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Maastricht University

KNOWLEDGE IN ACTION

Faculteit Rechten

master in de rechten

Masterthesis

The prosecution of Putin before the International Criminal Court

Esra Craeghs

Scriptie ingediend tot het behalen van de graad van master in de rechten, afstudeerrichting rechten

PROMOTOR :

Prof. dr. Jan WOUTERS

De transnationale Universiteit Limburg is een uniek samenwerkingsverband van twee universiteiten in twee landen: de Universiteit Hasselt en Maastricht University.



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Summary

Russia invaded Ukraine on February 24, 2022. Putin stated his motives for the invasion in a speech prior to the invasion. He described it as a special military mission to secure Russia and demilitarise and denazify Ukraine. The conflict was widely condemned around the world. The consequences are enormous. Many citizens — over half of the Ukrainian population — chose to flee the country, but many others remained to fight for their country. The conflict has already claimed thousands of lives and, millions of people are in need of humanitarian assistance.

In 1998, the International Criminal Court (ICC) was established. It was given jurisdiction over the most serious crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. The Court can exercise its jurisdiction over crimes committed by State-parties as well as crimes committed by nationals of State-parties after July 1, 2002. Ukraine and Russia are both not State-parties; however, Ukraine lodged a declaration accepting the Court's jurisdiction twice, once in 2014 and once in 2015. On March 1 and 2, 2022, 39 member States referred the situation in Ukraine to the ICC. The ICC opened its investigation on March 2, 2022.

In this thesis, the focus will be on a possible prosecution of Putin before the International Criminal Court. Specifically, this thesis will address the issues that might arise in a possible prosecution. Putin can be tried before the Court if he meets the Court's jurisdiction and the case is rendered admissible. Russia, under the leadership of Putin, committed a lot of crimes in Ukraine. The invasion is considered an act of aggression. However, the Court has no jurisdiction over the crime of aggression as Russia is not a State-party. For the crimes to qualify as a war crimes, it will have to be proven that they were targeted against protected persons and/or objects. This will require a thorough investigation. For one war crime, the Court already issued an arrest warrant against Putin on March 17, 2023.

Even though Putin is the current head of State of Russia and enjoys immunity, this immunity does not come into play before the Court. Hence, he could be tried before the Court. However, he would first need to be arrested before he could be tried, as the Court does not conduct trials *in absentia*, and in this case, the immunity might play a part. Russia will not hand over Putin himself to the Court. The Court will have to rely on State parties to arrest Putin if he shows up on their territory, as the ICC does not have its own police force or enforcement body. States might not be so keen to arrest a head of State who enjoys immunity.

Additionally, the principle of complementarity applies, meaning that the national court's jurisdiction takes precedence over that of the ICC.

Acknowledgements

With this thesis, I close a major chapter in my life. A chapter with a lot of highs and a lot of lows, but at the end very rewarding. This thesis allowed me to work out my love for humanitarian law, as well as my sense of justice. In addition, I was also able to incorporate my interest in history.

First and foremost, I would like to thank my promotor, Professor Dr. Jan Wouters, for allowing me to work out this interesting and pertinent topic. In addition, I would like to thank my mentor, Katrien Martens, for all of her time spent on my thesis, as well as all of her useful feedback and extra feedback moments. This feedback provided me with much-needed structure and pushed my thesis to the next level. Furthermore, I would want to thank my sisters for proofreading my work and assisting me with all technical issues. Lastly, I want to thank my friends for their emotional support.

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List of abbreviations

EoC	Elements of Crimes
EU	European Union
HRMMU	Human Rights Monitoring Mission in Ukraine
HRW	Human Rights Watch
IAC	International Armed Conflict
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IMT	International Military Tribunal for the Major War Criminals, Nuremberg
NIAC	Non-international Armed Conflict
OHCHR	The Office of the United Nations High Commissioner for Human Rights
OTP	Office of the Prosecutor
POW	Prisoner of War
PrepCom	Preparatory Committee on the Establishment of an International Criminal Court
RPE	Rules of Procedure and Evidence
UN	United Nations
USSR	Union of Soviet Socialist Republics

Introduction

1. Subject

1. Following a speech by Russian President Vladimir Putin on February 24, 2022, Russia invades Ukraine. Putin refers to it as a special military operation. Virtually the rest of the world calls it a war.¹ There is a clear violation of Article 2(4) of the UN Charter, which states, "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."² The West is reacting implacably and disapprovingly to the act of aggression and has already taken several measures to stop Russia. For example, military equipment was delivered to Ukraine, the accounts of several Russians were blocked, a travel ban is in place, the Council of Europe terminated Russia's membership, etc.³

2. In this research, I will examine the conflict and the crimes taking place on Ukrainian territory with a view to a possible trial before the International Criminal Court. In particular, I will look at what difficulties will or can arise in the possible prosecution of President Putin.

3. The Rome Statute of the International Criminal Court (hereafter: the Rome Statute) established the International Criminal Court (hereafter: the ICC) in 2002. The ICC is the first-ever international permanent criminal court. Though the establishment of the Court did not happen overnight. The Rome Statute was signed by 60 States Parties back in 1998.⁴ At the time of writing, 123 States are Parties to the Rome Statute.⁵ The reasons for establishing the ICC were the many atrocities that took place in the 20th century. There was a need for a permanent international court to try serious crimes if the countries involved were unable to do so themselves. Earlier, international tribunals such as the Rwanda Tribunal and the Yugoslavia Tribunal were established to try serious crimes.⁶ However, even several centuries ago, there was a need for international criminal law and an international criminal court.⁷

4. First, it is interesting for this research to take a closer look at the history of the conflict between Russia and Ukraine. The conflict has been going on for years; what started as a political crisis eventually turned into a violent act of aggression that captivated the whole world. The trigger

¹ J. MANKOFF, "Russia's war in Ukraine", *CSIS*, 2022, https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/220422_Mankoff_RussiaWar_Ukraine.pdf?tGhbfT.eyo9DdEsYZPaTWbTZUtGz9o2 (Consulted on 4 November 2022).

² J. WOUTERS, "De oorlog in Oekraïne: internationaalrechtelijke aspecten", *RW* 2021-22, No. 41, 1610; C. DEPPEZ, "Guerre en Ukraine : que peut le droit international ?", *JT* 2022, No. 6890, 150.

³ F. FONTEYN, "Raad van Europa zet Rusland buiten omwille van oorlog in Oekraïne", *DJK* 2022, No. 447, 6-7; C. DEPPEZ, "Guerre en Ukraine : que peut le droit international ?", *JT* 2022, No. 6890, 150; F. FONTEYN, "Raad van Europa zet Rusland buiten omwille van oorlog in Oekraïne", *Juristenkrant* 2022, No. 447, 6-7.

⁴ S. BABAIAN, *The International Criminal Court – An international criminal world court?*, Switzerland, Springer, 2018, 7-11.

⁵ International Criminal Court, *The States Parties to the Rome Statute*, <https://asp.icc-cpi.int/states-parties> (Consulted on 4 November 2022).

⁶ J. WOUTERS, "20 jaar Internationaal Strafhof: verwezenlijkingen en uitdagingen", *RW* 2021-22, No. 42, 1651-1653.

⁷ S. CORTHOOT, *Strafrechtelijke vervolging van ernstige schendingen van mensenrechten*, Antwerp, Maklu, 2002, 23-35.

for the conflict was pro-Russian Ukrainian President Viktor Yanukovich's refusal to sign a European Trade Agreement in 2013.⁸ But even decades earlier, there were tensions between Russia and Ukraine. On February 28, 2022, the ICC Prosecutor announced that "he would seek authorization to open an investigation into the situation".⁹ On March 1 and 2, 2022, 39 member States referred the case to the ICC. Later, seven additional States referred the situation. The ICC opened its investigation on March 2, 2022.¹⁰ The Prosecutor sent the largest team ever to Ukraine, consisting of 42 forensic experts and investigators. Over 20 Treaty Parties sent experts to the Court during this time, and the Court received significant financial contributions from Treaty Parties.¹¹ Eventually, in March 2023, the ICC issued an arrest warrant against Putin, allowing ICC member States to arrest the Russian leader.¹²

Secondly, it is important to discuss the establishment and functioning of the International Criminal Court. The ICC has jurisdiction over four types of crimes - listed in Article 5 of the Rome Statute - namely: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Articles 12 and 13 of the Rome Statute specify when the Court can exercise its jurisdiction. The Court's jurisdiction is based on complementarity, meaning that the national court's jurisdiction takes precedence over that of the ICC.¹³ However, both Ukraine and Russia are not Treaty Parties and thus do not recognise the ICC's jurisdiction. Nonetheless, based on Article 12 of the Rome Statute, Ukraine has twice lodged a declaration to accept the Court's jurisdiction. The first declaration was lodged with respect to the crimes that took place between November 21, 2013, and February 22, 2014. This period was extended by a second declaration.¹⁴ Thereby, the ICC can still investigate, and possibly try, grave crimes allegedly perpetrated on the territory of Ukraine.¹⁵

After that, I will explore the crimes that are taking place/have taken place on Ukrainian territory, as well as the challenges that the ICC may encounter in prosecuting President Putin. More specifically, I will take a closer look at whether Putin could be tried for the crime of aggression and/or for war crimes. In addition, I will examine the implications of the principle of complementarity and discuss whether the ICC can conduct a trial in absentia. There will also be a discussion about whether Putin's position as President affects the possibility of a trial.

⁸ J. MANKOFF, *Russia's war in Ukraine*, 2022, https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/220422_Mankoff_RussiaWar_Ukraine.pdf?tGhbFT.eyo9DdEsYZPaTWbTZUtGz9o2 (Consulted on 4 November 2022).

⁹ International Criminal Court, *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> (Consulted on 4 January 2023).

¹⁰ International Criminal Court, *Ukraine*, <https://www.icc-cpi.int/ukraine> (Consulted on 4 January 2023).

¹¹ J. WOUTERS, "20 jaar Internationaal Strafhof: verwezenlijkingen en uitdagingen", *RWE* 2021-22, No. 42, 1660-1661.
¹² International Criminal Court, *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, 17 March 2023, <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> (Consulted on 2 April 2023).

