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The Crime of Aggression and Public International Law

Meagan S. Wong

The Crime of Aggression and Public International Law

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Abbreviations

AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts 2001
ASP	Assembly of States Parties to the Rome Statute of the International Criminal Court
Commentaries on the ARSIWA	Commentaries on the Articles on the Responsibility of States for Internationally Wrongful Acts 2001
Commentaries on the Draft Code of Crimes	Commentaries on the Draft Code of Crimes against the Peace and Security of Mankind 1996
Draft Code of Crimes	Draft Code of Crimes against the Peace and Security of Mankind 1996
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY Statute	Statute of the International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
IMT Charter	Charter of the International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
Kellogg-Briand Pact	General Treaty for the Renunciation of War as an Instrument of National Policy 1928
NMT	Nuremberg Trials pursuant to Control Council Law no.10
Nuremberg Principles	Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal 1950
Rome Statute	Rome Statute of the International Criminal Court
SWGCA	Special Working Group on the Crime of Aggression
UN	United Nations
UN Charter	Charter of the United Nations
VCLT	Vienna Convention on the Law of Treaties 1969

Introduction

Criminalising the planning, preparation, initiation or waging of the (state) act of aggression, has been one of the most important developments in international law. Individuals can now be made criminally responsible for the crime of aggression. Individual criminal responsibility for the crime of aggression had emerged shortly after the Second World War, when the International Military Tribunal at Nuremberg (IMT) in 1946, the subsequent Nuremberg Trials pursuant to Control Council Law no.10 (NMT) in 1946-1949 and the International Military Tribunal for the Far East at Tokyo (IMTFE) in 1946-1948 indicted, prosecuted and subsequently convicted individuals for crimes against peace.[1] Many decades after Nuremberg, the International Criminal Court (ICC) was established, with jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression.

However, the crime of aggression was not defined in the Rome Statute of the International Criminal Court (Rome Statute). Pursuant to Article 5(2) of the Rome Statute, 'the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 [amendments] and 123 [Review of the Statute] defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.' This happened in 2010, at the Review Conference in Kampala, where amendments to the Rome Statute for the crime of aggression in Kampala (the Kampala Amendments) were adopted by consensus (Resolution RC/Res.6). At present, the ICC is the only international criminal forum that may potentially prosecute individuals who plan, prepare, initiate or execute an act of aggression, subject to the activation of the jurisdiction of the Court over the crime of aggression.

This crime is fundamentally different from the other core international crimes in Article 5(1) of the Rome Statute, i.e. genocide, crimes against humanity and war crimes. There are two significant differences. First, unlike genocide, crimes against humanity and war crimes, individual criminal responsibility for the crime of aggression is predicated upon state responsibility for an act of aggression.[2] This is because the legal definition of the crime of

[1] It should be noted that 'crimes against peace' and the 'crime of aggression' are synonymous and are used interchangeably.

[2] See Commentaries on the Draft Code of Crimes against the Peace and Security of Mankind 1996, Yearbook of the International Law Commission, 1996, vol. II, Part II, (hereinafter "Commentaries on the Draft Code of Crimes"),30.

aggression encompasses a state act of aggression as a substantive component of the crime.[3] The IMT approached the issue by establishing that Germany had committed 'wars of aggression' against twelve nations prior to assessing individual criminal responsibility of the defendants for crimes against peace.[4] The need to first establish the existence of aggression committed by the state prior to considering the conduct of the defendant has been incorporated in the Kampala Amendments.[5] Therefore, an individual can only be found criminally responsible for the crime of aggression if it has been established that the aggressor state has committed an act of aggression.

Second, the victim of the crime of aggression is the aggressed state. This is the fundamental difference between the crime of aggression and the other core international crimes, as the victims of genocide, crimes against humanity and war crimes are natural persons. Arguably, the submission that the victim of the crime of aggression is a state does not necessarily affect any of the constitutive elements of the crime. Yet, the fact that the victim of the crime of aggression is a state, and not a natural person, has symbolic significance: under international law, a state can be a victim of an international crime. There is also legal significance, as the norms under international law that criminalise aggression serve to protect the aggressed state. Thus, when there is a breach of these norms, it is in the legal interest of the aggressed state that legal consequences are to be enforced against the perpetrator of the crime of aggression.

These two aspects of the crime of aggression, i.e. the unique relationship between state responsibility and individual criminal responsibility with respect to the crime of aggression, and the need to protect the legal interests of the aggressed state under international law, initiated my interest to conduct the present study. The crime of aggression has recently attracted considerable academic interest, especially in light of the negotiations on the definition of the crime of aggression and the conditions under which the ICC may exercise jurisdiction, which had spanned over a period of ten years. Stefan Barriga and Claus Kress have made a compilation of all relevant documents pertaining to the negotiation history of the Kampala Amendments, *Crime of Aggression Library: the Travaux Préparatoires of the Crime of Aggression*.[6] In the specific

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[3] Article 6(a) Charter of the International Military Tribunal has defined crimes against peace as: planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances; Article 8 bis(1) Kampala Amendments has defined the crime of aggression as: 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.

[4] 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (1947) 41 American Journal of International Law 172, 186–214.

[5] Articles 15 bis (6) – 15 bis (9), Resolution RC/Res.6.

[6] Stefan Barriga and Claus Kress, *Crime of Aggression Library: The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press 2012).

context of the ICC and the crime of aggression, Carrie McDougall has published a monograph on *The Crime of Aggression under the Rome Statute of the International Criminal Court*,[7] and Mauro Politi and Giuseppe Nesi have edited a volume on *The International Criminal Court and the Crime of Aggression*.[8] Writing before the proliferation of international criminal tribunals, Cornelis Pompe examined the criminalisation of aggression from the Nuremberg Trials to the implementation of the 'Nuremberg Principles' in *Aggressive War and International Criminal Law*.[9] In a similar vein, Kirsten Sellars traces the historical criminalisation of aggression, from its origins after the First World War, to the post-war tribunals at Nuremberg and Tokyo in *'Crimes against Peace' and International Law*.[10]

With respect to a more general overview of the crime of aggression, several monographs have recently been published: Patrycja Grzebyk, *Criminal Responsibility for the Crime of Aggression*;[11] Sergey Sayapin, *The Crime of Aggression in International Criminal Law, Historical Development, Comparative Analysis and Present State*;[12] Gerhard Kemp, *Individual Criminal Liability for the International Crime of Aggression*;[13] Larry May, *Aggression and Crimes Against Peace.*[14] Broadly speaking, these studies examine the prohibition of the use of force under *jus ad bellum*, the historical origins of the norms that criminalise aggression, and prosecution in domestic courts and at the ICC.

Although any study pertaining to the crime of aggression involves an examination of the laws on the use of force (*jus ad bellum*), existing literature appears to be written from a predominantly international criminal law perspective. The position taken in this dissertation is that this gives rise to an incomplete understanding of the crime of aggression for the main reason that the study of this crime from an international criminal law perspective can only acknowledge that individual criminal responsibility is predicated upon state responsibility, without examining this special feature of the crime in depth. Yet, this feature is important not only from a conceptual perspective, but also from a practical perspective, as a lack of understanding of the

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[7] Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press 2013).
[8] Mauro Politi and Giuseppe Nesi (eds), *The International Criminal Court and the Crime of Aggression* (Ashgate 2004).
[9] Cornelis Pompe, *Aggressive War: An International Crime* (Martinus Nijhoff 1953).
[10] Kirsten Sellars, *'Crimes against Peace' and International Law* (Cambridge University Press 2013).
[11] Patrycja Grzebyk, *Criminal Responsibility for the Crime of Aggression* (Routledge 2013).
[12] Sergey Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (Springer 2013).
[13] Gerhard Kemp, *Individual Criminal Liability for the International Crime of Aggression* (Intersentia 2010).
[14] Larry May, *Aggression and Crimes Against Peace* (Cambridge University Press 2008).

relationship between individual criminal responsibility and state responsibility may cause apprehension with respect to carrying out the prosecution of this crime.

There is an intrinsic link between the state act of aggression and the crime of aggression, and state responsibility for aggression and individual criminal responsibility for the crime of aggression, which upholds a relationship between the aggressor state and the perpetrator of the crime. To better understand this intrinsic link, there is need to return to the broader framework of public international law, as it is necessary to study the primary level of norms under international law that prohibit aggression and the norms that criminalise aggression, which in effect, shape the way that the concomitant norms interplay on the secondary level of responsibility.

In this regard, there is a lack of clarification in present academic literature in relation to two issues. First, the legal definition of the crime of aggression is predicated upon the interplay between the norms that prohibit aggression and the norms that criminalise aggression on the primary level. Second, the concomitant norms interplay on the secondary level of responsibility so that individual criminal responsibility can only be found upon state responsibility. The problem is that the constitutive elements within the definition of the crime of aggression encompass two separate wrongful conducts by different actors, and it does not become immediately clear how international responsibility is attributed to the aggressor state and the individual accordingly.

The central research question of this dissertation aims to analyse the conditions of responsibility relating to the crime of aggression to the State and the individual. Delineation of responsibility of these very different subjects provides an analytical perspective for engaging with the legal interests of the aggressed state in the context of the establishment and implementation of individual criminal responsibility against the individual who has committed the crime of aggression.

This research is conducted from a positivist international law perspective, and thus relies on treaty law, customary international law and judicial decisions as the principal sources. In particular, the travaux préparatoires of the Kampala Amendments is examined extensively as a necessary step towards a better understanding of the *sui generis* nature of the jurisdictional regime of the Court over the crime of aggression and how these amendments to the Rome Statute affect the legal interests of States Parties to the original treaty.

In this regard, this dissertation can be seen to encompass both conceptual and practical elements. The conceptual element of this dissertation is the delineation between the norms that prohibit aggression and the norms that criminalise aggression on the primary level, and the concomitant explanation of how the secondary norms should be interpreted with respect to state

responsibility and individual criminal responsibility in a situation of prosecution of the crime of aggression. The more practical elements of the present research encompass the contemplation of whether and to what extent the crime of aggression can be prosecuted at the ICC and domestic courts.

This research intends to contribute to scholarship by studying the crime of aggression from a public international law perspective, with particular reference to the intrinsic link between the state act of aggression and the crime of aggression. By a public international law perspective, this dissertation will assert that individual criminal responsibility for the crime of aggression should not be understood as a phenomenon exclusive to international criminal law, but as part of the broader context of international responsibility for wrongful conduct. This study will give priority to three main issues.

First, the better understanding of how the norms of international law on the primary level prohibit and criminalise aggression (the act of aggression and the crime of aggression), and how the breach thereof gives rise to legal consequences under the secondary level of international responsibility (state responsibility and individual criminal responsibility). This will put into perspective how the intrinsic link between the state act of aggression and the crime of aggression should be understood in relation to how the interplay between state responsibility and individual criminal responsibility should be interpreted during the prosecution of the crime of aggression.

Second, the relevant actors should be identified, that is to say, the duty-bearers of the norms that criminalise aggression and the rights-holders of the enjoyment of the protection of these norms. It is submitted that the former are individuals, whilst the latter are states. It is further submitted that it is within the legal interests of the latter to enjoy the protection afforded by these norms; and in situations when the former has failed to comply with the duty to refrain from such conduct, that legal consequences by means of criminal sanctions are enforced.

Third, there is need to examine how the norms that criminalise aggression are enforced under international law. Enforcement refers to ensuring that duty-bearers comply with their obligations to respect the norms that criminalise aggression; and that in the event of breach thereof, legal consequences can be enforced directly against the duty-bearer. The general argument is that, by attaching legal consequences to the breach of the norms that criminalise aggression, the duty-bearer will feel compelled to respect obligations to refrain from the relevant prohibited conduct. In a situation of breach of obligations, it is of course in the interests of the rights-holder that legal consequences are invoked against the duty-bearer. Therefore, the protection of the legal interests of the aggressed state as the victim of the crime of aggression

refers to ensuring that legal consequences are enforced against the perpetrator of the crime of aggression.

In adopting the outlined approach of examining the crime of aggression, the study of this crime is advanced in both the fields of public international law and international criminal law. In the context of public international law, this dissertation contributes to the ongoing study of international responsibility for wrongful conduct, particularly in the light of international crimes committed by individuals. By clarifying how the norms that prohibit aggression and the norms that criminalise aggression interplay on the primary level, it can be understood how the relationship between state responsibility and individual criminal responsibility should be interpreted with respect to the crime of aggression. With respect to international criminal law, this dissertation contributes to the ongoing study of prosecution of the crime of aggression at both the ICC and domestic courts. In particular, the hypothesis that the ICC should have de facto exclusive jurisdiction over the crime of aggression[15] is challenged.[16] Against the backdrop of international criminal law, the acknowledgment that the victim of the crime of aggression is the aggressed state is important, as this is indicative of the concept that the concept of a victim of an international crime may encompass both states and natural persons. Furthermore, an unusual asymmetry is brought to light, i.e. that the perpetrator of the crime is a natural person, whilst the victim is a state. The ramifications of this insight are examined in the context of the normative framework of victims' rights and the regime of the ICC with respect to victim participation and reparations.

There is also the question of whether natural persons who have suffered injury in a situation of aggression may be considered as victims of the crime of aggression. The assessment of injury to natural persons in a situation of aggression (as the result of the state act of aggression and the crime of aggression) involves examining the legal framework applicable in a situation of aggression, and delineating between *jus ad bellum* and *jus in bello*. From a broader public international law perspective, this illustrates how the three separate legal frameworks, international criminal law, *jus ad bellum* and *jus in bello* interplay in a situation of aggression.

The findings of this research are also important from a practical perspective. First, the aggressed state may rightfully identify itself as the rights-holder of the enjoyment afforded from the protection of the norms that prohibit aggression and the norms that criminalise aggression.

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[15] Article 8, Draft Code of Crimes against the Peace and Security of Mankind 1996 ("Draft Code of Crimes"); see also Commentaries on the Draft Code of Crimes, 27-28; see also Beth Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (2012) 10 Journal of International Criminal Justice 133.

[16] This will be examined in Section 5.3 in Chapter V.

The aggressed state may thus understand better its legal interests under international law in relation to legal consequences against the aggressor state for the act of aggression, and the alleged perpetrator(s) of the crime of aggression.

Second, the jurisdiction of the ICC over the crime of aggression is yet to be activated. States Parties to the Rome Statute (State Parties) have raised questions relating to the entry-into-force of the Kampala Amendments and the jurisdictional regime of the Court over the crime of aggression.[17] This dissertation examines how the entry-into-force of the Kampala Amendments and the jurisdictional regime of the ICC over the crime of aggression should be interpreted, which is of interest to both academics and practitioners.

Third, from a practitioner's perspective, it may be useful to understand the legal positions of the aggressor state, aggressed state, the perpetrator of the crime of aggression, and natural persons in a situation of aggression. This way the legal position of each of these subjects can be taken into consideration when deciding upon the need to enforce legal consequences under the secondary rules of responsibility, with particular reference to individual criminal responsibility.

This dissertation is conducted in three parts. Part I provides the background to the crime of aggression. The aim is to study the definition of the crime of aggression under international law, with particular reference to the norms that prohibit aggression and the norms that criminalise aggression, thereby placing obligations on states to refrain from an act of aggression and obligations on individuals to refrain from conduct relating to the crime of aggression. Part I consists of three chapters.

Chapter I addresses the state act of aggression from the perspectives of both the aggressor state and the aggressed state in the light of the framework of collective security and the United Nations. This Chapter examines how international law places obligations on states to refrain from an act of aggression pursuant to the applicable legal framework, i.e. *jus ad bellum*. The scope and nature of these obligations will be studied, with particular reference to the duty-bearers and rights-holders of the protection from the norms that prohibit aggression. This puts into perspective how responsibility can be attributed to the aggressor state under international law for the act of aggression.

Chapter II examines crimes against peace pursuant to the Charter and judgment of the IMT, which mark the origins of the crime of aggression. Indeed the IMT signifies the turning point in international law when individuals were prosecuted and convicted for crimes against peace. It

[17] This is background information gathered from personal experience when I was accredited to the Liechtenstein delegation to attend the 11th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court 2012 and spoke to various States Parties with respect to the ratification and implementation of the Kampala Amendments.

will be suggested that the norms that criminalise aggression did not exist prior to the formation of the Charter of the IMT or the judgment of the Tribunal. Yet, both the Charter and judgment of the IMT ("the Nuremberg principles")[18] have gradually gained customary international law status.[19] This means that there are now norms under international law that impose obligations directly on individuals to refrain from conduct relating to a state act of aggression, and attach sanctions directly for the breach thereof, i.e. the criminalisation of aggression. The subsequent Nuremberg Trials pursuant to Control Council Law no.10 were directly bound by the judgment of the IMT and had further developed the Nuremberg principles. For these reasons, only the IMT and NMT will be examined in this Chapter in relation to understanding the origins of the norms that criminalise aggression. This Chapter aims to delineate the contours of the crime at Nuremberg (and thus customary international law), with particular reference to the state act element of the crime (the state act of aggression), and the elements of the crime pertaining to individual conduct (*actus reus* and *mens rea*). It is beyond the scope of this dissertation to include an analysis of the IMTFE.

Chapter III examines the definition of the crime of aggression in the Kampala Amendments. Upon examining the legal nature of the Kampala Amendments, it is submitted *inter alia* that the definition of the crime under Article 8 *bis*(1) has not attained customary international law status. Therefore, the legal definition of the crime of aggression under customary international law is still the substantive definition of crime against peace pursuant to the Nuremberg principles. By comparing the definition of the crime of aggression in the Kampala Amendments with the definition of crimes against peace at Nuremberg, the legal definition of the crime of aggression can be studied in the context of whether, and how, the scope of the crime has developed in international law.

Part II considers the more conceptual aspects of the present study. This involves examining the relationship between the aggressor state for committing an act of aggression and the perpetrator of the crime of aggression, to understand better how the norms that prohibit aggression and the norms that criminalise aggression interplay on the primary and secondary level, and how they should be interpreted with respect to the crime of aggression. As such, it can be better understood how the obligations placed on states to refrain from an act of aggression are interconnected with the obligations on individuals to refrain from conduct relating to the crime of aggression, and how this should be interpreted with respect to individual criminal

[18] GA Resolution 95(1) 1946.

[19] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal (1950), Yearbook of the International Law Commission, 1950, vol. II, para. 97.

responsibility for the latter. The aggressed state is identified as the rights-holder of the enjoyment of the protection from the norms that criminalise aggression, which has suffered from the failure of the relevant duty-holder to comply with obligations to refrain from conduct relating to the crime of aggression. Thus, it is submitted that enforcement of sanctions against the perpetrator(s) of the crime of aggression by means of criminal prosecution is in the direct legal interests of the aggressed state. Part II comprises two chapters.

Chapter IV examines the relationship between the aggressor state and the perpetrator of the crime of aggression. It examines the intrinsic link between the act of aggression and the crime of aggression (primary level), whereby individual criminal responsibility for the crime of aggression is predicated upon state responsibility for the act of aggression (secondary level). This Chapter identifies the points of distinction between the norms that prohibit aggression and the norms that criminalise aggression to delineate how these norms interplay on the primary level. It then continues to elaborate the point of intersection between the norms that prohibit aggression and the norms that criminalise aggression to understand how the obligations on states to refrain from an act of aggression interplay with the obligations on individuals to refrain from conduct which relates to the act of aggression. The aim is to shed light on the relationship between state responsibility for aggression and individual criminal responsibility for the crime of aggression to explain how the former is *sine qua non* for the latter.

Chapter V submits that the victim of the crime of aggression is the aggressed state because it is the rights-holder of the enjoyment of the protection afforded by the norms that criminalise aggression, who has suffered from the breach of obligations by the relevant duty-holder. As such, enforcement of sanctions (prosecution) against the perpetrator of the crime of aggression is in the direct legal interests of the aggressed state. That said, this submission appears to depart from the general concept of victims in international criminal law, which usually pertains to natural persons. Thus, it will be examined whether natural persons may also be considered as victim(s) of the crime of aggression. As the victim of the crime of aggression is the aggressed state, the question is how this can be reconciled with the normative framework of victims' rights (which pertains to individuals). In particular, it will be addressed whether and to what extent the aggressed state may be a beneficiary to reparations for the crime of aggression from the perpetrator of the crime (individual civil responsibility).

Part III examines the enforcement of the norms that criminalise aggression, with particular reference to the enforcement mechanisms under international law, the ICC and domestic courts. This Part will examine the question whether and to what extent international law protects the

legal interests of the aggressed state. In other words, whether and to what extent prosecution can take place at either the ICC level or in domestic courts. This Part has two chapters.

Chapter VI examines prosecution of the crime of aggression at the ICC. The aim of this chapter is to understand to what extent the ICC as enforcement mechanism, is representative of the legal interests of the aggressed state (and the international community) to prosecute the crime of aggression. In order to do so, it is necessary to delineate the jurisdictional regime of the ICC over the crime of aggression (Articles 15 *bis* and 15 *ter,* Kampala Amendments) as this encompasses the contours of situations that may be prosecuted at the Court. As will be discussed, the jurisdictional regime over the crime of aggression at the Court is different from the jurisdictional regime over the other crimes in Article 5(1) of the Rome Statute: it is *sui generis* in nature. Another important and contentious issue that will be contemplated is the question of the consent of the aggressor state with respect to the jurisdictional regime of the ICC over the crime of aggression.

Chapter VII examines prosecution of the crime of aggression in domestic courts. As a preliminary issue, this Chapter challenges and rejects the hypothesis that suggests that domestic courts are not competent fora for the prosecution of the crime of aggression, and that the ICC should have de facto exclusive jurisdiction. It will be submitted that domestic courts and the ICC may have concurrent jurisdiction over the crime of aggression as international law relies on both enforcement mechanisms to prosecute the perpetrator of the crime of aggression. This Chapter will examine the concerns that arise with respect to domestic prosecution for the crime of aggression and whether and to what extent they may be overcome.

Before engaging with the topic of research, few conceptual clarifications are in order. First, the terms 'crimes against peace' and the 'crime of aggression' are synonymous and will be used interchangeably throughout this dissertation. Although there has been a change in terminology, this is limited only to nomenclature and has no effect on the substantive components of the crime. Second, the terms 'state act of aggression' and 'state act element of the crime' both refer to an act of aggression committed by the aggressor state. This can be juxtaposed with the 'elements of the crime pertaining to the conduct of the individual', which refers to the behaviour of the individual. Third, it is commonly known that the term 'war' is rather anachronistic and has been replaced with the term 'use of force.' Yet, a 'war of aggression' is the state act element of crimes against peace pursuant to the Charter and judgment at the IMT (and thus customary international law). As such, a 'war of aggression' will be referred to in this dissertation in the context of the state act element for crimes against peace at the IMT, the NMT and the Nuremberg Principles under customary international law. Fourth, the primary/secondary level

distinction refers to the norms on the primary level under international law that impose obligations on the relevant actor to refrain from an act of aggression (norms that prohibit aggression) or a crime of aggression (norms that criminalise aggression), and the norms on the secondary level that govern the responsibility of the relevant actors for the breach of obligations on the primary level.

In this dissertation, it is submitted that the intrinsic link between the state act of aggression and the crime of aggression within the definition of the crime exists on two levels. On the primary level, the intrinsic link can be explained by identifying the point of intersection between the norms that prohibit aggression and the norms that criminalise aggression, as this demonstrates that both sets of norms run in parallel, and cannot exist separately from each other. On the secondary level, the intersection between state responsibility and individual criminal responsibility serves as an indicator that there has been a breach of both sets of norms on the primary level. The reason why state responsibility of the aggressor state is a necessary pre-requisite of the crime of aggression is because it demonstrates that the individual(s) has acted in breach of the parallel set of obligations to refrain from conduct pertaining to the state act of aggression. As such, the individual is only responsible under international law for the breach of the set of obligations relating to prohibited conduct, and not the state act of aggression.

Part I. Background

Chapter I. The state act of aggression

1.1. Introduction

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

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

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

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

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

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

1.2. The United Nations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[30] See Article 33, UN Charter.

[31] See Orakhelashvili, *Collective Security* (n 20) 26–27.

[32] Krisch (n 26) 1256.

[33] See Orakhelashvili, *Collective Security* (n 20) 150; see also Leland M Goodrich and Anne P Simons, *The United Nations and the Maintenance of International Peace and Security* (Greenwood Press 1974) 362; Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) 174–176.

[34] The International Criminal Tribunal for the former Yugoslavia (ICTY) has previously held, '[t]he situations justifying resort to the powers provided for in Chapter VII are a threat to the peace', a breach of the peace' or an 'act of aggression. While the 'act of aggression' is more amenable to a legal determination, the 'threat to the peace' is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter', Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case IT-94-1-AR72, Appeal Chamber, Decision on Jurisdiction, 2 October 1995, para.29; see also De Wet (n 33) 134–138, in particular, she observes that the supporters of unlimited Security Council discretion under Article 39 'point to the fact that the the terms "threat to the peace", "breach to the peace" or an "act of aggression" are not defined anywhere in the Charter', ibid 135.

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

1.2.1 Determining an act of aggression

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

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

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

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

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

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

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

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

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

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

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

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

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[50] Goodrich and Simons (n 33) 366.

[51] Article 27(3), UN Charter.

[52] Peters writes that 'regarding the relationship between the Council and the Assembly, the term "primary" does not offer a precise guideline as to when and under what conditions exactly an act of the Assembly would unduly interfere with the competences of the Council and therefore be ultra vires. The exact delineation of competences is made not by the provision of Art.24 but by the more specific provisions of Arts 11, 12 and 39 and also by the Uniting for Peace Resolution,' Anne Peters, 'Article 24' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) 769;Waldock (n 23) 505; Juraj Andrassy, 'Uniting for Peace' (1956) 500 American Journal of International Law 563, 564.

[53] See LH Woolsey, 'The "Uniting for Peace" Resolution of the United Nations' (1951) 45 American Journal of International Law 129, 130.

[54] See G.A.O.R., 5th Sess., Annexes, vol.2, Item 68, U.N. Doc.A/1377(1950); See Peters (n 52) 768–769.

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

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

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

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

[56] Andrassy (n 52) 463.

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

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

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

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

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

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

Article 14 of the UN Charter states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[77] Corten (n 63) 51.

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

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

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

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

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

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

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

[80] Corten (n 63) 50–52.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
>
> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
>
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
>
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;
>
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
>
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
>
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
>
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

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

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

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

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

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

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

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

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

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

1.3.3. A legal determination of an act of aggression

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.4.1. Self-defence

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

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[102] ibid.

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

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

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

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

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

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

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

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

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

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

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

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

[106] Corten (n 63) 207–208.

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

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

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

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

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

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

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

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

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

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

[113] Corten (n 63) 409.

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

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

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

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

1.4.2. Authorisation by the Security Council under Chapter VII

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

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

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

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

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

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

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

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

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

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

1.5. The question of humanitarian intervention

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

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

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

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

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

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

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

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

[128] Corten (n 63) 499.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[141] ibid 69–72.

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

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

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

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

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

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

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

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

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

[147] Schachter (n 108) 129.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.7. Conclusion

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

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

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

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

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

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

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

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

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

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

Chapter II. Nuremberg and Crimes against Peace

2.1 Introduction

The IMT, which commenced in late November 1945, marked one of the most significant landmarks in history.[169] The major war criminals of World War II stood trial and were prosecuted for their participation in a common plan or conspiracy to commit, or the commission of the crimes which were defined in Article 6 of the IMT Charter: crimes against peace; war crimes; and crimes against humanity.[170] After the Nuremberg Trial, the subsequent NMT, which were established pursuant to Control Council Law No.10,[171] and the Tokyo Trials at the IMTFE,[172] had also indicted and convicted individuals for crimes against peace.

Although the historical origins and efforts to criminalise aggression may have originated before the Nuremberg Trial,[173] this chapter argues that the norms criminalising aggression did not exist prior to the Trial. It was the subsequent affirmation of the IMT Charter and the judgment of the Nuremberg Trial, i.e. the Nuremberg principles,[174] which gradually led to the crystallization of the norms that criminalise aggression under customary international law. As established in the previous chapter, individuals are not the duty-bearers or the rights-holders with respect to the norms that prohibit aggression under international law. States are the duty-bearers that must comply with primary obligations to refrain from an act of aggression and the rights-holders of the enjoyment of compliance of these obligations.

The criminalisation of aggression means that norms under international law confer direct obligations on individuals to refrain from specific proscribed conduct relating

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[169] Guénaël Mattraux, *Perspectives on the Nuremberg Trial* (Oxford University Press 2008).
[170] The Indictment is available at http://avalon.law.yale.edu/imt/count.asp.
[171] See Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press 2012).
[172] See Neil Boister and Robert Cryer, *Documents on the Tokyo International Military Tribunal: Charter, Indictment, and Judgments* (Oxford University Press 2008).
[173] Merkhel evaluates the failed first bases for an international criminal law after the First World War, in particular, it should be noted that he submits 'a provision in international law against war was […] not created in Versailes', Reinhard Merkhel, 'The Law of the Nuremberg Trial: Valid, Dubious, Outdated', *Perspectives on the Nuremberg Trial* (Oxford University Press 2009) 558–562; Bert VA Röling, 'The Nuremberg and Tokyo Trials in Retrospect' in Guénaël Mattraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2009) 467–477; see also Sellars (n 10) 1–46.
[174] GA Resolution 95(1) 1946.

to the state act of aggression. The breach of these norms results in sanctions, which are executable directly against the individual for the breach of primary obligations. It is therefore the IMT, which was the starting point of the criminalisation of aggression.

As already clarified in the introduction, there is an apparent change in terminology where international law now recognises the 'crime of aggression' in lieu of 'crimes against peace'.[175] However, this does not mean there have been any changes to the substantive constituents of the definition of the crime as any changes are purely nomenclature.[176] Both of these terms will be used interchangeably in this chapter.

This Chapter will first look at the IMT (section 2.2), followed by the NMT (section 2.3). As the latter were directly bound by the judgment of the former,[177] the case law is helpful in understanding the scope of the legal construct of crimes against peace pursuant to the Nuremberg Principles. When studying the IMT and NMT, there are primarily two main questions, which are relevant to understanding the contours of the crime of aggression under customary international law. First, what is the state act element that constitutes a crime against peace? In other words, which acts of aggression committed by Germany gave rise to individual criminal responsibility? Second, what are the elements of the crime pertaining to individual conduct that allow one to be liable for crimes against peace? In the light of these findings, this chapter will continue to examine how the Nuremberg principles gradually attain customary international law status (section 2.4), and the contours of the crime of aggression (section 2.4.3).

2.2 The International Military Tribunal at Nuremberg: The Nuremberg Trial

At the Nuremberg Trial, the Indictment contained two counts for crimes against peace:

[175] Article 16, Draft Code of Crimes; Article 5(1), Rome Statute; The Kampala Amendments, Resolution RC/Res.6.

[176] In the R v Jones, Lord Bingham of Cornhill stated that it had not been suggested that there was "any difference of substance' between a crime against peace and a crime of aggression and that as a matter of convenience he would refer to the latter. [2006] UKHL [4].

[177] Military Government – Germany, United States Zone, Ordinance No.7, Trials of War Criminals before the Nuernberg Military Tribunals, United States Government Printing Office, 1951, vol.III, p.XXIII (hereinafter "Ordinance no.7").

> Count One included *inter alia* a 'common plan or conspiracy to commit, or which involved the commission of, crimes against peace.'[178]
>
> Count Two alleged that all the defendants participated in the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances.[179]

Article 6(a) of the IMT Charter defined crimes against peace as:

> the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances […].

In my view, the definition should be demarcated into two separate substantive components:

i) the planning, preparation, initiation or waging of […]

ii) a war of aggression, or a war in violation of international treaties, agreements or assurances.

The first component refers to conduct of an individual, whilst the second component is the act of aggression committed by a state. The former is acknowledged as the elements of the crime pertaining to individual conduct, and the latter, the state act element of the crime. The approach of the Tribunal had been to first ascertain that Germany had committed wars of aggression, i.e. the state act element before assessing the conduct of each defendant, i.e. elements of the crime pertaining to individual

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[178] Count one described the following acts committed against 12 countries: the planning and execution of the plan to invade *Austria* (1937-1938) and *Czechoslovakia* (1938-1939); formulation of the plan to attack *Poland*: preparation and initiation of aggressive war (1939); expansion of the war into a general war of aggression: Planning and execution of attacks on *Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia and Greece* (1939-1941); the invasion of the *U.S.S.R* territory in violation of the Non-Aggression Pact of 23 1939; collaboration with Italy and Japan and the aggressive war against the *United States* (1939-1941); The common plan or conspiracy embraced the commission of crimes against peace, in that the defendants planned, prepared, initiated and waged wars of aggression, which were also wars in violation of international treaties, agreements or assurances; available at http://avalon.law.yale.edu/imt/count1.asp.

[179] The wars referred to were as follows: against *Poland* (1939); against the *United Kingdom* and *France* (1939); against *Denmark* and *Norway* (1940); against *Belgium, the Netherlands* and *Luxembourg* (1940); against *Yugoslavia* and *Greece* (1941); against the *U.S.S.R* (1941); against the *U.S.A* (1941). Reference was also made to Count One of the indictment for allegations charging that these wars were wars of aggression on the part of the defendants; available at: http://avalon.law.yale.edu/imt/count2.asp.

conduct. [180]As the conduct of two different legal subjects were assessed, it can be inferred that there are two separate components within the definition of the crime that need to be assessed for a successful conviction of crimes against peace. The order is to first establish the state act element, followed by considering the elements of individual conduct.

2.2.1. The state act element of crimes against peace

According to Article 6(a) IMT Charter, the state act element of crimes against peace is:

- a war of aggression [or]
- a war in violation of international treaties, agreements and assurances

As the conjunctive 'or' is used, the state act element of the crime can be established upon one of these two variants of war.

A. War of aggression

A 'war of aggression' is not defined in the IMT Charter. Thus, it is in the discretion of the Tribunal to determine a war of aggression. It should be noted that the Tribunal had differentiated between an act of aggression and a war of aggression.[181] It found that Germany had committed acts of aggression against Austria and Czechoslovakia.[182] As these acts did not amount to wars of aggression, no defendants were charged or convicted for crimes against peace in relation to Austria and Czechoslovakia. It is worth examining the factual basis why the acts committed by Germany were considered as acts of aggression and not wars of aggression, as this will delineate the constituents of the state act element of crimes against peace.

The German attacks on Austria and Czechoslovakia were both referred to as 'acts of aggression' under Count One and named as 'seizures' in the IMT judgment.[183] In examining the facts, it becomes apparent that there was no actual use of armed force

[180] Conduct of Germany against other nations 186-214; conduct of defendants 272-331, 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[181] The Tribunal acknowledged that ''The first acts of aggression referred to in the Indictment are the seizure of Austria and Czechoslovakia; and the first war of aggression charged in the Indictment is the war against Poland begun on September 1939', ibid 186.
[182] ibid 192–197.
[183] ibid.

by Germany or armed resistance or counterforce by Austria[184] or Czechoslovakia.[185] However, despite the lack of armed force, both countries were annexed by Germany. The internal political structures of both countries were changed and they were incorporated into Germany as a result of duress from the series of threats backed with the use of force. [186] The annexation of both countries amounted to acts of aggression because 'the methods employed to achieve the object were those of an aggressor. The ultimate factor was the armed might of Germany ready to be used if any resistance was encountered.'[187]

Therefore, it is the threat of the use of force that gives rise to the aggressive element, but the lack of military force that prevents such acts from being considered a war of aggression. Nevertheless, these acts were part of the 'participation in a common plan or conspiracy' under Article 6(a) which is why the acts committed against Austria and Czechoslovakia were considered under Count One of the Indictment and not Count Two. As a result, defendants could not be convicted for committing aggressive wars against Austria or Czechoslovakia (Count Two) but only for the common plan or conspiracy to commit aggressive acts (Count One);[188] the element of which was fulfilled by the duress and threats of the use of force in order to achieve the political means desired by Germany.

In contrast to the acts committed against Austria and Czechoslovakia, Germany initiated the use of force against the other countries in the indictment (Poland, UK, France, Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia, Greece, U.S.S.R.) and made a formal declaration of war against the U.S.[189]

Poland was the first act of aggression identified by the IMT.[190] Despite a German-Polish declaration of non-aggression, Hitler declared 'there will be war'[191]

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[184] ibid 192.
[185] ibid 194–197.
[186] It was held 'this was premeditated and carefully planned, and was not undertaken until the moment was thought for it to be carried through as a definite part of the pre-ordained scheme and plan', ibid 187.
[187] ibid 197.
[188] Göring (272-273); Hess (275-277); von Ribbentrop (278-279); Keitel (281-282), Rosenberg (286-287); Raeder (306-308); Jodl (314-315) and von Neurath (324-325),'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[189] ibid 192–214.
[190] ibid 197.
[191] On the 23 May, at a meeting where Göring, Raeder and Keitel were amongst those who were present, Hitler announced his decision to attack Poland and gave his reasons and

and was determined for the destruction of Poland [192] as a necessity for Germany to enlarge her living space and secure her food supplies.[193] Such invasions led to war with the objective of annexation and occupation of territory. Fully aware of the existence of a pact of mutual assistance between Great Britain and Poland and an undertaking between France and Poland for mutual assistance, Hitler was determined to carry out his plans for annexation and occupation knowing that 'this intention would lead to war with Great Britain and France as well'[194] as there was the reality of counterforce by these two countries. He was of the opinion that if the isolation of Poland could not be achieved, Germany should attack Great Britain and France first, or should concentrate primarily on the war in the West, in order to defeat Great Britain and France quickly, or at least to destroy their effectiveness.[195] The IMT held:

> [B]y the evidence that the war initiated by Germany against Poland on 1 September 1939 was plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity.[196]

The IMT stated 'the aggressive war against Poland was but the beginning. The aggression of Nazi Germany spread quickly from country to country.' [197] The next two countries to suffer were Denmark and Norway. [198] This showed that a 'war of aggression' could also encompass invasions with the objective of gaining military advantage of adversaries.[199] The underlying reason for the invasions of Denmark and Norway appeared to be for preventing British encroachment on

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discussed the effect the decision might have on other countries. He admitted it was necessary for Germany to enlarge her living space and secure food supplies, "there is therefore no question of sparing Poland, and we are left with the decision to attack Poland at the first suitable opportunity. We cannot expect a repetition of the Czech affair. There will be war. Our task is to isolate Poland. The success of the isolation will be decisive… the isolation of Poland is a matter of skilful politics", ibid 200.

[192] ibid 201.
[193] ibid 199.
[194] ibid 203.
[195] ibid 200.
[196] ibid 203.
[197] ibid.
[198] ibid 203–207.
[199] ibid 204.

Scandinavia and the Baltic, and for gaining bases in Norway in order to make effective attacks on England and France.[200] Unlike the acts committed against Austria and Czechoslovakia, there did not appear to be a change of internal policy of the governments of Denmark or Norway. However, there was nonetheless, occupation of both countries as German possessions for further purpose of aggression against other countries, and a 'breach of international treaties, agreements or assurances' as there was a Treaty of Non-Aggression between Germany and Denmark, and a solemn assurance of peace to Norway.[201]

The Defence had put forward an argument that Germany was compelled to attack Norway to forestall an Allied invasion, and thus her action was preventive.[202] However, the IMT rejected this as 'it is clear that when the plans for an attack on Norway were being made, they were not made for the purposes of forestalling an imminent Allied landing, but, at the most, that they might prevent an Allied occupation at some future date"[203] and that "Norway was occupied by Germany to afford her bases from which a more effective attack on England and France might be made, pursuant to plans prepared long in advance of the Allied plans which are not relied on to support the argument of self-defence.'[204]

Thus, the IMT concluded that 'in the light of all the available evidence, it is impossible to accept the contention that the invasions of Denmark and Norway were defensive, and in the opinion of the Tribunal they were acts of aggressive war.'[205]The breach of neutrality of Belgium, Netherlands and Luxembourg was for purposes of obtaining air bases to gain military advantage over the United Kingdom and France.[206] In May 1939, when Hitler foresaw the possibility at least of a war with England and France in consequence of the attack against Poland, he said "Dutch and Belgian air bases must be occupied … Declarations of neutrality must be ignored."[207] The IMT held that 'the invasion of Belgium, Holland, and Luxembourg was entirely

[200] ibid 205–207.
[201] Denmark entered a Treaty of Non-aggression on 31 May 1939, signed by von Ribbentrop. However, Germany invaded Denmark on 9 April 1940. Germany had also sent a solemn assurance to Norway on 2 September 1939 to respect her territory. However, on 9 April 1940, Norway was invaded by Germany, ibid 203-204.
[202] 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 205.
[203] ibid 206.
[204] ibid.
[205] ibid 207.
[206] ibid 207–209.
[207] ibid 207.

without justification. It was carried out in pursuance of policies long considered and prepared, and was plainly an act of aggressive war. The resolve to invade was made without any consideration that the advancement of the aggressive policies of Germany.'[208]

The IMT considered the wars of aggression against Yugoslavia and Greece together,[209] where Hitler said to one of the defendants, von Ribbentrop that 'the best thing to happen would be for the neutrals to be liquidated one after the other. This process could be carried out more easily if on every occasion one partner of the Axis covered the other while it was dealing with the uncertain neutral. Italy might well regard Yugoslavia as a neutral of this kind." [210] The attempt to persuade Italy to enter war on Germany's side against Yugoslavia was unsuccessful. As for Greece, when asked for confirmation that the 'whole of Greece will have to be occupied, even in the event of a peaceful settlement,' Hitler replied "the complete occupation is a prerequisite of any settlement."[211] It can be assumed that the breach of neutrality of Yugoslavia fulfilled the agenda to liquidate one neutral after another, presumably for purposes of military advantage against the growing adversaries:

> It is clear from this narrative that aggressive war against Greece and Yugoslavia had long been in contemplation, certainly as early as August of 1939. The fact that Great Britain had come to the assistance of the Greeks, and might thereafter be in a position to inflict great damage upon German interests was made the occasion for the occupation of both countries.[212]

Once again, despite a non-aggression pact, Germany invaded the U.S.S.R for purposes of political, military and economic exploitation for the enlargement of German territory to the east.[213] The IMT held that 'Germany had the design carefully thought out, to crush the U.S.S.R as a political and military power, so that Germany might expand to the east according to her own desire.'[214]

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[208] ibid 209.
[209] ibid 209–211.
[210] ibid 209.
[211] ibid 210.
[212] ibid 211.
[213] ibid 211–213.
[214] The IMT held that 'the plans for the economic exploitation of the U.S.S.R. for the removal of masses of the population, for the murder of Commissars and political leaders, were all part

In the case of the U.S., Germany made a formal declaration of war in the light of the Tripartite Pact between Germany, Italy and Japan (1940).[215] Germany agreed to support Japan for an attack against the U.S, despite the fact that under this Tripartite Pact, Italy and Germany were only to assist Japan if she was attacked. Four days after the attack launched by the Japanese in Pearl Harbour, Germany declared war on the U.S.[216] The IMT held:

> Although it is true that Hitler and his colleagues originally did not consider that a war with the United States would be beneficial to their interest, it is apparent that in the course of 1941 that view was revised, and Japan was given every encouragement to adopt a policy which would almost certainly bring the United States into the war. And when Japan attacked the United States fleet in Pearl Harbor and thus made aggressive war against the United States, the Nazi Government caused Germany to enter that war at once on the side of Japan by declaring war themselves on the United States.[217]

B. War in violation of international treaties, agreements or assurances

As the Tribunal had found that the defendants planned and waged aggressive wars against 12 nations, it was rendered 'unnecessary to discuss the subject in further detail, or even to consider at any length the extent to which these aggressive wars were also "wars in violation of international treaties, agreements, or assurances."'[218] It was also considered unnecessary to 'consider the other treaties referred to in the Appendix, or the repeated agreements and assurances of her peaceful intentions entered into by Germany.'[219] Indeed, most of the wars of aggression were also in violation of bilateral agreements and assurances of peace between the particular aggressed state and Germany.

Nevertheless, "wars in violation of international treaties, agreements or assurances" is still part of the state act element of the crime of aggression under

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of the carefully prepared scheme launched on 22 June without warning of any kind, and without the shadow of legal excuse. It was plain aggression', ibid 213.

[215] ibid 213–214.

[216] ibid 214.

[217] ibid.

[218] ibid.

[219] ibid 216.

Article 6 of the IMT Charter. The IMT had acknowledged that the following international treaties, agreements or assurances were of principal importance: the Hague Conventions, Versailles Treaty, Treaties of Mutual Guarantee, Arbitration and non-aggression between Germany and the other Powers, and the Kellogg-Briand Pact.[220] At the time of the events on trial, these instruments were representative of the normative framework that governed the prohibition of the use of force under international law. The violation of these instruments resulting in war, is indicative of a breach of the prohibition of the use of force. Thus, this variant of war implies that a violation of the prohibition of the use of force may amount to crimes against peace.

2.2.2. Observations

The first and foremost underlying requirement appears to be that there must be an actual use of force, as evident by how the judgment dealt with the acts committed against Austria and Czechoslovakia. An annexation was not sufficient to be considered as a war of aggression without the use of force to achieve those means despite the threat of the use of force (which nevertheless qualified the methods employed to achieve such means as being aggressive in nature). The use of force may be accompanied with: the objective of annexation and occupation of territory, and perhaps annihilation (Poland); the objective of occupation for furthering purposes of aggression against other countries (Belgium, The Netherlands, Luxembourg, Yugoslavia, Greece); the objective of gaining military advantage over other adversaries by preventing them from assisting a previously aggressed state (Denmark, Norway); the expansion of territory (USSR).

The common underlying factor appears to be that a war of aggression will typically involve the initiation of the use of force by the aggressor state, leading to a partial or full occupation of the invaded territory. The exception was the war of aggression against the U.S. where there was a formal declaration of war, for the purposes of assisting in Japan's war of aggression.

However, upon a deeper analysis, I submit that a "war of aggression" is predicated upon two separate elements – an objective element and a subjective element. The former is the initiation of armed force by the aggressor state, i.e. Germany. The latter refers to the intention behind the armed force, the 'aggressive

[220] ibid 214–216.

intention' or *animus aggressionis.* In relation to the list above, each war of aggression comprises of the objective element of the use of force by Germany (with the exception of the US), accompanied with the *animus aggressionis*, e.g. gaining military advantage over other adversaries, or expansion of territory. I argue that the *animus aggressionis* is a necessary part of a "war of aggression", as the objective component is limited only to the violation of the Kellogg-Briand Pact by virtue of recourse to war, which may amount only to a "war in violation of international treaties, assurances and agreements."

In 1951, Special Rapporteur Spiropolous in the *Annex on the possibility and desirability of a definition of aggression* of his Second Report on a Draft Code of Offences Against the Peace and Security of Mankind [221] explained the concept behind the *animus aggressionis*:

> In the absence of a positive definition of aggression provided for by an international instrument and applicable to the concrete, this case, international law, for the purpose of determining the "aggressor" in an armed conflict, is assumed to refer to the criteria contained in the "natural" notion of aggression.[222]

The 'natural' notion according to him consists of both an objective and subjective criteria. The former is the first act of violence, whilst the latter is that the violence committed must be due to aggressive intention.[223] The link between the objective and subjective can be seen here:

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[221] Yearbook of the International Law Commission 1951, Vol II, Second report by Mr. J. Spiropoulos, Special Rapporteur (A/CN.4/44).
[222] ibid para.52.
[223] He submits that only if both objective and subjective criteria are taken together, may it be possible to decide 'which State, in an international armed conflict, is to be considered as "aggressor under international law". The (natural) notion of aggression is a concept per se, which is inherent to any human mind and which as a primary notion, is not susceptible of definition. Consequently whether the behavior of a State is to be considered as an "aggression under law" has to be decided not on the basis of a specific criteria adopted a priori but on the basis of the above notion which, to sum it up, is rooted in the "feeling" of the Government concerned', ibid para. 153.

> The mere fact that a State acted as first does not, per se, constitute "aggression" as long as its behavior was not due to: aggressive intention (Subjective element of the concept of aggression). That the *animus aggressionis* is a constitutive element of the concept of aggression needs no demonstration. It follows from the very essence of the notion of aggression as such.[224]

Perhaps this is the reason the Tribunal found that Germany committed a war of aggression against the US despite the lack of armed force, i.e. its Declaration of War represented the *animus aggresssionis* – the intention to assist a third state in an aggressive war. Here, the *animus aggressionis* is the aggressive intention to commit war against another state(s). Others have also considered the state act element for the crime of aggression to encompass the *animus aggressionis,* [225] e.g., Cassese argued 'the illegal use of force must be directed to the acquisition of the territory, the coercion of the victim state to change its government or its political regime, or else its domestic or foreign policy, or to the appropriation of assets belonging to the victim state';[226] while McDougall submits that the State act element of the crime must include: (i) war with the object of the occupation or conquest of the territory of another State or part thereof; (ii) war declared in support of a third party's war of aggression; (iii) war with the object of disabling another State's capacity to provide assistance to (a) third State(s) victim of a war of aggression initiated by the aggressor.[227]

2.2.3. Elements of the crime pertaining to the conduct of the individual

In accordance with Article 6(a) IMT Charter, the substantive component of the definition of the crime pertaining to the conduct of the individual is the 'planning, preparation, initiation and waging' […]. In my view, this can be interpreted as the material element of the crime – or *actus reus* of the crime, as it is representative of

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[224] Ibid.
[225] See Gerhard Werle, *Principles of International Criminal Law* (TMC Asser Press 2005) 395; Oscar Solera, *Defining the Crime of Aggression* (Cameron May Ltd 2007) 427.
[226] Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2004) 160.
[227] McDougall (n 7) 3.

perpetration by an individual in relation to the state act element of the crime, i.e. the wars of aggression or in violation of international treaties, agreements or assurances. As all other crimes, there is also the mental element, i.e. *mens rea* that must be satisfied in addition to the *actus reus.* In addition to the *actus reus* and *mens rea* of the crime, there is one additional issue that should be examined in relation to the elements of crime pertaining to the conduct of individuals. This additional element is the "leadership element" as this suggests that the perpetrator needs to have attained a sufficiently authoritative position within the hierarchy of state and/or the military and can realistically play a role in facilitating the state act of aggression.

There is no explicit reference to a leadership element in the definition of the crime in Article 6(a) IMT Charter. However, the Kampala Amendments have incorporated an explicit leadership element in the substantive definition of the crime of aggression (Article 8 *bis*). Understanding the approach of the IMT in ascertaining the scope of perpetrators that may be liable for crimes against peace is important to evaluate the extent to which the leadership element in the Kampala Amendments reflects the legal construct of the crime under customary international law.

Thus, there are three main elements that need to be focused upon: i) the scope of perpetrators; ii) the *actus reus*; iii) the *mens rea.* The elements pertaining to the conduct of the individual for crimes against peace at Nuremberg will be analysed under these headings, in accordance with the findings of the Tribunal under Count One and Count Two.

i. Count One: Conspiracy or Common plan

From the evaluation presented by the IMT, it can be observed that planning and preparation relating to aggressive war had been carried out systematically. The IMT held that "planning and preparation are essential to the making of war."[228] Once again the tribunal reiterates "we shall therefore discuss both Counts together, as they are in substance the same. The defendants must have been charged under both Counts, and their guilt under each Count must be determined."[229]

[228] 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 221.
[229] ibid 222.

The IMT found eight defendants guilty under Counts one: Göring, Hess, von Ribbentrop, Keitel, Rosenberg, Raeder, Jodl and von Neurath.[230] These defendants were also found guilty under Count Two. Six other defendants were charged only under Count One, and they were subsequently acquitted: Kaltenbrunner, Frank, Streicher, von Schirach, Fritzsche and Bormann.[231] Four defendants were indicted only under Counts One and Two: Schacht, Sauckel, von Papen and Speer, and all of them were acquitted under both counts.[232]

The Prosecution had put forward that 'any significant participation in the affairs of the Nazi Party or Government is evidence of a participation in a conspiracy that is in itself criminal.'[233] However, the Tribunal adopted a narrower approach by examining whether a concrete plan to wage war existed, followed by the determination of the participants in the concrete plan. It was also held that 'it is not necessary to decide whether a single master conspiracy between the defendants has been established by the evidence'[234] and that 'the evidence establishes the common planning to prepare and wage war by certain of the defendants. It is immaterial to consider whether a single conspiracy to that extent and over the time set out in the Indictment has been conclusively proved. Continued planning, with aggressive war as the objective, has been established beyond doubt.'[235] Therefore, the Tribunal did not need to be satisfied that a single master conspiracy existed, but instead, there could be several conspiracies or common plans.

The IMT also rejected the argument that such common plan cannot exist where there was a complete dictatorship as:

> A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to

[230] Göring (272-273); Hess (275-277); von Ribbentrop (278-279); Keitel (281-282); Rosenberg (286-287); Raeder (306-308); Jodl (314-315) and von Neurath (324-325),'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[231] Kaltenbrunner (283-284); Frank (288-289); Streicher (293-294); von Schirach (309-310); Fritzsche (326-327); Bormann (328), ibid.
[232] Schacht (298-302); Sauckel (311-312); von Papen (316-318); Speer (321), ibid.
[233] ibid 222.
[234] ibid.
[235] ibid 223.

> have the cooperation of statesmen, military leaders, diplomats and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here anymore than it does in the comparable tyranny of organized domestic crime.[236]

Thus, the Tribunal broadened the scope of perpetrators beyond the Head of State by the acknowledgement that 'statesmen, military leaders, diplomats and business men' could be held criminally responsible if they had knowledge of his aims, cooperated and became parties to the common plan.

A. Scope of perpetrators

In examining the eight defendants who were convicted under Count One, five held high governmental positions, whilst three held high military positions. In particular, Göring was the second most prominent man in the Nazi regime after Hitler, and had 'tremendous influence' with Hitler. He had a governmental position as Plenipotentiary for the Four Year Plan and economic dictator, as well as a military position where he was Commander-in-Chief of the *Luftwaffe.*[237] Hess, the Deputy Führer, was Hitler's closest personal confidant and 'their relationship was such that Hess must have been informed of Hitler's aggressive plans when they came into existence. And he took action to carry out these plans whenever action was necessary'[238] as he was responsible for handling all Party matters. He also had the authority to make decisions in Hitler's name on all questions of Party leadership. He was also Reichminister without Portfolio where he had the authority to approve all legislation before its enactment as law.[239]

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[236] ibid.
[237] ibid 272.
[238] ibid 277.
[239] ibid 275.

Von Ribbentrop was Minister Plenipotentiary at Large, Ambassador to England and Reichminister for Foreign Affairs.[240] Rosenberg was recognized as the Party's ideologist, as he developed and spread Nazi doctrines in newspapers. His governmental positions included Reichsleiter and Reich minister for Eastern Occupied Territories.[241] Von Neurath served as a professional diplomat, as the German Ambassador to Great Britain (1930 – 1932), Minister of Foreign Affairs in the von Papen Cabinet, and was made Reich Minister without Portfolio, President of the Secret Council Cabinet, and a member of the Reich Defence Council after he resigned and was Reich Protector for Bohemia and Moravia on 18th March 1939.[242]

The other three defendants did not have political or governmental roles; instead they held high positions in the military. Keitel was the Chief of the High Command of the Armed Forces.[243] Raeder was made Gross-Admiral and member of the Reich Defense Council. He built and directed the German navy in the 15 years he commanded it.[244] Jodl was Chief of the Operations Staff of the High Command of the Armed Forces and reported directly to Hitler on operational matters. In the strict military sense, he was the actual planner of the war and responsible in large measure for the strategy and conduct of operations.[245]

Therefore, those who were convicted under Count One held high governmental or military positions. They had the authority to make decisions on behalf of the state. Not only did these defendants know Hitler on a personal basis, but also had a good relationship with him. From this, it can be presumed that they were in a position where Hitler would inform them about his plans. This can be inferred by the acquittal of Schacht for Count One who 'was clearly not one of the inner circle around Hitler which was most closely involved with this common plan. He was regarded by this group with undisguised hostility,'[246] and the acquittal of Fritzsche who had never achieved 'sufficient stature to attend the planning conferences which led to aggressive war' and had never had a conversation with Hitler.[247]

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[240] ibid 277.
[241] ibid 306.
[242] ibid 297–298.
[243] ibid 280.
[244] ibid 306.
[245] ibid 313.
[246] ibid 301.
[247] ibid 328.

It appears that the Tribunal did not hold these individuals responsible for the common plan or conspiracy to commit aggression based on their official titled position, but rather from their relationship with Hitler. This is because only those within Hitler's 'inner circle' were in the position to know about his plans, discussed his plans which may or may not have influenced some of his decisions and carried out his plans.

B. Conduct

The IMT placed paramount significance on four secret, high level conferences held on 5 November 1937 and 23 May, 22 August and 23 November 1939 which were crucial in facilitating the common plan or conspiracy, as Hitler outlined his aggressive plans for the future. [248] One common factor between the eight defendants that were successfully convicted under Count One was that they attended one or more of these conferences where Hitler disclosed his decisions to his leaders or other important conferences in which other decisions were made relating to his plans for aggressive wars. Therefore, those who attended these conferences would have acquired the knowledge of Hitler's intent to commit these acts and wars of aggression, making them a part of the common plan or conspiracy.

This can be demonstrated by the following acquittals. Bormann was acquitted, as he 'attended none of the important conferences when Hitler revealed piece by piece these plans for aggression.'[249] Frick was acquitted because 'the evidence does not show that he participated in any of the conferences at which Hitler outlined his aggressive intentions,'[250] Streicher was acquitted as 'there is no evidence to show that he was in ever within Hitler's inner circle of advisers; nor during his career was he closely connected with the formulation of the policies which led to war. He was never present, for example, at any of the important conferences which Hitler explained his decisions to his leaders,' therefore 'the evidence fails to establish his connection with the conspiracy or common plan to wage aggressive war.'[251] Donitz was also acquitted of Count one as 'he was not present at the important conferences where plans for aggressive wars were announced, and there is no evidence that he was informed about

[248] ibid 188.
[249] ibid 329.
[250] ibid 291.
[251] ibid 294.

the decisions reached there.'[252] Kaltenbrunner and von Papen were acquitted because there was no evidence to connect them with plans to wage aggressive war on any other front.[253] The grounds for the acquittal of Frank, von Shirach, Sauckel and Speer were vague.[254]

C. Mental Element

It can be inferred that all of the defendants who were convicted under Count One had knowledge of Hitler's aggressive plans because they attended one or more of the four conferences, and had a relationship with Hitler which allowed them to be informed about his plans, or even participate in discussions in shaping or formulating them. For example, the Tribunal observed that 'Hess was Hitler's closest personal confidant. Their relationship was such that Hess must have been informed of Hitler's aggressive plans when they came into existence. And he took action to carry out these plans whenever action was necessary.'[255]It is submitted that knowledge was the underlying *mens rea* for being a part of the common plan or conspiracy to wage aggressive war.

ii. Count Two: planning, preparing, initiating or waging aggressive war

The following defendants were acquitted on both Count One and Count Two: Schacht, Sauckel, von Papen and Speer.[256] The following defendants were acquitted under Count One, but guilty of Count Two: Frick, Funk, Donitz and Seyss-Inquart.[257] These defendants appeared to be acquitted of Count One because they did not participate in any of the conferences at which Hitler outlined his aggressive intentions. However, the evidence showed that their actions still amounted to guilt under Count Two.

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[252] ibid 302.
[253] Kaltenbrunner (284); von Papen (318), 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[254] Frank (289); von Shirach (310); Sauckel (311); Speer (321) ibid.
[255] ibid 276–277.
[256] Schacht (301-302); Sauckel (312); von Papen (318); Speer (321),'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[257] Frick (291-291,293); Funk (296-297); Donitz (302-303); Seyss-Inquart (319-321), ibid.

A. Scope of perpetrators

The IMT Charter was silent on the scope of perpetrators for crimes against peace. Thus, the Tribunal did not have the mindset of an established scope of perpetrators when assessing individual criminal responsibility,[258] but appeared to create one from assessing each individual as to whether they could be liable under Counts One and/or Two. First, the relationship of the individual and the Head of State, i.e. Hitler, was examined. The nature of this relationship was either professional or personal – or even somewhat interlinked. The next step was to consider the official position of the individual with respect to his position and role in the government or military. Emphasis should not be placed strictly upon the official title as such, but rather upon the scope of powers within the role pertaining to the official position.

This was demonstrated in relation to Donitz, where the Tribunal acknowledged that although his official position entailed him doing tactical tasks, he actually had a leadership role in the army, as Hitler consulted him somewhat 120 times throughout the war.[259] Therefore, the official title of position of the individual was not as important as the scope of their powers. Other factors that were taken into consideration included whether the individual had the authority to make official decisions on behalf of the government, sign laws or decrees, sign or initial directives and letters of memorandum.

B. Conduct

It is not entirely clear what the difference was between each of the modes of perpetration, 'planning, preparing, initiation or waging' wars of aggression. The judgment did not really create an obvious distinction between the different modes of participation committed by the defendants under Count Two. However, it is important to note that "planning, preparing, initiation" were considered together, whilst "waging" considered on its own. It is also important to note that the defendant did not

[258] McDougall (n 7) 172.

[259] It should be noted that the significance of his position rather than his official title was concentrated upon by the Tribunal as 'he was no mere army or division commander. The U-boat arm was the principal part of the German fleet and Donitz was its leader', see 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 302.

necessarily have to commit all four modes of perpetration to be convicted under Count Two.

It is rather difficult to differentiate between 'planning' as part of the 'common plan' and 'planning' as one of the modes of perpetration for an aggressive war. Frick, Funk, Donitz and Seyss-Inquart who were acquitted under Count One were not held to be responsible for 'planning' under Count Two.[260] As for those who were also convicted of planning as part of the conspiracy or common plan, they were found to have participated in the planning of certain aggressive wars under Count Two, e.g. Göring was found to be 'the moving force for aggressive war, second only to Hitler. He was the planner and prime mover in the military and diplomatic preparation for war which Germany pursued.'[261] The IMT therefore considered "planning" a war of aggression synonymous with the "common plan" to carry out an aggression.

Acts which amounted to 'planning' under Count Two appear to include: diplomatic manoeuvers which included false assurances of peace (Göring,[262] von Ribbentrop[263]); diplomatic pressure with the object of occupying the remainder of Czechoslovakia and inducing the Slovaks to proclaim their independence (von Ribbentrop[264]); diplomatic activity leading to attacks (von Ribbentrop[265]); signing directives and memoranda concerning aggressive plans (Keitel[266], Jodl[267]); initialing documents containing aggressive plans (Keitel[268], Jodl[269]); issuing a timetable for the invasion (Keitel[270]); originating the plan to attack Norway (Rosenberg[271], Raeder[272]); preparing occupation plans (Rosenberg[273]); discussions with Hitler concerning plans or preparations for aggression (Raeder[274]).

Although the defendants acquitted under Count One were not found liable for 'planning', some of them were nevertheless held liable for preparation. Frick was held

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[260] Frick (291-291,293); Funk (296-297); Donitz (302-303); Seyss-Inquart (319-321), ibid.
[261] ibid 273.
[262] ibid 272–273.
[263] ibid 278–279.
[264] ibid 278.
[265] ibid 278–279.
[266] ibid 281–282.
[267] ibid 314–315.
[268] ibid 281.
[269] ibid 314–315.
[270] ibid 281–282.
[271] ibid 286–287.
[272] ibid 307.
[273] ibid 287.
[274] ibid 307–308.

liable for participating in the preparation for aggressive war by the numerous laws he drafted, signed and administered to abolish all opposition parties, thereby preparing the way for the Gestapo and their concentration camps to extinguish all individual opposition.[275] Funk was held liable for participating in the economic preparation such as transferring into gold all foreign exchange resources available to Germany, economic preparation for certain aggressive wars, such as Poland, and plans for printing ruble notes in Germany before the attack on the Soviet Union to serve as occupation currency.[276] Other acts which amounted to preparation included preparing the Yugoslavian and Greek campaigns (Göring[277]); signing the law establishing compulsory military service (Hess[278]); arranging conferences in December 1939 between Hitler and the traitor Quisling which led to the preparation of the attack on Norway (Rosenberg[279]); preparing plans for occupation by attending numerous conferences (Rosenberg, Keitel, Raeder, Göring, Funk, von Ribbentrop[280]); preparing several drafts of instructions concerning the setting up of the administration in the Occupied Eastern Territories (Rosenberg[281]).

It is not clear what the Tribunal held 'initiation' to be. Perhaps the execution of a plan was considered as the initiation, e.g. executing the Yugoslavian and Greek campaigns (Göring[282]); formulation and execution of occupation policies in the Occupied Eastern Territories (Rosenberg[283]). The only time 'initiation' was explicitly mentioned was in relation to Donitz, that he was held not guilty of planning, preparing or initiating aggressive war because he was a line officer carrying out strictly tactical duties and was not present at any of the important conferences, nor was there supporting evidence that he was informed about the decisions reached there.[284]

Thus, as mentioned above, waging appears to be separate from planning, preparing and initiation because one can be convicted solely on waging (Donitz,

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[275] ibid 291.
[276] ibid 296.
[277] ibid 273.
[278] ibid 275–276.
[279] ibid 286–287.
[280] Rosenberg (286-287); Keitel (281-282); Raeder (306-308); Göring (272-273); Funk (296-297); von Ribbentrop (278-279); 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[281] ibid 287.
[282] ibid 273.
[283] ibid 287.
[284] ibid 302.

Seyss-Inquart.[285]) Acts which appear to amount to waging of aggressive war include: direct participation such as commanding the *Luftwaffe* in the attack on Poland and subsequent aggressive wars (Göring[286]); signing laws incorporating Austria into the German Reich (Hess, Frick[287]); signing decrees setting up the Government of the Sudetenland in Czechoslovakia (Hess[288]) signing laws incorporating other occupied territories into the Reich (Frick[289]) establishment of German administration in occupied territories (Frick[290]) participation in administration of annexed/occupied territories (Hess, Rosenberg, Seyss-Inquart[291]) giving permission to attack Russian submarines before the invasion of the Soviet Union (Raeder[292]) commanding the U-boats (Donitz[293]); being solely responsible for the submarine warfare that damaged and sank millions of tons of Allied and neutral ships (Donitz)[294]; directing army units to carry out economic directives for the exploitation of Russian territory, food and raw materials (Keitel[295]).

Therefore, the level of participation of the individual should be considered when determining individual criminal responsibility. To summarize, the modes of participation can be broadly categorized into two different categories 'planning, preparing and initiation' and 'waging'. Planning, preparing and initiation appear to be inter-related, whilst waging can be carried out separately. One does not necessarily have to participate in all four modes to be convicted. Therefore, upon closer examination, the scope of perpetrators for both categories may be slightly different. In relation to the former, there is a narrower scope of perpetrators, whilst the latter may perhaps be slightly broader.

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[285] Donitz (302-303); Seyss-Inquart (319-321),'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[286] ibid 273.
[287] Hess (276); Frick (291-291), 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[288] ibid 276.
[289] ibid 291–292.
[290] ibid 291.
[291] Hess (276-277); Rosenberg (287); Seyss-Inquart (319-321), 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[292] ibid 308.
[293] ibid 302.
[294] ibid 302–303.
[295] ibid 282-283.

C. Mental Element

The IMT did not appear to pay too much attention to any particular mental element, apart from knowledge being the pre-requisite for conviction for crimes against peace. Knowledge appears to be the underlying *mens rea.* Thus, it can be inferred that there is no need to prove beyond reasonable doubt any aggressive intention – or *animus aggressionis* on the part of the defendants.

Those who were convicted under Count One were held to be liable for planning specific acts or wars of aggression, whilst on the other hand, those who were acquitted were not held liable for planning under Count Two. It can therefore be deduced that the knowledge of Hitler's plans for aggressive war was a pre-requisite for conviction of planning aggressive war under Count Two. 'Preparing' and 'initiating' were the subsequent modes of participation after 'planning' and it can be assumed that there was knowledge of the plans for aggressive war. Thus, although the perpetrator may not necessarily have been involved in planning any specific aggressive wars, they still had knowledge of the aggressive plans (Frick, Funk[296]) and had carried out preparations for certain aggressive wars.

