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Judging Aggression

Noah Weisbord

*Florida International University College of Law*, nweisbor@fiu.edu

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Judging Aggression

NOAH WEISBORD*

One of the most polarizing debates in international law is how the goal of peace should figure into the work of international criminal tribunals. The freshly minted crime of aggression lands the judges of the International Criminal Court in the middle of the peace versus justice dilemma and will challenge the court to prove its value for advancing peace in appropriate circumstances while building the rule of law and maintaining its legitimacy. This Article, the final installment in the author’s trilogy on the crime of aggression, explores the gaps, ambiguities and contradictions woven into the definition of the crime and evaluates the range of ways in which well-intentioned international judges might attempt to do justice while promoting peace through decisional law focusing on three of international law’s most controversial questions: the scope of self-defense, the status of humanitarian intervention under the UN Charter and the character of an armed attack. Ultimately, this Article argues for a richer understanding of the concepts of peace and justice that will permit international judges to punish aggression while promoting peace.

* Assistant Professor of Law, Florida International University College of Law; S.J.D., LL.M. program, Harvard Law School; B.Sc., B.S.W., LL.B., B.C.L., M.S.W., McGill University. The author was an independent expert delegate on the Special Working Group on the Crime of Aggression and at the ICC Review Conference. He would like to thank Martha Minow, Benjamin Ferencz, Alana Klein, Payam Akhavan, Donald Ferencz, the International Criminal Court Student Network at Duke Law School (Drew Kostic, Meaghan Krupa, Emily Randall, Stephanie Richards, Tati Sainati and Saleena Siraj) and the members of the Special Working Group on the Crime of Aggression for their ideas and suggestions. Thanks to Katherine Maxwell for her research and to Marisol Floren for her assistance at the FIU College of Law Library.
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INTRODUCTION

Two of the foremost controversies within the field of international criminal law are on a collision course: the definition of the crime of aggression and the peace versus justice dilemma. When these controversies collide, the judges of the International Criminal Court ("ICC") will be expected to mediate the impact. Punishing aggression while promoting peace will be a herculean task if ever there was one.

In June 2010, in Kampala, the Assembly of States Parties ("ASP") to the ICC successfully negotiated a consensus definition of the crime of aggression as well as jurisdictional conditions and a
mechanism for the amendments to the ICC Statute to enter into force.¹ These amendments will give the ICC jurisdiction to prosecute political and military leaders of states for planning, preparing, initiating or executing illegal wars. The elements of an illegal war and the doctrinal link that will allow a judge to attribute it to an individual are circumscribed by the definition of the crime.

The Kampala outcome is the culmination of approximately seventy years of on-and-off multilateral negotiations that gained momentum after the Cold War.² The ICC and the crime of aggression are legacies of the Nuremberg Trials whose evolution was obstructed by the conflict between the Soviet Union and the United States.³ Both court and crime became live issues again in the 1990s with the end of the Cold War.⁴ The ICC Statute was created in 1998, and the crime of aggression, the most contentious topic at the diplomatic conference establishing it, was included alongside genocide, crimes against humanity and war crimes, but left undefined.⁵ The 1998 diplomatic conference in Rome (the “Rome Conference”) instead assigned a Preparatory Commission (“PrepCom”)⁶ to draft proposals to be considered at a future Review Conference, to be convened no earlier than seven years after the entry into force of the Rome Statute.⁷ This Review Conference took place in Kampala in June 2010.

The negotiations over the crime of aggression gained unanticipated traction in 2002 when the PrepCom delegated the issue to a


². For a compilation of key documents, see BENJAMIN B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE (1975); for historical accounts, see Noah Weisbord, Prosecuting Aggression, 49 HARV. INT’L L.J. 161, 162–76 (2008) and sources cited at 162–63, nn.6, 12; see also OSCAR SOLERA, DEFINING THE CRIME OF AGGRESSION (2007).

³. Weisbord, supra note 2, at 167.


⁷. Rome Statute, supra note 5, art. 123.
Special Working Group on the Crime of Aggression ("SWGCA"), composed of ICC States Parties and interested non-party states, which met formally at UN Headquarters and in The Hague, and informally at Princeton University, to comb through the details. The SWGCA’s draft definition was adopted without changes at the Review Conference, and the ASP reached a consensus compromise over the laden issues of jurisdiction and the entry into force of the amendments.

In order to achieve an agreement among rival nations, the ASP employed a number of drafting techniques, including the use of "constructive ambiguity," in the language of the compromise where nations could not reach specific agreement. The practical result, for better or for worse, was to transfer the task of interpreting the definition of the crime of aggression and its jurisdictional conditions to the ICC judges.

The crime of aggression may have overshadowed other issues at the Review Conference, but it was not the only significant issue that was discussed. Delegations also participated in a stocktaking exercise where they considered the impact of the ICC Statute to date. One of the questions given priority in these discussions was how the goal of peace should figure into the work of the ICC.

In the years since the ICC’s birth in 2002, perhaps the biggest challenge for the nascent court has been fulfilling its mandate to investigate, prosecute and punish genocide, crimes against humanity and war crimes in the midst of ongoing conflicts without undermining extra-judicial attempts to resolve the dispute through, for example, peace negotiations and indigenous justice traditions. The so-called peace versus justice dilemma has complicated a number of the ICC’s ongoing cases, notably in the Democratic Republic of Congo.

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8. Effectively, most of the members of the ASP sent delegations to the SWGCA, as well as many non-party states including China, Iran, Russia and India, to name a few.

9. For the records of these meetings, see THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 2003–2009 (Stefan Barriga et al. eds., 2009) [hereinafter PRINCETON PROCESS].


12. Id.
JUDGING AGGRESSION

The peace versus justice dilemma has given rise to intense debate concerning the proper role of the ICC. The commentary has not been limited to observers of the ICC; arguments have been launched from within the court itself. Stakeholders have invoked a familiar pattern of the Rome Statute’s provisions to justify competing courses of action, among them prosecution at all costs, deferral of cases, substitution of local for international justice, withdrawal of arrest warrants and amnesty (in various forms). Though scholars have clarified the contours of the issue, the peace versus justice question remains unresolved. What the diplomatic delegations failed to do in Kampala was to link the two fundamental issues they wrestled with: the crime of aggression and the peace versus justice dilemma. Because the problem will inevitably arise in the context of an aggression case, this article undertakes to establish the missing link between the crime and the dilemma and propose ways an ICC judge could mediate between the two.

If the ICC’s practice to date is any indication, the peace versus justice dilemma will weigh heavily on the minds of the ICC judges as they mete out justice against political or military leaders accused of aggression. The crime of aggression was drafted with the specific purpose of deterring threats to the peace; conceivably, the goal of peace will figure prominently in its interpretation. Furthermore, where the Rome Statute as a whole contains quite a few gaps,


15. See Carsten 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. OF INT’L L. 875, 875–76 (2010) (observing that the crime “is embedded in peace maintenance even more deeply than the other core crimes” due to its close relationship to jus ad bellum and Article 39 of the UN Charter).
ambiguities and contradictions that leave room for judicial interpretation, the crime of aggression, in leaving to judges the resolution of longstanding negotiation debates, contains still more. It is largely within these zones of interpretation that the peace versus justice debate can be expected to unfold. Because the criminalization of aggression requires the ICC to intervene in the domain of fundamental national security, an area of discretion warily guarded by states, the stakes will be especially high. Judicial interpretation of the crime of aggression will not only determine the outcome of particular cases, it will shape the international legal order.

This Article argues that the ICC judges should attempt to promote peace as they do justice. It eschews narrow interpretive theories and proposes instead that the ICC judges take a variety of contextual factors into account as they interpret the law. Judging Aggression applies the author-participant’s knowledge of the Kampala negotiations as the basis for a doctrinal analysis revealing the gaps, ambiguities and contradictions in the aggression framework that leave room for judicial interpretation. Building on the literature on the peace versus justice dilemma to date, it evaluates a range of ways that well-intentioned international judges might attempt in their decisions to do justice while promoting peace in the context of an aggression case. The way that the ICC judges address the challenges they encounter as they adjudicate what the Nuremberg Tribunal called “the supreme international crime,” will serve, whether they succeed or fail in harmonizing the demands of justice and peace, as a lesson on the exercise of the judicial function.

I. The Kampala Outcome

The aggression amendments adopted in Kampala are made up of three facets: (1) the definition of the crime; (2) the jurisdictional regime specific to the crime of aggression; and (3) the mechanism for the entry into force of the amendments. These amendments, which ICC judges will be expected to interpret and apply, were part of a larger political compromise that balances all three. The following section explains each facet in turn, as well as their relationship, and


identifies key gaps and ambiguities that leave room for judicial interpretation.

A. The Definition

The definition of the crime of aggression builds from the Nuremberg precedent, which effectively shifted the subject of international law from the state to the individual by declaring, “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”\textsuperscript{18} In 2010, the ASP revitalized the first Nuremberg Principle as it pertains to international law regulating the use of force: “Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.”\textsuperscript{19}

The definition provides a fascinating legal-doctrinal answer to two of the twentieth century’s most troubling questions. First, is there a distinction between a just and an unjust war and, if so, is it possible to define the difference with sufficient specificity in universal terms? The second question, raised by Hannah Arendt in \textit{Eichmann in Jerusalem},\textsuperscript{20} is how to find a normatively persuasive basis for judges to hold an individual accountable for acts of political violence that require many people to carry out.\textsuperscript{21} Arendt dismissed the debate between the prosecution and defense in the Eichmann trial over whether the defendant was “a ‘tiny cog’ in the machinery of the Final Solution” as “legally pointless,” focusing instead on the existence of a crime and relying on the tribunal to transform the “cogs in the machinery . . . back into perpetrators.”\textsuperscript{22} But where Arendt left it to the Jerusalem court to transform Eichmann from cog into perpetrator, the SWGCA was obligated to find a normatively persuasive legal-doctrinal basis upon which the ICC judges could impose individ-

\textsuperscript{18} \textsc{International Military Tribunal, I Trial of the Major War Criminals Before the International Military Tribunal} 223 (1947).


\textsuperscript{20} \textsc{Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil} 289 (2006).


\textsuperscript{22} \textsc{Arendt, supra} note 20, at 289.
ual criminal liability for violence carried out en masse.

The two components of the substantive definition of aggression, the state act and its doctrinal link to the individual perpetrator, represent answers to these questions. The state act, set out in Article 8 bis, paragraph 1 of the definition, with an enumerated list of acts that qualify in paragraph 2, constitutes the Review Conference’s distinction between a just and an unjust war. The SWGCA’s answer to this highly politicized question relied on post-World War II international legal precedent and the UN Charter in particular.

The “act of aggression” is a violation of the UN Charter that, by its character, gravity and scale, surpasses the “manifest” threshold established by the drafters. One of the Understandings appended to the Kampala outcome explains that the drafters intended character, gravity and scale to be interpreted together and that no one component is sufficient to give rise to liability on its own. Thus, a few bullets fired across a border would not be grave or large-scale enough to qualify as a manifest violation; nor, for example, would the good-faith delivery of emergency medical supplies by military helicopter to a vulnerable refugee population without the prior approval of the host state qualify because the character of the act is humanitarian and not overtly threatening. On the other hand, the Special Working Group regularly referred to Saddam Hussein’s 1990 invasion of Kuwait as a clear-cut act of aggression.

The second paragraph of the definition offers the judges specific guidance by listing categories of acts that will qualify as aggression. These include invasion, bombardment, blockade, attacking another state’s armed forces, contravening an agreement to station forces in another state (e.g., by refusing to leave), offering one’s state as a launching ground for another state to attack a third state and the

\[ \text{Rome Statute, supra note 5, art. 8 bis, para. 1.} \]

23. Article 8 bis, para. 1 provides:

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.

Rome Statute, supra note 5, art. 8 bis, para. 1.

24. The “Understandings” are interpretive aids meant to assist judges in determining the drafters’ intent.

25. Kampala Outcome, supra note 1, ann. III, para. 7.

26. See Rome Statute, supra note 5, art. 8 bis, para. 2.
sanding of armed bands to attack another state. The 2003 U.S. intervention in Iraq is an example of an invasion; it also included bombardment of a gravity and scale captured by the definition. The most important question pertaining to the list of acts is whether the list is open or closed. The ICC’s answer to this question will determine whether acts of aggression beyond the scope of the enumerated categories, such as cyber attacks causing massive damage to persons and property, will fall within the ambit of the crime.

The second component of the definition of aggression, the link to the individual perpetrator, is composed of four strands. The definition itself contains two strands: conduct verbs and a leadership clause. It is through the conduct verbs that individuals who planned, prepared, initiated or executed the act of aggression can be held accountable and punished for it. These conduct verbs were borrowed from the London Charter establishing the Nuremberg Tribunal where they were used to hold Nazi leaders accountable for the crime against peace, the predecessor to the crime of aggression, after World War II.

The second strand is the leadership clause. Only those individuals in a position to effectively exercise control over, or to direct the political or military action of, a state can be held responsible and punished. An ordinary foot soldier, by this definition, is not criminally responsible for the collective act of the military. The scope of both of these doctrinal strands is open to interpretation by a judge applying the provision.

The last two strands linking the individual and the state act

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27. See id.
28. Legal questions would arise only regarding the criterion of “character.” This is where a defense lawyer might, for example, raise the issue of self-defense under Article 51 of the UN Charter.
30. See infra Part III.
32. Kampala Outcome, supra note 1, annex I, art. 8 bis, para. 1.
33. For an analysis of the language of the definition, see Weisbord, supra note 31, at 43; see also Michael Anderson, Reconceptualizing Aggression, 60 DUKE L. J. 411 (2010).
appear in Article 25(3) of the Rome Statute,\textsuperscript{34} which pertains to individual criminal responsibility and is equally applicable to all of the ICC crimes. The first link is the liability doctrine commonly known as joint criminal enterprise ("JCE") or enterprise participation: "a common plan, design or purpose which amounts . . . to the commission of a crime."\textsuperscript{35} The ICC judges will apportion individual blame for the collective act of aggression by finding that the defendant was a leader of a common plan to violate the UN Charter.\textsuperscript{36} The second strand is found in the modes of perpetration and participation in the commission of the crime, also contained in Article 25(3) of the Rome Statute. A leader can perpetrate the crime or participate in it by ordering, soliciting, inducing, assisting or providing means for its commission (individually, jointly or through another).\textsuperscript{37}

Thus, four doctrinal links—two in the definition of aggression itself and two in Article 25(3) of the Rome Statute—ensure the ICC’s ability to transform cog into perpetrator, at least in theory. However, the four doctrinal links between the individual and the collective act of aggression are not always compatible, and reconciling them will require some technical sophistication on the part of the ICC judges.\textsuperscript{38}

The definition of the crime is supplemented by the elements of the crime, a legal instrument that serves as an authoritative guide to the ICC prosecutor and judges in the interpretation of the definition.\textsuperscript{39} An individual can only be held criminally responsible for the crime of aggression if the material elements of the crime, conceived as conduct, consequences and circumstances, are committed with the requisite intent and knowledge as set out in this instrument.\textsuperscript{40} The in-

\begin{footnotesize}
\begin{enumerate}
\item See Rome Statute, supra note 5, art. 25(3); see also Weisbord, supra note 31, at 54–62 (analyzing how these doctrinal links will apply to the crime of aggression); Weisbord, supra note 2, at 190.
\item See Weisbord, supra note 31, at 54–59, for an explanation of why the other contenders, such as command responsibility, are unlikely to be useful as liability doctrines in an aggression case.
\item Rome Statute, supra note 5, art. 25(3)(a)–(d); see Weisbord, supra note 2, at 190; Weisbord, supra note 31, at 61.
\item Weisbord, Conceptualizing Aggression, supra note 31, at 61 (observing, for example, that "[i]f a leader prepares individually, there is no one being led" and asking whether a leader can be an assistant).
\item See Kampala Outcome, supra note 1, annex II, art. 8 bis.
\end{enumerate}
\end{footnotesize}
troduction to the elements, for example, clarifies that “[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.”41 This informs an ICC judge that it is his or her responsibility to make an objective determination here. The elements do not expand the definition; they remain safely within it.

Finally, several “Understandings” were appended to the report of the Review Conference as an indication of the drafters’ intent.

The peace versus justice dilemma will surface in the areas of the definition that will require interpretation. These key zones are discussed infra in Section D of this part.

B. Jurisdiction

The most intractable debate over the crime of aggression since the drafting of the Rome Statute has been whether the Security Council should have the exclusive authority to trigger an aggression case.42 The debate was finally resolved in Kampala.43 The Review Conference decided that the ICC should be able to seize jurisdiction over aggression cases in three situations: (1) where a State Party refers a case to the ICC Prosecutor; (2) where the Security Council refers a case to the Prosecutor; or (3) where the Prosecutor initiates it proprio motu and the Pre-Trial Division of the ICC, convening in full session, authorizes him or her to proceed.44 To achieve this result, an intricate set of trade-offs was brokered between the proponents of Security Council exclusivity and the majority of the Review Conference.45

The ICC has the broadest authority to prosecute aggressors when the Security Council refers a case, the so-called Article 15 ter trigger.46 Under Article 15 ter, the Security Council has the power to

41. Kampala Outcome, supra note 1, annex II, art. 8 bis, para. 2.
42. See generally The International Criminal Court and the Crime of Aggression 121–50 (Mauro Politi & Giuseppe Nesi eds., 2002).
43. See Christian Wenaweser, Reaching the Kampala Compromise on Aggression: The Chair’s Perspective, 23 LEIDEN J. INT’L L. 883 (2010) (explaining how the compromise over the jurisdictional trigger was brokered).
44. Kampala Outcome, supra note 1, annex I, arts. 15 bis, 15 ter.
46. Kampala Outcome, supra note 1, annex I, art. 15 ter.
resolve, under its robust Chapter VII mandate, to refer an aggression situation to the ICC Prosecutor. This trigger gives the ICC unlimited global jurisdiction over aggression. The Prosecutor can investigate ICC States Parties, non-Party States, and ICC states that have chosen, under the Kampala outcome, to opt-out of the state and proprio motu triggers.

The ICC’s robust authority and global reach under the 15 ter trigger derive from the Security Council’s power to authorize the use of all means necessary to maintain or restore international peace and security. There are, however, some limits on the ICC’s power to investigate and try alleged aggressors pursuant to the Article 15 ter trigger. The first is a limit that can only be put in place by the Security Council itself. Under Article 16 of the Rome Statute, the Security Council, under Chapter VII, can request that the ICC halt an investigation or prosecution for renewable twelve-month intervals. For the Security Council to defer a case, the investigation or prosecution must constitute a threat to international peace and security. The crux of an Article 16 deferral, which proponents of a powerful ICC appreciate, is that it is based upon a positive resolution of the Security Council and it can therefore be vetoed by one of the five permanent members with an interest in seeing an aggression case proceed.

