ It is doubtful that the qualifiers of 'character, gravity and scale' would be sufficient to exclude actions such as NATO's two-month long bombing campaign. As the *mens rea* of the crime does not include bad faith, honourable motives would not negate intent or discount the will of the leader of a state to

⁵⁵ *Ibid.*

⁵⁶ Christopher Greenwood, 'Humanitarian intervention: the case of Kosovo', *Finnish Yearbook of International Law* (2002) 141.

⁵⁷ Thomas Franck, 'Interpretation and change in the law of humanitarian intervention' in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge University Press 2003).

⁵⁸ Nicholas J. Wheeler, *Saving strangers: Humanitarian Intervention in International Society* (Oxford University Press 2000) 243.

⁵⁹ Franck, *supra* note 57.

⁶⁰ McCabe, *supra* note 36 1012.

⁶¹ Sean D. Murphy, 'The International Criminal Court and the Crime of Aggression: Criminalizing Humanitarian Intervention', 41 *Case Western Reserve Journal of International Law* (2009) 341.

engage in armed action.⁶² Thus, individuals in a leadership position who plan and conduct a Kosovo-style operation could be liable for the crime of aggression had they been aware of the conditions in which military action occurred, although, as the final section article demonstrates, there is every reason to believe that were prosecutions brought in these cases, they would be highly unlikely to succeed.

3.2 *Military Interventions that will Probably Not Qualify as Crimes of Aggression*

Interventions pursuant to Articles 42 and 51 of the UN Charter enjoy concrete legal cover and will not be considered acts of aggression. For example, the Security Council acting under Chapter VII passed Resolution 1973 authorizing NATO forces to enforce a no-fly zone to ensure the protection of civilians in Libya.⁶³ Other interventions, such as the US invasion in Afghanistan after 2001, were first and foremost legally justified as acts of self-defence. Broader readings of the right to self-defence might appear to vindicate invasions not compliant with conditions of proportionality and necessity imposed by law to this type of action.⁶⁴ Tanzania's intervention in Uganda in 1978-1979 resulted in the toppling of Idi Amin's government, raising questions as to whether or not Tanzania's forces were acting within the bounds of the doctrine of self-defence when they pushed deep into Uganda in response to a relatively minor incursion into Tanzanian territory.⁶⁵ Interventions of this sort would not be considered aggression, as military force of a defensive nature is to a large extent supported by international law and state practice. Thus, actions similar to that of Tanzania's, although not indisputably legal, would not be considered completely illegal.

In other instances, partial legal justifications may provide an alternate basis for intervention not explicitly mandated by the UN Charter. UN Resolutions that do not explicitly contain an

⁶² Beth Van Schaack, 'The Crime of Aggression and Humanitarian Intervention on Behalf of Women', 11(1) *International Criminal Law Review* (2011) 477.

⁶³ SC Res. 1973, UN Doc S/RES/1973 (2011), 17 March 2011.

⁶⁴ *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, International Court of Justice, Advisory Opinion, <www.icj-cij.org/docket/?sum=367&p1=3&p2=3&case=70&p3=5> 28 September 2016.

⁶⁵ For an overview of the Uganda situation, see Daniel G. Acheson-Brown, 'The Tanzanian Invasion of Uganda: A Just War', 8(1) *International Third World Studies Journal and Review* (2001).

authorization to use force under Chapter VII would fall into this category. The no-fly zone established in Iraq in 1991 was set up under the authority of a Resolution which aimed to protect civilians and described the oppression against the Kurd population and other minorities as a ‘threat to international peace and security’, but did not explicitly authorize international action.⁶⁶ Still, such military interventions do possess partial legal cover and as such, would not constitute a manifest violation of the Charter; likewise, they could not, by their character, gravity and scale, qualify as a crime of aggression under Article 8 *bis*. Enforcement actions undertaken by regional organizations are another type of intervention that would be unlikely to be considered acts of aggression. Although not unambiguously legal, interventions conducted by regional actors without obtaining a prior UN mandate have received *ex post* endorsement by the Security Council.⁶⁷ The ECOWAS intervention in Liberia in 1990 was not conducted under Security Council authorization; nonetheless, the Council in Resolution 788, noting the provision of Chapter VIII, commended ECOWAS for its initiative to reinstate peace and stability in Liberia. Therefore, it is arguable that ECOWAS’ use of coercive force was retroactively ratified by the Security Council and given some legal standing *ex post*.⁶⁸ Hence, this sort of action would also be unlikely to fall within the definition of the crime of aggression; although not completely legal, it would probably not constitute a manifest violation of the UN Charter.