A defendant could be convicted under Count Two for waging aggressive war even if he did not have knowledge of the aggressive plans. However, it was necessary that he had knowledge that the nature of war is aggressive. For example, because Hitler consulted Donitz somewhat 120 times during the course of the war, it was satisfied that he knew the war was of an aggressive nature.[297] As for Seyss-Inquart, 'he assumed responsibility for governing territory which had been occupied by aggressive wars and the administration of which was of vital importance in the aggressive war being waged by Germany.'[298] This implies that he had knowledge that the war being waged was an aggressive war. Evidence of such knowledge may include participation in high-level government conferences or meetings where decisions are discussed. This is where the relationship between the individual and head of state should be considered, as it is likely that if one was in a close professional relationship with the

[296] Frick (291-291, 293); Funk (296-297),'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4).
[297] ibid 303.
[298] ibid 319.

head of state, then there is a strong assumption that knowledge has been acquired of aggressive plans.

It is not entirely clear whether knowledge needed to be from a factual or legal basis. Would the defendant need to have knowledge of the existing legal framework pertaining to how states should conduct recourse to force and deliberately planned, prepared, initiated or waged a war contrary to the laws on the use of force? Or would it suffice that the defendant was aware of the factual circumstances that the war being committed can be considered to be aggressive?

At the time of the events, the prohibition of the use of force relied mainly on the Kellogg-Briand Pact and treaties and agreements of non-aggression between Germany and respective countries. To require legal knowledge that the war was aggressive in nature would entail knowledge of the provisions and obligations within the Kellogg-Briand Pact and/or treaties and agreements of non-aggression between Germany and the respective intended victim States, and that the war being waged was in breach of such provisions and obligations.

The requirement of factual knowledge can be satisfied if the defendant was aware that Germany had entered into such instruments with the intended victim States and that the plans to commit war were contrary to this. Here, knowledge could be said to be both legal and factual, as the defendant was simultaneously aware that: i) Germany entered into such an agreement with the intended victim State (factual knowledge); ii) such war would violate the legally binding agreement between both states parties (legal knowledge).

However, other factors can also demonstrate factual knowledge that the wars committed were aggressive in nature. This may include *inter alia* knowledge that the state is initiating the use of force against another State, i.e. the first use of armed force against another State; that the war against the intended victim state was unprovoked; the magnitude of the scale of the war against the intended victim state; the plans for occupation, annihilation and annexation; the plans for gaining military advantage of adversaries; assisting in an aggressive war by a third State.

It must be appreciated that in the light of the present UN framework of collective security, the rules of *jus ad bellum* are rather complex, thus it may now be more difficult than during the pre-UN Charter era to expect the defendant to have simultaneous legal and factual knowledge that the use of force will amount to an act of aggression.

2.2.4. Observations

The analysis above has discussed three constituents of the elements pertaining to the conduct of the individual: the leadership element; the modes of perpetration (*actus reus*); the mental elements of the crime (*mens rea*). The IMT appears to be rather silent on the leadership element in both the IMT Charter and the judgment. Instead, each individual was assessed as to whether they could be liable under Counts One and/or Two by first examining the relationship of the individual and Hitler, followed by considering the official position of the individual. The former could be either professional or personal, or interlinked, but the general assumption was that those within Hitler's inner circle were in a position to effectively play a substantial role in one of the modes of perpetration that gave rise to the war(s) of aggression. With respect to the latter, the emphasis was not necessarily on the official position or title of the perpetrator but rather on the scope of underlying powers that the position entailed. The underlying determining factor that created the scope of perpetrators was that each individual had a close relationship with Hitler. Naturally, each one was in a position where Hitler would confide in them and tell them of his plans. Furthermore, as they also consulted with him, discussed and influenced his plans, they would have held an influential position in either the government or the military.

With respect to the modes of perpetration, "planning, preparing, initiation" can be considered separately from "waging" [a war of aggression]. There appeared to be no particular distinctive feature that defined each mode of perpetration. It should be noted that "common plan or conspiracy" (Count One) and "planning" (Count Two) were regarded as synonymous. That said, those who were held liable for planning aggressive war needed to be in a highly influential position where they have knowledge of the government policies and plans for aggressive wars, and to be able to participate in this planning. It can be assumed that they would need to have authority to make decisions/laws/policies/sign or initial directives, memoranda and make decisions in the name of the state.

At Nuremberg, those held liable included deputy Heads of State (Göring, Hess), ministers or heads of departments of foreign affairs (von Ribbentrop, Rosenberg, von Neurath), Command leaders in military (Keitel, Raeder, Jodl). Those who potentially could be held liable for preparing and initiation would not need to have participated in the planning of aggressive war, but must nevertheless have obtained knowledge of the

aggressive plans. Thus, it can be inferred that the perpetrators that were held liable for planning are more limited than those that can be held for the other modes of perpetration because a narrower scope of perpetrators were convicted under Count One.

The underlying mental element that must accompany the leadership element and the modes of perpetration is knowledge. Such knowledge need not necessarily be legal, but may encompass an awareness of the factual circumstances of the aggressive plans and/or that the war being waged displays the attributes of a war of aggressive nature.

2.2.5. Individual criminal responsibility for crimes against peace: the question of the legal basis of the Nuremberg Trial

The legal basis of Article 6(a) IMT Charter is questionable,[299] as opined by Poltorak:

> either the verdict of the international tribunal, having condemned aggression and aggressors, has a solid legal basis or its basis is unlawful because in establishing the guilt of the accused for aggression it cannot cite any norms of international law.[300]

In my view, it is questionable as to whether at the time of the formation of the IMT Charter and the Nuremberg Trial, norms under international law had criminalised aggression. The underlying issue is whether international law had placed obligations directly on individuals to refrain from the crime of aggression. This requires an examination of the international instruments that existed at the time of the events in order to understand the nature of the underlying norms and obligations in relation to the use of force, with particular reference to the rightful duty-bearer of these norms.

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[299] Otto Kranzbuhler, 'Nuremberg Eighteen Years Afterwards' in Guénaël Mattraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2009) 441; for a different view see Poltorak, 'The Nuremberg Trials and the Question of Responsibility of Aggression' in Guénaël Mattraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2008) 445-454; Stefan Glaser, 'The Charter of the Nuremberg Tribunal and New Principles of International Law' in Guénaël Mattraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2008) 67-69; see also Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law' (1947) 1 International Law Quarterly 153.
[300] Poltorak (n 299) 447.

The source primarily relied upon by the Tribunal was the Kellogg-Briand Pact. Article 1 stipulates:

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

Article 2 states:

> The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

As can be seen, the obligations under these Articles pertain to the High Contracting Parties that have signed the Pact. These states are the duty-bearers with respect to the obligations under the Pact. This suggests by default that individuals are inherently excluded from any obligations under this Pact. A further observation of the Pact indicates there are no apparent sanctions with respect to the breach of the obligations. Jackson acknowledges:

> Secretary Kellogg said that it was out of the question to impose any obligation respecting sanctions on the United States. The Senate proceedings make clear that its ratification was due only to the assurance that it provided no specific sanctions or commitment to enforce it.
>
> This treaty, however, was not wholly sterile despite the absence of an express legal *duty* of enforcement. It had legal consequences more substantial than its political ones. It created substantive law of national conduct for its signatories and there resulted a right to enforce it by the general sanctions of international law.[301]

[301] Robert H Jackson, 'The Challenge of International Lawfulness' in Guénaël Mattraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2008) 7.

The general sanctions of international law refer to the remedies of self-help, whereby one contracting party may resort to wrongful measures against another for the wrongful conduct.[302] Such sanctions do not refer to criminal sanctions executable against individuals, as correctly pointed out by Merkhel:

> the Briand-Kellogg Pact did not establish a set of criminal sanctions for the case of its violation. For the case of a war-like aggression, its preamble merely drew the simultaneously weak and logical conclusion that an attacker could no longer invoke the other parties' duty to keep the peace governed in the pact.[303]

Poltorak, who is critical of those who do not view that the Pact gives rise to criminaity of aggression observes:

> the legal importance of the pact when applied to the problem of the criminalization of aggressive war can be reduced to zero on the basis that there is no categoricalness in the formulations, and in particular, the words 'illegality and criminality' are missing.[304]

However, it is not the lack of the words 'illegality and criminality' *per se* which is the reason why the Pact does not give rise to criminal responsibility. Rather it is the non-applicability of the provisions to individuals and the lack of enforcement measures within the Pact that undermine any basis for individual criminal responsibility for aggression.[305] Yet, a view persists that individuals are somehow duty-bearers of the obligations of the Pact and sanctions can be executed directly against them. Poltorak submits that:

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[302] Jackson states that 'the fact that Germany went to war in breach of its treaty discharged our own country from what might otherwise have been regarded as a legal obligation of impartial treatment towards the beligerents', ibid 6; for a different view see Kranzbuhler (n 299) 441.
[303] Merkhel (n 173) 562.
[304] Poltorak (n 299) 452.
[305] Poltorak acknowledges that critics of the Nuremberg principles argue that the 'Briand-Kellogg Pact was so legally flawed that it cannot be taken seriously as a basis for criminal responsibility for aggression', ibid 446–447.

> one can often conclude that only the illegality of aggression can be deduced from the pact but not criminality which, of course, is not the case. (…) Modern war, with its ever-developing destructive technology threatens the life of all peoples. Under these conditions, there is no basis for creating a distinction between illegality and criminality for such an infringement of an agreement which leads to war.[306]

His premise rejects any distinction between norms that prohibit aggression and norms that criminalise aggression. However, his supporting argument that the infringement of a common international treaty should not be compared with an infringement of an agreement, which is based on the protection of international law, is weak and bears little legal relevance. The point is that the duty-bearers of the obligations of this treaty are states, regardless of whether the agreement is based on the protection of international law.

In my view, it is important to demarcate between norms that prohibit conduct and norms that criminalise conduct, as this is representative of the existing international legal framework and the correct conferral of obligations upon the relevant legal personalities. It is precarious to argue that sanctions under international law are executable against individuals for the breach of this Pact, especially in the light of the fact that the Pact applied only towards signatory states and not towards individuals. Only the former were duty-bearers to comply with the provisions of the pact. Therefore, the IMT was wrong when it held:

> the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.[307]

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[306] ibid 452.

[307] 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 218.

The Tribunal attempted to justify its approach by relying on customary international law:

> The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing. The view which the Tribunal takes of the true interpretation of the Pact is supported by the international history which preceded it.[308]

Poltorak has criticised the opponents of the Nuremberg principles, for recognizing only the Briand-Kellogg Pact as a source of international law (applied to the problem of aggression) hereby reducing its international legal importance to zero, and for firmly denying the importance of any other international legal acts in the period from 1919-1939.[309] He continues to examine the legal instruments that existed at the time, e.g. Article 2 of the Geneva Convention on the Protocol on the Peaceful Settlement of International disputes (declared that 'aggressive war' is an international crime), the Declaration of 21 American Republics on the Sixth Havana Conference ('aggressive war is an international crime against the human species', the General Convention on the Peaceful Settlement of Disputes (condemnation of war as an instrument of national policy).[310] His opinion is that these instruments suffice to provide a legal basis for an argument that existing customary international law conferred obligations directly on individuals to refrain from conduct pertaining to aggression – the crime of aggression. Glaser shares the same opinion, arguing that 'the idea that such war would constitute an international crime had reappeared continually in international acts and in the doctrine of the law of nations. One could say without exaggeration, that it has been adopted by the universal conscience of civilised nations.'[311] Thus, he finds no fault with the legal basis of the IMT Charter:

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[308] ibid 219.
[309] Poltorak (n 299) 448–449.
[310] ibid 451–452; see also Glaser (n 299) 67–68.
[311] Glaser (n 299) 68.

> well before the outbreak of the Second World War, the consideration that a war of aggression constitutes a crime against the law of nations had developed in the conscience of peoples and in international relations to such an extent that one must recognize that an international custom had been formed in this regard, and in consequence that this consideration had already acquired the significance of a principle of international law.[312]

The Tribunal itself held:

> All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of pacts and treaties to which the Tribunal has just referred.[313]

I disagree. The legal nature of the majority of the instruments that he referred to were soft-law with no legal binding effects as only agreements or conventions have legal binding effects on signatory parties, which in turn may gradually crystallise into customary international law. Thus, the IMT had erred in submitting:

> Although the Protocol (1924 Geneva Protocol) was never ratified, it was signed by the leading statesmen of the world, representing the vast majority of the civilized states and peoples, and may be regarded as strong evidence of the intention to brand aggressive war as an international crime.[314]

Indeed, declarations and unratified protocols are considered as soft-law and are insufficient to provide a legal basis for criminalisation. Therefore, Poltorak is incorrect in submitting the existing instruments as proof that 'the idea of establishing criminal responsibility for aggression has taken deep root in the legal awareness of

[312] ibid; see also Poltorak (n 299) 451–452.
[313] 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 220.
[314] Ibid 219.

people and this has allowed the development of a process of creating an international legal norm for the criminal and legal prohibition of aggression. […] even before 1939, that is prior to the start of WWII, an international legal standard had formed in international law which put aggressive war beyond [sic] the law and declared it an international crime.[315]

My view is that at the time of the Trial, there were no existing obligations on individuals to refrain from criminal conduct amounting to crimes against peace, as rightly said by Judge Röling:

> It is beyond doubt that before World War II, there had been no question of individual criminal responsibility for a violation of the Kellogg-Briand pact. Neither this treaty nor the resolutions of the League of Nations or the abortive treaties in which it was stated that aggression was an international crime had the effect of creating international criminal law.[316]

At the Trial, the defence raised the issue of *nullum crimen sine lege, nulla poena sine lege.* It was submitted that 'ex post facto punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.'[317] To which, the Tribunal responded:

> it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the Government of

[315] Poltorak (n 299) 451–453.
[316] Röling (n 173) 455, 459–460; for a different view see Glaser who argues that the Charter has 'done nothing more than confirm a principle that had already been well established in public international law', Glaser (n 299) 69.
[317] 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 217.

> Germany, the defendants or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes, they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.[318]

There has been a divide in opinion as to whether *nullum crimen sine lege* was applicable at the Trial. Glaser and Poltorak for example, believe that the principle is not applicable in international law.[319] Kelsen, on the other hand, argues that it is applicable.[320] This debate need not be discussed here.[321] It is worth mentioning however that the debate encompasses an interesting interplay between arguments from a natural law and positive law approach.

Glaser for example submits that 'the real source of the idea which forms the essene of the law – the idea of justice – is natural law: that law is made of eternal moral truths which are born with mankind, which each of us has in his conscience, and which are immutable.'[322] Judge Röling, on the other hand, submits that 'positive international law did not recognise the crime of aggressive war for which individuals could be punished.'[323]

As the war had truly shocked the conscience of mankind, it brought forth the struggle between morality and legality with respect to punishing the perpetrators for aggressive war, as submitted by Jackson: 'it is clear that by 1939 the world had come to regard aggressive war as so morally wrong and illegal that it should be treated as criminal if occasion arose.'[324] Donnedieu de Vabres submits:

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[318] ibid.
[319] Glaser (n 299) 62–64; Poltorak (n 299) 446–447; see also Henri Donnedieu de Vabres, 'The Nuremberg Trial and the Modern Principles of International Criminal Law' in Guénaël Mattraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2009) 225-226, 271.
[320] Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law' (n 299) 171.
[321] Merkhel (n 173) 569; see also Donnedieu de Vabres (n 319) 224–227.
[322] Glaser (n 299) 70.
[323] Röling (n 173) 460.
[324] Robert H Jackson, 'Nuremberg in Retrospect: Legal Answer to International Lawlessness' in Guénaël Mattraux (ed), *Perspectives on the Nuremberg Trial* (Oxford University Press 2009) 369; see also Merkhel (n 173) 570.

> it is wrong to present as unjust the punishment inflicted on those who, in contempt for solemn commitments and treaties have, without prior warning, assaulted a neighbouring state. In such cases, the aggressor knows the odious character of his action. The conscience of the world, quite far from being offended if he is punished, would be shocked if he was not. […] the defendants knew that was of aggression were outlawed by most of the states of the world, including Germany itself; it was in full awareness of the situation that they violated international law when they deliberately followed their aggressive intentions with their plans for invasion. [325]

Merkhel, who generally appears to find the legitimacy of the Tribunal problematic, attempts to reconcile the two different positions by submitting:

> the punishment of the perpetrators was still the right to do; however, the construction foisted on it was wrong a more courageous and above all more honourable establishment would have openly acknowledged the breach of the prohibition of retroactive effect – and justified it, for there were conclusive arguments for it. [326]

Indeed, there is merit in the middle ground that despite the questionable legal basis of the Tribunal with respect to the crime of aggression, the prosecution of the perpetrators for the atrocities committed by Germany was nevertheless justifiable from a moral perspective. Be that as it may, the Charter and Judgment of the Trial at Nuremberg marks the cornerstone in international law whereby sanctions were enforced against individuals for their conduct in relation to aggression by the State they serve.

Although it is questionable as to whether these individuals had acted in breach of conduct directly attributable to them under international law, the legal construct of the crime pursuant to Article 6(a) of the IMT Charter is now referred to as the substantive source of law that confers obligations on individuals to refrain from planning, preparation, initiation or waging of the state act of aggression. Thus, emerging developments in international law have provided legitimacy to the legal premise applied by Nuremberg. This will be examined further below.

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[325] Donnedieu de Vabres (n 319) 226–227.
[326] Merkhel (n 173) 568.

This section has endeavoured to signify that the IMT Charter and Nuremberg judgment represent the turning point in international law, which propagated the emergence of norms that criminalise aggression. Prior to the Nuremberg Trial, international law did not provide norms that criminalise aggression.

2.3. The Tribunals established pursuant to Control Council Law No.10: The Nuremberg Military Tribunals

After the Nuremberg Trial, the US established military tribunals as part of the occupation administration for the American zone in Germany pursuant to Control Council Law No.10,[327] which was also known as the Nuremberg Military Tribunals, ("NMT").[328] 12 trials were held from 1946 to 1949: four of which dealt with crimes against peace: United States of America v Carl Krauch et al (the "I.G. Farben case");[329] United States of America v Alfried Felix Alwyn Krupp von Bohlen and Halbach, et al (the "Krupp case");[330] United States of America v Wilhelm von Leeb et al (The "High Command case")[331]; United States of America v. Ernst von Weizsacker et al. (the "Ministries Case").[332]

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[327] Control Council Law No.10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity; reprinted in Trials of War Criminals before the Nuernberg Military Tribunals, United States Government Printing Office, 1951, Vol.III, p.XVIII (hereinafter "Control Council Law No.10").

[328] See Kranzbuhler (n 299) 434.

[329] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No.10, Nuernberg, October 1946- April 1949, United States Government Printing Office, 1952, vol. VIII, (hereinafter "The I.G. Farben Case"); available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-VIII.pdf; in the Indictment, 24 individuals who were high-level officials of I.G. Farben were charged under Count One with planning, preparation, initiating and waging wars of aggression and invasions of other countries; and Count five for participating and executing a common plan or conspiracy to commit such crimes against peace; Indictment available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf

[330] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No.10, Nurenberg, October 1946- April 1949, United States Government Printing Office, 1950, vol. IX, (hereinafter "the Krupp Case"); available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-IX.pdf; in the Indictment, 12 officials of the Krupp firm who held high-level positions in management or other high official positions in the business. They were charged under Count one for committing crimes against peace and Count four for participating in a common plan or conspiracy to commit such crimes.

[331] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No.10, Nuernberg, October 1946- April 1949, United States Government Printing Office, 1950, Vol.XI, (hereinafter "The High Command Case"); available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf; in the

Control Council Law No.10 was the legal basis for which the NMT were carried out.[333] According to Article X of Military Ordinance No.7:

> The determinations of the International Military Tribunal in the judgments In Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary.

Thus, the NMT were legally bound by the Charter and judgment of the Nuremberg Trial. Article II(1)(a) of Control Council Law No.10 defined crimes against peace as:

> initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including *but not limited* to planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing *(Emphasis added).*

Article II(2)(f) stipulates that any person without regard to nationality or the capacity in which he acted, is deemed to have committed crimes against peace 'if he held a high political, civil or military (including General Staff) position in Germany or in

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Indictment, 14 officers who held high-level positions in the German military were charged under Count One for crimes against peace and Count four for conspiracy to commit such crimes.

[332] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No.10, Nuernberg, October 1946- April 1949, United States Government Printing Office, [No publication date available] Volume XIV, (hereinafter "the Ministries Case"); available at: http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XIV.pdf; in the Indictment, 17 out of the 21 defendants were charged under Count two for planning, preparing, initiating and waging wars of aggression and invasions of other countries and under Count Two for participating in a common plan or conspiracy to commit such crimes.

[333] Control Council Law No.10, available at: http://avalon.law.yale.edu/imt/imt10.asp.

one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.'

As can be seen, the NMT adopted a broader scope of crimes against peace than the IMT because the definition of the crime in Article II(1)(a) Control Council Law no.10 included the 'initiation of invasions of other countries.' Furthermore, as emphasised, the definition in Control Control Law No.10 is non-exhaustive. Article II (2)(f) had put forward a scope of perpetrators that may be potentially prosecuted for crimes against peace, whilst the IMT Charter was non-explicit on this matter.

In a similar approach to the IMT, the NMT Tribunals first determined the existence of the state act element, followed by examining the conduct of the individual. Yet, there are a couple of preliminary points, which should be made. From the outset, three differences between the NMT and the IMT can be observed. First, the Ministries tribunal had convicted two defendants for the invasions of Austria and Czechoslovakia.[334] This was of course in contrast to the IMT, where no defendants were convicted under Count Two for crimes against peace with respect to these two states. Second, unlike the IMT, the NMT Tribunals provided definitions for invasions and wars of aggression.[335] Third, unlike the IMT, the NMT also elaborated upon the scope of perpetrators who could be liable for crimes against peace.[336]

2.3.1. The state act element of crimes against peace

There are two immediate differences between the definition in the IMT Charter and Control Council Law No.10. First, the definition in the latter includes 'invasions' as crimes against peace. Second, Law No.10 contains the phrase 'including but not limited to' to expressly indicate a non-exhaustive nature. Both of these differences amount to a broader scope for crimes against peace than held at the IMT.

The tribunals in Farben and Krupp accepted the determination of the IMT with regard to the invasions and wars of aggression and held that the alleged acts that the

[334] Ministries Case, (n 332) 867, 869.
[335] High Command Case, (n 331) 485; Ministries Case, (n 332) 330-331.
[336] see Kevin Jon Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' (2007) 18 European Journal of International Law 477, 480–488.

accused participated in were aggressive.[337] The High Command and Ministries Case re-examined the findings of the IMT in relation to the nature of the acts committed.[338] The High Command Tribunal sought to define 'war.' It held:

> war is the exerting of violence by one State or politically organized body against another. In other words, it is the implementation of a political policy by means of violence.[339]

It subsequently sought to define an invasion, holding that:

> [A]n invasion of one State by another is the implementation of the national policy of the invading state by force even though the invaded State, due to fear or a sense of the futility of resistance in the face of superior force, adopts a policy of non-resistance and thus prevents the occurrence of any actual combat.[340]

It can be inferred that war (implementation of a political policy by means of violence) is an escalated form of hostilities in comparison to an invasion (implementation of the national policy of the invading state by force). The key point is that an invasion does not require resistance from the victim state or any actual hostilities. The Tribunal continued:

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[337] I.G. Farben Case, (n 329) 1096-1097; Krupp Case (n 330) 157.

[338] High Command case (n 331) 485; In the Ministries Case, the Tribunal stated 'Notwithstanding the provisions in Article X of Ordinance No.7, that the determination of the International Military Tribunal that invasions, aggressive acts, aggressive wars, crimes, atrocities, and inhumane acts were planned or occurred, shall be binding on the Tribunals established thereunder and cannot be questioned except insofar as the participation therein and knowledge thereof of any particular person may be concerned, we have permitted the defense to offer evidence upon all these matters. In so doing we have not considered this article to be a limitation on the right of the Tribunal to consider any evidence which may lead to a just determination of the facts. If in this we have erred, it is an error which we do not regret, as we are firmly convinced that courts of justice must always remain open to the ascertainment of the truth and that every defendant must be accorded an opportunity to present the facts,' (n 332) 317.

[339] High Command Case (n 331) 4.

[340] High Command Case (n 331) 485.

> Whether a war be lawful, or aggressive and therefore unlawful under international law, is and can be determined only from a consideration of the factors that entered into its initation. In the intent and purpose for which it is planned, prepared, initiated and waged is to be found in lawfulness or unlawfulness.[341]

This is indicative of the *animus aggressionis*, which was subsequently affirmed in the following dictum:

> As long as there is no aggressive intent there is no evil inherent in a nation making itself militarily strong.[342]

Thus, the state act element of crimes against peace consists of:

- the exertion of violence by one State against another or the implementation of the national policy of the invading State by force
- the *animus aggressionis*.

The Ministries Tribunal viewed an invasion as 'the use of force'[343] with respect to its examination of the attacks against Austria and Czechoslovakia and held:

> the invasions were hostile and aggressive. An invasion of this character is clearly such an act of war as is tantamount to, and may be treated as, a declaration of war. It is not reasonable to assume that an act of war, in the nature of an invasion, whereby conquest and plunder are achieved without resistance, is to be given more favourable consideration than a similar invasion which may have met with some military resistance. The fact that the aggressor was here able to so overawe the invaded countries does not detract in the slightest from the enormity of the aggression in reality perpetrated. The

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[341] Prior to this, the Tribunal observed that 'the initiation of war or an invasion is a unilateral operation. When war is formally declared or the first shot is fired the initiation of that war has ended and from then on there is a waging of war between the two adversaries. Whether a war be lawful, or aggressive and therefore unlawful under international law, is and can be determined only from a consideration of the factors that entered into its initiation', High Command Case (n 331) 486.

[342] High Command Case (n 331) 488.

[343] It relied on the definition of invasion from Webster's Unabridged Dictionary as 'act of invading, especially a warlike or hostile entrance into the posessions or domains of another; the incursion of an army for conquest or plunder', Ministries Case (n 332) 331.

> invader here employed an act of war. This act of war was an instrument of national policy.[344]

By establishing that such attacks were aggressive invasions, and thus the state act element, the Ministries Tribunal was able to convict Lammers for his role in the invasion of Czechoslovakia;[345] and Keppler for his role in the invasions of both Austria and Czechoslovakia.[346]

2.3.2. Observations

The NMT adhered to a broader interpretation of the state act element of crimes against peace than the IMT. Unlike the IMT, the High Command Tribunal had sought to define wars and invasions. From the definitions provided by the High Command Tribunal, the state act element of the crime can be inferred as 'the exertion of violence by one State against another or the implementation of the national policy of the invading State by force'[347] in conjunction with the *animus aggressionis*. The immediate difference from the IMT is that there was no need for an actual use of force for the act to fulfil the state act element of the crime. Thus, there was a lower threshold for the state act element at the NMT than the IMT.

In the absence of actual use of force, it can be inferred that the *animus aggressionis* was the ultimate determining factor whether the act may be considered as an invasion or an aggressive war. Furthermore, the substantive content of an invasion appears to be reflective of the aggressive intentions identified by the IMT with respect to Austria and Czechoslovakia, which suggests that the common underlying factor is indeed the *animus aggressionis.*

Thus, according to NMT case law, the absence of armed force by the alleged aggressor state does not detract from individual criminal responsibility for crimes against peace. The implementation of national policy by force will suffice, provided that the underlying criterion of the *animus aggressionis* is present.

Three main points of comparison can be made between the NMT and the IMT with respect to the state act element of crimes against peace. First, the definition of

[344] Ministries Case (n 332) 331.
[345] Ministries Case (n 332) 867.
[346] Ministries Case (n 332) 869.
[347] High Command Case (n 331) 485.

the crime under Article II(1)(a) Control Council Law no.10 encompassed invasions as part of the state act element of crimes against peace. Immediately, this is broader than the definition under Article 6(a) IMT Charter. Second, the indictment at the IMT had excluded acts of aggression (Austria and Czechoslovakia) from Count Two of the indictment, which related to charges of crimes against peace. By contrast, the NMT did not exclude the acts committed against Austria and Czechoslovakia from the charges relating to crimes against peace. This implies that the IMT determined that aggressive wars were committed against twelve countries, whilst the NMT determined that aggressive invasions or wars were committed against fourteen countries. Third, the Ministries tribunal had convicted two defendants for crimes against peace for the invasions against Austria and Czechoslovakia.[348] This immediately departs from the judgment at Nuremberg.

2.3.3. Elements of the crime pertaining to the conduct of the individual

A. Scope of perpetrators

Control Council Law no.10 did not contain a specific leadership element requirement.[349] The first tribunal that attempted to delineate a scope of perpetrators was the Farben Tribunal. It suggested:

> to depart from the concept that only major war criminals-that is, those persons in the political, military, and industrial fields, for example, who were responsible for the formulation and execution of policies-may be held liable for waging wars of aggression, would lead far afield.[350]

[348] Ministries Case, (n 332) 867, 869.
[349] This was observed by the High Command Tribunal which stated, 'no matter how absolute his authority, Hitler alone could not formulate a policy of aggressive war and alone implement that policy by preparing planning and waging such a war. Somewhere between the Dictator and the Supreme Commander of the Military Forces of the nation and the common soldier is the boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it. Control Council Law No.10 does not definitely draw such a line', High Command Case (n 331) 486.
[350] I.G. Farben Case (n 329) 1124.

Here, it can be inferred that the scope of perpetrators must be persons in the political, military and industrial fields who were responsible for the "formulation and execution" of policies. To depart from this scope of perpetrators would 'result in the possibility of mass punishments,'[351] the Tribunal held that 'some reasonable standard must, therefore, be bound by which to measure the degree of participation necessary to constitute a crime against peace in the waging of aggressive war.'[352] It held:

> The defendants now before us were neither high public officials in the civil Government nor high military officers. Their participation was that of followers and leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people. […]
>
> Strive as we may, we are unable to find, once we have passed below those who have led a country into a war of aggression, a rational mark dividing the guilty from the innocent. […] To find the defendants guilty of waging aggressive war would require us to move the mark without finding a firm place in which to reset it. We leave the mark where we find it, well satisfied that individuals who plan and lead a nation into and in an aggressive war should be held guilty of crimes against peace, but not those who merely follow the leaders.[353]

As can be seen, this marked the emergence of the 'leadership element.' It can be inferred that this leadership element is representative of a position in the political, military or industrial fields, which confers the power to "formulate and execute" policies. The leadership element was further developed in the High Command Tribunal, where it was held:

> Wars are contests by force between political units, but the policy that brings about their initiation is made and the actual waging of them is done by individuals. What we have said thus far is equally as applicable to a just as to

[351] I.G. Farben Case (n 329) 1125.
[352] I.G. Farben Case (n 329) 1125-1126.
[353] I.G. Farben Case (n 329) 1126; see also High Command Case, (n 331) 486.

> an unjust war, to the initiation of an aggressive and therefore, criminal war as to the waging of a defensive and, therefore, legitimate war against criminal aggression. The point we stress is that war activity is the implementation of a predetermined national policy.[354]

If it is national policy which gives rise to a war, it is only logical that those who can be criminally responsible for war are the individuals that participate on the policy level:

> If the policy under which it is initiated is criminal in its intent and purpose, it is so because the individuals at the policy-making level had a criminal intent and purpose in determining the policy. If war is the means by which the criminal objective is to be attained, then the waging of war is but an implementation of the policy, and the criminality which attaches to the waging of an aggressive war should be confined to those who participated in it at the policy level.[355]

The Tribunal continued, 'it is self-evident that national policies are made by men. When men make a policy that is criminal under international law, they are criminally responsible for so doing. This is the logical and inescapable conclusion.'[356]Here, the Tribunal appears to suggest that the *animus aggressionis* is attributable to individuals at the policy-making level by placing emphasis on the 'criminal intent and purpose' and 'criminal objective' in relation to the waging of war – which is an implementation of the policy.

As discussed earlier, the *animus aggressionis* is part of the state act element of the crime, but appears in the present context to also be a part of individual conduct as a mental element of the crime. From this, two points can be deduced. First, the *animus aggressionis* is key component to an aggressive invasion or war and is part of the substantive definition of the crime. Second, this *animus aggressionis* stems from individuals who are on the policy level.

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[354] High Command Case (n 331) 485.
[355] High Command Case (n 331) 488.
[356] High Command Case (n 331) 490.

The Tribunal continues to qualify the scope of perpetrators in relation to crimes against peace:

> lf and as long as a member of the armed forces does not participate in the preparation, planning, initiating, or waging of aggressive war on a policy level, his war activities do not fall under the definition of crimes against peace. It is not a person's rank or status, but his power to shape or influence the policy of his state, which is the relevant issue for determining his criminality under the charge of crimes against peace.
>
> […]
>
> International law condemns those who, due to their actual power to shape and influence the policy of their nation, prepare for, or lead their country into or in an aggressive war. But we do not find that, at the present stage of development, international law declares as criminals those below that level who, in the execution of this war policy, act as the instruments of the policy makers. Anybody who is on the policy level and participates in the war policy is liable to punishment. But those under them cannot be punished for the crimes of others.[357]

From the High Command Case, it is inferred that the leadership element is predicated upon a position to "shape or influence" policy. As a result, all of the accused were acquitted for crimes against peace because they were not on the policy level:

> The acts of commanders and staff officers below the policy level, in planning campaigns, preparing means for carrying them out, moving against a country on orders and fighting a war after it has been instituted, do not constitute the planning, preparation, initiation, and waging of war or the initiation of invasion that international law denounces as criminal.
>
> […]
>
> Under the record we find the defendants were not on the policy level, and are not guilty under count one of the indictment. With crimes charged to have been committed by them in the manner in which they behaved in the waging

[357] High Command Case (n 331) 491.

> of war, we deal in other parts of this judgment. It is important to note that this Tribunal held the leadership element as a necessary requirement for all modes of participation in crimes against peace, i.e. planning, preparing, initiation and waging.[358]

The Ministries Tribunal appeared to adopt the "shape or influence" standard from the High Command Tribunal.[359] The Tribunal examined each defendant's liability according to each separate invasion/war. A defendant's guilt revolved greatly around his positions and activities (e.g. Koerner's position as deputy to Goring.[360]) As a result, some defendants were ultimately held liable for certain invasions and aggressions: Keppler (Austria, Czechoslovakia[361]); Woermann (Poland, although he was eventually aquitted[362]); Lammers (Czechoslovakia, Poland, Norway, Belgium, the Netherlands and Luxembourg, Russia[363]); Koerner (Czechoslovakia, Poland, Russia[364]).

Keppler was given full authority over the direction of the Nazi Party's activities in Austria and became the direct representative of Hitler.[365] Woermann was originally convicted for aggressive war against Poland, but a defence motion was subsequently granted to set aside this conviction, thus acquitting him.[366] Nonetheless, his roles were the Ministerial Director and chief of the Political Division of the Foreign Office from

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[358] ibid.

[359] The tribunal acknowledge that the perpetrators had to be 'men holding positions of authority in the various departments of the Reich Government charged with the administration or execution of such programmes.' Heller (n 171) 185.

[360] Ministries Case (n 332) 21-22.

[361] The Ministries Tribunal found 'the defendant had knowledge of Hitler's plan for aggression against Czechoslovakia, knew that it was indefensible, and that he willingly participated in it. We find him guilty under count one in connection with the aggression against Czechoslovakia,' Ministries Case (n 332) 389.

[362] The Ministries Tribunal found 'on the evidence adduced with respect to the charges against Woermann in connection with the aggression against Poland, the Tribunal finds the defendant guilty under count one', (n 332) 398; The Tribunal, with presiding Judge Christianson dissenting, set aside this conviction by an order of 12 December 1949.

[363] The Ministries Tribunal established beyond a reasonable doubt that the defendant Lammers
was a criminal participant in the formulation, implementation and execution of the Reich's plans and preparations of aggression against those countries. It found the defendant Lammers guilty under count one, Ministries Case, (n 332) 416.

[364] The Ministries Tribunal found the defendant Koerner guilty under count one, Ministries Case (n 332) 435.

[365] Ministries Case (n 332) 386.

[366] The Tribunal, with presiding Judge Christianson dissenting, set aside this conviction by an order of 12 December 1949.

1938-1943 (Under State Secretary). Therefore, he carried out important duties 'which often involved the exercise of a wide discretion and had a bearing on the plans and policies which were being considered or were in the process of execution.'[367]

Lammers, occupied a position of 'influence and authority through which he collaborated with and greatly helped Hitler and the Nazi hierarchy in their various plans of aggression and expansion.'[368] There was evidence that he 'held and exercised wide discretionary powers'[369] and had 'great importance and influence'[370] in the higher Nazi circles in the distinctly policy making sphere, thus indicating his 'great activity and contribution to the furtherance and implementation of the Nazi aggression against other countries generally.'[371] Koerner was permanent deputy to Goring, and had a 'wide scope of his authority and discretion in the positions he held, and which enabled him to shape and influence plans and preparations of aggression.'[372]

On the other hand, von Weizsacker was acquitted from aggression against Poland because 'he had no part in the plan for Polish aggression; he was not in the confidence of either Hitler or von Ribbentrop. While his position was one of prominence and he was one of the principal cogs in the machinery, which dealt with foreign policy, nevertheless, as a rule, he was an implementer and not an originator. He could oppose and object, but he could not override.' [373] It can thus be inferred that in addition to being able to 'shape or influence' policy, the individual must have been a part of originating the aggressive policy.

As the Ministries Tribunal had only convicted three defendants for specific invasions or wars of aggression, this implies that the role of an individual to 'shape or influence' state policy should be assessed on a case-by-case basis to see if in each particular situation they had either shaped or influenced the aggressive policy. There was no general assumption that they were able to 'shape or influence' state policy in every single invasion or war. Thus, it was not necessarily the official ranking or

[367] Ministries Case (n 332) 392.
[368] Ministries Case (n 332) 401.
[369] Ibid.
[370] Ministries Case (n 332) 406.
[371] Ibid.
[372] Ministries Case (n 332) 425.
[373] The Ministries Case (n 332) 357.

position of the individual at all, but the ability to shape or influence policy in each circumstance leading to aggressive invasion or war. [374]

B. ***Mental Element***

Just like the IMT, the NMT adopted knowledge as the underlying *mens rea* of crimes against peace.[375] The indictments for crimes against peace in all four tribunals had also included a common plan or conspiracy. The NMT appeared to use the same standard that was derived from the IMT judgment, where the defendant was either 'in such close relationship with Hitler that he must have been informed of Hitler's aggressive plans … or attended at least one of the four secret meetings at which Hitler disclosed his plans for aggressive war."[376]The charges were summarily dismissed in both Farben and High Command, and dismissed by the Krupp and Ministries Tribunals.[377]

Upon analysing Count Two relating to crimes against peace, the Farben Tribunal stated that 'the question of knowledge'[378] was the decisive factor of guilt or innocence of the defendants. It had cautioned earlier against viewing the conduct of the defendants in retrospect, as determination was meant to take into consideration 'their state of mind and their motives from the situation as it appeared, or should have appeared, at the time.'[379]

The Tribunal drew a distinction between common knowledge and personal knowledge.[380] The former implied a common or general knowledge of Hitler's plans and purpose to wage aggressive war throughout Germany, whilst the latter revolved

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[374] Heller submits that there are four aspects of the "shape or influence" standard which are important to note: i) a defendant's ability to shape or influence policy could not simply be inferred solely from his position in the Nazi hierarchy; ii) a defendant's ability to "shape or influence" policy was not all-or nothing; iii) the tribunals were divided over whether a defendant had to actually influence Nazi policy in order to satisfy the leadership element; iv) although no industrialist was ever convicted of crimes against peace, the tribunals consistently emphasized that industrialists could satisfy the leadership requirement, Heller (n 171) 186.

[375] ibid 194.

[376] The I.G. Farben Case (n 329) 1102; ibid 199.

[377] Heller argues that this conclusion is open to question in the light of the fact that both Koerner and Lammers were convicted for planning crimes against peace, ibid 200.

[378] I.G. Farben Case (n 329) 1113.

[379] I.G. Farben Case (n 329) 1108.

[380] I.G. Farben Case (n 329) 1102-1110.

around knowledge imputable to individual defendants.[381] The former was held not to exist, as there was no such common knowledge in Germany,[382] whilst the latter could not be imputed to the defendants as they were not military experts and could not reasonably have been expected to know about the extent of general rearmament plans or the armament strength of neighbouring nations.[383]

Knowledge, or "actual knowledge" to be more precise, was the first criterion the High Commands Tribunal put forward for individual criminal responsibility for crimes against peace. It held:

> If a defendant did not know that the planning and preparation for invasions and wars in which he was involved were concrete plans and preparations for aggressive wars and for wars otherwise in violation of international laws and treaties, then he cannot be guilty of an offence. If, however, after the policy to initiate and wage aggressive wars was formulated, a defendant came into possession of knowledge that the invasions and wars to be waged were aggressive and unlawful, then he will be criminally responsible if he, being on the policy level, could have influenced such policy and failed to do so.[384]

Two things can be pointed out. First, the requirement of knowledge that the wars were "aggressive and unlawful" implies that such knowledge must be both factual and legal. Second, guilt appears to be predicated upon knowledge. The Ministries Tribunal also adopted a high standard of knowledge:

> Our task is to determine which, if any, of the defendants, knowing there was an intent to so initiate and wage aggressive war, consciously participated in either plans, preparations, initiations of those wars, or so knowing, participated or aided in carrying them on. […] One can be guilty only where knowledge of aggression in fact exists, and it is not sufficient that he have suspicions that the war is aggressive.[385]

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[381] I.G. Farben Case (n 329) 1102-1107.
[382] I.G. Farben Case (n 329) 1107.
[383] I.G. Farben Case (n 329) 1108-1110.
[384] High Command Case (n 331) 489.
[385] Ministries Case (n 332) 337.

The defendant needs to have actual knowledge that the wars were of an aggressive nature as 'no man may be condemned for fighting in what he believes is the defence of his native land, even though his belief to be mistaken. Nor can he be expected to undertake an independent investigation to determine whether or not the cause for which he fights in the result of an aggressive act of his own Government.'[386] The test is that 'one can be guilty only when knowledge of aggression in fact exists, and it is not sufficient that he have suspicions that the war is aggressive.'[387]

(i) The Industrialists

The *mens rea* requirement of the knowledge resulted in the acquittal of the industrialists for crimes against peace.[388] Heller writes that the *mens rea* requirement 'doomed the crimes against peace charges'for the Farben Tribunal. [389] The defendants in the Farben and Krupp Tribunals were high-level officials of industry, i.e. industrialists. The fact that they were charged with crimes against peace demonstrates that industrialists were not entirely excluded from the scope of perpetrators.

Although both tribunals did not convict any of the industrialists for crimes against peace, this was not because they did not meet the requirement for the Leadership Element, but rather because they lacked knowledge. The Farben Tribunal concluded that 'there was no such common knowledge in Germany that would apprise any of the defendants of the existence of Hitler's plans or ultimate purpose.'[390]

It also held that the defendants could not have personal knowledge of the magnitude of the rearmament efforts because they were not military experts.[391] The Krupp Tribunal had found that the prosecution had failed to prove each defendant guilty beyond a reasonable doubt upon the two counts in the Indictment relating to crimes against peace, yet was careful to emphasize that its decision to acquit the

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[386] Ibid.
[387] The Tribunal held that 'any other test of guilt would involve a standard of conduct both impracticable and unjust', Ministries Case (n 332) 337.
[388] Heller observes that the Ministries Tribunal held a higher standard of mens rea than the Farben and Krupp tribunals. The latter did not distinguish between rearmament and other preparations for crimes against peace, and applied the regular knowledge requirement. However, the former held that 'rearmament was criminal only if a defendant both knew that his arms production would be used for aggressive purposes and intended them to be used in that way', Heller (n 171) 196.
[389] ibid 197.
[390] I.G. Farben Case (n 329) 1113.
[391] Ibid.

defendants for crimes against peace should not be interpreted as industrialists being excluded from the scope of perpetrators:

> We do not hold that industrialists, as such, could not under any circumstances be found guilty upon such charges. [392]

C. Conduct: the Actus Reus

The definition for crimes against peace in Article II(1), Control Council Law No.10 is the 'planning, preparing, initiation or waging' [of an aggressive war or a war in violation of international treaties, agreements or assurances]; or the 'initiation' [of invasions of other countries]. The four modes of perpetration are identical to the definition of crimes against peace in the IMT Charter.

From the analysis in the sections above, the NMT jurisprudence suggests that the first and foremost requisite element of individual conduct is actual knowledge that there are plans and intention for an (aggressive) war and that the nature of this war if waged, is aggressive. This could be seen in the *Farben* and *Krupp* tribunals where the defendants were acquitted based on lack of knowledge. The point is that the *mens rea* of knowledge must be satisfied before it can be considered whether the defendants facilitated any modes of perpetration.

In addition to the requisite knowledge, the individual must be in a position to "shape or influence" policy (*High Command, Ministries* tribunals). As such, knowledge of the aggressive plans or aggression is a necessary pre-requisite to determine participation when one is in a position to "shape or influence" policy. Subsequent to acquiring such knowledge, an individual who fulfils the leadership element either participates in a substantial manner or omits to hinder or frustrate the aggressive plans.

This was the view of the *High Command* Tribunal, as cited earlier, where a defendant, who satisfies the leadership element requirements, can be liable for crimes against peace if he knew about the plans for invasions and aggressive wars 'could have influenced policy and failed to do so.'[393] Thus, it can be inferred that if a

[392] The Krupp Case (n 330) 393; Heller observes that there was no explanation as to why industralists were held to a different *mens rea* than other types of defendants, Heller (n 171) 196.
[393] High Command Case (n 331) 489; see also Ministries Case (n 332) 381-383.

defendant is on the policy level, participation in crimes against peace can either be: i) direct participation; ii) omission.

(i) Direct participation: Planning, preparing, initiating, waging

Like the IMT, the NMT considered "planning, preparing, and initiating" separately from "waging."[394] This could be seen in the *Ministries* Tribunal, where Ritter, Berger, and Schwerin von Krosigk were found to have participated in the 'waging' of aggressive war, without taking part in or being informed of Hitler's plans of aggression.[395] Also, like the IMT, the *Farben* tribunal treated "common plan" and "planning" as synonymous.[396] However, Heller observes that the *Ministries* Tribunal regarded both counts separately and adopted a broader definition of planning than either the IMT or the *Farben* Tribunal as the latter considered an individual to have planned a crime 'only if he was involved in Hitler's decision to launch an aggressive war or invasion against that country. The former, by contrast, expanded planning to include individual who were not involved in the decision to launch an aggressive attack, but formulated the policies to ensure that the attack succeeded – what the IMT and the Farben tribunal would have considered "preparing."'[397]

As the Ministries Tribunal was the only Tribunal that convicted defendants for crimes against peace, examining the judgment may shed some light to understand how it was satisfied that a defendant participated in a substantial way in one of the modes of perpetration. First and foremost, the Ministries Tribunal held 'to say any action, no matter how slight, which in any way might further the execution of a plan for aggression, is sufficient to warrant a finding of guilt would be to apply a test too strict for practical purposes,'[398] which suggests that participation in any of the modes of perpetration must be substantial.

Keppler was convicted under Count One because of his knowledge of Hitler's plans and the important role he played in carrying them out in relation to Austria and

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[394] Heller (n 171) 189.
[395] Ritter (398-399); Berger (417); Schwerin von Krosigk (418), Ministries Case (n 332).
[396] See Heller (n 171) 189 .
[397] Heller writes that 'the latter considered an individual to have planned a crime 'only if he was involved in Hitler's decision to launch an aggressive war or invasion against that country. The former, by contrast, expanded planning to include individual who were not involved in the decision to launch an aggressive attack, but formulated the policies to ensure that the attack succeeded – what the IMT and the Farben tribunal would have considered "preparing"', Heller (n 171) 191.
[398] Ministries Case (n 332) 966.

Czechoslovakia. This included delivering an ultimatum to President Milkas in Austria,[399] being present at the conference between Hacha and Hitler, as well as negotiating and concluding a treaty of friendship and defence with Slovakia (the separation of Slovakia from the Czechoslovakian State was an important and an integral part of Hitler's plan of aggression).[400] Thus, the acts he committed were: delivering an ultimatum, negotiating and concluding bilateral treaties.

Lammers was called by Hitler and Goring to edit the Four Year Plan, translated decrees and ordinances the wishes and plans of Hitler in connection with the Nazi programme pertaining to aggression against other countries; signing decrees with Hitler and Goring establishing the Ministerial Council for Reich Defence.[401] He was not charged with the invasion of Austria because although he had knowledge of plans and preparations, there was no indication that he played 'an active role in the formulation or implementation of such plans.'[402] Rather, his acts were related to the administration of the seized territory as he signed a number of decrees concerning the reunion of Austria with the German Reich. However, it is not clear as to why the Tribunal did not find this to be an act of 'waging' aggressive invasion.

He was nonetheless convicted for the 'formulation, implementation and execution of the Reich's plans and preparations of aggression against Czechoslovakia, Poland, Norway, Holland, Belgium, Luxembourg and Russia.'[403] His actions included attending the meeting of Hitler and Hacha and drafting and signing the decree establishing the Protectorate of Bohemia and Moravia and signing the following decrees: incorporation of Poland into the Reich; concerning the Government of occupied Norway immediately after its invasion; central control of questions concerning Eastern European region and issuing and informing a limited number of high-level officials about a decree approved by Hitler concerning preparations for the occupation of Belgium, the Netherlands and Luxembourg; decree providing for central control of questions concerning the Eastern European region. Thus, the acts he committed were: attending high-levelled meetings, drafting and signing decrees.[404]

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[399] Ministries Case (n 332) 132.
[400] Ministries Case (n 332) 134-136.
[401] Ministries Case (n 332) 406-416.
[402] Ministries Case (n 332) 406.
[403] Ministries Case (n 332) 415-416.
[404] Ministries Case (n 332) 406-416.

Koerner played a 'leading role in the planning, coordination, and execution of an economic program to prepare the German Reich for the waging of aggressive war, and that he was further responsible for coordinating the economic exploitation of the occupied territories in furtherance of the waging of aggressive war.'[405] He also directed the office of the Four Year Plan, which was held as an instrumentality for the planning and carrying on of aggression. He was held to have participated in the plans, preparations and execution of the Reich's aggression against Russia because *inter alia* he was informed by Goering of the coming attack against the Soviet Union and he subsequently attended and advised the conferences which were convened to consider the scope and method of German exploitation of the eastern economies.[406] Nevertheless, it is still difficult to identify a clear distinction between each mode of perpetration.

(ii) Omission

The High Command implied that an omission could amount to criminal liability if the individual was on the policy level and gained knowledge of the aggressive plans but failed to reversely influence the policy somehow.[407] The Ministries Tribunal had made similar implications when determining the individual conduct of von Weizsacker in relation to a war of aggresson committed against the Soviet Union:

> We are not to be understood as holding that one who knows that a war of aggression has been initiated is to be relieved from criminal responsibility if he thereafter wages it, or if, with knowledge of its pendency, he does not exercise such powers and functions as he possesses to prevent its taking place. But we are firmly convinced that the failure to advise a prospective enemy of the coming aggression in order that he may make military preparations which would be fatal to those who in good faith respond to the call of military duty does not constitute a crime.[408]

[405] Ministries Case (n 332) 419.
[406] Ministries Case (n 332) 418-435.
[407] High Command Case (n 331) 488-489.
[408] Ministries Case, (n 332) 383.

From this, it can be inferred that inner disapproval is not sufficient, as the individual must somehow display an adverse reaction to the aggressive plans or policies. The acquittal of von Weizsacker may be insightful. The Tribunal aimed 'to ascertain what he did and whether he did all that lay in his power to frustrate a policy which outwardly he appeared to support.'[409] It found that 'instead of participating, planning, preparing or initiating the war against Poland, the defendant used every means in his power to prevent the catastrophe.'[410] Such means included warning the other powers, trying to bring pressure on other powers to intervene, advising against the aggressive action.[411] This part of the judgment is important:

> Although these efforts were futile, his lack of success is not the criterion. Personalities, hesitation, lack of vision and the tide of events over which he had no control swept away his efforts. But for this he is not at fault.[412]

This indicates that the attempts to hinder or frustrate the plans do not need to have any real results. Whilst considering aggression against Russia, this statement of the judgment is useful:

> we are firmly convinced that the failure to advise a prospective enemy of the coming aggression in order that he may make military preparations which would be fatal to those who in good faith respond to the call of military duty does not constitute a crime.[413]

This implies that the question of defendant's involvement with foreign powers is not to be made a determining factor for a basis of guilt, because it may not be reasonable to expect an individual to warn a prospective enemy of an invasion. Therefore, disapproval can be expressed in an internal domestic matter, where the individual is measured only by whether he had voiced out or advised against the upcoming aggression. Whether or not the advice will be taken into consideration or followed is irrelevant.

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[409] Ministries Case (n 332) 356.
[410] Ministries Case (n 332) 369.
[411] Ministries Case (n 332) 369.
[412] Ministries Case (n 332) 369.
[413] Ministries Case (n 332) 383.

It is somewhat surprising that the Tribunals held that omissions to adversely shape or influence aggressive policy to frustrate or hinder the aggressive plans would amount to criminal liability for crimes against peace. [414] As submitted above, at the time of these trials, there were no existing obligations under international law on individuals to refrain from conduct amount to crimes against peace. Individuals were thus under a duty to obey national law and could not reasonably be expected to know that international law was holding them to a standard whereby they had to not only refrain from conduct amounting to crimes against peace, but upon acquiring such knowledge had a duty to adversely influence policy, of which he/she had a role in shaping or influencing. Suffice it to say, international law did not impose any of such duties directly on the individual to hinder/frustrate aggressive policies of the state.

2.3.4. Observations

There appear to be three components, or elements of the crime, that must be satisfied in relation to the conduct of the individual: i) actual knowledge of the aggressive plans and that the nature of such invasion(s) or war(s) is aggressive; ii) the leadership element, i.e. being on the policy level; iii) a substantial participation or omission to frustrate/hinder the aggressive plans.

These three components appear to be interlinked: knowledge is the first and foremost determining factor *(Farben, Krupp*). Upon the defendant's actual knowledge of the aggressive plans, the Tribunals then examined whether the leadership element was satisfied. The *Farben* Tribunal held the leadership element as an individual in position to "formulate and execute" policies, whilst on the other hand, the *High Command* and *Ministries* Tribunal interpreted the leadership element as an individual in position to "shape or influence" policies. When satisfied that a defendant had fulfilled both of these elements, it was examined whether the defendant participated in one of the modes of perpetration. The leadership element applied in every mode of perpetration (*High Command*).

The NMTs did not rule out the possibility of industrialists, and thus private economic actors from satisfying the leadership element. As the IMT did not explicitly establish or develop a leadership element, it is likely that when examining the scope of perpetrators under customary international law or existing case law –the NMT will

[414] See Kranzbuhler (n 299) 438.

be considered. Thus, it can be asserted that customary international law or existing case law does not necessarily exclude private economic actors from being able to "shape or influence" policy to give rise to individual criminal responsibility for crimes against peace.

2.3.5. The Tribunals established pursuant to Control Council Law No.10 and customary international law

Perhaps one of the factors that may have contributed to diminishing the judicial precedential value of the principles within the judgment of the NMT is the question of *ex post facto* law in relation to crimes against peace. The issues that were discussed above in relation to the question of *ex post facto* law for crimes against peace at the IMT also arise in the context of the NMT. They do not need to be repeated here. Instead, a related issue will be examined.

In accordance with Article X of Military Ordinance No.7, the NMT were legally bound by the judgment and decisions of the IMT. The question is whether the NMT had acted *ultra vires* in departing from the determinations of the judgment of the IMT with respect to convictions for crimes against peace in relation to Austria and Czechoslovakia. Under Article X, the powers of judicial review of the NMT appear to be limited only to questioning insofar as the participation therein or knowledge thereof by any particular person may be concerned. It is thus questionable as to whether the NMT had the legal competence to judicially review the determinations of the IMT in relation to the acts committed by Germany.

Overall, the NMT had played an undeniable role in further developing crimes against peace by 'clarifying and further elaborating the principles of international law contained therein;'[415] in particular, the leadership element and the potential liability of private economic actors. However, the extent to which the NMT case law may be relied upon as customary international law is uncertain. As Heller points out:

> Although international and domestic courts have consistently relied on the NMT judgments to determine the state of customary international law, they have exhibited considerable uncertainty about their authority. A number of courts have simply finessed the issue, stating that the judgments "contribute"

[415] Historical Developments relating to aggression, PCNICC/2002/WGCA/L.1, 45.

to customary international law without identifying the weight of their contribution. [416]

Nevertheless, the case law of the NMT gives rise to an interesting study and is helpful in understanding the *corpus* of crimes against peace, and may perhaps be ultimately considered as a 'subsidiary means' for determining the rules of international law.[417]

2.4. The Nuremberg principles and customary international law

The Nuremberg Trial marks the cornerstone upon which the present paradigm of international criminal law and international criminal justice has developed from. As dicussed in section 2.2.5, the legal basis of the IMT Charter and judgment is questionable, especially in the context of crimes against peace. Nevertheless, GA Resolution 95(1) 1946, affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal, i.e. the Nuremberg Principles.

This is indicative of confirmation by the international community of the principles found in the IMT Charter and the Nuremberg judgment. However, this does not mean that the Nuremberg Principles have attained customary international law status. At the time of adoption by the General Assembly, the Resolution was only an affirmation of the Nuremberg principles. A further resolution, GA Resolution 177(II), was adopted, which entrusted the formulation of the principles of international law recognized in the Charter of the Nuremberg Tribunal and the judgment of the Tribunal to the International Law Commission ("ILC"); whereby the Commission was directed *inter alia* to formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.

In the process, the Commission had questioned whether to examine the extent to which the principles contained in the Charter and judgment constituted principles of international law. It concluded:

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[416] Heller also states 'other courts have viewed the judgments as evidence of U.S. practice, no more important than the decisions of any national court. And still others have treated the judgments as the decisions of an international tribunal, entitling them to considerably more authority than national decisions', Heller (n 171) 375.

[417] See Article 38(1)(d), Statute of the International Court of Justice.

> since the Nuremberg principles had been affirmed by the General Assembly in resolution 95 (I) of 11 December 1946, the task of the Commission was not to express any appreciation of these principles as principles of international law but merely to formulate them. [418]

Therefore, the customary international law status of the envisaged Nuremberg principles was still not clear at this point in time. Nevertheless, the Commission continued with the task of formulating these principles, which was subsequently adopted during its second session in 1950.[419] The Nuremberg principles as elaborated by the Commission were actually never formally adopted by the General Assembly. Instead, GA Resolution 488(V) (1950) had invited the "Governments of Member States to furnish their observations accordingly."[420]

In parallel to the work on formulating the Nuremberg Principles, the ILC was also directed to work on compiling a Draft Code of Crimes against the Peace and Security of Mankind. [421] The first draft of 1951, comprised of five Articles, of which the crimes defined in Article 2 were considered as crimes under international law, for which the responsibility individuals shall be punished.[422] This included Article 2(1):

> [a]ny act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.[423]

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[418] See Report of the International Law Commission to the General Assembly, Formulation of the Nürnberg principles and preparation of a draft code of offences against the peace and security of mankind 1949 Yearbook of the International Law Commission, A/CN.4/SER.A/1949 (1949), 282.

[419] See Yearbook of the International Law Commission 1951, Vol II, Second report by Mr. J. Spiropoulos, Special Rapporteur (A/CN.4/44).

[420] See Observations of Governments of Member States relating to the formulation of the Nürnberg principles prepared by the International Law Commission, Extract from the Yearbook of the International Law Commission 1951 Vol. II., A/CN.4/45*, A/CN.4/45 & Corr.1, Add.1 & Corr.1 & Add.2.

[421] GA Resolution 177(II) 1950.

[422] Article 1, Draft Code of Crimes against Peace and Security of Mankind 1951, Yearbook of the International Law Commission, 1951, vol.II, 58-59.

[423] See Commentaries on the Draft code of Crimes against Peace and Security of Mankind, Yearbook of the International Law Commission, 1954, vol. II, 135.

There is a shift in terminology from 'crimes against peace' to 'act of aggression.' Despite the absence of a definition for the 'act of aggression',[424] Article 2(1) nevertheless reflects the framework of *jus ad bellum* and principles of collective security pursuant to the UN Charter.

In the later version of the Draft Code of Crimes against Peace and Mankind, which was adopted in 1996 ("Draft Code of Crimes"), Article 16 proscribes the crime of aggression. Here, another shift in terminology can be seen, i.e. from 'crimes against peace' to 'crime of aggression.' As clarified in the introduction, the difference in terminology has no substantive impact on the underlying constituents of the crime. As such, both terms are interchangeable.

The legal status of the Draft Code of Crimes and the GA Resolutions were unclear. However, the positive opinions generally expressed by Governments with respect to the Nuremberg principles are nevertheless indicative of the political will of States to embrace the Nuremberg principles as a substantive source of law. Thus, positive opinions, affirmations and multilateral international instruments suggest the formation of customary international rules with respect to the Nuremberg principles.

Yet, it is not entirely clear when the actual crystallisation of the Nuremberg principles as customary international law had occurred. My view is that it was a rather gradual process. Thus, it must be understood that the principles within the Nuremberg Charter, and the judgment of the Tribunal did not create any form of instant customary international law rules contrary to the opinion expressed by Sayapin:

> the Tribunal confirmed in its Judgment the validity of (then quite recent) treaty-based rules prohibiting an aggressive use of force by one State against another, and bestowed those international legal prohibitions addressed to States with individual criminal sanctions addressed to officials acting as organs of States. In that sense, the Nuremberg Tribunal testified to the formation of an "instant custom" on the subject.[425]

Instead, the crystallisation process was gradual, as the Nuremberg principles were affirmed and gradually accepted by the international community through positive

[424] See Yearbook of the International Law Commission 1951, Vol II, Second report by Mr. J. Spiropoulos, Special Rapporteur (A/CN.4/44), 262.
[425] Sayapin (n 12) 160.

declarations and multilateral instruments. There are two particular aspects of the Nuremberg Principles which are relevant to this Chapter: i) individual criminal responsibility (Principle I); ii) crimes against peace (Principle VI(a)).

2.4.1. Individual criminal responsibility for international crimes

Principle I of the Nuremberg Principles reads 'any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.' The premise of this principle can be traced back to Article 6 of the IMT Charter, which had bestowed individual responsibility for the crimes within the jurisdiction of the Tribunal: crimes against peace, war crimes and crimes against humanity. At the time, the Defence had submitted:

> international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State.[426]

The Tribunal rejected both of these submissions and held that 'international law imposes duties and liabilities upon individuals as well as upon States.'[427] The underlying rationale can be seen in the subsequent famous statement:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[428]

This is arguably the most frequently cited dictum in the context of individual criminal responsibility for international crimes. It implies that prosecution, and the subsequent criminal punishment of individuals for international crimes is a type of enforcement to ensure that individuals comply with their obligations to refrain committing international crimes.

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[426] 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 220.
[427] ibid.
[428] ibid 221.

That said, the argument raised by the Defence is not without merit, as conduct committed by individuals as part of the organ of the state should be attributed to the state, and not the individual. It is the rationale of the Tribunal, which is questionable as to whether international law had recognised individual as a personality of international law at the time of the events as they happened.

Thus, it is debatable as to whether international law actually imposed duties and liabilities upon individuals in addition to states as proclaimed by the Tribunal. This debate need not be revisited here – the point is that it is rather uncertain as to whether international law had conferred obligations directly on individuals with respect to personal conduct and provided concomitant sanctions for the breach thereof.

As such, the judgment can be interpreted as follows. By acknowledging that individuals commit international crimes, not only does the judgment initiate a shift in paradigm from the recognition of states as the only personality under international law to individuals also being personalities under international law, but it also indicates a dichotomy between the act of state and the act of an individual. Glaser submits that:

> The Charter has pierced through the principle, or even the idea, of state sovereignty. Two facts lead us to this conclusion: first of all, the Charter recognized individuals as subjects of international law – that is, as subjects of international rights and obligations; second, the Charter broke with the doctrine of immunity for what is called an act of state.'[429]

Therefore, the Nuremberg Trial gave rise to the emergence of a new phenomenon: individual criminal responsibility for international crimes under international law.[430]

2.4.2. Crimes against peace: the norms that criminalise aggression

Principle VI (a) of the Nuremberg Principles reflects Article 6(a) of the IMT Charter.[431] As discussed in 2.2.5, crimes against peace did not exist prior to the

[429] Glaser (n 299) 55.
[430] See Article 7, ICTY Statute; Article 6, ICTR Statute; Article 25, Rome Statute.
[431] For a comparative study on national legislation pertaining to the crime of aggression, see Astrid Reisinger Coracini, 'National Legislation on Individual Responsibility for Conduct Amounting to Aggression' in Roberto Bellelli (ed), *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (2010) 547–578; see also McDougall (n 7) 142.

Nuremberg Trials. In other words, there was no individual criminal responsibility for aggression. Judge Röling affirms that:

> Until recently, traditional international law had regarded the *jus ad bellum* as one of the prerogatives of the sovereign state.[432]

Therefore, the Nuremberg Trial is representative of the turning point in international law where sanctions may be executed directly against individuals for wrongful conduct under international law. The gradual crystallisation of the Nuremberg principles into customary international law suggests that the legal definition of crimes against peace within Article 6(a) IMT Charter now confers primary obligations directly on individuals to refrain from the proscribed conduct. The breach of these obligations entails direct legal consequences against the individual under the secondary rules of individual criminal responsibility, governed by international criminal law.

The customary international law rule pertaining to the crime of aggression has not appeared to develop past the Nuremberg Principles. As will be examined in the next chapter, even though the Kampala Amendments now provide a definition of the crime of aggression in the Rome Statute, this definition is only for the purposes of prosecution at the ICC.

2.4.3. Crimes against peace and customary international law

The present scope of the crime of aggression under customary international law is predicated upon the legal definition of crimes against peace according to the Nuremberg Principles. As clarified in the introduction, the change in terminology does not necessarily affect the substantive components of the crime. The state act element of the crime and the elements of the crime pertaining to the conduct of individuals with respect to crimes against peace under customary international law will now be examined.

[432] Röling (n 173) 456.

A. The state act element of the crime

Under customary international law, the state act element of the crime of aggression is a 'war of aggression' or a 'war in violation of international treaties, agreements or assurances.' Wilmshurst argues that:

> as far as international customary law is concerned, it is only a "war of aggression" which constitutes the crime of aggression in international law. [433]

However, as the definition of Article 6(a) IMT also encompasses a war in violation of international treaties, agreements or assurances, it is only logical that this variant is retained in the crystallisation of the legal construct of the crime into a rule of customary international law. Indeed, the reason why the latter was not considered in the judgment appeared to be for the purposes of procedural convenience, and not because it was irrelevant.[434] Yet, she is not wrong that 'the consequence of this is that there may be a violation by a State of an international law rule against the use of force which does not give rise to individual criminal culpability for the crime of aggression.'[435] Perhaps her position can be clarified by submitting that the threshold for the state act element under customary international law is that the violation of the rule against the use of force must be of sufficient magnitude to amount to a 'war.' This way the second variant of the state act element need not be discarded.

Pursuant to the Nuremberg judgment, the state act element of the crime can be understood as:

- the initiation of the use of force, accompanied by *animus aggressionis*

or

- a violation of the prohibition of the use of force, which is of sufficient magnitude to be considered as war.