A second limit is that a Security Council determination that an act of aggression has occurred is not prejudicial to the court. A referral or determination merely triggers ICC jurisdiction; the Security Council’s resolution has no bearing on the application of the definition to the facts of the case. The implication is that the ICC and the Security Council could conceivably make contradictory determinations regarding a particular use of armed force.

This development is the outcome of a protracted debate within the Special Working Group about the importance of fair trial standards versus the structure of the international order. The debate

47. U.N. Charter arts. 41, 42.
48. Rome Statute, supra note 5, art. 16.
49. U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).
50. Kampala Outcome, supra note 1, annex I, art. 15 ter, para 4.
51. Coal. for the Int’l Crim. Ct., Informal Inter-sessional Meeting of the Special Working Group on the Crime of Aggression, Held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at Princeton University, New Jersey, United
was ultimately resolved in favor of those prioritizing fair trial standards. They argued, persuasively, that it would be prejudicial to the accused if the Security Council, unchallenged by the defense, could simply determine that an act of aggression has occurred.\textsuperscript{52}

In addition to the Security Council trigger, the ICC also has the authority to prosecute aggressors if a State Party refers a case\textsuperscript{53} or if the Prosecutor initiates a case under his or her \textit{proprio motu} power.\textsuperscript{54} The fact that the ICC can make determinations pertaining to the use of armed force independently of the Security Council is a historic development in international law; it represents a shift from politics to law in the use of force regime.

This remarkable outcome was achieved through concessions from the majority of states at the Review Conference to the small number of states that sought to retain complete Security Council authority over determinations of aggression. These concessions became jurisdictional limits, set out in article 15 bis, that must be respected should a State Party or the Prosecutor, rather than the Security Council, wish to initiate a case.

Most importantly, the ICC cannot acquire jurisdiction over the leaders of non-party states that commit aggression unless the Security Council refers the case under article 15 ter.\textsuperscript{55} The state referral and \textit{proprio motu} triggers do not suffice. This means that, unlike the other currently enforceable ICC crimes, should a non-party state attack a State Party, the leaders of the non-party state cannot be prosecuted unless the Security Council refers the situation. The implication is that leaders in the United States, Israel, Iran, North Korea and other non-party states do not fall within the ambit of the crime of aggression.

Another group that falls outside the scope of the crime are the leaders of States Parties that opt out of the state referral and \textit{proprio motu} triggers. Article 15 bis, paragraph 4, allows an ICC State Party to declare that it does not accept the court’s jurisdiction over aggression by filing a declaration with the registrar of the ICC. A state opt-

\begin{footnotesize}
\begin{itemize}
\item[52.] Id.
\item[53.] Rome Statute, \textit{supra} note 5, art. 13, para. a.
\item[54.] Id. art. 13, para. c.
\item[55.] See Kress & von Holtzendorff, \textit{supra} note 45, at 1213; Stahn, \textit{supra} note 15, at 878.
\end{itemize}
\end{footnotesize}
ing out of the aggression regime under this provision can withdraw its declaration at any time and, certainly, civil society groups will lobby the state to obtain this result. In addition, Article 15 bis stipulates that a State Party that has opted out of the aggression amendments shall reconsider its declaration every three years while the declaration is active, presumably with the intention of eventually withdrawing it.  

One of the longstanding debates within the SWGCA was whether an international organ, such as the UN General Assembly or the International Court of Justice ("ICJ"), should be empowered to determine that a state has committed an act of aggression for the purpose of triggering ICC jurisdiction in the event the Security Council is silent. The permanent members of the Security Council and their allies were against the idea. Other states within the SWGCA had their own preferences for one organ or another. Some states preferred that the pre-trial chamber of the ICC have the authority to make the determination itself. Skeptics were worried that this highly sensitive determination pertaining to the state act of aggression might be too onerous and politically fraught for criminal law judges to bear. Ultimately, the Review Conference decided to entrust this determination to the Pre-Trial Division of the court, that is, all of the ICC’s pre-trial judges convening in full session. This was a victory for the proponents of an independent court because the provision allows the ICC to acquire jurisdiction over an aggression case on its own if the Security Council is silent for six months. The decision to buttress the pre-trial chamber in aggression cases, unnecessary in any other type of ICC case, was intended to assuage those states concerned that the pre-trial judges might be biased or vulnerable to political pressure. The reasoning was that adding more judges whose personal and political proclivities would counterbalance each other offsets those risks.

56. See Kress & von Holtzendorff, supra note 45, at 1212 (describing the Article 15 bis opt-out provision as effectuating a “soft” consent-based regime, rather than a “hard” consent-based regime in which States Parties would have been required to opt in to the aggression amendment for it to apply to their nationals and territory).


58. CICC Report, supra note 51, at 16.

59. Kampala Outcome, supra note 1, annex l, art. 15 bis, para. 8.

60. Id.
Another aspect of the compromise between the proponents of an independent ICC and the proponents of Security Council exclusivity in the realm of *jus ad bellum* determinations, which the Review Conference built into the jurisdictional regime, is a mandatory dialogue between the court and the Council. Even if the ICC Prosecutor concludes after a preliminary analysis that there is a reasonable basis to proceed with an aggression investigation, he or she must complete another step before moving forward: the Prosecutor must notify the UN Secretary-General of the situation and provide him or her with documentation that aggression has occurred. The Secretary-General is expected to pass on the Prosecutor’s documentation to the Security Council. After this exchange, the Security Council has six months to deliberate and make a determination before the Prosecutor can proceed. Only if the Security Council has not made a determination or a referral by that time can the Prosecutor move forward and request that the Pre-Trial Division of the court authorize an investigation.

The hope of a number of the drafters is that the involvement of the ICC will spur the Council to respond to breaches of the peace in a more principled manner than it has in the past. Going forward, if the Council does not do its job, the court can step up to the plate.

C. Entry into Force

A key aspect of the Kampala outcome pertains to the conditions that must be met before the aggression amendments will enter into force and the ICC can start a case. This mechanism determines the temporal jurisdiction of the court and, in particular, the earliest date that the ICC can act upon an alleged violation. The entry into force mechanism is a moving target with three interrelated conditions.

Under the first condition, thirty States Parties must ratify or accept the amendment. Judging from the number of states supporting and actively promoting the aggression amendments at the Kampala Review Conference, this number should not be especially difficult to reach. If only the African Group and the Group of Latin American and Caribbean States, groups strongly supportive of the

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61. *Id.* art. 15 bis, para. 6.
62. *Id.* art. 15 bis, para. 8.
63. *Id.* art. 15 bis, para. 2, art. 15 ter, para. 2.
aggression amendments, ratify, this first condition will have been met. The ICC must then wait at least a year after the thirtieth state ratifies or accepts the amendment before exercising jurisdiction over the crime.64

Under the second condition, the court can seize jurisdiction over aggression after two-thirds of the ASP have decided that the ICC should proceed.65 This condition requires a larger number of states to agree than the first, as thirty states out of 111 at the time of the Review Conference (not accounting for new signatories to the Rome Statute) is less than two-thirds. Nevertheless, two-thirds of the ASP may not be a particularly onerous condition to meet either. The aggression amendments were adopted by consensus in Kampala with only a handful of states signaling displeasure with the outcome. The states that were not fully on board were predominantly the permanent members of the Security Council and their closest allies. Of the members of the ASP, France and the United Kingdom were the only permanent members of the Security Council with voting rights, and they chose not to block the consensus.

The third entry into force condition is a simple time delay of seven years. Under Articles 15 bis and 15 ter, paragraphs 3, “[t]he Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 ....”66 As a result of these paragraphs, even if two-thirds of the ASP is prepared to activate ICC jurisdiction over the crime, the earliest that the court can act against an alleged aggressor is January 1, 2017. If it takes longer than seven years for thirty states to ratify or accept the aggression amendments and one year to pass after the thirtieth ratification, this will delay the ASP vote past this threshold date. In sum, the prohibition against aggression may be on the books, but it will only come into force after thirty states sign on, seven years pass and two-thirds of ICC member states vote to trigger it.

This delay is frustrating for some. However, the conditions for entry into force should not be too difficult to satisfy,67 and the

64. Id.
65. Id. art. 15 bis, para. 3, art. 15 ter, para. 3 (requiring the agreement of “the same majority of States Parties as is required for the adoption of an amendment to the Statute”).
66. Id.
67. See David Scheffer, Adoption qf the Amendments qn Aggression qn the Rome Statute qf the International Criminal Court, ASIL BLOG—INTERNATIONAL CRIMINAL COURT REVIEW CONFERENCE (June 13, 2010), http://iccreview.asil.org/ (remarking that he “would
holding period may be prudent. The delay gives governments and militaries occasion to adjust to the new legal landscape and modify their policies and practices if necessary. If the effect of the activated Rome Statute is any indication, this review is likely to influence the policies and practices of non-party states as well as States Parties.

D. Key Zones of Interpretation

For the sake of clarity, the gaps and ambiguities built into the Kampala outcome are best considered in sequence, as an ICC judge is likely to face them, and in three groups: (1) jurisdiction and admissibility, (2) the act of aggression and (3) the culpable conduct linking the individual to the collective act.

1. Jurisdiction and Admissibility

Judges responsible for determining whether an aggression case is admissible must contend with four major zones of ambiguity in the Kampala amendments and the overall ICC Statute. They will need to interpret any Security Council determination relating to the case, decide where the alleged act of aggression took place, assess the genuineness of domestic investigations into the incident(s) and interpret Article 53 of the ICC Statute, which empowers the Prosecutor to call off an investigation or prosecution if it is not in the interests of justice.

   a. Interpreting the Security Council Determination

First, the judges will need to interpret whether the Security Council has determined that aggression has occurred. This is not as

68. The Pre-Trial Division convening in full session.

69. The judges must also interpret whether the Security Council has determined that aggression has not occurred, whether it has been silent and/or whether it has properly referred a case to the ICC under article 15 ter but left it to the ICC judges to make the
obvious as it might seem. Since the Council began its work in 1945, it has only made express resolutions condemning aggression thirty-one times.\textsuperscript{70} Meanwhile, a recent study concluded that 313 armed conflicts took place between 1945 and 2008.\textsuperscript{71} It is more common for the Security Council to use other terminology to condemn the use of force.\textsuperscript{72} Past practice suggests that the Security Council is likely to determine that an aggressive act constitutes a threat to the peace, a breach of the peace or the unlawful use of force.\textsuperscript{73} The accused, faced with a Security Council resolution containing these terms, rather than the more blunt condemnation of aggression per se, can be expected to challenge the Prosecutor’s authority to proceed. It will be up to the pre-trial chamber to interpret article 15 ter and decide whether the Security Council determination is a sufficient basis for the Prosecutor’s investigation.

The judges will be faced with an even more challenging task of judicial interpretation when the Security Council determines that aggression has \textit{not} occurred. The Kampala outcome spells out with some specificity what an ICC judge should do when the Security Council refers an aggression case to the ICC,\textsuperscript{74} makes a determination that aggression has occurred\textsuperscript{75} or remains silent for six months.\textsuperscript{76} But, as Scheffer recently explained: “Nothing in Article 15 \textit{bis} ex-


\textsuperscript{73} \textit{Id.}

\textsuperscript{74} Kampala outcome, \textit{supra} note 1, annex I, art. 15 ter (directing the court to proceed with the case).

\textsuperscript{75} \textit{Id.} art. 15 bis, paras. 6–7 (requiring the Prosecutor to notify the Secretary-General of the situation before the Court and then proceed with the case).

\textsuperscript{76} \textit{Id.} para. 8 (imposing a condition precedent to proceeding with the case, namely, that the prosecutor seek and obtain the authorization of the Pre-Trial Division to move forward).
licitly prohibits the ICC from forging ahead even if the Security Council renders a negative determination.\textsuperscript{77} The course of an aggression case will hinge upon this early judicial interpretation. Scheffer concludes, “In the absence of relevant language contemplating a negative determination on aggression, Article 15 \textit{bis} leaves a yawning gap.”\textsuperscript{78}

This aspect of the Kampala outcome raises, in a slightly different guise, the controversial question that legal scholars debated in relation to the 1998 NATO intervention in Kosovo and places its resolution squarely with the judges.\textsuperscript{79} If the Security Council is blocked by a single permanent member from making an affirmative Chapter VII resolution condemning an act of aggression, does this amount to a Security Council determination that aggression has not occurred, or does it amount to silence? Presumably, a number of factors will shape each judge’s reasoning as they interpret Article 15 bis of the Kampala outcome, not the least of which will be his or her assessment of how the decision will affect peace and stability.

\textit{b. Where the Act of Aggression Took Place}

Another early interpretation that an ICC judge will be required to undertake in order to establish whether an aggression case is admissible is where an alleged act of aggression took place. Under the Kampala outcome, “[i]n 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.”\textsuperscript{80}

What is clear from Article 15 bis, paragraph 5 (quoted above), is that, absent a Security Council referral under 15 ter, the ICC has no jurisdiction over the political and military leaders of non-party states that attack ICC States Parties. Even if the United States (a non-party state) attacks Canada (an ICC State Party) and the aggression amendments are in force in Canada, U.S. political and military leaders cannot be investigated and tried by the ICC.

However, the interpretive question arises if Canada attacks

\begin{itemize}
\item \textsuperscript{77} Scheffer, supra note 69, at 901.
\item \textsuperscript{78} Id. at 902.
\item \textsuperscript{79} INDEP. INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2000).
\item \textsuperscript{80} Kampala Outcome, supra note 1, annex I, art. 15 bis, para. 5.
\end{itemize}
the United States. Article 15 bis, paragraph 5 specifies that the ICC shall not exercise jurisdiction over aggression when committed on the territory of a non-party state. But was the crime of aggression—the planning, preparation, initiation or execution of a manifest violation of the UN Charter—committed where the attack was launched (Canada) or where it landed (the United States)? If the judges find that the act of aggression was committed where the attack landed (the United States), the ICC will have no jurisdiction when a State Party that has signed the aggression amendments attacks a non-party state. If the judges find that the act of aggression was committed where the attack was launched (Canada) or, in accordance with the majority opinion at the Review Conference, where the attack was launched and where it landed, the ICC has jurisdiction over the Canadian leaders who planned, prepared, initiated or executed this hypothetical attack.

c. Complementarity

The principle of complementarity may also require interpretation by ICC judges. Under Article 17 of the ICC Statute, a case is inadmissible while it is being investigated or prosecuted by a state with jurisdiction, unless that state is unwilling or unable to proceed in a genuine manner. A case is also inadmissible when it has been investigated and the state has decided not to prosecute, unless, as above, the state has decided not to prosecute because it is unwilling or unable. Here, the ICC judges will be required to determine whether a domestic investigation or prosecution of an alleged aggressor is genuine or whether it is a pretext meant to render a case inadmissible at the ICC.

The ICC Statute requires a judge assessing whether a state is unwilling to proceed to consider, on top of the genuineness of the proceedings, whether there has been an unjustified delay, whether the proceedings are being conducted independently and impartially, and whether they are being conducted in any other manner inconsistent with the intent to bring the accused to justice. The ambiguity of these standards leaves the ICC judges with ample discretion to interpret the domestic investigation or prosecution of aggressors as excluding ICC jurisdiction or inviting it. For instance, it will be a mat-

81. Rome Statute, supra note 5, art. 17.
82. Id. art. 17, para. 2.
ter of judicial interpretation whether an official response such as the
United Kingdom’s Chilcot Inquiry into that country’s use of force in
Iraq amounts to an investigation for the purposes of precluding ICC
jurisdiction under Article 17.83

d. The Interests of Justice

There may be an incontrovertible legal and factual basis for
the ICC prosecutor to investigate and prosecute an individual for ag-
gression, but he or she may still decline to do so under Article 53 of
the Rome Statute because doing so would not serve the interests of
justice. Judges can review the decision not to proceed on this basis at
the request of the referring state84 or the Security Council85 or by the
judges’ own volition.86

However, the judges will not find much guidance in the ICC
Statute about which investigations and prosecutions should be called
off in the interest of justice. Article 53 directs the Prosecutor and the
court to “tak[e] into account all the circumstances, including the
gravity of the crime, the interests of victims and the age or infirmity
of the alleged perpetrator, and his or her role in the alleged crime.”87
The implication is that it will be a matter for judicial interpretation
whether the judges, faced with an aggression investigation or prose-
cution that has been deferred by the Prosecutor in the interests of jus-
tice,88 will rekindle it. If the early practice of the court is any indica-
tion, Article 53 will only be used to call off an investigation or
prosecution in the most unusual of circumstances. To date, no case
has been called off in the interests of justice.

2. The Act of Aggression

There are two stages throughout the legal process during
which the ICC judges will be responsible for making determinations
concerning the act of aggression and, in particular, whether or not an

(last visited Jan. 9, 2012).
84. Rome Statute, supra note 5, art. 53(3)(a).
85. Id.
86. Id. art. 53(3)(b).
87. Id. art. 53(2)(c).
88. Id. art. 53(1)(c), (2)(c).
act sufficient to attract individual criminal responsibility under the ICC Statute has occurred. The first is at the jurisdictional phase of the proceedings when the pre-trial chamber is assessing whether a case is admissible. The second stage is at the trial itself.  

At each of these stages, an ICC judge will be faced with two key areas of ambiguity requiring interpretation. First, the judge must determine whether a manifest violation of the UN Charter has occurred, and second, the judge must decide what acts qualify as aggression. These areas of ambiguity, introduced below, will be considered in more detail in Part III of this article in the context of three hard cases: the scope of self-defense, the character of an armed attack and the legal status of humanitarian intervention.

a. A Manifest Violation of the UN Charter

The rules contained in the UN Charter and customary international law, which serve as the foundation of modern jus ad bellum, do not apply themselves. They require interpretation. Debates over the correct legal interpretation of the UN Charter, previously addressed primarily through a disaggregated political process in which state officials responded to the use of force by another state in a diplomatic venue, will be relegated to the ICC judges for resolution by formal legal process. Within this process, the ICC judges will be required to interpret the “manifest” qualifier in Article 8 bis, which is meant to ensure that only the most clear-cut violations of the UN Charter attract individual criminal responsibility. In doing so, the judges will need to consider the character, gravity and scale of the use of armed force by one state against another.

b. The Acts That Qualify as Aggression

The Review Conference defined an act of aggression as “the use of armed force by a State against the sovereignty, territorial in-

89. A third opportunity will present itself if there is an appeal directly pertaining to the act of aggression.


91. Kampala Outcome, supra note 1, annex I, art. 8 bis, para. 2, annex III, paras. 6–7.
tegrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.” The ICC judges will be required to determine what amounts to armed force and whether every use of armed force by one state against another violates that state’s sovereignty, territorial integrity or political independence. In addition, the ICC judges will have to interpret Article 8 bis, paragraph 2 of the Kampala outcome, and determine whether the list of acts of aggression contained within it is closed or whether new forms of aggression not yet contemplated might qualify.