¹³ Article 1 Rome Statute; E. PRAKKEN and T.N.B.M. SPRONKEN, *Handboek Verdediging*, Deventer, Kluwer, 2009, 21.2.1.2.

¹⁴ International Criminal Court, *Ukraine*, <https://www.icc-cpi.int/ukraine> (Consulted on 4 January 2023).

¹⁵ R. BOONE, "Het oorlogsrecht impliceert altijd een afweging tussen twee zaken: militaire noodzaak en humanitaire overwegingen" [Interview met Tom Ruys], *DJK* 2022, No. 446, 8-9.

2. Problem

5. The ICC is a criminal court that can punish individuals internationally; however, since its jurisdiction is not yet recognised globally, it is often not possible to see notable criminals being penalised before the ICC. In the past, the Court was criticised for being too focused on Africa, which made its reputation decrease significantly, when the ICC was first welcomed with great enthusiasm.¹⁶

6. With a possible trial of President Putin, certain difficulties might arise. Problems may surface regarding the Court's jurisdiction. The Court has jurisdiction over four different crimes¹⁷, each of which is subject to different conditions. Not every condition may be met, which could make it impossible to rule on the crime in question. In addition, not all States in this conflict are Parties to the statute. In this thesis, I examine the extent to which this affects the Court's jurisdiction.

Second, there may be issues of admissibility. For example, there is the principle of complementarity, which means that the national court's jurisdiction takes precedence over that of the ICC.¹⁸ Also, no trials are conducted in absentia, therefore Putin will have to be arrested. What problems this may cause will be discussed further in this research.

Finally, the Court must be able to prove President Putin's individual criminal responsibility.¹⁹ Did Putin himself give the orders or forge plans for the alleged crimes? Evidence-related problems may surface here.

3. Relevance

7. The conflict happening in Ukraine is very topical at the moment, the fact that 43 member States have referred the case to the ICC shows how important the conflict is considered internationally.²⁰ The conflict between the two nations is Europe's worst since World War II.²¹ As a result, the implications for Europe are significant. The energy and food markets were especially affected, where supply was constrained, and prices rose to previously unheard-of heights.²²

¹⁶ S. BABAIAN, *The International Criminal Court – An international criminal world court?*, Switzerland, Springer, 2018, 7-11.

¹⁷ Article 5 Rome Statute.

¹⁸ E. PRAKKEN and T.N.B.M. SPRONKEN, *Handboek Verdediging*, Deventer, Kluwer, 2009, 21.2.1.2.

¹⁹ Article 25 Rome Statute; R. BOONE, "'Het oorlogsrecht impliceert altijd een afweging tussen twee zaken: militaire noodzaak en humanitaire overwegingen' [Interview met Tom Ruys]", *DJK* 2022, No. 446, 9.

²⁰ International Criminal Court, *Ukraine*, <https://www.icc-cpi.int/ukraine> (Consulted on 5 January 2023).

²¹ UC Press, *Ukraine and Russia: A Current History Virtual Issue*, <https://www.ucpress.edu/blog/58619/ukraine-and-russia-a-current-history-virtual-issue/> (Consulted on 10 March 2023).

²² O. ARCE, G. KOESTER and C. NICKEL, "One year since Russia's invasion of Ukraine – the effects on euro area inflation", *The ECB Blog*, 24 February 2023, <https://www.ecb.europa.eu/press/blog/date/2023/html/ecb.blog20230224~3b75362af3.en.html> (Consulted on 9 March 2023).

8. The ICC can only work effectively as an international criminal court when it is recognised worldwide. Cooperation with States is critical since the International Criminal Court does not have its own police force to arrest suspects or detention centres to detain suspects.²³ The Court has jurisdiction over any of the crimes under the Statute that are committed on the territory of an ICC member State. For this purpose, apart from the crime of aggression, it does not matter whether the crimes are committed by nationals of States that are not members of the ICC. In addition, the International Criminal Court can prosecute crimes committed by nationals of all ICC member States, wherever they are committed.²⁴ The more parties, the more comprehensive the Court's jurisdiction becomes, and the more the Court can achieve its goal of ending impunity for the most serious crimes.²⁵

9. The initial enthusiasm around the ICC has diminished, and the criticism surrounding it has only increased.²⁶ A potential conflict such as this one may just further demonstrate the importance of the Criminal Court. First of all, it can show that it is not only focused on Africa. The ICC's workload has been increasing every year, and they have also had budgetary struggles. In this regard, the war in Ukraine could be a real turning point for the ICC, as there is now an unprecedented deployment of ICC resources and a renewed focus on collaboration between the Court and domestic jurisdictions.²⁷ Many States have made financial contributions, and the largest-ever team of investigators was dispatched to collect evidence in Ukraine.²⁸ The ICC can show that it will not be intimidated by powerful States such as Russia. Holding Putin accountable for his actions would thus set a good example for the rest of the world.

4. Limitations

10. The ICC has jurisdiction over four different types of crimes: the crime of aggression, crimes against humanity, war crimes and genocide.²⁹ In this research, I am mainly going to focus on war crimes as well as the crime of aggression, as these will be most relevant. The other two crimes – crimes against humanity and genocide – will be discussed briefly but not looked at in further detail. Genocide will not be discussed, as it is, in general, more difficult to prove genocide, as this is subject to strict conditions such as the necessary presence of genocidal intent.³⁰

²³ P. DE HERT, et. al, *Handboek internationaal en Europees strafrecht*, Morsel, Intersentia, 2014, 470.

²⁴ Article 12(2) Rome Statute; P. DE HERT, et.al., *Handboek internationaal en Europees strafrecht*, Morsel, Intersentia, 2014, 482.

²⁵ International Criminal Court, *Understanding the International Criminal Court*, <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf> (Consulted on 5 January 2023).

²⁶ C. CHUNG, "The International Criminal Court 20 years after Rome – Achievements and Deficits" in G. WERLE and A. ZIMMERMANN (eds.), *The International Criminal Court in Turbulent Times*, The Hague, T.M.C. Asser Press, 2019, 10-20.

²⁷ I. MARCHUK and A. WANIGASURIYA, "The ICC and the Russia-Ukraine war", *American Society of International Law*, 5 July 2022, <https://www.asil.org/insights/volume/26/issue/4> (Consulted on 5 January 2023).

²⁸ Ibid.

²⁹ Article 6 Rome Statute.

³⁰ C. STAHN, *A Critical Introduction to International Criminal Law*, Cambridge, Cambridge University Press, 2019, 37.

11. In addition, this research is going to cover the conflict between Ukraine and Russia. I will only look at alleged crimes that Russia has committed in Ukraine, possible crimes that Ukraine has committed against Russia are not part of this research.

12. In this thesis, I will only focus on President Putin; other high authorities will not be discussed, as they can possibly be tried in the national courts of Ukraine. This is not the case for Putin, as he is still the reigning head of State and enjoys immunity. This immunity does not come into play at the International Criminal Court. As a result, for the time being, the International Criminal Court is the only option for prosecuting Putin.³¹

A brief history of the conflict between Russia and Ukraine will be outlined. However, for further research, the focus is only going to be on the current act of aggression and not on previous crimes that have taken place, for example, in Crimea.

5. Sources

13. During this research, I tried to study and peruse as many sources as possible. I searched mainly international databases.

14. In terms of legislation, I will evidently start with the Rome Statute. The Rome Statute is a comprehensive treaty text with 128 articles. The Statute contains the different rules concerning the jurisdiction of the Court, its composition, and its procedure. This is the main source I will be using in this research, as this is a legally binding document. Besides, I will use the Rules of Procedure as well as the Elements of Crimes, both of which are instruments for the application of the Rome Statute.³² In addition, I am also going to apply the UN Charter³³ and the Geneva Conventions³⁴.

Aside from legislation, the majority of the sources will be legal doctrine; case law on this subject is rather limited, but previous ICC judgements, as well as case law from its predecessors³⁵, will be examined. The doctrinal sources have very different subject matters. For my first sub-question, I have found a few sources that discuss the Ukraine conflict. Since this is not the most important part of this master's thesis, there are a limited number of sources. In addition, I have quite a few sources that write extensively about the functioning, jurisdiction, and establishment of the International Criminal Court.

³¹ Article 27 Rome Statute; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 62-64.

³² Rules of Procedure and Evidence, Assembly of States Parties (9 September 2002), ICC- ASP/1/3 (Part.II-A) (2002); Elements of Crimes, Assembly of States Parties (9 September 2002), ICC-ASP/1/3(part II-B) (2002).

³³ Charter of the United Nations, San Francisco, 26 June 1945, *United Nations Treaty Series*, Vol. 1, XVI.

³⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, UNTS, vol. 75, 31 (1950) (Hereafter: Geneva Convention I); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, UNTS, vol. 75, 85 (1950) (Hereafter: Geneva Convention II); Geneva Convention relative to the Treatment of Prisoners of War, UNTS, vol. 75, 135 (1950) (Hereafter: Geneva Convention III); Geneva Convention relative to the Protection of Civilian Persons in Time of War, UNTS, vol. 75, 287 (1950) (Hereafter: Geneva Convention IV).

³⁵ The International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia.

6. Methodology

15. This thesis will involve monodisciplinary research.³⁶ Through legal research—by comparing different sources of legislation, case law, and legal doctrine—I am going to answer my central research question. My central research question is going to examine whether a trial of Putin is possible before the International Criminal Court. I am going to answer this research question using three different sub-questions.

16. In the first part of this master's thesis, I will be using the descriptive research method.³⁷ The descriptive research method involves an interpretation of legal rules and will be used as a preliminary step, benefiting the following part of my research.³⁸ My first sub-question is going to be merely a description of the history of the conflict between Ukraine and Russia. No legal rules will have to be interpreted or applied here. In addition, in my second sub-question, I am going to discuss the establishment of the ICC as well as its composition and functioning, and more specifically, its jurisdiction and admissibility procedure. This description will be based on legislation as well as case law and legal doctrine.

