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The Crime of Aggression

An Analysis of the State Conduct Element in Art. 8bis in light of the UN Charter

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Crime of aggression

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

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement.

1 Introduction

1.1 Topic and background

In February 2020, the ratification of the Crime of Aggression in the Kampala amendments[1] to the Rome Statutes, was proposed in the Norwegian Parliament.[2] The occasion for the proposal was the 80-year anniversary of the German invasion of Norway under WW2. The proposal argued that ratifying the crime of aggression in Art. 8bis of the Rome Statute would strengthen Norway's legal protection from acts of aggression by other States, serve as an extra checkpoint prior to Norwegian engagement in international force operations, and signal support to the international community's efforts to end impunity for acts of aggression.[3]

The Norwegian Parliament ultimately rejected the proposal in January 2021.[4] Prior to the vote, the Ministry of Foreign Affairs had provided several legal and political arguments advising against ratification.[5] Among the arguments for non-ratification was uncertainty regarding the scope of the prohibited conduct in Art. 8bis. Another concern was the ICC's unclear jurisdictional reach and its relationship to the Security Council, the latter of which possessed until recently exclusive jurisdiction over determining acts of aggression in international law. Finally, the prospect of the crime of aggression contributing to the politization of ICC, referring to the political sensitivity of acts of aggression, was a point of concern.[6]

These points of concern are not unique to Norway, but shared by a number of ICC State parties.[7] It is not without reason that international efforts to finalize a definition for the crime of aggression took 20 years, reports by a Preparatory Commission, Special Working Group and several rounds of international negotiations.[8] The prospect of an international crime of aggression raised political and legal concerns for many States. The fundamental tension was between militarily powerful States who were hesitant to limit their liberty of action in matters relating to the use of force, and typically military weaker states, who sought strengthened legal protection against the use of force by foreign states.[9] Eventually, the State parties adopted Art. 8bis through a somewhat tense consensus under the Kampala Conference in 2010.[10] In the

[1] Resolution RC/Res.6 of the Review Conference of the Rome Statute (11/6/2010)

[2] Representantforslag 8:63S (2019-2020)

[3] Norwegian scholars have endorsed similar arguments for ratification. See Ulfstein (2020) and Einarsen (2020a)

[4] Innst.164S (2020-2021), Voting Report 4/2/2021 (Matter no. 5)

[5] Letter from the Ministry of Foreign Affairs to Parliament (28/2/2020)

[6] Ibid p. 3. Similar points against the crime of aggression were raised upon the ratification of the Rome Statute in 1999, see St.prp. nr. 24 (1999-2000) section 5.3.2

[7] This is evident throughout the *travaux préparatoires* and in documents from national ratification processes. See for instance memo from the Danish Ministry of Foreign Affairs (2018) arguing against ratification.

[8] For an account of the negotiation history of Art. 8bis, see Barriga (2012) p. 3-57

[9] Kress (2017) p. 413

[10] Kress (2010) p. 1180

aftermath, the number of ratifications of Art. 8bis have been modest. The provision was activated in 2017 upon reaching the required number of 30 ratifications.[11] After 2017, 13 additional States have accepted or ratified the amendments, making it a total of 43 States upon the submission of this thesis (April 2022).[12] This constitutes about 1/3 of the ICC's State parties. Among those who have chosen to ratify, we find States who share similar foreign policy and alliance affiliation as Norway, such as Germany, the Netherlands and Sweden.

It is the scope, rather than the *importance,* of a crime of aggression that has been the point of contention. As the text of Art. 8bis shows, the crime of aggression is a prolongation of the well-established blanket prohibition of the use of force in Art. 2(4) of the Charter. It is undisputed that the prohibition of the use of force is a cornerstone of the modern international legal order, and upholds one of the fundamental purposes of the Charter.[13] What Art. 8bis essentially aspires to do, is to enable the ICC to prosecute *individuals* acting in official capacity of a State which has committed a qualified violation of the Charter prohibition on the use of force. Expanding the prohibition of the use of force in the Charter to the sphere of international criminal law entails that a breach can not only induce responsibility and sanctions against the breaching *State*, but also impose personal criminal liability on the decision makers of said State.

The concept of aggression as an international crime, i.e. attaching individual criminal liability to unlawful uses of force, is not unfamiliar to the international community. In fact, it precedes the decades long efforts of defining Art. 8bis with half a century. The first time an international tribunal attached individual criminal responsibility to unlawful uses of force, was in 1945 in Nuremberg during the post WW2 military trials. The International Military Tribunal at Nuremberg stated that "crimes 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."[14] Furthermore, it described crimes against peace – referring to acts of aggression – as the "supreme international crime differing only from the other war crimes in that it contains within itself the accumulated evil of the whole."[15] Similarly, The International Military Tribunal of Tokyo held that "indeed no more grave crimes can be conceived of than a conspiracy to wage a war of aggression or the waging of a war of aggression, for the conspiracy threatens the security of the peoples of the world, and the waging disrupts it."[16]

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[11] Akande (2017b), Blokker (2017) p. 633-634

[12] UN Treaty Collection, Amendments on the Crime of aggression

[13] UN Charter Preamble (1) and (4), Randelzhofer (2012a) p. 203 with further references

[14] Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 22, p.447

[15] France et al. v. Göring et al., (1946) 22 IMT 411, p. 427

[16] International Military Tribunal for the Far East, Majority Judgement, 596

Then what exactly makes Art. 8bis contested in 2022? There are several aspects of the crime of aggression that could be studied in order to answer this question. This thesis will explore the objective element, i.e. the prohibited *conduct* in Art. 8bis, and provide an account of the assessment criteria. The objective element is chosen because it was the main point of contention throughout the negotiations. As will be explained in the next section, the thesis will explore the scope of the prohibited *State* conduct, which constitutes the objective element of Art. 8bis. The analysis of Art. 8bis will be conducted against the backdrop of the broad and well-established prohibition of the use of force in the UN Charter. The aim is to show that the scope of Art. 8bis is not as uncertain as it might appear, and that it only criminalizes a narrow selection of acts already prohibited by the Charter.

1.2 Research problem

When all States recognize the prohibition on inter-State use of force as the cornerstone of the international legal order, why are States reluctant to ratify Art. 8bis? The approach of this thesis is to study Art. 8bis in light of the UN Charter. This will be done by analysing the State conduct element of Art. 8bis and then, to examine and compare it against the legal backdrop of the scheme governing the use of force in the Charter. The approach is adopted in order to respond to the common concerns against Art. 8bis as presented in our introduction. By demonstrating the overlaps and differences between the prohibited State conduct in the Charter and in Art. 8bis, this thesis seeks to clarify the scope of Art. 8bis and compare it to the familiar and well-established scheme in the Charter.

The thesis is structured around one overarching research problem: *How does the State conduct element of Art. 8bis differ from the prohibited State conduct under the Charter?* Highlighting the overlaps and differences between the prohibited State conduct in the two legal regimes will progressively answer this research problem, condition by condition. In practice, this will be done by a systematic analysis whereby each chapter of the thesis will study one of the five conditions comprising the prohibited State conduct in Art. 8bis and its equivalent in the Charter. The ambition is to demystify the assessment criteria on which the ICC will base its interpretation of Art. 8bis, and in the process, highlight where the definition in Art. 8bis differs from the force scheme in the Charter. The thesis will hopefully contribute to an understanding of how the regimes governing the use of force in international law relate to one another.

Prior to starting the comparative analysis of the two legal regimes, it is also important to clarify what the analysis will *not* be addressing. The first delimitation that has been made, is against a more general customary international law study of the crime of aggression. Three legal regimes govern the use of force in contemporary international law: (i) the force scheme in the Charter, (ii) Art. 8bis in the Rome Statutes, and finally (iii) customary international law in both the public international law and international criminal law sphere. All three regimes interrelate at

some level, and have a mutual influence on each other. Still, this thesis will be confined to studying the *treaty* regimes governing the use of force, i.e. the Charter and Art. 8bis in the Statutes. The reason for this is quite simply that Art. 8bis makes explicit reference the UN Charter when it comes to determining what an act of aggression is. Therefore doing a comparative treaty regime analysis will give us a better basis to understanding Art. 8bis. While the thesis will draw upon the underlying customary international law as a legal source to interpret the treaty regimes, the limited scope of our thesis requires us to focus on the Charter and the Statutes.

The second delimitation is confining the analysis to the State conduct element of Art. 8bis. As the text of Art. 8bis shows, the State conduct element is only one part of the definition. Like any other criminal provision, the crime of aggression also contains individual elements. However, when studying a criminal provision, the objective element, here the State conduct element, is a natural point of departure. It is the objective element that defines and captures the unique characteristics of a criminal provision. For Art. 8bis, the State conduct element is the actual prohibited conduct, and the relevant element when comparing Art. 8bis to the Charter regime, which by design only regulates State conduct.

As will be evident throughout our analysis, the relationship between Art. 8bis and the Charter has several dimensions. The first is a structural one. In its essence, Art. 8bis is a procedural structure to enforce the prohibition of the use of force in international law; the primary prohibition springs from the Charter, and the secondary rule of international criminal law attaches individual criminal liability to qualified violations of the Charter prohibition.[17] The second is a substantial connection; as we will see, Art. 8bis relies substantially on the Charter scheme on the use of force. We will explore the extent of this reliance, and the points where Art. 8bis departs from the Charter scheme when establishing the scope of the crime of aggression

The structure of the thesis will therefore follow the structure of the State conduct element in Art. 8bis. In Chapter 2, a detailed account is given for the forthcoming analysis, alongside an explanation of the structure of the State conduct element. For now, we can make the reader aware of the main underlying structural division that will appear in the forthcoming analysis. This structural division has been divided into two separate phases. In Phase 1, we will study the foundational building blocks of the prohibition in the UN Charter and Art. 8bis. The analysis in the Phase 1 Chapters will show that the prohibited State conduct in Art. 8bis and the Charter largely align. In Phase 2 however, the analysis will show that Art. 8bis and the Charter part ways. Phase 1 and Phase 2 rely on separate legal methodologies. The methodological approach

[17] Kress (2010) p. 1190

is Phase 1 will be the same for both Art. 8bis and the UN Charter. However in Phase 2, owing to a departure in the two regimes, there will be a specific methodological approach for each treaty regime. The next section elaborates on methodological challenges in this analytical approach.

1.3 Methodology and challenges

1.3.1 Overview

Methodological clarifications are particularly important for our topic. Interpreting Art. 8bis raises some unique challenges compared to the other core crimes under the Statutes. The two characteristics complicating the process of interpretation are, firstly, the novelty of the provision, and secondly, the structure of the article. The provision is constructed in a manner that demands consideration of legal sources *outside* of the Statute, and where an exhaustive analysis is not achievable without deriving rulings from other treaties and customary rules of international law, particularly the Charter. Now, these sets of rules differ in relevant sources, principles of interpretation and other particularities. The distinctions require the application of different methodological norms on different stages of the interpretation process of Art. 8bis. In this section, we will walk through the main legal sources and their challenges, establishing a legal framework for the forthcoming analysis.

1.3.2 Interpreting Art. 8bis

International criminal law is a branch of the international legal order and therefore emanates from the same sources as other branches of public international law. These sources have been codified in the ICJ Statute.[18] The Rome Statute affirms in Art. 21(1) the sources of public international law, and provides an order for their application:

> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, where appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.[19]

[18] Art. 38(1), ICJ Statute

[19] Rome Statute Art. 21(1)

When interpreting Art. 8bis, the Statute framework provides two sets of supportive material: The *Elements of the Crime to Art. 8bis (hereafter 'Elements')*[20] and the *Understandings*.[21] The Elements are uncontroversial; in Art. 9(2), the Statues emphasize that they "shall assist the Court in the interpretation and application of art. 6, 7, 8 and 8bis.". Elements 3, 5 and 6 in particular are important supplements when interpreting the State conduct element of the crime of aggression. The legal status of the seven *Understandings* is however contested.[22] They are not mentioned as a legal source in the Statute, and it has therefore been argued that they do not carry the same legal authority as the Elements.[23] However, regardless of their unclear legal Status, they are an adopted source of understanding Art. 8bis and will in all probability be taken into consideration by the Court.[24] Both will therefore be used when interpreting the State conduct element.

Besides the Statute, Elements and Understandings, there are few authoritative resources on which to base an interpretation of Art. 8bis. The provision entered into force only in 2017 and has yet to be applied by the ICC. When interpreting the foundational provisions in the Phase 1 Chapters, the interpretation of Art. 8bis will rely to a considerable extent on its Charter equivalent. In these Chapters, authoritative interpretation of the *Charter* will be drawn upon to provide meaning to Art. 8bis. These will be explained in the next section. However, in the conditions particular to Art. 8bis, primarily in the Phase 2 Chapters, the absence of authoritative resources will mean that the analysis will rely on scholarly writings,[25] , underlying customary international law, the *travaux préparatoires* of Art. 8bis,[26] and the principles and objectives of the Statutes.[27]

The scholarly contributions that will be relied upon the most in the forthcoming analysis, are Kreß and Barriga's *The Crime of Aggression: A Commentary*[28] and McDougall's *The Crime of*

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[20] Annex II to the Kampala amendments (Resolution RC/Res.6 11/6/2010)

[21] Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, Annex III to the Kampala amendments (Resolution RC/Res.6 11/6/2010)

[22] McDougall (2021) p. 143. For an account of the negotiation history of the Understandings, see Barriga (2012) p. 83, who writes that their "precise legal significance (…) was neither debated or decided upon in the course of the negotiations." It seems the State parties had a pragmatic approach when adopting the Understandings, using them as a tool to clarify certain contested aspects of Art. 8bis.

[23] Heller (2012) p. 231

[24] Kress (2017) p. 418

[25] Scholarly writings are recognized as a secondary source of international law in ICJ Statute Art. 38(1)(d)

[26] Preparatory works are recognized as a supplementary means of interpretation of treaties in The Vienna Convention on Law of the Treaties (VCLT) Art. 32

[27] VCLT Art. 31(1) recognizes that the object and purpose of a treaty can be used when interpreting the meaning of treaty terms.

[28] Kress (2017)

Aggression under the Rome Statute of the International Criminal Court.[29] These are recent and comprehensive accounts of Art. 8bis, with slightly differing approaches. Kress and Barriga's commentary provides an objective (and optimistic) account of Art. 8bis, while McDougall's work has a critical approach, primarily discussing the differences between the definition in Art. 8bis and the underlying customary international law. In addition to these works, we will draw upon reports such as the *Tallinn Manual 2.0*. Finally, there is an abundance of journal articles on the crime of aggression, many commenting on Art. 8bis from a *de lege ferenda* perspective. We will adhere to some selected articles that can contribute to our *de lege lata*-assessment.

The decades long negotiations on Art. 8bis resulted in a lot of preparatory work. We will draw upon relevant reports and discussions to shed light on the intended meaning of unclear points in Art. 8bis. The *travaux préparatoires* carry limited legal weight, and are mostly used as supportive material.[30] Most of the documents referred to in our analysis are reprinted in Kress and Barriga's collection *The Travaux Préparatoires of the Crime of Aggression*.[31]

Although our thesis is treaty focused and does not interpret customary law independently, the underlying customary law continues to be a relevant legal source to interpret Art. 8bis. It is undisputed that Art. 8bis is intended to be interpreted along the lines of the underlying customary law, and should be interpreted with the presumption of conformity between the rule sets.[32] This means that if two possible interpretations of Art. 8bis differ, the one that aligns with a rule of customary law should be chosen. However, the underlying customary law is neither unambiguous nor undisputed, and when drawn upon in this thesis, we will lean on prominent scholarly interpretations.

Finally, one overarching principle stands out in its practical importance when interpreting Art. 8bis. The principle of legality reflected in Art. 22(2) of the Rome Statute reads that the definition of a crime under the Statute "should not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." The principle requires a generally restrictive and text-adherent approach when interpreting all conditions of Art. 8bis,[33] an objective implemented into our analysis.

[29] McDougall (2021)

[30] VCLT Art. 32

[31] Barriga (2012)

[32] This is the premise of McDougall's (2021) approach. See also Kress (2017) p. 421

[33] For an account on the principle of legality under international criminal law, see Cassese (2011) p. 53-76

1.3.3 Interpreting the UN Charter

By referring to the UN Charter in the very definition of the crime of aggression, Art. 8bis makes the provisions regulating the use of force in the Charter, a central sources of law. Art. 8bis criminalizes "an act of aggression which, by its character, gravity and scale, constitutes *a manifest violation of the Charter of the United Nations*."[34]. What conduct constitutes an "act of aggression" is elaborated in Art. 8bis(2) as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner *inconsistent with the Charter of the United Nations.*" The references illustrate the reliance of Art. 8bis on the Charter and pertaining legal sources when establishing the prohibited conduct. Interpretations by the Security Council and General Assembly, decisions by the International Court of Justice[35] and scholarly contributions to the prohibition of the use of force therefore become essential sources for providing meaning to Art. 8bis.

When interpreting the Charter provisions, the general rules of treaty interpretation apply. We can presume that the reader is familiar with the customary rules of treaty interpretation reflected in VCLT Art. 31-33.

In this thesis, the Charter provisions on the use of force will have two functions. First, interpreting them will be one step in the process of interpreting the assessment criteria in Art. 8bis. Second, we will compare the scope of the Charter provisions to Art. 8bis to showcase what acts "stay behind" in the public international law sphere, and what acts are transferred to the international criminal law sphere through Art. 8bis. The analysis of Charter provisions in our thesis will be limited to the points relevant for understanding Art. 8bis. Due to space restrictions, where the scope of a Charter provision is contested, we will go with the majority position.[36]

1.3.4 Method of comparison

The comparative study we will conduct, is not a comparative analysis in a traditional sense. Rather, it is the comparing of two treaty regimes, where one regime is based on the other in a two-layered installation. What the reader can expect is an exploration of the relationship between Art. 8bis and the Charter regime, and the relationship between the two layers in Art. 8bis through a legal dogmatic approach. The ICC will need to conduct a similar exercise when eventually applying Art. 8bis.

[34] Art. 8bis(1)

[35] One comment must be made regarding the use of ICJ practice in Charter interpretation. The majority of the ICJ judgements we will refer to, are decided on the grounds of the customary "principle of non-use of force". As the Charter prohibition and the customary prohibition largely align, the judgements are commonly used to interpret the contents of the Charter provisions on the use of force.

[36] The purpose of this thesis is not to clarify uncertainties surrounding the Charter scheme on the use of force.

2 The State conduct element of the Crime of Aggression

2.1 The characteristic requirement of State conduct

The Crime of Aggression is the only crime in the Rome Statute which requires the commission of an internationally wrongful act by a State.[37] The individual responsibility under Art. 8bis is dependent on the determination that the *State* has committed an act of aggression as outlined in Art. 8bis.[38] The text of Art. 8bis does not explicitly show this important nuance. However, it can be inferred from the reference to the UN Charter in Art. 8bis(1). The Parties and subjects to the Charter are States, and accordingly, States are the only legal persona that have obligations under the Charter.[39] Consequently, only a State can commit a violation of the Charter. An affirmation of the distinction further follows in the definition of aggression in Art. 8bis(2), where an act of aggression is defined as the "use of armed force by a *State*".[40]

The requirement of *State* conduct is unique to Art. 8bis and alienates it from the other core crimes of the Statute: neither one of the other core crimes refer to State conduct. Art. 6 on genocide criminalizes "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" and lists in (a) to (e) the prohibited acts. Art. 7 on crimes against humanity and Art. 8 on war crimes are built identically, with no reference to the State. There is no formal condition of genocide, crimes against humanity or war crimes being carried out through *State* policy. The inherent scale requirements of the crimes, such as "widespread and systemic attack" for Crimes against humanity in Art. 7 or "as part of plan or policy or as part of a large-scale commission" for War crimes in Art. 8, do to a certain extent require the acts being conducted through a position of political command or through State policy, but without an entry *requirement* of State conduct similar to that of the Crime of Aggression. For these provisions, individual conduct is sufficient – they impose international obligations directly on individuals.[41] Art. 8bis, on the other hand, imposes individual criminal liability on (qualified) violations of a State treaty obligation. In this aspect, the crime of aggression is closer to the party constellations of public international law and Art. 2(4) of the Charter.

As Akande puts it, the crime of aggression is "at its roots, an illegal use of force by one state against another."[42] It is when the *State* is in breach of its obligation under the Charter, that Art. 8bis will be actualized and trigger an investigation of the *individual* conduct of the persons who

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[37] Kress (2017) p. 412
[38] Akande (2017a) p. 214
[39] Randelzhofer (2012a) p. 213
[40] Chapter 3 explores the limitations of this condition.
[41] Cassese (2013) p. 3
[42] Akande (2017a) p. 214

were responsible for the state conduct. The entry requirement of Art. 8bis is that a State has violated its obligation to refrain from the unlawful use of force under the Charter, and then the second requirement is that of individual conduct. This two-layered system is reflected in the structure of Art. 8bis.

2.2 The structure of the State conduct element

The question on how to approach and analyse the State conduct element has, in the absence of clarifying practice from the ICC, been discussed in several scholarly contributions. Kress divides the interpretation of Art. 8bis into three analytical steps:[43] Firstly, a State must commission a use of force within the scope of Art. 2(4) of the Charter. Secondly, this use of force must be unlawful, meaning that the justifications of the use of force in the Charter must not apply. Finally, the unlawful use of force must constitute a manifest violation of the Charter. The "character", "gravity" and "scale" of the use of force are the parameters of determining the gravity of the violation.[44] Kress argues:

> "The separation between the threshold requirement ('by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations') and the definition of the act of aggression into the two paragraphs of article 8 bis of the Rome Statute is of a purely drafting nature and should not lead to an artificial divorce. In substance, the two paragraphs of article 8 bis together define one single, though complex, state conduct element of the crime, and the International Criminal Court (Court, ICC) will have to look into that one element comprehensively from the earliest point of any proceedings relating to the crime of aggression."[45]

In this model, the assessment of the threshold requirement of the State conduct element in Art. 8bis is compressed into the final step of the analysis. McDougall on the other hand, emphasizes the distinction between an *act* of aggression and the State conduct element of the *crime of aggression* in her work.[46] This approach places emphasis on the distinction between a *base* act of aggression and a *crime* of aggression, which is an act of aggression that reaches the threshold requirement of Art. 8bis.[47] Also Scheffer's analysis of the structure of Art. 8bis acknowledges that the ICC will need to conduct a two-step interpretation process.[48] An account for an intended distinction between an act of aggression and a crime of aggression is also found in the wording of Art. 15bis(4) in the Statute. 15bis regulates the ICCs jurisdiction over the crime of aggression

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[43] Kress (2017) p. 422

[44] Ibid

[45] Kress (2017) p. 418

[46] McDougall (2021) p. 85, 126.

[47] We will explain this distinction in Chapter 6

[48] Scheffer (2010) p. 898-90. Scheffer acknowledges that the distinction for practical purposes presents an "awkward framework for analysis."

by State referrals.[49] Art. 15bis(4) reads that the Court can exercise jurisdiction "over a crime of aggression, arising from an act of aggression committed by a State Party", indicating that the *crime* of aggression is a subset of an *act* of aggression. In this approach, four interpretation steps – (i) the use of armed force, (ii) an act of aggression, and (iii) a *violation* of the Charter (iv) that is *manifest* – must be met before a crime of aggression has been committed.

The complexity of the crime of aggression and the intricacies of each condition of State conduct – which will be evident in the forthcoming analysis – suggest that the ICC will refrain from a pragmatic intertwined approach, and conduct a step-by-step interpretation of the conditions under the State conduct element. Therefore, this thesis is built around a four-step analysis.

Concluding on a "correct" method of how best to structure the analysis of the crime of aggression for future proceedings, is however not the purpose of this thesis. The intention of highlighting the different approaches is to illustrate the differences of opinion on the relative importance and relationship between the conditions within the State conduct element. What approach the ICC ultimately will deem appropriate will to some extent affect the substantive contents of each condition. For instance, should the court minimize the discussion around what constitutes an "act of aggression" and strictly adhere to the list of acts in Art. 8bis(2), the importance of "armed force" in the *chapeau* defining an *act* of aggression will be reduced. Furthermore, how the ICC eventually will interpret and apply Art. 8bis, will depend on the points of dispute and other particularities of each case. When determining whether a crime of aggression has been committed, Understanding 6 to Art. 8bis emphasizes that the Court will need to consider "all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations."[50] With these relative factors in mind, the humble conclusion we *can* reach at this time, is that an isolated discussion of the assessment criteria in Art. 8bis would be less fruitful than the comparative approach selected for this analysis.

