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The crime of aggression and public international law

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Part I. Background

Chapter I. The state act of aggression

1.1. Introduction

An act of aggression is committed by the aggressor state against the aggressed state. Every act of aggression should be understood against the present framework of collective security pursuant to the Charter of the United Nations (UN Charter), as one of the purposes of the UN is the prevention and removal of threats to peace, and the suppression of acts of aggression or other breaches of the peace. By membership to the UN, the interests of a member state to resort to unilateral measures have been precluded because all enforcement measures relating to the maintenance of international peace and security must be collective in nature. Concomitant to collective security is the legal framework pertaining to the use of force (*jus ad bellum*), which prohibits the use of force between states. Thus, an act of aggression represents a breach of the status quo of international peace and security by the aggressor state, as well as international law.

The state act of aggression differs from a crime of aggression as the former is committed by a state while the latter by an individual. As will be discussed in the next two chapters, the state act of aggression is an essential component of the substantive definition of the crime of aggression, which is understood as the state act element of the crime. Thus, it is important to understand the premise upon which the crime of aggression is predicated on.

This chapter aims to study the obligations that international law confers on states to refrain from an act of aggression. The objective is to understand the scope and legal nature of these obligations, with particular reference to identifying the duty-bearer and rights-holder of the norms that prohibit aggression. This way, the obligations that the international legal framework places on states to refrain from an act of aggression, and the consequences of a breach thereof, can be understood. It should be clarified from the outset that the purpose of this chapter is not to provide an extensive, in-depth analysis of *jus ad bellum* in general, but rather to discuss the key elements, as far as necessary within the present context of this study of the state act of aggression.

The chapter begins by examining the UN (section 1.2), with particular reference to the obligations placed on member states to refrain from an act of aggression, and

how the relevant organs of the UN may play a role in maintaining the status quo of international peace and security. The determination of an act of aggression and the ramifications thereof, will then be discussed. This is important to understand the role of the Security Council in determining an act of aggression for the purposes of prosecution of the crime of aggression at the ICC (Chapter VI).

The Chapter continues to examine the legal framework that governs the use of force, *jus ad bellum*, in the light of how the prohibition of the use of force as encapsulated under Article 2(4) of the UN Charter confers obligations on states with respect to the use of force (section 1.3), and the applicability of the exception to this primary rule (section 1.4). By mapping out the framework of *jus ad bellum*, this helps to put into perspective how the rules under international law should be interpreted with respect to how states conduct themselves in relation to the use of force. The more contentious aspects of *jus ad bellum*, such as humanitarian intervention will also be examined (section 1.5.), followed by the legal nature of Article 2(4) of the UN Charter (section 1.6).

1.2. The United Nations

The obligations on states to refrain from aggression, and the act of aggression itself, must be understood in the light of the framework of collective security within the UN.[20] The prevention and removal of threats to the peace, and suppression of acts of aggression or other breaches of the peace are central to the objectives of collective security and the existence of the UN.[21] After the horrors of World War II, the world was determined to establish an international multilateral institution that would maintain international peace and security, in the hopes that the future generations are protected from the scourge of war. This led to negotiations in 1944 and 1945 at Dumbarton Oaks and San Francisco, whereby, on June 26th 1945, the UN Charter was signed at San Francisco. The UN was born, an international organization with the primary purpose of maintaining international peace and security.[22]

The essence of collective security can be seen in Article 1 of the UN Charter, which stipulates that the purposes of the UN are *inter alia*:

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[20] Alexander Orakhelashvili, *Collective Security* (Oxford University Press 2011) 11.
[21] See *Preamble* and Articles 1, 24 and 39, UN Charter.
[22] *Preamble* to the UN Charter; see Leland M Goodrich, 'From League of Nations to United Nations' (1947) 1 International Organization 3.

> to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

According to this provision, the status quo is international peace and security. It can be inferred that states are under obligations to refrain from unilateral measures to maintain the status quo, as it is explicitly stated that measures of preventing and removal of threats to the peace, and the suppression of acts of aggression or other breaches of the peace are "effective collective measures." It is also inferred that states are now under obligations to refrain from unilateral actions when a wrong has been committed against them, as the provision confers obligations to resolve such matters under methods of international dispute settlement under international law as peaceful measures. This should be read together with Article 2(3) and Article 2(4) of the UN Charter. The former stipulates that 'all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered', whilst the latter pertains to the prohibition of the use of force.

This departs from practice prior to the formation of the UN Charter, [23] where international law had allowed unilateral measures, e.g. by means of sanctions when a state resorts to war,[24] reprisals or self-help.[25] Here, it can be said that the framework of collective security is an improvement from the League of Nations, as the sanction mechanism of the latter appeared to be dependent upon the willingness of the member States to take action,[26] as was in the nature of a decentralized legal order.[27]

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[23] Claud H. Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952) 81 Recueil des Cours II 451, 460.
[24] Hans Kelsen, *Principles of International Law* (2nd edn, Holt, Rinehart and Winston, Inc 1966) 25.
[25] Waldock (n 23) 460.
[26] Article 16 of the League Covenant states that 'should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse

The prohibition of states from unilateral measures either as sanctions against an aggressor state, or in response to wrongful activity, and the conferral of the interests of member states to the UN to preserve the status quo of international peace and security represent the shift from a decentralized system to a centralized system, i.e. from the League of Nations to the UN. By conferring their interests to the United Nations, it eliminates the autonomy for unilateral action when states believe the status quo is being challenged. According to Article 24 (1) of the UN Charter:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Thus, the Security Council is the UN organ that acts on behalf of all member states to the UN for the maintenance of international peace and security.[28] It is important to note that Article 24 of the UN Charter refers to 'primary' responsibility, and not 'exclusive responsibility.'[29] The powers of this organ are mainly found in Chapters VI and VII of the UN Charter, which provides the legal basis for the recommendations

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between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not'; See also Nico Krisch, 'Introduction to Chapter VII Powers: The General Framework, Articles 39 to 43' in Bruno Simma and others (eds), *The United Nations Charter: A Commentary* (3rd edn, Oxford University Press 2012) 1239.

[27] Kelsen has defined the principle of self-help as the primitive legal technique whereby 'in early law the execution of the sanction was decentralized, that is, it was left to the individual whose interest was violated by the behavior of another individual which constituted the delict', Kelsen, *Principles of International Law* (n 24) 7; He further submits that 'the significant – and decisive - step in the development of collective security is achieved only when the principle of self-help is eliminated, and the principle of self-help is eliminated only when a legal order effectively reserves the execution of the sanction to a special organ, that is, when the force monopoly of the community is effectively centralized. The effectiveness of collective security then, is dependent upon the extent to which the force monopoly of the community is centralized, and the scope afforded to the principle of self-help is correspondingly restricted', 36.

[28] Dan Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of Its Chapter VII Powers* (Oxford University Press 1999) 6.

[29] See *Certain expenses of the United Nations* (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C. J. Reports 1962, 151 (hereinafter "Certain Expenses of the United Nations"),163; *Legal consequences of the construction of a wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, 136 (hereinafter "Legal consequences of the Construction of a wall in the Occupied Palestinian Territory"), para.26.

and decisions made by the Security Council. Chapter VI provides the powers relating to peaceful settlement of disputes,[30] whilst Chapter VII provides the powers of enforcement. [31] These powers are to be enjoyed by the Council insofar as they are conferred or implied in the UN Charter.[32] Under Chapter VII, Article 39 of the UN Charter stipulates:

> 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.

None of the terms 'threat to the peace', 'breach of the peace' or 'act of aggression', are defined in the UN Charter. Thus, it can be inferred that any determination is likely to be a political decision based on factual findings rather than a legal determination;[33] and is ultimately at the discretion of the Council.[34] Upon a determination under Article 39, the Council may make recommendations or decide on the following measures under Articles 41 and 42 to maintain or restore international peace and security.

Thus, this provision serves as the trigger mechanism for undertaking collective enforcement measures under the UN Charter. It is important to note the necessary pre-requisite that the Council must first determine that there is either a 'threat to the

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[30] See Article 33, UN Charter.
[31] See Orakhelashvili, *Collective Security* (n 20) 26–27.
[32] Krisch (n 26) 1256.
[33] See Orakhelashvili, *Collective Security* (n 20) 150; see also Leland M Goodrich and Anne P Simons, *The United Nations and the Maintenance of International Peace and Security* (Greenwood Press 1974) 362; Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) 174–176.
[34] The International Criminal Tribunal for the former Yugoslavia (ICTY) has previously held, '[t]he situations justifying resort to the powers provided for in Chapter VII are a threat to the peace', a breach of the peace' or an 'act of aggression. While the 'act of aggression' is more amenable to a legal determination, the 'threat to the peace' is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter', Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case IT-94-1-AR72, Appeal Chamber, Decision on Jurisdiction, 2 October 1995, para.29; see also De Wet (n 33) 134–138, in particular, she observes that the supporters of unlimited Security Council discretion under Article 39 'point to the fact that the the terms "threat to the peace", "breach to the peace" or an "act of aggression" are not defined anywhere in the Charter', ibid 135.

peace, breach of the peace, or act of aggression.'[35] Here, the contrast between the UN and the League of Nations can be seen, as the latter had left member states to make such a determination, whilst the first three words of Article 39 of the UN Charter clearly establish that it is the role of the Security Council to determine any threats or breaches of the status quo and decide on collective enforcement measures. This is because member states of the UN have conferred upon the Security Council the authority to determine the existence of any threat to the peace, breach of the peace, or act of aggression; upon which, it can determine collective enforcement actions.

