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Criminally Disproportionate Warfare: Aggression as a Contextual War Crime

Rachel E. VanLandingham

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CRIMINALLY DISPROPORTIONATE WARFARE: AGGRESSION AS A CONTEXTUAL WAR CRIME

*Rachel E. VanLandingham**

International law has long recognized the general principle that an illegal act cannot produce legal rights. Yet, this principle of ex injuria jus non oritur is seemingly ignored in the uneasy relationship between the two international legal regimes most associated with war. A head of State can, for example, violate international law regulating the resort to armed force by ordering his military forces to illegally invade another country, yet he, through his military forces, simultaneously and subsequently benefits on the battlefield from the application of the separate body of international law regulating the actual conduct of war. The paradoxical benefit flows from the latter regime's salutary rules that allow for both the killing of opposing military forces, and for the incidental death of civilians and destruction of civilian property during hostilities, even if the war is illegally triggered.

Yet, the ex injuria jus non oritur principle is not completely jettisoned by this divorced operation of related legal regimes; the once-controversial crime against peace developed at Nuremberg has blossomed into the modern international crime of aggression, thus in theory condemning such a head of State under international criminal law for his role in launching an illegal invasion, thereby limiting his illegal gains. However, the prosecution of a head of State for the crime of aggression remains chimerical, at least for the time being, as the international community moves in fits and starts to enforce international law in the criminal arena.

While the crime of aggression has not been prosecuted since its predecessor was controversially developed and implemented at Nuremberg, the international community has

* Associate Professor of Law, Southwestern Law School, Lt. Col., USAF, (ret.). The author is grateful for the Frederick K. Cox International Law Center's thoughtful call for papers on this important topic, a call made in honor of Benjamin B. Ferencz, whose tireless efforts for peace through law continue to serve as inspiration for many. She also thanks her research assistant, Jessica Vasquez, as well as Professor Geoffrey S. Corn for his erudite feedback.

*since witnessed numerous international prosecutions of war crimes—violations of international laws governing the battlefield. This Article explores whether the crime of aggression can be prosecuted as a war crime by exposing the intersection of war’s two legal regimes within the war crime of disproportionate attack. It concludes that, exclusively for those State leaders responsible for crimes of aggression, the resultant collateral damage caused by such aggression—the civilian deaths and property destruction otherwise allowed by the international laws governing warfare—could be considered criminally excessive by building upon the contextual approach inherent in both bodies of law. Such an approach resides at the outer edges of the *lex lata*, but is one that normatively resonates with both common sense and the dictates of humanity.*

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INTRODUCTION

One of the paradoxes of international law is the fact that not all acts of death and destruction committed in the course of pursuing an illegal war are illegal, never mind criminal. For example, if one assumes that Saddam Hussein violated *jus ad bellum*¹ when he led

1. See generally Sean D. Murphy, *Protean Jus Ad Bellum*, 27 BERKELEY J. INT’L L. 22, 23 (2009) (describing *jus ad bellum* as a changing versus

Iraq to invade Kuwait in 1991, that assumption does not legally taint the battlefield killing and property destruction necessary to carry out the invasion. Simply put, the illegality of Iraq's armed invasion, or aggressive war, did not itself make the violent acts taken to carry out that conflict either illegal or criminal: illegal wars can be legally fought.²

This counter-intuitive result stems directly from the intentional bifurcation of *jus ad bellum* from *jus in bello*: there is a wall between the international legal framework regulating States' resort to war and that governing the actual conduct of war.³ As this Article describes, the separate operation of these legal regimes is teleological and pragmatic in nature, linked to both the distinct purposes of the two frameworks as well as their histories. Fundamentally, the wall dividing these legal realms stems from *jus in bello*'s humanitarian impulses. Because it aims to lessen the suffering associated with war, the scope of *jus in bello*, or international humanitarian law (IHL), is pragmatically designed to be as wide as possible, equally applying to all parties in a conflict regardless of the legality of their cause.⁴

This equal application of *jus in bello* to those on both sides of an armed conflict, aggressor and victim, seems to offend the legal precept of *ex injuria jus non oritur*: that legal rights cannot be acquired by an illegal act.⁵ Despite Iraq's illegal invasion of Kuwait, its armed

static set of international rules that regulate the resort to war by States).

2. See CHRISTOPHER GREENWOOD, HISTORICAL DEVELOPMENT AND LEGAL BASIS, IN THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 10, §101 para. 7, at 10 (Dieter Fleck ed., 2d ed. 2008) (emphasizing the "illogical" axiom that "the rules of international humanitarian law apply with equal force to both sides in the conflict, irrespective of who is the aggressor").
3. NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 6 (2010) (describing the relevant legal frameworks); see also YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 1, 3 (2d ed. 2010) [hereinafter DINSTEIN, CONDUCT OF HOSTILITIES] (describing international humanitarian law as *jus in bello*, regulating the conduct of hostilities and noting that "[t]he law of war in its totality is subdivided into the *jus in bello* (LOIAC) and the *jus ad bellum* (governing the legality of war)"). *Jus in bello* also provides protections for victims of war. See generally Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, para. 75 (July 8) (describing the merger of the Hague and Geneva law) [hereinafter Nuclear Weapons Advisory].
4. See *infra* Part I.A.
5. See generally Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L L. 206, 212 (1953) (applying this principle to aggressor States implies that an aggressor State should not benefit from *jus in bello*).

forces benefited from belligerent rights found in *jus in bello* during the conduct of that invasion; *jus in bello* tolerates incidental civilian death and destruction if proportionate to the military ends.⁶ While one can argue that Iraqi forces did not actually acquire *jus in bello* privileges from the invasion—that they were, instead, technically acquired through the application of positive law which created *jus in bello*'s privileges and strictures—the practical effect is the same.⁷ By triggering an armed conflict through a violation of *jus ad bellum*, an aggressor such as Hussein also triggers international humanitarian law that provides rights to, as well as imposes obligations on, his armed forces equal to that of the victim's belligerent forces, seemingly in violation of *ex injuria jus non oritur*.

International criminal law partially rectifies this apparent injustice by criminalizing clear *jus ad bellum* violations. The international crime of aggression, codified in the Rome Statute of the International Criminal Court, criminalizes manifest violations of *jus ad bellum*.⁸ Applied to the Iraq invasion of Kuwait, such criminalization would theoretically result in the criminal conviction and punishment of Saddam Hussein and other national leaders responsible for the illegal invasion, without attaching criminality to Iraqi soldiers' individual acts on the battlefield. The soldiers' acts of warfare, as long as conducted in accordance with *jus in bello*, would remain immune from prosecution despite their context of supporting a criminal war of aggression. This is international law's incentive structure, one designed to limit the effects of war by shielding from criminal prosecution acts of warfare as long as *jus in bello* rules are followed.⁹

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6. See 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. OF INT'L L. 47, 52-53 (2008) (explaining that while *in bello* proportionality tries to limit needless suffering in war, harm to civilians is anticipated with use of force).
 7. See Francois Bugnion, *Just Wars, Wars of Aggression and International Humanitarian Law*, 2 INT'L STUD. J. 39, 48 (2005) (characterizing the maxim of *ex injuria jus non oritur* as "irrelevant" in situations of aggressive war, arguing that the rights found in *jus in bello* flow not from the fact of war itself but from the conventions governing such a war).
 8. See *infra* Part II; see also The Rome Statute of the International Criminal Court, art. 8bis, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), <http://www.icc-cpi.int/iccdocs/PIDS/publications/RomeStatutEng.pdf> [<https://perma.cc/NK5E-Y74R>] [hereinafter Rome Statute].
 9. Cf. David Rodin, *Two Emerging Issues of the Jus Post Bellum: War Termination and the Liability of Soldiers for Crimes of Aggression*, in *JUS POST-BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE* 53, 62 (C. Stahn & J.K. Kleffner eds., 2008)

Prosecuting the crime of aggression, in theory, provides individual criminal accountability for the senior leaders of government for starting and conducting wars of aggression, thereby furthering international criminal law's goals of deterrence and retribution. Concurrently, the *jus in bello* separation from *jus ad bellum*, instead of allowing a criminal to, in a sense, gain from their criminal acts, mitigates the suffering experienced by the victims of the crime of aggression through *jus in bello*'s set of rules governing warfare.¹⁰ Yet, since Nuremberg's controversial development and implementation of the crime of aggression's predecessor, the crime against peace, there have been no criminal prosecutions for the crime of aggression, and it is unclear when such a prosecution may occur.¹¹ Hence, the equal application of *jus in bello* to both aggressor and victim forces appears particularly jarring, immunizing the Hussein-type aggressors from criminal accountability for their war's resultant death and destruction.

However, international criminal tribunals have the increasing capacity and will to judge individual soldiers and statesmen regarding war crimes, that is, violations of *jus in bello*.¹² This so-called "judicialization of armed conflict"¹³ is typified by the *ad hoc* international criminal tribunals established by the United Nations

(describing the immunity for fighting in an unjust war currently enjoyed by soldiers as the "liability gap").

10. Yet, it cannot be ignored that *jus in bello*, through its balance of military necessity with humanitarian desires, while reducing the suffering experienced by civilians and combatants in war, certainly does not eliminate it. But wars conducted under its rules are less horrific than those that are not. Hence, international law has chosen to immunize from criminal prosecution those soldiers who abide by its strictures.
11. See generally Manuel J. Ventura and Matthew Gillett, *The Fog of War: Prosecuting Illegal Uses of Force as Crimes Against Humanity*, 12 WASH. U. GLOBAL STUD. L. REV. 522, 524 n. 2 (2013) [hereinafter Ventura & Gillett, *The Fog of War*] ("In short, the ICC is unlikely to try an aggression case in the foreseeable future.").
12. See JAMES GOW, WAR AND WAR CRIMES: THE MILITARY, LEGITIMACY, AND SUCCESS IN ARMED CONFLICT 5 (2013). By war crimes this Article refers to serious violations of international humanitarian law (the law of armed conflict, or *jus in bello*). See generally ANTONIO CASSESE, ET. AL, CASSESE'S INTERNATIONAL CRIMINAL LAW 65 (3d ed. 2013) [hereinafter CASSESE'S ICL]; Fausto Pocar, *The Criminalization of The Violations of International Humanitarian Law from Nuremberg to the Rome Statute*, in WAR CRIMES AND THE CONDUCT OF HOSTILITIES 3 (Fausto Pocar et al. eds., 2013).
13. Gow, *supra* note 12, at 5, citing Elspeth Guild, *The Judicialisation of Armed Conflict: Transforming the Twenty-First Century*, in THE POLITICS OF PROTECTION: SITES OF INSECURITY AND POLITICAL AGENCY 122-35 (Jef Huysmans et. al., eds. 2006).

Security Council, for Yugoslavia (ICTY)¹⁴ and Rwanda (ICTR),¹⁵ the Special Court for Sierra Leone (SCSL),¹⁶ as well as by the international community's sole permanent criminal court, the International Criminal Court (ICC).¹⁷ To hold serious transgressors of *jus in bello* accountable for their actions, such courts have made great strides in translating the regulatory, operational rules found in international humanitarian law into criminal standards.¹⁸

Despite these courts' efforts, ambiguity remains regarding war crimes' specific contours. Most relevant for this Article, the last few decades of international criminal prosecutions for war crimes reveal that *jus ad bellum* and *jus in bello* do not exist in hermetically sealed universes.¹⁹ The intersection of the two legal regimes—a junction this Article utilizes to potentially find criminal accountability for the crime of aggression—is reflected most often in debates regarding *jus*

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14. Statute of the International Tribunal for the Prosecution of Persons responsible for the Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, May 25, 1993, UN Doc. S/RES/827 [hereinafter ICTY].
 15. Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1004, S.C. Res. 955, Nov. 8, 1994, UN Doc. S/RES/955 [hereinafter ICTR].
 16. Statute of the Special Court for Sierra Leone, S.C. Res. 1315, Aug. 14, 2000, <http://www.rscsl.org/Documents/scsl-statute.pdf> [<https://perma.cc/WL7C-LLZN>] (last visited July 21, 2015).
 17. See Beth Fain, *The International Criminal Court: An Eminent Impact on A Hesitant United States*, 35 TEX. TECH. L. REV. 163, 165 (2004); see also Peggy E. Rancilio, *From Nuremberg to Rome: Establishing an International Criminal Court and the Need for U.S. Participation*, 77 U. DET. MERCY L. REV. 155, 179-80 (1999).
 18. See generally Rogier Bartels, *Dealing With The Principle of Proportionality In Armed Conflict In Retrospect: The Application of The Principle in International Criminal Trials*, 46 ISR. L. REV. 271, 271 (2013) (noting that *jus in bello* “has been significantly clarified and developed by international criminal tribunals and courts” (emphasis added)).
 19. The opinion of the International Court of Justice (ICJ) in the *Nuclear Weapons Advisory* case also reflects an acknowledged intersection between the two legal frameworks. See *Nuclear Weapons Advisory*, *supra* note 3, at 226; cf. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 161-62 (4th ed. 2005) [hereinafter DINSTEIN, *WAR*] (describing the ICJ's *Nuclear Weapons Advisory* opinion as “enigmatic and vexing” and potentially an “extreme departure from the concept that the *jus in bello* applies equally to all belligerents, irrespective of...the *jus ad bellum*”); see generally Sloane, *supra* note 6, at 49 (describing the overlap between the two regimes).

in bello's principle of proportionality, violations of which are criminalized through the crime of disproportionate attack.²⁰ For example, critics of the ICTY prosecutor²¹ contended that operators of the NATO aerial bombing campaign over Kosovo in 1999 should have been held to more restrictive legal standards regarding the foreseen but unintended civilian casualties and destruction of civilian property given the overall military campaign's humanitarian *raison d'être*.²² They also charged that the humanitarian motive behind the overall military campaign inappropriately relaxed interpretations and assessments of *jus in bello*, such as the calculus involved in the proportionality principle.²³ In contrast, the independence of the two

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20. The *jus in bello* proportionality principle prohibits attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, art. 51(5) [hereinafter AP I].
 21. See, e.g., Anne-Sophie Massa, *Nato's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion?*, 24 BERKELEY INT'L L. 610, 618 (2006); cf. FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA, ICTY Doc. PR/P.I.S./510-E, June 13, 200, 39 I.L.M. 1257 (2000), available at <http://www.icty.org/sid/10052#IVB3> [<https://perma.cc/Y2FB-N5YM>][hereinafter FINAL REPORT TO THE PROSECUTOR].
 22. See, e.g., Michael Bothe, *The Protection of the Civilian Population and NATO Bombing in Yugoslavia: Comments on a Report to the Prosecutor of the ICTY* 12 EUR. J. INT'L L. 531, 535 (2001) (suggesting a heightened proportionality targeting equation in humanitarian interventions); cf. Frederic Megret, *Jus In Bello as Jus Ad Bellum*, 100 Am. Soc'y Int'l L. Proc. 121, 122 (2006) (describing a "tension between the rhetoric of a 'humanitarian' intervention and taking advantage of all the still rather permissive elasticity of the laws of war"). There were also those that charged that the humanitarian nature of NATO's intervention caused the rules to be retroactively applied less rigorously. See, e.g., Sloane, *supra* note 6, at 96 (suggesting that the humanitarian impetus behind NATO's intervention influenced the *ex post facto* assessments of proportionality by the ICTY prosecutor, loosening the rules and thereby legally allowing greater civilian casualties and damage to civilian property than what the standard was supposed to allow).
 23. This same dynamic was, per some scholars, also present earlier in the decade in the 1991 Gulf War, in which Iraq was forced out of Kuwait following Iraq's illegal invasion: *jus ad bellum*, it was maintained, inappropriately affected the interpretation of *jus in bello* proportionality, allowing greater civilian casualties because of the *jus ad bellum* propriety of the conflict itself. See Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM J. INT'L L. 391, 412 (1993) ("It seems

legal regimes has been underscored by at least one tribunal. The SCSL Appeals Chamber, in overturning a trial chamber decision to mitigate punishment for war crimes based on what it considered a worthy cause for the resort to force, emphasized that:

[I]nternational humanitarian law specifically removes a party's political motive and the "justness" of a party's cause from consideration. The basic distinction and historical separation between *jus ad bellum* and *jus in bello* underlies the desire of States to see that the protections afforded by *jus in bello* (i.e., international humanitarian law) are "fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflicts."²⁴

Despite this emphatic statement, there is at least one gray area in the current framework of *jus in bello* that reflects an overlap between the two legal regimes, one that could potentially be used to criminalize egregious *jus ad bellum* violations through a war crime prosecution. As background, scholars in the field of philosophical ethics are particularly consistent in their calls for changed conceptions of the dichotomy of the *jus belli*, specifically to delimit the contours of the *jus in bello* proportionality principle.²⁵ Some argue, from a moral standpoint, that the military advantage that must be weighed against civilian casualties and damage within the proportionality standard derives its value from the war itself; hence, if *jus ad bellum* is not satisfied, the *jus in bello* military advantages are severely undermined, and vice versa.²⁶ Per this reasoning, belligerents pursuing an

unlikely that the international community would have tolerated the scale of civilian casualties in the conflict if it were not for the consensus that Iraq's action had no legal or moral basis.").

