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Humanitarian interventions trapped in the crime of aggression

Humanitarian interventions through the lens of article 8bis in the Rome Statute.

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Abstract

The purpose of this thesis is to examine interventions under the doctrine of R2P without appropriate legal authority becomes coercive actions of Unilateral Humanitarian Intervention. And that a unilateral humanitarian intervention would amount to the crime of aggression.

The R2P doctrine states that sovereignty is derived from the responsibility for a population. The responsibility to protect is primarily on the state. In the event of a failure to protect a human population the responsibility is transferred to the international community of states.
According to the doctrine of Humanitarian Interventions it exists a third exception to the use of force, which allows states to legally intervene in the event of a humanitarian catastrophe.

This thesis will first examine the link between R2P and Unilateral Humanitarian Intervention. Secondly, the legal status of Unilateral Humanitarian interventions will be examined, and how Unilateral Humanitarian Intervention can fulfil the elements of the crime of aggression. The last part examines if Unilateral Humanitarian Intervention can constitute 'defensive force of others' as grounds to exclude criminal responsibility, in the event of an ICC criminal trial for the crime of aggression.
The thesis concludes that a person subject to a criminal prosecution for the crime of aggression in the event of Unilateral Humanitarian Intervention, could successfully argue 'defensive force of others' as grounds to exclude criminal responsibility.

List of Abbreviations

ICC	The International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	The International Court of Justice
R2P	Responsibility to Protect
UNHRC (HRC)	Human Rights Council
UNGA (GA)	United Nations General Assembly
UNSC (SC)	United Nations Security Council

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Introduction

The 20th September 1999, then Secretary-General held a speech to the UN, in which he posed a challenge to the international community to not shield atrocities, such as Rwanda and Yugoslavia, behind the veil of sovereignty[1]. Normative changes in human rights law and human security have contributed to the increased engagement by the international community to humanitarian crises and catastrophes. This development has also increased the willingness of international community to engage in coercive actions such as interventions. The doctrine of R2P tries to give new meaning to the principles of sovereignty and non-intervention, to merge the need to stop or prevent humanitarian catastrophes, with compliance with international law.

The thesis will focus in the first part, when coercive actions under the doctrine of R2P lacks the right authoritative element it constitutes unilateral humanitarian intervention. The middle part will examine how unilateral humanitarian intervention can satisfy the material elements of acts of aggression.

The last part examines how unilateral humanitarian intervention could constitute a crime of aggression and under which circumstances an argument of defensive force can be made.

Research aim and question

The purpose of this thesis paper is to examine how pursuers to R2P-interventions could find themselves in R2P's unlawful extension - Unilateral Humanitarian Intervention. And therefore, see themselves under prosecution of the ICC for the crime of aggression under Article 8bis. And, if it is possible to argue defensive force as grounds for excluding criminal responsibility under Article 31(1)(c).

1 UNGA, 'Secretary-General presents his Annual Report to the General Assembly' (20 September 1999) - 'If States bent on criminal behaviour know that frontiers are not the absolute defence; if they know that the Security Council will take action to halt crimes against humanity, then they will not embark on such a course of action in expectation of sovereign impunity'.

1. From responsibility to protect (R2P) to humanitarian intervention

1a. Genesis and content of R2P

The Responsibility to Protect (R2P) was formulated in the aftermath of the crisis and conflict patterns that emerged after the cold war ended.

Significant legal changes during the latter half of the 20th century and the signing of several conventions[2] during the 20th century, obliged states to act or refrain from acts of certain conduct. The horrors witnessed during the conflicts in Yugoslavia and Rwanda reinforced the need for legal obligations in intra-state conflicts[3]. The subsequent war in Kosovo was subject to a commission[4] report whose aim was to investigate transpired events, and the following legal issues.

The Kosovo Report identified a legal gap between international laws aimed to protects civilians against serious and grave perils on life and dignity and the principle of non-intervention[5]. The report suggested to merge lawful conduct with legitimate concerns for the Kosovar population as a way forward[6]. The Kosovo commission called for developing legal norms that reconciled a practice of intervention with sovereign rights, to prevent humanitarian catastrophe[7]. It also suggested an amendment to the UN charter along its suggestions and a formal adoption and interpretation by both the GA and the SC[8].

In 2001 the ICISS published a report called 'The Responsibility to Protect'[9] in which a framework was formulated to close the legal gap identified in the Kosovo report[10]. The stated aim of the ICISS report was to establish clear rules and procedures for intervention, establish legitimacy when necessary. And that military intervention can only be carried for stated purposes to minimize human costs and help eliminate causes of conflict[11].

The R2P-doctrine redefines two core legal concepts contained within the UN charter. State sovereignty found in article 2(1) entails that states' rights and obligations are equal within the legal system. The ICISS interprets sovereignty broader than being international legal identity. And as the responsibility for the welfare of the state's human population. Being a part of the international system of states, ultimately being part of the UN-system, creates responsibilities and obligations towards the international system as a whole[12].

The interpretation had an impact on the principle of non-intervention found in article 2(7). The primary responsibility of welfare for a human population lies with the state, but a secondary

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[2] such as; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, Entry into force 26 June 1987) 1465 UNTS 85.
[3] UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (on establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991); UNSC Res 955 (8 November 1994) UN DocS/RES/955 (on establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal).
[4] Independent International Commission on Kosovo (IICK)
[5]Independent International Commission on Kosovo (IICK), *The Kosovo report: Conflict, International Response, Lessons Learned* (Oxford University Press, 2000), 186-187.
[6] IICK (n 5), ch 8.
[7]IICK (n 5), 187.
[8] IICK (n 5), 187.
[9] International Commission on Intervention and State Sovereignty (ICISS) 'The Responsibility To Protect: Report Of The International Commission On Intervention And State Sovereignty' (IDIRC 2001), pt II.
[10] ICISS (n 9), ch 1.
[11] ICISS (n 9), ch 2.
[12] ICISS (n 9), para 2.15.

responsibility lies with the international community of states in the event of a state failing to mitigate or remedy the suffering. Article 24 of the UN charter grants the SC responsibilities to act on threats towards international peace and security. The UN system creates greater state dependencies and serve the need of cooperation for problems to be solved.

A state that fails the primary responsibility, the principle of non-intervention falls short to the responsibility of the international community to stop or prevent a humanitarian catastrophe[13]. This means that the responsibility, is both owed by the individual state and the international community. Under R2P, the principle of non-intervention becomes flexible[14]. In 2005 the UNGA affirmed the primary responsibility of states[15].

The R2P-doctrine is formulated to contain three elements; The Responsibilities to Prevent, React, and Rebuild[16]. The Responsibility to React is carried by the international community to respond to serious humanitarian violations on a population. This part of the doctrine triggers when preventive measures fails or when a state is unwilling or unable to address a situation. The UNGA affirmed that coercive measures need to be taken in accordance with the charter[17]. The most serious coercive action being a military intervention directed towards a state.

According to the ICISS, the use of force and the exception to the non-intervention principle is reserved for the most conscience-shocking catastrophes and constitutes threats to the peace and security of the international order in such clear and present danger that it requires a military response. These are acts of genocide, crimes against humanity, or massacres and mass killings[18].

The content of R2P has been reinforced throughout the international community. Referencing to concepts in human security as threats to peace and security[19] and encouragement to conceive of R2P legitimate reason for collective action[20].
For an intervention to be lawful[21], legitimate[22], and effective[23] in accordance with the R2P-doctrine, several criteria need to be fulfilled. Right authority, just cause, right intention, last resort, proportional means, and reasonable prospects[24].

Right intentions and military means are a last resort and adheres to the doctrine as it emphasizes multilateral and collective action through the means of the SC[25]. Intervention can only take place when all other means and efforts are depleted as it is a serious departure from Article 2(7) of the UN charter.
Proportional means and reasonable prospects reflect the realities and consequences of any military operation. If the intentions are to stop or contain any humanitarian catastrophe the consequences

[13] ICISS (n 9), para 4.10.
[14] ICISS (n 9) para 4.11
[15] UNGA, '2005 World Summit Outcome: resolution / adopted by the General Assembly' (2005) UN Doc A/RES/60/1, para 138-139.
[16] ICISS, (n 9), pt Synopsis.
[17] The responsibility to protect secretary general report a/66/874-s/2012/578; UNGA (n15) para 139.
[18] ICISS, (n 9), para 4.13.
[19] UNGA 'Note [transmitting report of the High-level Panel on Threats, Challenges and Change, entitled "A more secure world: our shared responsibility"]' (2004) UN Doc A/59/565.
[20]UNGA 'In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General' (2005) UN Doc A/59/2005.
[21] Legality refers to the compliance with international law
[22] Legitimacy concerns political or moral dimensions
[23] Effort to produce result in accordance with stated aim and purpose.
[24] ICISS, (n 9) para 4.16.
[25] ICISS, (n 9) para 4.33, para 4.37-4.38.

cannot exceed the original issue, thus gravity and scale of the military operation must be proportionate to the expected result. This is also true for reasonable prospects; it must be feasible to attain the least minimum stated goal of the intervention before launching any military operations.