The Charter sets the standard and baseline for the crime of aggression.[51] In its essence, Art. 8bis criminalizes "manifest violations" of the Charter.[52] This means that the Charter is an important source of interpretation of Art. 8bis, and is the point of departure when ascribing meaning to the text of Art. 8bis. An exhaustive analysis of Art. 8bis would thus require studying the underlying regime in the Charter.

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[49] The jurisdictional rules of Art. 8bis are outside the scope of this thesis and will not be discussed.

[50] Understanding 6 is discussed in Chapter 6

[51] Schabas (2016) p. 310

[52] Art. 8bis(1)

In our introduction we touched upon the significance of Art. 2(4) and its great impact on the modern international legal order. Inevitably, the regime of the use of force in the Charter has in its lifetime been subject to thorough discussions and interpretations by authoritative international bodies and by international scholars. The relatively new provision in the Rome Statute regarding the crime of aggression has not (yet) been subject to a similar review. For this reason, I will conduct the analysis of the State conduct element of Art. 8bis in a comparative manner, exploring Art. 8bis against the backdrop of the familiar prohibition of the use of force in the Charter. This exercise will paint a holistic picture of the State conduct element in Art. 8bis while identifying where the two regimes overlap and differ.

2.3 The five conditions comprising State conduct

For pedagogical reasons, I have divided the further analysis into five conditions that in conjunction comprise the State conduct element in Art. 8bis. By studying the texts of Art. 8bis and the provisions regarding use of force in the Charter (and consulting a range of literature), these five conditions appear to build the State conduct element. The points and their corresponding condition in the Charter are illustrated in the following table:

	ART. 8*BIS*	**THE UN CHARTER**	
1	"by a State, against (…) another State"	«All Members» (…) "in their international relations»	Art. 2(4)
2	«use of armed force»	«threat or use of force"	Art. 2(4)
3	"sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations"	"territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"	Art. 2(4)
4	«act of aggression, which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations"	«use of force»	Art. 2(4)
		«The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression (…)»	Art. 39
5	"a manifest *violation* of the Charter of the United Nations"	Invitation or consent	Art. 2(4)
		"the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations"	Art. 51
		The Security Council "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security"	Art. 42

Table 1

Our analysis is confined to these five key conditions of the State conduct element in Art. 8bis. The proportions of each analysis will wary depending on the character of each condition. The heart of the thesis is the analysis' of the key conditions 2, 4 and 5, and the depth of analysis has been distributed accordingly. As explained in Chapter 1.2, our analysis will show a division halfway through our thesis. Phase I, consisting of conditions 2 and 3, discuss what appear to be the foundational building blocks of the prohibition in the Charter and in Art. 8bis. Phase 1 consists of Chapters 4 and 5. Up to this point, the Charter prohibition and Art. 8bis will substantially align. Conditions 4 and 5, discussed in Chapters 6 and 7, constitute Phase 2 of our analysis. Here, the Charter prohibition and Art. 8bis part ways in both function and substantial scope, and the comparative element will be somewhat limited. It is in these last Chapters we will get into the particularities of Art. 8bis.

Before diving into the substantial conditions, we will briefly discuss condition 1 in Chapter 3. This will place the forthcoming analysis in the legal landscape by establishing the subjects of the Charter and Art. 8bis.

3 In the international relations of States

3.1 Overview

	ART. 8*BIS*	THE UN CHARTER	
1	"by a State, against (…) another State"	"All Members" (…) "in their international relations»	Art. 2(4)

In the prolongation of Chapter 2, the first condition we will discuss is the "State" requirement in the Charter and Art. 8bis. Art. 8bis requires the commission of State conduct.[53] The other side of the State conduct element is the scope of the term "state" – what limitations does it impose on the range of subjects Art. 8bis addresses, and who does it protect? To demonstrate the confines of the State term, we will begin by examining the State term in the Charter in Chapter 3.2.1. In 3.2.2, we will study whether the State term in Art. 8bis differs from the Charter. In section 3.3, we will analyse the expression "in their international relations". Section 3.4 will study the status of non-State actors.

3.2 Addressees of the prohibition

3.2.1 The Charter: Member States

In Art. 2(4) the addressees of the prohibition are all "Members" of the UN. Art. 4 of the Charter establishes that only *States* can become members to the UN. The Member *status* of States is normally undisputed – either a State has undergone the procedure of obtaining membership and been admitted by the Security Council and General Assembly, or it has not.[54] Any possible dispute would normally be located at the steps preceding membership, i.e. the question of whether an entity qualifies as a State. The Charter and the UN bodies do not provide any requirements of statehood. The requirements of statehood the General Assembly and Security Council, and essentially the Charter, rely on are found in customary international law. Roughly, these are a requirements of a permanent population, a defined territory, government and independence from other States.[55]

A literal reading of the wording of Art. 2(4) implies that non-member States of the UN are not bound by the prohibition in Art. 2(4). Upon the submission of this thesis (April 2022), there are some entities functioning as States on the international arena that are not members of the UN,

[53] Kress (2017) p. 412

[54] The admission process is set out in Chapter XIV of the GAs Rules of procedure.

[55] For an overview of the conditions of statehood, see Crawford (2019) p. 118-126

such as Palestine[56] and Kosovo.[57] Does this mean that they are not bound by the Charter prohibition on the use of force? This can be answered in the affirmative – States that are not members of the UN are not legally bound by *the Charter*.[58]

However, the customary status of the prohibition on the use of force is undisputed. This means that all entities fulfilling the customary requirements of statehood operating on the international arena are bound by the prohibition in customary international law. States are bound by the prohibition in their capacity of *being* a State. Although the Charter only addresses Member States, non-member States are bound by the prohibition on the use of force with a different legal anchoring. The customary prohibition on the use of force largely coincides with the understanding of Art. 2(4) in the Charter, diminishing the practical relevance of the "Member State" limitation in Art. 2(4). A State commissioning an act of force against the sovereignty, territorial integrity or political independence of another State will be in violation of public international law, regardless of their relationship with the Charter.

We can establish that the force scheme in the Charter limits its addressees to (1) States, who are (2) Members of the UN. However, the member restriction carries limited practical meaning as the underlying customary prohibition extends to all entities fulfilling the customary criteria for statehood. All states can commit and be the victims of unlawful use of force.

3.2.2 Art. 8bis: States

Art. 8bis is essentially an individual criminal liability provision, making individuals the subject of the prohibition. The provision addresses individuals "in a position effectively to exercise control over or to direct the political or military action of a State".[59] However, as explained in the previous Chapter, our thesis studies the State conduct requirement of Art. 8bis. We will focus on the contents of the *State* term in Art. 8bis. By establishing the scope of the State term, we can also understand which individuals, i.e. the leaders of what entities, can be prosecuted for the crime of aggression.

Art. 8bis(2) defines an act of aggression as the use of armed force "by a State against the sovereignty, territorial integrity or political independence of another State". The State term is not further explained in the text of Art. 8bis, the Elements or the Understandings. The closest we get to an elaboration of the State term, is the Explanatory note to Art. 1 of the Annex to

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[56] Crawford (2019) p. 129. In 2012, Palestine gained "non-member observer State status" by GA resolution 67/19(29/11/2012). As the title implies, this constellation does not give membership status.

[57] See Crawford (2019) p. 130 for an account of Kosovo's relationship with the UN.

[58] The view is supported by Randelzhofer (2012a) p. 213

[59] Art. 8bis(1), Art 25(3bis)

General Assembly Resolution 3314 on the Definition of Aggression.[60] Res. 3314 is essentially the General Assembly's non-binding interpretation of the term "aggression" in Art. 39 of the Charter, and as we will see in the next Chapters, it provides some guidance in the interpretation of Art. 8bis.[61] We will study the Resolution thoroughly in Chapter 6, but introduce the Explanatory note to Art. 1 now. The State term for the purpose of the definition is elaborated in two points:

> "In this Definition the term "State":
> a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations
> b) Includes the concept of a "group of States" where appropriate."[62]

As we can see, the Explanatory note provides limited guidance for the actual contents of the State term. Point (a) holds that membership in the UN or State recognition is not a prerequisite for protection nor liability for acts of aggression, meaning that any entity substantially qualifying as a State can commit and be the victim of acts of aggression pursuant to the Res. 3314 Definition. There is nothing in the Rome Statute or the travaux préparatoires that suggests a particular understanding of the term "State".[63] In the absence of specific statehood criteria, we can rely on the concept of statehood in customary international law, and establish that all entities fulfilling the customary requirements of statehood can be the perpetrators and victims of the crime of aggression.[64] Unlike the Charter, the subjects of the State conduct element of the crime of aggression are *all* States, regardless of their membership status in the UN.

However, it is not unusual that acts of aggression are committed in situations of unclear statehood, for instance in a case of annexation or a potential liberation war. If a case pending before the ICC has elements of unclear statehood, the Court would preliminarily have to determine the statehood question. A recent example of this came in the ICC Pre-Trial Chambers I's decision on 5 February 2021, where the Court decided that Palestine was a State under the Courts jurisdiction.[65] In January 2015, the Government of Palestine accepted the jurisdiction of the International Criminal Court, and referred in May 2018 alleged Israeli war crimes

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[60] General Assembly Resolution 3314(XXIX) on the Definition of Aggression (1974)

[61] There is a discussion on whether Resolution 3314 in its entirety can be used to interpret Art. 8bis as only parts of Art. 1 and 3 of the Definition were adopted to Art. 8bis and the rest intentionally omitted. Barriga (2012) p. 26-27 argues in favour of other parts of Res. 3314 being used to interpret Art. 8bis, while McDougall (2021) p. 123-124 disagrees. Barriga's approach appears sensible: Explanatory notes elaborating the terms, particularly in the parts of Res. 3314 that *were* adopted to Art. 8bis, should be used to interpret the terms transferred to Art. 8bis.

[62] GA Res. 3314 Annex I Art. 1

[63] Kress (2017) p. 423

[64] Kress (2017) p. 422, McDougall (2021) p. 135

[65] ICC-01/18-143

("Situation of Palestine") to the Prosecutor.[66] The question before the Chamber was whether the territorial scope of the ICCs jurisdiction extended to the Palestinian territories of Gaza and the West Bank. As the ICC only has jurisdiction in State Parties and Israel was not a Party to the Rome Statues, the question before the Chamber was determining whether Palestine was a sovereign State. Following the affirmative decision, the ICC Prosecutor released a statement in response to protests,[67] confirming that the ICCs assessment of statehood is strictly legal and confined to the sources of international law, and is in its essence, a question of the territorial jurisdiction of the Statute. [68] The determination builds on the legal status of a State according to international law during the time of the alleged crimes, and could not be built on *de lege ferenda* considerations.[69]

It is important to note that in *Situation of Palestine*, the ICC is investigating war crimes and not the crime of aggression. This topical case and the Prosecutor's statement is presented solely to illustrate the State determination process and considerations. It further demonstrates that the ICCs determination of statehood is independent from the UN and State recognition, and confirms the legal nature of the notion of statehood as opposed to it being a political question.[70] Finally, it can be taken as a light testification to the ICC becoming involved in cases concerning controversial statehood in its future practice on the crime of aggression.[71]

To summarize, the subjects of both Art. 8bis and Art. 2(4) are States. The State term in both provisions rely on the conditions of statehood in customary international law. In situations of unclear statehood, the State determination in Art. 8bis is a purely legal question subject to the rules of international law, and independent from the entity's relationship with the UN.

3.3 In their international relations

Art. 2(4) of the Charter prohibits the use of force in "the international relations of States." The purpose of this explicit reference to international relations is to exclude from Art. 2(4) any use of force *within* a State, such as civil wars or clashes between a government and domestic rebel movements.[72] The ICJ confirmed this limitation in the *Kosovo* Advisory Opinion by stating that the prohibition is confined to 'the sphere of relations between States".[73] In the Advisory Opinion on *Nuclear Weapons*, the Court distinguished uses of force by a State "within its own

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[66] Situation in the State of Palestine, ICC-01/18

[67] See Press Statement by the US Department of State (3/3/2012)

[68] Statement of ICC Prosecutor Bensouda, respecting an investigation of the Situation in Palestine, 3/3/2021

[69] Kress (2017) p. 423

[70] Kress (2017) p. 423

[71] Strapatsas (2017) p. 185

[72] Randelzhofer (2012a) p. 214, Corten (2021) p. 138, Ruys (2014) p. 163

[73] *Kosovo's Declaration of Independence,* Advisory Opinion (2010), para 80

boundaries" from the customary prohibition of the use of force.[74] This means that State-internal use of force fall out of the scope of Art. 2(4) in its entirety. Kress argues that a textual interpretation of Art. 2(4) does not indicate a requirement of the use of force being *directed* at a *State* – it is sufficient that the use of force is directed outwards from the acting State.[75] This broad interpretation holds that a use of force will be in the "international relations" of a State if it is directed towards a disputed territory, in which case the State with *de facto* control over the territory will be the victim State.[76] Violation of demarcation lines on disputed territory, acts of force against extra-territorial sovereign property such as embassies, or the use of force against a political entity short of statehood, might also be included in a broad "international relations" clause.[77] Such a broad interpretation does not contradict the text of Art. 2(4), as it in addition to acts against another State's territorial integrity and political independence, also prohibits acts that are in "any other manner" inconsistent with the purposes of the UN.[78] However, as Kress also points out, these situations are, at their most, debatable exceptions from the main rule. The main rule is that international relations refer to inter-State force.[79]

The State centrism of Art. 2(4) is transferred to Art. 8bis.[80] Although Art. 8bis does not contain a similar explicit reference to "international relations", it regulates inter-State use of force by design.[81] The restriction to States is clear from a textual interpretation of the definition; in Art. 8bis(2), an act of aggression is committed "by a State against the sovereignty, territorial integrity or political independence of another State."[82] Under Art. 8bis, the primary function of an inherent "international relations" requirement is to preclude internal acts of aggression, committed by a State on its own territory against its own population. This requirement distinguishes Art. 8bis from the other core crimes of the Statute. While genocide,[83] crimes against humanity,[84] and war crimes[85] can be State-internal or be committed by a State against its own population, the crime of aggression is reserved to inter-State conduct.

A broad interpretation of the international relations clause in Art. 2(4) will for three reasons be met restrictively under Art. 8bis. Firstly, Art. 22(2) of the Rome Statute requires a restrictive

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[74] *Nuclear Weapons*, Advisory Opinion (1996), para 50
[75] Kress (2017) p. 432
[76] Ibid
[77] Kress (2017) p. 434-435, Corten (2021) p. 156
[78] Kress (2017) p. 434
[79] Kress (2017) p. 435
[80] Kress (2017) p. 432,435
[81] Kress (2017) p. 432
[82] Art. 8bis(2)
[83] Art. 6, Rome Statute
[84] Art. 7, Rome Statute
[85] Art. 8, Rome Statute

interpretation approach and precludes widening the scope of application of Art. 8bis to legally uncertain situations, particularly in this case where the broadening contradicts a clear textual reading of Art. 8bis(2). Secondly, and this will be discussed in Chapter 6, the characteristic "manifest violation" threshold in Art. 8bis(1) is an additional gatekeeper to preclude legal uncertainties from the Charter or acts of insufficient gravity from entering the scope of the crime of aggression.[86] Finally, the jurisdictional reach of the Rome Statute is limited to State parties.[87] This means that a use of force only "directed outwards" from a State is not sufficient to fulfil the inherent international relations requirement in Art. 8bis – the use of force must be directed at another State party to activate ICC jurisdiction. In borderline cases on whether a use of force is in the international relations of a State, the ICC will need to conduct an assessment depending on the particularities of each case. The text of Art. 8bis suggests that the *State* term should serve as a guideline for the Court. In that case, use of force against non-political entities short of statehood would fall entirely outside Art. 8bis' scope, while "extraterritorial sovereign emanations" of another State, such as embassies and armed forces or fleets are not categorically ruled out,[88] but might struggle to meet the intensity threshold of Art. 8bis(1).[89]

3.4 The question of non-State actors

In this context, the term non-State actor refers to a group, organisation or non-territorial political entity short of statehood that conducts border-crossing uses of force. Under the Charter, the role of non-State actors has been extensively debated in international law scholarship, mostly in relation to the right to self-defence in the aftermath of the 11/9/2001 US attacks.[90] It can be argued that Security Council practice, State practice and scholarship in the past decades has adopted a more accepting approach towards a widening of the State term with regards to the rule of self-defence in Art. 51.[91] This leniency can be attributed to the purpose and function of the Art. 51, which is to allow a State to respond proportionally to immediate armed attacks when its territorial integrity is gravely violated.[92]

[86] The gatekeeping function of the «manifest violation of the Charter of the United Nations» threshold in Art. 8bis(1) must apply to all aspects of Art. 8bis that rely on the Charter, such as the State term. Nothing suggests that it is limited to matters of "force".

[87] Art. 12, Art. 15bis, Rome Statute

[88] Art. 8bis(2)(d) in fact categorizes attacks on "marine and air fleets" as acts of aggression. We will return to this point in Chapter 6.2.2

[89] Kress (2017) p. 433. The intensity threshold is discussed in Chapter 6.4

[90] See Corten (2021) p. 137-203, McDougall (2021) p. 131-137, Crawford (2019) p. 744, Gray (2018a) p. 206. We will discuss the right to self-defence in Chapter 7

[91] Crawford (2019) p. 746

[92] Corten (2021) p. 174-175. Corten (2021) p. 203 points out an illogicality in extending the concept of self-defence to non-State actors when Art. 2(4) only addresses States. In this situation, a State A involuntarily housing a non-State actor whose actions cannot be attributed to it, can be the victim of use of force in self-defence from an attacked State B, while State A itself never violated the prohibition of the use of force in Art. 2(4).

As a main rule, the Charter addresses States. Considering the clear State-centrism in Art. 2(4), extending the subjects of the provisions to non-State actors would require solid legal grounding. In contemporary international law, such sound legal grounding cannot be found. States and authors have attempted to challenge the State restriction in the general prohibition of the use of force in Art. 2(4), but the view has not gained sufficient support. The majority of scholarship restricts the prohibition to inter-State conduct.[93] At the time being, we can establish that the general prohibition on the use of force in the Charter does not extend to non-State actors. The same conclusion can be drawn for the scope of Art. 8bis in the Statute. Art. 8bis does not contain any legal grounds of extending its reach to non-State actors, neither does customary law in the international criminal law sphere extend the crime to non-State actors. [94] It is widely accepted that leaders of a non-State group or organization cannot commit, nor can a non-State actor be the victim of, a crime of aggression.[95]

If the actions of a non-State actor were to fall under Art. 2(4) for the purpose of State responsibility, they must be attributable to a State pursuant to the rules on State responsibility in public international law.[96] In the case of attribution, it is the State, and not the non-State actor, that will be in violation of the prohibitions. For the actions of non-State actors to fall under the crime of aggression in Art. 8bis, the rules of State responsibility under public international law are the point of departure – if the actions are not attributable to a State, they cannot be a "manifest violation of the Charter of the United Nations",[97] nor fulfil the State criteria in Art. 8bis.

3.5 Summary

To summarize, the subjects of Art. 8bis' are States that fulfil the criteria of statehood in international law. Like the Charter, Art. 8bis rely on the customary notion of statehood. In cases of unclear statehood, the ICC will conduct a legal assessment of a political entity's statehood, independent from the entity's relationship with the UN.[98] Non-state actors are excluded from the scope of Art. 2(4) of the Charter and Art. 8bis unless their acts can be attributed to a State under the customary rules of State responsibility. State-internal force, such as civil wars, fall

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[93] Gray (2018b) p. 603, Ambos (2010) p. 488, Heller (2019) p. 8, Tallinn Manual (2017) p. 330

[94] McDougall (2021) p. 137

[95] The State-centrism of Art. 8bis has been criticized in international scholarship for leaving out a growing number of non-State cross-border conflicts from its definition. See McDougall (2021) p. 131, Scheffer (2017) p. 1482, Corten (2021) p. 174, Cassese (2007) p. 846

[96] ILCs Draft Articles on State Responsibility (2001) Art. 4-11. See Crawford (2019) p. 526-538

[97] Art. 8bis(1), Rome Statute

[98] This also follows from the fact that we are dealing with two different treaties and branches of international law. Ratifying the Rome Statute does not require membership in the UN.

outside the scope of both the Charter and Art. 8bis. The forthcoming analysis is therefore built on the presumption of inter-State use of force.

4 The use of armed force

4.1 Overview

	ART. 8*BIS*	**THE UN CHARTER**	
2	«use of armed force»	«threat or use of force”	Art. 2(4)

This Chapter will examine the first substantial condition of the State conduct element in Art. 8bis and Art. 2(4) – the *use* of *force*. By reading Art. 8bis, it is not immediately evident that the entry requirement of the State conduct element is the use of armed force. After all, Art. 8bis criminalizes qualified acts of *aggression*. The substantive definition of the State conduct element of the crime of aggression in Art. 8bis(1) reads:

> “ (…) an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”

By a first reading, it appears that an “act of aggression” is the entry requirement, and the qualification clause “manifest violation” is the threshold the act of aggression must reach to fulfil the State conduct element. This is not wrong, but when dissecting the building blocks of the State conduct element, particularly in comparison to the Charter, it becomes evident that an “act of aggression” is not the given point of departure. One requirement comes *before* the act of aggression. This can be deducted from the definition of an act of aggression in Art. 8bis(2):

> “For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”

Here, an act of aggression is in its essence defined as a use of armed force which is inconsistent with the Charter. The first stepping stone of the State conduct element in the crime of aggression is thus the requirement of “armed force”. As we will see in Chapter 6, the requirement of “armed force” will in the majority of cases be consumed by the requirement of aggression, rendering a preceding assessment of the “armed force” condition redundant. However, in some cases, the Court might need to assess whether the conditions of the building blocks of *aggression* are fulfilled.[99] This Chapter will analyse “armed force” in Art. 8bis.

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[99] These situations are discussed in Chapter 4.3 and Chapter 6

4.2 A gradation of the use of force

The concept of force under the Charter is mainly regulated in Art. 2(4), Art. 39 and Art. 51. In these provisions, the Charter employs a variety of terms to describe inter-State violence; "use of force",[100] "armed force",[101] "armed attack",[102] "act of aggression",[103] "threat to the peace"[104] and "breach of the peace".[105] The fact that the Charter applies different terms indicates that the terms differ in their meaning, normative function and that these are different *types* of force. Ascribing meaning to the various terms is necessary to establish the constitutive acts of each type of violation, the gravity of each violation, and the consequences the Charter actuates to each type of conduct.

The Charter does not provide definitions for any of the terms, nor suggest how the different types of force relate to each other or their relative gravity.[106] However, an implicit notion of a gravity scale of the use of force was introduced in the frequently cited ICJ judgement of *Nicaragua v. USA*.[107] The Court held that "it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms."[108] The judgement here presumed a gravity scale for different types of force. The question then arises – in what ways does "armed attack" differ from other types of force? Is the scope of "armed attack" narrower than that of "force"? If answered in the affirmative, the distinction indicates that the Charter does not authorize self-defence for all violations of the "catch-all" prohibition in Art. 2(4).[109] The fact that some violations of Art. 2(4) trigger the right to self-defence, while others do not, confirms a scale or gradation of the gravity of different types of inter-State use of force.

Some scholars have argued that ICJ operates with a three-step gradation of the use of force. Although such a three-step gradation is not a legal doctrine formally expressed by the Court, it

[100] UN Charter Art. 2(4)

[101] Preamble para 7

[102] UN Charter Art. 51

[103] UN Charter Art. 1(1) and 39

[104] Ibid.

[105] Ibid.

[106] For a thorough review, see McDougall (2021) p. 89

[107] Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. USA) ICJ, 1986. The Court rendered its judgment on customary international law and not the provisions on the use of force in the Charter. However, the substantive remarks the Court made on the law of the use of force are widely used to interpret the identical provisions codified in the Charter.