3. The Culpable Conduct Linking the Individual to the Collective Act

An ICC judge will face four interpretive challenges when determining whether, under the definition of aggression and the Rome Statute, an individual can be held criminally accountable for the collective act of aggression: (a) determining who counts as a leader; (b) deciding what behavior falls within the ambit of “planning, preparing, initiating or executing,” the actus reus of the crime of aggression; (c) establishing the scope of the joint criminal enterprise; and (d) settling on the forms of perpetration and participation that matter in the context of an aggression case.

a. Determining Who Counts as a Leader

Under the definition of aggression, a leader is “a person in a position effectively to exercise control over or to direct the political or military action of a State.” The components of the leadership clause are the position of the person in the organization, his or her capacity to exercise effective control or to direct political or military action, and the nature of the aggressive act as one carried out collectively by a state. Each of these components is open to interpretation.

Position in an organization can be interpreted as the formal position in a military hierarchy or an individual’s central position in a social network. The higher standard of “effective control” is offset

92. Id. annex 1, art. 8 bis, paras. 1–2.
93. Kampala Outcome, supra note 1, annex 1, art. 8 bis, para. 1.
94. Weisbord, supra note 31, at 44.
95. Id. at 48.
by the looser “or to direct” standard, and the judges will be expected to interpret which standard applies in which contexts. Furthermore, the “direct” standard, when taken with “political or military action of a state,” would seem to capture leaders outside of the formal state bureaucracy, such as business or religious leaders. Finally, the word “state” has already given rise to an as yet unresolved debate in the context of the Palestinian Authority’s referral of its situation to the ICC. The ICC judges will be expected to determine what political entities qualify as states for the purpose of an aggression case.

b. Deciding What Behavior Falls within the Actus Reus of the Crime

The Nuremberg tribunal failed to meaningfully operationalize or apply the conduct verbs in the London Charter’s definition of crimes against peace. The justices, for example, concluded that preparation included acts as diverse as Hitler’s writing of *Mein Kampf* as well as the Führer’s meetings with his highest-ranking military commanders. It will be for the ICC judges to add substance and specificity to these terms in the context of an aggression case.

c. Establishing the Scope of the Joint Criminal Enterprise

Mark Osiel has called the doctrine of joint criminal enterprise “dangerously illiberal” because the perpetrator cannot know before the judge establishes the bounds of the enterprise whether he or she will be captured within its ambit. The leadership clause of the crime of aggression narrows the doctrine, but it does not complete-

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96. See Office of the Prosecutor, Int’l Crim. Ct., Summary of Submissions on Whether the Declaration Lodged by the Palestinian National Authority Meets Statutory Requirements 1 (May 3, 2010), http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACCO-B41706BB41E5/282852/PALESTINEFINAL201010272.pdf (collecting arguments interpreting the term “State,” including, for example, the argument that “article 12(3) including the term ‘State’ should be examined in the context of the Statute and its object and purpose. . . . [T]he term ‘State’ is subject to variable defining characteristics under public international law, and lacks an unambiguous or ‘ordinary’ meaning”).

97. Weisbord, supra note 31, at 50–52.

98. Id. at 49–54.


100. Weisbord, supra note 31, at 59.
ly answer Osiel’s critique. Because many organizations (or even states) can be implicated in an act of aggression, and because the judges establish the scope of JCE after the crime is committed, leaders are not forewarned whether they will fall within the ambit of the crime. This is an important zone of interpretation that the judges will be expected to fill.

d. Settling on the Forms of Perpetration and Participation That Matter in the Context of an Aggression Case

There is an uneasy relationship between the conduct verbs (planning, preparation, initiation and execution) and the modes of perpetration and participation set out in Article 25(3)(a)–(f) of the Rome Statute.\(^\text{101}\) For example, under Article 25(3)(f) of the Rome Statute, an “attempt” is an action that constitutes a “substantial step” toward the execution of a crime.\(^\text{102}\) The judges will need to resolve, along with other compatibility issues, whether an incomplete plan constitutes a substantial enough step to justify criminal responsibility and punishment.\(^\text{103}\) Moreover, it is not clear what providing the means for the commission of “initiation” entails.\(^\text{104}\) My prior scholarship has identified the compatibility problems.\(^\text{105}\) It will be for the judges, however, to devise solutions in the context of an aggression case.

E. Methodological Considerations: Legality and Judicial Interpretation

In an article published before the Review Conference, Professor Michael Glennon warned that the draft definition of the crime of aggression is “blank-prose” that violates the principle of legality.\(^\text{106}\)

\(^{101}\) Criminal responsibility attaches under Article 25 where a person commits individually, commits jointly, commits through another, orders, solicits, induces, assists, provides the means for or attempts the commission of a crime. Rome Statute, \(supra\) note 5, art. 25(3)(a)–(f).

\(^{102}\) \(Id.\) art. 25(3)(f).

\(^{103}\) Weisbord, \(supra\) note 31, at 62.

\(^{104}\) \(Id.\)

\(^{105}\) \(Id.\)

According to Glennon, “[p]rosecution under it would turn upon factors that the law does not delineate, rendering criminal liability unpredictable and undermining the law’s integrity.”\(^{107}\) Glennon is right that the definition will require the ICC judges to fill gaps and ambiguities through judicial interpretation, but he overstates the claim that the definition violates the principle of legality.\(^{108}\) The repercussion for a judge hearing an aggression case is that the definition should withstand the void-for-vagueness charge that is likely to be leveled by the first defendant in an aggression case.

Perhaps most problematic for Glennon’s vagueness argument is his failure to consider the crime of aggression in its entirety and in light of the ICC’s rules of interpretation. The definition of aggression includes the Elements of the Crime and the Understandings, which Glennon overlooks in his paper. According to Article 21 of the ICC Statute, the court shall apply the ICC Statute as a whole, the Rules of Procedure and Evidence, applicable treaties and the principles and rules of international law.\(^{109}\) If these sources are insufficient to resolve the question at hand, the judges are expected to consider “general principles of law derived . . . from national laws of legal systems of the world”\(^{110}\) and the court’s own precedents.\(^{111}\) Faced
with legal gaps and ambiguities of the type identified in the last sub-
section, ICC judges are expected to follow the applicable rules of in-
terpretation, fill the gap or resolve the ambiguity and arrive at a well-
reasoned decision—not invalidate the law.

II. WHEN PEACE AND JUSTICE CLASH

The peace versus justice dilemma has begun to coalesce into a
general structure with foreseeable conceptual elements and rhetorical
dynamics. Ideological intelligentsias who understand themselves to
be acting for stakeholder groups have begun to take positions in what
has become an intense academic, policy and media debate. Since the
compromise adopted in Kampala leaves room for interpretation, it
will be for the judges to work within the law to advance outcomes
that are consistent with the language, purpose and meaning of the
Rome Statute. The challenge the bench faces when judging aggres-
sion will be how to advance peace and justice without undermining
either.

The overall claim of this section, building on the outcome of
the stocktaking exercise on peace and justice at the Review Confer-
cence, is that there is an “intrinsic link between justice and
peace” and that “[p]eace and justice, if properly pursued, promote
and sustain one another.” The diplomatic delegations and experts

111. Id. art. 21(2).

112. Méndez, supra note 13; ICC-ASP, Report of the Bureau on Stocktaking: The
Impact of the Rome Statute System on Victims and Affected Communities, U.N. Doc. ICC-
/ICC-ASP-8-49-ENG.pdf; David Tolbert and Marieke Wierda, Stocktaking: Peace and
Justice (May 2010), http://ictj.org/sites/default/files/ICTJ-RSRC-Global-Peace-Briefing-
2010-English.pdf; Letter Dated 13 June 2008 from the Permanent Representatives of
Finland, Germany and Jordan to the United Nations Addressed to the Secretary-General,
[hereinafter Nuremberg Declaration], available at http://www.icc-cpi.int/iccdocs/asp_docs
/RC2010/Stocktaking/Nuremberg%20Declaration%20UNGA.pdf; see generally ICC-ASP,
Stocktaking of International Criminal Justice, http://icc-cpi.int/Menus/ASP
/ReviewConference/Stocktaking/ (last visited Jan. 8, 2012) (collecting background and
additional papers and materials on peace and justice submitted during stocktaking exercise at
the Review Conference).

113. Méndez, supra note 13, at 1.

114. Nuremberg Declaration, supra note 112, at 4; see also U.N. Secretary-General, The
Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Rep. of the
participating in the stocktaking exercise in Kampala discussed how the ICC and the ad hoc tribunals have advanced peace and justice to date and what challenges the court has faced. They did not, however, go so far as to consider how an ICC judge might attempt to advance peace and justice, or to forecast how the dilemma might evolve in the context of an aggression case. Extrapolating from the ICC’s work managing the peace versus justice dilemma to date and the work of scholars who have mapped the problem and attempted to chart a course, this part proposes an approach for judges to take when faced with an aggression case where the peace versus justice dilemma is a central concern.

How the peace versus justice dilemma is depicted determines how it is addressed and resolved. What is most apparent when studying the rhetorical dynamics of the debate is that disagreement is premised on remarkably narrow notions of both peace and justice. Peace and justice are equated with institutional responses rather than practical outcomes. Peace is associated with negotiations between the leaders of warring groups or their representatives, accompanied by an offer of amnesty for past crimes that is meant to serve as an incentive to reach an agreement. Justice is retributive. It takes place in a courtroom in accordance with predetermined rules of evidence and procedure and culminates in the punishment of guilty defendants. The dilemma is starkly portrayed by Father Carlos Rodriguez of the Acholi Religious Leaders Peace Initiative: “Obviously, nobody can convince a rebel leader to come to the negotiating table and at the same time tell him that when the war ends he will be brought to trial.”115 An important starting point in mediating the tension between peace and justice is to reconsider the debate using richer notions of justice and also of peace.

A. The Proponents of International Justice

Within the narrow structure of this debate, the international justice hawks, a group comprised of international prosecutors, victim organizations, certain aid groups (such as Human Rights Watch and International Crisis Group) and political representatives of important middle powers (such as France, the United Kingdom and Belgium)

have advocated for prosecution over amnesty for deontological, institutional competence and utilitarian reasons. First, the justice hawks rely on deontological concerns, such as the dignity of survivors of atrocity crimes and mass violence, as a primary reason for preferring prosecution to amnesty. As explained by Harvard Law School Dean Martha Minow, an author who has reflected upon the various responses to mass violence, “through retribution, the community reasserts the truth of the victim’s value by inflicting a publicly visible defeat on the wrongdoer.”

According to Professor Eric Blumenson, “[m]any retributivist supporters of the ICC believe that bringing war criminals to justice is an absolute moral obligation of the Court, or a non-negotiable right of the victims.” David Tolbert, president of the International Center for Transitional Justice and former International Criminal Tribunal for Yugoslavia (“ICTY”), Deputy Chief Prosecutor, has advanced a related argument that amnesties are no longer, in any event, legally permissible. The international justice hawks argue that some crimes are so heinous that human dignity requires the perpetrators to be held criminally accountable and punished.

Additionally, institutional competence has been cited as a reason to favor prosecution over ICC-granted impunity. As ICC Deputy Prosecutor Serge Brammertz, an international justice hawk who led the UN investigation into the assassination of former Lebanese Prime Minister Rafiq Hariri and later became Prosecutor of the ICTY, stated: “[t]he ICC is ‘here for justice, not politics... The priority of the Rome Statute is to prosecute[;] it’s not to provide political stability.”

Here, the underlying logic is that the ICC lacks the expertise


117. For an appraisal of criminal trials as a response to mass violence, see MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACEING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 12 (1998).

118. Blumenson, supra note 14, at 819.

119. Tolbert, supra note 112, at 2–3. See also Nuremberg Declaration, supra note 112, at 4 (“The most serious crimes of concern to the international community, notably genocide, war crimes, and crimes against humanity, must not go unpunished and their effective prosecution must be ensured. The emergence of this principle as a norm under international law has changed the parameters for the pursuit of peace. As a minimal application of this principle, amnesties must not be granted to those bearing the greatest responsibility for genocide, crimes against humanity and serious violations of international humanitarian law.”).

120. Blumenson, supra note 14, at 821 (quoting Interview with Serge Brammertz,
and tools to stabilize societies in conflict and, furthermore, that it was created to do justice in a context insulated from global political pressures. Likewise, Hannah Arendt argued in discussing the Eichmann trial: “Not only does [the Eichmann court] not have at its disposal ‘the tools required for the investigation of general questions,’ it speaks with an authority whose very weight depends upon its limitation.” In contrast, the UN Security Council is equipped to promote peace and security by delaying ICC cases if necessary and making room for amnesty when prosecution constitutes a threat to the peace.

Finally, the international justice hawks advance a utilitarian case for prosecution, arguing that it will have a general deterrent effect. McGill University Professor Payam Akhavan, a former prosecutor at the ICTY, argues: “beyond dispensing retributive justice and vindicating the suffering of victims,” the retributive justice paradigm has a deterrent effect on political and military leaders. Akhavan claims that retributive justice for genocide and other atrocities changes the rules of international relations: “[c]riminal accusations increasingly constitute a serious political impediment to the ambitions of existing or aspiring leaders.”

B. The Proponents of Negotiated Peace

In contrast, proponents of negotiated peace base their preference for amnesty and negotiation over prosecution on three consequentialist arguments: (1) prosecution makes peace less attainable,
(2) indictments raise obstacles to negotiation by hardening the positions of warring factions and (3) prosecutions can unite political leaders who fear the ICC.\textsuperscript{127}

The proponents of negotiated peace cast themselves as political realists who recognize that a brokered peace is more important to global stability than the pursuit of justice. Andrew Natsios, U.S. Special Envoy to Sudan from 2006 to 2007, argues, “[i]nstead of trying to bring Sudan to the gates of some just and democratic Eden, the West must encourage the Sudanese to work out a limited and practical settlement . . . .”\textsuperscript{128} The Refugee Law Project, another proponent of negotiated peace, which has worked closely with populations affected by the conflict in Northern Uganda, criticized the ICC referral as a distraction from the plight of Northerners and peaceful avenues for ending the war.\textsuperscript{129}

The proponents of negotiated peace assume that prosecution impedes peace negotiations.\textsuperscript{130} For example, according to Natsios, the ICC indictment against President Omar al-Bashir endangered the safety of civilians in Darfur and compromised the 2005 Comprehensive Peace Agreement between the North and the South.\textsuperscript{131} Natsios argued that the threat of arrest increased Bashir’s incentive to cling to power as the only means of avoiding punishment. Furthermore, the ICC indictment sent the wrong signal to rebel groups who would presumably add prosecution to their list of non-negotiable demands, thereby making the possibility of a political agreement more re-

\textsuperscript{127} See, for example, the African Union statements supporting al-Bashir: \textit{African Union Moves Aggressively to Shield Bashir from Prosecution}, Sudan Trib. (July 29, 2010), http://www.sudantribune.com/African-Union-moves-aggressively, 35786; \textit{African Union in Rift with Court}, BBC News (July 3, 2009), http://news.bbc.co.uk/2/hi/8133925.stm.


\textsuperscript{130} For a countervailing claim, see Méndez, \textit{supra} note 13, at 1 (“Less than 85 per cent of negotiations end in an agreement and far less are implemented. In Sudan, there was no peace process before the ICC. All attempts at agreement failed. All attempts at appeasing President Al Bashir failed. The idea that the ICC stopped an ‘emerging’ peace process is pure invention.”).

\textsuperscript{131} Natsios, \textit{supra} note 128.
mote. Natsios favored a “political deal between the north and south based on a realistic appraisal of what is achievable under the current unfavorable circumstances.” In short, peace required a deal brokered by balancing the interests of competing groups.

C. A Broader Concept of Justice

Expanding the concept of justice beyond the purely retributive institutional response is a promising way to mediate the tension between peace and justice. The Nuremberg Declaration on Peace and Justice, for example, invoked at the ICC Review Conference, contains a robust concept of justice with the potential to mitigate the tension between the two aspirations:

“Justice” is understood as meaning accountability and fairness in the protection and vindication of rights, and the prevention and redress of wrongs.

Justice must be administered by institutions and mechanisms that enjoy legitimacy, comply with the rule of law and are consistent with international human rights standards. Justice combines elements of criminal justice, truth-seeking, reparations and institutional reform as well as the fair distribution of, and access to, public goods, and equity within society at large. Justice may be delivered by local, national and international actors.

132. Id. But see Tolbert, supra note 112, at 4 (offering a different account: “The ICC's involvement clearly affected the parties' calculations and might have created the conditions that made the February 2009 reconvening of the talks possible. International mediation managed to draw the Justice and Equality Movement (JEM) and a majority of the Sudan Liberation Movement (SLM) factions into a reinvigorated peace process in early 2010.”).

133. Natsios, supra note 128. But see Nuremberg Declaration, supra note 112, at 5 (“Mediators bear a responsibility to contribute creatively to the immediate ending of violence and hostilities while promoting sustainable solutions. Their commitment to the core principles of the international legal order has to be beyond doubt.”).

134. Natsios, supra note 128.


Within this definition, non-penal means such as truth and reconciliation commissions and traditional restorative justice processes have a place in the aftermath of ICC crimes.

Professor Eric Blumenson, like the drafters of the Nuremberg Declaration, begins his analysis of the peace versus justice problem from a robust notion of justice. His approach is to break down the peace versus justice dilemma into three related questions. First, does justice in the aftermath of crime always require prosecution, or will non-penal means such as truth commissions, reparations, traditional confessions and reintegration sometimes suffice? Non-retributive alternatives may bring accountability without interfering with parallel peace negotiations.

Second, when justice requires prosecution, does this obligation outweigh all other obligations, such as the obligation to promote the safety of innocent people threatened by a violent government or insurgent organization? This question opens the discussion to countervailing ethical obligations that may, in defined contexts, trump the ICC’s retributive justice response. Blumenson concludes that the ICC prosecutor or judges should defer or stop an investigation or prosecution in exceptional cases where proceedings would have catastrophic results.

Finally, Blumenson asks how much deference the ICC should afford to diverse state responses to crimes within its jurisdiction. He advances a pluralistic view of international criminal justice and contends that the ICC should provide leeway for diverse state responses. Blumenson’s analysis effectively expands the debate beyond a narrow competition between retributive justice and negotiations incentivized by amnesty by allowing for alternative institutional responses to ICC crimes such as truth commissions and Mato Oput.