1.2.1 Determining an act of aggression

In the broader context of the UN, an act of aggression represents a violation of international peace and security. As there is no definition of an act of aggression in the UN Charter, the determination of an act of aggression is not so straightforward. As will be examined later in Chapter VI, one of most controversial aspects of the negotiations leading up to the Kampala Amendments was the determination of the existence of an act of aggression. The drafters had to be careful that the definition and conditions that the Court may exercise jurisdiction were consistent with the UN Charter,[36] which meant that they had to take into consideration the role of the Security Council with respect to determining an act of aggression. As such, opinion was divided upon whether the Security Council had the exclusive competence to determine an act of aggression, or whether other UN organs and/or the ICC may also have the competence to do so.[37]

As submitted above, the Security Council has the primary responsibility for the maintenance of international peace and security (Articles 1, 24, 39 of the UN Charter). Yet, by evidence of practice, the Security Council has appeared rather

[35] Krisch (n 26) 1335.
[36] See Niels Blokker, 'The Crime of Aggression and the United Nations Security Council' (2007) 20 Leiden Journal of International Law 867, 867–894; Roger Clark, 'Negotiating Provisions Defining the Crime of Aggression, Its Elements and the Conditions for the ICC Exercise of Jurisdiction Over It' (2010) 20 European Journal of International Law 1103, 1103–1115.
[37] This will be examined further in Chapter VII.

reluctant to determine acts of aggression.[38] To date, there have been only five situations that have been determined as aggression:

1) Acts committed by Southern Rhodesia against: *Zambia,*[39] *Mozambique,*[40] *Angola, Mozambique and Zambia;*[41]
2) Acts committed by South Africa against: *Angola,*[42] *Botswana,*[43] *Lesotho,*[44] *Seychelles;*[45]
3) Acts committed by mercenaries against Benin;[46]
4) Attacks committed by Israel against Tunisia;[47]
5) Acts committed by Iraq against diplomatic premises and personnel in Kuwait[48]

However, it can be argued that there have certainly been more than five situations of aggression since 1945. For example, the invasion of Kuwait by Iraq in 1990 and the invasion of Iraq by the US in 2003 could also be considered as acts of aggression if assessed in accordance with the primary norms under *jus ad bellum.*

Determinations of an act of aggression by the Security Council contain political ramifications such as the condemnation of the aggressor state, and the need for collective enforcement measures. As pointed out by Krisch, 'the determination of an act of aggression by the Security Council is a political and not a judicial finding. It primarily opens the way for enforcement action and helps unite the international community against the aggressor.'[49] The determination of an act of aggression under Article 39 of the UN Charter is thus concomitant with the responsibility to recommend enforcement collective measures under Chapter VII of the UN Charter to maintain or restore international peace and security as 'such determination has been a

[38] See Christine Gray, 'The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after Nicaragua' (2003) 14 European Journal of International Law 867, 898–899.
[39] SC Res. 326 (1973); SC Res. 455 (1979).
[40] SC Res. 386 (1976); SC Res. 441 (1977) ; SC Res. 424 (1978).
[41] SC Res. 445 (1979).
[42] SC Res. 387 (1976); SC Res. 546 (1984); SC Res. 571 (1985).
[43] SC Res. 568 (1985); SC Res. 572 (1985).
[44] SC Res. 527 (1982); SC Res. 580 (1985).
[45] SC Res. 496 (1981); SC Res. 507 (1982).
[46] SC Res. 405 (1977) .
[47] SC Res. 573 (1985); SC Res. 611(1988).
[48] SC Res. 667 (1990).
[49] Krisch (n 26) 1294.

method of collective coercion as well as a preliminary to collective measures of coercion.'[50] In other words, if the Security Council determines a situation as an act of aggression, there are legitimate expectations from the international community as a whole, for the Council to recommend enforcement measures.

Thus, the reluctance to determine the existence of aggression becomes somewhat more understandable, as the Council minimizes its potential of being in a position which gives rise to such expectations from the international community. There is also the political reality that all permanent members need to reach a consensus to authorize collective enforcement measures under Chapter VII in a situation of an act of aggression.[51] By refraining from determining the existence of aggression, the Council may avoid being in a position where an act of aggression has been determined but it is not in the position to authorize enforcement measures.

It is reasonable to question what would happen if the Security Council, as the central organ, fails to carry out its primary responsibility to restore and maintain international peace and security in the face of a threat to the peace, breach of the peace or act of aggression. If Article 24 of the UN Charter confers the Security Council the *primary* responsibility for maintaining international peace and security, then it can be implied that there is a subsidiary or secondary responsibility that falls upon another UN organ for the maintenance of international peace and security.[52]

This question came to light when GA Resolution 377 A(V) was adopted in 1950, ("The Uniting for Peace Resolution").[53] Against the backdrop of blockage by the USSR of furnishing any form of assistance to the Republic of Korea against the aggression by North Korea,[54] the US introduced an agenda item "United Action for Peace" whereby Secretary of State Dean Acheson proposed that the Assembly

[50] Goodrich and Simons (n 33) 366.
[51] Article 27(3), UN Charter.
[52] Peters writes that 'regarding the relationship between the Council and the Assembly, the term "primary" does not offer a precise guideline as to when and under what conditions exactly an act of the Assembly would unduly interfere with the competences of the Council and therefore be ultra vires. The exact delineation of competences is made not by the provision of Art.24 but by the more specific provisions of Arts 11, 12 and 39 and also by the Uniting for Peace Resolution,' Anne Peters, 'Article 24' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) 769;Waldock (n 23) 505; Juraj Andrassy, 'Uniting for Peace' (1956) 500 American Journal of International Law 563, 564.
[53] See LH Woolsey, 'The "Uniting for Peace" Resolution of the United Nations' (1951) 45 American Journal of International Law 129, 130.
[54] See G.A.O.R., 5th Sess., Annexes, vol.2, Item 68, U.N. Doc.A/1377(1950); See Peters (n 52) 768–769.

"organize itself to discharge its responsibility [for collective security] promptly and decisively if the Security Council is prevented from acting."[55] This Resolution intended to 'improve the machinery of the United Nations for preserving peace', by 'organizing the possibilities of collective action through the medium of the General Assembly in case the Security Council fails to exercise its responsibilities.'[56] Paragraph 1 of The Uniting for Peace Resolution:

> *Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or an act of aggression the use of armed force when necessary, to maintain or restore international peace and security.[57]

The underlying basis for this paragraph is that the failure of the Council to exercise its primary responsibility must be due to an exercise of the veto power.[58] The qualifiers of 'threat to the peace, breach of the peace, or act of aggression' in the Uniting for Peace Resolution are consistent with Article 39 of the UN Charter, which serves not only to reinforce the primary responsibility of the Security Council, but also implies that it is necessary for the situation to be of a level that may invoke Chapter VII of the UN Charter.

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[55] G.A.O.R., 5th Sess., Annexes, vol.2, Item 68, U.N. Doc.A/1377 (1950); It is also known that one of the purposes of the Uniting for Peace resolution was 'to eliminate any need for such improvisation as was necessary in Korea by laying a basis for a program in which members will make adequate forces available to the United Nations without undue delay', U.S. Department of State, United States Participation in the United Nations, Report by the President to the Congress for the Year 1960, Publication 4178 (1951) 100, as cited in Goodrich and Simons (n 33) 406.

[56] Andrassy (n 52) 463.

[57] Paragraph 1 further provides that the GA may meet in emergency special session within twenty-four hours of the request therefore, if it is not already in session at the time. The request for such emergency special session 'shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations,' which depicts the procedural steps within this mechanism.

[58] Myres S McDougal and Richard N Gardner, 'The Veto and the Charter: An Interpretation for Survival' (1951) 60 Yale Law Journal 258, 289.

According to paragraph 1 of the Uniting for Peace Resolution, the General Assembly may make 'appropriate recommendations to Members for collective measures' to maintain or restore international peace and security, which must be read in accordance with Article 11(2) UN Charter, which stipulates:

> The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

There appear to be two aspects within this provision: i) the discussion of any questions relating to the maintenance of international peace and security; ii) making a recommendation with regard to any such question. With respect to former, there does not appear to be limits, which implies that the General Assembly is allowed to discuss a question even if the Security Council is carrying outs its functions with respect to it.[59] However, there is a limitation on the latter, as can be seen in Article 12(1) of the UN Charter:

> While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

Article 14 of the UN Charter states:

[59] Andrassy writes that 'function' is 'a stage beginning when a matter is included in the agenda of the Council'but he cautions that 'there are stages in the Council's procedure where an item, though still on its agenda, is not actually considered', Andrassy (n 52) 568–569.

> Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

Thus it appears the Assembly can exercise its 'dispute-settlement functions comprehensively and has the power of investigation to that effect',[60] provided that it does not encroach upon the functions of the Security Council. In the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice (ICJ) observed that:

> As regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda. […] The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter.[61]

That said, as the *Uniting for Peace Resolution* is explicitly predicated upon the failure of the Security Council to exercise its primary responsibility, it is presumed that Article 12(1) of the UN Charter is not applicable in the present context.

The next question is the competence of the General Assembly to make recommendations to Members for collective measures, which include the use of armed force.[62] However, although such collective measures may include the use of armed force, they are not necessarily the same type of collective enforcement measures (Article 42, UN Charter) that the Security Council can make under Chapter

[60] Orakhelashvili, *Collective Security* (n 20) 46.
[61] *Legal consequences of the construction of a wall in the Occupied Palestinian Territory,* (n 29) paras. 27-28.
[62] Thomas M Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge University Press 2002) 35; Christine Gray, *International Law and the Use of Force* (3rd edn, Oxford University Press 2008) 260.

VII of the UN Charter. Unlike the Security Council, the General Assembly does not have any powers under the UN Charter to make legally binding recommendations to Member States, which undermines the hypothesis of the General Assembly having enforcement competences. Furthermore, it should not be forgotten that the Security Council derives its competence to authorize the use of military force by delegating its powers under Chapter VII of the UN Charter to Member States, whilst the General Assembly has no such powers under the UN Charter to delegate to Member States - an organ cannot delegate powers that it does not already possess. Also, as General Assembly resolutions have no legally binding effect, it is difficult to argue that a GA resolution can be relied upon as a legal source to confer powers to the General Assembly that are non-existent within the UN Charter. [63]

Upon closer examination of the text, the Uniting for Peace Resolution mentions that any appropriate recommendations to Members for collective measures, and the use of armed force if necessary, may be made in a situation of a 'breach of peace or act of aggression.' This implies that the use of force by the alleged aggressor state is already present. Therefore, the aggressed state is permitted under Article 51 of the UN Charter and customary international law to resort to self-defence. Likewise, as Article 51 provides for collective self-defence, the General Assembly may call upon the obligations of other States. [64] In other words, if the General Assembly makes recommendations that involve the use of military force, this is not authorization of military force *per se,* but rather a reinforcement of the inherent right to individual or collective self-defence as enshrined in the UN Charter. [65] Furthermore, by excluding 'threat to the peace', the Uniting for Peace Resolution reserves the competence to decide upon collective enforcement measures to preserve the status quo in the absence of an armed attack.