The use of consent and self-defence based arguments to justify Western powers’ use of armed drones against groups situated in the territory of other states also tests limits of legality, albeit not to the point of rendering these attacks crimes of aggression. While states’ right of self-defence, as traditionally understood, do not cover retaliations directed at non-state entities, the use of drone strikes as a response to terrorist threats amounts to pre-emptive self-defence,

⁶⁶ SC Res. 688, UN Doc S/RES/688 (1991), 5 April 1991.

⁶⁷ See Franck, *supra* note 57.

⁶⁸ *Ibid* 204.

a sort of action whose legality is far from settled in international law.⁶⁹ Furthermore, when it comes to states consenting to allow other states to conduct drone strikes in their territory,⁷⁰ questions often arise as to the existence and validity of the agreement through which the host state approves another state's drone strikes in its territory.⁷¹ The consent supposedly given by the governments of Pakistan and Yemen to US drone operations in their respective territories has been disputed by citizens and political groups within the two countries.⁷² As cooperation with US-led drone programmes raises internal political difficulties in the host country, often consent is not registered in public records.⁷³ Hence, it is difficult to establish if the drones campaign in question complied with authority which was freely given by a responsible official of the country whose territory the terrorist group was located. Yet, despite these shortcomings, the legal case for drone strikes of the sort commonly used by Western powers in counterterrorism operations probably has sufficient backing so that it would not cross the manifest violation of the Charter threshold set out in the Amendments. Also in view of the 'character, gravity and scale' of contemporary drone warfare would be unlikely to qualify as individual strikes are sufficiently localised that they would not constitute aggression.

3.3 The Functional Legitimacy Issues Caused by the Narrowness of Article 8 bis.

Article 8 *bis* is extremely narrow and many instances of the use of force will fall outside the ICC's reach for prosecution. The existing grey zones in the law on the use of force, in particular those surrounding the use of self-defence under Article 51, have led to a growth in

⁶⁹ Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010), pp. 160-166.

⁷⁰ "Intervention by invitation" would be outside the scope of the prohibition of Article 2 (4). On consent and the use of force, see Max Byrne, 'Consent and the use of force: an examination of "intervention by invitation" as a basis for US drone strikes in Pakistan, Somalia and Yemen', 3(1) *Journal on the Use of Force and International Law* (2016) pp. 97-125.

⁷¹ Corten, *supra* note 69, pp. 268 – 271.

⁷² See Peter L. Bergen and Daniel Rothenberg (eds), *Drone Wars: Transforming Conflict, Law and Policy* (Cambridge University Press, 2015)

⁷³ William C. Banks, 'Regulating Drones: Are Targeted Killings by Drones Outside Traditional Battlefields legal?' in Peter L. Bergen and Daniel Rothenberg (eds.), *Drone Wars: Transforming Conflict, Law and Policy* (Cambridge University Press, 2015) pp.143-144.

military actions that have a questionable legal basis, without being considered outright violations of the UN Charter.⁷⁴ Equally, some military actions carried out by states which are notionally based on UN Resolutions are in fact relying on instruments that do not explicitly authorize the use of force and adopting a highly elastic approach to the rule-based conservatism of the law regulating the use of force.⁷⁵ Again this is unlikely to be caught by the restrictive definition of Article 8 *bis*. The reason why the court is likely to err on the side of caution is that they would need to be mindful in the interpretation of this new crime not to potentially create unexpected or novel interpretations of criminal liability because, as James Boeving notes, ‘members of any type of legal system, be it local, national, or international, have a legitimate right to know in advance what conduct is prohibited.’⁷⁶ Indeed, creating a far reaching or novel interpretation of Article 8 *bis* would amplify claims of prosecutorial overreach from some states. It is equally probable that other states would claim that by sticking to a narrow interpretation of the law, the ICC was privileging states engaging in aggression. As a result, this could create a functional crisis of legitimacy for the ICC, as the court would be implicitly taking sides with one bloc of states (whichever decision it ultimately took). In sum, were the court to take an expansive interpretation of its powers under Article 8 *bis*, there would be the risk that states would withdraw from the Rome Statute or that the court would become gridlocked with large numbers of referrals.⁷⁷ On the other hand, were it to take the conservative interpretation of its powers under Article 8 *bis*, it is

⁷⁴ Dinstein *Supra* note 51.