[108] *Nicaragua*, Merits, para 191. A frequent example in scholarly writings to describe "less grave forms" of the use of force are accidental small-scale border crossings without ill-intent or minor border skirmishes, Schabas (2016) p. 310

[109] McDougall (2021) p. 88

does serve as a pedagogical model illustrating the gliding scale of the use of force. On the basis of their review of ICJ jurisprudence on the use of force, Akande and Tzanakopoulos suggest:

> "there are two different sets of concepts which allow gradation, through an assessment of gravity, of the use of force. One set is that which progresses from a mere use of force (article 2(4) of the UN Charter), to an armed attack (article 51 of the UN Charter), to a serious breach of a peremptory norm of general international law (article 40 of the Articles on State Responsibility). Another set is that which moves from a mere use of force, to an act of aggression and then to a war and/or crime of aggression. The first set of concepts is used exclusively in the realm of state responsibility, whereas the second set doubles as one that can serve both for the purposes of state responsibility, and for the purposes of individual criminal responsibility. What this means is that both sets have been used, at least by the ICJ to discuss the responsibility of states for use of force; however, the second set has also been used by the International Military Tribunal, the UN General Assembly and the drafters of the 2010 Resolution on the Crime of Aggression, in order to define the crime of aggression.»[110]

This gradation scale can be summed up in the following table:

	Under the Charter / State responsibility	**Under the Charter *and* the Statutes / State responsibility *and* individual criminal responsibility**
1. step	The use of armed force	The use of armed force
2. step	Armed attack	Act of aggression
3. step	A serious breach of a peremptory norm of international law (Art. 20, DASR)	A war of aggression / The State conduct element of the crime of aggression

Table 2

Table 2 roughly indicates the relative gravity of each term. As the table illustrates, a three step gradation is evident in both legal regimes. It further shows that the first step in both legal regimes is identical – the crime of aggression builds on the fundamental entry requirement as that of Art. 2(4) of the Charter. After the initial step, the paths of the two legal regimes deviate.

Introducing the gradation scale at this point in the thesis forestalls parts of the analysis and conclusions we will draw further on. It is however necessary to familiarize the reader to framework surrounding the forthcoming analysis. For now, it is sufficient to make the reader aware of the plethora of categories of the inter-State uses of force and their relative gravity. The terms employed in the table will be defined when relevant in our analysis.

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[110]Akande (2017a) p. 229-30

4.3 The necessity of defining "armed force" in Art. 8bis

The necessity of defining the scope of "armed force" in Art. 8bis is not immediately apparent. When interpreting the crime of aggression, can we not just start our assessment with "aggression" as our point of departure? The subparagraphs of Art. 8bis(2) do provide a broad and detailed list of acts predetermined to qualify as aggression,[111] and if the facts of a particular situation are covered by one of the subparagraphs, there should be no need to conduct an assessment of the foundational "armed force" criteria. This might be true for clear cut cases of aggression which fall directly under one of the subparagraphs in Art. 8bis(2) (a)-(g), allowing the ICC to simply confirm an act of aggression and focus on the final threshold requirement of a "manifest violation" of the Charter. However, the ICC might stand before cases that are more complicated, where it is not obvious that an *act* of aggression has been committed. In such cases, the Court will need to assess whether the requirements of an act of aggression in Art. 8bis(2) are fulfilled.

If the definition of aggression in Art. 8bis(2) is read literally, an act of aggression *equals* "the use of armed force". The *chapeau* of Art. 8bis(2) defines an act of aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." Nowhere does the text explicitly state that "aggression" is something different from the use of armed force. What does then separate these two concepts? To answer this question, we will need background knowledge of the concept of "armed force".

As we will see in Chapter 6, there is a discussion among scholars on whether the list of acts of aggression in Art. 8bis(2) is *exhaustive.* If the list is intended to be exhaustive, i.e. acts not covered by one of the subparagraphs describing predetermined acts of aggression cannot constitute aggression, the *chapeau* in Art. 8bis(2) will practically be inoperative, making any discussion of the concept of "armed force" redundant. However, we will find in Chapter 6 that the list is understood as *non-exhaustive*. This implies that acts of force not covered by any of the subparagraphs of Art. 8bis(2) can constitute aggression under certain conditions. The *chapeau* of Art. 8bis(2) will be the starting point of assessing whether the relevant act qualifies as aggression. In this determination, the notion of "armed force" is crucial for the assessment.

The two points presented in this section illustrate why defining "armed force" under Art. 8bis is necessary to understand the concept of aggression. In the following sections, we will study this foundational building block of the crime of aggression.

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[111] McDougall (2021) p. 129

4.4 The use of armed force

4.4.1 Armed force in Art. 8bis

The "use of armed force" is not defined in the text of Art. 8bis. Neither the Elements nor the Understandings elaborate on the concept. The only qualification requirement of "armed force" in Art. 8bis(2) is that the force must be used against the "sovereignty, territorial integrity or political independence of another State." The content of the sovereignty clause is closely intertwined with the concept of "armed force", and will be further explored in Chapter 5. For now, we will discuss the isolated meaning of "armed force".

Art. 8bis protects the core of the prohibition of the use of force in international law.[112] The identical formulations in Art. 8bis and Art. 2(4), "the use of armed force" in Art. 8bis and "the use of force" in Art. 2(4) indicate a close relationship between the concepts. Although the text of Art. 2(4) prohibits the "use of force" and does not contain a limitation of "armed" force, it is widely accepted that "use of force" in Art. 2(4) is understood as armed force.[113]

The second part of the definition of an act of aggression in Art. 8bis(2) reads "or in any other manner inconsistent with the Charter of the United Nations." The formulation "in *any other* manner" implies that the use of armed force is *one* of the manners inconsistent with the Charter. This illustrates that the common base requirement for the prohibitions in both the Charter and under the Statute is the universal notion of armed force in public international law. "Armed force" in Art. 8bis(2) must therefore be interpreted with the Charter as the point of departure.[114]

4.4.2 Types of force in Art. 2(4)

The wide formulation in Art. 2(4) invites disputes regarding its scope.[115] International practice and scholarly debates on the scope of Art. 2(4) prove that even this most fundamental building block of Art. 2(4) is not undisputed. Furthermore, the scope of the prohibition cannot be determined by an isolated interpretation of Art. 2(4), but must be read in conjunction with the provisions of justification in the Charter. As will be demonstrated in Chapter 7, the terms employed in the justification provisions are also subject to controversy. Combined, these factors, accompanied by the semi-political nature of the use of force, render it challenging to draw clear boundaries around the notion of force.[116]

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[112] Kress (2017) p. 412

[113] Kress (2017) p. 424 with further references, Randelzhofer (2012a) p. 208

[114] Kress (2017) p. 425

[115] Randelzhofer (2012a) p. 208

[116] Art. 8bis responds to the uncertainties transferred from the Charter through its characteristic threshold requirement of a "manifest violation" of the Charter. This is discussed in Chapter 6.

Nonetheless, the absence of qualification requirements in Art. 2(4) does not mean that the prohibition is all-encompassing and includes any force-resembling interaction between States. Defining the limitations of the scope of Art. 2(4) depends on two interrelated aspects. The first is the confines of "force". Are there types of force that fall outside the scope of Art. 2(4) and are consequently not prohibited in the Charter? The second aspect is the minimum requirement for the use of force, i.e. the *de minimis* threshold. Is there an intensity requirement for the use of force in Art. 2(4)? These two questions will be answered in the forthcoming paragraphs.

The first limitation of the scope of "force" in Art. 2(4) is regarding the *types* of force contained in the term. There have been few attempts by the ICJ, Security Council or General Assembly to holistically and generally define the types of force covered by the notion of force in Art. 2(4).[117] However, by putting together interpretations affirmed in the diverse practice of these bodies, a depiction of what types of force fall in or out of the term emerges.

As touched upon earlier, "force" is Art. 2(4) is limited to *armed* force. There is no significant controversy surrounding this point.[118] An authoritative affirmation appears in the *Oil Platforms* case, where ICJ held that "The United States has never denied that its actions against the Iranian platforms amounted to a use of armed force."[119] Kress takes this statement as an account for ICJ interpreting the "use of force" as "armed force".[120] Randelzhofer,[121] Crawford[122] and McDougall confirm this understanding. McDougall elaborates on the scope of armed force:

> "It seems equally certain that the term 'force' covers all types of inter-State armed violence ranging from the comprehensive armed hostilities commonly associated with the term 'war', to isolated acts that cause very little measurable damage, such as the firing of warning shots by an aircraft of one State toward a naval vessel of another." [123]

As this paragraph illustrates, the limitation of "armed" force still leaves us with quite a broad scope. At its utmost, "armed" force might include any physical effect that is caused against another States sovereignty, from small scale border skirmishes or illegal trespassing through territorial waters, to unprovoked acts of aggression and traditional armed wars. The broad scope of "armed force" is further indicated by the list of acts of aggression in General Assembly

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[117] Kress (2015) p. 576-77

[118] Kress (2017) p. 424, Randelzhofer (2012a) p. 208-209, McDougall (2021) p. 89, Crawford (2019) p. 720, Ruys (2014) p. 163

[119] Case Concerning Oil Platforms (Iran v. US), ICJ, Judgement, para 45

[120] Kress (2015) p. 576-77

[121] Randelzhofer (2012a) p. 208

[122] Crawford (2019) p. 720

[123] McDougall (2021) p. 89-90

Resolution 3314 on the Definition of Aggression.[124] Essentially, the resolution is an expression of the GA's interpretation of "acts of aggression" for the purpose of Art. 39 in the Charter. As we saw in Table 2, an act of aggression is a qualified form of the use of armed force. This means that all acts of aggression are in their essence uses of "armed force", and consequently, that the list of acts of aggression in Art. 3 (a) to (g) are examples of uses of armed force. The purpose of emphasizing this is to point out the diversity and wide range of the types of armed force. For instance, (b) mentions an act of traditional warfare, i.e. bombardment, while (c) includes "the blockade of the ports or coasts of a State by the armed forces of another State" and (f) even "the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State".

The general meaning of the term "force" is in the Oxford dictionary "strength or energy as an attribute of physical action or movement" or "coercion or compulsion, especially with the use or threat of violence".[125] As Kress has argued, for Art. 2(4), it is not even necessary that the physical effect is caused by the "release of kinetic force" or the use of a weapon in a literal sense.[126] On this basis, it seems that the notion of armed force is so broad that the only requirement is "the use of an instrument capable of causing a physical effect in a sufficiently direct manner."[127]

The most important authoritative interpretation of the concept of "force" was delivered by the ICJ in 1996 in the advisory opinion *Nuclear Weapons.*[128] The Court held that the provisions on the use of force in the Charter "do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed."[129] In GA Resolution 3314, among the acts of aggression listed in Art. 3, (b) reads "or the use of *any weapons* by a State against the territory of another State". An explanatory note of the Special Committee for the resolution stated:

[124] General Assembly Resolution 3314 on the Definition of Aggression is discussed in detail in Chapter 6, but is now briefly introduced to illustrate the broad scope of the notion of force.

[125] Oxford Dictionary of English, 2005

[126] Kress (2017) p. 424

[127] Ibid. The requirement of an instrument causing physical effect leaves political and economic force out of the equation. The prevailing view is that the exclusion of economic and political coercion from the "force" concept was intentional by the State parties when the Charter was adopted in 1945, see Kress (2017) p. 424, Randelzhofer (2012a) p. 209, McDougall (2021) p. 99, Tallinn Manual (2017) p. 331. A rationality for leaving economic and political coercion out of the definition of force is commented by Randelzhofer p. 209: "if the prohibition against the use of force was extended to economic and political coercion, States would be left with no lawful means of exerting pressure on other States who were in violation of international law."

[128] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ (1996)

[129] *Nuclear Weapons*, para 39

> "With reference to article 3, subparagraph (b), the Special Committee agreed that the expression "any weapons" is used without making a distinction between conventional weapons, weapons of mass destruction and any other kind of weapon."[130]

The question of types of force is in its essence a question of what *arms* are prohibited. Neither the Court nor the General Assembly has confined the arms employed in the concept of armed force to traditional weapons.[131] The broad and not strictly defined concept of armed force opens the definition in Art. 2(4) up for new methods of force and allows the notion to develop dynamically. Consequently, the pool of acts within "armed force" can expand, making the prohibition in Art. 2(4) cover newfound weapons and technologies. This has raised questions throughout the lifetime of Art. 2(4) of whether chemical and biological weapons, nuclear weapons,[132] and in recent decades, inter-State cyber operations are covered by Art. 2(4).

The question of cyber operations was discussed in 2017 by an international expert group, resulting in the *Tallinn Manual 2.0*, a thorough study of the status of cyber operations under the concept of force in international law.[133] Ultimately, the manual carries the same legal weight as other scholarly writings, and is frequently referred to in writings on the use of force.[134] The manual establishes that in the contemporary international law on the use of force, cyber operations are included in the force concept:

> "Therefore, the mere fact that a computer (rather than a more traditional weapon, weapon system, or platform) is used during an operation has no bearing on whether that operation amounts to a 'use of force' (…) In the cyber context, it is not the instrument used that determines whether the use of force threshold has been crossed, but rather, as described in Rule 69, the consequences of the operation and its surrounding circumstances."[135]

This corresponds with the prevailing view among scholars,[136] and confirms two important aspect of the notion of armed force in the Charter and the corresponding customary international law: its broad scope and its dynamism. Whether this dynamism transfers to the notion of armed force in Art. 8bis, we will discuss later in this Chapter.

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[130] Special Committee on Defining Aggression, 29th Session, para. 20 as referenced in Kress (2017) p. 442

[131] Kress (2015) p. 577

[132] See Akande (1998) for a deciphering of *Nuclear weapons*.

[133] The expert group was founded by NATO Cooperative Cyber Defence Centre of Excellence in 2009. The Tallinn Manual 2.0 from 2017 is an updated version of the original report. The mandate of the expert group was to give an "objective restatement of the lex lata.", Tallinn Manual (2017) p. 3

[134] Kress (2017) p. 425 and McDougall (2021) p. 139 referring to it as "highly influential"

[135] Tallinn Manual (2017) p. 328

[136] See Kress (2017) p. 425, McDougall (2021) p. 139

While discussing cyber operations, the Tallinn Manual presents another general aspect of the concept of force. It elaborates on the criteria of including cyber operations into the concept of force:

> "The Experts agreed that there is no basis for excluding cyber operations from within the scope of actions that may constitute a use of force if the scale and effects of the operation in question are comparable to those of non-cyber operations that would qualify as such.»[137]

The Expert group here holds that a cyber operation can *qualify* as use of force if the *scale* and *effects* of the force are of a certain gravity, implying there are cyber operations that will not amount to force. This question of an intensity requirement is applicable to other types of force, and particularly evident in the question of *indirect* force.

4.4.3 Indirect force

The types of force discussed so far, have been different types of *direct* force. Indirect force is by Randelzhofer described as the "participation of one State in the use of force by another State (e.g. by allowing parts of its own territory to be used for violent acts against a third State), as well as to a State's participation in the use of force by unofficial bands organized in a military manner, such as irregulars, mercenaries, or rebels, against another State."[138] This is a different situation from that of attributing the actions of a non-State group to a State pursuant to the rules of State responsibility,[139] and is rather a question of how and when a State's *support* of the unlawful use of force against another State qualifies as a "use of force" under the Charter. While it is undisputed that indirect force is included in the notion of force,[140] the confines and types of indirect force are not clarified beyond doubt. This is because of the variety of forms of such support and participation, which can vary from funding and training, to enabling. Some guidelines can be extracted from the *Nicaragua* case. In the Nicaragua judgement, the ICJ held that Art. 2(4) generally covers "assistance to rebels in the form of the provision of weapons or logistical or other support",[141] but that not *every* act of assistance to military hostilities in another State qualifies as a use of force:

> "In the view of the Court, while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the *contras*, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force.»[142]

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[137] Tallinn Manual (2017) p. 331

[138] Randelzhofer (2012a) p. 211

[139] Tallinn Manual (2017) p. 332. We touched upon State attribution in Chapter 3.4

[140] Randelzhofer (2012a) p. 211-212

[141] *Nicaragua*, Merits, para 195

[142] *Nicaragua*, Merits, para 228

While the Court found that the US' *arming* and *training* of the guerrilla force Contras engaged in armed hostilities in Nicaragua did amount to a use of force, the mere *funding* of them did not. This indicates a requirement of participation, or an *intensity* requirement, in the actual hostilities for support to be considered a use of force. The notion of indirect force is elaborated in the Declaration on Friendly Relations:

> "Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
>
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."[143]

We can take from the Resolution that "encouraging" and "organizing, instigating, assisting or participating" are points of departure when assessing whether an act of support to armed hostilities in another State constitute acts of force. What the Declaration on Friendly Relations does not elaborate on, is the intensity requirement of this support. When is the *de minimis* threshold of armed force reached? The answer of this question is not only applicable to situations of indirect force, but to all uses of force within Art. 2(4).

4.4.4 The minimum intensity requirement of armed force in Art. 2(4)

The Charter does not provide any guidelines for the intensity requirement of the use of force, besides indicating, through using different terms, that it differs from a "threat"[144] and an "intervention".[145] In the Tallinn Manual, the Expert group found a method to determine when an act can amount to the use of force. In the absence of any intensity criteria provided in the Charter, the Expert group borrowed the components "scale and effects" from the Nicaragua judgement.[146] The ICJ employed these components to determine whether the particular acts amounted to the higher intensity threshold of "armed attack" under the customary rule of self-defence.[147] The Expert Group found the guidelines as an "equally useful approach" when determining whether an act qualifies as a use of force, as the components capture both a qualitative and a quantitative factor.[148] Furthermore, we can also draw some guidance from Art. 8bis of the Rome Statutes, where the criteria for determining the manifestness of a violation of

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[143] Declaration on Friendly Relations (1970), under (1), para 9,10

[144] Art. 2(4)

[145] Art. 2(7)

[146] Tallinn Manual (2017) p. 330-331

[147] *Nicaragua*, Merits, para 195. The rules of self-defence are discussed in Chapter 7.4

[148] Tallinn Manual (2017) p. 330-331

the Charter are "character", "gravity" and "scale". These components are studied thoroughly in Chapter 6, but at this step, they can provide us with an understanding of relevant criteria when determining the intensity of uses of force.

Eventually, the assessment of whether an act reaches the "force" threshold of Art. 2(4) will be specific to each particular case, considering all relevant circumstances and the type of force involved. The variety of types of force renders it difficult to draw general guidelines. For instance, the intensity assessment of indirect force such as training military groups in another State would be quite different to the assessment of a cyber operation targeting the data systems of another States arms plantation. Furthermore, not all uses of force violating the territorial integrity or political independence of another State may result in the loss of human lives or property destruction. Can operations causing few evident effects qualify as uses of force?

Again, some general guidelines can be extracted from the Tallinn Manual. Although the Manual discusses the threshold of force in relation to cyber operations, the method applied provides a general sense of the placement of the force threshold that can be applied to all types of force. For instance, the Manual found that "acts that injure or kill persons or physically damage or destroy objects are uses of force."[149] Computerized operations that cause an aircraft or train crash resulting in death and destruction would be included in the notion of force, while computerized operations that disrupt a State's banking system, make public a State's sensitive information on the internet, or disrupt the function of a State's public institutions will not amount to force, despite such operations causing similar damage.[150] Corten compares the latter types of operations to economic or political force, both capable of causing significant damage, but as mediate or indirect consequences.[151]

As a general guideline, we can conclude that the intensity requirement cannot be high. The objective of Art. 2(4) is to protect the sovereignty, territorial integrity and political independence of States. In his article on the threshold of the use of force, Ruys argues that the origins, objectives and *travaux préparatoires* of Art. 2(4) suggest a comprehensive and broad scope, placing the burden of proof for a restrictive interpretation on the scholars who advocate for a higher intensity threshold.[152] Based on his analysis of UN and State practice, Ruys reaches the conclusion that the idea of a gravity requirement and a general *de minimis* threshold for the concept of force must be dismissed. He further argues that any actual armed confrontation between two States, no matter how small-scaled or local, falls within the intended scope of Art.

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[149] Tallinn Manual (2017) p. 333

[150] Ibid

[151] Corten (2021) p. 104 with further references

[152] Ruys (2014) p. 164 with further references. For a differing view, i.e. for a higher intensity threshold for the concept of force and a more restrictive approach to Art. 2(4), see Corten (2021) Chapter 2B

2(4), and that the same applies to so-called limited targeted operations of killings abroad: “any deliberate projection of lethal force onto the territory of another state – even if small-scale and even if not targeting the state itself – will normally trigger Article 2(4).”[153] Although Ruys' analysis almost eliminates an intensity threshold, his conclusion allows Art. 2(4) to function as intended, and thus aligns with the teleological interpreting approach encouraged by international rules on treaty interpretation.[154]

For the purpose of this thesis, we do not need to conclude on a precise lower threshold for the concept of force. An act of force balancing on the borderline of the concept of armed force will not meet the threshold of *aggression* that is required under Art. 8bis.[155] What we *can* conclude with, is that the concept of force under the Charter is broad, and includes physical coercion caused by any weapon. We can establish that cyber operations are included in the force concept, and that political and economic coercion is excluded. Finally, we can establish that there is a certain intensity requirement for an act to qualify as armed force, and that this threshold is not clearly defined and is specific to each case. As Table 2 illustrates, ”armed force” has, if any, the lowest intensity requirement of the notion of force.

4.5 The force concept of Art. 2(4) in Art. 8bis

In section 4.2, we established that the entry requirement of “armed force” in Art. 8bis is identical to the concept of force under the Charter. Now that we have discussed the concept of force, we can point out some observations of interest.

Firstly, the *Nuclear weapons* Advisory Opinion and the Tallinn Manual illustrate that the notion of armed force in Art. 2(4) is open to a dynamic interpretation adaptable to new military and technological developments. The question of whether this openness transfers to the concept of armed force under Art. 8bis can be answered in the affirmative. For instance, an expert report was released in 2021 by the Permanent Mission of Liechtenstein to the UN on the application of the Rome Statutes to cyberwarfare, arguing for the inclusion of cyberwarfare under the crime of aggression.[156] The prevailing view in scholarly writings on Art. 8bis is indeed that cyberoperations can qualify as crimes of aggression, as long as the intensity thresholds of the State conduct element in Art. 8bis are fulfilled.[157] In other words, Art. 8bis reliance on the Charter opens the criminal provision for dynamic interpretation, synchronized with the development of the notion of force under Art. 2(4) and the *jus ad bellum*. As we will see in

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[153] Ruys (2014) p. 209

[154] VCLT Art. 31(1)

[155] We will return to the concept of aggression in Chapter 6.

[156] The Council of Adviser's Report on the Application of the Rome Statute of the International Criminal Court to Cyberwarfare (2021). See also Trahan (2021) p. 1160-1163

[157] Kress (2017) p. 425, McDougall (2021) p. 139

Chapter 6, the "manifest violation" threshold of Art. 8bis prevents this dynamism from defying the requirements of certainty under international criminal law.

Secondly, as we touched upon in the previous section, a *de minimis* threshold of the use of force will hold practical importance for the concept of force under the Charter, as it will determine which acts falls within the scope of Art. 2(4). However, for Art. 8bis, the lower threshold for the concept of armed force is of theoretical interest. As we will see in Chapter 6, the concept of aggression under the Statute introduces an intensity threshold for uses of armed force which is not attainable for acts in the *de minimis* sphere of force.

Thirdly, the Charter contains legal categories for acts that do not amount to force under Art. 2(4), such as the prohibition of intervention grounded in the notion of State sovereignty in Art. 2(1) and the prohibition of threats of force in Art. 2(4). The practical implication of this is that acts that do not qualify as uses of armed force, still constitute violations of the Charter. For Art. 8bis, acts that are not "armed force" fall entirely out of the scope of the crime of aggression, and cannot entail individual criminal responsibility. The exclusion of political and economic force from the concept of armed force in the Charter transfers to the concept of armed force in Art. 8bis. Even though political and economic coercion of a certain intensity holds the potential to violate State sovereignty by pressuring for a regime change or in other ways force a State to comply with a demand, such coercion cannot amount to a crime of aggression unless armed force is involved. The exclusion of *threats* from the State conduct element of Art. 8bis raises some interesting points which will be discussed in the next section.