Therefore, although the UN Charter states that primary responsibility falls upon the Security Council to maintain international peace and security, the competence to authorize military force under Chapter VII is exclusively for the Security Council. This is consistent with the opinion of the ICJ in the Advisory Opinion on Certain Expenses of the United Nations:

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[63] Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 331.
[64] ibid 333.
[65] ibid 331; Yoram Dinstein, *War Aggression and Self-Defence* (5th edn, Cambridge University Press 2011) 541.

> the kind of action referred to in Article II, paragraph 2, is coercive or enforcement action. […] This last sentence says that when "action" is necessary the General Assembly shall refer the question to the Security Council. The word "action" must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article II has a comparable power. The "action" which is solely within the province of the Security Council is that which is indicated by the title of Chapter VI1 of the Charter, namely "Action with respect to threats to the peace, breaches of the peace, and acts of aggression".[66]

Therefore the General Assembly may not authorize enforcement collective measures in the same way as the Security Council under Chapter VII, not even pursuant to the Uniting for Peace Resolution. Be that as it may, the General Assembly may determine the existence of acts of aggression. The General Assembly has previously determined six situations involving aggression:

1) acts committed by China in Korea;[67]
2) the occupation of Namibia by South Africa;[68]
3) South Africa against other African States;[69]
4) acts committed by Portugal against territories under Portuguese administration;[70]
5) acts committed by Israel in the Middle East;[71]
6) acts by Serbia and Montenegro against Bosnia and Herzegovina.[72]

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[66] *Certain expenses of the United Nations* (n 29), 164-165.
[67] GA Res. 498(V)(1951), see also GA Res. 500(V)(1951); GA Res. 712(VII)(1953); GA Res. 2132 (XX)(1965).
[68] GA Res. 1899(XVIII)(1963); GA Res. S-9/2(1978).
[69] GA Res. 36/8(1981); GA Res. 36/172A(1981); GA Res. 38/92(1983); GA Res. 39/72(1984); GA Res. 2508(XXIV)(1969); GA Res. 36/172C(1981); GA Res. 38/39C(1983); GA Res. 39/72G(1984).
[70] GA Res. 2795(XXVI)(1971); GA Res. 3061(XXVIII) (1973); GA Res. 3133(XXVII)(1973).
[71] GA Res. 36/27(1981); GA Res. 37/18(1982); GA Res. 36/226A(1981); GA Res. ES-9/1(1982); GA Res. 36/226A(1981).
[72] GA Res. 46/242(1982); GA Res. 47/12(1992).

The present analysis has shown that under Article 24 of the UN Charter, the responsibility conferred to the Security Council to determine an act of aggression is *primary* and not *exclusive.* Other UN organs may thus also play a role in determining the existence of an act of aggression. However, collective enforcement measures to suppress any acts of aggression and maintain or restore the status quo of international peace and security can only be made by the Security Council. [73]

1.3. The prohibition of an act of aggression under international law

Concomitant to the framework of collective security within the UN Charter is the international legal framework that regulates the use of force, *jus ad bellum*. The primary rules confer obligations on States with respect to how they conduct their recourse to force. Yet, these rules are not precisely defined. Article 2(4) of the UN Charter is highly subject to interpretation, whilst the interpretative framework with respect to the customary international law rules is incoherent.[74] In a situation where there is need to consider the legality of the use of force, the situation will be assessed in accordance to the legal framework of jus ad bellum. This is not necessarily a straightforward task.

1.3.1. The legal prohibition of the use of force: Article 2(4) of the UN Charter

The cornerstone of *jus ad bellum* is the prohibition on the use of force, as enshrined in Article 2(4) of the UN Charter:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This is the rule under international law that confers obligations on member states to refrain from the threat or use of force. 'All members' implies that Article 2(4) is legally binding on every signatory state to the UN Charter. However, as it is generally

[73] Gray, 'The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after Nicaragua' (n 38) 888–896.
[74] Corten (n 63) 4–27.

accepted that Article 2(4) has attained customary international law status,[75] it is also legally binding on non- signatory states. Therefore, Article 2(4) confers obligations on *all* states to refrain from unilateral force against other states.

The question is whether Article 2(4) imposes a duty on individuals with respect to obligations to refrain from inter-state force. This is central to understanding the relationship between the act of aggression and the crime of aggression; with particular emphasis on the obligations that international law confers on states and individuals respectively. As the UN Charter is a legal instrument binding on all member States of the United Nations, an argument can be made that it is only applicable to states as subjects of international law. Individuals, *a fortiori*, are not under any obligations to comply with Article 2(4), as confirmed by Dörr and Randelzhofer:

> Private individuals or groups do not fall under Art.2(4), nor under customary prohibition of the use of force.[76]

Therefore, individuals are not duty-bearers with respect to compliance of Article 2(4). The inter-state nature of the obligations is further demonstrated by the use of the phrase 'international relations,' which suggests that the prohibition encompasses inter-state conflict, i.e. the use of force by one state against another state. This complements Article 2(3) of the UN Charter.

The next component of Article 2(4) is the 'use of force.' Here, the shift in terminology from 'war'[77] can be seen. The normative framework under the League of Nations that restricted recourse to war did not appear to prohibit measures short of war, thus leaving it for member states to determine that their recourse to force was not necessarily prohibited as it did not constitute war. Article 1 of the General Treaty for

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[75] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, 14 (hereinafter "Military and Paramility Activities in and against Nicaragua") para 190; see also para.73; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 29) para.87; See also Claus Kress, 'The International Court of Justice and the "Principle of Non-Use of Force"' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 567–568.

[76] Albrecht Randelzhofer and Oliver Dörr, 'Article 2(4)' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) 213.

[77] Corten (n 63) 51.

Renunciation of War as an Instrument of National Policy ("Kellogg-Briand Pact") stipulates:

> the High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.

The concept of 'recourse to war' is broad and can be envisaged to encompass a broad range of forcible acts. States may carry out military actions and not declare them as war and argue that they are thus not in breach of international law;[78] or states may carry out military actions which do not constitute a gravity severe enough to be considered as 'war' and similarly argue that they are not in breach of international law.

Article 2(4) overcomes this by setting a broader prohibition, which would encompass measures 'short of war' in addition to 'war.' Thus, any use of force is *prima facie* a breach of Article 2(4). Furthermore, the prohibition under Article 2(4) extends beyond the use of force, and also encompasses a 'threat to force.' This infers *prima facie* that states are also under an obligation to refrain from the threat of the use of force against other states, in addition to the use of force.[79]

It is generally accepted that 'force' refers to military force.[80] Thus, Article 2(4) should be understood as the prohibition of use or threat of military force by one State against another State.[81] Under Article 2(4), states are under obligation to refrain from the use of military force against the 'territorial integrity and political independence' of

[78] For example, in 1931 and 1937, China and Japan engaged in hostilities with each other but denied that there was no state of war, and thus the situation did not fall under the Kellogg-Briand Pact; see Randelzhofer and Dörr (n 76) 207. Nico Schrijver, 'The Ban on the Use of Force in the UN Charter' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 468–469.

[79] In general, see Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press 2009); Romana Sadurska, 'Threats of Force' (1988) 82 American Journal of International Law 239; Dino Kritsiotis, 'Close Encounters of a Sovereign Kind' (2009) 20 European Journal of International Law 299; Marco Roscini, 'Threats of Armed Force and Contemporary International Law' (2007) 54 Netherlands International Law Review 229; Corten (n 63) 92–124.

[80] Corten (n 63) 50–52.

[81] Corten argues that 'the applicability of article 2(4) presupposes a use of force by one State against another and not just a simple police operation by one State against individuals who allegedly broke its laws. If an aircraft unduly enters the airspace of a State that decides to shoot it down, the relationship opposes the State whose domestic legal order has been violated and the persons or persons responsible for that violation', ibid 66.

other States. That said, the modes 'territorial integrity' and 'political independence' are relatively vague, which naturally leaves room for interpretation by States with respect to their obligations to refrain from the use of force.[82]

Article 2(4) includes the phrase 'or in any other manner inconsistent with the purposes of the United Nations.' Arguably, this could also provide room for interpretation by States that the use of force is not contrary to Article 2(4) as it is not inconsistent with the purposes of the UN. However, in my view, the use of the conjunction "or" should be read as broadening the scope of the prohibition of the use of force, and not to suggest that States may use force for purposes which are not contrary to the purposes of the UN. In other words, the phrase serves to extend the circumstances when the use of force is prohibited. Thus, in addition to refraining from the use of force against the territory integrity or political independence of any state, states are also under obligations to refrain from the use of force in any other manner inconsistent with the purposes of the United Nations.

For example, Article 2(4) does not appear to explicitly exclude reprisals as a form of self-help against a wrong state when an international wrong has been committed against the aggrieved state. An argument can be made that Article 2(4) does not necessarily restrict or preclude a state's inherent right to forcible self-help. However, the general framework of collective security within the UN requires states to relinquish their right to unilateral measures such as forcible self-help. The phrase 'or any other manner inconsistent with the purposes of the United Nations' would arguably encompass obligations on states to refrain from the use of force as reprisals because such forms of self-help are contrary the framework of collective security.[83] This may be further affirmed by reading Article 2(3) together with Article 2(4).[84] Therefore, 'or in any other manner inconsistent with the purposes of the United

[82] Myres S McDougal and Florentino P Feliciano, 'Legal Regulation of Resort to International Coercion: Aggression and Self-Defence in Policy Perspective' (1959) 68 The Yale Law Journal 1057, 1101; Rosalyn Higgins, 'Legal Limits to the Use of Force by Sovereign States United Nations Practice' (1961) 37 British Yearbook of International Law 269, 283–284; Randelzhofer and Dörr (n 76) 215–216.