Professor Linda Keller contributes to the peace versus justice

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137. Blumenson, supra note 14, at 805.
138. Id. at 804.
139. Id.
140. Id. at 844.
141. Id. at 804.
142. Id. at 804, 854, 859.
143. Id. at 809–10, 854–55. Mato Oput is a restorative justice ritual practiced in parts of Northern Uganda. For a description of the ritual, see Mato Oput Ceremony, JUSTICE AND RECONCILIATION PROJECT (May 10, 2010), http://justiceandreconciliation.com/2010/05/701.
debate primarily through a black-letter analysis of the ICC Statute where she identifies key avenues of deferral to alternative justice mechanisms. For Keller, the ICC Statute leaves plenty of room for local alternatives that advance both peace and the goals of international criminal justice. These goals, in her view, are retribution, deterrence, expressivism and restorative justice.

Once Keller finds the room she needs in the language of the statute, she proceeds to set out principled guidelines for deferral. In essence, if an alternative justice mechanism such as a truth and reconciliation commission or a traditional justice process meets the goals of international criminal justice better than the ICC, the ICC should defer. The strength of Keller’s approach is that by relaxing both the ICC Statute and the meaning of justice, she diffuses the peace versus justice dilemma as it would surface in many instances. But, though her framework puts forth a broad notion of justice, she offers no way for ICC judges to conceptualize and accommodate the demands of peace.

D. Envisaging a Broader Concept of Peace

Neither Keller nor Blumenson broadens the concept of peace in the same way they broaden notions of justice. Both scholars are seeking the optimum model of justice for a particular context. What is missing from their articles, and from the literature generally, is an account of the concept of peace that is on par with the richer concept of justice they are innovating, a concept with the potential to help an ICC judge managing the peace versus justice dilemma.

The Nuremberg Declaration’s definition of “sustainable peace” is a promising start. According to this semi-official UN document:

Sustainable peace goes beyond the signing of an agreement. While the cessation of hostilities, restoration of public security and meeting basic needs are urgent and legitimate expectations of people who have been traumatized by armed conflict, sustainable peace requires a long-term approach that addresses the struc-

145. Id. at 237–51.
146. Id. at 213.
147. Id. at 259–62.
This multifaceted definition of peace includes short- and long-term ends. It assumes that the rule of law and respect for human rights will help make peace sustainable. Rather than putting peace and justice at odds, it requires peace-builders (including government officials, local leaders, aid groups, negotiators and judicial actors) to coordinate their interventions toward a broad, shared goal. What was once the peace versus justice dilemma is forthwith transformed into a question of timing and nuance: when and how should justice be done to promote sustainable peace?

The Nuremberg Declaration is a good place to start to conceptualize peace, but it does not go on to operationalize its concepts. Recently, a White House policy paper took a step in this direction. \(^{149}\) The paper makes concrete recommendations for U.S. action aimed at achieving peace in Northern Uganda. \(^{150}\) Its practical agenda exemplifies a concept of peace that, through its nuance, transcends the intellectual struggle so far associated with the peace versus justice dilemma within the international justice movement.

The authors of the U.S. strategy have a desired end-state in mind as well as a preferred approach for achieving it. In this end-state, the Lord’s Resistance Army’s (“LRA’s”) threat to civilians is eliminated. \(^{151}\) Joseph Kony and his senior commanders are captured and brought to justice. \(^{152}\) The remaining LRA fighters are demobilized. \(^{153}\) People displaced by the rebels return home and resume their livelihood activities. Struggling communities are assisted, and their basic humanitarian needs are met. \(^{154}\) The report posits that the protection of civilians requires both the improvement of information sharing about the vulnerabilities of the civilian population and the

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150. Id. at 8–20.

151. Id. at 8.

152. Id. at 9.

153. Id.

154. Id.
modus operandi of the LRA, and the development of effective protection strategies likely to prevent and mitigate LRA attacks. The House Committee’s approach to apprehending Kony and his senior commanders is to enhance logistical, operational and intelligence assistance in support of multilateral partners and to enhance and sustain diplomatic efforts that promote multilateral military support in the campaign against the LRA.\footnote{Id. at 14.}

The policy paper makes clear that viewing peace as the nonnegotiable end does not leave conceptions of justice on the cutting room floor. Rather, it allows for positive action on the part of judicial actors, whereas an abstract debate on the comparative value of peace and justice might mire effective peace building efforts. Part of the U.S. strategy on this front is to support the ICC’s intervention to arrest and prosecute Kony and his senior commanders.\footnote{Id. at 13.} The committee also recommends supporting trials by the War Crimes Division of the Ugandan High Court.\footnote{Id.} The report sets priorities among its proposals for achieving peace: “the sustained military and diplomatic cooperation of governments in the region to defeat Joseph Kony and the LRA, coupled with strong support from the international community, remains the most critical component for success.”\footnote{Id. at 13.} Meanwhile, “bringing these senior [LRA] commanders to justice is a key component of creating a lasting peace in the region.”\footnote{Id.} The way the committee is using these terms as a unit suggests that in practice, justice and peace are not as severable as the abstract debate might lead one to believe.

The White House Policy Paper begins to set out a more nuanced relationship between peace and justice, but it stops short of describing the role of international judicial actors in advancing sustainable peace. Meanwhile, the scholarship of Payam Akhavan, the McGill law professor who advised the Ugandan government on the situation in the North, offers the ICC judges some important preliminary insights into how they might interpret the law in order to advance ongoing multidimensional attempts to achieve peace.\footnote{Payam Akhavan, \textit{The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court}, 99 AM. J. INT’L L. 403 (2005) [hereinafter Akhavan, \textit{Lords Resistance Army Case}]; Payam Akhavan, \textit{Are International
Akhavan’s proposals are closely tied to his broader argument about the role of international criminal prosecutions in promoting international order.161

For example, Akhavan describes the government of Uganda’s self-referral to the ICC as a means of achieving peace in a historically intractable conflict;162 when the obvious tools for achieving peace with the LRA repeatedly failed, the government hoped that the ICC referral would “engage an otherwise aloof international community”163 and mobilize it against its mercurial enemy. Akhavan views the ICC intervention that followed as part of a coordinated multilateral peace initiative. For example, the ICC’s scrutiny of the situation in Northern Uganda threatened to make public the LRA’s ties to the Sudanese government and other backers; consequently, the LRA lost much of its financial support and military aid.164 Other accounts suggest that the ICC intervention also made supporting the LRA riskier and prompted the Sudanese government to cooperate with the ICC arrest warrants,165 correlated with an increase in defections166 and forced the LRA to the negotiating table.167 Akhavan concludes, “[t]his recent willingness to negotiate [was] linked to the LRA’s political isolation and military containment—both of which are linked to the new context created by the ICC referral.”168


161. Akhavan, supra note 125, at 7.
163. Id.
164. Id.
167. Brody, supra note 116; see also Tolbert, supra note 112, at 1 (“There are early indications that the issuing of arrest warrants may strengthen motivations to negotiate. There are also signs that the existence or threat of arrest warrants can spur parties to examine a broader array of justice measures than might otherwise have been the case . . . .”).
168. Akhavan, Lord’s Resistance Army Case, supra note 160, at 404; see also VICTIMS’ RIGHTS WORKING GRP., THE IMPACT OF THE ROME STATUTE SYSTEM ON VICTIMS AND
More generally, Akhavan argues that “[r]ealism’ is not founded on the appeasement of power, and ideals are not irrelevant to ‘pragmatic’ considerations.”\textsuperscript{169} International criminal tribunals can be an impetus to peace by “discrediting and containing destabilizing political forces.”\textsuperscript{170} Indictments, along with arrest and prosecution, have served to stigmatize violent leaders, thereby undermining their influence.\textsuperscript{171} Akhavan considers Slobodan Milošević’s fall from power a prime example: following indictments issued by the ICTY, the Serbian people forced the internationally-marginalized Milošević out of office, achieving peace without amnesty.\textsuperscript{172}

However, Akhavan’s analysis suffers from some methodological flaws. It is anecdotal and selective. He provides no indicators that would allow for systematic evaluation of when and how each investigation and prosecution advanced or undermined other initiatives to achieve peace. Additionally, Akhavan’s analysis is retrospective, and as a result, some of the fact patterns he discusses are susceptible to alternative explanations. Furthermore, he does not consider how international judicial actors should fulfill their mandate when pressing forward represents an acute impediment to peace. Nonetheless, Akhavan supplies persuasive preliminary evidence, corroborated by others, that trials, in conjunction with other peace initiatives, can be an incentive rather than a barrier to peace.

E. Judicial Considerations

The suggestion that ICC judges should interpret the law in order to promote peace may seem to run against an entrenched dogma held by some liberal jurists.\textsuperscript{173} According to this dogma, justice requires a division of power where the legislature makes the law and the judiciary applies it. When this division holds, we can be said to

\textsuperscript{169} Akhavan, supra note 125, at 10.

\textsuperscript{170} Id. at 7.

\textsuperscript{171} Akhavan, Lords Resistance Army Case, supra note 160, at 419.

\textsuperscript{172} Akhavan, supra note 125, at 17–18.

\textsuperscript{173} See, e.g., Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1180 (1989); Thomas Paine, Common Sense, in COMMON SENSE AND OTHER POLITICAL WRITINGS 3, 32 (Nelson F. Adkins ed., 1953) (“[I]n America the law is king. For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other.”), cited in Scalia, supra note 173, at 1176.
live under the rule of law, not the rule of the king. To suggest that an ICC judge should do anything other than impartially apply the law threatens the legitimacy of the ICC. Adam Branch argues that the fact that the ICC must take contextual political concerns into account “puts into relief the limits to the ICC’s capacity to realize justice and the rule of law.”

There are two reasons, however, why it is not necessarily a deviation from the liberal ideal to suggest that an ICC judge should seek in his or her work to promote both peace and justice. The first pertains to the nature of the ICC Statute and an ICC judge’s mandate under its terms. The Statute is meant to advance both aspirations. Perpetrators should be punished, the preamble makes clear, in order to put an end to impunity for atrocity crimes. But ending impunity is meant to serve, as its purpose, the promotion of peace and security. If an ICC judge takes the preamble of the Statute seriously, it invites—perhaps even requires—him or her to look to the effects of his or her decisions and evaluate whether a particular decision contributes to peace and security.

The second reason that this proposal does not transgress the liberal ideal involves the crime of aggression itself, or rather, its prosecution. The goal of prosecuting the crime of aggression, known as the crime against peace in the Charter of the International Military Tribunal at Nuremberg, is first and foremost to promote peace. Even if one concedes, as Blumenson does, that there is inherent value in retribution, especially concerning political and military leaders who plan, initiate and wage illegal wars against their neighbors, it would be problematic to prosecute aggression if the prosecution itself would further jeopardize international peace and security.

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175. Rome Statute, supra note 5, pmbl. (“Recognizing that such grave crimes threaten the peace, security and well-being of the world . . .”).

176. Id. (“Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . .”).

177. The ICC Prosecutor may also be under the same obligation. ICC Prosecutor Luis Moreno-Ocampo has been outspoken in interpreting his mandate in this way. See Luis Moreno-Ocampo, *The International Criminal Court: Seeking Global Justice*, 40 CASE W. RES. J. INT’L L. 215, 221 (2008).

178. Rome Statute, supra note 5.

179. London Charter, supra note 31, art. 6(a).
This is not to suggest that indictments should be dismissed every time perpetrators, like the LRA leaders, threaten reprisals. Juan Méndez, former Special Adviser to the UN Secretary-General on the Prevention of Genocide, warns, “If the ICC is contemplated simply as a lever, it will be undermined as some will expect it to be turned on and off as political circumstances dictate.”

Rather, the task of ICC judges is to interpret the new prohibition on aggression within the language of the ICC Statute to advance its retributivist and expressivist goals in such a way as to promote peace and security.

When making the empirical assessment of how the ICC intervention will interact with other institutional attempts to bring peace, the judges should begin by understanding the conflict. The International Negotiation Program of the Harvard Program on Negotiation, in consultation with a group of international justice experts, created a promising “Conflict Assessment Tool” to help systematize this task. The tool guides the researcher, in this case an ICC judge and his or her staff, to focus on vital aspects of the conflict. It is designed to help judicial decision-makers understand the actors (and their relationships, positions and interests), the history of the conflict (including triggers and attempted solutions) and the “mythologies” surrounding the conflict to imagine the possible impact the ICC’s case may have on the ground.

181. Mark A. Drumbl, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 173 (2007) (“The expressivist punishes to strengthen faith in rule of law among the general public, as opposed to punishing simply because the perpetrator deserves it or because potential perpetrators will be deterred by it.”); see also Mark Drumbl, The Push to Criminalize Aggression: Something Lost Amid the Gains?, 41 CASE W. RES. J. INT’L L. 291 (2009).


183. Originally, the Office of the Prosecutor.
When considering the impact that an ICC case will have, the Conflict Assessment Tool can help an ICC judge identify and account for considerations such as the moral hazard problem for national courts, the cost externalization of national governments, the increasing costs of defection for actors involved in the conflict, the delegitimization of particular officials, the emotional legitimization of certain parties, the role of the ICC as a catalyst to domestic actors, and the potential for either stabilizing or destabilizing a given situation.

The Conflict Assessment Tool and related materials developed by conflict management scholars and practitioners can assist judges in taking the concrete requirements of peace into account as they interpret the law.

The Conflict Assessment Tool, for example, can help ICC judges recognize that the court is seldom the only institution working to advance peace and security. Its primary contribution to a concerted peace-building effort is to investigate, prosecute and try the gravest crimes within its jurisdiction. Thus, when it comes to protecting civilians from backlash by an indicted leader, the ICC judges should resist pressure to permanently stop a substantively compelling case. Juan Méndez makes a persuasive claim that “[j]ustice contributes to peace and prevention when it is not conceived as an instrument of either and on condition that it is pursued for its own sake.”

With no independent enforcement machinery, the ICC is not the best institution to protect civilians. As the Nuremberg Declaration on Peace and Justice makes clear, “[e]ach State has the primary responsibility to protect its population from these crimes.” If the state fails to protect its population from unscrupulous political and military leaders in its midst, other institutions, like the Security Council, are better positioned than the ICC judges to protect the civilians. This may, in rare cases, involve deferring the warrants for renewable twelve-month intervals under Article 16 of the ICC Statute while attempting to broker peace.

If one or more of the permanent members of the Council is committed, however, to preventing the deferral of the investigation or

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185. Méndez, supra note 13, at 6.
186. Nuremberg Declaration, supra note 112, at 5.
prosecution, and the court’s decision to press on with the case would have catastrophic effects, the Prosecutor also has a responsibility to call off the case under Article 53, which identifies “the interests of victims” as a reason to halt an investigation or prosecution. Because the Prosecutor’s Article 53 decision is reviewable by the pre-trial chamber of the ICC, the judges may also be faced with the “interests of victims” question. Only after considering less drastic means, such as delaying the investigation or prosecution, should the judges contemplate interpreting the statute to stop the case. In Blumenson’s language, this is the “catastrophic exception.”

Nor is the simple existence of parallel peace negotiation enough to justify halting or delaying an ICC case, as Southwick, LoMo and Natsios seem to suggest. An important factor a judge should consider when evaluating if and how to harmonize the various aspects of the case with parallel peace processes is the history of the negotiations between the warring groups and the patterns of violence. A pattern of failed negotiations does not necessarily spell the failure of future negotiations, but it certainly requires caution by an ICC judge considering whether and how to coordinate the timing of a case.

Thus, for example, the Ugandan Government’s history of failed negotiations with the LRA militates against withdrawing or holding back the court’s intervention. The fact that the historical pattern establishes that the negotiations gave the LRA time to regroup and rearm and were followed by reprisals against civilians is still more reason for a judge to stay the course. In the context of Sudan, so long as the arrest warrant against Ahmad Harun, Sudanese Minister for Humanitarian Affairs, was ignored in favor of a three-track peace process including political negotiation, peacekeeping and humanitarian aid, there was little or no progress, and the plight of the internally displaced people under Harun’s control in Darfur deteriorated. Only after 2008, when Sudanese President al-Bashir was also indicted, did the peace process gain traction, ultimately culminating in an agreement and the relatively peaceable secession of South Sudan. Indictments following wartime atrocities can become a sig-

189. See Méndez, supra note 13, at 4.
JUDGING AGGRESSION

Some commentators, notably David Lanz at the Fletcher School of Law and Diplomacy, have concluded that in Northern Uganda the ICC presence was a beneficial factor for achieving peace at the outset, but that the warrants eventually came to block a final compromise. \(^{191}\) Lanz proposes trading justice for peace in order to seal a deal with the LRA. \(^{192}\) His suggestion is for the UN Security Council to defer the case under Article 16 of the Rome Statute if the LRA agrees to demobilize. If the Security Council is not prepared to do this, Lanz maintains that the Prosecutor should stop the case under Article 53(2) of the Rome Statute, in the interests of justice. \(^{193}\) This decision would be reviewable by the ICC judges. Lanz would withdraw the warrants under the terms of the ICC Statute to avoid “undermin[ing] the credibility of the ICC.” \(^{194}\)

This is not the way that justice should contribute to peace. For those who take retributive principles seriously, leaders who commit massive crimes such as genocide should be punished because what they did is wrong. Furthermore, “[f]or justice to have an impact, the most important condition is that justice follows its own rules, without interference and without being subject to political considerations.” \(^{195}\) To date, 117 States Parties to the ICC have agreed to this proposition and committed to ensure that leaders who perpetrate international crimes are removed from power and incarcerated. Lanz’s shortsighted approach would erode the general deterrent impact that the ICC was established to achieve and that Akhavan and others have begun to document. \(^{196}\) Furthermore, Lanz’s approach

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190. See, e.g., Akhavan, supra note 125, at 8 (using the former Yugoslavia as an example).


192. Id. at 2, 6 (“As a peace incentive, the ICC should consider removing the threat posed by the indictments in the eventuality that the LRA makes a credible and verifiable commitment to laying down their arms.”).

193. Id. at 2 (citing Rome Statute, supra note 5, art. 53(2)(c)).

194. Id.


196. See supra notes 188–199 and accompanying text; see also Moreno-Ocampo, supra note 177, at 217 (“In Colombia, the Rome Statute’s provisions influenced legislation and proceedings against paramilitary forces. One of the most interesting achievements of the
would undermine the ICC’s expressive function by turning justice into another political expedient. Justice can be an element of a rich notion of peace, but the judges should not lose sight of the fact that it is also an end in itself and that its effectiveness depends upon its consistent application.

This is not to suggest that judges should remain blind to the attitudes of stakeholders as they interpret the law. In particular, the judges should be attuned to the attitudes of survivors of past ICC crimes and potential victims when adjudicating an aggression case. As legal scholar Cass Sunstein argues, “in rare (but important) cases, judges legitimately attend to outrage and its effects as a way of ensuring against futile or perverse outcomes.”