According to the ICISS, the Just cause-threshold constitutes the:

> 'large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation: or large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape'[26].

The threshold is aimed towards building legitimacy in a situation where anticipatory action is needed as a response to clear evidence of large-scale killings.

The UNSC is the universally accepted authority to validate any non-peaceful action under article 42 and has the primary responsibility to maintain international peace and security. The SC continuously developed its interpretation on issues of international peace and security in line with the doctrine[27].

1b. What happens where R2P remains un-triggered?

The R2P-doctrine and its implementation strategy have been much debated[28]. The two of the responsibilities are based on existing practice within the UN framework[29]. Some of the recent examples of R2P- interventions demonstrate weaknesses contained within the concept. The question of the right authority could at first glance look straightforward. By acting within the UN security framework, the SC has the primary responsibility, and any SC resolution should have sufficient legal authority.

However, if the rationale behind SC's decision is based on unclear or dubious pretexts the questions regarding the legitimacy of the intervention fail. Legitimacy does not in and of itself create legality, but what matters for the law, is if it exists inconsistencies found in the emerging practice of R2P. Any action is to be taken through the SC on a case-by-case basis[30]. The formulations of the doctrine and the inconsistent application of the R2P demonstrate weakness in the doctrine's scope of application as well as its legal foundation.

Examples of R2P inconsistencies:
The responsibility to react in R2P was put into practice in Libya. The UNSC had reiterated the responsibility of the Libyan authorities to protect civilians in resolution 1973. This was a significant step in the direction of implementing the doctrines concepts of responsibilities, equally significant was the step from the strict application of the principles of sovereignty and non-intervention. Resolution 1973 acted under chapter VII of the UN Charter and 'to take all necessary measures, […] to protect civilians and civilian populated areas under the threat of attack'[31].
Coercive action, such as a no-fly zone[32] was taken under the auspice of a coalition of willing states.

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[26] ICISS (n 9) para 4.15.
[27] UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674, para 4 - acknowledge the responsibility to protect first time
[28] Alex Stark, 'Introduction' The Responsibility to Protect: challenges & opportunities in light of the Libyan intervention (2011) e-International Relations, 4ff.
[29] Fiammetta Borgia 'The Responsibility to Protect doctrine: between criticisms and inconsistencies' (2015) Journal on the Use of Force and International Law, 2:2, 236.
[30] UNGA, '2005 World Summit Outcome' para 139.
[31] UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973, para 4.
[32] UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674, para 6-8.

The western dominated coalition interpreted the mandate to use force more widely than the SC had anticipated. The coalition's interpreted the mandate to target the whole government security apparatus, which effectively meant regime change[33]. Thus, acting outside the scope of its original authorisation[34]. Several problems can arguably be included in the Libyan example. First the connection between the R2P doctrine and its application within the SC. Firstly, the criteria for intervention set out by the ICISS is not explicitly stated in the GA declaration, nor is it mentioned in resolution 1973. One can assume that if core concepts such as the reinterpretations of the principles of non-intervention and sovereignty are implemented in the SC's practice, the thresholds for interventions should also apply. The intervention failed to meet the requisites of several criteria.

The just cause-threshold should apply to specific cases in which large losses of life is imminent. According to the GA the just cause-threshold is met when a state 'have manifestly falling to protect their population from genocide, war crime, ethnic cleansing and crimes against humanity'[35], the ICISS settles with 'large scale'. The SC decides on which situation meets the threshold, based on a contextual analysis. The HRC[36] concluded that instances of war crime and torture occurred, by both opposition forces and the Libyan authorities during the war. Despite this, it is questionable if it would reach the threshold of large-scale. Considering the scale of both Rwanda and Bosnia, it is highly unlikely[37]. It is even suggested that there is a lack of evidence that mass-killing of civilians or ethnic cleansing was occurring or would occur[38], without the active measures taken by the coalition.
Due to the vagueness of the world summit document and lack of explicit criteria contained within, the SC can decide to act on a case-by-case basis[39] any use of force would be legal even without holding up to the just cause-threshold. It does, however, have an impact on legitimacy.

Even though there is no 'responsibility to rebuild' contained within the GA's R2P definition, the continuing and fragmenting intrastate violence can hardly be deemed as a success[40].
The question remains regarding the catastrophes that fared worse than Libya which did not become subject to intervention and illustrates the inconsistency of R2P when defining which populations should be helped.

In Syria, preventive measures taken by the international community failed to produce any fruitful results possible to halt the ongoing conflict. Syria was to the Russian[41] and the Chinese[42]; a possible repeat of the Libyan conflict and any possible action would further weaken the principles of

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[33] Yasmine Nahlawi 'The legality of NATO's pursuit of regime change in Libya' (2018), Journal on the Use of Force and International Law, 5:2, 295-323,
change in Libya, Journal on the Use of Force and International Law, 5:2, 295-323.
[34] Christopher Hobson 'Responding to Failure: The Responsibility to Protect after Libya' (2016) Millennium Journal of Int Stud, 44(3),443.
[35] UNGA '2005 World Summit Outcome', para 139.
[36] UNGA Human Rights Council (HRC) 'Report of the International Commission of Inquiry on Libya' (28 January 2014) UN Doc A/HRC/19/68.
[37] Estimations range between 800,000 and 1 million perished under 100 days during the Rwandan Genocide.
[38] Arif Saba & Shahram Akbarzadeh 'The Responsibility to Protect and
the Use of Force: An Assessment of the Just Cause and Last Resort Criteria in the Case of Libya' (2018) International Peacekeeping, 25:2, 242-265
[39] UNGA '2005 World Summit Outcome' para 139.
[40] Hobson (n 34) 444.
[41] Henry Meyer, Brad Cook and Ilya Arkhipov 'Russia Warns U.S., EU Not to Aid Syria Protests After Libya' (Bloomberg, 2 June 2011) < https://www.bloomberg.com/news/articles/2011-06-01/russia-warns-u-s-nato-against-military-aid-to-syria-protests-after-libya> Latest access 2021/01/05
[42] Foreign Ministry Of China 'Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference' (24 May 2011) <http://ch.china-embassy.org/ger/fyrth/t825290.htm> Latest access 2021/01/05

sovereignty and non-intervention and any interference would ultimately threaten the political independence of Syria. This view conflicted with Western states such as the US, UK, and France which pushed for a hurried conflict-resolution. The opposing views of the P5 countries regarding the conflict and the on-going humanitarian catastrophe entrenched diplomatic positions within the SC council, and possible solutions. The use of chemical weapons by the Assad regime further antagonized western states to promote the use of force. The SC adopted resolution 2118 in which they demanded the destruction of Assad's chemical weapons stockpile and 'determined them being a threat to international peace and security'[43]. The resolution shifted focus to collective security[44] but did not allow the use of force. However, it decided to 'impose measures under Chapter VII'[45] in the event of non-compliance. The US position reserved itself the right to use force even without SC authorisation, conditioned to the compliance of resolution 2118[46]. The responsibility of the international community was not mentioned regarding the protection of the Syrian people, but only formulates the threat to peace and security by the Syrian chemical weapons.

The UK reserved the right to intervene, not contrary to the position of the SC, but just because of the failure of the SC to act upon the humanitarian catastrophe[47].

These examples help illustrate inconsistencies contained within the UN framework regarding the R2P doctrine. Since the reports and declaration are of a non-binding character and no conventional treaties that refers to the R2P-doctrine, there are not any conventional obligations.

The implementation of the doctrine has failed to impact Institutional structures within the UN framework to establish under which circumstances a state is 'manifestly falling' or when the responsibility to protect falls to the international community. According to Borgia 'the weak anchoring of R2P in the charter and the uncertain practice […] does not give rise to the conclusion that military intervention under R2P is now admitted under international law'[48].

Borgia argues further that there is a need to establish an obligation to intervene to distinguish a humanitarian intervention from r2p[49]. And that the problems faced by the R2P; 'exclusion of any obligation to act, lack of guidelines to determine the urgency of a situation and to identify appropriate measures to take in these cases, pose several problems for the effectiveness of the R2P doctrine'[50] and the doctrine collapses into unilateral humanitarian intervention. To this paper humanitarian intervention shall be understood as 'the threat or use of force by an individual or collective of state(s), aimed at preventing or ending widespread and grave violations of fundamental human rights of individuals other than its own citizens'[51].