[83] Derek Bowett, 'Reprisals Involving Recourse to Armed Force' (1972) 66 American Journal of International Law 1, 1.

[84] SC Res. 188(1964) has condemned 'reprisals as incompatible with the purposes and principles of the United Nations';[84] GA Res. 2625 (XXV)(1970) Declaration on Principles of International Law concerning Friendly Relations and cooperation among States ("Declaration on Friendly Relations") has also provided that 'States have a duty to refrain from acts of reprisal involving the use of force'.

Nations' can be interpreted as extending the prohibition of the use of force to encompass situations that are contrary to the framework of collective security.

1.3.2. Article 2(4) and an act of aggression

An act of aggression is not defined in the UN Charter. As such, there is no provision under the Charter that specifically prohibits an act of aggression. Articles 1 and 39 infer that an act of aggression is contrary to the status quo of international peace and security. These articles suggest that states are under general obligations to refrain from committing an act of aggression. Yet, the only relevant provision conferring legal obligations on states with respect to recourse to force is Article 2(4) of the UN Charter. By prohibiting recourse to unilateral force on the inter-state levels, the UN Charter effectively precludes a situation of aggression.

Differences in thresholds pertaining to the use of force can be inferred from Articles 1 and 39 of the UN Charter, which describe 'threats to the peace', 'acts of aggression', or other 'breaches of the peace' as potential disruptions to the maintenance of international peace and security. As it is presumed that an act of aggression is more serious than a threat to the peace and/or breach of the peace, it is logical that only a serious violation of Article 2(4) of the UN Charter should be considered as an act of aggression. Thus, there is an implicit understanding that a certain threshold must be met in order for a violation of Article 2(4) UN Charter to be determined as an act of aggression.

In 1974, the General Assembly adopted GA Resolution 3314 (XXIX), which contains a definition of aggression.[85] This definition is not legally binding on member states. Nevertheless, it can be said to have highly normative value in determining whether a violation of Article 2(4) of the UN Charter can be considered as an act of aggression.[86] It will now be examined to what extent this definition is useful in providing an insight to what the required threshold is for a violation of Article 2(4) UN Charter to amount as an act of aggression. Article 1 of the annex to GA Resolution 3314(XXIX):

[85] For a comprehensive account of the drafting and negotiation history of GA Resolution 3314(XXIX) 1974, see Benjamin B Ferencz, *Defining International Aggression: The Search for World Peace*, vol II (Oceana 1975).
[86] Dinstein, *War Aggression and Self-Defence* (n 65) 124.

> 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.

Although this provision appears to broadly mirror Article 2(4) of the UN Charter, there are several differences between both texts. First, Article 1 of the annex to GA Resolution 3314(XXIX) excludes the 'threat of force.' Second, it specifies the need for the use of 'armed force.' Third, Article 1 of the annex to GA to Resolution 3314(XXIX) has included the term 'sovereignty' to be read together with territorial integrity and the political independence of the intended victim state. Fourth, the intended victim state is described as 'another state' rather than 'any' state. Fifth, the scope of the prohibited conduct under Article 2(4) of the UN Charter includes 'any other manner inconsistent with the purposes of the United Nations', whilst Article 1 of the annex to GA Resolution 3314(XXIX) sets the scope for prohibited conduct to include 'any other manner inconsistent with the Charter of the United Nations.' Sixth, there is a phrase that connects Article 1 with the rest of the definition.

The key aspects of Article 1 of the annex to GA Resolution 3314(XXIX) that demonstrate an act of aggression encompasses a higher gravity of the use of force than a violation of Article 2(4) of the UN Charter are:

- the elimination of the threat of force.
- the requirement of 'armed force', which suggests that a higher level of the use of force is needed for a situation to be considered as an act of aggression.
- the criteria of 'any other manner inconsistent with the UN Charter' suggests the need for legal assessment of the use of force under Article 2(4), Article 51 and Chapter VII of the UN Charter. The ramifications are that such use of force is clearly unlawful.

It is questionable whether the inclusion of 'sovereignty' with the phrase 'territorial integrity and political independence' has any added value with respect to the interests of the intended victim state or if it is merely rhetorical. Be that as it may, Article 1 of the annex to GA Resolution 3314(XXIX) when read against Article 2(4) UN Charter suggests that the intended use of force must be actual armed force that is clearly

unlawful, directed against the sovereignty, territorial integrity and political independence of the aggressed state.

Article 1 of the annex to GA Resolution 3314(XXIX) must be read in conjunction with Article 2 of the annex to GA Resolution 3314 (XXIX):

> The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council, may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

Armed force must be initiated by the aggressor state and must be in contravention to the UN Charter. As such, this provides ambit for an argument that any initiation of armed force, which is not in contravention to the UN Charter, may not be considered as aggression under Article 2 of the annex to GA Resolution 3314(XXIX).

Article 2 of the annex to GA Resolution 3314(XXIX) suggests that whenever a state initiates the use of armed force, which is in contravention of the UN Charter against another State, this is *prima facie* an act of aggression. The Security Council, upon its discretion, can reverse the presumption that the armed force is an act of aggression. It is not clear who makes the presumption, whether it is a general presumption made by the aggressed state, international community or a specific organ within the UN. Regardless, the role of the Security Council in this provision is important.

By conferring the Security Council with the discretion to refute a presumption that an armed force is an act of aggression, Article 2 of the Annex to GA Resolution 3314(XXIX) upholds the primary role of the central organ to maintain international peace and security and determine an act of aggression (Articles 24 and 39 UN Charter). The discretion of the Council with respect to the situation extends not only to the assessing the gravity of the use of armed force, but also the gravity of the consequences of the armed force. Presumably, these consequences refer to the aftermath of the initiation of the use of force in the territory of the aggressed state. This is a rather broad discretion.

The mention of ‘sufficient gravity’ as a determining factor with respect to the armed force and its consequences, when read together with Article 1 of the annex to

GA Resolution 3314(XXIX), can be used to support the argument that the armed force must be of a sufficiently serious violation of Article 2(4) of the UN Charter to be considered as an act of aggression. Article 2 of the annex to GA Resolution 3314(XXIX) also demonstrates how determination of an act of aggression by the Security Council is normative, as the criteria of 'other relevant circumstances' including the lack of 'sufficient gravity' are not necessarily legal criteria.

The next provision provides an enumerative list of acts that may qualify as an act of aggression. Article 3 of the annex to GA Resolution 3314 (XXIX) stipulates:

> Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, 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 therein.

The enumerated list is to be read in conjunction with Article 2 of the annex to GA Resolution 3314(XXIX). This means that each of these acts may qualify for an act of aggression if they are initiated by the aggressor state and not refuted by the Security Council as being of insufficient gravity (or other relevant circumstances). Upon a closer examination of the text of the enumerated acts, it can be observed that each act

is either performed by or on behalf of a state.[87] This reaffirms the state-centric aspect of an act of aggression under GA Resolution 3314(XXIX).

It can be questioned whether the enumerated list is exhaustive, i.e. opened or closed. The former would suggest that other acts that fall outside the list could also qualify as an act of aggression, whilst the latter would imply the contrary. The answer is in Article 4 of the annex to GA Resolution 3314(XXIX), which stipulates:

> The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

Therefore, acts that fall outside the list in Article 3 of the annex to GA Resolution 3314 (XXIX) may also be considered as an act of aggression. Article 4 of the annex to GA Resolution 3314(XXIX) specifically provides the Council with discretion to determine that an act outside the list may be an act of aggression. As can be seen, the definition within GA Resolution 3314(XXIX) has made specific reference to the discretion of the Security Council in several provisions. This demonstrates that the definition in GA Resolution 3314(XXIX) is for the purposes of guiding the Security Council to make a determination of an act of aggression under Article 39.

Ultimately, the definition of aggression in GA Resolution 3314(XXIX) is normative, and does not carry the legal weight as envisaged by the representative of the USSR at the adoption of the Resolution, when he proclaimed that the definition "accomplished its main purpose of depriving a potential aggressor of the possibility of using juridical loopholes and pretexts to unleash aggression."[88] Nevertheless, GA Resolution 3314(XXIX) is a significant instrument in international law and plays a role as a guiding text in both legal and normative determinations of an act of aggression.[89]

As will be discussed in more detail in Chapter III, the definition of an act of aggression for the purposes of the state act element of the crime in Article 8 *bis* of the Kampala Amendments has incorporated Articles 1 and 3 of the Annex to GA

[87] Randelzhofer and Dörr (n 76) 213–214.
[88] Representative of the USSR, UN Doc. A/C.6/SR.1472 (1974), 2.
[89] For a criticism of GA Resolution 3314(XXIX) 1974, see Julius Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression' (1977) 71 American Journal of International Law 224, 224; in particular, Stone claims that the 'remarkable text rather appears to have codified into itself all the main "juridical loopholes" and pretexts to unleash aggression'; see also Sayapin (n 12) 105.

Resolution 3314(XXIX). This implies that the determination of an act of aggression for the purposes of prosecuting the crime of aggression at the ICC will encompass examining a violation of Article 2(4) in the light of Articles 1 and 3 of the Annex to GA Resolution 3314(XXIX).

1.3.3. A legal determination of an act of aggression

It is interesting to note the practice of the International Court of Justice (ICJ) with respect to determining an act of aggression.[90] Although the Court has not yet made any determinations of an act of aggression, this does not mean that it does not have the competence to do so.[91] In the *Case concerning armed activities on the territory of the Congo* (Democratic Republic of Congo v Uganda),[92] the Democratic Republic of Congo (DRC) had filed an Application instituting proceedings against Uganda in respect of a dispute concerning "acts of armed aggression perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity."[93]

Upon examining the facts,[94] the Court held that 'the evidence has shown that the UPDF (Ugandan forces) traversed vast areas of the DRC, violating the sovereignty of that Country. It engaged in military operations in a multitude of locations […]. These were grave violations of Article 2, paragraph 4 of the Charter.'[95] It concluded that 'Uganda has violated the sovereignty and also the territorial integrity of the DRC. […] The unlawful military intervention by Uganda was of such a magnitude and

[90] See Separate Opinion of Judge Elaraby, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, 168 (hereinafter "Armed activities on the territory of the Congo"), at para.11

[91] Blokker (n 36) 883; Gray, 'The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after Nicaragua' (n 38) 888–905; see also *Certain Expenses of the United Nations* (n 29) 163-165; *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), Judgment, I.C.J. Reports 1980, 3 (hereinafter "United States Diplomatic and Consular Staff in Tehran), 21-22, *Military and Paramilitary Activities in and against Nicaragua* (n 75), 434-437.