4.6 Some comments on the threat of force

The full prohibition in Art. 2(4) of the Charter is the "threat or use of force". The wording confirms that "a threat of force" is an independent prohibition in Art. 2(4), detached from an eventual succeeding use of force. Despite its autonomy, there are few examples of practice to authoritatively elaborate the scope of the prohibition on threats.[158] The explanation for the lack of international and State practice is merely practical – substantial threats of the use of force are often preceded with actual uses of force, making the latter aspect the point of focus in resulting disputes.[159] Scholarly writings are therefore a central source of exploring the notion of threats in the Charter.

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[158] For clarification purposes, the Security Council's competence to react to "threats of the peace" in Art. 39 in the Charter is a different question, unaffected by Art. 2(4). The term in Art. 39 has a different normative purpose and broader scope than "threat" in Art. 2(4), and is often used by the Security Council to describe actual use of inter-State force. Art. 39 is discussed in Chapter 6.

[159] Randelzhofer (2012a) p. 218

According to Brownlie, "A threat of force consists in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government."[160] Dubuisson describes the minimal requirement of a threat as "it should leave no doubt as to the determination of a state to resort to force if the targeted state does not adopt certain conduct. The ultimate criteria will be the existence of coercion."[161] Randelzhofer endorses that the prohibited threat of force requires a direct compelling intent to influence the specific behaviour of another State.[162] Furthermore, the threatened force must be contrary to the Charter.[163] In *Nuclear Weapons*, the ICJ confirmed that the legality of a threat of force is dependent on the legality of the force in question – a threat of an unlawful use of force, will in itself be unlawful.[164]

An interesting question is the upper limit of the threat notion and its relation to the threshold of the use of force. For the purpose of Art. 2(4), the border line between threats and the use of force is of limited significance – both are prohibited, and the conditions of unlawfulness of a threat coincide with those of the use of force.[165] For the purpose of Art. 8bis however, the border line holds significance, as only the use of armed force is criminalized. A "threat" of force is kept out of the State conduct element of Art. 8bis, and is accordingly not criminalized. However, once an act surpasses the threat sphere and enters the force sphere, it possesses the potential to constitute an act of aggression.

With regards to the threshold of the use of armed force in Art. 8bis, the "use" of armed force implies that armed force must be *deployed* to commence an act of force. This is a narrow reading of the wording. Kress writes:

> "The requirement of a use of force does not imply the need for shots being fired and human beings being killed or injured or property being physically damaged. Rather, the internationally unlawful presence of a state's military with a hostile intent may also amount to a use of force. This is evident from the inclusion of invasions, (maritime) blockades and the unlawful extension of the extra-territorial presence of armed forces which were originally sent with the agreement of the receiving state in the list of acts of aggression in litterae (a), (c) and (d) of article 3 of the Annex to 1974 GA Resolution 3314, as reproduced in article 8 bis(2) of the Rome Statute."[166]

[160] Brownlie (1963) p. 364
[161] Dubuisson (2015) p. 924
[162] Randelzhofer (2012a) p. 218
[163] *Nuclear Weapons*, para 47
[164] *Nuclear Weapons*, para 48
[165] Ibid
[166] Kress (2017) p. 424

Kress' argues that the "use" of armed force in Art. 8bis, and consequently Art. 2(4), is to be understood broadly, and that (a), (c) and (e) can be interpreted to include the "internationally unlawful presence of a state's military with a hostile intent". A military presence without the actual *use* of force can – semantically – also be understood as only a threat to resort to force. However, it appears from the context that the unlawful military presence in question is *within* the territory of the victim State, either unlawful in its entirety, or an initially lawful presence exceeded in contravention of the agreed terms with the host State. For an act to remain a threat and not amount to *use*, any military presence or amassing of troops should be no further than *by the border* of the victim State, or in the case of establishing military bases, in a consenting neighbouring State to the victim State. Acts that violate the territorial integrity of a State, e.g. military presence on the States territory, will amount to an unlawful *use* of force, and will no longer be merely a threat that falls outside the scope of armed force in Art. 2(4) and Art. 8bis.

This gives that amassing troops by the border, actively preparing for military engagement, blatantly threatening with imminent invasion or deployment of force, giving warnings of use of weapons of mass destructions or large scale cyber-attacks, or even oral declarations of war, would not amount to the *use* of force for the purpose of Art. 2(4), nor to the use of armed force for the purpose of Art. 8bis.[167] The acts would be prohibited by the Charter as threats, but not criminalized in Art. 8bis. This is regardless of the illegality of the act that is threatened. Threats that intend to coerce a State to act a certain way, jeopardize the sovereignty and political independence of the victim State, which are important objectives the Charter and Art. 8bis seek to protect. Leaving "threats" out of the definition of Art. 8bis is therefore not a trivial exclusion.

To summarize, by referring only to the *use* of armed force, Art. 8bis excludes a number of acts that traditionally follow prior to the deployment of armed force, such as military preparations, threats of the use of force and declarations of war.[168] Threats that are blatantly coercive and compel a State to act a certain way might violate the sovereignty or political independence of the victim State, but are not "armed force", and therefore not criminalized in Art. 8bis.

4.7 Summary

In this Chapter, we have discussed how the concept of force under the Charter and under Art. 8bis relate to each other. The analysis shows that the difference in language – "use of force" in Art. 2(4) and "use of armed force" in Art. 8bis does not entail different meanings, as both concepts are limited to armed force. The analysis has demonstrated how Art. 8bis' entry requirement of "armed force" relies on the concept of armed force under Art. 2(4) of the UN

[167] Art. 8bis(2) even specifies that a "declaration of war" does not hold independent meaning, nor influences the assessment of an act of aggression

[168] Ibid

Charter. Art. 8bis' reliance on Art. 2(4) allows the scope of the crime of aggression to develop alongside the underlying concept of force in public international law, which generally is adaptable to developments in methods of inter-State force. The dynamic capacity of Art. 2(4) has been demonstrated by its embracement of new technological developments in the force genre, such as the extension of its scope to covering cyber operations.[169] This dynamism is transferred to Art. 8bis through its reliance on the Charter.

The notion of armed force in Art. 2(4) serves as an *outer frame* for what acts can qualify as acts of aggression under Art. 8bis. The practical implication of this is that Art. 8bis cannot logically criminalize acts that fall outside the contemporary established scope of the prohibition of the use of force in the Charter. For States concerned about vagueness in the scope of Art. 8bis, clarifying the scope of its outer frame in Art. 2(4) is one tool to crystallize the confines of Art. 8bis.

[169] Tallinn Manual (2017)

5 Sovereignty, territorial integrity and political independence

5.1 Overview

	ART. 8*BIS*	THE UN CHARTER	
3	"sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations"	"territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"	Art. 2(4)

As mentioned in the previous Chapter, the text of Art. 2(4) and Art. 8bis(2) prohibits the use of force against the territorial integrity or political independence of another State. The concept of force is closely tied to this clause. Section 5.2 will explore the contents of the clause, the main question being whether it constitutes a limitation to the concept of force, first in the Charter (section 5.2.1) and then in Art. 8bis (section 5.2.2).

5.2 A limitation clause?

5.2.1 In Art. 2(4)

In Art. 2(4), the clause "territorial integrity or political independence" is closely related to the concept of force, up to the point that an isolated interpretation of the clause might seem artificial. The language of Art. 2(4) prohibits the use of force, but only uses of force that alter the "territorial integrity or political independence" of another State or are inconsistent with "the Purposes of the United Nations". Thus, a literal reading of Art. 2(4) will deem lawful uses of force that do *not* compromise the purposes of the United Nations, or the territorial integrity or political independence of another State. If this was the correct reading of Art. 2(4), the clause would be one of few restrictions on the all-encompassing scope of the blanket prohibition in Art. 2(4). Defining the relevant purposes of the United Nations and the terms territorial integrity and political independence would therefore be crucial.

The view that the clause serves as a restriction can be translated into a notion of two different types of force – force that intends to alter territorial integrity or political independence of a State, and force that does not, i.e. "non-aggressive" uses of force with a "benign purpose".[170] An example of a use of force that violates the territorial integrity of a State is a military invasion or occupation, and for political independence, a regime overthrow. Examples of uses of force intended to fall within "benign purpose" can include trespassing of the armed forces of a State

[170] Kress (2017) p. 431

through the territory of a second State on their way to a third State, or assembling warships in the territorial waters of another State to simply do minesweeping, an operation that does not bring physical harm to people nor property of said State.[171] A minority of scholars hold the position that the latter type of force falls outside the prohibition in Art. 2(4) and is consequently lawful.[172]

A lengthy discussion on the notion of "benign purpose" is unnecessary. The dominating position in scholarly writings[173] and in the *travaux préparatoires* to Art. 2(4)[174] is that the clause does not intend to limit the scope of Art. 2(4). The forthcoming paragraphs will present the reasoning for an all-encompassing prohibition.

Already the first two modes "territorial integrity" and "political independence" aim to cover all possible inter-State uses of force.[175] Randelzhofer argues that territorial "integrity" must be read as "inviolability", with the result that "an incursion into the territory of another State constitutes an infringement of Art. 2(4) even if it is not intended to deprive that State of part of its territory and if the invading troops are meant to withdraw immediately after completing a temporary and limited operation ('in-and-out operations')".[176] This means that acts not directed against the territorial integrity or political independence of a State, such as trespassing of armed forces or so-called targeted killings on the territory of another State, are covered by the prohibition.

Kress argues that the notion of a use of force with a "benign purpose" was implicitly rejected by the ICJ in *Corfu Channel*.[177] One of the questions before the Court was whether the UKs minesweeping activity in the Albanian waters of the Corfu Channel prior to passing British warships through the Channel, was a violation of Art. 2(4). The UK justified its actions by claiming the operation was a limited intervention and not a use of force, and argued that its action "threatened neither the territorial integrity nor the political independence of Albania".[178] Although the ICJ did not address the argument directly, the Court stated with regards to the point of intervention that "The Court cannot accept such a line of defence."[179] Kress read the

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[171] As the case was in the Corfu Channel Case (UK v. Albania), ICJ, 1949, Merits, p. 33-34

[172] Randelzhofer (2012a) p. 216, Kress (2015) p. 573, Kress (2017) p. 431

[173] Randelzhofer (2012a) p. 215, Kress (2017) p. 431, Ruys (2014) p. 163-164

[174] Tallinn Manual (2017) p. 329 with references to preparatory documents suggesting this reading of Art. 2(4): UNCIO Vol. 6, Doc. 1123, I/8, Docs. 65 (1945); UNCIO Vol. 6 Doc. 784, I/1/27, Docs. 336 (1945); UNCIO Vol. 6 Doc. 885, I/1/34, Docs. 387 (1945)

[175] Randelzhofer (2012a) p. 216 with further references

[176] Ibid

[177] Kress (2015) p. 573

[178] Oral Statement of 12/11/1948, Corfu Channel, p. 296, referred to in Kress (2015) p. 573 and Crawford (2019) p. 720

[179] *Corfu Channel*, Merits, p. 35

Court's reasoning as a "judicial rejection of the idea that the words 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN Charter' subject the prohibition of the use of force to an exception for certain 'non-aggressive' uses of force."[180] Although the Court discussed *intervention* and not "force", the arguments can be transferred to Art. 2(4) with a "more to less"-reasoning. As the merits of *Corfu Channel* are one of very few authoritative sources commenting on the clause, and there is no subsequent practice from the ICJ suggesting a change of opinion by the Court,[181] the judgement is a relevant source supporting the dominating scholarly position on an all-comprehensive prohibition in Art. 2(4).

Furthermore, a lengthy discussion on the scope of "territorial integrity and political independence" is redundant because the remaining catch-all mode "the Purposes of the United Nations" covers any gaps the two prior modes leave.[182] The purposes of the United Nations are laid down in the Preamble and different articles in the Charter, and can be summed up as "to maintain international peace and security",[183] suppress act of aggression or other breaches of the peace,[184] to protect the equal sovereignty of member States,[185] and to ensure that "armed force shall not be used, save in the common interest".[186] The reference to the purposes of the United Nations suggests that the only lawful use of force would be that which the Charter deems lawful, i.e. the specified exceptions to the prohibition laid out in Art. 42 and Art. 51.[187] This also includes the implicit exception in Art. 2(4) of a prior valid consent of a State that automatically negates unlawful use of force.[188] The *travaux préparatoires* confirm that "the intention of the authors (…) was to state in the broadest terms an absolute all-inclusive prohibition; the phrase 'or in any other manner' was designed to insure that there should be no loopholes."[189] The wide scope of the third mode is therefore the final confirmation that the clause is intended to cover all types of inter-State uses of force.

On the basis of the foregoing analysis, we can conclude on the non-restricting nature of the clause "territorial integrity and political independence, or in any other manner inconsistent with the Purposes of the United Nations". The clause does not intend to limit the types of force

[180] Kress (2015) p. 573-74.
[181] Ibid
[182] Randelzhofer (2012a) p. 216, Tallinn Manual (2017) p. 329
[183] UN Charter Art. 1 (1)
[184] Ibid.
[185] UN Charter Art. 2 (1)
[186] UN Charter preamble, para 7
[187] This interpretation also follows from Randelzhofer (2012a) p. 216
[188] Kress (2017) p. 429
[189] UNCIO Vol. 6 (1945) p. 334-335 as referenced in Ruys (2014) p. 164

covered by Art. 2(4), and rejects any notion of uses of force with a "benign purpose". How this relates to the crime of aggression will be explored in the next section.

5.2.2 In Art. 8bis

An act of aggression in Art. 8bis is comprised by the "use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."[190] The immediate differences between the clause in Art. 2(4) and in Art. 8bis appear in the language. The first difference is the mode *sovereignty* in addition to territorial integrity and political independence, and the second is inconsistency with "the Charter of the United Nations", instead of "the purposes of the United Nations".

The phrasing in Art. 8bis reflects the language in Art. 1 of GA Resolution 3314[191], which reads:

> "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."

As shown in Chapter 4.2, "aggression" – both in the Charter and in the Statutes – is a qualified form of the use of force. The notion of force is therefore the foundational building block of any definition of aggression. When Art. 1 of resolution 3314 refers to "sovereignty" in addition to territorial integrity and political independence, it is plausible to assume that the term is merely an explicit expression of an implicit point in the clause in Art. 2(4), rather than an addition to it. While McDougall writes that the significance of the distinction in language is unclear[192], Kress[193] and Randelzhofer[194] argue along the line of "sovereignty" being implicitly included already in Art. 2(4). Nevertheless, a theoretical discussion around the meaning of "sovereignty" holds limited importance, considering the already all-encompassing coverage of the clause in Art. 2(4).

As the wording of Art. 8bis is based on Art. 1 of the 3314 Definition, the same line of reasoning can be applied when interpreting the clause in Art. 8bis(2). This entails that the term "sovereignty" does not expand the coverage of the notion of force any further than Art. 2(4). With the help of the mode "in any other manner inconsistent with the Purposes of the United

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[190] Art. 8bis(2)

[191] GA Resolution 3314 is the General Assembly's definition of "act of aggression" for the purpose of Art. 39 in the Charter. The definition of aggression in Art. 8bis is largely based on the GA resolution.

[192] McDougall (2021) p. 99

[193] Kress (2017) p. 431

[194] Randelzhofer (2012a) p. 216

Nations", Art. 2(4) already covers *all* uses of force not justified by the exceptions in the Charter. This interpretation also touches upon the role of the second distinction in Art. 8bis, namely the third mode "in any other manner inconsistent with the Charter of the United Nations". In fact, the phrasing in Art. 8bis (and Resolution 3314) appears more tangible than the reference to "the purposes of the United Nations" in Art. 2(4). The legal significance of this linguistic distinction is therefore limited. On this background, we can conclude that the clause "sovereignty, territorial integrity or political independence" align with the sister clause in the Charter, and does not limit the scope of the State conduct element of Art. 8bis.

5.3 Summary

This Chapter has shown that the entry requirement of armed force is all-encompassing and covers all uses of armed force, regardless of their objective, in both Art. 2(4) and Art. 8bis. Furthermore, the addition of "sovereignty" in Art. 8bis does not entail any substantial difference from the clause in Art. 2(4). This alignment eliminates arguments of so-called "non-aggressive" uses of force under both legal regimes. Consequently, the clause cannot be used to justify uses of armed force with a "benign purpose", such as unilateral humanitarian interventions.[195]

At this point in the analysis, we have discussed the foundational building blocks of the prohibitions in Art. 2(4) and Art. 8bis. This first Phase has shown that Art. 8bis builds directly on the Charter prohibition. The point of departure in Art. 8bis is therefore a broad, all-encompassing concept of force. We will now enter the second Phase of our analysis – the parting of the two regimes.

[195] Ruys (2018) p. 895. Humanitarian intervention is discussed in Chapter 7.5.

6 The prohibited act of aggression

6.1 Overview

	ART. 8*BIS*	THE UN CHARTER	
4	«act of aggression, which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”	«use of force»	Art. 2(4)
		«The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression (…)»	Art. 39

Up to this point, we have discussed the foundation building blocks of the crime of aggression, i.e. the use of armed force by a State against the sovereignty, territorial integrity and political independence of another State. These building blocks have, as the analysis has shown, aligned with Art. 2(4) of the Charter. As the language of the relevant terms in Art. 2(4) and Art. 8bis(2) is nearly identical, any divergence in the meaning of the text has emerged from a difference in methodological approach, where interpreting criminal provisions under the Statute requires increased restrictiveness and adherence to the principle of legality, cf. Art. 22(2) of the Statute.

From this point, the concept of aggression in Art. 8bis and that of the language of the Charter will part ways. The definition of aggression in Art. 8bis does build on Art. 2(4) and Art. 39 of the Charter, but two important aspects divorce the outcomes of their interpretation. Firstly, the purpose of the provisions are different, and the *function* of the aggression term in the Charter and in the Statute differ. Secondly, the characteristic qualifying dimension of Art. 8bis intends to criminalize only a portion of the acts that are covered by Art. 2(4) and Art. 39. The distinction between an *act* of aggression and a *crime* of aggression illustrated in Table 2 materializes at this step.

Section 6.2 will provide an overview of the concept of aggression in the Charter. Section 6.3 will study the term aggression in Art. 8bis. In section 6.4, the characteristic qualifying threshold of the crime of aggression will be examined.

6.2 The concept of aggression in the Charter

6.2.1 Art. 2(4)

Before discussing the concept of aggression in the Charter, we need to revisit some points from Chapter 4. In Chapter 4.2, we used Table 2 to model a three-step gradation of the use of force. An analysis of ICJ practice revealed an inherent notion of a gravity scale in the concept of "force" in the Charter. The *de minimis* requirement of an act entering the concept of force, is the *use* of *armed* force. The all-encompassing scope of Art. 2(4) covers the entire scale of the use of force – border incursions, the use of armed force, cyber-attacks and grave full-blown aggressive wars. Within the concept of force in Art. 2(4) however, there is no inherent hierarchy or gradation of types of armed force. For the application of Art. 2(4) and the pertaining consequences of a breach it is sufficient to establish a *de minimis* use of force contrary to Art. 2(4). Consequently, Art. 2(4) does not need to, and neither does, elaborate on the concept of aggression.

The role of Art. 2(4) in understanding the concept of aggression in the Charter is therefore limited. What the concept of aggression *can* draw from Art. 2(4), is the pool of acts that fall within the meaning of armed force. As we concluded in Chapter 4, the notion of armed force in Art. 2(4) serves as an outer frame on what acts qualify as uses of force. Consequently, an act that falls outside the scope of "force" in Art. 2(4), will not qualify as aggression, no matter the gravity of the act, as the case is for political and economic force. We can establish that Art. 2(4) *assists* in the interpretation of the concept of aggression. However, when we talk about the concept of aggression under the Charter, it is not primarily with Art. 2(4) in mind. Our point of departure is Art. 39 of the Charter.

6.2.2 Art. 39

6.2.2.1 The limited function of "aggression" and the Security Council's discretion

The term "aggression" appears two places in the Charter. The first mention of aggression is in Art. 1(1), where the "suppression of acts of aggression» is laid out as one of the main purposes of the UN. Employing the term in Art. 1(1) holds an important symbolic meaning, particularly in light of the historical era of the Charters adoption. The second mention of aggression appears in Art. 39, in Chapter VII on Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression. Art. 39 is the only provision in the Charter where the term aggression holds a legal normative function, and it is one of the most powerful provisions and instruments of the UN.[196] Art. 39 reads:

[196] Krisch (2012) p. 1273

> "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."

Art. 39 empowers the Security Council to adopt enforcement measures[197] in situations where it determines the existence of any threat to the peace, breach of the peace or act of aggression.[198] Art. 25 emphasizes the importance of Council decisions, as it holds that Council decisions are binding upon the members of the UN. This entails that Members States, in addition to accepting Council decisions, are obliged to also cooperate in carrying them out. In other words, the powers Art. 39 vests upon the Council makes it the primary organ managing the concept of aggression under the Charter.[199]

Despite aggression being "the most serious and dangerous form of the illegal use of force"[200] and the act the Charter ultimately seeks to prevent and sanction, the Council rarely determines that a State has committed an act of aggression. Neither has the ICJ ever decided in favour of claims arguing that aggression has taken place.[201] We will look at why the legal and functional relevance of the term has proven to be limited.

Art. 39 employs three different terms that may trigger Council enforcement: 1) threats to the peace, 2) breach of the peace, and 3) acts of aggression.[202] The fact that there are three different terms indicate that each term holds individual meaning, and thus that three separate legal facts can trigger Council reaction. To illustrate our point, I will give a brief summary of what acts each of the term holds.

"Threats to the peace" is the broadest and most frequently applied term by the Council,[203] and as McDougall describes it, the "least offensive" of the terms in Art. 39.[204] It is undisputed that the term allows the Council to react before an actual use of armed force occurs, and allows enforcement action "well beyond situations of 'imminent attacks'".[205] The terms indistinctness

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[197] Measures as laid out in Art. 40, 41, 42.

[198] For an examination of the Security Council's function and powers, see Crawford (2019) p. 731-742

[199] The General Assembly also has the ability to identify acts of aggression, albeit in non-binding resolutions with limited legal effect, McDougall (2021) p. 276. A recent example is the GAs condemnation of the Russian war in Ukraine in A/ES/-11/L.1

[200] GA Res. 3314, Annex, Introduction para 5

[201] Akande (2017a) p. 219

[202] McDougall (2021) p. 88

[203] Krisch (2012) p. 1278

[204] McDougall (2021) p. 90

[205] Krisch (2012) p. 1279

– and absence of an upper limitation – allows the Council to use it to describe anything from threats and actual uses of inter-State armed force, to State-internal armed conflicts that may cause instability in a region,[206] terrorism threats from non-State groups of individuals,[207] and gross violations of human rights law.[208] "Threats to the peace" therefore also contains acts that are categorised under the two remaining terms "breach of the peace" and "acts of aggression".

"Breach of the peace" refers to situations where we have passed the stage of mere threats to the peace, and an actual positive *breach* of the peace has materialized.[209] Randelzhofer and McDougall hold that this term applies to "actual uses of inter-State armed force",[210] with a typical scenario being hostilities between the armed forces of two States or a military invasion of another State.[211] Art. 1(1) of the Charter refers to "acts of aggression or other breaches of the peace", implying that "acts of aggression" are one type of breaches of the peace.[212]

On "acts of aggression", it is established that this term is reserved to qualified breaches of the peace.[213] The *travaux préparatoires* of the Charter reveal discussions during the drafting of Art. 39 on this exact point, where the revision subcommittee held that "there may be breaches of the peace other than those qualified by present connotations as aggression"[214]. Furthermore, the text of Art. 39 suggests that the terms are placed "in order of ascending gravity"[215], placing acts of aggression as the most serious use of force among the three terms. We will first explain why "acts of aggression" in Art. 39 is less used by the Council than the former terms.

