Aggression under the Rome Statute

Zimmermann / Freiburg-Braun

2019
ISBN 978-3-406-70826-8
C.H.BECK

This triggers the question as to the necessary degree of control that is required to equate the sending and conduct of the mentioned non-State actors – armed bands, groups, irregulars and mercenaries – with direct acts of the sending State under the said Article 8 of the ILC's ARSIWA. In its *Nicaragua* judgment, the ICJ held that such control must amount to "effective control". By "effective control", the Court meant a situation where the State directly controls the perpetration of specific acts.[172] **169**

As is well-known, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) contested the *Nicaragua* judgment's *effective control* test. In its *Tadić* case, the Tribunal argued that the *Nicaragua* test was inconsonant with both, the logic of the law of State responsibility and with judicial, as well as with State practice,[173] the required degree of control being one of "overall" control over subordinate armed forces or military or paramilitary units "going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations".[174] **170**

In its 2007 judgment in the *Bosnian Genocide* case, the ICJ however rightly upheld the position laid out in the *Nicaragua* judgment and plainly rejected the criticism brought up by the ICTY in the *Tadić* case. The Court argued that the overall control criterion was useful for concluding whether a State was involved in a conflict on another State's territory and hence whether a conflict was international, but underlined that the ICTY was not called upon to decide on questions of State responsibility.[175] Accordingly, in order for insurgents to having been sent "by or on behalf of a State" for purposes of Article 8 *bis* (2)(g), they must either qualify as *de facto* organs, or be within the effective control of the "sending" State. **171**

For purposes of the *jus ad bellum* issue addressed in Article 8 *bis* (2)(g) "armed bands" and "groups" do not seem to require a certain degree of organization and organizational coherence and hierarchy, such as a command structure and the capacity to sustain military operations. This is confirmed by an *argumentum e contrario* with Article 8 (2)(f), which unlike Article 8 *bis* (2)(g) here under consideration, refers to "organized" armed groups. The term "groups" should also encompass private military and security companies.[176] **172**

"Irregulars" are understood as opposed to the term of "regular armed forces" as used in international humanitarian law. Under Article 43 (1) of the Additional Protocol I to the Geneva Conventions, the armed forces of a State party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by an adverse party. In contrast, thereto, the term "irregular forces" comprises militia or voluntary corps[177], not subject to a formal chain of command and not forming part of the armed forces of a party to a conflict. **173**

[172] *ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Judgement (Merits), ICJ Rep. 1986, 14, 64 *et seq*., para. 115.

[173] *ICTY, The Prosecutor v. Duško Tadić*, No. IT-94-1, Judgment, Appeals Chamber, 15 July 1999, paras. 115–45.

[174] *ICTY, The Prosecutor v. DuškoTadić*, No. IT-94-1, Judgment, Appeals Chamber, 15 July 1999, para. 145.

[175] *ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Rep. 2007, 43, 210, para. 404.

[176] Sayapin, *The Crime of Aggression in International Criminal Law,* 2014, 270.

[177] *Cf.* Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277, TS No. 539, Regulation 1.

174 The term "mercenary" is defined in both, Article 47 of the Additional Protocol I to the Geneva Conventions and in Article 1 of the 1989 *International Convention against the Recruitment, Use, Financing and Training of Mercenaries.*[178] Accordingly, a mercenary is any person who is specially recruited locally or abroad in order to fight in an armed conflict; is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party; is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; is not a member of the armed forces of a party to the conflict; and has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

175 The third parties listed in Article 8 *bis* (2)(g), namely armed bands, groups, irregulars and mercenaries, are not meant to encompass single individuals (although the last two may theoretically do so) since they were supposed to commit acts similar in gravity to the one otherwise listed in Article 8 *bis* (2).[179]

176 The various actors just referred to (*i.e.* armed bands, groups, irregulars and mercenaries) must actually "carry out acts of armed force against another State of such gravity as to amount to the acts listed above", *i.e.* as listed in Article 8 *bis* (2)(a)-(f). Not only must they therefore use "armed force" as defined above,[180] but those acts must also be directed against a third State. Finally, such acts must be similar in gravity to the other acts mentioned in Article 8 *bis*. It is worth noting, however, that the comparison only relates to the gravity of their acts but not to their scale, or indeed their character.[181]