[92] *Armed Activities on the Territory of the Congo* (n 90) 168.

[93] See *Armed Activities on the Territory of the Congo* (n 90) at para.1: The Application also included the request that the Court adjudge and declare inter alia that Uganda is guilty of an act of aggression within the meaning of Article 1 of resolution 3314 of the General Assembly of the United Nations of 14 December 1974 and of the jurisprudence of the International Court of Justice, contrary to Article 2, paragraph 4, of the United Nations Charter.

[94] *Armed Activities on the Territory of the Congo* (n 90) paras. 72-91.

[95] *Armed Activities on the Territory of the Congo* (n 90) para. 153.

duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter.'[96]

Therefore, the findings of the Court *inter alia* were that Uganda did not commit an act of aggression, but had violated the principle of the non-use of force and non-intervention.[97] In the Separate Opinions of Judge Elaraby and Judge Simma, the Court was criticised for not finding that an act of aggression was committed by Uganda. Judge Elaraby held in his Separate Opinion that the Court should have explicitly upheld DRC's claim that 'such unlawful use of force amounted to aggression'[98] and felt it was 'incumbent upon the Court to respond to the serious allegation put forward by the DRC that the activities of Uganda also constitute aggression,'[99] and:

> Rarely if ever has the Court been asked to pronounce upon a situation where such grave violations of the prohibition of the use of force have been committed. This makes it all the more important for the Court to consider the question carefully and — in the light of its dicta in the Nicaragua case — to respond positively to the Democratic Republic of the Congo's allegation that Ugandan armed activities against and on its territory amount to aggression and constitute a breach of its obligations under international law. […].[100]

Judge Simma observes that 'Uganda invaded a part of the territory of the DRC of the size of Germany and kept it under its own control.'[101] He continues:

> So, why not call a spade a spade? If there ever was a military activity before the Court that deserves to be qualified as an act of aggression, it is the Ugandan invasion of the DRC. Compared to its scale and impact, the military

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[96] *Armed Activities on the Territory of the Congo* (n 90) para. 165.
[97] For a criticism, see Blokker, 'The Crime of Aggression and the United Nations Security Council' (n 36) 884.
[98] Separate Opinion of Judge Elaraby, *Armed Activities on the Territory of the Congo* (n 90) para. 1.
[99] Separate Opinon of Judge Elaraby, *Armed Activities on the Territory of the Congo* (n 90) paras. 8-9.
[100] Separate Opinon of Judge Elaraby, *Armed Activities on the Territory of the Congo* (n 90) paras.18, 20.
[101] Separate Opinion of Judge Simma, *Armed Activities on the Territory of the Congo* (n 90) para. 2.

> adventures the Court had to deal with in earlier cases, as in Corfu Channel, Military and Paramilitary Activities in and against Nicaragua or Oil Platforms, border on the insignificant.[102]

This case demonstrates that even though the facts may present an act of aggression, this does not necessarily amount to a legal determination of the existence of such an act, as the Court was only satisfied that a grave violation of Article 2(4) of the UN Charter was committed.

1.4. Exceptions to Article 2(4) of the UN Charter

The UN Charter provides two exceptions to Article 2(4) of the UN Charter: i) self-defence (Article 51, UN Charter); ii) authorization by the Security Council under Chapter VII (Article 42, UN Charter).[103] These exceptions allow a state to depart from its obligations to comply with Article 2(4), which means that they may resort to the use of force under these circumstances. In such situations, there is no breach of primary obligations on the part of the state in question, e.g. the alleged aggressor state, which means that there is no finding of an unlawful use of force – or act of aggression. Thus, it is in the interests of the alleged aggressor state to argue that the purported act of aggression falls within one of the exceptions to the prohibition of the use of force.

1.4.1. Self-defence

Self-defence is broadly understood as counter-force by (an) aggrieved state(s) against an attacking state(s), with the objective to repel and/or protect its territory from further attack. As any and all instances of the use of force must be assessed within the primary rules of *jus ad bellum*, self-defence should always be examined in the light of this legal framework. The primary rule under international law that prohibits the use of force allows a state to act in self-defence as an exception to the rule. Thus, in the present UN era, self-defence should be read in accordance with the

[102] ibid.

[103] Randelzhofer and Dörr argue that, '[A] State which wishes to invoke an exception to that rule in order to justify forcible actions in its international relations, will carry the burden to show that the invoked justification exists as a legal norm in abstracto and that its preconditions were fulfilled in a given case of armed force', Randelzhofer and Dörr (n 76) 217.

prohibition of the use of force and not in an abstract form, or as its own primary rule within *jus ad bellum*.

The norms pertaining to self-defence are an exception to the primary rule that prohibits the use of force. Therefore, it is only logical that these norms are governed by this primary rule in the sense that the circumstances where a state can resort to self-defence are subject to the conditions within the rule itself for an exception to the rule. It is these conditions that depict when an exception can be made to the primary rule, allowing a state to resort to the use of force.

As Article 2(4) encapsulates the primary rule that prohibits the use of force, the exception to this rule is reflected in Article 51:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[104]

The UN Charter acknowledges that states have the 'inherent right' of self-defence. A connection can be made that self-defence is a form of self-help. Thus, the "inherent right" refers to the primitive right of states to resort to self-defence as a form of self-help. As this right has always been present in international law, it is logical that it is retained as an exception to the primary rule that prohibits the use of force. This is reflected in Article 2(4) and Article 51 of the UN Charter.

Yet, it is important that the "inherent right" to self-defence is not completely unfettered, and must be conducted in accordance with the norms under international law that govern the exception to the rule that prohibits the use of force. These norms delineate the circumstances when a state may resort to self-defence. The sources that govern these norms are the UN Charter and customary international law. Similarly to Article 2(4), there is ambit for interpretation, as Article 51 can be read either

[104] See Franck (n 62) 45–52; Dinstein, *War Aggression and Self-Defence* (n 65) 187–239.

comprehensively or restrictively, and Randelzhofer and Nolte rightly point out that 'the content and scope of a customary right of self-defence are unclear.'[105] This means that there is ambit of interpretation with respect to whether the use of force by the state in question is lawful self-defence.

There appears to be a gap between Article 2(4) and Article 51, as there is a difference between the "use of force" and "armed attack."[106] The latter implies a larger scale attack than the former. Simply put, not every use of force may constitute an armed attack. This was recently held by the Eritrea Ethiopia Claims Commission (EECC); that the border incidents between the two countries amounted to 'relatively minor incidents' and 'were not of a magnitude to constitute an armed attack by either State against the other within the meaning of Article 51 of the UN Charter.'[107]

It can be inferred that not every violation of Article 2(4) would provide a legal basis for the aggrieved state to invoke the norms relating to self-defence: there is the criterion of a certain degree of gravity of the armed force.[108] Yet, whether an armed force (which is of sufficient gravity) is a condition within the primary rule that prohibits the use of force for an exception to the rule to apply is one of the most contested areas of *jus ad bellum.* In other words, is an armed attack a condition, which is necessary for a state to exercise self-defence? [109] This has given rise to a divide in consensus in both practice and scholarship.[110]

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[105] Albrecht Randelzhofer and Georg Nolte, 'Article 51' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) 1404.

[106] Corten (n 63) 207–208.

[107] Eritrea-Ethiopia Claims Commission (EECC): Partial Award - Jus ad bellum, Ethiopia's Claims 1-8* [December 19, 2005] 45 ILM 430 (2006) (hereinafter "Eritrea Ethiopia Claims Commission, Partial Award, Jus ad Bellum"), at 433.

[108] Corten (n 63) 403; see also Waldock (n 23) 471–498; Dinstein, *War Aggression and Self-Defence* (n 65) 201; Oscar Schachter, 'In Defense of International Rules on the Use of Force' (1986) 53 University of Chicago Law Review 113, 132.

[109] Dinstein, *War Aggression and Self-Defence* (n 65) 196.

[110] ibid 194–200; Abraham Sofaer, 'On the Necessity of Pre-Emption' [2003] European Journal of International Law 209; Michael Bothe, 'Terrorism and the Legality of Pre-Emptive Force' (2003) 14 European Journal of International Law 227; Michael Reisman and Andrea Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense' (2006) 100 American Journal of International Law 525; Ruth Wedgwood, 'The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense' (2003) 97 American Journal of International Law 576; Bin Cheng, 'Pre-Emptive or Similar Type of Self-Defense in the Territory of Foreign States' (2014) 13 Chinese Journal of International Law 1; Miriam Sapiro, 'Iraq: The Shifting Sands of Preemptive Self-Defense' (559) 97 American Journal of International Law 2003; Christine Gray, 'The US National Security Strategy and the New " Doctrine" on Preemptive Self-Defense' (2002) 13 Chinese Journal of International Law 1;

The opposing views are predicated upon the interpretation of Article 51 of the UN Charter. A broad reading of Article 51 would assert that the UN Charter does not preclude a state from recourse to self-defence in the absence of an armed attack as part of the "inherent right."[111] The crux of this argument reads the phrase "inherent right" to encompass a customary international law right that allows states to exercise anticipatory self-defence in the absence of an armed attack. Presumably, this right has existed prior to the formation of the UN Charter. Therefore, Article 51 provides that nothing in the UN Charter could preclude this inherent right to anticipatory self-defence, not even the explicit requisite of an armed attack.

In my view, this interpretation is incorrect for two reasons. First, it is questionable as to whether the "inherent right" mentioned within Article 51 encompasses the so-called right to anticipatory self-defence under customary international law.[112] Corten rightly points out:

> this argument relies on an assertion that is far from proven: the existence, at the time the Charter was drawn up, of a customary right of preventive self-defence that supposedly then subsisted without ever being fundamentally called into question.[113]

Christian Henderson, 'The Bush Doctrine: From Theory to Practice' (2004) 9 Journal of Conflict and Security Law 3;Gray, 'The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA'.

