

Crime of Aggression: is the ICC limited to investigating only the gravest of the already grave acts of aggression?

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Introduction

The notion of aggression has been widely discussed during the last decades. The 2010 Review Conference of the Rome Statute can be seen as the culmination of approximately seventy years of careful negotiations after World War II. Thus, when the States parties to the Rome Statute delivered on their promise contained in the provisions of Article 5(2) of the Rome Statute and adopted the Kampala Amendments (KA) on the Crime of Aggression (CoA), in which are set forth both the definition and the conditions for the International Criminal Court (ICC)'s exercise of jurisdiction over such crime¹, a landmark development in the concept of aggression has been reached.

Despite the CoA being a legacy of the Nuremberg Trials, difficult negotiations were necessary to achieve the final provisions contained in the amended Rome Statute. As a result of these negotiations, the provisions include compromises intended to appease the concerns of several States regarding the definition of the CoA and the ICC's exercise of jurisdiction over this crime, the s. c. "Understandings", which, however, leave many aspects regarding the text of the KA ambiguous and, as such, have been subject of scholarly debate as to their appropriate interpretation.

Article 8bis of the Rome Statute (Art. 8bis) defines CoA in its first paragraph as follows:

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

The second paragraph of Art. 8bis purports to define the act of aggression as follows:

For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with

¹ ICC-ASP, Resolution RC/Res.6, in Review Conference to the Rome Statute of the International Criminal Court: Official Documents, Document RC/11, 19-24 (2010).

United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression [...]. This definition is then followed by a list of specific acts of aggression, taken *verbatim* from Article 3 of the UN General Assembly (UNGA) Resolution 3314² (Res. 3314).

One of the most controversial issues regarding the KA is certainly the interpretation of the threshold condition for an act of aggression to be considered as a CoA.

Several scholars have examined the gravity threshold contained in the definition of Art. 8*bis*, and almost all of those scholars point to a direct correlation between this definition and the UN Charter articles themselves referring to the use of force in international relations, as well as to decisions by several UN organs, such as the UNGA, the UN Security Council (UNSC) and the International Court of Justice (ICJ).

The UN Charter, in prohibiting the illegal use of armed force in international relations³, differentiates these concepts with respect to threats to the peace, acts of aggression or other breaches of the peace⁴. Res. 3314 calling upon States “to refrain from all acts of aggression and other uses of force contrary to the Charter”⁵, separates aggression from the other uses of force based upon its gravity⁶.

This article seeks to enquire on the question as to whether the inclusion of the gravity threshold in the definition of CoA in art. 8*bis* creates a new ‘category’ of illegal use of force in public international law, i.e., aggression (or AoA using the wording of art. 8*bis*), other unlawful uses of force and CoA, which would be the gravest of the already “most serious and dangerous forms”⁷ of use of force; or, contrarily, if the KA drafters’ intention to include the gravity threshold in the wording of the definition of the CoA, but not in the definition of AoA, is merely to follow the already accepted distinction contained in the UN Charter system between aggression and other uses of force.

² UNGA Resolution 3314 (1974) approving a “*Definition of Aggression*”, UN Doc. A/RES/3314(XXIX) (1974).

³ A. McCabe, *Balancing “Aggression” and Compassion in International Law: the Crime of Aggression and Humanitarian Intervention*, 83Fordham L.Rev.991, 994 (2014-2015).

⁴ 1945, United Nations Charter, 1 UNTS XVI, Art.1.1 and Chapter VII’s title.

⁵ See *supra* note 2, para. 3.

⁶ See *supra* note 2, preamble “[...] aggression is the most serious and dangerous form of the illegal use of force of the United Nations [...]”.

⁷ See *supra* note 2, Annex, para. 5.

It is worth to preliminary underline that, contrary to the opinion of many scholars, although the Art. 8bis definition of AoA refers to Res. 3314 and uses concepts included in the UN Charter, the rudiments of the definition of aggression in the UN system are not necessarily the same as the rudiments of the definition of AoA in the ICC system. Indeed, the former only relates to State responsibility for acts of aggression while the latter, in determining whether or not a CoA has occurred, specifically addresses individual culpability within the context of State-sponsored aggression.

In our analysis we will depart by discussing aggression within the context of international relations (Chapter 1). This chapter briefly reviews the principle of prohibition of the illegal use of force and places it within an historical framework, starting with the era during which such prohibition was non-existent, and culminating with an analysis of the regulations on the use of force included in the UN Charter. In this context, in particular the terms of ‘threat or use of force’, ‘threat to the peace’, ‘breach of the peace’, ‘act of aggression’ and ‘armed attack’ will be discussed, as well as the UNGA Res. 3314, which provides a definition of aggression, and the Resolution 2625⁸, which refers to the principle of the prohibition of the use of force. The provisions of the UN Charter and the UNGA Resolutions will be in particular analysed in light of the ICJ’s decisions in which aggression was considered as a key component.

We will then examine aggression in the context of individual criminal responsibility, starting with a brief analysis of the Nuremberg and Tokyo Charters and judgements on the crimes against peace, and continuing with an analysis of Art. 8bis definitions of the act and crime of aggression (Chapter 2). Particular attention will be paid to the *rationale* and scope of the gravity threshold included in Art. 8bis, analysing first the ordinary meaning of the text, second the context, object and purpose (including Understandings 6 and 7), and finally the *travaux préparatoires* and the reference to Res. 3314.

1: Aggression in the Context of State responsibility

⁸ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/25/2625(XXV) (1970).

1.1. Historic background

Prior to World War I, States had essentially free reign in resorting to armed conflict to settle disputes as there was no explicit international prohibition regarding the use of force⁹, given that the concept of *bellum iustum* espoused by theologians over the centuries had never been accepted as a valid in international law.

The Hague International Peace Conferences (1899 and 1907) marked the beginning of a shift in opinion regarding accepted international restrictions on the use of force. These conferences were convened in order to revise the declaration put forth by the Conference of Brussels in 1874, concerning the laws and customs of war¹⁰. The Hague Conferences resulted in a series of international treaties and declarations. Article 1 of the Hague Convention III (1907) stated that “[t]he contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war”¹¹. Moreover, Article 1 of the Hague Convention II (1907) prohibited resorting to armed force for the recovery of contractual debts¹².

Another important development regarding restrictions on the use of force by States to settle disputes was the Bryan Treaties. Beginning in 1913, William Jennings Bryan, the then Secretary of State of the United States, negotiated and entered into 48 bi-lateral agreements by which the parties were obliged to submit all their disputes to a conciliation commission and not to begin hostilities prior to the commission’s report¹³.

After the never before seen devastation of World War I, States attempted to restrict war within the framework of the League of Nations, by, on one hand, setting “a mechanism of ‘cooling-off period’ for all cases of armed conflict [...] [since] [t]he members were bound not to resort to war before the dispute had been submitted to judicial settlement, arbitration, or to the Council

⁹ O. Dorr & A. Randelzhofer, *Ch. I Purposes and Principles, Article 2(4)*, in B. Simma *et al.* (Eds.), *The Charter of the United Nations: A commentary*, Volume I, 204 (2012).

¹⁰ 1874, Project of an International Declaration concerning the Laws and Customs of War, Brussels.

¹¹ 1907, The Hague Convention (III) Relative to the Opening of Hostilities, available at: <https://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/b59c84b75bfb1520c125641e0037aa5a?OpenDocument>.

¹² 1907, The Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, available at: http://avalon.law.yale.edu/20th_century/hague072.asp.

¹³ H. Schlochauer, *Bryan Treaties (1913/1914)*, 2007 MEPEPIL.

of the League”¹⁴, and on the other hand, forbidding the recourse to war against a State complying with the award or a report that had been unanimously adopted by the Council¹⁵. However, it is important to note that the League of Nation’s member States each reserved “the right to take such action as they shall consider necessary for the maintenance of right and justice”¹⁶ if the Council failed to reach an unanimously agreed report, which essentially gave States an important opt-out to the prohibition on the use of force. This opt-out eventually revealed the inherent flaws and ineffectiveness of the League of Nations to interdict the use of force by member States.

In 1924, Article 2 of the Geneva Protocol for the Pacific Settlement of International Disputes endeavoured to prohibit States to ‘resort to war’ with the exception of self-defence or collective enforcement measures. However, the Protocol never entered in force, lacking the necessary number of ratifications¹⁷. The following year (1925), Germany, Belgium and France concluded the Locarno Treaty, which proscribed any attack, invasion, or war, subject to some narrow exceptions¹⁸, demonstrating that some States were still keen to restrict the use of force to settle international conflicts.

All of these negotiations and regional treaties paved the way for one of the most revolutionary developments regarding the prohibition on the use of force¹⁹, that is, the Briand-Kellogg Pact, signed in Paris on 27 August 1928. Its Article 1 read as follows:

The High Contracting Parties solemnly declare [...] 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.

Nearly all States became parties to the Briand-Kellogg Pact except for a number of Latin American States that decided instead to sign the Saavedra-Lamas Treaty, which also had a general prohibition on the recourse to force²⁰.

Despite the fact that the Briand-Kellogg Pact represented an enormous development in

¹⁴ 1919, League of Nations Covenant, Arts.10 and 12. See *supra* note 9, 205.

¹⁵ *Ibid.*, Arts. 13(4) and 15(6).

¹⁶ See *supra* note 14, Art. 15(7).

¹⁷ Benjamin Ferencz, *The Search for World Peace - A Documentary History and Analysis*, Vol. 1. Part 1, (1975) 81, available at www.derechos.org/peace/dia/doc/bf1.html#12c Defining International Aggression.

¹⁸ 1925, Locarno Treaty, Art. 2.

¹⁹ I. Brownlie, *International Law and the Use of Force by States* 74-75 (1963); R. Lesaffer, *Kellogg-Briand Pact 1928*, 2010 MPEPIL, mn 1.

²⁰ See Bownlie, *supra* note 18, 95-96; H. Caminos, *Saavedra-Lamas Treaty (1933)*, 2006 MPEPIL, mn 1-3.

attempting to sustain international peace, it was not without its shortcomings. War itself, not the use of force in general, was forbidden. As well, there was no mechanism to impose sanctions against those States that ultimately engaged in war. Hence, many States that had ratified the Pact simply circumvented it by engaging in war without formally declaring it²¹.

As we will see in the next section, these important deficiencies with respect to the terminology used and the enforcement powers were determinedly addressed in the UN Charter.

1.2. UN system: the UN Charter and the UN organs' decisions and practice

The UN was created as a direct response to the inhumane carnage of World War II. The primary purpose inspiring the States that participated in the San Francisco Conference, was, and continues to be, as said in the UN Charter Preamble, to “save succeeding generations from the scourge of war” and “maintain international peace and security [...] [by suppressing] acts of aggression and other breaches of peace”²².