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[43] UNSC Res 2118 (27 September 2013) UN Doc S/RES/2118.
[44] Carsten Stahn 'Syria, Security Resolution 2118 (2013) and Peace versus Justice: Two Steps Forward, One Step Back?' (EJIL:Talk October 3, 2013) < https://www.ejiltalk.org/syria-security-resolution-2118-2013-and-peace-versus-justice-two-steps-forward-one-step-back/> Latest access 2021/01/05
[45] UNSC Res 2118 (27 September 2013) UN Doc S/RES/2118.
[46] Muditha Halliyadde 'Syria - Another Drawback for R2P?: An Analysis of R2P's Failure to Change International Law on Humanitarian Intervention' (2016), 4 Ind. J. L. & Soc. Equality 215-247
[47] BBC 'Syria air strikes: Theresa May statement in full' (BBC NEWS 14 April 2018) <https://www.bbc.com/news/uk-43766966>Latest access 2021/01/05
[48] Borgia, (n 29), 231-232.
[49] Borgia, (n 29), 233.
[50] Borgia, (n 29), 233.
[51] Definition used by J.L. Holzgrefe and Robert O. Keohane*, Humanitarian Intervention: Ethical, Legal and Political Dilemmas,* (Cambridge University Press, 2003), 18, In J. E. Linter 'Humanitarian Intervention: Legitimising the Illegal?' (2005) Defence Studies, 5:2 271-294.

2. Humanitarian intervention's contentious status under *jus ad bellum*

2a. Arguments for and against humanitarian intervention's lawfulness

Humanitarian intervention is a contentious part of the international legal system. It can be traced to Just war theories and was before the signing of the UN charter an accepted part of the legal order[52]. Despite its contentious status, unilateral humanitarian interventions are practiced by states. I will now briefly account for the arguments on the lawfulness of humanitarian intervention.

Prohibition on the use of force is found within the UN Charter. Article 2(4) states that 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'[53].

The debate on the use of force has centred around the different interpretations of the wording in Article 2(4). The majority view[54] holds that an extensive interpretation of Article 2(4) contains an absolute prohibition on the use of force, and that it does not exists any other exception than the two found within the charter (article 51 self-defence and measure taken by the SC under Article 42).
The permissive minority view[55] argues that by interpreting the charter provision that a use of force that is not directed against the 'territorial integrity or the political independence of any state' could be allowed. Or that the use of force aimed towards values contained within the charter such as promotion of human rights, also could be legal due to the 'duty to co-operate' found within article 55[56] and 56[57], as well as in article 1(3)[58] of the UN charter. This view is a contextual approach to the charter and its founding values, in which human rights are a cornerstone.

In the jurisprudence of the ICJ, one can find legal precedents regarding the use of force. In the Corfu channels case, The UK swept the Corfu Channel for mines, after two British warships were severely damaged when passing through the Corfu channel. In the court, the UK argued that the military actions taken were not in breach of the prohibition on the use of force, due to it not being a 'threat to the territorial integrity nor political independence of Albania'[59]. The ICJ concluded that the use of force were not 'a demonstration of force for the (*specific)* purpose of exercising political pressure on Albania'[60] but that the actions was a 'manifestation of a policy of force, and rejected the right to intervention'[61], the ICJ declared that the action did not constitute a violation of Albanian sovereignty[62].
In the Barcelona Tractions case[63] the ICJ specified the obligations of states that concern the international community as a whole as obligations erga omnes, including the act of aggression, genocide, slavery, and racial discrimination[64].

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[52] Martin Dixon, *International law* (7th ed, OUP, 2013), 322.
[53] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (16). art 2(4).
[54] Christine Gray, *International Law and the Use of Force* (4th edn, OUP 2018),42.
[55] Fernando Téson, 'Humanitarian Intervention: An Inquiry into Law and Morality' (3rd ed, Brill, 2005), 192-202.
[56] Charter of the United Nations, (n 53) Art 55.
[57] Charter of the United Nations, (n 53) Art 56.
[58] Charter of the United Nations, (n 53) Art 1(3).
[59] *The Corfu Channel Case,* [1949] ICJ Reports 4, [35].
[60] *Corfu*, [35].
[61] *Corfu,* [34].
[62] *Corfu,* [32].
[63] *Barcelona Traction Case* (Belgium v Spain) (Judgment) [1970] ICJ Rep. 3, [33]-[34].
[64] *Barcelona [34]*.

And in the Nicaragua Merits case, the ICJ elaborated on if the protection of human rights could provide legal justification for the use of force. The ICJ stated that 'a strictly humanitarian objective cannot be compatible with the [actions of the US in this case] mining of ports, destruction of oil installation or again with the training arming and equipping of the rebel forces'[65]. They also concluded that the prohibition as it stood in the charter constituted a peremptory norm[66].

The UK formulated a legal analysis on the lawfulness of humanitarian intervention with regards to the conduct of military operations in Syria. In both 2013 and 2018, the UK stipulated three criteria when interventions outside the UN charter were lawful, according to the UK the airstrikes which were a response to Syrian use of chemical weapons, met the criteria[67].

(i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
(ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
(iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose)'[68].

The UK had previously asserted the 'right for states to use force in the case of overwhelming humanitarian necessity where, in the light of all the circumstances, a limited use of force is justifiable as the only way to avert a humanitarian catastrophe[69].

Belgium is the second nation that has clearly adopted a stance in where it exists a third exemption to the prohibition on the use of force article 2(4): In the Legality on the use of force case between Belgium and f. d. Republic of Yugoslavia. Belgium argued that the military intervention in Kosovo was a humanitarian intervention and that they 'felt obliged to intervene to forestall an ongoing humanitarian catastrophe'[70]. Belgium further developed its arguments regarding the legality of humanitarian interventions. In the case of Kosovo, NATO and Belgium acted to safeguard essential values of jus cogens status (such as the right to life, physical integrity, the prohibition on torture), to prevent a humanitarian catastrophe, deemed as such by the SC, and that it existed a state responsible for the catastrophe.
The SC resolution had a basis in chapter VII and deemed the situation as a threat to international peace and security.

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[65] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America) (Merits) [1986] ICJ Rep 14, [268].
[66] *Nicaragua* [190].
[67] Prime Minister's Office*, Syria action – UK government legal position* (Policy paper) (april 2018) https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position (latest access 2021/01/05)
[68] Prime Minister's Office (n 67); Prime Minister's Office, *Chemical weapons use by Syrian regime: UK government legal position (*Policy paper) (august 2013) https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version (latest access 2021/01/05)
[69] UK Parliament Select committee on Foreign affairs, *Reports and Proceedings of the Committee 4th report HC28-I* (June 2000), [124].
[70] *Legality on the use of force* (Yugoslavia vs Belgium) (Provisional Measures, Oral Pleadings) ICJ doc CR 99/15 (§ *the absolute and compelling reason for the current armed operation*) (Translation, bilingual version).

Belgium used the argument that the armed humanitarian intervention is compatible with Article 2(4) because it did not challenge the territorial integrity nor the political independence of a state[71].

Denmark elaborated on its position on a humanitarian intervention regarding US and British airstrikes conducted against Syria in 2013. Denmark reiterated that 'the UN charter contains a prohibition to use force under Article 2(4) and that it contained only two explicit exceptions article 51 and measures taken by the SC under Article 42. They also referred to several precedents where countries and regional organisations in extraordinary situations has without a clear UN-mandate, motivated the use of force within the means of humanitarian intervention due to the necessity to counter massive attacks on the civilian population and extreme humanitarian necessity'[72]. They stipulated three criteria to when a humanitarian intervention has legal founding:

i) it exists an extreme humanitarian need on a large scale that needs immediate and urgent response;
ii) whether the possibilities for an alternative solution to the use of force without an UN-mandate have been exhausted;
iii) In any situation emphasis must be placed on whether the use of military force is in accordance with the principles proportionality and necessity, and strictly limited in time and aimed at safeguarding humanitarian considerations[73].

2b. Where the law stands today

The sources of international law are specified in the ICJ statute article 38[74]. The ICJ specifies in 38(1)(a) that treaties or international conventions establish rules of international law, and in 38 (1)(b) international custom evident of a general practice accepted as law.
This means that there are two avenues to inquire the legal status of unilateral humanitarian intervention.