24. See Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-A, Appeal Judgment, 529-31 (May 28, 2008) (describing the separation between *jus in bello* and *jus ad bellum* as a "bedrock principle" of the law of war).
25. See e.g., Jeff McMahan, *The Ethics of Killing in War*, 34 PHILOSOPHIA 23, 23-41 (2006); see also Thomas Hurka, *Proportionality in the Morality of War* 33 PHIL. & PUB. AFF. 34, 35 (2005) [hereinafter McMahan, *The Ethics of Killing in War*]; cf. David Rodin, *The Liability of Ordinary Soldiers for Crimes of Aggression*, 6 WASH. U. GLOBAL STUD. L. REV. 591, 597 (2007) [hereinafter Rodin, *Liability*] (additionally providing a consequentialist argument for expanding proportionality to consider the war's aims).
26. See McMahan, *The Ethics of Killing in War*, supra note 25, at 29 ("One cannot evaluatively weigh the "mischief" caused by an act of war against the contribution the act would make to the probability of a mere *event*; one must also have some sense of the importance or value of

aggressive war contra *jus ad bellum* should not enjoy equal privileges in pursuing such improper ends.²⁷

Various legal scholars have made similar calls to incorporate *jus ad bellum* factors within the *jus in bello* proportionality analyses, particularly regarding asymmetric conflicts against non-state actors.²⁸ Some outline what they deem a “fuller” interpretation of proportionality that takes into account *jus ad bellum* propriety.²⁹ Others criticize what they deem as *jus ad bellum* assessments improperly entering the “backdoor” of *jus in bello* proportionality balancing equations when what appear to be *jus ad bellum* considerations of protection of the attacking State’s civilians are at play.³⁰ While there is also debate regarding the impact of adherence to

the event. If one’s cause is unjust, the value of the event – victory – would presumably be negative, not positive.”).

27. 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, 547 (2009) (describing McMahan’s moral objections to the concept of equal application of *jus in bello* standards regardless of *jus ad bellum* considerations).
28. Legal scholars have questioned the separation of *jus ad bellum* and *jus in bello* in other contexts as well, such as at the intersection of the principles of military necessity and distinction and the propriety of killing belligerents based on their status as such. *See, e.g.*, Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. OF LEGAL ANALYSIS 115,128 (2010).
29. *See, e.g.* Benvenisti, *supra* note 27 at 546 (describing a “fuller account of the *jus in bello* proportionality analysis” that takes into account “the legitimacy of the pursuit of the military goals”). *See also* Inger Osterdahl, *Dangerous Liaison? The Disappearing Dichotomy between Jus ad Bellum and in Bello*, 78 NORDIC J. OF INT’L L. 553-566, (2010) (outlining existing points of contact between the legal frameworks); *see generally* Enzo Cannizzaro, *Contextualising proportionality: jus ad bellum and jus in bello in the Lebanese war*, 88 INT’L REV. RED CROSS 864 (2006) (suggesting that *jus ad bellum* consider *jus in bello* proportionality); *see also* Megret, *supra* note 22, at 122 (“how about asking more of States in terms of *jus in bello* in certain cases on the basis of their *jus ad bellum* motivation for going to war?”)
30. Eliav Lieblich, *Reflections on the Israeli Report on the Gaza Conflict*, JUST SECURITY (June 24, 2015), <http://justsecurity.org/24197/reflections-israeli-report-gaza-conflict/> [<https://perma.cc/P52T-9Q6Z>]. Additionally, similar to the above NATO example, States have also been criticized when deemed as importing *jus ad bellum* into *jus in bello* proportionality calculations; States have utilized so-called “just war logic” in conflicts against non-state actors to inappropriately justify relaxed interpretations of *jus in bello* as well as to justify outright violations. *See, e.g.*, Jasmine Moussa, *Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law*, 872 INT’L REV. RED CROSS 963, 964, 988 (2008) (describing the United States’ “war on terror” as one “in which self-defense against the grave threat of terrorism has been invoked to justify

jus in bello on the propriety of a State's *jus ad bellum* justifications,³¹ this Article focuses on how the legality of an armed conflict or use of force under *jus ad bellum* affects *jus in bello* analyses, particularly regarding proportionality. Instead of calling for a definitive change in the laws regulating the battlefield, this Article proposes utilizing the already-opaque contours of the proportionality principle to criminalize the crime of aggression as a war crime. It highlights that there may be a *jus ad bellum* component already within the extant *jus in bello* proportionality principle, one derived from that principle's contextual core.

This Article assays the possibility of *jus ad bellum* factoring into the *jus in bello* war crime of disproportionate attack, exclusively for those individuals in leadership positions, such as Iraq's Hussein who would otherwise be criminally liable for the crime of aggression. Part I briefly sketches the modern contours of the distinction between *jus ad bellum* and *jus in bello*, highlighting the historical, teleological, and pragmatic factors behind their separation. This summary treatment is foundational for demonstrating that the two frameworks' intersection, when assessing criminal liability for the war crime of disproportionate attack exclusively for those individuals who engage in the crime of aggression, aligns with both legal regimes' purposes. Part II summarizes the development and need for criminalizing aggression, and provides an elemental overlay of violations of war crimes. This prosecutorial overlay could potentially be used as a tool for providing criminal accountability for those who commit the crime of aggression. Part III discusses a hypothetical prosecution of the crime of aggression as a war crime of disproportionate attack, finding it the most logical vehicle for addressing the crime of aggression within a war crime.

In conclusion this Article notes that the international criminal prosecution of *jus ad bellum* criminal aggressors through the war crime of disproportionate attack may be criticized as violating the *nullum crimen nulla poena sine lege* principle; it is susceptible to criticisms similar to those lodged against Nuremberg's crime against the peace.³² Necessary work remains to be done by States to appropriately evolve *jus in bello* to take into consideration the context of modern warfare, with its largely asymmetric nature and

all kinds of excesses, while also implying that the terrorist, whose recourse to force is clearly illegal, is prevented from enjoying the protections of international humanitarian law").

31. See generally Robert D. Sloane, *supra* note 6, at 47; see also Nuclear Weapons Advisory, *supra* note 3, at 226.
32. See generally CASSESE'S ICL, *supra* note 12, at 24-30 (outlining how the post-World War II international tribunals dealt with criticisms that the crime against peace was afoul of the principle of legality).

devastating effects on civilian populations. Such evolution is necessary if States are to remain faithful to the laws of humanity and their own professed allegiance to the dignity of all mankind.

I. JUS AD BELLUM AND JUS IN BELLO

A. *Modern Contours*

The separate legal regimes of the *jus belli* operate primarily at different levels. At the macro level is the modern *jus ad bellum*, the international legal architecture delineating when and why States can lawfully use armed force against other States.³³ Its modern centerpiece is the United Nations (UN) Charter, which prohibits the inter-state use of armed force except in limited cases of self-defense, or when authorized by the United Nations Security Council for purposes of collective security.³⁴ This relatively sparse treaty legal regime, focused exclusively on inter-state armed violence, is informed by less clear customary international law.³⁵ For example, the Charter's exceptional lawful use of force in self-defense is supplemented by the customary

33. See Greenwood, *supra* note 2. While the term itself refers expressly to war (*bellum*), *jus ad bellum* in recent years is typically used to refer to the legality of States' use of armed force, regardless of whether such use rises to the level of what constitutes war, or armed conflict. See DINSTEIN, WAR *supra* note 19, at 85–91.

34. "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2, para. 4. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. Charter, art. 51.

35. See generally *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U. S.), 1986 I. C. J. 14, para 34 (June 27) [hereinafter *Nicaragua* case] ("There can be no doubt that the issues of the use of force and collective self-defense...are regulated both by customary international law and by treaties, in particular the United Nations Charter."); see also Ian Brownlie, *International Law and the Use of Force by States Revisited*, CHINESE J. INT'L L. 1, 6 (2002) (hereinafter Brownlie, *Revisited*) (pointing to a "continuing role of customary international law relating to the use of force"); see generally Christine Gray, INTERNATIONAL LAW AND THE USE OF FORCE 150 (Malcolm Evans & Phoebe Okowa eds., 3d ed. 2008) (describing necessity and proportionality as key customary law components of the *jus ad bellum*). Customary international law regarding *jus ad bellum* also consists of issues such as what State actions constitute an armed attack. See *eg* DINSTEIN, WAR *supra* note 19, at 201 (explaining *Nicaragua* case's attribution to customary international law of armed attack's inclusion of sending of irregulars into another State's territory).

principles of necessity, proportionality, and immediacy, based not on treaty language but rather on State practice and *opinio juris*.³⁶

In contrast to *jus ad bellum*'s concise international legal regime, intended to severely limit States' resort to armed force, the micro level of war—how it is fought and the protections accorded to victims—is robustly regulated by international law via a plethora of treaty and customary provisions. *Jus in bello*, typically referred to today as international humanitarian law or the law of armed conflict (LOAC),³⁷ delimits the means and methods of war and provides treatment standards for those in opposing sides' custody.³⁸ Unlike the Charter *jus ad bellum*, which is concerned with the use of armed force among and between States,³⁹ *jus in bello* regulates, in varying degrees, both inter and intra-state armed violence: armed conflicts⁴⁰ between and among States as well as civil wars, for example, within a State.⁴¹

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36. See generally Gray, *supra* note 35 at 147; see also DINSTEIN, WAR *supra* note 19, at 237-243 (outlining the substance of the customary principles of necessity, proportionality, and immediacy). The International Court of Justice has stated that proportionality and necessity are “rule[s] of customary international law.” See *Nuclear Weapons Advisory*, *supra* note 3, at ¶ 41.
37. This article uses these three terms (*jus in bello*, international humanitarian law (IHL), and the law of armed conflict) interchangeably and neutrally.
38. *Jus in bello* also regulates the government of occupied territory, and some consider it to also include the law of neutrality; see GREENWOOD, *supra* note 2, at 13 (describing the law of neutrality as a “distinct branch of the laws of armed conflict” which regulates relations between States not party to a conflict and those who are).
39. Cf. LUBELL, *supra* note 3, at 9 (finding that *jus ad bellum* is of “crucial concern” when States resort to armed force extraterritorially against non-state armed groups because another State's territory is involved).
40. Due to a desire to limit law avoidance by States trying to evade the application of *jus in bello* by not engaging in the formal activities required to trigger technical war designation, the Geneva Conventions utilize the term “armed conflict” to denote a de facto, objective condition of hostilities that triggers its legal rules. See Int'l Comm. of the Red Cross, Commentary on the I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 49–50 (Jean S. Pictet ed., 1952), http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf [<https://perma.cc/GKK8-49J3>] [hereinafter Commentary to Geneva Convention I]; see also Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I].
41. See generally GEOFFREY S. CORN ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 103, 35 (2012) [hereinafter CORN ET AL., AN OPERATIONAL APPROACH]; GARY D. SOLIS, THE LAW OF ARMED CONFLICT 22 (2010); DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 3, at 3.

Its conventional sources include the four Geneva Conventions of 1949, their Additional Protocols of 1977, the 1907 Hague Regulations and other treaties.⁴² While the Geneva Conventions themselves have earned near-universal ratification, the other treaties have not.⁴³ Customary international law plays a huge role in both extending the reach of particular provisions of relevant treaties, as well as in developing and signaling their accepted meanings.⁴⁴

Developed as a result of different historical influences and at different times,⁴⁵ these legal frameworks share related but distinct objectives: modern *jus ad bellum* aims to limit the use of armed force as a means of national policy by States, thereby limiting the frequency of war, in order to maintain stability of the “international social order.”⁴⁶ International humanitarian law, in contrast, works to limit the actual suffering wrought by war: “its purpose is almost entirely humanitarian in the literal sense of the word . . . to rescue life from the savagery of battle and passion.”⁴⁷ Yet *jus in bello*’s “desire to

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42. See GREENWOOD, *supra* note 2, at 11; see generally CORN ET AL., AN OPERATIONAL APPROACH, *supra* note 41 at 40-50 (listing the treaties deemed to constitute conventional international humanitarian law).
43. For example, the United States is not a State Party to the Additional Protocols I and II. See *Treaties and State Parties to Such Treaties*, INT’L COMM. RED CROSS, https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=US [<https://perma.cc/H5DX-XC82>] (last visited Aug. 24, 2015).
44. See Jean-Marie Henckaerts, *Study on Customary International Law: A contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. OF THE RED CROSS, No. 857 (2005), https://www.icrc.org/eng/assets/files/other/icrc_002_0860.pdf [hereinafter *ICRC Study*].
45. A history of these legal regimes is outside the scope of this Article, but numerous wonderful such resources exist. See, e.g., LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* (3d ed. 2008); see generally GREENWOOD, *supra* note 2.
46. Raphael Steenberghe, *Proportionality under Jus Ad Bellum And Jus In Bello: Clarifying Their Relationship*, 45 ISR. L. REV. 107, 118 (2012) (describing the aim of *jus ad bellum*, or at least its proportionality principle, as “to minimize the disturbance of the international social order”). See also Ian Brownlie, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 112 (1963).
47. Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. OF INT’L L. 360, 363-4 (1952), reprinted in JUDITH GARDAM, ed., *HUMANITARIAN LAW* (1999); see also U.S. Department of Defense Law of War Manual, June 12, 2015, para. 1.3.4, (“[t]he main purposes of the law of war are: protecting combatants, noncombatants, and civilians from unnecessary suffering”), <http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf> [<https://perma.cc/H8P4-N52L>].

diminish the evils of war”⁴⁸ is balanced with military necessity.⁴⁹ *Jus in bello* is not purely humanitarian in nature because it only limits, vice prohibits, the killing of innocent civilians and destruction of civilian property as a corollary of military necessity; the law is pragmatic at heart.⁵⁰ Furthermore, because of their unique purposes, modern international humanitarian law and *jus ad bellum* primarily regulate, or at least influence, the decision-making of different types of State actors: *jus ad bellum* is directed toward those deciding to engage in armed conflict⁵¹ while *jus in bello* focuses primarily on those engaged in the fighting.⁵²

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48. Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 22, Oct. 18, 1907, 36 Stat. 2277 (entered into force Jan. 26, 1910), available at <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4D47F92DF3966A7EC12563CD002D6788&action=openDocument> [<https://perma.cc/A9G5-88FN>] [hereinafter Hague IV].
49. See CORN ET AL., AN OPERATIONAL APPROACH, *supra* note 41, at 112; see also DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 3, at 5 (referring to this body of law as a “compromise formula” between military necessity and humanitarian considerations); Michael N. Schmitt, *Military necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT’L L., 795, 796 (2010) (“the delicate balance ...preserves the viability of IHL in a state-centric normative architecture”); Wolff Heintschel von Heinegg, *Asymmetric Warfare: How to Respond?* 87 INT’L L. STUD. SER. US NAVAL WAR COL. 463, 465 (2011) (finding that the law of armed conflict establishes “an operable balance...that...does not make warfare impossible”).
50. See DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 3, at 5 (“it can be categorically stated that no part of [the *jus in bello*] overlooks military requirements”).
51. International criminal law, beginning with Nuremberg and continued by the Rome Statute of the International Criminal Court, recognizes that only certain high-level decision-makers are responsible for *jus ad bellum* decisions. See generally KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 184-188 (2011) (describing the “leadership requirement” necessary for individual criminal responsibility for waging aggressive war contra *jus ad bellum*) [hereinafter HELLER, THE NUREMBERG MILITARY TRIBUNALS]; see also *USA v. Wilhelm von Leeb et al.*, Trials of War Criminals before the Nuernberg Military Tribunals, Vol. XI, 490 (holding that “[t]hose who commit the crime are those who participate at the policy making level in planning, preparing, or in initiating war. After war is initiated, and is being waged ... [t]he crime at this stage likewise must be committed at the policy making level”). See The Crime of Aggression, I.C.C. Res.6 (June 11, 2010), available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf [<https://perma.cc/2ZY7-KMWF>] (including as an element of the crime of aggression the requirement that “[t]he perpetrator was a person in a position effectively to exercise control over or to direct the political or

B. Separation of Jus ad Bellum and Jus in Bello

Because it developed during what was known as the “war as fact” period, in which resort to war was considered a sovereign prerogative, none of the nineteenth and early twentieth century foundational codifications of today’s *jus in bello* made any of the protections or limitations on means and methods contingent on who was in the legal or moral right regarding the war itself.⁵³ Hence, when international law experienced an extreme about-face in its treatment of war in the early twentieth century—pivoting from a *jus ad bellum* which largely viewed war as a legal means of national policy, to prohibiting it—*jus in bello* retained its original neutral quality.⁵⁴ The *jus ad bellum* reversal formally began after World War I, with first the Covenant of the League of Nations and then the Kellogg-Briand Pact⁵⁵ outlawing war as an instrument of national policy.⁵⁶ This pivot culminated in its modern form in the UN Charter, the codification of modern *jus ad bellum*.⁵⁷

As international humanitarian law was updated following World War II alongside this new *jus ad bellum* framework, it continued its independent application both in the 1949 Geneva Conventions and in their 1977 Additional Protocols, the latter merging the traditional Geneva and Hague traditions.⁵⁸ Article 2, common to all four

military action of the State which committed the act of aggression”) [hereinafter AGGRESSION RESOLUTION].