The answer is found in the *discretion* Art. 39 gives the Council. Art. 39 gives the Council considerable discretion in determining whether a threat to the peace, a breach of the peace, or an act of aggression exists.[216] The freedom the Council enjoys can be read out of the text of Art. 39: "The Security Council shall *determine* the existence of (…)". The *travaux préparatoires* of the Charter reveal that the terms "threats to the peace, breach of the peace and acts of

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[206] See for instance UNSC Res. 2611(17/12/2021) on the recent shift in Afghanistan to the Taliban government and UNSC Res. 713(25/9/1991) on the civil war in former Yugoslavia

[207] See for instance UNSC Res. 1054(26/4/1996) on Libya, UNSC Res 1267(15/10/1999) on Sudan, UNSC Res 1333(19/12/2000) on Afghanistan, and UNSC Res 1390(28/1/2002) on the Taliban

[208] See UNSC Res 221(9/4/1966) on Rhodesia and UNSC Res. 688(5/4/1991) on the repression of the Kurdish population in Iraq, and UNSC Res 794(2/12/1992) on Somalia

[209] Krisch (2012) p. 1293

[210] Ibid, McDougall (2021) p. 90

[211] See UNSC Res 660(2/8/1990) on the Iraqi invasion in Kuwait

[212] Schabas (2016) p. 312

[213] McDougall (2021) p. 90, Kress (2017) p. 427

[214] UNCIO, Vol. 6,Doc. 723,I/I/A/19 as referenced in McDougall (2021) p. 91

[215] McDougall (2021) p. 90-91 with further references

[216] Krisch (2012) p. 1275

aggression" were intended to create few substantial limits to the discretion, as even the decision on what acts constitute threats to the peace, breach of the peace and acts of aggression is left to the Councils discretion.[217]

The wide discretion the Council enjoys has three dimensions: Firstly, the Council decides under which term the relevant act or threat of force is to be categorised, and defines the scope of each term. Secondly, The Council has freedom in deciding *when* to act – despite the wording "*shall* determine" in Art. 39, the Council is not obliged to respond to any given situation, even if it considers a breach of the peace or act of aggression exists.[218] During the course of its existence, there are several situations of when the Council has refrained from acting on serious breaches of the peace (and been criticized for its inaction).[219] Finally, the Council enjoys broad discretion with regards to choice of measures to respond with. Art. 40, 41 and 42 of the Charter empower the Council to decide a wide range of responses, from "calling upon the parties" in Art. 40, to economic and diplomatic sanctions in Art. 41, and finally, measures of armed force in Art. 42.

The Council has proved reluctant in characterizing a situation as a "breach of the peace" or "act of aggression", and the terms are significantly less used by the Council to describe a situation than "threat to the peace".[220] The reluctancy particularly applies to the concept of "aggression". Given the serious implications and symbolic meaning of the term aggression, the Council might refrain from categorizing a grave use of force, that does fulfil the legal requirements of aggression, as an act of aggression, simply because it does not *need* to – the labelling will bring no additional legal effect under Art. 39.[221] The Council is authorized to respond with the same enforcement measures as if the act constituted a "threat to the peace". Simply referring to the broader concept "threat to the peace" is sufficient.[222]

As Krisch writes, "The determination of an act of aggression by the SC is a political, not a judicial finding. It primarily opens the way for enforcement action and helps unite the international community against the aggressor."[223] The function of Art. 39 and the Council is *not* to decide legally that an act of aggression has taken place to pronounce a judgement, it is

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[217] It should be noted that three terms do carry independent meaning – the Council is not entirely free in its decisions, and may not use its enforcement powers in situations when there exists no threat to international or regional stability. Krisch (2012) p. 1275-1276 with references to the *travaux préparatoires*.

[218] Ibid

[219] Krisch (2012) p. 1276. A recent example is the Russian war in Ukraine, when the Council failed to adopt resolutions due to Russia's veto powers as a permanent member. See Council Press statement SC/14808 25/2/2022 and SC/14838 23/3/2022

[220] Krisch (2012) p. 1293

[221] Ruys (2016) p.

[222] Krisch (2012) p. 1293

[223] Krisch (2012) p. 1294

primarily to fulfil one of the three “entry requirements” in Art. 39 before measures can be enforced subject to Art. 40, 41 and 42 for the “maintenance of international peace and security”, cf. Art. 24.[224] Determining a breach of the peace or an act of aggression primarily carry a symbolic meaning, a meaning the Council for political reasons seeks to avoid in complex and tense situations.[225]

The point of explaining the Councils broad discretion, is to emphasize the Councils freedom to *not* determine that a State has committed aggression. Council practice with regards to aggression is therefore not comprehensive, as acts fulfilling the legal requirements of aggression have in the past been categorized as threats or breaches of the peace, or even left unaddressed.[226] The Council has in several resolutions referred to the *factual* term aggression when describing for instance military intervention[227] and bombing and military occupation,[228] but McDougall argues that despite these references, it is difficult to conclude that the Council has ever specifically *determined* the existence of a legal act of aggression.[229] Rather, the term has been used as a factual description of situations of unlawful uses of force of a certain intensity. Strapatsas on the other hand, holds that the Council from 2017 and back determined aggression in 34 resolutions.[230] Concluding whether the references to the term “aggression” are *determinations* of aggression or not, is not crucial in the current context. The observation of interest is that the concept of aggression holds a modest practical function under the Charter.

In the next section, we will study the meaning of aggression in the Charter, primarily to build a backdrop against which aggression in Art. 8bis will be analysed.

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[224] This must not be taken as a reduction of Council resolutions to a mere political instrument. In practice from the ICJ, Council resolutions are interpreted as a legal instrument, with the methodological approach for interpretation of treaties set out in VCLT Art. 31-32 as a point of departure and “guidance”. The ICJ elaborated its methodological approach in the *Kosovo* advisory opinion (2010) para 94. For a comprehensive account on Council resolution interpretation, see Wood (2017).

[225] For instance, the Iraqi invasion of Kuwait in 1990 which appeared as a classical act of aggression was categorized as a “breach of the peace” in UNSC Res/660 (2/8/1990). See McDougall (2021) p. 285 and Wet (2018) p. 456-481

[226] McDougall (2021) p. 109-10

[227] UN Doc. S/RES/326(2/2/1973). In introductory para 2, the Council was “Gravely concerned (…) by the provocative and aggressive acts committed by the illegal regime in Southern Rhodesia (…)”.

[228] UN Doc. S/Res/546(6/1/1984). In introductory para 3, the Council was “Gravely concerned at the renewed escalation of unprovoked bombing and persistent acts of aggression, including the continued military occupation, committed by the racist regime of South Africa in violation of the sovereignty, airspace and territorial integrity of Angola.”

[229] McDougall (2021) Chapter 6, p. 107

[230] Strapatsas (2017) p. 180-203 with extensive references to Council resolutions

6.2.2.2 The meaning of "aggression under the Charter"

Neither of the Charter provisions employing the term "aggression" define its contents, despite its occurrence constituting a legal fact able to trigger the Council mechanisms of Art. 39. The contents of the concept of aggression under public international law are to be found outside the Charter, mainly from the practice of the ICJ, the Security Council and the General Assembly. We need to study two main aspects of aggression to map its contents: the pool of acts that can constitute aggression, and the threshold of acts of aggression.

The first question we will study, is the pool of acts carrying the potential to amount to acts of aggression. As discussed previously, the entry requirement to the concept of aggression is the *use of armed force*.[231] What remains to examine, is *what acts* of armed force can constitute aggression. What qualifying elements can be derived from the legal sources elaborating the concept of aggression in the Charter?

If we were to strictly adhere to the text of Art. 39, we would have few starting points for our analysis. The provision simply employs the term "aggression", with no explicit connection to Art. 2(4). From the context, one understands that the notion of aggression must inevitably include some type of force, but the provision carries no implications on a gradation or qualification elements. It is not evident from the text that an act of aggression must fulfil qualification elements stricter than the *de minimis* threshold for the use of force. The limited wording of Art. 39 demanded interpretation, and consequently, the General Assembly adopted Resolution 3314 on the Definition of Aggression in 1974.[232]

Resolution 3314 is a widely discussed document in scholarly contributions on aggression, many emphasizing the relevance of the context and negotiation history of the resolution.[233] While the negotiation history of the resolution is important and shed light on the compromises States made to compile the definition, I will mostly adhere to the text of the definition in its final form in the forthcoming analysis. This is both due to the limited scope of this thesis, but also because of the legal nature of the GA resolution: it is to be read primarily as the General Assembly's *interpretation* of aggression under the Charter. The resolution did not intend to limit the

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[231] See Chapter 4

[232] GA Res. 3314 (1974) Annex I. In the Definition of Aggression, Art. 5(2) postulates that "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility." This Article has been interpreted to establish the intended dual function of the 3314 definition: it defines aggression both under Art. 39 and for the customary rules on State responsibility. The latter points falls outside the scope of our thesis. See Ruys (2016) p. 188-189 for an account.

[233] McDougall (2021) p. 86-106, Bruha (2017) p. 154

Security Council's powers to the confines of the definition,[234] and being a General Assembly resolution, it is not a legally binding document to its addressee.[235] The Assembly was aware of its competency limitations, and stated in para 4 of the Resolution that it "*recommends* that it [the Security Council] should, *as appropriate*, take account of that Definition *as guidance* in determining, in accordance with the Charter, the existence of an act of aggression." In general, General Assembly resolutions can be regarded as authoritative interpretations of the Charter if they are "unambiguously and widely supported",[236] but in the case of the Definition of Aggression, few implications exist on the authoritativeness of the resolution. Although it is one of the few thorough examinations of the concept of aggression by an international organ, the Council has in fact yet to refer to the *definition* in a resolution.[237]

This is however not to downplay the relevance of Res. 3314. Its limited application under the Charter and its organs can be ascribed to the point we made earlier; neither of the organs in their practice *need* to determine aggression. The international community embraced Art. 3 of the definition of aggression under the Kampala negotiations and transferred it to Art. 8bis in the Statutes, almost four decades after its adoption.[238] Furthermore, in the resolutions where the Council has referred to the *term* aggression and the judgements where the ICJ has employed the term, the acts the term is used to describe largely coincide with Res. 3314's understanding of aggression.[239]

Art. 3 of the 3314 Definition of Aggression provides us with a list of act that qualify as aggression.[240] Kress provides a thorough commentary on each of the listed acts.[241] Due to scope limitations, we will not go systematically through all possible acts covered by each example. We will discuss some observations of interest in the forthcoming paragraphs. Notably, Art. 4 of the definition explicitly states that the list is *not* exhaustive, and that the Council "may determine that other acts constitute aggression under the provision of the Charter."[242] The

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[234] This is explicitly stated in para 4 of the introduction to Annex 1: "Bearing in mind that nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations."

[235] Crawford (2019) p. 39

[236] Schrijver (2015) p. 476

[237] For a thorough examination of SC practice containing the *term* "aggression", see McDougall (2021) p. 106.

[238] McDougall (2021) p. 122

[239] Strapatsas (2017) p. 186-189. For a thorough examination of Council practice regarding the term aggression, see Strapatsas (2017). For an examination regarding ICJs practice, see Akande (2017a)

[240] The list is identical to the subparagraphs in Art. 8bis(2)

[241] Kress (2017) p. 438-450. Technically, Kress is interpreting the identical list as a part of Art. 8bis. The commentary is also relevant when interpreting the list in Res. 3314 for the purpose of the Charter: Art. 8bis(2) reads "Any of the following acts (…) shall, in accordance with United Nations General Assembly resolution 3314(XXIX) of 14 December 1974 qualify as an act of aggression."

[242] GA Res. 3314, Annex I, Art. 4

following points therefore provide an idea of the core concept of aggression, rather than exhaustive descriptions.

Firstly, most of these acts imply a certain inherent intensity of the use of force.[243] This is a pointer towards the threshold of an act of aggression, which we will study in the next section. What act are *not* listed is noteworthy – *threats* of force and *interventions* are excluded from the notion of aggression. Although the non-binding character of the resolution and the non-exhaustiveness of the list theoretically holds open a possibility for the Council to determine such acts as aggression, the likelihood of this scenario is microscopic considering the consistent references to "armed force" in the definition, particularly in Art. 1, which reads "Aggression is the use of armed force by a State (…)". The appropriateness of limiting aggression strictly to "armed force" can however be criticized, as it could exclude for instance illegal occupations resulting from an invasion that required no use of force.[244]

Secondly, (b) refers to the "use of any weapons". The language opens for broad interpretations, and can cover, in additional to conventional military arms, nuclear, chemical, biological and IT weapons.[245] This illustrates that the concept of aggression does not narrow down the wide understanding of "(armed) force" from Art. 2(4).[246] The findings of Chapter 4 thus also apply to aggression, covering uses of force by any "instrument capable of causing a physical effect in a sufficiently direct manner",[247] including cyberattacks, provided the effects reach the innate threshold of aggression.

Thirdly, political and economic force is left out of the list. This is evident already by the fact that these types of actions are not conducted by "armed forces", as is the requirement in almost all of the subparagraphs. This does however not mean that political and economic coercion are excluded in their entirety, but it requires an involvement of a physical element of a certain intensity to deem political and economic coercion an act of aggression. Consequently, effects caused by (c) – for instance a naval blockade of ports and coast – can meet the requirements of armed force and thus be characterized as an act of aggression, but economic sanctions or boycotts resulting in a trade stop and empty ports will not suffice, despite both acts creating

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[243] Kress (2017) p. 427

[244] McDougall (2021) p. 100 referring to the German occupation of Austria and Czechoslovakia which did not occasion the use of armed force.

[245] McDougall (2021) p. 100

[246] As discussed in Chapter 4.4-4.5

[247] Kress (2017) p. 425

similar effects.[248] Keeping other types of force than *armed* force out of the definition was in the end a deliberate choice of the State parties.[249]

Fourthly, (d) differs from the other types of force in an unexpected way. It includes the use of force targeting the *forces* of a State, and also certain "non-sovereign" belongings of another state, such as "marine and air fleets". [250] With no reference to the territory of a State, (d) does not contain any geographical limitations on where the attack must have occurred.[251] An act of aggression can thus be conducted on for instance the high sea or on the territory of a third "host" State. There is however a limitation in the text that prevents a wide-ranging scope that covers any attack on the military belongings of another State. The term "marine or air *fleets*" was carefully chosen to indicate that an attack must be of a significant scale, and acts targeting a single machine would not suffice to aggression.[252] The scale requirement must also apply to the "armed forces on the land, sea or air *forces*" – it is difficult to deem a single attack on a foreign soldier as an act of aggression. Furthermore, in the Sixth Committee Report developing the definition, it was agreed upon that (d) would not "prejudice the authority of a State to exercise its rights within its national jurisdiction", confirming that a States enforcement powers to detain vehicles on its *own* territory cannot amount to aggression.[253]

Fifthly, the reference to the "armed forces" of a State in (a)–(e) implies that the forces carrying out the acts must be State organs under official command. Kress submits that this includes all organs of a State within the meaning of the ILC's Articles on State Responsibility Art. 4-6,[254] which include State organs,[255] "persons or entities exercising elements of governmental authority",[256] and "organs placed at the disposal of a State by another State."[257] Furthermore, he argues that *de facto* organs should be included, as the ICJ formulated in the genocide case of *Bosnia and Herzegovina v. Serbia and Montenegro*: "persons — or groups of persons — who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State's responsibility for an internationally wrongful act."[258] Notably, actors who

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[248] McDougall (2021) p. 99

[249] McDougall (2021) p. 95 with references to the 1953 Special Committee Report, p. 195

[250] Kress (2017) p. 444

[251] Ibid

[252] Kress (2017) p. 445 with further references.

[253] GA Sixth Committee Report (1974) UN DOC A/9890, para 10, as referenced in Kress (2017) p. 445

[254] Kress (2017) p. 437. It is widely accepted that the relevant Articles on State Responsibility (DASR) are an expression of customary law and thus binding for all States, Crawford (2019) p. 523.

[255] DASR Art. 4

[256] DASR Art. 5

[257] DASR Art. 6

[258] *Bosnia and Herzegovina v. Serbia and Montenegro,* ICJ (Judgement) 2007, para 391-393

however fall outside the reach of "armed forces" or de facto State organs do not fall outside the list. They are sought covered by (g), which includes acts by non-State "armed bands, groups, irregulars or mercenaries", as long as they act "on behalf of" a State or involve a States "substantial involvement". The question then arises; when is a person or individual acting "on behalf of" a State, and when is a State substantially involved in the acts of a person or group? This point was surrounded by controversy under the negotiations, as it includes in the definition acts of "indirect aggression" and its pertaining challenges.[259] Some confines can be drawn from customary international law and ICJ practice. Kress argues:

> "The use of the term "sending" suggests that those persons must move from the territory of the aggressor state across this state's border in order to carry out their acts of armed force. They will either move into the territory of the victim state or to a place where they can carry our acts of armed force against the land, sea or air forces, or marine and air fleets of another state."[260]

He further holds that this *sending* should be interpreted in accordance with Article 8 of the ILC rules on State responsibility, which ICJ has interpreted to require "effective control over the specific acts in question, which is a very demanding threshold."[261] With regards to the "substantial involvement" option in (g), the State should "exercise overall control by the aggressor state over the persons concerned, within the meaning of the case law of the international criminal courts, as initiated by the International Criminal Tribunal for the former Yugoslavia."[262] In *Prosecutor v. Tadic*, the tribunal concluded that overall control goes "beyond the mere financing or equipping of such forces" and involves "also participation in the planning and supervision of military operations."[263] The ICJ has not interpreted the clause yet, and although the indistinctness of the term opens for a wide interpretation, such as the mere *toleration* of acts by non-State actors from a States own territory towards another State, Kress argues for a restrictive approach in line with the Yugoslavia tribunal. [264] This approach appears sensible considering the absence of explicit grounds supporting a broad interpretation. As we will see in the next section, the inherent threshold of aggression also indicates a restrictive approach.

Finally, (f) appears inconsistent with the other types of force in the list, establishing that an act of aggression can be committed by allowing ones territory to be used by another State to

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[259] Kress (2017) p. 448

[260] Kress (2017) p. 448

[261] Kress (2017) p. 449, *Bosnia v. Serbia,* para 400-407. Due to scope limitations of this thesis, we will not dive deeply into the requirements of "effective control". See Crawford (2019) Chapter 25 for a review.

[262] Kress (2017) p. 449

[263] *Prosecutor v. Tadic,* ICTY Judgement (1999) para 145

[264] Kress (2017) p. 449-450 with further references

perpetrate an act of aggression towards a third State. Essentially, a State is considered a co-perpetrator if it places its territory at the disposal of another State and facilitates another State in commissioning an act of aggression. Kress divides (f) into three requirements:

> "The state conduct described in *littera* (f) requires, first, that this state place a part of its territory at the disposal of another state. Second, this other state must use this territory for the perpetration of an act of aggression. Third, the aggressor state within the meaning of *littera* (f) must have allowed the other state to make use of the territory placed at the latter's disposal for the perpetration of the act of aggression."[265]

While none of the requirements are specified in the definition, some points can be drawn from the literature on (f). Firstly, there seems to exist no requirement of the intent of the "hosting" State – it is not necessary that the State had the intent of the other State using the territory to commission an aggressive act.[266] Secondly, the territorial connection can be less direct than the armed forces or weapons of the primary aggressor State being located on the "host" State's territory. It is sufficient for collusion that a "command and control facility" is located on the "host" States territory.[267] Finally, the requirement of a State "allowing" another State to use its territory to commit aggressive acts does not cover "non-prevention", but is a stricter standard closer to "active collusion." The latter might include failure to exercise sufficient due diligence.[268] On this background, we can conclude that (f) does expand the definition of aggression in a different direction than the other subparagraphs in the definition by including "derived" responsibility.

The review of subparagraphs (a)-(g) demonstrates the broad concept of aggression under the Charter. It appears that the qualifying elements of "aggression" are not found in the *types* of force, but rather in an intensity threshold. Although an inherent threshold can be detected in some of the listed acts, the GA definition does not explicitly provide a threshold for an act of aggression. To determine this threshold, we will have to explore other sources. The next section will draw on ICJ practice and scholarly contributions to try to establish a threshold.

6.2.2.3 The threshold of aggression under the Charter

As explained in Chapter 4.2, the concept of force under the Charter can be divided on the three step gradation scale. Although the ICJ has never discussed the concept of aggression in detail, we can derive a certain threshold for aggression from its practice on the use of force.[269] The

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[265] Kress (2017) p. 446

[266] Ibid. with further references

[267] Kress (2017) p. 447 with further references

[268] Ibid

[269] Akande (2017a) p. 215, Ruys (2016) p. 191

same non-necessity to determine aggression for the Security Council, also applies to the ICJ: when dealing with questions on the use of force, the Court needs only determine the legality of the use of force, where interpretation of Art. 2(4), Art. 51 on self-defence or the relevant Security Council resolution authorizing the force is sufficient.[270] However, the Court has referred to the Res. 3314 definition on aggression when interpreting the scope of these other provisions.

Several authors have interpreted ICJs practice to draw a certain parallel between the concept of "armed attack" in Art. 51 of the Charter and customary law, and the concept of aggression.[271] Although all emphasize the different functions of the two concepts (Art. 51 and the underlying customary rule is for self-defence purposes as we will see in Chapter 7, while aggression is for Council response under Art. 39),[272] there seems to be an understanding of a certain overlap between the terms. As Table 2 illustrates, both are the second step on their respective ladders, and are considered graver than the mere use of armed force. As "armed attack" has been interpreted by the Court on several occasions, while "aggression" has not, it is natural to draw upon the practice on "armed attack" to compare the thresholds and understand their relativity to each other.[273]

The connection between the two concepts is evident by the Court's consistent references to the concept of aggression, and even the Res. 3314 definition of aggression, when ascribing meaning to the notion of armed attack.[274] In *Nicaragua*, the Court referred to the Declaration on Friendly Relations and stated when describing the document: "Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force."[275] The Court here endorsed that aggression, like armed attack, is a more grave form of the use of force. Further on, the Court referred to (g) of the Res. 3314 definition of aggression when interpreting the scope of "armed attack":

> "In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to

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[270] Akande (2017a) p. 219

[271] Akande (2017a) p. 221-229, McDougall (2021) p. 92 with further references, Krisch (2012) p. 1408-1409 with further references

[272] McDougall (2021) p. 93

[273] Ibid

[274] Akande (2017a) p. 221, Randelzhofer (2012b) p. 1408

[275] *Nicaragua*, para 191

> General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law."[276]

It appears that the Court presumed there is a conceptual connection between the notion of armed attack and the concept of aggression. A similar example is found in the *Armed activities* case:

> "The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC."[277]

Akande holds these references are a confirmation that ICJ sees a relationship between the two concepts, and although the relationship is not clarified, it indicates that the thresholds of the two concepts are related.[278] Randelzhofer acknowledges that the concepts are not identical, but writes that "the difference between the two is so small that it is often overlooked."[279] McDougall emphasizes the distinctions between the two concepts, but does not conclude on the relative gravity of the concepts.[280] What we can understand from this, is that the concept of aggression under the Charter must require a certain intensity, in line with the requirements of "armed attack" under Art. 51. To provide an indication of the threshold of aggression, we will highlight some points indicating the threshold of "armed attack".

The ICJ has decided that "mere frontier incidents" do not meet the gravity threshold in *Nicaragua*,[281] but stated in *Oil platforms* that "The Court does not exclude the possibility that the mining of a single military vessel might be sufficient" to reach the threshold.[282] Randelzhofer writes that the requirement of an "armed attack" if fulfilled when "force is used on a relatively large scale, is of sufficient gravity and has a substantial effect."[283] McDougall contests this view, stating there is nothing in Art. 51 or ICJ practice indicating that the use of force must be large or important to constitute an armed attack.[284] There does seems to be a prevailing view among scholars that the notion of "armed attack" is slightly narrower than that

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[276] *Nicaragua*, para 195

[277] *Armed activities*, para 146

[278] Akande (2017a) p. 224, Kress (2017) p. 427

[279] Randelzhofer (2012b) p. 1407-1408 with further references

[280] McDougall (2021) p. 92-93 with further references

[281] *Nicaragua*, para 191

[282] *Oil platforms*, para 72

[283] Randelzhofer (2012b) p. 1409 with further references

[284] McDougall (2021) p. 92-93

of aggression.[285] An explanation for this is found in the different functions of the two terms: for determining "aggression" under Art. 39, the Council enjoys wide discretion and may render a use of force as aggression despite it not fulfilling the requirements of an armed attack that triggers the right to self-defence under the Charter or customary law.[286]

As evident, drawing firm conclusions on the gravity threshold of armed attack is equally challenging as that of aggression, despite the existence of ICJ practice. This is because the factual circumstances of each case will vary and influence the outcome of each particular case.[287] Considering this, it is difficult to draw general conclusions beyond establishing that the thresholds are *above* the de minimis threshold of the use of force in Art. 2(4).