177 In contrast to the first alternative of Article 8 *bis* (2)(g), *i.e.* the "sending by or on behalf of a State", the second alternative, *i.e.* "[the State's] substantial involvement", pays tribute to the difficulties of providing evidence for the first alternative.[182] This second alternative is vaguer than the first one and has not yet been sufficiently addressed by international courts. In the *Armed Activities* case, the ICJ did not properly differentiate between these two alternatives of Article 3(g) of UN General Assembly Resolution 3314 (now reproduced in Article 8 *bis* (2)(g)), but merely indicated that this form of State aggression generally requires a careful assessment of the standard and burden of proof.[183]

178 As a matter of principle, allowing non-State actors to make use of one's territory in order to prepare for acts of aggression similar to those listed in Article 8 *bis* (2) against persons or property situated in another State may be considered as the respective host State's "substantial involvement" within the meaning of Article 8 *bis* (2)(g).[184] It remains doubtful, however, whether a mere failure to take repressive measures against such acts (be it for a lack of ability or willingness) ought to be already considered to give rise to a substantial involvement, and thus eventually even give rise to a punishment for a crime of aggression.

hh) Other forms of aggression not listed

179 Given that Article 8 *bis* (2) merely repeats the respective wording of UN General Assembly Resolution 3314, modern methods of warfare, such as the use of "cyber-

[178] 2163 UNTS 75.
[179] Broms, 154 (I) *RdC* 1977, 299 (354).
[180] See mn. 109.
[181] For the content of these three terms see mns. 53 *et seq*.
[182] Broms, 154 (I) *RdC* 1977, 299 (354).
[183] *ICJ, Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005, 168, 222, para. 146.
[184] Sayapin, *The Crime of Aggression in International Criminal Law,* 2014, 260.

force", unforeseeable in 1974, but a major topic in modern international law,[185] have not been listed in Article 8 *bis* either. However, as shown above, the list of possible acts of aggression, as contained in Article 8 *bis* (2), is not exhaustive,[186] although any other acts should be interpreted narrowly and must equate the character of the acts listed in order to also amount to an act of aggression for purposes of Article 8 *bis* (2).

180 It is worth noting that in the context of the notion of "armed attacks" in the sense of Article 51 of the UN Charter, the ICJ has held that the exercise of the right to self-defence does not depend on the type of weapon employed for a given attack.[187] Still, it remains difficult to interpret this statement in a way that electronic measures could be treated as "weapons" in the sense of Article 8 *bis* (2)(b).[188] At the very least, methods of "cyber warfare" would have to bring about destructive effects comparable to those of conventional weapons, such as the disabling of the State's infrastructure[189] in order to constitute an act of aggression within the meaning of Article 8 *bis* (2).

c) Contentious cases of aggression

181 While there is no fixed "canon" of scenarios where the issue will most likely arise, whether a given military action will amount to a violation of the UN Charter, let alone a "manifest" one, issues of preventive/pre-emptive self-defence, self-defence against non-State actors operating from the territory of another State, humanitarian intervention, implicit authorizations and revitalization of previous UN Security Council resolutions, interventions upon invitation, as well as the rescue of one State's own nationals abroad will be among the most likely scenarios in which the issue of whether such uses of force amount to a manifest violations of the UN Charter will arise.

aa) Preventive and pre-emptive self-defence

182 Article 51 of the UN Charter provides that nothing in the Charter shall impair the inherent right of individual or collective self-defence, if an armed attack occurs against an UN Member, until the Security Council has taken measures necessary to maintain international peace and security. This definition has, ever since its incorporation into the Charter, given rise to a number of controversies.

183 For one, while the ICJ (and following its jurisprudence also the Ethiopian-Eritrean Claims Commission)[190] has held that the term of armed attack is narrower than the scope of Article 2 (4) of the UN Charter,[191] only the gravest forms of the use of force constituting armed attacks,[192] the matter has remained somewhat controversial.[193] This raises the question whether an armed response to a use of force, which is short of an armed attack within the meaning of the jurisprudence of the ICJ would then not only be

[185] See generally Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare,* 2013, *passim*.

[186] See *supra* mn 59.

[187] *ICJ, Legality of the Threat of Use of Nuclear Weapons,* Advisory Opinion, ICJ Rep. 1996, 226, 244, para. 39.

