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ARTICLES

ATTRIBUTING CRIMINAL RESPONSIBILITY FOR THE CRIME OF AGGRESSION

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Abstract

To hold a person criminally responsible, the prosecution must prove that his conduct violated (without justification) a prohibitory norm of the criminal code and that he is culpable for such wrongdoing. In international criminal law, wrongfulness and culpability are assessed through the prisms of material (actus reus) and mental (mens rea) elements, respectively. Also called "objective attribution," ascribing wrongfulness requires a causal link between individual conduct and criminal consequences. Attributing culpability, or "subjective attribution," on the other hand, consists of establishing mental links between the perpetrator and the occurrence he has caused and the situation in which such an event took place. This Article sets out the normative foundation for the attribution of criminal responsibility for aggression based on the theory of actus reus that I proposed in my previous scholarship. Two findings are paramount. First, to incur wrongfulness, the perpetrator need not necessarily be accountable for an entire act of aggression. It suffices if the prosecution proves that he caused a single instance of the use of armed force that is part of broader hostilities which, taken as a whole, amount to the overarching state conduct element, i.e., an act of aggression that manifestly violates the Charter of the United Nations (U.N. Charter). Second, as a consequence of the first proposition, the individual is culpable if he is mindful of his state leadership position and intends the use of armed force against another state or is aware that such occurrence will result from his conduct, while being cognizant of the factual circumstances allowing for such action to constitute in and of itself or contribute to an overarching act of aggression that manifestly violates the U.N. Charter.

I. INTRODUCTION

The beginning of 2022 will be remembered by unfortunate events in Ukraine qualified as an aggressive war by Russia.[1] The open military invasion of Ukraine presents an enormous challenge to preserving the current international legal order and calls for responsibility for the crime of aggression.[2] The crime of aggression is part of what we refer to as international law stricto sensu, alongside war crimes, genocide, and crimes against humanity.[3] These

[1] G.A. Res. ES-11/1 (Mar. 18, 2022).

[2] *Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine*, JUSTICE FOR UKRAINE (Mar. 4, 2022), https://justice-for-ukraine.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration-English.pdf.

[3] In a stricto sensu meaning, international criminal law constitutes individual criminal responsibility directly under the norms of international law. *See* Claus Kreß, *International Criminal Law*, *in* 5 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 717, 719 (2009). "Core crimes" are part of the body of international criminal law stricto sensu; that is, there is direct criminal responsibility under international law in the event of breach of those norms.

are the four *core* crimes that are under the jurisdiction of the International Criminal Court (ICC),[4] and they are recognized as universally wrong on the international plane.[5] Unlike the other three crimes, which have been fully operational at the ICC since 2002, the definition for the crime of aggression was adopted only at the first Review Conference of the Rome Statute of the International Criminal Court in Kampala in 2010.[6] The reasons for the delay in international criminalization, which I discuss elsewhere,[7] were chiefly political. Nonetheless, jurisdiction over the crime of aggression is now activated at the ICC.[8]

The crime of aggression was first codified in the aftermath of World War II (WWII) in the London Charter, which provided the legal basis for first international trial for aggression.[9] Article 6(a) of the London Charter defined the crime of aggression under the label "[c]rimes against peace."[10] This provision marked the beginning of the current era in which individual criminal responsibility for aggression is part of customary international law.[11] Despite the post-WWII enthusiasm, little progress has been made in reaching internationally agreed-upon definition of the crime of aggression prior to the late 1990's negotiations preceding the adoption of the Rome Statute.[12] At the end of negotiations, the crime of aggression was included in the jurisdiction of the

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[4] Rome Statute of the International Criminal Court, *adopted* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter ICCSt.].

[5] *See* TOM DANNENBAUM, THE CRIME OF AGGRESSION, HUMANITY, AND THE SOLDIER 20 (2018).

[6] ICCSt., *supra* note 4, at art. 8*bis* & n.3. Koh and Buchwald identified a number of issues that arose after the Kampala Review Conference pertaining to the understanding of different components of the definition of the crime of aggression. *See* Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective,* 109 AM. J. INT'L L. 257 (2015).

[7] *See* NIKOLA R. HAJDIN, UNDERSTANDING AGGRESSION: LEGAL STATUS AND INDIVIDUAL CRIMINAL RESPONSIBILITY BEFORE THE 2010 KAMPALA CONFERENCE 9 (2015).

[8] Assembly of States Parties [ASP], ICC-ASP/16/Res.5, *Activation of the Jurisdiction of the Court over the Crime of Aggression*.

[9] *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, 59. Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Charter].

[10] *Id.* at art. 6(a).

[11] R v. Jones [2006] UKHL 16, [12], [19] (Lord Bingham), [44], [59] (Lord Hoffmann), [96] (Lord Rodger), [97] (Lord Carswell), [99] (Lord Mance) (UK); Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179, 1182 (2010); Bing Jia, *The Crime of Aggression as Custom and the Mechanisms for Determining Acts of Aggression*, 109 AM. J. INT'L L. 569, 571 (2015). *But see* Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT'L L. 71, 74 (2010).

[12] Claus Kreβ, *Introduction: The Crime of Aggression and the International Legal Order*, *in* 1 THE CRIME OF AGGRESSION: A COMMENTARY 5 (Claus Kreß & Stefan Barriga eds., 2017).

Rome Statute without, however, provision on the definition.[13] Finally in Kampala 2010, Resolution 6 of the Review Conference of the Rome Statute[14] laid down the definition,[15] conditions for jurisdiction,[16] and the new leadership clause.[17]

The Rome Statute defines the crime of aggression as follows:

> For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[18]

The definition comprises individual conduct and state action elements. The former is broken down into planning, preparation, initiation, and execution. The latter—an act of aggression that manifestly violates the U.N. Charter—is the reference point for individual criminal responsibility. Compared with the other core crimes, the crime of aggression is peculiar in many ways.[19] First, the crime stipulates as a condition of criminal responsibility direct state action, i.e., the state conduct element.[20] While state involvement is typical of the other core crimes,[21] the crime of aggression is the only crime that explicitly requires

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[13] ICCSt., *supra* note 4, at art. 5 & n.1 ("The [International Criminal] 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 jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.").

[14] Rev. Comm., ICC-RC/11/Res.6, *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*.

[15] ICCSt., *supra* note 4, at art. 8*bis*.

[16] *Id.* at arts. 15*bis*, 15*ter*.

[17] *Id.* at arts. 8*bis*(1), 25(3*bis*).

[18] *Id.* at art. 8*bis*(1).

[19] *See* Astrid Reisinger Coracini & Pål Wrange, *The Specificity of the Crime of Aggression*, *in* THE CRIME OF AGGRESSION: A COMMENTARY, *supra* note 12, at 307.

[20] *See infra* Part II.

[21] International crimes are marked by an organizational context; they all have a unique, systemic nature in that they are typically committed as part of a collective wrongdoing. *See* 1 KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW 85 (2013). Ambos refers to the nature of core crimes as being "systemic" and gives as examples the extermination of Jews during WWII, the Bosnian war in the 1990s, Rwanda's genocide, and prison camps in armed conflicts. All these crimes have a context in which they occur: for genocide, targeting a group with intent to destroy; for crimes against humanity, a systematic or widespread attack; and for war crimes, the notion of armed attack. *See id.* Geneuss and Jessberger argue that international crimes are ordinarily committed not as isolated events but in the context of disturbed society. Julia Geneuss & Florian Jessberger, *Introduction: The Need for a Robust and Consistent Theory of International Punishment*, *in* WHY PUNISH PERPETRATORS

state involvement for criminal responsibility.[22] Second, the crime of aggression is premised by the so-called "leadership clause," as the attribution of criminal responsibility is restricted to "person[s] in a position effectively to exercise control over or to direct the political or military action of a [s]tate."[23] Third, harm to individual human persons is not part of the definition.[24] The question of who the victims of a crime are (states or human beings), albeit an important one,[25] does not substantially further the main argument and therefore will not be discussed here. The first two points are pertinent to the main subject of this Article—the system of attribution of individual responsibility.

To ascribe criminal responsibility, we must make objective and subjective links between the individual and the offense.[26] In international criminal law, this is done through the prisms of material (actus reus) and mental (mens rea) elements.[27] The former is further broken down into conduct, consequences, and circumstances, while the latter consists of intent and knowledge. In my previous article, *The* Actus Reus *of the Crime of Aggression*[28] (*ARCA*), I propose a new reading of the material (actus reus) elements of the crime of aggression. Accordingly, I make a conceptual distinction between the material act of use of armed force and the state conduct element—both subsumed under the term "state action."[29] The former is classified as a consequence element, whereas the latter is to be understood as the contextual circumstance that qualifies individual conduct as the crime of aggression. Discussion of the

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OF MASS ATROCITIES? PURPOSES OF PUNISHMENT IN INTERNATIONAL CRIMINAL LAW 1, 2 (Florian Jessberger & Julia Geneuss eds., 2020).

[22] While the international core crimes are ordinarily directed against a collective entity, the crime of aggression occurs exclusively on the macro level. *See* Tom Dannenbaum, *Why Have We Criminalized Aggressive War?*, 126 YALE L.J. 1242, 1246 (2017).

[23] ICCSt., *supra* note 4, at art. 8*bis*(1).

[24] *See id.* In a strict legal-technical sense, the victim of the crime is a state. *See* Carsten Stahn, *The 'End', the 'Beginning of the End' or the 'End of the Beginning'? Introducing Debates and Voices on the Definition of 'Aggression'*, 23 LEIDEN J. INT'L L. 875, 876–77 (2010).

[25] For a detailed treatment of this issue, see Erin Pobjie, *Victims of the Crime of Aggression*, *in* THE CRIME OF AGGRESSION: A COMMENTARY, *supra* note 12, at 816. *Cf.* Tom Dannenbaum, *The Criminalization of Aggression and Soldiers' Rights*, 29 EUR. J. INT'L L. 859, 860–64 (2018) (opining that the core criminal wrong of the crime of aggression is essentially human violence and not the inter-state breach as many would think).