In order to accomplish this purpose, Article 2.4 calls upon member States to “refrain 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”. The rules regulating the use of force in international relations are governed by this principle. Therefore, the prohibition of the threat or use of force could be emphatically considered as “the most fundamental of all obligations”²³ for States under current international law. Indeed, the prohibition on the threat and use of force is now considered to be customary international law²⁴, and, by some only in respect of the use of force, a *ius cogens* norm.²⁵

²¹ See *supra* note 9, 206-207.

²² UN Charter, Art. 1(1).

²³ Oil Platforms (Islamic Republic of Iran v. United States of America), Judgement, 2003 ICJ Rep.161, 330 (Judge Simma separate opinion).

²⁴ Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States) Jurisdiction and Admissibility, 1984 ICJ Rep.392, at 424, para. 73; Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Judgement, 198 ICJ Rep. 14, paras. 187–190, 292 (4)(6). For comments on the Nicaragua Case, see K. Highet, *Evidence, the Court and the Nicaragua Case*, 81AJIL1 (1987). See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep.136, at 171, para. 87; Dorr & Randelzhofer, *supra* note 9, 229.

²⁵ ILC Draft Articles on the Law of Treaties, 1966, YILC, Vol.2, at 247, para. 1. I. Brownlie, *Principles of Public International Law* 488–489 (2003); Dorr & Randelzhofer, *supra* note 9, 231-232. See also, C. Gray, *The Use of Force and*

In order to fully understand the scope of the principle of the prohibition of the use of force, it is important to read Article 2.4 in context with Articles 39, 51 and 53²⁶, given that the terms included in those Articles, such as ‘use or threat of force’, ‘treat to the peace’, ‘breach of the peace’, ‘act of aggression’ and ‘armed attack’, are indeed related but have somewhat different meanings. Since the UN Charter itself does not adequately define those terms, some commentators²⁷ as well as States themselves²⁸ and UN organs²⁹ have tried to clarify their meanings. Even so, attempts to refine these terms and achieve uniform acceptance of those interpretations have failed

In this analysis, it is important that we consider the role played by the ICJ, as the principal judicial organ of the UN³⁰, in the interpretation and application of the UN Charter rules on the use of force in the *Nicaragua* case³¹, the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion³², the *Oil Platforms* case³³ and the case *Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)*³⁴.

Particularly relevant for our analysis, is the affirmation by ICJ, in the *Nicaragua* case, that the UNGA Resolutions on the use of force (i.e., Res.3314, Res.2625 and Res.42/22), when adopted by consensus, are a statement of international customary law or authoritative interpretations of the UN Charter³⁵.

the International Legal Order, in Evans (Ed.) *International Law* 615, 616-617 (2006); D. Donat Cattin, *Intervention of Humanity or the Use of Force to Halt Mass Atrocity Crimes, the Peremptory Prohibition of Aggression and the Interplay between Jus ad Bellum, Jus in Bello and Individual Criminal Responsibility on the Crime of Aggression*, in Acconci, Donat Cattin, Marchesi, Palmisano & Santori (Eds.), *International Law and the Protection of Humanity: Essays in Honour of Flavia Lattanzi*, 353-396 (2016).

²⁶ See *supra* note 9, 208.

²⁷ E.g. H. Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, with supplement, (1950); B. Simma *et al.* (Eds.), *The Charter of the United Nations: A commentary*, Vol. II (2012); C. Gray, *International Law and the Use of Force* 128-148, 173-183 (2008).

²⁸ R. Higgins, *The Attitude of Western States Towards Legal Aspects of the Use of Force*, 435-452; H. Bokor-Szego, *The Attitude of Socialist States towards the International Regulation of the Use of Force*, 453-477, M. Sahovic, *Non-Aligned Countries and the Current Regulation of the Use of Force*, 480-488, all chapters in A. Cassese (Ed.), *The Current Legal Regulation of the Use of Force* (1986).

²⁹ E.g. UNGA Res.2625, *supra* note 8, UNGA Res.3314, *supra* note 2 and Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, UN Doc. A/RES/42/22 (1987).

³⁰ UN Charter, Articles 92-96.

³¹ See *supra* note 23.

³² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep.226.

³³ See *supra* note 22.

³⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement, 2005 ICJ Rep.168.

³⁵ See *Nicaragua* Judgement, *supra* note 23, paras. 191, 193 and 195.

1.2.1 Article 2.4

It is important to understand that, despite there being a majority view that the language in Article 2.4 only refers to armed force³⁶, some States, particularly many developing States, claim that the term “force” needs to be more broadly interpreted to encompass political and economic coercion³⁷.

Given the ambiguity in the wording of the article, it becomes essential then that, according to the rules of interpretation of the Vienna Convention on the Law of the Treaties (VCLT), we not only need to consider the words themselves but also to place them within their context. Thus, if we read Article 2.4 in conjunction with paragraph 7 of the preamble³⁸ and Article 44³⁹ of the UN Charter, the notion that force refers only to armed force is given credence. This conclusion is further supported by its teleological interpretation, since, for example, if States are unable to exert political and/or economic pressure on rogue States, there would be no other means at their disposal other than armed force to pressure these rogue States to cease committing acts that violate international law⁴⁰. Finally, the *travaux préparatoires* of the UN Charter also allow us to reach the same conclusion, seeing that at the San Francisco Conference, Brazil’s proposal to broaden the concept of the use of force to include economic coercion was rejected⁴¹.

It is important to reiterate that the mere threat of force (not only its manifestation) is also forbidden by Art. 2(4) of the Charter. Even though there has been leniency by States regarding the threat of force by a State⁴², the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* held that the mere possession of nuclear weapons themselves could indeed amount to a credible threat of force contrary to Article 2.4, if the envisaged use of such

³⁶ H. Kelsen and R. Tucker, *Principles of International Law* 86 (1966); D. Bowett, *Self-Defence in International Law* 148 (1958); S. Khare, *Use of Force under the UN Charter* 27-28 (1985).

³⁷ J. Zourek, *L’Interdiction de l’emploi de la force en droit international* 73–78 (1974); B. Asrat, *Prohibition of Force under the UN Charter: A Study of Article 2(4)* 113–138 (1991).

³⁸ “[...] armed force shall not be used, save in the common interest”.

³⁹ “When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member’s armed forces”.

⁴⁰ *See supra* note 9, 209.

⁴¹ *Id.*

⁴² *See supra* note 9, 218.

weapons would violate the requirements of necessity and proportionality⁴³.

Finally, it is important to note that there are exceptions to the prohibition contained in Article 2.4 within the framework of the UN Charter itself, namely: 1) the measures against former enemy States, Articles 107 and 53.1 of the UN Charter; 2) the UNSC enforcement actions (Chapter VII UN Charter); and 3) self-defence (Article 51 of the UN Charter). However, given that all the ‘former enemy’ States are now parties to the UN Charter, these provisions have become obsolete⁴⁴. Therefore, we will analyse the other two exceptions to fully understand the scope of the principle of prohibition of the threat and use of force.

1.2.2 Article 39

Chapter VII of the UN Charter begins with Article 39, termed by some as “the single most important provision of the Charter”⁴⁵ as it provides the UNSC with the power, not the obligation even if the assertive term ‘shall’ was used⁴⁶, to “determine the existence of any threat to the peace, breach of the peace, or act of aggression”, as well as to “make recommendations, or decide what measures shall be taken, in accordance with Articles 41 and 42 to maintain or restore international peace and security”.

During the drafting of Article 39, some States wanted to define the concepts of ‘threat to the peace’, ‘breach of the peace’ and ‘act of aggression’ in order to provide more clarity regarding situations under which the UNSC could presumably act. An example of this is the proposal made by Bolivia to define aggression in the Charter. Even though that proposal garnered widespread support, some States, most notably some UNSC permanent members, objected to its inclusion stating that binding the UNSC to a restricted definition or a list of acts “could lead to premature imposition of sanctions”⁴⁷. Therefore, the proposal was ultimately rejected; and, consequently, the UNSC now enjoys considerable discretion⁴⁸ in determining what constitutes

⁴³ See *supra* note 31, at 246-247, para. 48.

⁴⁴ A. Cassese, *International Law in a Divided World* 137 (1986).

⁴⁵ US Secretary of State, *Charter of the United Nation: Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation* 90-91 (1945).

⁴⁶ See Kelsen *supra* note 26, 736-737; T. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers Under Chapter VII of the Charter*, 26NYIL33, 40 (1995). Cf. A. Orakelashvili, *Collective Security* 151-152 (2011).

⁴⁷ N. Krisch, *Ch. VII Action with respect to Threats to the Peace, Breaches of the peace, and Acts of Aggression, Article 39*, in B. Simma *et al* (Eds.) *The Charter of the United Nations: A commentary*, Volume II, 1274 (2012).

⁴⁸ *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No.IT-94-1-T, A.Ch.,

a threat to the peace, a breach of the peace or an act of aggression. We say considerable discretion since the procedural and substantive threshold included in Article 39⁴⁹ indicates that the discretion of the UNSC is broad but not unlimited, as recognized by the International Criminal Tribunal for the former Yugoslavia (ICTY)⁵⁰.

In practice, ‘threat to the peace’ is the term most often used by the UNSC⁵¹ even though it is the broadest concept of the three⁵². A vast majority of scholars agree that an “impending or already initiated armed conflict between States”⁵³ is the core idea of a threat to the peace. However, there are still uncertainties about some aspects, such as the time and scope of the situation and the actors affected⁵⁴, that could lead the UNSC to determine if there is a plausible threat to the peace. For example, whether or not the UNSC is authorised to take actions outside of situations of “imminent attacks”⁵⁵ in order to prevent conflicts or act on generalized threats such as terrorism, non-proliferation, climate change, etc. is rather vague⁵⁶. However, it has now been clearly established that the UNSC can indeed act in post-conflict situations if the renewal of violence is conceivable⁵⁷.

Nevertheless, because this measuring concept is extremely subjective in nature, and, given the fact that intra-State conflicts currently pose the single greatest threat to international peace and stability, it is clear then that there needs to be a comprehensive reassessment of the UNSC’s appropriate role in resolving and preventing these sorts of conflicts.

On the other hand, ‘breach of the peace’ is understood to include situations in which a ‘threat to the peace’ has already materialized⁵⁸. Moreover, this term has also been used by the UNSC to refer to hostilities between the armed forces of two States, such as in the Iraqi invasion of

at 42, para. 28 (1996); Kelsen *supra* note 28, 736; W. Reisman, *The Constitutional Crisis in the United Nations*, 87AJIL83, 93–94 (1993); B. Conforti, *The Law and Practice of the United Nations 172–73* (2005); Gill, *supra* note 48, 42.