An argument based on treaty interpretation are the first avenue to explore where the law stands today.
As described above, the sets of treaty-based arguments are common when challenging the wording of Article 2(4). The Corfu channels case is the clearest counterargument that rejects the minority interpretation of the provision. According to Henderson, the *travaux preparatoire*[75] does not support any permissive interpretation of the prohibition, it rather indicates that the prohibition is absolute. The other set of the argument, based on a contextual approach to the charter is the interpretation of the phrase 'in any other manner inconsistent with the charter', and that there is a duty to co-operate mentioned above, refers to the idea that the development of human rights and the founding values of the UN are worth protecting as it allows the use of force in such manner. However, the primary purpose of the UN is to maintain international peace and security[76], and the Universal Declaration on Human Rights does not contain any provision that allows the use of force, nor does the Geneva

[71] *Legality, use of force* (§ *the absolute and compelling reason for the current armed operation*) [].
[72] Udenrigsministeriet ' Overordnede principielle overvejelser om det folkeretlige grundlag for en evt. militæroperation i Syrien' (30. august 2013) 3.S.123-1.
[73] Udenrigsministeriet (n 73).
[74] UNGA Res 264 (8 October 1948) UN Doc A/RES/264 (Statute of the International Court of Justice), art. 38.
[75] Christian Henderson *The Use of Force and International Law* (Cambridge University Press, 2018), 20.
[76] Simon Chesterman Just War or Just Peace? Humanitarian Intervention and International Law (OUP, 2000), 52-53 In Diana Amnéus *Responsibility to Protect by Military Means – Emerging Norms on humanitarian Intervention?* (SU 2008), 496.

conventions or any other major human right or humanitarian instrument[77]. There is little support that it exists a treaty-based exception that allows for the use of force on humanitarian grounds[78].

Regarding customary law. There is a need to explain the possibilities of a different prohibition on the use of force, and under which circumstances a humanitarian intervention, if possible, would be legal without the expressed authorisation of the SC. That is if it exists a legal norm that significantly distinguishes itself from the treaty prohibition. Two avenues appear from this position. Either it existed a customary norm pre-un charter that is still in effect, or the customary norm has changed since the signing of the charter to include a third exception on the use of force.

According to Dixon [79] pre-charter law did not explicitly prohibit the use of force but the prospect of it was severely diminished after WW1 with the covenant of the League of Nations article 10 to 16. A separate category of 'force short of war' in which the legal right to self-defence developed[80]. Signatories to the Kellogg-Briand pact[81] were obliged to not use warfare as an instrument in their international politics and to settle whatever conflict with nothing but the pacific means[82]. The question is then two-folded. Was it legal to intervene on humanitarian grounds pre-charter, and if so, has the legal norm survived past 1945?
It is questionable if it existed a doctrine of unilateral humanitarian intervention before the charter as according to Brownlie 'the Kellogg-Briand Pact preserved a right of self-defence, but it is conceptually difficult to fit a right of humanitarian intervention into the notion of self-defence,'[83]. From Brownlie's position, the claim of a pre-charter right of humanitarian intervention did not survive post-un charter.

Redirecting the question to post-1945 and if by the means of state practice, the customary norm has changed to allow the use of force for unilateral humanitarian intervention?
White summarizes three instances of state practice during the Cold War, the Tanzanian intervention in Uganda, India's intervention in East Pakistan, and the Vietnamese intervention in Cambodia[84]. However, none of the examples has been relying on humanitarian considerations as their main argument to justify the use of force.

India relied on self-defence to counter Pakistani aggression[85]. And as Bass notes, India had mixed motives in the intentions of the East Pakistani intervention, both humanitarian[86] and strategic antagonism[87]. The Vietnamese intervention in Cambodia was the result of Khmer Rouge policies that resulted in the killing of roughly 3 million people[88]. The Vietnamese initially denied involvement in

[77] Diana Amnéus *Responsibility to Protect by Military Means – Emerging Norms on humanitarian Intervention?* (SU 2008), 496.
[78] Nigel David White 'Humanitarian Intervention' (1994) Int Law and Armed Conflict, Commentary 1:1, 14.
[79] Dixon (n 52), 321.
[80] Dixon (n 52), 323-324.
[81] Kellogg-Briand Pact (Signed August 27 1928, Entered into force July 24 1929).
[82] Ove Bring, *Sverige och Folkrätten* (5th ed, Norstedts Juridik, 2014),172.
[83] Ian Brownlie 'Thoughts on Kind-Hearted Gunmen' In Richard B Lillich (Ed.) *Humanitarian Intervention and the United Nations* (University Press of Virginia Charlottesville, 1973), 142 In Diana Amnéus *Responsibility to Protect by Military Means – Emerging Norms on humanitarian Intervention?* (SU 2008) footnote 2527, 504.
[84] White (n 78), 20-22.
[85] White (n 78), 20.
[86] Gary J Bass, 'The Indian way of Humanitarian Intervention' (2015) 40 Yale J. Int'l L ,245-246.
[87] Bass (n 86), 239-240.
[88] White (n 78), 21.

Cambodia, at first but later claimed self-defence[89], it was later condemned by the GA[90]. Tanzania ousted General Idi Amin in 1979, after Uganda annexed territories belonging to Tanzania in 1978[91].

Since the Cold War ended there have been several unauthorized interventions that used humanitarian considerations as justification for their uses of force. Most prominently NATO's war in Kosovo[92] and the US intervention in Northern Iraq following Operation Desert Storm[93].

The Northern Iraq intervention was preceded by a UNSC resolution 688, which deemed the situation a threat to the peace, but did not take any measures under chapter VII[94]. US, UK, France, and Turkey took it upon themselves to create secure areas and a no-fly zone to help stabilize the situation and to alleviate humanitarian distress. According to Henderson, The French, British, and the US all claimed that the action was either 'in consistence with the resolution'[95], or 'within the confines of the UN Framework'[96].

Kosovo was a province belonging to the Federal Republic of Yugoslavia, which is predominately inhabited by an ethnic minority called Kosovar. In 1998, the internal security situation deteriorated, and federal Yugoslav forces started conducting military operations to stabilize the situation.
The Yugoslav authorities, with the track record from previous conflicts and a heavy ethnically inflamed rhetoric[97], caught the eye of the international community and prompted a response. In 1999, the SC in a series of resolutions[98] deemed the situation a regional threat to international peace and security and condemned the violence that had turned to mass-killings[99]. The conflict was targeted by several chapter VII measures including calls for a ceasefire, cooperation with the international community to stop humanitarian catastrophe[100].

The NATO alliance conducted a bombing campaign against the Yugoslav armed forces, which included objectives outside Kosovo and in Yugoslavia proper. NATO stated 'We must stop the violence and bring an end to the humanitarian catastrophe now taking place in Kosovo. We have a moral duty to do so'[101]. The subsequent commission[102] report deemed the actions of NATO to be illegal but legitimate[103].

In resolution 1244 the SC, authorised 'the establishment of an international security presence […] using all necessary measures to fulfil responsibilities'[104].

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[89] White (n 78), 21.
[90] UNGA 'The situation in Kampuchea' ()14 November 1979) UN Doc GA/RES/34/22, 16.
[91] White (n 78), 21.
[92]Taylor B Seybolt, *Humanitarian Military Intervention: The Conditions for Success and Failure* SIPRI (OUP, 2008)
[93] Seybolt (n 92) 47.
[94] UNSC Res 688 (5 April 1991) UN Doc S/RES/688.
[95]Henderson (n 75), 145.
[96] Henderson (n 75), 145
[97] IICK (n 5), 29-99.
[98] UNSC Res 1199 () UN Doc S/RES/1199, UNSC RES 1203 () UN Doc S/RES/1203, UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244
[99] The Recak massacre conducted on 15 January 1999, by Serb forces.
[100] UNSC Res 1203 (24 October 1998) UN Doc S/RES/1203
[101] NATO, *Press Release 041* (24 Mar. 1999)
[102] IICK (n 4).
[103] IICK (n 5),4.
[104]UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244

In customary law regarding unilateral humanitarian intervention, there is little support for those who claim it to be legal[105]. Customary norms pre-charter did not extend beyond 1945. The prohibition on the use of force constitutes a jus cogens norm[106]. For a legal norm of customary law to be subject to change, it needs extensive and virtually uniform state practice. Most state practices do not meet the definition of humanitarian intervention. It is a rather fragmented piece of legal reasoning that mostly relies on grounds other than humanitarian such as self-defence, ex post facto authorisation, or implied SC authorisation, which supports the view of a lacking opinio juris to humanitarian intervention status as lawful.
The UK's and Danish reasoning about the use of force was regarding the enforcement of the prohibition on chemical weapons, any crossover argumentation to humanitarian interventions based on human rights abuses needs to be complemented with state practice, the lack of reaction to other crimes within the Syrian conflict effectively argues against the right to intervene on those grounds.