The third research question, on the other hand, is going to be an evaluative study.³⁹ An evaluative research question involves assessing or valuing a legal figure in light of a predetermined norm.⁴⁰ I am going to evaluate what possible difficulties might arise in Putin's trial before the ICC and explain how these difficulties came about. Before using an evaluative method, the criteria that will be used for the evaluation must first be set. Internal criteria derived by the legal system itself will be used in this thesis, resulting in an "assessment by reference to a standard set by law itself".⁴¹ In this thesis, the legal system is the Rome Statute, and the articles of the Statute will be used as internal criteria. I will be evaluating what problems might arise in light of the following specific criteria: the Court's jurisdiction, which is very broad and contains all types of jurisdictions, as well as the exercise of jurisdiction. I will evaluate if the situation at hand falls within the Court's jurisdiction, in particular regarding the two relevant crimes in this research, or if the Court might face some challenges regarding its jurisdiction. Besides, the conditions of admissibility will be evaluated, and I will evaluate, if in light of the internal criteria, whether the situation is admissible.

17. After answering and reviewing my three sub-questions, I am going to be able to conclude an answer to my central research question: Could Putin be prosecuted before the International Criminal Court?

³⁶ L. KESTEMONT, *Handbook on Legal Methodology*, Mortsel, Intersentia, 2018, 19-20.

³⁷ L. KESTEMONT and P. SCHOUKENS, *Rechtswetenschappelijk schrijven*, Leuven, Acco, 2017, 50.

³⁸ H. TIJSEN, *De Juridische Dissertatie onder de loep*, The Hague, Boom Juridische uitgevers, 2009, 58.

³⁹ L. KESTEMONT and P. SCHOUKENS, *Rechtswetenschappelijk schrijven*, Leuven, Acco, 2017, 64.

⁴⁰ H. TIJSEN, *De Juridische Dissertatie onder de loep*, The Hague, Boom Juridische uitgevers, 2009, 58.

⁴¹ L. KESTEMONT, *Handbook on Legal Methodology*, Mortsel, Intersentia, 2018, 60.

CHAPTER 1 How did the conflict between Russia and Ukraine arise?

In order to comprehend the current conflict, we must look back a few decades and look into the history between Russia and Ukraine.⁴²

1. Before the rise of the USSR

The very beginning

18. First, an overview of Ukraine's historical development as a nation-state dating back several centuries is required. The Ukrainian territory has been highly populated since very early on. When the area was visited by Herodotus around 500 BC, he referred to it as very fertile with very fish-rich rivers. In addition, its nature and climate made it an ideal route to travel from the East to the West. Many nomadic tribes thus decided to settle here, but in doing so, they often had to compete with other tribes to maintain control over their territory.⁴³ These settlements provided trade, and this development gave rise to many new cities, including Kiev. In 882, Oleg, Rurik's successor and Varangian prince of Novgorod, captures Kiev, making it the capital of a new State called 'Kyivan Rus'.⁴⁴

19. Kyivan Rus became a recognised European power mainly after the transition of Prince Vladimir "The Great" to Christianity in its Byzantine variant in 988. The metropolitan of Kiev and all of Russia was the head of the Russian church.⁴⁵ At this time, Kyivan Rus was a large land, and its dominance covered most of what is now Ukraine, Belarus, and European Russia.⁴⁶ However, in 1054, when Yaroslav "The Wise" the grand prince of Kiev, passed away, the empire gradually fragmented into regional rival city-states.⁴⁷ During the same period, the Eastern (Byzantine) and Western forms of Christianity began to grow apart. This resulted in the use of the Slavic language rather than Latin and Greek, making it much more difficult for the Russian people to participate in European culture.⁴⁸ Kiev gets plundered in 1169, which simultaneously marks the end of the Kiev empire.⁴⁹ The metropolitan eventually moved, in 1328, to Moscow.⁵⁰

⁴² L. ANATOL, *Ukraine & Russia: a fraternal rivalry*, Washington D.C., United States Institute of Peace Press, 1999, 12. (Hereafter: L. ANATOL, *Ukraine & Russia: a fraternal rivalry*).

⁴³ A. KRUF, *Rusland, Oekraïne en de Krim: historische wortels van een conflict*, Soesterberg, Aspekt, 2016, 22-23. (Hereafter: A. KRUF, *Rusland, Oekraïne en de Krim: historische wortels van een conflict*).

⁴⁴ M. JANSEN, *Een geschiedenis van Oekraïne*, Amsterdam, Van Oorschot, 2015, 18. (Hereafter: M. JANSEN, *Een geschiedenis van Oekraïne*).

⁴⁵ J.W. BEZEMER and M. JANSEN, *Een geschiedenis van Rusland: van Rurik tot Poetin*, Amsterdam, Van Oorschot, 2015, 27.

⁴⁶ L. ANATOL, *Ukraine & Russia: a fraternal rivalry*, 12.

⁴⁷ M. JANSEN, *Een geschiedenis van Oekraïne*, 22.

⁴⁸ A. KRUF, *Rusland, Oekraïne en de Krim: historische wortels van een conflict*, 28-29.

⁴⁹ J.W. BEZEMER and M. JANSEN, *Een geschiedenis van Rusland: van Rurik tot Poetin*, Amsterdam, Van Oorschot, 2015, 17-18.

⁵⁰ *Ibid.*, 26-27.

Disputes over Ukrainian territories

20. In the centuries that followed, the land was repeatedly divided by belligerents. In the thirteenth century, Mongol troops from the east conquered the Kiev Empire. The Mongol's new empire, which contained much of present-day Ukraine and Russia, was called 'The Golden Horde'.⁵¹ In the sixteenth century, the Russian Tsardom was established.⁵² Under the empire of the tsars, autonomous Ukrainian institutions and laws were abolished.⁵³ Also in the sixteenth century, Polish and Lithuanian armies invaded the region from the west and formed the Polish-Lithuanian Commonwealth. The Cossacks began to resist the control of the Polish-Lithuanian Commonwealth. The Cossacks were the most vocal supporters of their own "Ukrainian" social, political, and religious rights.⁵⁴ They managed to capture Kiev but were still under great threat from Poland and Lithuania; this was the reason why they decided to seek help from Moscow. This would be considered, even years later, an act that reunified Ukraine and Russia, bringing all the Rus people together. Years of fighting between Russia, Poland, the Ottoman Empire, and the Cossacks followed for control of modern-day Ukraine.⁵⁵ Without consulting the Cossacks, Russia and Poland-Lithuania signed a treaty in 1667 to divide Ukraine between them. Areas east of the Dnieper River fell into the hands of the Russian Tsar. The areas west of the Dnieper were under Polish rule. Ukraine was and remains a border area between East and West for many centuries.⁵⁶

Rise of Ukrainian identity

21. Between 1793 and 1795, part of western Ukraine was eventually annexed by the Russian Empire.⁵⁷ During the nineteenth century, a more complete Ukrainian identity began to emerge. Russians considered Ukrainians as well as Belarusians to be ethnically Russian but referred to both groups as 'Little Russians'.⁵⁸ A growing separatist movement in Ukraine led to a ban on using the Ukrainian language in state schools and publications in order to ensure political control and unity.⁵⁹ Ukrainian was regarded as the language of peasants.⁶⁰

⁵¹ A. KRUF, *Rusland, Oekraïne en de Kirm: historische wortels van een conflict*, 31.

⁵² J.W. BEZEMER and M. JANSEN, *Een geschiedenis van Rusland: van Rurik tot Poetin*, Amsterdam, Van Oorschot, 2015, 37.

⁵³ L. ANATOL, *Ukraine & Russia: a fraternal rivalry*, 25.

⁵⁴ M. JANSEN, *Een geschiedenis van Oekraïne*, 30.

⁵⁵ L. ANATOL, *Ukraine & Russia: a fraternal rivalry*, 20-21.

⁵⁶ *Ibid.*, 30-33.

⁵⁷ A. KRUF, *Rusland, Oekraïne en de Kirm: historische wortels van een conflict*, 49.

⁵⁸ M. JANSEN, *Een geschiedenis van Oekraïne*, 63.

⁵⁹ L. ANATOL, *Ukraine & Russia: a fraternal rivalry*, 25.

⁶⁰ M. JANSEN, *Een geschiedenis van Oekraïne*, 66.

2. The Soviet Era

22. In 1914, the First World War began. The Russian Empire in 1914 was even larger than the later Soviet Union. It was ruled very authoritatively. The dozens of non-Russian people were often suppressed in terms of language, religion, and culture. The two countries with the most Ukrainians, Russia and Austria-Hungary, were in opposite camps. Russia was part of the Entente, while Austria, along with Germany, belonged to the Central Powers.⁶¹ During the war, Russia suffered severe defeats from which it never really recovered. These defeats caused many food shortages on the home front, which led in the year 1917 to many frustrations, strikes, and demonstrations, which in turn led to the February Revolution.⁶²

23. The Russian Empire collapsed, and a provisional government took power. More than a week after the revolution began, representatives of various Ukrainian civil society groups set up a Central Rada in Kiev. The Rada focused on being an autonomous State within Russia.⁶³ In November 1917, the Bolsheviks, a communist party, overthrew the provisional government in Petrograd, the former Russian capital, and formed a Soviet-based government. The Bolshevik uprising soon turned into a dictatorship. In Kiev, this new regime was rejected, and not much later, the Rada declared full independence for Ukraine. The Bolsheviks refused secession from Ukraine, as Ukraine was of great economic importance to them.⁶⁴ The Bolsheviks managed to capture Kiev in early 1918, upon which the Ukrainian parliament decided to enlist German and Austrian help. Meanwhile, the Bolsheviks wanted to introduce communism in Kiev and make Russian the only official language. Within three weeks, the German army drove the Bolsheviks out of Kiev.⁶⁵

24. As World War I came to an end in November 1918, the situation in the Russian Empire devolved into civil war, one of the twentieth century's most devastating events. The new Bolshevik regime encountered resistance, and as a result, it established the Red Army. Not only Ukraine came into conflict with the Red Army, but other national minorities of the former Russian Empire also went to battle for their independence.⁶⁶ By the end of 1921, the Bolsheviks had emerged victorious, and Kiev was recaptured by the Red Army.⁶⁷ The Soviet Union, founded in 1922, rose to become a world superpower.⁶⁸ From the civil war emerged the Ukrainian Soviet Socialist Republic, which occupied most of the territory of today's Ukraine. Formally, Soviet Ukraine was independent, but in practise, it formed a whole with Soviet Russia. In 1922, Ukraine joined Russia, Belarus, and the Transcaucasian Federation of Georgia, Armenia, and Azerbaijan to form the Union of Soviet Socialist Republics (USSR).⁶⁹ In 1932, a dramatic famine broke out in Ukraine, created by Stalin's communist

⁶¹ M. JANSEN, *Een geschiedenis van Oekraïne*, 89.