52. Of course there are times, such as when approving targets at high levels, that these decision-makers are one and the same, such as President Barack Obama’s approval of the raid targeting Osama Bin Laden. See Mark Bowden, *The Death of Osama Bin Laden: How the U.S. Finally Got its Man*, THE GUARDIAN (Oct. 12, 2012), <http://www.theguardian.com/world/2012/oct/12/death-osama-bin-laden-us> [https://perma.cc/85LN-L54H].
53. DINSTEIN, WAR, *supra* note 19, at 76, citing A.S. HERSHEY, THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW 349 (1912) (characterizing war prior to World War I as “a right inherent in sovereignty itself”).
54. DINSTEIN, WAR, *supra* note 19, at 156 (characterizing this development as a “drastic modification of the *jus ad bellum*”).
55. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact].
56. See generally Brownlie, *Revisited*, *supra* note 35, at 6; see also DINSTEIN, WAR, *supra* note 19, at 83.
57. Article 2(4)’s prohibition against the use of inter-state force also constitutes customary international law. See generally Gray, *supra* note 35, at 30 (finding that it also constitutes *jus cogens*, but its scope remains undefined).
58. See generally CORN ET AL., AN OPERATIONAL APPROACH, *supra* note 41, at 48-49 (discussing the merger effected by the 1977 protocols).

conventions, states that it applies in “all cases of declared war or of any other armed conflict,” and Article 1, also common to all four conventions, states that the conventions apply “in all circumstances.”⁵⁹ Additionally, Protocol I’s preamble states that *jus in bello* should apply “without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.”⁶⁰ Furthermore, instead of war, with its formal triggering mechanisms carried over from the just war period, modern *jus in bello* is triggered by a *de facto* state of hostilities, with the causes for such hostilities irrelevant.⁶¹

The idea that modern international humanitarian law operates independently from the UN Charter’s *jus ad bellum* framework, one that prohibits the resort to armed force except in cases of self-defense or when authorized by the Security Council, is considered axiomatic.⁶²

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59. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 1, 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, available at <http://www.unhcr.org/refworld/docid/3ae6b36d2.html> [<https://perma.cc/NJ2C-NSMB>] [hereinafter GC IV]; see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, at preamble, June 8, 1977, 1125 U.N.T.S. 3, available at <http://www.unhcr.org/refworld/docid/3ae6b36b4.html> [<https://perma.cc/3GRQ-LSWF>] [hereinafter Additional Protocol I]; see also Int’l Comm. of the Red Cross, Commentary on the III Geneva Convention Relative to the Treatment of Prisoners of War art. 1 (Jean S. Pictet ed., 1960) (“It is clear, therefore, that the application of the Convention does not depend on whether the conflict is just or unjust. Whether or not it is a war of aggression, prisoners of war belonging to either party are entitled to the protection afforded by the Convention.”) [hereinafter Commentary to GC III].
60. However, controversial components of Additional Protocol I reflect *jus ad bellum* considerations in their treatment of wars of national liberation as well as their relaxed standards for guerilla movements to obtain combatant status; such components are not considered customary international law. See generally Megret, *supra* note 22, at 121-22.
61. See Commentary to Geneva Convention I, *supra* note 40, at art. 2 para. 1 (“[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war). See also Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (requiring organized armed groups and intensity of violence for certain duration as triggering non-international armed conflict).
62. See generally WILLIAM H. BOOTHBY, THE LAW OF TARGETING 490 (2012) (describing this equality of application as a “well-established principle”); see also MARCO SASSOLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR 85 (1999) (concluding that there is a “complete separation between the *ius ad bellum* and *ius in bello*,” such a division “implies that IHL applies whenever there is *de facto* an armed

Acceptance of such autonomous operation is reflected not only in academic circles, but in State practice, jurisprudence, and the law itself.⁶³ Regardless of the legality or illegality of the war—the adherence or not to the UN Charter *jus ad bellum*—international humanitarian law regulates all parties to a conflict equally; this is referred to as the principle of equal application.⁶⁴ Stated differently, *jus in bello* grants the same privileges and duties to all parties based on a *de facto* existence of armed conflict, unaffected by *jus ad bellum* considerations.⁶⁵ As applied, if a State wages an illegal war of aggression, for example Iraq’s 1991 invasion of Kuwait, yet it adheres to the regulations contained in *jus in bello*, it can lawfully prosecute an unlawful war. Its leaders would be, theoretically, criminally liable for the international crime of aggression, but no one would be liable for the incidental deaths and destruction caused by military operations conducted pursuant to *jus in bello*.⁶⁶ The reason for this anomalous result is that by thus insulating *jus in bello* from *jus ad bellum*, international law pragmatically incentivizes adherence to the former.⁶⁷ Yet such insulation for those controlling the reins of government makes little sense, as their liability for the incidental deaths and destruction in war does not *per se* lessen their forces’ adherence to *jus in bello*.

conflict...and that no *jus ad bellum* arguments may be used in interpreting IHL”); *see generally* Bugnion, *supra* note 7 at 39 (critiquing proposals to require differentiated *jus in bello* standards for aggressors, finding equal application works best for humanitarian reasons).

63. *See generally* Antoine Bouvier, *Assessing the Relationship Between Jus in Bello and Jus ad Bellum, An “Orthodox” View*, 100 AM. SOC’Y INT’L L. PROC. 109, 110 (2006).
64. Moussa, *supra* note 30, at 967.
65. *See* GREENWOOD, *supra* note 2, at 10 (“Once hostilities have begun, the rules of IHL apply with equal force to both sides in the conflict, irrespective of who is the aggressor”); *see also* BOOTHBY, *supra* note 62, at 490 (describing this equality of application as a “well-established principle”); *see also* William A. Schabas, *Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and The Law of Armed Conflict, And The Conundrum of Jus Ad Bellum*, 40 ISR. L. REV. 592, 593 (2007) (“International humanitarian law is predicated on an indifference to the origin of the conflict.”); *see also* Theodor Meron, *Shakespeare’s Henry the Fifth and The Law of War*, 86 Am. J. Int’l. L. 1, 12 (1992) (stating that “[i]n contrast to medieval law, most modern rules of warfare (e.g., on requisitioning property and the treatment of prisoners of war and civilians, that is, *jus in bello*) apply equally to a state fighting a war of aggression and to one involved in lawful self-defense.”).
66. Senior military personnel may be liable for the crime of aggression if they fulfill the leadership element.
67. *See* Jeff McMahan, *Morality, Law, and The Relation Between Jus Ad Bellum and Jus in Bello*, 100 AM. SOC’Y INT’L L. PROC. 46, 48 (2006).

This independent operation of *jus ad bellum* and *jus in bello* results in the equal application of the *jus in bello* to all parties to a conflict, and frankly made sense when there was parity on the *jus ad bellum* scene. However, this independence strengthened despite the momentous change in the *jus ad bellum* framework; such change removed the parity of warring parties by outlawing armed force as a means of national policy plus eventually criminalizing such wars of aggression.⁶⁸ In addition to the historical influences outlined above, the equal application of *jus in bello*, despite the lack of equality of parties on the *jus ad bellum* level, stems largely from the overt recognition of the teleological purposes of the former: “[w]hy try to put an end to the unnecessary hardships of war? Out of respect for human personality, which centuries of civilization have gone to create.”⁶⁹ *Jus in bello* as a legal regime attempts to mitigate suffering and reduce the violence associated with armed conflict, balanced with the recognition that warring parties still need to be able to achieve necessary military objectives—itsself a paradoxical equipoise driven by mankind’s lamentable refusal to suppress armed violence.⁷⁰

While the indifferent application, one blind to the causes of the conflict, of *jus in bello* rests on that body of law’s overarching humanitarian goals, that does not logically mean that *jus ad bellum* and *jus in bello* have to remain independent for *all* players on both sides of conflict. The principle of equal application incentivizes those executing military force in an armed conflict to follow that body of law by granting them immunity for death and destruction they cause

68. DINSTEIN, WAR, *supra* note 19, at 156.

69. Commentary to Geneva Convention I, *supra* note 40 (explaining that the purpose of the 1949 Geneva Convention is “the same desire, now extended to others as well as to the wounded and sick, to mitigate the evils inseparable from war, to ameliorate the lot of the war victims, and to put an end to unnecessary hardships”).

70. The equal application principle works in practice regarding non-state actors because of the accommodations in international humanitarian law itself for the asymmetry of the parties: *jus in bello* denies combatant immunity to non-state groups who fail to function like State militaries. *See generally* Jens David Ohlin, *The Combatant’s Privilege in Asymmetric & Covert Conflicts*, 40 YALE J. INT’L L. 337, 345 (2015) (describing this accommodation). While this denial may seem driven solely to reinforce State sovereignty, it rests on humanitarian grounds, as requirements such as bearing arms openly, wearing uniforms, and being responsible to a chain of command help both fulfill the principle of distinction and ensure adherence to the rest of *jus in bello*, thus limiting the effect of war on civilians. Failure to fulfill such requirements, while exposing non-state armed groups to domestic prosecution for violent acts such as murder, does not relieve the opposing State of its *jus in bello* requirements, resting as they do on humanitarian, not reciprocity-based, values. *See generally* Commentary to Geneva Convention I, *supra* note 40, at art. 2.

as long as their acts of violence are in accordance with its rules.⁷¹ The national leaders responsible for aggressive war in violation of *jus ad bellum* are not similarly incentivized to follow *jus in bello* by a separation of the two legal regimes. They are not, because even if *jus in bello* is violated by their forces, they are not typically criminally liable for such a war crime, *because they are not the ones executing the war*. Theoretically a national leader could be responsible for a *jus in bello* violation through a command responsibility theory of liability, but this is one quite difficult to prove, given that *jus ad bellum* decision-makers do not typically execute the actual military operations regulated by *jus in bello*. Hence, lessening the separation of the legal regimes for those most responsible for the death and destruction caused by aggressive war aligns with the purposes of *jus in bello*—if the merger exists solely in the leadership realm, and only for those manifestly violating *jus ad bellum*.

C. On Lessening The Separation

Modern war crimes trials have emphasized this division between legality of conduct in hostilities and that of *jus ad bellum*.⁷² Despite the overall illegality of Germany's wars of aggression, not all Nazi actions in World War II were *ipso facto* considered illegal. The International Military Tribunal at Nuremberg (IMT), faced with deciding the fate of the architects of the Holocaust and World War II, grappled with the potential legal linkage between war and warfare. Sir Hartley Shawcross, the British prosecutor who argued the case alongside Justice Robert Jackson from the United States, argued in his closing argument, in describing the indictments for crime against the peace, that:

The killing of combatants in war is justifiable, both in international and in municipal law, only where the war itself is legal. But where a war is illegal, as a war started not only in breach of the Pact of Paris but without any sort of warning or declaration clearly is, there is nothing to justify the killing, and

71. Adam Roberts, *The equal application of the laws of war: a principle under pressure*, 90 Int'l Rev. of the Red Cross No. 872, pg. 932 (Dec. 31, 2008), <https://www.icrc.org/eng/assets/files/other/irrc-872-roberts.pdf> [<https://perma.cc/KV7H-A3T4>].

72. See *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-A, Judgement, ¶1082 (Dec. 17, 2004) (“The unfortunate legacy of wars shows that ... many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a ‘just cause.’”).

these murders are not to be distinguished from those of any other lawless robber bands.⁷³

The IMT itself never addressed this claim directly, and its findings never addressed the killings of soldiers on the battlefield normally immunized under *jus in bello*; it did, however, put the above statement in context with its famous observation that “[t]o initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”⁷⁴

The American Nuremberg Military Tribunal (NMT), on the other hand, expressly disagreed with Sir Shawcross’s conflationary logic, stating in *the Hostages* trial that:

[W]hatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other.⁷⁵

Similarly, in the *Justice Trial*, the NMT opined that “under such reasoning, the rules of land warfare upon which the prosecution has relied would not be the measure of conduct, and the pronouncement of guilt in any case would become a mere formality.”⁷⁶ Additionally, in the *High Command* case, the NMT explicitly disagreed with the

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73. TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, Vol. XIX, 458 (1948), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XIX.pdf [<https://perma.cc/YEQ6-LRZ6>] (last visited July 9, 2015) (At the time Sir Shawcross was discussing the defendants’ culpability for crimes against the peace).
74. TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, Vol. XXII, 426 (1948), *available at* <http://avalon.law.yale.edu/imt/09-30-46.asp> [<https://perma.cc/E6KG-4DZE>].
75. *USA v. William List et al.*, TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, Vol. XI, 1247 (1950), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XI.pdf [<https://perma.cc/A7DY-BXWR>] [hereinafter *The Hostages Trial*].
76. *USA v. Altstotter et al.*, LAW REPORTS OF TRIALS OF WAR CRIMINALS, Vol. VI, 52 *selected and prepared by* United Nations War Crimes Commission (1947-9), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-6.pdf [<https://perma.cc/U6CJ-VJE5>].

prosecution when the latter argued that *jus in bello* military necessity could never be utilized by those guilty of aggressive war.⁷⁷

More recent international criminal jurisprudence agrees with the Nuremberg conclusion that *jus in bello* operates relatively autonomously, apart from *jus ad bellum*, thus applying *jus in bello* equally to all parties in an armed conflict.⁷⁸ The ICTY prosecution reaffirmed the distinction between the two regimes in its report regarding NATO's bombing campaign in Kosovo,⁷⁹ and the SCSL Appeals Chamber rebuked the trial chamber for its mitigation of punishment based on the defendant's just cause, stating that such action "provides implicit legitimacy to conduct that unequivocally violates the law—the precise conduct this Special Court was established to punish."⁸⁰ Finally, jurisprudence from the International Court of Justice (ICJ) generally affirms the separate application of *jus in bello* and *jus ad bellum*, despite confusion sowed by its conclusions in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.⁸¹

Sir Shawcross's sentiment, that all killing in an illegal war is murder, is reminiscent of one of the most common criticisms of the operation of international humanitarian law independent from *jus ad bellum*: that based on moral grounds, the immunity for killing granted in a legal war should be revoked in an illegal one, thereby making the killing and destruction crimes instead of privileged conduct.⁸² Per this