Belgium's legal reasoning has arguably been invalidated by interpretations made by the ICJ in the Corfu channels case. The Belgian reasoning is also weakened by the principle referred to by the ICJ in Nicaragua merits case; "If a State acts in a way prima facie incompatible with a recognized rule but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule"[107].
The overwhelming view of the international community points towards the illegal status of a humanitarian intervention[108]. There is not sufficient state practice and opinion juris to support that humanitarian intervention forms a third exception to the prohibition on the use of force.

3. Humanitarian intervention and the crime of aggression

3a. If humanitarian intervention is unlawful, does it amount to an act of aggression?

In the previous section, we concluded that unilateral humanitarian interventions are viewed by most countries as the illegal use of force. Could the breach of the prohibition on the use of force also amount to acts of aggression?
Aggression – as a concept Is not thoroughly described within the UN charter. However, the outlines of aggression are found within a contextual reading of the provisions in the UN charter and some of

[105] Harold Hongju Koh 'Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward' (Just Security 26 september 2013) <https://www.justsecurity.org/1506/koh-syria-part2/> 2021/01/05; Harold Hongju Koh 'Syria and the Law of Humanitarian Intervention (Part I: Political Miscues and U.S. Law)' (Just Security October 2, 2013) <https://www.justsecurity.org/1506/koh-syria-part2/> 2021/01/05
[106] *Nicaragua* (Judgement of 1987 Dissenting opinion of Judge Schwebel), [227].
[107] *Nicaragua,* [186].
[108] The Kosovo intervention was condemned by the Group 77 in which they stated that 'humanitarian intervention has no basis in the charter' Declaration on the occasion of the Twenty-third Annual Ministerial Meeting of the Group of 77 (New York, 24 September 1999), § 69.

its content can be deduced from Articles 1(1)[109], 2(4)[110] and 39[111].
Article 1(1) states the purpose, and what legal norms flows from the charter, namely that 'to maintain international peace and security […] to take collective measures for the prevention and removal of threats to the peace, and acts of aggression o other breaches of the peace'.

Article 2(4) which we have mentioned earlier, lays out the general prohibition on the use of force. As it makes for the use of force to be illegal between states it is widely constructed. There are two exceptions found within the charter, collective or individual right to self-defence, and measures authorized by the SC deemed to be necessary to maintain or restore peace and international security. As Gray points out 'any exception to the general prohibition should be narrowly constructed'[112]. This means that the exceptions to the use of force prohibition should be interpreted and applied less, rather than often.

Article 39 allows for and centralizes measures in response to acts of aggression, threats, and breaches to the peace to the UN SC.

When reading these three articles in conjunction, an outline of the concepts found within an act of aggression clears. The maintenance or restoration of international peace and security as the primary purpose of the UN and laid out within article 1(1), is reiterated in article 39.

Reading article 1(1)'s last paragraph, and article 2(4) we can conclude that the settlement of disputes or situations under the provisions with violent means, constitutes (threats/ or breaches to the peace, or) aggression.

Looking more closely on article 39 some problem arises with the distinction and the separation of threats, breaches to the peace and acts of aggression. The wording indicates that there could be a gradual increase in seriousness between the concepts. An alternative understanding could be that within UN charter interpretations all three of the concepts found in article 39 instantiate the same consequences, namely the responsibility of the SC to maintain or restore peace.

Through the jurisprudence of the ICJ's dealing with illegal uses of force, we can learn parts of what constitutes the concepts. In the Nicaragua Merits case, the ICJ made several observations regarding the triggering of self-defence, which ultimately is a response to a more serious breach of Article 2(4). The right to self-defence is triggered when a state is under armed attack[113]. And armed attacks are some of the most serious and dangerous forms of use of force[114].

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

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

[111] 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'.

[112] Christine Gray, *International Law and the Use of Force* (4th edn, OUP 2018), 124.

[113] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (16). Art 51.

[114] *Nicaragua*, [191].

For Article 2(4) prohibition to be triggered, the threat or use of force concerned is the armed force between states[115]. There is a distinction between 'force' and an 'armed attack'[116]. The ICJ stipulated that there is a gravity threshold separating frontier incidents and an armed attack[117]. However, they also considered that the mining of a single ship could possibly constitute an armed attack, which makes the actual conduct context specific[118].
The ICJ based some of their considerations on the GA resolutions 3314[119] and 2625[120], and the resolutions should because of this, be regarded as part of customary law[121]. Because the ICJ based its decisions regarding the constitution of an armed attack on resolution 3314 (XXIX), it follows that both an armed attack and an act of aggression is, if not *the* same, are at least closely related[122]. Even though the ICJ never has defined aggression explicitly[123] it did so by implication.

As with armed attacks, the act of aggression contains a material element meaning the use of armed force between two or more states[124], that aggression has a material element is supported using the words 'suppression of the act of aggression'[125] rather than something to prevent.

Solera discusses that 'in theory all uses of force could constitute aggression. The determinant factor is not the material element but the subjective element'[126],

From the practice of the SC's application of chapter seven measures, there has been several references to acts of aggression[127]. However, the SC and the mandate they wield does not hinge upon an incremental application of these concepts, and any measure taken could be potentially the same whether a situation is deemed either 'a threat to peace, breach of the peace or act of aggression'[128].
This could explain the lack of development to what constitutes acts of aggression within the developing field that is the UN SC measures taken under the seventh chapter. The SC simply does not need to define acts of aggression concerning possible and appropriate measures. A threat to peace and security could also be argued to have both more convenience and more flexibility regarding the political aspects of SC resolutions, as to what types of situations can be referred to the SC, especially with the development of security risks posed by non-state actors, intrastate conflicts, and developments within the doctrine of R2P/ unilateral humanitarian interventions.

[115]Charter of the United Nations (n 56) Art 41, Art 46; *Nicaragua*, [228].
[116] Henderson (n 75), 63.
[117] *Nicaragua*, [195], [103].
[118] *Oil Platforms* (Islamic Republic of Iran v. United States of America) (Judgment) ICJ Reports 2003, [72].
[119] UNGA 'Definition of Aggression' Res 3314(XXIX) (14 December 1974) UN Doc A/RES/3314.
[120]UNGA Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV)(24 October 1970) UN Doc A/RES/2625(XXV) (1970).
[121] Yoram Dinstein, "The Crime of Aggression," *War, Aggression and Self-Defence* (5th edn, Cambridge University Press 2011), 124.
[122] Ove Bring, *Sverige och Folkrätten* (5th ed, Norstedts Juridik, 2014),177–179.
[123] Dapo Akande & Antonios Tzanakopoulos 'The International Court of Justice and the concept of Aggression' in Claus Kreβ and Stefan Barriga (eds) The Crime of Aggression: A Commentary (CUP 2017), 215.
[124] Oscar Solera, 'The Definition of the Crime of Aggression: Lessons Not Learned' (2010) 42 Case W Res J Int'l L 801, 813.
[125] Charter of the United Nations (n 56) Art 1.
[126] Solera (n 124), 813.
[127] UNSC Res 326 (1973) UN Doc S/RES/326; Res 496 (1981) UN Doc S/RES/496; Res 611 (1988) UN Doc S/RES/496 amongst others.
[128] Charter of the United Nations (n 56) Art 39.

In the light of this assumption, and to further develop the understanding of aggression, we now turn to the GA's definition of aggression[129]. GA's resolution is the most comprehensive document regarding acts of aggression.
In resolution 3314 (XXIX) 'Definition of aggression', an act of aggression is defined in article 1 as 'the use of armed force by a state against the territorial integrity or political independence of any other state, or any other manner inconsistent with the UN charter' [130]. This formulation echoes the definitions on the use of force found in Article 2(4) in the UN charter. In Article 2 of the resolution, it is stated that 'the state of the armed force by a State in contravention to the charter shall constitute *prima facie* evidence of an act of aggression although the use SC may in conformity with the charter, conclude the that a determination of 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'[131]. The resolution introduces a SC threshold that can decide if the gravity of force used, constitutes aggression or not. The GA specified 'a non-exhaustive[132] list of acts qualifying as acts of aggression'[133]. The list found in Article 3(a)-(g) in resolution 3314 has been used to determine the objective requisite of an act of aggression as it entails state responsibility[134].
However, because an act of aggression is conducted by states, the invocation of state responsibility bases itself on objective liability which needs no subjective requirement[135]. Akande and Tzanakopoulos[136] support the interpretation that there in ICJ's jurisprudence evident that the concepts of 'armed attacks and 'aggression' are closely related.

Henderson discusses if a subjective requirement on the use of force is required. Henderson's discussion concludes by stating that the subjective requirement is either not necessary[137], or it is an integral aspect of the conduct[138] and presupposes the knowledge of the aggressor state[139], thus supporting a view that a mens rea is already implied within the act itself, and therefore the outcome, to invoke state responsibility arises the same way[140]. Henderson continues with the conclusion 'whatever motives lies behind a state's action, benign, altruistic, or otherwise, if the intentions is to force the will of another state through physical coercion the prohibition [article 2(4)] is engaged'[141].