⁷⁵ Bill Bowring, *The Degradation of the International Legal Order?: the Rehabilitation of Law and the Possibility of Politics* (Glasshouse, 2008), pp. 46- 48.

⁷⁶ James Boeving ‘Aggression, International Law, and the ICC: An Argument for the Withdrawal of Aggression from the Rome Statute’ 43 (1) *Columbia Journal of Transitional Law* (2004) 557-611, 560.

⁷⁷ This was warned of at the time of signing the Rome Statute - Linda Jane Springrose ‘Aggression as a Core Crime in the Rome Statute Establishing and International Criminal Court’ *St. Louis-Warsaw Transatlantic Law Journal* (1999) 151 – 175.

possible that this decision would add to existing criticism that the ICC favours powerful states.⁷⁸

A legitimacy problem is then created because Article 8 *bis* does not lend itself easily to an application in relation to existing scenarios, which makes interpretations favouring existing power structures more likely. This is possible to cause similar functional legitimacy issues to the interpretation of Article 17. The doctrine of complementarity, under Article 17, applies when a state is ‘unwilling or unable genuinely’ to carry out an investigation or prosecution, and allows the ICC to assert its jurisdiction over a particular situation, a process designed to protect the interests of justice rather than directly overrule the national legal system.⁷⁹

Complementarity was one of the legal factors contributing to the ICC’s focus on cases from African states in its first decade. This led to criticism that the provisions of the Rome Statute were drafted in a manner designed to cement Western superiority and non-Western victimhood, and Article 17 has been cited by opponents of the court as evidence of its anti-African bias.⁸⁰

In the case of the Kampala Amendments, the lack of prosecutions resulting from the narrowness of the substantive definition of the crime is likely to be linked to the politics of its drafting. During the negotiations on the definition of the crime at the 2010 Kampala Conference, states were broadly split into two camps. States of the Non-Aligned group, who had a colonial past, and states that had been the victims of aggression favoured the adoption

⁷⁸ See Michael Hart and Antonio Negri *Multitude* (Penguin Books) pp.28-29.

⁷⁹ Rehmat Mohammed, ‘The role of the International Criminal Court and the Rome Statute in international criminal justice standard setting: some reflections’ in Rowena Maguire, Bridget Lewis and Charles Sampford (eds.) *Shifting Global Powers and International Law: Challenges and Opportunities* (Routledge, London, 2013), p. 100.

⁸⁰ Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Southern Africa* (Cambridge University Press, Cambridge, 2009). Max du Plessis, Tiyanjana Maluwa

and Annie O’Reilly ‘Africa and the International Criminal Court’ Chatham House Report International Law 2013/01 available at

https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf

of a more expansive version of the crime. States with stronger militaries or who had engaged in military action against other countries preferred a version of the crime with a narrow scope and weak jurisdictional powers.⁸¹ Many of the types of aggression falling outside the scope of Article 8 *bis* outlined in subsection 3.2 above, in particular drone strikes and the enforcement of no-fly zones, are often carried out by states that were in favour of narrowing the definition of the crime against aggression. This fits into a broader historical pattern observed by Nico Krisch, where dominant states influence the creation of international law and seek to shape laws concerning the use of force to maintain their own dominant position.⁸² This has the potential to exacerbate criticisms that the functional failures of the ICC are rooted in its institutional construction, a claim which could weaken the cosmopolitan basis of the ICC's original legitimacy (outlined in section 2.3) by portraying the court as an organization that further entrenches existing sovereign inequality and impunity.

4. Prosecuting Cases of Humanitarian Intervention: The Functional Legitimacy problem in practice

The first part of this article explained the distinction between original legitimacy and functional legitimacy of international organizations and the relationship between these two forms of authority in the context of the ICC. It has been argued that there exists a real potential for problems in the functional legitimacy of the organization to undermine its original legitimacy as a whole. As the section above pointed out, the structure of the Kampala Amendments excludes far more situations of aggression than they include. This may well lead to a frustration of the normative expectations raised by the activation of the crime of aggression, which in turn can endanger the institutional legitimacy of the court entirely. The

⁸¹ Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press, Cambridge, 2013) pp. 9 -29.