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77. *The German High Command Trial*, LAW REPORTS OF TRIALS OF WAR CRIMINALS, Vol. XII, 125, *selected and prepared by* United Nations War Crimes Commission (1949), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-12.pdf [<https://perma.cc/6GSY-5J9M>].
78. The Inter-American Commission on Human Rights in the *Tablada* case found that the "application of the law is not conditioned by the causes of the conflict." *See* Report No. 55/97, Argentina, Doc. 38, 1997, paras. 173-174.
79. *See* FINAL REPORT TO THE PROSECUTOR, *supra* note 22, para. 32. (noting that although "the precise linkage between *jus ad bellum* and *jus in bello* is not completely resolved... a certain crude reciprocity [of *jus in bello* obligations is] essential if the law was to have any positive impact").
80. *See* Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-A, Appeal Judgment, 529-30 (May 28, 2008) (describing the separation between *jus in bello* and *jus ad bellum* as a "bedrock principle" of the law of war).
81. *See generally* DINSTEIN, WAR *supra* note 19, at 161-62 (describing the ICJ's opinion as "enigmatic and vexing" and potentially a "dangerous departure from the concept that the *jus in bello* applies equally to all belligerents, irrespective of...the *jus ad bellum*.").
82. *See generally* McMahan, *The Ethics of Killing in War* *supra* note 25, at 30-33 (proposing a theory of accountability based on individual self-defense that finds "combatants who fight for an unjust cause" are not

argument, primarily made in normative ethics literature,⁸³ soldiers participating in conflicts in violation of *jus ad bellum* should not be accorded prisoner of war status; they should be “prosecuted and severely punished for any death or other injury that they may have caused in war.”⁸⁴ This call to destroy the independent operation of the two legal regimes for all participants on the unjust side of a conflict stems largely from moral reasoning that analogizes warfare to the individual right of self-defense, with soldiers fighting aggressive wars not justified in their use of force against soldiers fighting in accordance with *jus ad bellum*—because the latter “lack liability for force being used against them.”⁸⁵ This position denies a right to use self-defensive force against all those that pose a threat, because some who pose a threat, analogous to police officers, are justified in using force.⁸⁶ Some philosophers go even further and ascribe liability to attack to those “morally responsible” for the aggressive war, expanding such liability to both belligerents, (soldiers or members of an armed group,) as well as civilians.⁸⁷

Suggestions to infuse the *jus in bello* proportionality principle with *jus ad bellum* considerations are related to such asymmetrical arguments dealing with the moral and legal liability of belligerents killing other belligerents in war.⁸⁸ The principle of *jus in bello*

privileged to kill opposing combatants); see also DINSTEIN, WAR, *supra* note 19, at 157; see also Rodin, *Liability*, *supra* note 25, at 591 (characterizing the lack of accountability of soldiers for prosecuting wars of aggression as a “liability gap” to be remedied).

83. *But see* MICHAEL WALZER, JUST AND UNJUST WARS 34, 41, 21 (1977) (arguing for “the moral equality of soldiers” who possess “an equal right to kill” because it is “perfectly possible ... for an unjust war to be fought in strict accordance with the rules”). Walzer’s renewal of just war theory in the 1970s aligned the tradition with prevailing international law norms regarding the independence of the two legal regimes. See Jeff McMahan, *The Morality and the Law of War*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 19 (David Rodin & Henry Shue eds., 2008) [hereinafter McMahan, THE MORALITY] (stating that the law of war should be separated from morality).
84. DINSTEIN, WAR, *supra* note 19, at 157;
85. David Rodin, *LIABILITY*, *supra* note 25, at 592-93; McMahan, *THE MORALITY*, *supra* note 83, at 21-22 (explaining that individual self-defense, contra Walzer’s position, does not justify threat-based killing because not all those who pose a threat, such as a police officer using justified force or a victim using force in self-defense, forfeit their right not to be attacked in response).
86. See McMahan, *THE MORALITY*, *supra* note 83.
87. See McMahan, *THE MORALITY*, *supra* note 83.
88. David Rodin & Henry Shue, *Introduction*, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 2 (David Rodin & Henry Shue eds., 2008) (describing an “asymmetry thesis” which

proportionality, codified in Additional Protocol I to the Geneva Conventions (AP I), prohibits attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁸⁹ Some ethicists, vaguely echoed by some State treatment of proportionality,⁹⁰ argue that military advantages only possess instrumental value derived from a broader context—the context of the conflict itself.⁹¹

According to this ethical reasoning, neither blowing up a bridge nor destroying a weapons depot carries intrinsic value; the military advantage gained is the contribution such destruction makes to the overall war ledger for that particular belligerent party.⁹² Hence, if the war itself carries no moral or legal weight because it is one of aggression, the contextual value derived from that war is negative, thus making the destruction and deaths caused disproportionate.⁹³ Taken to an extreme, this argument suggests that because the aggressor party’s aims are illegitimate, the means used to fulfill the immoral and illegal ends are *ipso facto* illegitimate as well.⁹⁴ This Article now turns to applying similar reasoning solely to those most

provides unequal rights and obligations under *jus in bello*). See e.g., McMahan, *The Ethics of Killing in War*, *supra* note 25 at 34; see also Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34, 35 (2004); cf. Rodin, *Liability*, *supra* note 25 (providing a consequentialist argument for expanding proportionality to consider the war’s aims).

89. See AP I, *supra* note 20, at art. 51.

90. See *infra* Part III.

91. See generally Rodin, *LIABILITY* *supra* note 25, at 596-97 (finding that military advantages gain value from “the broader project of which it is a part”).

92. Rodin, *LIABILITY* *supra* note 25, at 596-97.

93. Rodin, *LIABILITY* *supra* note 25, at 596-97; see also McMahan, *The Ethics of Killing in War*, *supra* note 25, at 29.

94. See generally Judith Lichtenberg, *How to Judge Soldiers Whose Cause is Unjust*, in *JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS* 121 (David Rodin & Henry Shue, eds., 2008) (summarizing and critiquing this approach). Such an argument has been advanced regarding the opposite dynamic, that *jus ad bellum* has been used to impermissibly relax *jus in bello* standards for those on the right side of *jus ad bellum*. See, e.g., Adam Roberts, *The Principle of Equal Application of the Laws of War*, in *JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS* 226, 227 (David Rodin and Henry Shue eds., 2008) (describing the position that wider *jus in bello* rights should be afforded to those whose side is in conformity with *jus ad bellum*).

responsible for the armed conflict itself: those who commit the crime of aggression.

II. WAR CRIMES AS SHADOW CRIMES OF AGGRESSION

A. *The Gap*

Both the international Nuremberg and Tokyo prosecutions of the Nazi and Japanese architects of World War II included “crimes against peace,” crimes which provided “individual responsibility for illegal war.”⁹⁵ The International Military Tribunal Charter, annexed to the 1945 London Agreement, defined such crimes in Article 6(a): “Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”⁹⁶

Subsequently, the IMT, in finding twelve defendants guilty of such crimes, famously characterized this category: “[t]o initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”⁹⁷ In holding individual high-level participants in State aggression

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95. Noah Weisbord, *Conceptualizing Aggression*, 20 DUKE J. COMP. & INT’L L. 1, 1 (2009). Twelve defendants were found guilty of crimes against peace during the International Military Tribunal at Nuremberg (hereinafter Nuremberg IMT) and twenty-five at the International Military Tribunal for the Far East in Tokyo. *See generally* CASSESE’S ICL *supra* note 12, at 136. Attempts were unsuccessfully made earlier than Nuremberg to hold individuals criminally responsible for aggressive wars, such as the charge against the German Kaiser, Wilhelm III, of “a supreme offence against international morality and the sanctity of treaties” found in the Versailles Treaty of Peace following World War I. *See* Weisbord, *supra* note 95, at 65.
96. *Nuremberg Trial Proceedings Vol. 1, Charter of the International Military Tribunal*, THE AVALON PROJECT, <http://avalon.law.yale.edu/imt/imtconst.asp> [<https://perma.cc/ZF2U-6SPJ>] (last visited July 22, 2015).
97. NAZI CONSPIRACY AND AGGRESSION INTERNATIONAL MILITARY TRIALS NUREMBERG 16 (1947) *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Nazi-opinion-judgment.pdf [<https://perma.cc/7XBS-3V5S>] [hereinafter Nuremberg Judgment]. The Allies also established Control Council Law, no. 10 to establish uniform crimes for prosecution in each of the allied zones of occupation; this statute also included crimes against peace, a crime subsequently prosecuted by both the United States and France in their zones of occupation. *See* HELLER, THE NUREMBERG MILITARY TRIBUNALS *supra* note 51, at 107, 179.

accountable for illegal war, the Nuremberg IMT and Tokyo IMT recognized the deleterious consequences of all wars; consequences that are morally and legally unjustifiable in all but exceptional circumstances.⁹⁸ Controversially, crimes against peace at Nuremberg and Tokyo broke with the tradition of State responsibility mechanisms, such as reparations, to instead hold individuals, and not simply their States, accountable for waging war in violation of international law.⁹⁹

Yet, since Nuremberg and Tokyo, international criminal bodies have not taken on this crime of illegal war.¹⁰⁰ For example, neither the constitutional statute of the ICTY nor the ICTR includes the crime of aggressive war; these courts' jurisdictions are limited to crimes against humanity, war crimes and genocide.¹⁰¹ This gap in international criminal law is deeply concerning, demonstrating a failure of accountability, deterrence, and retribution.¹⁰² Additionally, this inability to prosecute violations of *jus ad bellum* perverts the legal separation of *jus ad bellum* from *jus in bello*; serious war crimes perpetrators are criminally punishable on the international plane, yet

98. Not all violations of *jus ad bellum* constitute a crime against the peace—only wars of aggression. See DINSTEIN, WAR, *supra* note 19, at 121.

99. See DINSTEIN, WAR, *supra* note 19, at 121; see also CASSESE'S ICL, *supra* note 12, at 136, n. 7 (noting the subsequent criticism against these crimes as violations of the principle of legality, given that State responsibility did not translate to individual criminal responsibility).

100. Despite the failure to prosecute those guilty of aggressive war since Nuremberg and Tokyo, "the criminality of aggressive war has entrenched itself in an impregnable position in contemporary international law." DINSTEIN, WAR, *supra* note 19, at 124, 122-131 (describing the UN General Assembly's series of resolutions affirming Nuremberg's crimes against peace as well as complementary efforts by the International Law Commission to flesh out the crime of aggression as demonstrative of this entrenchment). Domestic criminal prosecutions of this crime have likewise been non-existent; despite the Iraqi High Tribunal's jurisdiction over the crime of aggression, for example, the crime was never prosecuted. See CASSESE'S ICL, *supra* note 12, at 137-38.

101. See ICTY, *supra* note 14; see also ICTR *supra* note 15; see also CASSESE'S ICL, *supra* note 12, at 138-39 (attributing the lack of "international follow-up to the criminalization of aggression after 1947" to various factors such as Cold War politics and the ambiguity inherent in the UN Charter *jus ad bellum*). Hybrid courts have also lacked jurisdiction over crimes of aggression; see *e.g.* *supra* note 16.

102. See generally Donald M. Ferencz, *Aggression in Legal Limbo: A Gap in the Law that Needs Closing*, 12 WASH. U. GLOBAL STUD. L. REV. 507 (2013) (describing concerns such as lack of accountability and deterrence resulting from the lack of criminal accountability for crimes of aggression).

those who illegally unleash war's terrific violence remain criminally immune for such unleashing.¹⁰³

The lack of international criminal accountability for the most extreme violation of *jus ad bellum*, wars of aggression, is arguably mitigated by the increasing attention paid to war crimes and crimes against humanity within international criminal law.¹⁰⁴ Such attention is a much needed positive step, particularly as the latter also accounts for atrocities committed outside of a war context.¹⁰⁵ Yet the ability and will to prosecute crimes against humanity and war crimes on the international level are alone insufficient. In the words of the indomitable Benjamin Ferencz, the famed U.S. prosecutor of the NMT *Einsatzgruppen* Trial and a driving force behind the establishment of the International Criminal Court, without the ability to prosecute the crime of aggression, "aggressors will know that they remain immune and cannot face trial . . . [i]nstead of deterring war, they will be encouraged to make war."¹⁰⁶ Hence the application of

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103. Or, even more perversely, if the ensuing illegal war is conducted per *jus in bello*—an illegal war fought legally—there would be zero criminal accountability for the deaths and destruction that *jus in bello* unfortunately tolerates. See generally CASSESE'S ICL, *supra* note 12, at 64 (noting that prior to Nuremberg, low-ranking members of armed forces could be held accountable for misconduct during war but "states alone could be called to account by other states" for initiating war or other "gross misconduct").
104. See generally Gow, *supra* note 12, at 17, 21 (describing the growing influence of international criminal law as well as human rights law on the conduct of warfare).
105. Rome Statute, *supra* note 8, at art. 7 (requiring that culpable acts "be committed as part of a widespread or systematic attack" but not requiring a nexus to war or armed conflict).
106. Ben Ferencz, *Letter to Admiral Mueller Re Aggression*, BEN FERENCZ, (Mar. 3, 2010), <http://www.benferencz.org/2010-2015.html#admiralmullen> [<https://perma.cc/LQ9J-6DVH>]; see also Mark Hull, "Vengeance is not our Goal": A Conversation with Nuremberg Prosecutor Benjamin Ferencz WARONTEROCKS (Aug. 5, 2014), <http://warontherocks.com/2014/08/vengeance-is-not-our-goal-a-conversation-with-nuremberg-prosecutor-benjamin-ferencz/> [<https://perma.cc/8W8P-4TMS>].

Nuremberg held that war making was no longer a national right. It was an international crime for which those responsible, the leaders re — I'm not talking about the common soldier who goes out and fights — I'm talking about those who plan and perpetrate the aggressive war, will be held to account in a court of law. That was the most important lesson which came out of Nuremberg. As you well know, it was ignored after Nuremberg. We've had a hundred wars since then. Another hundred million people killed. The international community had an obligation to do better.

Id.; see also Benjamin B. Ferencz, *Ending Impunity for the Crime of Aggression*, 41 CASE W. RES. J. INT'L L. 281, 284 (2009) (emphasizing

criminal law specifically to those guilty of waging wars of aggression is needed for humanity's sake, and this Article now turns to specifically focus on that task.

Criminal law, including international criminal law, is an expression of society's collective moral condemnation of particular conduct; the gravamen of every *malum in se* crime represents the essence of why society wants to punish, and thereby deter, such behavior.¹⁰⁷ The gravamen of the crime of aggression, the purpose for punishing such acts, is not equivalent to that of war crimes or crimes against humanity. This crime, specifically, condemns intentional violations of those international laws—today the UN Charter—designed to maintain global peace among States.¹⁰⁸ While wars of aggression are *malum in se* because they often result in extreme devastation and loss of innocent life (by lawful conduct as well as through war crimes and crimes against humanity), the orchestration of such wars must also be criminally punished because of the credibility test they pose to international law itself: they threaten the law's ability to maintain relations among States.¹⁰⁹ The crime of aggression “is inimical to a rules-based international order, and to the cause of peace and security”¹¹⁰ and its criminalization condemns “the destruction of the minimum elements of trust which can hold the community of nations together in peace and progress.”¹¹¹ These

that without a viable crime of aggression, “tyrants and dictators would more likely be emboldened to flaunt their immunity by defiant acts of aggressive war”).

107. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 404 (1958) (“What distinguishes a criminal from a civil sanction and all that distinguishes it...is the judgment of community condemnation which accompanies and justifies its imposition.”).
108. See generally G.A. Res. 3314 (XXIX) (Dec. 14, 1974), available at <https://www1.umn.edu/humanrts/instree/GAres3314.html> [<https://perma.cc/8B9J-4LTV>].
109. See generally Matthew Gillett, *The Anatomy of an International Crime: Aggression at the International Criminal Court*, INT'L CRIM. L. R. 1, 3 (2013), available at <http://ssrn.com/abstract=2209687> or <http://dx.doi.org/10.2139/ssrn.2209687> [<https://perma.cc/8NDS-STJ9>] (“the gravity of the crime of aggression is underscored by the fact that it frequently creates the conditions of conflict and upheaval in which other atrocity crimes are likely to be perpetrated”) [hereinafter Gillett, *The Anatomy*].
110. Beth Van Schaack, *U.S. Policy on the ICC Crime of Aggression Announced*, JUST SECURITY (Apr. 21, 2015), <http://justsecurity.org/22248/u-s-policy-icc-crime-aggression/> [<https://perma.cc/8D8Z-5LC6>] (repeating the U.S. State Department's Under Secretary for Civilian Security, Democracy, and Human Rights remarks regarding the ICC's crime of aggression).
111. Robert Jackson, Justice Jackson's Report to the President on the Atrocities and War Crimes; June 7, 1945, *United States Department of*

foundational aspects of the crime of aggression contrast with, for example, the gravamen of war crimes.¹¹² The latter consist of serious violations of the rules of international humanitarian law—rules designed, as mentioned above, not to maintain global peace, but instead built to allow war to be conducted in a manner that lessens the suffering of all involved.¹¹³

Yet, because the crime of aggressive war deals with the most difficult task of international law—its ability to maintain global peace—it is also the most political of international crimes, and continues to face an uphill battle regarding formal criminal prosecution in modern international fora.¹¹⁴ While the Rome Statute, in establishing the ICC in 1998, listed “[t]he crime of aggression,” as among “the most serious crimes of concern to the international community as a whole,” it left it undefined and subject to future jurisdictional requirements.¹¹⁵ While these gaps were subsequently filled by a 2010 amendment to the Rome Statute, the jurisdictional hurdles remain quite high; the likelihood of an ICC prosecution for the crime of aggression remains slim.¹¹⁶ The following section outlines

State Bulletin (Government Printing Office) (1945), available at http://avalon.law.yale.edu/imt/imt_jack01.asp [<https://perma.cc/H27M-9TL5>] (July 17, 2015).

112. *But see* Benjamin B. Ferencz, *A New Approach to Deterring Illegal Wars*, appendix to Donald M. Ferencz, *Aggression in Legal Limbo: A Gap in the Law that Needs Closing*, 12 WASH. U. GLOBAL STUD. L. REV. 507, 520 (2013) (highlighting the similarities between the crime of aggression and crimes against humanity, finding that “[w]hat the crime is called should not be decisive”).
113. The threat to international order is also missing from crimes against humanity, which now exists distinct from the context of war, though there can be overlap between the two crimes. *See, e.g.*, Ventura & Gillett, *The Fog of War*, *supra* note 11, at 524 (noting “[t]he close relationship between armed conflict and crimes against humanity” while also noting the modern severance of a required link between the two).
114. *See* Van Schaack, *supra* note 110 (describing the United States’ opposition to activation of this crime under the Rome Statute, concerns that appear to represent the challenges involved in states ceding sovereignty to international law).
115. *See* Rome Statute, *supra* note 8, at art. 5 (listing four crimes, including “[t]he crime of aggression,” as “the most serious crimes of concern to the international community as a whole,” yet specifying in Article 5.2 that the Court could not exercise jurisdiction over the crime of aggression until it was later defined by amendment and jurisdictional triggers established).
116. *See generally* Kevin Jon Heller, *The Sadly Neutered Crime of Aggression*, OPINIO JURIS (June 13, 2010, 9:24 PM), <http://opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression/> [<https://perma.cc/RE7V-M9XD>] (describing the limited

the new Rome Statute definition of the crime of aggression, and then compares its elements to that of various ICC war crimes to determine whether overlap exists that could provide some measure of accountability for the crime of aggression through a war crimes prosecution.

B. ICC Crime of Aggression and War Crimes: Definitions and Elements

1. ICC Crime of Aggression

As mentioned above, the Rome Statute placed the crime of aggression within the ICC's jurisdiction—along with genocide, crimes against humanity, and war crimes—but did not define it nor provide jurisdictional provisions until the 2010 Kampala Agreements.¹¹⁷ The resultant amendments to the Rome Statute contain, *inter alia*, Article 8*bis*, which defines the crime of aggression:¹¹⁸

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

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression¹¹⁹

jurisdiction of the ICC regarding this crime); *see also* Ventura & Gillett, *The Fog of War*, *supra* note 11, at 524 n.2 (concluding that “the ICC is unlikely to be seized of an aggression case in the foreseeable future”).

117. *But see* Van Schaack, *supra* note 110 (the United States has noted the “uncertainty that still surrounds crucial aspects of the amendments”).

118. This definition draws upon the IMT London Charter, the UN Charter, and the seminal 1974 UNGA Resolution. *See* CASSESE'S ICL, *supra* note 12, at 139; *see also* Claus Kreß & Leonie von Holtendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179, 1188 (2010) (explaining that “it was never disputed that the precedents of Nuremberg and Tokyo provided crucial guidance in defining the crime” of aggression).

119. *See* Rome Statute *supra* note 8. The amendments also included jurisdictional requirements.

The *actus reus* of this crime involves the “planning, preparation, initiation or execution” of a predicate State act of aggression,¹²⁰ defined in Article 8*bis* as armed force by a State “against the sovereignty, territorial integrity or political independence of another State.”¹²¹ Per these explicit terms, violent acts by non-state actors are excluded unless their action is attributable to a State.¹²² Article 8*bis* also provides a non-exclusive list of qualifying acts of aggression, including invasions or attacks on another State’s territory, military occupation, annexation of territory by force, bombardment, blockades, and large-scale attacks on the armed forces of another State.¹²³

For criminal liability to attach, such acts of aggression must also specifically be considered “manifest violations” of the UN Charter, with regard to their character, gravity and scale.¹²⁴ Lesser acts of aggression may give rise to State responsibility for breaches of *jus ad bellum*, but only those deemed “manifest violations” carry individual criminal liability.¹²⁵ This requirement was deemed necessary during drafting to ensure that only clear violations of the UN Charter would lead to criminal responsibility, given the well-noted ambiguities regarding the permissible exceptional uses of force under the modern *jus ad bellum*.¹²⁶ Commentators have assessed this manifest qualifier as signifying that the crime must involve only those acts of aggression which are “large-scale and produce serious consequences;” this severity criterion echoes the Rome Statute’s preambulatory language

120. See Gillett, *The Anatomy*, *supra* note 109, at 7 (bifurcating the crime of aggression into the crime involving individual responsibility, and the predicate State conduct of an act of aggression).

121. An act of aggression also includes the use of armed force by a State “in any other manner inconsistent with” the UN Charter. See *Elements of Crimes*, Int’l Criminal Court at p. 43 art. 8*bis* para. 2 (2011), <http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf> [<https://perma.cc/WTB6-UTJJ>] (last visited July 31, 2015) [hereinafter EOC].

122. See Rome Statute, *supra* note 8; see also CASSESE’S ICL *supra* note 12, at 140.

123. See EOC, *supra* note 121, at p. 43 art. 8 *bis*.

124. See EOC, *supra* note 121, at p. 43 art. 8 *bis* para. 1; see also Kreß & Holtendorff, *supra* note 118, at 1192.

125. See generally CASSESE’S ICL, *supra* note 12, at 140; see also Kreß & Holtendorff, *supra* note 118, at 1192, 1200.

126. See generally Kreß & Holtendorff, *supra* note 118, at 1192-93, 1211 (acknowledging a “grey area of legal controversy” surrounding prohibited uses of force under the UN Charter, areas of ambiguity which the crime of aggression is designed to avoid via the manifest element; “the requirement of ‘manifest illegality’ takes due regard of the fact that, regrettably, the primary norm of the prohibition of the use of force suffers from considerable ambiguity”).

that the ICC was established to deal with “the most serious crimes of concern to the international community as a whole.”¹²⁷

Article 8*bis* also possesses a leadership requirement, one traceable to the Nuremberg IMT. In order for criminal liability to attach, the required act must be by conducted “by a person in a position effectively to exercise control over or to direct the political or military action of a State.”¹²⁸ This leadership requirement is also replicated in Rome Statute Article 25 (the statute’s modes of liability section), to ensure that average soldiers cannot be prosecuted for the crime of aggression via accomplice liability such as aiding and abetting.¹²⁹

Regarding the *mens rea*, or subjective mental element of the crime of aggression, Article 8*bis* is complemented by Article 30, which requires that all of the material elements of ICC crimes be committed with both intent and knowledge.¹³⁰ The amendments to the Rome Statute regarding the crime of aggression provide further clarification by specifying a lesser “knowledge of fact” mental state regarding the use of force’s violation of the UN Charter; the amendment only requires awareness “of the factual circumstances” which make the armed force in question inconsistent, and manifestly so, with the UN Charter.¹³¹ The amendments also clarify that “[t]here 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” and similarly, “[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to the ‘manifest’ nature of the violation” of the UN Charter.¹³² Finally, some commentators have controversially argued that there is

127. Rome Statute, *supra* note 8, at pmb1. Additionally, the amendment listing elements of the crime of aggression provides: “[t]he term ‘manifest’ is an objective qualification.” See AGGRESSION RESOLUTION, *supra* note 51, at 21-22.

128. See AGGRESSION RESOLUTION, *supra* note 51, at 17; see generally Kreß & Holtendorff, *supra* note 118, at 1189 (describing the crime of aggression as “an absolute leadership crime” that is “differentiated” from the other ICC crimes).

129. Rome Statute *supra* note 8, at Article 25(3) *bis*; see Kreß & Holtendorff, *supra* note 118, at 1189; see also Gillett, *The Anatomy*, *supra* note 109, at 26 (“[c]onsequently, common foot soldiers cannot and will not be charged for aggression before the ICC”); see also Gillett, *The Anatomy*, *supra* note 109, at 26 (noting that “the leadership clause would ordinarily be considered to cover the high level military and political leadership” as well as others, such as the German industrialists tried for aggression by the IMT and NMT).

130. See Rome Statute, *supra* note 8, at art. 30(1).

131. See AGGRESSION RESOLUTION, *supra* note 51, at 21; EOC, *supra* note 121, at p. 43 art. 8 *bis* Elements 4 and 6.

132. EOC, *supra* note 121, at p. 43 art. 8 *bis* Introduction, paras. 1 and 4.

an additional special or specific intent requirement for the crime of aggression: “a malevolent purpose or *animus malus* held by the attacking State.”¹³³ This intent, it is argued, is such that the act be committed with “the will to achieve territorial gains,” or the act was otherwise “an instrument of national policy.”¹³⁴ Yet, since no such intent is expressed in the amendments to the Rome Statute, it appears to either not be required, or is subsumed in the manifest violation of the UN Charter requirement itself.¹³⁵

2. ICC War Crimes

As mentioned above, war crimes consist of serious violations of the rules of international humanitarian law, a body of law whose objective is to limit the effects of war; its rules allow war to be conducted in a manner that lessens the suffering of all involved while also enhancing the discipline, and hence, effectiveness, of the military forces who abide by its rules.¹³⁶ Not every crime committed during an armed conflict is a war crime, and not every violation of *jus in bello* constitutes a war crime either: there must be a nexus to both the armed conflict and a serious violation.¹³⁷ These requirements exist

133. Gillett, *The Anatomy*, *supra* note 109, at 11.

134. See Beth Van Schaack, ‘*The Grass that Gets Trampled when Elephants Fight*’: *Will the Codification of the Crime of Aggression Protect Women?*, SANTA CLARA UNIV. LEGAL STUDIES RESEARCH PAPER NO.10-10 1-47, 13 (2010) (concluding that “the mere crossing of an international border by military forces without the consent of the neighboring State, for example, could be condemned an act of aggression regardless...of the motive or intent behind the operation,” finding that there is no special intent requirement). *But see* Gillett, *The Anatomy*, *supra* note 109, at 11 (concluding that “[i]t is unclear whether the qualifiers concern the subjective purpose for which the force is used (to the extent a State may have a subjective will), or the objective results of the use of force”).

135. *But see* CASSESE’S ICL, *supra* note 12, at 142 (citing to S. Glaser in support of such a special intent); *see also* Gillett, *The Anatomy supra* note 109, at 11.

136. *See supra* Part I.A (outlining the purposes of modern IHL); *see also* Willem-Jan Van Der Wolf, WAR CRIMES AND INTERNATIONAL CRIMINAL LAW 7 (Willem-Jan Van Der Wolf ed., 2010) (“This body of law declares certain behaviors impermissible, in order to limit the harmful effects of armed conflicts on participants and non-participants alike.”); *see also* CORN ET. AL., AN OPERATIONAL APPROACH, *supra* note 41, at 467 (highlighting “the relationship between sanctioning violations of those rules and disciplined military forces”).

137. *See* Hersch Lauterpacht, *The Law of Punishment of War Crimes*, 21 BRIT. Y.B. INT’L L. 58, 74 (1944); *see generally* CASSESE’S ICL, *supra* note 12, at 77-79 (discussing the nexus to armed conflict as “linking the armed conflict to the crime, not the criminal”); *see also* DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 3, at 263.

both to avoid having opportunistic but ordinary crime occurring during an armed conflict considered as war crimes, and to ensure that not every violation of the myriad rules of warfare is stigmatized as a war crime.¹³⁸ A noted commentator finds that the general “rationale behind the punishment of war crimes” is to ensure individual accountability of “those who, during an armed conflict, seriously contravene rules of IHL against persons protected by such rules.”¹³⁹

It is worth noting that *jus in bello* historically, and today primarily, speaks to States and their duties to the international community, making them responsible for the acts of their armed forces.¹⁴⁰ Modern *jus in bello* obligates States to wage war in accordance with it by ensuring those under their control adhere to the law, requiring domestic criminal sanctions as part of such control.¹⁴¹ For example, the Geneva Conventions specifies that State parties “undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches” of the Conventions.¹⁴²

138. See generally CASSESE’s ICL, *supra* note 12, at 78 (noting that a crime committed, for example, by one combatant against a fellow combatant during an armed conflict is not a war crime, even though the conflict provided the opportunity and context for the crime; the offense must be “perpetrated to (wrongly) pursue the purposes of war.”).

139. Cassese’s ICL *supra* note 12, at 68.

140. The Hague Convention, 18 October 1907, provides in Article 3 that:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

see Hague (IV), *supra* note 48, at art.3; *see also* Rep. of the Int’l Law Comm’n, 53rd Sess., Apr. 23-June 1, July 2-Aug. 10, 2001, 63-65, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001); *see generally* Frits Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces*, in JUDITH GARDAM ed, HUMANITARIAN LAW 267, 267-8 (1999) (highlighting that the “armed forces furnish a striking example of an organ whose acts may be so attributable and hence engage the responsibility of the State”); *see also* CASSESE’s ICL, *supra* note 12, at 67 (pointing out that States are IHL’s “main addresses,” not individuals); Van Der Wolf, *supra* note 136, at 13 (describing States as “the classic bearers of international law”).

141. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL LAW 559 (2005).

142. *See* GC I, *supra* note 40, at art. 49; *see also* Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; GC IV, *supra* note 59, at art. 146; *see generally* Van Der Wolf, *supra* note 136, at 11.

Prior to such modern requirements, domestic military criminal systems have long criminally sanctioned certain misconduct by their own soldiers¹⁴³ that today constitutes war crimes, such as pillaging, robbery, etc., out of the need to maintain effective fighting forces—as well as out of a recognition that such rules ease the transition to peace by avoiding the alienation of local populations.¹⁴⁴ On the international level, individual international criminal liability notably came to the fore following World War II; however, international trials such as that of Peter von-Hagenbach in 1474 and that of William Wallace by Edward I are considered by commentators as early examples of international war crimes trials.¹⁴⁵ Yet it was Nuremberg that transformed extant international humanitarian law into a body of law that provided for individual, and not just State, responsibility for serious infractions of its rules.¹⁴⁶ While subsequent *jus in bello* treaties specified particular conduct as war crimes—in particular the Geneva Conventions’ grave breaches system—serious violations of *customary* international humanitarian law also constitute war crimes, and it is in this area that the Rome Statute makes particular headway.¹⁴⁷

Article 8 of the Rome Statute carries on the Nuremberg legacy of individual criminal responsibility for serious breaches of *jus in bello*.¹⁴⁸ It defines war crimes for prosecution by the ICC, and Article 8(1) notes that the ICC “shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a

143. States also criminally sanctioned certain violations by enemy soldiers of the victor’s State’s early codes of war. *See generally* DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 3, at 253.