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[129] UNGA 'Definition of Aggression' (n 119).
[130] UNGA 'Definition of Aggression' (n 119), Art 1.
[131] UNGA 'Definition of Aggression' (n 119), Art 2.
[132] UNGA 'Definition of Aggression' (n 119), art 4.
[133] UNGA 'Definition of Aggression' (n 119), art 3(a)-(g).
[134] UNGA 'Definition of Aggression' (n 119), art 5; *Nicaragua*, [191]-[198].
[135] James Crawford *State Responsibility: the general part* (Cambridge university press 2013),61 In Christian Henderson *The Use of Force and International Law* (Cambridge University Press, 2018),75.
[136] Akande, Tzanakopoulos (n 123), 221-225.
[137] Tom Ruys, 'The meaning of "force" and the Boundaries of the Jus ad Bellum: Are minimal uses of force Excluded from the UN charter article 2(4)' (2014),191 In Christian Henderson *The Use of Force and International Law* (Cambridge University Press, 2018), 75.
[138] 'Unlawful intervention is the intentional application of coercion´- Russell Buchanan, 'Cyber-attacks: Unlawful uses of force or prohibited interventions? 2012 17 Journal of Conflict and Security Law 212, 227 Found in Henderson (n 75), 76.
[139]Oliver Corten 'The Law against War: The prohibition on the Use of Force in Contemporary International Law' (Hart 2010), 78 In Christian Henderson *The Use of Force and International Law* (Cambridge University Press, 2018), 76.
[140] As the ICJ did in Corfu channels case, the lack of malicious intent was not necessary to invoke state responsibility and, only the consequences of the act itself.
[141] Henderson (n 75), 77; and -'no considerations of whatever nature may be invoked by the resort to the use of in violations of the charter.

According to Akande and Tzanakopoulos[142]the ICJ has constructed two strands regarding the closely related concepts of armed attack and aggression with gradually increasing seriousness. The first strand which is used exclusively within the realm of state responsibility traces the prohibition on the use of force to an armed attack and its most advanced stage constitutes a serious breach of a peremptory norm. The second strand moves from a use of force to acts of aggression and to a war and/ or crime of aggression and can entail both state responsibility and individual criminal responsibility, this reasoning is supported by article 25(4) of the Rome Statute[143]. Nollkaemper concurs and states that 'In some cases of individual responsibility is subjected to a threshold of gravity. This holds for grave breaches under the Fourth Geneva Convention or for jurisdictional provisions of the ICC Statute that limit the jurisdiction in respect of war crimes to war crimes 'committed as part of plan or policy or as a large-scale commission of such crimes'[144]. If individual crimes satisfy the thresholds of the ICC statute may also satisfy the threshold of article 40 ILC Articles'[145].

This could have the impact that any use of force outside the accepted exceptions to the prohibition could potentially fall under the definition of aggression. For a unilateral humanitarian intervention, that is, a humanitarian intervention lacking the proper authorisation from SC, and which cannot possibly rely on the inherent right to self-defence would amount to an act of aggression. If so, and following the second strand of Akande and Tzanakopoulos, with sufficient gravity the humanitarian intervention would lead to a war and/ or crime of aggression entailing both state and individual criminal responsibility.

Kelsen[146] regarded the *crime* of aggression only attributable to the state and that person acting in their official capacity had no individual criminal responsibility attached to their own conduct as officials of the state. However, Dinstein[147] shows that this view was rejected by the Nuremberg trial and has since been incorporated within both the draft codes against the offenses of peace and security of mankind 1956 article 3 and 1996 article 7 as well as the Rome Statute (article 27 and article 25(4)). Dinstein concludes that 'there is no negation of acts attributable to the state and the criminal liability of individuals acting on behalf of the state'[148].

3b. Article 8*bis* of the Rome Statute and elements of crimes

The next task is to look at the link between acts of aggression and the crime of aggression, and what implications it possible can have on the doctrine of unilateral humanitarian intervention. The Kampala Review Conference adopted in 2010 provisions that included the jurisdiction over the crime of aggression to the ICC. And in 2017, state parties to the Rome Statute made for the prosecution of the crime of aggression.

The Crime of Aggression is in the Rome Statute defined through Article 8 bis.
Article 8bis (1) reads as the following:

[142] Akande, Tzanakopoulos (n 123), 228-229.
[143] The Rome Statute (n 149), art 25(4).
[144] The Rome Statute (n 149), art 8bis.
[145] Andre Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52 Int'l & Comp LQ 615, 623.
[146] Hans Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals' (1943) 31 Calif L Rev 530, 538-539.
[147] Dinstein (n 121) 153-154.
[148] Dinstein (n 121), 154.

For 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[149].

The provision is divided into two parts, Firstly, the commission of the crime by an individual through the means of planning, preparing, initiating, or executing an act of aggression, presupposed that the individual is in a capacity to control or act through the political or military means of a state.
The individual crime is connected to an act of aggression by a state party, supposing that the acts of the state meet the qualifying criteria.
Secondly, article 8bis (1) includes a qualification; 'the act of aggression by the state needs to be of such a character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations'. The qualification is used to distinguish acts of aggression from other, less serious, uses of force. Being an objective qualification[150], the fulfilment of the requirements is subject to the ICC's assessment. According to Paulus[151], the manifest criteria could have the meaning found in VCLT 'being objectively evident of any state conducting itself in the matter of in accordance with normal practice and in good faith'[152].
Ruys suggest there were two purposes to the manifest qualification. A quantitative qualification to distinguish acts of a less serious degree[153]. And a qualitative qualification to exclude acts that are within the legal grey area.

In Article 8bis (2) the definition of what constitutes an act of aggression; 'For the purpose of article 1 an 'act of aggression' means the use of armed force[154] by a state against the sovereignty territorial integrity or political independence of another State, or in any other manner inconsistent with Charter of United Nations'[155]. The ICC included the definition used by the GA in resolution 3314 (XXIX) with a slight difference. Some slight changes are worthy to point out, Article 2 was not to include the minimal threshold of force to constitute the act of aggression at the authority of the SC, Article 4 also lacked the non-exhaustive component to the specified acts constituting an act of aggression. According to Solera[156] this due to the more rigid requirements by international criminal law and the political nature of the GA resolution.

The second part of article 8bis (2) states 'Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression' and the following list of acts that constitute acts of aggression is virtually identical to article 3(a)-(g) found in Res. 3314 (XXIX). As the criminal provisions echo the charter prohibition on the use of force and the provisions on aggression, a close interpretation is that

[149] The Rome Statute (n 149), art 8bis (1).
[150]The Rome Statute (n 149) art 8bis (1), elements of crime introduction (3)
[151] Andreas Paulus 'Second Thoughts on the Crime of Aggression' EJIL 20:4 (2010), 1121.
[152] United Nations, Vienna Convention on the Law of Treaties (Signed 23 May 1969, Entry into force 27 January 1980) UNTS 1155, art 46.
[153] Tom Ruys 'The meaning of "force" and the Boundaries of the Jus ad Bellum: Are minimal uses of force Excluded from the UN charter article 2(4)' (2014), 164; Robert Cryer, 'Defences/ Grounds for Excluding Criminal Responsibility' In Robert Cryer (ed), An Introduction to International Criminal Law and Procedure (Cambridge University Press, 2007), 326-327.
[154] Matthew Gillett, 'The Anatomy of an International Crime: Aggression at the International Criminal Court' (2013) Int C Law Rev 13:4, 8 - it signifies kinetic force in the normal understanding.
[155] The Rome Statute (n 149) art 8bis (2).
[156] Solera (n 124), 806. - This is due to the legality principle - nullum crimen, nulla poena sine praevia lege poenali.

Article 8bis could equate any unlawful use of force under the UN charter with the crime of aggression[157]. However, when reading Understanding 6 Article 8bis[158];'aggression is the most serious form of use of force; and that the determination on the act of aggression has been committed requires consideration of all the circumstances of each case, including the gravity of the acts concerned and their consequences, in accordance with the charter of the united nations'. This furthers the notion that the crime of aggression not only echoes, but also contains the distinctions made by legal interpretation of acts of aggression by both the ICJ and the SC[159].