⁶² *Ibid.*, 91.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, 92-93.

⁶⁵ A. KRUF, *Rusland, Oekraïne en de Kirm: historische wortels van een conflict*, 95-96.

⁶⁶ M. JANSEN, *Een geschiedenis van Oekraïne*, 92-95.

⁶⁷ *Ibid.*, 97.

⁶⁸ L. ANATOL, *Ukraine & Russia: a fraternal rivalry*, 34.

⁶⁹ M. JANSEN, *Een geschiedenis van Oekraïne*, 103-104.

regime. The trigger was grain withholding and peasant resistance to mandatory grain deliveries.⁷⁰ This famine is also known as "the Holodomor".⁷¹

25. The Second World War deepened the rift between Ukraine and Russia. In 1939, the USSR and Germany signed a non-aggression pact in which they agreed not to attack one another and to divide Poland and Eastern Europe among themselves.⁷² However, Germany did not comply and invaded the Soviet Union in 1941. When Germany invaded Ukraine, some Ukrainians decided to oppose the Germans; however, another segment of the Ukrainian population sympathised with Germany because they were relieved that the Soviet Union had left Ukraine and saw the Germans as liberators.⁷³ According to current authors, this is why Putin portrays Ukraine as a Nazi nation in the current conflict.⁷⁴ The Soviets launched a counteroffensive after defeating the Germans at the Battle of Stalingrad in 1943, causing the Germans to pull back from Ukraine. The Soviets returned to Kyiv, and brutal battles took place. Eventually, Ukraine was once again under Soviet rule.⁷⁵

26. The Cold War began in 1947, dividing Western and Eastern Europe. The Soviet Union installed communist governments, while the West developed democracies. This deep ideological divide fuelled distrust and tension between the two sides. These two sides formed military alliances; in 1949, NATO was formed in the West. The Eastern side joined the Warsaw Pact alliance.⁷⁶ Europe remained this way for decades until one side collapsed. The ever-so-strong Soviet Union went through some changes when the new head of the Soviet communist party, Mikhail Gorbachev, decided to reform the system. Many republics demanded more self-government and took power for themselves. In August 1991, conservative communists staged a coup to restore Soviet authority, but it failed, and most Union republics no longer recognised Soviet authority.⁷⁷ By late 1991, republics like Ukraine began declaring independence from Soviet domination. The Soviet Union was no more, and it dissolved into 15 independent States.⁷⁸ On the other hand, NATO was still going strong and growing. Countries that were once part of the Soviet sphere of influence, such as Poland and Hungary, joined NATO.⁷⁹ Ukraine wanted to join NATO for a long time, which made it a prime target for Russia. However, Ukraine entered into an agreement with NATO under the Partnership for Peace in 1994, bringing them one step closer to membership.⁸⁰ Ukraine was also interested in joining the EU, though the EU showed little interest and willingness to accept the offer in the early 1990s.⁸¹

⁷⁰ M. JANSEN, *Een geschiedenis van Oekraïne*, 108-109.

⁷¹ At least 4.8 million deaths occurred directly caused by the Famine; O. WOLOWYNA, "Understanding Holodomor loss numbers", *HREC*, 2018, <https://education.holodomor.ca/understanding-holodomor-loss-numbers/> (Consulted on 7 January 2023).

⁷² Scalar USC, *The Nazi-Soviet Non-Aggression Pact*, <https://scalar.usc.edu/works/usm-open-source-history-text-the-world-at-war-world-history-1914-1945/the-nazi-soviet-non-aggression-pact> (Consulted on 8 March 2023).

⁷³ M. JANSEN, *Een geschiedenis van Oekraïne*, 122-126.

⁷⁴ M. KRAMER, "Russia is Repeating its Brutal History in Ukraine", *Davis Center Harvard University*, 3 May 2022, <https://daviscenter.fas.harvard.edu/insights/russia-repeating-its-brutal-history-ukraine> (Consulted on 9 March 2023).

⁷⁵ Britannica, *The Nazi occupation of Soviet Ukraine*, <https://www.britannica.com/place/Ukraine/The-Nazi-occupation-of-Soviet-Ukraine> (Consulted on 9 March 2023).

⁷⁶ R. MENON and E.B. RUMER, *Conflict in Ukraine: The Unwinding of the Post-Cold War Order*, Cambridge, MIT Press, 2015, 132-135.

⁷⁷ *Ibid.*, 12-16, 21.

⁷⁸ A. KRUF, *Rusland, Oekraïne en de Kirm: historische wortels van een conflict*, 146.

⁷⁹ M. JANSEN, *Een geschiedenis van Oekraïne*, 171.

⁸⁰ *Ibid.*, 174.

⁸¹ *Ibid.*, 171.

27. Following the fall of the Soviet Union in the 1990s, Russia entered a period of democracy. By the end of the twentieth century, Russia had largely recovered from its economic meltdown, and its citizens enjoyed greater political freedom than ever before.⁸² On December 31, 1999, then-Russian President Yeltsin announced his resignation and named a successor, Vladimir Putin. In March 2000, Putin won the presidential election; this was the first peaceful transfer of power in the presidency since 1991 and the first democratic transfer of power in Russian history.⁸³ Soon after taking over as Acting President, Putin called for a "dictatorship of law". Afraid that regional governors had too much freedom under the Yeltsin administration, he wanted to recentralise the Russian political system.⁸⁴ Putin was given the authority to remove elected regional governors and dissolve their legislatures.⁸⁵ In January 2020, Putin presented a list of amendments that, in his judgement, would improve the balance of power and modernise the Constitution to take into account the changes that had taken place since the original version was approved in 1993. One of these amendments proposed a change in presidential terms, allowing Putin to serve another 12 years as president. The constitutional changes were eventually ratified.⁸⁶

3. The 2014-conflict

28. In 2013, Ukraine reached an association agreement with the European Union. But when it came down to signing the agreement, the pro-Russian president of Ukraine, Viktor Yanukovich, refused.⁸⁷ Hundreds of thousands of protesters took to the streets to demand the signing of the agreement. Riots erupted, government buildings were stormed, and even fatalities occurred. Eventually, Yanukovich fled the country.⁸⁸ These demonstrations led, especially in the east of Ukraine and Crimea, to calls for secession. Russian forces then proceeded to quickly take over Crimea. A referendum followed, in which the majority supposedly voted in favour of Crimea's reunification with Russia. Due to the lack of international observers on the conditions of the referendum, it is uncertain how accurate these results are. However, for Putin, this was Crimea's liberation; for almost the rest of the world, this was Crimea's annexation.⁸⁹

27. Russia's success in Crimea was quickly followed by an operation in eastern Ukraine, more specifically in Donetsk and Luhansk. The Donetsk and Luhansk regions might also be known under the name of 'Donbas'. In April 2014, separatists eventually overpowered several government

⁸² D.P. SOLOMON, "A Tsar Is Born: The Consolidation of Power in Putin's Russia.", *Center for Security Policy*, 2006, <http://www.jstor.org/stable/resrep05045> (Consulted on 9 March 2023).

⁸³ P. RUTLAND, "Putin's path to power", *Harvard University*, <https://uh.edu/~pgregory/conf/Rutland.PDF> (Consulted on 9 March 2023); F. HILL and C.G. GADDY, *Mr. Putin: Operative in the Kremlin*, Washington D.C., Brookings Institution Press, 2015, 8.

⁸⁴ D.P. SOLOMON, "A Tsar Is Born: The Consolidation of Power in Putin's Russia.", *Center for Security Policy*, 2006, <http://www.jstor.org/stable/resrep05045> (Consulted on 9 March 2023).

⁸⁵ D.P. SOLOMON, "A Tsar Is Born: The Consolidation of Power in Putin's Russia.", *Center for Security Policy*, 2006, <http://www.jstor.org/stable/resrep05045> (Consulted on 9 March 2023).

⁸⁶ European Parliament, *Constitutional change in Russia More Putin, or preparing for post-Putin?*, 2020, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651935/EPRS_BRI\(2020\)651935_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651935/EPRS_BRI(2020)651935_EN.pdf) (Consulted on 9 March 2023).

⁸⁷ P. D'ANIERI, *Ukraine and Russia: From Civilized Divorce to Uncivil War*, Cambridge, Cambridge University Press, 2019, 204-205.

⁸⁸ *Ibid.*, 211.

⁸⁹ *Ibid.*, 227-230.

buildings. Ukraine deployed its army, though with support from Russian troops, the insurgents managed to take control of the area.⁹⁰ Donetsk and Lugansk held referendums on their independence in May 2014. The result was clear, and the next day independence was declared in both self-proclaimed people's republics. However, this independence is not widely accepted in the rest of the world. Both territories are referred to as 'temporarily occupied territories' in Ukraine.⁹¹

4. Present-day conflict

28. For years, Putin has kept these areas under his control, preventing Ukraine from moving closer to the West. But in November 2021, while the conflict in the Donbas was also heating up, satellite images showed military troops piling up on the border of Ukraine. Putin's main demand to the West was for NATO to move its military border away from Russia's. Putin asserted that NATO has a military presence in Ukraine. Another demand of Putin was for NATO to stop expanding farther east towards Russia; NATO rejected this demand as it has an "open door" policy.⁹² Negotiations took place but went nowhere. Russia stated that it would be "forced to draw the corresponding conclusions and take all necessary measures to assure the strategic balance and remove unacceptable threats to [its] national security."⁹³ On February 21, 2022, the threat became more real. Putin's troops crossed borders into separatist regions in order to keep the peace, as Putin would say. Yet, on February 24, 2022, a full invasion took place. Putin claims this invasion was necessary in order to keep Russia safe and has pledged to "demilitarise and denazify" Ukraine.⁹⁴ He claims that Ukraine should join Russia because they are one due to their long-shared history.