⁴⁹ D. Bowett, *The Law of International Institutions 38–39* (1982); F. Kirgis, *The Security Council’s First Fifty Years*, 89AJIL506, 512 (1995); *see also* Report of the Sub-Committee on the Spanish Question, UN Doc. S/75 (1946), para. 20.

⁵⁰ *See* Tadić, *supra* note 47.

⁵¹ *See supra* note 46, 1278.

⁵² *See* Kelsen, *supra* note 26, 727, 728, 737.

⁵³ *See supra* note 46, 1279. *See also* Kelsen, *supra* note 28, 930; I. Österdahl, *Threat to the Peace 85–99* (1998). Some situations have been determined as threat to the peace, *see e.g.* UN Doc. S/RES/1298(2000); UN Doc. S/RES/2046(2012).

⁵⁴ *See supra* note 46, 1279–1280.

⁵⁵ P. D’Argent *et al.*, *Article 39*, in J. Cot *et al.* (Eds), *La Charte des Nations Unies: commentaire Article par Article 1131, 1154* (2005).

⁵⁶ *See* UNSC Statements that refer to those threats as peace threats, *e.g.* UN Doc. S/23500(1992), UN Doc. S/PRST/2000/25 (2000).

⁵⁷ *See e.g.* UN Doc. S/RES/687(1991); UN Doc. S/RES/1031(1995); UN Doc. S/RES/1244(1999); UN Doc. S/RES/1272 (1999).

⁵⁸ *See supra* note 46, 1293.

Kuwait in 1990⁵⁹, or when there is use of force by or against a *de facto* regime that is not a recognized State, such as when North Korean troops attacked South Korea⁶⁰.

Finally, with regard to aggression, even though the Charter refers to it on many occasions⁶¹, a specific definition of what it entails was never included. Consequently, the UNGA, in order to facilitate the work of the UNSC, created a Special Committee charged with drafting an adequate definition of aggression⁶². The Committee's efforts concluded with the adoption of Res.3314 by the UNGA in 1974 after more than twenty years of negotiations, in which aggression was defined in Article 1:

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.

Even though this definition of aggression seems to be taken almost *verbatim* from Article 2.4 of the UN Charter, “aggression” and “illegal use of force” are not considered synonymous⁶³. This differentiation is supported by the text of Res. 3314 which states in its Preamble that “[...] aggression is the most serious and dangerous form of the illegal use of force” or in its paragraph 3, which calls on States to “refrain from all acts of aggression and other uses of force contrary to the Charter of the United Nations”, highlighting the notion that there could be other illegal uses of force which, by definition, would not (yet) constitute aggression⁶⁴. The gravity threshold is therefore used to measure what would differentiate aggression from other threats to or breaches of the peace, with aggression always being a breach of the peace but a breach of peace not to be yet considered aggression. This conclusion is supported by the UN Charter itself which, in Article 1.1, states “[...] 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 [...]” highlighting the relation of breaches of the peace as a general framework and aggression as a subcategory.

Article 2 of Res. 3314 further supports this conclusion when it states “[...] the Security Council

⁵⁹ UN Doc S/RES/660(1990).

⁶⁰ UN Doc S/RES/82(1950).

⁶¹ UN Charter, Articles 1.1, 39 and 53. Art 51, French version “agresion armée”.

⁶² U. Leanza, *The Historical Background*, in M. Politi & G. Nesi (Eds.), *The International Criminal Court and the Crime of Aggression* 1, 4 (2004).

⁶³ Y. Dinstein, *War, Aggression and Self-Defence* 101-102 (2011).

⁶⁴ M. O'Connell & M. Niyazmatov, *What is Aggression? Comparing the Jus ad Bellum and the ICC Statute*, 10J.Int'l.Crim.Just.189, 193-194 (2012).

may [...] 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*⁶⁵. Meaning that, in addition to the requirements of Article 1, in order for an act of force to constitute aggression, the gravity of such force would need to be considered⁶⁶.

Although the UNGA provides a definition of aggression, this definition does not limit the power of the UNSC under Article 39, as it specifically mentions such power in its Article 4, namely that the “[...] Security Council may determine that other acts constitute aggression under the provisions of the Charter”⁶⁷ in addition to the acts enumerated in Article 3. Moreover, the UNSC’s determination of an act of aggression appears to also include political, as well as legal considerations⁶⁸, with the goal of justifying peace enforcement actions⁶⁹.

It is important to look at the reference to ‘war of aggression’ included in Article 5.2 of Res. 3314 as something apparently different from ‘aggression’ itself, since this article provides that “war of aggression is a crime against international peace” and that “aggression gives rise to international responsibility”. Some scholars⁷⁰ and States’ representatives, such as the delegates from Germany⁷¹, have argued that because Article 5.2 refers to ‘crime’ when talking about ‘war of aggression’, it relates to individual responsibility with respect to a crime of aggression. Therefore, ‘war of aggression’ is a type of act that can also entail a crime of aggression (i.e., individual culpability), as opposed to ‘acts of aggression’, which would only entail State responsibility. Contrary to this assertion, some contend that the inclusion of war of aggression had an historic purpose, as after the adoption of the UN Charter, ‘war’ was not an accepted international law precept, with the term ‘armed conflict’ being used instead⁷². They also argued that the definition of aggression was aimed at States not at individuals since the objective was

⁶⁵ Emphasis added.

⁶⁶ B.B. Broms, *The Definition of Aggression*, 154HagueRecueil299, 346 (1977).

⁶⁷ UNGA Res.3314, *supra* note 2.

⁶⁸ *See supra* note 46, 1294.

⁶⁹ *See d’Argent, supra* note 54, 1139.

⁷⁰ J. Hogan-Doran & B. van Ginkel, *Aggression as a Crime under International Law and the Prosecution of Individuals by the Proposed International Criminal Court*, 43Netherlands Int’l.L.Rev.321, 335 (1996); Broms, *supra* note 65, 356-357; T. Meron, *Defining Aggression for the International Criminal Court*, 25 Suffolk Transnational L.Rev.1, 7 (2001-2002).

⁷¹ ICC Preparatory Commission, Proposal submitted by Germany the Crime of Aggression: A Further Informal Discussion Paper, PCNICC/2000/WGCA/ DP.4 (2000) paras. 19-21. *See also* N. Jorgensen, *The Responsibility of States for International Crimes* 240 (2003).

⁷² International Law Association, Committee on the Use of Force, Final Report on the Meaning of Armed Conflict in International Law, especially at 32-33 (2010) available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/102>.

to set a definition that would allow the UNSC to determine when and if aggression had been committed by a State.

Looking at the preparatory works, we can see that the debate surrounding Article 5.2 was focused on the issue concerning whether Res. 3314 should have included any reference to the consequences of committing aggression⁷³. In this regard, some considered that there was no need for the UNGA to refer to the consequences of aggression since the goal was simply to define it⁷⁴, while the International Law Commission was already working on the law of State Responsibility and on a Draft Code of Crimes against the Peace and Security of Mankind⁷⁵.

Therefore, some wanted to refer and use the wording of the Nuremberg Charter, which defined crimes against the peace as “planning, preparation, initiation or waging of a *war of aggression*”⁷⁶ (emphasis added). Yet, others wanted to include a reference to State responsibility that flowed from aggression.

These different positions resulted in the current drafting of Article 5.2 which includes elements from the request of those that wanted a reference to the Nuremberg Charter crimes and those that wanted a reference to State responsibility. However, such wording led to confusion among scholarship on whether there exists two distinct forms of aggression⁷⁷. In this regard, the Chair of the Special Committee on the Question of Defining Aggression, Broms, explained that the two sentences of Article 5.2 should not be interpreted as if States recognized two different types of aggression since even when the Article stated that “a war of aggression was a crime against international peace and [...] that aggression gave rise to international responsibility [it] should not be interpreted so as to imply that aggression would not in future lead to any criminal responsibility”⁷⁸. And such a clarification was not contested.

The 1970 UNGA Declaration on Friendly Relations also includes a reference to war of aggression as “[...] a crime against the peace, for which there is responsibility under international law”⁷⁹. It is important to note that at that time, the term ‘crimes of state’ was still

⁷³ See *supra* note 63, 196.

⁷⁴ Report of the Special Committee on the Question of Defining Aggression, UN Doc. A/C.6/SR.1471, para.5 (1974).

⁷⁵ Report of the Commission on the work of its forty-eighth session, 1996 YILC, Vol.II (Part Two), UN Doc. A/CN.4/SER.A/1996/Add.1, 15-56.

⁷⁶ See *supra* note 73.

⁷⁷ See *supra* note 66, 197.

⁷⁸ See *supra* note 73, at 42, para.8.

⁷⁹ See *supra* note 8, Annex, Section 1, para.2.

being used⁸⁰.

Taking into consideration the preparatory works and the discussions that were held when Article 5.2 was drafted, we conclude that there is no legal disparity, based on gravity or any other element, between ‘war of aggression’ and ‘aggression’. The ‘difference’ in the wording was a result of historical interpretation, with the term ‘war of aggression’ being used at the Nuremberg trials prior to the creation of the UN and ‘aggression’ being used thereafter.

The ICJ also referred to aggression in the *Nicaragua* judgement when it made a distinction between ‘the most serious forms of use of force’, that is, those constituting an armed attack or aggression⁸¹, and other ‘less severe forms’⁸². The ICJ echoed this distinction, in its judgement of the case of *Oil Platforms*⁸³.

In its decision in the *Armed Activities on the Territory of the Congo* case, despite the fact that the ICJ referred to the same part of Res.3314 used in the *Nicaragua* case, such ruling made no specific determination on aggression⁸⁴, which was highly criticized, even by two of its members in their dissenting opinions. Judge Elaraby stated that since the Democratic Republic of Congo (DRC) characterized Uganda’s activities as aggression and requested the Court to make a decision in that regard⁸⁵, he considered that there was no reason to avoid declaring that the actions carried out by Uganda constituted aggression, citing the fact that the ICJ had previously recognized the customary nature of Article 3(g) of Res.3314 in the *Nicaragua* case. In the same vein, Judge Simma, in his separate opinion, also criticized the ICJ for the fact that it did not label Uganda’s actions as aggression following the request made by DRC. According to Judge Simma, the Ugandan invasion of DRC was clearly an act of aggression so “why [should the ICJ] not call a spade a spade?”⁸⁶.

The avoidance by the ICJ of including the word ‘aggression’ in the judgement in this case has also been analysed by scholars. While some considered that the ICJ found Uganda responsible for the illicit use of force in DRC, it considered that Uganda’s action did not reach the level of

⁸⁰ E.g. ILC’s former Article 19 of the Articles on State Responsibility for Internationally Wrongful Acts.