How would these two variants of the state act element of the crime apply in the current paradigm of international law? Although international law has shifted away

[433] Elizabeth Wilmshurst, 'Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility' in Mauro Politi and Giuseppe Nesi (eds), *The International Criminal Court and the Crime of Aggression* (Ashgate 2004) 95.
[434] 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 186.
[435] Wilmshurst (n 433) 95.

from the use of the word 'war' as terminology to describe the use of force, the substantive elements of a 'war of aggression' or a 'war in violation of international treaties, agreements or assurances' is nevertheless retained under customary international law.[436]

The latter is relatively more straightforward. The international treaties, agreements or assurances referred to in the Nuremberg Trial are reflective of the normative framework that prohibits the use of force. As examined in Chapter I, the core international treaty that currently regulates the use of inter-state force is the UN Charter (Article 2(4)). Thus, this variant of the state act element of the crime can be understood as a 'war' in violation of the Article 2(4) UN Charter and other instruments under international law.[437] It shall be presumed that the intended violation must be of sufficient magnitude that it may be normatively perceived as 'war.'

The former is slightly more complex, as it encompasses the *animus aggressionis.* Not only is this a subjective concept, but it is also a rather natural concept, which *prima facie* is incompatible with a positive approach to the *jus ad bellum*. As discussed in Chapter I, determining the legality of the use of force or the existence of an act of aggression is subject to the methodological interpretation of the existing rules of *jus ad bellum.* The relevance of the *animus aggressionis* will depend on the approach taken with respect to interpreting the legal rules within *jus ad bellum*. If a positive international law approach is taken, it is likely that the *animus aggressionis* will not be considered in the determining process, and the situation will be assessed objectively in accordance with the existing legal framework.

This suggests that the *animus aggressionis* may no longer be necessarily relevant in the light of the present framework of *jus ad bellum.* In my view, there should indeed be caution in accepting that the legality of the use of force is dependent upon its intent and purpose. However, it should not be forgotten that at the time of the events, there was only a normative framework in place that prohibited the use of force. Thus, it is understandable that in the absence of a legal framework, the *animus*

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[436] McDougall (n 7) 151.

[437] e.g. GA Resolution 2625 (1970) *The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*; and GA Resolution 3314 (1974), *The Definition of Aggression.*

aggressionis may play a role in determining the legality of the use of force in question.

Be that as it may, it should be noted that considering the *animus aggressionis* is for the purposes of establishing the state act element of the crime to prosecute an individual for crimes against peace, and *not* for determining the existence of an act of aggression committed by the alleged aggressor state for the purposes of invoking consequences under state responsibility. The latter can be done in an objective manner without the need to consider any mental element of the aggressor state.[438]

B. The elements of the crime pertaining to individual conduct

The elements of the crime pertaining to the conduct of the individual are:

- the material elements of 'planning, preparation, initiation or waging' [a war of aggression];
- the mental element of knowledge (and not necessarily intent).

It is likely in a situation of prosecution either at the ICC or domestic courts, the approach of the IMT (and perhaps NMT) will be considered with respect to these elements of the crime pertaning to individual conduct.

There is no explicit component within the definition of the crime that puts forward a scope of perpetrators that can be prosecuted. Nevertheless, from the Nuremberg judgment and the case law of the NMT, a scope of perpetrators may be formulated.[439] Although the definition of the crime within the Kampala Amendments contains a specific leadership element, it can be assumed that the judges would nevertheless take the Nuremberg principles into account when interpreting the leadership element.'[440]

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[438] See Article 2 ARSIWA 2001; See André Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility In International Law' (2003) 52 International and Comparative Law Quarterly 615, 633.

[439] McDougall writes that 'obviously state acts of aggression can never be completed by a single individual. In all states, however, it is only a handful of individuals who have the ability to control the State's political and military activities. As such, it is proper that only those same individuals are able to be charged with crimes of aggression. Sophisticated critiques of international criminal law more generally express concern that punishing an individual is wholly inadequate in the face of great tragedy, and that a focus on individuals may unfairly exonerate the collective. […] in such circumstances it seems particularly appropriate that individual leaders be punished for their decisions and actions, rather than any blame being placed on an entire people', McDougall (n 7) 46–47.

[440] SWGCA Report 2007 (December) para.9.

On the national level of prosecution, states which have the crime of aggression in their criminal codes appear to be rather silent on the leadership element.[441] Thus, it can also be assumed that the judges of the national courts would consider the Nuremberg principles when determining whether an individual is in a position to be a perpetrator for the crime of aggressive war.

2.5. Conclusion

Despite its many and varied flaws,[442] it cannot be disputed that the Nuremberg Trial has bestowed a legacy to international law and a platform for individual criminal law to develop and flourish. Out of the sorrow and ashes of war marked the turning point where the Nuremberg Trial signified the promise that mass atrocities and violations of international law committed by individuals are no longer tolerated as they may be brought personally to trial and punished accordingly for their crimes. The phenomenon of individual criminal responsibility was applied to the wars of aggression committed by Germany against twelve nations, resulting in the conviction of the relevant perpetrators for crimes against peace.

This chapter had illustrated how the legal basis of Article 6(a) IMT and the Nuremberg judgment with respect to crimes against peace was rather questionable because at the time of the events, the existing norms under international law had only prohibited – and not criminalised – aggression. States were the only rights-holders with respect to the norms that prohibit aggression. Thus, prosecution and conviction of individuals for crimes against peace at the Nuremberg Trial is indicative of executing sanctions (deprivation of liberty and life) directly against them for wrongful conduct, which was not attributable to them (at the time) under international law.

Be that as it may, the subsequent affirmation of the IMT Charter and the Nuremberg judgment into the "Nuremberg Principles" represent the international community's acceptance, and the gradual crystallisation of individual criminal responsibility and the crime of aggression into customary international law. Thus, at

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[441] Reisinger Coracini, 'National Legislation on Individual Responsibility for Conduct Amounting to Aggression' (n 431) 553.

[442] Such criticisms include *inter alia,* the *legal foundation of the IMT Charter and Tribunal*, Kranzbuhler (n 299) 437; Merkhel (n 173) 565; George A Finch, 'The Nuremberg Trial and International Law' (1947) 41 American Journal of International Law 20, 26;*"Tu quoque" argument*, Merkhel (n 173) 570–571; Poltorak (n 299) 446; *Ex post facto law*, Merkhel (n 173) 567; Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law' (n 299).

present there are norms under international law that criminalise aggression, by placing obligations directly on individuals to refrain from proscribed conduct relating to the crime of aggression, and attaching concomitant sanctions for the breach of these obligations.

This chapter also delineated the contours of the crime of aggression under customary international law. This is highly valuable for several reasons. First, this will help place into perspective the obligations that customary international law confers on individuals with respect to the crime of aggression. Second, the relationship between the aggressor state and the perpetrator of the crime may be clarified in the light of the dichotomy between the state act element of the crime and the elements of the crime pertaining to individual conduct. These two points will be examined further in Chapter IV. Third, it can be assessed whether the definition of the crime of aggression in the Kampala Amendments for the purposes of prosecution at the ICC reflects or departs from the definition under customary international law. A direct comparison between the definition of the crime in the IMT Charter and the Kampala Amendments will be conducted in the next chapter.

Chapter III. The Crime of Aggression today: the Kampala Amendments

3.1. Introduction

Six and a half decades after the Nuremberg Trial, the Review Conference of the Rome Statute in Kampala adopted by consensus, Resolution RC/Res.6. This Resolution contains amendments to the Rome Statute, which provide a definition and jurisdictional regime for the crime of aggression ("Kampala Amendments"). The Kampala Amendments comprise of:

- Definition of the crime of aggression (Article 8 *bis*)
- Conditions for which the court can exercise jurisdiction (Article 15 *bis* and 15 *ter*)
- Elements of the Crime
- Understandings of the Crime.

This Chapter focuses on the definition of the crime of aggression. The Elements of the Crime and the Understandings served as key tools to attain consensus for the definition of the crime of aggression.[443] The conditions for the exercise of jurisdiction depict the jurisdictional regime of the ICC, which relates to the scope of prosecution that the Court may execute sanctions against individuals for the crime of aggression. This will be examined in Chapter VI.

This Chapter begins by examining the journey from Rome to Kampala with respect to defining the crime of aggression (section 3.2), followed by introducing the Kampala Amendments (section 3.2.1). First, the state act element of the crime is examined (section 3.2.2.), followed by the elements of the crime pertaining to the conduct of the individual ("elements of individual conduct" [section 3.3]). As the Kampala Amendments have not attained customary international law status, the legal nature of the definition of the crime of aggression in Article 8 *bis* will be examined (section 3.4). Finally, a comparison will be made between the definition of the crime of aggression in the Kampala Amendments and crimes against peace in the IMT Charter and Nuremberg judgment (section 3.5).

[443] See Frances Anggadi, Greg French and James Potter, 'Negotiating the Elements of the Crime of Aggression' in Stefan Barriga and Claus Kress (eds), *Crime of Aggression Library: the Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press 2012); Claus Kress and others, 'Negotiating the Understandings on the Crime of Aggression', *Crime of Aggression Library: the Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press 2012).

3.2. From Rome to Kampala

Article 5(1) of the Rome Statute stipulates that the ICC has jurisdiction over (a) genocide; (b) crimes against humanity; (c) war crimes; (d) the crime of aggression ("core crimes"). However, unlike the other core crimes within Article 5(1), the crime of aggression remained undefined.[444] States were undecided amongst themselves whether or not to include the crime of aggression in the Statute.[445] The atmosphere pertaining to this issue was 'too antagonistic for a substantive negotiation, whilst some delegations feared this controversy might derail the adoption of the Statute as a whole.'[446] Thus, Article 5(2) represented a "codified impasse"[447] derived from much uncertainty between the plenipotentiaries during the Rome Statute negotiations.[448] It stipulates:

> The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise

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[444] See Article 5, 1998 Prepcom Draft Statute, 'Draft Statute for the International Criminal Court', Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc.A/CONF.183/2/Add.1; reprinted in Barriga and Kress (n 6) 248.

[445] See 1998 Rome Summary Records (18thJune) Committee of the Whole, Summary Record of the 6th Meeting, 18 June 1998, UN Doc.A/CONF.183/C.1/SR.6; excerpts reprinted in Barriga and Kress ibid 255–268; 1998 Rome Statute Summary Records (19th June) Committee of the Whole, Summary Record of the 6th Meeting, 18 June 1998, UN Doc.A/CONF.183/C.1/SR.6; excerpts reprinted in Barriga and Kress ibid 269–271.

[446] Stefan Barriga, 'Negotiating the Amendments on the Crime of Aggression' in Stefan Barriga and Claus Kress (eds), *Crime of Aggression Library: the Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press 2012) 6.

[447] Silvia Fernandez de Gurmendi, 'The Working Group on Aggression at the Preparatory Commission for the International Criminal Court' (2001) 25 Fordham International Law Journal 589, 589.

[448] The Non-Aligned Movement expressed disappointment as 'many of the difficulties that would allegedly result from [the crime of aggression] inclusion seemed merely to be pretexts for excluding that the "mother of crimes" –which has been recognized by the Nuremberg Tribunal some fifty years previously – from the Statute', 1998 Rome Summary Records (13 July, 10.00am), Committee of the Whole, Summary Record of the 34th Meeting, 13 July 1998, UN Doc.A/CONF.183/C.1/SR.34, para.17; excerpts reprinted in Barriga and Kress (n 6) 305–306.; Azerbaijan proposed that 'there could be a transitional clause stating that, pending a definition thereof, the provisions on crimes of aggression and treaty crimes would not come into force' 1998 Rome Summary Records (13 July, 3.00pm), Committee of the Whole, Summary Record of the 34th Meeting, 13 July 1998, UN Doc.A/CONF.183/C.1/SR.36, para.43; excerpts reprinted in Barriga and Kress ibid 307; See also 1998 Proposal by NAM, 'Amendments Submitted by the Movement of Non-Aligned Countries to the Bureau Proposal (A/CONF.183/C.1/L.59', 14 July 1998, UN Doc.A/CONF.183/C.1/L.75; reprinted in Barriga and Kress ibid 315.

> jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

The deliberate ambiguity in Articles 5(1) and 5(2) was a political move to ensure the sufficient votes necessary for adoption of the Statute. Resolution F of the Final Act adopted on the July 17th 1998, mandated the Preparatory Commission (hereinafter "PrepComm") 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 regard to this crime.[449]

Altogether, the negotiations post-Rome lasted from 1999 to 2010. Barriga, who played an instrumental part in the drafting process,[450] has succinctly categorized the negotiation history into four phases: (i) 1999 – 2002, the PrepComm; ii) 2003-2009, the Special Working Group on the Crime of Aggression (SWGCA); iii) Spring 2009-2010, Assembly of States Parties to the Rome Statute (ASP); iv) 31st May to 11th June 2010,the Review Conference at Kampala.[451] As the history has been well documented elsewhere, it need not be repeated here.[452] Relevant reference to the negotiation history will nevertheless be made when necessary.

3.3. The Kampala Amendments: the crime of aggression

Article 8 *bis* of the Kampala Amendments represents the first definition of the crime of aggression in a multilateral instrument. It is worth producing the provision in full.

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[449] 'Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', 17 July 1998, UN Doc.A/Conf.183/13; reprinted in Barriga and Kress (n 6) 330–331.
[450] Kress and von Holtzendorff (n 133) 1186.
[451] Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 5.
[452] See Barriga and Kress (n 6).

Crime of aggression:

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

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

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

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

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

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

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

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

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

According to Article 8 *bis*(1), the state act element is 'an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.' The elements of the crime pertaining to the conduct of the individual ("elements of individual conduct") comprises of two separate components:

- 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.

The first component refers to the different modes of perpetration that are related to the state act of aggression. The latter represents the leadership element of the crime.

There is also the additional element of *mens rea*. Overall, there are three elements of individual conduct for the crime of aggression: the modes of perpetration, the leadership element and the *mens rea* of the defendant.

3.3.1. The state act element of the crime of aggression

The state act element of the crime is undeniably an "act of aggression."[453] Yet not all recourse to force and/or acts of aggression can satisfy the underlying pre-requisite of the state act element of the definition of the crime because Article 8 *bis*(1) of the Kampala Amendments has set a significantly high threshold that the "act of aggression" by its "character, gravity and scale" constitutes a "manifest violation" of the UN Charter. The threshold for the use of force to be considered as the state act element of the "crime of aggression" appears to be set higher than the threshold for an "act of aggression" under *jus ad bellum*.

The definition of an "act of aggression" for the purposes of Article 8 *bis*(1) is contained in Article 8 *bis*(2) of the Kampala Amendments. This means that the Court will first assess whether the use of armed force by the alleged aggressor state amounts to an "act of aggression" under Article 8 *bis*(2). If this is satisfied, the Court will proceed to examine whether the "act of aggression" has reached the threshold to be considered as the state act element of the "crime of aggression."

A preliminary point should be made prior to analysing the substantive aspects of this element. It is important to understand that the "crime of aggression" is not committed by the alleged aggressor state, but by the individual who was in a position to effectively exercise control over or direct the political/military action of that state and had 'planned, prepared, initiated, and executed' the act of aggression as defined under Article 8 *bis*(2).

The definition within Article 8 *bis*(2) can be divided into two sections. The first section operates as a chapeau clause:[454]

> 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.

[453] Princeton Report (2006), para.14-15; para 23.
[454] Princeton Report (2006) para 10.

The latter section gives meaning to the chapeau clause by listing acts that may qualify as aggression:

> 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 (...)

As can be observed, the definition under Article 8 *bis*(2) is verbatim of Articles 1 and 3 of the Annex to GA Resolution 3314 (albeit the slight but fundamental difference that Article 3 has been modified where 'in accordance with the provisions of Article 2' has been replaced with 'in accordance with UN GA Resolution 3314'). This has raised criticism, primarily because the legal nature of this Resolution is a non-binding multilateral instrument, which has the underlying purpose of serving as guidance to the Security Council in determining the existence of an act of aggression under Article 39 of the UN Charter.[455]

The main concern associated with this is that non-binding provisions in the Annex to GA Resolution 3314(XXIX) have been replicated in a multilateral instrument for the purposes of giving rise to individual criminal responsibility.[456] Not only is this contrary to the original drafting intentions behind the provisions of the Resolution, but as is well known, specificity and non-retroactivity are important in fulfilling the principle of legality in the context of criminal prosecution.[457] Thus the issue is that the provisions in the Annex to GA Resolution 3314(XXIX) lack the specificity to constitute a basis for individual criminal responsibility. [458]

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[455] SWGCA Report 2007 (January) para. 22; SWGCA Report 2008 (June) para.32.

[456] SWGCA Report 2009 (February), para.17; SWGCA Report 2007 (December), para.23.

[457] SWGCA Report 2007 (January), para.22; Judge Theodore Meron has written that 'the prohibition of retroactive penal measures is a fundamental principle of criminal justice and a customary, even peremptory, norm of international law that must be observed in all circumstances by national and international tribunals,' Theodor Meron, *War Crimes Law Comes of Age* (Clarendon Press 1999) 224; Ward Ferdinandusse argues 'the essence of the principle of legality, that an individual may not be prosecuted for conduct she could not know was punishable, requires the law to be so clear as to make its consequences forseeable', Ward N Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (Springer 2006) 238.

[458] See UN GA OR, 51 st sess., sup no.10 at 9, UN Doc A/51/10(1996); Documents of the 47th Session [1995] 2 YB Intl Commn 1, 39, UN Doc. A/CN.4/SER.A/1995/ Add.1 (part 1).

Although the incorporation of Articles 1 and 3 of the Annex to GA Resolution 3314(XXIX) may not be ideal,[459] two points should be appreciated. First, the definition of an act of aggression in Article 8 *bis*(2) of the Kampala Amendments does not give rise to individual criminal liability because it is not the state act element of the crime *per se*; the latter is found in Article 8 *bis*(1). Instead, Article 8 *bis*(2) provides the definition of an "act of aggression" for the purposes of the "crime of aggression" in Article 8 *bis*(1). Thus, the act of aggression pursuant to Article 8 *bis*(2) is still subject to the threshold of "manifest violation" under Article 8 *bis*(1) in order to satisfy the state act element of the crime and give rise to individual criminal responsibility. Second, the political reality behind the negotiations should be taken into consideration that the drafters were aiming to achieve a consensus. The definition within GA Resolution 3314(XXIX) was relied upon because it was the consolidation of language agreed upon after some 20 years of negotiations, and not necessarily because of its substantive element.[460] Strategically, this was the most logical decision because the SWGCA had incorporated the normative definition of aggression under international law.[461]

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[459] Some delegations preferred to make no reference to resolution 3314(XXIX) at all, see Princeton Report (2007), para.41; Kress writes that 'it would have been preferable to define the state component of the crime of aggression without reference to that document', Claus Kress, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus' (2009) 20 European Journal of International Law 1129, 1136.

[460] Stefan Barriga, 'Against the Odds: The Results of the Special Working Group on the Crime of Aggression' in Stefan Barriga, Wolfgang Danspeckgruber and Christian Wenaweser (eds), *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression* (2010) 9–10; SWGCA Report 2007 (December) para.14.

[461] See SWGCA Report 2007 (January) para 20-21; in the SWGCA Report 2008 (June), it was stated that 'some delegations considered draft article 8 *bis*, paragraph 2, to constitute the best compromise, as it fulfilled several requirements: it was precise enough to respect the principle of legality; it covered only the most serious crimes; it was sufficiently open to cover future forms of aggression; and it was clearly understood that this definition only served the purpose of individual criminal responsibility under the Rome Statute. The Security Council and other organs thus remained free to continue to apply their own standards to the crime of aggression. The reference to resolution 3314(XXIX) was considered appropriate, as that resolution was a carefully negotiated instrument that reflected current customary international law,' at para.31.; See Jan Klabbers, 'Intervention, Armed Intervention, Armed Attack, Threat to Peace, Act of Aggression, and Threat or Use of Force: What's the Difference' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 498–499.

3.3.2. A closer inspection of Article 8 bis(2) and GA Resolution 3314(XXIX) 1974

The explicit incorporation of Articles 1 and 3 of the Annex to GA Resolution 3314(XXIX) into the definition of an act of aggression in Article 8 *bis*(2), *prima facie* implies an omission of Articles 2, 4, 5, 6, 7 and 8.[462] This gives rise to two questions. First, what are the ramifications of the omission of Articles 2, 4, 5, 6, 7 and 8 of the Annex to GA Resolution 3314(XXIX) from the text of Article 8 *bis*(2)? Second, whether these omitted provisions may nevertheless be given effect in the context of Article 8 *bis*(2) which contains the phrase 'in accordance with UN GA Resolution 3314(XXIX).'[463]

i. the omission of Articles 2, 4, 5, 6, 7 and 8 of GA Resolution 3314(XXIX)1974.

Only Articles 2, 4 and 6 are of relevance to the present analysis. The incorporation of Articles 2 and 4 are particularly problematic because they refer to the role of the Security Council to make a determination of an act of aggression.[464] Thus, from the ommission of references to Articles 2 and 4, it can be inferred that the Security Council is excluded from determining an act of aggression as part of the state act element of the crime for the purposes of prosecution at the ICC.[465]

It should be clarified that this a separate matter from the role of the Security Council with respect to determining aggression as a condition for the exercise of jurisdiction under Article 15 *bis* Kampala Amendments, as the present matter refers to the substantive definition of the crime. The difference is that the determination by the Security Council of an act of aggression pursuant to Article 15 *bis* is a procedural matter, while the determination by the Security Council of an act of aggression for the purposes of the state act element of the crime relates to the substantive element of the crime. To allow the Security Council to play a role in the latter raises concern not only with respect to the principle of legality, but also the rights of the accused under Article 67(1)(i) Rome Statute.[466] Article 6 of the Annex to GA Resolution 3314 stipulated:

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[462] See Princeton Report (2007) paras. 38-43.
[463] Kress and von Holtzendorff (n 133) 1191.
[464] Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 27.
[465] ibid.
[466] See SWGCA Report 2007 (December), para.15.

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

The potential gap caused by excluding Article 6 was discussed during the negotiations.[467] Some delegates suggested that a reference to "unlawful" should be inserted before the phrase 'use of armed force' in draft article 8 *bis*, paragraph 2,[468] as this was 'intended to make clear that not all uses of armed force constituted aggression, in particular, in case of self-defence.'

This stemmed primarily from the concern that by excluding Article 6 in the definition in Article 8 *bis*(2), all uses of armed force by a State against another State, even in situations of self-defence and approval by the Security Council, are *prima facie* acts of aggression. [469] On the other hand, others objected to this suggestion, stressing that the wording of General Assembly Resolution 3314(XXIX) should not be changed.'[470] It is apparent that the latter view prevailed.

Although an ordinary reading of the text of Article 8 *bis*(2) could suggest that an act of aggression may also encompass situations of the use of force which are lawful, this is not logical in the context of Article 8 *bis* and in the light of its object and purpose. The most simple object and purpose of defining aggression is to characterize the circumstances that result in the breach of primary norms to refrain from the use of force against other states.

Thus, to suggest that the definition of an act of aggression may encompass situations of force that are consistent with *jus ad bellum* and the UN framework of collective security appears to be contrary to the object and purpose of ascertaining the situations where unlawful recourse to force may be considered as aggression.[471] More

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[467] SWGCA Report 2009 (February), para.15; SWGCA Report 2008 (June), para.77; SWGCA 2007 Report (December), para.17; see Michael J Glennon, 'The Blank-Prose Crime of Aggression' (2010) 35 Yale Journal of International Law 71, 89.
[468] SWGCA Report 2009 (February), para.15.
[469] See Glennon (n 467) 88–89.
[470] SWGCA Report 2008 (June), para.33; McDougall is of the view that 'given the passion with which States defend their reserved right to use force it is surprising that they have adopted a definition of an act of aggression that deals with permissible uses of force so opaquely', McDougall (n 7) 101.
[471] Kress and von Holtzendorff argue that 'the recognition of such an odd concept can be avoided by way of a harmonious interpretation of Articles 1, 3 and 6 of the annex of Resolution 3314, as is required by Article 8 of that same annex. The absence of a ground precluding the wrongfulness of the use of armed force constitutes an implicit negative

importantly, in the overall context of Article 8 *bis,* defining an act of aggression under Article 8 *bis*(2) is to give meaning to "an act of aggression" in Article 8 *bis*(1) for the purposes of defining the state act element of the "crime of aggression." Article 8 *bis*(2) cannot be read separately from Article 8 *bis* (1) as both of these provisions form Article 8 *bis*, the definition of the crime of aggression.[472]

The act of aggression as defined in Article 8 *bis*(2) is still subject to an additional threshold within Article 8 *bis*(1), which would serve to exclude lawful instances of the use of force. Thus, the threshold of a "manifest violation" of the UN Charter under Article 8 *bis*(1) overcomes any drafting inadequacies in Article 8 *bis*(2) with respect to lawful situations of the use of force.

ii. Is GA Resolution 3314(XXIX)1974 to be incorporated in its entirety?

Some of the participants in the negotiations had expressed the view that a provision on the state act of aggression must refer to GA Resolution 3314(XXIX) in its entirety, stressing that the resolution was a package and that all its provisions were interrelated, as evidenced by Article 8.[473] The question is whether the phrase 'in accordance with' in Article 8 *bis*(2) can be read to incorporate GA Resolution 3314(XXIX) in its entirety into the definition of an act of aggression.[474] This suggests that the aforementioned omitted provisions will nevertheless be incorporated into the definition in Article 8 *bis*(2) because the definition of an act of aggression in GA Resolution 3314(XXIX) must be read in its entirety. Yet, reading GA Resolution 3314 (XXIX) in its entirety would give effect to the discretion of the Security Council under Articles 2 and 4 with respect to the determination of the state act element of the crime. To exclude the role of the Security Council from determining an act of

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element of the concept of 'act of aggression' as defined in the annex to Resolution 3314. As this construction of the term is 'in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974', it should also be adopted under draft Article 8 bis,' Kress and von Holtzendorff (n 133) 1192.

[472] ibid.

[473] Princeton Report (2006), para 33 mentions a "generic reference" to GA Resolution 3314(XXIX): such a reference would be consistent with the need to preserve the integrity of the resolution, respect the interconnected nature of its provisions (article 8) and, in particular, cover also articles 1 and 4, which were relevant in this context. This approach would further, avoid time-consuming discussion surrounding the selection of specific acts, Princeton Report (2007), para.39; SWGCA Report 2007 (December), para.15; see Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 27; McDougall (n 7) 99.

[474] McDougall (n 7) 97.

aggression for the purposes of establishing the state act element of the crime would exclude Articles 2 and 4 of GA Resolution 3314(XXIX) from being applicable. Thus, the only logical approach is to read Article 8 *bis*(2) without incorporating GA Resolution 3314(XXIX) as a whole so as to exclude the Security Council from playing a role in determining the state act element of the crime.

Notably, the Security Council has a specific role to play in determining an act of aggression as an external mechanism prior to the initiation of an investigation of the crime of aggression (Article 15 *bis* (6)). The Security Council may also refer a situation of aggression to the ICC (Article 13(b)), or defer proceedings relating to a crime of aggression (Article 16). It is worth clarifying that these are procedural actions and do not affect the substantive element of the state act element of the crime of aggression pursuant to Article 8 *bis*. Be that as it may, such procedural actions in relation to the prosecution of the crime of aggression at the ICC is indicative of a relationship between the Security Council and the Court, and an unforeseen role for the Security Council to play in relation to determining an act of aggression at the time when GA Resolution 3314(XXIX) was adopted in 1974.

Lastly, an argument can be made that if it was intended for other provisions of GA Resolution 3314(XXIX) to be incorporated into Article 8 *bis*(2), the relevant provisions could have also been included in the draft together with Articles 1 and 3. As such, it is submitted that Article 8 *bis*(2) should be read without the incorporation of GA Resolution 3314(XXIX) as a whole. Support for this argument can be found in the February Report of the Special Working Group on the Crime of Aggression (2009), where it had been observed that 'the point was made that the reference to General Assembly Resolution 3314 did not import the content of that resolution as a whole.'[475] Thus, only Articles 1 and 3 of GA Resolution 3314 are to be given effect in Article 8 *bis* (2). The phrase 'in accordance with' acts as a reference to the source from which the definition is obtained, i.e. GA Resolution 3314 and should not serve as a point of reference for incorporation.[476]

[475] SWGCA Report 2009 (February), para.17.
[476] Princeton Report (2007), para.41.

iii. The enumerated list: open or closed?

In the negotiations leading to Kampala, the SWGCA held extensive discussions over the question whether the definition should be specific or generic in nature.[477] The former refers to a definition that includes a concrete list of acts of aggression,[478] whilst the latter focused upon more general acts such as 'armed attack'[479] or 'use of armed force.'[480] It appears that in subsequent discussions, the majority appeared to favour the specific approach based on GA Resolution 3314(XXIX).[481] By mirroring the acts defined under Article 3, it is possible that this was a strategic move to appease the states that wanted a specific definition of list of acts.[482] Article 3 GA Resolution 3314(XXIX) was adopted in its entirety as the participants were reluctant to revisit the illustrative list of acts.[483]

The SWGCA also considered the question of whether the enumerated list within Article 8 *bis*(2) is open or closed.[484] Those in favour of a closed list were focused upon the importance of the principle of legality, expressing the view that 'the ambiguity of the nature of the list was in itself problematic under the principle of

[477] See Barriga and Kress (n 448) 24; Princeton Report (2005), para.75; Princeton Report (2006), para.7.

[478] See Princeton Report (2006), para.7; Barriga informs us that 'Arab and AM countries, in particular, favored a definition based on GA Resolution 3314, especially since it contained strong references to the right of self-determination and the 'right to struggle to that end and to seek and receive support,' and that it appealed to the permanent members of the Security Council as 'it stressed the autonomy of the Security Council in determining the existence of an act of aggression', in Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 24–25.

[479] 'Proposal Submitted by Germany: Definition of the Crime of Aggression', 30 July 1999 ("Proposal by Germany") UN Doc. PCNICC/1999/DP.13; reprinted in Barriga and Kress (n 6) 340.

[480] 'Proposal Submitted by Greece and Portugal', 7 December 1999, UN Doc.PCNICC/1999/WGCA/DP.1; 'Proposal Submitted by Greece and Portugal', 28 November 2000, UN Doc.PCNICC/2000/WGCA/DP.5; reprinted in Barriga and Kress, ibid 343, 375.

[481] Princeton Report (2006), paras.7-13; SWGCA Report 2006 (November), para.8; SWGCA Report 2007 (January), paras.14-15.

[482] Princeton Report (2007), para.46: Support was expressed for the list of acts contained in the non-paper, taken from article 3 of resolution 3314(XXIX). It was stated that the list represents current customary international law, though some took the view that was only true for subparagraph (g). It was stated that most of the acts contained in the list were reflected in the practice of the Security Council, while for some acts there was no Council practice.

[483] SWGCA Report 2007 (December), para.19.

[484] SWGCA Report 2008 (June), para 34-35; SWGCA Report 2007 (December), para 18-21; SWGCA Report 2007 (June), 47-53; Princeton Report (2007), para.47.

legality.'[485] Whilst, on the other hand, those in favour of the open or semi-open list 'indicated that there was a need to provide room for future developments of international law and to ensure that perpetrators would not enjoy impunity.'[486] Apparently, the matter was never definitely resolved.[487] However, it was 'emphasized that the generic and specific approaches could easily be combined by including a general chapeau and a non-exhaustive list of specific acts.'[488]

As mentioned above, Article 8 *bis*(2) contains the chapeau clause, whilst the list demonstrates examples of acts which may *qualify* as aggression under the chapeau clause. The use of the term 'qualify' implies that the listed acts have been determined to meet the chapeau definition, but this does not mean that the list is necessarily exhaustive. My interpretation is that the list under Article 8 *bis*(2) is open to the extent that the acts which fall outside the enumerated list can be considered aggression provided they meet the definition of an act of aggression within the chapeau clause, i.e. '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.'[489]

As there is the possibility that acts which potentially fall outside the list may be considered as an act of aggression under Article 8 *bis*(2), this may raise concern with respect to the principle of legality. Kress suggests that the threshold under the chapeau clause would serve as the limiting factor to curtail the potential acts which fall outside the enumerated list, and that this is sufficiently specific to fulfil the principle of legality for the purposes of international criminal law.[490]

From the list, it may be argued that some of the illustrative acts may not meet the threshold in the chapeau clause or may not be sufficiently grave to be considered a "serious crime of international concern" as set out under the general ambit of the Rome Statute.[491] For example, (f) refers to 'the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that State

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[485] Princeton Report (2007), para.50; SWGCA Report (January), 2007 para.20; See Kai Ambos, 'The Crime of Aggression after Kampala' (2010) 53 German Yearbook of International Law 463, 487.
[486] Princeton Report (2007), para.51.
[487] McDougall (n 7) 103.
[488] Princeton Report (2006), para.10.
[489] Princeton Report (2007), para 48; SWGCA Report 2008 (June), para.34; McDougall (n 7) 103; See Kress and von Holtzendorff (n 133) 1191.
[490] Kress (n 459) 1137; See also Princeton Report (2006), paras.11-12.
[491] SWGCA Report 2007 (December), para 23.

for perpetrating an act of aggression against a third State'. It is questionable as to whether this is sufficient enough for judges to consider that this amounts to an "act of aggression" which is a use of armed force which is "inconsistent with the UN Charter" under the chapeau clause or a "crime of serious international concern"? As there is no apparent reason why this act was incorporated into the enumerative list, it can be inferred that this was the result of the general reluctance of the participants to open the Pandora's Box of re-examining each act under the list individually. Once again, this is why the threshold clause in both the chapeau and Article 8 *bis*(1) is so important.[492]

3.3.3. An act of aggression that by its character, gravity and scale constitutes a manifest violation of the Charter of the United Nations

Article 8 *bis*(1) contains a threshold that the act of aggression by its "character, gravity and scale" must constitute a "manifest violation of the UN Charter." The need for a threshold had already originated in the July 2002 Coordinator's Paper ("character, gravity and scale, constitutes a flagrant violation of the Charter of the UN.") The 2006 Princeton Report shows that some participants stressed there was no need for an additional qualifier as an act of aggression under Article 1 of GA Resolution 3314(XXIX) was serious enough,[493] others however, were in favour of this threshold as it "excluded borderline cases."[494] In general, there appeared to be a preference for the term "manifest" in lieu of "flagrant."[495]

A threshold implies that some acts of aggression are more serious than others and should give rise to individual criminal responsibility, and this 'would not only exclude minor border skirmishes and other small-scale incidents but also acts whose illegal character was debatable rather than manifest.'[496] Thus, the threshold is intended to preserve the criteria under Article 5(1) of the Rome Statute that the crimes within the jurisdiction of the ICC should be limited to those that were considered "the most serious crimes of concern to the international community as a whole."[497]

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[492] SWGCA Report 2008 (June), para 24.
[493] Princeton Report (2006), para.18.
[494] Princeton Report (2006), paras.18-20.
[495] Princeton Report (2006), para.20; see Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) footnote 146.
[496] SWGCA Report 2007 (January), para. 16; SWGCA Report 2008 (June), para.24; SWGCA Report 2009, para.13.
[497] SWGCA Report 2007 (January), para.17; SWGCA Report 2007 (December), para.23.

The threshold also appears to serve another purpose, which is to rectify any drafting inadequacies within Article 8 *bis*(2) Kampala Amendments, especially in the light of the potential gap caused by the omission of Articles 2, 4 and 6 of the Annex to GA Resolution 3314(XXIX). This would help to overcome concern that the definition in Article 8 *bis*(2) may not necessarily differentiate between a breach of Article 2(4) and an act of aggression; nor clearly exclude situations of use of force which fall within exceptions to Article 2(4) of the UN Charter.

That said, there is no reference to a "manifest violation" in either the UN Charter or GA Resolution 3314: this threshold is a new construct. This meaning is not entirely clear and is subject to the discretion to the judges. This is where ambiguity arises. What does "manifest violation" mean? According to the simple dictionary definition, "manifest" is "to show something clearly, through signs or actions;"[498] "able to be seen: clearly shown or visible."[499] This suggests that a "manifest violation" is the clear, visible, and obvious breach of the laws of the use of force as enshrined within the UN Charter.

Upon referring to the Elements of the Crime of Aggression, in the Introduction, it is written that the term "manifest" is an objective qualification.[500] The fifth Element of the Crime is verbatim with Article 8 *bis*(1) which states that:

> The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

If the Elements of the Crime are meant to be instructive, then 'character, gravity and scale' should be taken into consideration to identify a "manifest violation." It can be inferred:

- the character of an act of aggression is a "manifest violation"
- the gravity of an act of aggression is a "manifest violation"
- the scale of an act of aggression is a "manifest violation"

The terms "character, gravity and scale" therefore assist the court in determining that the act of aggression represents a "manifest violation" of the UN Charter.[501] Yet, none

[498] Cambridge Online Dictionary
[499] Merriem-Webster Dictionary Online
[500] Paragraph 3, Introduction, Elements of the Crime of Aggression, Resolution RS/Res.6.

of these terms are defined, which suggests that there is discretion for interpretation by the judges.

The more important question is whether all three factors have to be present. At first glance, the use of the conjunctive 'and' implies that all three factors must be present – to what extent is this true? [502] Understanding 7 states:

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

The first sentence suggests that each of the three components must be independently sufficient to be considered as a 'manifest' determination,[503] whilst the second sentence infers that two of the three components are sufficient to assist the Court to determine that the use of force was a "manifest" violation. However, the latter does not necessarily convey that two components *are* sufficient for a finding of a 'manifest violation' of the UN Charter. Instead, it suggests that in the absence of one of the components, the Court is not precluded from finding that an act of aggression pursuant to Article 8 *bis* (2) has amounted to a 'manifest violation' of the UN Charter.

Therefore, the correct approach is that an act of aggression pursuant to Article 8 *bis* (2) should be assessed in the light of all three components. In a situation when one of the components is absent, this should not preclude the Court from finding that the act of aggression has amounted to a 'manifest violation' of the UN Charter in the light of the two components that are present.

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[501] See McDougall (n 7) 130.

[502] Robert Heinsch, 'The Crime of Aggression After Kampala: Success or Burden for the Future' (2010) 2 Goettingen Journal of International law 713, 729.

[503] Claus Kress, who was the focal point for the negotiations relating to the Understandings, explains that, 'the idea behind this sentence was to exclude the determination of manifest illegality in a case where one component is most prominently present, but the other two not at all. It was thought that use of the word 'and' in the formulation of the threshold requirement in draft art 8 *bis* (1) excluded a determination of manifest illegality in such a case and that the understanding should properly reflect this fact', see Kress and others (n 443) 96.

3.3.4. Grey areas of jus ad bellum: the question of humanitarian intervention

As already mentioned in section 1.5, humanitarian intervention was discussed during the negotiations in Kampala. The Head of the US delegation intervened at the Review Conference on 4 June 2010:

> The current definition in Article 8 *bis* does not fully acknowledge, as President Obama did in his recent Nobel acceptance speech, that certain uses of force remain both lawful and necessary. If Article 8 *bis* were to be adopted as a definition, understandings would need to make clear that those who undertake efforts to prevent war crimes, crimes against humanity or genocide, the very crimes that the Rome Statute is designed to deter – do not commit 'manifest' violations of the U.N. Charter within the meaning of Article 8 is. Regardless of how states may view the legality of such efforts, those who plan them are not committing the 'crime of aggression' and should not run the risk of prosecution.[504]

The US Delegation then proceeded to prepare a set of proposed draft Understandings ("US Non-Paper 2010"), which covered the issue of humanitarian intervention in its proposed third Understanding:

> It is understood that, for the purpose of the Statute, an act cannot be considered to be a manifest violation of the United Nations Charter unless it would be objectively evident to any State conducting itself in the matter of accordance with normal practice and in good faith, and thus an act undertaken in connection with an effort to prevent the commission of one of the core crimes contained in Articles 6, 7 or 8 of the Statute would not constitute an act of aggression.

[504] See ibid 95; The US delegation proceeded to introduce a set of proposed draft Understandings that addressed this issue, see 2010 non-paper by the United States; reprinted in Barriga and Kress, id 751; see 'Understandings Regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression', 11 June 2010, in Review Conference Official Records, RC/10/Add.1, 2010 (with particular reference to Understandings 3 and 4), reprinted in Barriga and Kress, id, 805.

As can be seen in the final Understandings to the Kampala Amendments, this had been rejected. However, Kress *et al* observe:

> the great majority rejected Understandings 3 and 4. […] there was the widespread concern that it would be inappropriate to deal with key issues of current international security law in the haste of the final hours of diplomatic negotiations. Therefore the widespread rejection of Draft Understandings 3 and 4 of the US must not be interpreted as widespread rejection of their content.[505]

As such, it can be reasonably presumed that the US was not the only nation present at the Review Conference that had concern with respect to the potential qualification of humanitarian intervention and other grey areas of *jus ad bellum* as the state act element of the crime of aggression under Article 8 *bis*(1). Thus, some States Parties may still be concerned that the definition of the act of aggression (Article 8 *bis*(2)) and the crime of aggression (Article 8 *bis*(1)) may encompass humanitarian intervention. This suggests that individuals who satisfy the leadership element under Article 8 *bis*(1) are not protected from prosecution at the Court for humanitarian intervention as a crime of aggression, even though the alleged act of aggression was a "good act" or benign aggression which served the purposes of protecting human rights. Creegan goes even further by arguing:

> [I]n the context of humanitarian intervention, the crime of aggression and the other crimes of the Rome Statute are put into violent contrast: humanitarian intervention is a tool to prevent war crimes, genocide and crimes against humanity – yet it is indictable elsewhere in the Rome Statute. Again, this contrast underscores the fundamental wrongness of war crimes, genocide and crimes against humanity in any context, as the true highest crimes of the international system, while aggression remains a way to both precipitate and alleviate these wrongs.[506]

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[505] ibid.

[506] Creegan (n 133) 70; She also writes that 'the two groups of offences, human rights crimes and the polticial crime of aggression simply cannot be compared', 81.

In my view, to create a distinction between a good aggression and bad aggression is not entirely consistent with a positivist approach to *jus ad bellum*. An act of aggression is an act of aggression regardless of whether it is a "good" aggression or a "bad" aggression.

The underlying criterion is that the aggressor state has acted in violation of Article 2(4) of the UN Charter, regardless of the nature or justness of this act. To take into consideration the justness of the act of aggression to determine if it is a good aggression or a bad aggression is precarious as the determination is entirely political and subject to the agenda of the interpreter.

Any assessment of the justness of the cause of war, or the use of force, is incompatible with a positive approach to the international legal framework that governs the use of force. The legality of the use of force should be assessed with respect to the existing framework, and not the moral validity or justness of its cause. The same objective standards should be applied in determining whether a situation amounts to an act of aggression (Article 8 *bis*(2)) and/or whether an act of aggression amounts to a crime of aggression (Article 8 *bis*(1)), irrespective of the cause of the underlying use of force.

It is therefore possible that humanitarian intervention may be considered as an "act of aggression" under Article 8 *bis*(2). But, to satisfy the state act element of the crime, it must amount to a "manifest violation" of the UN Charter under Article 8 *bis*(1).Thus, it can be argued that the threshold excludes cases of insufficient gravity and the grey areas *of jus ad bellum* by virtue of the three qualifiers of 'character, gravity and scale.'[507] This way, only the clear and obvious acts of aggression attract individual criminal responsibility for the purposes of prosecution at the ICC.

The threshold in Article 8 *bis*(1) may potentially act as a safeguard to prevent judges from prosecuting individuals for the planning, preparation, initiation and execution of acts of aggression, whereby the international community is divided with respect to the legality of the underlying use of force.[508] Be that as it may, it is not for the ICC, or the framework of international criminal law to clarify the grey areas within the *jus ad bellum.*[509] The purpose of determining the act of aggression is only to establish the state act element of the crime.

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[507] SWGCA Report 2008 (June), para.24.
[508] McDougall (n 7) 159.
[509] ibid.

3.4. The crime of aggression and the act of aggression: the tale of two thresholds

The state act element of the crime of aggression entails a significantly higher threshold ("manifest violation" of the UN Charter) than an act of aggression under *jus ad bellum* (presumably a "serious violation" of the UN Charter).[510] Thus, not all acts of aggression may give rise to individual criminal responsibility, but only those, which by their character, gravity and scale constitute a "manifest violation" of the UN Charter.[511]

The significantly higher threshold under Article 8 *bis* (1) in comparison to the existing threshold required by *jus ad bellum* for an act of aggression has given rise to two broad concerns. First, some have expressed concern that such inconsistencies have the ramification of diluting/eclipsing the current definition of aggression under *jus ad bellum*.[512] Second, some fear that such a high threshold will indirectly condone the use of force or acts of aggression.[513] In my view, both concerns are unfounded.

3.4.1. Myth One: diluting/eclipsing jus ad bellum

O'Connell and Niyazmatov have argued that 'public international law experts are right to be concerned about the rise of two competing definitions of aggression in public international law. They especially need to be concerned about the newer ICC definition eclipsing the *jus ad bellum* definition.'[514] They submit that 'the immediate concern is the potential to dilute the *jus ad bellum.*'[515] They explain:

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[510] SWGCA Report 2009 (June), paras.26-28; Mary Ellen O'Connell and Mirakmal Niyazmatov, 'What Is Aggression? Comparing the Jus Ad Bellum and the ICC Statute' (2012) 10 Journal of International Criminal Justice 189, 119.
[511] Princeton Report (2006), paras 18-19.
[512] O'Connell and Niyazmatov (n 510) 200.
[513] Daniel D Ntanda Nsereko, 'Aggression under the Rome Statute of the International Criminal Court' [2002] Nordic Journal of International Law 497, 501–504; Andreas Paulus, 'Second Thoughts on the Crime of Aggression' (2009) 20 European Journal of International Law 1117, 1124.
[514] O'Connell and Niyazmatov (n 510) 200.; Sean Murphy also argues in a similar vein that 'adoption of the definitions on "act" and "crime" of aggression may have collateral implications outside of the criminal context, especially on rules relating to the *jus ad bellum'*, Sean D Murphy, 'The Crime of Aggression at the International Criminal Court' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 556–557.
[515] O'Connell and Niyazmatov (n 510) 201.

> Article 8 bis (1) requires that the conduct by its 'character, scope and gravity' constitutes a 'manifest' violation of the UN Charter to constitute aggression. Yet, the GA has already made a determination than the examples in Article 3 of its Definition are serious violations of the Charter. In other words, Article 3 acts are 'manifest' violations. International law experts will need to emphasize this point so that government leaders do not come to think that leaving troops on the territory of another state, as Uganda did in Congo, or other conduct is not a violation of the UN Charter because it is not a 'manifest' violation for the ICC Statute.[516]

They appear to equate a serious violation of the UN Charter pursuant to GA Resolution 3314(XXIX) with a manifest violation of the UN Charter in Article 8 *bis* (1). They suggest that every act of aggression should rightfully qualify as the state act element of the crime. However, this would appear contrary to the object and purpose of the threshold of a "manifest violation" in Article 8 bis (1) as it is clearly intended that not every act of aggression may amount to the state act element of the crime of aggression.

In further criticism, the second part of their submission that government leaders may act in the belief that their conduct is not a violation of the UN Charter because it is not a "manifest" violation for the ICC Statute is rather groundless. Regardless of the applicability of the Kampala Amendments and the Rome Statute, States have primary obligations under the UN Charter with respect to their conduct of recourse to force. These obligations fall upon Government leaders, within their official capacity as organs of the State.[517] Thus, regardless of the legal effect of the Kampala Amendments or Rome Statute, government leaders have a duty to comply with their primary obligations under *jus ad bellum* to refrain from violating the UN Charter. Paulus had argued in a similar vein that:

> What happens to the remaining 'ordinary' violations of the prohibition on the use of force? Are they less meaningful because they are not criminalized? The true impact of the definition as adopted by the Working Group may well lie in

[516] ibid 200.
[517] Article 3, ARSIWA 2001.

> the derogation from the existing comprehensive prohibition on the use of force rather than its clarification.[518]

I disagree with his premise. Irrespective of whether an act of aggression may amount to a crime of aggression for the purposes of the Rome Statute, states are prohibited from 'ordinary' and all violations of the prohibition of the use of force. The prohibition of the use of force is a peremptory norm, which aside from compliance pull, gives rise to a special set of consequences under the secondary rules of state responsibility.[519] This means that 'ordinary' violations of the prohibition of the use of force are by no means less meaningful as there are consequences for the aggressor state under the secondary rules of state responsibility.

O'Connell and Niyazmatov conclude that 'the crime of aggression has been included in the ICC Statute, but is based on a different definition than that found in the *jus ad bellum*. This is regrettable.'[520] However, there is a different definition for the crime of aggression than an act of aggression, this does not necessarily have a detrimental effect on the obligations of states with respect to *jus ad bellum.* Regardless of whether the act of aggression meets the threshold to be considered as the state act element of the crime of aggression, *jus ad bellum* is applicable.

Therefore, it is submitted that violations of *jus ad bellum* that are not criminalized should not be viewed as "less meaningful" nor should the entire legal framework be viewed as "diluted or eclipsed" or "derogated from." It is not disputed that two thresholds for the act of aggression under international law may have the potential to cause confusion. The point is that despite any potential concern, the threshold for the state act element for the crime of aggression does not necessarily "dilute" or "eclipse" the definition under *jus ad bellum* because it pertains to the prosecution of an individual and not for invoking legal consequences against the aggressor state.

3.4.2. Myth Two: condoning the use of force which gives rise to "lesser violations" of the UN Charter

Another concern which arises in relation to the threshold under Article 8 *bis* (1) is that acts of aggression which fall short of the threshold become implicitly condoned

[518] Paulus (n 513) 1124.
[519] Article 26, and Chapter III, ARSIWA 2001
[520] O'Connell and Niyazmatov (n 510) 207.

as they do not give rise to individual criminal responsibility. In other words, states believe there is a green light to commit acts of aggression, which fall beneath a "manifest violation" of the UN Charter because there are no consequences of criminal punishment.[521] Nserenko, writing before the Review Conference submitted:

> to exempt small-scale armed attacks on other states' sovereignty, territorial and political independence from the reach of international criminal law will be to encourage leaders of powerful states to launch repeated short, sharp armed attacks on less powerful states with impunity. Weak states must be protected from such bullying by powerful ones.[522]

This is rather pessimistic and rather unwarranted. Leaving aside his conceptual distinction between powerful and less powerful states, 'short, sharp, armed attacks' are still prohibited under Article 2(4), which means that every state has obligations to refrain from such conduct, regardless of whether the leader may face the criminal prosecution. Both 'weak' and 'powerful' states are rights-holders of the enjoyment of the norms that prohibit aggression. Paulus had also expressed similar concern that:

> in the absence of prosecution by the Court, states can easily view such abstention as an unjustified bill of clean health. Thus, in the end, criminalisation may lead to the unintended consequence of rendering the use of force easier rather than sanctioning it more effectively.[523]

As I had argued above, regardless of criminalisation of aggression, the rule of the prohibition of the use of force under *jus ad bellum* will confer primary obligations on states. The high threshold under Article 8 *bis*(1) is directly relevant to individual criminal responsibility. Once again, it must be clarified that this qualifier applies in isolation, strictly in the context of when individuals may be prosecuted and should not be interpreted as affecting the legal framework of jus ad bellum.

Regardless of whether the state act of aggression can satisfy the criteria to be considered as the state act element of the crime of aggression and thus prosecutable, it

[521] See McDougall (n 7) 133.
[522] Nsereko (n 513) 103.
[523] Paulus (n 513) 1124; for a reply, see Kress (n 459) 1135.

is still prohibited conduct and a violation of *jus ad bellum.* Thus, all acts of aggression are prohibited under international law, regardless of whether or not the relevant individuals who are part of the state organ may face criminal prosecution. It should not be presumed that the high threshold required in order for an act of aggression to be considered as a crime of aggression would condone – or encourage state officials to commit violations of Article 2(4) of the UN Charter which fall short of a manifest violation of the UN Charter.

3.5. Elements of Individual Conduct

The elements of individual conduct in Article 8 *bis*(1) comprise two components:

- Planning, preparation, initiation or execution ("perpetration phase")
- Position effectively to exercise control over or to direct the political or military action of a State ("leadership element").

The former describes the material element or *actus reus* of the crime, while the latter is the necessary pre-requisite which enables the perpetrator to be in a position to conduct the relevant *actus reus*. The necessity of the latter can be seen by the incorporation of the use of the word 'by' to connect both the perpetration phrase and the leadership element. Suffice it to say, like all crimes – the *actus reus* must be accompanied with the mental elements (*mens rea)*. Therefore, there are three elements altogether which give rise to the elements of individual conduct of the crime of aggression: *actus reus*, leadership element and the *mens rea.*

3.5.1. Leadership element

The leadership element was a relatively uncontentious issue in the negotiations leading up to the Kampala Amendments.[524] The basic assumption is that one has to be in a high position within the hierarchy of a state to be considered as a perpetrator of the crime of aggression. Under Article 8 *bis*(1) the individual must be in a position to exercise control over or direct the political or military action of a State ("control or

[524] The leadership element was already contained in the Draft Statute for an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.193/2/Add.1; in the Coordinator's 1999 Consolidated Text of Proposals on the Crime of Aggression, PCNICC/1999/WGCA/RT.1(9 Dec.1999); Princeton Report (2006), para.88; 'Proposal for Alternative Language on Variant (a) Prepared by the Chairman for the Informal Consultations', in Princeton Report (January) 2007, Annex (Appendix); reprinted in Barriga and Kress (n 6) 577.

direct"). This is a substantive component of the definition, and should not be interpreted as merely jurisdictional in nature.[525]

The negotiation history supports this claim. The 2007 Proposal by the Chairman on Variant (a) (January), annexed to the 2007 SWGCA Report (January), was criticised by some delegations that 'the new formulation seemed to link the leadership element to the scope of jurisdiction of the Court, and no longer to the definition of the crime of aggression itself.'[526] Some participants had 'stressed the importance of retaining the leadership clause in the definition itself, since it constituted an integral part thereof.'[527] In response, the 2007 Chairman's Non-Paper on Defining the Individual's Conduct included the leadership clause as part of the definition of the crime. It can be inferred that it was intended that the leadership element should be a substantive component of the definition of the crime.[528]

The importance of the leadership element is further reinforced by the following addition to Article 25(3) of the Rome Statute:[529]

> In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

The leadership element is imposed on all modes of perpetration, implying that all secondary perpetrators must also fulfil the "control or direct" criteria.[530] The footnote in the second Element of the Crime of Aggression states that 'more than one person may be in a position that meets these criteria.' Thus, subject to these conditions, there can be more than one perpetrator of the crime.

The leadership element can be understood in two parts: i) the role of the perpetrator in the context of the hierarchy of the State political/military structure that enables him/her to carry out the requisite conduct; ii) the requisite conduct of the

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[525] Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 23; see also 2007 Proposal by the Chairman on Variant (a) (January); 2007 SWGCA Report (January), para.11.
[526] SWGCA Report 2007 (January), para.11.
[527] Princeton Report (2007), para.9.
[528] SWGCA Report 2007 (December), para.6.
[529] Princeton Report (2007), para.11.
[530] See Barriga and Kress (n 6) 23; SWGCA Report 2009, para 25: it was noted that this provision was crucial to the structure of the definition of aggression its current form.

perpetrator to control or direct the political/military action of the State. The requirement that the person must be 'in a position', implies that the perpetrator must formally attain a position where he/she has the capacity to carry out the requisite conduct, i.e. an official leadership position. This would involve examining the official title of the defendant and the relevant powers and duties affiliated with such position.

However, the inclusion of the word "effectively" suggests that the perpetrator must possess the actual ability to exercise sufficient authority to carry out the requisite conduct, in addition to a formal leadership position. Thus, 'in a position effectively' suggests a de facto leadership position, where the person is able to carry out the requisite conduct of 'controlling/directing' the political or military action of a state, who is not a mere figurehead who lacks the capacity to carry out those functions.

The simple definition of "control" is "to order, limit or rule something, or someone's actions or behaviour";[531] "the power to influence or direct people's behaviour or the course of events."[532] The simple definition of "direct" is "to give authoritative instructions to; command; order or ordain";[533] "to cause (someone or something) to turn, move, or point in a particular way";[534] "to control the operations of; manage or govern."[535] Put in context, this suggests that the perpetrator must have the power or authority to have a direct effect on the 'political or military' action of the aggressor state by having a decisive say or command, or order, limit, rule, govern, regulate, supervise the political or military action of the relevant state which is aimed at achieving the objectives which lead to the act of aggression which by its character, gravity and scale constitutes a manifest violation of the UN Charter.

The next question that needs to be addressed is the scope of the persons with respect to the leadership element.[536] Should "control or direct" adhere to a strict interpretation or does it provide ambit for nuance? The former suggests that the defendant must be a de facto leader who must have effective control and/or direction, whilst the latter suggests that the defendant may not necessarily have to be a political

[531] Cambridge online dictionary
[532] Oxford online dictionary
[533] Dictionary.com
[534] Merriam-Webster online
[535] Oxford online dictionary
[536] McDougall interprets the scope of perpetrators as 'de facto "leaders" who are in position to have a decisive say over, govern, instruct or command the deeds of the political or military establishments of a State aimed at achieving particular objectives' and that business and religious leaders are excluded,' McDougall (n 7) 203.

or military leader but one who nevertheless attains de facto effective control and/or direction over the political/military action of the relevant state.

This may arguably include leaders of non-state parties (e.g. private economic actors) or religious leaders. This issue was touched upon in the negotiation history,[537] as it had been raised that 'the content of the leadership clause merited greater consideration, and that the Nuremberg precedent (indictments under the IMT and Control Council Law No.10) referred to persons outside formal government circles who could "shape or influence" the State's action [...].[538]

Some delegations had considered the 'language to be sufficiently broad as to permit the prosecution of more than a single leader, including persons outside formal government circles'[539] and it was subsequently expressed that 'the language of this provision was sufficiently broad to include persons with effective control over the political or military action of a State but who are not formally part of the relevant government, such as industrialists.'[540]

Heller argues that 'the SWGCA rejects the "shape or influence" standard because it believes that the IMT and NMT applied the more restrictive "control or direct" requirement.'[541] However, McDougall disagrees and argues that the participants of the negotiations were aware of the broader scope of perpetrators applied by the NMT, and 'made a conscious choice to narrow the scope of perpetrators captured.'[542] This was perhaps also the most logical decision, as Barriga reflects that 'given that the wording of the clause already enjoyed widespread support, […] there was limited interest in exploring alternative formulations. There was also concern that this formula would open the doors too far, especially in relation to democracies where a

[537] See SWGCA Report 2007 (January) para 13; Princeton Report (2007), para.12; 'Elements of the Crime of Aggression – Proposal Submitted by Samoa', 21 June 2002, UN Doc.PCNICC/2002/WGCA/DP.2; 'Proposed text on the Definition of the Crime and Act of Aggression – Proposal Submitted by the Delegation of Colombia', 1 July 2002, UN Doc. PCNICC/2002/WGCA/DP.3; 'Elements of Crimes', 9 September 2002, in ASP Official Records, ICC-ASP/1/3, Part II, 108; reprinted in Barriga and Kress (n 6) 418.
[538] Princeton Report (2007), para.12.
[539] SWGCA Report 2007 (December), para.9.
[540] SWGCA Report (2009), para. 25.
[541] Heller (n 336) 479.
[542] McDougall (n 7) 183.

very large circle of persons could be said to 'shape or influence' the State's action.'[543] Thus, it is intended that the scope of perpetrators should be narrow.

Heller criticises the leadership element in the Kampala Amendments as representing 'a significant retreat from the Nuremberg principles – not their codification.'[544] He expressed concern that:

> Adopting the 'control or direct' requirement also entails rejecting the principle – central to both the IMT and NMT – that non-governmental actors can commit the crime of aggression, because no private economic actor and very few complicit third-state officials could ever be in a position to control or direct an aggressive state's political or military action.[545]

However, including non-state actors in the scope of perpetrators may be rather problematic, especially in the broader context of non-state actors and/or private economic actors (businesses and/or multinational corporations) having a *locus standi* at the ICC. Also, it would have been unrealistic to expect a consensus if the definition of the crime allowed for the potential prosecution of non-state actors. The implications of the leadership element will propagate the Court to concentrate upon the endeavour of prosecuting the few who are truly responsible for making decisions relating to the use of force. This may perhaps be more effective in achieving the deterrent objectives. [546]

Be that as it may, there does appear to be ambit for discussion that the scope of perpetrators under Article 8 bis (1) is sufficiently broad so as to encompass a key leadership role attained by a religious leader or industralist. The decision as to whether an individual may fall within the leadership element is ultimately for the discretion of the Court.

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[543] Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 22.; 'Proposal for a Definition of the Crime of Aggression Submitted by the Delegation of Germany', 19 February 1997, UN Doc.A/AC.249/1997/WG.1/DP.3; reprinted in Barriga and Kress (n 6) 223–225; see Princeton Report (2007) para.12; 1997.
[544] Heller (n 336) 497.
[545] ibid 488–489.
[546] McDougall (n 7) 46–47.

3.5.2. Actus reus: planning, preparing, initiation or execution

In the negotiations leading up to Kampala, the participants were divided between two drafting approaches with respect to the forms of individual participation within the definition of the crime. The starting point is the July 2002 Coordinator's Paper:

> a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a state, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.[547]

As it was considered difficult to reconcile this with the secondary forms of participation within Article 25(3),[548] it was initially suggested that:

> The provisions of articles 25, paragraphs 3, 28 and 33 of the Statute do not apply to the crime of aggression.[549]

This has been described as the "monist" approach because the definition contains a description of different forms of participation, whilst excluding application of the various modes of participation enlisted within Article 25(3).

As the negotiations carried on towards the 2005 Princeton Meeting, there was a shift towards a preference for adopting an approach which was more consistent with the other crimes in the Rome Statute, where the formulation was: the conduct of the principal perpetrator, in addition to the other forms of participation contained in

[547] It is also interesting to note that 'the requirement in the July 2002 Coordinator's Paper for the perpetrator to be 'in a position effectively to exercise control over or to direct the political or military action of a State' also made its way unchanged into article 8 bis of the resolution adopted in Kampala', Barriga and Kress (n 6) 10.
[548] Princeton Report (2004), para.37; Princeton Report (2005), para.19.
[549] 'Discussion Paper Proposed by the Coordinator', 11 July 2002, UN Doc.PCNICC/2002/WGCA/RT.1/Rev.2, in Report of the Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/2002/2/Add.2, Part II, 3, para.3.

Article 25(3).[550] This was called the "differentiated approach" as it intended to include the modes of participation in Article 25(3).[551]

Some had found that the difference between the two options was very minimal as they were largely predicated upon the same rationales. Although, many delegations indicated in the light of the above that they were flexible, they nevertheless expressed a preference for one of the two variants.[552] As can be seen, the "differentiated approach" ultimately prevailed[553] and the definition of the crime of aggression is drafted in a similar manner to the other core crimes, where there is the conduct of the principal perpetrator, in conjunction with the other forms of participation found in Article 25(3).[554]

However, to be able to adopt the "differentiated approach," the challenge for the participants was to decide upon the series of conduct verbs to describe how the principal perpetrator committed the crime of aggression:[555]

> in the case of the crime of aggression the underlying collective act is not broken down in a list of possible individual types of conducts, as is the case with the crime of genocide (killing, causing serious bodily or mental harm etc) and the crime against humanity (murder, extermination, etc); that means that it is the collective act as such that constitutes the point of reference for any definition of what the individual principal perpetrator actually does.[556]

It was argued that the term "participates" should be excluded from the definition in order to avoid the forms of participation under Article 25(3) Rome Statute.[557] Possible words that were suggested included "organize and direct", "direct" and "order" as

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[550] Princeton Report (2005), paras.20-25; Princeton Report (2006), para.84.
[551] Barriga informs that 'the conceptual challenge of the differentiated approach, however, was to find a single conduct verb for the definition that properly describes what the principal perpetrator actually does', Barriga and Kress (n 6) 21.
[552] See SWGCA Report (January) 2007, para.9.
[553] Princeton Report (2006), para.84; SWGCA Report 2007 (January), para.6: the main advantage of this approach was that the existing provisions of the Statute would be applicable to the greatest extent possible.
[554] See 'Discussion Paper Proposed by the Chairman', 16 January 2007, ICC-ASP/5/SWGCA/2; reprinted in Barriga and Kress (n 6) 101.
[555] Princeton Report (2006), para.85; see also Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 20–22.
[556] SWGCA Report 2005 (June), Appendix III, Discussion Paper I, Section III(1)(a), Discussion Paper on *the Crime of Aggression and Article 25, paragraph 3 of the Statute.*
[557] Princeton Report (2006), para.87.

alternative conduct words.[558] The discussion included whether to keep the phrase "planning, preparing, initiation and execution' which was already contained in the 2002 PrepCom Paper.

In the course of the negotiation process, some had wished to delete this phrase as the elements of this notion were contained in the forms of participation under Article 25(3) Rome Statute and thus 'the inclusion of these terms in the conduct element might blur the distinction between primary and other perpetrators.'[559]Those who wished for the phrase to be retained noted that it 'reflected the typical features of aggression as a leadership crime, and its retention in the text would highlight the criminalized conduct and thus increase the deterrent effect of the provision.'[560] It was then suggested that the terms in this phrase should be used as conduct verbs. [561]

In 2007, the Chairman of the SWGCA suggested that paragraph 3 *bis* should be added to Article 25:

> With respect to the crime of aggression, the provisions of the present article shall only apply to persons being in a position effectively to exercise control over or to direct the political or military action of a State.[562]

This ensured the leadership requirement applies to both primary and secondary perpetrators.[563] Barriga writes:

> This approach squared the circle in many ways: it allowed for retaining the Nuremberg precedent in the definition, it allowed for fully applying article 25(3) to the crime of aggression, and it brought the cumbersome search for an innovative conduct verb to an end.[564]

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[558] Princeton Report (2006), para.89.
[559] SWGCA Report (2006), para.92.
[560] SWGCA Report (2006), para.92.
[561] SWGCA Report (2006), para.92.
[562] 'Proposal for Alternative Language on Variant (a) Prepared by the Chairman for the Informal Consultations', in 2007 *Princeton Report (January),* Annex *(Appendix);* reprinted in Barriga and Kress (n 6) 104.
[563] ibid
[564]Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 21; Princeton Report (2007), para.8: The point was made that with respect to the conduct verb, the Chairman's alternative language followed the Nuremberg precedent. The proposal would thus cover all forms of conduct and would be qualified by the leadership element. The proposal would furthermore replicate the structure used for the other crimes under the Statute, which

Criticism had been raised with respect to the addition of the verbs 'planned' 'prepared' 'initiated' or 'executed' to the modes of liability covered in Art 25(3);[565] and that 'multiplication of modes of liability will create unnecessary confusion in the current structure of the Statute.'[566] However, excluding the perpetration phrase would have resulted in the lack of a direct nexus between the conduct of the individual and the state act of aggression. Also, this would have departed from the legal construct of the crime of aggression with respect to the Nuremberg Trial.

3.5.3. Mens Rea

As the Kampala Amendments do not refer to any special intent requirement,[567] it is assumed that Article 30 of the Rome Statute applies. This was mentioned in the 2009 Chairman's Non-Paper on the Elements of the Crime:

> where no reference is made in the Elements to a particular mental element for any particular material element listed, the relevant mental element set out in article 30 – intention, or knowledge, or both – applies. Usually, intention applies to a conduct or consequence element, and knowledge applies to a circumstance or consequence element.'[568]

Thus, it is useful to examine the Elements of the crime of aggression to decipher whether they are a 'conduct or consequence' element (intention) or a 'circumstance or consequence element (knowledge)'. Elements 1 and 2 describe the conduct of the individual, Elements 3 and 4 on the other hand refer to the state act element, whilst Elements 5 and 6 relate to the threshold requirement.