[111] For example, Sir Humphrey Waldock argues that 'it would be a travesty of the purposes of the Charter [the preservation of international peace and security] to compel a defending state to allow its assailant to deliver the first, and perhaps fatal blow… to read Article 51 literally is to protect the aggressor's right to the first strike', Waldock (n 23) 498.

[112] The basis that is relied upon to argue that the right to anticipatory self-defence exists under customary international law can be traced back to the exchange between the USA and Great Britain in the 1830s, also known as the *Caroline case*. The Secretary of State of the United States, Daniel Webster, called upon the British to show that the 'necessity of self-defence was instant, overwhelming, leaving no choice of means, and no moment for deliberation … and that the British force, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it', Letter from Daniel Webster, U.S. Secretary of State, to Henry Fox, British Minister in Washington (Apr.24, 1841), 29 British and Foreign State Papers 1840-1841, at 1138; for a criticism of the *Caroline case* as a source with respect to anticipatory self-defence, see Corten (n 63) 409–410; Dinstein, *War Aggression and Self-Defence* (n 65) 197; Ian Brownlie, 'The Use of Force in Self-Defence' (1961) 37 British Yearbook of International Law 183, 265.

[113] Corten (n 63) 409.

Second, to read Article 51 broadly would appear contrary to the object and purpose of the provision and the overall UN Charter. A broad interpretation would suggest a drafting incoherency as Article 51, which contains an explicit condition precedent of an armed attack for a member state to invoke the inherent right of self-defence, would simultaneously allow this inherent right of self-defence to exist irrespective of the condition precedent. In this regard, the explicit mention of the condition of an armed attack is rather redundant. This interpretation, as argued by Dinstein, is "counter-textual, counter-factual and counter-logical."[114]

Be that as it may, the debate relating to anticipatory self-defence need not be examined here.[115] Instead, attention is drawn to the prospect of a situation when a state has acted in a situation of anticipatory self-defence against another state. Here, there appear to be two findings; either the state has acted lawfully in anticipatory self-defence in the absence of an armed attack by the other state, or the state has committed an unlawful recourse to force against the other state, the gravity of which may amount to an act of aggression. As can be seen, the interpretation of the applicability of the norms pertaining to self-defence, which allow an exception to the primary rule of the prohibition of the use of force, has significant implications with respect to whether the state in question has acted in breach of international obligations.

This can be used as an example to demonstrate how the determination of an act of aggression is highly subject to the interpretation of the primary rule prohibiting the use of force – and the exceptions to this rule. The implications of this with respect to the crime of aggression are that it is unclear whether the state act of aggression may include anticipatory self-defence. In other words, it may be contended that there is no legal basis for prosecuting the perpetrator for the crime of aggression because the alleged aggressor state has not committed an act of aggression, but rather has acted in anticipatory self-defence. Ultimately, this will be at the discretion of the ICC to determine whether the use of anticipatory self-defence in question may amount to a state act of aggression for the purposes of prosecution of the crime of aggression.

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[114] Dinstein, *War Aggression and Self-Defence* (n 65) 196. In particular, he argues that 'the reliance on an extra-Charter customary right of self-defence is also counter-logical', at 198.
[115] see Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 255–367.

1.4.2. Authorisation by the Security Council under Chapter VII

As established in section 1.2, the Security Council has the primary responsibility (Article 24, UN Charter) to facilitate collective measures for the purposes of maintaining the status quo of collective security (Article 1, UN Charter) upon determination of the existence of any threat to the peace, breach of the peace or act of aggression (Article 39, UN Charter). Its powers are *inter alia* derived from Chapter VII of the UN Charter, which allow it to decide which form of collective measures shall be taken in accordance with Articles 41 and 42 of the UN Charter to maintain or restore international peace and security.

Article 41 refers to peaceful measures, whilst Article 42 refers to 'actions by air, sea, or land forces as may be necessary to maintain or restore international peace and security'. The latter encompasses forceful measures such as military action, which is carried out by Member States of the UN that Blokker has called the 'coalition of the able and willing'.[116] He observes that 'these resolutions have become the primary instrument through which the Security Council has acted if the use of military force was considered necessary.'[117] He points out that 'this model of "delegated enforcement action" is not explicitly mentioned in the UN Charter as one of the instruments available to the Security Council',[118] but concludes nevertheless that 'it is an implied power of the Security Council to adopt such resolutions.'[119]

The legal basis for the "delegated enforcement action" is derived from the UN Charter. As all member states have conferred their interests and competence to the

[116] Niels Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"' (2000) 11 European Journal of International Law 541. See also Niels Blokker, 'Outsourcing the Use of Force: Towards More Security Council Control of Authorized Operations?' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015).

[117] Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"' (n 116) 542.

[118] Ibid; see also Sarooshi (n 28) 148–149; Also, Sarooshi submits that three conditions are necessary for a lawful delegation by the Council of its Chapter VII powers to Member States: first, there must be a certain minimum degree of clarify in the resolution which delegates the power; second, there is an obligation on the Council to exercise some form of supervision over the way in which the delegated powers are being exercised; third, the Security Council must impose on Member States a requirement to report to the Council on the way in which the delegated power is being exercised, 155.

[119] Ibid 567; Sarooshi further submits that 'both the Charter system and principles of delegation reject carte blanche delegations and favour authorizations with respect the authority and responsibility of the SC in the UN Collective security system', id.

central organ to have the power to decide and/or recommend collective enforcement measures to restore or maintain international peace and security, authorization of the use of force represents a delegation of these powers under Chapter VII of the UN Charter to the participating member states to facilitate forcible enforcement measures.[120]

Practice of the Security Council resolutions that authorize the use of force has been varied and diverse; [121] yet what is consistent is that such authorization is sufficiently clear and explicit: 'all necessary means'[122]; 'all necessary measures.'[123] A sufficiently clear and explicit authorization of the use of force is also representative of unanimity between all permanent members of the Council with respect to forcible enforcement measures. In the spirit and framework of collective security, the Security Council does not recommend forcible enforcement measures for the purposes of punishing any State *per se* for breaching primary obligations, but rather to maintain or restore the status quo of international peace and security (Articles 1, 24, 39 , UN Charter).

The conferral of powers under Chapter VII of the UN Charter is the reason why a clear and explicit authorization by the Security Council is needed for member states to use force.[124] This serves as an exception to the prohibition on the use of force under Article 2(4) of the UN Charter because states have been delegated powers under Chapter VII to exercise the use of force.[125] It should be noted that the powers that the Security Council may delegate to member states under Chapter VII are the same powers as accorded to it under the UN Charter. Without this delegation of powers by the Security Council to the member states, Article 2(4) is applicable.

1.5. The question of humanitarian intervention

Grey areas in *jus ad bellum* relate to situations where the particular legality of the use of force is uncertain because the international community is divided with respect

[120] Sarooshi (n 28) 144.
[121] Blokker, 'Outsourcing the Use of Force: Towards More Security Council Control of Authorized Operations?' (n 116) 211–214.; Corten (n 63) 314.
[122] *Gulf War,* SC Res. 678(1990) para 2; *Yugoslav Conflict*, SC Res. 816 (1993) para 4; SC Res. 836(1993) para 10; SC Res. 770 (1992) para 2; *Somalia*, SC Res. 792(1992), para.2; *Rwanda*, SC Res.929 (1994); *Zaire*, SC Res. 1080 (1996) para.5; *Albania*, SC Res. 1114 (1997) para 4; *East Timor*, SC Res. 1264 (1999) para 3.
[123] *Haiti*, SC Res. 1264 (1999) para 3.
[124] Corten (n 63) 314; Sarooshi (n 28) 13.
[125] Corten (n 63) 312; Krisch (n 26) 1333.

to how the rules should be interpreted. In addition to anticipatory self-defence, another example is humanitarian intervention. This is when states, a group of states, or international organisations resort to the use of force against the territory of another state in order to protect that state's nationals from deprivation of international recognised human rights; such protection neither having authorisation by the Security Council nor an invitation from the legitimate government of the target state.[126]

Humanitarian intervention appears *prima facie* incompatible with Article 2(4) of the UN Charter and the broader framework of collective security, and does not fall within one of the exceptions to the primary rule that prohibits the use of force. However, proponents in favour of the legality of this doctrine may put forward a restrictive interpretation of Article 2(4), whereby the scope of the prohibition of the use of force is narrow, and excludes humanitarian intervention. This interpretation is largely premised on the goals of humanitarian intervention, which is to enforce human rights. Such goals are *prima facie* consistent with the purposes of the UN. Furthermore, as argued by Reisman, such intervention 'seeks neither territorial change nor a challenge to the political independence.'[127]

Corten however, is not convinced. He submits that it is 'excessive to claim that an armed action conducted on the territory of a State without its consent would not be contrary to its territorial integrity or to its political independence, or performed in a manner incompatible with the UN's purposes.'[128] I concur, as my interpretation of the phrase "or, in any other manner inconsistent with the purposes of the United Nations" is intended to broaden the scope of the prohibition under Article 2(4) of the UN Charter to include recourse to force contrary to the centralized system of collective security.

It would appear that intervention by states in the absence of delegation of powers by the Security Council under Chapter VII of the UN Charter is inconsistent with the purposes of the UN, and the underlying framework of collective security. Corten

[126]Verwey defines humanitarian intervention as, 'the protection of fundamental human rights by a State or group of States, particularly the right to life of persons who are nationals of and sojourning in other States, involving the use or threat of force, such protection taking place neither upon authorisation by relevant organs of the United Nations nor upon invitation by the legitimate government of the larger State', WD Verwey, 'Humanitarian Intervention under International Law' (1985) 32 Netherlands International Law Review 357, 375.

[127] M. Reisman, 'a humanitarian intervention to protect the ibos' in R.B. Lilich, (ed)., *Humanitarian Intervention and the United Nations* (Charlottesville 1973), at 177, cited in WD Verwey, ibid 389.