⁸² Nico Krisch 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' 16(3) *European Journal of International Law* (2005) pp. 369–408.

analysis thus far has focused on the substance of the law and what is eliminated from its scope but, as this section argues, there are strong reasons to believe that even if an act of aggression meets the requirements of Article 8 *bis*, it is highly unlikely that the ICC would be able to secure a conviction. Humanitarian intervention, which has received considerable attention from scholars and policy makers, provides a good case study to illustrate this problem, due to its contested status. Some of the points made below would apply to any prosecution of aggression, while some are specific to humanitarian intervention; in any case, they all serve to illustrate how Article 15 *bis* in tandem with procedural norms would cause a functional legitimacy crisis when prosecuting the crime of aggression. A chronological analysis of the procedural limitations and other legal factors surrounding the prosecution of the crime of aggression demonstrates that at every stage a prosecution of a humanitarian act of force is likely to fail, creating multiple and mutually distinct legitimacy problems for the ICC as an institution.

4.1 *Bespoke Jurisdiction: Exacerbating the Problem of Double Standards*

Article 15 *bis* allows state parties to the ICC to opt out from the jurisdiction of the crime of aggression, although non-state parties can still be referred by the Security Council for prosecution under Article 13 of the Rome Statute.⁸³ It is noteworthy that nothing in the Amendments prevents a state party from strategically opting out of the jurisdiction for the crime of aggression prior to engaging in the use of force. McDougall argues that this is not possible, since the definition of the crime includes the preparation and planning of the act of aggression, in such circumstances the crime could have already been committed before a state opts out, which could arguably render its opt out invalid.⁸⁴ Yet, this ignores the complex level of preparation that goes into some conflicts. It is conceivable that had the regime under the Kampala Amendments been in place at the time of the 2003 Iraq invasion, the UK

⁸³ Art 15 *bis* (1) precludes the operation of Art 13(b).

⁸⁴ McDougall, *supra* note 17, p. 266.

government would have opted out of Article 15 *bis* in September 2002 when the legal basis of an invasion was first contemplated, as a basic precautionary measure.⁸⁵ This would then create some considerable debate as to what exactly ‘planning and preparation’ meant, an issue which could be very difficult for the pre-trial chamber to resolve.

Since the legitimacy of the ICC depends in part on it being perceived as applying the principle of universal justice equally and impartially, the fact that Article 15 *bis* creates a jurisdictional regime for the crime of aggression that allows large numbers of states to avoid prosecution poses a significant problem for the notion of equality before the law.⁸⁶ At the time of writing in November 2016, only 12% state parties to the ICC are also state parties to Kampala Amendments, with a further 30% taking some kind of action to ratify the amendments.⁸⁷ States such as the United States, Russia and China are not party to the ICC and would be able to use their power on the Security Council to protect themselves or other states from being prosecuted for aggression. This also creates an odd legal double standard whereby a state could effectively opt out of the legal consequences for the violation of a *jus cogens* norm.⁸⁸ In *Nicaragua v US*, the ICJ was clear about the strict prohibition on the use of force under the UN Charter, and whilst Article 15 *bis* does not in theory weaken this rule, it does create a bifurcated regime for its enforcement.⁸⁹ Moreover, the capacity of the ICC to make what Ian Hurd describes as future claims to authority would be reduced if, having assumed the capacity to rule on acts of aggression, the court remained inactive whilst

⁸⁵ *Report of the Iraq Enquiry*, Volume 5, Section 1, <www.iraqinquiry.org.uk/media/246506/the-report-of-the-iraq-inquiry_section-50.pdf>, 17 July 2016.

⁸⁶ Wolfgang Kaleck, *Double Standards: International Criminal Law and the West*, 2015, pp. 110-111, <www.ficpl.org>, accessed 10 March 2016.

⁸⁷ The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression *Status of ratification and implementation* from <http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/> accessed 31 October 2016.

⁸⁸ On aggression as a *jus cogens* norm see M. Cherif Bassiouni, ‘International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*’, 59(4) *Law and Contemporary Problems* (1997) p. 63.