29. The armed conflict that followed the invasion has already caused unimaginable suffering. Many citizens — over half of the Ukrainian population — chose to flee the country, but many others remained to fight for their country. Following the invasion, many explosions were reported in several large cities, and numerous horrific crimes have been committed in the area up to this point.⁹⁵ Russia tried to seize many cities, including the capital, Kyiv. However, it was unable to capture Kyiv; the first city to fall following Russia's invasion was the city of Kherson.⁹⁶ Following its failed attempt to seize Kyiv, Russia began a new operation in eastern Ukraine in April 2022. Mariupol, a significant and strategically important port city in the southeast that had been under siege since late February, was taken over by Russian forces in May.⁹⁷

⁹⁰ A. BELD, *Donbas Verscheurd tussen Oekraïne en Rusland*, Soesterberg, Aspekt, 2022, 5.

⁹¹ *Ibid.*, 13.

⁹² K.E. EICHENSEHR (ed.), "Russia Invades Ukraine", *American Journal of International Law* 2022, 599-600.

⁹³ A. TROIANOVSKI and D.E. SANGER, "Russia, at an Impasse with the West, Warns It Is Ready to Abandon Diplomacy", *N.Y. TIMES*, 13 January 2022, <https://www.nytimes.com/2022/01/13/world/europe/russia-ukraine-talks.html> (Consulted on 7 January 2023).

⁹⁴ K.E. EICHENSEHR (ed.), "Russia Invades Ukraine", *American Journal of International Law* 2022, 599-604.

⁹⁵ Human Rights Watch, *Ukraine events of 2022*, <https://www.hrw.org/world-report/2023/country-chapters/ukraine> (Consulted on 9 March 2023); Human Rights Council, *Report of the Independent International Commission of Inquiry on Ukraine*, 15 March 2023, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf (Consulted on 16 March 2023).

⁹⁶ M. SCHWIRTZ and R. PEREZ-PENA, "First Ukraine city falls as Russia strikes more civilian targets", *The NY Times*, 2 March 2022, <https://www.nytimes.com/2022/03/02/world/europe/kherson-ukraine-russia.html> (Consulted on 16 March 2023).

⁹⁷ X, "Mariupol: Key moments in the siege of the city", *BBC*, 17 May 2022, <https://www.bbc.com/news/world-europe-61179093> (Consulted on 16 March 2023).

30. In early January 2023, the Human Rights Monitoring Mission in Ukraine (hereafter: HRMMU) of the United Nations documented at least 6,919 civilian fatalities and more than 11,000 civilian injuries since the conflict's beginning and suspected the actual toll was higher.⁹⁸ The organisation Human Rights Watch (hereafter: HRW) investigates cases of human rights violations and focuses on various countries to make sure they are not violating the Universal Declaration of Human Rights of 1948.⁹⁹ It has already identified several violations. According to the HRW, Russia has carried out many attacks that are unlawful under international humanitarian law and have injured and killed thousands of civilians. Bombs were detonated in residential areas, apartment buildings, hospitals, supermarkets, and the regional theatre, among other places. Several deadly weapons were employed throughout the battle. The HRW recorded numerous Russian cluster munitions attacks between February and July 2022, as well as the use of anti-personnel landmines. Another violation identified by the HRW was the abuse of prisoners of war. The organisation stated that prisoners of war have been "ill-treated, tortured, and, in some cases, apparently summarily executed".¹⁰⁰ The conflict is heavy, and the toll is high.

5. Conclusion

31. As Alexander Motyl, an American historian, put it, "Ukraine cannot be understood in isolation from Russia, but, by the same token, Russia cannot be understood in isolation from Ukraine."¹⁰¹ Not many countries share the history that these two do. Both countries have a long history that dates back to the establishment of the first Slavic State, Kyiv Rus, with Kyiv as its capital city. Kyiv Rus ended up being invaded by the Mongols and later Poland-Lithuania, but in late 1700 it became part of the Russian Empire. The following years saw a policy of "Russification", where the Ukrainian identity was suppressed. In 1918, Ukraine declared its independence; this wasn't for very long, as they joined the Soviet Union in 1922. In 1991, Ukraine became an independent country again when the Soviet Union collapsed. But the history the two countries have together is inseparable. Putin leveraged this shared history to invade Ukraine.

⁹⁸ Human Rights Watch, *Ukraine events of 2022*, <https://www.hrw.org/world-report/2023/country-chapters/ukraine> (Consulted on 9 March 2023).

⁹⁹ Human Rights Watch, *About our Research*, <https://www.hrw.org/about/about-us/about-our-research> (Consulted on 9 March 2023).

¹⁰⁰ Human Rights Watch, *Ukraine events of 2022*, <https://www.hrw.org/world-report/2023/country-chapters/ukraine> (Consulted on 9 March 2023).

¹⁰¹ L. ANATOL, *Ukraine & Russia: a fraternal rivalry*, 11.

CHAPTER 2 How does the International Criminal Court function?

1. Establishment

32. For a long time, there has been a great desire for the creation of an international criminal court.¹⁰² A first ad hoc tribunal was established as early as 1474 to convict Governor Peter von Hagenbach, who served Duke Charles of Burgundy. Von Hagenbach had been guilty of several crimes, including murder, rape, and plunder. He was convicted and beheaded.¹⁰³ A first proposal for an independent international criminal court came in 1872 from Gustave Moynier, one of the founders of the International Committee of the Red Cross.¹⁰⁴ However, his proposal was not heeded.

33. The Treaty of Versailles provided for the possibility of establishing an international criminal court to try some of WWI's criminals.¹⁰⁵ Nevertheless, this possibility was not made use of, and the war criminals were tried before a national German tribunal.¹⁰⁶ The assassinations of King Alexander of ex-Yugoslavia and Louis Barthou in 1934 brought another attempt to establish a permanent international criminal court, again without success.

A so-called "greater" success occurred after the atrocities of WWII, when, in reaction, the international military tribunal was established in Nuremberg and Tokyo. For the first time, international crimes were tried on an international level. Several attempts were made after World War II to establish a permanent international criminal court. Running parallel to this were initiatives to codify substantive criminal law.¹⁰⁷ The Genocide Convention¹⁰⁸, the Geneva Conventions and Additional Protocols¹⁰⁹, and the Convention against Torture¹¹⁰ were all adopted, which was a step

¹⁰² International Criminal Court, *The ICC at glance*, https://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/afet_04112008_icc/afet_04112008_iccen.pdf (Consulted on 4 January 2023).

¹⁰³ W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 1.

¹⁰⁴ S. CORTHOUT, *Strafrechtelijke vervolging van ernstige schendingen van mensenrechten*, Antwerp, Maklu, 2002, 25-26; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 2.

¹⁰⁵ Articles 227-229 Treaty of Versailles of 28 June 1919, *League of Nations*.

¹⁰⁶ Articles 227-229 Treaty of Peace between the Allied and Associated Powers and Germany ('Treaty of Versailles'), (1919) TS 4; D. MCGOLDRICK, "Criminal trials before International Tribunals: legality and legitimacy" in D. MCGOLDRICK, P. ROWE and E. DONNELLY (eds.), *The permanent International Criminal Court*, Oregon, Hart Publishing, 2004, 13-14; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 3-4; O. HUZIK, "The genesis of the international criminal court", *Journal of Legal Studies* 2021, 76.

¹⁰⁷ S. CORTHOUT, *Strafrechtelijke vervolging van ernstige schendingen van mensenrechten*, Antwerp, Maklu, 2002, 26.

¹⁰⁸ UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948.

¹⁰⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, UNTS, vol. 75, 31 (1950); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, UNTS, vol. 75, 85 (1950); Geneva Convention relative to the Treatment of Prisoners of War, UNTS, vol. 75, 135 (1950); Geneva Convention relative to the Protection of Civilian Persons in Time of War, UNTS, vol. 75, 287; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, UNTS, vol. 1125, 3 (1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol II), UNTS, vol. 1125, 610 (1979).

¹¹⁰ UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, *Treaty Series* 1996, Vol. 1465, 85.

forward. However, this progress was not matched by the creation of international judicial mechanisms.¹¹¹

34. In the 1990s, after the Yugoslav wars and the Rwandan genocide, the United Nations reintroduced the notion of an international criminal court. Due to the conflicts that occurred in the Balkans in the 1990s, the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993. The creation of the International Criminal Tribunal for Rwanda (ICTR) by the Security Council followed, in 1994, in response to the genocide and other serious violations that took place in Rwanda that same year.¹¹² The creation and verdicts of these tribunals eventually served as a motivating factor in the eventual establishment of the International Criminal Court and other international criminal justice systems and, as well, brought a renewed focus on domestic prosecution of transnational crimes. It fully brought to life the largely moribund field of international criminal law.¹¹³

35. In 1998, in Rome, negotiations regarding the Statute of the International Criminal Court took place. The Rome Statute was adopted by a vote of 120 to 7, with 21 countries abstaining. The statute finally went into effect on July 1, 2002, after 60 States ratified it.¹¹⁴

¹¹¹ W.A. SCHABAS (ed.), *The Cambridge Companion to International Criminal Law*, Cambridge, Cambridge University Press, 2016, 117-118.

¹¹² Y. BEIGBEDER, *International Justice Against Impunity: Progress and New Challenges*, Leiden, Koninklijke Brill N.V., 2005, 69; M. STERIO, "The Legacy of the Yugoslavia and Rwanda Tribunals" in M. STERIO and M. SCHARF (eds.), *The Legacy of Ad Hoc Tribunals in International Criminal Law: Assessing the ICTY's and the ICTR's Most Significant Legal Accomplishments*, Cambridge, Cambridge University Press, 2019, 9.