[128] Corten (n 63) 499.

rightly points out that nothing in the actual text of Article 2(4) of the UN Charter indicates that it 'authorises infringement of any of the UN's purposes.'[129] Yet, some may argue that humanitarian intervention is lawful under customary international law, thus constituting an extra-Charter exception to the prohibition of the use of force.[130] The question whether customary international law allows humanitarian intervention need not be answered here.[131]

Humanitarian intervention has arisen as an area of contention with respect to the definition of the crime of aggression. As will be examined in further detail in Chapter III,[132] the question of humanitarian intervention was raised in the negotiations at Kampala. The US, in particular, although a non-State party, was anxious that the definition of the crime of aggression should not encompass humanitarian intervention.[133] Creegan has also expressed concern that the definition of the crime of aggression would encompass some situations of use of force, which although are *prima facie* unlawful, are nevertheless "good acts", and do not appear to be protected.[134] Her premise is that if humanitarian intervention is considered as an act of aggression under the definition of the crime of aggression in the Kampala Amendments, there is a possibility that individuals, who planned, prepared, initiated or executed the intervention, may be prosecuted at the ICC.[135] Therefore, individuals who satisfy the leadership element pursuant to the definition of the crime do not appear to be protected from prosecution at the Court if the State they serve has committed a "good act" of aggression, which served the purposes of protecting human rights.

Her position has underpinnings of just war theory.[136] She writes in favour of defining the crime of aggression in a way so as to 'proscribe only conquest, or

[129] ibid 500.
[130] Lilich submits that, 'when it is clear that the international authorities cannot or will not discharge their responsibilities, it would seem logical to resort again to customary international law to accept its rule and validity of the doctrine of humanitarian intervention', quoted by Verwey (n 126) 384.
[131] For an overview of humanitarian intervention in the context of UN Debates on the Use of Force from 1945-1999, see Corten (n 63) 505–511.
[132] As will be discussed in section 3.3.1, Chapter III.
[133] See Claus Kress and Leonie von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 Journal of International Criminal Justice 1179, 1179–1217; see also Erin Creegan, 'Justified Uses of Force and the Crime of Aggression' (2012) 10 Journal of International Criminal Justice 59, 62–64.
[134] Creegan (n 133) 69.
[135] ibid 69–72.
[136] ibid 64.

enumerate conquest with other aims of force that are considered reprehensible.'[137] According to her, 'to defend, defer and prevent greater conflicts and greater violence, sometimes force, sometimes even aggressive force must be used.'[138] In my view, any assessment of the justness of the cause of war, or the use of force, is incompatible with a positive approach to the international legal framework that governs the use of force. The legality of the use of force should be assessed with respect to the existing framework, and not the moral validity of its cause.

Within the broader context of the use of force, Creegan has submitted that 'the justness of a use of force should be politically judged by other states.'[139] I strongly disagree. In my view, to allow states to politically judge the justness of a use of force appears to be remnant of a decentralized system of international law, where states are allowed to unilaterally decide upon the legitimacy of actions by other states, and exercise sanctions against these states.[140] Indeed, the shift from a decentralized system to a centralized system of international law has endeavored to remove such unilateral powers from states, and to confer such powers to the Security Council as the central organ. Her view is thus problematic because it is remnant of a decentralized framework of international law, which is not compatible with the present international legal framework, the very foundations of collective security and the UN.

In my view, humanitarian intervention is contrary to Article 2(4) of the UN Charter in the light of its object and purpose. Any use of force in the absence of authorization by the Security Council under Article 42 of the UN Charter is representative of the use of force by states without Chapter VII delegated powers. This use of force is unlawful, regardless of the alleged justness of its cause, because it is a breach of the primary norms that prohibit the use of force. This raises the question of whether this breach is even important in the broader context of the gravity of the situation and the humanitarian situation at stake.

As can be seen, it is difficult to discuss humanitarian intervention without considering the underlying moral implications, or addressing the underlying cause of the use of force. Indeed, the protection of human rights is arguably an obligation *erga omnes*. As such, even though the use of force for humanitarian purposes is *prima*

[137] ibid.
[138] ibid.
[139] ibid 65.
[140] ibid 81–82.

facie inconsistent with the rules of *jus ad bellum*, the cause of such intervention is upheld as the right and moral course of action. Such arguments depart from a positive approach to *jus ad bellum,* and rely on the "just cause" implications of the intervention to justify the use of force.[141] The expression is that such uses of force may not necessarily be legal, but may be nevertheless legitimate.[142]

My intention is not to discard the moral or humanitarian issues and considerations at stake, but to delineate the existing legal framework of *jus ad bellum*. Humanitarian intervention is considered here in the context of the latter. It is also considered in the context of the crime of aggression, as a concern by some states and scholars is that individuals may be prosecuted for humanitarian intervention.

My view is that humanitarian intervention, like all other instances of the use of force or aggression, should be assessed in accordance with the existing framework of *jus ad bellum*, and not upon the justness of the cause of the use of force. This also applies in the context of determining whether humanitarian intervention may be considered as an act of aggression for the purposes of the crime of aggression at the ICC. The situation in question should be assessed in accordance with *jus ad bellum* and not whether it is a "good act" or "good policy."

1.6. The legal nature of Article 2(4) of the UN Charter

The rule that prohibits the use of force pursuant to Article 2(4) confers a duty on states to comply with their obligations to refrain from the threat or use of force against the territorial integrity and political independence of other states, or in any other manner inconsistent with the purposes of the UN. The rights-holders of these norms are states, as they enjoy the compliance of the duty-bearer with obligations to refrain from the threat or use of force. Yet, the duty-bearers are also states, as obligations fall on them to refrain from the threat or use of force against the rights-holders. Thus,

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[141] ibid 69–72.

[142] The Independent International Commission on Kosovo had found that 'the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule', Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press 2000) 4.

every state is both the duty-bearer and rights-holder of the norm that prohibits the use of force.

The legal nature of the prohibition of the use of force can be described as a peremptory norm – or a norm of *jus cogens.*[143] Article 53 of the Vienna Convention on the Law of Treaties 1969 ("VCLT") defines a peremptory norm as:

> a norm accepted and recognized by the international community of States as a whole by a subsequent norm of general international law having the same character.

Although it is explicitly stated that this definition is only 'for the purposes of the convention,' it is nevertheless regarded as the definition of a peremptory norm under international law.[144] In the Commentary to the VCLT, the ILC had stressed that 'the law of the charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens.'[145] The ICJ has subsequently cited this comment,[146] and others, such as Schachter, have also pronounced that 'article 2(4) is the exemplary case of a peremptory norm.'[147]

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[143] See *Military and Paramilitary Activities in and against Nicaragua* (n 75) para 190; Judge Elaraby held 'the prohibition of the use of force … is universally recognized as a jus cogens principle, a peremptory norm from which no derogation is permitted', Separate Opinion of Judge Elaraby, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (n 29), 254; See Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2006) 50–51; Corten (n 63) 200–201; James A Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32 Michigan Journal of International Law 215; Dinstein (n 69) 104–105; Ulf Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2008) 18 European Journal of International Law 853.; Schrijver (n 78) 484–486.

[144] It is worth noting that Article 53 governs a situation when a treaty conflicts with a peremptory norm of general international law, and stipulates that the former is void in the light of the latter. The aforementioned derogation is not to be interpreted in abstract form, but in the context that states are not permitted to enter or conclude treaties that may have the effect of derogating from the peremptory norm (see Corten (n 63) 200–201.); see also Article 64 Vienna Convention on the Law of Treaties (VCLT) 1969.

[145] Reports of the ILC to the GA, 21 UN GAOR Supp. No.09, pt. II, UN Doc. A/6309/Rev.1 (1966) reprinted in (1966) 2 YB Int'L Commn 172 at 247, UN Doc/A/CN.4/SER.A/1966/Add.1

[146] Military and Paramilitary Activities in and against Nicaragua (n 75), para. 190.

[147] Schachter (n 108) 129.

However, there have been doubts as to the validity of the qualification of the prohibition of the use of force as a peremptory norm. Green for example, questions whether the prohibition of the use of force is suitable, or indeed even capable, of being viewed as a *jus cogens* norm. His general position is that 'the inherent uncertainty and flexibility of the prohibition would not seem to be compatible with the conception of peremptory norms as set out in the VCLT.'[148]

The first problem he identifies is that if Article 2(4) of the UN Charter is a peremptory norm, it implies that the threat of force has also attained *jus cogens* status. He suggests that 'the view that it is the prohibition of the use of force alone that is *jus cogens* – rather than Article 2(4) as a whole – would seem preferable as it excludes the problematic issue of the threat of force.'[149] Yet, he acknowledges that the problem is that 'the threat and use of force are inherently conjoined concepts as they currently exist in international law.'[150] This leads him to submit that 'the presence of the prohibition of the threat of force may mean that Art 2(4) cannot in its entirety form a jus cogens norm, but it does not prevent the prohibition of the use of force standing alone from meeting the criteria for a peremptory rule of international law.'[151]

However, there is no need to separate the threat of force and the use of force with respect to the legal construct of the prohibition under Article 2(4) of the UN Charter. The entirety of the provision is held to have *jus cogens* status.[152] Corten, for example, writes that 'the distinction between the prohibition of aggression and the prohibition of other less serious forms of the violation of the prohibition, while essential for determining the existence of self-defence within the meaning of the Charter, does not seem to me, however, to have to dictate a difference in status to the peremptory character of the rule.'[153]

Be that as it may, what Green finds 'far more damaging' is that 'a jus cogens norm is one from which no derogation is permitted. Yet, in the case of the prohibition of the use of force, exceptions to the rule not only exist, but are built into the very nature of the UN system.'[154] The derogations that he is referring to are the two

[148] Green (n 143) 225.
[149] ibid 228.
[150] ibid.
[151] ibid 228–229.
[152] Sondre Torp Helmersen, 'The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations' (2014) 61 Netherlands International Law Review 167, 173.
[153] Corten (n 63) 200–201.
[154] Green (n 143) 229.

exceptions to Article 2(4) within the UN Charter: Article 51 and Article 42. He claims that 'simply put, the prohibition of the use of force is a rule from which derogation is explicitly and uncontrovertibly permitted.'[155]

He appears to have conflated the concepts of 'exception' and 'derogation.'[156] Articles 51 and 42 of the UN Charter are not derogations from the prohibition of the use of force, but are in fact, exceptions to the rule. To derogate from a rule implies that the primary rule is applicable, but the relevant actor may detract from its obligations under the permitted circumstances. It represents taking a step back from the level that the rule applies on, which thus allows the relevant actor to depart from existing obligations. An exception, on the other hand, applies on the same level as the primary rule, and implies that the rule is not applicable to the relevant actor (subject to the conditions precedent within the exception). There is no breach of the primary rule if an act is committed within the compass of an exception to the rule.