⁸¹ M. Stein, *The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council’s power to determine Aggression?* 16 *Indiana International & Comparative Law Review* 1, 21 (2005). Stein argues that the ICJ used the term “armed attack” and “aggression” interchangeably to refer to the most serious forms of use of force.

⁸² C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* 68 (2013).

⁸³ See *supra* note 22, at 161, para. 51.

⁸⁴ See *supra* note 33, 223, 280-283. See also *supra* note 3, 1007.

⁸⁵ See *supra* note 33, 329 (Separate Opinion Judge Elaraby).

⁸⁶ See *supra* note 33, 334-335 (Separate Opinion Judge Simma).

aggression⁸⁷, others contended that the ICJ implicitly recognized that Uganda's acts constituted aggression, given that the Court did not expressly reject the request of the DRC to qualify the actions as aggression and it used the term 'grave violation' of the use of force⁸⁸. They argued that the ICJ purposely tempered its language given the political ramifications of explicitly labelling Uganda an aggressor State, especially considering that the UNSC had already qualified the situation in the DRC as a threat to the peace and not aggression⁸⁹. This last issue was also among Simma's most important considerations in his separate opinion⁹⁰.

Agreeing with the aforementioned dissenting opinions and some scholars, we believe that the ICJ missed an opportune moment to unequivocally determine that Uganda's activities constituted aggression. Even so, given the same juridical nature of the concepts 'aggression' and 'grave violation of the principle of prohibition of illegal use of force', by recognizing that such grave violation took place, the ICJ indirectly recognized the existence of aggression⁹¹.

As we can see from above, case law reiterates the aforementioned distinction between aggression and other uses of force, with gravity acting as the differentiating measurement.

1.2.3 Article 51

As mentioned before, the right to self-defence included in Article 51 is one of the exceptions to the prohibition of the use of force set in Article 2.4. However, the terms used in these 2 Articles, i.e. 'armed attack' in Article 51 – 'agresion armée' used in the French version of this Article - and 'threat or use of force' used in Article 2.4, are not interchangeable. It is agreed by a majority of scholars that 'armed attack' is a narrower⁹² concept than the threat or use of force⁹², seeing that an armed attack can only exist when large scale use of force of a sufficient gravity is used producing a substantial effect. Therefore, if a State is somehow impacted by another

⁸⁷ M. Drumbl, *The push to criminalize aggression: something lost amid the gains?* 41CaseW.Res.J.Int'l.L.291, 298 (2009).

⁸⁸ R. Uerpmann-Witzack, *Armed Activities on the Territory of the Congo Cases*, 2013 MPEPIL, mn 9.

⁸⁹ See e.g. S/RES/1493(2003), S/RES/1499(2003), S/RES/1501(2003), S/RES/1522(2004), S/RES/1533(2004), S/RES/1552(2004), S/RES/1555(2004), S/RES/1565(2004), S/RES/1592(2005). See also e.g. S/RES/1304(2000) where UNSC called Uganda to withdraw the forces from DRC.

⁹⁰ See *supra* note 33, at 335, para. 3 (Separate Opinion Judge Simma).

⁹¹ L. Pezzano, *El principio de la abstención del uso de la fuerza y la agresión*, 8Cuaderno de Derecho Internacional105, 128 (2013).

⁹² G. Nolte & A. Randelzhofer, *Ch. VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 51*, in B. Simma et al (Eds.) *The Charter of the United Nations: A Commentary*, Volume II, 1401 (2012). See also C. Gray, *supra* note 28, 118; Dinstein, *supra* note 62, 207–209; O. Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* 403 (2010).

State's use of force which does not sufficiently meet the scale, gravity, and effect to amount to an armed attack, the first State may not use self-defence as an exception to the prohibition of the use of force. Therefore, such State must respond to this threat or use of force with means other than armed conflict, or, alternatively, the State must present its case to the UNSC for it to use its prerogatives under Article 39 to intervene for restoring international peace and security⁹³.

This differentiation was supported by the ICJ in the *Nicaragua* and *Oil Platforms* judgements when the ICJ expressed that not all uses of force are considered armed attacks, and that only when a State suffers an armed attack can it resort to forcible measures for its self-defence, limited by the principles of proportionality and necessity⁹⁴.

Armed attack, or '*agression armée*' as in the French version of Article 51 of the UN Charter, seems to be related to the term aggression found in Article 39. However, there are no explicit definitions of these terms contained in the UN Charter and, as mentioned before, the UNGA Res. 3314 only refers to aggression as embodied in Article 39, not the notion of the armed attack considered in Article 51⁹⁵.

Regarding the further issue of the relationship between 'armed attack', and 'aggression', several States such as the United States, United Kingdom and the Soviet Union stated that 'aggression' and 'armed attack' are not the same⁹⁶, and many scholars support that conclusion by stating that an armed attack as used in Article 51 is narrower in concept than aggression⁹⁷. This interpretation seems to be supported by the French version of the expression armed attack, which is not "agression tout court", but "agression armée". Contrarily, other scholars contend

⁹³ As a way of protection against States violating Article 2.4 (even if the violation does not amount an armed attack), some scholars have tried to find a compromise by considering that the terms in Article 51 are not more restrictive than 'use of force' in Article 2.4 or that "proportionate defensive measures" are permitted against other uses of force that do not amount to an armed attack. However, such an interpretation is contrary to the letter of Art. 51(2). See E. Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self Defence*, 55ICLQ963, 966 (2006); C. Greenwood, *Self-Defence*, 2011 MPEPIL, mn 12; J. Green, *The International Court of Justice and Self-Defence in International Law* 149 (2009); W. Taft, *Self-Defence and the Oil Platforms Decision*, 29YaleJ.Int'l.L.295, 300–301 (2004). See also A. Cassese, *International Law* 172 (2005); J. Kammerhofer, *Oil's Well that Ends Well? Critical Comments on the Merits Judgement in the Oil Platforms Case*, 17Leiden J Int'l L695, 710-711 (2004).

⁹⁴ *Nicaragua Judgement*, *supra* note 23, para. 194; *Oil Platforms*, *supra* note 22, para. 51 and Separate Opinion Judge Higgins, para. 43 and Separate Opinion Judge Simma, para. 12.

⁹⁵ T. Ruys, 'Armed Attack' and Article 51 of the UN Charter 136 (2010).

⁹⁶ See UN Doc. A/AC.134/SR.105, Summary Record of the 105th meeting (1973), 15-16 (Soviet Union's statement), 17 (US' statement). See also UN Doc A/AC.134/SR.67, Summary Record of the 67th meeting (1970), 5 (UK's statement).

⁹⁷ Gray, *supra* note 26, 130, 182; Dinstein, *supra* note 62, 196 *et seq.* and 308; Corten, *supra* note 91; A. Rifaat, *International Aggression: a study of the legal concept: its development and definition in international law* 124–25 (1979).

that “the difference is so small that it is often overlooked”⁹⁸.

From its practice, it is unclear if the UNSC sees these terms as identical given that in some cases the UNSC has qualified short-term military actions as aggression⁹⁹, and in others cases has recognized the right to self-defence without finding the presence of overt aggression. This was the case after the terrorist attacks against the United States in 2001¹⁰⁰.

The ICJ has not provided a specific definition of armed attack. However, in the *Nicaragua* judgement it illustrated which specific situations could be considered armed attacks, such as cross-border action by regular forces and also the use of force by unofficial armed bands¹⁰¹. With regards to the last example, the ICJ referred to Article 3(g) of Res. 3314 as reflecting customary international law¹⁰². Even when this reference, if not clarifying the definition of armed attack, it demonstrates the importance of the Resolution that defines aggression in order to achieve a definition of armed attack.

Based on this analysis of international law¹⁰³ (with the UN Charter being the preeminent¹⁰⁴ international treaty, and the ICJ judgements and advisory opinions as setting customary international law, as well as the authoritative soft law, in particular Res. 3314), we conclude that there are indeed two different types of the use of force, both prohibited by Article 2.4: a) aggression, which is the most severe or grave form (considering armed attack, as the same or as a narrower type of aggressive act and which allows States to use force as self-defence), and b) the less serious forms of illegal use of force that do not amount to acts of aggression.

2: Aggression in the framework of individual criminal responsibility

⁹⁸ See Nolte & Randelzhofer *supra* note 91, 1408.

⁹⁹ See e.g. UN Doc. S/RES/57 (1985), condemnation of the Israeli air raid as an ‘act of armed aggression’; UN Doc. S/RES/577 (1985), the demand that South Africa cease ‘all acts of aggression’ against Angola.

¹⁰⁰ UN Doc. S/RES/1368 (2001).

¹⁰¹ Nicaragua Judgement, *supra* note 23, para. 195.

¹⁰² *Id.* See also *supra* note 31, para. 146; The Wall Advisory Opinion, *supra* note 23, para. 139.

¹⁰³ Statute of the International Court of Justice, Article 38.1.

¹⁰⁴ UN Charter, Article 103.

2.1. Precedents of the CoA

The never before seen brutality of World War I finally concluded with the capitulation of the Central Powers and the signing of the Treaty of Versailles in 1919. The Treaty of Versailles can be viewed as one of the first international treaties which undeniably recognised the culpability of individuals within the context of State aggression, and that such individual participation could, in fact, be considered an international criminal offence¹⁰⁵, calling the acts of Kaiser Wilhelm I himself (as opposed to the German State itself) as “a supreme offence against international morality and the sanctity of treaties”¹⁰⁶. However, The Netherlands gave asylum to the former Kaiser and the Allied Powers did not proceed in requesting his extradition, so the tribunal intended to prosecute him as an individual never was created. Additionally, the 1921 Leipzig trials which prosecuted other German officials were not for counts of aggression¹⁰⁷, and were conducted in a national court (i.e., the German Supreme Court) and not before an international tribunal.

The prosecution and punishment of individuals, acting in their capacity as agents of the State, and not the States themselves, for their decisions to go to wars of aggression or their complicit participation in them, occurred for the first time at the Nuremberg and the Far East (Tokyo) Tribunals¹⁰⁸. The Charters establishing those International Military Tribunals provided them with jurisdiction over crimes against peace, namely “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or preparation in a common plan or conspiracy for the accomplishment of any of the foregoing [...]”¹⁰⁹, and these Tribunals set an important precedent in international law whereby individuals themselves were held accountable and prosecuted for their participation in the acts of aggression of a State.

At the Nuremberg trials, twelve defendants in total were ultimately convicted for crimes against

¹⁰⁵ R. Griffiths, *International Law, the Crime of Aggression and the Ius Ad Bellum*, 2International Criminal Law Review301, 303 (2002).