144. *See generally* CORN ET AL., AN OPERATIONAL APPROACH, *supra* note 41, at 467 (noting that “some of the greatest military leaders in history recognized the benefits derived from regulating battlefield conduct” and noting that limiting war’s brutality aids in the restoration of peace).

145. *See* Gow, *supra* note 12, at 50-51; *see also* CORN ET AL., AN OPERATIONAL APPROACH, *supra* note 41, at 470; *see generally* CASSESE’S ICL, *supra* note 12, at 67. *But see* DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 12, at 253 (claiming that “[s]ince time immemorial, international law has allowed other States—in particular, the enemy State(s), to prosecute persons accused of war crimes”).

146. *See* Gow, *supra* note 12, at 52.

147. *See. e.g.*, GC I *supra* note 40, at art. 50; *see also* GC II, *supra* note 142, at art. 51; GC III, *supra* note 142, at art. 130; GC IV, *supra* note 59, at art. 147.

148. The ICC treatment of war crimes helps fill the gaps left by the London Charter and IHL treaties such as the Geneva Conventions; it does so by providing elements, *mens rea* and *actus reus* components, etc. *See generally* Pocar, *supra* note 12.

large-scale commission of such crimes.”¹⁴⁹ While this qualifier seems to focus the Court on systematic large-scale crimes, the statute does not exclude isolated war crimes as a jurisdictional matter.¹⁵⁰ Article 8(2)(a) includes as war crimes grave breaches of the Geneva Conventions of 1949, which deal with particular acts against protected persons and property, such as willful killing and torture.¹⁵¹ Per the Geneva Conventions, grave breaches only occur during international armed conflicts; Article 8(2)(b) supplements these grave breaches with “[o]ther serious violations of the laws and customs applicable in international armed conflict,” specifically listing twenty-six separate offenses.¹⁵² These enumerated offenses reflect violations of the principles of international humanitarian law; for example, distinction and proportionality are reflected in Articles 8(2)(b)(i) and (iv), respectively:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹⁵³

Non-international armed conflict, that between a State or States and an organized armed group or solely between or among such groups, is provided for in the Rome Statute’s Article 8(2)(c)-(f); this is a shorter list of war crimes than those the statute provides for international conflicts.¹⁵⁴ These include violations of Article 3 common to the Geneva Conventions, as well as a circumscribed list of fifteen distinct crimes under Article 8(2)(e) (as compared to twenty-six

149. See Rome Statute, *supra* note 8, at art. 8(1).

150. See generally CASSESE’S ICL, *supra* note 12, at 80 (stating that the ICC Statute drafters wanted “to limit the Court’s jurisdiction over war crimes to those...more conspicuous” crimes and those that “may involve a plurality of persons or constitute part of a general practice”).

151. See Rome Statute, *supra* note 8, at art. 8(2)(a)(i)-(viii).

152. See Rome Statute, *supra* note 8, at art. 8(2)(b)(i)-(xxvi).

153. See Rome Statute, *supra* note 8, at art. 8(2)(b)(i) and (iv).

154. See CASSESE’S ICL *supra* note 12, at 82 (noting the current trend in customary international law as moving toward the same IHL rules applying in both international and non-international armed conflicts, despite Article 8’s contrary direction).

within international armed conflicts).¹⁵⁵ Notably, the above prohibition against disproportionate attacks, relevant in international armed conflicts per Article 8(2)(b)(iv), is not considered a war crime during non-international armed conflicts.¹⁵⁶ The Statute does, however, prohibit as a war crime during non-international armed conflicts crimes such as intentionally attacking civilians and/or civilian objects, “[d]estroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict,” etc.¹⁵⁷

III. PROSECUTING THE CRIME OF AGGRESSION AS A WAR CRIME

A. Key Assumptions And Elemental Background

The following exercises are specifically aimed at exploring whether, given Article 8*bis*'s current desuetude, a clear case of criminal aggression can be incorporated within a prosecution of an Article 8 war crime.¹⁵⁸ This analysis assumes that the crime of aggression has occurred—that all of the elements of that crime have been met—but that it cannot be charged as such in the ICC because of jurisdictional and political hurdles. To make this analysis more straightforward, the assumed crime of aggression is unambiguous: Saddam Hussein's 1990 invasion of Kuwait is used below as the exemplar crime of aggression, with supporting assumptions that Iraq's invasion of Kuwait constituted a manifest violation of the UN Charter, and that Hussein's particular acts, coupled with the requisite intent, as the head of the Iraqi State, met the below elements of

155. See GC III, *supra* note 142, at art. 3; see also Rome Statute, *supra* note 8, at art. 8(2)(e).

156. See Rome Statute, *supra* note 8, at art. 8.

157. See Rome Statute, *supra* note 8, at art. 8(2)(e)(i) and (ii). While disproportionate attacks are not considered by Article 8 to constitute war crimes during non-international armed conflicts, the ICTY utilized instances of grossly disproportionate attacks to find that civilians had been intentionally attacked; that is, disproportionate attacks were shoe-horned into the crime of intentional attacks against civilians. See Bartels *supra* note 18, at 283 (finding that ICTY's determination of proportionality “violations merely serve as evidence of attacks directed against civilians or against civilian objects”); see also *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment and Opinion, ¶ 58 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 5, 2003), <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf> [<https://perma.cc/Z2M6-V3G2>] [hereinafter *Galic Trial Judgment*].

158. The need to initially utilize relatively non-controversial and clear examples of both crimes stems from the numerous problems associated with using situations at the margins.

criminal aggression.¹⁵⁹ This clarity is needed to sharpen the focus regarding the purpose of this analysis, which is not to explore the crime of aggression *per se*, but to demonstrate whether or not the criminal prosecution of a war crime before the ICC can simultaneously sanction the crime of aggression without the latter crime being separately charged.

The below analysis first briefly discusses various modes of liability as potential avenues for incorporating the crime of aggression into a war crime prosecution. This discussion sharply reveals the distinct natures of *jus ad bellum* and *jus in bello* sketched in Part I of this Article, and highlights the difficulties of tying *jus in bello* crimes to the high-level officials who, per the leadership requirement of the crime of aggression, constitute the sole type of individual who can be guilty of this crime.¹⁶⁰ This brief examination focuses on particular means of participating in a war crime which would seem, though unlikely, the most realistic option for finding a Saddam Hussein-type aggressor liable for war crimes physically perpetrated by others. These separate means include, the *actus reus* of ordering such a crime; aiding and abetting; accessory-type liability for the war crime; as well as superior responsibility as a mode of liability. After this review the analysis turns to its primary inquiry, which proposes prosecuting the crime of aggression as a war crime of excessive incidental death, injury or damage (the war crime of excessive, or disproportionate, attack).¹⁶¹

To make such inquiries, several initial background elemental considerations are needed. To best discuss modes of liability and how a crime of aggression can be included within a prosecution for war crimes, a specific war crime is chosen as an exemplar from the long and non-exhaustive Article 8 list, and its exact elements unpacked.¹⁶² The Elements of Crimes (EOC), the document providing interpretative guidance regarding ICC crimes, clarifies the *mens rea* required for all ICC crimes in its general introduction.¹⁶³ It reiterates that the Rome Statute Article 30's intent and knowledge

159. See S.C. Res. 660 at 19, U.N. Doc. S/RES/660 (Aug. 2, 1990).

160. See generally *supra* Part II.B.1 (discussing the leadership requirement).

161. See Rome Statute, *supra* note 8, at art. 8(2)(b)(iv).

162. See Rome Statute, *supra* note 8, at art. 8.

163. Article 9 of the Rome Statute directs that non-binding elements of the ICC crimes be developed as interpretative aids to assist the ICC judges; a preparatory commission subsequently did so for all but the crime of aggression, whose elements were formulated during the 2010 Review Conference of Rome Statute and its amendments. KNUT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT SOURCES AND COMMENTARY 2 (2003); see also EOC, *supra* note 121.

threshold¹⁶⁴ is required for all material elements¹⁶⁵ of war crimes “unless otherwise provided.”¹⁶⁶ Article 30 defines intent regarding conduct as “that person means to engage in the conduct” and, regarding a particular consequence, “that person means to cause that consequence or is aware that it will occur in the ordinary course of events.”¹⁶⁷ Article 30 further defines knowledge as “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”¹⁶⁸

Critically, the EOC’s general introduction clarifies that intent and knowledge can be inferred from the circumstances and facts, and that particular value judgments do not have to be personally made by the defendant.¹⁶⁹ Additionally, the EOC’s Article 8 introduction to the elements of war crimes further specifies that the defendant need not make particular legal evaluations regarding the existence and characterization of an armed conflict; it instead requires “awareness of the factual circumstances that established the existence of an armed conflict.”¹⁷⁰ Given that the existence of an armed conflict is the *sine qua non* of war crimes—no war, no war crime—and that the classic crime of aggression is the ultimate act of war—this latter standard is an important one because it makes proving the element of knowledge of an armed conflict easier. This is particularly so if one, for example, is arguing that an initial aggressive attack that triggers an armed conflict is actually an act that is taken *during* an armed conflict. Awareness of the fact that the attack is one perpetrated by one’s national military forces against property or citizens of another sovereign nation should be sufficient to meet such awareness.

164. Rome Statute, *supra* note 8, at art. 30(1) (“Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”).

165. Yet, neither the EOC nor the Rome Statute specify which elements are material; paragraph seven of the EOC’s general introduction structures elements generally as conduct, consequences, and circumstances of the crime, but does not state whether these are material or not. *See generally* DORMANN, *supra* note 163, at 12.

166. EOC, *supra* note 121, at p. 1; *see also* DORMANN, *supra* note 163, at 11 (discussing the “unless otherwise provided” provision, concluding that different mental states than Article 30’s intent and knowledge may be required by treaties and customary international humanitarian law, and explicitly referencing ICTY jurisprudence to find that recklessness is an allowable mental state for grave breaches of the Geneva Conventions).

167. Rome Statute, *supra* note 8, at art. 30(2).

168. Rome Statute, *supra* note 8, at art. 30(3).

169. *See* Rome Statute, *supra* note 8, at art. 30(3) & (4); EOC, *supra* note 121, at p.1.

170. *See* EOC, *supra* note 121, at p.13 art. 8.

B. Addressing the Crime of Aggression Through War Crimes: Modes of Liability

The Rome Statute allows for individual criminal responsibility not just for the direct physical commission of a particular crime,¹⁷¹ but for various levels and types of participation in, or contributions to, an offense, including direct and indirect perpetration, as well as aiding-and-abetting, and accomplice-type liability.¹⁷² Given that the distinct legal regimes undergirding war crimes (*jus in bello*) and the crime of aggression (*jus ad bellum*) are directed at different levels of decision-making (operational and tactical versus strategic), and that those responsible for decisions that result in aggressive war will rarely be responsible for actions that result in war crimes, the overlap between those who engage in war crimes and those guilty of the crime of aggression will typically require utilization of modes of liability beyond direct perpetration.¹⁷³

Hence, the following analysis briefly explores, at a general level, an approach to sanctioning the crime of aggression (here, Hussein's invasion of Kuwait) via prosecution of a war crime. The essential mechanism for achieving this outcome requires tying a particular war crime to Hussein through both the Rome Statute's various modes of accomplice liability and through the related concept of superior responsibility. While this nexus can be made regarding any war crime if given the proper facts, the below scenario picks the war crime of attacking civilians—the paradigmatic violation of *jus in bello*'s principle of distinction—and assumes that Saddam Hussein's forces have engaged in conduct satisfying the elements of *this* war crime. The below exercise assumes that a particular instance of the war crime of attacking civilians was perpetrated by Iraqi troops during the invasion of Kuwait, with the invasion concomitantly constituting the

171. Or commission by omission when an individual has a duty and ability to act but fails to do so. See CASSESE'S ICL, *supra* note 12, at 161.

172. As well as for Rome Statute, *supra* note 8, at art. 25; see generally CASSESE'S ICL, *supra* note 12 at 175 (outlining various ICL modes of liability, and controversially arguing that joint criminal enterprise liability (JCE) is "implicitly permitted by Article 25(3)(a)); cf., James G. Stewart, *The End of "Modes of Liability" for International Crimes*, 25 LEIDEN J. INT'L L. 1, 4 (2012) (describing the impetus behind expanded modes of liability as supposedly necessary to "capture the role of the principal architects of atrocity," and noting the difficulty of ensuring fair and appropriate individual culpability when someone is made criminally responsible for the acts of others).

173. A national leader is unlikely to personally attack civilians, and it is also unlikely that one would be involved in in planning or ordering such an attack, or have knowingly facilitated its commission by meeting Article 25(d)'s requirements, given the typical distinction in decision-making levels between warfare and the decision to wage war.

manifest act of aggression that could be criminally attributed to Hussein.

Juxtaposing elements of the crime of aggression against that of the war crime of attacking civilians, one is struck by the disparate levels of the *actus reus*:

Article 8 <i>bis</i> Crime of aggression¹⁷⁴	Article 8(2)(b)(i) War crime of attacking civilians¹⁷⁵
1. The perpetrator planned, prepared, initiated or executed an act of aggression	1. The perpetrator directed an attack
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	2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities
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	3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack
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	4. The conduct took place in the context of and was associated with an international armed conflict
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations	5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.	

174. See EOC, *supra* note 121, at p. 43 art. 8*bis*.

175. See Rome Statute, *supra* note 8, at art. 8(2)(b)(i).

This elemental comparison highlights the reality that most war crimes are committed at the tactical and operational levels of armed conflict by those who do not meet element two of the above crime of aggression (the leadership requirement).¹⁷⁶ For example, the preparatory committee (PrepCom) that drafted the ICC criminal elements clarified, in the PrepCom's Article 8(2)(b)(iv)'s *travaux preparatoires*, that "directing an attack" as required by the above war crime, "describe(s) the act of the attack itself" whereas "launching an attack," the *actus reus* of an excessive attack found in Article 8(2)(b)(iv), "would also include the planning phase."¹⁷⁷ However, the commentary to AP I Art. 51(2), the primary legal basis of this crime,¹⁷⁸ explains that the word "directed" in the Article was meant to emphasize the article's objective: "[b]y using the words 'directed' and 'as such' it emphasizes that the population must never be used as a target or as a tactical objective."¹⁷⁹ Yet, even with the PrepCom's limited definition of directing, this does not mean that those that "merely" planned an attack against civilians, even if at the leadership level of the State, versus tactically directing its execution, would be immune from prosecution of such an intentional attack—it just makes it harder to prove.¹⁸⁰

Articles 25 and 28 of the Rome Statute also provide, given the appropriate facts, other modes of liability to hold Hussein-type aggressors criminally responsible for their military members' war crime of attacking civilians. For example, if Hussein participated by ordering the attacks against civilians, this would satisfy Article 25(b)(3)'s particular mechanism of criminal responsibility. Yet, punishing the ordering of an attack against civilians would not sanction Hussein for his crime of aggression; ordering the crime is simply a type of criminal participation, one common to many domestic systems, and the resultant crime is the actual war crime, not

176. See *supra*, part I.A.X at X (highlighting *jus ad bellum* and *jus in bello*).

177. DORMANN, *supra* note 163, at 162.

178. DORMANN, *supra* note 163, at 166.

179. Int'l Comm. of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* ¶ 1938 (Yves Sandoz et al. eds., 1987), http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf [<http://perma.cc/29A9-4A5W>] [hereinafter AP COMMENTARY].