¹¹³ *Ibid.*, 117; S. CORTHOUT, *Strafrechtelijke vervolging van ernstige schendingen van mensenrechten*, Antwerp, Maklu, 2002, 27-28.

¹¹⁴ R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 145-146.

2. Composition (of the Court)

36. The ICC is a permanent and independent international organisation and tribunal, with its seat situated in The Hague. While the Court is independent, it still maintains a relationship agreement with the United Nations, as mentioned in the Preamble.¹¹⁵ The Court consists of four different organs, in conformity with Article 34 of the Rome Statute: The Presidency; an Appeals Division, a Trial Division, and a Pre-Trial Division; the Office of the Prosecutor; and the Registry.¹¹⁶

37. The Presidency consists of the President and First and Second Vice-Presidents, who shall be elected by an absolute majority of the judges pursuant to Article 38 Rome Statute. They will be elected for a three-year renewable term. Besides, there will also be three judges elected, who will also compose the Presidency on a full-time basis. The function of the presidency is to maintain the proper administration of the Court.¹¹⁷ Furthermore, there are the Judicial Divisions, composed of the Pre-trial judges, Trial judges and Appeals judges. The first two generally consist of three judges per case, the latter generally holds five judges per case. An election of judges shall be held in accordance with Article 36 Rome Statute. These judges are responsible for examining the Court's proceedings at different stages.¹¹⁸ The Office of the Prosecutor is an independent organ of the Court, headed by the Prosecutor and assisted by one or more Deputy Prosecutors. The Office is in charge of examining State referrals and any other significant information on crimes; it also carries out investigations and prosecutions. The Prosecutor and Deputies are mandated for a non-renewable period of nine years.¹¹⁹ Article 43 Rome Statute contains the provisions regarding the Registry. The Registry is responsible for providing services and 'non-judicial aspects' of administration to the Court in order for the Court to work effectively and conduct fair proceedings. The head of the Registry, the Registrar, shall exercise his function for a term of five years.¹²⁰ In addition, the Assembly of States Parties provides management oversight, sets the budget, adopts subsidiary instruments, and elects the judges and Prosecutor. The Assembly is a legislative body; it is not, however, an organ of the Court. The Assembly is composed of the representatives of each of the States that are Parties to the Rome Statute.¹²¹ At the time of writing, 123 States are members of the Rome Statute.¹²²

¹¹⁵ Article 2 Rome Statute; Preamble, para. 9 Rome Statute; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 361-362; S. BABAIAN, *The International Criminal Court – An International Criminal World Court?*, Switzerland, Springer, 2018, 16.

¹¹⁶ Article 34 Rome Statute.

¹¹⁷ Article 35 and 38 Rome Statute; International Criminal Court, *The Presidency*, <https://www.icc-cpi.int/about/presidency> (Consulted on 4 January 2023).

¹¹⁸ Article 36 and 39 Rome Statute; International Criminal Court, *Judicial Divisions*, <https://www.icc-cpi.int/about/judicial-divisions> (Consulted on 4 January 2023).

¹¹⁹ Article 42 Rome Statute; International Criminal Court, *Office of the Prosecutor*, <https://www.icc-cpi.int/about/otp> (Consulted on 4 January 2023).

¹²⁰ Article 43 Rome Statute; R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 146; International Criminal Court, *Registry*, <https://www.icc-cpi.int/about/registry/default> (Consulted on 4 January 2023).

¹²¹ Article 112 Rome Statute; R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 146; International Criminal Court, *Assembly of States Parties*, <https://www.icc-cpi.int/sites/default/files/Publications/aspENG.pdf> (Consulted on 4 January 2023).

¹²² International Criminal Court, *The States Parties to the Rome Statute*, <https://asp.icc-cpi.int/states-parties> (Consulted on 2 April 2023).

3. Jurisdiction

38. The present chapter will deal with the jurisdiction of the ICC. The structure will be as follows: First, the Court's material jurisdiction will be thoroughly discussed. The core crimes and their conditions will be covered in this chapter but will be applied to the situation at hand in the next chapter. Next, the Court's temporal jurisdiction will be outlined. The ICC only has jurisdiction over crimes committed after a certain date. The jurisdiction *ratione personae* and *ratione loci* of the Court will then be examined. Unless a crime is committed by a national of a State Party or against a State Party, the ICC lacks jurisdiction. Exceptions might occur.¹²³ These are all the internal criteria that will be used in the next chapter to evaluate if Putin can be tried before the ICC as a possible perpetrator.

3.1. Jurisdiction *ratione materiae*

39. Pursuant to Article 5 of the Rome Statute, the International Criminal Court has jurisdiction over four categories of international crimes: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.¹²⁴ These are regarded as the "most serious crimes of international concern".¹²⁵ These crimes are collectively known as core crimes.¹²⁶ Since the crime of aggression and war crimes are more crucial to this thesis, they will be dealt with more extensively than the crimes against humanity and genocide. To interpret and apply each of the core crimes, the General Assembly of States Parties adopted the Elements of Crimes (hereafter: EoC), as provided in Article 9 of the Rome Statute.¹²⁷

¹²³ I. CAMERON, "Jurisdiction and Admissibility Issues under the ICC Statute", in D. MCGOLDRICK, P. ROWE and E. DONNELLY (eds.), *The Permanent International Criminal Court Legal and Policy Issues*, Oxford, Hart Publishing, 2004, 65-66.

¹²⁴ Article 5 Rome Statute; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 74.

¹²⁵ Article 1 Rome Statute.

¹²⁶ Eurojust, *Core International Crimes*, <https://www.eurojust.europa.eu/crime-types-and-cases/crime-types/core-international-crimes> (Consulted on 26 January 2023).

¹²⁷ Article 9 Rome Statute; Elements of Crimes, Assembly of States Parties (9 September 2002), ICC-ASP/1/3(part II-B) (2002); C. LAUCCI, *The Annotated Digest of the International Criminal Court: 2009*, Leiden, Koninklijke Brill N.V., 2014, 56-57; G.M. PIKIS, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, Leiden, Martinus Nijhoff Publishers, 2010, 68; A. CASSESE, "Genocide" in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, 348; N. KOURSAMI, "The 'Contextual Elements' of the Crime of Genocide" in G. WERLE and M. VORMBAUM (eds.), *International Criminal Justice series*, The Hague, Asser Press, 2018, vol.17, 128-130.

3.1.1 Genocide

40. In 1944, Raphael Lemkin introduced the term "genocide" for the first time in his book on Nazi atrocities in occupied Europe.¹²⁸ The Nuremberg prosecutors used the term "genocide" the following year, and the United Nations General Assembly classified it as an international crime in 1946.¹²⁹ In 1948, the General Assembly signed and ratified the Convention on the Prevention and Punishment of the Crime of Genocide, the first international human rights protection treaty within the UN framework.¹³⁰ In the Rome Statute, the crime of genocide is mentioned under Article 6. Article 6 of the Statute is an exact copy of Article II of the Genocide Convention of 1948:¹³¹

"Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;*
- (b) Causing serious bodily or mental harm to members of the group;*
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) Imposing measures intended to prevent births within the group;*
- (e) Forcibly transferring children of the group to another group."*

41. Article 21 Rome Statute mentions that in the first place, the Statute, EoC, and Rules of Procedure and Evidence (hereafter: RPE) should be applied.¹³² However, the crime of genocide appears to be of particularity here, as it is required to first examine other articles of the Genocide Convention as well as other sources of international law, such as the pertinent ICJ, ICTY, and ICTR jurisprudence.¹³³

42. The crime of genocide requires, like all crimes, an objective side (*actus reus*) and a subjective side (*mens rea*).¹³⁴ The *actus reus* consists of three material elements: the 'conduct' element, the 'consequence' element and the 'circumstances' element.¹³⁵

¹²⁸ R. LEMKIN, *Axis Rule in Occupied Europe: Law of Occupation, Analysis of Government, Proposals for Redress*, Washington D.C., Carnegie Endowment for International Peace, 1944, 79.

¹²⁹ W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 87; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 75; G.M. PIKIS, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, Leiden, Martinus Nijhoff Publishers, 2010, 59.

¹³⁰ V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 77; W.R. PRUITT, *An Introduction to the Criminology of Genocide*, Switzerland, Springer, 2021, 16; W.A. SCHABAS, *International Criminal Law*, Cambridge, Cambridge University Press, 2015, 206; G.J.A. KNOOPS, *Mens Rea at the International Criminal Court*, Boston, BRILL, 2016, 93.

¹³¹ Article 6 Rome Statute; Article II Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 87; M. KLAMBERG (ed.), *Commentary on the Law of the International Criminal Court*, Brussels, Torkel Opsahl Academic EPublisher, 2017, 18.

¹³² Article 21 Rome Statute.

¹³³ V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 79-80.

¹³⁴ R. ARNOLD, "The mens rea of genocide under the statute of the International Criminal Court", *Criminal Law Forum* 2003, 128-129.

¹³⁵ P. BEHRENS, "The mens rea of genocide", in P. BEHRENS and R. HENHAM (eds.), *Elements of Genocide*, London, Taylor & Francis Group, 2012, 70.

A. Material elements

43. First of all, the perpetrator must commit one of the five specific acts of genocide, which is also called 'the conduct element'.¹³⁶ These five specific genocidal acts are provided in Article 6(a) to (e) of the Statute: killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, imposing measures intended to prevent births, and forcibly transferring children.¹³⁷ Three of the five crimes, also listed in Article II of the Genocide Convention — killing group members, causing serious bodily or mental harm, and forcibly transferring children — require evidence of a result. The other two acts — deliberately inflicting conditions of life calculated to bring about physical destruction and imposing measures intended to prevent births — do not require this kind of proof but do require further specific intent.¹³⁸ There are different ways to participate in the crime; the different ways are mentioned in Article 3 of the Genocide Convention and are all prohibited. The following are mentioned: conspiracy; direct and public incitement; an attempt; and complicity.¹³⁹ Genocide does not require a nexus to an armed conflict; it can be committed during times of peace. The ICTR Appeals Chamber upheld this in the *Siméon Nchamihigo* case.¹⁴⁰

The victims must belong to one of the targeted groups, 'the consequence element'. The EoC lists four groups, which are the same as those mentioned in Article II of the Genocide Convention: national, ethnic, racial, or religious.¹⁴¹ This is a limited list of groups, which in the past has received much criticism and has called for votes to include political and social groups, but without success.¹⁴² Defining these groups is not always easy, as there is no international definition provided.¹⁴³ However, it is not really the victim of the crime that is the object, but the group to which it belongs.¹⁴⁴ Genocide does not necessitate a large number of victims, but it cannot exist with only one victim.¹⁴⁵

¹³⁶ Article 6(a),(b),(c),(d),(e) ICC Elements of Crimes; C. LAUCCI, *The Annotated Digest of the International Criminal Court: 2009*, Leiden, Koninklijke Brill N.V., 2014, 11; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 81; R. ARNOLD, "The mens rea of genocide under the statute of the International Criminal Court", *Criminal Law Forum* 2003, 128-129.