[26] The attribution of criminal responsibility presupposes objective and subjective links between the individual and the crime in question. *See* Thomas Weigend, *Problems of Attribution in International Criminal Law: A German Perspective*, 12 J. INT'L CRIM. JUST. 253, 254 (2014).

[27] Nikola R. Hajdin, Individual Responsibility for the Crime of Aggression 54 (2021) (Ph.D. thesis, Stockholm University).

[28] Nikola R. Hajdin, *The* Actus Reus *of the Crime of Aggression*, 34 LEIDEN J. INT'L L. 489 (2021).

[29] *See* ICCSt., *supra* note 4, at art. 8*bis*(1).

consequence element was completely disregarded in both the preparatory works and scholarship. The distinction between the consequence element and the contextual circumstance, however, is crucial for the attribution of criminal responsibility, as the prosecution must establish mental and material links between the accused and consequences, while only mental links apply to circumstances.[30]

This Article builds on the theory of actus reus set out in *ARCA* and provides the normative foundation for the attribution of criminal responsibility for the crime of aggression. Drawing on the conceptual separation between the use of armed force as a consequence element and the state conduct element as the contextual circumstance, this Article argues that the perpetrator need not necessarily be accountable for an act of aggression to incur wrongfulness of aggression. It suffices if he caused the use of armed force that either in and of itself constitutes the state conduct element or was part of a series of state actions that together constitute the state conduct element. This Article also revisits the scholarship on the mental (mens rea) elements of the crime of aggression and suggests a reading based on the theory of material (actus reus) elements.

The analysis is structured as follows. Part II explains the kinds of state conduct elements required for individual responsibility for the crime of aggression. Part III sets out the conditions for adjudicating criminal responsibility in international criminal law. In arguing criminal responsibility, the prosecution must prove that the accused committed the wrongdoing and that he is culpable and therefore liable for punishment. Referring to *ARCA*, Part IV briefly gives an account of the material elements and expounds on the attribution of wrongfulness in the crime of aggression. Part V examines the mental elements of intent and knowledge required to hold an individual criminally responsible for aggression. This Part revisits the scholarship on the mens rea for the crime of aggression and offers a new interpretation based on the new reading of the actus reus set out in *ARCA*. Part V's main findings suggest that the individual is culpable if he is mindful of his leadership position; intends the use of armed force against another state or is aware that such occurrence will result from his conduct; and is cognizant of the factual circumstances allowing for such action to constitute in and of itself or contribute to an overarching act of aggression that manifestly violates the U.N. Charter. Part VI provides a brief conclusion of the overall argument.

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[30] Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 142 CRIM. L.F. 291, 307 n.54 (2002).

II. PROCEDURAL DEVELOPMENTS

Throughout most of history, waging war was a legitimate means for states to promote their political interests. The first international legal limitations addressed only the methods and means of waging war (*jus in bello*).[31] With respect to the right to wage war itself (*jus ad bellum*), the first international regulation was adopted in 1928, when the General Treaty for Renunciation of War as an Instrument of National Policy was signed in Paris.[32] Also known as the Kellogg-Briand Pact, this treaty served as a legal basis for convictions regarding the crime of aggression during the Nuremberg era.[33] The crime of aggression was first codified in the aftermath of WWII. In 1945, the Allied Powers adopted the London Charter as a legal basis for the Nuremberg International Military Tribunal,[34] the first international trial for aggression.[35] Article 6(a) of the London Charter defined the crime of aggression under the label "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, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."[36] The International Military Tribunal for the Far East had a similar provision,[37] as did the Nuremberg Military Tribu-

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[31] *See* GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 530 (Oxford Univ. Press 3d ed. 2014).

[32] General Treaty for Renunciation of War as an Instrument of National Policy, Aug, 27, 1928, 94 L.N.T.S. 57.

[33] *But see* Thomas Weigend, *"In General a Principle of Justice": The Debate on the "Crime Against Peace" in the Wake of the Nuremberg Judgment*, 10 J. INT'L CRIM. JUST. 41 (2012) (arguing that the Nuremberg judgment did not give a good argument for maintaining the principle *nullum crimen sine lege* with respect to convictions regarding the crime of aggression).

[34] London Charter, *supra* note 9.

[35] ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 307 (3d ed. 2016).

[36] London Charter, *supra* note 9, at art. 6(a).

[37] Charter of the International Military Tribunal for the Far East, art. 5(a), Jan. 19, 1946, 1589 T.I.A.S. 21 (amended Apr. 26, 1946) [hereinafter Tokyo Charter] ("The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.").

nals run by the occupying authority that later prosecuted perpetrators of aggression in the different zones of occupation.[38] In the Rome Statute, the definition is enshrined in Article 8*bis*(1).[39]

In essence, the criminalization of aggression is an effort to deter illegal inter-state violence, in line with the prohibition of the use of force in international law.[40] The main legal basis for the prohibition of the use of force is found in Article 2(4) of the U.N. Charter, which reads "[State members of the U.N. Charter] 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."[41] It is noteworthy that the concept of "force" is broader than "war," which denotes "an especially serious form of the use of force."[42] To establish the existence of the use of force, two criteria must be satisfied. The first is objective and pertains to the level of intensity. The second is more subjective and requires that a state intend to resort to force against another state in order to compel her to act or to refrain from action.[43]

Depending on the level of intensity, the use of force in international law may be classified as a *mere* use of force, armed attack, or act of aggression. To date, the minimum intensity of violence that reaches the threshold of use

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[38] Only a couple of months after the Nuremberg Tribunal rendered its judgment, the Allied Powers issued Law No. 10 authorizing the occupying authority in each of the zones of occupation to establish tribunals to prosecute war criminals and other similar offenders not addressed in the Nuremberg judgment. Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity* (Dec. 20, 1945), *in* 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 12 (1946). Article II(1)(a) criminalizes aggression, *id.* ("Each of the following acts is recognized as a crime: (a) Crimes against Peace. 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 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.").

[39] ICCSt., *supra* note 4, at art. 8*bis*(1).

[40] The prohibition of the use of force is part of customary international law. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 172–186 (June 27) [hereinafter *Nicaragua Judgment*]. For criticism of the crime of aggression's deterrent value, see Kevin Jon Heller, *Who is Afraid of the Crime of Aggression?*, 19 J. INT'L CRIM. JUST. 999 (2021) (arguing that given the crime's jurisdictional and substantive limitations, prosecutions before the ICC will be rare).

[41] U.N. Charter art. 2, ¶ 4. Article 2(4) prohibits the transboundary use of armed force, including the use of force justified by different doctrines, such as reprisal and humanitarian intervention. Sean D. Murphy, *Terrorism and the Concept of Armed Attack in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 42 (2002).

[42] OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 51 (2010).

[43] *Id.* at 67.

of force remains unclear.[44] According to the so-called *de minimis* approach, small-scale territorial incursions by armed units with hostile intent would amount to use of force.[45] What is clear is that, unlike the *threat* of use of force, the actual *use* of force (which is a requirement in the definition of the crime of aggression) always implies an act of violence.[46] That is, violence is built into the notion of use of force. The term "violence" in international law denotes a deliberate exercise of force or intimidation by the exhibition of such force by a state against another state.[47] Consequently, while there must be an actual physical effect, the use of force does not necessarily need to render harm.[48] An example is a military invasion with neither resistance nor casualties.[49]

A mere violation of the prohibition on use of force in Article 2(4) of the U.N. Charter is an internationally wrongful act of a state that solely entails state responsibility.[50] An armed attack, on the other hand, invokes the right to self-defense pursuant to Article 51 of the U.N. Charter.[51] There is no definition of "armed attack" in the U.N. Charter, and therefore, it must be sought in customary international law.[52] In *Nicaragua*, the International Court of Justice

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[44] CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 36–40 (4th ed. 2018).

[45] *See* Tom Ruys, *The Meaning of "Force" and the Boundaries of the* Jus Ad Bellum*: Are "Minimal" Uses of Force Excluded From UN Charter Article 2(4)?*, 108 AM. J. INT'L L. 159, 189 (2014).

[46] *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 88 (5th ed. 2011); CARRIE MCDOUGALL, THE CRIME OF AGGRESSION UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 65–66 (2013).

[47] *See violence*, OXFORD ENGLISH DICTIONARY 825 (2012); *World Report on Violence and Health*, WORLD HEALTH ORGANIZATION [WHO] 5–7 (2002).

[48] In this context, harm means death, injury, and damage or destruction of property. *But see* Gray, *supra* note 44, at 34. Gray seems to conflate the terms physical harm and violence. While the latter usually presupposes the former, violence can also occur without any physical harm (exhibition of force).

[49] Rodin gives two examples of what he coins "bloodless invasion." First, the aggressor state may violate the territorial integrity and political independence of the victim state in an uninhabited territory. Second, the victim state may choose not to resist the intervention. DAVID RODIN, WAR AND SELF-DEFENSE 132–33 (2002).

[50] Int'l L. Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, 56 U.N. GAOR Supp. No. 10, art. 2, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Pt. 2), art.1 ("Every internationally wrongful act of a State entails the international responsibility of that State.").

[51] U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an *armed attack* occurs . . . ." (emphasis added)).

[52] TOM RUYS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 22 (2011) (arguing against a fixed interpretation of "armed attack" as it was understood in 1945 when the U.N. Charter was drafted and suggesting we should look at the evolution in state practice and *opinio juris* in order to construe the meaning of the concept).