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would satisfy the principle that the drafting of the provisions on aggression should follow the structure of the other crimes, wherever possible.

[565] SWGCA 2006 (June), para.92.

[566] Dov Jacobs, 'The Sheep in the Box: The Definition of the Crime of Aggression at the International Criminal Court' in Christoph Burchard, Otto Triffterer and Joachim Vogel (eds), *The review conference and the future of the ICC* (Kluwer law International 2010) 142.

[567] This is in contrast with genocide, as there is a special intent requirement, i.e. dolus specialis which requires the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, Article 6 Rome Statute; see Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning and the Ultimate Crime* (Cambridge University Press 2012) 44–49.

[568] 'Non-Paper by the Chairman on the Conditions for the Exercise of Jurisdiction' in 2009 Princeton Report, annex III, para.10; reprinted in Barriga and Kress (n 6) 677.

Element 1 contains the perpetration phrase, which is a conduct element and not a circumstance or consequence element, which means that 'intention' must be present. In other words the perpetrator must have intended to plan, prepare, initiate or execute the act of aggression. Knowledge is not necessarily applicable here. [569]

Element 2 confirms that the perpetrator was in a position effectively to "control/direct" the political/military action of the State which committed the act of aggression. This is a circumstance element, which means that 'the perpetrator must have known (that is, been aware) that he or she was in a position effectively to exercise control over or to direct the political or military action of the State which committed an act of aggression.'[570]

Elements 3 and 4 refer to the act of aggression under Article 8 bis (2) and are circumstance elements which mean that knowledge is applicable. In particular, Element 4 states that:

> the perpetrator was aware of the *factual* circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations (emphasis added).

It is important to understand that 'there is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.'[571]

In the 2009 Chairman's Non-Paper on the Elements of Crimes, it is explained that the mental element of "knowledge of fact" means that 'the perpetrator is not required to have knowledge of the legal doctrine and rules used to evaluate whether a State use of force is inconsistent with the Charter of the United Nations, but is only required to have awareness of the factual circumstances establishing this inconsistency.'[572] To satisfy the "factual circumstances" element:

> it would not be sufficient merely to show that the perpetrator knew of the facts indicating that the State used armed force. It would also be necessary to show that the perpetrator knew of facts establishing the inconsistency of the use of

[569] Ibid, para.12.
[570] Ibid, para.14.
[571] Ibid, para.2.
[572] Ibid, para.6.

> force with the Charter of the United Nations. Examples of relevant facts here 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.[573]

Heller points out that the jurisprudence at the NMT differs in terms of *mens rea*, as these tribunals held that 'participating in an act of aggression was criminal only if the defendant knew that the act was illegal under international law.'[574] Although this was indeed acknowledged by the Chairman, he expressed concern that:

> a mental element requiring that the perpetrator positively knew that the State's acts were inconsistent with the Charter of the United Nations (effectively requiring knowledge of law) may have unintended consequences. For example, it may encourage a potential perpetrator to be wilfully blind as to the legality of State acts even if that advice is subsequently shown to have been incorrect. Also, mental elements requiring knowledge of the law are regularly avoided in domestic legal systems as they are often difficult to prove to the required standard.[575]

Elements 5 and 6 relate to the threshold of the "manifest' violation of the UN Charter. The introduction to the Elements of the Crime clarifies that 'the term "manifest" is an objective qualification'[576] and that 'there is no requirement to prove that the perpetrator has made a legal evaluation as to the "manifest" nature of the violation of the Charter of the United Nations.'[577]

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[573] Ibid, para.20.
[574] Heller (n 336) 379.
[575] 'Non-Paper by the Chairman on the Elements of the Crimes', in 2009 Princeton Report, annex II, para.18; reprinted in Barriga and Kress (n 6) 677.
[576] Elements of the Crime, Resolution RC/Res.6, para.3; In the Chairman Non-Paper on Elements of the Crime (2009), it is clarified that 'Paragraph 3 clarifies that the use of the term "manifest" in proposed Elements 5 and 6 is an objective qualification. In other words, the Court's determination whether the particular violation of the Charter of the United Nations is objectively a "manifest" violation is decisive, rather than whether the perpetrator considered it to be a manifest violation, at para.7, Appendix II; reprinted in Barriga and Kress, ibid 680.
[577] Elements of the Crime, Resolution RC/Res.6, at para.4.

Once again, in Element 6, there is the requirement of knowledge of "factual circumstances." This should be read in conjunction with Element 4 because 'there may be instances where an accused is aware of facts establishing that a State use of force is an act of aggression, but not aware of other facts establishing that this act of aggression constitutes, by its character, gravity and scale, a manifest violation of the Charter of the UN.'[578] In other words, the perpetrator may fulfil the mental elements of the act of aggression under Article 8 bis (2) but not the mental elements required of a "manifest" violation of the UN Charter to be liable for the crime of aggression.

It appears that the perpetration phrase is the only component of the definition of the crime of aggression where the mental element required is the intention of the perpetrator. The other components, i.e. the leadership element and state act element require the mental element of factual knowledge. To satisfy the mental elements required for a successful conviction for the crime of aggression means that the individual must first acquire factual knowledge that the intended use of force is "inconsistent with the UN Charter"; and the acts which such use of force entails will constitute a "manifest" violation of the UN Charter. Upon such knowledge, the defendant must intend to plan, prepare, initiate or execute such acts.

The threshold for the mental elements appears to be relatively low, especially in comparison with the high threshold required to satisfy the leadership element and the state act element. However, it can be logically assumed that if the perpetrator fulfils the leadership element, he/she has an inherent knowledge of being in such a position and of his/her scope of powers to exercise control over or to direct the political/military action of a State.

Having attained such a high-level governmental position, it is likely that the person will be able to acquire the necessary knowledge of the factual circumstances that the intended use of force is inconsistent with the UN Charter. However, knowledge that such intended use of force will constitute a "manifest violation" of the UN Charter may be more difficult to satisfy. Perhaps the latter will be the most difficult mental element to satisfy.

[578] 'Non-Paper by the Chairman on the Elements of Crimes', in 2009 Princeton Report, annex II, para.25; reprinted in Barriga and Kress (n 6) 684.

3.6. The legal nature of the Kampala Amendments

Article 8 *bis* (1) and Understanding 4 affirm that the definition of the crime of aggression is only for the purposes of this Statute. Thus, the definition in Article 8 *bis* (1) does not *prima facie* have customary international law status, nor is it a universally binding definition. What then is the legal nature of the Kampala Amendments? Do the Kampala Amendments confer substantive obligations to refrain from the conduct proscribed in Article 8 bis? If so, who are the duty-bearers of these obligations, and who are the rights-holders of the enjoyment of the proscribed conduct?

The legal nature of the Rome Statute should first be considered.[579] Milanovic has argued that there are two possible ways of reading the Rome Statute:

> First, like the statutes of other international criminal tribunals the Rome Statute could be seen as being purely jurisdictional in nature. Its provisions defining international crimes would be addressed to the Court itself, setting out the scope of its subject-matter jurisdiction, but they would not be addressed to individuals directly. Rather, the source of substantive norms of criminal law, which are directly addressed to individuals would be elsewhere, in customary international law.[580]

The answer is not at all straightforward, as he points out 'it is impossible to resolve this fundamental ambiguity about the legal nature of the Rome Statute by reference to the text alone or to its drafting history.'[581]

The first step is to examine the relationship between the State Party and the ICC. When a State Party ratifies the Rome Statute, it accepts the jurisdictional competence of the Court over the crimes in Article 5(1), whereby the ICC may enforce sanctions against the perpetrators of these crimes provided they are nationals or had committed the crime on the territory. The classical jurisdictional nexus of nationality or territorial

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[579] See Marko Milanovic, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' (2011) 9 Journal of International Criminal Justice 25, 26; see also Marko Milanovic, 'Aggression and Legality: Custom in Kampala' (2012) 10 Journal of International Criminal Justice 165, 171.
[580] Milanovic, 'Aggression and Legality: Custom in Kampala' (n 579) 171.
[581] ibid 172.

principle is reflected in Article 12 of the Rome Statute. Thus, the acceptance of jurisdictional competence by the ratification of the Kampala Amendments signifies the delegation of enforcement powers against a crime (nationality principle and territorial principle) from the State Party to the ICC.

Yet, enforcement powers are concomitant with the powers to prescribe. In other words, for punishment to be executed against these crimes, there must first be a legal source that confers substantive obligations on individuals to refrain from the proscribed conduct relevant to each crime. Thus, if the ICC may enforce sanctions against the crimes that it proscribes, it is only logical that the Rome Statute carries some substantive legal effect that creates obligations on individuals to refrain from the criminalized conduct.[582]

However, the Rome Statute does not place obligations on States Parties to proscribe the crimes under Article 5(1) into their domestic criminal legislation. Whether States Parties proceed to codify these crimes into their domestic legislation is dependent upon their domestic ratification process. Some States Parties do not require a separate implementation process with respect to ratification, which means that the Rome Statute acts directly as a substantive legal source, while other States Parties need to implement the core crimes (Article 5(1) Rome Statute) into their domestic legislation as part of the domestic ratification process. As such, the legal source that confers obligations on the relevant individuals is domestic legislation.

Any substantive effect with respect to obligations to refrain from proscribed conduct of the crimes appears to be predicated upon the ratification of the Rome Statute.[583] As the State Party clearly consents to the jurisdictional competence of the ICC over the crimes in Article 5(1), it is presumed that Articles 6, 7 and 8 confer obligations on individuals that have a national or territorial jurisdictional link to the State Party. Such obligations may be directly applicable; or incorporated into domestic legislation (and then applicable).

In the context of the Kampala Amendments, the same discussion applies, i.e. whether Article 8 *bis* is jurisdictional or substantive in nature. If the answer is the former, then no substantive legal obligations are conferred on any legal personality.

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[582] Milanovic, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)'(n 576) 29–30,32,38,45,51–52.

[583] Milanovic, 'Aggression and Legality: Custom in Kampala' (n 579) 175. His premise is that 'the rule on the Statute's substantive scope of application should trace the Statute's jurisdictional regime, but do so while avoiding ex post facto application', at 177.

Thus, the definition in Article 8 *bis* describes the subject matter of the crime of aggression in the Rome Statute.

The legal obligations stem from another legal source, i.e. customary international law; whilst Articles 15 *bis* and 15 *ter* create the jurisdictional regime whereby sanctions can be executed against the individual for the breach of obligations to refrain from conduct relating to the crime of aggression. Thus, if Article 8 *bis* does not confer any substantive legal obligations, there is no need to contemplate the relevant duty-bearers or rights-holders. The opposing argument is that Article 8 *bis* does create substantive obligations when a State Party has ratified the Kampala Amendments. Once again, such obligations may be directly applicable or incorporated into domestic legislation. In my view, it is only logical that the Kampala Amendments assimilate the legal nature of the Rome Statute.

Thus, it is presumed that in situations where the Court has jurisdiction over the crime of aggression, the Rome Statute confers substantive obligations on the individuals to refrain from the proscribed conduct under Article 8 *bis* (on the basis of a nationality or territorial nexus to the ratifying State Party). However, it should be noted that the jurisdictional regime of the Court over the crime of aggression is *sui generis* and different from the other crimes. This *sui generis* jurisdictional regime will be examined in more detail later in Chapter VI. At present, it will suffice to submit that the delegation of domestic competence to prosecute the crime of aggression under the nationality or territorial principle is predicated upon the ratification of the State Party to the Kampala Amendments.[584]

The next question is whether the duty-bearer of these obligations is the State Party or individuals that have a jurisdictional nexus with the State Party under the nationality or territorial principle. As the ICC has jurisdiction over natural persons (Article 25(1) Rome Statute) and serves as an enforcement mechanism against international crimes by punishing individuals by means of criminal sanctions, it is only logical that the duty-bearer of any substantive obligations in relation to the Kampala Amendments are individuals.

Yet, what about the State Party? This question is relevant because Article 8 *bis*(2) refers to state conduct. Does Article 8 *bis*(2) confer obligations on States Parties that ratify the Kampala Amendments in relation to how they conduct their use of force?

[584] ibid 175–183.

In my view, it is rather difficult to argue in the affirmative. In the light of the object and purpose of Article 8 *bis* and the overall Kampala Amendments, the definition of the "act of aggression" provides a definition for the state act element of the crime, from which the elements of individual conduct can subsequently be evaluated.

Thus, it can be inferred that the inclusion of the definition of the "act of aggression" is to clarify the state act element, and not to impose legally binding obligations on States Parties as subjects of international law with respect to recourse to force. Indeed, if Article 8 *bis*(1) and *bis*(2) had intended to impose such obligations on States Parties, it is unlikely that a consensus would have been achieved.

The next step is to delineate the underlying norms that formulate the substantive obligations upon individuals pursuant to a nationality or territorial link of the ratifying State Party. The definition under Article 8 *bis*(1) stipulates 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 conduct within the brackets, i.e. the state act element of the crime, is carried out by the alleged aggressor state and need not be discussed here. How should the substantive obligations on individuals be depicted? The leadership element, as emphasized in italics above, suggests that these obligations fall specifically on individuals who satisfy this criterion.

Thus, in the course of duties performed in official capacity with regard to this criterion, the relevant individuals have obligations to refrain from planning, preparation, initiation or execution of any political or military action of a State, which would amount to an act of aggression.

In other words, the duties, responsibilities or activities of the individual who is in a position to effectively exercise control over or direct the political/military action of a state must not encompass the planning, preparation, initiation, or execution by means of any actions which result in the state committing an act of aggression which by its character, gravity and scale constitutes a manifest violation of the UN Charter. It should be noted that there are no direct obligations on individuals to refrain from an act of aggression, as such obligations can only be conferred onto states. The duty, which falls on individuals is to comply with obligations to refrain from all of the modes of perpetration connected to the state act of aggression.

Article 8 *bis*(1) has criticised as being too vague.[585] Prior to the Review Conference, Glennon has submitted that:

> the proposed definition would constitute a crime in blank prose (…). The high level of specificity needed to impose individual criminal liability—as opposed merely to guide state conduct—has therefore proven unattainable.[586]

His premise is based on the principle of legality;[587] where he submits that 'the definition, suffering from overbreadth and vagueness, does not provide sufficient notice to potential defendants as to what conduct is permitted and what is proscribed,'[588] and is 'irretrievably vague.'[589]

Two points can be made in relation to this. First, the definition of the other crimes also provide ambit for interpretation. As such, the criticism of vagueness is not entirely unique to the crime of aggression.[590] It is the ICC that will ultimately deal with any interpretation relating to the definition of the crime of aggression. Second, the question is how much specificity is required in light of the fact that it is not the state that is prosecuted for an act of aggression, but the individual for participating in one or more of the modes of perpetration. An argument can be made that it is sufficient that individuals are aware that international criminal law confers a duty on them to comply with obligations to refrain from the planning, preparation, initiation or execution stages of an act of aggression committed by a state.

In general, the legal determination of an act of aggression is not a straightforward endeavor. The contours of the primary norms that prohibit the use of force are not entirely clear, and neither is the threshold for an act of aggression. Yet, the very existence of the crime of aggression is predicated upon the ascertainment of breach of primary norms relating to the prohibition of the use of force.

As the breach of primary norms is inherently unspecified under international law as to what constitutes a state act of aggression, the criticism that the state act element of the crime of aggression is too vague or imprecise runs deeper than Article 8 *bis* (1).

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[585] Glennon (n 467) 101–102.
[586] ibid 72.
[587] ibid 85.
[588] ibid 88.
[589] ibid 102.
[590] Milanovic, 'Aggression and Legality: Custom in Kampala' (n 579) 170.

It involves questioning the fundamental construct of the definition of the crime of aggression,[591] as the obligations on individuals to refrain from the modes of perpetration are intrinsically connected with the obligations on states to refrain from an act of aggression.

Although the legal construct of the crime of aggression may be rather complex, to question its very existence is rather unhelpful to the present analysis. As per Lord Bingham in *R v Jones*, 'the core elements of the crime of aggression have been understood, at least since 1945, with sufficient clarity to permit the lawful trial (and, on conviction, punishment) of those accused of this most serious crime. It is unhistorical to suppose that the elements of the crime were clear in 1945 but have since become in any way obscure.'[592]

Thus, the Kampala Amendments, although far from being perfect and entirely precise, are nevertheless representative of a positive step towards formulating a substantive definition of the state act element of the crime of aggression; as nicely put by Milanovic, 'while these problems are real, they are not necessarily fatal to the Kampala definition.'[593] Furthermore, in the absence of any substantive legal effects on State Parties, it can be argued that the specificity of the state act element was intended to satisfy the interests of the principle of legality, and concomitant due process rights of the defendant.[594]

3.7. The Kampala Amendments and the IMT Charter: a comparison

The legal construct of crimes against peace at Nuremberg is representative of the substantive definition of the crime under customary international law. Thus, the Kampala Amendments should be examined in the light of customary international law with respect to whether and to what extent the definition of aggression has encapsulated or departed from the substantive norms of the crime.[595]

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[591] See Glennon (n 467) 102.
[592] R v Jones, UKHL [2006], para 19.
[593] Milanovic, 'Aggression and Legality: Custom in Kampala' (n 579) 170.
[594] For a contrary view, see Glennon (n 467) 101.
[595] See Milanovic, 'Aggression and Legality: Custom in Kampala' (n 579) 171.

3.7.1. Overview

The table below shows the comparison between the crime of aggression in the Kampala Amendments and crimes against peace at Nuremberg. This enables deductions to be made as to what extent the Kampala Amendments reflects or departs from the customary international law scope of the crime of aggression.

Table 1: Comparison between Kampala Amendments and Nuremberg

	Kampala Amendments	**Nuremberg**
State act element	Act of aggression which by its character, scale and gravity constitutes a "manifest violation" of the UN Charter	**War of aggression** or war in violation of international treaties, agreements or assurances
Elements of individual conduct	• Position to effectively control or direct the political or military action of the relevant State • Planning, preparing, initiation, or execution [of an act of aggression]	Planning, preparing, initiation or waging [a war of aggression or war in violation of …]
Mental element	• **Intention** - Planning, preparing, initiation or execution. • **Knowledge** – position to effectively control or direct the political or military action of the relevant State • **Factual Knowledge** - the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner is inconsistent with the UN Charter.	• **Knowledge** of Hitler's aggressive plans – 'planning, preparing, initiation' • **Knowledge** that the nature of the war is aggressive – 'waging'[596]

[596] It is unclear as to whether this encompasses legal knowledge or factual knowledge. I have assumed that both legal and factual knowledge apply simultaneously and/or interchangeably to satisfy the requirement of "knowledge."

	• **Factual knowledge –** the act of aggression, by its character, gravity and scale, constituted a manifest violation of the UN Charter.	

3.7.2. The state act element of the crime

The question is whether an act of aggression by its character, gravity, scale, which constitutes a manifest violation of the UN Charter (Kampala Amendments) is of equal gravity to a war of aggression or a war in violation of international treaties, agreements and assurances.[597] In the previous chapter, it was submitted that a "war of aggression" for the purposes of the Nuremberg Trial (and thus customary international law) encompasses the following:

- the use of military force ("war")
- war with the objective of annexation, occupation of territory or annihilation of the intended victim state
- occupation with the objective for further purposes of aggression against other countries
- war for the purposes of gaining military advantage over other adversaries by preventing them from assisting a previously aggressed state
- war for the purposes of expansion of territory
- formal declaration of war in support of a third state's war of aggression

It is difficult to directly assess whether the threshold of "manifest violation" of the UN Charter under Article 8 *bis* (1) will encompass the acts listed above. The centralized system of collective security enshrined within the UN Charter had only been established during the time of the Trial. Prior to the formation of the UN Charter, only a normative framework existed with respect to the prohibition of the use of force. Thus, the Tribunal had to assess the acts committed by Germany under a different framework than the one applicable to the ICC. It is difficult to envisage a threshold for the Tribunal with respect to the state act element, which will amount to a "manifest violation" of the UN Charter. As such, it is difficult to assess whether the

[597] Princeton Report (2006), para.24 (note that opinions differed on what customary international law required).

12 wars committed by Germany will satisfy the threshold within Article 8 *bis*(1). Presumably Germany's war of aggression and occupation of Poland would satisfy this criterion, but not the war of aggression declared on the USA. Yet, it is difficult to be certain that the threshold under Article 8 *bis*(1) represents a narrower scope of the state act element than customary international law.[598] For example, it can be argued that the normative value of a 'war' encompasses a greater magnitude of armed force than a 'manifest violation' of the UN Charter. In this regard, the state act element under Article 8 *bis*(1) is broader. McDougall submits:

> Articles 1 and 3 of the 3314 Definition, which are replicated in Article 8 *bis* (2), capture an extremely broad range of conduct. The effect of the additional threshold in draft Article 8 *bis* (1) is not entirely clear; nevertheless it seems highly unlikely that in requiring a certain level of seriousness and evident illegality it sets the bar as high as importing a de facto requirement that a 'war' has taken place. The intention of the majority of the SWGCA was certainly for a much broader range of acts to be captured by the definition.[599]

She concludes that:

> Article 8 *bis* criminalises a significantly broader range of conduct than the customary definition of the State act element of the crime.[600]

Another point to consider is that the state act element of a "war of aggression" under customary international law must include the initiation of military force and the *animus aggressionis.* In the 1999 Proposal by Germany for the definition of the crime of aggression, the state act element of the crime was put forward as:

> an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in manifest contravention of the Charter of the United Nations with the object or

[598] Id.
[599] McDougall (n 7) 154.
[600] ibid.

> result of establishing a military occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.[601]

The 'object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof' could perhaps be seen as the *animus aggressionis*. However, most participants were against this for reasons such as 'the fact that the object extended into the *jus in bello*, whereas the crime of aggression fell within the *jus ad bellum*; the difficulties in making an exhaustive enumeration of the objects or results; the fact that articles 3 and 5 of GA Resolution 3314(XXIX) only included military occupation or annexation as examples of aggression; the Security Council did not refer to the object or result in its decisions relating to aggression.'[602] Ultimately, Article 8 *bis* (1) does not include any explicit reference to objectives of the act of aggression – or the *animus aggressionis*.

However, this does not mean that the drafters of the Kampala Amendments should be faulted for excluding the *animus aggressionis.* First of all, it is a concept of natural law, which suggests that the *animus aggressionis* is 'based on "sentiment" (impression) and not on legal constructions.[603] Such natural notions appear seemingly irreconcilable with a positive approach to the *jus ad bellum*.

Furthermore, it is worth pointing out that at the time of the events that preceded the Nuremberg Trial, the primary instrument that prohibited the use of force was the Kellogg-Briand Pact. Thus, every violation of this instrument *prima facie* gave rise to war. As such, war needed to be accompanied with the *animus aggressionis* to be regarded as a war of aggression for the purposes of individual criminal responsibility. In the light of the current *jus ad bellum*, as there is now a legal framework that prohibits the use of force, it is possible to establish the state act element of the crime on objective considerations.

That said, the IMT Charter had not included an explicit reference to the *animus aggressionis*, and yet the Tribunal considered the *animus aggressionis* when determining the state act element of the crime. Thus, it is possible that judges at the

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[601] 'Proposal Submitted by Germany: Definition of the Crime of Aggression', 30 July 1999, UN Doc. PCNICC/1999/DP.13; reprinted in Barriga and Kress (n 6) 340.
[602] Princeton Report (2006), para. 26.
[603] Yearbook of the International Law Commission 1951, Vol II, Second report by Mr. J. Spiropoulos, Special Rapporteur (A/CN.4/44), at para.151.

ICC may nevertheless consider the *animus aggressionis,* particularly if they adopt a non-positive interpretation to *jus ad bellum.*

Overall, the Kampala Amendments appear to have a more specific definition of the state act element of the crime of aggression than the IMT Charter. By reason of the two-tier process involved in determining the state act element of the crime under Article 8 *bis,* it is only logical that a narrow scope of acts committed by the aggressor state may satisfy the requirements of the overall test. The inference is that a narrower scope of situations of aggression may be prosecuted at the ICC than at the IMT, or domestic courts. Thus, in my view, the threshold for the state act element of the crime of aggression is narrower in the Kampala Amendments than customary international law.

3.7.3. Elements of individual conduct

The first difference is that the definition of crimes against peace in the IMT Charter does not have any explicit reference to a leadership element, whilst the definition in the Kampala Amendments has a specific leadership element. The IMT did not work with any set scope of perpetrators, but assessed the relationship between the defendant and Hitler to ascertain whether this was professional or personal, followed by the official position and role in the government or military. At the NMT, despite inconsistencies between the Tribunals, the prevailing opinion appeared to be that the perpetrator must be able to "shape or influence" policy.[604]

Therefore, the Kampala Amendments appear to have put forward a narrower definition ("control or direct"), which has become one of substantive components within the definition of the crime. As a result, the scope of perpetrators that can be prosecuted at the ICC is presumably narrower than that at the IMT and NMT. The perpetration phrase is nearly verbatim with the exception of the use of the term 'execution' in lieu of 'waging' in the Kampala Amendments; it can be presumed that this does not have any substantive implications. That said, it should be noted that the modes of perpetration in Article 8 *bis* (1) are connected to the leadership element in the definition, i.e. that the perpetrator can only participate in the conduct within the perpetration phrase if he/she is in a position to effectively direct or control the military/political action of the relevant State.

[604] Princeton Report (2007), para.12.

There also appear to be more detailed requirements for the mental elements in the Kampala Amendments than was required at Nuremberg. The former is consistent with the Rome Statute which contains a specific provision for mental elements (Article 30) and a set of Elements of the Crime. It is established that the required knowledge can be factual knowledge and does not necessarily have to be legal knowledge.

At the IMT, it was not clear as to whether the knowledge required at Nuremberg was predicated upon a legal or a factual basis. It is inferred that both are applicable, either interchangeably or simultaneously, i.e. a defendant may have both factual and legal knowledge. It is worth pointing out that the pre WWII framework pertaining to the use of force as applied by the IMT was much simpler than the *ius ad bellum* of the present UN era, which made the requirement of such legal knowledge easier to acquire than it would today.

3.8. Conclusion

This Chapter, which has focused on the substantive definition of the crime of aggression, should not be read in isolation from Chapter VI, which focuses on the conditions for the exercise of jurisdiction of the ICC over the crime of aggression. The reason why the substantive definition of the crime in the Kampala Amendments was examined prior to, and in isolation from the jurisdictional regime of the ICC over the crime of aggression, is because the former is relevant to the study of the legal definition of the crime, which falls into this Part of the dissertation (Part I: Background), while the latter is relevant to understanding when a situation of aggression may be prosecuted as a crime of aggression (Part III: Enforcement).

This Chapter has studied the substantive constituents of the definition of the crime of aggression in the Kampala Amendments. There appears to be two tiers for an alleged situation of aggression to satisfy the definition of the crime of aggression. First, it must be satisfied under Article 8 *bis*(2) that a state has used armed force against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Upon being satisfied that Article 8 *bis*(2) has been met, the next step is to determine that this act of aggression is by its 'character, gravity and scale', a 'manifest violation of the Charter of the United Nations' pursuant to Article 8 *bis*(1). Once the state act element of the crime is established under Article 8 *bis*(1), the defendant will be assessed

whether he/she is in a position to exercise control over or direct the political or military action of the State (and must be aware that he/she is in such a position) and had planned, prepared, initiated or executed the act of aggression.

This Chapter has analysed how the legal definition of the crime of aggression has developed since the Nuremberg Trial. The definition and scope of the crime in the Kampala Amendments appear to be different from the Nuremberg definition in some respects, namely that the latter is significantly more detailed and specific with regard to the state act element and gives rise to a narrower scope of perpetrators that may be potentially prosecuted as a result of the leadership element. This can be used to infer that the Kampala Amendments do not appear to reflect customary international law. That said, the Kampala Amendments do not depart entirely from customary international law either, and may eventually attain customary international law status.

Part II. Understanding the Crime of Aggression

Chapter IV. The relationship between the aggressor state and the perpetrator of the crime of aggression

4.1. Introduction

The crime of aggression is unique because it encompasses an act of aggression as a substantive part of its legal definition. Not only is an act of aggression an essential component of the definition, but it is also the very premise upon which this crime is predicated. This is indicative of a relationship between the aggressor state and the perpetrator of the crime of aggression in the sense that responsibility under international law for the latter can only be found in the light of the former. Therefore, the norms that prohibit aggression and the norms that criminalise aggression are intrinsically linked on both primary and secondary levels.

Yet, what does this really mean? How does a situation of aggression give rise to a crime of aggression? How does the responsibility of the aggressor state give rise to individual criminal responsibility for the perpetrator of the crime of aggression?
To shed light on these questions, this chapter will examine the definition of the crime of aggression under international law to delineate between the norms that prohibit aggression and the norms that criminalise aggression (section 4.2).

By identifying the points of distinctions between the norms that prohibit aggression and the norms that criminalise aggression, it becomes possible to understand how these norms interplay on the primary level (section 4.2.1). To correctly identify the point of intersection between the norms that prohibit aggression and the norms that criminalise aggression will show how the obligations on states to refrain from an act of aggression interplay with the obligations on individuals to refrain from conduct which relates to the act of aggression (section 4.2.2). By understanding the framework of primary norms that prohibit aggression and the norms that criminalise aggression, it is then possible to understand the relationship between state responsibility and individual criminal responsibility with respect to the crime of aggression; in particular, the apparent paradox whereby former is a *sine qua non* for the latter (section 4.3).

The point of clarifying the applicable legal framework on both primary and secondary levels is directly relevant to the objective of this dissertation to determine

how responsibility is attributed under international law to the aggressor state and the perpetrator of the crime with respect to the crime of aggression.

States are not tangible entities and are unable to conduct themselves in the form of physical beings.[605] Thus, individuals who form part of the state organ essentially perform the acts, which are then construed as an act committed by a state.[606] Aggression, although committed by the aggressor state against the aggressed state, is an act that was technically orchestrated by individual(s) who form part of the state organ. As these individual(s) had acted in the official capacity of the state, the act of aggression is committed by the aggressor state. As such, aggression is seen as a collective act that is committed by the entity of the state as a whole, and is attributed to the state.

However, as examined in Chapters II and III, aggression has become criminalized under international law and individuals can now be held criminally responsible for the crime of aggression. As the use of force by the aggressed state is technically the result of the actions of individual(s), this raises the question of how this conduct should be attributed to individuals. There is also the question of how the conduct is also attributable to the aggressor state, as there are now two actors that can be held responsible under international law. Hence, it is important to examine the legal construct of the crime of aggression to understand how the norms that prohibit aggression and the norms that criminalise aggression come into play on both the primary and secondary levels (section 4.3.1).

In addition to examining the intersection between state responsibility and individual criminal responsibility with respect to the crime of aggression, this Chapter will also examine three other issues that arise. First, the *animus aggressionis,* which represents the aggressive intent behind the act of aggression, will be examined (section 4.3.2). More specifically, whether the *animus aggressionis* can be attributed to the aggressor state or to the individuals who planned, prepared, initiated or waged, the state act of aggression. This has implications with respect to the mental element of the crime of aggression. Second, the defendant may plead rather unconventional defences under international criminal law, which is due to the relationship between state responsibility and individual criminal responsibility, namely that the act of aggression was committed either in self-defence or under a circumstances precluding

[605] Kelsen, *Principles of International Law* (n 24) 182.
[606] ibid 194.

wrongfulness (section 4.3.3). An interesting issue that will be examined is whether prosecution of the crime of aggression can be considered as satisfaction for the aggressed state (section 4.3.4).

4.2. The legal definition of the crime of aggression

Under Article 6(a) of the IMT Charter, crimes against peace is the:

> planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances.

Article 8 bis (1) Kampala Amendments has defined the crime of aggression as:

> 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.

From studying both definitions, it can be deduced that the legal definition of the crime of aggression consists of three separate components: i) the state act element of the crime; ii) the material element of the crime (*actus reus*); iii) the mental element of the crime (*mens rea*). The state act element of the crime refers to the act of aggression committed by the aggressor state, whilst the *actus reus* and the *mens rea* are elements of the crime pertaining to the conduct of the alleged perpetrator. It is important to note that the legal construct of the crime encompasses conduct from two different legal personalities: the aggressor state and an individual.

The state act element is the "war of aggression" or "an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." Broadly understood, it refers to the wrongful recourse to force committed by the aggressor state. The key point is that it is an act committed by a state. Therefore, this is a separate element from the material element of the crime, which is committed by an individual.

However, as the act of aggression is the actual physical manifestation of the crime of aggression, it is easy to presume that it is the material element, i.e. the *actus*

reus of the crime. This can be further supported by the fact that it is necessary to determine an act of aggression prior to assessing the conduct of the individual. From this premise, the criminality of conduct of the individual is assessed in accordance with the alleged participation in carrying out the material element of the crime. This interpretation suggests that the actual aggression itself is the material element of the crime, and the perpetrator is guilty if it is found that he/she participated in the planning, preparation, initiation or waging/execution of the material element of the crime. The state act of aggression is the material element of the crime, and criminality of the conduct of the individual is subsequently assessed in relation to his/her participation in the material element of the crime. Thus, the material element of the crime comprises of:

- planning an act of aggression
- preparation of an act of aggression
- initiation of an act of aggression
- waging/execution of an act of aggression

The act of aggression becomes attributable to the individual by virtue of his/her participation in one of the modes of perpetration. *Prima facie*, this is consistent with the underlying rationale of international criminal law, which confers individual criminal responsibility for acts committed in sovereign capacity of the state. However, my view is that this interpretation is incorrect. An act of aggression, which is the violation of norms under *jus ad bellum* can only be committed by a state. Unlike other international crimes, such as genocide, whereby the conduct may be attributable to individuals, an act of aggression can only be attributed to a state, as individuals are not duty-bearers to respect the norms that prohibit the use of force.

To argue that the act of aggression is the material element of the crime is problematic for two reasons. First, it attributes responsibility under secondary norms to a legal personality who has not acted in breach of relevant primary norms. It is the aggressor state, not an individual, which has acted in breach of international law. Second, by labeling an act of state as the material element of a crime suggests that the crime of aggression is a state crime, as opposed to a crime committed by an individual. This is contrary to the rules of state responsibility and individual criminal

responsibility, as the former excludes the concept of state crimes,[607] and the latter attributes responsibility directly on individuals. The act of aggression can therefore, only be attributed to the aggressor state and must remain as a separate component of the crime from the elements pertaining to the conduct of the individual.

In my view, the material elements of the crime refer to:

- planning
- preparation
- initiation
- waging/execution

This must be read in conjunction with the state act element of the crime:

- planning [an act of aggression]
- preparation [an act of aggression]
- initiation [an act of aggression]
- waging/execution [an act of aggression]

The correct reading therefore, is that the state act element must first be satisfied, i.e. that the state has committed an act of aggression, and then it can be determined whether the individual had participated in the planning, preparation, initiation or waging of the act of aggression committed by the aggressor state. As discussed in Chapter II, this was the approach of the Nuremberg Tribunal, and as will be discussed in Chapter VI, the intended approach of the Review Conference as seen in Article 15 *bis* and 15 *ter* of the Kampala Amendments.

As the material elements of a crime refer to the conduct of the individual, and not the conduct of a state, it is only logical that a distinction must be made between the four modes of perpetration and the act of aggression. The former is considered as the material elements of the crime, which is to be attributed to the individual and the latter is the state act element, which can only be attributable to the aggressor state.

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[607] See Giorgio Gaja, 'Should All References to International Crimes Disappear from the ILC Draft Articles on State Responsibility?' (1999) 10 European Journal of International Law 365; Rosenne Shabtai, 'State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility' (1997) 30 New York University Journal of International Law and Politics 145; James Crawford, 'Revising the Draft Articles on State Responsibility' (1999) 10 European Journal of International Law 435; Georges Abi-Saab, 'The Uses of Article 19' (1999) 10 European Journal of International Law 339; Andrea Gattini, 'Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility' (1999) 10 European Journal of International Law 397; Alain Pellet, 'Can a State Commit a Crime? Definitely, Yes!' (1999) 10 European Journal of International Law 425.

Therefore, individual criminal responsibility is predicated on the state responsibility of the aggressor state. This had been expressed in the Commentaries on the Draft Code of Crimes against the Peace and Security of Mankind 1996 ("Commentaries on the Draft Code of Crimes"):

> [T]he responsibility of an individual for participation in this crime is established by his participation in a sufficiently serious violation of the prohibition of certain conduct by States contained in Article 2, paragraph 4, of the Charter of the United Nations. The aggression attributed to a State is a *sine qua non* for the responsibility of an individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State.[608]

The responsibilities described in this statement refer to the secondary norms that arise as a result of breach of primary norms. The overlap between these secondary norms is the result of the legal construct within the definition of the crime. There can be no crime by an individual if there is no act of aggression committed by the aggressor state. This sets the crime of aggression apart from the other crimes, as the underlying purpose of international criminal law is to impute accountability and responsibility on individuals for acts that may otherwise be attributed to the state; and yet, the legal construct of aggression upholds a relationship between the aggressor state and the perpetrator of the crime.

The next component is the mental element of the crime of aggression. It is important to note that this refers to the *mens rea* of the defendant, and not the mental element of the aggressor state. If the material element of the crime consists of four modes of perpetration, the *mens rea* of the defendant must therefore be directly relevant to the intention of the defendant to participate in one of these modes of perpetration, e.g. the defendant had intended to participate in the planning an act of aggression.

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[608] Commentaries on the Draft Code of Crimes, para.14.

4.3. An act of aggression and a crime of aggression: the norms that prohibit aggression and the norms that criminalise aggression

An act of aggression and a crime of aggression can be understood as two different wrongful actions under international law, committed by two different legal personalities. The former can only be committed by a state, while only individual(s) may commit the latter. Yet, as submitted above, the latter can only be founded upon establishment of the former; and individual criminal responsibility can only be predicated upon state responsibility. To understand why this is so, the norms that prohibit aggression and the norms that criminalise aggression should be examined.

First, it is important to identify the points of distinction between the act of aggression and the crime of aggression (section 4.2.). The next step is to identify the point of intersection between the norms that prohibit aggression and the norms that criminalise aggression (section 4.2.2). By identifying this intersection, it brings to light how these norms are connected on the primary level, and form the legal definition of the crime of aggression. By understanding how these norms interplay on the primary level, it then becomes possible to understand how the norms on the secondary level should be interpreted with respect to individual criminal responsibility for the crime of aggression.

4.3.1 Points of distinction

There are two legal frameworks that apply to the phenomenon of aggression: *jus ad bellum* and international criminal law. These two legal frameworks apply on distinct and separate levels, and govern the conduct of different subjects of international law. *Jus ad bellum* only applies to states, whilst international criminal law applies directly upon individuals. The existence of these two distinct legal frameworks is why and how international law confers different obligations on states and individuals to refrain from the act of aggression and crime of aggression respectively. Caution must be warned against presuming that the rule of international law that prohibits the act of aggression automatically gives rise to individual criminal responsibility. For example, the ILC wrote in the Commentaries on the Draft Code of Crimes:

> the violation by a State of the rule of international law prohibiting aggression gives rise to the criminal responsibility of the individuals who played a decisive role in planning, preparing, initiating or waging aggression.[609]

The latter sentence appears to be rather broad-brush as it suggests that the criminal responsibility of the individuals who played a decisive role in planning, preparing, initiating or waging aggression is predicated upon the violation of the rule of international law prohibiting inter-state aggression. It can be inferred that the same rule of international law gives rise to both forms of responsibility.

There are in fact two rules, which are applicable in the present context: the rule of *jus ad bellum* that prohibits inter-state aggression, and rules under international criminal law that give rise to the criminal responsibility of the individuals who played a decisive role in planning, preparing, initiating or waging, of aggression committed by the aggressor state. The rule of *jus ad bellum* prohibiting aggression does not automatically give rise to individual criminal responsibility. These two separate rules demonstrate that international law provides norms prohibiting the use of force on the inter-state level, and norms that place obligations on individuals to refrain from prohibited conduct amounting to the crime of aggression. In other words, there can only be a crime of aggression if there is an act of aggression, and not the other way round.

A situation of aggression violates the norms contained within both of these frameworks under international law. This is why a situation of aggression can be attributable to both the state and the individual as an act of aggression and a crime of aggression. Both have failed to perform their duties to comply with their respective obligations under international law.

Three inter-related points of distinction can be seen: i) there are two different acts under international law: an act of aggression; and crime of aggression; ii) there are two different subjects of international law: the state; and the individual; iii) there are two different frameworks of international law that interplay in the prohibition of a situation of aggression: *jus ad bellum* (act of aggression); and international criminal law (crime of aggression).

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[609] Commentaries on the Draft Code of Crimes, 43.

4.3.2. The point of intersection

The point of intersection between the crime of aggression and act of aggression refers to the point where the norms that prohibit the act of aggression interconnect with the norms that criminalise aggression. In other words, it is the point where the obligations to refrain from an act of aggression conferred onto a state are interconnected with the obligations conferred on individuals to refrain from one of the relevant modes of perpetration. Thus, by identifying the point of intersection, it becomes clear how the norms that prohibit aggression and the norms criminalise aggression are connected on the primary level. In my view, the point of intersection between the aggressor state and the individual is that the act of aggression was facilitated *by* the conduct of the individual in his/her participation in one of the modes of perpetration, as part of his/her official capacity as part of the organ of a state. But for the individual, the aggressor state would not have committed an act of aggression. However, if the aggressor state has not committed an act of aggression, the individual could not have participated in one of the modes of perpetration intended to facilitate aggression. Indeed, this intersection reaffirms that the crime of aggression and the act of aggression are clearly intrinsically linked.[610]

i. Obligations to refrain from the act of aggression

States are not tangible beings, which essentially means that obligations to refrain from inter-state aggression really fall upon individuals who are 'indirectly and collectively, in their capacity as organs or members of the state, subjects of the obligations, responsibilities and rights presented as obligations, responsibilities and rights of the state.'[611] The selection of these individuals is not governed by international law, but instead by the national law of the state. Hence, any conduct committed by these individuals in their capacity as organs of the state will be imputed

[610] Commentaries on the Draft Code of Crimes, 43; see Constantine Antonopoulos, 'Whatever Happened to Crimes against Peace?' (2001) 6 Journal of Conflict and Security Law 33, 36.
[611] Kelsen, *Principles of International Law* (n 24) 194–195; see Commentaries on ARSIWA, where it is written that the reference to a "State organ' covers all the individual or collective entities which make up the organization of the State and act on its behalf, at 40.

to the state. The breach of any of such obligations by individuals in their capacity as organs of the state will be considered as conduct, or acts of the state.[612]

Therefore, although international law confers obligations upon states, these obligations are really imposed upon individuals in their capacity as organs of the state, and not in their individual capacities as natural persons.[613] An act committed by individuals in the official capacity as a state organ implies that such acts were committed in a collective capacity, and not an individual one. This is why the breach of obligations conferred onto states as legal subjects gives rise to collective responsibility, in the sense that the state as a whole, is responsible.

In the context of an act of aggression, obligations are conferred onto individuals who act in the official capacity of a state, to refrain from making any political or military decisions, which will lead the state to act in violation of the prohibition of the use of force under Article 2(4) of the UN Charter. The nature and scope of the obligations placed on states to refrain from aggression against other states under *jus ad bellum* was examined in detail in Chapter I and need not be repeated here.

The point is that obligations conferred onto states to refrain from an act of aggression are technically conferred on individuals who act in official capacity of the state. By virtue of their role as part of the state organ, the acts performed by individuals that are committed in official capacity are attributed to the state. An argument can be made that the underlying rationale of international criminal law is that individuals who perform tasks in their official capacities of the state, may no longer hide behind the shield of the state if these acts result in international crimes.[614] Therefore, the individuals who were responsible in their state capacity for facilitating the act of aggression should also be made personally responsible.

There is, however, one issue that arises. This is that individuals are not the duty-bearers of the obligations to refrain from an act of aggression. As argued in Chapter I, the prohibition of the use of force, and Article 2(4) does to not apply to individuals. Therefore, this is different from other international crimes such as genocide, crimes against humanity and war crimes, where individuals are the duty-bearers of the

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[612] In the Commentaries on ARSIWA, it is written that 'the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State', 38; Nollkaemper (n 438) 616; See Sayapin (n 12) 103.

[613] Article 4, ARSIWA 2001; Kelsen, *Principles of International Law* (n 24) 196.

[614] 'Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences' (n 4) 221.

obligations to refrain from the proscribed conduct. To attribute the act of aggression *directly* to the individual results in imputing norms of secondary responsibility for conduct, which he/she has not acted in breach of.

The point of intersection, thus, refers to conduct which can be attributable to individuals in relation to their facilitation of the act of aggression in their official position as part of a state organ. This is specific conduct, which is identifiable as part of the duties of the individual in his/her role as part of the state organ. It is this conduct that international criminal law places obligations on individuals to refrain from. This means that in the course of their official duties, individuals must refrain from such conduct in relation to the military and political policies and/or actions of the state they serve. If an individual has acted in breach of obligations to refrain from this conduct, causing the state to commit an act of aggression, a crime of aggression can be found. As submitted above, the breach of this conduct is the material element of the crime, whilst the act of aggression committed by the aggressor state is the state act element of the crime.

ii. Obligations to refrain from the crime of aggression

The planning, preparation, initiation or waging/execution of aggression can only be carried out in connection with the state committing aggression. These four modes of perpetration cannot exist independently without the state act of aggression. The point of intersection is that the act of aggression was facilitated by the conduct of the perpetrator through one of these modes of perpetration. Therefore, the obligations to refrain from "planning, preparation, initiation and waging/execution" can only take effect in parallel with the obligations on the state to refrain from the act of aggression. When the state has breached its obligations to refrain from the act of aggression, the responsible individual has also breached obligations to refrain from planning, preparing, initiating or waging, the act of aggression by the state. These modes of perpetration serve to determine the conduct of an individual in relation to the aggressor state committing aggression.

iii. The question of the leadership element

It is generally accepted that the crime of aggression is a leadership crime, as only someone who has attained such capacity within a state can realistically "plan, prepare,

initiate or wage/execute" the state act of aggression.[615] Indeed, as mentioned above, the material elements of planning, preparation, initiation and execution refer to specific conduct, which can be identified as the duties of an individual in his/her role as part of the state organ. The question is whether customary international law places obligations on all individuals to refrain from the crime of aggression, or only upon those individuals who fall within the leadership element.

Although the definition in the Kampala Amendments explicitly provides that the perpetrator must be in a position to "control or direct" the political or military action of a State, as discussed in Chapter III, this is not necessarily reflective of customary international law as the standard for the leadership element is considerably narrower than applied by the IMT or NMT (to "shape or influence" the policy of a State).
Thus, the leadership element in the Kampala Amendments need not be considered here.

As examined in Chapter II, neither the IMT nor NMT convicted a defendant for crimes against peace on the pure basis of their official position(s). It should be further recalled that neither Statute contained any explicit references to a leadership element.
The IMT did not have a pre-determined scope of perpetrators, but instead examined whether the defendant had a professional or personal relationship with Hitler to determine whether he was in a realistic position to participate in one of the modes of perpetration. The NMT did not make any decisions based on the official position of the individual, but instead contemplated his ability to shape or influence policy in each circumstance giving rise to Germany's aggression.

It can be inferred that the tribunals used the leadership element to determine whether the individual could have "planned, prepared, initiated or waged" a war of aggression for the purposes of limiting the culpability of the German population for the crime. As cannot be disputed, a war of aggression is a collective act committed by the state. The leadership element therefore limits the culpability by directing the responsibility onto the individuals who are in position to "plan, prepare, initiate or wage" a war of aggression as opposed to the population as a whole. Such individuals would realistically be in Hitler's "inner-circle" or in a position to "shape or influence" the policy of a state. Thus, the process of applying the leadership element was not to determine whether customary international law had placed obligations on the

[615] Sayapin (n 12) 222.

individual to refrain from the crime of aggression, but rather to make a realistic culpable link between the individual, the modes of perpetration, and the act of state.

As touched upon in Chapter II, it is difficult to argue that the crime of aggression existed under customary international law at the time of the IMT and NMT trials, thus the process of applying the leadership element should not be interpreted as determining whether customary international law had placed an obligation on the individual to refrain from the crime of aggression. Instead, the leadership element was contemplated in order to make a realistic culpable link between the individual, the modes of perpetration, and the act of state.

Therefore, it is submitted that the leadership element should not be interpreted to mean that only individuals who fall within this scope of perpetrators have the duty to perform obligations under customary international law to refrain from the crime of aggression. Customary international law imposes obligations on *all* individuals to refrain from planning, preparing, initiating and waging [a war of aggression]. How the leadership element comes into play, is that the Court uses a threshold to assess whether the perpetrator could realistically be culpable for the crime of aggression.

It can be further recalled that the NMT did not entirely rule out that private economic actors, i.e. industrialists may be criminally responsible for crimes against peace. Thus, an argument can be made that private economic actors are not excluded from criminal responsibility for the crime of aggression under present customary international law.[616] This reinforces the submission that customary international law applies obligations on *all* individuals to refrain from the crime of aggression, as private economic actors and non-state actors[617] consist of individuals.

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[616] See Florian Jessberger, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial' [2010] Journal of International Criminal Justice 783.

[617] It is worth noting that in contemporary warfare, there may be situations where non-state actors may commit aggression against states, perhaps in a nature which falls outside of Article 3(g) GA Resolution 3314(XXIX) 1974. As the present legal definition of the crime of aggression under international law is state-centric, it is likely that an act of aggression committed by a non-state actor (which may not be attributed to a state) would not satisfy the state act element of the crime of aggression under customary international law or the Kampala Amendments. The implications are that such acts of aggression committed by non-state actors may not be qualified as crime(s) of aggression. At present, only aggression committed by a state can give rise to criminally responsibility for the individual. The question of aggression committed by non-state actors, although an interesting one, exceeds the scope of this dissertation.

This is why an interpretation that customary international law imposes obligations on *all* individuals to refrain from the crime of aggression is preferable.[618] More importantly, this is consistent with the doctrine of individual criminal responsibility: customary international law imposes obligations on *all* individuals to refrain from the crime of aggression, irrespective of his/her official position in the government/military of the state. The latter, governed by domestic law, is ultimately irrelevant, as obligations apply directly on the individual; the breach of which entails criminal punishment.

4.4. The norms that apply on the secondary level

A situation of aggression breaches norms contained within two frameworks of international law: the aggressor state has breached the rules of international law prohibiting unlawful recourse to force[619] and the individual(s) responsible has breached obligations under international law to refrain from causing a state to act in the prohibited manner. This is why aggression can be attributable to both the state and the individual pursuant to the secondary norms of responsibility, i.e. there is dual attribution.[620]

As two different actors have acted contrary to the obligations placed on them by international law, each set of secondary norms must apply, and should not be interpreted to cancel each other out. In other words, state responsibility for aggression does not mean that the individual is no longer responsible for the crime of aggression and need not be prosecuted. Likewise, the finding of individual criminal responsibility of the perpetrator for the crime of aggression does not mean that the aggressor state is precluded from the traditional consequences under the secondary rules of state responsibility.[621] In addition to prosecution of the crime of aggression, the aggressed state may bring the matter to an international forum or other traditional form of dispute settlement for the purposes of invoking legal consequences pursuant to responsibility of the aggressor state.

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[618] See Antonio Cassese, 'On Some Problematic Aspects of the Crime of Aggression' (2007) 20 Leiden Journal of International Law 841, 846; Sayapin (n 12) 224–225.
[619] Article 1, ARSIWA (2001).
[620] Wilmshurst (n 433) 93; Beatrice I Bonafé, *The Relationship Between State and Individual Responsibility for International Crimes* (Martnius Nijfhoff 2009) 44; Nollkaemper (n 438) 617.
[621] Article 58, ARSIWA 2001; Article 4, Draft Code of Crimes; Bonafé (n 620) 44, see also 115 and 190.

The purposes and objectives of state responsibility have evolved throughout history,[622] an examination of which exceeds the compass of this dissertation. At present, it is generally accepted that the secondary rules of state responsibility are considered to be *inter alia* restorative and/or reparative in nature, whilst also serving a legality function of ensuring that the wrongdoing party complies with international obligations.[623] More importantly, it is generally accepted that this set of secondary rules is not meant to be punitive in nature.[624] This can be seen in Article 34 of the Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA"), as the damages are essentially non-punitive in nature: restitution, compensation and satisfaction.

The immediate difference appears *prima facie* that state responsibility does not encompass a punitive element, whilst the fundamental objective of individual criminal responsibility is centered upon punishing individuals for committing international crimes.[625] The general idea is that the aggressor state cannot be punished under international law for the act of aggression,[626] but on the other hand, the perpetrator of the crime of aggression can be punished in the form of criminal sanctions.

4.4.1. The crime of aggression: the intersection between state responsibility and individual criminal responsibility

The relationship between state responsibility and individual criminal responsibility in the context of the crime of aggression is especially interesting

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[622] See James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 3–42.

[623] For an examination into how reference to crimes of state was ultimately omitted, see Crawford, ibid 390–394.

[624] In the Commentary on the ARSIWA, it was written that it was initially thought that the breach of peremptory norms of international law could be reflected in a category of "international crimes of State" which were in contrast with all other caes of internationally wrongful acts ("international delicts"), and that there had been 'no development of penal consequences for States of breaches of these fundamental norms,' at 111. In earlier drafts of the ARSIWA, Article 19(2) read 'an internationally wrongful act which results from the breach by a State of an obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.' The concept of state crimes and Article 19 was eventually dropped from the present Draft Articles. The present articles thus do not recognize the existence of any distinction between State "crimes" and "delicts"', at 111.

[625] Nollkaemper (n 438) 636; Bonafé (n 620) 224–225.

[626] It was held by the Appeals Chamber of the ICTY that 'under present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems', *Prosecutor v. Blaskic*, International Tribunal for the Former Yugoslavia, Case IT-95-14-AR 108 bis, ILR, vol.110, 688 at 698.

because the former can exist independently from the latter, whilst the latter is entirely predicated upon the former. [627] On the primary level, as discussed above, the norms that prohibit an act of aggression that run in parallel with the norms that prohibit the planning, preparation, initiation and waging thereof, are the norms that prohibit the use of force pursuant to Article 2(4). Thus, the violation of norms that prohibit aggression simultaneously give rise to a breach of the norms that prohibit the planning, preparation, initiation and waging thereof. As there is a simultaneous breach of the parallel norms that prohibit aggression and the norms that criminalise aggression, this can be understood as the intersection between state responsibility and individual criminal responsibility with respect to the crime of aggression. In this regard, it appears that this intersection is largely a matter for determining that there has been a breach of primary obligations, and not necessarily for the purposes of ascertaining the legal consequences under the secondary rules of responsibility.

To clarify, the intersection where state responsibility for an act of aggression gives rise to individual criminal responsibility for the crime of aggression is representative of a breach of the norms that prohibit aggression and the norms that criminalise aggression by the aggressor state and the perpetrator of the crime of aggression. Therefore, the determination of the act of aggression in the present context is not for the purposes of invoking legal consequences against the aggressor state, but to ascertain that the defendant had acted in breach of primary norms to refrain from the proscribed conduct. The establishment of responsibility of the aggressor state is necessary to indicate that the individual has acted in breach of the parallel set of obligations to refrain from the modes of perpetration.

4.4.2. The animus aggressionis: the individual or the state?

The *animus aggressionis* can be understood as the natural concept that encompasses the aggressive intent. The question is how this should be qualified: is this the mental element of the aggressor state or the individual? [628] Although the question of fault in state responsibility falls outside the scope of this dissertation,[629] the general position appears to be that fault is not necessary to establish the

[627] Commentaries on the Draft Code of Crimes, 43; See Antonopoulos (n 610) 36; Bonafé (n 620) 108.
[628] Bonafé (n 620) 138; Nollkaemper (n 438) 633–634.
[629] See Crawford (n 622) 38, 49, 60–61; Bonafé (n 620) 120; Gattini (n 607).

responsibility of states.[630] Indeed, the ARSIWA do not make any explicit reference to fault.[631] The criteria for establishing state responsibility appears to be objective, as 'once the breach of an obligation owed under a primary rule of international law is established, this is *prima facie* sufficient to engage the secondary consequences of responsibility.'[632]

In reality, the act of aggression was conducted by an individual(s) acting on behalf of the aggressor state in his/her official capacity within an organ of the state.[633] The idea or intention for the state to act in aggression thus originates from an individual as a natural person, and not the state as a tangible entity. However, the question is whether the aggressive psychological element should be attributed to the aggressor state as part of the state act of aggression, or to the individual as *mens rea* for the crime. Sayapin has identified the *animus aggressionis* as the mental element of the crime of aggression, which 'emerges before any objective action is embarked upon and accompanies the entirety of developments related to the commission of the crime.'[634] He submits:

> the formation of an *animus aggressionis* in the minds of a group of individual civilian and/or military leaders of a State is the very first step in the process of planning the crime of aggression. The *animus aggressionis* is in place at the moment when one leader first thinks of using force against another State, without that this planned use of force is manifestly consistent with the Purposes of the United Nations.[635]

To argue that the absence of an *animus aggressionis* in the minds of individuals involved in the planning of the use of military force would render the intended use of

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[630] Crawford (n 622) 60–61.
[631] See Ibid 60.
[632] ibid 61; see Commentary on ARSIWA, at 36; Nollkaemper (n 438) 633.
[633] Sayapin writes that 'the *animus aggressionis* emerges before any objective action is embarked upon and accompanies the entirety of developments related to the commission of the crime. In effect, the formation of an *animus aggressionis* in the minds of a group of individual civilian and/or military leaders of a state is the very first step in the process of planning the crime of aggression. The *animus aggressionis* is in place at the moment when one such leader first thinks of using force against another state, without that this planned use of force is manifestly consistent with the Purposes of the United Nations', Sayapin (n 12) 228.
[634] ibid.
[635] ibid.

force manifestly consistent with the purposes of the United Nations is rather simplistic. The legality of the use of force in the light of whether it is consistent with the purposes of the UN is not dependent upon the intention or the purpose with which the use of force was carried out, but instead whether the force is within the confines of permissible use of force under the legal framework of *jus ad bellum.*[636]Yet, Sayapin is not incorrect in stating that the formation of an *animus aggressionis* is in the minds of a group of individuals, as states are abstract entitites and are unable to formulate thoughts and intentions in a mental capacity. However, the question is whether it is correct to attribute the *animus aggressionis* to individuals or if it should be attributed to states.

As examined in Chapter II, under customary international law, the state act element of the crime, a "war of aggression" comprises of: i) the initiation of armed force by the aggressor state; and the ii) the *animus aggressionis.* The latter is a substantive part of the state act element of the crime. In my view, this provides sufficient legal basis to argue that it is the state policy *ipso facto* that encompasses the underlying *animus aggressionis.* Hence, the *animus aggressionis* should be considered as the aggressive intention of the state, and not the individual.

It should be clarified that this does not amount to "fault" in the light of the secondary rules of state responsibility,[637] as the *animus aggressionis* falls within the compass of the primary rules of international law. In this regard, the primary norms that prohibit the act of aggression encompass an additional element to refrain from having any *animus aggressionis* towards other states. This suggests that aggressive objectives such as occupation or annihilation of territory are attributable to the state as part of the state act element, and not as *mens rea* of the individual.

The question is whether this aggressive intention is necessary to evaluate that a state has committed an act of aggression. As discussed in Chapter I, this is highly subject to the methodological interpretation of *jus ad bellum.* The *animus aggressionis* may not hold any significance with respect to ascertaining the legality of the use of force from a positive approach, whilst on the other hand; a non-positive approach may value the *animus aggressionis* in determining whether the use of force by the alleged aggressor state was inherently aggressive in nature.

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[636] See Article 3, ARSIWA 2001.
[637] Bonafé (n 620) 122.

Be that as it may, any consideration of the *animus aggressionis* is pursuant to the primary norms prohibiting an act of aggression. Responsibility of the aggressor state for an act of aggression under the secondary rules can be conducted in an objective manner without having to take into consideration any mental element or intention of the state. The significance of not attributing the *animus aggressionis* to the individual is that this mental element does not need to be proven beyond reasonable doubt for the purposes of ascertaining individual criminal responsibility. In other words, the *mens rea* of the individual does not necessarily have to encompass an aggressive intent *per se* for the state act element of the crime. This is consistent with the judgment at the IMT where it appeared that the knowledge of Hitler's aggressive plans had sufficed as criteria for the mental element. This is also consistent with the Kampala Amendments, as there is no explicit mention of a special intent requirement to commit aggression.[638]

Presumably, *mens rea* can be satisfied if it can be proven beyond reasonable doubt that the individual had knowledge of the aggressive plans of the state, or perhaps even the *animus aggressionis*. It does not appear to be necessary that this knowledge requires any legal evaluation of the use of force, but can be predicated upon a factual basis.[639] This was stated in the second paragraph of the Introduction of the Elements of the Crime in the Kampala Amendments:

> There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.

The factual basis is reaffirmed in the following Elements of the Crime:

> Element 4:
> The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.

[638] See Paragraph 2 of the General Introduction to the Elements of Crimes, RC-Res.6.
[639] 'Non-Paper by the Chairman on the Elements of Crimes', in 2009 Princeton Report, annex II, para.6 (Appendix II), ibid.

> Element 6:
>
> The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

The *mens rea* of the individual refers to the intention to participate in one or more of the modes of perpetration, and factual knowledge that the use of armed force is inconsistent with the Charter of the UN. The threshold for the *mens rea* of the individual with respect to the state act element appears to be relatively low. However, this is logical, as the individual has attained a high-ranking position in the state organ, thus the *mens rea* can be inferred from the state act element of the crime, as it is highly plausible that he/she had knowledge of the aggressive state policy. There is no need to prove that the individual personally had *animus aggressionis* once it is established that there is an act of aggression.

In my view, the *animus aggressionis* cannot be attributed to individuals, because the act of aggression itself is attributed to the state. It is therefore only logical that if the act of aggression is attributed to the state, its underlying *animus aggressionis* must also be attributed to the state.

4.4.3 Self-defence and circumstances precluding wrongfulness: unconventional defences under international criminal law

A point that arises from the unique relationship between state responsibility and individual criminal responsibility is that the defendant may plead rather unconventional defences for the crime of aggression. These defences are self-defence and circumstances that may preclude wrongfulness. Indeed, a plea that the alleged aggression was really an act of self-defence may be used as a defence by both the alleged aggressor state and the accused.[640] On the level of primary norms, if recourse to force was conducted in self-defence, there is no wrongful conduct of unlawful use of force. This is affirmed in Article 21 of ARSIWA:

> The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

[640] Bonafé (n 620) 156.

A successful plea by the aggressor state would imply that there is no breach of primary obligations, and thus no responsibility for aggression. A defendant prosecuted for the crime of aggression may also plead that the aggressor state had acted in self-defence. If so, this would preclude the establishment of the state act element, therefore individual criminal responsibility cannot be assessed. It should be noted that this defence does not relate to personal conduct, but rather the conduct of the aggressor state.

Another unconventional form of defence that may be pleaded by the individual is that the alleged act of aggression is not unlawful recourse to force as it was conducted under circumstances that preclude its wrongfulness.[641] These circumstances are governed in Chapter V of ARSIWA.[642] According to the ILC, 'they do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists.'[643] Thus, the defendant may plead that there is no act of aggression committed by the aggressor state because the use of force was conducted under a circumstance that may preclude wrongfulness. That said, Article 26 of ARSIWA does not preclude the wrongfulness of any state for an act, which is contrary to *jus cogens.* Thus, it appears *prima facie* that circumstances precluding wrongfulness to justify an act of aggression are inadmissible in principle.[644] This is of course subject to dispute under international law, as some may argue that the use of force may be justified under the theory of countermeasures, distress and necessity.[645] This debate need not be examined here. In the light of the possibility of circumstances precluding wrongfulness being invoked to justify a use of force, the present analysis has contemplated this as a defence that may be pleaded by the defendant. The general idea is that it is in the interests of the defendant to dismiss the state act element of the crime.

The difference between self-defence and circumstances precluding wrongfulness is that the former applies on the level of primary norms, whilst the latter applies to the secondary rules of responsibility. The former means that there is no breach of primary obligations by the aggressor state, and thus no parallel breach of primary obligations

[641] Chapter V, ARSIWA; ibid 158.
[642] The six circumstances are: consent (Article 20, ARSIWA), self-defence (Article 21, ARSIWA), countermeasures (Article 22, ARSIWA), force majure (Article 23, ARSIWA), distress (Article 24, ARSIWA) and necessity (Article 25, ARSIWA).
[643] Commentaries on ARSIWA, at 71.
[644] Corten (n 63) 199–200.
[645] ibid 198.

by the individual. The latter on the other hand, means that there may have been a breach of primary obligations by both aggressor state and individual, but there are circumstances that may preclude the aggressor state from responsibility under the secondary rules. The question is whether the responsibility of the individual for breach of primary obligations will be precluded because the aggressor state is not found responsible for aggression under the secondary rules.

There are two ways of interpreting this. First, the two sets of secondary rules of responsibility are linked with respect to the legal consequences. In other words, the finding of individual criminal responsibility is entirely predicated upon the finding of state responsibility. If so, then the criminal forum may have to assess whether there are any circumstances that may preclude the wrongfulness of the aggressor state, which would ultimately lead to the acquittal of the defendant due to the lack of state act element of the crime.

The problem with this approach is that when the aggressor state breached obligations on the primary level, the individual had breached parallel obligations to refrain from the planning, preparing, initiation and waging of the act of aggression. Regardless of whether the aggressor state is found ultimately responsible under secondary rules, the individual had nevertheless breached obligations under international law. To acquit the individual on the basis that the aggressor state is not found responsible for the breach of obligations because of circumstances that preclude wrongfulness suggests that the legal consequences of both rules of responsibility are interlinked and must be found in the parallel.

The other way of approaching this question is to appreciate that there is a dichotomy between the two sets of secondary rules with respect to the legal consequences. If it is found that there has been a breach of primary obligations by the aggressor state, and thus, a breach of primary obligations by the individual, circumstances that may preclude wrongfulness may affect the findings under the rules of state responsibility, but not individual criminal responsibility. In other words, if the court is satisfied that the aggressor state had committed an act of aggression, and that the individual had planned, prepared, initiated or waged this act, circumstances precluding the wrongfulness of the act of aggression should not affect the individual criminal responsibility because primary obligations have nevertheless been breached by the individual. The individual may not be acquitted for the crime of aggression as the Court may find *prima facie* that the breach of primary obligations by the state is

sufficient to satisfy the state act element of the crime, regardless of the legal consequences under state responsibility for the aggressor state.

In my view, a preference is expressed for the second interpretation. If it can be satisfied that an individual has breached a duty to comply with obligations under the norms that criminalise the modes of perpetration relating to an act of aggression, the aggressed state has a legal interest to invoke legal consequences against the perpetrator for a breach of duty owed to it. So long as it is satisfied that there has been a breach of the relevant primary norms by an individual, legal consequences may be invoked under the secondary norms of individual criminal responsibility.

4.4.4. Prosecuting the crime of aggression: the question of satisfaction

An important question is whether prosecution of state leaders or other high-ranking government/military officials of the aggressor state for the crime of aggression can be considered as a form of satisfaction for the aggressed state.[646] Under Article 31(1), ARSIWA, the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Satisfaction, is one of the legal consequences of an internationally wrongful act by a state, as set out in Article 34, ARSIWA:

> Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination […]

The provision governing satisfaction is Article 37, ARSIWA, which stipulates in sub-paragraph 1:

> The State responsible for an internationally wrongful act is under obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

[646] Article 34 and 37, ARSIWA 2002.