[188] For a different view, see Randelzhofer and Nolte, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary,* 3rd ed., 2012, Art. 51, mn. 43.

[189] Randelzhofer and Nolte, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary,* 3rd ed., 2012, Art. 51, mn. 43, with further references.

[190] See mn. 240.

[191] Randelzhofer and Nolte, in: Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary,* 3rd ed., 2012, Art. 51, mn. 6.

[192] *ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Judgement (Merits), ICJ Rep. 1986, 14, 101, para. 191; *ICJ, Oil Platforms (Iran v. USA)*, ICJ Rep. 2003, 161, 186, para. 51.

[193] Wilmshurst, 55 *ICL* 2006, 963.

unlawful under the UN Charter, but rather also manifestly unlawful within the meaning of Article 8 *bis* (1).

184 If an armed attack occurs, the exercise of the right of self-defence must be both, necessary and proportionate. However, surpassing the threshold of necessity and proportionality will not automatically lead to a manifest violation of the UN Charter.

185 In contrast thereto, instances of alleged "pre-emptive" self-defence against a possible attack which is said to occur in the farer future, as, *inter alia*, alluded to in the United States National Security Strategy of 2002, which stipulated that the right of pre-emptive self-defence which would be legal "even if uncertainty remains as to the time and place of the enemy's attack",[194] would not only amount to a violation of the UN Charter as such, but also to a manifest one. This assumption is supported by the unequivocal reaction by the international community to Israel's bombing of the Iraqi nuclear reactor Osirak in 1981, and to the US-led invasion of Iraq in 2003.[195] At the very least, as of today, the ICJ has clarified in its judgment in the *Armed Activities* case between the DRC and Uganda that "Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down" and that "[i]t does not allow the use of force by a State to protect perceived security interests beyond these parameters" given that "[o]ther means are available to a concerned State, including, in particular, recourse to the Security Council".[196] Given this unequivocal 2005 statement by the principal judicial organ of the UN Charter, it stands to reason that any future instance of such alleged "pre-emptive" self-defence would amount to a "manifest" violation of the UN Charter.

bb) Self-defence against non-State actors

186 Self-defence against non-State actors, namely terrorist groups, operating from the territory of another State, remains a matter of dispute. For purposes of Article 8 *bis*, this raises the question whether the use of military force against such groups, when taking place in a third State (the "target State"), constitutes a manifest violation of the UN Charter.

187 If the target State itself can be held responsible for the acts carried out by such groups under regular rules of State responsibility, and further provided such terrorist acts are comparable to acts of regular armed forces, the right to self-defence would be triggered[197]. This would then in turn not only exclude a manifest violation of the UN Charter, but any such violation *tout court*.

188 Were this however not the case, *i.e.* in situations in which the acts of the non-state actor are not attributable to a State, the ICJ in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* found that the inherent right of self-defence only applies "in the case of armed attack by one State against another State".[198] This approach has however been challenged not only by the practice of the UN Security Council when adopting Resolution 1368 one day after the terrorist attacks of 9/11 in which it referred to "the inherent right of individual or collective self-defence in accordance with the Charter".[199] This was affirmed by Resolution 1373, as the UN Security Council, acting under Chapter VII, adopted several measures on international terrorism, obliging all states to "[t]ake the necessary steps to prevent the commission of terrorist

[194] http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html [last accessed May 2019].
[195] UN Doc S/RES/487 (19 June 1981); Sifris (2003) 4 *MelbJIL* 521, 537; also see mn. 194.
[196] *ICJ, Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005, 168, 223, para. 148.
[197] Shaw, *International Law*, 7th ed., 2014, 823.
[198] *ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, 136, 194, para. 139, emphasis added.
[199] UN DOC S/RES/1368, 12 September 2001, preambular part, para. 3.

acts".[200] Moreover, the ICJ in its *Armed Activities* case between the DRC and Uganda left it deliberately open whether attacks emanating from non-State actors may trigger the right of self-defence[201]. Yet, there is at least some amount of State practice indicating that large-scale terrorist attacks, especially when originating from the territory of States which deliberately failed to prevent them, can amount to an armed attack in the sense of Article 51 of the UN Charter, hence triggering the right of self-defence.[202]