It strengthens Sunstein’s argument that the ICC Statute creates a special role for victims to be heard within the judicial process. Under Article 64 of the Rome Statute, for example, “[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” In addition, the Prosecutor’s decision to halt a case in the interests of victims under Article 53 of the Rome Statute is reviewable by the judges. The ICC Statute is unusual insofar as it requires judges to proactively consider the interests of victims as they interpret the law. Who those victims are and how to assess their interests, especially in the context of the crime of aggression, will no doubt require careful reflection on the part of the judges.

The question remains: should an ICC judge take consequenti­alist considerations into account explicitly or implicitly? This decision should be a factor of the provision(s) at issue. Under Article 53(1) and (2), for example, the ICC prosecutor can decline to investigate or call off an investigation or prosecution in “the interests of jus-

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197. See Nuremberg Declaration, supra note 112, at 5 (recognizing role for victims in peacebuilding, justice and reconciliation processes).


199. Rome Statute, supra note 5, art. 15(3) (permitting victims to appear before the Pre-Trial Chamber regarding Prosecutor’s request to proceed with an investigation); see also id. arts. 19, 43, 53, 54, 57, 64.

200. Id. art. 53.
Under Article 53(3), the pre-trial chamber of the ICC may be called upon, or act upon its own initiative, to review the prosecutor’s decision not to proceed. Little guidance beyond this language is given to the ICC prosecutor and judges apart from the requirement that they take into account two contextual factors, the gravity of the crime and the interests of victims. Drafted as it is, Article 53 is an example of a provision that seems to invite an explicit explanation of the decision to decline to investigate or to halt an ongoing investigation or prosecution. It can be contrasted with a provision of the ICC Statute requiring a case to be excluded on jurisdictional grounds when the accused did not commit the alleged crime on the territory of a State Party and is not a national of a State Party. In the latter case, an ICC judge does not need to provide a consequentialist explanation for his or her decision.

**F. The Peace Versus Justice Dilemma in an Aggression Case**

The peace versus justice dilemma can be expected to evolve from these forms in the context of an aggression case. It will retain many of the familiar dynamics but take on new elements as well. This section forecasts how recognizable arguments will surface in an aggression case. As with the other ICC crimes, the successful management of the peace versus justice dilemma in the context of the crime of aggression lies in the sophisticated interpretation of the ICC Statute and the Kampala outcome in light of the context in which the court operates. It also depends on the ICC judges retaining rich and integrated concepts of peace and justice as they hear an aggression case.

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201. *Id.* art. 53(1)(c) (“Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”).

202. *Id.* art. 53(3)(a)–(b).

203. *Id.* art. 12.

204. In a similar manner, Professor Mark Drumbl suggests that ICC judges and prosecutors proceed with a “light touch,” which he describes as “a gentle and flexible understanding of complementarity that adumbrates qualified deference to the national or local.” Mark Drumbl, *Policy Through Complementarity: The Atrocity Trial as Justice*, in *The International Criminal Court and Complementarity: From Theory to Practice* (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).
1. Prosecution of Aggression as a Hurdle to a Negotiated Solution

What has become increasingly clear from the peace versus justice debate to date is that amnesties are no longer an acceptable response to ICC crimes committed by political and military leaders. The danger of involving the ICC in matters of war and peace without the possibility of negotiated amnesties is that the existence of international criminal accountability will harden international relations so that negotiated solutions to armed conflicts are set back. Henry Kissinger, in *Diplomacy*, laments the disappearance of the limited cabinet wars of the Post-Napoleonic era where dispassionate experts put idealistic impediments to negotiated solutions aside in favor of a realistic balancing of power. The argument that criminal accountability makes trade-offs with indicted leaders less palpable and undermines the incentives for aggressors to negotiate a peace agreement since they can expect to be arrested when the conflict ends reflects Kissinger’s concerns.

There are two reasons why this argument is not wholly persuasive. The first is that preliminary evidence suggests that in the context of the other ICC crimes, and contrary to the expectations of the proponents of peace negotiations and amnesty, the intervention of the court can actually advance peace processes. The second is that the strategy of appeasing power and ratifying the subordination of one nation to another in a peace agreement is both immoral and unsustainable. It is immoral because states should not reward aggressors and participate in establishing or enforcing an exploitative arrangement between peoples. It is unsustainable because a people existing in an unjust and subordinate relationship with another will await an opportunity to revolt.

Moreover, the appeasement of powerful aggressors has had mixed results for the appeasers. Leaders disposed to resort to atrocity crimes against their own populations and wars against others have not proven to be the most reliable negotiating partners. The most conspicuous example, of course, is Chamberlain’s signing of the Munich Agreement in 1938, conceding the Sudetenland to Nazi Germany. This emboldened Hitler, and, soon after, he invaded Po-

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205. See supra note 119 and accompanying text.
207. See supra notes 187–98 and accompanying text.
208. See Neville Chamberlain, Speech to the House of Commons (Oct. 6, 1938) in
land. More recently, the American and British strategy of rapprochement with Colonel Moammar Gaddafi has not successfully stabilized Libya. Gaddafi continued to employ violence against civilians at home and abroad until he was stopped by a military coalition intervening under Chapter VII of the UN Charter.\textsuperscript{209} It remains to be seen whether the involvement of the ICC will steady Libya’s transition to democracy or complicate it.\textsuperscript{210}

The question for an ICC judge in an aggression case is whether and when he or she should make space for traditional diplomatic alternatives to criminal accountability such as a peace deal and amnesty when confronted by a \textit{prima facie} aggression case. The answer from the early history of the ICC, set out above, is that the ICC judge should only stop a substantively compelling case when a catastrophe is imminent (Blumenson’s “catastrophic exception”), when other institutional mechanisms to protect civilians and end a conflict have failed (exhaustion of remedies) and where the ICC is the sole impediment to a successful resolution.

It is the responsibility of the ICC’s States Parties to ensure that judges are not put in an untenable position due to failures of diplomacy. When negotiations are about to collapse, and the court becomes a threat to international peace and security, the Security Council has a mechanism under Article 16 of the Rome Statute to delay the case for renewable intervals. If one or more of the permanent members of the Council is prepared to prevent a deferral, and proceeding is in all probability going to block the resolution of the conflict, the prosecutor has a responsibility to call off the case under Article 53 of the Rome Statute, in “the interests of victims.” Only after considering less drastic means, such as delaying the proceedings, should the judges contemplate interpreting the statute in such a way to stop the case.


2. Overlapping Domestic and International Responses

Where truth commissions and traditional justice rituals are now challenging the ICC prosecutor and judges as they interpret the Statute’s complementarity regime, national responses to a state’s own alleged aggression, such as the UK’s Chilcot Inquiry, are likely to create uncertainty in the context of an aggression case. The UK Prime Minister and House of Commons established the inquiry in 2009 to “identify lessons that can be learned from the Iraq conflict.” Though the inquiry has investigatory powers and can question witnesses, its terms of reference, as set out by its Chairman, Sir John Chilcot, nowhere mention criminal accountability. Nor do they preclude it. Under the ICC’s complementarity regime, the United Kingdom could render an ICC intervention inadmissible by investigating and then deciding not to prosecute, so long as the national response is genuine. A great deal, therefore, hinges on the way that an ICC judge interprets the word “genuine.”

An ICC judge should, in accordance with the Rome Statute, take peace and justice into consideration when determining whether a national response is genuine. Initiatives that successfully advance utilitarian, deontological, expressive and restorative functions, even if they do not result in the incarceration of leaders, should be evaluated as more genuine than blanket amnesties for acts of aggression. In a context where coordinated institutional responses at the national and international level are successfully advancing sustainable peace, the ICC judges can relax their complementarity analysis slightly.

211. About the Inquiry, supra note 83.

212. Id.


214. Tolbert, supra note 112, at 3 (“Article 17 of the Rome Statute refers to the duty of states to genuinely investigate or prosecute (if they seek to challenge admissibility), but it is silent on the issue of punishment. Punishment tends to take different forms in different societies. A few states have explored alternatives to amnesty, however, such as reduced sentences in exchange for guilty pleas.”).

215. This argument builds from Keller’s proposal in the context of Northern Uganda. Keller, supra note 14, at 265 (“If AJM [Alternative Justice Mechanisms] meet most of the enumerated factors [retribution, deterrence, expressivism, restorative justice] to a significant extent, or at least to the same extent as ICC prosecution, then they further this theory, and the ICC should defer.”). I would add that ICC judges should consider whether the official response is likely to exacerbate the conflict or defuse it, for instance, by taking into account the attitudes of victims.
The Chilcot Inquiry, meanwhile, which was constituted to make transparent and publicize the decisions that brought the United Kingdom to war in Iraq and derive lessons for the future, is an attempt to satisfy utilitarian and expressivist goals, but it fails to fully address deontological and restorative aims. No accountability for delinquent officials was contemplated within the inquiry’s framework and there was no plan to compensate victims. Punishment need not have amounted to incarceration for it to be genuine. Official condemnation, administrative lustrations, bans from holding high office and the compensation of victims are reasonable alternatives to incarceration when the act of aggression has ended, there is little chance that it will recur, a rigorous investigation has taken place and the nation is attempting, through genuine official responses, to come to terms with what happened and make amends to the victims. Though the Chilcot inquiry is a promising model, under this framework, it would have fallen short of satisfying the complementarity criteria of the Rome Statute.

Under the Kampala outcome, the ideal is a domestic response rather than an international one. The drafters hope that the existence of an international court and an enforceable crime will encourage national initiatives to prevent or punish political and military leaders for aggression.216 As I have suggested elsewhere, “[h]ad aggression been a prosecutable crime in 2003, Prime Minister Tony Blair—who relied heavily on the legal advice of his attorney general—may have never brought his country to war in Iraq without a Security Council resolution authorizing him to do so.”217 If Blair had gone ahead anyway, in spite of legal advice that the invasion amounted to the crime of aggression, he may have faced a domestic tribunal instead of an inquiry. Though the Chilcot model would have fallen short, a slightly modified alternative may have sufficed.

3. Reprisals Against Civilians

Just as political and military leaders indicted for genocide, crimes against humanity and war crimes may threaten reprisals against civilian populations under their control unless the warrants


are dropped, victorious aggressors may attempt to bully out an am-
nesty. The same game of brinksmanship that Sudanese President
Omar al-Bashir undertook with the ICC in response to the indictment
against him is likely to arise in the context of an aggression case as
well.

When it does, the Security Council will be lobbied, as it was
regarding Darfur, to consider whether to defer the process for renew-
able twelve-month intervals. If the Council does not defer the case,
the ICC prosecutor will be faced with the question of whether to stop
it under Article 53 of the Rome Statute “in the interests of justice”
and, under that rubric, in “the interests of victims.” If the prosecu-
tor does so, it will be incumbent on the judges to make a decision
whether to interpret leeway in the ICC statute to make way for a po-
litical compromise that appeases the alleged aggressor and takes the
pressure off of the civilians under his control. If the early history of
the ICC is any indication, the default answer should be no, except in
the case of the “catastrophic exception.” The correct solution is to
protect the civilians, not withdraw the warrants.

4. The ICC’s Long-Term Efficacy

According to Henry Kissinger, the League of Nations was
discredited when the Axis powers began invading surrounding na-
tions with no legal recourse: “the values it extolled clashed with
the incentives needed to enforce it.” The same disconnect between
the commitments of states and their will to follow through exists at
the ICC when it comes to an aggression case. The difference is that,
at the ICC, professional judges are in a position to interpret the Stat-
ute so as to safeguard the regime. This will not be an easy duty to
manage.

There are two ways that the ICC judges, in prosecuting an ag-
gression case, could gravely undermine the court’s efficacy. Both
begin with a powerful state attacking its neighbor. In the first scenar-
io, the ICC launches a case against a powerful aggressor but is unable
to secure an arrest because its efforts are obstructed at every turn by
the defendant and his or her allies. This would undermine the ICC’s

218. Rome Statute, supra note 5, art. 53.
220. KISSINGER, supra note 206, at 218–45.
221. Id. at 244.
credibility. In the second scenario, the ICC declines to hear a case against a powerful perpetrator on legal grounds, knowing full well that an arrest would be impossible at that time. This would compromise the ICC’s objectivity.

The answer here resides, as it does elsewhere when the peace versus justice dilemma arises, in the sensitive interpretation of the law in light of external contingencies. Experience has shown that even powerful leaders like Charles Taylor, Slobodan Milošević and Jean-Pierre Bemba can be unseated and brought to justice. Rather than mechanically and blindly pursuing the case or devising a legal pretext to pull out, the key to successful prosecution and trial is timing and judgment. Just as a fisherman reels in a ten-pound fish on a five-pound line by letting out line when the fish darts away and spooling it in when the fish approaches, a sensitive judge will proceed forcefully when he or she has the cooperation required to be effective and less vigorously when encountering resistance that threatens to snap the line.

The special jurisdictional regime for the crime of aggression will certainly alleviate some of these legitimacy concerns, though it gives rise to others. This “soft” consent based system does not capture states that are not members of the ICC treaty, such as the United States, Russia, China, Iran and Israel. Non-party states constitute many of the states most likely to pose a challenge to the ICC’s legitimacy by projecting force abroad. Even if they attack an ICC State Party that has ratified the Kampala outcome, the leaders of these non-party states are immune from ICC prosecution. This is different from the other ICC crimes. The leader of a non-party state, for example, that commits crimes against humanity on the territory of an ICC State Party can be prosecuted in The Hague. Furthermore, ICC States Parties that opt out of the aggression amendments shield their political and military leaders from accountability. This opt-out mechanism is not available for the other ICC crimes. As a result of this jurisdictional framework, ICC justice for aggression is incomplete. Aggressors from states that have not signed the ICC Statute or have signed and opted-out of the aggression amendments will be above the law.

Imperfect justice, however, is better than no justice at all. This “soft” consent-based regime, by creating a patchwork of potential accountability, also insulates the ICC judges somewhat since they

223. Rome Statute, supra note 5, art. 12(2)(a).
only have to hear cases against the leaders of states that have accepted the court’s jurisdiction over aggression. At the outset at least, this will include those states dedicated to the ICC’s success and exclude many of the great powers whose projections of military force could challenge the judges. The hope of proponents of the Kampala outcome is that, over time, the rule will become widely accepted and even powerful states will face domestic constituencies, political processes and multilateral pressures that militate against its violation.

III. HARD CASES

The peace versus justice dilemma will retain familiar characteristics and also acquire new ones in the context of an aggression case. Beyond deciding how to harmonize peace and justice aspirations in the case at hand, ICC judges will need to consider how the precedents they set will contribute to world order. Their interpretations of the Kampala outcome will have implications for the national security of states, and this will raise the ante in aggression cases. Three hard cases that the judges are likely to face, which remain controversial in international law, are the scope of self-defense, the legal status of humanitarian intervention and the character of an armed attack. This section will suggest ways that the ICC judges might decide these questions in order to advance peace and justice.

A. The Scope of Self-Defense

Contemporary international law on the use of force derives from a general prohibition contained in the UN Charter.224 States are expected to resolve their disputes by peaceful means.225 Article 51 of the UN Charter, however, reserves to states the “inherent” right to respond to an armed attack in self-defense until the UN Security Council takes measures to restore peace.226 The legal question that arises today is whether, in an age of weapons of mass destruction and high-speed delivery systems, a state must wait for an attack to have landed

225. Id. para. 3.
226. Id. art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”).
before responding in self-defense. The question became important in the run-up to the 2003 invasion of Iraq but was never adjudicated and resolved at the time.\footnote{227} It is likely to be raised at the ICC in a future aggression case.

To advance the goals of peace and justice, the ICC judges should apply the *Caroline* test to distinguish aggression and self-defense. The *Caroline* test charts a sensible course between the countervailing dangers of an unreasonably restrictive rule that requires states to wait until they have been struck before responding in legitimate self-defense and one that fails to meaningfully distinguish the aggressor and the victim. A rule requiring states to wait until they have been struck before defending themselves would be unjust in an age where a first strike with weapons of mass destruction threatens the survival of entire communities and small states. Meanwhile, there is an equally compelling danger in interpreting self-defense broadly so as to include preemptive strikes\footnote{228}; relaxing the prohibition on first strikes to this degree would create a Zeno’s paradox where states are tempted to preempt each other’s preemptions.\footnote{229}

Under the *Caroline* test, a state need not wait for an attack to have landed before responding in self-defense. The state invoking the right must show, “[n]ecessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation.”\footnote{230} In short, the attack must have been imminent and the response necessary and proportionate for it to qualify.\footnote{231} In addition, the UN Char-
ter requires the state invoking the right of self-defense to report immediately any measures taken to forestall the attack and to desist once the Security Council manages to maintain or restore international peace and security.232

The Caroline test is not the only legal test that the ICC statute and the Kampala outcome will reasonably accommodate. There is a sixty-year long debate among legal scholars about the scope of legitimate self-defense, and the ICC judges will be expected to understand its rhetorical dynamics and take positions within it.233 The definition of the crime of aggression (Art. 8 bis) is the starting point for an ICC judge. The language of the definition, meanwhile, does not explicitly distinguish between aggression and self-defense. Nor does it distinguish between important variants that fall on the spectrum in between, such as preventive, preemptive and anticipatory self-defense. Under the definition, an ICC judge is expected to interpret and apply a rule that is quite general. Any manifest violation of the UN Charter amounts to an act of aggression.234 There are two zones of interpretation here that the ICC judges will be expected to fill when assessing whether a particular act amounts to aggression or self-defense: whether the act violates the UN Charter and whether that violation is manifest. The most reasonable way to interpret the first zone will be set out in this sub-part, and the “manifest” qualifier will be discussed in the context of humanitarian intervention.

1. A Blanket Prohibition on the Use of Force?

Article 2(4) of the UN Charter is “[t]he starting point for any examination of the law [of the use of force].”235 The key legal ambiguity of the provision stems from the interpretation of the second half of the article: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or

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234. Rome Statute, supra note 5, art. 8 bis, para. 1.

235. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 6 (3d ed. 2008); see also YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 85 (4th ed. 2005) (describing Article 2(4) as “the pivot on which the present day jus ad bellum hinges”).
JUDGING AGGRESSION

political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."  

The way this segment is interpreted affects how narrowly or broadly the prohibition on the use of force should be read and conditions the outcome of a self-defense claim (as well as other claims, such as humanitarian intervention, the protection of nationals abroad and hot pursuit).

The elements of the legal argument are captured in the classic and opposing positions of Professors Hersch Lauterpacht and Derek William Bowett. Lauterpacht’s broad reading of the blanket prohibition on the use of force contained in Article 2(4) limits the scope of self-defense:

Neither is the obligation not to resort to force or threats of force limited by the words ‘against the territorial integrity or political independence of any State’. Territorial integrity, especially where coupled with ‘political independence’, is synonymous with territorial inviolability . . . . Thus a State would be acting in breach of its obligations under the Charter if it were to invade or commit an act of force within the territory of another state, in anticipation of an alleged impending attack or in order to obtain redress, without the intention of interfering permanently with the territorial integrity of that State.