6.3 An act of aggression under Art. 8bis

Unlike in the Charter, determining what constitutes an act of aggression is imperative for the application of Art. 8bis. Like the previous section, the analysis is divided into two parts: the pool of acts covered by aggression, and the threshold of aggression under the Statutes.

Art. 8bis' reliance on the Charter becomes evident when determining the pool of acts prohibited by the provision. The Special Working Group tasked with developing the definition found agreement on basing the definition in Art. 8bis on the General Assembly's definition of aggression in Res. 3314.[288] Art. 3 of Res. 3314 – the catalogue of acts of aggression – was taken in its entirety into Art. 8bis, while Art. 1, the general definition of aggression, was modified and taken in a general *chapeau* in Art. 8bis(2). In Res. 3314, the non-exhaustiveness of the catalogue in Art. 3 was explicitly stated in Art. 4 for the purpose of interpreting Art. 39 of the Charter. As Art. 4 was not transferred to Art. 8bis,[289] there is no similar specification in the text

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[285] Randelzhofer (2012b) p. 1408 with further references. McDougall (2021) p. 93 disagrees from the prevailing view.

[286] Corten (2021) p. 401

[287] Gray (2018a) p. 134-155, Crawford (2019) p. 722. Randelzhofer (2012b) p. 1408 endorses this and writes: "The jurisprudence of the ICJ, while leaving many controversial questions unanswered, demonstrates that the ascertainment of the specific factual circumstances of each alleged instance of an exercise of the right of self defence, and the corresponding attribution of the burden of proof, are often more decisive for the determination of a situation, in particular the outcome of a judicial decision, than the resolution of certain questions of legal interpretation."

[288] Barriga (2012) p. 4. The State parties' decision to base Art. 8bis on the GAs definition has been criticized by many. Critics claim the State parties' reliance on Res. 3314 was mainly to avoid opening "pandoras box" and renegotiating a definition of aggression, a task whose difficulty the decades long negotiation history of Art. 8bis had proven. McDougall writes the GAs definition was "relied upon because it represented agreed language, rather than for its intrinsic value". See McDougall (2021) p. 86, 131. Furthermore, the parts of the 3314 definition included in Art. 8bis were taken in without amending the text, meaning the catalogue of acts of aggression from 1974, almost four decades before 2010, was adopted without considering new methods of warfare. See McDougall (2021) p. 122.

[289] Barriga (2012) p. 26

of Art. 8bis. The general reference to Res. 3314 in the second sentence of Art. 8bis(2) cannot be interpreted as a general reference including the whole resolution in Art. 8bis, but is to be understood as "a statement of the source of the definition" according to the prevailing view.[290] The question of whether the list in Art. 8bis was intended to be exhaustive was an important point of discussion under the negotiations of Art. 8bis, but was never definitively solved.[291] It has continued to be discussed in scholarly contributions.

Reading the list as exhaustive would imply that only acts falling within the examples of (a)–(g) can qualify as acts of aggression. Uses of armed force that are *not* covered by a subparagraph, would not qualify as aggression and not be criminalized under the crime of aggression. It can be argued that (a)–(g) combined have a broad scope and cover a significant portion of traditional inter-State uses of armed force and weaponries, and furthermore, employ language open for dynamic interpretation, such as "the use of any weapons by a State" in (b) and "invasion or attack" in (a). Even new forms of warfare such as cyber operations could qualify as an "attack" by "any weapon".[292] It can be argued that if the list is read as exhaustive, most types of armed force would be covered by one of the examples in the list. However, there are still some "unlisted" acts of force that might escape the coverage of the list. For instance, a military occupation by one State of another State's territory would only be covered by (a) if the occupation resulted from an *unlawful* use of armed force.[293] A temporary occupation resulting from lawful self-defence or involving no use of armed force would fall outside the scope of (a) and is not covered by (b)–(g).

The prevailing view in scholarly contributions is that the enumeration of acts of aggression in Art. 8bis(2) is not exhaustive, and opens the definition for unlisted acts of aggression.[294] The reasoning for this is found in the structure of Art. 8bis(2). The inclusion of a generic definition in the *chapeau*, the first sentence in Art. 8bis(2), would be redundant if the enumerated acts were considered exhaustive. Furthermore, the language in Art. 8bis differs from the other penal provisions in the Statutes: Art. 8bis(2) establishes that "any of the following acts (…) *qualify* as an act of aggression". The same sentence is reproduced in the Elements to Art. 8bis: "It is understood that any of the acts referred to in article 8bis, paragraph 2, qualify as an act of aggression."[295] McDougall interprets the word "qualify" to simply imply that the acts listed are predetermined to meet the generic definition in the first sentence of Art. 8bis(2).[296] Therefore,

[290] Kress (2017) p. 436 with further references

[291] Barriga (2012) p. 28, McDougall (2021) p. 128

[292] Kress (2017) p. 451

[293] We will discuss justifications for the use of force in Chapter 7.

[294] See Kress (2017) p. 435-436, McDougall (2021) p. 129, The Council of Adviser's Report (2021), p. 10

[295] Elements, Introduction (1).

[296] McDougall (2021) p. 129

unlike the other provisions, nothing in the language of Art. 8bis suggests that the list of acts is exhaustive.[297] Kress argues that the *travaux préparatoires* do not contradict interpreting the list as open, and as the matter of exhaustiveness is *not* a question of textual ambiguity, the principle of legality does not require considering the list as exhaustive.[298] Although the State parties did not conclude on the matter, keeping the list open to future developments for the functionality and effectiveness of Art. 8bis was an emphasized argument during the negotiations.[299]

We can establish that the list of acts of aggression in Art. 8bis(2) is not exhaustive. It opens for unlisted acts of force to qualify as acts of aggression if they fall within the scope of the *chapeau* in Art. 8bis(2). The *chapeau* does instil conditions for residual acts to qualify as aggression: 1) a use of armed force must be commissioned, 2) by a State against another State, and 3) which is inconsistent with the Charter. The reader will recognize these conditions – they are identical to those of the use of force under the Charter. This explains why we interpreted and compared the notions of "(armed) force" under the Charter and the Statute in Chapter 4 – any act qualifying as a use of armed force can qualify as aggression if it meets the threshold of aggression under Art. 8bis.

The second question in this section is the threshold of aggression under Art. 8bis. The text of Art. 8bis does not indicate a threshold for the *act of aggression*. In the text of Art. 8bis(1), i.e. "an act of aggression which, by its character, gravity and scale constitutes a manifest violation of the Charter of the United Nations", the characteristic threshold requirement of Art. 8bis appears *after* the step of aggression, presupposing the existence of an act of aggression subject to Art. 8bis(2).

As previously explained, a gravity threshold is incorporated in the Charter's understanding of aggression. Table 2 illustrates that this innate threshold transfers to the concept of aggression under Art. 8bis. Understanding 6 contains an explicit confirmation of this intensity threshold:

> "It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations."[300]

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[297] Kress (2017) p. 435

[298] Kress (2017) p. 436

[299] SWGCA, Report, June 2008, para 34-36, SWGCA, Report, December 2007 para 18-23, Princeton Report (2007) para 47-53

[300] Understanding 6 was proposed by the US under the Kampala-negotiations, and was initially an attempt to keep open a possibility of humanitarian intervention without Council mandate, Schabas (2016) p. 311.

Asserting that aggression "is the most serious and dangerous form of the illegal use of force" implies there are other, less serious forms of the use of force whose gravity does not amount to aggression. The Understanding confirms that the notion of aggression is narrower than that of the use of force, and as Ruys phrases, it "effectively presupposes a minimum gravity" of the use of force in question.[301] Understanding 6's reaffirmation of the inherent intensity threshold of aggression leaves the ICC with two intensity requirements to consider:[302] an act of aggression, and that of a manifest violation of the Charter.[303] Kress holds that to preserve an independent meaning for the latter, and arguably most important, threshold requirement of a "manifest violation", the inherent intensity threshold in the base act of aggression should not be high. He argues that the inherent threshold of aggression should be situated "only slightly above" the *de minimis* level inherent in the armed force concept under Art. 2(4).[304] This is a sensible approach, but eventually, this question remains for the Court to authoritatively decide upon.

The negotiating history of Understanding 6 reveals that the State parties intended another point to be read out of the text.[305] The initial purpose of Understanding 6 was to exclude unilateral humanitarian intervention from the aggression concept.[306] Although the original US proposal was rejected by the majority of State parties, the reference to "all the circumstances of each particular case, including the gravity of the acts concerned and their consequences" was kept in the modified version.[307] This passage intends to make the *consequences* of a use of force relevant in determining whether the threshold of aggression has been met.[308] Understanding 6, if interpreted in line with the original proposal, requires the Court to deem lawful clearly unlawful uses of force if they can be justified with a "legitimate" purpose and have "positive" consequences, for instance an unilateral intervention stopping a genocide on the territory of another State. The text of Art. 8bis does not mention the *consequences* of the aggression as a factor for determining an act of aggression, making Understanding 6 the only source

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[301] Ruys (2014) p. 165

[302] The first, "use of armed force", functions as an entry requirement and not a "threshold" requirement. In the majority of cases, it will be consumed by the act of aggression and thus not addressed separately.

[303] Discussed in Chapter 6.4

[304] Kress (2017) p. 427

[305] Barriga (2012) p. 95

[306] We will revisit the matter of humanitarian interventions in Chapter 7.5.

[307] See McDougall (2021) p. 150-151 with further references to the *travaux préparatoires*.

[308] When discussing the consequences of an act of aggression, it is important to be aware of a foundational distinction between the crime of aggression and the humanitarian crimes of the Statute. Typically, a crime of aggression such as a military intervention brings along the commitment of other core crimes of the Statute, for instance war crimes. As a point of departure, the crime of aggression is judged *separately* from subsequent commitments of other international crimes: the unlawfulness of a military intervention is not affected in either direction by ensuing war crimes (or their absence). This point is emphasized in customary international law as the distinction between the *jus ad bellum* and *jus in bello*.

introducing the factor as relevant. Introducing such a potentially decisive factor in the Understandings and not in the text of Art. 8bis(2) raises some questions on legal weight of the factor. The assessment appears similar to that under the qualitative factor "character" under the "manifest violation" threshold, which we will discuss in the next section. Considering the principle of legality and the unclear legal status of the Understandings[309], the Court might deem it more appropriate to allocate the assessment of "legitimacy despite unlawfulness" under the latter. It should however be noted that at its best, consequences can only be *one* of the factors the Court will consider when subsuming a case under the intensity requirements of Art. 8bis.

Additionally, there are three points the Court will need to consider when establishing the threshold of aggression. First, there is an inherent difficulty in determining an overall intensity requirement for acts of aggression. The nature of the listed acts in Art. 8bis(2) varies greatly, and for a threshold requirement to be functional, it must be adjusted to the particularities of each type of act. For instance, creating collective intensity guidelines for (b) bombardment of the territory of another State, and (c) the blockade of the ports of another State is a strained task. The same applies for (g) the sending of armed bands to another State, and (e) unlawfully extending the armed forces' invitation on the territory of another State. The second sentence of Understanding 6, emphasizing the need to consider the circumstances of each particular case prior to determining aggression, is a necessary nuance.

Secondly, the difference between the functions of the aggression term under the Charter and the Statutes becomes apparent at this step. While Art. 8bis relies on the Charter understanding of aggression through its reference to Res. 3314, the *practice* under the Charter related to aggression is of limited legal importance. The limitation applies particularly to Council practice. As explained in Chapter 6.2.2, the Council's discretion has resulted in an irregular and non-comprehensive use of the aggression term under the Charter. When the ICC will interpret the aggression term, it cannot afford a similar pragmatic approach as the Council. The principle of certainty and interpreting a criminal provision in favour of the accused in cases of ambiguity in Art. 22(2) demand a stricter approach. Practice under the Charter therefore provides insufficient assistance for the ICCs interpretation of the concept of aggression, both with regards to the scope and threshold requirement.

To summarize on the threshold of "act of aggression" under Art. 8bis, we can conclude that the threshold is situated above the *de minimis* use of armed force. It cannot be too high and eliminate the purpose of the second intensity threshold of a "manifest violation". The first intensity threshold will differ depending on the *type* of force in question. When comparing it to the Charter threshold, it can be argued that the ICC will adopt a stricter legal approach that that

[309] As touched upon in Chapter 1.3.2

of Council and ICJ practice. It can also be argued that the threshold might be *lower* in Art. 8bis, as the Court presumably will discuss any disqualifying element under the second intensity threshold of the crime of aggression. This is discussed in the next section.

6.4 A manifest violation of the UN Charter

6.4.1 The "manifest" threshold

The "manifest violation" threshold is the characteristic trait of Art. 8bis. In Art. 8bis(1), only an act of aggression which "by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations" is criminalized. This is the final gravity requirement fulfilling the State conduct element of the crime of aggression; 1) there exists a use of armed force by a State against another State, 2) which qualifies as an act of aggression, and finally, 3) the act of aggression must amount to a *manifest violation* of the Charter.

This final intensity requirement was indispensable for reaching consensus for the definition under the Kampala review conference.[310] The objective of the State parties in favour of an elevated threshold clause was to "ensure that the Court would only take up 'the most serious crimes of concern to the international community' and not be drawn into deciding borderline cases."[311] The State parties acknowledged the existence of significant grey areas surrounding the primary prohibition of the use of force in the Charter.[312] The threshold clause would prevent the undesirable scenario of the ICC attempting to establish the scope of a primary international law rule, i.e. the prohibition on the use of force in the Charter, "through a backdoor" when interpreting a secondary international law rule, i.e. the crime of aggression.[313] In the prolongation of this, the qualifying threshold responded to concerns of State parties regarding sufficient certainty of the objective element of the crime. Finally, the threshold clause brought the Art. 8bis definition closer to the concept of aggression under customary international law.[314]

Although the manifest threshold is a potential decisive factor of the State conduct element, there are few authoritative legal sources elaborating on its contents. Unlike the other conditions of the State conduct element, the manifest threshold is exclusive for the crime of aggression under the Statutes, with no equivalent in the Charter.[315]

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[310] Kress (2017) p. 507

[311] Barriga (2012) p. 29 with reference to Princeton Report (2006) para 19. The reference to "the most serious crimes" is found in the preamble of the Statutes, para 4.

[312] Kress (2017) p. 508 with reference to SWGCA Report (2008) para 24. See Barriga (2012) p. 606

[313] Kress (2017) p. 508

[314] Kress (2017) p. 509

[315] As we will see in Chapter 7, the function of the manifest threshold is closely related to the Charter provisions on the use of force. Our approach - establishing the manifest threshold *before* we continue to examine the justifications of the use of force in Chapter 7 – is a deliberate decision. Sequencing the analysis in this order

When interpreting the manifest threshold, we begin with a linguistic analysis. The word "manifest" is in its ordinary meaning equivalent to "obvious" or "evident",[316] or "unambiguous", "clear" and "apparent".[317] In our context, the term seeks to exclude from the State conduct element acts of aggression falling outside the core of the prohibition on the use of force in the Charter. Acts which are not *obviously* and *unmistakably* within Art. 2(4), but are in contemporary international law situated in a grey area or periphery of its core, will not amount to a manifest violation.[318] The determination of the obviousness must be objective, based on sound legal reasoning and the prevailing view of the international community. In the Elements to Art. 8bis, Introduction (1) explicitly states that "The term 'manifest' is an objective qualification".[319] This means that although the perpetrating State might hold strong opinions on the legality of their actions, insistently employ international law reasoning in the justification of their use of force,[320] *or* claim the particular use of force is within a grey area and not a "manifest" violation, the argumentation will not be viable unless it *objectively* aligns with contemporary international law.[321]

As Kress correctly points out, the term "manifest" does not contain an inherent requirement of *severity*. A small scale act of aggression of lesser intensity can perfectly be an *obvious* violation of the prohibition on the use of force.[322] McDougall illustrates this scenario by the following example: A State sends troops into the territory of another State without invitation or Security Council authorization, and executes the president of this State by firing only a single bullet.[323] This scenario would undoubtedly constitute an obvious and serious violation of the Charter, but is not an intense or severe use of armed force. There *is* however a severity requirement to the threshold, introduced in the ensuing components "character, gravity and scale". It is also confirmed by Understanding 6, which affirms that aggression "is the most serious and dangerous form of the illegal use of force" and that "the gravity of the acts concerned" is a circumstance the Court must consider when applying the Art. 8bis on a particular case.

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allows us to efficiently focus on the core of the justification grounds and avoid lengthy discussions in Chapter 7 on grey areas which do not qualify as *manifest* violations of the Charter.

[316] Kress (2017) p. 510. This understanding aligns with the primary purpose of the crime of aggression, which is to protect the core of the prohibition on the use of force as contained in the Charter. Kress (2017) p. 412

[317] Council of Advisers' Report (2021) p. 12

[318] Werle (2020) p. 606

[319] Elements to Art. 8bis, Introduction, (1)

[320] A recent example of this is Russia's unfounded self-defence and humanitarian intervention claims for the military invasion in Ukraine. See Milanovic (2022), Ulfstein (2022)

[321] McDougall (2021) p. 157

[322] Kress (2017) p. 510

[323] McDougall (2021) p. 158

The two latter components, "gravity" and "scale", relate to the intensity threshold of aggression, while the former, "character", elaborates the "manifest" qualification. This distinction between "character" and "gravity and scale" illustrates the double function of the threshold requirement – the qualitative dimension and the quantitative dimension.[324] Kress summarizes the distinction as such:

> "In its *qualitative* dimension, as articulated through the words 'manifest by its character', the threshold clause is to exclude from the definition those uses of force that fall in the legal grey area surrounding the prohibition of the use of force. In its *quantitative* dimension, as articulated through the words 'manifest by its gravity and scale', the threshold clause requires a use of force of a certain intensity."[325]

The use of the word "and" between the components confirms that both dimension must be satisfied in order to fulfil the manifest threshold. An individual assessment of each of the three components will cover both the qualitative and the quantitative dimension of the threshold.[326] Understanding 7 elaborates on the internal relationship between the three components:

> "It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself."

The second sentence of Understanding 7 establishes a crucial point: a manifest violation cannot be determined if only one of the three components are fulfilled. The text of Understanding 7 does however not state that the three components are *cumulative*. This raises the question of whether the fulfilment of two of the components is sufficient to satisfy the "manifest" requirement, or if all three criteria must be met independently. Kress and Barriga argue that the first sentence of Understanding 7 implies all three components must be satisfied, although they may be present to varying degrees.[327] Furthermore, they argue the purpose of the final sentence was not to imply two of three components are sufficient, but rather "to exclude the determination of manifest illegality in a case where one component is most prominently present, but the other two not at all."[328] McDougall, on the other hand, argues that the satisfaction of two of the three components might be sufficient for the Court to conclude on a manifest

[324] Kress (2017) p. 510

[325] Kress (2017) p. 511 with further references

[326] Ibid

[327] Kress (2017) p. 512. For a different (minority) view, see the independent Council of Adviser's Report (2021) p. 12 which "generally agreed that two of the three are sufficient to determine a manifest violation.".

[328] Barriga (2012) p. 96

violation of the Charter.[329] Some authors have placed emphasis on the character component, holding that it must be met under all circumstances, being the only component pertaining to the qualitative dimension.[330] All do however reach the same conclusion: The Court will have to consider all three components in combination to determine the seriousness and gravity of the act, and all three need to be *present* to some degree. This interpretation aligns with the drafters intentions and is the prevailing view in scholarly contributions.[331]

Neither of the general terms "manifest", "character", "gravity" or "scale" indicate exactly *where* the dividing line between the acts included and acts excluded is drawn.[332] From our analysis of the "aggression" threshold in section 6.3, we can establish that the line is situated *above* the de minimis concept of armed force. There are however few legal sources to rely on when drawing the line between an act of aggression, and the *manifest* violation of the Charter, and for the assessment of when the character, gravity or scale requirements are met. For the "gravity" component, is there a requirement of a certain number of humans killed by the act of aggression? Are there requirements to how extensive the material destruction resulting from a bombardment must be to meet the "scale" component? And for the qualitative dimension, how far from the core of the concept of aggression is the line of certainty drawn? For each of the subparagraphs of the list of acts of aggression in Art. 8bis(2), there are scenarios that beyond doubt would constitute a manifest violation pursuant to Art. 8bis(1). Under (a), that could be an unprovoked large scale attack by the armed forces of one State against a neighbouring State, with the purpose of occupying the victim State and causing severe human and property losses in the quest. Under (b), the scenario of dropping an atom bomb on the territory of another State, regardless of justification, would unquestionably fulfil the criteria of Art. 8bis(1). The Court will likely determine more complicated cases than this, and will need to establish where the line of each component in Art. 8bis(1) is drawn. And when completing this task, the Court should adhere to a restrictive approach in line with the principle of legality in Art. 22(2).

In the forthcoming sections, we will study the three components character, gravity and scale individually and attempt to indicate the contents of each term.

6.4.2 Character

The component "character" refers to the qualitative dimension of the threshold clause. The objective of the character component is to exclude legal grey areas from the State conduct element, and confine the scope of Art. 8bis to the *core* of the prohibition on the use of force in

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[329] McDougall (2021) p. 160

[330] Ruys (2018) p. 893

[331] See Barriga (2012) p. 96 and Kress (2017) p. 511-12 for the negotiation history of Understanding 7. Werle (2020) p. 606 holds the same opinion

[332] This is also pointed out by McDougall (2021) p. 162

international law.[333] Acts with a debatable legal character will not meet the character criteria, and thus not reach the "manifest violation" threshold. Formulated another way, "a use of force whose legality under international law forms the object of genuine disagreement between reasonable international lawyers will not fulfil the state conduct element of the crime of aggression."[334] As the character component is the only component relating to the *qualitative* dimension of the threshold clause, it is indispensable for fulfilling the State conduct element: the threshold requirement would not be met unless both the qualitative and the quantitative dimensions are present.[335] Determining the existence of the character component is a more straightforward exercise compared to "gravity" and "scale", the latter measurable on a gradual scale.

In Chapter 7, we will look at some specific uses of force with debatable legal character. For now, we will illustrate our point with one frequently used example whose legality is *generally* debated: that of unilateral humanitarian intervention.[336] A unilateral humanitarian intervention is when a State uninvited, and without Security Council mandate, invades with their armed forces another State, primarily to avert a larger humanitarian catastrophe.[337] The prevailing view among international scholars is that unilateral humanitarian intervention contravenes Art. 2(4) of the Charter.[338] However, some scholars, and some States such as the UK[339] and Denmark,[340] hold the contrary position, insisting there exists a conditional right to unilateral humanitarian intervention in international law. The legality of this use of force is thus subject to genuine legal discourse,[341] and would not fulfil the character component of the threshold.

Linguistically, "character" is not limited to the *legal* character of a use of force. An observation of interest is that it might also include the *factual* character of a use of force. For instance, bombardment of schools or hospitals, institutions protected under international humanitarian law,[342] might qualify as acts of aggression with a particularly malicious intent.[343] It can be argued that a use of force with a particularly malicious intent, notwithstanding the legal status of the use of force, might overfulfill the character component of the manifest threshold, and

[333] Kress (2017) p. 523-24. Barriga (2012) p. 29

[334] Kress (2017) p. 524

[335] Ibid. This view is also expressed in the Council of Advisers report (2021) p. 13

[336] Humanitarian intervention if further discussed in Chapter 7.5

[337] An illustrative example of such use of force is the NATO intervention in former Yugoslavia in 1999. See Tzanakopoulos (2018)

[338] Kress (2017) p. 524

[339] Crawford (2019) p. 726-728

[340] See memo, Danish Ministry of Foreign Affairs (2018)

[341] Randelzhofer (2012a) p. 222 with further references

[342] ICC Statutes Art. 8(2)(b)(ix)

[343] This point is also touched upon in the Council of Adviser's report (2021) p. 13, footnote 35

thus influence the required relativity between the "character" component and the components of "gravity" and "scale". This side of the character component is not much discussed, and if any, its function will be limited to a supportive, rather than a decisive argument. In any way, these considerations are covered by the "gravity" component.