At the very least and given the current debate on the matter, it thus seems safe to assume that the use of military force as a reaction to armed attacks emanating from non-State actors would at least not amount to a "manifest" violation of the UN Charter, as required by Article 8 *bis* (1) in order for such use of force to eventually constitute a crime of aggression. **189**

cc) Humanitarian intervention/Responsibility to protect

In cases of massive human rights violations where the UN Security Council refuses to authorize the use of force (or where it is foreseeable that a respective draft resolution would be vetoed), and where self-defence is not applicable either, it has been argued that the concept of humanitarian intervention may justify the use of force.[203] This concept is an attempt to legalize the use of armed force in, and directed against, a foreign state for the prevention or discontinuation of massive human rights violations. State practice referred to, in order to justify the legality of such behaviour, encompasses the interventions by India in Bangladesh (1971), Vietnam in Cambodia (1978), Tanzania in Uganda (1979), the United States in Grenada (1983) and, most prominently, NATO member States in Kosovo (1999). **190**

However, one might doubt whether these examples do indeed fulfil the requirements to provide for a new rule of customary international law, namely extensive and uniform state practice as well as sufficient *opinio iuris*,[204] even more so since both of the two interventions for primarily humanitarian reasons, the Indian invasion in Bangladesh,[205] as well as the NATO intervention in Kosovo,[206] were condemned by a majority of States, while even the NATO States themselves (apart from Belgium), in front of the ICJ, did not rely on the concept of humanitarian intervention.[207] **191**

One may argue that the approval of the relatively new concept of the "Responsibility to Protect" (R2P) implies that humanitarian intervention has by now amounted to international custom, or is currently in the process of doing so. Still, even under the concept of R2P it is mainly, if not exclusively, the UN Security Council that might provide for an authorization to use military force.[208] **192**

---

[200] UN DOC S/RES/1373, 28 September 2001, para. 2(b).

[201] *ICJ, Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005, 168, 223, para. 147.

[202] Shaw, *International Law*, 7th ed., 2014, 824 *et seq.*; also see UN DOC S/RES/1701, 11 August 2006 referring to the attacks by Hezbollah in Lebanon upon Israel; more restrictive Tams, 20 *EJIL* 2009, 359 (378 *et seq.*).

[203] Lillich, 53 *IowaLRev* 1967, 325 (347); Greenwood, 49 *ICLQ* 2000, 926; *cf.* Simma, 10 *EJIL* 1999, 1; Rodley, in: Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015) 790.

[204] Article 38 (1) (b) ICJ Statute; *ICJ, North Sea Continental Shelf (Germany v. Denmark)*, ICJ Rep. 1969, 3, 43 para. 74; *ICJ, Right of Passage over Indian Territory (Portugal v. India)*, ICJ Rep. 1960, 6, 40.

[205] UN DOC A/RES/2793(XXVI), 7 December 1971; Schachter, 82 *MichLRev* 1984, 1620 (1629).

[206] China (UN DOC S/PV/3988, 24 March 1999); Russia (*ibid.*); India (UN DOC S/1999/328, 26 March 1999); Non-Aligned Movement (UN DOC S/1999/451, 21 April 1999); Rio Group (UN DOC A/53/884, 26 March 1999); Group of 77 (UN DOC A/55/74, 12 May 2000, para. 54).

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

[208] World Summit Outcome, UN DOC A/RES/60/1, 24 October 2005, paras. 79, 139; UN DOC S/RES/1674, 28 April 2006; UN DOC A/59/565, 2 December 2004, para. 203.

193 Yet, if one were to take the position that a humanitarian intervention constitutes a violation of the UN Charter, it still remains a matter of discussion whether, by its character, it would then also constitute a manifest violation thereof, and could thus also amount to a crime of aggression. It was during the 2010 Review Conference, that the then Legal Adviser of the United States Department of State insisted that the inclusion of that sentence had to be understood in a way that any humanitarian intervention carried out, in order to prevent genocide, war crimes, or crimes against humanity, could *ipso facto* not constitute a manifest violation of the UN Charter.[209] A respective understanding to that effect, as proposed by the United States, was however not adopted.[210] Yet, this does not automatically indicate that such humanitarian intervention would then amount to a manifest violation of the UN Charter, in light of its goals and hence its character.[211]

dd) Implicit authorizations by the UN Security Council and the "revitalization" of previous UN Security Council resolutions