It is indeed possible that restitution or compensation may not provide full reparation for the 'non-material injury' caused by an act of aggression.[647] In the Commentary to the draft ARSIWA, the ILC writes that:

> Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences of the State concerned.[648]

The question is whether prosecution of the crime of aggression may amount to a form of satisfaction for the aggressed state. Article 37(2), ARSIWA stipulates:

> Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

It should be noted that this list is not exhaustive,[649] which can be used to infer that prosecution can indeed be considered as a form of satisfaction. It should be clarified that 'satisfaction is not intended to be punitive in character, nor does it include punitive damages.'[650] The remedy of satisfaction does not intend for the aggressed state to punish the aggressor state. Instead, the punishment of individuals who were a part of the organ of the state for the crime of aggression can be seen as a form of appeasement for the moral damage caused towards the aggressed state. As there are

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[647] In the Commentaries on ARSIWA, the ILC had specifically listed violations of sovereignty and territorial integrity' as examples where the internationally wrongful act of a State causes non-material injury to another State, at 106.
[648] ibid.
[649] The Commentary elaborates that 'the appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance. Many possibilities exist […] Paragraph 2 does not attempt to list all the possibilities, but neither is it intended to exclude them all. Moreover, the order of the modalities of satisfaction in paragraph 2 is not intended to reflect any hierarchy or preference. Paragraph 2 simply gives examples which are not listed in order of appropriateness or seriousness. The appropriate mode, if any, will be determined having regard to the circumstances of each case', Commentaries on the ARSIWA, at 106; see also 99.
[650] Commentaries on ARSIWA, 107.

no clear rules on satisfaction, this remedy should be considered on a case-by-case basis. Two circumstances may be contemplated: i) prosecution by the aggressor state of its own state officials for the crime of aggression; ii) prosecution at the ICC for the crime of aggression.

i. Prosecution by the aggressor state of its own state officials for the crime of aggression

The aggressor state has jurisdiction under the nationality principle to prosecute its own state officials for the crime of aggression in a domestic court. The punishment of nationals who are responsible for the relevant misconduct could serve as a form of satisfaction for the aggressed state. It has been argued that 'a judgment against an individual perpetrator can be considered as a (partial) remedy against the state.'[651] Therefore, in situations where the aggressor state has conducted proceedings against its own nationals for the crime of aggression, this may be representative of the legal remedy of satisfaction for the aggressed state.

Such proceedings may be initiated by the aggressor state, or perhaps ordered by the competent forum of dispute settlement that is dealing with the state responsibility of the aggressor state as a form of satisfaction.[652] As prosecution is the means of exercising sanctions directly against individuals for the breach of duty to perform primary obligations and does not amount to any direct enforcement action against a state, forums might be more ready to grant this as a form of satisfaction.[653]

ii. Prosecution at the ICC for the crime of aggression

There are two aspects to this. First, whether a judgment at the ICC can be considered as a judicial declaration of wrongfulness as a form of satisfaction.[654] As prosecution involves first determining the state act element of the crime, there are two levels upon which a judicial declaration of wrongfulness could take place: i. the determination of an act of aggression; and ii. the conviction and subsequent punishment of the individual. Thus, even if there is no successful conviction of the

[651] Nollkaemper (n 438) 638.
[652] ibid.
[653] ibid.
[654] Crawford (n 622) 529–530.

defendant for the crime of aggression, the determination of the act of aggression could still be considered as a judicial declaration of wrongfulness, e.g. the *Corfu Channel* case, where the ICJ declared:

> the action of the British Navy constituted a violation of Albanian sovereignty. This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction. [655]

The determination of aggression in proceedings at the ICC is representative of a finding by an international court that the aggressor state had committed a wrongful act against the aggressed state. However, this may not be immediately associated with the remedy of satisfaction for the aggressed state, as it is a part of the definition of the crime of aggression. It may be viewed and understood as the preliminary step prior to assessing the conduct of the defendant. Nevertheless, the question is whether the positive determination of an act of aggression could serve as satisfaction for the aggressed state.[656]

The next question is whether prosecution at the ICC can be considered as a form of satisfaction. As the ICC is the embodiment of the international community, prosecution is representative of the interests of the international community in punishing the nationals from the aggressor state who have committed wrongful activities against the aggressed state. This may arguably amount to a form of satisfaction for the aggressed state against the aggressor state.

Either way, prosecution at the ICC is representative of the possibility, in the interests of the aggressed state, of the legal remedy of satisfaction under international law.

4.5. Conclusion

This chapter has clarified how the norms that prohibit aggression and the norms that criminalise aggression interplay on the primary level, and how the breach thereof should be interpreted with respect to the secondary level of responsibility. This is in the direct legal interests of the aggressed state, as the victim of the crime of

[655] Corfu Channel Case, (United Kingdom of Great Britain and Northern Ireland v Albania), Judgment of April 9th, 1949, [hereinafter "Corfu Channel Case"] 4, 35.
[656] Commentaries on ARSIWA, 107.

aggression. The intrinsic link within the definition of the crime whereby the crime of aggression is predicated on an act of aggression can be explained by examining the point of intersection between the norms that prohibit aggression and the norms that criminalise aggression. The act of aggression committed by the aggressor state was facilitated *by* the conduct of the individual in his/her participation in one of the modes of perpetration, as part of his/her official capacity as part of the organ of the state. By identifying this intersection, it can be understood that the crime of aggression is predicated on the act of aggression because the norms that prohibit the modes of perpetration, planning, preparation, initiation or waging, run in parallel with the norms that prohibit an act of aggression. Each set of norms cannot exist independently of each other.

The intrinsic link where individual criminal responsibility is predicated upon state responsibility can be clarified by understanding that the intersection where the latter gives rise to the former is for the purposes of identifying that there has been a breach on the primary level of the norms that prohibit aggression and the norms that criminalise aggression. Thus, state responsibility of the aggressor state is indicative that the defendant has acted in breach of the parallel set of obligations to refrain from the modes of perpetration. By doing so, the legal position of the three parties involved in a situation of aggression, the aggressor state, the aggressed state and the perpetrator of a crime can be brought to light, with particular reference to a crime of aggression. The legal positions of these three parties can be summarized as follows.

The aggressor state has acted in breach of the norms that prohibit an act of aggression. If the breach has reached a sufficient threshold, it may satisfy the state act element of the crime of aggression. This means that there has also been a breach of the parallel norms that confer obligations on individuals to refrain from the planning, preparation, initiation or waging/execution of the proscribed act of aggression. Thus, upon establishing the state act element of the crime, it can be assessed whether the defendant has acted in breach of the relevant norms, which gives rise to the material element of the crime. There is of course, also the need to establish the mental element with respect to the 'planning, preparation, initiation or waging' modes of perpetration, for a successful conviction of the crime of aggression.

In criminal proceedings, determining the existence of an act of aggression by the aggressor state is not for the purposes of considering or invoking legal consequences under the secondary rules of state responsibility. Instead, this determination serves the

purpose of identifying that there has been a breach on the primary level by the defendant of the relevant norms.

Subject to this determination, the conduct of the defendant will be assessed with respect to whether he/she had participated in the material elements of the crime, and has the relevant mental element. The individual is responsible only for his/her involvement in planning, preparation, initiation or waging, the act of aggression. The latter is attributed to the aggressor state because it is the correct duty-bearer with respect to the norms that prohibit an act of aggression.

The attribution of conduct to the relevant duty-bearer is thus demarcated into the 'act of aggression' and 'planning, preparation, initiation and waging.' The significance of this demarcation is to retain a dualist structure of responsibility, whereby the aggressed state has a legal interest to invoke legal consequences against the aggressor state under the secondary rules of state responsibility, and a legal interest for legal consequences against the perpetrator of the crime of aggression under the secondary rules of individual criminal responsibility.

During prosecution, the parallel and simultaneous existence of state responsibility and individual criminal responsibility for aggression is accepted and acknowledged for the purposes of ascertaining the state act element within the definition of the crime. However, a dichotomy is still respected in the light of the conditions and legal consequences of the secondary rules of responsibility, as the purpose of prosecution is to punish the perpetrator and not to invoke responsibility of the aggressor state.

Here, the question arises as to whether prosecution of the perpetrators for the crime of aggression may amount to a form of the legal remedy of satisfaction for the aggressed state. This way, there are legal consequences against both the aggressor state and the perpetrator of the crime for their breaches of primary obligations. Regardless of the outcome of prosecution, the aggressed state may choose to bring the matter to another form of international dispute settlement for the purposes of invoking responsibility of the aggressor state. In such forum, there is a possibility that an order may be made for the aggressor state to prosecute the responsible individuals for the crime of aggression as a form of satisfaction for the aggressed state.

Chapter V. The victim of the crime of aggression

5.1. Introduction

As the ordinary meaning of a victim can be rather broad, this Chapter approaches the concept of a victim from a more technical perspective, whereby the victim is the rights-holder of the enjoyment of the protection from the norm prohibiting the act in question that has suffered harm or injury ("damages") from the breach of duty of the duty-bearer to comply with this norm. The victim of the crime of aggression therefore is the rights-holder of the enjoyment of the protection afforded by the norms that criminalise aggression that has suffered from the breach of duty by the relevant duty-holder (the perpetrator of the crime of aggression) to refrain from the prohibited conduct.

The premise of this Chapter is that the aggressed state is the victim of the crime of aggression because it is the rights-holder of the enjoyment of the protection afforded by these norms (section 5.2.1). Be that as it may, human suffering, injury, death and destruction of natural persons within the territory of the aggressed state should not be undermined or neglected. In this regard, they are victims of a situation of aggression in the light of the inevitable destruction, hardship, physical and emotional suffering that war brings with it. Thus, it is easy to presume that these natural persons who suffer from the crime of aggression are the victims of the crime. This presumption will be examined in the form of a hypothesis that natural persons are the victims of the crime of aggression.

This Chapter will begin by challenging this hypothesis with the intention of showing that it is not sustainable (section 5.2.). The first ground for rejecting the hypothesis is that natural persons are not the rights-holders of the norms that criminalise aggression (section 5.2.1). The second ground is that there is need to establish actual harm caused to the natural person in a situation of aggression. Yet, actual harmed caused by the crime of aggression is the sovereignty and territorial integrity of the aggressed state (section 5.2.2). This will be proven by examining the legal framework applicable in a situation of aggression, i.e. *jus ad bellum* and *jus in bello.* This legal analysis will show how actual harm caused to natural persons in a situation of aggression should be assessed under *jus in bello* and not *jus ad bellum.*

Thus, injury to natural persons in a situation of aggression may be qualified as violations of *jus in bello* and thus potentially war crimes (if it is satisfied that the constitutive elements of the crime are present). In other words, natural persons who are injured in a situation of aggression are not victims of a crime of aggression, but instead may be victims of war crimes (section 5.2.3) That said, I am prepared to acknowledge that although natural persons are not the rights-holders of the norms that criminalise aggression, they may arguably be beneficiaries of the implementation of the norm by the duty-bearer (section 5.2.5). As such, they may be considered as the indirect victims of the crime of aggression. Although conceptually this may be logical, from a practical perspective, the problem is with establishing actual harm, as there is a wide scope of situations that may amount to harm.

As the focus of this Chapter is on the (direct) victim of the crime of aggression, this Chapter continues to examine the legal interests of the aggressed state (section 5.3). As the victims of the other core international crimes are natural persons, international criminal law has appeared to adopt a victim-centric approach,[657] as can be seen from the emerging normative framework of victims' rights.[658] The first question is how the crime of aggression should be considered within the normative framework of victims' rights (section 5.3.1). The implications of this are whether the aggressed state, as a victim of an international crime, may receive reparations for the crime of aggression from the perpetrator (section 5.3.2.).

The Chapter then continues to examine prosecution of the crime of aggression in both domestic courts and the ICC (section 5.3.3.). The latter is particularly interesting because at the ICC, the victims of the core crimes, and thus the crime of aggression, are natural persons.[659] This means that natural persons may participate in the Court's proceedings (Article 68(3) Rome Statute) and receive reparations (Article 75 Rome Statute). The implications of reparations at the ICC for the crime of aggression are that individuals, who are non-rights holders, are receiving reparations for the breach of duty that was not owed to them. The legal and practical implications will be discussed. (section 5.3.3.iv).

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[657] In general, see M Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 Human Rights Law Review 203.
[658] Friedrich Rosenfeld, 'Individual Civil Responsibility for the Crime of Aggression' (2012) 10 Journal of International Criminal Justice 249, 250.
[659] Article 85, Rules of Evidence and Procedure, International Criminal Court.

5.2. Can natural persons be victim(s) of the crime of aggression?

This section will challenge the hypothesis that natural persons are the victims of the crime of aggression. The first step is to identify the rights-holder of the enjoyment of the protection afforded by the norms that prohibit aggression and the norms that criminalise aggression. This involves re-examining the obligations that international law places on states and individuals as the relevant duty-bearers to refrain from a situation of aggression (act of aggression and crime of aggression). The second step is to consider the need to ascertain the actual harm caused to the intended rights-holder, i.e. the victim of the crime of aggression as a result of the failure of the duty-bearer to comply with the duty to refrain from the prohibited conduct. This should be assessed in the light of the legal framework applicable in a situation of aggression. This enables the third step, which is to assess how injury to natural persons that have suffered as a result of a situation of aggression should be qualified. There is also the concomitant issue of injury to natural persons who are part of collateral damage.

5.2.1. Re-examining the obligations to refrain from an act of aggression and a crime of aggression

As discussed in the previous chapter, the respective obligations conferred on states and individuals to refrain from the act of aggression and crime of aggression are intrinsically linked and run in parallel to each other. The obligations placed on individuals to refrain from the four modes of perpetration (planning, preparation, initiation and waging) cannot exist independently to the obligations on the state to refrain from the act of aggression. In other words, international criminal law applies in parallel with *jus ad bellum* by placing obligations on individuals to refrain from conduct in their position as part of the state organ that will facilitate the state to act in aggression.

It is important to consider the nature of the obligations pertaining to the prohibition of inter-state force. These obligations fall upon states, and are owed to each and every state that is part of the international community of states as a whole. It should be concentrated upon that the nature of these obligations applies only to the legal personality of states under international law.

As obligations conferred on the individual with respect to the crime of aggression are predicated upon the obligations conferred on the state to refrain from an act of

aggression, both sets of obligations are owed to the same right-holders. In a situation of aggression, the act of aggression and the crime of aggression stem from the same unlawful use of force by the aggressor state, which means that both wrongful conduct cause harm of a singular nature to the rights-holder. In this context, the rights-holder can be identified as the aggressed state, as it is this legal personality that is owed the obligations to refrain from the act of aggression and obligations to refrain from the crime of aggression. As the breach of these obligations cause direct harm to the aggressed state as the rights-holder, it can be classified as the victim of both the act of aggression and the crime of aggression.

Immediately this departs fundamentally from the other crimes, as the victims of these crimes are natural persons. Yet, to argue that both state(s) and individual(s) are victims of the crime of aggression suggests that the perpetrator has breached a duty to comply with obligations owed to both state and individuals. This implies that obligations international law confers on individuals to refrain from the modes of perpetration are owed to individuals, in addition to every state that is a member of the international community of states. As such, an argument can be made that obligations imposed on individuals to refrain from "planning, preparing, initiation and waging" aggression are owed to "the international community" and not the "international community of states as a whole." This appears consistent with the premise of international criminal law, whereby individuals are under obligations to refrain from crimes that are against the interests of the international community, which can be understood to encompass natural persons, in addition to states. Thus, by virtue of the crime of aggression being an international crime, the obligations that fall on individuals to refrain from the prohibited conduct, by default, is owed to the international community.[660] This is because the norms that criminalize acts under international law, i.e. international crimes, impose direct obligations on individuals to refrain from such conduct; such obligations are owed to the international community. Therefore, individuals, in addition to states, may also be considered as right-holders.

The contrary argument is that the obligations imposed on individuals with respect to the crime of aggression are owed to the international community of states as a whole – and not the international community. The effect of this is that these obligations are not owed towards individuals; thus there is a narrower scope of

[660] M Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligation Erga Omnes' (1996) 59 Law and Contemporary Problems 63, 68.

obligations placed on individuals to refrain from the prohibited conduct with respect to the crime of aggression than the other crimes. The rights-holders are only States.

My preference is for the second view because the obligations that fall on individuals to refrain from the crime of aggression under customary international law cannot exist independently from obligations that fall on states to refrain from the act of aggression. To argue that obligations to refrain from the modes of perpetration are owed to individuals, in addition to states as subjects of international law, would arguably extend the obligations on individuals to refrain from the modes of perpetration further than the obligation placed on states to refrain from aggression. If so, then these obligations cannot exist in parallel, as one set of obligations is wider than the other.

It may be questioned why it is important to preserve this parallel-construct of obligations to refrain from the act of aggression and the crime of aggression as it would appear to limit the scope and nature of obligations on individuals to refrain from the latter. Indeed, in the interests of the international community, such formalism in adherence to legal doctrine may appear anachronistic, or even contrary to the purposes of international criminal justice. Yet, it is important that adherence to the parallel-construct of the act of aggression and crime of aggression should be upheld because the legal construct of the definition of the crime pursuant to customary international law is that the latter is predicated upon the former. To argue that obligations conferred onto individuals with respect to the crime of aggression extend beyond the obligations conferred onto states for the act of aggression would depart from the substantive definition of the crime under customary international law as it shifts the parallel construct that the definition is predicated.

5.2.2. The legal framework applicable in a situation of aggression

When examining a situation of aggression, it should be understood that a military operation conducted by the aggressor state takes place on two tiers: i) the use of force on the inter-state level between the aggressor state and aggressed state(s); ii) the actual hostilities, i.e. armed conflict that takes place. The legal framework with respect to the former is *jus ad bellum*, which regulates how states resort to the use of force on the inter-state level, whilst the legal framework pertaining to the latter is *jus*

in bello, which governs the hostilities.[661] It is expected that states when engaging in warfare should comply with both *jus ad bellum* and *jus in bello* as these are two different legal frameworks that apply to separate stages of the military operation. In other words, states are expected to comply with the rules of *jus ad bellum* in the way that they conduct their recourse to force, and to also comply with the rules of *jus in bello* during the hostilities that follow from the use of force. Both legal frameworks are therefore concurrent as they apply simultaneously. It is worth mentioning that the latter is also directly applicable to individuals, in the sense that individuals who take direct part in hostilities have obligations to comply with the rules of *jus in bello.* It should be clarified that for *jus in bello* to be applicable, a certain threshold needs to be met that there is in fact an armed conflict. As this legal framework does not apply during times of peace, the threshold serves to ensure that there is an armed conflict for its applicability.

The application of *jus ad bellum* and *jus in bello* are separate and independent from each other, which is known as the separation dissertation.[662] This means that the legality of one legal framework does not affect the application of the other. This is especially important in a situation of aggression. Regardless of the fact that the aggressor state has acted in violation of *jus ad bellum, jus in bello* will still be applicable to the hostilities between the aggressor state and aggressed state. This means that notwithstanding the legality of the use of force that initiated the hostilities, both parties whether right or wrong, are entitled to the same rights and protection under the framework *jus in bello,* and are under a duty to perform the obligations imposed on them with respect to how to conduct hostilities.[663]

This symmetrical application of *jus in bello* between both parties to the conflict is known as the principle of equality between belligerents.[664] Therefore, regardless of

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[661] See Jasmine Moussa, 'Can Jus Ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law' (2008) 90 International Review of the Red Cross 963.
[662] See Keiichiro Okimoto, *The Distinction and Relationship between Jus Ad Bellum and Jus in Bello* (Hart 2011) 12–36.
[663] For the moral implications of the separation dissertation, see Jeff McMahan, 'Morality, Law and the Relation Between Jus Ad Bellum and Jus in Bello' (2006) 100 Proceedings of the Annual Meeting (American Society of International Law) 112.
[664] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2010) 3; for the moral implications with respect to the equality of belligerents principle, see Donald M Ferencz, 'Aggression in Legal Limbo: A Gap in the Law That Needs Closing' (2013) 12 Washington University Global Studies Law Review 507, 513; Michael Mandel, 'Aggressors' Rights: The Doctrine of "Equality Between Belligerents" and the Legacy of Nuremberg' (2011) 24 Leiden Journal of International Law 629, 650.

the status of a state under *jus ad bellum*, the same rules of *jus in bello* apply equally. Koutroulis submits that the equality of belligerents principle entails the following:

> *primo,* the belligerent party that violated *jus ad bellum* does not have fewer rights or more obligations than the one that did not violate *jus ad bellum*; *secundo,* conversely, the belligerent party that did not violate *jus ad bellum* does not have more rights or fewer obligations than the one that did.[665]

The significance of this is the natural persons, i.e. soldiers and civilians from both aggressor and aggressed state are entitled to the equal rights and subject to the same obligations under *jus in bello.*

Under *jus in bello,* there are two types of armed conflicts: i) international armed conflict (IAC); ii) non-international armed conflict (NIAC).[666] This was reaffirmed by the ICTY, which held:

> an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved."[667]

From this, it can be deduced that an IAC is the resort to armed force between states, and a NIAC is the resort to protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. The threshold for the former appears to be lower (armed force) than the latter (armed violence). This implies that it is easier to be satisfied that there is an IAC than a

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[665] Vaios Koutroulis, 'And Yet It Exists: In Defence of the "Equality of Belligerents" Principle' [2013] Leiden Journal of International Law 1, 20.

[666] See Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012).

[667] *Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, para.70.

NIAC. As aggression involves the initiation of the use of force by the aggressor state against the aggressed state, the threshold for an IAC is met. In this type of conflict, the legitimate aim of each party is to weaken the military position of the enemy.[668] The significance of the classification of conflicts is to identify whether the applicable principle of distinction is consistent with the rules of *jus in bello* that apply in an IAC or an NIAC.[669] The principle of distinction is the cardinal rule of *jus in bello* that places an obligation on those participating in hostilities to distinguish between the natural persons who may be a legitimate 'military objective' or a 'protected person.'[670] Only the former may be targeted.

The underlying concept of the principle of distinction is that attacks are only permitted against the combatants who are part of the armed forces of the parties to the conflict and military objects (Article 43 Additional Protocol I). Civilians, civilian objects and the rest of the civilian population must be protected in the course of hostilities. This can be seen in Article 48 of Additional Protocol I (AP I):

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[671]

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[668] Meagan S Wong, 'Targeted Killings and the International Legal Framework: With Particular Reference to the US Operation against Osama Bin Laden' (2012) 11 Chinese Journal of International Law 127, 147.

[669] Nils Melzer, *Targeted Killings in International Law* (Oxford University Press 2008) 300–301.

[670] Melzer writes that 'In order to exclude any ambiguity in this respect, these two categories of persons must be mutually exclusive, as well as absolutely complementary. In other words in the context of hostilities, every person must either be a legitimate 'military objective' or a 'protected person' – *tertium non datur.'* ibid 300; Wong (n 668) 147–149.

[671] In the Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, it was written that 'The basic rule of protection and distinction is confirmed in this article. It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives' at 598; see Melzer (n 669) 301.

Only military objectives may be attacked, whilst attacks against protected persons are prohibited regardless of potential military advantage of such attacks.[672] 'Military objectives' does not appear to be defined in the Geneva Conventions 1949, but was defined in Article 52(2) AP I:

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage.[673]

It can be inferred that this provision refers to objects in the sense of physical and tangible objects, and not necessarily natural persons. Melzer elaborates that 'a more comprehensive overview of persons constituting legitimate military objectives can be obtained by identifying those categories of persons which IHL does not protect against direct attack.'[674]

Nevertheless, even if the natural person does not fall within the category of a protection person, it is still important to comply with other principles of *jus in bello* in the course of targeting, e.g. the principles of proportionality and military necessity, the prohibition of indiscriminate attack and the prohibition or restriction of certain means and methods of warfare.[675] In other words, military objectives from the aggressed state may be lawfully targeted if the principle of distinction is applied correctly and consistently with proportionality and other rules within *jus in bello.*

Stemming from the present analysis, the following inter-related points should be concentrated upon.

First, although there is undeniably a causal link between the act of aggression and the injury to the natural person, there are two legal frameworks that come into play

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[672] The ICJ held in the Advisory Opinion on Nuclear Weapons, that 'states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets,' *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (hereinafter "Legality of the Threat or Use of Nuclear Weapons"), I.C.J. Reports 1996, 226 at 257; Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 664) 33–35.
[673] For a criticism of the definition in Article 52(2), see Dinstein ibid 90–91.
[674] Melzer (n 669) 302.
[675] ibid 303.

which impose different primary obligations on the relevant actors. This is important because there are different legal consequences under the secondary rules of responsibility for violations of *jus ad bellum* and *jus in bello.* The aggressor state has breached its duty to refrain from the use of force against the aggressed state. Regardless of this violation of *jus ad bellum* on the part of the aggressor state, the aggressed state is nevertheless under a duty to comply with its obligations under *jus ad bellum* to conduct counterforce lawfully and/or to act upon authorization by the Security Council under Chapter VII. Upon the initiation of the use of force by the aggressor state against the aggressed state, the threshold has been crossed for the rules of *jus in bello* pertaining to an IAC to be applicable to the hostilities for both parties to the conflict. This means that armed forces from both the aggressor and aggressed state may lawfully target military objectives from either side under the principles of distinction, necessity and proportionality.

Second, regardless of the legality of the use of force, be it aggression or lawful self-defence, the same rules of *jus in bello* apply between both parties to the conflict. This means that soldiers, i.e. combatants from both the aggressor state and the aggressed state are entitled to lawfully target combatants from the other side in accordance with the principles of distinction, necessity, proportionality and other existing norms of *jus in bello.*

Third, any fatalities or injuries of natural persons in a situation of aggression may not necessarily be unlawful conduct, because the individual could have been killed in accordance with *jus in bello.* For example, if the natural person was a combatant who was targeted lawfully. Indeed, the preservation of equality between belligerents and the equal applicability of *jus in bello* in a situation of aggression, has raised dissatisfaction, which appears to be centered upon a moral basis.[676]

Fourth, any harm or injury to natural persons must be assessed in the light of *jus in bello,* and not *jus ad bellum.* This involves examining which primary norms have been breached, so that the correct secondary norms of responsibility may be invoked. Potential violations of *jus in bello* may give rise to individual criminal responsibility for war crimes if there was an existing rule of customary international law that has criminalised the specific norm of *jus in bello* that had been breached. As such,

[676] See Ferencz (n 664); Mandel (n 664); *Handbook on the Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC: Crimes of Aggression and War Crimes* (2013) 4.

sanctions can be exercised directly against the individual for the breach of duty to comply with obligations to respect the specific norm that had been criminalised.

5.2.3. Natural persons that have suffered as a result of a situation of aggression

In the course of hostilities subsequent to an act (and crime) of aggression, there is a possibility that natural persons who are nationals from both the aggressor state and the aggressed state may be injured or killed. Such natural persons can be either civilians or soldiers. The lawfulness of the act of injuring or killing an individual will depend on the legal status of the person under *jus in bello* pursuant to the principle of distinction, in conjunction with other factors such as necessity and proportionality. The person who is carrying out the targeting is under a duty to make a distinction between persons who are legitimate targets and persons that are to be protected from attack.

Under *jus in bello,* there are two broad categories of persons: combatants and civilians. Article 43(2) AP I states that members of the armed forces of a party to a conflict are combatants, and have the right to participate directly in hostilities.[677] However, not all combatants are legitimate targets for attack. Under Article 41(1) AP I, if the combatant has been rendered *hors de combat*, he/she should not be made the object of attack.[678] Pursuant to Article 48(1) AP 1, parties to the conflict are prohibited from attacks against civilians and civilian objects. Article 50(1) AP I defines a civilian as:

> any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43

[677] Article 4(2) Geneva Convention III lists four conditions for the classification as a part of the armed forces of a State: i) being under responsible command; ii) wearing a fixed distinctive sign; iii) carrying arms openly; iv) conducting their operations in accordance with the laws and customs of war; It is interesting to note that Article 43(1) Additional Protocol I (AP I) only lists two criteria to be considered as part of the armed forces of a State: i) organized armed forces, groups and units, which are; ii) under a command responsible to the relevant party to the conflict.

[678] Article 41(2) AP I states that a person is 'hors de combat' if: (a) he is in power of an adverse Party; (b) he clearly expresses an intention to surrender; or (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself, provided in any of these cases that he abstains from hostile acts and does not attempt to escape

of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

Melzer writes that 'the negative definition of civilians as all persons who are not members of the armed forces has become part of customary law'[679] and that ' the only exception to this basic dichotomy are participants in a levée en masse, who both conventional and customary international humanitarian law recognize as combatants, but who qualify neither as members of the armed forces nor as civilians.'[680]

Indeed, there may be situations where civilians directly participate in hostilities. Although they retain their legal status as civilians, they lose their protection against direct attack for the period that they are directly participating in hostilities (Article 51(3) API).[681] Therefore, the legal status of a person under *jus in bello* is not necessarily the exclusive determining factor that depicts whether or not they become a legitimate target, as the conduct of the person is also important, i.e. whether they are a hors de combat or a civilian taking direct part in hostilities.

In the case of injury or fatality to a natural person on the territory of either the aggressor state or the aggressed state, the first step is to consider whether the person was a combatant or a civilian. If the person was the former, the next step is to consider whether he/she was a person *hors de combat*. In the case of the latter, the question is whether the person was taking a direct part in hostilities, or behaving in a 'hostile' act and had temporarily lost his/her protection under *jus in bello.* These steps are to be taken in consideration of existing treaty and customary rules of *jus in bello* that apply in an IAC.

The targeting of a person *hors de combat* or a civilian may indeed give rise to a violation of *jus in bello.* However, the principle of distinction is not a sufficient ground to assess the legality of the specific targeting. The fatality must also be assessed in accordance with the other principles of *jus in bello*, i.e. military necessity

[679] Melzer (n 669) 310.
[680] ibid.
[681] ibid; The International Committee of the Red Cross Guidance on the notion of Direct Participation in Hostilities ("ICRC Guidance") states 'for the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participating in a leve´e en masse are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities'; see also Wong (n 668) 147–149.

and proportionality.[682] The latter is measured with respect to expected collateral damage from the attack. According to Dinstein, collateral damage is either: (a) incidental losses or injury to civilians; (b) destruction of or damage to civilian objects; or (c) combination of both.[683] Thus, injuries and fatalities of civilians may nevertheless be permitted as collateral damage under *jus in bello,* provided such damage must be proportionate with respect to military necessity.

It is submitted that any injury to natural persons on the territory of both the aggressed state and aggressor state should be assessed under *jus in bello* (and not *jus ad bellum*). As already mentioned, there are certain primary norms within *jus in bello* that give rise to individual criminal responsibility, in the sense that the breach of such obligations give rise to sanctions that can be executed directly against the individual for the breach thereof pursuant to the secondary norms regulated by international criminal law.

Such conduct constitutes war crimes, because there are specific obligations under international criminal law that run in parallel with obligations under *jus in bello*, which place duties on combatants to refrain from specific prohibited acts when conducting hostilities. In other words, there can be individual criminal responsibility for a serious violation of *jus in bello* as a war crime if there is a concomitant rule governed by international criminal law which provides individual criminal responsibility for the act committed.

If injuries and fatalities of civilians take place on a large scale where it affects the civilian population, this raises the factual question of whether this was the result of direct attack(s) against a civilian population, or if these atrocities are part of the collateral damage. The latter does not technically amount to any violation of *jus in bello.* The former, on the other hand, is prohibited under Article 51(2) API, and has been criminalized as a war crime under Article 8(2)(b)(i) of the Rome Statute.[684] As discussed earlier, direct attacks against the civilian population can also amount to a crime against humanity if it can be proven that such attacks were part of a systematic and planned attack against the civilian population.

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[682] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 664) 128–130.
[683] ibid 128.
[684] ibid 125.

There is the possibility that such attacks may be the result of indiscriminate attacks, where the person facilitating the targeting did not apply the principle of distinction. As such, damage and injury are caused to both civilian and military objectives without any distinction, which may lead to mass killings of the civilian population.[685] This is prohibited under Article 51(5)(b) AP I as 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and military advantage anticipated,' and has also been criminalized as a war crime under Article 8(2)(b)(iv) Rome Statute.

In the light of the above, it is submitted that natural persons in the territory of aggressed state who are injured or killed as a result of hostilities in a situation of aggression (act of aggression and crime of aggression) may in fact be victims of violations of *jus in bello* and war crime(s) if it can be satisfied that the necessary elements of the crime are present.[686]

5.2.4. Injury to natural persons who are part of collateral damage

There is one aspect, which is worth examining in further detail. As mentioned above, collateral damage, subject to military necessity, is permissible under *jus in bello.* This leaves the question of natural persons that are killed or injured as part of collateral damage, which does not constitute a violation of *jus in bello.* How should the injury of these persons be assessed; and what are their legal interests?

These natural persons were owed obligations under the primary norms of *jus in bello* by the duty-bearer to comply *inter alia* with the principles of distinction, necessity and proportionality. However, there is no violation of the primary norms under *jus in bello* because the duty-bearer was exempted from these primary obligations because of military necessity. As there are no violations of the primary norm, there can be no responsibility under the secondary norms of state responsibility or individual criminal responsibility. Thus, natural persons who are injured or killed

[685] Dinstein explains that 'the indiscriminate character of an attack is not a by-product of 'body count' (i.e. ensuring number of civilian fatalities). The key to a finding that a certain attack has been indiscriminate is the nonchalant state of mind of the attacker' ibid 127.

[686] See Riccardo Pisillo Mazzeschi, 'Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview' (2003) 1 Journal of International Criminal Justice 339.

as part of collateral damage may not be considered as victims of *jus in bello* or war crimes.

It should be noted that injury or killing of natural persons as part of collateral damage can be committed by both sides of the conflict, i.e. both the aggressor state and the aggressed state. Collateral damage is indeed one of the realities of the use of force and can be envisaged to encompass damage to the infrastructure and environment of the receiving state, in addition to natural persons. Returning to the premise that collateral damage is an aspect of the use of force, it can perhaps be assessed in accordance with *jus ad bellum,* as such damage can be viewed as part of the use of military force against the receiving state, which may be either the aggressor state or the aggressed state.

The shift from focusing on collateral damage under the lens of *jus in bello* to *jus ad bellum,* means that individuals are no longer considered as direct rights-holder, and the state becomes the immediate rights-holder of the enjoyment of the protection from the norms that govern the use of force. As the rights-holder, the receiving state is entitled to invoke the responsibility of the opposing state for damage caused to civilians and infrastructure in its territory as a result of the use of force.

It is of course difficult in practice to distinguish between damages caused by violations of the *jus ad bellum* and by violations of the *jus in bello*. In practice, both violations occur simultaneously. The approach of the UN Compensation Commission (UNCC) which was established by Security Council Resolution 687(1991) processed claims and paid compensation to a variety of personalities, i.e. individuals, corporations, governments and international organisations who had suffered from the invasion and occupation of Kuwait by Iraqi forces. The Commission did not appear to make any distinction between violations of *jus ad bellum* and *jus in bello*, but rather compensation for the 'direct loss, damage, including environmental damage and the depletion of natural sources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait.'[687]

The Eritrea-Ethiopia Claims Commission (EECC), on the other hand, made a distinction between violations of *jus ad bellum* and *jus in bello*.[688] Of particular

[687] SC Res. 687(1991), para.16.

[688] See *Eritrea-Ethiopia Claims Commission (EECC): Partial Award - Jus ad bellum*, para.5; *Eritrea-Ethiopia Claims Commission (EECC): Final Award - Ethiopia's Damages Claims*

relevance is the fact that EECC had awarded reparations to Ethiopia *inter alia* for civilian deaths and injuries related to Eritrea's breach of *jus ad bellum,*[689] injuries caused by landmines because of Eritrea's *jus ad bellum* violation.[690]

From these awards, two brief points can be observed. First, even if injuries and deaths to civilians are lawful as permissible military damage under *jus in bello*, responsibility for these injuries and deaths may be invoked if the damage occurred during the period which the wrongful state has acted in violation of *jus ad bellum.* Second, any damage to civilians as a result of violations of *jus ad bellum,* irrespective of legality under *jus in bello*, is contrary to the interests of the injured state. As such, this provides the state as a rights-holder with the legal interest to invoke legal consequences against the wrongful state under the secondary norms of state responsibility for such damage to civilians. One way to read this is that natural persons, who are nationals of the state, are representative of that state's interests. The same could be said for non-nationals who are within the territorial state and thus subject to its domestic laws. Injury or damages to a state's nationals or non-nationals within its territory is representative of an infringement of its interests. That this injury is caused by a violation of the primary norm owed to the territorial state with respect to the enjoyment of the prohibition of the use of force provides this state with a legal interest to invoke responsibility for the breach thereof.

Another way to read this is that as the norms relating to *jus ad bellum* are inapplicable to individuals, the state becomes the indirect rights-holder in the event of damages to individuals within its territory caused by a violation of the primary norms. As such, the state may have an indirect interest in invoking responsibility for the breach of primary norms of *jus ad bellum* that led to such damages against individuals in its territory.

Regardless of which of the two readings is adopted, the common point is that natural persons do not have a direct legal interest with respect to violations of *jus ad bellum*. Their interests can only be represented by the territorial state with respect to invoking responsibility of the wrongful state for the violation of *jus ad bellum.* It is for the discretion of territorial state on how to distribute any awards it may receive

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between the Federal Democratic Republic of Ethiopia and the State of Eritrea (hereinafter "Final Award, Ethiopia's Damages Claims")[17 August 2009], para. 311.

[689] Final award, Ethiopia's Damages Claims, ibid para. 349.

[690] Final award, Ethiopia's Damages Claims, ibid paras. 388-391, and 393.

from methods of international dispute settlement with the individuals within its territory.

In the present context of a situation of aggression, the natural persons on the territory of the aggressed state who are injured or killed from collateral damage caused by the aggressor state may not have a legal interest to invoke state or individual criminal responsibility of the combatants of the aggressor state, or the aggressor state for violations of *jus in bello* or war crimes, respectively; as such damage may be permissible under this legal framework if military necessity has been satisfied. Nor do they have legal interest to invoke the responsibility of the aggressor state for the initial and any subsequent breaches of *jus ad bellum* that gave rise to the collateral damage, as they are not rights-holders of the enjoyment of primary norms under this legal framework. It is the aggressed state that has the legal interest to invoke the responsibility of the aggressor state for the collateral damage, with particular reference to the injury and deaths caused to civilians.

5.2.5. Indirect victims of the crime of aggression

Although natural persons are not rights-holders of the norms that criminalise aggression, they may nevertheless be beneficiaries of the implementation of the norm because they also enjoy the protection afforded by the norm that criminalises aggression. Thus, it can be argued that natural persons are indirect victims of the crime of aggression. Although this is logical on a conceptual level, it can be predicted that practical difficulties that arise would include establishing that harm was caused to the natural person as a result of the crime of aggression as the scope of damages appear to be wide, e.g. death, physical injury, psychological and emotional distress, personal economic loss, etc.

As the present dissertation focuses on the direct victim of the crime of aggression, i.e. the aggressed state, the discussion on indirect victims need not be continued further.

5.3. The victim of the crime of aggression: the legal interests of the aggressed state

It has been established that the aggressed state is the victim of the crime of aggression; this section will now consider its legal interests with respect to legal consequences against the perpetrator of the crime of aggression. It is important to note that the aggressed state has a direct legal interest against the perpetrator of the crime of aggression, in addition to a direct legal interest against the aggressed state.

5.3.1. The victims' rights paradigm

The emerging paradigm of victims' rights propagates a victim-centric, i.e. individual-centric approach in international criminal law.[691] However, unlike the other international crimes (genocide, crimes against humanity and war crimes), it is clear that the victim of the crime of aggression is a state. How then should the crime of aggression be considered within the normative framework of victims' rights?[692]

Perhaps, the crime of aggression should *prima facie* be excluded from this normative framework because of its state-centric attributes. To focus on the victim of the crime of aggression would appear contrary to the grain of the emerging paradigm that shifts the focus onto individuals. This suggests that the normative framework focuses only on the international crimes that are premised on violations of international humanitarian law and international human rights law. Therefore, structural changes need not be made to the normative framework of victims' rights, and it may continue to develop forward in its current direction.

Alternatively, the focus will fall upon the indirect victims of the crime of aggression, who are natural persons that have suffered as a result of the violation of *jus ad bellum* by the aggressor state. Yet, this is not entirely straightforward, as pointed out above and also by Grzebyk that it is 'difficult to determine the victims of aggression, and consequently it is almost impossible to view the aggression from the victims' perspective, as is the trend in international criminal law'.[693] Furthermore, as argued above, there is the need to assess the legal status of the natural person who

[691] In general, see Bassiouni, 'International Recognition of Victims' Rights' (n 657).
[692] Rosenfeld (n 658) 250.
[693] Grzebyk (n 11) 264.

may be injured in a situation of aggression in accordance with the applicable legal framework.

Another possibility is that the normative framework of victims' rights may evolve to acknowledge that the definition of a victim may also include a state. Although this appears *prima facie* incompatible with the focus on individuals, this is not necessarily an insurmountable limiting factor. International criminal law as a young discipline is developing. Expanding the legal personality of a victim to encompass a state is a natural progression post-Kampala.

Regardless of which approach is adopted, the more pragmatic question is, how would the aggressed state benefit from the normative framework pertaining to victims? Aside from the monetary or compensatory purposes of this normative framework, the other symbolic concepts appear to be of relatively little value to the aggressed state. For example, the aggressed state having a *locus standi* to participate in proceedings in conjunction with the perpetrator of the crime of aggression does not carry the same symbolic significance as a natural person who is the victim of genocide or crimes against humanity having a *locus standi* to participate in proceedings against the perpetrator.[694] Likewise, the value, significance or relevance of the right to the truth, and recovery and reintegration into society, which is of paramount importance to victims of the other crimes, is not applicable to the aggressed state.

Therefore, the question of the victims' rights of the aggressed state is limited to reparations under international law for the violations of the obligations owed to it under the primary norms by the relevant duty-bearers, i.e. the aggressor state and the perpetrator of the crime of aggression. In my view, the question of whether the victim of the crime of aggression is compatible with the normative framework of victims' rights is rhetoric. The underlying element that can be distilled is whether as the rights-holder – or victim of an international crime – a logical argument can be made that the aggressed state, like the victims of the other international crimes, is also entitled to rights under international law as a beneficiary with respect to remedies for the violation of international obligations owed to it.

It is worth clarifying that although the reparations with respect to state violations of international law and the reparations with respect to international crimes both

[694] Article 68, Rome Statute.

extend in their respective forms beyond monetary value, the form of reparation that shall be referred to in the present study is compensation. For the purposes of the forthcoming analysis, reparation shall be understood as monetary compensation.

5.3.2. The question of reparations for breaches of jus ad bellum and the crime of aggression

States have always been viewed as the rights-holders of international obligations and the beneficiaries of reparations in the light of violations of international law. Thus, the aggressed state has always been recognised as the beneficiary of reparations for state breaches of *jus ad bellum.* Yet, there is still ambit for interesting discussion. The question is whether the aggressed state is entitled to reparation from the perpetrator of the crime of aggression. In other words, can the aggressed state, in addition to reparations for a state act of aggression also receive reparations for the crime of aggression? It is worth placing emphasis that reparations with respect to the crime of aggression are not to be made by the aggressor state, but the perpetrator as the true duty-bearer. Therefore, it is an individual that must pay compensation to the aggressor state for the harm he/she has caused for failing to comply with the duty to refrain from conduct relating to the crime of aggression. The concept where an individual must pay compensation or damages to an injured party for wrong that he/she has committed is not an entirely novel concept. For example, Zegveld writes that:

> The individual perpetrator is not only criminally responsible for the crimes he has committed towards the international community, but also liable for the harm he has caused towards the victims being the object of the protection of the criminal norms.[695]

As the aggressed state is entitled to reparations for an act of aggression, irrespective of whether it may also receive reparations for the crime of aggression, this may lead one to argue that it does not really matter whether the aggressed state may also be entitled to reparations for the crime of aggression, as reparations may be sought under state responsibility. Yet alternatively, one may argue that it is indeed in the best

[695] Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts: Incompatible Values' (2010) 8 Journal of International Criminal Justice 79, 85.

interests of the aggressed state to be able to seek reparations for both the act of aggression and the crime of aggression. This way, if the aggressed state is unsuccessful in obtaining reparations for the act of aggression, there is still a chance for it to obtain reparations for the crime of aggression.

Regardless, there is basis to argue that the aggressed state as the victim of the crime of aggression has a legal interest in reparations by the perpetrator of the crime of aggression. This may appear to be rather conceptual. Nevertheless, the question of individual civil responsibility in addition to individual criminal responsibility of the perpetrator of the crime of aggression is relevant in understanding the full scope of the legal interests of the aggressed state and the perpetrator of the crime.[696]

In my view, the aggressed state has a legal interest in the individual civil responsibility of the perpetrator, in addition to individual criminal responsibility. The next step is to examine to what extent individual civil responsibility of the perpetrator of the crime of aggression is enforceable. It is important to understand that any individual civil responsibility for the crime of aggression is first predicated upon a conviction pursuant to individual criminal responsibility. At present, the intended forums that may award reparations are domestic courts and the ICC. Yet, it should be remembered that the primary function of these forums is to enforce (criminal) sanctions directly against the perpetrator of the crime of aggression, and not to enforce individual civil responsibility against the defendant. As such, the latter will be examined in the context of the former, in relation to the legal interests of the aggressed state.

5.3.3. Prosecution of the crime of aggression

If the aggressed state is the rights-holder, it can be argued that it has a direct legal interest in the enforcement of sanctions against the perpetrator for the crime of aggression as a crime has been committed directly against it. It has been suggested that the aggressed state also has an interest in reparations as a legal consequence of individual civil responsibility of the perpetrator of the crime of aggression. The question is to what extent these legal interests of the aggressed state are protected by the present enforcement mechanisms against the crime of aggression.

[696] Rosenfeld (n 658).

i. Prosecution of the crime of aggression in domestic courts

In domestic courts, prosecution is carried out by the sovereign (crown) or the Government against the defendant. In contrast with prosecution at the ICC (as will be examined below), prosecution of the crime of aggression in the domestic court of an aggressed state is directly representative of its interests. By virtue of domestic prosecution, the aggressed state may enforce criminal sanctions directly against the duty-bearer for his or her failure to comply with the duty owed to the aggressed state to comply with the norms that criminalise aggression.

Here, a difference can be identified between the crime of aggression and the other crimes. Domestic prosecution of the other crimes, e.g. war crimes, genocide or crimes against humanity is conducted by the sovereign (crown) or the government against the perpetrator on behalf of the interests of the victims who are natural persons. Although this may not give rise to any real practical ramifications, the difference is symbolic. The crime of aggression is a crime committed by an individual directly against the aggressed state. As the state itself is the victim, the sovereign (crown) or government is not facilitating proceedings on behalf of individual(s) in the interests of society for breach of the domestic penal code, or the international community for breach of international norms, but rather for prosecuting a crime committed directly against it.

Aside from the aggressed state that may initiate proceedings under the territorial principle of jurisdiction, the aggressor state may also prosecute a perpetrator under the nationality principle of jurisdiction. Both the aggressor state and aggressed state have a legal interest to enforce sanctions against the perpetrator of the crime of aggression by virtue of the nationality or territorial principle of jurisdiction. If the aggressor state has initiated proceedings, it is still nevertheless in the interests of the aggressed state that sanctions are executed against the perpetrator of the crime of aggression. As discussed in the previous chapter, there is also the possibility that prosecution of the crime of aggression in the domestic courts of the aggressor state may amount to satisfaction for the aggressed state.[697]

With respect to individual civil responsibility, upon a successful conviction, the domestic court may order the defendant to pay compensation to the aggressed state. Presumably, this would be in a situation where the aggressed state has initiated

[697] See Articles 34 and 37, ARSIWA 2001.

proceedings. The practical shortcomings are that the perpetrator may not have sufficient funds or assets to make any compensation to the aggressed state. Indeed, it should be emphasized that the source of compensation should be from the personal assets and funds of the perpetrator, and not from the aggressor state. For this reason, individual civil responsibility may not be practically feasible – or enforceable.

ii. Prosecution of the crime of aggression at the International Criminal Court

At the ICC, prosecution is representative of the interests of the international community.[698] It can be said that the legal interests of the aggressed state are represented by virtue of its membership in the international community. Even if the aggressed state itself refers the situation to the ICC (Article 14 Rome Statute), it delegates its direct interests of invoking individual criminal responsibility of the perpetrator to the interests of the international community as a whole. However, this does not necessarily mean that the interests of the aggressed state are undermined by ratifying the Rome Statute, the aggressed state has consented to the delegation of its interests. As discussed earlier in Chapter III, the competence of the ICC to prosecute international crimes is delegated from the domestic competence of States Parties. Thus, the ICC does not undermine the legal interests of the aggressed state even though prosecution takes place in the interests of the international community.

In relation to reparations to the victims of the core crimes within Article 5(1) Rome Statute, the ICC has its own regime pertaining to victim's rights. This will now be examined as a preliminary issue, followed by examining the more specific question of reparations for the victim(s) of the crime of aggression.

iii. Preliminary Issue: the regime at the International Criminal Court pertaining to victims

The ICC has established a regime pertaining to victims, which serves as an innovative platform for the advancement of victims' rights in international law. Under this regime, victims are given *locus standi* to participate in proceedings (Article 68(3) Rome Statute) and may even be awarded reparations (Article 75 Rome Statute). The

[698] Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 Journal of International Criminal Justice 618, 626.

concept behind victims' participation is that a platform is provided for victims to present their side of the story in the same proceedings as the perpetrators who have committed crimes against them. It can be envisaged that this would provide an insight to the social reality and personal story of the victim.[699] The idea is that they are able to be a part of the process that enforces sanctions against the perpetrators who have committed crimes against them.[700]

As must be appreciated, this is one of the most progressive steps taken in international criminal justice, as the ICC is the first international criminal court that has provided such a platform for victims,[701] and has aptly been described as a 'shift away from a retributive justice system to a more restorative, justice-oriented model.'[702] The Court has an infrastructure, which facilitates the regime pertaining to victims. There is a Victims and Witnesses Unit (VWU) within the Registry, along with a Victims Participation and Reparations Section (VPRS) and Office of the Public counsel for Victims (OPCV). As a subsidiary of the Assembly of States Parties, there is also a Trust Fund for Victims (TFV), which is a preparatory mechanism established in Article 79 of the Rome Statute:

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction fo the Court, and of the families of such victims.

2. The Court may order money and other property collected through hfines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.[703]

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[699] Christine van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 Case Western Reserve Journal of International Law 475, 487.
[700] See Salvatore Zappala, 'The Rights of Victims v. the Rights of the Accused' [2010] Journal of International Criminal Justice 137.
[701] See Zegveld (n 695); van den Wyngaert (n 699).
[702] van den Wyngaert (n 699) 476; see also Conor McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory' (2009) 3 The International Journal of Transitional Justice 250, 253.
[703] See Rules 98 (1-4) specifies reparations awarded by the Court against a convicted person; Rule 98(5) Trust Fund's assistance mandate with regard to the use of "other resources" for the

According to definition of victims set in Rule 85 of the Rules and Procedure and Evidence (RPE) of the ICC:

> (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
>
> (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

In the broader framework of public international law, this is also a significant development, as the regime at the ICC pertaining to victims is an example of the participation of individuals in their own capacity at an international court and the recognition of individuals as rights-holders and beneficiaries.

Pursuant to Article 75(2) of the Rome Statute, the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79 of the Rome Statute. It appears that reparations may take two forms: from the convicted perpetrator, or the TFV.[704] Reparations from the former indicate that the individual has breached his/her duty owed towards the victim(s) to comply with the norms that criminalise the convicted act, and is now facing legal consequences under secondary norms of responsibility. This is representative of reparations and damages in the light of the relationship between the perpetrator and the victim as the duty-bearer and rights-holder under international law. The latter, on the other hand, is not predicated upon a bilateral relationship

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benefit of victims, Rules of Procedure and Evidence, International Criminal Court; See also Resolution ICC-ASP/4/Res.3, Regulation of the Trust Fund for Victims; See also Commentaries to the Rome Statute, text 79; available at: http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-7/#c3903.

[704] van den Wyngaert (n 699) 480.

stemming from rights and duties, but is representative of the international community providing a form of financial support to the victims of international crimes.

It is worth examining the TFV in more detail.[705] An important difference between a reparation order made against the defendant and a reparation order through the Trust Fund is that resources under the latter may be made for the benefit of victims of crimes that have yet to be prosecuted.[706] The latter may also provide for assistance to victims and families through humanitarian programmes that undertake activities to provide physical rehabilitation, psychological rehabilitation, and/or material support to victims in situations where the Court has jurisdiction.[707] Indeed, the TFV appears to serve broader purposes relating to victims' rights than reparation for international crimes. The mandate of the Fund is: i) to implement Court-Ordered reparations and (ii) to provide physical, psychological, and material support to victims and their families.[708] The second part of the mandate addresses the social reality of the victims,[709] and appears to exist independently to the reparative function under the first part of the mandate, which is connected to finding of guilt of the perpetrator.

Both forms of reparations demonstrate that the ICC is an additional avenue for reparations to victims of the crimes, in addition to reparation for state violations of international humanitarian law or international human rights law.[710] Indeed, this means that in theory, the victims of crimes within the jurisdiction of the ICC may be entitled to two forms of reparations: i) against the perpetrator of the crime; ii) against the state that is in violation of international humanitarian law or international human rights law. Both reparations arise in the context of different secondary norms of responsibility.

It should be noted that reparations under the ICC are irrespective to the secondary norms that arise from breach by states of primary norms that prohibit conduct. In other word, reparations at the ICC relate solely to international crimes, and not violations of international law that lack criminal sanctions.

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[705] Frédéric Mégret, 'Justifying Compensation by the International Criminal Court's Victims Trust Fund: Lessons from Domestic Compensation Schemes' (2011) 36 Brooklyn Journal of International Law 123.
[706] Zegveld (n 695) 89.
[707] http://www.trustfundforvictims.org/programme.
[708] http://www.trustfundforvictims.org/trust-fund-victims.
[709] http://www.trustfundforvictims.org/programmes.
[710] See Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 International Review of the Red Cross 497; van den Wyngaert (n 699); Zegveld (n 695).

iv. Reparations with respect to the crime of aggression at the International Criminal Court

The victim of the crime of aggression is the aggressed state and not natural persons pursuant to Rule 85(b) Rules of Procedure and Evidence to the Rome Statute. However, as argued above, individuals are the beneficiaries of the implementation of the norms that criminalise aggression. This way, although they are not rights-holders *per se,* it is presumed that States Parties have conferred the status of beneficiaries onto individuals with respect to the crime of aggression. This presumption is supported by the absence of any agreements or further amendments that stipulate a separate victims' regime for the crime of aggression. By having the status as a beneficiary, a legal interest is created, which allows the natural person to have the *locus standi* to participate in proceedings and to receive reparations. What are the implications of this from a legal and practical perspective?

a. The legal implications for the aggressed state

As the ICC does not include the aggressed state in its regime pertaining to victims, the rights-holder of the protection from the norms that criminalise aggression is excluded from participating in proceedings against the perpetrator, and from being awarded reparations. Instead, natural persons, who are not rights-holders, are the beneficiaries of the rights and remedies from the regime pertaining to victims at the ICC.

That said, the exclusion of the aggressed state from the regime pertaining to victims at the ICC is understandable. The legal mandate of the ICC covers individuals, which is representative of an international forum that recognises individuals as a legal personality and confers them the *locus standi* to appear in court – whether as a defendant or a victim participant. Pursuant to Article 25(1) of the Rome Statute the Court has jurisdiction over natural persons. By allowing individuals to participate in the proceedings against other individuals and to receive reparations from individuals, the regime pertaining to victims is reflective of the underlying premise that individuals owe duties to each other to refrain from international crimes.

To allow the aggressed state to have *locus standi* as a victim participant in the proceedings and/or to receive reparations for violations of *jus ad bellum* would run

the risk of the ICC becoming an alternate or surrogate forum for international dispute settlement. This is especially so if the reparations are made from the Victims Trust Fund, as this fund can be considered as a reparatory mechanism that is part of the ICC. The risk is that the ICC may be manipulated as the alternate forum where the aggressed state can receive reparations for aggression if other forms of dispute settlement are unsuccessful. Not only is this precarious from a political perspective, but it also departs from the purpose of the ICC as an enforcement mechanism under international law to invoke individual criminal responsibility for international crimes.

For this reason, my view is that the regime pertaining to victims at the ICC should not be modified with respect to the crime of aggression. Although the aggressed state is the direct victim of the crime of aggression, the ICC is not the correct forum for it to have a *locus standi* to participate in proceedings or to award reparations through either a reparation order against the defendant or the Victims Trust Fund. Be that as it may, it can be argued that it is nevertheless in the interests of the aggressed state for its nationals to be considered as victims for the purposes of the regime at the ICC, and to receive reparations for the crime of aggression from either the perpetrator or the Victims Trust Fund. Thus, individuals are the direct beneficiaries, and the aggressed state is the indirect beneficiary.

If the aggressed state wishes to receive reparations for the crime of aggression, perhaps domestic prosecution should be considered. Even so, as discussed above, the individual civil responsibility of the perpetrator cannot be guaranteed under domestic prosecution. There is a very strong possibility that the only avenue for the aggressed state to receive reparations for a situation of aggression is under the secondary norms of state responsibility.

Be that as it may, it should not be forgotten that the legal consequences under the secondary norms of international criminal law that arise from a breach of the norms that criminalise aggression are the sanctions of a criminal nature against the perpetrator. Prosecution in itself is representative of the legal interests of the aggressed state, regardless of whether there may be reparations, in addition to the conviction of the defendant.

b. The legal implications for individuals

To understand the significance of the recognition of individuals as beneficiaries of the implementation of the norms that prohibit aggression and the norms that criminalise aggression, the first question is whether injured individuals have a right of reparation directly conferred by international law for violations of *jus ad bellum*. As submitted above, individuals are not rights-holder of the norms that prohibit or criminalise aggression. Rosenfeld confirms:

> In the field of state responsibility, an individual right to reparation for violations of the *ius ad bellum* is still widely rejected among scholars. […] In the absence of primary individual rights, individuals would not be in a position to assert secondary rights to reparation, either.[711]

The ICC is therefore representative of the first international forum that may potentially award reparations to individuals for violations of *jus ad bellum.*[712] Such reparations may be ordered directly against the perpetrator, or may be ordered from the Victims Trust Fund. This means that the reparations do not come from the aggressor state, but from the perpetrator of the crime of aggression or a multilateral fund, which is considered as a reparative mechanism under the ICC.

The next question is how individuals who are not primary rights-holders may nevertheless have tertiary rights that allow them to be beneficiaries of reparations. The legal basis for this is the Rome Statute, whereby all States Parties to the Rome Statute have conferred these tertiary rights to natural persons, and have consented to the application of the regime pertaining to victims. As the Kampala Amendments do not address the regime pertaining to victims, it can be presumed that the existing regime will apply. The implications of this are that these tertiary rights to reparations

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[711] Although it may be argued that the UNCC awarded reparations for individuals for violations of international law (including *jus ad bellum* and *jus in bello*) committed by Iraq, its composition as a claims commission was a subsidiary of the Security Council (Resolution 687 (1991) para 18) for the specific purposes of compensation for losses, damage and injury resulting directly from Iraq's invasion and occupation of Kuwait. It is questionable as to whether this can be used as an example of an international forum that could grant reparations to individuals for state violations of *jus ad bellum*. For example, Rosenfeld questions whether the UNCC may be regarded as state practice to base a customary right of individuals to reparation for violations of jus ad bellum; Rosenfeld (n 658) 262.

[712] ibid.

are only applicable at the ICC. As individuals are not true rights-holders under international law, as a general rule, they may not be able to request for reparations for violations of *jus ad bellum* in other forums.

c. The practical implications

Article 75 of the Rome Statute, which governs reparations, is rather vague:

> The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss or injury to, or in respect of, victims and will state the principles on which it is acting.

Such 'constructive ambiguity' provides the Court with a large ambit of discretion to determine how reparations are made.[713] Considering that the ICC is the first international forum that will allow reparations to individuals for the violations of jus ad bellum, there is considerable pressure on judges to develop an approach and standards for awarding reparations. Suffice it to say, different standards will apply to reparations in this context, than the objective criteria under the secondary norms of state responsibility.

However, it is outside the scope of the present study and perhaps too premature at this point in time to discuss how reparations should be made with respect to the crime of aggression. Instead, this section will focus on some concerns that may arise with respect to the practical implications of applying the regime pertaining to victims to the victims of the crime of aggression. Without prejudice to the applicability of the regime applicable to victims of the other crimes within Article 5(1) of the Rome Statute, there are indeed particular concerns with arise with respect to the victims of the crime of aggression.

First, there is the practical difficulty of determining whether an individual may be considered as a victim under Rule 85 RPE for the purposes of the applicable regime.

[713] van den Wyngaert (n 699) 486; McCarthy (n 702) 255–256.

For example, with respect to sub-paragraph (a), how would the threshold for "harm" be satisfied? Indeed, the potential scope for "harm" would be extensive in the context of aggression, as it could encompass *inter alia* emotional distress or mental anguish, minor or major injuries, fatalities, damage to personal property, economic loss. Thus, it may be difficult to draw a line to determine whether or not harm is sufficiently serious for the natural person to be considered a victim of the crime.

Second, there is also the need to consider the legal framework applicable in a situation of aggression. The Court would have to be careful that the determination of a "natural person" does not conflate *jus ad bellum* with *jus in bello*. For example, injury to a natural person should be assessed in the light of the status of the individual under *jus in bello* as to whether he/she is a civilian or combatant, and whether this amounted to any violation of international law. If so, then the next question is whether such violation could be considered as a war crime. It is important in situations when the injury or harm caused to the individual does not constitute a violation of *jus in bello,* or a war crime, that he/she should not be classified as a victim of the crime of aggression as a matter of convenience.

With respect to the entities covered under Rule 85, "direct harm" to property, which is dedicated to religion, education, art or science or charitable purposes, historic monuments, hospitals and other places and objects for humanitarian purposes are *prima facie* representative of violations of *jus in bello* and not *jus ad bellum.* In particular, the damage of this "direct harm" appears to be a breach of obligations to refrain from attacks against cultural property under *jus in bello*.[714] Nevertheless, violations of *jus ad bellum* and *jus in bello* often occur simultaneously, and the "direct harm" to the entity which is described may be classified as a violation of *jus ad bellum* if it is found to be a part of permissible collateral damage under *jus in bello.* Caution must be taken to ensure that there is no conflation between *jus ad bellum* and *jus in bello,* and the entity in question should be classified correctly as a victim of a war crime or a victim of the crime of aggression.

Third, by providing a potential avenue for reparations for violations of *jus ad bellum*, this creates a possibility for political manipulation by states as there is the possibility that the aggressed state would view the ICC as an alternative forum for reparations than the ones under traditional dispute settlement, which would then

[714] Rule 38, Customary International Humanitarian law, available at: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule38.

initiate an interest for the aggressed state to refer the situation to the Court. The incentive for initiation of prosecution is then based on the prospect of reparations than the legal interest to establish the individual criminal responsibility of the perpetrator. This would dilute the symbolic significance of the ICC as an enforcement mechanism against international crimes, as the underlying political agenda is the quest for reparations for the crime of aggression.

In my view, for these three reasons, the regime pertaining to victims should exclude the crime of aggression. That said, this is a matter of policy for the Court to deal with upon the activation of the Court's jurisdiction of the crime of aggression.

5.4. Conclusion

This Chapter has delineated the concept of a victim as the rights-holder of the enjoyment of the protection of the norms that criminalise aggression that has suffered injury or harm from the failure of the duty-bearer to comply with the duty to refrain from the prohibited conduct. As states are the rights-holders, the victim of the crime of aggression is the aggressed state. Following from this premise, the hypothesis that natural persons are also the victims of the crime of aggression has been rejected on two grounds. First, natural persons are not the rights-holders of the enjoyment of the protection of the norms that criminalise aggression. Therefore, they cannot be considered as victims of the crime. Second, the actual damage caused by the crime of aggression, which is the state act of aggression (*jus ad bellum*), is committed against the sovereignty and territorial integrity of the aggressed state and not against natural persons. Thus, it is difficult to conceptualise natural persons as victims of the crime of aggression, as any harm or injury caused must be assessed under *jus in bello*.

It is submitted that in a situation of aggression (state act of aggression and crime of aggression), individuals may be considered as victims of violations of *jus in bello* and war crimes if it is satisfied that all constituent elements of the crime are present – and not victims of the crime of aggression. As there are currently available fora for the prosecution of war crimes and it is generally accepted that victims are entitled to reparations, it may perhaps be in the better interests of natural persons who are harmed or injured in a situation of aggression to initiate proceedings as a victim of war crimes and not the crime of aggression.

That said, an issue that was addressed was the question of death or injury to natural persons in a situation of collateral damage, which is permissible under *jus in bello.* As there has been no wrongful conduct on the primary level of norms, there is no responsibility on the secondary level. Thus, natural persons who are injured or killed as part of collateral damage may not be considered as victims of *jus in bello* or war crimes. In such a situation, the collateral damage should be assessed under *jus ad bellum*, which means that the aggressed state has a legal interest to invoke the responsibility of the aggressor state for damages (death or injury to natural persons) caused as a result of failure to comply with a duty to refrain from an act of aggression.

Although the hypothesis that natural persons are victims of the crime of aggression is rejected, it is acknowledged that they may be considered as indirect victims of the crime of aggression, as they are nevertheless beneficiaries of the enjoyment of protection from the implementation by the duty-bearers of the norms that criminalise aggression.

As the victim of the crime of aggression, the aggressed state has a legal interest that legal consequences are invoked against the perpetrator(s) of the crime of aggression in the form of criminal sanctions. It is also argued that the aggressed state has a legal interest in reparations for the crime of aggression, which is to be paid for by the perpetrator (and not the aggressed state). Therefore, the aggressed state has a legal interest in reparations for both the state act of aggression and the crime of aggression.

It is predicted that the only forum that may potentially protect the legal interests of the aggressed state with respect to reparations for the crime of aggression are its domestic courts. Upon successful conviction of the defendant for the crime of aggression, the Court may make an order for reparations (from personal assets). The practical problems are that the defendant may not have sufficient funds to pay reparations to the aggressed state. On the other hand, the ICC does not appear to be directly representative of the aggressed state's legal interest with respect to reparations. At the ICC, natural persons are recognised as potential legal beneficiaries to receive reparations for the crime of aggression. As natural persons have a jurisdictional nexus to the aggressed state by either the nationality or territorial link, it can be said that reparations are nevertheless in the (indirect) interests of aggressed state.

Be that as it may, regardless of reparations by the perpetrator or Victims Trust Fund for the crime of aggression, prosecution of the crime of aggression should be regarded as the first interests of the aggressed state as this is representative of the invocation of legal consequences against the perpetrator of the crime of aggression for failure to comply with primary obligations under international law.

Part III of this dissertation will now continue to examine these enforcement mechanisms.

Part III. Enforcement

Chapter VI. Prosecution of the crime of aggression at the International Criminal Court

6.1. Introduction

Chapter III had examined the definition of the crime of aggression in the Kampala Amendments (Article 8 *bis*). This Chapter will focus on the entry-into-force of the Kampala Amendments and the conditions for the exercise of jurisdiction of the ICC over the crime of aggression (Articles 15 *bis* and 15 *ter*). The contours of this jurisdictional regime depict the scope of situations of aggression that may be prosecuted as the ICC as the crime of aggression.

Thus far, it has been established that prosecution of the crime of aggression at the ICC is in the interests of the international community, and also in the direct legal interests of the aggressed state. Yet, the effectiveness of the Court as an enforcement mechanism is predicated upon the contours of its jurisdictional regime (Article 15 *bis* and Article 15 *ter*) as it is unable to carry out proceedings in situations that fall outside of this regime. This means that the ICC is able to protect the legal interests of the aggressed state only to the extent that the situation of aggression falls within the jurisdictional regime of the Court over the crime of aggression.