180. If planning is an acceptable type of participation giving rise to criminal responsibility, demonstrating that Hussein helped plan the initial invasion of Kuwait, including an alleged war crime, could contribute to meeting the material elements of Art.8(2)(b)(i) as well as demonstrate elements of the crime of aggression, such as the leadership position element (through the evidence of what type of control he exercised) and type of involvement in the aggressive act, etc.

the crime of aggression. Hence, this analysis turns to Article 25(3)(c)'s facilitation mode of liability: aiding and abetting the attacks, including by "providing the means for its commission."¹⁸¹

To address the crime of aggression through the war crime of attacking civilians (or of attacking civilian objects, per Article 8(2)(b)(ii)), one could argue that the manifest act of aggression itself constitutes the provision of the means for the war crime of attacking civilians. The act of aggression is the proverbial green light to conduct attacks against civilians. This line of argument would allow the prosecutor to put on evidence of the crime of aggression, which could theoretically be utilized in sentencing.¹⁸² However, the prosecution would still need to overcome the huge obstacle that is proving the requisite intent: that Saddam Hussein, when assisting or providing the means for the crime of attacking of civilians (the means or assistance being the manifest act of aggression itself) did so with the purpose of facilitating the commission of the war crime. While such intent can be inferred from the circumstances, war crimes are not typically considered a consequence that will occur in the ordinary course of events of launching a war.¹⁸³ Even with Article 25(3)(d)'s common purpose mode of liability, the act must be made with the goal of furthering the criminal activity or made in the knowledge of the intention of the group to commit the crime;¹⁸⁴ this common criminal purpose will be difficult to establish beyond a reasonable doubt, thus making the liability link between the war criminals and Hussein a significant evidentiary challenge.

In rare situations, it seems that what might be decisive in such a prosecutorial effort would be the extent to which the national leader

181. Rome Statute, *supra* note 8, at art. 25(3); "(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission." *Id.*

182. See Ventura & Gillett, *The Fog of War*, *supra* note 11, at 534 (explaining that a factual finding of a crime of aggression could be utilized as an aggravating factor, falling under "abuse of power or official capacity," or used to enhance the gravity of the war crime in question).

183. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. FOR THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOL. I: RULES, Rule 156 (2005), *available at* <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> [<https://perma.cc/UB35-CZHC>] (stating that "[t]he description of 'intention' of the Statute of the International Criminal Court includes the perpetrator being 'aware that [the consequence] will occur in the ordinary course of events'" [hereinafter CIL Database]; Rome Statute, *supra* note 8, at art. 30(2)(b).

184. Rome Statute, *supra* note 8, at art. 25(3)(d)(i) and (ii).

signaled to his subordinates his understanding of the illegality of the decision to launch the war. Inferring a shared criminal purpose to execute the war contrary to fundamental norms of *jus in bello* would be more logical in such a situation, because those responsible for operational execution would understand the national leadership's view that compliance with international law was inconsequential.

Another method of addressing, at least in part, the crime of aggression via prosecution of a war crime utilizes Rome Statute Article 28's doctrine of command or superior responsibility. This mechanism of attaching individual liability for acts of others imposes liability on military commanders or any "person effectively acting as a military commander," making them criminally responsible for crimes committed by those "forces under his or her effective command and control, or effective authority and control" in certain instances.¹⁸⁵ Any national leader such as Hussein, if they possessed command and control authority over the armed forces, would theoretically be criminally responsible for Iraqi armed forces attacking civilians *if* he: knew or should have known they would so criminally attack (in other words, that the criminal acts were foreseeable), *and* he "failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission."¹⁸⁶ But, if Hussein was not acting as a military commander—and most national commanders do not—and instead was serving as a political vice military leader, Article 28(b)'s tougher standard of *mens rea* would be applicable, requiring that that Hussein actually knew (or consciously disregarded information indicating) that; (1) his military was committing war crimes; (2), plus that the challenged activities were within his "effective authority and control,"; and (3) and finally that he failed to take requisite measures or report the activities for investigation.¹⁸⁷

In establishing that Hussein exercised Article 28's requisite authority and control, the prosecutor might be able to demonstrate that he met the leadership requirement of the crime of aggression, as well as possibly supporting aggression's first element: evidence that Hussein prepared or planned an act of aggression could be relevant to demonstrate the level of authority he wielded over those in the military. Furthermore, showing that he engaged in an act of aggression via planning, preparing, or initiating the act of aggression could suggest that reasonable measures were within his control to prevent such crimes. One could argue that if he had the type of participatory power required in element one of the crime of

185. Rome Statute *supra* note 8, at art. 28(a).

186. Rome Statute *supra* note 8, at art. 28(a)(i) and (ii).

187. Rome Statute *supra* note 8, at art. 28(b).

aggression, it is more likely that he possessed the type of control requisite to attach superior responsibility liability.¹⁸⁸

If one finds that Hussein functioned as a military-type commander, the evidence and argumentation: (1) utilized to establish that he had the requisite *mens rea* of “knew or should have known”¹⁸⁹ that his troops would directly attack civilians; and (2) utilized to establish both the nexus to an armed conflict and his “awareness of factual circumstances that established the existence of an armed conflict” (elements four and five, respectively, of above right-hand column), could potentially establish the manifest act of aggression element, plus his awareness of the factual circumstances of same (element six). Yet finding evidence to prove beyond a reasonable doubt that Hussein knew his subordinates would commit a particular war crime, such as that of attacking civilians, either by direct knowledge or by arguing that such crime would “occur in the ordinary course of events” of launching an aggressive war is problematic and represents an extremely high prosecutorial hurdle to clear.¹⁹⁰

C. Crime of Aggression As An Excessive Attack

1. General Concept

Similar to the approaches outlined above regarding the war crime of directing an attack against civilians, a similar treatment of the crime of aggression could be attempted with regard to the war crime of disproportionate (excessive) attack against civilians and/or civilian objects, the ICC crime found at Article 8(2)(b)(iv).¹⁹¹ Yet, this

188. See Rome Statute *supra* note 8, at art. 28(a)(ii). However, a national level military commander cannot be expected to be aware of everything his subordinates are doing, even under the relaxed “should have known” standard. See generally Victor Hansen, *What’s Good for the Goose is Good for the Gander Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own*, 42 GONZ. L. REV. 335, 369, 364 (2006-2007) (analyzing the various treatments of *mens rea* associated with command responsibility in post-World War II cases).

189. Rome Statute, *supra* note 8, at art. 28(b)(i).

190. Rome Statute, *supra* note 8, at art. 31. This is a high hurdle unless there is a situation in which the aggressor clearly makes his knowledge of the illegality of the decision to launch the war known to his military forces. In such a situation, it arguably becomes more foreseeable that military units will disregard international law.

191. And severe damage to the natural environment. See EOC, *supra* note 121, at p. 19 art. 8(2)(b)(iv). As noted above, “launching” is construed by the ICC elemental PrepCom to include participation in the planning phase of an attack; this type of contribution seems more likely to correspond to the possible participatory level of a high-ranking military or civilian official who meets Article 8bis’s leadership requirement. Hence, the evidence used to demonstrate such participation could

method suffers from the same proof issues identified in the above discussion: it assumes that the aggressor did actually help plan, order or otherwise participate in, a particular unlawful attack with the requisite intent; or that he possessed the requisite knowledge that his subordinates were going to engage in such a criminal act, knowledge necessary to make his facilitation a criminal one, as well as necessary to attach liability via superior responsibility—and that evidence exists to support such elements beyond a reasonable doubt. Beyond such vexing likely proof issues stands a penological challenge: even if an aggressor can be found criminally liable for a war crime, and in doing so various elements of the crime of aggression are demonstrated and survive relevancy challenges because they help prove the war crime, the aggressor at sentencing will be punished for the war crime, not for the illegal war, unless all the aggression elements are met and considered at sentencing.

So instead of such tangential approaches, this Article proposes a differentiated application of the proportionality principle, one that finds that a manifest act of aggression can itself constitute the war crime of excessive attack committed by the aggressor, without constituting either a war crime or crime of aggression for the soldiers executing the actual military operations. The vehicle for such a nuanced treatment of particular conduct is provided by the war crime of “excessive incidental death, injury, or damage,” found at Article 8(2)(b)(iv) [hereinafter war crime of excessive attack].¹⁹² Pursuant to this approach, it is the national leader’s act of launching the war of aggression that makes discrete attacks on the battlefield excessive.¹⁹³ Accordingly, this approach does not rely on an accessorial link to an *in bello* violation by subordinate forces. Instead, the moment those forces place civilians or civilian property at risk of incidental injury of collateral damage, the national leader is culpable for launching an excessive attack. As described, Hussein’s crime of aggression *ipso facto* constitutes an excessive attack. The criminal act of aggression transforms the risk of incidental civilian deaths, injury and property destruction that are an intrinsic part of war from otherwise constituting lawful collateral damage, to that of criminal excess.

In order to maintain the principle of equal application of *jus in bello*—on pragmatic and teleological grounds, thus preserving its

likewise support crime of aggression elements such as the leadership requirement plus, possibly, the overall plan for the manifest act of aggression itself.

192. The Rome Statute restricts this crime to international armed conflicts, and does not list it as a war crime for those situations considered non-international armed conflicts per Article 8(2)(b)(iv).

193. See Rome Statute, *supra* note 8, art. 8*bis* (implying that any attack during a war of aggression will be excessive).

humanitarian effects on conflict—the separation described in Part I between *jus ad bellum* and *jus in bello* must continue for the vast majority of combatants outside those liable for crimes of aggression.¹⁹⁴ Hence, this proposal’s conversion of incidental damage from lawful to criminally excessive, occurs only for those who order the aggressive war (those who satisfy the elements of the crime of aggression), and not for those planning or executing, at the operational and tactical levels, the actual attacks that create this inherent risk. The criminal liability for an excessive attack under this approach—whose excessiveness hinges on *jus ad bellum* illegality—is only incurred by those responsible and accountable for non-compliance with today’s *jus ad bellum*, because it is the latter criminal act that tips the balance for its perpetrators from *jus in bello* legality to battlefield illegality. This is a nuanced, contextual approach to finding liability for the war crime of excessive attack, as it takes an attack that is otherwise lawful—not excessive, in particular—for almost all of those participating in a particular attack, and makes its resultant incidental damage criminally excessive for those most culpable for the war’s unavoidable brutality: the criminal aggressors responsible for initiating and sustaining the conflict.

2. War Crime of Excessive Attack: Background and Elements

An explication of Article 8(2)(b)(iv) is warranted to fully flesh out this suggestion. It prohibits:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹⁹⁵

The legal foundation for this war crime of excessive attack rests on the *jus in bello* principle known as proportionality, which itself reflects an uneasy compromise among the principles of military necessity, humanity, and distinction/discrimination.¹⁹⁶ The “cardinal

194. See generally Jens D. Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT’L L. 79, 115 (2013) (highlighting that “IHL norms have practicality and enforcement concerns built into them at the ground level” because “once participants start rejecting the rules they risk sliding towards total war”) [hereinafter Ohlin, *Targeting*].

195. Rome Statute, *supra* note 8, at art. 8(2)(b)(iv).

196. See generally, William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 93 (1982) (dissecting the principles of military necessity and humanity as they relate to proportionality).

principle”¹⁹⁷ of distinction requires that military forces distinguish civilians and their property from combatants and military targets and only direct their attacks at the latter.¹⁹⁸ The principles of military necessity and humanity undergird this concept of civilian protection from attack, prohibiting destruction for its own sake and those measures unnecessary for victory. Thus, despite immunizing civilians from attack, *jus in bello* recognizes that civilian deaths, injury, and property destruction will continue to occur in armed conflict; the law “virtually take[s] for granted” civilian injury and damage as a result of war, even when attacks are limited to military targets.¹⁹⁹

While recognizing that such “unavoidable” death and destruction will occur in an armed conflict, international humanitarian law attempts to limit it through the principles of proportionality and precautions.²⁰⁰ Whereas the latter directs belligerents to take all feasible measures to mitigate the risks to civilians posed by military operations, the proportionality principle puts the principle of military necessity, in the form of military advantage, on one side of the ledger and anticipated civilian deaths, injury and property destruction on the other.²⁰¹ Hence, this rule juxtaposes incidental damage—the civilian death and destruction that is collateral to an attack directed

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197. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 257 (July 8, 1996).
198. LTC RICHARD P. DiMEGLIO, JA, USA ET AL., LAW OF ARMED CONFLICT DESKBOOK 148 (William J. Johnson & Andrew D. Gillman, eds. 2012) [hereinafter LOAC DESKBOOK]; *see also* AP I, *supra* note 20, at art. 48 (“Parties...shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”).
199. DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 3, at 123; *see also* AP COMMENTARY, *supra* note 179, at para. 1935 (“There is no doubt that armed conflicts entail dangers for the civilian population.”); A.P.V. ROGERS, LAW ON THE BATTLEFIELD 19 (2004) (“It is an unfortunate feature of war in populated areas that large numbers of civilians are killed.”); Fenrick, *supra* note 196, at 92 (“In any armed conflict people are injured or killed and property is damage or destroyed.”).
200. FRANCES LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 15 (Apr. 24, 1863), *available at* <https://www.icrc.org/ihl/INTRO/110?OpenDocument> [<https://perma.cc/XE5Y-ZLJB>] (“Military necessity admits of all direct destruction of life or limb of ‘armed’ enemies, and of other persons whose destruction is incidentally ‘unavoidable’ in the armed contests of the war.”).
201. *See* Geoffrey S. Corn, *War, Law, and Precautionary Measures: Broadening the Perspective of the Vital Risk Mitigation Principle*, 42 PEPP. L. REV. 419, 422-23 (2015) (arguing that precautionary measures provide greater protection to the civilian population than the proportionality calculus) [hereinafter Corn, *Precautionary Measures*].

against a legitimate military objective—with the military advantage expected from the otherwise lawful attack, and prohibits the attack if the former outweighs the latter.²⁰² Such a prohibited attack is one AP I considers “indiscriminate.”²⁰³

This principle of customary international law²⁰⁴ is codified in Article 51 of AP I which prohibits indiscriminate attacks, including attacks²⁰⁵ that are expected to cause “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”²⁰⁶ While this rule has been widely criticized as vague and complex, due to its balancing act between dissimilar considerations, it is also characterized as “the true guarantee of robust civilian protection from the effects of attacks in wartime.”²⁰⁷ This rule is supremely important because it prohibits otherwise lawful attacks against legitimate military objectives because of their collateral effects on civilians. Hence, it reduces the amount of unavoidable destruction condoned by *jus in bello* by causing military

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202. *See generally* A.P.V ROGERS, *supra* note 199, at 17-22 (outlining the principle of proportionality, noting that the word itself is absent from the principle’s codification in AP I due to the inherent difficulties surrounding such a calculus).
203. AP I, *supra* note 20, at art. 51(5).
204. CIL Database, *supra* note 183, at Rule 14 (citing the proportionality principle as articulated by Article 51(5)(b), AP I, as a norm of customary international law).
205. Attacks are defined as “acts of violence against the adversary, whether in offence or in defence.” *See* AP I, *supra* note 20, at art. 49(1). While the EOC elements focus on a disproportionate attack, the principle of *jus in bello* proportionality upon which this crime is based has at times been construed to apply to all military operations during an armed conflict and not simply attacks. *See, e.g.* THE TURKEL COMM’N, THE PUB. COMM’N TO EXAMINE THE MAR. INCIDENT OF 31 MAY 2010, Part I, paras. 94, 96 (2011), *available at* <http://turkel-committee.gov.il/files/wordocs//8707200211english.pdf> [<http://perma.cc/5RBP-ZZQN>] (applying a proportionality analysis to both a naval blockade conducted during an international armed conflict, as well as to related sanctions).
206. AP I, *supra* note 20, at art. 51(5)(b). AP I Article 57 also includes this proportionality calculation, requiring commanders to both refrain from launching a disproportionate attack as well as requiring them to call off an attack if it becomes apparent that it will be disproportionate. AP I, *supra* note 20, at art. 57(2)(a)(iii) and (b).
207. DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 3, at 130; *see generally* Corn, *Precautionary Measures*, *supra* note 201, at 3 (highlighting the uncertainty inherent in weighing civilian casualties against military gains); *see also* Fenrick, *supra* note 196, at 94 (“It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances.”).

forces to forgo some attacks that are militarily necessary, but too impactful on civilians.