As international criminal law applies to individuals, the crime of aggression applies to 'a person in a position effectively to exercise control over or to direct the political or military action of a State'[160]. This provision applies to state leaders who could through the commission of an act of aggression come under the jurisdiction of the ICC[161].
The crime of aggression hinges on a state act of aggression, such as an act specified in article 3 of RES/3314 (XXIX), not necessarily deemed as such by the security council because of the definition is reiterated in Article 8bis (2). The issue remains, if a state leader who orders an operation of military use of force as a part of humanitarian intervention, could qualify as a manifest violation of the UN charter.
The question turns to what is stated in Understanding 7 in article 8bis 'It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself[162]. Gillett[163] suggests that if at least two criteria are found in a sufficient amount it could amount to the triggering of a manifest violation, however, Kreß[164] suggests one criterion meeting the 'manifest determination' with the lack of the other two is excluding.

Both the gravity and scale criteria being quantitative factors refers to the severity of the act and the number of resources used. Both closely resemble the wording of the ICJ in Armed Activities[165].The ICJ did not conclude the case to be an act of aggression but dissenting Judge Simma stated 'If there ever was a military activity before the Court that deserves to be qualified as an act of aggression, it is the Ugandan invasion of the DRC. Compared to its scale and impact, the military adventures the Court had to deal with in earlier cases, as, in Corfu Channel, Military and Paramilitary Activities in and against Nicaragua or Oil Platforms, border on the insignificant'[166].
Judge Elaraby stated 'Indeed the definition of aggression applies *a fortiori* to the situation at hand: the full force of the Charter provisions are applicable; the nature and form of the activities under consideration fall far more clearly within the scope of the definition'[167] . Character, as suggested by

[157] Akande, Tzanakopoulos (n 123), 229.
[158] The Rome Statute (n 149), art 8bis
[159] Akande, Tzanakopoulos (n 123),228.
[160] The Rome Statute (n 149), art 8bis (1).
[161]The Rome Statute (n 149), art 8bis (1) and elements of crime (elements 2)
[162]The Rome Statute (n 149), RC/Res/6 'Understanding 7'.
[163] Matthew Gillett, 'The Anatomy of an International Crime: Aggression at the International Criminal Court' (2013) Int C Law Rev 13:4, 25.
[164] Claus Kreβ, 'The ICC Review Conference at Kampala: Mission Accomplished or Unfulfilled Promise?', 8 *Journal of International Criminal Justice* (2011) 1179-1217, 1206, In Gillette (n 119), note 122, 25.
[165] *Case Concerning Armed Activities on the Territory of the Congo* (DRC v Uganda), Judgment, [2005] ICJ Rep. 168 at [165] Magnitude and duration, as a grave violation on article 2(4).
[166] *Armed Activities* (Judge Simma separate opinion) [2].
[167] *Armed Activities* (Judge Elabary separate opinion) [16].

Gillett, refers to the nature of the act, and that due to the lack of clarity in the aggression amendments the criterion is subject to both a qualitative and a subjective assessment[168]

In article 30(1) in the Rome Statute, a material element is complemented with the mens rea requirement. The provision states 'a person shall be held criminally responsible […] if the material elements are committed with intent and knowledge'[169] .

Within the Elements of Crime[170] regarding article 8bis, it is specified that there is no specific requirement that a legal evaluation had preceded whether the armed force was inconsistent with the charter[171], nor if it the violation have 'manifest nature' of the charter[172]. However, it is further stated that 'awareness of the factual circumstances that established the armed force inconsistent with the charter[173], and the manifest violation of the charter'[174]. This reading does not seem to include a specific intent, as it is not specified within the provisions of the crime of aggression.

The prosecution of the Crime of Aggression is directed towards leadership[175] within a country rather than the average armed forces personnel. The acts set out as the material element; the planning, preparing, initiating, or execution, and to be performed collectively as a state has the mental requirement of knowledge. The knowledge is extended to include the use of armed force and that the use of force was inconsistent with the charter.

The Special Working Group on the crime of aggression noted that; 'Example of facts that the defendants must know to satisfy the criteria could include the fact that the use of force was directed against another State, the existence or absence of a Security Council resolution, the content of a Security Council resolution, the existence or absence of a prior or imminent attack by another state'[176].
Weisbord concludes that the mental element regarding the 'aware of the factual circumstances that established such a manifest violation' suggest a knowledge of the laws standing, this is circumvented by the objective determination of the court.
However, he further concludes that 'the court will be expected, on a case-by-case basis, to distinguish between objectively reasonable defensive or humanitarian actions and manifestly illegal ones'[177].
There is serious doubt that a unilateral humanitarian intervention would be excluded from the crime of aggression on legal grounds. The question of legality regarding the unilateral and unauthorized humanitarian intervention has earlier been left at the political considerations of the SC. This has contributed to the beforementioned debate on whether there exists a third exception to the prohibition on the use of force. As the crime of aggression ultimately relies on the assessment of the ICC and the Rome Statute, the developments in the law regarding human rights and humanitarian perspective would have to be taken into consideration in assessing state responsibility, as we know

[168] Gillett (n 163), 26.
[169] The Rome Statute (n 149) art 30(1).
[170] The Rome Statute (n 149) art Resolution 6 annex II
[171] The Rome Statute (n 149) art 8bis, Elements of Crime introduction (2).
[172] The Rome Statute (n 149) art 8bis, Elements of Crime Element introduction (4)
[173] The Rome Statute (n 149) art 8bis, Elements of Crime Element (4).
[174] The Rome Statute (n 149) art 8bis, Elements of Crime Element (6).
[175] The Rome Statute (n 149) art 8bis, Elements of Crime Element (2); Noah Weisbord, 'The Mens Rea of the Crime of Aggression' (2013) 12 Wash U Global Stud L Rev 493
[176] ICC Special Working Group on the Crime of Aggression (SWGCA) '2009 Chairman's Non-Paper on the Elements of Crime' In Stefan Barriga and Claus Kreß (eds), The Travaux Préparatoires of the Crime of Aggression (Cambridge University Press, 2011) 683, §20.
[177] Noah Weisbord, 'The Mens Rea of the Crime of Aggression' (2013) 12 Wash U Global Stud L Rev 497.

does not fall under the jurisdiction of the ICC. Criminal responsibility on the other hand does not hinge on whether state responsibility can be attributed for an act of aggression[178], rather it is the factual circumstance of the act of aggression that the court needs to conclude upon, whether it would amount to a crime of aggression.

The question regarding if the ICC prosecutor would seek prosecution of state leaders that take part in the commission of an international crime, such as the crime of aggression, the tentative answer must be yes. Especially considering the rarity of a 'genuine' intention of unauthorized humanitarian interventions as any state's coercive action is prone to serve self-interests first, and humanitarian second, even so, a 'genuine intention' is not grounds to be excluded from criminal responsibility.

4. Can humanitarian intervention constitute the defence of other persons?

The defence of others or self-defence provision is introduced as a justification for an otherwise criminal act. The provision needs to be separated from the collective use of self-defence as actions between states is regulated within Jus ad Bellum. The provision is a part of customary law[179] and the inherent right to individual self-defence is common in domestic law systems over the world. The provision equates the defence against imminent and unlawful use of force against oneself with the defence of force directed against another person.
The question that follows is if a head of state can invoke the provision under article 31(1)(c) to be excluded from criminal responsibility when the crime of aggression has been pursued by ICC prosecutors in the event of unilateral humanitarian intervention.

4a. Defensive force as an exclusionary ground under Article 31(1)(c)

When analysing Article 31 (1) (c), it includes three elements. The first, it must exist a certain danger to a person, oneself, or another, and in the case of war crimes – property necessary for basic survival or militarily necessary from unlawful and imminent use of force.
Second, the defender needs to act reasonably and proportionate against the attackers use of force. And lastly, a mental element connects the purpose of the act with the aversion of the danger produced by the unlawful use of force.

Tonkin discusses whether the material element of danger is to be deemed objectively or subjectively[180]. The outcome of this reasoning differentiates, as a subjective element implies that the mental state of the victim decides whether it was danger present. This reasoning implies that the criteria are satisfied when the victim has genuine belief of danger. However, Tonkin concludes that a strict reading of the article points towards that the imminent and unlawful danger, instead exists objectively[181]. The view of an objective qualifier for the first element is supported by several scholars[182], as it excludes the perception of the threat even if the act occurred by mistake. The objective threat of danger does not require a predetermined negative outcome, rather it needs to contain a potentially negative result to be satisfied[183].
The danger posed by the attacker, needs to be both imminent and unlawful. Imminence suggests

[178] The Rome Statute (n 149), art 25(4).
[179] ICTY Kordic´ and Cerkez §448–52 In Robert Cryer, 'Defences/ Grounds for Excluding Criminal Responsibility' In Robert Cryer (ed), An Introduction to International Criminal Law and Procedure (Cambridge University Press, 2007) 337.
[180] Hannah Tonkin, 'Defensive Force under the Rome Statute' (2005) 6 Melb J Int'l L 86, 93.
[181] Tonkin (n 180), 94.
[182] Tonkin (n 180), footnote 37, 94.
[183] Tonkin (n 180), 95-96.

excluding anticipated and retaliatory action. However, the provision does not demand that the defensive force happens after a first strike[184].
As the provision also specifies that the use of force the defender acts upon must be unlawful, the interpretation needs to include an objective qualifier. The provision effectively excludes, by its wording, a reaction to lawful uses of violence[185]. Tonkin suggests that 'The preferable approach is to require the attack to be objectively unlawful […] separating the wrongfulness of the act from the blameworthiness of the actor'[186].