6.4.3 Gravity

The gravity component relates mainly to the quantitative dimension, but does have a qualitative side. The component seeks to capture the requirement of "sufficient seriousness".[344] Linguistically, the *gravity* of an act may refer to both the character and the scale of an act of aggression. There is however no need to interpret a character factor into the gravity component, as the components in any way will be assessed in conjunction. Kress holds that the two intensity components "gravity" and "scale" might either be looked at in conjunction, or they may be interpreted isolated, but in recognition that "they can each be satisfied to a greater or lesser degree".[345] This view aligns with the original categorization of a qualitative and quantitative dimension of the threshold requirement. When distinguishing the gravity component from the "scale" component, Kress suggests that "the number of human causalities on all sides, the scope of the disturbance of common life within the victim state and the level of property destruction on all sides should be related to the gravity" while the "spatial and temporal dimension of the use of force relates to its scale, which should also be the case with regard to the intensity of the man- and firepower used. Roughly put, the scale component refers to the means.»[346]

"Gravity" relates to the *effects* of the act of aggression.[347] The Council of Adviser's report holds it "connotes the extent of damage that resulted to life, limb or property", where the assessment includes "the scale, nature, manner of commission of the crimes, as well as their impact.»[348] The question then arises – when exactly is the point of sufficient gravity reached? Does the act need to result in a certain number of causalities or property destruction? Does it need to cause "death and destruction", or can serious geopolitical consequences alone suffice?[349] To establish guidelines for the innate threshold of "gravity", we will need to draw customary international law underlying the crime of aggression.

Kress holds the ICC will be able to draw upon practice from the Nuremberg and Tokyo tribunals to establish the contents of the gravity component.[350] His review illustrates that the gravity

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[344] Kress (2010) p. 1193 with further references
[345] Kress (2017) p. 512
[346] Kress (2017) p. 520
[347] Ibid
[348] The Council of Adviser's report (2021) p. 13
[349] McDougall (2021) p. 167
[350] Kress (2017) p. 519

component has a high threshold: the Tokyo and Nuremberg precedents operated with a conceptual classification of, in descending gravity, a "war of aggression",[351] "limited war"[352] and "grave incidents short of war."[353] Kress argues that "full scale-hostilities" are not required, resulting in the equivalent "gravity" line under customary law to be situated between the two latter categories.[354] The lower limit of the gravity requirement would be drawn between a "grave incident short of war", and a "limited war", implying certain human causalities and destruction of property, and to some extent, malicious or strategic intent. Kress further holds that "limited war" must be situated above the notion of "armed attack" in ICJ self-defence practice,[355] confirming that the complete State conduct element of the crime of aggression is situated at step 3 in the gradation scale in Table 2.

As we will see, we cannot conclude on the scope of the gravity component isolated from the scale component. The analysis of "scale" in the next section will shed light on nuances of the gravity component.

6.4.4 Scale

The scale component relates exclusively to the quantitative dimension of the manifest threshold and refers to the *magnitude* of the attack. The Council of Adviser's report writes that it encapsulates "numerous considerations ranging from resources employed, to the level of planning and coordination undertaken, or extent of the consequences of the attack."[356] As mentioned in the previous section, while the gravity component relates to the *effects* of the act of aggression, the scale component relates to the *means*, i.e. the physical power employed.[357] The scale component does not necessarily require physical combat between the armed forces of two states, as the point of focus are the *means* employed by the aggressor State. Not meeting

[351] As referenced in Kress (2017) p. 516-519: The traditional concept of "war", as based on the Nuremberg and Tokyo trials and the 1945 London Charter and promoted by certain States, prominently US and UK under Art. 8bis negotiations, is summed up by this frequently cited definition by Lauterpacht: "War is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases." This traditional customary definition requires full-scale armed force hostilities.

[352] As referred in Kress (2017) p. 519, a "limited war" is by Dinstein (2011) p. 119 defined as a use of armed force which "may be confined to the defeat of only some segments of the opposing military apparatus; the conquest of certain portions of the opponent's territory (and no others); or the coercion of the enemy Government to alter a given policy (e. g. the Kosovo air campaign of 1999)." In other words, the act is short of full-scale hostilities, but still a grave act of aggression amounting to a (limited) war.

[353] Kress (2017) p. 519. In determining a similar lower threshold, the ICC will consider "to what extent the values of state sovereignty, international peace and security, and life, limb and property of human beings are affected" by the act of aggression.

[354] Ibid

[355] Ibid

[356] Council of Adviser's report (2021) p. 13

[357] Kress (2017) p. 520

physical resistance by the victim State does not legitimize a unlawful act of aggression from the aggressor State. The question of so-called "bloodless invasions" falls within the same category – will the scale criteria be met if an act of aggression is met with no resistance and no lives are lost or property destroyed? Kress holds the possibility open:

> "Whether or not a 'bloodless invasion' passes the intensity threshold in Art. 8bis(1) of the Rome Statute depends on its 'scale'; that is, its spatial and temporal dimension, as well as the number of armed forces used in the course of the invasion and any military occupation resulting therefrom."[358]

This stand illustrates the purpose of Art. 8bis, which in its essence is to protect the core of the prohibition on the use of force in international law. The underlying principle of the prohibition is to protect the sovereignty of States and maintain peace in the international order.[359] This must be a guiding principle when applying Art. 8bis on factual circumstances, rather than reserving the prohibition to visibly "bloody" full-scale wars. The interplay between the gravity and scale component materializes at this point. When reading the "gravity" and "scale" components in conjunction, we can conclude that as a main rule, human causalities and property destruction are required to meet the "manifest" threshold of Art. 8bis. However, depending on the particularities of each case, "bloodless" acts of aggression can meet the threshold if the *scale* of the deployment of an act of aggression is sufficient.

A final question the scale component raises, is that of the accumulation of events. Can a series of small scale attacks, such as prolonged border skirmishes over years, which individually would not meet the manifest threshold, *collectively* constitute a manifest violation of the Charter? The question is briefly touched upon in the Council of Adviser's report, but left open.[360] While I agree the possibility cannot be excluded, we will need to approach the question through the lens of Art. 5(1) of the Statutes. Art. 5(1) postulates the Courts jurisdiction is limited "to the most serious crimes of concern to the international community as a whole". In addition, the first intensity threshold of an act of aggression, and the second intensity threshold of a manifest violation of the Charter, including the character and gravity components, will need to be fulfilled. While prolonged border skirmishes might not meet this threshold, the possibility should be left open for sequenced strategic acts of aggression intended to violate the sovereignty

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[358] Kress (2017) p. 523. Russia's annexation of the Ukrainian territory Crimea in 2014 is a contemporary example of a relatively "bloodless" invasion, see O'Connell (2018) p. 856. The illegality of the annexation is not contested, and as Kress also points out, it would be difficult to deny the act fulfilling the components of gravity and scale despite the limited material losses.

[359] Kress (2017) p. 419

[360] Council of Adviser's report (2021) p. 15

of a State. This is presuming they collectively meet all three components of the manifest violation threshold.

6.5 Summary

The second intensity threshold, the "manifest violation of the Charter of the United Nations" clause contained in Art. 8bis(1), is the decisive step in determining the achievement of the State conduct element of the crime of aggression. The three independent and cumulative components "character", "gravity" and "scale" raise this final threshold significantly higher from a mere "act of aggression" in Art. 8bis(2) and Art. 39 of the Charter.

The "character" component ensures that only manifestly unlawful uses of force can fulfil the State conduct element of the crime of aggression. A practical demonstration of the character component is done in Chapter 7. The fact that there is one "scale" requirement relating to the *means* employed,[361] and one "gravity" requirement relating to the material *effects* of the act in question,[362] further indicates that material destruction and human loss caused by considerable military engagement is necessary to fulfil the State conduct element. This is however only a point of departure. While providing the general assessment criteria in each component takes us a way on the journey, drawing their exact demarcation lines can only really be demonstrated when the Court will apply Art. 8bis on a practical situation, taking into account the circumstances and particularities of the case.[363]

In the practical application of Art. 8bis, the final intensity threshold of a "manifest violation" consumes the preceding intensity threshold of an "act of aggression" and the entry requirement of "armed force" in Art. 8bis(2). Arguably, placing too much emphasis on this first intensity threshold appears as a superfluous task, and its inclusion is perhaps more symbolic than practical. For the placement of a first intensity threshold of an "act of aggression", it is difficult to establish anything beyond it being situated above the *de minimis* requirement of a use of force as contained in Art. 2(4) of the Charter. It is primarily for those arguing that Art. 2(4) does *not* contain a de minimis threshold of a use of force, that the intensity requirement of an act of aggression in Art. 8bis(2) would serve a gatekeeping function against minimal acts not amounting to armed force. However, such uses of force would be ruled out in any way, as they will not pass the second intensity threshold of Art. 8bis. On this background, we can establish that the main purpose of the preceding requirement of an "act of aggression" is to delimit the *pool of acts* holding the potential to amount to a crime of aggression, rather than holding an operative *intensity threshold* function.

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[361] As found in Chapter 6.4.4

[362] As found in Chapter 6.4.3

[363] McDougall (2022) p. 162

Art. 8bis only criminalizing "manifest violations" of the Charter has by some been criticized as condoning lesser violations of the Charter, whom despite their illegality and gravity, do not qualify to the high intensity threshold of the State conduct element.[364] It has been argued that Art. 8bis gives "green light" to lighter violations of the Charter.[365] These concerns seem misplaced. Firstly, the intensity threshold can also be regarded as a *jurisdictional* limit similar to those the Statute imposes on the other core crimes[366] to ensure that the Court focuses on serious violations.[367] Secondly, conduct not qualifying as a crime of aggression is in no way excused under public international law. The mechanisms of the Security Council and ICJ, and the international law of State responsibility, countermeasures, reparations and sanctions continue to exist after the activation of Art. 8bis. Only *individual* responsibility is reserved to Art. 8bis.

There is one remaining step in our analysis of the complete State conduct element of the crime of aggression. What remains to study, are the criteria of a *violation* of the Charter. As will be evident, this final condition is suited to demonstrate the practical application of the characteristic manifest threshold of Art. 8bis.

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[364] See Nsereko (2002) p. 502-503 and Paulus (2009) p. 1121

[365] McDougall (2021) p. 154

[366] Most notably war crimes in Art. 8(1), where the Court is given jurisdiction over war crimes when they are "committed as a part of a plan or policy or as part of a large-scale commission of such crimes." See Kress (2009) p. 1135-1136.

[367] Schabas (2016) p. 310-311

7 A violation of the UN Charter

7.1 Overview

	ART. 8*BIS*	**THE UN CHARTER**	
5	“a manifest *violation* of the Charter of the United Nations”	Invitation or consent	Art. 2(4)
		“the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”	Art. 51
		The Security Council “may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”	Art. 42

In Chapter 6, we studied the two thresholds an act of armed force must surpass before the State conduct element of the crime of aggression is fulfilled. What remains to discuss, is the condition of *unlawfulness* of the use of armed force. The question of legal grounds for justification of a use of force has great practical importance; it is almost expected that any defendant prosecuted for the crime of aggression will put up a defence grounded in the rules of justification, arguing that their particular use of force was lawful. This final condition is therefore expected to be a central point of dispute in cases of aggression eventually pending before the ICC.

Although the text of Art. 8bis does not contain any explicit conditions for the (un)lawfulness of uses of force, the requirement of unlawfulness is inherent in the crime of aggression. Firstly, the condition of unlawfulness appears already from the purpose of the provision; ending impunity for qualified violations of the prohibition of the use of force in international law.[368] Self-evidently, a use of force that is *lawful* under international law cannot constitute a crime of aggression under international criminal law.[369] Secondly, it can be argued that there is an inherent requirement of unlawfulness in the concept of *aggression* under Art. 8bis. Kress points out that State aggression has inseparably been understood as implying unlawfulness already

[368] Rome Statute, Preamble para 4

[369] Kress (2017) p. 453

from the first discussions on the concept of aggression in the 1920s.[370] This implicit notion was confirmed in the text of Res. 3314, where the GA established that

> "Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful."[371]

When developing the concept of aggression under the Charter, Res. 3314 presupposed that a lawful act of force under the Charter would not become unlawful under the Definition. Nothing in the *travaux préparatoires* of Art. 8bis rejects that this fundamental consideration underlying the concept of aggression is transferred to the concept of aggression under Art. 8bis.[372] Finally, the text of Art. 8bis does, at both threshold steps, presuppose the unlawfulness of the use of force in question; in Art. 8bis(2), an act of aggression is "*inconsistent* with the Charter of the United Nations", and in Art. 8bis(1), the act of aggression must constitute "a manifest *violation* of the Charter of the United Nations."

What is evident from the references to unlawfulness in Art. 8bis, is that the notion relies entirely on the Charter regime. As Table 1 illustrates, the grounds for justification of the use of force are identical in Art. 8bis and the Charter. To interpret the conditions of unlawfulness under Art. 8bis, our point of departure is therefore to interpret the grounds of justification of uses of force under the Charter.[373] There is however one important modification: Art. 8bis' threshold requirement of a "manifest violation" of the Charter *widens* the Charter pool of lawful acts of force for the purpose of the crime of aggression. When establishing the scope of the grounds of justification in the Charter for the purpose of Art. 8bis, we have to study their scope through the "manifest violation"-lens of Art. 8bis(1).

In the forthcoming sections, we will study the grounds for determining a use of force as lawful under the Charter. There are four potential lawful uses of force: (1) invitation or consent, (2) self-defence, (3) Council mandate, and potentially (4) humanitarian intervention. Due to the scope limitations of our thesis, we will not discuss the grounds of lawfulness comprehensively. For the purpose of our thesis, it is sufficient to establish the core of each ground for justification and point to where the legal grey areas surrounding the core begin. This is because the legal

[370] Kress (2017) p. 453 with further references, Kress (2010) p. 1191-1192

[371] GA Res. 3314, Annex I, Art. 6

[372] Kress (2017) p. 454 does point out that including an *explicit* reference to unlawfulness was rejected during the negotiations of Art. 8bis, but that this "resulted from an unwillingness to change the wording of 1974 GA Resolution 3314." Nevertheless, as we will see further on in the discussion, the rejection is not decisive and contradicts a clear textual reading of Art. 8bis.

[373] This step in the interpretation of Art. 8bis illustrates the two-layered nature of the prohibition, and shows the extent of Art. 8bis' reliance on the Charter.

grey areas will not pass the test of the qualitative dimension of the ”manifest violation” requirement in the State conduct element of Art. 8bis. Pointing out acts surrounded by legal controversy is sufficient to answer our research problem: highlighting the differences and similarities between Art. 8bis and the Charter regime on the use of force.[374]

Establishing the scope of the grounds of lawfulness is an equally challenging task as establishing the scope of the force prohibition – drawing the line of lawfulness and unlawfulness between the two is a highly specific task, subject to the factual circumstances of each case. Furthermore, the legal controversy surrounding the grounds of lawfulness is extensive. As Kress points out, the difference of opinion of "reasonable" international lawyers are founded in textual ambiguities, ambiguities in the diverse range of State practice and in nuances in methodological approaches.[375] These legally anchored ambiguities will not be eliminated in international law until authoritative interpretations by relevant UN bodies gradually build out the use of force framework. In the forthcoming sections, we will therefore primarily rely on qualified international law publicists in establishing the legal grey areas of the exemptions to the prohibition on the use of force.

Section 7.2 will explore invitation as ground for lawfulness of the use of force. Section 7.3 will study self-defence. In section 7.4, we will study Council mandates. Section 7.5 will explore the contested ground of so-called humanitarian intervention in the Charter.

7.2 Invitation or consent

The first exemption to the prohibition of the use of force is invitation or consent by the host State.[376] If State A invites State B's military presence or use of armed force on its own territory, State B's use of force is lawful. It will not constitute a violation of State As sovereignty or territorial integrity, and neither contravene with Art. 2(4) or fulfil the State conduct element of Art. 8bis. This exemption is inherent already in the concept of force; the valid invitation or consent of a State precludes the objectives and application of Art. 2(4) and 8bis.[377]

Like the other grounds of lawfulness, the use of force conducted by invitation or consent is restricted to strict frames. Some guidelines on the extent of consent being a ground of lawfulness are found in the *Armed Activities* case before the ICJ. The Court here implicitly held that the use of force by a State on another States territory is lawful if it is by the consent of the territorial State. Without explicitly addressing consent as an exemption, the Court simply

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[374] See research problem and analytical approach in Chapter 1.2

[375] Kress (2017) p. 457

[376] A contemporary example is the Russian airstrikes in Syria in 2014 by invitation of the Syrian government. See Corten (2018) p. 878-879

[377] Kress (2017) p. 457

presupposed that the use of force by an invited State on a foreign State's territory did not contravene with the customary principle of non-use of force as long as the invited State acted within the parameters of the consent.[378] The host State could draw up the confines of the consent, and withdraw it explicitly or implicitly at any time.[379]

The conditions of lawfulness grounded in invitation or consent can also be read from (e) in Art. 8bis(2). The subparagraph states that a use of armed force on the territory of another State which is in contravention with the conditions provided or which extends beyond the agreement, constitutes an act of aggression. This illustrates the strict confines of the lawfulness of the use of force by invitation, and confirms ICJs understanding in *Armed Activities*: any act by the invited State must be within the parameters of the host State's invitation.

This means that the scope of the agreement with the host State provides the extent of the lawfulness of the use of force. The reasons for State A to invite State B's military presence on its territory, are usually to assist in combatting internal violence, rebel groups or other tumults. Regarding consent, State A may allow State B to conduct a military operation on State As territory in cases of, for instance, targeted killings. The core of lawfulness of such operations is for the acting State to stay within the confines of the agreement with the host State. Should State B violate the agreement, either with regards to the scale of the force, territorial confines, causalities or objectives, the act of force falls outside of the host State's consent. The consent as a ground of lawfulness would therefore not be sufficient, and the use of force beyond the confines of the agreement would be assessed as a "normal" unlawful use of force under Art. 2(4).

In Art. 8bis, the "manifest violation" threshold, and particularly its qualitative dimension, modifies the criminalization of such excessive use of force. Under Art. 8bis, the use of force *within* such agreement is lawful, as the force in question is not a violation of the Charter. However, the further from the core of the agreement the use of force drifts, the risk of unlawfulness increases. It is in the peripheral areas of the agreement between the acting and hosting State, when hosting State A disputes a potentially excessive use of force claiming it is unlawful, that the mechanisms of the "manifest" threshold apply. The quantitative dimension of the manifest threshold prevents a use of force with insufficient *gravity* and *scale* to fulfil the State conduct element of the crime of aggression.[380] If State Bs targeted killing operation on State A's territory causes one additional causality or an unplanned destruction of one property, such effects are nearly to be expected, and the gravity and scale requirements of the manifest

[378] Kress (2015) p. 577, *Armed Activities*, Judgment, para 46

[379] *Armed Activities*, Judgment, para 47

[380] Art. 8bis(1)

threshold might not be reached.[381]. This way, an excessive use of force falling only slightly outside the agreement by its gravity and scale might be a violation of the Charter, but not amount to the State conduct element of Art. 8bis.

The qualitative dimension of the manifest threshold also invites further assessment. When determining whether invitation or consent is a valid ground of lawfulness of the use of force in question, establishing the confines of the allowed use of force by interpreting the explicit (or implicit) agreement between the two States is an important exercise.[382] Ambiguity in the consent of the host State or loosely defined confines might increase the legal grey areas surrounding the consent. This will expand the legal grey area in which a particular use of force can be placed, and consequently, lift the threshold of a manifest qualitative violation under Art. 8bis. Only acts of force falling manifestly and clearly outside the agreement between the host State and the acting State will reach the qualitative threshold of the crime of aggression. If there exists reasonable and objective doubt of the lawfulness of acts of force, the act will not fulfil the qualitative dimension nor fulfil the State conduct element. It is therefore in the interest of the host State to draw up the boundaries of the consent as clearly as possible.

While a use of force within the boundaries of an agreement with the host State is a licit exemption from Art. 2(4) and Art. 8bis, there is one important modification: State cannot invite *any* use of force on its territory. In contemporary international law, there are general (controversial) restrictions on a States permission to invite foreign use of force on its own territory. It remains an unsettled question whether a State A can invite the military intervention of State B to forcibly shut down a rebel movement responding to gross internal human rights violations by State A or a "genuine non-colonial self-determination struggle" of a people within State A, and which is not supported by any foreign State.[383] Furthermore, the legality of an invitation or consent of a State whose government is no longer effective or not legitimate, can be questioned.[384] In both these cases, the grounds of lawfulness of the use of force are within a legal grey area. Such use of force might constitute a violation of the Charter, but will not fulfil the qualitative dimension of the threshold requirement in Art. 8bis. This probably means that as long as an invitation or consent by State A exists (albeit legally debatable), a military intervention by State B will likely not amount to a crime of aggression.

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[381] While such a use of force *without* a prior agreement independently could constitute a use of force, the use of force in question should not be assessed isolated from the preceding agreement.

[382] Like the ICJ did in *Armed Activities*, Judgment, para 42 and onwards

[383] Kress (2017) p. 457

[384] Randelzhofer (2012a) p. 215

7.3 Security Council authorization

The second ground of justification for inter-State use of force is collective security measures by Security Council authorization pursuant to Chapter VII of the Charter. The force scheme under the Charter mandates the Council to authorize military measures, "action by air, sea, or land forces",[385] to respond to situations threatening international peace.[386] When the Council has determined a threat or breach of the peace pursuant to Art. 39, it can authorize Member States to conduct acts of force on another State's territory to achieve specified objectives. As the Council authorized use of force will be perfectly lawful under the Charter, States conducting limited operations within the confines of the authorization will not fulfil the State conduct element of the crime of aggression. The questions, and eventual legal grey areas, arise when the scope of the authorization is ambiguous or contested.

Typically, a Council resolution enabling the use of force on the territory of a State authorizes "all necessary measures."[387] This wide formulation, and at times the deliberate textual ambiguity of Council resolutions,[388] requires further interpretation of the scope of the authorization. A case well suited to illustrate our points, is that of Resolution 1973 (2011) on Libya and the following NATO operations.[389] In the Resolution, the operative paragraph authorizing force read:

> "Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory (…)"[390]

In this paragraph, the Council authorized Member States, acting independently or in an arrangement (such as NATO), to take "all necessary measures" in the pursuit of a defined objective: to "protect civilians and civilian populated areas". These were the confines of the authorization, and measures serving *other* interests would, as a point of departure, not be

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[385] Art. 42. See Chapter 6.2.2 on the Councils powers and discretion

[386] For the purpose of our thesis, it is sufficient to refer Council *authorization* of forcible measures. The common way of Council action has been decentralized authorization of Member states to implement measures of force. This makes the question of participation, time frame and degree of involvement essentially a State decision. See Krisch (2012) p. 1336 and Kress (2017) p. 454

[387] Kress (2017) p. 455

[388] Kress (2017) p. 458. See for instance Akande/Milanovic (2015) on the constructive ambiguity of the Council's Resolution 2249 (2015) on ISIL

[389] For an overview of the factual and legal aspects of the Libya situation, see Deeks (2018) p. 749-759 and the report of the Norwegian Committee on Libya (2018)

[390] Res. 1973, paragraph 4

covered by the authorization. The NATO operations in Libya grounded in the resolution later faced considerable criticism; while no one disputed that the Resolution did authorize the use of force, disputes arose on whether NATOs operations were within the scope of the authorization.[391] Res. 1973 allowed military action to protect civilians and civilian populated areas, but the NATO operations targeted military targets in Libya and assisted rebels in overthrowing their State leader, pressure eventually leading to a regime change.[392] The question then arose; did the use of force by NATO States that *exceeded* the resolution's authorization and pursued a deviating objective violate Art. 2(4) of the Charter?[393] There appears to be dispute among international lawyers on this question. While some argue that assisting rebels and targeting military targets to weaken the States military ability was lawful if it was for the purpose of eventually protecting civilians,[394] other scholars argue that such use of force fell outside of the Council authorization and thus constituted a violation of the Charter.[395] The existence of genuine scholarly discourse surrounding the breadth of a Council authorization, or in some cases, even the existence of an authorization,[396] carries different legal implications under the Charter and under Art. 8bis. The lawfulness of debatable uses of force can roughly be illustrated as such:

	Acts of force within Council authorization	**Acts of force within a legal grey area of Council authorization**	**Acts of force clearly outside Council authorization, but of a limited gravity and scale**	**Acts of force clearly outside Council authorization and of significant gravity and scale**
Lawfulness under the Charter	Lawful under the Charter	Possibly unlawful under the Charter	Likely unlawful under the Charter	Clearly unlawful under the Charter
Lawfulness under Art. 8bis	Not a crime of aggression	Not a crime of aggression	Not a crime of aggression	Possibly a crime of aggression

Table 3

[391] See Deeks (2018) p. 755-757

[392] See report of the Norwegian Committee on Libya (2018) and Deeks (2018) p. 755-757

[393] Deeks (2018) p. 756, Kress (2017) p. 459

[394] See Akande (2011), Norwegian Committee on Libya (2018) p. 61

[395] See Henderson (2011)

[396] As the case was in Council Resolution 1441 (2002) concerning Iraq and Kuwait

As Table 3 illustrates, only acts of force clearly and undebatable falling outside a Council authorization, and being of significant gravity and scale, would fulfil the State conduct element of the crime of aggression. As long as the legality of acts of force (rightfully or not) grounded in a Council resolution is *contested* by reasonable international lawyers, the acts of force will not pass the threshold test of Art. 8bis.[397] Reparations or other consequences for the acting State will have to be grounded in public international law, following the determination of an eventual violation of the Charter.