(I.C.J.) famously held that the gravest form of use of force is an armed attack. The court spelled out that the criteria of "scale and effect" classify an instance of use of force as an armed attack.[53] An example of an action below the "armed attack" threshold is funding groups within a state who aim to overthrow the government.[54] Actions above the "armed attack" threshold include crossing state borders with the army or sending armed irregulars who carry out acts of armed force against another state.[55]

The concept of aggression is defined neither in the U.N. Charter nor explicitly in the practice of the I.C.J. At a minimum, aggression in international law denotes state action in violation of the prohibition of use of force in Article 2(4).[56] In an analysis of the jurisprudence of the I.C.J., Dapo Akande and Antonios Tzanakopoulos demonstrated that the court "almost equated" the terms "armed attack" and "aggression."[57] For example, the I.C.J. in *Nicaragua*[58] elucidated the concept of "armed attack" by invoking Article 3(g) of the Definition of Aggression annexed to General Assembly Resolution 3314 (Resolution 3314).[59] In *Armed Activities*, the court again referred to the same provision.[60] Resolution 3314 defined the concept of "act of aggression," which served as the basis for defining aggression in the Rome Statute.[61] Accordingly, Article 8*bis*(2) of the Rome Statute defines "act of aggression" as follows:

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

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[53] *Nicaragua Judgment*, *supra* note 40, ¶ 195.

[54] *Id.* ¶ 103.

[55] Murphy, *supra* note 41, at 45.

[56] *See* U.N. Charter art. 2, ¶ 4.

[57] Dapo Akande & Antonios Tzanakopoulos, *The International Court of Justice and the Concept of Aggression*, *in* THE CRIME OF AGGRESSION: A COMMENTARY, *supra* note 12, at 214, 227.

[58] *Nicaragua Judgment*, *supra* note 40, ¶ 195.

[59] G.A. Res. 3314 (XXIX), annex (Dec. 14, 1974).

[60] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 146 (Dec. 19) [hereinafter *Armed Activities*].

[61] *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* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 488, 499 (Marc Weller ed., 2015).

> (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.[62]

The exclusion of non-state actors from this definition sparked some scholarly debate. According to Claus Kreß, this *jus cogens* provision has always been understood to bind states only.[63] This is empirically true, as there are no court cases of aggression committed by non-state actors. Antonio Cassese agrees with this point in principle but opines that the definition of the crime of aggression ought not to be restricted to state conduct only.[64] According to Cassese, if the idea of international criminal law centers around individual criminal responsibility and the purpose of the crime of aggression is to protect the world community from breaches of the peace, then "one fails to see why individuals operating for non-state entities should be immune from criminal

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[62] ICCSt., *supra* note 4, at art. 8*bis*(1).

[63] Claus Kreß, *The State Conduct Element*, *in* THE CRIME OF AGGRESSION: A COMMENTARY, *supra* note 12, at 412, 412.

[64] Antonio Cassese, *On Some Problematical Aspects of the Crime of Aggression*, 20 LEIDEN J. INT'L L. 841 (2007).

liability for aggressive conduct."[65] Similarly, Mark Drumbl states that the intent of criminalizing aggression is to protect four interests, namely stability, security, human rights, and sovereignty.[66] He then argues that the state-centric definition of aggression does not sufficiently protect those interests and therefore should be expanded to include, inter alia, non-state actor violence.[67] Carrie McDougall, on the other hand, aligns with Kreß; she avers that the crime of aggression is based on *jus ad bellum* norms and that any inclusion of non-state actors would undermine the crime.[68]

Nonetheless, the Rome Statue definition confines the crime of aggression to inter-state violence only. Whether the aggressor or the victim qualifies as a "state" in this context is up to the ICC to decide.[69] Future instances in which non-state actors are labelled aggressors are conceivable. In any event, the question of whether a particular act constitutes an act of aggression remains to be determined by a court of law[70] under the rules of *jus ad bellum*.[71]

Be that as it may, criminal responsibility for aggression "requires the commission of certain internationally wrongful conduct by a state."[72] As for the reference point for individual conduct, Article 8*bis*(1) relies on the concept of "an act of aggression which, by its character, gravity and scale, constitutes a *manifest* violation of the Charter of the United Nations."[73] This *state conduct element*—an act of aggression that manifestly violates the U.N. Charter—is a requirement for criminal responsibility. The term used in the Nuremberg and Tokyo tribunals was "war of aggression,"[74] the precise meaning of which has

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[65] *Id.* at 846.

[66] Mark A. Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains*, 41 CASE W. RES. J. INT'L L. 291, 306 (2009).

[67] *See id.* at 304–11.

[68] *See* McDougall, *supra* note 46, at 109–10.

[69] Kreß, *supra* note 63, at 422–24.

[70] There was a debate during the negotiation process preceding the Kampala amendments about whether the Security Council's determination of an act of aggression should be a prerequisite for prosecution. However, the Special Working Group for the Crime of Aggression decided to dispense with this requirement and focused attention on "the [International Criminal] Court's own findings" in this respect. Any determinations by any organ outside the Court are to be taken without prejudice to the Court's own decision. *See* Stefan Barriga, *Negotiating the Amendments on the Crime of Aggression*, *in* THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION 3, 30–31 (Claus Kreß & Stefan Barriga eds., 2011).

[71] *See* CRYER ET AL., *supra* note 35, at 316.

[72] Kreß, *supra* note 63, at 412.

[73] ICCSt., *supra* note 4, at art. 8*bis*(1) (emphasis added).

[74] *See* London Charter, *supra* note 9, at art. 6(a); Tokyo Charter, *supra* note 37, at art. 5(a).

never been clarified.[75] "War of aggression" was again introduced during the negotiation process preceding Kampala 2010.[76] However, the majority of states favored the concept of the "act of aggression."[77] It is to be noted that an act of aggression differs from a war of aggression in terms of gravity. Article 5(2) of Resolution 3314 states that while a war of aggression is a crime against peace and therefore entails individual criminal responsibility, "[an act of a]ggression only gives rise to international responsibility."[78] Therefore, not every act of aggression constitutes a war of aggression—only the most serious instances of the use of force.[79]

Even though states opted for the seemingly less stringent concept of an act of aggression during the Kampala negotiations, the normative premise of "war of aggression" was preserved in the Rome Statute. This was reflected in the "Understandings" adopted by the Special Working Group for the Crime of Aggression (SWGCA). Points 6 and 7 state the following:

> 6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.
>
> 7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity

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[75] *See* Carrie McDougall, *The Crimes Against Peace Precedent*, in THE CRIME OF AGGRESSION: A COMMENTARY, *supra* note 12, at 49, 55 & n.35 (referring to a number of scholars who draw the same conclusion).

[76] *See* Preparatory Comm'n for the Int'l Crim. Ct., *2002 Coordinator's Paper (July)*, *reprinted in* THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION, *supra* note 70, at 412, § 1, Options 1–2.

[77] *See* Claus Kreß & Leonie Von Goltzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179, 1193 (2010).

[78] G.A. Res. 3314 (XXIX), at annex art. 5(2) (Dec. 14, 1974). *See also* Dinstein, *supra* note 46, at 114.

[79] *See* Akande & Tzanakopoulos, *supra* note 57, at 218–25. The authors argue that a "mere" use of force is at the bottom of the gravity threshold. The more serious instance of the use of force is an act of aggression that is similar to the concept of "armed attack." Finally, a war of aggression is the most serious situation. *Id.* at 225.

> and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.[80]

The upshot of the negotiations was a provision in Article 8*bis*(1) of the Rome Statute that a necessary condition for criminal responsibility is "an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."[81] This is the *state conduct element*, which represents a reference point for individual conduct and therefore an indispensable element of criminal responsibility.[82] The threshold clause has both qualitative ("manifest by its character") and quantitative ("manifest by its gravity and scale") dimensions.[83] Accordingly, an act of aggression as understood in international law is insufficient to constitute individual criminal responsibility; what is needed is a more serious form, similar to the concept of "war of aggression." As Fletcher shrewdly put it: "[in the eyes of the ICC] some aggression is acceptable but not too much."[84] A clear example that satisfies both qualitative and quantitative requirements is Russia's invasion of Ukraine.[85]

To sum up, individual responsibility for the crime of aggression presupposes the existence of a completed state conduct element. When adjudicating a claim on criminal responsibility, the court will take as reference points for individual conduct only those state acts that amount to manifest violations of the U.N. Charter. Further analysis of *jus ad bellum* is beyond the scope of this Article.

III. THE CONCEPTUAL FRAMEWORK FOR THE ATTRIBUTION OF CRIMINAL RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW

As a reference point for individual responsibility, the state conduct element is the contextual circumstance in the actus reus paradigm that classifies

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[80] Rev. Conf. of the Rome Statute, ICC-RC/Res.6, annex III, Understandings Regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression (June 11, 2010).

[81] ICCSt., *supra* note 4, at art. 8*bis*(1).

[82] *See* Hannah Lea Pfeiffer, *The Crime of Aggression and the Participation Model of the Rome Statute of the International Criminal Court*, *in* 7 COLOGNE STUDIES ON INTERNATIONAL PEACE AND SECURITY LAW 29 (Claus Kreß ed., 2017).

[83] For an overview of the threshold clause, see Kreß, *supra* note 63, at 507–38.

[84] 2 GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW, INTERNATIONAL CRIMINAL LAW 23 (2020).

[85] *See* Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, JUST SEC. (Mar. 10, 2022), https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/.

the perpetrator's wrongdoing as the crime of aggression. Wrongfulness is therefore predicated on the existence of the state conduct element. This Part sets out the analytical framework for the account of wrongfulness and culpability for the crime of aggression that follows in the next two Parts.