¹³⁷ Article 6(a),(b),(c),(d),(e) ICC Elements of Crimes.

¹³⁸ W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 177.

¹³⁹ Article 3 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

¹⁴⁰ *Prosecutor v. Siméon Nchamihigo*, "Appeal Judgement", ICTR (Appeals Chamber), 18 March 2010, ICTR-2001-63-A, para. 363; International Criminal Law Services, *Genocide*, <https://iici.global/0.5.1/wp-content/uploads/2018/03/icls-training-materials-sec-6-genocide.pdf> (Consulted on 26 January 2023).

¹⁴¹ Article 6(a),(b),(c),(d),(e) ICC Elements of Crimes; Article II Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

¹⁴² W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 92; W.A. SCHABAS, *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2009, 117.

¹⁴³ In the *Akayeshu* case, the ICTR interpreted the Genocide Convention to mean "any stable and permanent group." This broad interpretation, however, is not supported by other case law or state practice; *Prosecutor v. Akayeshu*, "Judgement", ICTR (Trial Chamber II), 2 September 1998, ICTR-96-4-T, para. 516; The Trial Chamber, in the *Krstić* case, followed a different approach by recognising the list as exhaustive while also accepting that the four groups were not given interpretations in the Convention; *Prosecutor v. Krstić*, "Judgement", ICTY (Trial Chamber I), 2 August 2001, IT-98-33, paras.555-556; R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 211-212;

¹⁴⁴ *Prosecutor v. Jelisić*, "Judgement", ICTY (Trial Chamber I), 14 December 1999, IT-95-10-T, paras. 66-67; I.O. IFEKANDU and C.E. OCHEM, "Examination of the Crime of Genocide under the Rome Statute of the International Criminal Court", *Journal of Law, Policy and Globalization* 2021, 32.

¹⁴⁵ A. CASSESE, "Genocide" in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, 348.

The specific act of genocide must take place “in the context of a manifest pattern of similar conduct directed against that group or be conduct that could itself effect such destruction,” also called the ‘circumstances element’.¹⁴⁶ In order for a pattern to be considered manifest, it must be apparent and not consist of a few isolated crimes spread out across a number of years.¹⁴⁷ The expression “could itself effect such destruction” refers to circumstances in which the accused is in such a powerful position and the group is rather small that a pattern of similar conduct is not necessary.¹⁴⁸

B. Mental element

44. The *mens rea* of the crime of genocide comprises two elements, as stated in the *Al-Bashir case*.¹⁴⁹ One being the general subjective element that is provided for in Article 30 of the Rome Statute, namely the general intent and knowledge requirement. Secondly, an additional subjective element, being the specific intent to “destroy, in whole or in part, the targeted group”, is included in Article 6 Rome Statute.¹⁵⁰

45. Intent and knowledge are the two requirements under Article 30 of the Rome Statute. Paragraphs 2 and 3 of Article 30 describe when a person has “intent”, and what is meant by “knowledge”: “a person has intent where (a) in relation to conduct, that person means to engage in the conduct; (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events”, and “knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events”.¹⁵¹ In light of Article 30 Rome Statute, the *mens rea* must correspond to the previously mentioned material elements: the conduct element, consequence element, and circumstances element.¹⁵² In particular, in the elements of conduct and consequence, intent is required. Direct intent is required for the conduct element, which means that the person intends to commit the conduct. In case of the consequence element, the intent can be either direct or indirect; the person either has the intent to

¹⁴⁶ Article 6(a),(b),(c),(d),(e) ICC Elements of Crimes; R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 218; C. LAUCCI, *The Annotated Digest of the International Criminal Court: 2009*, Leiden, Koninklijke Brill N.V., 2014, 11; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 81; R. ARNOLD, “The mens rea of genocide under the statute of the International Criminal Court”, *Criminal Law Forum* 2003, 128-129.

¹⁴⁷ R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 218; V. OOSTERVELD and C. GARRAWAY, “The Elements of Genocide” in R. LEE et al. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, Transnational Publishers Inc., 2001, 41, 44-45.

¹⁴⁸ R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 218.

¹⁴⁹ *Prosecutor v. Al-Bashir*, “Decision on the Prosecution’s Application for a Warrant of Arrest”, ICC (Pre-Trial Chamber I), 4 March 2009, ICC-02/05-01/09, para. 139.

¹⁵⁰ C. LAUCCI, *The Annotated Digest of the International Criminal Court: 2009*, Leiden, Koninklijke Brill N.V., 2014, 12; R. ARNOLD, “The mens rea of genocide under the statute of the International Criminal Court”, *Criminal Law Forum* 2003, 130-132; K. AMBOS, “What does ‘intent to destroy’ in genocide mean?”, *International Review of the Red Cross* 2009, 834; G.J.A. KNOOPS, *Mens Rea at the International Criminal Court*, Boston, BRILL, 2016, 95.

¹⁵¹ Article 30(2)(3) Rome Statute; R. ARNOLD, “The mens rea of genocide under the statute of the International Criminal Court”, *Criminal Law Forum* 2003, 129.

¹⁵² R. ARNOLD, “The mens rea of genocide under the statute of the International Criminal Court”, *Criminal Law Forum* 2003, 132.

cause the consequence or is aware of its potential consequences. The knowledge element comes into play with the element of circumstance.¹⁵³

46. Article 6 of the Statute contains a specific intent, also called “genocidal intent”. An act of genocide must be committed with the intent to destroy a group, in whole or in part.¹⁵⁴ This requirement does not need to correspond with a material element, contrary to Article 30.¹⁵⁵ Two special elements arise from this definition that both need to be present in order for the crime to fall under the crime of genocide.¹⁵⁶ First of all, there must have been an intent to destroy. ‘To destroy’ is specified in the Genocide Convention as physical or biological destruction. Secondly, the intent to destroy must be committed against a particular group, in whole or in part. In *Kayishema*, it was said that ‘in part’ relates to the intention to destroy a considerable number of individuals in the same group.¹⁵⁷ The ICJ also stated that it is difficult to establish genocidal intent on the basis of solely isolated acts.¹⁵⁸ Furthermore, the ICTY has issued numerous rulings on the interpretation of the subjective side of the crime.¹⁵⁹

3.1.2 Crimes against humanity

47. One can once again trace the history of crimes against humanity to the Allied Declaration of 1915. Crimes against humanity were classified as a separate category of international crimes by the Nuremberg Charter and the Tokyo Charter, and numerous people were found guilty of committing such crimes. These crimes are also included as subjects in the ICTY and ICTR laws. Numerous laws categorise certain actions as crimes against humanity or forbid actions that are degrading to human dignity.¹⁶⁰ The definition of Crimes against humanity is laid down in Article 7 of the Rome Statute:

¹⁵³ R. ARNOLD, “The mens rea of genocide under the statute of the International Criminal Court”, *Criminal Law Forum* 2003, 130-131; O. TRIFFTERER, “Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such”, *LJIL* 2001, 399-400.

¹⁵⁴ V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 81; C. LAUCCI, *The Annotated Digest of the International Criminal Court: 2009*, Leiden, Koninklijke Brill N.V., 2014, 12.

¹⁵⁵ R. ARNOLD, “The mens rea of genocide under the statute of the International Criminal Court”, *Criminal Law Forum* 2003, 150.

¹⁵⁶ V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 82.

¹⁵⁷ *Prosecutor v. Kayishema*, “Judgement”, ICTR (Trial Chamber II), 21 May 1999, ICTR-95-1-T, paras. 96-97; I.O. IFEAKANDU and C.E. OCHEM, “Examination of the Crime of Genocide under the Rome Statute of the International Criminal Court”, *Journal of Law, Policy and Globalization* 2021, 34.

¹⁵⁸ “Since it is the group, in whole or in part, which is the object of the genocidal intent, the Court is of the view that it is difficult to establish such intent on the basis of isolated acts. It considers that, in the absence of direct proof, there must be evidence of acts on a scale that establishes an intent not only to target certain individuals because of their membership of a particular group, but also to destroy the group itself in whole or in part”; *Croatia v. Serbia*, “Application of the Convention on the Prevention and Punishment of the Crime of Genocide”, ICJ, 3 February 2015, ICJ Reports 2015, para. 139.

¹⁵⁹ It was first noted by the Trial Chamber in the *Karadžić and Mladić case*, that the character of the conduct may justify the conclusion of genocidal intent. However, in the *Jelisić case* this approach was seen as too expansive. In *Jelisić* the Tribunal judged that the charge of genocide could not be proven ‘beyond reasonable doubt’, as the specific genocidal intent was not present; *Prosecutor v. Karadžić*, “Appeals Judgement”, ICTY (Appeals Chamber), 11 July 2013, IT-95-5/18, para. 57; *Prosecutor v. Jelisić*, “Appeals Judgement”, ICTY (Appeals Chamber), 5 July 2001, IT-95-10-T, para. 50.

¹⁶⁰ G.M. PIKIS, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, Leiden, Martinus Nijhoff Publishers, 2010, 60-62.