In other words, any resort by one state to the use of force in self-defense against another is within the scope of Article 2(4) and must be justified by an exception to its general prohibition. The principal exception is Article 51’s reservation of the “inherent right of individual or collective self-defence” following an “armed attack.” Not surprisingly, judges and scholars that view Article 2(4)’s blanket prohibition broadly interpret Article 51’s exception narrowly to require a completed “armed attack.” Because, on this view, the UN

237. HERSH LAUTERPACHT, OPPENHEIM’S INTERNATIONAL LAW 154 (7th ed., 1952); see also BROWNLIE, supra note 233.
239. See Sadoff, supra note 231, at 540–41 (observing that Article 51 is the “focal point” for discussion of the right of self-defense).
240. U.N. Charter art. 51.
Charter superseded any customary law that might have permitted the use of force before an “armed attack” is complete, there is no room for a state to exercise anticipatory self-defense.

Bowett disagrees with Lauterpacht. His narrow reading of the second half of Article 2(4) leaves room for a right of anticipatory self-defense rooted in pre-Charter customary international law:

> Despite these reasons it is submitted that, the phrase having been included, it must be given its plain meaning. Moreover, to give it its plain meaning coincides with the limitations on the obligation of non-intervention which traditional international law recognizes. The rights of territorial integrity and political independence have never been absolute . . . . In our view, therefore, invasion of territory necessitated by the imminence of an attack from that territory, and justified by the conditions governing the right of self-defence under general international law, would not be prohibited under Art 2(4). 242

This narrow reading of the text of Article 2(4) has led some commentators to conclude that the provision effects only a partial ban on the use of force.243 Further, to the extent a state must look to Article 51 to justify the application of defensive force, scholars taking a narrow view of Article 2(4) generally argue that pre-Charter customary law included the right to exercise anticipatory self-defense and that Article 51 incorporated that “inherent right.”244

Lauterpacht and Bowett’s argumentative dynamic is especially important because it goes beyond self-defense to make room for (or close off) many exceptions to the UN Charter’s pivotal prohibi-

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right of collective self-defense presupposes that an armed attack has occurred . . . .”), available at http://www.icj-cij.org/docket/files/70/6503.pdf; see also Sadoff, supra note 231, at 550 (summarizing the “restrictionist” argument that states are only entitled to exercise defensive force in response to an attack that has already occurred).


243. See, e.g., Anthony D’Amato, *Israel’s Air Strike Upon the Iraqi Nuclear Reactor*, 77 Am. J. Int’l L. 584 (1983) (concluding that Israeli strike against Osirik reactor did not compromise Iraq’s territorial integrity or political independence and was not inconsistent with the purposes of the UN; therefore, the strike did not violate Article 2(4) of the Charter). Sadoff observes that this is a minority view. Sadoff, *supra* note 231, at 10.

tion on the use of force, including humanitarian intervention, discussed below.\textsuperscript{245}

Since the adoption of the UN Charter in 1945, international lawyers have used Lauterpacht’s argument to condemn, and Bowett’s argument to justify, a variety of uses of armed force that they expect will further peace and/or justice. In 1946, following the destruction of some of its war ships, the United Kingdom sent ships into the Corfu Channel to collect evidence and determine who was responsible. Albania, claiming a violation of its sovereignty, brought the case to the ICJ, which rejected the United Kingdom’s argument that its incursion did not violate the territorial integrity or political independence of Albania.\textsuperscript{246} Professor Christine Gray notes, “[t]he famous rejection of this argument by the ICJ has been interpreted in fundamentally divergent ways, either as a complete rejection of the narrow interpretation of Article 2(4) or as a more limited rejection of the UK claim on the particular facts.”\textsuperscript{247} Lauterpacht and Bowett’s debate has persisted.

Each time the narrow reading of the prohibition on the use of force has been put forward, the broad reading has been raised to rebut it, and the argument has never been definitively resolved.\textsuperscript{248} International tribunals and states have tended to favor Lauterpacht’s interpretation of Article 2(4),\textsuperscript{249} but it would be premature to declare it authoritative. There are not many judicial decisions, the tribunals do

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\textsuperscript{245} See T.D. Gill, The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy, 11 J. CONFLICT & SEC. L. 361, 363 (2006) (“Much controversy has centred on whether the prohibition was intended to bar uses of force not explicitly treated as exceptions in the Charter, such as humanitarian intervention and national liberation struggles.”).


\textsuperscript{247} Gray, supra note 235, at 32.

\textsuperscript{248} The ICJ has declined to consider this question in the context of Article 51. See Nicaragua Case, supra note 241, ¶ 194.

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not address the issue head on and the international bodies that condemn the use of force (the UN Security Council and the General Assembly) do not provide legal reasons for their resolutions. The ICC judges, in contrast, adjudicating a criminal case in which a defendant’s liberty is at stake, will have little leeway to obscure their interpretation of the law.

2. Temporal Dimensions of the Self-Defense Exception

Another contentious provision of the UN Charter that the ICC judges will be required to interpret when faced with a claim by the defendant that his or her state used armed force in legitimate self-defense is Article 51. According to the language of this article, the right of self-defense is triggered by an armed attack. When an armed attack has occurred, however, has historically been a matter of controversy. The controversy has temporal and qualitative dimensions.

The temporal question pertains to when the attack has begun, thereby triggering the right of self-defense. The qualitative dimension, discussed in the next sub-part, pertains to the character of an armed attack. The dominant position of international lawyers in relation to the temporal dimension of an armed attack is that an armed attack need not have landed on the territory of a member state for the right of self-defense to arise and for that state to respond with armed force.250 The question for a judge hearing an aggression case is whether the use of defensive force is legitimate if it is (i) interceptive, (ii) anticipatory and (iii) preemptive. Sadoff defines the categories in this way251:

Interceptive self-defense is characterized by military action in response to an attack that has not actually crossed the defending State’s sovereign borders, but nevertheless has commenced . . . .

Anticipatory self-defense consists of the use of force in “anticipation” of an attack when a State has manifested its capability and intent to attack imme-

250. Elizabeth Wilnshurst, Principles of International Law on the Use of Force by States in Self-Defense 4 (Chatham House, Working Paper No. 05/01, Oct. 2005); see also Mary Ellen O’Connell, supra note 229, at 8; DINSTEIN, supra note 235; Sadoff, supra note 231, at 530.

251. Sadoff, supra note 231, at 530. There is considerable difference of opinion regarding terminology in the literature. See generally id. at 529 and authorities cited therein at 529–30 nn.29–31.
nently... . Preemptive self-defense stems from a fear that in the near future, though not in any immediate sense, a State may become an armed target of an aggressor State. The notion is to “preempt” a potentially escalating military threat . . . \(^{252}\)

In his review of the legal authorities, Sadoff rightly concludes that interceptive self-defense is now “widely accepted in principle,” though “no modern day examples exist,”\(^{253}\) while preemptive self-defense “has had virtually no legal traction.”\(^{254}\) Other international law scholars who have surveyed the authorities agree.\(^{255}\) It is anticipatory self-defense, and the limits of this notion, that are more controversial and, therefore, where an aggression case might turn.

Because the language of Article 51 specifies that the right of self-defense only exists if an armed attack occurs, a judge at the ICC considering including anticipatory self-defense in the provision would need to read it in. There are two schools of thought among international law scholars on whether this can be done; each is based on a distinct line of precedent. Everything turns on the first sentence of Article 51 and the phrase, “[n]othing in the present Charter shall impair the inherent right [French: droit naturel] of individual or collective self-defense.”\(^{256}\) This seemingly anachronistic phrase sparked a sixty-year debate among legal scholars about the character and scope of this right.

Hans Kelsen, writing in 1951, concluded, “the right has no

\(^{252}\) Id. at 530–31.

\(^{253}\) Id. at 531. Depending upon how one interprets the facts, the Six Day War may qualify as interceptive or anticipatory self-defense. See id. at 530–31 nn.31, 38 (rejecting Dinstein’s “unconventional” characterization of the 1967 Six Day War as interceptive self-defense and observing that most scholars would classify the Six Day War as “invad[ing] the province of ‘anticipatory’ self-defense.”); DINSTEIN, supra note 235, at 192; see also MARY-ELLEN O’CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS 280 (2d ed. 2009).


\(^{256}\) U.N. Charter art. 51.
other content than the one determined by Art. 51.” Bowett rejoined, “[Kelsen’s] is a fundamentally erroneous approach which produces a restricted interpretation of the article not warranted by the Charter.” The disagreement was never resolved and reached its climax in the debate over the 2002 National Security Strategy of the United States and the legality of the 2003 invasion of Iraq, with the United States making the arguments espoused by Bowett. Despite this active academic debate and interpretations set out by the ICJ and other judicial bodies, some contend that the precedent has “become increasingly irrelevant to governments making decisions in the stressful context of armed attack.”

While the language of Article 51 limits self-defense to situations where an armed attack has occurred, legal authorities who choose Bowett’s reasoning over Kelsen’s invoke the Caroline doctrine as the classic pre-Charter statement of the right of anticipatory self-defense. The Caroline doctrine originated in correspondence between U.S. Secretary of State Daniel Webster and British Ambassador Henry Fox following a British incursion into the United States that destroyed the Caroline, a ship being used by U.S. nationals to supply Canadian rebels with arms and reinforcements. A successful justification for the incursion, Webster and Fox agreed, would require the state invoking the right to show “[n]ecessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment


261. See generally Sadoff, supra note 231, at 535–37.
of deliberation.” In addition to being a response to an imminent attack, the use of force must have been necessary and proportionate (“nothing unreasonable or excessive”) for it to qualify as lawful anticipatory self-defense. While the Caroline doctrine is more specific than Article 51 of the UN Charter, it is also, arguably, broader because it permits the defensive use of force in response to an attack that is merely anticipated and has not yet been launched. Bowett’s broad interpretation of Article 51 opens the door to a variety of controversial exceptions to the Charter’s prohibition on the use of force, of which anticipatory self-defense is but one.

The Caroline test has been endorsed by important authorities and criticized by others, creating contradictory lines of precedent. The Nuremberg Tribunal applied the Caroline standard to analyze the claim raised by some of the defendants that Germany had attacked Norway to forestall an Allied invasion and occupation of that country. The tribunal acknowledged that no treaty could take away the right of self-defense and that each state was left to determine, in the first instance, whether immediate defensive action was necessary to forestall an imminent danger. “But that does not mean,” the judges concluded, “that the state thus acting is the ulti-
mate judge of the propriety and of the legality of its conduct. It acts at its peril. Just as the individual is answerable for the exercise of his common law right of defense, so the state is answerable if it abuses its discretion."\textsuperscript{270} The Tokyo Tribunal followed suit.\textsuperscript{271}

The case law at the ICJ has done little to resolve the debate over the \textit{Caroline} doctrine because the judges have consistently decided cases pertaining to the use of force without recourse to the doctrine of self-defense. The ICJ, in \textit{Nicaragua}, invoked the \textit{Caroline} test when evaluating the state of customary international law on the use of force, but ultimately found that it did not apply to the case because the conflict was ongoing.\textsuperscript{272} The ICJ also took the requirements of necessity and proportionality, two of the three elements of the \textit{Caroline} test, into account in the \textit{Oil Platforms} case.\textsuperscript{273} In \textit{Oil Platforms}, the United States claimed self-defense to justify its attacks on Iranian oil platforms, but the ICJ found that the original attacks on the United States were not attributable to Iran. Nonetheless, the court added \textit{in obiter} that the U.S. attacks had not been necessary and proportionate.\textsuperscript{274}

The ICJ rejected Uganda’s self-defense claim in its case against the DRC on a similar basis: the attacks Uganda was responding to were not attributable to the DRC.\textsuperscript{275} Similarly, when Israel invoked self-defense to justify the construction of its security barrier, the ICJ found that the threat was not from another state and concluded, “Article 51 of the Charter has no relevance in this case.”\textsuperscript{276} Rather than clarify the doctrine of self-defense, the ICJ seems to prefer to decide use of force cases on the basis of the less contentious doc-

\textsuperscript{270} Id.
\textsuperscript{271} STANIMIR A. ALEXANDROV, \textbf{SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW} 68–69 (1996).
\textsuperscript{274} Id. ¶ 78.
trine of attribution.

Meanwhile, critics of the Caroline standard cast doubt on its relevance today, describing it as a political agreement brokered by two states in an era when the sovereign right to wage war was barely limited by international law.277 Yoram Dinstein, an opponent of the standard, adds, “[t]here was nothing anticipatory about the British action against the Caroline steamboat” since the relevant armed conflict was already in progress.278 According to Gray, “[t]his episode has attained a mythical authority.”279 O’Connell warns against “privileging one word [“inherent”] over the whole structure and purpose of the UN Charter,” which “specifically designated the Security Council to meet threats to the peace, preserving the right of a state to act unilaterally only in cases of armed attack.”280 An ICC judge adjudicating a grey-area aggression case where anticipatory self-defense is alleged will need to resolve some of these historic ambiguities.

An ICC judge might reconcile an appeal to customary international law and the Caroline criteria with a strict reading of the text of Article 51 by approaching the issue as one involving resort to canons of construction. For example, applying the rule generalia specialibus non derogant,281 a judge could conclude that where Article 51 is specific (for example, in requiring an armed attack) its terms should prevail. However, where Article 51 is incomplete or silent (for example, in failing to define an armed attack or identify the moment of its commencement), a judge might resort to customary international law (pre- and post-Charter) to supplement the text.282

Although the discussion thus far has focused on interpreta-

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277. The right was inseparable from the concept of self-defense and there was no ban on the use of force. See Sadoff, supra note 231, at 528, 535. Because the Caroline doctrine was articulated while these concepts were developing, “critics question the formula’s proper contribution to shaping customary international law at all.” Id. at 537; see also WILLIAM V. O'BRIEN, THE CONDUCT OF JUST AND LIMITED WAR 132–133 (1981) (finding the Caroline doctrine “more rhetorical than substantive” in effect); James A. Green, Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense, 14 CARDOZO J. INT'L & CONTEMP. L. 429, 440–41 (2006).

278. DINSTEIN, supra note 235, at 184–85.

279. GRAY, supra note 235, at 149.


281. “The general does not detract from the specific.”

282. See Gill, supra note 245, at 364.
tions of Articles 2(4) and 51 in isolation, a complete understanding of
the right of self-defense requires an examination of the Charter provi-
sions as they relate to each other.283 Articles 2(4) (prohibiting the use
of force), 2(3) and 33 (requiring the peaceful settlement of disputes),
and 43 et seq. (establishing a mechanism for ensuring collective se-
curity) “collectively were designed, to the extent possible, to promote
peace (even at the expense of justice) and accordingly to deter States
from engaging in hostilities, especially on a unilateral basis.”284 In
this respect, Joyner has observed that although the Charter sought to
achieve goals falling within the scope of “justice” (for example, en-
suring human rights violations were not left unremedied), these goals
were not to be attained “at the expense of peace.”285 Thus, for Sadoff
and Joyner, these provisions are indicative of the Charter’s “sharp fo-
cus on peace”286 and strong preference for resort to nonviolent means
of dispute resolution. In this account, the enforcement of the Charter
provisions by the ICC judges against leaders who violate them is a
form of peacemaking through justice.

3. Alternatives to the Caroline Test

There are reasonable alternatives to the Caroline test that an
ICC judge, in the interest of promoting peace and justice, might en-
tertain. One is a strict standard requiring an attack to have landed to
justify a state’s exercise of self-defense. A bright line rule of this sort
would inoculate the ICC against accusations of bias. So long as the
attack surpassed a de minimis threshold, whoever struck first would
be automatically deemed the aggressor.

In a marginally more flexible variant, a state could invoke the
right of self-defense in response to an attack that has commenced but
not actually crossed the defending state’s sovereign borders.287 Pro-
fessor Mary Ellen O’Connell favors these bright-line standards.288
Referring to the Caroline test, Professor O’Connell asks, “why

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283. Sadoff, supra note 231, at 541.
284. Id. (citations omitted).
285. CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR
GLOBAL GOVERNANCE 165 (2005), cited in Sadoff, supra note 231, at 541 n.88.
286. Sadoff, supra note 231, at 541 n.88.
287. So-called interceptive self-defense. See DINSTEIN, supra note 235, at 182, cited in
Greenwood, supra note 238, at 14 n.31.
288. O’CONNELL, supra note 253, at 8.
should we want such a low, subjective threshold to killing?"\(^{289}\)

ICJ Judge Christopher Greenwood favors an interpretation of the right of self-defense that is based on the *Caroline* test but is somewhat broader. Greenwood argues that, while international law does not require states to wait until it is too late to engage in self-defense, it does not give a broad general license for preemptive military action either.\(^{290}\) Under Greenwood’s framework, a judge evaluating a self-defense claim, particularly one where the threat was imminent, would give special consideration to the gravity of the threat and the manner in which it would materialize.\(^{291}\) Self-defense against a state or a non-state group in possession of weapons of mass destruction, for example, would be permissible, even if the moment of the attack remained uncertain.\(^{292}\)

Greenwood’s flexible imminence threshold invites abuse when applied by states themselves, who tend to favor their own causes, but his proposal is more reasonable when applied by an independent judicial institution in accordance with widely accepted rules of evidence and procedure. When applied by the ICC judges, the doctrine provides checks and balances on the arbitrary use of military force while incrementally accommodating new threats to the peace. Checks and balances on the ICC judges themselves, such as requirements of the judicial method, pre-established rules of evidence and procedure, the need to decide by majority holding, the transparency of judicial decisions, the right of appeal and the Security Council power under Article 16 of the Rome Statute to defer a case, just to name a few, are insurance against judicial abuse of a flexible standard.

Professor Amos Guiora, on the other hand, completely rejects the *Caroline* criteria and proposes a “strict scrutiny” approach that would permit a state to act earlier against a non-state actor than international law presently allows, provided that the use of force is based on “reliable, viable, valid and corroborated intelligence presented to a court of law.”\(^{293}\) Under Guiora’s proposal, “a President that acts in contravention to the [domestic] court’s ruling could be liable for


\(\)\(^{290}\) Greenwood, *supra* note 238, at 36.

\(\)\(^{291}\) *Id.* at 36–37.

\(\)\(^{292}\) *Id.* at 17 (stating that even the *Caroline* attack was not advanced by a state actor but came from someone most would call a “terrorist” today).