Criminal responsibility is based on the violation of a prohibitory norm of the criminal code.[86] If an actor unjustifiably causes (e.g., fires a gun) an occurrence (e.g., death) that is normatively regarded as *wrongdoing*, he should answer (*respond*) for his behavioral choice. The process of establishing a causal (objective) link between the perpetrator's conduct and the crime is what we call "objective attribution."[87] This is the first step in adjudicating criminal responsibility. The second step is determining whether such an individual is *culpable* and thus can be blamed and punished.[88] This process of "subjective attribution" requires establishing subjective links between the actor and the crime. The perpetrator that commits the wrongdoing but does not satisfy the necessary mens rea would not be treated as a responsible agent but as a mere "causal factor."[89]

In international criminal law, objective attribution is made through the prism of the material elements, namely, conduct, consequences, and circumstances.[90] At the ICC level, the material elements are posited in either the definitions of the core crimes[91] or the elements of crimes.[92] *Conduct* describes what the perpetrator does to bring about the *consequences* or criminal result. For example, *A* fires a gun (conduct) and causes the death of *B* (consequence). Accordingly, the conduct and consequences create a condition for the violation of the prohibitory norm.[93] Most crimes incorporate the consequence element, which is a particularly relevant occurrence in space and time to which we tie individual conduct. If conduct does not cause consequences, there is no criminal liability.[94] It follows that consequences are changes in the material world caused by conduct.

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[86] *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 458 (2000).

[87] *Id.* at 492.

[88] In this Article, "culpability" and "blameworthiness" denote the same thing.

[89] Thomas Weigend, *Subjective Elements of Criminal Liability*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 490, 490 (Markus D. Dubber & Tatjana Hörnle eds., 2014).

[90] *See* INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES 1, § 7 (2010) [hereinafter ELEMENTS OF CRIMES].

[91] ICCSt., *supra* note 4, at arts. 6–8*bis*.

[92] *See* WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 630 (2016).

[93] In this case, the norm is "thou shall not kill."

[94] *Cf.* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 92 (2d ed. 1985).

Exceptions to this rule are so-called "crimes of conduct"[95] that do not have harmful consequences but nonetheless incorporate in their definition a particularly relevant occurrence in space and time that marks the moment in which the conduct is in violation of the prohibitory norm. Take, as an example, crimes of endangerment. A prototypical example in the Rome Statute is Article 8(2)(b)(xii): declaring that no quarter will be given in an international armed conflict.[96] Suppose that military commander *P* issues orders to his subordinate *P1* to inform the enemy that no quarter will be given a couple of days before formal cessation of the armed conflict. *P*'s order does not spark any further military operation. The message does not even get to the enemy, no one dies or is wounded, and nothing notable happens on the battlefield. However, there is a particularly relevant occurrence to which we can tie individual conduct. A particularly relevant change in space and time occurred in the moment when *P1* heard the orders issued by *P*.[97] This is the moment we look at when determining whether the actor violated the prohibition in Article 8(2)(b)(xii) of the Rome Statute. It does not have to be a formal declaration; what matters is the realization that no one will be spared.[98] Precisely this moment of realization is the consequence element that causally resulted from the conduct. The "naked" conduct—a simple declaration—is not prohibited if it does not bring about a particularly relevant occurrence in space and time, that is, the moment when the subordinate hears the declaration from his commander. Just now as I write I have said loudly in my home "no quarter shall be given," and I have not violated anything. If there is no particularly relevant occurrence in space and time caused by a bodily movement, the individual conduct is not in violation of the prohibitory norm.

So-called "inchoate crimes" fit the same paradigm, as by definition, they do not render intended harm.[99] Crimes of attempt are believed to be based exclusively on the conduct element.[100] How do we know what satisfies the conduct requirement for a crime of attempt without looking at the changes in

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[95] *See* CASSESE'S INTERNATIONAL CRIMINAL LAW 38 (3d ed. 2013). James G. Stewart states that the traditional understanding divides crimes into three categories: inchoate crimes (attempt), conduct-type crimes (e.g., rape or fraud) and harm-type offences (e.g., murder). James G. Stewart, *Overdetermined Atrocities*, 10 J. INT'L CRIM. JUST. 1189, 1195 (2012).

[96] ICCSt., *supra* note 4, at art. 8(2)(b)(xii).

[97] *See* ELEMENTS OF CRIMES, *supra* note 90, at art. 8(2)(b)(xii) ("The perpetrator declared or ordered that there shall be no survivors.").

[98] *See* Michael Cottier & Julia Grignon, *Article 8, Para. 2(b)(xii): Quarter*, *in* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: ARTICLE-BY-ARTICLE COMMENTARY 488, 490 (Kai Ambos ed., 4th ed. 2022).

[99] *See* IRYNA MARCHUK, THE FUNDAMENTAL CONCEPT OF CRIME IN INTERNATIONAL CRIMINAL LAW: A COMPARATIVE LAW ANALYSIS 112 (2014).

[100] *See* 1 GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL 292 (2007).

the material world caused by one's action? The Rome Statute prohibits attempts to commit one of the crimes under its jurisdiction. The relevant provision reads:

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.[101]

The prohibitory norm here amounts to: "thou shall not take a substantial step toward committing a crime." I assert that there is no means of classifying conduct as being in violation of the prohibitory norm for attempt except to look at the particular occurrence in space and time caused by that conduct. For example, shooter *P* tries to murder *V* to no avail. Bullets go astray, hitting a tree a few meters from *V*. *V* did not hear the shooting and did not even realize that she was the target. *P*'s shooting could be characterized as a violation of many norms, e.g., unlawful shooting, unlawful possession of weapons, endangerment of public safety, etc. In order to be prosecuted for the attempted murder, the prosecution must prove that *P* wanted the death of *V* and instead hit the tree next to her. In our example, firing a gun in *V*'s direction is a particularly relevant occurrence in space and time that classifies the conduct of pulling the trigger (moving a finger) as violating the prohibition on attempting to commit murder.

In order to qualify the violation as wrongdoing, there must be a particular situation that accompanies criminal conduct, which we refer to as the *circumstance element*. To this end, the perpetrator acts wrongfully if there are no circumstances justifying his conduct. Circumstances are facts that are part of the definition of crime.[102] They may be defined as a factual or legal situation that qualifies the violation of the prohibitory norm (conduct + consequence)

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[101] ICCSt., *supra* note 4, at art. 25(3)(f).

[102] *See* AMBOS, *supra* note 21, at 273.

as being wrongful.[103] An example of a factual circumstance is the victim's age, while the fact that a person is protected under the Geneva Conventions[104] is an example of a legal (normative) circumstance. In international criminal law, there exist so-called "contextual circumstances" that classify the wrongdoing as a specific crime.[105] For example, if a murder occurs as part of a "widespread or systematic attack" against a civilian population, then it is a crime against humanity.[106] The existence of an "attack" is a contextual circumstance.

A criminal law system would not be rational if we blamed a person for something that he could not prevent or was not able to foresee.[107] Therefore, once we ascribe the unjustified violation of the prohibitory norm to the perpetrator, the next step is to assess whether he is blameworthy for his behavioral choice. This appraisal is made through the prism of the mental elements that link the perpetrator's act to the criminal context.[108] Unlike material elements, the Rome Statute has a separate provision (Article 30) on mental elements that applies to the core crimes as a default rule.[109] The Rome Statute is the first statute of an international tribunal to have a separate article on mens rea.[110] At other international criminal courts, the issue of mental elements was left to the discretion of the judges.[111] Article 30 of the Rome Statute refers to *intent* and *knowledge* and is considered by some authors to be the general mens rea rule in international criminal law.[112] The reference points are the material elements: intent pertains to conduct and consequences, whereas knowledge refers to circumstances and consequences.[113]

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[103] *Cf.* Kevin Jon Heller, *The Rome Statute of the International Criminal Court*, *in* THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 593, 602 (Kevin Jon Heller & Markus Dubber eds., 2010).

[104] *See* ICCSt., *supra* note 4, at art. 8(2)(a).

[105] *See* WERLE & JESSBERGER, *supra* note 31, at 174–75.

[106] *See* ICCSt., *supra* note 4, at art. 7.

[107] Weigend, *supra* note 89, at 490.

[108] *See* Kai Ambos, *The Crime of Aggression After Kampala*, 53 GER. Y.B. INT'L L. 463, 497 (2010).

[109] *See* 2 KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW 211 (2014); Geert-Jan Alexander Knoops, *Mens Rea and the Crime of Aggression*, *in* MENS REA AT THE INTERNATIONAL CRIMINAL COURT 148, 155 (10 INT'L CRIM. L. SERIES 2017).

[110] Sarah Finnin, *Mental Elements Under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis*, 61 INT'L COMPAR. L.Q. 325, 325 (2012).

[111] *See* WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 292 (2006).

[112] *See* AMBOS, *supra* note 21, at 266.

[113] *See* ICCSt., *supra* note 4, at art. 30.

Intent is a person's wish or desire.[114] According to Article 30(2)(a), a person acts with intent when he "*means to* engage in the conduct."[115] The existence of intent (as well as knowledge) is to be inferred from circumstances in which the conduct took place.[116] In the example above, *A* meant to fire the gun by pulling the trigger. It bears stressing that an actor cannot be blamed for "unintentional conduct such as automatic or reflex behaviour."[117] Therefore, the notion of voluntariness is crucial for ascribing conduct to an agent. With respect to consequences, according to Article 30(2)(b) of the Rome Statute, a person can be criminally responsible and liable for punishment only if he "means to cause that consequence or is aware that it will occur in the ordinary course of events."[118] The meaning of the first part of this provision ("means to cause that consequence") is largely uncontested and is analogous to the case with conduct—a person is to be blamed only for intentionally causing the consequence. The second part ("will occur") implies that the consequence will follow from the person's conduct. In this regard, it is not sufficient that an individual anticipates the *possibility* of occurrence; rather, in the moment when he performs the conduct, he must be *virtually certain*[119] that the criminal result will occur in the ordinary course of events, since "after all, [the Rome Statute] does not say 'may occur.'"[120] In this vein, "risks or possibilities" do not satisfy the "will occur" standard,[121] which is more in the domain of *dolus*

[114] Weigend, *supra* note 89, at 498.