The amount of defensive force that can be used is limited to the concept of what is reasonable[187]. In Article 31(1)(c), what is reasonable both governs necessity and proportion of the responding defensive force. This constrains the act of the victim, or the act of the defender on the victim's behalf to not use excessive force against the attacker. If such excessive force would be used by either the defender of the victim, or a victim that acts in self-defence against an attacker the defensive force could potentially fall out of the scope reason. Let us consider an example to illustrate how reason and proportionality works under the provision. Someone (an attacker) slaps me (the victim) in the face, the attack is not continued with further violence from my attacker. However, in the moment of the attack a bystander (a defender) jumps in my defence, as I am both subject to an unlawful and imminent use of force and unable to defend myself. The defender kills the attacker by excessive force. Surely the bystander exercised an act that would exclude criminal responsibility, unless it was the excessive force used. Turning the question around to the victim's perspective, would it have been reasonable for the victim to endure the violence from the attacker? That question must be answered in the negative. Both proportionality and necessity of the defensive force is viewed through the lens of reason, as earlier stated, as an objective qualifier. The somewhat crude example illustrates how the defensive force is not excluded from criminal responsibility by nature, but by fulling the specific elements of the provision, thus preventing the extension of criminal responsibility to the defender[188].

Any test of 'reason' must consider the elements of the threat and the danger posed, such as the nature of the attack, means and resources such as weapons at the disposal of the attacker and the defender, as well as the timing of the response. However, some consideration to the fact that 'a person does not have the luxury of time to weigh things very carefully when there is an imminent or ongoing attack'[189].
Article 31(1)(c) also stipulates the need of the defensive force to be directed towards the attacker[190]. Any other target of the defensive force, such as force being directed against an outside party would be out of the scope of the provision.
There is also needed to satisfy the mental element of the defensive force. The defender needs to

[184] Robert Cryer, 'Defences/ Grounds for Excluding Criminal Responsibility' In Robert Cryer (ed), An Introduction to International Criminal Law and Procedure (Cambridge University Press, 2007) 337.
[185] This means justified actions of violence. To claim self-defence in the event of a police arrest needs to be objectively verified. To protect oneself or other against a violent act by someone under the excuse of a criminal act such as insanity still falls under the provision, See Robert Cryer, 'Defences/ Grounds for Excluding Criminal Responsibility' In Robert Cryer (ed), An Introduction to International Criminal Law and Procedure (Cambridge University Press, 2007), 337-338.
[186] Tonkin (n 180), 99.
[187] The Merriam-Webster dictionary defines reasonable as 'being in accordance with reason; or not extreme or excessive' - https://www.merriam-webster.com/dictionary/reasonable (Accessed last 2021/01/05).
[188] Tonkin (n 180), 102-104.
[189] Robert Cryer, 'Defences/ Grounds for Excluding Criminal Responsibility' In Robert Cryer (ed), An Introduction to International Criminal Law and Procedure (Cambridge University Press, 2007) 338.
[190] Tonkin (n 180), 104-105.

have knowledge to thwart off the specific attack[191]. Ambos argues that only the objective existence of the use of force is not enough for justification, the defender needs to act in good faith and knowingly to the attack and possibly even with the knowledge that the right to defensive force was exercised[192].
The last paragraph of 31(1)(c) distinguishes between collective self-defence governed by the UN charter article 51, and individual self-defence that are derived from situations of acute danger. According to Scallotti anyone pleading self-defence or defensive force needs to be under the factual circumstances that invoke the right of self-defence, participating in a collective self-defence operation does not in itself exclude criminal responsibility[193].

A more detailed look at the last issue regarding the defence of property in the case of war crimes is beyond the scope of this paper.

4b. Humanitarian intervention and the requirements of other defence.

Defence of other, or self-defence under Article 31(1)(c) relates to situations between natural persons[194]. The right of the victim is governed by international criminal law, which is derived from criminal law principles. Collective self-defence relates to the acts of states and in the context of inter-state conflicts[195]. This means that the right of self-defence by a state is found within article 51 of the UN charter.
The second paragraph of Article 31(1)(c) states that, exclusion of criminal responsibility does not follow automatically from the participation in an inter-state conflict in which one state party is the victim, and subject to an unlawful use of force by another state assailant. However, it does not effectively exclude a person within that interstate conflict, to exercise force in such a way that it functions as grounds for excluding criminal responsibility, provided that the factual circumstances are applicable to the specific context.
In a case of humanitarian intervention, provided it is conducted to halt the violent act of an attacker upon a victim fits the description of our earlier example in the last section.
An illegal armed intervention on the territory of another state would amount to an act of aggression. The criminal responsibility of a person who is in 'a position of authority to exercise control over, or to direct the political, or military actions of a State'[196] and 'plans, prepares, initiate or executes an act of aggression'[197] of such an intervention could be excluded.
In order to successfully plea Article 31(1)(c) as the defence of such an intervention the physical and mental element of the crime of aggression would have to be negated by the elements of the provision in others-defence.

Consider the example that was given earlier but fitted to our current discussion. A state conducts serious and grave violations on parts of its own population. The state is the attacker, and the population is the victim corresponding to the earlier example. The serious and grave violation by the state constitutes imminent and unlawful use of force. The state becomes subject to a military intervention, aimed at stopping the imminent and unlawful use of force. The physical elements of

[191]Kai Ambos, 'Defences in International Criminal Law' In Bartram S Brown (ed) Research handbook on International Criminal Law (Edward Elgar Publishing 2011), 308.
[192] Ambos (191), 309.
[193] Massimo Scaliotti, 'Defences before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility - Part 1' (2001) 1 Int'l Crim L Rev 111, 171.
[194] Ambos (n 191), 309.
[195] Ambos (n 191), 309.
[196] The Rome Statute (n 149), art 8bis Elements of Crime Element (2)
[197]The Rome Statute (n 149) art 8bis Elements of Crime Element (1)

Article 31(1)(c) are fulfilled in this scenario. The violence of the defender is aimed at the attacking state to protect the victimized population. As demonstrated earlier in this thesis, a unilateral humanitarian intervention can constitute acts of aggression, and as such a head of state can become subject to ICC prosecution. It is likely however, that a military or political leader subject to such an prosecution can, provided that the factual circumstance correspond so it fulfils the elements of Article 31(1)(c), successfully plead grounds to exclude criminal responsibility.

However, it is perfectly reasonable to question how the potential defender fulfils the mental element in any practical scenario. As mentioned earlier, the mental element of Article 31(1)(c) stipulates for a successful defence, that the defender had knowledge of the imminent and unlawful use of force, and the attacker needs to be the intended target of the defender's action. A defender that uses a humanitarian intervention as pretext for other political or military advantages would under this reasoning not fulfil the elements excluding criminal responsibility.

Conclusion

The ICC has since the Kampala amendment entered into force in 2017 gained yet another tool at its disposal to counteract impunity of international crimes. As the purpose of the ICC is to try and convict those who often escape prosecution, state leaders responsible for 'atrocities that shock the conscience of the human mind'[198].
The purpose of this paper was to examine how pursuers to R2P-interventions could find themselves in R2P's unlawful extension - Unilateral Humanitarian Intervention. And therefore, see themselves under prosecution of the ICC for the crime of aggression under Article 8bis. And if it were possible to argue defensive force as grounds for excluding criminal responsibility under Article 31(1)(c).
The conclusion is that it is theoretically possible to argue defensive force as grounds for excluding criminal responsibility.

The legal status of any intervention conducted under the R2P-doctrine hinges on the authority of the UN SC. In the lack of a legal authorisation by the SC, any coercive action such as a Humanitarian Intervention would be unlawful. Whether the purpose is to stop or prevent an on-going grave violation of fundamental human rights. As the law stands today, there is no lawful exception to the use of force under that pretext, making the concept of unilateral humanitarian intervention ultimately fall under the crime of aggression.

In a case of a crime of aggression the ICC would have to deem the actions of a state leader with the physical and mental elements of the crime. Defensive force, if successfully applied to the factual circumstance of the case would negate the elements of the crime and therefore act as grounds for excluding criminal responsibility.

[198] The Rome Statute (n 149), Preamble.

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