¹⁰⁶ 1919, Treaty of Peace with Germany (Treaty of Versailles), 2U.S.T.43, Article 227.

¹⁰⁷ C. Mullins, The Leipzig Trials (1921), K. Sellers, *Delegitimizing aggression: First Steps and False Starts after the First World War*, 10J.Int.Criminal Justice7 (2012).

¹⁰⁸ S. Murphy, *The Crime of Aggression at the ICC*, in M. Weller (Ed.), Oxford Handbook on the Use of Force 1, 2 (2013).

¹⁰⁹ See Agreement for the Prosecution of the Major War criminals of the European Axis Powers and Charter of the International Military Tribunal, 82UNTS279, Article 6(1).

peace. These crimes were divided into two counts: 1) participation in a common plan or conspiracy for the accomplishment of a crime against peace; and 2) planning, initiating and waging wars of aggression and other crimes against peace. Of the twelve defendants, eight were convicted on both counts, while 4 were only convicted on the second count¹¹⁰.

In convicting the defendants, the Tribunal took into account pre-war international agreements such as the Briand -Kellogg Pact, and found that aggression had been an outlawed action at the moment of the commission of the acts. This was a controversial finding and was highly criticized by many who contended that no “international agreement criminalising wars of aggression was in force in 1939, and therefore, on the basis of the *nullum crimen sine lege* principle, the Allies were not legally entitled to prosecute the top Nazi leaders for aggression”¹¹¹.

The Tokyo Tribunal also had jurisdiction over crimes against peace¹¹². Twenty-eight defendants were brought before the tribunal and charged as “leaders, organizers, instigators, or accomplices [in the] formulation or execution of a common plan or conspiracy”¹¹³ to wage wars of aggression. All of the defendants (except for two that died and one that was declared incompetent) were ultimately convicted of crimes against peace¹¹⁴.

After the judgements were delivered, in 1946, the UNGA adopted Resolution 95¹¹⁵ in which it affirmed that the principles of international law set forth in the Charter and judgements of the Nuremberg Tribunal, *inter alia* the individual responsibility for aggression, are part of customary international law¹¹⁶. Additionally, the International Law Commission codified the principles on the crime of aggression set forth in the UN Charter and jurisprudence of the Nuremberg tribunal.¹¹⁷

¹¹⁰ International Military Tribunal Proceedings, Vol. XXII, 467-468, 554-557.

¹¹¹ P. Wilson, *Aggression, Crime and International Security: Moral, Political and Legal Dimensions of International Relations* 55 (2009); *see also* 1928, General Treaty for the Renunciation of War, 46 Stat.2343, 94LNTS57, at 50.

¹¹² Special Proclamation: Establishment of an International Military Tribunal for the Far East, in the Tokyo War Crimes Trial, Vol I: Pre-Trial Documents, Transcript of the Proceedings in Open session, 1-2.

¹¹³ N. Boister & R. Cryer (Eds.), *Indictment in Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgements* 16, 18 (2008).

¹¹⁴ *See* Y. Totani, *The Tokyo War Crimes Trial; The Pursuit of Justice in the Wake of World War II* (2009); N. Boister & R. Cryer, *The Tokyo International Tribunal: A Reappraisal* (2008).

¹¹⁵ Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, UNGA Res.95(I), UN Doc. A/236 (1946).

¹¹⁶ *See supra* note 104, 307-308.

¹¹⁷ Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, with Commentaries, ICL Report on the Work of its Second Session, UN GAOR, 5th Session, Supp. No. 12, UN Doc. A/1316(1950), reprinted in 2YILC374 (1950).

Initially, many international relations experts saw these developments as a positive sign towards the creation of a permanent International Criminal Court with jurisdiction over the CoA. However, the geopolitical divisions of the Cold War world order contributed to an atmosphere of resistance to these concepts and, thus, the idea of international prosecution of the CoA, as well as of other core crimes under international law, fell into disuse¹¹⁸.

As the geopolitical climate dramatically shifted into the post-Cold War era in the early 1990s, the possibility of convening international criminal tribunals to prosecute crimes under international law became somewhat more viable. Even so, the ICTY¹¹⁹ and the International Criminal Tribunal for Rwanda¹²⁰ created in 1993 and 1994, respectively, were only provided with jurisdiction for the prosecution of individuals accused of crimes against humanity, genocide and war crimes. Jurisdiction over the CoA was totally absent from these Tribunals' Statutes. The other quasi-international or 'hybrid' criminal tribunals¹²¹ created after the former Yugoslavia and Rwanda Tribunals also were not given a mandate to prosecute the CoA. However, the mere creation of these courts can be viewed as having at least "helped through the political log-jam holding back the creation of a permanent International Criminal Court"¹²² which includes in its Article 5 the CoA as a crime under its jurisdiction. Nevertheless, there has been significant reluctance within the realm of geopolitics to give the ICC adequate jurisdiction to effectively prosecute CoA.¹²³

2.2. The International Criminal Court

2.2.1 Drafting and adoption of the Rome Statute and the Kampala Amendments

Although the drafting process of the Rome Statute and the Kampala Amendments has been described on numerous occasions elsewhere¹²⁴, a short overview is important to understand the

¹¹⁸ M. Walzer, *The Crime of Aggressive War*, 6Wash.U.Glob.Stud.L.Rev.635, 635 (2007).

¹¹⁹ UN Doc. S/RES/827 (1993).

¹²⁰ UN Doc. S/RES/955 (1994).

¹²¹ Crimes Panels of the District Court of Dili; "Regulation 64" Panels in the Courts of Kosovo; Special Court for Sierra Leone; Extraordinary Chambers in the Courts of Cambodia, Special Tribunal for Lebanon.

¹²² Murphy, *supra* note 107, 9.

¹²³ See *supra* note 1, Article 15ter, paras. 2, 3.

¹²⁴ A. Zimmermann, *Article 5*, in O. Triffterer (Ed.), *Commentary on the Rome Statute*, 16-41(2008); R. Clark, *The Crime of Aggression*, in C. Stahn & G. Sluiter (Eds.), *The Emerging Practice of the International Criminal Court*, 709- 723 (2009).

challenges and controversy of the inclusion of the CoA as a crime under the jurisdiction of the ICC¹²⁵.

At the Rome Conference there was vehement opposition by some States, most notably the United States, to include the CoA within the jurisdiction of the Court due to the potential risks that such inclusion could possibly pose to its government officials¹²⁶. However, a broad coalition including European Union States and approximately thirty member States of various regional groups (many of which were members of the Non-Aligned Movement)¹²⁷ enabled the Rome Statute to vest the ICC with jurisdiction over four crimes, including CoA¹²⁸.

This was a pivotal compromise of the negotiating States and the CoA was explicitly listed under Article 5.1. Even so, Article 5.2 stipulated that States would need to adopt a proposal “in accordance with Articles 121 and 123” that defined the CoA and set out the jurisdiction conditions with respect to such crime¹²⁹ before the ICC would be able to effectively exercise its jurisdiction. Therefore, the Final Act of the Rome Conference¹³⁰ requested the Preparatory Commission of the Court (PrepCom) to “prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and conditions under which the International Criminal Court shall exercise its jurisdiction with regards to this crime”¹³¹. The PrepCom met from 1999 to 2002¹³² and different proposals of criminalisation of aggression were put forth. For example, in 1999, Russia presented a proposal to criminalise the “planning, preparing, initiating, carrying out a war of aggression”¹³³. Alternatively, Germany deviated from the Nuremberg language of ‘wars of aggression’ to include a more inclusive description

¹²⁵ For a summary of the negotiations see J. Harrington, *The Aggression Negotiations at the ICC Review Conference*, EJIL Talk, at <http://www.ejiltalk.org/the-aggression-negotiations-at-the-icc-review-conference/> (last visited 22 August 2016).

¹²⁶ See *supra* note 3, 997.

¹²⁷ E. LeClerc-Gagne & M. Byers, *A question of Intent: The Crime of Aggression and unilateral Humanitarian Intervention*, 41 *CaseW.Res.J.Int'l.L.* 379, 380 (2009).

¹²⁸ Rome Statute, Article 5.1.

¹²⁹ Rome Statute, Article 5.2. Article 121 contains rules for amending the Rome Statute and Article 123 requires that a Review Conference would consider amendments to the Rome Statute after seven years of its entry into force.

¹³⁰ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I, Resolution F, UN Doc. A/CONF.183/10, para. 7 (1998).

¹³¹ *Id.*

¹³² See the list of proposals and documents related to the CoA in UN Doc. PCNICC/2002/2/Ass.2 (2002). See also R. Clark, *Rethinking Aggression as a Crime and Formulating its Elements: The Final Work Product of the Preparatory Commission do the International Criminal Court*, 1 *LeidenJ.Int'l.L.* 859, 859n. (2002).

¹³³ Compilation of Proposals on the CoA submitted at the Preparatory Committee on the Establishment of an International Criminal Court (1996-1998), the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998) and the Preparatory Commission for the International Criminal Court (1999), UN Doc. PCNICC/1999/INF/2, 23 (1999) [emphasis added].

of a State's use of force, limited by two important qualifiers. The German proposal is considered by many to be the precursor to the threshold language of Art. 8bis,¹³⁴ which will be discussed later in this Chapter.

The first qualifier was that the use of force must be “undertaken in manifest contravention of the Charter of the United Nations”¹³⁵. The second qualifier required that the object or result of the AoA was “establishing a military occupation of, or annexing, the territory” of another State¹³⁶. A subsequent German discussion paper in 2000 explained that Germany considered it necessary to have “a narrow concept of the CoA, fully in line with what has been identified, in essence, as an aggressive, large-scale armed attack against the territorial integrity of another State, clearly without justification under international law”¹³⁷.

Although the PrepCom was not able to finish its task at hand, it drafted a Discussion Paper proposed by the last Coordinator of the Working Group on the CoA.¹³⁸ This paper included both a proposal to create a ‘Special Working Group on the Crime of Aggression’ (SWGCA) and an initial text with a number of options for the definition on the CoA in which only the first German qualifier remained.

When the Rome Statute entered into force in July 2002, the Assembly of States Parties established the SWGCA as the successor to the PrepCom with respect to the negotiations over the CoA¹³⁹. The SWGCA met formally eight times between 2003 and 2009, where States and non-State parties were both invited to participate¹⁴⁰. Additionally, a set of informal meetings were hosted by the Liechtenstein Institute on Self-Determination at Princeton University, the ‘Princeton Process’¹⁴¹, which contributed to develop mutual trust and expertise on the subject-matter amongst the many delegates of States who participated in those meetings¹⁴².