[115] ICCSt., *supra* note 4, at art. 30(2)(a) (emphasis added).

[116] Prosecutor v. Bemba, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, §§ 137–38 (June 15, 2009) ("In the case of murder as a crime against humanity, the intent can be inferred from the use of a firearm against unarmed persons.") [hereinafter *Bemba*].

[117] SCHABAS, *supra* note 92, at 631.

[118] ICCSt., *supra* note 4, at art. 30(2)(b).

[119] Prosecutor v. Katanga, ICC-01/04-01/07-3436-tENG, Judgment Pursuant to Article 74 of the Statute, ¶¶ 775–76 (Mar. 7, 2014). This standard is also used before English courts. *See* R v. Woollin [1999] AC 82.

[120] Gerhard Werle & Florian Jessberger, *'Unless Otherwise Provided': Article 30 of the ICC Statute and the Mental Element of Crimes Under International Criminal Law*, 3 J. INT'L CRIM. JUST. 35, 41 (2005).

[121] *See* Donald K. Piragoff & Darryl Robinson, *Article 30 Mental Element*, *in* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: ARTICLE-BY-ARTICLE COMMENTARY, *supra* note 98, at 1328, 1338.

eventualis.[122] The required mens rea in international criminal law is *dolus directus* in the first or second degrees,[123] while concepts like "recklessness," "negligence," and "*dolus eventualis*" are normally not sufficient for culpability.[124]

The term "knowledge" in Article 30 of the Rome Statute is conflated with "awareness."[125] Pursuant to Article 30(3), the points of reference for "knowledge" are circumstances and consequences.[126] With respect to circumstances, knowledge means awareness of the situation in which conduct takes place.[127] In relation to the consequence element, knowledge means that the actor was aware that the consequence would occur in the ordinary course of events as the result of his conduct.[128]

IV. ATTRIBUTING WRONGFULNESS OF THE CRIME OF AGGRESSION

The immediate survey shows that the objective (actus reus) paradigm of the structure of international crimes determines the "wrong" of the crime, whereas the mental (mens rea) sub-structure determines whether the actor who committed the wrongdoing is to be blamed. One way to view these facets is by regarding the former as "conduct" elements and the latter as "fault" elements.[129] In *ARCA*, I suggest an interpretation of the actus reus of the crime of aggression based on Article 8*bis* of the *Elements of Crimes*,[130] which reads as follows:

Article 8 *bis*

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[122] In criminal law theory, *dolus directus*, *dolus directus* in the second degree (or *dolus indirectus*), and *dolus eventualis* are the three manifestations of intent. In *dolus directus*, the perpetrator foresees and desires the criminal outcome. In *dolus indirectus*, the perpetrator foresees criminal consequences as a certainty resulting from his conduct but does not desire them. In *dolus eventualis*, the perpetrator does not desire consequences but foresees the criminal outcome as a possible result of his conduct and nonetheless accepts that risk and engages in the conduct. Johan D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. MIA. INT'L COMPAR. L. REV. 57, 62–63 (2004). Both the common law and civil law systems developed doctrines on different degrees of mental elements. For a comprehensive discussion of the different degrees of mens rea, see Finnin, *supra* note 110.

[123] *Bemba*, *supra* note 116, ¶¶ 357–69

[124] *See* Clark, *supra* note 30, at 300–01, 314–15, 334.

[125] ICCSt., *supra* note 4, at art. 30(3).

[126] *Id.* ("For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.").

[127] *Id*.

[128] *Id*.

[129] ANDREW ASHWORTH & JEREMY HORDER, PRINCIPLES OF CRIMINAL LAW 83 (7th ed. 2013).

[130] *See* Hajdin, *supra* note 28.

Crime of aggression
Introduction

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.

2. 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.

3. The term "manifest" is an objective qualification.

4. 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.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.

2. The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

3. The act of aggression—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—was committed.

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.

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

6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.[131]

[131] ELEMENTS OF CRIMES, *supra* note 90, at art. 8*bis* (footnote omitted).

Elements 1, 2, 3, and 5 are actus reus elements, while Elements 4 and 6 provide further directions to mens rea for the crime of aggression.[132]

The conduct element is constituted by the integrated conduct verbs: "planned, prepared, initiated, or executed an act of aggression."[133] The consequence for each action is the same, namely, the use of armed force. In this vein, the conduct verbs—planning, preparation, initiation, and execution—are crucial stages prior to an act of aggression. Therefore, conduct is best understood as a contribution of a certain degree to one of these stages, since ordinarily there are many individuals involved in the process of carrying out the state collective act.[134] This is true for the other core crimes as well.[135] Whenever there is an element of collectiveness implied in the commission of a certain act, there are at least two stages prior to action, namely, planning and execution. The difference between the crime of aggression and the other three core crimes (genocide, crimes against humanity, and war crimes) is that the latter do not explicitly contain in their definitions the stages prior to the criminal consequences.[136]

Element 2 is a *circumstance* element of the crime that denotes the leadership position of the perpetrator—a position to control or direct state action.[137] The crime of aggression was always considered a *leadership crime*—a crime of leaders who devise state policies.[138] Justice Robert H. Jackson, Chief Prosecutor for the United States in the Nuremberg trial, stated in his opening speech that the intention of the prosecution was not to incriminate the entire German people but "to reach the planners and designers, the inciters and leaders without whose evil architecture the world would not have been for so long scourged with the violence and lawlessness . . . of this terrible war."[139] He later made it clear that during the London Conference (where the Nuremberg Charter was adopted), the intention of the drafters was to exclude followers from responsibility for aggression: "[i]t never occurred to me, and I am sure

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[132] *Id.* From this point on, Elements 1 to 6 will refer to the six paragraphs under 'Elements' of Article 8*bis*.

[133] *Id*.

[134] *See* Hajdin, *supra* note 28, at 493–97.

[135] Furthermore, this is true for any crime that is collective in nature.

[136] *See* ELEMENTS OF CRIMES, *supra* note 90, at arts. 6–8.

[137] For an account of who may satisfy the leadership requirement, see Nikola R. Hajdin, *Responsibility of Private Individuals for Complicity in a War of Aggression*, 116 AM. J. INT'L L. 788–97 (2022).

[138] *See* Roger S. Clark, *Negotiating Provisions Defining the Crime of Aggression, Its Elements and the Conditions for ICC Exercise of Jurisdiction Over It*, 20 EUR. J. INT'L L 1103, 1105 (2010); Akande & Tzanakopoulos, *supra* note 57, at 225.

[139] *See* Robert H. Jackson, Opening Statement for the United States of America (Nov. 21, 1945), *in* THE CASE AGAINST THE NAZI WAR CRIMINALS 1, 13 (1946).

it occurred to no one else at the conference table, to speak of anyone as 'waging' a war [of aggression] except topmost leaders who had some degree of control over its precipitation and policy."[140]

The leadership clause narrows the scope of criminal responsibility for aggression. This is highly reasonable from a criminal law perspective. First and foremost, states are run by leaders and their followers, and expecting everyone to be accountable for state actions runs the risk of over-criminalization.[141] Thus, the Nuremberg Military Tribunal held that there must be a standard for criminal responsibility, a threshold of sorts for wars of aggression that differentiates the guilty from the innocent and prevents collective guilt and mass punishment.[142] Consequently, the leadership clause was introduced as a tool to limit the scope of criminal responsibility, and since the post-WWII trials, it has been generally accepted that only high-ranking state agents can be held responsible for the crime of aggression.[143] Another reason for leadership responsibility lies in the nature of the norms violated in the crime of aggression. The crime of aggression is, inter alia, a violation of *jus ad bellum*—something that is said not to be carried out by soldiers or even lower-ranking state officers.[144] Only state leaders are typically aware that state policies, which are products of their own doing, are illegal, and therefore, it would be unfair to hold followers responsible for something they did not have knowledge of. An admiral who gives orders for an unlawful attack certainly knows much more than the regular soldiers who carry out that attack. Moreover, the actions of leaders and followers are normatively distinct, and since the latter are in no position to decisively influence state policy on the use of force, they should not be blamed for the crime of aggression.[145]

The main contribution of *ARCA* is the classification of the state collective act. During the *travaux préparatoires*, it was not clear whether Elements 3 and 5, which describe the state collective act, refer to the consequence or circumstance element.[146] The drafters highlighted the practical issue of characterizing Elements 3 and 5 as consequences, as the required mental element

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[140] Robert H. Jackson, *The United Nations Organization and War Crimes*, 46 PROC. AMER. SOC'Y INT'L L. 196, 198 (1952).

[141] *See* NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL 151–52 (2008).

[142] United States v. Krauch, Opinion and Judgment of the United States Military Tribunal VI, *in* 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1126 (1952).

[143] Matthew Gillett, *The Anatomy of an International Crime: Aggression at the International Criminal Court*, 3 INT'L CRIM. L. REV. 829, 860 (2013).

[144] *See* LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE 16 (2008).

[145] Dannenbaum, *supra* note 25, at 867.