The aim of this Chapter is to ascertain the jurisdictional regime of the ICC over the crime of aggression, which determines when a situation of aggression can be prosecuted at the Court as a crime of aggression. As will be shown, the jurisdictional regime over the crime of aggression is not entirely consistent with the existing jurisdictional regime that the Court has with respect to the other core crimes under Article 5(1) Rome Statute. It is *sui generis* in nature. To understand how and why this *sui generis* regime was adopted, it is necessary to examine to the negotiation history behind the Kampala Amendments in relation to the conditions for the exercise of jurisdiction.

The Chapter begins by examining the activation of the Court's jurisdiction over the crime of aggression (section 6.2), followed by revisiting the negotiation history starting from Article 5(2) Rome Statute (sections 6.3 and 6.4) to the Review Conference at Kampala (section 6.5). As a result of the Kampala Compromise (section 6.6), the jurisdictional regime over the crime of aggression (section 6.6.2) is divided into state referrals and *proprio motu* investigations (Article 15 *bis*) and Security Council referrals (Article 15 *ter*). In relation to the former, there is the

concomitant question of state consent (aggressor state). This issue pertains to whether the consent of the aggressor state is necessary for a situation of aggression to be prosecuted at the ICC. This Chapter submits that the jurisdictional regime at the ICC requires the consent of the aggressor state in situations of state referrals and *proprio motu* investigations (Article 15 *bis*), and will examine how this consent should be expressed and the ramifications of this with respect to the jurisdictional regime over the crime of aggression. The Chapter continues to examine the jurisdiction regime pursuant to Security Council referrals (Article 15 *ter*), followed by contemplating the effects of the Kampala Amendments on future States Parties (section 6.6.3).

The final section in this Chapter (section 6.7) considers the ICC as an enforcement mechanism, with particular reference to the legal interests of the aggressed state.

6.2. The beginning of all prosecutions: activating the crime of aggression at the International Criminal Court

The crime of aggression currently lies dormant at the Court. Although the Rome Statute has encompassed the crime of aggression as one of the most serious crimes of concern to the international community as a whole (Article 5(1)), its jurisdiction was delayed until a provision would be adopted stipulating the definition and conditions for the exercise of jurisdiction over the crime. At Kampala, it was decided by consensus that the activation of the Court's jurisdiction was to be even further delayed. This political strategy played a significant role in helping to achieve consensus.[715] Therefore, the delayed activation of the Court's jurisdiction was a substantial part of the compromise and should be appreciated as a component of the conditions for the exercise of jurisdiction.[716]

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[715] The President of the Review Conference, Ambassador Christian Wenaweser reflects Post-Kampala, 'I considered in Kampala, and still do today, that the issue of the formula for delayed activation – while important – was of significantly less relevance than some of the compromises that had been forged beforehand, in particular the opt-out framework for states parties, the wholesale exemption for non-states parties and the competence given to the Pre-Trial Division to authorize an investigation in the absence of a determination by the Security Council', Christian Wenaweser, 'Reaching the Kampala Compromise on Aggression: The Chair's Perspective' (2010) 23 Leiden Journal of International Law 883, 887; Niels Blokker and Claus Kress, 'A Consensus Agreement on the Crime of Aggression: Impressions from Kampala' (2010) 23 Leiden Journal of International Law 889, 891.

[716] Wenaweser (n 715) 886; Kress and von Holtzendorff (n 133) 1207.

The Kampala Amendments provide two requirements for the activation of the Court's jurisdiction over the crime of aggression. One requirement is that there must be at least 30 ratifications of the Kampala Amendments as seen in Articles 15 *bis* (2) and 15 *ter* (2):

> The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

The second requirement involves a majority of two thirds of States Parties to make a decision to activate the Court's jurisdiction after 1 January 2017. This can be seen in Article 15 *bis* (3) and Article 15 *ter* (3):

> The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

Understandings One and Three state that the Court may exercise its jurisdiction 'only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, *whichever is later*' (italics added). The phrase "whichever is later" implies that the minimum requirement of 30 ratifications and the activation decision are cumulative conditions.[717]

6.3. The conditions for the exercise of jurisdiction: revisiting the negotiation history

6.3.1. Article 5(2) Rome Statute: a "codified impasse"

As Article 120 of the Rome Statute does not allow for reservations, an argument can be made that every State Party has accepted the jurisdiction of the ICC over the

[717] Astrid Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some' [2010] Goettingen Journal of International law 745, 771.

core crimes pursuant to Article 5(1) Rome Statute, including the crime of aggression. Thus, the crime of aggression appears to be a rather curious crime that is present and already operational since the adoption and entry-into-force of the Rome Statute, but yet remains to be defined and intended to be subject to its own jurisdictional regime: a crime which has been described as "half in and half out."[718] The starting point to understanding this curious crime, is to return to Article 5(2) of the Rome Statute, which can be broken down into the following components:

- the Amendments are to be adopted in accordance with Articles 121 (Amendments to the Rome Statute) and 123 (Review of the Statute)
- the definition of the crime and the conditions under which the Court can exercise jurisdiction are to be adopted by the ASP/Review Conference
- the definition of the crime and the conditions under which the Court can exercise jurisdiction are to be consistent with the UN Charter

The negotiations from Rome to Kampala thus had to encompass: i) deciding upon the correct entry into force mechanism under Article 121; ii) defining the crime in a manner that was consistent with the UN Charter; iii) ascertaining the conditions under which the Court can exercise jurisdiction in a manner consistent with the UN Charter.

6.3.2. Trigger mechanisms

From early stages of the negotiation process, it appears to have been accepted that the existing trigger mechanisms under Article 13 (state referrals; Security Council referrals; *proprio motu* investigations)[719] should also be applicable to the crime of aggression. This could already be seen in the 1999 Coordinator's Paper,[720] whereby Option 1 for the conditions for the exercise of jurisdiction read:

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[718] Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 8.

[719] Kirsch and Robinson inform that 'the term 'trigger mechanism' emerged during the development of the ICC Statute to refer to the procedural mechanisms by which the ICC jurisdiction over a particular situation might be activated. As the concept developed, it became clear that it referred not simply to the commencement of specific investigations of a particular case or individual, but rather to the ability to direct the Court's attention to events in a particular time and place, possibly involving numerous criminal acts, with a view to initiating an exercise of jurisdiction over those events,' Phillippe Kirsch and Darryl Robinson, 'Referral by States Parties in the Rome Statute of the International Criminal Court', *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 619.

[720] 'Discussion Paper Proposed by the Coordinator: Consolidated Text of Proposals on the Crime of Aggression', 9 December 1999, UN Doc. PCNICC/1999/WGCA/RT.1 (as corrected

> The Court shall exercise its jurisdiction with regard to the crime of aggression in accordance with the provisions of article 13 of the Statute.

This was later affirmed in the 2007 Chairman's Non-Paper on the Exercise of Jurisdiction.[721] The significance is that the Security Council was not considered to be the exclusive trigger mechanism because proceedings may also be initiated by States and the Prosecutor.[722]

6.3.3. The role of the Security Council

Article 5(2) of the Rome Statute had specified that the provision relating to the crime of aggression 'shall be consistent with the relevant provisions of the Charter of the United Nations.' As examined in Chapter I, pursuant to Article 24 of the UN Charter, the Security Council has the primary responsibility for the maintenance of international peace and security, which includes determining an act of aggression under Article 39 of the UN Charter. Thus, Article 5(2) of the Rome Statute encompasses the question of the role of the Security Council with respect to the definition of the crime of aggression and the conditions under which the Court can exercise jurisdiction.

This envisaged role was arguably the most significant and contentious question in the negotiations.[723] Already in the much earlier 1994 Draft Statute for an International Criminal Court produced by the ILC ("Draft Statute for an International Criminal Court"), Article 23(2) provided that:

> A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.[724]

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on 13 December 1999, UN oc. PCNICC/1999/WGCA/R.1/Corr.1); reprinted in Barriga and Kress (n 6) 344.

[721] Article 15 *bis* (1), Non-Paper Submitted by the Chairman on the Exercise of Jurisdiction', in 2007 Princeton Report, Annex (Appendix) III; reprinted in ibid 553.

[722] Princeton Report (2006), para.61.

[723] See Blokker, 'The Crime of Aggression and the United Nations Security Council' (n 36).

[724] At the time, criticism was raised within the ILC that 'it would introduce into the statute a substantial inequality between State members of the Security Council and those that were not members, especially between the Permanent Members of the Security Council and other

In the Commentaries on the Draft Statute for an International Criminal Court, it was written:

> the difficulties of definition and application, combined with the Council's special responsibilities under Chapter VII of the Charter, mean that special provision should be made to ensure that prosecutions are brought for aggression only if the Council first determines that the State in question has committed aggression in circumstances involving the crime of aggression which is the subject of the charge.[725]

This clearly implies a type of exclusivity in competence for the Security Council to determine an act of aggression. Some delegations, such as the Russian Federation were in support of such an exclusive role of the Security Council:

> […] subject to a prior determination by the United Nations Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating, carrying out a war of aggression.[726]

States.' *Report of the International Law Commission on the work of its forty-sixth session, 2 May to 22 July 1994*, Official Records of the General Assembly, Forty-ninth session, Supplement No.10, UN Doc.A/49/10.43, at 87.

[725] Commentary to Art.20 of the Draft Statute for an International Criminal Court, Yearbook of the International Law Commission, 1994, vol. II, Part II, 39; The Commentary had also additionally included that 'any criminal responsibility for an act or crime of aggression necessarily presupposes that a State has been held to have committed aggression, and such a finding would be for the Security Council acting in accordance with Chapter VII of the Charter of the United Nations to make. The consequential issues of whether an individual could be indicted, for example, because that individual acted on behalf of the State in such a capacity as to have played a part in the planning and waging of the aggression, would be for the court to decide', 44.

[726] See 'Proposal by Cameroon', 2 July 1998, UN Doc. A/CONF.183/C.1/L.39; reprinted in Barriga and Kress (n 6) 274; 'Proposal Submitted by the Russian Federation: Definition of the Crime of Aggression', 29 July 1999, UN Doc. PCNICC/1999/DP.12; reprinted in Barriga and Kress, ibid 339; 'Proposal Submitted by Germany: the Crime of Aggression – a Further Informal Discussion Paper', 13 November 2000, UN Doc. PCNICC/2000/WGCA/DP4; reprinted in Barriga and Kress, ibid 340.

However, this was not necessarily the general opinion. Fernandez de Gurmendi who was the Co-ordinator of the Working Group on Aggression of the PrepCom in the period 2000-2002 reports that most of the proposals made in the Working Group appeared to accept that 'a determination of an act of aggression is a precondition for the Court to exercise its functions over the crime of aggression' and that 'the Security Council has the right to be the organ that acts in the first place.'[727] This suggests that the Security Council has the 'primary' role and not the exclusive role to determine an act of aggression.

Despite the apparent general consensus that a pre-determination of aggression by the Security Council is ideal as a requirement for the ICC to exercise jurisdiction, there has always been a divide in opinion with regards to whether the power and competence to determine aggression should be exclusive to the Security Council. Wilmshurst argues with respect to the pre-determination of aggression that:

> the Court will not be able to act in relation to the crime of aggression unless and until the Council has first determined that aggression has been committed by the State concerned (this was indeed the tenor of the statement made by the United Kingdom and the United States on the adoption of the Statute at the Conference).[728]

However, there appeared to be rather limited support outside of the permanent members.[729] At the SWGCA, the vast majority of the contentions which arose within the negotiations were significantly predicated upon the need for a prior external determination of the state act of aggression which had to be consistent with the UN Charter.[730]

As it was decided that all three mechanisms under Article 13 were applicable to the crime of aggression,[731] the role of the Security Council was especially significant

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[727] Fernandez de Gurmendi (n 447) 603.
[728] Elizabeth Wilmshurst, 'The International Criminal Court: The Role of the Security Council', *The Rome Statute of the International Criminal Court: A challenge to impunity* (2001) 41.
[729] Blokker, 'The Crime of Aggression and the United Nations Security Council' (n 36).
[730] Wenaweser (n 715) 884; see also Kress and von Holtzendorff (n 133) 1195.
[731] 'Proposals for a Provision on Aggression Elaborated by the Special Working Group on the Crime of Aggression', in *2009 SWGCA Report*, Annex (Appendix) I (2009 SWGCA

with respect to state referrals and *proprio motu* investigations. Such external determination was understood as the pre-condition for jurisdiction over the crime of aggression ("jurisdictional filter") and furthered the on-going debate encompassing whether the Security Council had primary or exclusive responsibility to determine an act of aggression. The inability to reach a consensus on the jurisdictional filter can be seen in Article 15 *bis* of the SWGCA Proposal 2009 which had marked the conclusion of the work of the Group. It is worth reproducing the relevant section in full:

> **Article 15 bis Exercise of jurisdiction over the crime of aggression**
>
> 2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
>
> 3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect to the crime of aggression.
>
> 4. **(Alternative 1)** In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression.
>
> ***Option 1 – end the paragraph here.***
>
> ***Option 2 – add*:** unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.
>
> 4. **(Alternative 2)** Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
>
> ***Option 1 – end the paragraph here.***
>
> ***Option 2 – add*:** provided that the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;
> ***Option 3 – add*:** provided that the General Assembly has determined that an act of aggression has been committed by the State referred to in article 8 bis;
> ***Option 4 – add*:** provided that the International Court of Justice has determined that an act of aggression has been committed by the State referred to in article 8 bis.

Proposals); reprinted in Barriga and Kress (n 6) 663; SWGCA Report 2008 (November), paras. 8-10.

As can be observed, Article 15 *bis* (4) (Alternative 1) promotes the exclusivity hypothesis. Article 15 *bis* (4) (Alternative 2) accords the Security Council with the primary responsibility/competence to determine aggression; but provides options for other bodies to act as the external determining filter: Pre-Trial Chamber, General Assembly, International Court of Justice. This Proposal was subsequently circulated at the Review Conference at Kampala to reach an agreement upon the relevant external determining filter.

Attention should also be drawn to Article 15 *bis* (5) of the 2009 SWGCA Proposal, which states:

> A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this statute.

This is highly significant as it represents a consensus that any role of the Security Council (and/or General Assembly and International Court of Justice) with respect to aggression is only procedural in nature.[732] The underlying basis for the argument against the ICC being bound by a pre-determination of the Security Council in relation to the exercise of jurisdiction over aggression is that the court will be subject to the political will of the Security Council, which could be detrimental to its integrity and the due process rights of the defendants.

As this may place strain upon the presumption of innocence (Article 66 ICC Statute) which would be unfair towards the accused as the onus will fall upon the Prosecutor to prove the guilt of the accused. The burden of proof should not be shifted to the accused. An argument can be made that a determination that is not based on pre-determined rules of law should not bind the court, and more significantly, must not bind a defendant charged with the crime of aggression as it may be inconsistent with *nullum crimen sine lege*.

[732] Kress and von Holtzendorff (n 133) 1195.

6.4. Interpreting Article 5(2) in conjunction with Article 121 of the Rome Statute: the issue of state consent

As the debate with respect to the exclusivity hypothesis advanced, a concomitant question of state consent began to emerge.[733] This referred to whether the aggressor state had to consent to the jurisdiction of the ICC over its nationals for the crime of aggression. This was directly relevant to the question of the entry into force of the Amendments and played a significant role in the debate pertaining to how Article 5(2) was to be read in conjunction with Article 121; more specifically, which provision under Article 121 should serve as the entry into force mechanism.[734] The SWGCA debated upon three possible interpretations of how the Amendments should enter into force under Article 121 in conjunction with Article 5(2): Article 121(3); Article 121(4) and Article 121(5). [735]

6.4.1. Article 121(3)

Also known as the "Adoption model" pursuant to Article 5(2), no ratification process was required as the Court could exercise jurisdiction over this crime once the resolution was adopted at the Review Conference.[736] As Article 5(2) does not mention "amendment" but "adopted," it can be suggested that this is consistent with Article 121(3):

> The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

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[733] See Stefan Barriga and Leena Grover, 'A Historic Breakthrough on the Crime of Aggression' 105 American Journal of International Law 517, 523–524.

[734] See Astrid Reisinger Coracini, '"Amended Most Serious Crimes": A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court' (2008) 21 Leiden Journal of International Law 699; Zimmermann refers to Article 121 as the relevant *lex specialis,* Andreas Zimmermann, 'Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties' (2012) 10 Journal of International Criminal Justice 209, 212.

[735] Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some' (n 717) 765.

[736] Roger Clark, 'Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute' (2009) 41 Case Western Reserve Journal of International Law 413, 413, 415 and 417.

However, this argument was not sustainable.[737] Pellet for example, argues that 'it is scarcely possible to claim that adoption of a provision in accordance with Article 5(2) should not be analysed as an amendment, given that this provision refers explicitly to Articles 121 and 123, and that Resolution F itself states that 'the provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute.'[738] There is also the issue of domestic process of ratification of treaties. Clark writes:

> some participants in the Special Working Group have argued that there are practical problems of how a State faced with a significant decision like this can cope with the necessary changes in domestic law without going through the ratification process. Some have been adamant that their Governments could not possibly contemplate an amendment of this magnitude that did not go through the ratification process and, since crimes are involved, legislative action would be necessary.[739]

As Article 121(3) did not prove to be acceptable, the SWGCA focused their attention on Article 121(4) or (5) as potential entry-into-force mechanisms.[740]

6.4.2. Article 121(4)

Article 121(4):

> […] an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

[737] McDougall (n 7) 239. see also Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some' (n 717) 763–765.; Zimmermann (n 734) 212–213.
[738] Alain Pellet, 'Entry into Force and Amendment of the Statute', *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 183.
[739] Clark, 'Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute' (n 736) 417–418; see also Kress and von Holtzendorff (n 133) 1196.
[740] McDougall (n 7) 239.

This provision is considered to be the general rule, according to which, entry into force is applicable for all States Parties, giving rise to a coherent jurisdictional regime.[741]

The legal implication of entry-into-force under Article 121(4) is that the concomitant jurisdictional regime would also encompass jurisdiction over non-states parties provided there is a nationality or territoriality link to the State Party as contained in Article 12(2). Thus, the jurisdictional regime would be identical to the other core crimes. This was of particular importance to all of the African states, members of the Non-aligned Movement (NAM) and most Latin American and Caribbean countries,[742] as they viewed that 'requiring aggressor state consent would depart from the territoriality principle enshrined in Article 12(2) of the Statute and lead to impunity rather than preventing aggression and protecting potential victims of this crime.'[743] The underlying rationale therefore is to encompass the broadest scope of jurisdiction over the crime to ensure that perpetrators could be punished accordingly.[744]

An argument can be made that this provision is allegedly the correct entry into force mechanism as almost all the proposed amendments do not technically involve any amendments to Articles 5, 6, 7 and 8 of the Rome Statute.[745] For example, Clark argues 'adding new crimes like drugs or terrorism to Article 5(1) is subject to Article 121(5); completing the negotiation on Article 5(2) is subject to Article 121(4).'[746] He adds that he personally thinks 'the argument in favour of the seven-eighths solution is stronger on the basis of the plain language and it is consistent with the complex preparatory history.' [747]

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[741] Article 121(6) offers States Parties that have not accepted the Amendment the possibility of opting out of the Rome Statute.
[742] Barriga and Grover (n 733) 524.
[743] ibid.
[744] Barriga labels this as "Camp Protection" as these delegations wanted a jurisdictional regime that was mainly protective in nature, and with effect beyond just States Parties'; Stefan Barriga, 'Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of Aggression' in Gerard Dive, Benjamin Goes and Damien Vandermeersch (eds), *From Rome to Kampala: The first 2 amendments to the Rome Statute* (Bruylant 2012) 45.
[745] Reisinger Coracini, '"Amended Most Serious Crimes": A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court' (n 734) 704.; See also Hans-Peter Kaul, 'Preconditions to the Exercise of Jurisdiction', *The Rome Statute of the International Criminal Court: A Commentary* (2002) 605.
[746] Clark, 'Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute' (n 736) 416.
[747] ibid 426.

6.4.3. Article 121(5)

Article 121(5):

> Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

This provision stipulates that the amendment enters into force only with respect to the accepting State Party.[748] As such, this reflects the premise that States do not have legal obligations under treaties they have not consented to. The ramification of this is that there is a rather fragmented jurisdictional regime pertaining to the crime of aggression, as the amendments only enter into force for States Parties that have ratified. [749]

There were two interpretations of the second sentence of Article 121(5) that were advanced in the SWGCA: i) a negative interpretation; ii) a positive interpretation. Both interpretations are central to the question of whether aggressor state consent is necessary for the exercise of jurisdiction.

i. Article 121(5) with a positive interpretation

This interpretation takes into consideration that Article 121(4) is the general rule relating to amendments; Article 121(5) therefore is the exception to this general rule.[750] Thus, it should not be considered as a specific rule which creates a separate jurisdictional regime pertaining to consent, but should be read in the light and purpose of the other provisions of the Rome Statute, and 'so far as it may have a limiting

[748] Reisinger Coracini, '"Amended Most Serious Crimes": A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court' (n 734) 706.
[749] ibid 706.
[750] See Article 121(4).

effect on other provisions' should be 'construed narrowly in order to respect the integrity of the Statute.'[751]

A narrow interpretation, i.e. a positive interpretation accepts that the Court shall not actively exercise jurisdiction with respect to a crime committed by the national of the State Party or on its territory. However, this does not rule that jurisdiction may still be established over the crime pursuant to the existing framework under Article 12(2). In other words, jurisdiction may still nevertheless be exercised if the crime was committed against the territory of a State Party that has ratified.

With respect to the crime of aggression, the State Party that has not ratified is placed on the same *locus standi* as a non-State Party with respect to the crime covered by the relevant amendments, as the Court is nevertheless able to exercise jurisdiction in accordance with its existing framework under Article 12(2).[752] The consent of the aggressor state is not strictly necessary as jurisdiction is nevertheless delegated to the ICC on the basis of territorial criminal jurisdiction upon the ratification and acceptance of the aggressed state of the Amendments. This is consistent with the ordinary jurisdictional regime contained within Article 12 of the Rome Statute, the purposes of the ICC, and the principles of international law that regulate the competence ICC as an international tribunal under international law. Pellet submits:

> Entry into force of an amendment to Article 5 to 8 leaves both third States and those who, though parties to the Statute, have not ratified the amendment in an exactly identical position: each are unaffected by the amendment. The fact that the amendment may apply not to them as States, but, should the case arise, to their nationals (and without any discrimination between nationals of States Parties to the Statute and those of third States) has absolutely nothing to do with the amending procedures; it is the normal consequence of territoriality of penal competence.[753]

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[751] Reisinger Coracini, '"Amended Most Serious Crimes": A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court' (n 734) 707, 718.; For a contrary view, see Zimmermann (n 734) 217.

[752] See McDougall (n 7) 243; Kress and von Holtzendorff (n 133) 1197; Reisinger Coracini, '"Amended Most Serious Crimes": A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court' (n 734) 707, 718.

[753] Pellet, 'Entry into Force and Amendment of the Statute' (n 736) 182; Reisinger Coracini, '"Amended Most Serious Crimes": A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court' (n 734) 707–708, 718; Dapo

ii. Article 121(5) with a negative interpretation

This interpretation derogates from the existing framework under Article 12(2). It excludes nationals from States Parties that have not ratified regardless of whether the other State Party has the competence to transfer its criminal jurisdiction to the ICC under the territoriality principle. Instead, there is the need for both jurisdictional links between both States to be cumulative in the sense that the crime of aggression must be committed by a national of a ratifying State Party against the territory of a ratifying State Party.[754] Reisinger Coracini observes that:

> Unlike Article 12(2), Article 121(5) does not distinguish between different 'trigger mechanisms' Therefore the same preconditions arguably need to be established, even upon a referral by the UN Security Council. As a consequence states parties would to a large extent be able to shield their nationals from the Court's jurisdiction over crimes covered by an amendment.'[755]

She suggests that this interpretation implies that States Parties that have not ratified the Kampala Amendments, i.e. non-ratifying States Parties would also be excluded from jurisdiction under Security Council referrals.[756] This was discussed in the SWGCA, where some delegations agreed that 'while this reading may be undesirable from a political perspective, it was nevertheless the only option under the current language of the article.'[757]

However, the view that ultimately prevailed was that this provision did not apply to Security Council referrals.[758] These delegations argued:

Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' [2010] Working Paper, Oxford Institute for Ethics, Law and Armed Conflict 2, 28.

[754] Reisinger Coracini, '"Amended Most Serious Crimes": A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court' (n 734) 707.

[755] ibid.

[756] ibid; See also Giorgio Gaja, 'The Long Journey Towards Repressing Aggression' in Antonio Cassesse, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 439.

[757] SWGCA Report 2008 (November), para.9.

[758] SWGCA Report 2008 (November), para.10.

> The Security Council could have the competence to refer cases involving the crimes of aggression to the Court with respect to non-States Parties, and it would therefore be illogical to preclude that possibility with respect to certain States Parties. Given the role of the Security Council under the Charter with respect to aggression, it would furthermore be particularly unconvincing to argue that the Council had less influence in triggering investigations into the crime of aggression than with respect to other crimes. […] Furthermore, article 121, paragraph 5, dealt with the issue of consent to be bound, which was irrelevant in the context of a Security Council referral.[759]

The other main problem with this interpretation is that non-ratifying States Parties are on a different *locus standi* than non-States Parties. Article 121(5) refers specifically to a State Party that has not ratified the amendments, which suggests that a crime of aggression committed by a non-ratifying State Party's national or on its territory is inherently excluded from the jurisdiction of the ICC.

However there is nothing in the provision that precludes jurisdiction over non-states parties.[760] This suggests that the jurisdictional links under Article 12(2) may apply to non-states parties but not to a non-ratifying State Party. The underlying rationale is that States Parties consented to the unamended Statute and should thus be protected from obligations from the amended Statute that they did not ratify or accept.[761]

Reisinger Coracini on the other hand, questions whether such a self-privilege is acceptable under the object and purpose of the Statute?[762] It was generally agreed within the SWGCA that the provisions on aggression 'should avoid unequal treatment of non-States Parties and States Parties in this respect.'[763] It is worth mentioning that at the SWGCA, there were suggestions that an amendment could be made to Article

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[759] SWGCA Report 2008 (November), para.8.
[760] Reisinger Coracini, '"Amended Most Serious Crimes": A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court' (n 734) 700.
[761] Zimmermann (n 32) 211, 218.
[762] Reisinger Coracini questions 'is such a self-privilege acceptable under the object and purpose of the Statute', Reisinger Coracini, '"Amended Most Serious Crimes": A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court' (n 734) 711.
[763] See SWGCA Report 2008 (November), paras.10,13; see also 'Jurisdiction Scenarios regarding Article 121(5) Second sentence', in 2008 SWGCA Report (November) Annex (Appendix) II; reprinted in Barriga and Kress (n 6) 620; McDougall (n 7) 247–248.

121(5) or possibly by other means, to clarify the issue above and to prevent future confusion.[764] However, this was countered by discussion that complications might arise from the need to choose the correct amendment procedure to amend Article 121(5). [765]

My view is that the positive interpretation allows for a more consistent reading of Article 121(5) with the provisions within the Rome Statute in the light of their object and purpose. This way, the provision does not appear to create an arrangement requiring state consent, which departs from the existing jurisdictional regime of the ICC and/or discrimination between States Parties that have not ratified and non-States Parties. Ultimately, the conundrum pertaining to the two differing interpretations of Article 121(5) is the result of ambiguous drafting.[766]

iii. Article 121: An open question

The problem with Article 5(2) is that it appears to be incompatible with Article 121,[767] which gives rise to a "fundamental ambiguity" with respect to the entry into force and the question of state consent.[768] To reiterate, the first interpretation of "adoption" under Article 121(3) was dropped relatively quickly. On the other hand, Article 5(2) does not mention "entry into force" which places it at odds with both Article 121(4) and Article 121(5). Clark has insightfully clarified that 'the preparatory work on Articles 5 and 121 is not conclusive on this crucial point of the applicable procedure. It is, however, worth rehearsing for what light it does shine on the matter'.[769] He explains that Articles 5(2) and 121 of the Rome Statute were drafted and formulated by two different working groups independently, which makes it rather difficult to reconcile.[770] This conundrum was left and passed on to the Review Conference.

[764] SWGCA Report 2008 (November) para.10.
[765] SWGCA Report 2008 (November) para.10; See also McDougall (n 7) 242.
[766] Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' (n 753) 28.
[767] See Kress and von Holtzendorff (n 133) 1215.
[768] Clark, 'Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute' (n 736) 413.
[769] ibid.
[770] ibid 413, 421–425; see also Zimmermann (n 734) 216.

6.5. Pushing forward at Kampala

Pursuant to Article 5(2), the Review Conference needed to adopt the definition of the crime of aggression and the conditions for the exercise of jurisdiction over the crime of aggression. The objective was to achieve this by consensus.[771] As the definition of the crime was already accepted by consensus at the ASP in February 2009,[772] the entire negotiations at Kampala relating to the crime of aggression focused upon the conditions for the exercise of jurisdiction. There was also the issue of the correct entry into force mechanism, which as examined above, represented more than just a drafting technicality. It had direct implications on the question of state consent in the absence of a Security Council referral.

As the SWGCA had already proposed a consensus definition of the crime of aggression in February 2009,[773] the remainder issues at the Review Conference, were:

i) Whether the consent of the alleged aggressor state is a pre-requisite for a *proprio motu* investigation and state referral with respect to a crime of aggression.[774]
ii) the role of the UN Security Council, i.e. whether the ICC may only proceed on the basis that the Council had actively determined an act of aggression had taken place, or if there are alternative options with respect to the determination of an act of aggression. [775]

Prince Zeid, acting as the Chairman of the SWGCA during the Review Conference announced in his Introductory Remarks (1 June):

> it is clear that two issues – the question of acceptance by the aggressor State, and the jurisdictional filter – are the main hurdles that we have to clear in order to arrive at an acceptable solution. We have a mandate from the Rome Conference to arrive at an acceptable provision on the crime of aggression,

[771] See Blokker and Kress (n 715).
[772] Barriga and Grover (n 733) 521–522.
[773] Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 24.
[774] Prince Zeid had conducted an informal "roll call" which provided an insight to the position of States Parties; reprinted in a footnote in Barriga and Grover (n 733) 524.
[775] See Wenaweser (n 715) 884.

> and we are called upon by the rules of procedure to make every effort to find a consensus.[776]

Ambassador Wenaweser, who acted as the President of the Review Conference, reflected post-Kampala that 'on both topics delegations held strong and seemingly irreconcilable positions usually presented as positions of principle. The two issues were also to some extent interlinked, which further complicated the matter.'[777]

It was also revealed by others who were present at Kampala that 'the best negotiation strategy was to focus the debate to the greatest extent possible on the conditions for the exercise of jurisdiction, and to first seek an agreement on the role of state consent. Only once such an agreement was reached could it be hoped that France and the UK would move away from their adamant insistence on SC monopoly. Fortunately, the strategy ultimately prevailed.'[778]

6.5.1. Preface: eliminating two jurisdictional filters

The Chairman's first Revised Conference Room Paper[779] dealt immediately with the issue of the jurisdictional filter. It suggested deleting the two options of the General Assembly and the International Court of Justice as a jurisdictional filter in the case of a lack of determination by the Security Council in the first instance. It is interesting to note the footnote to proposed Article 15 *bis*(1):

> The suggestion has been made to add a paragraph delaying the exercise of jurisdiction, e.g. "The Court may exercise jurisdiction only with respect to crimes of aggression committed after a period of [x] years following the entry into force of the amendments on the crime of aggression." Such a paragraph would only be relevant in case of article 121, paragraph 5, of the Statute were to be applied.

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[776] 2010 Introductory Remarks by the Chairman (1 June) [in Kampala]; reprinted in Barriga and Kress (n 6) 736.
[777] Wenaweser (n 715) 884.
[778] Kress and von Holtzendorff (n 133) 1201.
[779] 'Conference Room Paper on the Crime of Aggression', RC/WGCA/1/REV.1, 6 June 2010; reprinted in Barriga and Kress (n 6) 743; see Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 47.

6.5.2. Phase One: The Argentina, Brazil and Switzerland proposal

Argentina, Brazil and Switzerland put forward a joint initiative and submitted a non-paper ("ABS Proposal") on the 6th June 2010.[780] This non-paper represents the first phase towards achieving the final compromise as it enacted considerable interest amongst delegations. It addressed the issue of state consent by considering the Security Council referral trigger mechanism separately from the other two trigger mechanisms under Article 13, i.e. state referrals and *proprio motu*.[781] This provided the innovative platform for advancement, as it focused the substantive question of state consent directly to the relevant trigger mechanisms.

With respect to the former, in accordance with Article 13(b), the entry into force mechanism was to be Article 121(5), whilst Article 121(4) would govern the entry-into-force for State referrals and *proprio motu* once the seven-eighths majority of ratifications were obtained. In the light of the high threshold of ratifications, the jurisdictional regime envisaged to apply to the latter was identical to the other core crimes under Article 5(1) which would thus encompass both non-ratifying States Parties and non-States Parties.

The ABS Proposal received a mixture of both praise and disapproval the next day.[782] Nevertheless, the Proposal was considered to be "extremely useful"[783] in advancing the negotiations.[784] This was subsequently incorporated into the Chairman's Second Revised Conference Room Paper on the Crime of Aggression.[785] In this Paper, Article 15 *bis* was split into: i) Article 15 *bis* (state referral, *proprio*

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[780] Wenaweser (n 715) 885.

[781] Article 15 *bis* (1) The Court may exercise jurisdiction over the crime of aggression as defined in article 8 *bis* in accordance with article 13 (a) and (c), subject to the provisions of this article.

[782] In the 2010 WGCA Report, it was stated that 'these ideas were welcomed by some delegations as a creative attempt to attract consensus. It was suggested flexibility was needed regarding the entry into force mechanisms, as the respective provisions in the Rome Statute seemed to ambiguous and not to apply well to the crime of aggression, which was already contained in article 5 of the Rome Statute. Other delegations expressed concern about the legal and technical feasibility of an approach that would draw on elements of both paragraphs 4 and 5 of article 121 of the Statute. Concern was expressed that a creative interpretation of these provisions could harm the Court's credibility', Report of the Working Group on the Crime of Aggression, RC/5 in *Review Conference Officials Records*, RC/11, Part II, Annex III, 45, para.14.

[783] Barriga and Grover (n 733) 525.

[784] Wenaweser (n 715) 885.

[785] 'Conference Room Paper on the Crime of Aggression', RC/WGCA/1/Rev.2, 7 June 2010, in *WGCA Report*, Appendix I; reprinted in Barriga and Kress (n 6) 754.

motu) and Article 15 *ter* (Security Council referral).[786] However, Prince Zeid emphasized in his Introductory Remarks that 'splitting 15 *bis* into two provisions does, however, and I would like to underline this, not mean that the conference room paper now endorses the idea of also splitting the entry into force procedures, by using both 121(4) and 121(5). The conference room paper continues to be neutral on this issue of the entry into force procedure (…).'[787]

The ABS Proposal was so politically useful because it would have been difficult otherwise for Ambassador Wenaweser and Prince Zeid to construct the demarcation between the trigger mechanisms because 'such a move would have been appeared biased toward the permanent members of the Security Council,'[788] as it would have been implied that the other two trigger mechanisms should be dropped in the light of the difficulty in reaching an agreement.[789]

6.5.3. Phase Two: The Canadian proposal

The Canadian delegation put forward their own proposal on the 8th June ("Canadian Proposal"), which refocused on the issue of state consent of the aggressor state with respect to state referrals and *proprio motu* investigations. This Proposal can be seen to reflect elements from the negative interpretation of Article 121(5). Attention should be drawn to proposed Article 15 *bis* (2):

> Where the Security Council has not made such a determination within six (6) months after the date of notification and where a State Party has declared its acceptance of this Paragraph, at the time of its deposit of its instrument of ratification or acceptance or at any time thereafter, the Prosecutor may proceed with an investigation of a crime of aggression provided that:

[786] In the Introductory Remarks by the Chairman (8 June), he said 'my expectations that splitting the old 15 *bis* into two provisions, along exactly those lines, will help us sharpen our discussions on the question of consent, and on the question of the filter'; reprinted in Barriga and Kress ibid 761.
[787] ibid 762.
[788] Barriga and Grover (n 733) 525.
[789] ibid.

(a) the Pre-trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15; and

(b) [all state(s) concerned with the alleged crime of aggression] the state on whose territory the alleged offence occurred and the state(s) of nationality of the persons accused.

6.5.4. Phase Three: The Argentina, Brazil, Switzerland and Canada proposal

The delegations from Argentina, Brazil, Switzerland and Canada engaged in closed multilateral consultations and surprised the remaining delegations by producing a combined non-paper ("ABCS non-Paper") two days before the end of the Conference.[790] The starting premise for this non-paper was that in the case of a Security Council referral, there would be no further conditions for the exercise of jurisdiction by the Court. Thus, the focus was on conditions for the exercise of jurisdiction for the other two trigger mechanisms: state referrals and *proprio motu.* The following provisions played a significant role in the final compromise:

> **Article 15 *bis***
> **Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)**
> 4. (Alternative 2)
> …
> 4 *bis*. The Court may exercise its jurisdiction over the crime of aggression committed by a State Party's nationals or on its territory in accordance with article 12, unless that State Party has filed a declaration of its non-acceptance of jurisdiction of the Court under paragraph 4 of this Article.
>
> 4 *ter*. Such a declaration may be submitted to the Secretary General of the United Nations at any time before December 31, 2015 or, in the case that ratify or accede to the Rome Statute after that date, upon ratification or accession. This declaration may e withdraw at any time, in which case the Court, subject to the provision of paragraph 1, may exercise its jurisdiction in respect of the State concerned.
>
> 4 *cor.* In respect of a State which is not party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression as provided for in this article when committed by that State's nationals or on its territory.

[790] Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 50–51; Wenaweser (n 715) 885; Kress and von Holtzendorff (n 133) 1203–1204.

The ABCS non-Paper was considered seriously by Ambasador Wenawesser and Prince Zeid because it represented a significant political development in the negotiations. There appeared to be compromise between conflicting positions with respect to the issue of state consent.[791] The proposed provision was predicated upon Article 12 Rome Statute albeit two qualifications: i) allowing any State Party to file a declaration of non-acceptance of jurisdiction; and ii) excluding non-States Parties.[792] For the delegations who were in favour of the jurisdictional regime under Article 12, to agree to the exclusion of non-States Parties entirely was a large concession. Likewise, for the delegations who were in favour of state consent, the inclusion of Article 12 was a large compromise.[793] The ABCS Proposal gave rise to many informal bilateral and group consultations for the next day and a half.[794]

6.5.5. Phase Four: the final stages, the role of the President of the Review Conference

At the conclusion of the work of the Working Group, the negotiations were then presided over by the President of the Review Conference, who put forward the first non-Paper ("President's First Paper") at the plenary of the Review Conference in the morning of Thursday, 10 June 2010.[795] This non-Paper appeared to closely mirror the ABSC non-Paper:

> 1. Decides to adopt the amendments to the Rome Statute of the International Criminal Court (hereinafter "The Statute") contained in annex I of the present resolution, which are subject to the rafication or acceptance and shall enter into force in accordance with **article 121, paragraph 5** (bold in original text).

Two additional provisions have been put forward under Article 15 *bis* (1):

> **1 *bis* The Court may, in accordance with article 12, exercise jurisdiction with respect to an act of aggression committed by a State Party, unless that State has lodged a declaration of non-acceptance with the Registrar.**
>
> **I *ter* The Court may not exercise jurisdiction with respect to an act of aggression committed by a Non-State Party** (bold included in original text**).**

[791] see Barriga and Grover (n 733) 526; Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 51.
[792] Kress and von Holtzendorff (n 133) 1204.
[793] Barriga, 'Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of Aggression' (n 744) 45–46.
[794] Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 51.
[795] 'Draft Resolution: The Crime of Aggression', informal non-paper submitted by the President of the Review Conference, originally dated 10 June 2010, 10.00am; reprinted in Barriga and Kress (n 6) 774.

With respect to Security Council referrals, a footnote pertaining to Articles 15 ter reads:

> **The suggestion has been made to delete paragraphs, 2, 3 and 4. This would dispense the need for a determination of an act of aggression by the Security Council in order to proceed, bearing in mind that this article should not negatively affect the ability of the Security Council to exercise its competence under Art. 13 (b).** (bold included in original text).

The President's legal advisor, Barriga reveals that this suggestion was made in bilateral consultations and was then being openly tested.[796]

When speaking to the Plenary, Ambassador Wenawesser addressed the opt-out mechanism:

> You know that a number of states have circulated suggestions to this effect and have in their suggestions outlined something that would usually be referred to as an "opt out" under article 121(5) of the Rome Statute. This has met with quite some legal criticism as I understand it and this is why we have redrafted this approach in a new paragraph 1 *bis* of article 15 *bis*. Under this approach, this would not constitute an "opt out" of the amendment, much rather it would be a declaration that would affect a State Party's acceptance already given under article 12(1). So this approach is very strongly based on article 12 of the Rome Statute and the very specific manner in which the crime of aggression is already reflected in the Rome Statute.[797]

Half a day later, he circulated the second non-paper ("President's Second Paper").[798] The following provisions are worth reproducing:

> 1. *Decides* to adopt, **in accordance with article 5, paragraph 2**, of the Rome Statute of the International Criminal Court (hereinafter: "the Statute") the amendments to the Statute contained in annex 1 of the present resolution, which are subject to ratification

[796] Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 52.
[797] 2010 Introductory Remarks by the President (10 June, 11.00am); reprinted in Barriga and Kress (n 6) 780; In a reflection written post-Kampala, Ambassador Wenaweser states, 'I presented it to the plenary as a sui generis solution on the basis of the acceptance already given by states parties under Article 12 of the Rome Statute, which as possible due only to the specific placement of the crime of aggression in the Statute, Wenaweser (n 715) 886–887.
[798] 'Draft Resolution: The Crime of Aggression', informal non-paper submitted by the President of the Review Conference, 10 June 2010, 11.00pm; reprinted in Barriga and Kress (n 6) 147.

or acceptance and shall enter into force in accordance with article 121, paragraph 5; **and notes that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance.**

[…]

4. *Also decides* to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction.

Article 15 *bis*:

> **1 *bis*. The Court may exercise jurisdiction only with respect to crimes of aggression committed at least five years after the adoption of the amendments on the crime of aggression and one year after the ratification or acceptance of the amendments by thirty States Parties.**
>
> **1 *ter*.** The Court may, in accordance with article 12, exercise jurisdiction **over a crime of aggression, arising from** an act of aggression committed by a State Party, unless that State **Party** has **previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.**
>
> **1 *quarter*. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.** (bold included in the original text)

Another important modification can be seen in Article 15 *bis* (4) (Alternative 2) that the Pre-Trial Division instead of the Pre-Trial Chamber has to authorize the commencement of the investigation in respect of a crime of aggression where no such determination of the State act of aggression is made by Security Council.[799] With respect to Security Council referrals, under Article 15 ter, the provisions from the previous paper which require a determination by the Security Council have been deleted.

[799] Introductory Remarks by the President 10 June, 11.30 pm; reprinted in Barriga and Kress ibid 787.

On the last day of the Review Conference, the President put forward a Preliminary Compromise Proposal.[800]

> 15 *bis*
>
> 4. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respet of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council had not decided otherwise in accordance with Article 16.
>
> 5. The Court may not exercise jurisdiction over the crime of aggression in accordance with article 15 *bis* until States Parties so decide no earlier than 2017.

In a reflection written post-Kampala, Ambassador Weneweser writes:

> At this point, less than 24 hours before the end of the Conference, my assessment of the political dynamic at the Conference was such that the submission of a text that provided for an alternative in case of a Security Council inaction was the logical next step – although I was aware that this might raise serious objections. I therefore informally consulted the most important stakeholders in the late morning of Friday 11 June, on the basis of a short non-paper. *The paper suggested the Pre-Trial Division as an additional filter to the Security Council, and sought to balance this choice in two ways: first, it made a specific reference to Article 16 of the Statute and the competence of the Security Council to suspend ICC Proceedings. Second, it delayed the activation of the ICC's jurisdiction by at least seven years, and in doing so gave precedence to the Security Council filter: the ICC's jurisdiction under 15 ter would automatically be activated after seven years, unless states parties decided otherwise. The more controversial jurisdiction under 15 bis, on the other hand, would require an active decision by states parties (...) [Italics added]*[801]

[800] 2010 President's Preliminary Compromise; reprinted in Barriga and Kress, ibid 789.
[801] Wenaweser (n 715) 886–887.

The final non-Paper ("President's Third Paper) marked the final compromise proposal and was presented to the plenary at 4.30pm. It contained *inter alia* the additional condition of 'a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.' Under both Article 15 *bis* and 15 *ter*, paragraph 3, a provision is to be inserted for the delayed entry into force. Article 15 *bis*(8) had added "in accordance with article 16." Ambassador Weneweser further reflects:

> Direct talks between the most interested parties continued well into the evening with an extended and at times irrational argument over this aspect of the final package. In the end, they were unsuccessful. Given the high stakes and the late hour, I put a final proposal on the table, which today is the text of paragraph 3 of Articles 15 *bis* and 15 *ter* of the Rome Statute: the activation of both triggers is thus subject to a future decision of states parties, to be taken after 1 January 2017 by at least an absolute majority of two-thirds of states parties.[802]

This "final proposal" was made verbally, and the final revised draft resolution was put to the Review Conference, where the resolution was adopted by consensus at 12.20am.[803]

6.5.6. The importance of consensus

The Rome Statute provided no clear instructions how to amend the Statute to give effect Article 5(2), which is why it is presumed that the Review Conference has the competence under international law to adopt the *sui generis* regime pertaining to the crime of aggression.[804] The fact that the Kampala Amendments were adopted by

[802] ibid 887; the 2010 President's Final Compromise Proposal reads: 15 *bis* (3) The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute; 15 ter (3) The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute, reprinted in Barriga and Kress (n 6) 804.
[803] Barriga, 'Negotiating the Amendments on the Crime of Aggression' (n 446) 57.
[804] For presumed legality see *Certain Expenses of the United Nations* (n 29) 168.

consensus is significant as it is symbolic that every State Party present at the Review Conference had adopted the *sui generis* regime.

From a political perspective, the consensus is indicative that the crime of aggression was an important issue, requiring engagement from all present States Parties to create a sense of unity. Blokker and Kress reveal that 'almost every State Party from the outset indicated that it had strong preference for consensus decision-making or even that it did not want to vote as this would be divisive for the ICC.'[805] The unspoken compliance pull of aiming for consensus can be seen in the following example: before the adoption of resolution RC/Res.6, the representative of Japan had announced that 'it is with a heavy heart that I declare that, if all the other delegations are prepared to support the proposed draft resolution as it stands, Japan will not stand in the way of a consensus.'[806]

6.6. The Kampala Compromise

In the light of the above, the term Kampala Compromise is apt to describe the amendments on the crime of aggression, which were the result of the highly complex and conflicting interests within the States Parties, which inevitably led to significant concessions on all sides as the 'logical consequence of aiming for consensus.'[807]
Under Article 1 of the Kampala Amendments, the Review Conference:

> Decides to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: "the Statute") the amendments to the Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; and notes that any State Party may lodge a declaration referred to in article 15 bis prior to ratification or acceptance.

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[805] Blokker and Kress (n 715) 891.
[806] Statement by Japan, Statements by States Parties in explanation of position before the adoption of resolution RC/Res.6 on the crime of aggression; reprinted in Barriga and Kress (n 6) 810.
[807] Blokker and Kress (n 715) 891; Ambassador Wenaweser had affirmed 'few had expected – or even thought feasible – a consensus in Kampala on a comprehensive package on the crime of aggression. That this proved possible in the end was due to the very positive negotiating dynamic in Kampala, whih found its most important expression in the willigness of all sides to make massive concessions', Wenaweser (n 715) 887.

There are three important points to note. First, the Amendments are adopted in accordance with Article 5(2). Second, the Amendments shall enter into force under Article 121(5). [808] Third, the declaration pursuant to Article 15 *bis* allows a State Party to lodge a declaration with the Registrar that it does not accept the Court's jurisdiction over the crime of aggression, an "opt-out" clause (Article 15 *bis* 4).

The jurisdictional regime of the crime of aggression in the Kampala Amendments was the result of concessions and compromise in the light of two concomitant issues that encompassed seemingly irreconcilable positions: i) the role of the Security Council; ii) and the need for consent by the alleged aggressor state. This led to the separation of the trigger mechanisms, whereby state referrals and *proprio motu* investigations are governed by Article 15 *bis*, whilst Security Council referrals fall under Article 15 *ter*.

6.6.1. The entry into force and the conditions of jurisdiction: A tale of frustration

The entry-into-force mechanism is Article 121(5), while the jurisdictional regime is predicated upon Article 15 *bis* and Article 15 *ter*. As already produced above, Article 121(5) states:

> Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

The first sentence specifies the entry into force, whilst the second sentence pertains to jurisdiction of the Court over the crime covered by the amendment. Thus, the entry-into-force mechanism is directly relevant to the jurisdictional regime of the Court over the crime covered by the amendment. However, the second sentence does not appear to fit entirely with the jurisdictional regime contained within the Kampala Amendments, as pointed out by Zimmerman, 'both Article 15 bis and Article 15 ter contain significant deviations from the amendment provisions contained in the ICC

[808] Zimmermann (n 734) 212–215.

Statute itself, and, in particular, Article 121(5) thereof.'[809] *Per contra*, Article 15 *ter* does not necessarily deviate from the second sentence of Article 121(5) because the Court may ordinarily exercise jurisdiction over nationals of non-State Parties in situations of Security Council referrals.[810] Any contention thus stems from how Article 121(5) should be read in relation to Article 15 *bis*.

In my view, the most logical approach is to create a demarcation between the entry into force of the amendments (first sentence), and the jurisdiction (second sentence). The first sentence of Article 121(5) is to be read only in the context of the entry-into-force of the Kampala Amendments.[811] The text of OP1 can be read to support this, as it only mentions "entry into force" in accordance with Article 121(5) and does not make any explicit reference to jurisdiction.

This way, the mechanism for the entry-into-force of the amendments for each individual ratifying State Party is a separate matter from the jurisdictional regime of the Court with regard to the crime of aggression. Thus, upon entry into force of the amendments on the crime of aggression, the jurisdictional regime is not necessarily the one as contained within the second sentence of Article 121(5) as it is predicated upon the conditions pursuant to Article 15 *bis* and Article 15 *ter*.

As can be expected, this interpretation is not so readily accepted. Manson for example, argues that 'the Art. 121(5) reference in OP1 comes together with 'the baggage' of the second sentence, to which it is tied in the Statute, whether welcome or not.'[812] This suggests that the jurisdictional regime of the crime of aggression should be read in accordance with Article 121(5). His argument that Article 121(5) should be read in its entirety is not unreasonable. Yet, the interpretation that calls for a demarcation between the first sentence and the second sentence of Article 121(5) is tenable because the nature of the conditions of jurisdiction pertaining to the crime of aggression, which was ultimately adopted by the Review Conference is *sui generis* in nature. Article 5(2) Rome Statute is the *lex specialis* which provided the ASP/Review

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[809] ibid 220; See McDougall (n 7) 250.

[810] Article 13 Rome Statute; Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (n 698) 618.

[811] Barriga, 'Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of Aggression' (n 744) 31,34,46.; For a contrary position see Robert Manson, 'Identifying the Rough Edges of the Kampala Compromise' (2010) 21 Criminal Law Forum 417, 426; Kress and von Holtzendorff (n 133) 1214.

[812] Manson (n 811) 426; For a different view, McDougall writes that 'if Article 121(5) is not understood as applying to the crime of aggression as a matter of law, there is no legal impediment to the severing of the second sentence', McDougall (n 7) 252.

Conference with the legal basis to adopt this *sui generis* regime pertaining to the entry-into-force and conditions for the exercise of jurisdiction for the crime of aggression. This way, the amendments shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance, whilst the jurisdictional regime is a separate matter of interpretation.

As this section now continues to examine the *sui generis* jurisdictional regime over the crime of aggression, Article 15 *bis* will be focused upon, especially in the light of how the provision should be read together with Article 121(5). The findings are directly relevant to the jurisdictional regime over the crime of aggression in situations of state referrals and *proprio motu* investigations, as at present, the jurisdictional regime over the crime of aggression in relation to state referrals and *proprio motu* is not entirely clear and there are differing positions in relation to the correct regime.[813] Therefore, the answer stems from the correct interpretation of Article 121(5) and Article 15 *bis*(4).

6.6.2. The jurisdictional regime over the crime of aggression

i. State Referrals and *proprio motu*: Article 15 *bis*

There are two aspects to the jurisdictional regime under Article 15 *bis*: substantive conditions and procedural conditions. The former relates directly to the exercise of jurisdiction over the individual for the crime of aggression, whilst the latter refers to pre-determination that the state act element of the crime is present.

A. The substantive conditions

The crux of the substantive conditions is encapsulated in Article 15 *bis*(4):

> The Court may, in accordance with Article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept

[813] See Zimmermann (n 734) 224; Milanovic, 'Aggression and Legality: Custom in Kampala' (n 579) 182; Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some' (n 717) 771–781; see also Statement by Japan, Statement of States Parties in explanation of position before the adoption of resolution RC/Res.6 on the crime of aggression; reprinted in Barriga and Kress (n 6) 810.

> such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

The specific reference to Article 12 makes it worthwhile to reproduce the provision in its entirety. Article 12:

> (1) A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
>
> (2) In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> > (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
> > (b) The State of which the person accused of the crime is a national.
>
> (3) If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Pursuant to Article 12(1), it can be deduced that all States Parties to the Rome Statute have accepted jurisdiction with respect to the crime of aggression, which was already present under Article 5(1) at the adoption of the Statute.[814] Article 12(2) stipulates that the Court may exercise its jurisdiction under the territorial or nationality principle provided that one of the parties to the proceeding is a State Party. As such, jurisdiction is not limited only to States Parties and may extend towards nationals of

[814] William Schabas and Sharon Williams, 'Article 12' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, 2008).

non- States Parties under one of the aforementioned jurisdictional links above.

Thus, a reference to Article 12 implies that the Court may exercise jurisdiction over the crime of aggression provided that one of the parties to the proceedings has ratified the Kampala Amendments. Provided the State Party wishing to initiate proceedings has ratified the Kampala Amendments, jurisdiction can be established under the territorial or nationality principle. It is not necessary for both aggressed and aggressor state to ratify the Amendments.

It should be noted that Article 15 *bis*(4) stipulates that jurisdiction will be exercised over an act of aggression committed by a "State Party", which infers that non- States Parties are excluded from jurisdiction. Article 15 *bis*(5) affirms this, by stating 'in respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.' Read together, these provisions suggest that the jurisdictional regime of the crime of aggression departs from an ordinary reading of Article 12. Also departing from the Rome Statute is the "opt-out" mechanism whereby a State Party declares that it does not accept such jurisdiction by lodging a declaration with a Registrar.[815] Presumably, it is intended that this declaration should be made prior to the commission of the crime of aggression.[816] This appears to be contrary to the mechanism of "opt-in" where a State Party actively ratifies an Amendment.

(i) Understanding the scope of jurisdiction that the ICC can exercise over the crime of aggression

It is the reference to Article 12 which renders Article 15 *bis*(4) incompatible with the second sentence of Article 121(5). There are two conflicting views on how Article 15 *bis*(4) is to be read in conjunction with Article 121(5):

- The second sentence of Article 121(5) should prevail
- Article 15 *bis*(4) should prevail

[815] It is interesting to note that some have questioned the decision to lodge the Declaration with the Registrar of the Court, as it is the Secretary-General of the United Nations who is the depository of instruments of accession under Article 125(3). As such, this raises the concern of untransparency, see Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some' (n 717) 775; McDougall (n 7) 265–266.
[816] See McDougall (n 7) 266.

The scope of jurisdiction that the ICC may exercise over the crime of aggression is predicated upon the correct interpretation of how these two provisions should be read together. The following tables best illustrate the differences between both approaches.

Table 2: Prevalence of the negative interpretation of the second sentence of Article 121(5)

Jurisdiction	**[A] SP**	**[A]SP RA**	**[A] SP OO**	**[A] SP RA OO**	**[A] NSP**
[V] SP	No	No	No	No	No
[V] SP RA	No	**Yes**	No	No	No
[V] SP OO	No	No	No	No	No
[V] SP RA OO	No	**Yes**	No	No	No
[V] NSP	No	No	No	No	No

Table 3: The prevalence of Article 15 *bis*(4)

Jurisdiction	**[A] SP**	**[A]SP RA**	**[A] SP OO**	**[A] SP RA OO**	**[A] NSP**
[V] SP	No	**Yes**	No	No	No
[V] SP RA	**Yes**	**Yes**	No	No	No
[V] SP OO	No	**Yes**	No	No	No
[V] SP RA OO	**Yes**	**Yes**	No	No	No
[V] NSP	No	No	No	No	No

[A] – aggressor state; [V] – aggressed state; SP – State Party that has not ratified the Amendments; SP RA – State Party that has ratified the Amendments; SP OO – State Party that has not ratified the Amendments but has opted-out; SP RA OO – State Party that has ratified the Amendments and opted-out; NSP – non State Party.

As can be seen, the prevalence of Article 15 *bis*(4) gives rise to a broader jurisdictional scope than the interpretation which adheres to the prevalence of the negative interpretation of Article 121(5). Thus, both readings have significant differences with respect to the jurisdictional regime of the crime of aggression. This has practical ramifications relating to Court proceedings.

i. The second sentence of Article 121(5) should prevail

The first assumption is that those who hold this view, would argue that Article 121(5) is to apply in its entirety.[817] In other words, the first sentence and the second sentence must both apply. The next assumption is that those who subscribe to this

[817] Manson (n 811) 426.

view uphold the negative interpretation of the Article 121(5). This is arguably because Article 15 *bis*(4) appears to broadly reflect the positive interpretation of the second sentence of Art 121(5) Rome Statute, albeit the exclusion of non-States Parties entirely from the jurisdiction. Although Article 15 *bis*(4) is not entirely consistent with the positive interpretation, the crux of the matter is that it upholds that jurisdiction can be satisfied on either the nationality or territorial basis. This provides reason to believe that those who uphold the positive interpretation of the second sentence of Article 121(5) would be in favor of Article 15 *bis*(4) having prevalence.

The negative approach on the other hand, holds that jurisdiction is available only when both the aggressed state (party) and the aggressor state (party) have ratified the amendments on the crime of aggression. It is the latter that is important because the underlying issue is that the aggressor state must specifically consent to the jurisdiction of the Court. Thus, both the territorial and nationality jurisdictional links must be cumulative for the Court to have jurisdiction over this crime.

An argument in support of the negative interpretation of the second sentence of Article 121(5) can be made that RC/Res.5, which was also adopted at the Review Conference, amends Article 8 of the Rome Statute pursuant to Article 121(5). Hence the application of Article 121(5) should consistently apply to to the amendment to Article 8 and to the crime of aggression.[818] The criticism of this approach however is that it appears to discard Article 15 *bis*(4), which is arguably contrary to the intention and efforts of the drafters of the Amendments to create the *sui generis* framework.

ii. Article 15 bis(4) should prevail

This approach adopts the proposed demarcation between entry into force and conditions for the exercise of jurisdiction as submitted above. The first sentence of Article 121(5) should be concentrated upon with regards to the entry-into-force of the Kampala Amendments:

> Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance.

[818] Zimmermann (n 734) 220.

This means that the amendments on the crime of aggression will enter into force for the relevant State Party individually, one year after the deposit of the treaty instrument. It has no bearing on the question of jurisdiction, which falls under the second sentence. Therefore, this interpretation involves an apparent severance of the first and second sentence of Article 121(5), holding only the former to be applicable with respect to the overall Amendments. This can be reaffirmed by arguing that OP1 only mentions "entry into force" in accordance with Article 121(5).

In other words, only the first sentence of Article 121(5) applies specifically in the context of entry-into-force, whilst the second sentence becomes effectively discarded. The conditions for the exercise of jurisdiction are to be governed by Article 15 *bis* and *ter*. With respect to the former, in the conflict between the second sentence and Article 15 *bis*(4), it is the latter that prevails as the jurisdictional regime. Thus, the application of the first sentence of Article 121(5) as the entry-into-force mechanism, followed by Art 15 *bis*(4) as the conditions for the exercise of jurisdiction give rise to a "sui generis" adoption regime.[819]

The next stage of analysis is to find the legal reasoning that allows Article 15 *bis*(4) to prevail over the second sentence of Article 121(5). Three arguments can be put forward. The first argument is that Article 15 *bis*(4) is the *lex specialis* which is why it can prevail over the second sentence of Article 121(5). It can be argued that Article 15 *bis*(4) is more specific as it relates directly to the jurisdiction for the crime of aggression, whilst the second sentence of Article 121(5) refers more generally to amendments to Articles 5, 6, 7 and 8. As such, it should prevail in the light of the jurisdictional regime over the crime of aggression. Alternatively, it can also be argued that Article 15 *bis*(4) is the *lex posterior* and should thus prevail.

The second argument is predicated upon Article 12(1) as the *lex specialis*. This means that all State Parties have accepted the Court's jurisdiction over the crime of aggression under Article 5(1). The second sentence of Article 121(5) is not relevant because the States Parties have already accepted jurisdiction over the crime of aggression. As such, it is inapplicable in the present context: Article 15 *bis*(4) will apply.

[819] Kress and von Holtzendorff argue that 'it is thus perfectly possible and hence preferable to construe the enabling resolution and draft Article 15 *bis* (4) of the ICC Statute harmoniously as both the wording of the latter provision and the genesis of the negotiations suggest it', Kress and von Holtzendorff (n 133) 1214.

The final argument is that the *lex specialis* is Article 5(2), which allowed the ASP to adopt a *sui generis* approach under the legal basis of creating the "conditions for the exercise of jurisdiction."This *sui generis* approach appears to be predicated upon Article 5(1) and Article 12(1): that the crime of aggression is already present in the jurisdiction of the Court and that States Parties have already agreed to such.[820] Therefore, the second sentence of Article 121(5) does not necessarily apply, allowing the newly drafted Article 15 *bis* and Article 15 *ter* to apply as the "conditions for the exercise of jurisdiction." In my view, this is the most convincing argument as the Review Conference has the legal competence under Article 5(2) to adopt a *sui generis* jurisdictional regime, which is not entirely consistent with the typical adoption process under the Rome Statute but nevertheless falls under the "conditions for the exercise of jurisdiction."[821] It is worth examining again the Statement of the Japanese delegation after the adoption of the Kampala Amendments:

> Article 5, paragraph 2, is invoked as the basis with respect to "amendment", whereas article 121, paragraph 5, is invoked as the basis with respect to "entry into force". This is a typical "cherry picking" from the relevant provisions related to the amendment, that is, in Japan's view, very difficult to justify. We have serious doubt as to the validity of article 5, paragraph 2, as a basis of amendment to the Statute, if we adhere to a sound interpretation of the Rome Statute as agreed upon in Rome. The upshot is a highly accentuated complication in the legal relation after the amendment between States Parties, as well as the relation between States Parties and non-States Parties, which is extremely unclear and hard to understand.[822]

That said, the Rome Statute did not provide clear instructions how to make the relevant amendments with respect to Article 5(2). Although "cherry picking" is difficult to justify, it is to be presumed that the States Parties have the competence

[820] Wenaweser (n 715) 885; see also Kress and von Holtzendorff (n 133) 1215.
[821] Kress and von Holtzendorff (n 133) 1215; For a contrary position, see Zimmermann (n 734) 226–227.
[822] Statement by Japan, Statements by States Parties in explanation of positions after the adoption of resolution RC/Res.6 on the crime of aggression; reprinted in Barriga and Kress (n 6) 811–812.

under international law to implement Article 5(2) as they decide fit.[823] Furthermore, the *sui generis* adoption regime which encompassed the "cherry picking" was adopted by consensus.[824] This justifies Article 15 *bis*(4) taking prevalence over the second sentence of Article 121(5). The Japanese Delegation continued to express:

> What happens to article 5, paragraph 2?
> How can we possibly delete article 5, paragraph 2, of the Statute in accordance with article 5, paragraph 2, itself? This is nothing but a "legal suicide" or "suicide of legal integrity."

Yet, the deletion of Article 5(2) appears to be logical in the context of the addition of Article 8 *bis*, Article 15 *bis* and Article 15 *ter* to the Rome Statute. This is because the definition of the crime of aggression and the conditions for the exercise of jurisdiction have been incorporated into the amended Statute.

In the light of the present analysis, my view is that the intended jurisdictional scope that the Court can exercise over the crime of aggression is the one demonstrated in Table 3. It is still necessary for one of the State Parties to the proceedings to ratify the Amendments as the entry into force for this relevant State is required to activate the jurisdictional regime under Article 12(2). Thus, if the aggressor State Party has ratified the amendments, jurisdiction may be exercised under the nationality principle (Article 12(2)(b)) and it is not necessary for the aggressed state Party to ratify. Alternatively, if the aggressed state Party has ratified, the jurisdictional link may be established under the territorial principle (Article 12(2)(a)) even if the aggressor State Party has not ratified.[825]

Some may argue that the interpretation above is contrary to the VCLT, as Article 40(4) VCLT stipulates that the amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement.[826]

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[823] *Certain Expenses of the United Nations* (n 29) 168; See Kress and von Holtzendorff (n 133) 1215.
[824] Article 31(3)(a) VCLT 1969; see McDougall (n 7) 257.
[825] For an unfounded criticism of this interpretation, see Beth Van Schaack, 'Negotiating at the Interface of Power and Law: The Crime of Aggression' (2011) 49 Columbia Journal of Transnational Law 507, 598.
[826] Beth Van Schaack, 'The Aggression Amendments: Points of Consensus and Dissension' [2011] Santa Clara University Legal Studies Research Paper No.7-11 1, 2; Zimmermann (n 734) 210.

However, the chapeau of Article 40(1) states that paragraph (4) applies 'unless the treaty otherwise provides.' As the Rome Statute has provided under Article 5(2) for a *sui generis* regime pertaining to the crime of aggression, then Article 40(4) VCLT is not necessarily applicable.

(ii) Opting-out

Although the opt-out mechanism has led to much confusion, it is part of the conditions for the exercise of jurisdiction pursuant to Article 5(2). In a similar manner to the exclusion of non-States Parties entirely from the jurisdiction of the Court, such mechanism is unprecedented within the Rome Statute. There are three questions that need to be addressed:

i. What is the purpose of the opt-out mechanism?
ii. Can States Parties that do not intend to ratify or accept the Amendments opt-out?
iii. How should the opt-out mechanism be interpreted as part of the condition for the exercise of jurisdiction?

i. What is the purpose of the opt-out mechanism?

The opt-out mechanism effectively excludes a State Party from jurisdiction over the crime of aggression, by allowing it to derogate from Article 12(1) Rome Statute by a declaration that it does not accept the Court's jurisdiction over the crime of aggression. The opt-out also serves as derogation from Article 12(2) Rome Statute because it prohibits the exercise of jurisdiction even if the other State Party has ratified. Thus, the underlying rationale of the opt-out mechanism is to preserve the issue of state consent. As the declaration of non-acceptance of jurisdiction demonstrates an unequivocal dissent, the relevant State Party is excluded entirely from the jurisdiction of the Court.

As the Rome Statute does not provide any basis to opt-out of Article 12, the competence and power to create such derogation must fall within the mandate conferred to the Review Conference by Article 5(2).[827] When reflecting upon the

[827] See Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some' (n 717) 777.

negotiation history, it can be recalled that Article 15 *bis*(4) was the result of a compromise between the Argentinian, Brazilian, Swiss Proposal and the Canadian Proposal.[828]The former represented those who envisaged the broadest jurisdictional regime possible, whilst the latter stood for state consent. The exclusion of non-States Parties from the jurisdiction represented a compromise on the part of those who wanted a broader jurisdictional regime as this meant that the Court would have a more limited jurisdictional regime for the crime of aggression compared to the other crimes.[829]

On the other hand, those in favor of a consent based regime accepted a concession that States Parties did not have to specifically "opt-in" to the Court's jurisdiction, but instead could "opt-out."[830] The "opt-out" mechanism therefore represents a compromise between the objective of creating the broadest jurisdictional regime possible and the need for absolute state consent.[831]

ii. Can States Parties that do not intend to ratify or accept the Amendments opt-out?