\(\)\(^{293}\) Guiora, *supra* note 265, at 3.
committing a crime and possibly an impeachable offence.” 294

Guiora’s proposal has two weaknesses. First, it risks creating a situation in states with a hawkish judiciary in which the foxes are guarding the chicken coop. Second, and more fundamentally, it is a non-starter under the terms of the Kampala outcome. Paragraphs 2 and 4 of the Elements of the Crime of Aggression preclude a leader from successfully raising a domestic legal analysis authorizing the use of armed force as a defense. 295

Ultimately, the original Caroline test provides a stronger basis for establishing and maintaining world peace than the alternatives. Greenwood’s standard fails to effectively stabilize expectations among states possessing weapons of mass destruction. O’Connell’s narrow reading of the UN Charter is, in principle, unfairly restrictive. Guiora’s proposal may not provide credible oversight, and, at the same time, it violates the terms of the Kampala outcome.

In contrast, the Caroline standard minimizes the Zeno’s paradox problem by requiring proof of imminence, necessity and proportionality to establish the defense. 296 By permitting a case-by-case analysis, the Caroline standard accommodates factors, such as “the credibility and urgency of a specific threat, the consequences of suffering the incipient or probable attack and the availability, or lack thereof, of feasible alternatives” 297 to defensive action, that a bright-line rule would exclude. The Caroline criteria likewise permit a judge to interpret the imminence requirement reasonably, in light of the circumstances, for example, by permitting a focus on factors such as the “nature, purpose, and objective” of the response, rather than primarily on the time that lapsed between the initial attack and the response. 298 Additionally, the Caroline test enjoys broad support

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294. Id. at 21.
295. Kampala Outcome, supra note 1, annex II; see also Gazzini, supra note 254, at 31 (arguing that domestic courts are “inherently incapable of relaxing international rules on the use of force in self-defence and [the decision of a domestic court] cannot affect in any way the legality of the military action under international law.”).
296. Where the relevant conduct is a defensive first strike—as in the case of anticipatory self-defense—establishing the elements of the defense will be challenging. With respect to necessity, a state availing itself of the defense must show “that the external threat (including the adversary’s intention) is real and that peaceful means to resolve the crisis have been exhausted.” Sadoff, supra note 231, at 527. With respect to proportionality, “a State would be left to speculate about the military plans and capabilities of an adversary when calibrating its own non-excessive reaction to the threat posed.” Id.
298. See id. at 369.
among the international legal community: a critical mass of international law scholars have endorsed it; both the Nuremberg and Tokyo tribunals have cited it with approval;\textsuperscript{299} and the language of Articles 2(4) and 51 accommodates it.

**B. The Character of an Armed Attack**

Physical territory and armed conflict are, for historical reasons, key concepts in the language of the UN Charter and GA Resolution 3314.\textsuperscript{300} When the Charter and Resolution 3314 were drafted, armed attacks on territory were the most important method of warfare.\textsuperscript{301} However, as information technology transforms the nature of modern warfare,\textsuperscript{302} ICC judges will find it necessary to consider whether attacks that lack clearly defined physical boundaries—for example, cyber attacks and systems disruption\textsuperscript{303}—should fall within the scope of the crime of aggression. Professor Matthew Waxman summarizes this “exercise in legal line-drawing” as follows:

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\textsuperscript{299} Nuremberg Judgment, supra note 16, at 205; see Sadoff, supra note 231, at 538–39.


\textsuperscript{302} See, e.g., Kanuck, supra note 300, at 290 (1996) (“It is both much easier and more profitable to conduct information warfare against an adversary’s knowledge resources than to conduct a conventional war against its armed forces.”); Matthew C. Waxman, Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4), 36 YALE J. INT’L L. 420, 423 (2011) (noting there is “‘growing consensus’ that future conflict may feature ‘the use of cyber-warfare to disable a country’s infrastructure, meddle with the integrity of another country’s internal military data, try to confuse its financial transactions or to accomplish any number of other possibly crippling aims.’” (quoting Press Release, John Chipman, Dir.-Gen. & Chief Exec., Int’l Inst. for Strategic Studies, THE MILITARY BALANCE 2010 (Feb. 3, 2010), available at http://www.iiss.org/publications/military-balance/the-military-balance-2010/military-balance-2010-press-statement/)).

\textsuperscript{303} Cyber attacks and systems disruption are, in fact, one phenomenon.
The development and deployment of new technologies—both their offensive potential and the vulnerabilities they create for states reliant on those technologies—raise questions about permissible versus impermissible modes of interstate conduct and conflict. Military attacks are generally illegal, with exceptions for self-defense or when authorized by the U.N. Security Council. Most economic and diplomatic measures, even if they exact tremendous costs on target states (including significant loss of life), are generally not barred by the U.N. Charter, though some of them may be barred by other legal principles. Where along the spectrum of permissible to impermissible conduct do various types of cyber-attacks lie?\footnote{304}

The boundaries set by ICC judges could, if too broad, induce more violence under the auspices of the right of self-defense. The qualitative definition of what constitutes an armed attack must therefore straddle a fine line. It must be broad enough in its inclusion of aggressive acts so as to provide adequate deterrence, but remain narrow enough so as to permit consistent adjudication. An interpretation that captures a wider array of aggressive acts will also pose greater challenges to the ICC judges, who will presumably be faced with more cases in situations that have never before been adjudicated.

Despite the risks of an overbroad interpretation of armed attack, the term should nonetheless capture systems disruption causing massive damage within the ambit of the crime of aggression. Such a category has not yet been included within the scope of the UN Charter prohibition on the use of force by an official body. Excluding systems disruption would, however, threaten the relevance of the crime at a time when it is emerging as a common and potentially devastating species of transnational political violence.

John Robb, the U.S. military planner who coined the term systems disruption, defines it as the “sabotage of critical systems to inflict economic costs on the target state.”\footnote{305} I propose that the definition of systems disruption in the aggression context be narrower, covering only massive damage to persons or property rather than emphasizing economic costs. Robb provides a number of examples where a small group, with or without the assistance of traditional mil-

\footnote{304. Waxman, \textit{supra} note 302, at 422.}
\footnote{305. \textsc{John Robb}, \textit{Brave New War: The Next State of Terrorism and the End of Globalization} 95 (2007).}
itary hardware, surreptitiously attacked a vulnerable point in a network (the “systempunkt”) and caused massive damage. By impairing the systempunkt, a small group can cause a “cascade of failure,” amplifying the damage of an attack. For example, a coordinated attack on the Russian Gazprom pipeline, backup pipeline and a high voltage power transmission pylon in 2006 reduced Georgia to a pre-industrial level for a week in the midst of a cold spell, putting the lives of many vulnerable Georgians at risk. Robb’s argument is that, as the globe becomes more reliant on networks of all sorts—information, energy, water, transport—vulnerabilities are created that are being, and will increasingly be, exploited by aggressors. Whether damage to a nuclear reactor is caused by a missile or a computer virus, is, in this context, beside the point, warranting parallel treatment under the aggression rubric.

Expanding the concept of armed attack to include systems disruption such as cyber-attacks is not without risks to peace and justice. The bright-line rule may become murky and fail to properly guide behavior or fairly warn potential perpetrators about what behavior is impermissible. Destructive acts better left to domestic law enforcement officials to address may become politicized international issues if labeled as aggression, and this could destabilize international relations. This is especially the case because systems disruptions that involve computer networks are often disaggregated and difficult to attribute to a single actor or group of actors as required for criminal liability. The disaggregated nature of the attacks increases the risk that innocent people will be held accountable when a cyber-attack is clandestinely routed through their computer, a typical way of launching cyber-attacks today. Including systems disruption within the

306. Id. at 98.
307. Id. at 94. For other examples, see id. at 99 (describing 2004 attack on Iraqi oil pipeline), 103 (describing 2006 attack on water pipelines feeding natural gas plant in Pakistan).
308. See also HOFFMAN, supra note 182, at 78 (“[A]s Danzig pointed out, armies are of little use against such dangers, and neither the production nor delivery of such weapons requires large, expensive systems. They are accessible to small groups or individuals, and can hide under the radar.”).
310. Id. at ¶ 21 (“Infected computers scattered across the globe reportedly can be rented for four cents a machine, providing the equipment needed for a DDoS attack to any paying
ambit of “armed attack” also increases the risk that states will misattribute cyber-attacks to other states and respond with traditional military force in self-defense.311

This ambiguity can be clarified or mitigated by clear judicial limits on the term “armed attack,” with particular concern for evidentiary thresholds. A method of discerning the evidentiary sufficiency of a contentious case concerning the character of an armed attack is important to the ICC’s actions in this area. As I have argued elsewhere, to limit the scope of the term, only systems disruption, including cyber-attacks, causing massive damage akin to an armed attack, should be included as an act of aggression.312 Building on this idea, the damage must be physical, to persons or property, of a transnational political nature and must be tantamount to a manifest violation of the UN Charter. Consistent with Bowett’s narrow view of Article 2(4) of the UN Charter, this last criteria means that the attack must have, as one element, violated the territorial integrity or political independence of the victim state. Under this test, the effects of the attack are of particular significance, rather than the tools used to carry it out.313

The paradigmatic example of a systems disruption that would qualify as an armed attack under this proposal is a cyber-attack launched by the armed forces of one state against a nuclear reactor in another state causing civilian deaths. When the act is not sufficiently

311. See O’Connell, supra note 253, at 7 (the question of whether a state can be held liable “where it failed to control the attacks” is potentially more difficult here).


attributable to a state—the defacing of pictures of Georgian President Mikheil Sakaashvili on Georgian government websites may be an example—the attack does not amount to an armed attack under the test. When the damage is not physical, such as when websites are defaced, the attack does not qualify either. If the attack does not undermine the territorial integrity or political independence of a state, it does not trigger the right of self-defense. Though the attacks on Georgia’s websites were of a political character, they did not sufficiently undermine the political independence of the state and therefore should be excluded from the ambit of the crime of aggression. These attacks were not tantamount to an invasion, a bombardment or a blockade, enumerated acts in the definition of aggression. Aggressive acts by nationals of the victim state against their own state do not fall within the ambit of “armed attack” either, unless they can be attributed to another state. The ICC judges will need to be satisfied that the prosecutor has met the strict evidentiary burden to prove attribution. There are three ways that an ICC judge choosing to include systems disruption within the ambit of the crime of aggression might do so: (1) the crime of aggression can be interpreted in light of the 1974 GA definition which forms a part of it, (2) the acts listed in article 8 bis can be incrementally expanded by analogy or (3) the word “armed” can be interpreted broadly to include any tool capable of disrupting a system and causing massive damage to persons or property. The last mechanism is the most promising.

1. Interpreting the Armed Attack in Light of GA Resolution 3314 (1974)

Systems disruption can be included within the ambit of the crime by interpreting aggression in light of the seven acts enumerated in the 1974 GA definition: (1) invasion, (2) bombardment, (3) blockade, (4) attacking another state’s armed forces, (5) contravening an agreement to station forces in another state (e.g., by refusing to leave), (6) offering one’s state as a launching ground for another state to attack a third state and (7) sending armed bands to attack another state. The Special Working Group on the Crime of Aggression set-

314. See Ophardt, supra note 309, at 6.

tled the contentious question of whether the list was open or closed by building in what some participants termed “constructive ambiguity.”

Thus, under the language of the Kampala agreement, which stipulates, “any of the following acts . . . qualify as an act of aggression,” it is left to the judges to decide whether this list is comprehensive or illustrative. Under the language of the GA definition, as interpreted at the Kampala conference, a judge could reasonably decide to expand the definition of the crime of aggression to include a cyber-attack.

Further support for this interpretive leeway may be found within the original 1974 GA definition. Article 4 clarified: “The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.” Although only Articles 1 and 3 of the 1974 GA definition were ultimately incorporated in the Aggression amendments, they were included with the crucial caveat that the acts shall be interpreted “in accordance with United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974.”

A judge interpreting the list of acts in light of the 1974 GA definition may, in this way, open the list to systems disruption. The weakness of this approach is that the complexity of the interpretation may make a judge undertaking it appear to be biased, pressing for a particular outcome through circuitous reasoning. In fact, this reasoning is an attempt to achieve an outcome, but an appropriate outcome for an ICC judge, one that advances the goals of peace and justice rather than the interests of a particular nation. This interpretation is informed by a forward-looking approach to world order that seeks to deter and punish massively destructive acts of transnational violence.

2. Expanding the List of Acts of Aggression by Analogy

This is the least promising avenue of the three. By expanding the acts listed in 8 bis by analogy, the ICC judges may, for example, interpret a cyber-attack as an invasion or a denial of service attack.

317. Kampala Outcome, supra note 1, annex I, art. 8 bis, para 2.
319. Rome Statute, supra note 5, art. 8 bis, para 2.
320. A “denial of service” attack is one calculated to eliminate access to significant information networks; for example, “flooding an internet site, server, or router with data
as a blockade.\textsuperscript{321}

There are three problems with this interpretive approach.\textsuperscript{322} First, Article 22(2) of the ICC Statute explicitly prohibits extending the crimes by analogy.\textsuperscript{323} Second, not every systems disruption will fit cleanly within one of the enumerated acts in 8 bis. Finally, analogizing systems disruption to the enumerated acts does not answer the requirement of an “armed attack” contained in the definition.

3. A Broad Reading of Armed Attack

The best approach for a judge wishing to include systems disruption within the ambit of the crime, therefore, is to interpret the word “armed” broadly to include any tool capable of disrupting a system and causing massive damage. A paradigmatic example of an armed attack of this sort is a computer virus launched by the military of a state against the air traffic control systems of another, causing airplanes to crash, killing civilians. Within this interpretive framework, the computer that launched the attack is the armament. For an attack to qualify, the damage should be physical, to persons or property, of a transnational political nature and must be tantamount to a manifest violation of the UN Charter.

While this interpretive approach has the advantage of including new and increasingly important forms of transnational aggression, and it accords with the moral sentiment that intentionally destructive behavior is blameworthy whether accomplished with a missile, a computer virus, or a biological virus, the risk is overreach. The term “armed attack” should not, for example, encompass economic aggression such as domestic oil embargoes which disrupt transportation systems abroad, or it will invite retaliation in self-defense, thereby destabilizing expectations in the international system rather than stabilizing them. The judges, however, can answer the overreach critique by clearly limiting the doctrine to the circum-

\textsuperscript{321} E.g. Kanuck, \textit{supra} note 302, at 289 (“[T] he imbalanced ownership of telecommunication satellites and other network devices worldwide would permit certain developed nations in effect to impose an information embargo on other countries, at least temporarily. Such unilateral action clearly resembles a naval blockade of foreign ports . . . .”). In light of the “crippling effects” of an information embargo such as the foregoing, Kanuck would consider the act one of aggression. \textit{Id.}

\textsuperscript{322} Weisbord, \textit{supra} note 31, at 40.

\textsuperscript{323} Rome Statute, \textit{supra} note 5, art. 22, para. 2.
stances described above.

C. The Legal Status of Humanitarian Intervention

Ever since the 1999 NATO intervention to prevent ethnic cleansing of Kosovar Albanians by Slobodan Milošević’s forces, the status of humanitarian intervention under international law has been at issue. In spite of ample warning that atrocities were about to occur,\textsuperscript{324} no Security Council authorization to use force and prevent the impending catastrophe was forthcoming due to Russian and Chinese opposition.\textsuperscript{325} UN Secretary-General Kofi Annan, in his annual address to the UN General Assembly in September 1999, asked two questions that cut to the core of the issue:

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask, not in the context of Kosovo but in the context of Rwanda: if, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defense of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?

To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in


what circumstances? 326

In the context of the debate over the legality and legitimacy of the Kosovo intervention, the values of peace and justice were once again comingled and sometimes confounded. Justice could not possibly require the strict application of a limited use of force doctrine that precluded the rescue of the Kosovar Albanians from preventable genocide. Franck asks, "While consistency of application is an element in law's legitimacy, what benefit can a legal order derive from becoming an accomplice to moral depravity?" 327 Nor should justice be attainable only by violating the UN Charter. It would be absurd to define peace as the absence of international military intervention while Milošević's forces massacred the Kosovar Albanians. The Independent International Commission on Kosovo (The Goldstone Commission) concluded, "the NATO military intervention was illegal but legitimate." 328 NATO's unauthorized aerial bombing of Milošević's forces may have been legitimate, but it was not peace either.

The realists' portrayal of the peace versus justice dilemma in the context of humanitarian intervention, the dominant depiction in U.S. foreign policy circles, is unacceptably shallow. Justice is equated with an armed humanitarian response in violation of state sovereignty aimed at stopping violence by a government against its own people. 329 Peace is equated with the preservation of territorial sovereignty and the balance of power. 330 Even Franck falls prey to this shallow depiction of peace and justice. 331

Surely, it is misguided to equate the world's inaction in the face of ethnic cleansing in Kosovo with peace. But calling a blatant violation of the UN Charter just is problematic as well. The con-

327. THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 182 (2002).
328. KOSOVO REPORT, supra note 324, at 4 ("It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.").
330. FRANCK, supra note 327.
331. Id. at 14–19.
demnation of political and military leaders for mass violence against their own people or others abroad by an impartial tribunal in accordance with widely accepted and authoritatively enacted rules is a more defensible, if perhaps an unduly procedural, understanding of justice. Peace should consist of international as well as intra-national peace; justice should include accountability for pre-defined acts of aggression that violate international criminal law without a legally accepted justification. The ICC judges should include a limited right of humanitarian intervention as one such justification.

There are good reasons, however, to be skeptical of states that claim to be deploying armed force for humanitarian motives. Bass reminds us, “The worst imperialists often claim they are acting from the finest motives.” Franck and Rodley note, “[in] very few, if any, instances has the right [of humanitarian intervention] been asserted under circumstances that appear more humanitarian than self-interested and power-seeking.” The potential for abusing the humanitarian justification is significant. Intervening states have, in the past, imposed conditions that were not chosen by the beneficiaries of the humanitarian action. Humanitarian interventions have exacerbated international and internal conflicts. A United Nations University Report on the NATO intervention warns, “Any possible arguments that NATO might become a guarantor of stability in Europe . . . have lost their relevance and seem completely inappropriate


335. SCHACHTER, supra note 334, at 123–25.

336. Id.
The same report also notes, “China is worried that what happened in Yugoslavia yesterday could occur tomorrow in Asia, especially in China, whose minority and human rights policies are always criticized by the United States and its allies.” A countervailing critique is that states rarely use force for humanitarian aims against great powers, creating an imbalance that some consider unjust.

The most promising way to reconcile peace and justice is to carve out a limited right of humanitarian rescue with robust safeguards against abuse by powerful nations attempting to use humanitarian arguments as a pretext for territorial and economic expansion. According to Professor Nicholas Wheeler, “What is important, then, is to distinguish between power that is based on relations of domination and force, and power that is legitimate because it is predicated on shared norms.”