[146] *2009 Montreux Draft Elements of Crimes*, *reprinted in* THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION, *supra* note 70, at 671. Proposed Elements 3 and 5 can be characterized as either circumstances (in which the perpetrator's conduct

might be difficult to prove. Namely, Article 30 of the Rome Statute stipulates *intent* and *knowledge* in relation to consequences in that the perpetrator either meant to cause the consequence or was aware that a certain consequence would occur in the ordinary course of events.[147] If Elements 3 and 5 are understood in this way, the prosecution must prove that the accused knew that the collective act was both inconsistent with the U.N. Charter and represented a manifest violation, which may, for instance, allow the perpetrator to shield his responsibility behind disreputable legal advice.[148] Consequently, the act of aggression was regarded as a circumstance element, without defining the consequence element.[149] The *consequence element* of the crime of aggression—the result of the perpetrator's conduct—is the state's use of armed force that forms the basis for a normative determination of the existence of an act of aggression within the meaning of Article 8*bis* of the Rome Statute (Element 3). In *ARCA*, I use the term "material act of use of violence" to account for the consequence element for the crime of aggression.[150] Following discussions with Thomas Weigend, I have modified my position and now suggest "use of armed force" as a more suitable terminology for the consequence element. In essence, the argument remains unaffected: by actively engaging in conduct, the perpetrator causes the state's *violent* use of armed force against another state. As explained in *ARCA*, this act of inter-state violence is a deliberate exercise of force or intimidation by one state against another.[151] Moreover, the use of armed force always implies a physical effect as a manifestation of state action.[152] Consequently, the use of violence is built into the notion of *use* of armed force.[153] Nonetheless, Weigend was right to point out that the more adequate term to capture the consequence element would be "use of armed force" since this wording is employed in both Article 8*bis* of the Rome Statute and Element 3 of the Elements of Crimes.[154]

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takes place) or consequences (a result of the perpetrator's conduct), or both, therefore the application of Article 30's default mental elements is unclear. Accordingly, a policy choice about the correct characterization of proposed elements 3 and 5 and the corresponding mental attitude of the perpetrator is required.

[147] ICCSt, *supra* note 4, at art. 30.

[148] *See 2009 Montreux Draft Elements of Crimes*, *supra* note 146, at 671.

[149] *Id*.

[150] *See* Hajdin, *supra* note 28, at 502.

[151] *See id*. at 504.

[152] Article 8*bis*(2) of the Rome Statute requires the "*use* of *armed* force." This excludes non-violent actions, such as threats of use of force or economic coercions. *See* ICCSt., *supra* note 4, at art. 8*bis*(2) (emphasis added).

[153] Unlike the threat of force, the use of force always presupposes violence. *See* James A. Green & Francis Grimal, *The Threat of Force as an Action in Self-Defense Under International Law*, 44 VAND. J. TRANSNAT'L L. 285, 311 (2011).

[154] *See* ICCSt., *supra* note 4, at art. 8*bis*; ELEMENTS OF CRIMES, *supra* note 90, at art. 8*bis*, Element 3.

The *contextual circumstance* that qualifies the individual conduct as wrongful is the existence of an act of aggression that manifestly violates the U.N. Charter, that is, the *state conduct element* (Element 5). In effect, this means that causing the state's use of armed force is wrongful only if it constitutes "an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."[155] This normative characterization of "whether a particular situation constitutes the [contextual] circumstances of the crime of aggression is left entirely to the court of law."[156]

This is a correct reading of the material elements of the crime of aggression that solves much of the conceptual dilemma the drafters faced during the negotiations preceding Kampala 2010. In practical terms, to ascribe wrongfulness to the perpetrator of the crime of aggression, the prosecution need not necessarily prove that he is accountable for the entire state aggression. His conduct is wrongful if he causes the use of armed force that either constitutes in and of itself, or is *part* of a series of state actions that, taken as a whole, amount to the state conduct element.

V. ATTRIBUTING CULPABILITY FOR THE CRIME OF AGGRESSION

To ascribe individual responsibility for the crime of aggression, the prosecution must prove the wrongfulness of the perpetrator's conduct as well as the necessary mens rea in the moment when he acted.[157] We assess the culpability of the perpetrator based on mental elements. Pursuant to Article 30(1) of the Rome Statute,[158] if a definition of the crime or a mode of criminal responsibility does not specify mens rea, the default mental elements apply.[159] Accordingly, as stated in Part II above, intent refers to *conduct* and *consequences*, while knowledge is related to *consequences* and *circumstances*. In the *Elements of Crimes*,[160] there are two provisions that provide further directions on the mens rea for the crime of aggression: Element 4, which requires that "[t]he 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" and Element 6, which requires that "[t]he perpetrator was aware of the factual circumstances that established such a manifest violation of the

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[155] *See* ICCSt., *supra* note 4, at art. 8*bis*(1).

[156] *See* Hajdin, *supra* note 28, at 499.

[157] The moment the perpetrator acts is the moment to be examined when assessing the required mens rea.

[158] ICCSt., *supra* note 4, at art. 30(1) ("unless otherwise provided").

[159] *See* Piragoff & Robinson, *supra* note 121, at 1118.

[160] According to Article 9 of the Rome Statute., the Elements of Crimes shall assist the ICC in the interpretation of the definition of the crimes and shall be consistent with the text of the Rome Statute. *See* ICCSt., *supra* note 4, at art. 9.

Charter of the United Nations."[161] They refer to the consequence and circumstance requirements, respectively, and will be analyzed in the remainder of this Article.

A. Conduct

Article 30(2) of the Rome Statute requires that a person must *mean* to engage in her conduct.[162] The notion of voluntariness is crucial for ascribing conduct to an agent, and the person to whom the conduct is ascribed has to have the capacity to act freely.[163] Conversely, conduct that emanates from non-volition is beyond the scope of criminal responsibility. A person cannot be blamed for "unintentional conduct such as automatic or reflex behaviour."[164] Therefore, conduct may be either voluntary or involuntary; only the former entails attribution of culpability to the actor.[165] Element 1 defines conduct as planning, preparation, initiation, or execution.[166] These are the crucial stages prior to an act of aggression. As Weisbord asserts, "[p]lanning, preparing, initiating, or executing is to the crime of aggression what pulling the trigger of a gun is to murder."[167] Consequently, the prosecution must prove that the accused was voluntarily engaged in the complex action of the *planning*, *preparation*, *initiation*, or *execution* of the use of armed force.[168]

B. Consequence

In order to prove that the actor violated the prohibitory norm of the criminal code, we look at certain changes in the material world and argue that the

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[161] *See* ELEMENTS OF CRIMES, *supra* note 90, at art. 8*bis*.

[162] ICCSt., *supra* note 4, at art. 30(2).

[163] H.L.A. Hart adds a notion of "fair opportunity" to perform such capacity in a way other than someone else did. He proposes that it would be morally wrong to punish someone for a criminal act if the person did not have normal capacities and a fair opportunity to act accordingly. He states that "[w]here these capacities and opportunities are absent, as they are in different ways in the varied cases of accident, mistake, paralysis, reflex action, coercion, insanity, etc., the moral protest is that it is morally wrong to punish because 'he could not have helped it' or 'he could not have done otherwise' or 'he had no real choice'." H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 152 (2d ed. 2008).

[164] SCHABAS, *supra* note 92, at 631.

[165] *See* Piragoff & Robinson, *supra* note 121, at 1121.

[166] *See* ELEMENTS OF CRIMES, *supra* note 90, at art. 8*bis*, Element 1.

[167] Noah Weisbord, *The Mens Rea of the Crime of Aggression*, 12 WASH. UNIV. GLOB. STUD. L. REV. 487, 492 (2013).

[168] This is largely uncontested in the scholarship. *See* Clark, *supra* note 138, at 1112.

actor voluntarily caused such a result.[169] The criminal consequence is a particularly relevant occurrence in space and time that marks the end of the complex action causing the criminal result. The beginning of that action is a willed bodily movement that we refer to as conduct.[170] Consequently, conduct and consequence create the condition in which the violation of the prohibitory norm exists.[171]

The consequence of the crime of aggression is described in Element 3 ("the use of armed force").[172] Element 4 provides for the corresponding mens rea stipulating that the perpetrator must be aware of the factual circumstances that establish inconsistency of the use of armed force with the U.N. Charter.[173] Element 4, however, does not account for the actual existence (material manifestation) of consequences of the crime of aggression. Therefore, a default rule enshrined in Article 30 of the Rome Statute applies.[174] Accordingly, to satisfy the required mens rea, the perpetrator must intend ("mean to cause") the use of armed force or must be aware that the use of armed force will occur in the ordinary course of events as a result of his conduct.[175] Crucially, the mens rea does not require the offender to make a *legal evaluation* of whether the collective act he causes is inconsistent with the U.N. Charter;[176] he simply *intends* a forceful state action against another state or is *aware* that it will occur because of his engagement in one of the crucial stages prior to state action. Whether such state action would be eventually regarded as the use of armed force is subject to a normative evaluation and therefore irrelevant for subjective attribution.

It bears stressing that the mens rea standard was higher during the post-WWII trials, as the tribunals required actual knowledge of the existence of the state's aggressive war.[177] During the negotiations preceding Kampala 2010, the Chairman of the Special Working Group for the Crime of Aggression identified problems with such an approach that, if read in its essence, required

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[169] This proposition follows the rule that no one should be responsible for something that they did not cause. *See* JEREMY HORDER, ASHWORTH'S PRINCIPLES OF CRIMINAL LAW 118 (8th ed. 2016).

[170] In criminal theory, the dominant view of what makes human action is propounded by the mechanistic conception as "a willed bodily movement." *See* MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 39 (2010).

[171] *See* Hajdin, *supra* note 27, at 72.

[172] *See* ELEMENTS OF CRIMES, *supra* note 90, at art. 8*bis*, Element 3.

[173] *Id.* at Element 4.

[174] *See* Ambos, *supra* note 108, at 497.

[175] *See* ICCSt., *supra* note 4, at art. 30(2)(b).

[176] *See* ELEMENTS OF CRIMES, *supra* note 90, at art. 8*bis*, intro. § 2.