7.4 Self-defence

The third, and most frequently invoked, ground of justification of a use of armed force, is self-defence. In fact, as Randelzhofer writes, the right of self-defence has "become the pivotal point upon which disputes concerning the lawfulness of the use of force in interstate relations usually concentrate".[398] Art. 51 of the Charter sets the conditions of lawful self-defence:

> "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 (…)"

The key word in Art. 51 is *armed attack*. A State may only *respond* to another States ongoing armed attack against its sovereignty. The wording "armed attack" implies this is another type of force than a mere use of armed force. As we discussed in Chapter 6, the ICJ has established that the notion of armed attack holds a narrower meaning than the use of force.[399] In the *Nicaragua* judgement, the Court stated that less grave forms of the use of armed force would not amount to an armed attack.[400] As a guideline for the gravity threshold, the ICJ held that "a mere frontier incident" would not qualify as an armed attack.[401] Some authors have elaborated the notion of armed attack as use of force on a "relatively large scale", "of sufficient gravity" and "immediacy", which has a "substantial effect".[402] As discussed in Chapter 6, the gravity threshold of "armed attack" is comparable to that of "aggression" under the Charter.

In addition to the requirement of an immediate armed attack, there are inherent requirements of *necessity* and *proportionality* in the concept of self-defence.[403] In *Nicaragua*, the Court said about the requirements of necessity and proportionality:

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[397] McDougall (2021) p. 156-157
[398] Randelzhofer (2012b) p. 1400
[399] Randelzhofer (2012b) p. 1409
[400] *Nicaragua*, Merits, para 191
[401] *Nicaragua*, Merits, para 195
[402] Randelzhofer (2012b) p. 1409 with further references
[403] Randelzhofer (2012b) p. 1425, Crawford (2019) p. 722

> "As a result of this conclusion of the Court, even if the United States activities in question had been carried on in strict compliance with the canons of necessity and proportionality, they would not thereby become lawful. If however they were not, this may constitute an additional ground of wrongfulness."[404]

The requirement of *necessity* has been interpreted as that the victim State must be left with no other options than to use armed force in self-defence.[405] The requirement of proportionality expects that the intensity, duration and target of the responding use of armed force corresponds to that of the armed attack: the response must not be disproportionate to the gravity of the armed attack.[406] Furthermore, the response must not have a deterrent, punitive or retaliatory character; it must be solely self-defence.[407] As the cited passage from *Nicaragua* states, exceeding the limitations set by the requirements of necessity and proportionality renders use of armed force in self-defence unlawful under the Charter.

A use of force within the confines of Art. 51 – State A responding to an unlawful and unprovoked armed attack by State B with measures proportionate and necessary to self-defend – will be lawful under the Charter, and thus not fulfil the State conduct element of Art. 8bis. Like with the other grounds of justification, it is the grey areas surrounding the concept of self-defence that separate its lawfulness under the Charter and under Art. 8bis.

Kress provides a comprehensive account of the extensive legal grey area surrounding the notion of self-defence in the Charter.[408] The forthcoming analysis is based on this account. Due to the scope limitations of this thesis, we will restrict ourselves to the key points of the most probable scenarios, presented in (a)–(c) below.

(a) *State A uses armed force in response to a low-scale attack by State B. The attack by State B does not amount to an "armed attack" under Art. 51.*[409] As we know, the ICJ has distinguished between grave forms of the use of force, such as armed attack, and other less grave forms.[410] This distinction means that the right to self-defence is not applicable in cases where a use of force by State B against the territorial integrity of State A has a less grave form, such as a border

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[404] *Nicaragua*, Merits, para 237. See also *Oil Platforms*, Judgement, para 43, 51, 73-77, *Armed Activities*, Merits, para 147, *Nuclear Weapons*, para 226, 245

[405] Crawford (2019) p. 722

[406] The scopes of necessity and proportionality are disputed, both because of the diversity in cases where self-defense is invoked, and because States and authors have differing perceptions of the objectives of the right to self-defence. Due to the scope limitations of this thesis, we will not go into the discussions here. See Randelzhofer (2012b) p. 1425-26 with further references.

[407] Crawford (2019) p. 722, Randelzhofer (2012b) p. 1425

[408] Kress (2017) p. 459-488

[409] Kress (2017) p. 459

[410] *Nicaragua*, Merits, para 191

incident or other small-scale attacks. Is State A then defenceless and prevented from responding to small-scale attacks from State B? On one hand, the ICJ has held that the mining of a single military vessel might be sufficient to qualify as an armed attack, implying that even small-scale uses of force justify use of force in self-defence.[411] On the other hand, the ICJ repeated the gravity threshold of an "armed attack" in *Nicaragua* and *Oil Platforms*, which cannot be interpreted in any other way than that all uses of force do not justify an armed response. The answer to this question is disputed among States and scholars of international law; while some argue that self-defence against small-scale attacks cannot be justified as a lawful use of force, others oppose this standpoint and argue for a comprehensive right to self-defence.[412] This discourse is sufficient to place such scenarios in the legal grey area surrounding Art. 51. State As armed force response to a low-scale attack from State B can therefore not fulfil the qualitative dimension of the "manifest violation" threshold of Art. 8bis, and cannot constitute a crime of aggression.

(b) *State A uses armed force in response to an armed attack by a non-State group emanating from the territory of State B*.[413] This scenario refers to when a transnational use of force from a non-State group emanates from State B, but is below the level of State attribution. Instead, it relates to our discussion in Chapter 3: the question of extending the force scheme under the Charter to non-State actors. As a point of departure, the subjects under the Charter are *States*, leaving non-State groups out of the Charter force scheme. One position in scholarly contributions endorses this narrow interpretation of Art. 51, holding that the right to self-defence presupposes an armed attack *by a state*. This position deems unlawful a forceful response from State A against the territory of State B, as *State* B never conducted the armed attack.[414] The other position argues that the right of self-defence also covers attacks from non-State actors because a wide interpretation can be reconciled with the purpose of Art. 51.[415] Since the early 2000s, a notable amount of State practice in acceptance of a right to self-defence against non-State actors has developed, suggesting a cautious consensus, or at least acceptance, of an expansion.[416] As Kress summarizes, the discourse places this scenario too in the legal grey area of self-defence, making it possibly unlawful under the Charter, but unable to amount to a crime of aggression under Art. 8bis:

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[411] *Oil Platforms*, Merits, para 51

[412] See Kress (2017) p. 460 with further references.

[413] Kress (2017) p. 462

[414] Kress (2017) p. 462 with further references

[415] Kress (2017) p. 463

[416] One of the earliest examples was the Security Council's recognition of the USA's right to self-defence against non-State groups based in Afghanistan after the 9/11 incidents, see Resolution 1368 (2001). A recent example is these assertions of collective self-defense by Arab states, USA and Norway, against the non-State ISIL group in Syria. See UN Doc. S/2014/691(22/9/2014) (Iraq) and UN Doc. S/2014/695(23/9/2014) (USA) and UN Doc. S/2016/513(3/6/2016) (Norway) as referenced in Kress (2017) p. 464

> "the use of force by a victim state against the positions of non-state attackers on the territory of a base state that supports the non-state actors below the level of attribution or is unwilling or unable to prevent the non-state attack from occurring is not (yet) incontestably lawful, but there are certainly strong grounds in support of the lawfulness of such a use of force."[417]

(c) *State A uses armed force in response to an anticipated armed attack by State B*.[418] Such pre-emptive self-defence against the territory of State B would be conducted *before* an armed attack has actually occurred, but when State A has reason to suspect an armed attack against its own territory. The lawfulness of *anticipatory* self-defence under the Charter has been a long-standing point of controversy.[419] There is agreement on the existence of a right to anticipatory self-defence in *customary law* prior to the adoption of the Charter. The customary rule endorsed in the *Caroline* situation and Nuremberg Judgement[420] requires the existence of an "imminent attack", with the so-called "*Caroline* test" of necessity as a guideline: the imminent attack must be "instant, overwhelming and leaving no choice of means, and no moment of deliberation".[421] It is however disputed whether Art. 51 covers anticipatory self-defence. Scholars arguing *for* a right to anticipatory self-defence ground their standpoint in State practice, the pre-existing rule of customary law and in the purposes of Art. 51 specifically and the Charter generally. State As right to self-defence in Art. 51 would be seriously impeded if it was expected to wait until the armed attack *materialized* before responding, and such compulsory hesitation could not only escalate the armed conflict, but also disturb international peace and security.[422] Scholars arguing against the right to anticipatory self-defence argue that widening of the scope of Art. 51 is incompatible with a direct textual interpretation of Art. 51 (if an armed attack "*occurs*") and contravenes the purposes of the collective security scheme in the Charter.[423] While a cautious development towards including anticipatory self-defence in Art. 51 can be detected, Kress concludes that at the time being, anticipatory self-defence is a legal grey area under the Charter. This implies that such use of force will be possibly unlawful under the Charter, and cannot constitute a crime of aggression under Art. 8bis.

As examples (a)–(c) have shown, self-defence as a justification of the use of force is surrounded by significant legal grey areas. Until contemporary international law develops to eliminate the grey areas and determine whether a scenario falls within or outside the scope of Art. 51, the

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[417] Kress (2017) p. 465

[418] Kress (2017) p. 473

[419] See Kress (2017) p. 473-474.

[420] 1946 Nuremberg Judgement (para 205)

[421] Kress (2017) p. 478

[422] Kress (2017) p. 477-478

[423] Kress (2017) p. 476 with further references

depicted legal landscape will remain. This does however not mean that any State invoking self-defence as a ground of justification of their use of force against another State can argue that the legal particularities of their case are disputed under international law and thus exempt their conduct from the crime of aggression. As introductory Element 3 postulates, the manifest threshold is an objective qualification. If State B's use of armed force objectively cannot be anchored in the core of Art. 51 or the reasonably debated surrounding grey areas, the use of force will be unlawful under the Charter. Consequently, if it fulfils the character, gravity and scale requirements of Art. 8bis, the acts might amount to a crime of aggression.

7.5 Humanitarian intervention

The final argument of justification we will discuss is the concept of unilateral humanitarian intervention. Unilateral humanitarian intervention refers to the scenario of State A using unauthorized armed force against State B to prevent a humanitarian catastrophe or serious human rights violations by State B against its own population.[424] The lawfulness of unilateral humanitarian intervention under the Charter is highly contested, and past uses of force justified with this ground, such as the NATO intervention in Kosovo in 1999, have been debated rigorously.[425] The concept of humanitarian intervention cannot generally be categorised under any of the other three grounds of justification,[426] and none of the UN bodies have authoritatively decided upon its legality.[427] States such as the UK[428] and Denmark[429] have, following various conflicts, endorsed a right to humanitarian intervention. Other States, typically developing G77 States, have rejected the existence of such right on an abstract basis.[430] Based on the existing State practice, the clear majority position in legal scholarship is that current international law does not contain a right to unilateral humanitarian intervention.[431] For the purpose of this thesis, we do not need to conclude on the legality of such use of force, but rather on its placement in the sphere of unlawfulness of the Charter. For the time being, we can conclude that a use of force grounded in the concept of unilateral humanitarian intervention is unlawful, or at its best, falls within a legal grey area of the Charter.

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[424] This scenario must not be confused with the Responsibility to Protect norm endorsed in the 2005 GA World Summit Outcome. R2P presupposes Council authorization for any response involving the use of armed force, cf. GA Res 60/1(16/9/2005) para 139.

[425] See Tzanakopoulos (2018) p. 594-612

[426] Kress (2017) p. 490

[427] Kress (2017) p. 491 with further references

[428] See UKs justification grounded in humanitarian intervention on their Iraqi intervention in 1991, reprinted in British Yearbook of International Law (1992) p. 824 and the UKs position on the Kosovo intervention in UN Doc. S/PV.3988(24/3/1999) as referenced in Kress (2017) p. 495

[429] See Denmark's position on Syria in memo, Danish Ministry of Foreign Affairs (2013)

[430] Kress (2017) p. 498, 501, Ruys (2018) p. 896, Crawford (2019) p. 727 with further references

[431] Kress (2017) p. 499, Crawford (2019) p. 728, Randelzhofer (2012a) p. 222, McDougall (2021) p. 207, Corten (2021) p. 492

The concept of humanitarian intervention reappeared during the negotiations of Art. 8bis. The US proposed a draft Understanding which explicitly would exclude humanitarian interventions from the crime of aggression.[432] This proposal was rejected by a great majority of State parties.[433] However, the State parties did agree to adopt Understanding 6, which essentially was a similar proposal in a modified form.[434] The reference to the *consequences* in Understanding 6 can linguistically be interpreted as exempting acts of aggression with "beneficial" consequences, such as a (successful) unauthorized humanitarian intervention, from the State conduct element of the crime of aggression.[435] The majority view in scholarly contributions, shared by Kress,[436] McDougall,[437] Trahan,[438] Ruys,[439] and Schabas,[440] is accordingly that unauthorized humanitarian intervention falls within a legal grey area under the Charter. This entails that under contemporary international law, and only as a point of departure, the ICC will likely refrain from prosecuting unauthorized humanitarian interventions as crimes of aggression. A supportive argument in this regard is the object and purpose of the Statutes: the underlying "moral" reasons for a unilateral humanitarian intervention would be to prevent the exact atrocity crimes the ICC was founded to punish.[441] The final decision of the status of such interventions is eventually the Court's, where it preliminarily also will have to determine the conditions of a "genuine" humanitarian intervention.[442]

By excluding unauthorized humanitarian interventions from the crime of aggression, it may be argued that Art. 8bis encourages a broader acceptance and consolidation of the concept of unilateral intervention in public international law. As Ruys observes, if the Court finds that an unauthorized humanitarian intervention in its character or gravity is not enough to constitute a manifest violation of the Charter or amount to a crime of aggression, this can be perceived as a (cautious) endorsement of the unilateral intervention doctrine.[443] While there is no legal *methodological* presumption that the ICCs findings influence public international law on this

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[432] Kress (2017) p. 524
[433] Barriga (2012) p. 95
[434] Barriga (2012) p. 96
[435] See Ruys (2018) p. 892
[436] Kress (2017) p. 524
[437] McDougall (2021) p. 208
[438] Trahan (2015) p. 42
[439] Ruys (2018) p. 892
[440] Schabas (2016) p. 311
[441] Ruys (2018) p. 897
[442] Ruys (2018) p. 901-906
[443] Ruys (2018) p. 900

point,[444] it might be inevitable that an ICC ruling on the doctrine will leave a mark on State practice and *opinio juris.*

7.6 Summary

Chapter 7 concludes the analysis of the State conduct element of the crime of aggression. The grounds of justification are well suited to illustrate Art. 8bis' intensity threshold discussed in Chapter 6. As the analysis has shown, the intensity threshold of the crime of aggression is *high*. The required presence of all three components "character", "gravity" and "scale" entails that only legally obvious violations of the Charter, which are of a considerable gravity and scale with regards to human and material loss, can fulfil the State conduct element of the crime of aggression. As Chapter 7 has illustrated, it is the "character" component that emerges as the starting point of this assessment: as long as a use of force can be reasonably justified in one of the grounds of exemption in the Charter, the necessary character component will not be fulfilled. An important modification is that the use of force must *objectively* fall within the scope of the justification ground – it's *invoking* is not enough.

A purpose of the "manifest" threshold was to avoid Art. 8bis being a backdoor to clarify legal grey areas of public international law.[445] This objective particularly materializes when discussing the grounds of justification. Considering the significant grey areas surrounding these grounds, it appears sensible that Art. 8bis leaves the drawing of their confines to the authoritative UN bodies. As the public international law in this area gradually continues to be developed and clarified, these legal grey areas will diminish, and debatable uses of force will gravitate towards either the lawful or unlawful sphere, easing the ICCs task in determining their legal "character".

As the analysis' in Chapter 6 and 7 have shown, an indisputably illegal use of force needs to be of a significant gravity and scale to fulfil the State conduct element. With regards to the components "gravity" and "scale", drawing general demarcation lines is an impractical task. Unlike the character component, gravity and scale require highly specific assessments considering the factual aspects of each case. The Court will have to consider the amount of property destruction, the number of causalities and the size of measures employed to determine whether the gravity and scale components are met. In this matter, the final threshold clause leaves a "room for refinement" through judicial practice.[446]

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[444] Quite the contrary actually; Art. 10 and Understanding 4 postulate that nothing in the Statutes affects existing or developing rules of international law, while Art. 25(4) holds that nothing in the Statutes affects the responsibility of States under international law.

[445] Kress (2017) p. 508

[446] Kress (2017) p. 543

However, this room requiring refinement appears to be limited.[447] This thesis has shown that the definition of the State conduct element in Art. 8bis contains considerable delimitations, and throughout the thesis, the scope of the prohibited conduct has progressively been narrowed down by each condition. In Chapter 3, the subjects of Art. 8bis were limited to *States* in its strict sense, leaving non-State actors and State-internal situations out of Art. 8bis' reach. In Chapter 4 and 5, the outer frame of the prohibited conduct in Art. 8bis was set, aligning it with the widely approved "armed force" concept under Art. 2(4) in the Charter. In Chapter 6, the broad notion of "armed force" was first narrowed down to an "act of aggression", for which Art. 8bis provided a relatively detailed list of examples. Secondly, aggression was limited to a "manifest violation" of the Charter, restricting the scope of Art. 8bis to conduct that is prohibited by international consensus.[448] In Chapter 7, the implications of the manifest threshold were demonstrated on the possible grounds of exemption for the use of force. All of this means that the scope of Art. 8bis is already quite refined.

Moreover, the examination of the qualifying components "character", "gravity" and "scale" in this chapter, has shown that the only point generally left to the Court's discretion, is drawing up the demarcation lines for the intensity requirements "gravity" and "scale", both which demand a case-specific approach. As Kress correctly points out, the definition of the crime of aggression does indeed leave State leaders in a position "to receive legal advice of very considerable precision on the content of article 8bis of the Rome Statute."[449] This is the key finding of this thesis. Having reached this conclusion, this thesis will end with some final concluding remarks.

[447] Ibid

[448] McDougall (2021) p. 204

[449] Ibid. A similar conclusion is reached by McDougall (2021) p. 211

8 Concluding remarks

This thesis has attempted to conduct a systematic analysis of the conditions of the State conduct element in Art. 8bis. As outlined in chapter 1.2, the overarching research problem was as follows: *How does the State conduct element of Art. 8bis differ from the prohibited State conduct under the Charter?* The analysis has shown that Art. 8bis criminalizes only a fracture of the most grave and indisputable violations of the UN Charter. Phase 1 of the analysis in Chapter 4-5, found that Art. 8bis and Art. 2(4) share a common point of departure: the all-encompassing concept of "armed force" in public international law. Phase 2 of the analysis in Chapter 6-7, found that Art. 8bis contains two intensity thresholds, and in drawing up their margins, the ICC must conduct an independent assessment and cannot lean entirely on the Charter. The analysis revealed that the final "manifest" intensity threshold of Art. 8bis, ensures that only clearly unlawful uses of force of significant gravity and scale can constitute a crime of aggression.[450] This is the main finding of this thesis, and the answer to the above stated research problem.

This finding has some implications. Firstly, the characteristic threshold mechanism of Art. 8bis addresses concerns some States had regarding Art. 8bis' compliance with the principle of legality.[451] As Chapter 7 showed, it does so by precluding legal grey areas and minor violations of the prohibition on the use of force, from qualifying as crimes of aggression. This significant delimitation of Art. 8bis' coverage should appeal to State parties who are hesitant to ratify the Kampala-amendments.

Another implication of the analysis in this thesis, is that it has highlighted the extent to which prosecutorial discretion and the Pre-Trial Chambers will serve as guardians at the gate of the ICC. This is because both the judges and prosecutors of the court will be left to confine the application of Art. 8bis to the most obvious violations of the Charter prohibition.[452] Accompanied by the substantial high intensity threshold in Art. 8bis, concerns regarding politically motivated referrals or a general politization of the ICC ascribed to the crime of aggression appear overstated.[453] As mentioned in the introduction, the Norwegian Parliament decided not to ratify the Kampala-amendments in 2021. In addition to politicization concerns, the Parliamentary Foreign Affairs and Defence Committee pointed at the unclear scope of Art. 8bis as an argument against ratification.[454] While it is true that it remains for the ICC to authoritatively draw up the demarcation lines of the prohibited State conduct, the analysis in

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[450] As found in Chapter 6.4

[451] Innst. 164S(2020-2021) p. 2

[452] Ruys (2018) p. 889, Scheffer (2010) p. 899-900

[453] See Innst. 164S(2020-2021) p. 2

[454] Ibid

this thesis has shown that the demanding threshold mechanism in Art. 8bis sensibly responds to arguments about a vague and unlimited scope. This concern therefore appears to be somewhat overstated.

The construction of the State conduct element allows Art. 8bis to be relevant for the foreseeable future. Firstly, mechanisms for ensuring dynamic interpretation have been incorporated in the fundamental terms of the definition.[455] Secondly, the analysis in Chapter 4 showed that Art. 8bis' reliance on the Charter concept of force, which generally is adaptable to development in methods of inter-State force, allows it to develop alongside public international law on the use of force. Substantially, there is nothing in Art. 8bis preventing it from being applied to contemporary inter-State armed conflicts. Rather, it is the modest jurisdictional reach of Art. 8bis that halts the ICC's authority over the crime of aggression. In the end, it is the jurisdictional reach of Art. 8bis that will determine what contemporary cases of aggression can be brought before the Court.[456] For the time being, the modest number of State ratifications has resulted in a patchy jurisdictional landscape. For Art. 8bis to achieve a functional jurisdictional reach, more State ratifications are required.

Recent developments have unfortunately shown that unlawful inter-State uses of force are not a thing of the past, and that the crime of aggression continues to be relevant. The Russia-Ukraine conflict heightens the importance of having a permanent international criminal justice structure with jurisdiction over the crime of aggression. In fact, following the recent developments of March 2022, the Communist Party in Norway recently put forth a new ratification proposal before Parliament, actualizing Norwegian ratification of the Kampala amendments yet again.[457]

For most States, ratifying the Kampala-amendments will entail few practical consequences beyond the obvious deterrence from engaging in clearly unlawful acts of aggression. Primarily, ratification will incentivise increased scrutiny of the legal grounds prior to participation in international military operations.[458] Following the recent ratification proposal, Parliament will need to assess the legal implications for Norway of ratifying Art. 8bis, in which the scope of the State conduct element will be an important question.

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[455] As we have seen in Chapter 6, the list of acts of aggression is non-exhaustive and open to incorporation of new types of aggression. Art. 8bis' reliance on the common entry requirement of "armed force" in Art. 2(4) also opens the definition for dynamic development, as was illustrated with the case of cyber operations.

[456] Art. 15bis, 15ter, Rome Statute

[457] Representantforslag 8:122S (2021-2022)

[458] Einarsen (2020b)

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