The prohibition of the use of force, as a primary rule, has exceptions, which are inherent within its legal construct.[157] It is the structure of the rule itself, which contains exceptions to the rule. What is the logic behind this? The prohibition of the threat and use of force pursuant to Article 2(4) must always be read in the entirety of the UN Charter and the framework of collective security. As argued above, self-defence is a form of self-help, which allows states to act in recourse to force in a situation requiring it to repel or halt an incoming attack. It is only logical that the prohibition of the use of force must allow an exception to the rule for states to conduct this form of self-help. This construct of the rule and its exception is reflected in Article 2(4) and Article 51 of the UN Charter.

Article 42 of the UN Charter is representative of the delegation of the powers of the Security Council to member states to resort to force. This delegation of powers is consistent with the centralized system of collective security. If Article 2(4) of the UN Charter is to be read in accordance with the framework of collective security within the UN Charter, it is only logical that the rule must contain an exception for situations when there is a delegation of powers by the Security Council to use force.

In my view, the delegation of powers by the SC to the member state should not be viewed as a derogation of the rule, because it does not provide a basis where a state

[155] ibid.
[156] Helmersen (n 152) 175–176.
[157] See Linderfalk (n 143) 860.

may temporarily detract from obligations to refrain from the use of force, but instead it is derived from the same framework as the rule that prohibits the use of force. Both exist on the same level. For the delegation of powers under Chapter VII of the UN Charter from the Security Council to member states for the use of force to co-exist with a prohibition of the use of force, it is only logical that the structure of the latter should encompass an exception for the former.

If Article 2(4) is a peremptory norm, it is only logical that the prohibition of an act of aggression is also a peremptory norm. The next question is the significance of the peremptory norm status. Orakhelashvili writes that:

> the peremptory character of a rule derives from the substantive importance of the interest protected by that rule.[…] The purpose of jus cogens is to safeguard the predominant and overriding interests and values of the international community as a whole as distinct from the interests of individual states.[158]

Indeed, the prohibition of aggression is within the predominant and overriding interests and values of the international community as a whole. Yet, Green cautions in overstating the importance of the peremptory status (or lack thereof) of a rule. Nevertheless, he submits that 'a *jus cogens* norm potentially has an additional "compliance pull" to it. The widespread acceptance of the *jus cogens* concept means that states are more likely to take special note of peremptory norms and will potentially comply with them more often than with other rules.'[159]

In my view, the significance of identifying a norm as *jus cogens* is not necessarily for the purposes of ensuring compliance on the primary level, but rather to examine the legal consequences under the secondary rules of state responsibility. In present context, an act of aggression represents a breach of a peremptory norm by the aggressor state. The status of the prohibition of aggression as a peremptory norm should be taken into consideration when assessing the responsibility of the aggressor state and the legal consequences.

For example, under Article 26 of the Articles on Responsibility of States for Internationally Wrongful Acts 2001 (ARSIWA), there are no circumstances that may

[158] Orakhelashvili, *Peremptory Norms in International Law* (n 143) 46–47.
[159] Green (n 143) 256.

preclude the wrongfulness of any act of State which is not in conformity with an obligation arising under a peremptory norm of general international law. Thus, the aggressor state may not *prima facie* plead circumstances that may preclude wrongfulness with respect to an act of aggression.[160] Furthermore, Chapter III of the ARSIWA, entitled "Serious breaches of obligations under peremptory norms of general international law", sets out certain consequences relating to these breaches. This demonstrates that there are specific ramifications with respect to state responsibility if the prohibition of aggression is recognised as *jus cogens.*

Related to the issue of *jus cogens* is the concept of *obligation erga omnes.* The ICJ held that 'an essential distinction should be drawn between the obligations of a State towards the international community as a whole' and obligations of a bilateral reciprocal nature 'arising vis-à-vis another State.'[161] The Court continued:

> By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[162]

Indeed, the prohibition of aggression is in the interests of collective security, and is one of the core purposes of the UN. As such, the outlawing of acts of aggression is very much in the interests of all states. Thus, an argument can be made that the duty on states to comply with obligations to refrain from an act of aggression is owed to the international community as a whole. This suggests that such obligations are owed to each and every state that forms a part of the international community of states as a whole.

The question is whether obligations *erga omnes* extend only towards the prohibition of acts of aggression, or if such obligations also arise in the context of Article 2(4) of the UN Charter. Indeed, violations of Article 2(4) may occur on varied

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[160] Corten (n 63) 213–247.
[161] *Barcelona Traction, Light and Power Company, Limited,* (Belgium v Spain) *Judgme*nt, I.C.J. Reports 1970, 3 (hereinafter "Barcelona Traction") para. 33.
[162] *Barcelona Traction,* (n 161) paras. 33 – 34.

scales. This could range from small instances of the use of force across borders, to military operations against non-state actors without the consent of the territorial state, to serious violations of Article 2(4) against the territory of the aggrieved state.

An argument can be made that small border skirmishes are more representative of bilateral obligations between the wrongful state and the aggrieved state, rather than *erga omnes.* Be that as it may, the aggrieved state is a member of the international community of states as a whole. Thus, it may be the direct rights-holder of the obligation to refrain from the use of force on its territory, but this should not detract from the *erga omnes* nature of these obligations. Furthermore, if the prohibition of Article 2(4) of the UN Charter is *jus cogens*, the obligations relating to this rule are *ipso facto* valid *erga omnes.*[163] The obligations to refrain from the threat or use of force are owed to each and every state of the international community. This is consistent with maintaining the status quo of international peace and security.

The importance of identifying such obligations as *erga omnes* is to understand the legal consequences under state responsibility, which arise from the breach of such obligations.[164] As written by the ILC in the Commentary to ARSIWA, 'there are certain consequences flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of state responsibility.'[165]With reference to the latter, 'all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole'[166] pursuant to Article 48, ARSIWA. According to the ILC:

> Article 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the

[163] Christian J Tams, *Enforcing Obligation Erga Omnes in International Law* (Cambridge University Press 2010) 156–157.
[164] See Ian Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law."' (2002) 13 European Journal of International Law 1201; Christian J Tams, 'Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?' (2002) 13 European Journal of International Law 1161.
[165] Commentaries on the Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, vol. II, Part Two, ("Commentaries on ARSIWA"),111.
[166] Commentaries on ARSIWA, 112.

> international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of Article 42.[167]

This suggests that states other than the aggressed state may invoke responsibility of the aggressor state, as the prohibition of an act of aggression was owed "to the international community as a whole." Indeed, as noted by the ILC, 'each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations.[168]

1.7. Conclusion

An act of aggression is contrary to the purposes of the UN and represents a breach of the status quo of international peace and security. This is why the crime of aggression can be said to be a crime committed against the peace and security of mankind. It is a crime committed against the interests of each and every state that is part of the international community of states as a whole.

This Chapter has identified the primary rule of international law that prohibits an act of aggression as Article 2(4) of the UN Charter. States are both the duty-bearers and rights-holders of the norms that prohibit aggression. The nature of this rule is *jus cogens*, which arguably gives rise to obligation *erga omnes* on the duty-bearers to refrain from an act of aggression. In addition to potential compliance pull on the primary level, the breach of this peremptory norm has specific consequences for the aggressor state under the secondary rules of responsibility.

On the primary level, the legal construct of this rule allows exceptions to the rule: self-defence and authorization by the Security Council for the use of force under Chapter VII. If recourse to force conducted by a state falls within one of the exceptions to the primary rule, there has been no wrongful conduct. Thus, every alleged act of aggression must be assessed in the light of Article 2(4) of the UN Charter and its two exceptions. This will also be the task at hand when determining whether a situation amounts to an act of aggression for the purposes of prosecuting the crime of aggression.

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[167] Commentaries on ARSIWA, 126.
[168] Commentaries on ARSIWA, 127.

The point of this Chapter has been to delineate the scope and nature of the obligations that international law confers on states to refrain from an act of aggression. An understanding of these primary obligations is necessary in order to understand the legal positions of the aggressor state and the aggressed state in the context of a crime of aggression. This is important with respect to how the wrongful conduct is correctly attributed to the aggressor state and the perpetrator of the crime.

Furthermore, by establishing that bilateral obligations are owed between the aggressor state and the aggressed state, it becomes clear that the latter has a legal interest to invoke consequences under the rules of state responsibility, regardless of legal consequences against the perpetrator of the crime of aggression. This is important (as will be discussed in Part III), because the aggressed state may not always have access to enforcement against the perpetrator for the crime of aggression; as such, its legal interests in relation to the aggressor state should not be forgotten.

This chapter has also brought to light that the determination of an act of aggression is multifaceted in the sense that:

- a determination can be political or legal in nature
- a determination can serve the purposes of identifying a breach in international peace and security
- a determination can be made by the aggressed state for the purposes of self-defence against the aggressor state
- a determination can be made to identify wrongful conduct by the aggressor state for the purposes of state responsibility

As will be discussed in the next two chapters, a determination of an act of aggression must be made for the purposes of fulfilling the state act element of the crime of aggression in the interests of prosecution. However, as demonstrated in this chapter, the determination of an act of aggression is not a straightforward or common task, and appears to be largely political, as evidenced by the fact that some of the cases of aggression qualified by the Security Council and General Assembly were not as serious (e.g. mercenaries against Benin) as other situations that were not qualified as such (e.g. the 1990 Iraq invasion against Kuwait). Thus, it can be presumed that the determination of an act of aggression for the purposes of the state act element for the crime of aggression will also be somewhat political in nature.

This chapter has focused on the state act of aggression. The next two chapters will examine the criminalisation of aggression, which is how international law places direct obligations on individuals to refrain from conduct that will cause the aggressor state to act in aggression.