[177] *See* McDougall, *supra* note 46, at 195–96.

knowledge of the law.[178] This would enable the perpetrator to shield himself from responsibility by relying on disreputable legal advice. For example, the President of State *A* could use a handsome commission to nudge a prominent international legal expert to provide an opinion that strongly argues in favor of the legality of State *A*'s premeditated actions against State *B*. The Chairman thus proposed that instead of "knowledge of law," it is appropriate to have "knowledge of factual circumstances" showing the inconsistency of the state act with the U.N. Charter. The Chairman stated the following:

> To satisfy proposed Element 4, it would not be sufficient merely to show that the perpetrator knew of facts indicating that the State used armed force. It would also be necessary to show that the perpetrator knew of acts establishing the inconsistency of the use of 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.[179]

Accordingly, the required awareness element is based on the perpetrator's knowledge of the existing facts—Security Council resolutions, the existence or absence of an imminent attack, etc.— that may indicate a violation of the U.N. Charter. Unlike before the Nuremberg and Tokyo tribunals, this standard of knowledge ought not to be difficult to establish. As a rule, use of force is proscribed by international law,[180] and only on an exceptional basis is it permissible to resort to inter-state violence.[181] Consequently, anyone accountable for causing the use of armed force should be presumed to have had factual

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[178] *2009 Chairman's Non-Paper on the Elements of Crimes, reprinted in* THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION, *supra* note 70, at 682 [hereinafter *2009 Chairman's Non-Paper*].

[179] *Id.* at 683.

[180] *See* U.N. Charter art. 2, ¶ 4.

[181] There are two well-established exceptions to the prohibition of use of force in international law: the right to self-defense, *id.* at art. 51, and the use of force authorized by the Security Council acting under Chapter VII of the U.N. Charter. *See* RUCHI ANAND, SELF-DEFENSE IN INTERNATIONAL RELATIONS 60 (2009). A state that uses force may also invoke consent to preclude wrongfulness of her action within the limits of that consent. Int'l L. Comm'n, *supra* note 50, at art. 20 ("Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent."). On this point, see also Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT'L L.J. 1, 10 (2013) ("[A] state may invoke consent after the fact to justify violating an international agreement.").

knowledge of the illegality of his actions,[182] particularly given the high-level position of the perpetrator in the state's hierarchical structure of governance.[183]

A backwards glance is now in order. Every act of aggression is based on a material manifestation (physical effect) captured by the term "use of armed force." The physical manifestation is a particularly relevant occurrence in space and time to which the perpetrator's conduct is causally related. To this end, the use of armed force is to be understood in its naturalistic meaning—as a violent action against another state.[184] If the perpetrator not only intends forceful state action (such as "bombardment")[185] or is aware this event will occur as the result of his conduct but also is cognizant of all the relevant factual circumstances that establish that such an occurrence will violate the U.N. Charter, he satisfies the mens rea requirement for the consequence element of the crime of aggression. Whether such violation of the prohibitory norm (conduct + consequence) is wrongful or justified from a criminal law perspective, that is, whether the accused committed the crime of aggression by causing the use of armed force to occur, is to be determined in the circumstances paradigm. The following Section gives an account of this matter.

C. Circumstances

The circumstances of the crime of aggression are enshrined in Elements 2 and 5. Element 2 prescribes the leadership clause to which the default provision on mens rea applies.[186] Accordingly, pursuant to Article 30(2) of the Rome Statute, the perpetrator must be aware that he was in a position effectively to exercise control over or direct the political or military action of the state.[187]

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[182] The Nuremberg International Military Tribunal held that in cases of inter-state violence, the perpetrator "must know that he is doing wrong." 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 462. According to the so-called de minimis approach, even limited violent state action such as small-scale territorial incursions by armed units would amount to the use of armed force inconsistent with the U.N. Charter. *See* Ruys, *supra* note 45, at 189.

[183] Only the top-tier leaders of the state who control the policies on use of force may be prosecuted for the crime of aggression. *See* Hajdin, *supra* note 27, at 131–33.

[184] The use of violence is built on the notion of the *use* of armed force. *See* Green & Grimal, *supra* note 153, at 311.

[185] *See* ICCSt., *supra* note 4, at art. 8*bis*(2)(b).

[186] Roger S. Clark, *Individual Conduct*, *in* THE CRIME OF AGGRESSION: A COMMENTARY, *supra* note 12, at 565 (explaining that the default mental element requires that the perpetrator is *aware* that he obtained such a position during his engagement in state action). *See also 2009 Chairman's Non-Paper*, *supra* note 178, at 681.

[187] I discuss the leadership requirement elsewhere. *See* Hajdin, *supra* note 27, at 101–34.

Element 5 refers to an act of aggression that "by its character, gravity and scale" manifestly violates the U.N. Charter.[188] This so-called *state conduct element* is the contextual circumstance that qualifies the violation of the prohibitory norm—causing the use of armed force—as wrongful and classifies the individual conduct as the crime of aggression.[189] As stated in Part II above, only those instances of causing the use of armed force that are *classified* as the state conduct element—a manifest violation of the U.N. Charter—are criminalized under Article 8*bis* of the Rome Statute.[190]

The required mens rea for the contextual circumstances is specified in Element 6: the perpetrator needs to be "aware of the factual circumstances that established" the state conduct element.[191] By the same token, as the mens rea for the consequence element, Element 6 read in conjunction with paragraph 4 of the Introduction to Article *8bis* of the Elements of Crimes requires only that the perpetrator has knowledge of the *factual circumstances* that established a manifest violation of the U.N. Charter. Thus, "[w]ords, actions, the minutes of meetings attended, the armaments used in an attack,"[192] the existence of the state policy to commit aggression, and the perpetrator's actions in furtherance of such policy[193] are all relevant factors that may inform the mens rea of the accused in relation to the state conduct element.

In some cases, the perpetrator is aware that the act of use of force he causes would not satisfy the state conduct element; for example, the accused may know that inducing only a small-scale border skirmish would not amount to a manifest violation of the U.N. Charter.[194] In the situation where a larger military action ensues (amounting to a manifest violation of the U.N. Charter), without the knowledge or participation of the perpetrator, he would not be responsible, as he lacks the required mental element pertaining to the contextual circumstances.[195] Thus, the perpetrator is responsible only if he is aware

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[188] *See* ELEMENTS OF CRIMES, *supra* note 90, at art. 8*bis*, Element 5.

[189] *See* Hajdin, *supra* note 28, at 498–99.

[190] *See* ICCSt., *supra* note 4, at art. 8*bis*(1).

[191] *See* ELEMENTS OF CRIMES, *supra* note 90, at art. 8*bis*, Element 6.

[192] Weisbord, *supra* note 167, at 498.

[193] The International Law Commission held that the perpetrator needs to be aware that her conduct is part of an existing *plan or policy of aggression*. "The mere material fact of participating in an act of aggression is, however, not enough to establish the guilt of a leader or organizer. Such participation must have been intentional and have taken place knowingly as part of a plan or policy of aggression." *1996 International Law Commission Draft Code of Crimes, with Commentary (Excerpts), reprinted in* THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION, *supra* note 70, at 198.

[194] Weisbord, *supra* note 167, at 497.

[195] *See* Frances Anggadi et al., *Negotiating the Elements of the Crime of Aggression*, *in* THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION, *supra* note 70, at 76.

of the factual circumstances according to which the result of his actions constitutes the use of force of a certain character, gravity, and scale sufficient to lead to a finding that the U.N. Charter has been manifestly violated.

The excess situation should be clearly distinguished from a case where the perpetrator is aware that the state action for which he is accountable for in and of itself will not reach the threshold of Article 8*bis*(1) of the Rome Statute but is part of broader hostilities that, taken as a whole, amount to the state conduct element.[196] Herein lies the crucial importance of distinguishing the consequence element from the contextual circumstances of the crime of aggression. As I explained in *ARCA*, an act of aggression in the ordinary course of events consists of a series of collective state actions.[197] Not all such actions, partially taken, would normally amount to the state conduct element. As wrongfulness is predisposed on causing criminal consequences, to incur criminal responsibility the perpetrator needs to be accountable only for a single instance of the "mere" use of armed force not necessarily in and of itself amounting to the state conduct element. It suffices if the perpetrator is aware of the factual circumstances according to which the use of armed force is *part* of a series of state actions that, taken as a whole, constitute the state conduct element. For example, State *A* invades State *B*. The invasion consists of several attacks on the territory of State *B*. After several days, the invasion is complete, and State *A* installs a new government in State *B*. During the inter-state violence, there was no serious loss of human life. Even the property of State *B* remained almost intact. For the sake of argument, let us assume that State *A* committed an act of aggression in terms of Article 8*bis* of the Rome Statute.[198] However, each of the attacks taken separately from the whole invasion would not meet the threshold of Article 8*bis*(1). To make it even more interesting, none of the individual attacks constitutes an act of aggression but is rather a "mere" violation of Article 2(4) of the U.N. Charter. In the case at hand, offenders responsible for wrongdoings—i.e., individuals who caused separate attacks and satisfied the leadership clause (political leaders, military generals, etc.)—are culpable if the prosecution proves they were aware that the state action they caused was *part* of a series of state actions that together may be classified as the state conduct element.

The conceptual distinction between consequences and circumstances allows for such an interpretation. The prosecution must prove that the accused

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[196] *See Armed Activities*, *supra* note 60, ¶¶ 149–53. The International Court of Justice found that Uganda conducted a series of acts of armed violence against the DRC and therefore violated its sovereignty and territorial integrity. The series of military interventions were classified as "a grave violation of the prohibition on the use of force" due to their magnitude and *duration*. *Id.* ¶ 165.

[197] *See* Hajdin, *supra* note 28, at 500.