On February 13, 2009, the SWGCA adopted by consensus a “[p]roposal for a provision on

¹³⁴ J. Potter, *The Threshold in the Proposed Definition of the Crime of Aggression*, 6N.Z.Y.B.Int'l L.155, 161 (2008).

¹³⁵ UN Doc. PCNICC/1999/DP.13, Proposal submitted by Germany: definition of the crime of aggression.

¹³⁶ *Id.*

¹³⁷ See PCNICC/2000/WGCA/DP.4(2000), *supra* note 73, para.22.

¹³⁸ See Clark, *supra* note 123, 710.

¹³⁹ Continuity of Work in Respect of the Crime of Aggression, ICC Doc. ICC-ASP/1/Res.1 (2002).

¹⁴⁰ S. Barriga & L. Grover, *A Historic Breakthrough on the Crime of Aggression*, 105Am.J.Int'l.L.517, 518 (2011).

¹⁴¹ S. Barriga *et al.* (Eds.), *The Princeton Process on the Crime of Aggression: Material of the Special Working Group on the Crime of Aggression, 2003-2009* (2009).

¹⁴² See *supra* note 139.

aggression”¹⁴³. The main achievement of the SWGCA was the agreement on a definition of the CoA without any bracketed open issue or reservations¹⁴⁴. However, the negotiating States could not reach agreement regarding the way in which the Court should exercise its jurisdiction over this crime, specifically regarding the necessity of State consent and the determination by the UNSC of the existence on an AoA.

From May 31 to June 11 2010, State parties, non-State parties and civil society representatives participated in the first Review Conference of the Rome Statue held in Kampala, Uganda, where State parties adopted by consensus the named Kampala Amendments to the CoA¹⁴⁵. At the Kampala Review Conference, States adopted the CoA definition as drafted by the SWGCA. However, the United States, due to the lack of support to its proposal to reopen the discussion regarding the definition, requested the inclusion of some interpretative understandings¹⁴⁶. The German delegation facilitated the not so easy negotiations of the drafting of such understandings where several States were reluctant to intervene, as it seemed to be the only way to get the United States on board¹⁴⁷.

Even though the German delegation presented only three understandings for consultation, in the end seven understandings were agreed on two days before the end of the Review Conference. For the purpose of the present article, Understandings 6 and 7 are the most relevant. Understanding 6 stresses that aggression is the “most serious and dangerous form of the illegal use of force”. It further states that “all the circumstances of each particular case” have to be considered, including the “gravity of the acts” and their “consequences”, confirming that not every illegal use of force constitutes aggression.

Furthermore, the clarification of the sentence ‘manifest violation’ of the UN Charter used in the definition of CoA was obtained in Understanding 7. This Understanding states that the “three components of character, gravity and scale must be sufficient to justify a ‘manifest’ determination”. No one component can be significant enough to satisfy the manifest standard

¹⁴³ Report of the Special Working Group on the Crime of Aggression, ICC Doc. ICC-ASP/7/20/Add.1, Annex II, App.I (2009).

¹⁴⁴ *Id.*, 30-31.

¹⁴⁵ *See supra* note 1.

¹⁴⁶ *See supra* note 139, 522.

¹⁴⁷ For an account on this negotiation *see* C. Kreß & L. von Holtendorff, *The Kampala Compromise on the Crime of Aggression*, 8JICJ1179, 192-1193 (2010).

by itself”.

It is important to highlight that the Understandings themselves are not based upon any particular legal statute, so they should be considered as an indication of the intent of the drafters since they were adopted together with the amendments and by consensus¹⁴⁸.

The agreement on the Understandings, with its positive effect on the acceptance of the definition of CoA, increased the pressure on the delegates to find a compromise on the issues that were still outstanding, such as the system of ICC’s jurisdiction over the CoA. Arduous negotiations were required to reach an agreement on this matter. Finally, States compromised on the text of Articles 15*bis* and 15*ter* including the possibility of States to opt-out of the ICC jurisdiction over CoA and exempting from the jurisdiction of the ICC over CoA allegedly committed by nationals or in the territory of non-State parties while preserving the ICC independence from any determination of the existence of an AoA as precondition for a referral by the Council to the ICC under Article 13(b) of the Rome Statute¹⁴⁹.

Ambassador Christian Wenaweser, Chair of the Review Conference, before inviting delegates to decide on the amendments to the CoA echoed what Philippe Kirsch, Chair of the Committee of the Whole at the Rome Conference, had said about the outcome in Rome; “it contains uneasy technical solutions, awkward formulations, [and] difficult compromises that fully satisfied no one”¹⁵⁰. However, the political will of States to vest the ICC with the power to prosecute those responsible for the CoA prevailed and an historic agreement was reached marking an enormous leap forward for humanity.

2.2.2 *Rationale and scope of the threshold clause in the definition of CoA*

Differing opinions exist among scholars regarding the gravity threshold in Art. 8*bis* and how this should interplay *vis à vis* the UN Charter.

¹⁴⁸ Liechtenstein Institute on Self-Determination, Handbook Ratification and implementation of the Kampala Amendments to the Rome Statute of the ICC, Crime of Aggression, War Crimes 13 (2012).

¹⁴⁹ Some annotations on the negotiation process on the ICC jurisdiction over the CoA are made by D. Kostic, *Whose Crime is it anyway? The International Criminal Court and the Crime of Aggression*, 22Duke J.Comp.&Int’l.L.109, 111-121 (2011-2012). See *supra* note 139, 520, 523-531.

¹⁵⁰ P. Kirsch & J. Holmes, *The Birth of the International Criminal Court: The 1998 Rome Conference*, 36Canadian Y.B.Int’l.L.3, 38 (1998).

The first school of thought includes those authors that consider that the AoA, taking into consideration the elements from Res. 3314, especially its Article 2, already includes gravity in its definition. Therefore, by the inclusion of the gravity threshold in Art. 8bis paragraph 1, only the gravest AoA should be considered CoA, and, thus, result in individual criminal responsibility¹⁵¹. This means that, if we follow this interpretation, only the most serious of the already grave acts of use of force could constitute a CoA. This would lead to the scenario in which the ICJ could find a state responsible for aggression, following the UN Charter and Res. 3314, while the ICC could find the person in the leadership position who has planned, prepared, initiated or executed such act of aggression not responsible because the AoA is not grave enough to amount to a CoA. This situation would not necessarily amount to a problem as the law pertaining to State responsibility and the law governing individual criminal responsibility are separate and distinct.

Another school of thought holds that the inclusion of the gravity threshold in the definition of the CoA in Art. 8bis was necessary to reassure the delegates that only the gravest illegal use of force would be penalised¹⁵². In this sense, Paulus, considered that the SWGCA members wanted to distinguish the crime from an ordinary violation of the prohibition of the use of force¹⁵³. In the same vein, some authors such as Gillet sustain that the addition of the gravity threshold was necessary so that the considered ‘minor’ uses of force, such as border skirmishes, were not criminalised¹⁵⁴. We tend to agree with Gillet in the sense that only grave uses of force should give rise to a CoA and, therefore, be criminalised by the Rome Statute. However, following a third school of thought¹⁵⁵, and literally interpreting Gillet’s argument, it can be reasoned that since the inclusion of the gravity threshold was necessary to avoid criminalisation

¹⁵¹ R. Clark, *Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May-11 June 2010*, 2GoJIL689, 697 (2010); N. Weisbord, *Judging Aggression*, 50Colum.J.Transnat’l.L.82, 166 (2011). See also Kostic, *supra* note 149, 123-124.

¹⁵² C. Kreß, *Time for decision: Some thoughts on the immediate future of the Crime of Aggression: A reply to Andreas Paulus*, 20Eur.J.Int’l.L.1129, 1135 (2009); R. Heinsch, *The Crime of Aggression after Kampala: Success or Burden for the Future*, 2GoJIL713, 730-731 (2010). See also K. Petty, *Criminalizing force: resolving the threshold question for the CoA in the context of modern conflict*, 33Seattle U.L.Rev.105, 116 (2009).

¹⁵³ A. Paulus, *Second Thoughts on the Crime of Aggression*, 20Eur.J.Int’l.L.1117, 1121 (2009).

¹⁵⁴ M. Gillett, *The Anatomy of an International Crime: Aggression at the International Criminal Court*, 13International Criminal Law Review829, 852 (2013). See also Donat Cattin, *supra* note 25, 20-21.

¹⁵⁵ See Murphy, *supra* note 107, 38; D. Scheffer, *El significado y la activación del crimen de agresión bajo el Estatuto de Roma de la Corte Penal Internacional*, 7Política Criminal209, 112-213 (2012); B. Van Schaack, *The Grass That Gets Trampled When Elephants Fight: Will the Codification of the CoA Protect Women*, 15UCLA J.Int’l.L.&Foreign Aff.327, 340 (2010).

of minor uses of force (i.e. ‘other uses of force’ in the UN Charter terminology) and that such threshold was included in the wording of the definition of CoA, gravity is not necessary for the existence of an AoA as such, in the context of the Rome Statute, but it is a quality that an AoA needs to have in order to constitute the CoA.

After analysing the wording, context and the ontological meaning of Art. 8*bis* as well as the *travaux préparatoires*, we share this view.

In order to explain this consideration more in depth we must first analyse the “ordinary meaning” of the terms of Art. 8*bis* “in their context and in the light of its object and purpose” and then continue with the “supplementary means of interpretation”¹⁵⁶.

2.2.2.a. Ordinary meaning of the Definition

When interpreting Art. 8*bis* in accordance with the ordinary meaning to be given to the terms of the definition, AoA is the use of armed force inconsistent with the UN Charter and a CoA consists of the aforementioned AoA that ‘by its character, gravity and scale’ constitute a ‘manifest violation’ of the UN Charter perpetrated by a leader. As we can see, there is no reference to the gravity of such uses of force in order for a given use of force to constitute an AoA under the Rome Statute, the only requirement being that the act is inconsistent with the UN Charter.

As previously mentioned, some scholars (Clark and Kostic, for example), who subscribe to the idea that the definition AoA under the Rome Statute system includes the same elements as the definition of aggression in the UN System (i.e., including gravity), state that only the gravest of the already grave AoA should constitute a CoA¹⁵⁷. Kostic believes that the ICC judges, when deciding what a CoA is, will exclude the “lesser acts of aggression that might only satisfy one condition”¹⁵⁸, referring to the conditions of “character, gravity and scale” included in Art. 8*bis* (1). We agree with this conclusion to the extent that we understand that at least 2 of the 3 elements mentioned in the definition of the CoA must be fulfilled in order for an AoA to amount such a crime¹⁵⁹. However, contrary to what Kostic believes (i.e., that “only a narrow

¹⁵⁶ VCLT, Articles 31 and 32.