⁸⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, International Court of Justice, Judgment, *I.C.J Reports 1986*, Rep 14, p.268.

an act of aggression occurred; this may also affect state compliance, since the normative legitimacy of the court's decision-making would be also undermined.⁹⁰

These problems apply generally to the operation of Article 15 *bis* but a Kosovo style intervention has an additional dimension. Considering the negotiation history of the Amendments, where states that had participated in humanitarian interventions argued for an explicitly exclusion of uses of force for humanitarian purposes from the definition of the crime of aggression, it would not be surprising if states such as the UK and France lodge an opt out declaration.⁹¹ This is not just because of their self-interest in conducting interventions, but also because these countries are among the more rule compliant states. Empirical research conducted by Emilia Powell identified a correlation between states with well-established national legal systems and states that tended to abide by obligations imposed by international courts.⁹² States that are current ICC signatories and fall into this category include Britain and France. For them the political cost of the opt out is lower than other alternatives, in particular if they were to argue that the regime under the Kampala Amendments was too onerous given their existing international commitments. Therefore, the inclusion of humanitarian intervention within the scope of Article 8 *bis* combined with the possibility of opting out from jurisdiction enshrined in Article 15 *bis*, weaken any anticipated deterrent effect of the crime of aggression, which in turn is likely to undermine the original legitimacy of the ICC.

4.2 *The Pre-trial Stage: The Potential of Rejection at the Admissibility Stage*

When the Prosecutor initiates an investigation, they are required under the Rome Statute to assess 'the gravity of the crime and the interests of victims'.⁹³ Their decision is then subject

⁹⁰ Ian Hurd, 'Legitimacy and Authority in International Politics', 53(2) *International Organization* (1999) pp. 387-388.

⁹¹ Neither country are considering steps to ratify the amendments and although UK is noted as making 'positive references to the amendments'. Global Campaign for Ratification *supra* note 88.

⁹² Powell, *supra* note 25.

⁹³ *Rome Statute of the International Criminal Court*, 17 July 1998, (2187 UNTS I-28544), Art 51 (1) (c).

to judicial review in pre-trial proceedings. In cases involving the crime of aggression, in both *proprio motu* cases and state referrals, if there has not been a determination by the Security Council that an act of aggression has been committed, the pre-trial division must authorize the commencement of investigations.⁹⁴ This involves a panel of six judges assessing jurisdictional matters, the gravity of the crime and whether there are reasonable grounds to proceed.⁹⁵ In order to confirm the charges, the judges must be satisfied that the prosecution has established substantial grounds to demonstrate the accused has committed the offence.⁹⁶ In cases of illegal humanitarian intervention, the Prosecutor may decide that it is not in the interests of justice to prosecute a state leader for the crime of aggression on a number of different grounds, such as the *erga omnes* protection of basic human rights.⁹⁷ Equally, the pre-trial chamber may reject any such prosecution on legal grounds by arguing that, according to Understanding 6 of the Amendments, it is not clear that humanitarian intervention is an act of aggression.⁹⁸ Understanding 6 states that a determination of an act of aggression involves consideration ‘of all the circumstances of each particular case, including ... their consequences’.⁹⁹ While the language adopted does not expressly refer to purposes, a flexible interpretation of the provision may find that the reference to consequences opens the way for considering the motives behind the operation.¹⁰⁰ Still, as the Understandings were issued in Kampala to guide the ICC in the application of the crime, their legal status remains unclear.¹⁰¹

⁹⁴ Amendments, *supra* note 46, Art 15 *bis* (8).

⁹⁵ Joseph M. Isanga, ‘The international Criminal Court ten years later: appraisal and prospects’, 21 *Cardozo Journal of International and Comparative Law* (2012-2013) p. 235.

⁹⁶ Rowland J. V. Cole, ‘Africa’s Relationship with the International Criminal Court: more political than legal’, 14(2) *Melbourne Journal of International Law* (2014) p. 670.

⁹⁷ Thomas Weiss, *Humanitarian Intervention* (2nd edition, Polity Press, 2012), pp. 97 – 99.

⁹⁸ Class Kress, ‘Time for Decision: Some thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus’, 20(4) *European Journal of International Law* (2009) p. 1129.

⁹⁹ Amendments, *supra* note 47

¹⁰⁰ P. Grzebyk, *Criminal Responsibility for the Crime of Aggression* (Routledge 2013), p. 123.