The question is whether States Parties can "opt-out" in the absence of ratification or acceptance. This has interesting legal implications. The starting point is that the opt-out mechanism itself is contained within Article 15 *bis*(4), thus formulating part of the Amendments. The assumption therefore is that for such mechanism to apply, the Amendments would need to enter into force for the relevant State. However, it is interesting that OP1 *notes*:

> any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance.

It does not appear to be necessary for the State Party to ratify or accept the Kampala Amendments in order to opt-out from the Court's jurisdiction. However, the mention

[828] Barriga, 'Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of Aggression' (n 744) 45.
[829] ibid.
[830] ibid 46.
[831] Kress and von Holtzendorff write that 'the idea of an "opt-out" declaration was born precisely to bridge the gap between those in favor of applying the jurisdictional scheme under Article 12(2) of the ICC Statute without modification (ABS Proposal) and those in preference of a strictly consent-based regime (Canadian Proposal), Kress and von Holtzendorff (n 133) 1213.

of "prior to" bears the assumption that the relevant State Party has an intention to ratify or accept the Kampala Amendments at a subsequent stage. As there is no specific temporal condition, it can be assumed that there is no consecutive time frame between the declaration of non-acceptance and ratification or acceptance. In other words, there is no assigned time limit between the declaration of non-acceptance and the subsequent act of ratification or acceptance – only the assumption that relevant State Party intends to perform the latter.[832]

Nevertheless, as the opt-out mechanism is contained in Article 15 *bis*(4) which is part of the Amendments, it appears that ratification (at some point) is necessary. This may appear to some to be rather absurd. Why would a State Party ratify the Amendments in the light of its intent to opt-out from the jurisdiction of the Court? A simple explanation could be that the entry-into-force of the Amendments for that particular State Party contributes towards the requirement of 30 ratifications. By ratifying then opting out or vice versa, the State Party assists with the activation of the Court's jurisdiction over the crime without the concern of its own nationals being prosecuted. Such State Party is also in an advantageous position, as it can initiate proceedings against the aggressor state (party) but shields its nationals from jurisdiction if the situation is reversed (reference to Table 2).[833] Indeed, some may say that this asymmetry introduces 'a privilege that may also serve as an incentive to ratify the Statute.'[834]

This, nevertheless, remains only an assumption because it is not clear as to whether the declaration of non-acceptance is linked or conditional upon the subsequent process of ratification or acceptance. The reality is that a State Party may very well opt-out without subsequent ratification or acceptance. Thus, the possibility should be acknowledged that States Parties that do not intend to ratify or accept the Amendments may choose to opt-out from the Court's jurisdiction over the crime of aggression. Reisinger-Coracini writes that:

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[832] Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some' (n 717) 777.

[833] See ibid 776; McDougall submits that 'this benefit itself represents an abrogation of the negative interpretation of Article 121(5), which would have exempted the nationals and the territory of non accepting States Parties whether those States Parties were the victim or aggressor.' McDougall (n 7) 255.

[834] Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some' (n 717) 776.

> It is my understanding that only states parties that ratify the amendments may lodge a declaration of non-acceptance. The legal basis for the opt-out declaration is set forth in the amendments, which only enter into force for those states that have ratified them. A declaration of non-acceptance by a state party that does not ratify the amendments and remains party to the unamended treaty would be difficult to justify in light of the prohibition of reservation according to Art.120.[835]

In an earlier publication, she submitted that:

> It will ultimately be up to the Court to decide whether a declaration of non-acceptance would be covered by the undeniably wide discretion provided in Article 5(2) or whether such a declaration would amount to a prohibited reservation according to Article 120.[836]

This draws attention to the possibility that in a situation where the aggressor state (party) has opted out from the jurisdiction of the Court, the aggressed state (party) may challenge such declaration. It is of course for the Court's discretion as to whether to accept such declaration. In such a situation, the aggressor state (party) may choose to justify the legality of the declaration of non-acceptance under *pacta tertiis nec nocent nec prosunt.* As such, the relevant State Party does not necessarily have to ratify the amendments but may regard itself as a "third State" with respect to the amended Rome Statute.[837] An example where a "third State" is awarded such privilege can be seen in Article 12(3), which allows a non-State Party to accept the exercise of jurisdiction of the Court with respect to the crime in question by lodging a declaration with the Registrar.

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[835] Astrid Reisinger Coracini, 'More Thoughts on "What Exactly was Agreed in Kampala on the Crime of Aggression", 2 July 2010; available at http://www.ejiltalk.org/more-thoughts-on-what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression.
[836] Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some' (n 717) 778.
[837]Ibid; McDougall (n 7) 252.

iii. How should the opt-out mechanism be interpreted as part of the condition for the exercise of jurisdiction?

If it is held that the ratification and acceptance or intended ratification and acceptance of the Amendments is a necessary requisite for the declaration of non-acceptance to be legitimate, then the opt-out mechanism can be said to support the argument that the second sentence of Article 121(5) shall prevail. This is because the opt-out mechanism can only apply to a State Party that has ratified or accepted the amendments.

On the other hand, if it is accepted that a State Party may opt-out without ratifying or accepting the amendments under *pacta tertiis nec nocent nec prosunt,* then this reinforces the interpretation that Article 15 *bis*(4) should prevail.[838] Without having to ratify or accept the amendments, acceptance of and consent to jurisdiction is already present by virtue of Article 12(1) of the Rome Statute. Therefore, unless a State Party makes use of the opt-out mechanism, it is implied that the acceptance of and consent to the Court's jurisdiction over the crime as aggression pursuant to Article 5(1) is still applicable.

Although these arguments may appear to be logical, my view is that it is nevertheless necessary for the relevant State Party to ratify the Amendments for the Opt-out mechanism to have legal effect. This is consistent with the text of OP1 and Article 15 *bis*(4). Ultimately, it remains the discretion of the Court under Article 119(1) to decide whether the State Party wishing to opt-out of jurisdiction has the legal basis to do so.

B. The procedural conditions

The procedural conditions for the exercise of jurisdiction over the crime of aggression for state referrals and *proprio motu* can be found in Articles 15 *bis* (6) – (8). It is worth producing these provisions in full.

Article 15 *bis*(6):

[838] McDougall (n 7) 255.

> Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

Article 15 *bis*(7):

> Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

Article 15 *bis*(8):

> Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

As can be seen, the hypothesis that the Security Council has exclusive privilege to determine an act of aggression with respect to state referrals and *proprio motu* investigations was ultimately rejected. [839]The Council nevertheless is given the priority of making a determination of aggression, which is consistent with Article 24 of the UN Charter. However, the question is how 'determination' is to be considered. As Article 15 *bis*(6) does not specify that a determination should be made under

[839] France had expressed, 'France has decided not to oppose the consensus, despite the fact that it cannot associate with this draft text as it disregards the relevant provisions of the Charter of the United Nations enshrined in article 5 of the Rome Statute. In article 15 bis, paragraph 8, the text restricts the role of the United Nation Security Council and contravenes the Charter of the United Nations under the terms of which the Security Council alone shall determine the existence of an act of aggression. Under these conditions, France cannot depart from its position of principle', Statement by France, Statements by States Parties in explanation of position after the adoption of resolution RC/Res.6 on the crime of aggression; reprinted in Barriga and Kress (n 6) 811; see Blokker and Kress (n 715) 894.

Article 39, UN Charter or that the Council should be acting under Chapter VII, it is assumed that this is not necessary. In the present context, a determination of an act of aggression is not for the purposes of recommending enforcement collective measures in relation to a situation. Furthermore, it is unlikely that the Security Council would make a determination for the purposes of prosecution at the ICC in an ongoing situation of aggression. Thus, any determination of aggression for the purposes of Article 15 *bis*(4) is likely to be retrospective.

It is not clear whether the Council needs to be specific that an act amounts to "aggression" or if words broadly along the basis of a "threat to the breach of international peace and security" may suffice. Presumably, there should be a specific determination of an act of aggression. In the case of a 'negative determination,' it is likely that this should be viewed in the same light as a non-determination and the Prosecutor may seek the Pre-Trial Division's authorization after six months. This suggests that the ICC may reach a different conclusion than the Security Council in determining the existence of an act of aggression.

Here, an interesting observation can be made. Leaving aside the underlying fact that the IMT and the Security Council are different types of international institutions, and that the NMT and ICC are also different in nature, the common underlying factor is that the IMT and the Security Council are considered to be of a higher authority on a hierarchical level than the NMT or the ICC. Nonetheless, the determination by the IMT was re-evaluated and a broader scope was adopted in the subsequent NMT. Likewise, the determination by the Security Council can be re-evaluated by the ICC, and it is within the discretion of the Pre-Trial Division to determine aggression.

In any event, it should be remembered that in accordance with Article 15 *bis* (9), any determination by the Security Council shall be without prejudice to the Court's own findings. Thus, the Court may come to its own findings with regard to the determination of an act of aggression. Also, Article 15 *bis*(8) specifically refers to powers of the Security Council, which allows the Council to defer an investigation or prosecution for a period of 12 months pursuant to a resolution adopted under Chapter VII of the UN Charter.[840] Not only does the reference to Article 16 respect the primacy of international peace and security under Chapter VII, allowing prevalence over the interests of justice, but serves to reassure the P5 that despite the rejection of

[840] E.g., SC Res.1442 (2002), renewed in SC Res 1487 (2003).

the exclusivity hypothesis, the Council still has the power to defer an investigation pertaining to the crime of aggression.

The Pre-Trial Division of the Court was adopted as the jurisdictional filter when the Security Council fails to determine an act of aggression, which means that no less than six judges with predominantly criminal trial experience will convene in full session to decide upon authorizing the commencement of the investigation.[841] By comparison, three judges typically carry out the functions of Pre-Trial Chamber.[842] Therefore, choosing the Pre-Trial Division in lieu of the Pre-Trial Chamber as the jurisdictional filter provides an additional number of judges.[843] Questions may arise with respect to the operation of how this Division will authorize the investigation for the crime of aggression[844] – the contemplation of which exceeds the compass of this dissertation. Rather, it falls on to the Court to clarify Guidelines and/or the Rules of Procedure for how the judges should address this issue.[845] It is also worth noting that Article 15 *bis*(5) / 15 *ter*(5) state:

> This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in Article 5.

This implies that during the delay period of six months, the need for pre-determination of the state act element of the crime of aggression will not affect the exercise of jurisdiction over the other crimes if they are included in the same indictment against the defendant.

C. Non-States Parties

As mentioned above, non-States Parties are precluded from the jurisdiction of the ICC with respect to the crime of aggression (Article 15 *bis*(4) and *bis*(5)). Article 15

[841] Article 39, Rome Statute.
[842] Article 39(2)(b), Rome Statute.
[843] See Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some' (n 717) 784.
[844] ibid.
[845] See Hans-Peter Kaul, 'Kampala June 2010 – A First Review of the ICC Review Conference' (2010) 2 Goettingen Journal of International law 649, 664–665; see also McDougall (n 7) 272.

bis(5)[846] specifically excludes jurisdiction over the nationals and territory of non-States Parties.[847] This amounts to an 'element of reciprocity so far unknown to the Rome Statute.'[848] The opt-out mechanism, which is also so far unknown to the Rome Statute, allows a State Party to be excluded entirely from the jurisdiction of the Court over the crime of aggression, which would place the relevant state on the same *locus standi* as non-States Parties.[849] The exclusion of non-States Parties entirely from the jurisdiction of the Court has been criticized as being incompatible with the Rome Statute.[850] Before the adoption of RC/Res.6, the Japanese delegate expressed a serious concern that the amendments 'unjustifiably solidifies blanket and automatic impunity of nationals of non- States Parties: a clear departure from the basic tenent of Article 12 of the Statute.'[851]

The next question is whether Article 12(3) is applicable to the crime of aggression. This provision allows a non-State Party to declare that it accepts jurisdiction of the Court over the particular crime which must be read against Article 15 *bis* (5). Can the latter be said to be *lex posterior*?

Article 15 *bis* is not clear in this respect. An argument may be made that as there is no explicit provision otherwise, it can be assumed that non-States Parties can make a declaration under Article 12(3).[852] Barriga however, submits that 'this is not possible'[853] and supports his claim by explaining that 'the exclusion of the ad-hoc declarations under 12(3) is also confirmed by the drafting history of the understandings.'[854] Indeed, at the early stages of the Review Conference, a provisional draft understanding read:

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[846] It is interesting to note that the language used in Article 15 bis (5) is very similar to the text of the second sentence of Article 121(5). McDougall writes that this may suggest that a negative interpretation of the second sentence prevailed, McDougall (n 7) 256.
[847] Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some' (n 717) 780.
[848] ibid.
[849] See McDougall (n 7) 257.
[850] See Zimmermann (n 32) 221-223.
[851] Statement by Japan, Statements by States Parties in the explanation of position before the adoption of resolution RC/Res.6 on the crime of aggression; reprinted in Barriga and Kress (n 6) 810.
[852] See Rule 44 of the Rules of Procedure and Evidence, International Criminal Court
[853] Barriga, 'Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of Aggression' (n 744) 41.
[854] Ibid.

> It is understood, in accordance with article 11, paragraph 2, of the Statute, that in a case of article 13, paragraph (a) or (c), the Court may exercise jurisdiction only with respect to crimes of aggression committed after the entry into force of the amendment for that State, unless the State has made a declaration under article 12, paragraph 3.[855]

This provision was eventually deleted as a result of explicit requests by certain States Parties as there was concern that this would lead to an unfair advantage against States Parties.[856] This is because non-States Parties would then be in a position to decide whether or not to participate in proceedings against States Parties. As such, McDougall believes that Article 15 *bis* (5) must be viewed as the *lex specialis* and apply as a blanket exception. [857]

Assuming that both States Parties that have not ratified and non-States Parties are on the same locus standi, a related question is whether the aggressed state (party) that has not ratified against can invoke a declaration under Article 12(3) to invoke ad hoc acceptance of jurisdiction. Kress and Von Holtzendorff suggest that this may be possible.[858] The implications of this are that a State Party may wish to use Article 12(3) instead of going through the domestic and international ratification process.[859]

McDougall on the other hand disagrees, arguing that 'the requirement that the aggression amendments must have been ratified by a State Party to enter into force under the first sentence of Article 121(5) is not remedied by an Article 12(3) declaration. […] the carefully balanced *lex specialis* regime established under Article 15 *bis* militates against the application of Article 12(3). [860] My view is similar. Upon a straightforward reading of the text of Article 12(3), the provision appears to apply specifically to a "State which is not a party to this Statute." To allow States Parties to use this provision as an ad hoc acceptance defeats the purpose of having a specific framework relating to the crime of aggression. Should States Parties wish to accept

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[855] See McDougall (n 7) 263; Barriga, 'Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of Aggression' (n 744) 41.
[856] McDougall, ibid; Barriga, ibid.
[857] McDougall (n 7) 263.
[858] See Kress and von Holtzendorff (n 133) footnote 117.
[859] Reisinger Coracini, 'The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression - at Last ... in Reach ... Over Some' (n 717) 775–776.
[860] McDougall (n 7) 264.

the jurisdiction of the Court, they should ratify the Amendments pursuant to their domestic ratification process.

D. The question of state consent

In general, consent means that the State has agreed to the competence and jurisdiction of the international court or tribunal.[861] The *Monetary Gold* principle was raised during the course of negotiations with respect to the Kampala Amendments.[862] In this case, the ICJ held that the consent of a State is necessary for adjudication upon its international responsibilities, even when the relevant State is not a party to the proceedings so long as the legal interests of that State would form the subject matter of the decision.[863] Akande argues:

> Even if one assumes that the Monetary Gold doctrine applies to all international law tribunals, it will not, in most cases, be violated by the exercise of jurisdiction by the ICC over non-parties nationals in respect of official acts done pursuant to the policy of that non-party.[864]

However, he departs from this position with respect to the crime of aggression. Here, he argues strongly in favor of the applicability of the *Monetary Gold* Principle:

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[861] See Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' (n 753).

[862] McDougall (n 7) 245; see also Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' (n 753) 18.

[863] The ICJ held "to adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent. […] In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania." *Monetary Gold Removed from Rome* (Italy v France, United Kingdom and United States) I.C.J. Rep [1954] (hereinafter "Monetary Gold") 33 -34; This principle was subsequently applied by the Court in the *Case concerning East Timor*, where the Court held 'whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right erga omnes', Case concerning East Timor (Portugal v Australia) I.C.J Rep [1995] 90 (hereinafter "Case concerning East Timor"), para.29.

[864] Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (n 698) 635.

> the ICC, in cases of aggression, is not only called upon to determine individual criminal responsibility but is also being asked to make determinations of State responsibility under the law relating to the use of force. For the Court to make these determinations, it would need to consider the conduct of the relevant States […] The fact that the determination of state responsibility by the ICC is a prerequisite to determination of individual liability immediately implicates the principle of consent in cases where the State that is alleged to have committed the act of aggression is not a party to the ICC, or has accepted the jurisdiction of the ICC with respect to aggression.[865]

The underlying rationale is that 'the ICC will not be engaged in making determinations about a State's legal responsibility, nor will it need to do so, in order to convict an individual for war crimes, crimes against humanity or genocide. However, the position is different with respect to aggression.'[866] That said, it is not entirely accurate that the crime of aggression differs from the other Rome Statute crimes in this respect. The perpetration of war crimes, crimes against humanity or genocide may also directly or indirectly involve considerations of the conduct of a State.[867] McDougall rightly points out that 'there may be political, as opposed to legal, consequences for States as a result of aggression rulings, but this falls outside the Monetary Gold principle.'[868]

Furthermore, with respect to the question of state responsibility, Article 25(4) Rome Statute stipulates:

> no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

It can be inferred that individual criminal responsibility for the crime of aggression is without prejudice to state responsibility for an act of aggression. To be more specific,

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[865] Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' (n 753) 17, He adds 'in the case of ICC jurisdiction over aggression by a non-consenting State, the only way in which the ICC may convict for aggression is first to decide on State responsibility and then on individual responsibility. In such cases involving non-consenting States, the ICC would be acting contrary to the consent principle', *id.*
[866] ibid 16.
[867] See also McDougall (n 7) 245–246.
[868] ibid 245.

there are different legal consequences pertaining to each set of responsibility. Thus, the determination of an act of aggression is for the purposes of executing legal consequences against the perpetrator of the crime of aggression and *not* for enforcing legal consequences against the aggressor state for state responsibility.

Be that as it may, one more factor should be taken into consideration. This is the question of whether the determination of an act of aggression or successful conviction of a perpetrator for the crime of aggression may amount to satisfaction for the aggressed state as a legal remedy against the aggressor state. If so, a strong argument can be made that consent of the aggressor state is indeed necessary as satisfaction amounts to a legal consequence under state responsibility. Nevertheless, even if the determination of an act of aggression does not amount to satisfaction, the question of consent is still important and is directly linked to the jurisdictional regime.

E. How should consent be expressed?

Consent of a State Party to the jurisdiction of the Court over the core crimes under Article 5(1) is represented by ratifying the Rome Statute. In the context of the crime of aggression, explicit consent to the Court's jurisdictional regime is evidenced by ratifying the Kampala Amendments. By contrast, a non-ratifying State Party does not appear to consent to the jurisdictional regime of the crime of aggression. However, this is not necessarily true. An argument can be made that non-ratifying States Parties have nevertheless consented to the jurisdiction regime of the ICC over the crime of aggression by virtue of Article 5(1) and Article 12(1) of the Rome Statute. This suggests that consent can be either specific or implied. The former is evident by the ratification of the Kampala Amendments, whilst the latter appears to be predicated upon an interpretation of Article 5(1) and Article 12(1).

Akande argues that 'consent given by those States to the Statute in general cannot be regarded as consent to the exercise of jurisdiction over the crime of aggression.'[869] He continues 'a party that does not accept an amendment to which the provision relates does not consent to the exercise of jurisdiction by the Court over that crime.'[870] Be that as it may, pursuant to Article 15 *bis* (4), States Parties may make a declaration of non-acceptance of jurisdiction – the ramifications of which precludes the State

[869] Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' (n 753) 26.
[870] ibid 28.

Party from the jurisdiction of the court over the crime of aggression entirely. Thus, the concept of specific consent becomes reversed because the State Party is allowed to specify its non-consent to jurisdiction. For the opt-out mechanism to make sense, it is presumed that the consent of all States Parties is implied pursuant to Article 5(1) and Article 12(1) until or unless it makes a declaration of non-acceptance of jurisdiction under Article 15 bis(4). In a way, the opt-out mechanism is symbolic of a safeguard for States Parties to ensure that consent is represented.[871] As submitted by Kress and von Holtzendorff:

> To not require the ratification of the alleged aggressor State Party, but to grant that state the right to opt out, amounts to a 'softened consent-based regime' that is situated somewhere between the two poles and is, therefore, a suitable basis from which to create a compromise.[872]

In my view, it is negligent to assume that state consent is entirely irrelevant with respect to Article 15 bis. This is evident by two factors: i) the opt-out mechanism and ii) the exclusion of jurisdiction over non-States Parties. Thus, it is clear that consent is implied. It is not strict in the sense of the negative interpretation of the second sentence of Article 121(5) which implies an "opt-in" as opposed to "opt-out" mechanism where the State Party has to ratify the relevant amendments. Instead it is assumed that when acceding to the Rome Statute, States Parties have already indicated their consent to the jurisdiction over the crime of aggression in accordance with Article 12(1), as recalled in the preamble to Resolution RC-Res.6. Thus, the onus is placed on States Parties to opt-out if they do not intend to consent to the jurisdiction of the crime of aggression. This has been labelled as the 'softly consent-based pillar' of the Kampala compromise.[873]

Therefore, it is submitted that state consent is a condition for the exercise of jurisdiction pursuant to the Kampala Amendments. The nature of such consent need not be specific or explicit, but is implied so long as the State Party has not opted-out of the jurisditional regime over the crime of aggression.

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[871] See Kress and von Holtzendorff (n 133) 1213.
[872] ibid.
[873] ibid 1215.

ii. Security Council referrals: Article 15 *ter*

Unlike state referrals and *proprio motu* investigations, the jurisdictional regime pertaining to Security Council referrals is relatively straightforward. Article 15 *ter* (1) stipulates:

> The Court may exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraph (b), subject to the provisions of this article.

The jurisdiction over Security Council referrals is subject to the activation of the Court's jurisdiction pursuant to 15 *ter* (2) and 15 *ter* (3).[874] Article 13(b) Rome Statute refers to a 'situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.' By encapsulating the existing jurisdictional regime of Security Council referrals, this means that the Court can investigate and exercise jurisdiction over all of the four core crimes without having to make any differential treatment with respect to the crime of aggression.

There is no legal prerequisite of a determination that an act of aggression has occurred under Chapter VII of the UN Charter. This means that the Council does not necessarily need to make a specific determination of an act of aggression under Article 39; it shall suffice to refer the "situation" to the Court.[875] The Security Council therefore has the discretion to decide how it refers the situation to the court, the '"green light" is implied in its referral of a respective situation to the ICC.'[876] In any event, if such determination is made, Article 15 *ter*(4) reaffirms that this shall be without prejudice to the Court's own findings under this Statute, which inherently serves to uphold due process for the accused. Such determination nevertheless will have a persuasive effect on the Court's consideration of the state act element of the crime. For example, it is likely that the Court will find that such use of force was unauthorized by the Council.

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[874] Cf. Understanding One, Kampala Amendments, Resolution RC/Res.6.
[875] See Kress and von Holtzendorff (n 133) 1211–1212.
[876] Blokker and Kress (n 715) 893.

The procedural implications of Security Council referrals are that proceedings may take place faster, as the Prosecutor is able to proceed with the investigation without submitting it to the control of the Pre-Trial Chamber. Also, under Article 53 Rome Statute, the Prosecutor has the discretion to decide whether there is a sufficient basis for prosecution and is thus under no duty or obligation to initiate investigations upon the referral by the Security Council.

The issue of state consent is not relevant in situations of a Security Council referral. This is reflected in Understanding Two:

> It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

6.6.3. Future states parties

The Japanese delegate raised the question:

> What happens to a non-State Party that desires to accede to the Rome Statute after the adoption of the amendments? How can we be certain that such a newly acceding country will be bound by the amended Rome Statute, while we see no provisions stipulating about the entry into force of the amendments per se?[877]

It can be assumed that future State Parties will be bound by the aggression amendments. This is consistent with Article 40(5) of the VCLT:

> Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State: (a) be considered as a party to the treaty as amended; and (b) be

[877] Statement by Japan, Statements by States Parties in explanation of position after the adoption of resolution RC/Res.6 on the crime of aggression; reprinted in Barriga and Kress (n 6) 811.

considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.[878]

In any event, Article 15 *bis*(4) encompasses the opt-out mechanism, which allows the newly acceded State Party to declare its non acceptance of the Court's jurisdiction over the crime of aggression should it chose to do so. This neatly avoids the question of whether ratification of the amendments are necessary for the opt-out mechanism to take legal effect as it is assumed that the newly acceded State Party has consented to the amended Rome Statute.

6.7. The International Criminal Court as an enforcement mechanism

The analysis above has delineated the jurisdictional regime of the ICC over the crime of aggression in situations of state referrals and *proprio motu*, and Security Council referrals. This makes it possible to understand to what extent the ICC is representative of the legal interests of the aggressed state (and the international community) with respect to the prosecution of the crime of aggression.

There is a preliminary consideration which first needs to be addressed: this is the procedural issue of complementarity. The admissibility of cases to the ICC is predicated upon the mechanism of complementarity (Article 17 Rome Statute). Complementarity means that in situations where both States Parties and the ICC have concurrent jurisdiction, the former should have the primary competence to facilitate investigations/prosecutions. Thus, the case is inadmissible if the State Party is conducting an investigation or prosecution unless there is reason to believe that the State is unwilling or unable to genuinely carry out such proceedings (Article 17(1) Rome Statute). Therefore, complementarity serves as a procedural bar to the ICC where it must first be satisfied that there is judicial inactivity on the relevant domestic level or that the relevant State is unwilling/unable to genuinely carry out an investigation or prosecution in the interests of justice subsequent to the commencement of the proceedings.[879]

As discussed in Chapter III, the ratification of the Rome Statute is representative of a delegation of competence by the State Party to the ICC to prosecute individuals

[878] SWGCA Report 2008 (November), para.17.
[879] For a general understanding of complementarity, see Darryl Robinson, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 Criminal Law Forum 67.

under the national or territorial principle. This signifies that prosecution at the ICC is in the interests of the international community.[880] Complementarity ensures that it is only in a situation where domestic courts do not have jurisdiction under the nationality or territorial principle that the ICC assumes its jurisdictional competence over the crime (or are unwilling or unable to genuinely prosecute or investigate). Thus, the legal interests of State Parties are preserved as domestic courts have the priority of prosecution in situations of concurrent jurisdiction.

As discussed above, pursuant to Article 15 *bis,* the conditions for the exercise of jurisdiction can be summarized as follows. First, both the aggressed state and aggressor state must be a State Party to the Rome Statute. Second, one of the parties to the intended proceedings must have ratified the Kampala amendments. This represents the delegation of domestic competence of the ratifying State Party to the ICC to prosecute the crime of aggression under either the nationality or territorial principle of jurisdiction. Third, the aggressor state (party) must not have opted-out. As demonstrated in the Tables above in section 6.6.2, if the aggressor state (party) has opted out, it is excluded entirely from the jurisdictional regime over the crime of aggression. The aggressed state may of course choose to challenge the legality of the adoption procedure and/or opt-out declaration, and it is for the Court under Article 119 Rome Statute to settle such dispute.

As can be seen, the jurisdictional regime under Article 15 *bis* excludes non-States Parties. Thus, in a situation where the aggressor state is a non-State Party, its nationals are precluded entirely from the jurisdiction of the Court. This may be so even if the aggressed state party has ratified the amendments. In this case, the ICC is unable to carry out the legal interest of the aggressed state (party). Similarly, if the aggressed state is a non-State Party, its legal interest is excluded from the *ratione personae* jurisdiction of the Court even if the aggressor state is a ratifying State Party. Therefore, in situations where the aggressor state is a non-State Party, or a State Party that has opted-out, the legal interests of the aggressed state, regardless of whether it is a State Party, or has ratified the Kampala Amendments, can be represented at the ICC only if the Security Council makes a referral pursuant to Article 15 *ter*.

[880] Akande writes that *proprio motu* investigations may be considered as an expression of the 'joint authority of those states to prosecute', Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (n 698) 626.

Overall, it appears that the jurisdictional regime of the ICC is rather limited, which means that the scope whereby the ICC may act in the interests of the aggressed state to prosecute the crime of aggression is also rather limited. In particular, the exclusion of non-States Parties entirely from the jurisdictional regime significantly limits the effectiveness of the Court as an enforcement mechanism. Such asymmetry between State Parties and non-State Parties is indeed regrettable,[881] but ironically gave rise to a step forward in international law, as it was one of the substantial concessions that allowed the Kampala Amendments to be adopted by consensus.

It is worth recalling that the underlying rationale behind excluding non-States Parties and States Parties that have opted-out is the need for consent to the jurisdictional regime of the ICC over the crime of aggression. The question of consent in the negotiations was directly relevant to the legal interests of the aggressor state, which appear to have prevailed over the interests of the aggressed state for the ICC to serve as an enforcement mechanism over the crime of aggression. Upon examining the balance between the legal interests of the aggressor state and the aggressed state with respect to enforcement against the crime of aggression at the ICC, an observation can be made that the jurisdictional regime over the crime of aggression at the ICC is indicative of the former prevailing over the latter.

On the domestic level, assuming that the aggressed state has prescribed the crime of aggression in its domestic legislation, its courts may exercise territorial criminal jurisdiction against a national from the aggressor state. By ratifying the Kampala Amendments, the aggressed state (party) may then delegate this competence to the ICC. Under international law, such delegation can be made without the consent of the aggressor state. However, the need for the consent of the aggressor state, regardless of how 'softly based', appears to prioritise the interest of the aggressor State over the aggressed state, as the latter has a legal interest for the prosecution for a crime committed against its territory.

Indeed States Parties who were involved in the negotiation process leading to the Kampala Amendments had legal interests both ways – it was in their interests to protect their nationals from prosecution at the Court without their consent to the jurisdictional regime over the crime of aggression; yet it was also in their interests as

[881] ibid 649–650.

a potential victim of the crime of aggression to ensure that the jurisdictional regime at the ICC may represent their interests.

That said, it should not be forgotten that the question of aggressor state consent was directly predicated on the exclusivity hypothesis of the Security Council. The political reality is that France and the UK were more likely to agree to the non-exclusivity of the Security Council as a jurisdictional filter if aggressor state consent was an underlying requirement. Aggressor state consent in the absence of determination by the Security Council therefore played a large role as leverage, which allowed the two members of the P5 to concede on their monopoly point. This may account for a large part of the reason why the legal interests of the aggressor state appear to prevail over the legal interests of the aggressed state with respect to the ICC as an enforcement mechanism over the crime of aggression.

6.8. Conclusion

At present, it remains to be seen whether the jurisdiction of the ICC over the crime of aggression will be activated in 2017. Be that as it may, the role of the ICC as an enforcement mechanism against the crime of aggression can nevertheless be contemplated. It appears that the Kampala Compromise encapsulates a rather limited jurisdictional regime over the crime of aggression. There is still uncertainty over the scope of the jurisdictional regime in situations of state referrals and *proprio motu* as there are different interpretations that come into play with respect to Article 121(5) and Article 15 *bis* (4). As submitted in this chapter, my view is that the first sentence of Article 121(5) relates to the entry-into-force mechanism of the Kampala Amendments, while Article 15 *bis* (4) applies as the conditions for the exercise of jurisdiction. Thus, in the conflict between the second sentence of Article 121(5) and Article 15 *bis* (4), the latter prevails.

This means that at least one of the States Parties to the proceedings must ratify the Kampala Amendments, as jurisdiction will be applicable pursuant to Article 12(2) of the Rome Statute under the nationality principle (Article 12(2)(b)) or the territorial principle (Article 12(2)(a)). The aggressor state does not necessarily have to be a ratifying State Party, as ratification by the aggressed state is sufficient to establish a jurisdictional link under the territorial principle. That said, the aggressor state must not have opted-out from the jurisdiction of the Court over the crime of aggression. If

it has done so, then it is excluded entirely from proceedings even if the aggressed state (party) has ratified the Kampala Amendments.

The opt-out mechanism and the exclusion of non States Parties from the jurisdiction of the Court over the crime of aggression in situations of state referrals or *proprio motu* is indicative that state consent (of the aggressor state) is necessary for the jurisdictional regime of the Court to apply. Such consent need not be explicit in the form of a ratification of the Kampala Amendments, but is implied so long as the State Party has not opted out of jurisdiction pursuant to Article 15 *bis* (4). By contrast, in situations of Security Council referrals, the consent of the aggressor state is not necessary for the ICC to exercise jurisdiction over the crime of aggression.

This Chapter has shown that the jurisdictional regime of the ICC over the crime of aggression is rather limited, especially with regard to state referrals and *proprio motu.* Thus, the legal interests of the aggressed state and the international community may often be excluded from the competence of the Court to prosecute nationals from the aggressor state. The protection of the interests of the aggressed state can go only as far as Court has jurisdiction over the crime of aggression.

Nevertheless, the ICC is not the only enforcement mechanism. As will be discussed in the next chapter, domestic courts are also competent to serve as an enforcement mechanism against the relevant perpetrators. Thus, the aggressed state may also consider domestic courts as an enforcement mechanism. This is consistent with the mechanism of complementarity enshrined within the Rome Statute (Article 17), which gives priority to domestic prosecution in situations of concurrent jurisdiction.

It should be appreciated that although the jurisdictional regime pertaining to the crime of aggression is not perfect, it is nevertheless a phenomenal achievement. Prior to the Review Conference, many were skeptical as the question of the role of the Security Council and the concomitant question of state consent gave rise to seemingly irreconciliable positions. Under the legal mandate provided by Article 5(2) and a spirit of positive cooperation, the Review Conference adopted a *sui generis* regime by consensus. Thus, subsequent and inevitable legal ambiguities with respect to the interpretation of the Kampala Amendments should not undermine the historical significance of this consensus agreement.

Chapter VII. Prosecution of the crime of aggression at domestic courts

7.1. Introduction

Domestic courts represent an enforcement mechanism against the crime of aggression. As mentioned in the previous chapter, complementarity ensures that in situations where the ICC and domestic courts have concurrent jurisdiction over the crime of aggression, the latter should have the priority of prosecution. It has been pointed out that this preserves the legal interests of the State Party, by allowing it to retain its competence to prosecute the crime. That said, it has been argued that complementarity should not apply to the crime of aggression,[882] which suggests that prosecution of the crime should not take place in domestic courts. For example, Van Schaack generally discourages the ASP and the rest of the international community from domestic prosecutions of the crime of aggression and argues 'to the extent that the crime of aggression is ever prosecuted beyond the nationality state, it is done in an international, rather than domestic, forum.'[883] The underlying hypothesis of this argument is that domestic courts are not competent forum for prosecuting the crime of aggression, thus the ICC should have *de facto* exclusive jurisdiction. This was the position of the ILC in the Draft Code of Crimes. In its Report to the General Assembly, it was stated that 'the crime of aggression was inherently unsuitable for trial by national courts and should instead be dealt with only by an international court.'[884] As such, the proposed framework of enforcement against the crime of

[882] See Jennifer Trahan, 'Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression? Considering the Problem of "Overzealous" National Court Prosecutions' (2012) 45 Cornell International Law Journal 569; Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (n 15); see also Pal Wrange, 'The Crime of Aggression and Complementarity', *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Ashgate 2010); Roger Clark, 'Complementarity and the Crime of Aggression', *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011); Nicolaos Strapatsas, 'Complementarity and Aggression: A Ticking Time Bomb?' in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010).

[883] Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (n 15) 137.

[884] Report of the International Law Commission on the work of its forty-seventh session, 2 May to 21
July 1995 (A/50/10), Yearbook of the International Law Commission, 1996, vol.II(2), at 39.

aggression was that the ICC should have exclusive *de facto* jurisdiction, thereby serving as the sole enforcement mechanism.

As the hypothesis that the ICC should have *de facto* jurisdiction over the crime of aggression is contrary to the premise of this dissertation that international law relies on both the ICC and domestic courts as enforcement mechanisms against the crime of aggression, the question of domestic prosecution will be addressed as a preliminary issue (section 7.2). This Chapter will proceed to examine, and then challenge the underlying rationale put forward by the ILC (section 7.2.1) as to why domestic courts are not competent forum for prosecution (with the exception of the aggressor state wishing to initiate proceedings). In addition, recent developments will also be presented to demonstrate why the position of the ILC in the Draft Code of Crimes is not sustainable. Thus, it is substantiated that domestic courts are competent forum for the prosecution of aggression. From this premise, the legal interests of the forum state may be contemplated (section 7.2.2).

The Chapter will then continue to examine other concerns that arise (section 7.3) with respect to determining the state act element of the crime (section 7.3.1) and the elements of individual conduct (section 7.3.2) and whether and to what extent they may be overcome. The final section (section 7.4) focuses on the procedural bars that come into play, and contemplates whether and to what extent they may be overcome.

It should be clarified from the outset that this Chapter focuses on domestic prosecution for the crime of aggression from a legal analysis, leaving aside political considerations or ramifications. As such, the question is to be differentiated from 'should the crime of aggression be prosecuted in domestic courts,' as the latter appears to be more of a policy question as opposed to legal question.

7.2. The question of domestic prosecution

It has been questioned whether domestic courts are competent *fora* to prosecute the crime of aggression. The hypothesis is that the ICC should have *de facto* exclusive jurisdiction over the crime of aggression. [885] As such, complementarity is not entirely applicable to the crime of aggression.[886]

[885] In general see Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (n 15); see also Article 8, Draft Code of Crimes.
[886] ibid 155; see also Trahan (n 882).

This section will now examine and challenge this hypothesis to demonstrate that it is not sustainable. It is submitted that domestic courts are indeed competent *fora* with respect to prosecution; thus complementarity is applicable to the crime of aggression in the same way as it is to the other core crimes in Article 5(1) of the Rome Statute.

7.2.1 The International Law Commission and the 1996 Draft Code of Crimes against the Peace and Security of Mankind

In the Draft Code of Crimes, Article 8 stipulates:

> Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals of the crime set out in that article.

Thus, two separate jurisdictional regimes are proposed: jurisdiction for the crimes contained in Articles 17 to 20 (genocide, crimes against humanity, crimes against UN and associated personnel and war crimes) and jurisdiction for the crime set out in Article 16 (crime of aggression). The former refers to concurrent jurisdiction of an international criminal court and jurisdiction of national courts for the crime of genocide, crimes against humanity, crimes against UN and associated personnel and war crimes (the "other crimes") predicated on universal jurisdiction ('irrespective of where or by whom those crimes were committed'), whilst the latter envisages an exclusive jurisdiction of an international criminal court with regard to the crime of aggression, with the singular exception of the aggressor state trying its nationals.

In the Commentaries to the Draft Code of Crimes, an explanation for the different jurisdictional regimes was provided:

> This principle of exclusive jurisdiction is the result of the unique character of the crime of aggression in the sense that the responsibility of an individual for participation in this crime is established by his participation in a sufficiently

> serious violation of the prohibition of certain conduct by States contained in Article 2, paragraph 4 of the Charter of the United Nations. The aggression attributed to a State is a *sine qua non* for the responsibility of an individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a state. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*.[887]

Two main points can be ascertained. First, the state act of aggression is a necessary pre-requisite in order to determine individual criminal responsibility for the crime of aggression. Second, as the domestic court of one State has to consider whether another State has violated Article 2(4) of the UN Charter, this would violate the principle *par in parem imperium non habet* (also phrased *as "par in parem non habet imperium"*); this can be broadly understood to mean that one state cannot exercise jurisdiction over acts committed by another state, as "one State has no power over another."[888]

The consideration of the legality of the use of force with respect to Article 2(4) UN Charter does not appear to be the reason why the ILC believed that the international court should have exclusive jurisdiction over the crime of aggression because there was no objection to a State whose leaders participated in the act of aggression from carrying out proceedings:

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[887] Commentaries on the Draft Code of Crimes, 30.

[888] See Yoram Dinstein, 'Par in Parem Non Habet Imperium' [1966] Israel Law Review 407, 413–415;Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (n 15) 149; Kelsen writes that 'sovereignty is sometimes defined as supreme "power." In this connection, power means the same as authority, namely legal power, the competence to impose duties and confer rights', Hans Kelsen, *Peace Through Law* (2008 Reprint of first edition 1944) 35.

> this is the only State which could determine the responsibility of such a leader for the crime of aggression without being required to also consider the question of aggression by another State.[889]

Thus, the problem appears to be the consideration of the forum state of the legality of the use of force by another state and the issue of *par in parem non habet imperium.* Van Schaack refers to this issue as a problem with domestic prosecution for the crime of aggression, which is why the ICC should assume the 'posture of de facto exclusivity over the crime of aggression vis-à-vis domestic courts.'[890] She writes:

> domestic courts hearing aggression cases not involving their own nationals will essentially be sitting in judgment over the acts of a co-equal sovereign. The need to rule on the commission state's act of aggression implicates the principle of foreign sovereign immunity and its underlying philosophy, the maxim *par in parem imperium non habet* ('an equal has no power over an equal').[891]

Yet, she neglects to contemplate or elaborate further how *par in parem imperium non habet* shall apply with respect to the crime of aggression,[892] and more importantly whether or not this is a non-derogable principle. Thus, the question is whether *par in parem non habet imperium* serves as an insurmountable procedural barrier for prosecution of the crime of aggression in domestic courts. This question will be discussed separately later in this Chapter (section 7.3.1). At present, it is not necessary to examine *par in parem imperium non habet* in order to discredit the hypothesis that the ICC should have *de facto* exclusive jurisdiction on the basis that domestic courts are not competent *fora*. Three other reasons can be identified as to why the aforementioned position of the ILC in the Draft Code of Crimes is unsustainable.

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[889] Commentaries on the Draft Code of Crimes, 30.
[890] Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (n 15) 136.
[891] ibid 149.
[892] Van Schaack submits that 'prosecuting the crime of aggression domestically in situations other than following a change in regime will inevitably generate intense charges of politicization from within and outside the prosecuting state. Domestic aggression cases will no doubt exacerbate relations between states involved in situations already disrupted by a putative act of aggression', ibid 150.

First, regardless of whether *par in parem non habet imperium* may arise in domestic proceedings, the competence of states to codify the crime of aggression into domestic legislation is not affected. Each State has the discretion to codify the crime of aggression into its domestic legislation, which includes the jurisdictional scope that it wishes to prescribe over this crime.

Second, some states have actually codified the crime of aggression in their domestic criminal legislation.[893] In an extensive comparative study of domestic legislation pertaining to the crime of aggression, Reisinger Coracini identified that all states that have the crime of aggression in their national legislation have incorporated jurisdiction under the territorial principle,[894] the protective principle,[895] and even the universality principle. [896] With respect to the universality principle, she observes that a number of legislations provide 'blanket universal jurisdiction clauses' that allow 'prosecution of non-nationals for crimes committed abroad against foreigners, if such crimes are proscribed by a recognized[897] norm of international law or an international treaty binding upon that state.'[898]

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[893] See Reisinger Coracini, 'National Legislation on Individual Responsibility for Conduct Amounting to Aggression' (n 431) 547–578; Reisinger-Coracini has observed that the following countries have codified aggression as a crime within their criminal codes: Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina (criminal codes of the Federation, Brcko Disrict and Republika Srpska), Bulgaria, Croatia, Estonia, Georgia, Hungary, Kazakhstan, Kosovo, Latvia, Macedonia, Moldova, Mongolia, Montenegro, Poland, Russian Federation, Serbia, Slovakia, Slovenia, Tajikistan, Ukraine, Uzbekistan, at footnote 29.

[894] She observes that 'every state, which is the victim of an act of aggression, may establish jurisdiction on the principle of territoriality', ibid 564.

[895] She observes that 'a number of states provide for jurisdiction upon the protective principle, where that state's interests are violated' and refers as examples to Art.15(3)(2) Armenian criminal code; Art.132 Bosnian criminal code (Brcko district); Art.9 Estonian criminal code; Art.5(3) Georgian criminal code; Art.6, para.4, Kazakh criminal code [footnote 128], ibid.

[896] e.g., Article 11(3) Moldovan Criminal Code states: If not convicted in a foreign state, foreign citizens and stateless persons without persons without permanent domiciles in the territory of the Republic of Moldova who commit crimes outside the territory of the Republic of Moldova shall be criminally liable under this Code and shall be subject to criminal liability in the territory of the Republic of Moldova provided that the crimes committed are adverse to the interests of the Republic of Moldova or to the peace and security of humanity, or constitute war crimes including crimes set forth in the international treaties to which the Republic of Moldova is a party; Article 6(1) Bulgarian Criminal Code states: foreign citizens who have committed abroad crimes against peace and humanity, whereby the interests of another state or foreign citizens have been affected', ibid 564–565.

[897] ibid 564.

[898] Reisinger Coracini refers to Art.15(3)(1) Armenian criminal code; para.8 Estonian criminal code; Art.5(2) and (3) Georgian criminal code, Art.6, para.4 Kazakh criminal code; Art.15(2) Tajik criminal code in footnote 136; She subsequently elaborates that 'depending on the specific formulation and interpretation of such a clause, it may apply to the crime of aggression as a crime under customary law, or as a crime defined by treaty law, if the state in

Third, a significant development that clearly departs from the position of the ILC is that the Review Conference did not establish that the ICC should have exclusive jurisdiction for the crime of aggression. In the drafting process, during the negotiations of the SWGA, the concept of complementarity was touched upon, albeit somewhat briefly.[899] According to the 2004 Princeton Report, 'there was general agreement that no problems seemed to arise from the current provisions being applicable to the crime of aggression'[900] and that concerns 'could be addressed through interpretation of the provisions of the Statute and therefore no amendments would be required.'[901] It was concluded that:

> Articles 17, 18, and 19 were applicable in their current wording and the points raised merited being revised once agreement had been reached on the definition of aggression and the conditions for exercise of the Court's jurisdiction.[902]

The significance of this is that by agreeing that complementarity should apply to the crime of aggression in the same way as the other crimes in Article 5(1) of the Rome Statute, it is inferred that domestic courts may retain their position as the primary forum of prosecution.[903] The Review Conference had not intended for the ICC to have *de facto* exclusive jurisdiction over the crime of aggression.

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question is a party to the London Agreement or the Rome Statute. In the latter case, the prerequisite prescription might already be met, since the Statute confirms the existence of individual criminal responsibility for the crime of aggression and lists it as one of the "most serious crimes of concern to the international community as a whole" falling within the jurisdiction of the ICC. From a more cautious approach, complete international proscription may only be assumed, once a provision on aggression is adopted and binding upon a State Party. Some states however, do not only require the international prescription of the crime in this context, but only accept the establishment of universal jurisdiction if explicitly foreseen by an international treaty obligation', ibid 565.

[899] See Princeton Report (2004) paras. 20 – 27; Wrange (n 882) 592.

[900] Princeton Report (2004), para 21.

[901] Princeton Report (2004), para 26.

[902] Princeton Report (2004), para.27.

[903] Clark is of the opinion that the complementarity doctrine applies as it does in respect of the other crimes under the jurisdiction of the ICC, see Clark, 'Complementarity and the Crime of Aggression' (n 882).

In the light of these developments, it is submitted that the correct legal position is that both domestic courts and the ICC may have concurrent jurisdiction for the crime of aggression.[904]

7.2.2. The legal interests of the forum state

In Part II of this dissertation, it was submitted that prosecution of the crime of aggression in domestic courts by the aggressed state is directly representative of its legal interests, as the court is enforcing sanctions against a duty-barer for failure to comply with international obligations. Also, there is symbolic significance in the State or Crown bringing an action directly against the perpetrator of the crime for wrongful conduct committed against the state. In Chapter V, it was also discussed that it may be possible for domestic courts to make reparation orders against the defendant in addition to a successful conviction. However, the focus of this Chapter will be prosecution for the purposes of establishing individual criminal responsibility – and not individual civil responsibility.

The starting point is that the aggressed state has a legal interest to be the forum state for the prosecution of the crime of aggression. This is because the alleged perpetrator of the crime of aggression has acted in breach of duty to comply with obligations owed to it to refrain from the relevant prohibited conduct. Suffice it to say, if the aggressed state intends to act as the forum state, the crime of aggression must already be prescribed in its domestic legislation under the territorial principle of jurisdiction at the time when the crime was committed.

That said, the aggressor state also has a legal interest to be the forum state for the prosecution of the crime of aggression if the alleged perpetrator is a national. Indeed, it is hardly contestable that a state has a legal interest to prosecute its nationals for wrongful conduct in breach of domestic legislation. For this to be possible, the crime of aggression must be prescribed in domestic legislation under the nationality principle of jurisdiction. It is worth noting that domestic prosecution of the crime of aggression in the aggressor state may be considered as satisfaction (Article 37, ARSIWA) under international law for the aggressed state.[905]

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[904] See Wrange (n 882) 599.

[905] Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair Decision of

Therefore, both the aggressor state and the aggressed state have a legal interest to be the forum state for the prosecution of the crime of aggression. It is not within the compass of this section to examine which forum is more convenient or whether the legal interests of one state to act as the forum state should prevail over the other. Aside from the domestic and international political ramifications of domestic prosecution of the crime of aggression in both potential forums, there are also practical difficulties. Examples of the latter include factors such as fact-finding and gathering evidence, finding witnesses, arrest of the alleged perpetrator – especially if the forum state is the aggressed state, resources and judicial infrastructure. That said, such practical difficulties are not unique only to the crime of aggression and could also easily arise with respect to the other core crimes.

An interesting aspect to be considered is the question of whether a bystander state may have a legal interest to act as a forum for the prosecution of the crime of aggression under the universality principle, i.e. to exercise universal jurisdiction. Presumably, the bystander state intending to prosecute has already prescribed the universality principle as a base for jurisdiction in its domestic legislation, and wishes to exercise universal jurisdiction over the crime of aggression.[906]

As there has been no direct injury or wrong committed against the bystander state, it may be rather difficult to argue that there is a legal interest under international law to prosecute the individual for committing the crime of aggression against the aggressed state. As argued by Akande:

> when domestic courts prosecute for aggression they are not acting in the collective interest. […] domestic courts prosecuting for aggression are exercising a form of self help and are acting to protect domestic interests.[907]

A contrary argument can be made that the obligations owed by the duty-bearer to refrain from conduct pertaining to the crime of aggression is owed to the international community as a whole. Thus, enforcement against the responsible individual for the

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30 April 1990, Reports of International Arbitral Awards, 30 April 1990, Volume XX, 215-284 (hereinafter "The Rainbow Warrior Case"), 272; see also Commentaries on ARSIWA, 106.

[906] See Reisinger Coracini, 'National Legislation on Individual Responsibility for Conduct Amounting to Aggression' (n 431) 564–565.

[907] Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' (n 753) 35.

breach of such wrongful conduct is in the interests of the international community. It is not the place of this Chapter to discuss enforcement measures for violations of obligations *erga omnes*. Instead, the angle that will be focused upon is whether there is universal jurisdiction under international law for the crime of aggression.[908]

Scharf examines the legal status of the IMT trial at Nuremberg as whether this 'should be viewed as having applied a collective form of establishing the Nuremberg Tribunal, or whether it should instead be viewed as a court of the occupying powers applying the territorial jurisdiction of Germany over the accused Nazis.'[909] He finds the former type of jurisdiction more convincing, [910] and continues to submit that 'it is reasonable for states to conclude that Nuremberg and its progeny provide a customary international law basis for prosecuting the crime of aggression under universal jurisdiction.'[911] He further relies upon the Lotus principle,[912] stating that 'those who seek to argue that the exercise of domestic universal jurisdiction over the crime of aggression is invalid must surmount a large hurdle.'[913]

However, this does not seem to be so readily accepted. Clark for example, appears to disagree with Scharf, as he submits that:

> It is very doubtful that under current customary law it can be asserted unequivocally that aggression 'is' subject to universal jurisdiction.[914]

Akande similarly expresses that 'there is no rule (and indeed no precedent) which permits universal domestic jurisdiction for aggression.' [915] Yet, this does not

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[908] See Michael P Scharf, 'Universal Jurisdiction and the Crime of Aggression' (2012) 53 Harvard International Law Journal 358, 358; Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 Journal of International Criminal Justice 735, 745; Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford University Press 2010) 115–139; Clark, 'Complementarity and the Crime of Aggression' (n 882) 730–732.
[909] Scharf (n 908) 374.
[910] ibid 375–379.
[911] ibid 379.
[912] The Court held that 'far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory, [international law] leaves them in this respect a wide measures of discretion which is only limited in certain cases by prohibitive rules,' S.S. Lotus (Fr. Turk.), 1927 PCIJ (Ser.A) No.10, at 18.
[913] Scharf (n 908) 380.
[914] Clark, 'Complementarity and the Crime of Aggression' (n 882) 731–736.
[915] Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' (n 753) 35.

necessarily mean that the crime of aggression falls into a separate legal category as an international crime than the other crimes. In my view, the same norms of customary international law that criminalise the conduct relating to the other core crimes also apply to the crime of aggression. However, it can be said that these norms of customary international law are more developed for the other crimes and more specific (e.g. through state practice and codification in Statutes of international courts & tribunals; and treaties) and have given rise to a rule of extraterritorial jurisdiction under international law.

For example, there are treaties that give rise to individual criminal responsibility for some international crimes, e.g. the Convention against Torture (1984). These treaties can be said to provide a rule for extraterritorial jurisdiction for the crimes they prescribe between States Parties.[916] Although such rule of extraterritorial jurisdiction is only applicable between State Parties to the particular treaty as they have consented to such jurisdiction for the specified crime, these treaties may nonetheless be considered as part of state practice that there is universal jurisdiction for such crimes.[917] At present, there are no such multilateral treaties that criminalise nor confer a rule of extraterritorial jurisdiction for the crime of aggression.

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[916] Such treaties may confer specific rules of jurisdiction for the specified crime by imposing an obligation upon state parties to codify the crime into domestic legislation, e.g. Articles 2, 4, 5 Convention against Torture 1984; or general obligations on State Parties to codify the crime into national legislation, e.g. Article 5 of the Convention on the Prevention and Punishment of the Crime of Genocide. Such treaties may also provide an obligation to extradite or prosecute in circumstances where an alleged perpetrator is in their territory, e.g. Articles 7 and 8 Convention against Torture 1984; see also Cherif Bassiouni, 'The Penal Characteristics of Conventional International Criminal Law' (1983) 15 Case Western Journal of International Law 27, 27.

[917] Akehurst writes that 'treaties are part of State practice and can create customary rule if the requirement of opinio juris are met, e.g. if the treaty or its travaux préparatoires contain a claim that the treaty is declaratory of pre-existing customary law. Sometimes a treaty which is not accompanied by opini juris may nevertheless be imitated in subsequent practice; but in such cases it is the subsequent practice (accompanied by opinio juris), and not the treaty, which creates customary rules', Michael Akehurst, 'Custom as a Source of International Law' (1975) 47 British Yearbook of International Law 1, 53; In the Eichmann case, the court held that, 'the abhorrent crimes defined in [the Israeli Law] are not crimes under Israeli law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (delicta juris gentium). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law, is, in the absence of an International Criminal Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and bring the criminals to trial. The jurisdiction to try crimes under international law is universal.'(1986) 36 ILR 18, 26.

Nevertheless, this rule is still emerging for the crime of aggression as pointed out by Clark that 'universal jurisdiction for the crime of aggression, is thus a work in progress and we are just at the beginning.'[918] At present, there is very limited practice of states that have prescribed the universality principle in relation to the crime of aggression.[919] Thus, it is presumed that a bystander state has a legal interest in being the forum state as part of the international community of states as a whole; however, it is left open as to whether bystander states may exercise universal jurisdiction over the crime of aggression.

The next question is how this relates to complementarity and prosecution at the ICC. As discussed in the previous chapter, complementarity is representative of preserving the legal interests of states parties by allowing them to retain priority of prosecution in situations of concurrent jurisdiction. Article 17 of the Rome Statute is not specific with regard to which state needs to have jurisdiction over a case in order for the case to be inadmissible. Thus, it is presumed that in a situation of aggression, the states which may have jurisdiction over the case for purposes of Article 17 of the Rome Statute, are the aggressed state and the aggressor state. This means that in situations of concurrent jurisdiction, the aggressor state or aggressed state has the priority of prosecution. It is left open as to whether a bystander state may be considered as a state for the purposes of Article 17 of the Rome Statute.

7.3. Concerns that arise with respect to domestic prosecution for the crime of aggression

The substantive elements of the crime of aggression involve the state act element of the crime and the elements of the crime pertaining to individual conduct. The domestic court that is undertaking proceedings will have to deal with both these substantive elements of the crime, upon which, some concerns arise. In relation to the state act element of the crime, the first concern revolves around whether the act of aggression needs to be determined by the Security Council prior to a domestic court

[918] Clark, 'Complementarity and the Crime of Aggression' (n 882) 735.
[919] Astrid Reisinger Coracini, 'Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute's Complementarity Regime' in Carsten Stahn and Goran Sluiter (eds), *The ICC's Emerging Practice: The Court At Five Years* (2009) 564–565.

initiating proceedings.[920] The second concern is the issue of the determination of an act of aggression and *par in parem non habet imperium.*

With respect to the elements of crime pertaining to individual conduct, there is the question of the potential scope of perpetrators that can be prosecuted for the crime of aggression. In particular, whether the leadership element is a necessary pre-requisite for determining the scope of perpetrators. Concomitant to the scope of perpetrators is the question of immunities of foreign state officials in criminal jurisdictions, and whether and to what extent this procedural bar may be overcome.

7.3.1. The state act element of the crime

i. Is there a need for external determination of an act of aggression by the Security Council?

As discussed in the previous Chapter, one of the most contentious issues during the negotiations leading up to Kampala was the role of the Security Council in determining the state act element of the crime, i.e. an act of aggression. The final result was the adoption at Kampala of specific procedural conditions relating to determining the existence of an act of aggression pursuant to Article 15 *bis*(6) – Article 15 *bis*(9). This raises the question of whether domestic prosecution should also be subject to a specific procedural mechanism that encompasses the Security Council with respect to determining the state act element of the crime.

The following submission by Van Schaack will serve as the starting point for this discussion:

> Domestic prosecution for the crime of aggression will not benefit from the procedural regime – including painstakingly negotiated judicial and political controls established by the ASP to manage prosecutions of the crime of aggression.[921]

This was submitted as a reason why domestic prosecution for the crime of aggression is problematic. In my view, her criticism is rather unfounded. The 'painstakingly

[920] Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (n 15) 151.
[921] ibid 215.

negotiated judicial and political controls' that she refers is presumably the mechanism pursuant to Articles 15 *bis* (6) – Article 15 *bis* (8), which facilitates the primary position of the Security Council to determine the act of aggression, followed by a six months delay before the Pre-Trial Division can authorize an investigation. Domestic courts simply do not benefit or need to benefit from this 'painstakingly negotiated judicial and political controls' because such mechanism is non-applicable.

There is a fundamental difference between domestic courts and the ICC: the former is an enforcement mechanism within the relevant State, whilst the latter is an enforcement mechanism created by a multilateral treaty.

Furthermore, Article 5(2) Rome Statute explicitly provided that any conditions for the exercise of jurisdiction must be consistent with the purposes of the UN Charter. As such, it is Article 5(2) Rome Statute that gave rise to the 'painstakingly negotiated judicial and political controls' to manage to prosecutions of the crime of aggression at the ICC – it is unlikely that there is a somewhat similar provision in the constitution of the relevant state with respect to domestic prosecution of the crime of aggression.

First and foremost, the decision whether to prosecute a crime as grave as the crime of aggression is made by the State wishing to initiate proceedings in accordance with the underlying constitutional and administrative standards and procedures: it is an entirely internal process. In comparison, the ICC also has its own internal procedures with respect to the admissibility and initiation of investigations and proceedings. Therefore, both enforcement mechanisms operate on entirely different levels and a 'painstakingly negotiated judicial and political control' that applies to an international institution has no relevance to a domestic enforcement mechanism.

Furthermore, and more importantly, domestic courts do not have a relationship with the Security Council, or with the Pre-Trial Division of the ICC. As pointed out by Cassese, the Security Council:

> has no primary and exclusive responsibility in the field of international criminal liability of individuals (be they state officials or agents of a non-state entity) for aggression. It follows that a decision of the Security Council condemning actions by states as aggression may have no direct impact on courts empowered to adjudicate crimes of aggression. Courts are free to make

> any finding in this matter regardless of what is decided by the Security Council in the area of state misconduct and consequent responsibility.[922]

Wrange has also argued that:

> It would be quite difficult to argue that current international law requires that a SC decision is a procedural condition for states to prosecute the crime of aggression. (…) I cannot really see how one could formulate an argument that it would be an existing procedural requirement for domestic prosecutions. Either national legal systems have jurisdiction, or they do not; general international law cannot possibly require that states defer to an institution created by a treaty.[923]

Domestic prosecution of the crime of aggression, like other international crimes is considered as internal affairs of a State. As such, the Security Council is unlikely to intervene in any form of domestic proceedings. States do not have any obligations to confer a role to the Security Council to determine the existence of an act of aggression as a pre-requisite for domestic prosecution for the crime of aggression. By contrast, the Security Council may defer prosecutions for the crime at the ICC because Article 16 of the Rome Statute governs such competence. Also, the determination of an act of aggression under Article 39 of the UN Charter is different than the determination for the purposes of ascertaining the state act element of the crime. This is because determination under Article 39 of the UN Charter is for purposes of authorizing collective enforcement measures under Chapter VII for the maintenance of international peace and security, whilst, on the other hand, determination to ascertain the state act element of the crime is a retrospective decision strictly for the purposes of prosecuting the relevant individual. As such, the latter does not fall within the ambit of Article 39 of the UN Charter.

This however, does not mean that domestic courts may not make references to any prior findings by the Security Council or the General Assembly of the existence of an act of aggression. For example, the sequence of events is that one of the UN organs had determined the existence of an act of aggression; and post-conflict, either

[922] Cassese (n 226) 846.
[923] Wrange (n 882) 602.

aggressor or aggressed state has decided to initiate proceedings against the perpetrator. In this situation, the state wishing to prosecute may rely on the findings by the Security Council or General Assembly to demonstrate the existence of an act of aggression. This may help to carry an element of persuasion that it is in the public interest to conduct such proceedings. Although such external findings may be persuasive and helpful to establish the state act element of the crime, they should be without prejudice to the findings of the domestic court with respect to fact-finding and the consideration of the legality of the use of force to avoid affecting the due process rights of the defendant.

Another hypothetical situation could arise where the ICJ has determined that an act of aggression has occurred in an Advisory Opinion about the legality of the use of force in the particular situation, or in a Contentious Case between the aggressor state and the aggressed state as to the legality of the use of force. As a result of this finding, either aggressor or aggressed state may then wish to initiate proceedings against the perpetrator. The State wishing to prosecute may then rely on the findings of the ICJ to argue the existence of the aggression. Once again, this should be without prejudice to the findings of the domestic court.

If domestic courts choose to rely on previous findings by external UN organs to determine the existence of an act of aggression, this should be regarded as permissive as opposed to obligatory. External UN organs are not expected or required to form any part of the determination process and thus do not and should not play any direct role in helping domestic courts prosecute the crime of aggression. As pointed out by Cassese:

> one of the merits of the distinction between two different regimes of responsibility lies in, among other things, enabling courts that try persons accused of aggression legitimately to embrace a judicial approach which may differ from political stand taken by international political bodies such as the UNSC.[924]

[924] Cassese (n 226) 846.

ii. Determining an act of aggression and *par in parem non habet imperium*

As mentioned above (section.7.2.1) the ILC submitted *par in parem non habet imperium* as the underlying reason why domestic courts are incompetent fora for prosecution of the crime of aggression. The question was raised as to whether *par in parem non habet imperium* serves as an insurmountable procedural barrier for prosecution of the crime of aggression in domestic courts.

The first step is to examine the meaning of *par in parem non habet imperium*. Although the origins of this Latin phrase can be traced all the way back to canon law,[925] in a more contemporary context its literal meaning can be understood as 'one State has no power over another.'[926] Yet, power in the present context is not so helpful as the underlying issue is the exercise of jurisdiction by the forum state over an act committed by a foreign state. Thus, it is more relevant to understand *par in parem non habet imperium* as 'one state shall not have jurisdiction over another state.'[927] That said, there are situations when the forum state would have competence over the act of the foreign state in question because there is a jurisdictional nexus with the perpetrator of the crime. It would then appear that there are two competing legal interests: the forum state to exercise jurisdictional competence; and the foreign state to have its official acts precluded from the jurisdiction of the former.

In the present context, the states with the competing interests are the aggressor state and the aggressed states. Despite the lack of current state practice of the domestic prosecution of the crime of aggression, it should be noted that every state that has codified the crime of aggression in its domestic legislation has included the territorial principle of jurisdiction.[928] Thus, not only has the perpetrator allegedly

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[925] Dinstein, 'Par in Parem Non Habet Imperium' (n 888) 407–408.

[926] ibid 413–415; Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (n 15) 149.

[927] Kelsen, *Peace Through Law* (n 888) 35; Dinstein, 'Par in Parem Non Habet Imperium' (n 888) 416.; Lord Wright in *Compania Naviera Vascongado v S.S. Cristina* states that 'the principle "par in parem non habet imperium", no State can claim jurisdiction over another Sovereign State." Compania Naviera Vascongado v S.S. Cristina [1938] A.C 485 at 502; In *Jones v Saudi Arabia*, Lord Bingham stated that 'based on the old principle par in parem non habet imperium, the rule of international law is not that a state should not exercise over another state a jurisdiction which it has but that (save in cases recognised by international law) a state has no jurisdiction over another state', Jones v Saudi Arabia, [2006] UKHL 26, para.14.

[928] Reisinger Coracini, 'National Legislation on Individual Responsibility for Conduct Amounting to Aggression' (n 431) 564.

committed an international crime, but also a domestic crime pursuant to the criminal code of the aggressed state. There is no dispute that when a crime has been committed on (or against) the territory of the forum state, there is a legal interest for the state in question to prosecute the individual regardless of his/her nationality. This is known as the territorial competence (jurisdiction) of the forum state. It is this rule of territorial jurisdiction that will come into conflict with *par in parem non habet imperium*.

When contemplating the underlying norms, the conflict is between the norms that attach specific sanctions on individuals for violations of international law to refrain from the crime of aggression and the norms that give rise to sovereign equality of states. It is suggested that the former should prevail, as these norms are more specific and of customary international law nature (*lex specialis* principle).[929] In other words, because customary international law attaches sanctions directly on individuals in the event of breach of obligations to refrain from conduct relating to an act of aggression, these norms should prevail over the norms that give rise to sovereign equality of states. This is consistent with Kelsen's submission that *par in parem non habet imperium,* as a rule of positive international law, is subject to some exceptions which must be established by 'special rules of customary or contractual international law.'[930] Thus, the more specific rule of territorial jurisdiction should prevail over *par in parem non habet imperium,* which means that the latter is not applicable when the forum state is the aggressed state.