[198] Whether such a case would be eventually regarded as a manifest violation of the U.N. Charter is subject to the "scale" and "gravity" tests. *See* Kreß, *supra* note 12, at 523.

caused the consequence (use of armed force in violation of the U.N. Charter). According to the de minimis approach,[199] even a limited forceful state action would satisfy the consequence requirement and may entail criminal responsibility even though it does not itself constitute the state conduct element.[200] However, the actor need not have a causal relationship with the contextual circumstances (state conduct element); he only has to be mindful of the state of affairs in which his actions take place.[201] Roger Clark explains this relationship vividly:

> It is easy enough to think of "committing" conduct (including conduct by omission), or even of "committing" a consequence, such as a homicide. It is, on the other hand, difficult to think of "committing" a circumstance. It is not my action that makes something the property of another. That is part of the scene (a crucial part) against which I engage in conduct in taking someone else's stuff. I do have an attitude towards it, though, probably "knowledge". Hence, "committed" must be interpreted as meaning something like "accompanied by" in order to make sense in relation to circumstance elements.[202]

Indeed, it sounds more plausible to refer to a state of affairs as "accompanying" conduct rather than "committing." Certainly, human actions create circumstances. However, in the actus reus trichotomy, the perpetrator has only a

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[199] *See supra* Part II.

[200] An analogous argument may be found in an example of murder as a crime against humanity. According to ICCSt., *supra* note 4, at art. 7, causing (conduct) death (consequence) represents the violation of the prohibitory norm of the criminal code, while the existence of a widespread or systematic attack is the contextual circumstance that classifies such a violation as a crime against humanity. Accordingly, an act of murder may be classified as a crime against humanity if it constitutes in and of itself or is part of a widespread or systematic attack. *See* Kai Ambos, *Article 7: Crimes Against Humanity*, *in* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: ARTICLE-BY-ARTICLE COMMENTARY, *supra* note 98, at 135, 156 (arguing that a single act of murder may constitute the attack itself). In *Tadić*, on the other hand, the International Criminal Tribunal for the Former Yugoslavia spelled out that "a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable." Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 649 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997). Therefore, an isolated act of the use of armed force that would not in itself constitute a manifest violation of the U.N. Charter may entail criminal responsibility if it is part of a series of collective acts that together constitute the state conduct element.

[201] ICCSt., *supra* note 4, at art. 30(3).

[202] *See* Clark, *supra* note 30, at 307 n.54.

subjective (mental) connection with circumstances, and by no means is he accountable for their existence. Therefore, in a case of the crime of aggression, the perpetrator must be aware of the factual circumstances according to which the result of his actions either constitutes in and of itself or contribute to an overarching act of aggression that manifestly violates the U.N. Charter.

Another case that differs from the excess situation pertains to the temporal aspect of *jus ad bellum*. For example, State *A* initiates an armed attack against State *B*. State *B* invokes the right to self-defense pursuant to U.N. Charter Article 51. During the protracted hostilities, both states carry out several acts of use of armed force against each other. At some point, one of the states carries out an action that would ordinarily be considered a manifest violation of the U.N. Charter. The issue at stake is whether only State *A*'s initial attack may constitute a violation of *jus ad bellum* or whether any other subsequent act of inter-state violence may be regarded as such. The answer depends on whether the norms of *jus ad bellum* continue to apply during the protracted armed violence or are replaced by some other norms (e.g., *jus in bello*).[203]

In the past, the view was that *jus ad bellum* applies only to the initial use of force, while *jus in bello* applies thereafter.[204] If the norms of *jus ad bellum* cease to apply after the initial attack, then individual criminal responsibility for aggression is constrained to that particular action.[205] However, the current dominant view in both scholarship[206] and state practice[207] is that *jus ad bellum* norms continue to apply after the initial attack. Thus, Murphy, Kidane and Snider state the following:

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[203] The norms of *jus ad bellum* are conventionally understood as the basis for the justified transition from peace to war, whereby *jus in bello* defines conduct and responsibilities of the belligerents during the state of war. *See* Carsten Stahn, *'*Jus ad Bellum*', 'Jus in* Bello*' . . . 'Jus post Bellum'?–Rethinking the Conception of the Law of Armed Force*, 17 EUR. J. INT'L L. 921, 926 (2007).

[204] Jasmine Moussa, *Can* Jus ad Bellum *Override* Jus in Bello*? Reaffirming the Separation of the Two Bodies of Law*, 90 INT'L REV. RED CROSS 963, 968 (2008).

[205] For arguments for constrained temporal application of *jus ad bellum*, see Eyal Benvenisti, *Rethinking the Divide Between* Jus ad Bellum *and* Jus in Bello *in Warfare against Nonstate Actors*, 34 YALE J. INT'L L. 541, 546–47 (2009); Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT'L L. 227, 234 (2003).

[206] *See* Christopher Greenwood, *The Relationship Between* Jus ad Bellum *and* Jus in Bello, 9 REV. INT'L STUD. 221, 223 (1983) ("[M]odern *jus ad bellum* applies not only to the act of commencing hostilities but also to each act involving the use of force which occurs during the course of hostilities."); Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of* Jus ad Bellum *and* Jus in Bello *in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 68 (2009); Moussa, *supra* note 204, at 968; Eliav Lieblich, *On the Continuous and Concurrent Application of* ad Bellum *and* in Bello *Proportionality*, *in* NECESSITY AND PROPORTIONALITY IN INTERNATIONAL PEACE AND SECURITY LAW 41, 73, 75 (Claus Kreß & Robert Lawless eds., 2020).

[207] *See* Ethiopia v. Eritrea, Partial Award: *Jus Ad Bellum* – Ethiopia's Claims 1–8, 26 R.I.A.A. 457, 467, 469 (Eri.-Eth. Claims Comm'n 2005).

> The Article 2(4) prohibition is not narrowly crafted to the sanctioning of the initiation of a war; it precludes a state not just from using force to attack another state, but from using further force to prevent the other state from exercising its inherent right of self-defense to which it is entitled under international law. Preventing a state from defending itself, whether those defensive actions were anticipated or not by the aggressor, is a use of force against the territorial integrity and political independence of a state just as much as an initial invasion of that state. The conditions for engaging in self-defense under UN Charter Article 51, especially the restrictions on proportionality and necessity, are understood as operating throughout the course of the armed conflict; if a defending state undertakes action that is not necessary or proportionate, it engages in its own unlawful use of force in violation of Article 2(4). Similarly, whatever actions an aggressor takes that serve to maintain, preserve, or extend its aggression are all part of the *jus ad bellum* violation.[208]

Both arguments are equally plausible, at least in logical terms,[209] and it is unclear which path the ICC will eventually take. The choice is immaterial for proving mens rea regarding the existence of contextual circumstances since this is a matter that ought to be solved in the domain of *factual circumstances*.[210] If the ICC restricts the application of *jus ad bellum*, the better for the accused. However, if it opts for the continuous application of *jus ad bellum*, which will likely be the case, an actor suspected to have caused the illegal use of armed force during protracted armed violence amounting to the state conduct element could not invoke the defense of mistake of law by claiming that he *believed* the ICC would make a different assessment on the application of *jus ad bellum*.[211]

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[208] SEAN D. MURPHY ET AL., LITIGATING WAR: ARBITRATION OF CIVIL INJURY BY THE ERITREA-ETHIOPIA CLAIMS COMMISSION 119 (2013).

[209] Every argument, irrespective of how persuasive it seems, has an equally compelling counterargument stemming from the same premise. Therefore, at least from the logical perspective, there is no difference between the two. *See, e.g.*, David Kennedy, *The Last Treatise: Project and Person (Reflections on Martti Koskenniemi's "From Apology to Utopia")*, 7 GER. L.J. 982, 989 (2006).

[210] *See* ELEMENT OF CRIMES, *supra* note 90, art. *8bis*, intro. ¶ 3.

[211] *See* ICCSt., *supra* note 4, at art. 32(2). Roger S. Clark, a member of the Samoan delegation both in Rome and during the Kampala Conference, makes a good point regarding cases where the defense of mistake of law actually works:

> It is no defense to a bigamy charge to insist on a belief that having two or more spouses is legal, but there must be a defense for the actor who believes that the previous marriage had terminated in divorce, even if

To sum up, the ICC's normative assessment of whether a particular act constitutes a manifest violation of the U.N. Charter is immaterial for establishing mental links between the perpetrator and the state conduct element. The offender need only be aware of the factual circumstances that ultimately lay the grounds for the normative determination and not of the illegality itself.

VI. CONCLUSION

Collective in nature, state aggression is a product of many individuals who participate in a joint endeavor. According to Article 8*bis*(1) of the Rome Statute, there are four crucial stages prior to an act of aggression—*planning*, *preparation*, *initiation*, and *execution*—to which individuals contribute to varying degrees. To ascribe wrongfulness to the crime of aggression, the prosecution must prove that the accused was engaged in at least one of those complex actions and that he caused the material act of the use of armed force. Wrongfulness is a violation of the prohibitory norm without justification, and in some instances, the actor's conduct may be justified, like when acting to help his state in self-defense. What ultimately qualifies the perpetrator's conduct as wrongful is the qualification of the state act of use of force he caused as either constituting in and of itself or contributing to an act of aggression that manifestly violates the U.N. Charter.

Finally, to blame the wrongdoer, a mental link between the perpetrator and the crime must be established. In effect, the prosecution must prove that the offender voluntarily engaged in the planning, preparation, initiation, or execution of state action and intended or was aware of the factual circumstances according to which the use of armed force in contravention of the U.N. Charter would take place as a result of his conduct. In addition, the perpetrator needs to be aware of the factual circumstances establishing that i) such a use of armed force either constitutes in and of itself or contributes to an overarching act of aggression that manifestly violates the U.N. Charter and ii) he can "control or direct" state action. If all these conditions are met and there exists no

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> this involved some mistake as to the law relating to divorce. The typical case where the defense "works" is where the element in question . . . is what the Rome Statute would call a "circumstance" element. A mistake of law that works is typically about some law that is collateral to the central criminal proscription.

Roger S. Clark, *Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Court's First Substantive Law Discussion in the* Lubanga Dyilo *Confirmation Proceedings*, 19 CRIM. L.F. 519, 536 (2008). This is clearly different from the case where the perpetrator *is taking a risk* by choosing to believe that the ICC will make a normative determination that will serve him.

excuse, the perpetrator is blameworthy for the wrongdoing and thus liable for punishment.