¹⁰¹ Kevin Jon Heller, ‘The Uncertain Legal Status of the Aggression Understandings’, 9 *Journal of International Criminal Justice* (2011).

There are additional policy reasons for a case of humanitarian intervention to be dismissed at this stage. There have been concerns that the crime of aggression under the Rome Statute could lead to state inaction while mass atrocities unfold, as was the case in the 1994 Rwandan genocide.¹⁰² Thus, the most likely way to deal with a case of humanitarian intervention under Article 8 *bis* is for the Prosecutor not to investigate the case at all.¹⁰³ Yet, the Prosecutor's decision not to investigate British war crimes in Iraq in 2006 received considerable criticism, even though there was evidence to suggest that in so doing the Prosecutor was focusing on the most serious situations, in line with their stated powers under the Rome Statute.¹⁰⁴ Furthermore, as scholars have pointed out, humanitarian intervention is often subject to a variety of complex political and social conditions, which make them less than clear-cut, and therefore at least warrant consideration as acts of aggression.¹⁰⁵ As B.S. Chimni notes, it is not clear that the legitimacy of the norms being protected by humanitarian intervention justifies breaching the legal prohibition on the use of force.¹⁰⁶

Therefore, although it would be difficult for a Kosovo-style intervention to pass through the pre-trial stage, this would probably raise additional legitimacy problems. The notion that leaders who committed acts defined by the Amendments as crimes of aggression are exempted from prosecution, may certify the irrelevance of the court's new authority to maintain international peace. This functional failure on the exercise of the ICC's new

¹⁰² Andrea Paulus, 'Second Thoughts on the Crime of Aggression', 20(4) *European Journal of International Law* (2010) p. 1117.

¹⁰³ Murphy, *supra* note 2.

¹⁰⁴ Alette Smeulers, Maartje Weerdesteijn and Barbora Holá, 'The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance', 15(1) *International Criminal Law Review* (2015) p. 1; *see also* David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, 2014) pp. 88 - 92.

¹⁰⁵ Alan Kuperman, 'The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans', 52(1) *International Studies Quarterly* (2008) pp. 40 - 49.

¹⁰⁶ B. S. Chimni, 'Sovereignty Rights and Armed Intervention a Dialectical Perspective', in Hilary Charlesworth and Jean-Marc Coicaud (eds.), *Fault Lines of International Legitimacy* (Cambridge University Press, 2009) p. 303.

jurisdiction might backfire on the institution's original legitimacy, now also based on its role to enforce the ban on the illegal initiation of wars. Dismissing a case of illegal humanitarian intervention at pre-trial stage would indicate not only ineffectiveness, but also double standards on the exercise of authority, possibly damaging the court's perceived moral right to rule. Moreover, as Franck notes, the normative legitimacy of international law is dependent on a belief in 'rule adherence between states', and when this is challenged, alternate presumptions take root that the law does not work or that rule adherence is not in a state's interests.¹⁰⁷ Not investigating or dismissing an illegal humanitarian intervention in the manner described above would be a juridical endorsement of law-breaking; this would damage what Mattias Kumm terms the 'formal legitimacy' of the ICC, which is its authority as an international institution tasked with enforcing international law in order to prevent abuses of power and 'inappropriate impositions by other states'.¹⁰⁸

Admittedly, these tensions would not be alleviated if the court decides to prosecute the case. Genuine humanitarian interventions are legitimated, in part, by the same universalist values that confer the court part of its legitimacy of origin. As such, it would be incoherent to indict a party for stopping an action that is per se criminalized in the Rome Statute. As noted in section two, a particular feature of the ICC is that the original legitimacy of the court also informs its functional legitimacy and hence prosecuting cases of illegal-but-legitimate uses of force could also have the effect of causing an institutional legitimacy crisis. This conundrum reflects the point that the crime of aggression has a distinct normative legitimacy from the one the ICC originally had, so when the protection of human rights conflicts with the promotion of order in international relations, the court cannot comply with the responsibility to defend both.

¹⁰⁷ Thomas Franck, 'The Power of Legitimacy and the Legitimacy of Power: International law in an age of Power Disequilibrium', 100(1) *The American Journal of International Law* (2006) pp. 88 - 91.

¹⁰⁸ Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15(5) *European Journal of International Law* (2004) pp. 907, 919.