194 Chapter VII of the UN Charter enables the UN Security Council to authorize measures which are necessary to maintain peace and security, including the authorization to use military force. In 2003, the United States, as well as the United Kingdom, given the absence of an explicit UN Security Council authorization to use military force against Iraq, tried to justify their invasion of Iraq by relying on an "implicit" authorization contained in UN Security Council Resolution 1441 (2002), and/or on an alleged "revitalization" of the authorization to use all necessary means to restore peace and security in the region as contained in Resolution 678 (1990).[212] Those attempts were however vehemently rejected by the majority of States,[213] although due to the lack of precedence and in light of the somewhat divided scholarly views on the matter, the invasion might not have, at the time, amounted to a manifest violation of the UN Charter.[214]

195 It is in light of these very experiences that the UN Security Council has in its more recent practice either specifically stated that it only authorized measures under Article 41 of the UN Charter (*i.e.* non-military measures),[215] or that the use of military force would require an additional resolution.[216] At least in those latter cases, the use of military force without such additional explicit authorization would then amount to a manifest violation of the UN Charter, and hence constitute a crime of aggression.

---

[209] Koh/Buchwald, 109 *AJIL* 2015, 257 (273).

[210] Mancini, 81 *NordJIL*2012, 227 (236).

[211] McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court,* 2013, 162; also see *supra* mns. 233 *et seq.*

[212] UN DOC S/2003/350, 21 March 2003; UN DOC S/2003/351, 21 March 2003; Foreign & Commonwealth Office UK, *Iraq: Legal Position Concerning the Use of Force*, 17 March 2003, https://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/405/3030407.htm (last accessed May 2019).

[213] Russia, France, China and Chile (UN DOC S/PV.4714, 7 March 2003); the Non-Aligned Movement and the League of Arab States (UN DOC S/PV.4726, 26 March 2003); Belgium (UN DOC A/58/PV.8, 23 September 2003); Germany (Federal Administrative Court/Bundesverwaltungsgericht, Judgment of 21 June 2005, 2 WD 12.04).

[214] Ambos, *Treatise on International Criminal Law, Volume II,* 2014, 201.

[215] See the practice relating to sanctions on Iran: UN DOCs S/RES/1737, 23 December 2006; S/RES/1747, 24 March 2007; S/R S/1803, 3 March 2008; S/RES/1929, 9 June 2010.

[216] See already UN DOC S/RES/1737, 23 December 2006, para. 24 c), which "[adopt further appropriate measures under Article 41 of Chapter VII of the Charter of the United Nations to persuade Iran to comply with these resolutions and the requirements of the IAEA, and] underlines that further decisions will be required should such additional measures be necessary", thereby not even referring to measures according to Article 42 but only to Article 41 of the Charter of the United Nations; the same provision has been repeated verbatim in the following resolutions.

ee) Intervention upon invitation

Another contentious scenario which might, depending upon the circumstances of the individual case, amount to a manifest violation of the UN Charter as contemplated in Article 8 *bis,* relates to "interventions upon invitation", *i.e.* military interventions by foreign troops in an internal armed conflict upon the invitation of the legitimate government of the State concerned.[217] Given a valid (rather than a fabricated) official invitation by the government of the territorial State concerned, that State's sovereignty is considered not to be violated by following up on the invitation, hence neither amounting to an illegal use of force, nor even less an act of aggression, as defined in Article 8 *bis*. This view is supported, *inter alia*, by recent State practice including the sending of a Regional Assistance Mission to the Solomon Islands (created by the Pacific Islands Forum in order to restore international security)[218], as well as the French intervention in Mali since 2012. **196**

However, in situations when the respective government is no longer to be considered the effective government of the State concerned (and thus no longer able to represent the State or to issue a legally valid "invitation" or consent), intervention to support such government becomes illegal.[219] Yet, depending on the facts of the ground, which in many cases will be disputed, such use of force might not yet be "manifestly" illegal, as required by Article 8 *bis* so as to constitute a crime of aggression. **197**