In an international legal regime that functions, in Franck’s depiction, as a jury of political actors, a principled outcome based on the values of peace and justice, rather than so many competing national interests, may or may not be forthcoming. But with the advent of the ICC and a definition of aggression accepted by consensus by its Assembly of States Parties, a principled reconciliation of peace and justice in the context of impending humanitarian

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337. VLADIMIR BARANOVSKY, Russia: Reasessing National Interests, in KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION, supra note 325, at 105.


339. See, e.g., MacPherson, supra note 334, at 64 (observing that “intervention is an asymmetrical right” that “will mostly be employed by the powerful states against weaker states, and will seldom be employed against strong states, irrespective of the magnitude of their human rights violations,” but arguing that “[t]his inequality, while regrettable, does not require that interventions should be rejected when they will be useful.”). But see Tsagourias, supra note 334, at 84 (“[T]he promulgation of the non-intervention norm is essentially a matter of interests . . . . The determination whether [the interests of smaller states] are more important and take precedence over the interests of more powerful states (the definition of what is a weak, small or large and powerful state is elusive) is subjective and a matter of preference.”). Franck’s retort: “It is no argument that states willing to intervene in Kosovo may not be equally willing to intervene in Chechnya or Tibet. Such inconsistency demonstrates little but states’ sensible tactical realism. The ultimate test of a humanitarian intervention’s legitimacy is whether it results in significantly more good than harm, not whether there has been a consistent pattern of such interventions whenever and wherever humanitarian crises have arisen.” FRANCK, supra note 327, at 189.


341. See FRANCK, supra note 327, at 186–87.
catastrophes is now possible. The ICC judges are in a position to weigh humanitarian justifications for the use of force in accordance with predefined international law, settled rules of evidence and procedure, and institutional checks and balances.

There are three ways that an ICC judge might, through legal interpretation, exclude a genuinely humanitarian intervention from the ambit of the crime of aggression. The judge might: (1) fit the use of armed force into one of the existing exceptions to the UN Charter’s blanket prohibition, namely collective security or self-defense; (2) apply a doctrine of mitigation such as the one proposed by Thomas Franck; or (3) interpret article 2(4) of the Charter narrowly, in accordance with Bowett’s reading, and determine that the use of armed force was not a “manifest” violation. The second and third ways are the most promising.

1. Humanitarian Intervention as Collective Self-Defense

Of the six instances of humanitarian intervention since World War II, two states, India and Tanzania, attempted to justify their interventions by classifying them as self-defense. India repeatedly warned the United Nations that the Pakistani counter-insurgency operations in East Pakistan had reached a scale tantamount to genocide before invading East Pakistan and effectively ushering its secession and transformation into Bangladesh. In its appeal to the UN General Assembly, India categorized the refugee flows from East Pakistan as a form of “civil aggression” that was as damaging as a mili-

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342. In all three interpretive frameworks, the burden should be on the defendant to prove the defense that the use of armed force fits within the humanitarian exception. Cf. Bertram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1686 (2000) (“Those who rely upon the right of humanitarian intervention have a responsibility to define its legal parameters.”).


344. BOWETT, *supra* note 233, at 152.

345. Rome Statute, *supra* note 5, art. 8 bis.

346. Thomas Franck would add Vietnam to the states having employed the self-defense argument in the context of a humanitarian intervention. FRANCK, *supra* note 327, at 145–51. Vietnam’s arguments were less clearly articulated, however, so I exclude its justifications of self-defense. See id. at 150.


India did not exclusively rely on its self-defense justification but also presented two other legal arguments. It claimed that Pakistan was committing genocide in violation of the 1948 Genocide Convention and that the Bengalis had a right to self-determination under international law. Consequently, the Security Council and General Assembly both called for a cessation of hostilities and the withdrawal of armed forces without condemning India for aggression. However, without an authoritative body to weigh India’s legal claims, it is unclear which ones succeeded and failed. As such, India’s intervention does not provide determinate guidance for ICC judges today.

Of Ugandan Field Marshall Idi Amin’s atrocities against his own people and border incursions into Tanzanian territory, it was the latter that served as the justification for Tanzania’s massive military occupation of Uganda and overthrow of Amin. According to Professor Oscar Schachter, “Tanzania claimed self-defense rather than a right of humanitarian intervention.” Franck considers it noteworthy that “Tanzania, to the extent that it made any effort to justify its use of force, relied on a right of self-defense against Ugandan aggression and not on Amin’s egregious offenses against humanitarian law and human rights, even though “self-defense,” under Article 51, could not possibly justify the disproportionate Tanzanian reaction to a relatively minor border provocation.” Franck’s observations include an important warning for an ICC judge wishing to exclude a genuinely humanitarian intervention from the ambit of the crime of aggression. For a humanitarian intervention to fit within the doctrine of self-defense, it must meet stringent criteria, including necessity, proportionality and reporting.

The advantages of the interpretive technique highlighted above, primarily its structural preservation of the modern use of force

350. U.N. SCOR, 26th Sess. 1608th mtg. at 27, para. 262 (Dec. 6, 1971), in FRANCK, supra note 327, at 140.
351. SCHACHTER, supra note 334, at 124.
352. FRANCK, supra note 327, at 145. Proportionality is also important for Professor Anthony D’Amato in the context of humanitarian intervention in Kosovo. See Anthony D’Amato, There is No Norm of Intervention or Non-Intervention in International Law, 7 INT’L LEGAL THEORY 33, 37 (2001) (classifying humanitarian intervention by bombing “an absurdly blunt instrument,” but concluding that intervention was evidence of “a moral revolution in human civilization” that the international community should applaud and improve).
regime (a blanket prohibition with the exception of collective security and self-defense), is offset by its weaknesses. This technique can stretch the concept of self-defense beyond credibility. Furthermore, the legal fiction that refugee flows are tantamount to an armed attack only relates to adjoining states, which may not be inclined to intervene to protect a neighbor's vulnerable populations. Though neighboring states are often interested in maintaining a stable neighborhood, they are also usually invested, for self-interested reasons, in the affairs of adjoining states. A state's self-interested motive for intervening, sometimes difficult to distinguish from other justifications, is a disqualifying factor in the doctrine of humanitarian intervention. Beyond its humanitarian motives, for example, India had a security interest in splitting Pakistan and East Pakistan and establishing an allied regime on its border. However, it is more difficult to challenge a humanitarian intervention as pretextual when it is orchestrated by a coalition of states with negligible confounding vested interests beyond the humanitarian rescue.

2. Mitigation

A second, and better, interpretive technique that would allow a judge to exclude a genuinely humanitarian intervention from the ambit of the crime of aggression involves employing a doctrine of mitigation such as the one proposed by Franck. The doctrine of mitigation has the advantage of preserving the integrity of the current use of force regime while allowing for exceptions when a strict application of the rule would undermine peace and justice.

According to Franck, "the essence of mitigation is that the law recognizes the continuing force of the rule in general, while also accepting that, in extraordinary circumstances, condoning a carefully calibrated and justifiable violation may do more to rescue the law’s legitimacy than would its rigorous implementation." Franck, like a number of other scholars, recognizes that humanitarian intervention has been used as a pretext for self-interested states to accomplish prohibited political or military aims rather than humanitarian ends. His doctrine, if applied in a limited way by an independent judicial body like the ICC, has the advantage of offsetting these concerns while leaving some flexibility to protect vulnerable populations from

353. FRANCK, supra note 327, at 174–91.
354. Id. at 185.
355. See FRANCK, supra note 327.
massive atrocities committed by their own governments. Franck argues that applying a doctrine of mitigation in cases of purely humanitarian intervention is also in the interest of international law. International law searches for a method to “bridge any gap between its own institutional commitment to consistent application of formal rules and the public sense that order should not be achieved at too high a cost in shared moral values.” Applying the doctrine of mitigation can help accomplish the goal of consistency while also providing protection for the world’s most vulnerable populations.

To apply the doctrine of mitigation, an ICC judge must decide whether an intervention violates the UN Charter and then whether this intervention is justified. An ICC judge applying the doctrine of mitigation would find the NATO intervention in Kosovo, for example, to be a violation of the UN Charter since it was not authorized by the UN Security Council or conducted in self-defense. The judge could then introduce the doctrine into the analysis in either of two ways: he or she could determine that the violation was justified because it prevented a greater harm (e.g., an imminent genocide in Kosovo in violation of the 1948 Genocide Convention), or he or she could emulate the court in United States v. Holmes and reduce or remit the sentence. Both of these formulations of the doctrine fit cleanly within the text of the Kampala outcome.

Regardless of which doctrine of mitigation the judges choose to use, it is important for them to start with the threshold and contextual principles proposed in 2002 by the Independent International Commission on Kosovo (the Kosovo Report). These principles

356. Franck & Rodley, supra note 333, at 290; see also Jonathan E. Davis, From Ideology to Pragmatism: China’s Position on Humanitarian Intervention in the Post-Cold War Era, 44 VAND. J. TRANSNAT’L L. 217, 278 (2011) (recognizing China’s frequent argument “that humanitarian intervention is a pretextual tool of imperialism and hegemony, cynically manipulated by self-interested great powers”); Louis Henkin, How Nations Behave: Law and Foreign Policy 144-45 (2d ed. 1979) (observing that humanitarian intervention may serve as pretext for aggression); Ian Brownlie, Thoughts on Kind-Hearted Gunmen, in Humanitarian Intervention and the United Nations 139, 147-48 (Richard B. Lillich ed., 1973) (“Whatever special cases one can point to, a rule allowing humanitarian intervention, as opposed to a discretion in the United Nations to act through the appropriate organs, is a general license to vigilantes and opportunists to resort to hegemonial intervention.”); John Yoo, Fixing Failed States, 99 CAL. L. REV. 95, 105 (2011) (noting that post-World War II, the international legal system considered intervention a pretext for aggression).

357. 26 F. Cas. 360, (E.D. Pa. 1842) (No. 15383) (the crew of a sinking lifeboat jettisoned passengers to save the majority), in Franck, supra note 327, at 179.

distinguish genuine from pretextual humanitarian intervention. According to the drafters of the Kosovo Report, there are two valid triggers for humanitarian intervention: (1) a severe violation of human rights or humanitarian law on a sustained basis; or (2) state failure subjecting civilians to great suffering and risk.\textsuperscript{359} When considered applicable under one of these two triggers, the use of force must be conducted with the direct purpose of protecting the civilian population, and, accordingly, the methods of the intervention must be calculated both to end the catastrophe as quickly as possible and to safeguard those civilians in harm’s way.\textsuperscript{360} Furthermore, the use of force must be necessary; serious peaceful solutions must have been attempted before force is deployed, up to and including coercive measures such as sanctions and embargoes.\textsuperscript{361} Toward this end, significant attempts must have been made to acquire Security Council authorization under Chapter VII of the UN Charter.\textsuperscript{362}

Security Council authorization, however, is not dispositive of a justification defense. If, for instance, the Security Council is blocked from acting by one of the permanent members, it should not necessarily preclude the defense.\textsuperscript{363} Further guidance can be found in sanctions from other authoritative bodies, such as the UN General Assembly, or regional bodies like the Economic Community of East African States (ECOWAS), as was the case in the 1989–1999 situation in Liberia and Sierra Leone. Arguably, however, the most important indication that intervention is justified stems from the manner in which it takes place. It buttresses the defense if the intervention is a time-limited, multilateral action divorced from territorial or economic goals and followed by robust humanitarian aid to a supportive victim population. Though these criteria do not all need to be present for the defense to succeed, most of them should be.

3. The Manifest Qualifier in the Definition of Aggression

A third way for an ICC judge to exclude a genuinely humanitarian intervention from the ambit of the crime of aggression, the one

\textsuperscript{359} Id. at 193.

\textsuperscript{360} Id. at 194.

\textsuperscript{361} Id.

\textsuperscript{362} Id.

\textsuperscript{363} See MacPherson, supra note 334, at 65 (arguing that Security Council’s frequent failure to promptly authorize an effective response to humanitarian crises “requires that interventions be permitted outside of the auspices of the Security Council”)

I consider the best, is to interpret Article 2(4) of the Charter narrowly, in accordance with Bowett’s reading, and determine that the use of armed force for humanitarian ends is not a “manifest” violation. For example, an ICC judge could reason that because an intervention was aimed at redressing pervasive human rights abuses (and therefore, upholds provisions of the UN Charter protecting human dignity), and further, because the intervention was not carried out in a manner that impaired the territorial integrity or political independence of the state in which the intervention occurred (i.e., the character of the act was genuinely humanitarian), the particular use of force does not merit the imposition of criminal liability.

As the Kosovo Commission warned, “allowing the gap between legality and legitimacy to persist is not healthy.” For instance, the dissonance caused by the legal fiction that a humanitarian intervention was conducted in self-defense inhibits solidarity with the actual victims. It draws the attention away from the plight of vulnerable people and to the credibility of the legal arguments, which are sometimes tenuous. Similarly, while Franck’s mitigation doctrine is best at leaving the rule as clearly defined as possible, in doing so it fails to acknowledge that the safety of civilians threatened by genocidal leaders is a matter of international law rather than a moral stipulation that mitigates it. Mitigation, as a doctrine, does not effectively guide behavior.

Instead, finding that humanitarian intervention is not a “manifest” violation appears to be the path preferred by the drafters at Kampala. Though there was no formal agreement on this point during the conference, the drafters of the aggression provision repeatedly referred to humanitarian intervention as an example of the use of armed force not reaching the de minimis threshold (i.e., “manifest”). Furthermore, the definition of aggression was drafted in a way that fits well with this final interpretive approach. The risk of this third approach, of course, is that it will open the door to new and

364. Rome Statute, supra note 5, art. 8 bis.
366. KOSOVO REPORT, supra note 324, at 186.
367. See id.
spurious justifications for the use of aggressive force. The solution is for the judges to delimit the doctrine of humanitarian intervention clearly using criteria such as the ones proposed by the Kosovo Commission.

How should an ICC judge applying this third interpretive approach determine what constitutes a “manifest” violation of the UN Charter? Article 8 bis, paragraph 1 directs a judge to look to the character, gravity and scale of the act of aggression. It is significant that not every act of state aggression will attract individual criminal accountability under the ICC’s definition of aggression. Character is a qualitative factor while scale is quantitative. Gravity has qualitative and quantitative dimensions, as a recent policy paper produced by the Office of the Prosecutor explains. Understandings 6 and 7, interpretive guides that are part of the Kampala outcome that were incorporated late in the Review Conference at the behest of the United States, were meant, according to the U.S. delegation, to allow some scope for humanitarian intervention.

By clarifying, in Understanding 6, that aggression is “the most serious and dangerous form of the illegal use of force; and that the judicial 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,” the United States sought, in spite of direct opposition from the Iranian delegation, to exclude situations like Kosovo from


370. See Harold H. Koh, Legal Adviser, U.S. Dep’t of State, Statement at the Review Conference of the International Criminal Court (Jun. 4, 2010) available at http://www.state.gov/s/l/releases/remarks/142665.htm (“If Article 8 bis [the proposed crime of aggression definition] were to be adopted . . . understandings would need to make clear that those who undertake efforts to prevent war crimes, crimes against humanity or genocide—the very crimes the Rome Statute is designed to deter—do not commit ‘manifest’ violations of the U.N. Charter within the meaning of Article 8 bis. Regardless of how states may view the legality of such efforts, those who plan them are not committing the ‘crime of aggression’ and should not run the risk of prosecution.”).
the ambit of the crime.\textsuperscript{371} By adding, in Understanding 7, that character, gravity and scale must be read together when determining whether a particular use of force was a “manifest” violation, and including the caveat, “no one component can be significant enough to satisfy the manifest standard by itself,” the United States sought to raise the \textit{de minimis} threshold still further and tailor the definition of aggression to exclude the Kosovo precedent.

Certainly, if a judge determines that the “character” of the use of force is humanitarian, this could serve to exclude Kosovo-like situations from the ambit of the crime. In addition, a judge has leeway to decide that the “gravity” of an act of aggression is less if it is limited in scope and in time and conducted genuinely for the purpose of protecting civilians from catastrophic harm. These criteria, combined with the factors established by the Kosovo Commission, provide a good template for a judge expected to distinguish whether the character of the attack is aggressive or humanitarian. The risk, of course, is that Bowett’s narrow reading of Article 2(4) of the UN Charter, in conjunction with the manifest threshold, will open the floodgates to all sorts of bogus justifications for aggression. With the establishment of the ICC, however, for the first time in history, there is an international court to weed them out.

\section*{Conclusion}

Hannah Arendt argued, in discussing the Eichmann trial: “Not only does [the Eichmann court] not have at its disposal ‘the tools required for the investigation of general questions,’ it speaks with an authority whose very weight depends upon its limitation.”\textsuperscript{372} More recently, Juan Méndez maintained, “[j]ustice contributes to peace and prevention when it is not conceived as an instrument of either and on condition that it is pursued for its own sake.”\textsuperscript{373} The insight of Arendt and Méndez is that the authority and effectiveness of a tribunal rests upon its fidelity to a legal process insulated from external considerations.

\begin{itemize}
\item \textsuperscript{372} ARENDT, supra note 20, at 253–54.
\item \textsuperscript{373} Méndez, supra note 13, at 6.
\end{itemize}
The views of these scholars can be contrasted with those of Cass Sunstein and Mark Drumbl, who envision an outward-looking judge who takes account of context when interpreting the law. Sunstein argues, “in rare (but important) cases, judges legitimately attend to outrage and its effects as a way of ensuring against futile or perverse outcomes.”

Drumbl suggests that the ICC judges and prosecutors proceed with a “light touch,” gently and flexibly deferring to national or local initiatives when interpreting the ICC’s complementarity regime.

For an ICC judge to successfully accomplish his or her mandate in the context of an aggression case where peace and justice are at odds, he or she must build from the insights of both sets of scholars, finding a way to remain loyal to the legal process while taking contextual factors into account. This will be no easy task. It will require skillful legal technique as well as insight into how the ICC’s intervention is likely to interact with other peace-making initiatives.

The technical legal task is facilitated by the Kampala outcome itself, which contains zones of interpretation that the judges are now expected to fill, and the Rome Statute, which places the responsibility on ICC judges to advance peace as they do justice. Accordingly, the most important challenge the judges will face will be answering Arendt’s challenge and proving that they have the tools to make legal-policy decisions that advance peace in particular instances while, in the long term, building the rule of law.

It is no small step to acknowledge that the ICC judges exercise discretion as they interpret the law. The danger is that a spell will be broken and, with it, the law’s claim to authority. But the law’s authority can be built—and squandered—in various ways. Perhaps the most treacherous is for judges to deliberately remain blind to context as they make decisions that undermine rather than advance the law’s purpose. The hope, meanwhile, is that the crime of aggression, interpreted by a wise and far-sighted judge, will help bring peace and justice into closer alignment so that efforts to achieve one purpose successfully impel the other.

374. Sunstein, supra note 198, at 155.
375. Drumbl, supra note 204, at 171.