4.3 *The Trial Stage: The Defence of Necessity*

If the case passes through the jurisdictional filters and reaches the trial stage, a leader who committed the alleged act of aggression would likely be acquitted via the application of a humanitarian defence based on the doctrine of necessity. Article 31 of the Rome Statute excludes criminal liability in cases where the act was in the defence of others or where there were circumstances of duress or necessity.¹⁰⁹ Thomas Franck made a similar case, arguing that within the international order, penalties for illegal conduct may be mitigated on the basis of necessity.¹¹⁰ As Franck notes, in municipal law the doctrine of necessity accounts for cases where the law comes into conflict with justice and the need to defend shared legal interests can compel individuals to break the law under extreme circumstances.¹¹¹ As an *erga omnes* obligation, the protection of fundamental human rights generates legal interests on the part of all states and as seen in the aftermath of the Kosovo War, the enforcement of international public interests may give rise to extra-legal justifications for illegal behaviour.¹¹² Applying necessity to the crime of aggression would require the ICC judges to focus on the motives behind the action and its consequences, a latitude which Understanding 6 of the Amendments arguably allows.

In an institutional context, as Leclerc-Gagne and Byers argue, a humanitarian defence of necessity would be consistent with ICC's founding principles, since the Rome Statute was designed to avert the same human rights abuses as unauthorized humanitarian interventions are intended to end.¹¹³ Arguably the ICC, in a similar fashion to the doctrine of humanitarian intervention, utilizes a conception of sovereignty that only considers sovereigns legitimate if

¹⁰⁹ Roger S. Clark, 'Negotiating Provisions Defining the Crime of Aggression, its elements and the conditions for ICC exercise of Jurisdiction Over It', 20(4) *European Journal of International Law* (2009) p. 1103.

¹¹⁰ Franck, *supra* note 57, p. 212.

¹¹¹ *Ibid.*, pp. 214-215.

¹¹² See *Barcelona Traction, Light and Power Co Ltd (Belgium v. Spain)*, 5 February 1970, International Court of Justice, Judgement, *I.C.J Reports 1970*, Rep 3.

¹¹³ Elise Leclerc-Gagné and Michael Byers, 'A question of intent: the Crime of Aggression and Unilateral Humanitarian Intervention', 41(2) *Case Western Reserve Journal of International Law* (2009) p. 379.

they protect the basic human rights of individuals living within their territory. If intervening without Security Council authorization prevented a large-scale humanitarian catastrophe, necessity would probably succeed as a complete exculpatory defence, making the defendant not criminally liable for the act of aggression.¹¹⁴ This conclusion finds support in Oscar Schachter's statement that, in relation to humanitarian intervention, it would be better to 'acquiesce in a violation that is considered necessary and desirable in the particular circumstances' than it would be 'to adopt a principle that would open a wide gap in the barrier against unilateral use of force.'¹¹⁵ The defence of necessity provides some resolution to the balancing conundrum outlined above – it allows the ICC to continue its stated cosmopolitan humanitarian aim whilst maintaining the prohibition against the use of force. Strictly speaking allowing a defence of necessity does not render the underlying crime moot; in municipal law murder is not considered decriminalised because the defence of necessity exists.

However, the flip side to this reasoning can be seen by analysing what the defence requires judges to do – namely make an assessment that the harm caused by illegal intervention was less than the harm that would have resulted from inaction. This would require the court to take into account not only the civilian deaths but also the infrastructure damage caused by war in the victim state.¹¹⁶ This could undermine the bright-line prohibition on the use of force set out in Article 2(4) of the UN Charter; but since the association agreement between the ICC and the UN defines the court as a separate permanent judicial institution with legal

¹¹⁴ See Noah Weisbord, 'The Mens Rea of the Crime of Aggression', 12 (2) *Washington University Global Studies Law Review* (2013), p.487.

¹¹⁵ Oscar Schachter 'United Nations Law in the Gulf Conflict' 85 (3) *American Journal of International Law* (1991) pp.452, 470.