On the other hand, where the intervening State uses a fabricated "invitation" forced upon the respective government, any such military intervention would then constitute an obvious and manifest violation of the UN Charter.[220] **198**

ff) Rescue of nationals abroad

While in the 19th century, it has been a common practice to use military force in order to protect nationals abroad, the adoption of the UN Charter rendered such actions more controversial, since attacks on individuals abroad do not amount to an armed attack against the home State of the persons concerned itself.[221] Still, there is relevant State practice and *opinio juris*, which indicates that at least a significant number of States take the position that military operations limited in their scale, duration and purpose are legal under international law. Most prominently, following the Israeli rescue operation in the Entebbe incident, the debates in the UN Security Council were inconclusive and the opinion of States on the matter were divided, even when the then UN Secretary General, Kurt Waldheim, condemned these actions as constituting a serious violation of Uganda's sovereignty.[222] The position taken in 1993 by the United Kingdom Foreign and Commonwealth Office might be taken as a guideline in that respect. The United Kingdom argued that "[f]orce may be used […] against threat to one's nationals if: (a) there is good evidence that the target attacked would otherwise continue to be used by the other State in support of terrorist attacks against one's nationals; (b) there is, effectively, no other way to forestall imminent further attacks on one's nationals; (c) the force employed is proportionate to the threat".[223] **199**

[217] Nolte, "Intervention by Invitation", in: *MPEPIL*, mn. 1.
[218] French, 24 *AfricanYbIL* 2005, 337 (426 *et seq.*).
[219] Shaw, *International Law,* 7th ed., 2014, 835; Nolte, "Intervention by Invitation", in: *MPEPIL*, mns. 17 *et seq.*
[220] As to the necessary degree of consent and further details see Nolte, "Intervention by Invitation", in: *MPEPIL*, mn. 16.
[221] Shaw, *International Law,* 7th ed., 2014, 829; Beyerlin, *ZaöRV* 1977, 213 (220).
[222] Shaw, *International Law,* 7th ed., 2014, 829; *cf.* UN DOC S/PV.1939, 9 July 1976, para. 13.
[223] 64 *BYbIL* 1993, 732.

200 On the other hand, and somewhat similar to interventions upon invitation, the concept of using military force in order to (allegedly) rescue threatened nationals may give rise to abuse, the invasion of Grenada in 1983 and of Panama in 1989 by the United States possibly being examples at hand.[224] It would thus, once again, depend on the circumstances of the specific case to determine whether indeed, the operation was not only limited in kind, but also aiming at rescuing nationals genuinely in danger, or whether instead the concept was only relied on to justify an otherwise manifest violation of the UN Charter.

3. Difference between an act and a crime of aggression

> *"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."*

201 Article 8 *bis* (1) covers the definition of the "crime" of aggression, while (2) (as explained above) covers the definition of the "act" aggression. As noted, an act of aggression will have had to be committed before the crime of aggression can be investigated and prosecuted by the ICC.

202 The introductory words of Article 8 *bis* (1), "[f]or the purpose of this Statute" are identical to the very same formula used in Articles 6, 7 and 8 (2) respectively. The phrase confirms, in line with Article 10,[225] that the definition of the crime of aggression, just like the definition of genocide under Article 6, of crimes against humanity under Article 7, or finally of war crimes under Article 8, is meant to be only relevant for the purpose of the Court's exercise of jurisdiction.

203 The drafters of the Kampala amendment found it appropriate and necessary, however, to further confirm this as part of the enabling Resolution RC/Res.6, which in its Annex III contains "Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression". Understanding no. 4 accordingly provides that:

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

204 This does not prejudice, as indeed Article 10 confirms, that the definition of the crime of aggression, when compared with Articles 6–8, is even more closely interrelated with customary international law generally, and the UN Charter in particular, than those other provisions. It might thus influence the further development of general international law beyond the parameters of international criminal law, the saving clause in the chapeau of Article 8 *bis* (1) notwithstanding.

a) "Crime" of aggression

205 Article 8 *bis* is centred around the term of the "crime of aggression" instead of referring to a "war of aggression", the latter terminology having been used in both, the

[224] Shaw, *International Law,* 7th ed., 2014, 830, also see there for further practice.

[225] See generally on Article 10, Triffterer/Heinze, in: Triffterer/Ambos (eds.), *The Rome Statute of the International Criminal Court*, 3rd ed., 2016, Art. 10, in particular mn. 2.