The crime of aggression and public international law

Wong, M.S.

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

[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

[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.

[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.