¹⁵⁷ See Kostic, *supra* note 149, 124. See also Clark, *supra* note 151, 697.

¹⁵⁸ See Kostic, *supra* note 149.

¹⁵⁹ For discussions about this issue see Heinsch, *supra* note 152, 726-732.

category of the *gravest* acts of aggression”¹⁶⁰ could amount to a CoA), suggesting that the AoA, in the context of the Rome Statute, is already grave, we counter that the gravity element is not included as a necessary element constituting an AoA given that it should be proven, together with scale or character, and it should not be taken for granted. If gravity had already been included as an element in the definition of the AoA, it would not have been necessary to include it explicitly as an element to be proven for a CoA to exist.

On the other hand, many scholars have stated that the Art. 8*bis* definition of AoA “is equated with any other use of force in violation of the UN Charter”¹⁶¹ given that there is no gravity threshold in it¹⁶². Following this line of thought, they contend that if we were only to read the literal wording of Art. 8*bis* without also placing it within the context of the UN’s various documents, decisions and resolutions, any violation of Article 2.4 of the UN Charter would constitute an AoA, in the context of the Rome Statute, including the crossing of armed forces of the international limit without the consent of the neighbouring State¹⁶³. These scholars further state that not all AoA can be considered CoA, and that only those grave enough to manifestly violate the UN Charter¹⁶⁴ should be considered as such.

We agree with these scholars’ premises. However, contrary to what they contend, we believe that this is not an inherent flaw in the definitions set forth in the Kampala Amendments. We argue that there is no need to include the gravity threshold in the definition in Art. 8*bis*(2) since there is no consequence in the framework of the Rome Statute, *i.e.* individual criminal responsibility, attached to the performance of such act if it does not fulfil the requirements set in Art. 8*bis*(1). However, when the use of force is grave, States, may be found responsible for aggression, in the context of the UN system and individuals might be found culpable for CoA, in the context of the Rome Statute.

It is important to always bear in mind that aggression is different from a CoA; the first one entailing State responsibility and the second individual responsibility¹⁶⁵.

As we can see, The ordinary meaning of the terms is not clear, therefore, following Article 31

¹⁶⁰ See Kostic, *supra* note 149, 124.

¹⁶¹ See Murphy, *supra* note 107, 38-39; H. Koh, *The Crime of Aggression: The United States Perspective*, Faculty Scholarship Series, Paper 5006, 264 (2015).

¹⁶² See Scheffer, *supra* note 155, 212-213.

¹⁶³ See van Schaack, *supra* note 155, 340.

¹⁶⁴ S. Koran, *The International Criminal Court and Crimes of Aggression: Beyond the Kampala Convention*, 34*Hous.J.Int’l.L.*231, 252-254 (2011).

¹⁶⁵ I. Stancu, *Defining the Crime of Aggression or Redefining Aggression?* in M. Politi & G. Nesi (Eds.), *The International Criminal Court and the Crime of Aggression* 87, 88 (2004).

of the VCLT, it becomes necessary to interpret them “in their context and in the light of its object and purpose”.

2.2.2.b. *Context, object and purpose: the Preamble and the Understandings*

Article 31.2 of the VCLT provides us with guidance to understand which elements should be considered as context: the “text, including its preamble and annexes [as well as] [a]ny agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty [...]”

In order to analyse the gravity threshold considering the context, it is important to consider Annex III to the Kampala Amendments, which contains seven Understandings regarding the way in which the amendments should be interpreted¹⁶⁶. As previously mentioned, for our purposes, Understandings 6 and 7 are the most germane. Understanding 7 notes that the character, gravity, and scale must individually and collectively be sufficient to amount to a “manifest violation of the UN Charter”, thus reaffirming the notion that not every AoA is a basis for criminal prosecution¹⁶⁷ and that the ‘manifest’ threshold was included to exclude “borderline cases [or] those falling within a grey area”¹⁶⁸. This understanding contributes to the idea mentioned before that, in the context of the Rome Statute system, borderline cases could be considered AoA (since the threshold element is not included in its definition), but not CoA (since in order to be considered as such, they would need to be manifest violations of the UN Charter).

On the other hand, Understanding 6, presents a challenge to this consideration since it notes that aggression is “the most serious and dangerous form of the illegal use of force” and that all circumstances, including gravity and the consequences of the act, should be considered before determining if an AoA exists. In this way, the States seem to have implicitly included a gravity threshold in the definition of AoA in the context of the Rome Statute.

The addition of gravity in the definition of the AoA would go against not only the ordinary

¹⁶⁶ See *supra* note 1, Annex III.

¹⁶⁷ J. Isanga, *The International Criminal Court Ten Years Later: Appraisal and Prospects*, 21 *Cardozo J.Int'l&Comp.L.*235, 310 n. 368 (2013).

¹⁶⁸ J. Trahan, *The Rome Statute's Amendment on the CoA: Negotiations at the Kampala Review Conference*, 11 *Int'l Crim. LawRev.*49, 58 (2011).

meaning of the text of Art. 8bis as explained in the previous section but also against Understanding 7.

Even though the legal status of the Understandings is debatable¹⁶⁹, Understandings 6 and 7 do not provide a clear answer as to whether the gravity threshold is only included in the definition of the CoA or also present in the definition of AoA. Consequently, as a way to clarify the ambiguity presented by the Understandings, it is important to examine supplementary means of interpretation, including the preparatory work of the Kampala Amendments¹⁷⁰.

2.2.2.c. Preparatory work

Many scholars have also relied on the preparatory works as a means of interpreting the intent of the drafters with respect to the threshold element of the definitions of CoA and AoA.

They placed the aggression amendments adopted in Kampala within the context that they were part of a larger political compromise that balanced the interest among rival States as such compromise related to three main elements: (1) the definition of both the crime and the act of aggression; (2) the jurisdictional regime of the ICC over such crime; and (3) the mechanism for its entry into force¹⁷¹. These amendments, were drafted using ‘constructive ambiguity’ techniques¹⁷², leaving the judges with the task of interpreting the definition of the act and crime of aggression¹⁷³.

Evaluating the preparatory works, we can see that the threshold clause in the CoA was first proposed during the Rome Conference and the PrepCom¹⁷⁴. During the meetings and negotiations of the SWGCA, there were two divergent positions regarding the gravity threshold. Some participants considered that, taking into consideration the legal documents already available at that time, an AoA would typically constitute a manifest violation of the

¹⁶⁹ K. Heller, *The uncertain legal status of the aggression understandings*, 10 JICJ 229, 229-248 (2012).

¹⁷⁰ VCLT, Article 32.

¹⁷¹ See Weisbord, *supra* note 151, 88. See also R. Clark, *Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It*, 20Eur.J.Int'l.L 1103, 1104 (2009).

¹⁷² ICC-ASP, Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States, from 11 to 14 June 2007, Document ICC-ASP/6/SWGCA/INF.1 (2007). See also, Barriga, *supra* note 140, 117.

¹⁷³ See Weisbord, *supra* note 151, 86.

¹⁷⁴ ICC Prep.Com., Compilation of proposals on the Crime of Aggression submitted at the Preparatory Committee on the Establishment of an International Criminal Court (1996-1998), the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998) and the Preparatory Commission for the International Criminal Court (1999), Document PCNICC/1999/INF/2 (1999).

UN Charter, thereby being serious enough to need no further qualifications¹⁷⁵. They considered that the inclusion of the gravity threshold in the definition of the CoA would allow the exclusion of certain acts of aggression¹⁷⁶, which are already the gravest uses of force prohibited under international law.

Alternatively, those that favoured the incorporation of a gravity threshold in the definition of the CoA did so because they believed it was necessary to exclude those doubtful cases¹⁷⁷ and cases of whereby insufficient gravity caused them to fall within a grey area¹⁷⁸ of the ICC jurisdiction. After considering this position, which was the one that garnered the most support¹⁷⁹, it would seem that the delegates felt that the gravity threshold was not already included in the definition of the AoA, as it was in the case of Article 2 of the Res.3314. Otherwise, they would not have seen the necessity of adding another reference to gravity in the CoA definition. If we accept that the gravity threshold is included not only in the CoA but also in the definition of the AoA, it could lead us to an unnecessary redundancy mentioned already by Remiro Brotóns, when analysing the existing rules over this crime, “¿Se pretende ahora sugerir que solo los actos más graves de más grave de los crímenes más graves deben someterse a la jurisdicción de la Corte?” (Are we suggesting that only the most serious acts of more serious of the most serious crimes should be the one under the jurisdiction of the Court?)¹⁸⁰.

With respect to this matter, we are in agreement with Kreß and Holtzendorff who argue that the inclusion of the gravity threshold was meant to satisfy the States claiming that the use of force should be sufficiently serious and that the illegality should be reasonably uncontroversial¹⁸¹. Therefore, States included such gravity threshold in the CoA definition but not in the definition of AoA as the former is the one that would include the element of

¹⁷⁵ ICC- ASP, Official Records, Document ICC-ASP/7/20/Add.1, Appendix II, at 22, para. 13 (2009).

¹⁷⁶ *Id.* ICC-ASP, Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States, from 13 to 15 June 2005, Document ICC-ASP/4/32, Annex II.D, 3 (2005).

¹⁷⁷ See *supra* note 175.

¹⁷⁸ ICC-ASP, Official Records, Document ICC-ASP/6/20/Add.1, Annex II, at 4, para. 24 (2008).

¹⁷⁹ ICC-ASP, Official Records, Document ICC-ASP/5/35, Annex II, 11 (2007); ASP-SWGCA, Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States, from 11 to 14 June 2007, Document ICC-ASP/6/SWGCA/INF.1, at 11, para. 55 (2007).

¹⁸⁰ A. Remiro Brotóns, *Crimen de agresión. Crimen sin castigo*, in C. R. Chirnet (Ed.), *Uso de la Fuerza y Protección de los Derechos Humanos en un Nuevo Orden Internacional*, 120-121 (2006).

¹⁸¹ See Kreß & Holtzendorff, *supra* note 147, 1192-1193.

individual criminal responsibility. Those who supported the idea of including the threshold clause in the definition of the CoA did not aim to distinguish between different AoA, ones that would entail individual responsibility and ones that would not, but to exclude from the jurisdiction of the ICC cases of insufficient gravity. Gillett supports this idea by saying that the threshold was a necessary addition in order to prevent the criminalisation of uses of force that are considered minor, such as border skirmishes or less serious uses of force¹⁸². Acts that some say should not be included under the definition of aggression in the sense of the UN system (or, to be more precise, Res.3314), but should fall under the definition of AoA in the sense of Art. 8bis.