3. The Symmetry with Article 8*bis* Crime of Aggression

The Rome Statute, at least regarding international armed conflicts, recognizes the critical nature of the principle of proportionality by criminalizing its violation in Article 8(2)(b)(iv).²⁰⁸ The statute adds several modifiers to AP I's rule: it criminalizes those attacks which are "clearly" excessive, an addition that harmonizes the regulation of combat with criminal law, finding that: "excessive means that the disproportion is not in doubt."²⁰⁹ The ICC crime also adds "overall" to AP I's "concrete and direct military advantage" against which the incidental deaths, injury or damage must be weighed; the PrepCom noted that the term is explained in the EOC's footnote 36, which states in relevant part that "[s]uch advantage may or may not be temporally or geographically related."²¹⁰ The PrepCom also noted that several delegations to the drafting of the Rome Statute explained that "overall . . . could not refer to long-term political advantages or the winning of a war *per se*."²¹¹

If the *jus in bello* rule of proportionality and therefore Art. 8(2)(b)(iv)'s crime of excessive attack exists because of the desire to mitigate the fact that "in any armed conflict people are injured or killed and property is damaged or destroyed"²¹²—to lessen the incidental harm that occurs to civilians despite military operations being limited to military objectives—the ultimate mitigation effort is the outlawing of armed conflict all together, or at least those armed conflicts inconsistent with *jus ad bellum*. Hence, the crime of aggression, if it results in civilian death, injury, or property damage,²¹³ theoretically constitutes the ultimate crime of excessive attack, because it is this crime of aggression that opens the door for *jus in bello*'s consequent acceptance and limitation of warfare's "unavoidable" incidental damage and death.²¹⁴

208. Rome Statute, *supra* note 8, at art. 8(2)(b)(iv).

209. DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 3, at 131; *see generally* DORMANN, *supra* note 163 at 169 (noting that the addition of the words "clearly" and "overall" was not meant to change extant interpretations).

210. EOC, *supra* note 121, at p. 19 n. 36.

211. DORMANN, *supra* note 163, at 164.

212. Fenrick, *supra* note 196, at 94.

213. Or "widespread, long-term and severe damage to the natural environment." Rome Statute, *supra* note 8 at art. 8(2)(b)(iv).

214. Fenrick, *supra* note 196, at 94 (describing *jus in bello*'s protection "of the civilian population as such that does not preclude unavoidable incidental civilian casualties which may occur during the course of lawful attacks against military objectives").

But therein lies the rub: the strict compartmentalization of the laws of war into *jus ad bellum* and *jus in bello* rejects this natural symmetry between the war crime of excessive attack and the crime of aggression. As footnote 36 to the elements of Article 8(2)(b)(iv) expressly states, the former crime “does not address justifications for war or other rules related to *jus ad bellum*.”²¹⁵ This caveat echoes that found in the official Commentary to Article 51, AP I: “the distinction between ‘*jus ad bellum*’ and ‘*jus in bello*’ is fundamental and should always be respected.”²¹⁶ This well-established schism between the two legal regimes results in, as described in Part I, the equal application of *jus in bello* to all parties to a conflict, regardless of victim versus aggressor status.

Yet, this equivalence, if taken to its absurd extreme, allows the criminal aggressor to benefit from his own crime, an injustice particularly evident in the rule against excessive attack: despite a criminal act of aggression (assumed for this analysis), the aggressor can lawfully (through their military forces) kill civilians and destroy civilian property, either directly or indirectly, during the ensuing conflict as long as such harm is incidental to pursuing a military objective whose destruction or neutralization realizes gains proportionate to the civilian harms.²¹⁷ This consequence is clearly not what the drafters of the equal application principle had in mind: this principle only makes sense when it accrues to the benefit of subordinate operational military forces, as they should not be accountable for the illegal decision of the national leader to launch an aggressive war so long as they comply with *jus in bello* in execution. It also makes sense when used to guard against loosening *jus in bello* restrictions based on a lawful *jus ad bellum* cause; such a loosening would degrade achievement of *jus in bello*’s humanitarian ends. Yet it clearly does not make sense when applied to *jus ad bellum* violators.

To right this warped view of the equal application principle, a view not in keeping with the principle’s pragmatic or teleological roots, the military advantage component of excessive attack should be read more contextually for national leaders responsible for wars of aggression. This can be accomplished through the concept of anticipated military advantage—the expected military gain that must be weighed against expected civilian losses when considering whether an attack is criminally excessive. The “military” modifier of

215. EOC, *supra* note 121, at p. 19 n. 36 (further providing that “[i]t reflects the proportionality requirement inherent in determining the legality of any military activity inherent in the context of an armed conflict”).

216. AP COMMENTARY, *supra* note 179, at para. 1928.

217. See Greenwood, *supra* note 2, at 10 (explaining how the *jus in bello* / *jus ad bellum* distinction condones violations of the general principle “*ex injuria non oritur ius*”).

advantage has typically been understood to keep the gains within the *jus in bello* realm, one that does not include political gains;²¹⁸ this is a narrow interpretation reflecting a transparent but definite legal buffer between the battlefield and the government meeting rooms where the crime of aggression is hatched.

But this buffer may be permeable in one respect, specifically for those responsible for the crime of aggression: the exact outer contours of what constitutes a military advantage are not wholly settled in the law. The latest U.S. Department of Defense (DOD) Law of War Manual emphasizes that the “military advantage offered by the attack need not be immediate, but may be assessed in the full context of the war strategy.”²¹⁹ It repeats the identical sentence a few lines later, highlighting that military advantage refers to that resulting “from an attack when considered as a whole, and not only from its isolated or particular parts...[s]imilarly, ‘military advantage’ is not restricted to immediate tactical gains, but may be assessed in the full context of the war strategy.”²²⁰

So can such “war strategy” include the manifest act of aggression that lies at the center of the crime of aggression? That is, if an attack will provide gains relative to a war strategy, will an attack that provides gains to a war strategy integral to the crime of aggression therefore produce zero anticipated military advantage? This approach argues that such gains are rendered *a priori* disadvantageous by their direct connection to the crime of aggression. The DOD Law of War Manual cites its own previous report to Congress on the Persian Gulf War as support for its arguably expansive interpretation of military advantage: “[m]ilitary advantage’ is not restricted to tactical gains, but is linked to the full context of a war strategy, in this instance, the execution of the Coalition war plan for liberation of Kuwait” (emphasis added).²²¹ If the particular overall war plan is one designed to execute a criminal war of aggression, the DOD’s interpretation of military advantage would result in the resultant incidental harm to

218. DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 3, at 93. The concept of military advantage is also found in AP I, Art. 52 as a component of the definition of military objective; the definition of military objectives operationalizes the principle of military necessity. Military objectives include: “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances rules at the time, offers a definite military advantage.” AP I, *supra* note 20, at art. 52(2).

219. DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, *supra* note 47, at p. 211 para. 5.7.7.2.

220. *Id.*

221. DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, *supra* note 47, at p. 212 n. 170.

civilians being excessive, because the military advantage, when viewed so expansively—with regard to those liable for the crime of aggression only—is zero, as the military advantage for the aggressor of a particular, discrete attack that occurs during the manifest act of aggression arguably derives its value from *jus ad bellum*. The criminality of the strategy devalues the military advantage to zero. In other words, there can be no military advantages for the aggressor due to the crime of aggression’s taint: this represents a small but finite area of merger between *jus ad bellum* and *jus in bello*.²²²

While the ICC’s addition of the word “overall” in Article 8(2)(b)(iv) could imply that the ICC should expansively interpret the crime’s military advantage component, an EOC footnote pushes against this interpretation, explaining that this adjective is meant to clarify that the military advantage does not need to be temporally or geographically close in time to the attack.²²³ Yet, there is some case law supporting a very broad interpretation of military advantage, an interpretation that makes sense when applied to perpetrators of the crime of aggression. For example, the Eritrea-Ethiopia Claims Commission found that “military advantage must be considered in in the context of its relation to the armed conflict as a whole at the time of the attack” and “to the military operations between the Parties taken as a whole.”²²⁴ Yet, this has been called a “gross exaggeration” by at least one learned commentator.²²⁵

However, even the EOC commentary concludes in this regard that, “the military value of an object may be determined by taking into account the broader purpose of a particular military operation that may consist of various individual actions.”²²⁶ Nesting the crime of aggression into this “broader purpose” would invalidate the military value of that target, because of its characterization as part of a

222. This approach does not endorse the elimination of the doctrine of double effects upon which the principle of proportionality is based. *See generally* Ohlin, *Targeting*, *supra* note 194, at 92 (describing how, through the *dolus eventualis* mental state, international criminal tribunals such as the ICTY have begun to conflate incidental harms that are known but not intended with those harms actually intended, thus eliminating the concept of proportional, and hence legal, incidental collateral harms). Instead, this approach allows that such incidental harms are not intended, and argues that they are excessive due to the devaluing of military advantage by the illegal taint of aggressive criminality for the national leader as aggressor, and not excessive simply because they were known although not intended.

223. DORMANN, *supra* note 163, at 163-64.

224. DINSTEIN, WAR, *supra* note 19, at 95, *citing* the Eritrea-Ethiopia Claims Commission, Partial Award, (2005), 45 ILM 296 at 418.

225. *Id.*

226. DORMANN, *supra* note 163, at 173.

criminal enterprise; the broader purpose is a criminal one, thus the military advantage is zero.

In an admitted stretch, the Martens Clause, as demonstrated by the ICTY in the *Kupreskic* judgment, could be used to support this understanding of military advantage.²²⁷ In that case, the Tribunal found that references to the Martens Clause²²⁸ are relevant when a *jus in bello* rule “is not sufficiently rigorous or precise;” in such instances the clause’s “principles of humanity” and “dictates of public conscience” should help define the rule.²²⁹ The Tribunal used such principles to apparently conclude that repeated attacks which caused incidental damage that individually were not excessive may be collectively excessive per the “demands of humanity” and therefore possibly constitutive of a criminally excessive attack.²³⁰ In a similar manner, while individual attacks pursued as part of a manifest act of aggression may individually be proportionate for those executing the military operation, the principles of humanity and dictates of public conscience support an expansive interpretation of military advantage for those ordering the manifest act of aggression of which the individual attacks are an integral part, thus making those attacks excessive exclusively for high-level actors.

4. Application

A brief application of the above approach to this war crime’s elements is found in below table:

227. See Prosecutor v. Zoran Kurpreskic, Case No. IT-950150T, Judgment, ¶¶ 522-26 (Int’l Crim. Trib. For the Former Yugoslavia Jan. 14, 2000), <https://www.icrc.org/casebook/doc/case-study/icty-kurpreskic-case-study.htm> [<http://perma.cc/49ZA-NWCF>].

228. The original Martens clause in Hague II as well as its successor provision in Hague IV used similar language: “[u]ntil a more complete code of the laws of war is issued, the . . . Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience” See Hague Convention (II), Respecting the Laws and Customs of War on Land art. 50, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 403 [hereinafter Hague II].

229. *Prosecutor v. Zoran Kurpreskic*, Case No. IT-950150T, at ¶¶ 522-26.

230. *Id.*

Article 8 <i>bis</i> Crime of aggression ²³¹	Article 8 (2)(b)(iv) War crime of excessive incidental death, injury, or damage ²³²
1. The perpetrator planned, prepared, initiated or executed an act of aggression	1. The perpetrator launched an attack
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	2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated
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	3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated
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	4. The conduct took place in the context of and was associated with an international armed conflict
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations	5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict ²³³
6. The perpetrator was aware	

231. Rome Statute, *supra* note 8, at art. 8*bis*(1).

232. Rome Statute, *supra* note 8, at art. 8*bis*(2)(b)(iv).

233. *See* EOC, *supra* note 121, at p. 43 art. 8(2)(b)(iv).

of the factual circumstances that established such a manifest violation of the Charter of the United Nations. ²³⁴	
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To recap, this exercise assumes the following: (1) that a criminal act of aggression has been committed by a particular individual; (2) that the predicate manifest act of aggression included the act of ordering an invasion of a neighboring country; and (3) that at the time the invasion was ordered, it was reasonably foreseeable that attacks by the invading forces would produce incidental civilian death and property loss in the ordinary course of the invasion. The incidental damage that was expected to occur in the ordinary course of events of the illegal invasion fulfills elements two and three of the crime of excessive attack; the “excessive” sub-element is automatically met by virtue of the criminal invasion which acted to de-value the anticipated military gain. Element one, the *actus reus*, is met by the order to invade, per Article 25(3)(b)’s mode of liability. Elements four and five are met by the same facts demonstrating the manifest act of aggression assumed above.

CONCLUSION

The above approach locates a small point of merger between *jus ad bellum* and the *jus in bello* principle of proportionality that undergirds the ICC war crime of excessive attack in order to punish those guilty of the supreme crime. Some may argue that this expansive method constitutes a normative endeavor to change the *lex lata*. One could push back against this charge by pointing to the fact that the ICC elements of crime are interpretative aids, and that the outer reaches of the concept of military advantage have no settled boundaries within international law. However, most experts’ understanding of the crime of excessive attack, or at least the customary international law of proportionality which forms its foundation, is one which does not include reference to *jus ad bellum* norms.

Yet, it seems eminently reasonable to argue that the manifest, conspicuous illegality of the crime of aggression taints the military advantage component of the war crime of excessive attack, devaluing it to such an extent that any foreseeable civilian casualties anticipated from the attack are to be considered clearly excessive, but only for the individuals who have committed the crime of aggression. This reasoning is arguably consistent with the principle of legality because

234. EOC, *supra* note 121, at p. 43 art. 8*bis*.

the manifest act of aggression makes the initial knowledge of incidental civilian losses one no reasonable national leader would deem necessary, thus one that does not confer the requisite military advantage needed to offset such losses. Such an approach is “fully consistent with common sense and with the abiding purposes of the laws of nations.”²³⁵ Yet, Article 22(2) of the Rome Statute provides that “[i]n case of ambiguity, the definition [of a crime] shall be interpreted in favour [*sic*] of the person being investigated, prosecuted or convicted;” whether this above approach appropriately signals to potential aggressors the illegality of their acts is debatable.²³⁶

In conclusion, it is truly puzzling how national leaders responsible for an aggressive war have been able to reap such a windfall from the *ad bellum/in bello* division with little protest for so long. This division, which results in the equal application of the *jus in bello* on both sides of a conflict, is truly only logical when the benefits accrue to the operational forces on the field: the ones charged with executing war under *jus in bello* restraints. Why should the benefits of adhering to *jus in bello* run back up from the battlefield to those operating in a *jus ad bellum* world? Such an inverse, and perverse, application provides no incentive for *jus in bello* compliance because the national leaders responsible for aggressive war are typically not the individuals making the *jus in bello* decisions. Instead, this schism simply immunizes the *jus ad bellum* aggressor from criminal accountability for no reason, allowing the lawful execution of operations by subordinates to nullify the fact that any attack in an aggressive war that results in civilian death or property destruction is truly a criminally indiscriminate one for those ordering a war of aggression. Such attacks are indiscriminate in that they violate the proportionality principle for the leader who ordered the illegal attack; the attacks possess a different value for national leaders than for battlefield actors because there was never a legitimate necessity to offset the risk of civilian harm for the national level aggressors.

Finally, criminally sanctioning aggressive war as a war crime is not a new suggestion: the charges against Thomas Marle, King Charles I, Napoleon, and those against King George in the American Declaration of Independence all demonstrate early criminal conflation of the two governing legal regimes.²³⁷ While international law has

235. ROZA PATI, *DUE PROCESS AND INTERNATIONAL TERRORISM* 134 (2009) (attributing this quote to Sir Shawcross during the Nuremberg International Military Tribunal).

236. Rome Statute, *supra* note 8, at art. 22(2).

237. See generally Ziv Bohrer, *International Criminal Law's Millennium of Forgotten History*, forthcoming *Law and History Review*, (on file with author and cited with permission) (persuasively demonstrating that such trials are exemplars of the use of war crimes to prosecute what may be considered early crimes of aggression).

evolved greatly since such early criminal accountings, it has not matured enough. This Article's inquiry is made out of necessity, given the failure of the international community since Nuremberg and Tokyo to hold criminally accountable those who engage in aggressive war. The author hopes these ruminations may in some small measure help move the gears of justice in the direction of filling this void.