In addition to the *lex specialis* principle, there are other reasons, in my view, as to why *par in parem non habet imperium* should not come into play when the forum state is the aggressed state. First, *par in parem non habet imperium* which preserves the sovereign equality of states, cannot logically apply when the forum state is the aggressed state because it would deprive the state from its sovereign prerogative as the rights-holder of the enjoyment of the protection of the norms that criminalise aggression from its legal interest to enforce legal consequences against the duty-bearer of these norms for wrongful conduct committed against its territory. It is submitted that domestic prosecution of the crime of aggression is a form of self-help

[929] Michael Akehurst, 'The Hierarchy of the Sources of International Law' (1975) 47 British Yearbook of International Law 273, 274–275; see also Niels Petersen, 'Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation' 23 American University International Law Review 275, 287.
[930] Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law' (n 299) 159.

by the aggressed state as it is representative of the enforcement of legal consequences against a legal personality that has committed wrongful conduct against it.

Second, *par in parem non habet imperium* should not apply in situations when the aggressed state is the forum state as this would inhibit an enforcement mechanism that international law relies upon from carrying out sanctions against an individual who has acted in breach of duty to refrain from conduct pursuant to the crime of aggression. Thus, this would also paradoxically undermine the sovereign equality of states because the aggressed state is precluded from exercising its legal interest under international law to enforce legal consequences against the individual(s) responsible for committing a crime against its territory.

Suffice it to say, this is rather conceptual, and it is ultimately for the forum state to decide whether this procedural bar to jurisdiction should apply in domestic proceedings against the crime of aggression.

7.3.2. The elements of the crime pertaining to individual conduct: the question of the leadership element

The leadership element has been examined throughout this dissertation and need not be repeated here. The question is whether the leadership element is a necessary pre-requisite for an individual to be prosecuted at a domestic court for the crime of aggression.[931] According to the study conducted by Reisinger Coracini, states that have codified the crime of aggression in their domestic legislation have been mainly silent about the leadership element.[932] This appears to be consistent with customary international law, as neither the IMT Charter nor Control Council Law No.10 explicitly provided a leadership element. At the IMT, each defendant was assessed on a case-by-case basis, primarily with respect to his relationship with Hitler, followed

[931] Reisinger Coracini, 'National Legislation on Individual Responsibility for Conduct Amounting to Aggression' (n 431) 553,555.

[932] ibid 553; she further observes that 'an implicit reference to criminal responsibility of persons in a superior position can be found in the criminal codes of Montenegro and Serbia. Next to any person who "calls for or instigates aggressive war", "anyone who orders waging war" is liable for punishment.' (Art.442 Montenegrin criminal code, Art 386 Serbian criminal code) Comparably, the Croatian criminal code specifies waging a war of aggression as "commanding an armed action of one state against the sovereignty, territorial integrity or political independence of another state." (Article 157(3) Croatian Criminal Code). The conduct verbs "order" and "command" imply the existence of a hierarchical, superior-subordinate relationship and thus limit criminal responsibility to persons in a position to give such orders or commands", also that Estonia expressly punishes 'a representative of the state who threatens to start a war of aggression' (Para.91 Estonian criminal code).

by the scope of the underlying powers that his official position entailed. At the NMT, the underlying pre-requisite for the leadership element was that the individual must be in a position on the policy level, where they could *inter alia* "formulate and excecute policies" (*Farben*); and/or to "shape or influence" policies (*High Command*). It is also worth remembering that the Krupp Tribunal did not rule out industrialists from being on the policy level.[933] Although there is no leadership element *per se* that forms a substantive element of the definition of the crime in customary international law, the findings of the NMT may nevertheless be instructive in determining the scope of perpetrators that can be prosecuted in a domestic court.

In Chapter III, it was discussed how the Kampala Amendments put forward a narrower scope of perpetrators than Nuremberg by creating a leadership element that constituted a substantive part of the definition, i.e. 'a person in a position effectively to exercise control over or to direct the political or military action of a State.' Post-Kampala, some States Parties have implemented domestic legislation incorporating the Kampala Amendments verbatim;[934] therefore including the leadership element.[935] For these states, the leadership element is a necessary pre-requisite for an individual to be prosecuted in a domestic court, as it is a substantial part of the definition of the crime. Although there is no legal requirement for States Parties to implement the Rome Statute, or the Kampala Amendments, into their domestic legislation, it is perhaps in the interests of the ratifying State Party to do so because complementarity works on a same perpetrator same crime basis. If the defendant prosecuted in a domestic court of a State Party that has jurisdiction over the crime of aggression may not satisfy the leadership element in the Kampala Amendments, the situation may still be admissible to the ICC with an indictment against another accused.

In general, it can be presumed that a broader scope of perpetrators may be prosecuted at domestic courts (customary international law) than at the ICC (Kampala Amendments.[936] The discretion is ultimately for States whether to incorporate a leadership element into their domestic legislation or to leave it open, which means

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[933] Heller observes that there was no explanation as to why industralists were held to a different *mens rea* than other types of defendants, Heller (n 336) 196.
[934] See Meagan Wong, Germany and Botswana ratify the Kampala Amendments on the crime of aggression, at http://www.ejiltalk.org/germany-and-botswana-ratify-the-kampala-amendments-on-the-crime-of-aggression-7-ratifications-23-more-ratifications-to-go.
[935] e.g. Article 103 Slovenian Criminal Code.
[936] See Heller (n 336).

that domestic courts may prosecute a broader scope of perpetrators than the ICC.[937] Be that as it may, customary international law is sufficiently clear that only individuals who have high-level positions within the political or military action of a State may be prosecuted for the crime of aggression.[938] Also, customary international law does not exclude non-state actors from the scope of perpetrators that may be responsible for the crime of aggression. [939]

7.4. The question of immunities of state officials for international crimes in foreign domestic courts

Immunities of state officials in foreign domestic courts can be seen as a derivative from the international law doctrine of state immunity.[940] The idea is that a domestic court is precluded from exercising jurisdiction over a foreign state official either because (a) his/her official position in the hierarchy of a state is symbolic of state sovereignty; or his/her official position requires inviolability in foreign domestic courts for smooth facilitation of international relations; (b) the act in question was committed in the official capacity of a state. The former is known as *immunity ratione personae* (personal immunity); whilst the latter is known as *immunity ratione materiae* (functional immunity). Both nuances of immunity of state officials will be examined with particular reference to how they may apply to domestic prosecution for the crime of aggression; and whether and to what extent they may be overcome. It should be noted from the outset that the present analysis refers specifically to immunities of states officials in the context of criminal jurisdiction, and not civil jurisdiction.

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[937] For a criticism of this, see Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (n 15) 148–154.

[938] Article 16 of the Draft Code of Crimes against the Peace and Security of Mankind stipulates 'an individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiating or waging of aggression committed by a State shall be responsible for a crime of aggression.' In the Commentary, it was explained that 'these terms must be understood in the broad sense, that is to say, as referring, in addition to the members of a Government, to persons occupying high-level posts in the military, the diplomatic corps, political parties and industry, as recognized by the Nurnberg Tribunal, which stated that 'Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats and businessmen', Commentaries on the Draft Code of Crimes, 43.

[939] Cassese (n 618) 846.; for a criticism, see Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (n 15) 152.

[940] Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 American Journal of International Law 407, 409.

As a preliminary issue, it is important to understand the relationship between immunities of state officials in foreign domestic courts and jurisdiction. Both are separate concepts and should not be conflated.[941] Jurisdiction in this context means that the crime in question has already been prescribed in the domestic legislation of the forum state; and that the relevant domestic court is able to exercise jurisdiction over the defendant.[942] Immunities, as such, imply an exception from the jurisdictional competence of the forum state.[943] This was expressed in the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case at the ICJ:

> "Immunity" is the common shorthand phrase for "immunity from jurisdiction". If there is no jurisdiction en principe, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise. [...] "Immunity" and "jurisdiction" are inextricably linked.[944]

Indeed, for procedural convenience, a court may decide to view jurisdiction and the concomitant immunities from this jurisdiction for foreign state officials simultaneously, and/or the latter before the former.[945] Alternatively, as pointed out by Douglas, 'more often than not […], the forum court considers the question of entitlement to state immunity before the question of jurisdiction.'[946] He submits that 'this practice is undesirable because it places undue pressure on the test for state immunity by denying the doctrine of jurisdiction in international law its role as a filter on the cases that can properly be subject to the adjudicative competence of the forum state's courts.'[947]

Regardless, the procedural approach by domestic courts should not detract from the underlying issue that the forum state must have adjudicatory jurisdiction before

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[941] Ibid 407; Alexander Orakhelashvili, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah' (2011) 22 European Journal of International Law 849, 852.
[942] Zachary Douglas, 'State Immunity for the Acts of State Officials' (2012) 82 British Yearbook of International Law 281, 297–301.
[943] ibid 299.
[944] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment,
I.C.J. Reports 2002, [Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal], 64.
[945] Douglas (n 942) 297.
[946] ibid 285.
[947] ibid 344.

the state official invokes immunity.[948] Simply put, if there is no jurisdiction, then immunities cannot be pleaded, as there is nothing to be immune from.

7.4.1. Immunity Ratione Personae

Certain state officials are able to plead immunity from jurisdiction of a foreign domestic court by virtue of their official status in the government. Immunity *ratione personae* is attached directly to the particular official position for the entirety of the duration that the state official remains in office.[949] The nature of this immunity encompasses an absolute exception to both civil and criminal jurisdiction in a foreign domestic court for acts committed both in public and private capacity.[950] In other words, a state official that is able to plead immunity *ratione personae* is exempted from any form of proceeding in a foreign domestic court for acts that he/she may have committed in the official capacity of a state, and/or acts committed in private. Such acts could be committed prior to entry to office or during term.

The ICJ in the *Arrest Warrants* case identified these state officials as 'holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs.'[951] The inclusion of Ministers for Foreign Affairs in this category of state officials has been subject to criticism.[952] It need not be answered here whether customary international law provides *immunity ratione personae* for Ministers of Foreign Affairs.[953] That said, it is worth noting that the Dutch Expert Report on the Immunity of Foreign State Officials has included Ministers of Foreign Affairs within the Categories of Persons that enjoy personal immunity.[954] Thus, it can be inferred that in practice, states would likely recognise that *immunity ratione personae* applies to Ministers of Foreign Affairs.

There appear to be two broad rationales for this nuance of immunity. First, the state official has attained a position in the hierarchy of a state that is symbolic of state

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[948] ibid 297.
[949] Akande, 'International Law Immunities and the International Criminal Court' (n 940) 409.
[950] Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 European Journal of International Law 815, 819–820.
[951] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, (hereinafter "Arrest Warrant case"), 3, para.51
[952] Akande, 'International Law Immunities and the International Criminal Court' (n 940) 412.
[953] Akande and Shah (n 950) 824–825.
[954] Advisory Committee on Issues of Public International Law, Advisory Report on the Immunity of State Officials, Advisory Report No.20, the Hague May 2011 (Hereinafter "Dutch Expert Report on Immunities") Section 4, 28-30.

sovereignty.[955] The arrest, prosecution and subsequent punishment of serving Heads of State and/or Heads of Government will effectively interfere with the internal governance of the foreign state.[956] Second, this type of immunity provides for the smooth facilitation of diplomatic relations, as these state officials need to be able to carry out their tasks in foreign states without the possibility or risk of being arrested and prosecuted.[957] This was held by the ICJ in the *Arrest Warrants* case, where it was concluded that 'the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.'[958]

As the crime of aggression is a leadership crime, it is very likely that the defendant will belong to this particular category of state officials that may plead immunity *ratione personae* in the domestic courts of the forum state.

7.4.2. Immunity Ratione Materiae

In addition to immunity *ratione personae*, customary international law also confers immunity *rationae materiae* on state officials from jurisdiction of the forum state when the act or crime in question was committed in the official capacity of the state.[959] For purposes of this dissertation, such acts shall be known as "sovereign acts." When it is established that an act is a sovereign act, norms relating to jurisdiction provide an exception from the jurisdiction of the forum state for the state official. The Appeals Chamber of the ICTY had observed:

> [State] officials are the mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts

[955] R v Bow Street Metropolitan Stipendiary Magistrate Ex p Pinochet Ugarte (No.3) [2000] 1 A.C. 147 (hereinafter "Pinochet No.3"), as per Lord Millett at 269
[956] See Akande and Shah (n 950) 824.
[957] The ICJ noted that immunities under customary international law for Ministers for Foreign Affairs is 'to ensure the effective performance of their functions on behalf of their respective States.' Arrest Warrant Case (n 951) para.53.
[958] Arrest Warrants Case (n 951) para. 54.
[959] Akande and Shah (n 950) 826.

> which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.[960]

The norms that give rise to this type of immunity are attached to the sovereign act rather than the status of the official, which is why state officials that have acted in the capacity of the state may plead this immunity even if they no longer hold office, e.g., former heads of states and former state leaders. Non-state officials that have acted on behalf of the state and are indicted for conduct that can be considered as sovereign acts of the foreign state may also arguably plead this type of immunity.[961]

The common understanding is that prosecution of the individual may be the indirect exercise of jurisdiction by the forum state over the foreign state, as there is the need to assess the legality of the conduct in question – which was committed in official state capacity.[962] Indeed, if the act is a sovereign act, it is attributable to the State, which implies state responsibility. This is how there is a clash between interests of the forum state (territorial competence) and the foreign state (non-interference with *acta jure imperii*). The norms that give rise to state immunity come into play and create an exception to jurisdiction over the individual to preclude the forum state from calling upon the responsibility of the state for the act in question, allowing the sovereignty of the foreign state to prevail.

Douglas points out that by pleading immunity *ratione materiae,* the state official is effectively implying that the proper defendant in the proceeding should be the State.[963] Thus, in addition to acting as a procedural bar to jurisdiction of the forum state, immunity *ratione materiae* also has the effect of serving as a defence for the

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[960] *Prosecutor v Blaskic* (Objection to the Issue of Subpoena duces Tecum) IT-95-14-AR 108 (1997), 110 ILR (1997) 607, at 707, para.38.

[961] Akande and Shah (n 950) 825; see also Akande, 'International Law Immunities and the International Criminal Court' (n 940) 412–413.

[962] In Zoernsch v Waldock, it was held that 'a foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf. To sue an envoy in respect of acts done in his official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be 'en poste' at the date of his suit', Zoernsch v Waldock [1964] 1 WLR 675, at 692.

[963] Douglas writes that 'where foreign state officials are the named defendants, they can only benefit from their state's jurisdictional immunity if the foreign state itself is, by operation of a rule of law, the proper defendant in the action', Douglas (n 942) 321.

defendant as 'it indicates that the individual office is not to be held legally responsible for acts, that, in effect, are those of the state.'[964]

However, it must be clarified that although immunity *ratione materiae* may serve as a defence in the particular case to which it applies, it does not have a substantive effect because it does not exonerate the individual from his/her criminal responsibility.[965] The effect is procedural in nature because it implies that the domestic court is not the appropriate forum for proceedings. The state official may be prosecuted in either the foreign state or an international court or tribunal that has jurisdiction over the crime and individual.

Immunity *ratione materiae* only applies to the court of the forum state that has decided to adhere to the norms that provide an exception to jurisdiction, and only upon the relevant individual. Thus, if other individuals are also accused, they may be prosecuted if the forum state has jurisdictional competence. The emerging trend appears to be that immunity *ratione materiae* does not apply with respect to prosecution for international crimes.[966] Three broad theories have been identified as the reason why state officials may no longer successfully plead immunity *ratione materiae* if it is alleged that they have committed international crimes:

i) International crimes cannot be considered as sovereign acts committed by the state for the purposes of immunity *ratione materiae*;[967]

ii) The prohibition of international crimes has attained *jus cogens* status;[968]

iii) There is universal jurisdiction over international crimes (genocide, war crimes, crimes against humanity, torture), and the rule of extraterritorial jurisdiction will prevail over immunity.[969]

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[964] Akande and Shah (n 950) 817.
[965] Arrest Warrants Case (n 951) para 60.
[966] Dutch Expert Report on Immunities (n 954) 17-20; for a different view, see Bing Bing Jia, 'The Immunity of State Officials for International Crimes Revisited' (2012) 10 Journal of International Criminal Justice 1303; Akande, 'International Law Immunities and the International Criminal Court' (n 940) 413–414.
[967] Pinochet No.3 (n 955) as per Lord-Browne Wilkinson (205); Lord Hutton (263).
[968] See Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, 99 (hereinafter "Jurisdictional Immunities of the State") para.80.
[969] Pinochet No.3 (n 955) as per Lord Philipps 190; see also Akande and Shah (n 950) 828.

i. International crimes cannot be considered as sovereign acts committed by the state for the purposes of immunity ratione materiae

If the conduct in question, i.e. the international crime, is not considered as a sovereign act of the foreign state, it follows that the state official may not plead immunity *ratione materiae* as there is no legal basis for doing so. The idea is that the act in question is an international crime, thus it is automatically ruled out as a sovereign act to detach the act in question from the norms that attract an exception to jurisdiction over the state official. Simply put, if international crimes are not recognized as sovereign acts, there is no immunity *ratione materiae.*

The argument is that acts that are inherently regarded as unlawful under international law cannot simultaneously be recognized as sovereign acts for the purposes of immunity *ratione materiae.* This is because international law cannot simultaneously prohibit certain acts and yet attach immunity to such acts. Therefore, it is only logical that acts that are violations of international law should not be regarded as official functions of the state. This was expressed by some of the Lords from the House of Lords in the UK, in the case, Pinochet No.3.[970] Lord Browne-Wilkinson questioned 'how can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?'[971] Similarly, Lord Hutton said:

> The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime.[972]

This reasoning is *prima facie* problematic and contrary to the purposes of immunity *ratione materiae*. This immunity serves to preclude the forum state from considering a sovereign act of the foreign state regardless of the legality of the act in question. If the criterion for the recognition as a sovereign act is that the underlying act must be

[970] Pinochet No.3 (n 955).
[971] Pinochet No.3 (n 955) ibid 205.
[972] Pinochet No.3 (n 955) ibid 262; see also Douglas (n 942) 323–324, 338.

lawful under international law, then the foreign state's interests for an exception to jurisdiction can only prevail if the conduct is lawful. This suggests that the norms that allow an exception to jurisdiction are predicated upon the lawfulness of the conduct of the foreign state. This is incorrect.

In general, the determining factor whether the act/crime in question is a sovereign act is not and should not be predicated upon the legality of the conduct under domestic or international law. Instead, the purpose behind such acts should be considered pursuant to how they were executed.[973] Thus, the criteria should be to examine the nature of the act in question as to whether it was committed in official capacity and not whether the conduct was the result of breach of obligations placed directly on individuals. Furthermore, the step towards ascertaining that the act in question is an international crime may still involve considering the legality of the act in question, which is contrary to the purposes of immunity *ratione materiae* if the interests of the foreign state are concerned.

Overall, it is submitted that international crimes should be considered as sovereign acts, provided they satisfy the common test that the act in question was conducted by the state official in the capacity of his/her duties under the authority of the foreign state. It is inherently the underlying nature of how and why the act was committed that determines whether an act is a sovereign act, and not its status under international law. Bearing in mind that the state act element of the crime is a necessary pre-requisite of the crime of aggression, it is questionable as to whether the crime of aggression can be disregarded entirely as a sovereign act. This is because an act of aggression is part of the substantive definition of the crime and must be established prior to the ascertainment of individual criminal responsibility.

Furthermore, regardless of the legality of the use of force of the aggressor state, one would struggle to argue that the initiation, planning, preparation and waging an act of aggression was not committed by the defendant in the official capacity of the aggressor state or in public power. As the act of aggression encompasses the machinery of a state, it is difficult to suggest that the method of the individual who initiated, planned, prepared or waged an act of aggression was not conducted in the official capacity of the state and/or that such actions are not to be considered as official functions of his/her position.

[973] Akande and Shah (n 950) 832.

ii. The prohibition of international crimes is *jus cogens*

There are two broad arguments. First, an international crime amounts to a violation of peremptory norms, hence it cannot be recognised as a sovereign act.[974] However, it is not for the forum state to predicate immunity *ratione materiae* on the legal status of the sovereign act, but on the underlying nature of the act being committed in the official capacity of the State. If the forum state does not recognise the norms of immunity *ratione materiae* on the basis that the breach of peremptory norms does not amount to a sovereign act(s), it is inherently making an assessment of conduct of the foreign state. This is contrary to the norms that give rise to immunity *ratione materiae* in the first place.

Second, the norms that prohibit international crimes are *jus cogens*, which would prevail and 'overcome all inconsistent rules of international law providing for immunity.'[975] Lord Millett put forward a similar argument in Pinochet No.3:

> international law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.[976]

However, the question is whether the *jus cogens* norms that prohibit international crimes really come into direct conflict with the norms that provide an exception to jurisdiction over state officials.[977] The former applies directly against individuals to refrain from international crimes, from which no derogation can be made (substantive in nature), whilst the latter applies to the rule of jurisdiction to create an exception for the state official (procedural in nature). One set of norms applies directly against towards the individual, whilst the other set of norms applies to the rules of jurisdiction of the forum state.

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[974] Orakhelashvili, *Peremptory Norms in International Law* (n 143) 325; see also Douglas (n 942) 341–342.
[975] Akande and Shah (n 950) 828.; this was one of the arguments submitted by Italy at the ICJ, in Jurisdictional Immunities of the State (n 973) 34.
[976] Pinochet No.3 (n 955) 278.
[977] Jurisdictional Immunities of the State (n 968) 140, para.93; see also Jia (n 966) 1315.

As such, there is no actual conflict of norms, as 'two sets of rules address different matters.'[978] The ICJ held:

> The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.[979]

This reflects an argument made earlier by Fox:

> [s]tate immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a jus cogens mandate can bite.'[980]

It should be clarified that the prosecution of international crimes is not *jus cogens*.[981] Orakhelashvili is of the contrary opinion that '*jus cogens* norms relating to international crimes do not just prohibit the relevant conduct but also criminalize it with peremptory effect once the criminality of conduct is part of *jus cogens*, so are the rules regarding prosecution.'[982]However, it is not convincing that the rules regarding prosecution of international crimes constitute *jus cogens.* As observed by Jia, 'state practice has yet to recognise any obligation erga omnes to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law.'[983] Orakhelashvili further elaborates that:

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[978] Jurisdictional Immunities of the State (n 968) 140, para 93.
[979] Ibid.
[980] Hazel Fox, *The Law of State Immunity* (2nd edn, Oxford University Press 2008) 525.
[981] Akande and Shah (n 950) 836.
[982] Orakhelashvili, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah' (n 941) 851–852.
[983] Jia (n 966) 1315.; see also Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili' (2011) 22 European Journal of International Law 857, 860.

> Preventing, through immunity, the injured entity from claiming remedies for the breach of *jus cogens* is therefore substantially more than erecting a procedural bar – it is essentially a denial of the normative status of the substantive rule that has been violated. An abstractly valid prescription that cannot produce legal effect in relation to violation is simply not a legal rule.[984]

According to his argument, if the aggressed state is prevented from claiming a remedy, i.e. prosecuting the perpetrator for the crime of aggression, immunity has the effect of being more than a procedural bar because it denies the substantive effect of executing a sanction against an individual for committing an international crime.[985] I disagree. As held by the ICJ in the Arrest Warrants Case:

> Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.[986]

Last but not least, Orakhelashvili had also observed that 'the courts which uphold the state immunity for breaches of peremptory norms mostly ignore the question of the nature of the act in question and do not address it.'[987] Although he intended for this to be a criticism, my view is that the approach of these courts is consistent with the purposes of immunity *ratione materiae.* The underlying basis for whether an act is a sovereign act is not predicated on its compliance with obligation *erga omnes*, but instead the purpose and method of how it was facilitated with respect to the foreign state.

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[984] Orakhelashvili, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts: A Reply to Dapo Akande and Sangeeta Shah' (n 941) 852.
[985] Orakhelashvili goes one step further to suggest that immunity inevitably gives rise to impunity, see Orakhelashvili, *Peremptory Norms in International Law* (n 143) 358.
[986] Arrest Warrants Case (n 951) para 60.
[987] Orakhelashvili, *Peremptory Norms in International Law* (n 143) 326.

iii. There is universal jurisdiction over international crimes

This was expressed by Lord Phillips in Pinochet (No.3):

> International crimes and extra-territorial jurisdiction in relation to them are both new arrivals in the field of public international law. I do not believe that State immunity *ratione materiae* can co-exist with them. The exercise of extra-territorial jurisdiction overrides the principle that one State will not intervene in the internal affairs of another. It does so because, where international crime is concerned, that principle cannot prevail … once extra-territorial jurisdiction is established, it makes no sense to exclude from it acts done in an official capacity.[988]

Thus, when there is universal jurisdiction over international crimes, the rule of extraterritorial jurisdiction may prevail over the norms that provide an exception to jurisdiction over the individual for acts done in an official capacity.[989]

However, it is questionable as to whether this argument is relevant to the crime of aggression, as it is still undecided whether international law provides a rule of extraterritorial jurisdiction for the crime of aggression.[990] Therefore, the question is whether a rule of territorial jurisdiction may also prevail over immunity *ratione materiae*. Returning to the underlying rationale, the reason a rule of jurisdiction prevails over the norms that provide an exception to jurisdiction for the purposes of immunity *ratione materiae,* is the need to establish individual criminal responsibility.[991]As submitted by Akande and Shah, 'the newer rule of attribution supersedes the earlier principle of immunity which seeks to protect non-responsibilty.'[992] From this premise, it can be argued that the rule of territorial jurisdiction should also be able to prevail over the norms that provide an exception to jurisdiction for the purposes of *immunity ratione materiae*.

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[988] Pinochet No.3 (n.955) 190.
[989] see Akande and Shah (n 950) 843.
[990] Akande has expressed that he does not believe that there is universal jurisdiction for the crime of aggression, Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' (n 753) 35.
[991] Dutch Expert Report on Immunities (n 954) 19.
[992] Akande and Shah (n 950) 840.

In my view, as customary international law allows sanctions to be executed against the relevant duty-bearers for the failure to comply with their duty to refrain from international crimes, it is logical that procedural rules like immunities over state officials for sovereign acts should not apply in a domestic court whereby the forum state has the jurisdiction to determine upon the substantive nature of the act in question for the purposes of enforcement. Thus, in a situation where the forum state is the aggressed state, an argument can be made that immunity *ratione materiae* is non-applicable to the defendant because international law relies on the domestic court as an enforcement mechanism to exercise sanctions against the duty-bearer for failure to comply with international obligations.[993] Furthermore, this is in the legal interests of the aggressed state.

7.5. Domestic prosecution of the crime of aggression: overcoming procedural bars

This Chapter has focused upon two procedural bars that come into play: *par in parem non habet imperium*; and immunities from jurisdiction for state officials. The former acts as a procedural bar that precludes the forum state from exercising jurisdiction over the legality of the act of aggression, whilst the latter precludes a state from exercising jurisdiction over an individual that has participated in conduct relating to the alleged act because of the nature of his/her position in government (immunity *ratione personae*) or the nature of the act committed (immunity *ratione materiae*). It is important to understand that there must first be jurisdiction before either type of immunities may be pleaded, i.e. that the forum state is in a position to initiate proceedings against the defendant for the crime of aggression.

With respect to the first barrier, it is submitted that if *par in parem non habet imperium* acts as a procedural bar in situations when the forum state is the aggressed state, this would paradoxically undermine its sovereignty because it is inherently precluded from its *modus operandi* to enforce legal consequences against the individual who has committed a crime against its territory. Thus, it has been submitted that *par in parem non habet imperium* cannot logically co-exist with a rule of jurisdiction under the territorial principle (section 7.3.1.ii). The underlying argument is predicated upon the jurisdictional nexus between the victim state and the

[993] Douglas (n 942) 338.

individual for committing the crime of aggression against its territory. It is important to note that 'sitting in judgment over the acts of a co-equal sovereign,'[994] when considering the legality of the use of force during the prosecution of the crime of aggression is to satisfy the state act element of the crime and not to enforce legal consequences against the aggressor state.

If and upon overcoming *par in parem non habet imperium*, jurisdiction can be established, the forum court may then have to decide whether to allow an exception to jurisdiction over the state official by applying the norms that give rise to either immunity *ratione personae* or immunity *ratione materiae*. As aggression is essentially a leadership crime, it is likely that the individuals who may be prosecuted will be able to plead immunity *ratione personae* by virtue of their position in government being a symbolic representation of the state. Alternatively, if the individual does not fall within the category of those who may plead immunity *ratione personae*, they may be able to plead immunity *ratione materiae*.

It is submitted that the norms that give rise to immunity *ratione personae* will apply as an exception to jurisdiction from the forum court regardless of whether or not customary international law provides a rule of jurisdiction over the individual for the relevant crime. This should not be interpreted to trivialize the significance of the rule of jurisdiction over the individual, but rather to give precedence to the principle of non-intervention of the domestic affairs of a foreign state. The arrest, detainment, prosecution and subsequent imprisonment of a State leader represent an intervention in the domestic political structure of a foreign State. Such inviolability should not be interpreted as impunity, as it merely suggests that the present relevant domestic forum is not the appropriate forum for prosecution. An alternative forum, such as the domestic court of the foreign state and/or the ICC may be contemplated. Of course, whether prosecution can actually take place in the domestic court of the foreign state and/or the ICC may not always be likely.

On the other hand, it is suggested that the norms that give rise to immunity *ratione materiae* may not be applicable in situations where the defendant is indicted for an international crime. This is because a newer, and more specific rule of

[994] Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (n 15) 149; for an account of when states have 'sat in judgment' over other states, see Strapatsas (n 882) 455–456.

customary international law that attaches sanctions against an individual for the crime of aggression should be allowed to prevail over the rule of immunity ratione materiae.

It should be clarified that these norms exist on different levels. The rule(s) of jurisdiction that allow sanctions to be exercised against individuals is substantive in nature. International law relies on this rule of jurisdiction to enforce sanctions against the individual. On the other hand, the norms that allow exceptions from jurisdiction are procedural in nature as there is no actual substantive effect on the legality of the conduct or responsibility of the individual. It can therefore be said that the norms that provide a rule of jurisdiction do not directly affect the norms that allow an exception to jurisdiction because one is substantial in nature, and the other is procedural.

In theory, if the domestic court of the aggressed state or bystander state is contemplating whether to allow an exception to jurisdiction for the state official, then it is already presumed or satisfied that there is a rule of jurisdiction. This rule of jurisdiction, be it territorial or extraterritorial, allows sanctions to be executed against the individual. Thus, it can be assumed to prevail over the norms that give rise to *par in parem non habet imperium.* Likewise, this rule of jurisdiction should also prevail over the norms that give rise to immunity *ratione materiae.* For international law to be internally consistent, the rule of jurisdiction that attaches sanctions directly against the individual for the crime of aggression, it is suggested that this rule overcomes both *par in parem non habet imperium* and *immunity ratione materiae.* This way, domestic courts may fulfill their role as enforcement mechanisms against the norms that crimalise aggression.

7.6. Conclusion

This Chapter has challenged and rejected the hypothesis that domestic courts are incompetent fora for prosecution of the crime of aggression and that the ICC should have *de facto* exclusive jurisdiction. As such, it is submitted that both domestic courts and the ICC serve as enforcement mechanisms under international law against the norms that criminalise aggression.

Both aggressor state and aggressed state may serve as the forum state for the prosecution of the crime of aggression. With respect to the former, the legal interest can be established under the nationality principle, while the legal interest of the latter may be established under the territoriality principle. It can also be said that

prosecution in domestic courts of the aggressor state may amount to satisfaction for the aggressed state. Thus, the legal interests of the aggressed state are still represented even when the forum state is the aggressor state.

It is submitted that unlike the ICC, there is no need for a pre-determination of an act of aggression by the Security Council for a domestic court to prosecute the crime of aggression. Be that as it may, if the Security Council or General Assembly has determined the existence of an act of aggression, the forum state may rely on these findings as grounds to initiate proceedings against the relevant perpetrator of the crime of aggression. Thus, such determinations may carry persuasive value with respect to establishing the state act element of the crime of aggression.

It is also argued that *par in parem non habet imperium* is not necessarily an insurmountable procedural bar to domestic prosecution for the crime of aggression. In a more specific context whereby the forum state is the aggressed state, *par in parem non habet imperium* cannot logically apply as the victim of the crime of aggression is then precluded from enforcing legal consequences against an individual for wrongful conduct committed against its sovereignty and territorial integrity. Thus, this would paradoxically undermine the sovereign equality of states on a judicial level as it precludes a state (aggressed) from exercising its legal interests under international law to enforce sanctions against an individual responsible for committing a crime against its territory. It is suggested that *par in parem non habet imperium* should not be applicable in domestic courts when the forum state has a legal interest in enforcing sanctions (criminal) against the perpetrator. That said, this is a rather conceptual argument, and it is ultimately for the forum state to decide in practice whether this procedural bar to jurisdiction should apply.

As there is no strict requirement for States Parties who have ratified the Kampala to implement the amendments into their domestic legislation, it is questionable as to whether States Parties will choose to incorporate the leadership element within Article 8 *bis*(1) into their criminal codes. As such, it appears that there is a broader scope of perpetrators that can be prosecuted in domestic courts than at the ICC, which may arguably even encompass non-state actors. Be that as it may, the general presumption is that the crime of aggression is a leadership crime, which suggests that only state officials of the highest capacities will be prosecuted. Thus, it is likely that immunities of state officials will come into play. If the defendant may plead *immunity ratione personae,* this nuance of immunities would afford full immunity from the criminal

jurisdiction of the forum state. With respect to *immunity ratione materiae*, it is argued that in situations whereby the forum state is the aggressed state, immunity *ratione materiae* is non-applicable to the defendant as the forum state has a legal interest in the enforcement of sanctions (criminal) for the failure to comply with international obligations to refrain from conduct relating to the crime of aggression.

It is submitted that the jurisdictional rule concomitant to the legal interest of the aggressed state to enforce sanctions (criminal) against the perpetrator of the crime of aggression should prevail over the procedural bars to jurisdiction. The question, which was left open, is whether a bystander state may have a legal interest to act as a forum for the prosecution of the crime of aggression under the universality principle, i.e. to exercise universal jurisdiction.

Aside from the domestic and international political ramifications of prosecution of the crime of aggression in a domestic criminal court, there are also practical difficulties. Examples of the latter include factors such as fact-finding and gathering evidence, finding witnesses, arrest of the alleged perpetrator – especially if the forum state is the aggressed state, resources and judicial infrastructure. That said, such practical difficulties are not unique only to the crime of aggression and could also easily arise with respect to the other core crimes.

Although at present, it is rather unlikely that domestic prosecution for the crime of aggression may take place, some states have the crime of aggression in their domestic codes while some States Parties have adopted the Kampala Amendments, which means that in situations of concurrent jurisdiction, they will have the priority of prosecution. Domestic prosecution for the crime of aggression may indeed become a reality one day.

Conclusion

This dissertation studied the crime of aggression from a public international law perspective. Part I examined the criminalisation of aggression under international law. Part II considered how the primary norms under international law that prohibit an act of aggression interplay with the norms that criminalise aggression, and how this gives rise to responsibility on the secondary level in such a way that individual criminal responsibility is predicated upon state responsibility. Part III examined whether and to what extent international law protects the interests of the aggressed state by means of prosecution at either the ICC or in domestic courts.

This dissertation has delineated how responsibility for the crime of aggression should be attributed under international law to the aggressor state and the perpetrator of the crime by focusing upon the intrinsic link between the state act of aggression and the crime of aggression. It is by better understanding this intrinsic link that it can be appreciated how the breach of the primary norms that prohibit aggression and the norms that criminalise aggression give rise to legal consequences at the secondary level of individual criminal responsibility (Chapter IV). Adopting the premise that the aggressed state as the victim of the crime of aggression has a legal interest in the enforcement of criminal sanctions against the perpetrator (Chapter V), this dissertation considered the extent to which the ICC (Chapter VI) and domestic courts (Chapter VII) are able to protect this interest.

In my view, the most important findings of this dissertation can be stated in the following terms. First, this dissertation has examined the definition of the crime of aggression under international law (Part I). The present definition of the crime of aggression under customary international law originated from the definition of crimes against peace pursuant to the Nuremberg principles (Chapter II). There are two substantive components of the crime: the state act element of the crime (the state act of aggression) and the elements of the crime pertaining to individual conduct (planning, preparation, initiation or waging/execution; and *mens rea*).

The structure of the definition of the crime of aggression is formed by the primary norms that prohibit aggression and the norms that criminalise aggression. These norms place obligations on states to refrain from an act of aggression (Chapter I) and on individuals to refrain from conduct pertaining to the state act of aggression,

respectively (Chapters II and III). The definition of the crime demands that an act of aggression must be established to exist before the conduct of the individual can be assessed (Chapters II and III).

It is generally assumed that the crime of aggression is a leadership crime that may only be committed by persons in a sufficiently high-ranking position. Although the definition of the crime of aggression in the Kampala Amendments has specified a leadership element as a substantive component of the crime ("control or direct"), this is not entirely consistent with the definition under customary international law ("shape or influence").

Second, this dissertation has explained the intrinsic link between the state act of aggression and the crime of aggression that is part of the definition of the crime of aggression (Chapter IV). It explains that the intrinsic link exists on two levels. On the primary level, there are three inter-related points of distinction between the norms that prohibit aggression and the norms that criminalise aggression: i) there are two different conducts under international law (act of aggression and crime of aggression); ii) there are two different legal personalities under international law (aggressor state and perpetrator of the crime); iii) there are two different legal frameworks that are applicable (*jus ad bellum* and international criminal law). This is why in a situation of aggression there is a violation of both sets of norms, and both the aggressor state and perpetrator of the crime have failed to perform their duties to comply with their respective obligations under international law. Yet, this does not explain the intrinsic link.

Instead, it is the point of intersection between the norms that prohibit aggression and the norms that criminalise aggression, which clarifies why the crime of aggression is predicated on an act of aggression. The act of aggression committed by the aggressor state was facilitated *by* the conduct of the individual in his/her participation in one of the modes of perpetration, as part of his/her official capacity as part of the organ of the state. By identifying this intersection, it can be understood that the crime of aggression is predicated on the act of aggression because the norms that prohibit the modes of perpetration, planning, preparation, initiation or waging, run in parallel with the norms that prohibit an act of aggression, and each set of norms cannot exist independently of each other.

On the secondary level, the linkage between individual criminal responsibility and state responsibility whereby the latter gives rise to the former has the purpose of

identifying a breach on the primary level of the norms that prohibit aggression and the norms that criminalise aggression. Thus, state responsibility of the aggressor state is indicative of the defendant having acted in breach of the parallel set of obligations to refrain from the modes of perpetration. This should satisfy the state act element of the crime. For example, the elements pertaining to individual conduct, i.e. the *actus reus* and *mens rea* will need to be established in addition to the state act element of the crime, in order for the perpetrator to be found criminally responsible for the crime of aggression.

Despite the parallel existence of state responsibility and individual criminal responsibility for aggression, there should be a dichotomy between both sets of responsibilities with respect to legal consequences against the aggressor state and the perpetrator of the crime of aggression. For the purpose of prosecution, the establishment of state responsibility for an act of aggression is to find a breach of primary obligations by the defendant, and not to invoke legal consequences against the aggressor state. That said, an open question is whether this may nevertheless amount to satisfaction against the aggressor state. Whatever the best view may be, prosecution for the crime of aggression is intended to enforce legal consequences against the perpetrator of the crime, and not against the aggressor state.

It is submitted in this dissertation that the attribution of conduct to the relevant duty-bearer with respect to the definition of the crime of aggression is demarcated into the 'act of aggression' (aggressor state) and 'planning, preparation, initiation or waging/execution' (perpetrator of the crime). The significance of this demarcation is that the definition of the crime of aggression preserves a dualist structure of responsibility whereby the aggressed state has a legal interest to invoke legal consequences against both the aggressor state (state responsibility) and the perpetrator of the crime (individual criminal responsibility). Prosecution of the crime of aggression does not absolve the responsibility of the aggressor state or protect the legal interests of the aggressed state in relation to the legal consequences pursuant to the secondary norms of state responsibility.

Third, this dissertation establishes that the aggressed state is the victim of the crime of aggression because it is the rights-holder of the enjoyment of the protection afforded by the norms that criminalise aggression, and has suffered from the breach of primary obligations by the perpetrator of the crime (Chapter V). Although this is fairly uncontested, it is nevertheless an important submission because the general

assumption under international criminal law is that victims of international crimes are natural persons. Not wanting to depart entirely from the general concept of victims in international criminal law, it is suggested that natural persons who are injured in a situation of aggression (as a result of the act of aggression and crime of aggression) should be qualified as the victims of war crimes (provided the constitutive elements of war crimes are present) and not the crime of aggression. This is consistent with the applicable legal framework in a situation of aggression (*jus ad bellum* and *jus in bello*). Be that as it may, it is also suggested that natural persons may be considered as indirect victims of the crime of aggression, and may thus be recognised as beneficiaries of the enjoyment of protection from the implementation of the norms that criminalise aggression. It is submitted that the status of natural persons as beneficiaries to receive reparations at the ICC is a tertiary right conferred by the Rome Statute. Thus, it is unlikely that natural persons may be entitled to such reparations for the crime of aggression in another forum.

Fourth, this dissertation examines the enforcement mechanisms that international law relies upon to execute criminal sanctions against perpetrators for the crime of aggression (Part III), with particular reference to whether, and to what extent, the legal interests of the aggressed state are protected. The first part of the question, i.e. 'whether', refers to whether prosecution of the crime of aggression can take place at the ICC or domestic courts. It is anticipated that prosecutions may take place at the ICC subject to the activation of its jurisdiction in or after 2017, and following 30 ratifications (Chapter VI), and that prosecutions may take place in domestic courts provided the forum state has codified the crime of aggression in its domestic legislation (Chapter VII).

Although in principle, prosecution of the crime of aggression may be carried out at the ICC or in domestic courts, such prosecution may be rather unlikely in practice. The jurisdiction of the Court may remain dormant if there are insufficient ratifications of the Kampala Amendments. There is also the possibility that neither aggressor state nor aggressed state intends to initiate proceedings in their domestic courts for the crime of aggression. Be that as it may, the assumptio is that in principle, prosecution of the crime of aggression may take place in both the ICC and domestic courts.

The second part of the question (to what extent are the legal interests of the aggressed state protected) may appear rather theoretical as the jurisdiction of the ICC remains to be activated, and despite the codification of the crime of aggression in the

domestic legislation of some states, there is no practice of domestic prosecution for the crime of aggression. Be that as it may, in accordance with the principle of complementarity (Article 17 Rome Statute), in situations of concurrent jurisdiction between the ICC and a domestic court of a State Party, the latter has priority of prosecution. Indeed, some of the States Parties that have ratified the Kampala Amendments have already incorporated the crime of aggression into their domestic legislation. Thus, domestic prosecution for the crime of aggression may become an issue of practical importance.

This dissertation has considered whether and to what extent concerns that arise in relation to domestic prosecution for the crime of aggression may be overcome (Chapter VII). It is suggested that the procedural bar to jurisdiction, *par in parem non habet imperium,* is not applicable in a situation where the forum state is the aggressed state as its legal interest in the enforcement of legal consequences against a subject that has committed an internationally wrongful act against its territory should not be precluded. That said, it is entirely at the discretion of the forum state whether *par in parem non habet imperium* is applicable, which would thereby preclude the former from initiating proceedings over the crime of aggression.

As it is highly likely that the defendant is a state official, there is the question of whether immunities from criminal jurisdiction may be successfully pleaded. It is submitted that if a defendant is able to plead immunity *ratione personae,* this will be upheld in the domestic court of the forum state. In the event that a defendant is able to plead immunity *ratione materiae,* the norms that allow this exception to jurisdiction are not applicable as the rule of customary international law that allows for legal consequences to be enforced against an individual for an international crime should prevail. Furthermore, such an exception to jurisdiction should not be applicable, as it would have the effect of precluding the aggressed state from its legal interests to enforce legal consequences.

It is difficult to conclude with certainty that the procedural bars to jurisdiction, i.e. *par in parem non habet imperium* and immunities of state officials for international crimes, are not applicable when the forum state is not the aggressor state. There is a possibility that they may be applicable, thereby precluding the forum state from initiating proceedings over the crime of aggression. However, there is also a possibility that they may not be applicable, thus allowing the forum state to prosecute the crime of aggression.

The general rule is that domestic prosecution for the crime of aggression should be considered on a case-by-case basis. It is at the discretion of the forum state (aggressor state or aggressed state) whether to prosecute the crime of aggression or not. Although both states have a legal interest in acting as the forum state, this does not necessarily mean they will initiate proceedings, as other internal and external factors come into play, e.g. public interest/opinions and political considerations with respect to foreign states. This dissertation has left open the question whether a bystander state has a legal interest to act as a forum state and exercise jurisdiction over the crime of aggression.

The findings of this dissertation in relation to prosecution at the ICC (Chapters III and VI) suggest that it will be rather difficult for an act of aggression to be prosecuted as a crime of aggression. First, the definition of the crime of aggression in Article 8 *bis* (1) encompasses a rather high threshold for the state act element of the crime to be satisfied. Thus, it is clear that not all acts of aggression committed by States can satisfy the state act element within the definition of the crime of aggression pursuant to Article 8 *bis* (1) of the Kampala Amendments. Only an act of aggression by its "character, gravity and scale" constitutes a "manifest violation" of the UN Charter. (Chapter III). For the purposes of specificity, Article 8 *bis* (2) encompasses a definition of an act of aggression, which upon closer examination, is the incorporation of Articles 1 and 3 of the definition pursuant to GA Resolution 3314 (XXIX)1974. Concerns with regard to the specificity of the provisions of GA Resolution 3314 (XXIX)1974 as a basis for individual criminal responsibility are refuted by pointing out that the definition of an act of aggression in Article 8 *bis*(2) of the Kampala Amendments does not give rise to individual criminal liability because it is not the state act element of the crime *per se*; the latter is found in Article 8 *bis*(1). Further, the SWGCA had adopted the most pragmatic approach by relying on the normative definition of aggression under international law pursuant to GA Resolution 3314 (XXIX)1974. In any event, the act of aggression under Article 8 bis (2) must be read in the light of the threshold under Article 8 bis (1) to qualify for the state act element of the crime of aggression.

Indeed, the threshold for the use of force to be considered as an act of aggression for the purposes of fulfilling the state act element of the crime of aggression appears to be set higher than the threshold under *jus ad bellum*. This has lead to concerns that the normative definition of an act of aggression under *jus ad bellum* pursuant to GA

Resolution 3314(1974) may be diluted or eclipsed. A related concern has also been put forward that a high threshold of the state act element will have the unintended effect of indirectly condoning the use of force and acts of aggression. Both of these concerns have been rejected as obligations on States pursuant to the prohibition of the use of force under *jus ad bellum* are unaffected by the definition of the state act element under Article 8 bis (2) of the Kampala Amendments. Regardless of whether individuals who are part of the state organ may face criminal prosecution for the crime of aggression, the prohibition against an act of aggression is peremptory in nature, which in addition to obligations *erga omnes* on States to refrain from the use of force, entails particular legal consequences under the secondary rules of state responsibility against the aggressor state (Chapter I).

Second, state referrals and *proprio motu* investigations (Article 15 *bis*) require the need for prior external determination of an act of aggression, which must be satisfied before the Prosecutor may proceed with the investigation in respect of a crime of aggression. The Security Council is given the primary role to determine an act of aggression. It is presumed that determination of an act of aggression is retrospective in this regard, and not for the purposes of making recommendations under Chapter VII for the maintenance of international peace and security. Be that as it may, it is unlikely that the Security Council would reach such a determination in practice. In the absence of a determination, the Prosecutor may seek the Pre-Trial Division's authorization for the commencement of the investigation in respect of a crime of aggression after six months after the date of notification. The ICC may reach a different decision than the Security Council with regard to the determination of an act of aggression. The political and procedural implications of having two external determining mechanisms suggest that prosecution of the crime of aggression may be a long process. Furthermore, the Security Council may defer an investigation or prosecution of the crime of aggression for a period of 12 months.

Third, the *sui generis* jurisdictional regime raises the question of (aggressor) state consent with regard to the exercise of jurisdiction over its nationals for the crime of aggression. This is directly relevant to the question as to whether the aggressor state must ratify the Kampala Amendments in order for the jurisdictional regime to be applicable over its nationals for the crime of aggression. It is submitted that the consent of the aggressor state should be upheld because prosecution of the crime of aggression at the ICC can be regarded as a form of satisfaction for the act of

aggression. That said, consent need not necessarily be expressed through the act of ratification the Kampala amendments. The *sui generis* jurisdictional regime over the crime of aggression is premised on implied state consent of States Parties to the Rome Statute, as evident by the exclusion of non-states parties and the opt-out declaration provided in Article 15 *bis*(4).

Thus, for the jurisdictional regime over the crime of aggression to be applicable, it suffices that either the aggressor state or the aggressed state has ratified the Kampala Amendments so that the underlying jurisdictional links can be established under the national or territorial principle. Notably, the aggressor State must not have opted-out of the jurisdictional regime entirely. Be that as it may, the jurisdictional regime over the crime of aggression appears nevertheless to be rather limited in scope as it excludes non-states Parties, and allows States Parties to opt-out. It can be assumed that the role of the ICC as an enforcement mechanism against the perpetrators of the crime of aggression is expected to be rather limited in practice. That said, it is perhaps premature to assess the effectiveness of the Court as an enforcement mechanism as it remains to be seen whether the jurisdiction of the ICC over the crime of aggression will be activated in or after 2017. In the meantime, the symbolic significance of the adoption of the Kampala Amendments by consensus should not be undermined.

As a general observation, it can be said that while the contemporary international legal order recognises the importance of legal interests of the aggressed State, that legal consequences are invoked against the perpetrator of the crime of aggression, it has not yet generated structures and institutions that would be necessary to effectively implement responsibility for conduct affecting these interests. Notwithstanding, it is hoped that the findings of this dissertation contribute to a comprehensive understanding of the crime of aggression in public international law. In addition to clarifying the conceptual elements of the crime of aggression, it is hoped that this dissertation has helped to clarify at least some of the uncertainties that practitioners may have with respect to the crime of aggression.

The recognition of individual responsibility for a crime that is addressed solely at the protection of the aggressed State, and not individuals, may be read to suggest a significant shift in the structure of the international legal order. The proposition that individuals are subjects, and States objects or beneficiaries of rules of international

law certainly seems to be a striking departure from the orthodox view that States were exclusive subjects of international law. However, the intrinsic link between individual and State responsibility demonstrated in this thesis ensures that the crime of aggression simultaneously fits within the traditional inter-State model of international law and confirms the shift of the contemporary legal order towards greater legal appreciation of various roles that individuals may play.

As there is still general disagreement by States Parties with respect to the entry-into-force of the Kampala Amendments and the jurisdictional regime of the ICC over the crime of aggression, it is hoped that the findings of this research in relation to these issues will help to clarify the situation. It is also hoped that this research may put into perspective the legal interests of the aggressor state, the aggressed state and the perpetrator of the crime of aggression in a situation of aggression. From a practitioner's perspective, the assessment of injury to natural persons in a situation of aggression (as a result of an act of aggression and crime of aggression) in accordance with the applicable legal framework may also be useful in relation to legal proceedings. Last but not least, it is hoped that the findings of this research will help an aggressed state to understand better its legal interests under international law in relation to legal consequences for the aggressor state that has committed an act of aggression, and for the alleged perpetrator of the crime of aggression.

Samenvatting (Summary in Dutch)

Dit proefschrift onderzoekt aansprakelijkheid voor het misdrijf agressie vanuit het perspectief van internationaal publiekrecht. De staat getroffen door agressie heeft een rechtmatig belang in de vestiging van de individuele strafrechtelijke aansprakelijkheid voor het misdrijf agressie en het instellen van strafrechtelijke sancties tegen de dader. Individuele strafrechtelijke aansprakelijkheid voor het misdrijf agressie valt samen met staatsaansprakelijkheid voor een daad van agressie. Dit betekent dat het verbod op agressie twee verschillende verplichtingen van twee verschillende rechtssubjecten betreft. Staten zijn verplicht zich te onthouden van daden van agressie tegenover andere staten; individuen zijn verplicht af te zien van het misdrijf agressie. Bij agressie gaat het dus om een schending van internationale verplichtingen van een staat (de onrechtmatige daad agressie) en van een individu (het misdrijf agressie).

Agressie kent een bijzondere vorm van aansprakelijkheid onder internationaal publiekrecht, waarin een individu handelt in strijd met een internationale verplichting die de bescherming van een andere staat tot doel heeft. Dit is in tegenstelling tot andere internationale misdrijven, zoals het misdrijf genocide, misdrijven tegen de menselijkheid of oorlogsmisdrijven, die ter bescherming van individuen dienen. Het misdrijf agressie verschilt intrinsiek van deze misdrijven. Volgens de amendementen op het Statuut van Rome inzake het Internationaal Strafhof, aangenomen tijdens de Herzieningsconferentie in Kampala in 2010, evenals internationaal gewoonterecht, is een daad van agressie een essentieel element van de juridische definitie van het misdrijf agressie. Voordat strafrechtelijke aansprakelijkheid van een individu kan worden vastgesteld moet het eerst duidelijk zijn dat de staat zijn verplichting om van agressie af te zien heeft geschonden.

De definitie van het misdrijf agressie betreft dus twee verschillende schendingen van internationaal publiekrecht door twee verschillende rechtssubjecten. De vraag blijft echter hoe internationale aansprakelijkheid moet worden toegerekend aan, respectievelijk, de agressieve staat en de individuele dader, en waarom aansprakelijkheid van deze laatste afhankelijk is van de daden van de eerste. Internationaal publiekrecht biedt het juridisch kader voor een analyse van de wisselwerking tussen internationale rechtsregels die de daad van agressie verbieden en het individuele misdrijf van agressie strafbaar stellen.

Dit proefschrift analyseert de voorwaarden voor internationale aansprakelijkheid van zowel staten als individuen voor agressie. Op basis van deze analyse schetst het proefschrift het rechtmatig belang van de getroffen staat betreffende de vaststelling en de implementatie van individuele strafrechtelijke aansprakelijkheid.

Deel een schetst de achtergrond van het misdrijf agressie door eerst te onderzoeken hoe internationaal recht agressie verbiedt, oftewel welke verplichtingen het oplegt aan staten om zich te onthouden van de daad van agressie. Daarna bestudeert het hoe internationale rechtsnormen agressie criminaliseren, waarmee ze verplichtingen opleggen op individuen om af te zien van het misdrijf agressie.

Hoofdstuk een beziet de daad van agressie door de staat door de lens van het toepasselijke internationaal juridisch raamwerk, namelijk het *jus ad bellum*. Het hoofdstuk legt uit dat staten zowel de plichtdragers als de rechthebbenden zijn van de normen die agressie verbieden, waaruit blijkt dat onder internationaal recht staatsaansprakelijkheid kan worden toegerekend aan de agressieve staat voor de daad van agressie.

Hoofdstuk twee onderzoekt de herkomst van de normen die agressie criminaliseren door misdrijven tegen de vrede onder het Internationale Militaire Tribunaal te Neurenberg te bestuderen. Ten tijde van dit Tribunaal bestonden de bovengenoemde rechtsnormen nog niet. Echter, hierna kristalliseerden misdrijven tegen de vrede zich uit in de Principes van Internationaal Recht Erkend in het Handvest van het Tribunaal van Neurenberg en de Jurisprudentie van het Tribunaal (de "Neurenbergse Principes"). Dit vormt een aanwijzing voor het bestaan van directe verplichtingen van individuen om zich te onthouden van het misdrijf agressie (synoniem met misdrijven tegen de vrede), waarbij de schending van deze verplichtingen leidt tot directe rechtsgevolgen voor de betreffende individuen. Op basis van de vooronderstelling dat de definitie van misdrijven tegen de vrede de status van internationaal gewoonterecht heeft verkregen kunnen het statelijke element van het misdrijf, namelijk de daad van agressie door de staat, en de individuele elementen van het misdrijf agressie (de *actus reus* en de *mens rea*), worden vastgesteld.

Hoofdstuk drie bestudeert vervolgens de definitie van het misdrijf agressie zoals recentelijk aangenomen in de amendementen op het Statuut van Rome inzake het Internationaal Strafhof tijdens de Herzieningsconferentie in Kampala in 2010 (de "Kampala amendementen"). Het hoofdstuk stelt dat een vermeende situatie van agressie moet voldoen aan twee vereisten van de definitie van het misdrijf agressie.

Ten eerste moet onder Artikel 8 *bis*, lid 2, van het Statuut van Rome (zoals herzien) worden vastgesteld dat de staat militair geweld heeft gebruikt tegen de soevereiniteit, de territoriale integriteit of de politieke onafhankelijkheid van een andere staat, of op enige andere wijze in strijd met het Handvest van de Verenigde Naties. Ten tweede moet vervolgens worden vastgesteld dat deze daad van agressie vanwege haar "aard, ernst en schaal" een "onmiskenbare schending van het Handvest van de Verenigde Naties" vormt onder Artikel 8 *bis*, lid 1. Zodra het statelijke element van het misdrijf is vastgesteld onder Artikel 8 *bis*, lid 1, wordt onderzocht of de gedaagde in een positie verkeert (of zich daarvan bewust is) om controle uit te oefenen over of leiding te geven aan het politieke of militaire optreden van de Staat, en of hij/zij de daad van agressie heeft gepland, voorbereid, in gang heeft gezet of heeft uitgevoerd. Uit een vergelijking met de definitie van de Neurenbergse Principes blijkt dat het misdrijf agressie in de Kampala Amendementen significant meer gedetailleerd en specifiek is wat betreft het statelijke element en dat het expliciete leiderschapscriterium leidt tot een beperktere groep van mogelijke daders die onder deze definitie vervolgd kunnen worden.

Deel twee beziet hoe de verplichtingen van staten om zich te onthouden van daden van agressie verbonden zijn met de verplichtingen van individuen om af te zien van het misdrijf agressie, en hoe dit geïnterpreteerd moet worden in het licht van de individuele strafrechtelijke aansprakelijkheid. Hoofdstuk vier onderzoekt de verwantschap tussen de agressieve staat en de dader van het misdrijf agressie. Het hoofdstuk onderzoekt het intrinsieke verband tussen het misdrijf agressie en de statelijke daad van agressie (het primaire niveau) en tussen individuele strafrechtelijke aansprakelijkheid voor het misdrijf agressie en staatsaansprakelijkheid voor de daad van agressie (het secundaire niveau).

Het proefschrift identificeert de verschillen en het kruispunt tussen de rechtsnormen die agressie verbieden en de normen die agressie criminaliseren. Hierdoor is het mogelijk de wisselwerking tussen deze normen op het primaire niveau te schetsen, namelijk hoe de verplichtingen van staten om zich te onthouden van de daad van agressie betrekking hebben op de verplichtingen van individuen om af te zien van het gedragingen die gerelateerd zijn aan de daad van agressie. Dit biedt een beter inzicht in de reden waarom de staatsaansprakelijkheid voor de daad van agressie een *sine qua non* is voor individuele strafrechtelijke aansprakelijkheid voor het misdrijf agressie.

Hoofdstuk vijf betoogt dat de getroffen staat, als rechthebbende onder de rechtsnormen die agressie criminaliseren, het slachtoffer van het misdrijf agressie is. De getroffen staat heeft daarom een direct rechtsbelang bij de handhaving van de rechtsgevolgen ten aanzien van dader van het misdrijf agressie. Echter, deze stelling lijkt af te wijken van het algemeen geaccepteerde slachtofferbegrip in internationaal strafrecht, waarbij het om natuurlijke personen gaat. Twee aspecten behoeven verdere discussie. Ten eerste onderzoekt het hoofdstuk of natuurlijke individuen aangemerkt kunnen worden als slachtoffer van het misdrijf agressie en de repercussies hiervan op vervolging bij het Internationaal Strafhof. Ten tweede, als het slachtoffer van het misdrijf agressie inderdaad de getroffen staat is rijst de vraag hoe dit gezien moet worden binnen het normatieve kader betreffende de rechten van individuele slachtoffers. In het bijzonder behandelt het hoofdstuk of, en zo ja, in hoeverre, de getroffen staat de begunstigde kan zijn van herstelbetalingen voor het misdrijf agressie van de dader van het misdrijf (individuele civielrechtelijke aansprakelijkheid).

Deel drie onderzoekt de handhaving van rechtsnormen die agressie criminaliseren, met bijzondere aandacht voor de volgende mechanismes onder internationaal recht: het Internationaal Strafhof en nationale gerechten. Hoofdstuk zes analyseert vervolging van het misdrijf agressie bij het Internationaal Strafhof. Op dit moment moet de rechtsmacht van het Internationaal Strafhof over het misdrijf agressie nog worden geactiveerd. Om deze reden legt het hoofdstuk uit hoe de inwerkingtreding van de Kampala Amendementen en de voorwaarden voor de uitoefening van rechtsmacht over het misdrijf agressie zich tot elkaar verhouden. Het hoofdstuk verdiept zich in het bijzonder in de *sui generis* rechtsmacht over het misdrijf agressie. In navolging van de Kampala Amendementen maakt het hoofdstuk onderscheid tussen : i) aangiftes door staten en onderzoeken uit eigen beweging; ii) aangiftes door de Veiligheidsraad. Ten aanzien van deze eerste categorie is een bijkomende vraag of toestemming van de agressieve staat noodzakelijk is om het misdrijf agressie te kunnen vervolgen bij het Internationaal Strafhof; en verder, of een dergelijke toestemming expliciet moet worden gegeven in de vorm van ratificatie van de Kampala Amendementen. Het hoofdstuk betoogt dat toestemming van de agressieve staat inderdaad vereist is, aangezien vervolging bij het Internationaal Strafhof voor het misdrijf agressie kan uitmonden in genoegdoening als vorm van herstel voor een internationale onrechtmatige daad. Echter, toestemming hoeft niet te

worden gegeven door middel van ratificatie, aangezien de *sui generis* rechtsmacht gegrond is op impliciete toestemming van alle Staten die partij zijn bij Statuut van het Internationaal Strafhof. Dit kan worden afgeleid van twee punten: i) Staten die geen partij zijn worden volledig uitgesloten; ii) Staten die partij zijn mogen een verklaring afleggen dat zij de rechtsmacht van het Hof over het misdrijf agressie niet accepteren. Om deze reden mag het Hof rechtsmacht uitoefenen over het misdrijf agressie in situaties waarin één van de Staten die partij zijn bij de Kampala Amendementen is betrokken.

Hoe het ook zij, de rechtsmacht van het Internationaal Strafhof over het misdrijf agressie is relatief beperkt, in het bijzonder met betrekking tot aangiftes van staten en onderzoeken uit eigen beweging. Om deze reden reikt de bescherming van het rechtsbelang van de getroffen staat enkel zover als de rechtsmacht van het Hof over het misdrijf agressie.

Hoofdstuk zeven analyseert nationale vervolging van het misdrijf agressie. Het hoofdstuk betwist en verwerpt de hypothese dat nationale gerechten niet de competente fora zijn voor vervolging van het misdrijf agressie. De correcte zienswijze is dat nationale gerechten en het Internationaal Strafhof parallelle bevoegdheid hebben over het misdrijf agressie. Vervolging kan plaatsvinden in zowel de agressieve als de getroffen staat en het is een open vraag of derde staten vervolging mogen instellen tegen het misdrijf agressie onder het principe van universele rechtsmacht. Het hoofdstuk behandelt of, en in hoeverre, de volgende vragen met betrekking tot nationale vervolging kunnen worden beantwoord: of een daad van agressie moet worden vastgesteld door de Veiligheidsraad voordat een nationaal gerecht vervolging kan instellen; hoe een nationaal gerecht een daad van agressie vaststelt; hoe het leiderschapscriterium geïnterpreteerd dient te worden en de bijkomende vraag of de strafrechtelijke immuniteit van buitenlandse ambtsdragers van toepassing is.

Samenvattend, er is geen vereiste dat de Veiligheidsraad een daad van agressie vaststelt voordat een nationaal gerecht het misdrijf agressie kan vervolgen. Desalniettemin kan een dergelijke vaststelling overtuigende waarde hebben om het statelijke element van het misdrijf agressie te staven. Het hoofdstuk ontwikkelt een conceptueel argument met betrekking tot de vraag of een nationaal gerecht het bestaan van een daad van agressie van een buitenlandse staat mag vaststellen. Gezien het rechtsbelang van de getroffen staat in de handhaving van de rechtsgevolgen tegen

een vermeende dader van het misdrijf agressie zouden procedurele bezwaren niet in de weg moeten staan van een vaststelling dat een buitenlandse staat een daad van agressie heeft gepleegd. In dit geval overtreffen de belangen van de getroffen staat die van de agressieve staat.

In aanmerking genomen dat het misdrijf agressie een leiderschapsmisdrijf is lijkt de exceptie van immuniteit *ratione personae* te gelden. Echter, de exceptie van immuniteit *ratione materiae* zou niet toepasbaar moeten zijn aangezien de forum staat een rechtsbelang heeft bij de handhaving van de rechtsgevolgen tegen de dader vanwege schending van internationale verplichtingen.

Evenwel is het uiteindelijk aan de forum staat om te beslissen of hij vervolging in gang zet en rechtsmacht uitoefent. De vraag of nationale rechtsvervolging *kan* plaatsvinden verschilt van de vraag of vervolging plaats *zou moeten* vinden, gezien de vele praktische en politieke overwegingen die meespelen. Hoewel het onwaarschijnlijk lijkt dat nationale rechtsvervolging voor het misdrijf agressie daadwerkelijk plaats zal vinden, hebben sommige staten het misdrijf agressie toch in hun nationale wetgeving opgenomen. Verder kunnen Staten die partij zijn bij het Statuut van Rome en die de Kampala Amendementen hebben aangenomen overgaan tot rechtsvervolging onder het principe van complementariteit, in geval van parallelle rechtsmacht. Om deze reden zou nationale rechtsvervolging van het misdrijf agressie toch ooit realiteit kunnen worden.

Dit proefschrift betoogt dat het intrinsieke verband tussen de statelijke daad van agressie en het misdrijf agressie op twee niveaus bestaat met betrekking tot het misdrijf. Op het primaire niveau kan het intrinsieke verband worden aangetoond door het punt te identificeren waar de rechtsnormen die agressie verbieden en de normen die het criminaliseren elkaar doorkruisen, aangezien dit bewijst dat beide normen parallel aan elkaar lopen en dat de een niet kan bestaan zonder de ander. Op het secundaire niveau dient het kruispunt van staatsaansprakelijkheid en individuele strafrechtelijke aansprakelijkheid als indicator van een schending van beide rechtsnormen op het primaire niveau. Staatsaansprakelijkheid van de agressieve staat is dus een noodzakelijke voorwaarde van het misdrijf agressie, omdat het aantoont dat de betreffende individuen een parallelle verplichting, namelijk om zich te onthouden van gedragingen betreffende het statelijke element van de daad van agressie, hebben geschonden. Een individu is dus enkel aansprakelijk onder internationaal recht voor de schending van de verplichtingen betreffende het misdrijf van agressie en niet voor

het statelijke element van de daad van agressie. Het proefschrift concludeert dat de huidige internationale rechtsorde het rechtmatig belang van de getroffen staat om rechtsgevolgen in te stellen tegen de dader van het misdrijf agressie erkent, maar dat het nog niet de benodigde rechtsregels en instituties heeft gegenereerd om dit belang effectief te beschermen.

Curriculum Vitae

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Ms. Meagan Wong has conducted her doctoral research under the supervision of Professor Niels Blokker. She conducted the second year of her doctoral research as a Visiting Doctoral Student at Oxford University, and the third year of her doctoral research as a Visiting Scholar at the Lauterpacht Centre of International Law, Cambridge University. She has acquired an LLM in Public International Law from University College London (UCL) and an LLB (Hons) Law from Leeds University. She has a Postgraduate Diploma in Professional Legal Skills (City University London) and has been called to the Bar of England and Wales (Middle Temple).

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