2.2.3 *The reference to Resolution 3314 of the UN General Assembly*

As explained in the previous chapter, the UNGA, when it adopted Res.3314, strived to provide a clearer definition of aggression in order to assist the UNSC in determining whether a State action constituted aggression¹⁸³. However, Res. 3314 is not a legally binding source of international law.

Given that Art. 8bis refers to the Res. 3314 in its second paragraph, such reference could have implications over our thesis regarding the lack of gravity threshold in the definition of the AoA in the Rome Statute system.

In order to determine the possible implications of Res.3314, we must consider the meaning and scope of the reference to such Resolution. It is essential to determine if the reference necessitates the inclusion of the entire Resolution, specifically Article 2, or only Articles 1 and 3, given that the first sentence of the second paragraph of Art. 8bis defines an AoA in the same way as Article 1 of the Res. 3314, and the list of acts of aggression contained in Art. 8bis duplicates that one set forth in Article 3 of such Resolution.

When discussing the reference by Art. 8bis to Res. 3314 , most scholars also evoke the possible inclusion of its Article 4, which could lead to an extension of the list of acts included in Art. 8bis via a decision by the UNSC¹⁸⁴. Even though the focus of our analysis is whether the *de minimis* clause of Article 2 of the Res. 3314, which emphasises gravity as a characteristic

¹⁸² See M. Gillett, *supra* note 154, 852.

¹⁸³ See Clark, *supra* note 151, 696.

¹⁸⁴ See Kostic, *supra* note 149, 128.

element of aggression, is implicitly included in the definition of AoA under Art. 8bis, it is important to consider here the arguments used by scholars for the inclusion of Article 4 of the Resolution.

According to Kostic, the text of Art. 8bis provides “a clue in requiring that the acts shall be considered aggressive if such a determination is made ‘in accordance’ with Res. 3314”¹⁸⁵. Therefore, he concludes that the wording of Art. 8bis establishes that an AoA should be determined ‘in accordance’ with the entire resolution, including Article 4 (and nothing to stop us from adding Article 2 and the preamble). However, Kostic then continues by saying that the spirit of the drafters at the Kampala Review Conference was to give the ICC jurisdictional independence from the UNSC; and, therefore, Article 4 should not be considered as included in the definition of aggression. Given that Article 2 of Res. 3314 does not conflict with the ICC jurisdictional independence, if we follow Kostic reasoning, it could be considered that Article 2 is included in the definition of AoA.

We disagree with the basis of this argument given that the phrase “in accordance with the Resolution 3314” in Art. 8bis is included before the list of acts of aggression and after the general definition of an AoA separated by a period marking the finalization of the idea. We consider that the reference to the Resolution includes only Article 3 given that the list of acts that follows those words is taken *verbatim* from this Article.

Other scholars, such as O’Connell and Niyazmatov, believe that the incorporation of the entire resolution is possible to the extent that its provisions are not incompatible with the nature of the Rome Statute and the role of the ICC as an independent judicial body. They continue by saying that the inclusion of the gravity element of Article 2 is compatible with the gravity threshold of paragraph 1 of Art. 8bis while Article 4 of Res. 3314 is not. If we were to follow this premise, that would allow the interpreters of Art. 8bis to arbitrarily pick and choose in an *ad hoc* manner from the text of Res.3314 which of the Articles they themselves feel are applicable to the definition, and, in so, would infringe upon the independence of the ICC as a judicial body.

It is important to consider the opinion of Kreß and von Holtendorff, who state that while the reference to Res. 3314 constitutes a reconciliation of competing views of delegates when Art. 8bis was being drafted, “the addition of the phrase ‘in accordance with United Nations General

¹⁸⁵ *Id.*

Assembly Resolution 3314 (XXIX) of 14 December 1974’ in the second sentence of Art. 8bis(2) is constructively ambiguous in that it leaves open the question as to whether and in what way provisions other than Articles 1 and 3 in the annex of Resolution 3314 may become relevant for the ICC¹⁸⁶. These scholars defer to the judgement of the ICC judges as to whether Art. 8bis should only include Articles 1 and 3 of the Resolution or if by the wording ‘in accordance with [...]’, Articles 2 and 4 should be included. When predicting what the decision of the ICC Judges would be in this regard, Kreß considers that they will not apply Articles 2 and 4 of the definition¹⁸⁷.

Finally, scholars such as Petty believe that Article 2 of Res.3314 is not included in the definition of Art. 8bis(2), and this lack of inclusion is justified because the gravity threshold is already covered by other provisions of the Rome Statute, in particular, Article 17.1, paragraph d)¹⁸⁸. Even though we do not agree with the argument that Article 2 of the resolution is not included because it is already covered by other Articles of the Rome Statute, because the drafters chose to include only Articles 1 and 3 of the Res.3314, we do believe that the gravity threshold in the definition of the CoA could be considered unnecessary, given that articles 17.1 and 5.1 of the Rome Statute already includes such threshold, which could lead to a redundancy. However, this is not the issue at hand.

In sum, in our opinion, the wording of Art. 8bis(2) is clear and given that the first sentence is taken from Article 1 and the enumeration from Article 3 of the annex to Res.3314, as well as considering that the reference to the Resolution is mentioned in the second sentence of Art. 8bis, before the enumeration of acts of aggression, only Articles 1 and 3 were taken as a basis in the drafting of Art. 8bis.

Conclusion

Following our analysis of the ordinary meaning of the text of Art. 8bis, its context, object and purpose as well as the intent of the drafters, we can conclude that *within the Rome Statute*

¹⁸⁶ See Kreß & von Holtendorff, *supra* note 147, 1191.

¹⁸⁷ See Kreß, *supra* note 152.

¹⁸⁸ See Petty, *supra* note 152, 117.

framework the use of armed force inconsistent with the UN Charter which is not grave can be considered an AoA but not a CoA. Only those acts that can fulfil the gravity threshold should be elevated to the level of CoA, therefore, demanding individual criminal responsibility.

The fact that an act that does not fulfil the gravity threshold could be labelled an AoA under the Rome Statute system does not imply a State responsibility in inter-States context, since the same act would not entail aggression under the UN system. Subsequently, under the UN system, in order for aggression to exist, the use of force has to be grave.

It is important to keep in mind that the Rome Statute system is separate from the UN system. The definition of aggression in the Res.3314 and the mentioned decisions of the ICJ relate to State responsibility for the illegal use of force. The Rome Statute creates a system of individual criminal responsibility. This separation of systems, which we consider imperative, is reaffirmed by the words of the Art. 8bis since in its paragraph 1 states “for the purpose of this Statute” and paragraph 2 states “[f]or the purpose of paragraph 1”, a reminder that the definitions are drafted considering that they will be used to hold a person, not a State, responsible for an action. Understanding 4 to the Kampala Amendments provides further elements for this distinction as it clarifies that the definitions of act and crime of aggression are solely for the purposes of the ICC and do not limit or prejudice “in any way existing or developing rules of international law”. Moreover, Article 10 of the Rome Statute also contributes to this idea by saying that nothing in the Part 2, where Article 8bis is included, “shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”.

Therefore, the provisions regarding the illegal use of force are not prejudicially affected by the definitions included in the Rome Statute. To the contrary, the penalisation of a grave violation of the principle of use of force only serves to reaffirm such principle as it was the case with the prosecution of grave breaches of international humanitarian law that have further strengthened the system¹⁸⁹.

The qualifying characteristic of aggression, in the framework of the UN system, and one of the qualifying characteristics of CoA in the framework of the Rome Statute, is the gravity of the use of force, gravity that does not admit differentiations or nuances. A grave violation of

¹⁸⁹ M. Obeg, *The Absorption of Grave Breaches into War Crimes Law*, 91IRRC163, 182 (2009).

the principle of abstention of the illegal use of force entails State responsibility, and in the case of ‘armed attack’ the possibility for a State to be able to use the self-defence exception in the framework of the UN system, and individual responsibility for the leader that has planned, prepared, initiated and executed such acts, in the framework of the Rome Statute system.

Taking this into consideration, we separate ourselves from those that criticise the wording of Art. 8bis as weakening the system in place regarding the prohibition of the use of force and share the positive view of those authors¹⁹⁰ that considers that Art. 8bis further ratifies that the illegal uses of force should be under the jurisdiction of the ICC only when they fulfil, *inter alia*, the gravity threshold.

The inclusion of the gravity threshold in the wording of the definition of CoA but not in the AoA definition avoids the creation of a new category of the illegal use of force, the gravest of the already grave acts. This means that the ICC Prosecutor, when investigating acts that could amount to CoA, would not need to prove an additional element, meaning, he or she would not have to prove that the act in question is the gravest of the already grave use of force. The ICC Prosecutor would ‘simply’ have to prove that the act, by its character, gravity, and scale is a manifest violation of the UN Charter. Therefore, gravity should only be a quality of an AoA for it to constitute the basic element of the CoA committed by an individual, not for the AoA to exist as such under the Rome Statute system.

In conclusion, what the drafters intended in Kampala is to respect that only the grave illegal use of force should generate responsibility, either State responsibility within the context of the UN system or individual responsibility within the framework of Rome Statute system. Given the difficulties of the negotiations, the text of the amendments is not perfect. However, due to the political will of most of the delegates in Kampala to agree on a definition and a jurisdictional system for the ICC over the crime of aggression, “the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole”¹⁹¹, the delegations might have overlooked the imperfections of the

¹⁹⁰ C. Quesada Alcalá, *El Crimen de agresión como amenaza a la seguridad global*, 160Cuadernos de Estrategia77, 90-91 (2013), L. Pezzano, *El umbral de gravedad en el crimen de agresión: ¿Una Nueva Categoría en los Usos Ilícitos de la Fuerza?*, 4Anuario Iberoamericano De Derecho Internacional Penal 86, 104 (2015).

¹⁹¹ Judicial decisions, International Military Tribunal (Nuremberg), 41Am.J.Int'l.L.172, 186 (1947).

wording, and used different drafting techniques to achieve a final outcome¹⁹².

The adoption of the amendments is a remarkable achievement, a milestone, in the field of international criminal law¹⁹³ and after the activation of jurisdiction of the ICC over this crime it will be up to the judges to interpret the role that the gravity threshold plays in the determination of existence of an AoA or a CoA. We have seen this happen before when judges of international tribunals have defined in practice the uncertainties of the tribunals' founding instrument. Therefore, it will be in the hands of the ICC judges to advance the value of peace and security while contributing to the Rule of Law, its legitimacy, and the advancement of International Criminal Law.

¹⁹² See Barriga & Grover, *supra* note 140, 533.

¹⁹³ See Heinsch, *supra* note 152, 715; Kostic, *supra* note 149, 140.