¹¹⁶ See Christopher P. DeNicola, 'A shield for the "knights of humanity": the ICC should adopt a humanitarian necessity defense to the crime of aggression', 30(2) *Journal of International Law* (2014) pp. 641, 685.

personality, it is not clear to what extent this would affect the Security Council's powers of decision making.¹¹⁷

The necessity argument should also be treated with some suspicion even within the context of R2P. The UN Secretary General's report on R2P was highly sceptical of the necessity argument in humanitarian intervention, stating that it 'posed a false choice between two extremes: either standing by in the face of mounting civilian deaths or deploying coercive military force to protect the vulnerable'.¹¹⁸ Moreover, as Saira Mohamed argues in the context of the Libya intervention, necessity in the sense of preventing human rights abuses is often couched in terms of state interest of the intervening state, rather than an absolute duty to protect individuals.¹¹⁹ Hence, the scope of the necessity defence would have to be wide enough to account for a range of political motivations. This points towards the central problem with the ICC accepting necessity as a defence - it involves making what amounts to an overtly political declaration that the court effectively endorses the reasoning of the state conducting the intervention. Considering that the international human rights regime as a whole is perceived by some states as a Trojan horse for the advancement of Western hegemony and both the doctrine of humanitarian intervention and the ICC as an institution are common subjects of such criticism, the defence of necessity is likely to further exacerbate the legitimacy problems faced by the ICC.¹²⁰

¹¹⁷ International Criminal Court, *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, ICC-ASP-3-Res 1, <www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf>, visited on 5 February 2016.

¹¹⁸ UN Secretary General, *Implementing the Responsibility to Protect* (GA Doc A/63/677, 63rd Session, 12 January 2009), para. 9.

¹¹⁹ Saira Mohamed 'Taking Stock of the responsibility to Protect' 48 (2) *Stanford Journal of International Law* (2012) pp.63-83

¹²⁰ Samuel Moyn, *Human Rights and the uses of history* (Verso, 2014) pp. 37, 51.

5. Conclusion

Immi Tallgren described international criminal law as building a ‘fortress of its own, with its own laws and policies’, and in many respects, the Kampala Amendments follow this general trend.¹²¹ Whilst offering a broadly coherent system of rules governing the substance of the criminal conduct of starting unlawful wars, the law to be adopted excludes many more potential instances of aggression than it includes. Moreover, the jurisdictional regime of the Kampala Amendments aggravates complicated double standards in the operation of the ICC by providing the opt-out option for the crime of aggression. These issues need to be seen in the general context of the ICC as an institution, which as Triestino Mariniello argues, has already ‘unrealistic expectations’ being placed upon it, in particular, the assumption that ‘as a new civilizing institution’ it provides a definitive ‘cure for radical evil.’¹²² As argued above, the functional legitimacy of the ICC is almost certainly going to be undermined when acts of aggression take place but the court is unable to act due to the structure of the law to be incorporated into the Rome Statute. The ICC’s jurisdiction for the crime of aggression would rarely be, if ever, utilised, leaving the authority to punish perpetrators of the crime of aggression as a mostly exhortatory power. In addition, as the case study of humanitarian intervention suggests, even when a case does meet the requirements in Article 8 *bis* and Article 15 *bis*, it is still possible that a conviction would not occur. Such an outcome would have the effect of signalling that the types of violations committed by states that are otherwise norm abiding (state parties to the ICC and the Amendments) but that at the same time are powerful (can conduct humanitarian intervention) are exculpated, feeding into the criticisms that some ICC state parties are effectively immune from accountability.

¹²¹ Immi Tallgren ‘The Sensibility and Sense of International Criminal Law’ 13 (3) *European Journal of International Law* (2002) pp. 561- 582.

¹²² Triestino Mariniello ‘‘One, no one and one hundred thousand’ Reflections on the Multiple Identities of the ICC’ from Mariniello (eds.) *The International Criminal Court in Search of its Purpose and Identity* (Routledge 2015) pp. 4.

The problem lies in the structure of the law itself, rather than in the capacity of the ICC as an institution. The delay in drafting a definition of the crime of aggression was an attempt by states to reach a compromise which could have the maximum buy-in from state parties. However, the desire for inclusivity has led to a weak set of laws that are more the product of state self-interest than a codification of existing legal principles and international consensus on the subject of aggression. The Amendments will also come into force in the least opportune moment in the organization's history, when a number of countries are actively planning to leave the court. The activation of the jurisdiction on aggression presents the ICC with the burden of acquiring a new authority that carries specific normative expectations which the court will be unable to fulfil; as a result, a fresh crisis of functional legitimacy for the court seems inevitable.