"For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) *Murder;*
- (b) *Extermination;*
- (c) *Enslavement;*
- (d) *Deportation or forcible transfer of population;*
- (e) *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
- (f) *Torture;*
- (g) *Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*
- (h) *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*
- (i) *Enforced disappearance of persons;*
- (j) *The crime of apartheid;*
- (k) *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*¹⁶¹

48. Key elements of crimes against humanity include the requirement that they be "committed as part of a widespread or systematic attack," "directed against any civilian population," and "committed with knowledge of the attack," as stated in Article 7. Paragraph 2 of Article 7 also further defines some important elements mentioned in paragraph 1.¹⁶² The elements of crimes against humanity are laid out in Articles 7(1)(a) to 7(1)(k) ICC Elements of Crimes.

¹⁶¹ Article 7(1) Rome Statute; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 106.

¹⁶² G.M. PIKIS, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, Leiden, Martinus Nijhoff Publishers, 2010, 63; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 107.

A. Material elements

49. First, the attack must be widespread¹⁶³ or systematic¹⁶⁴. The Statute of Rome contains no definition. The precise meaning should be interpreted in light of both the case law of the ad hoc tribunals and customary international law.¹⁶⁵ This condition was nevertheless not required in the Nuremberg or Tokyo Charters. However, because these tribunals dealt with the crimes of World War II, this condition was still met.¹⁶⁶ Several elements may be considered when determining if an attack was widespread or systematic, including the number of victims, the means and methods utilised, the result, and the consequences of the behaviour.¹⁶⁷ For crimes against humanity, unlike for war crimes, the attack does not have to involve the use of armed force but can also include mistreatment.¹⁶⁸ In the *Tadić* case, the Trial Chamber ruled that only one of the conditions needed to be satisfied. The requirement of "widespread and systematic" refers only to the attack and not to the accused's individual actions.¹⁶⁹

50. Targeting a civilian population is completely forbidden by customary international law. If the attack was carried out due to a pressing military need, civilian losses may occasionally be acceptable. The proportionality principle must be followed in these circumstances.¹⁷⁰ The *Kunarac Appeal Judgement* defined what "civilian population" means.¹⁷¹ Concerning the word "any", the Court said it is not necessary for civilians to be associated with either side of the conflict.¹⁷²

¹⁶³ Widespread means the large-scale nature of the attack and the number of targeted persons; *Prosecutor v. Harun and Abd-Al-Rahman*, "Judgement", ICC (Pre-Trial Chamber I), 27 April 2007, ICC-02/05-01/07-1-Corr, para. 63; *Prosecutor v. Katanga*, "Judgement", ICC (Trial Chamber II), 7 March 2014, ICC-01/04-01/07, para. 1098; *Prosecutor v. Bagosara and Nsenyiyuma*, "Appeals Judgement", ICTR (Appeals Chamber), 14 December 2011, ICTR-98-41-A, para. 389; G.M. PIKIS, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, Leiden, Martinus Nijhoff Publishers, 2010, 62.

¹⁶⁴ Systematic was described as the organised nature of the acts of violence and the improbability of their random occurrence; *Prosecutor v. Harun and Abd-Al-Rahman*, "Judgement", ICC (Pre-Trial Chamber I), 27 April 2007, ICC-02/05-01/07-1-Corr, para. 63; *Prosecutor v. Katanga*, "Judgement", ICC (Trial Chamber II), 7 March 2014, ICC-01/04-01/07, para. 1098; *Prosecutor v. Bagosara and Nsenyiyuma*, "Appeals Judgement", ICTR (Appeals Chamber), 14 December 2011, ICTR-98-41-A, para. 389; G.M. PIKIS, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, Leiden, Martinus Nijhoff Publishers, 2010, 62.

¹⁶⁵ G.J.A. KNOOPS, *Mens Rea at the International Criminal Court*, Boston, BRILL, 2016, 113.

¹⁶⁶ C. BYRON, I. SCOBIE, D. MCGOLDRICK and J. D'ASPREMONT, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court*, Manchester, Manchester University Press, 2009, 191.

¹⁶⁷ *Prosecutor v. Kordic v Cerkez*, "Judgement", ICTY (Trial Chamber III), 26 February 2001, IT-95-14/2, para. 179; *Prosecutor v. Blaskic*, "Judgement", ICTY (Trial Chamber I), 3 March 2000, IT-95-14-T, para. 206.

¹⁶⁸ R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 233.

¹⁶⁹ *Prosecutor v. Tadić*, "Judgement", ICTY (Trial Chamber II), 7 May 1997, IT-94-1-A, para. 643; G.J.A. KNOOPS, *Mens Rea at the International Criminal Court*, Boston, BRILL, 2016, 113.

¹⁷⁰ G.J.A. KNOOPS, *Mens Rea at the International Criminal Court*, Boston, BRILL, 2016, 115.

¹⁷¹ "The use of the word "population" does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack', but that "it is sufficient to show that enough individuals were targeted in the course of the attack, or they were targeted in such a way that the attack was in fact directed against a civilian "population"; In the same case, it was required that the perpetrator "must have known or considered the possibility that the victim of his crime was a civilian". This approach is not followed by the ICC; *Prosecutor v. Kunarac, Kovac and Vukovic*, "Appeals Judgment", ICTY (Appeals Chamber), 12 June 2002, IT-96-23 and IT-96-231, para. 90; C. BYRON, I. SCOBIE, D. MCGOLDRICK and J. D'ASPREMONT, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court*, Manchester, Manchester University Press, 2009, 199.

¹⁷² *Prosecutor v. Tadić*, "Judgement", ICTY (Trial Chamber II), 7 May 1997, IT-94-1-A, para. 635, *Prosecutor v. Kunarac, Kovac and Vukovic*, "Appeals Judgment", ICTY (Appeals Chamber), 12 June 2002, IT-96-23 and IT-96-231, para. 423; G.J.A. KNOOPS, *Mens Rea at the International Criminal Court*, Boston, BRILL, 2016, 113; C. BYRON, I. SCOBIE, D. MCGOLDRICK and J. D'ASPREMONT, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court*, Manchester, Manchester University Press, 2009, 198.

51. In the Introduction to the crimes against humanity of the EoC it was stated that:

"The acts need not constitute a military attack. It is understood that "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population."

There has been much controversy surrounding this element. There are various interpretations of what constitutes an organisation. In the ICC *Kenya case*, the majority of judges followed a broad approach and argued that an organisation need not be state-like. Any association of people with an established structure could fall under this. The narrow view, followed by Judge Kaul, held that an organisation needs to be state-like.¹⁷³

B. Mental element

52. Article 30 Rome Statute encompasses a general *mens rea* requirement; it prescribes that crimes are committed with "intent" and "knowledge". An accused could incur criminal responsibility for crimes against humanity if he intended to commit the specific acts listed in Article 7(1)(a)-(k) and if he committed the acts "with knowledge" of a widespread or systematic attack directed against any civilian population. Some crimes against humanity include an additional *mens rea* requirement.¹⁷⁴

3.1.3 War crimes

53. War crimes have been a concern for humanity since the beginning of time. The issue of international jurisdiction over these crimes was first investigated in 1919 by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, which looked at the current international legal system and the principles derived from the 1907 Hague Convention. Following the end of World War II, war crimes were first prosecuted before the International Military Tribunals (IMT) of Nuremberg and Tokyo.¹⁷⁵

54. Article 8 of the Rome Statute is a very lengthy article. It provides a comprehensive enumeration of what is to be understood by war crimes within the jurisdiction of the Court. This enumeration is exhaustive. According to this article, war crimes under the jurisdiction of the Court can be divided into four broad categories: (1) grave breaches of the Geneva Conventions of August 12, 1949; (2) other serious violations of the laws and customs applicable in international armed

¹⁷³ *Prosecutor v. William Samoei Ruto, et. al*, "Dissenting Opinion", ICC (Pre-Trial Chamber II), 15 March 2011, ICC-01/09-01/11, paras. 49-50; R. DUBLER SC and M. KALYK, *Crimes Against Humanity in the 21st Century: Law, Practice and Threats to International Peace and Security*, Leiden, Koninklijke Brill N.V., 2018, 711; R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 238.

¹⁷⁴ G.J.A. KNOOPS, *Mens Rea at the International Criminal Court*, Boston, BRILL, 2016, 123.

¹⁷⁵ V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 127; C. BYRON, I. SCOBBIIE, D. MCGOLDRICK and J. D'ASPREMONT, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court*, Manchester, Manchester University Press, 2009, 12; O.A. HATHAWAY, P.K. STRAUCH, B.A. WALTON and Z.A.Y. WEINBERG, "What is a war crime?", *Yale J. Int.L.* 2019, 62.

conflict; (3) in the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of August 12, 1949; (4) other serious violations of the laws and customs applicable in armed conflicts not of an international character. The Statute makes a clear distinction between treaty law violations as defined by the Geneva Conventions and other laws, as well as between international and non-international conflicts.¹⁷⁶

The first paragraph reads as follows:

*"The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."*¹⁷⁷

In the Chamber's opinion, the expression "in particular" makes it plain that the existence of a plan, policy, or large-scale commission is not a constitutive element but rather acts as practical guidance for the Court. Crimes do not have to be committed on a large scale to be classified as war crimes. A single, isolated act committed by a single perpetrator can constitute a war crime.¹⁷⁸ Though plan, policy, and scale are not constitutive elements, alleged war crimes that fit these criteria have a greater possibility of being covered under the Rome Statute.¹⁷⁹

A. Material elements

55. There must be a nexus between the crime and the armed conflict for each of the war crimes listed in Article 8 Rome Statute. Any crime under Article 8 must occur "in the context of" and be "connected with" an international or non-international armed conflict, according to the Elements of Crimes.¹⁸⁰ Besides, the perpetrator must have been aware of factual circumstances that established the existence of an armed conflict.¹⁸¹ It is not necessary for the perpetrator to determine whether an armed conflict exists or whether it qualifies as being international or non-international.¹⁸² Only crimes committed during armed conflict can be classified as war crimes. There is no definition of an

¹⁷⁶ Article 8(2)(a),(b),(c),(e) Rome Statute; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 128-129; K. DORMANN, *War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the negotiations on the Elements of Crimes*, Leiden, Koninklijke Brill N.V., 2003, 343-345; G.J.A. KNOOPS, *Mens Rea at the International Criminal Court*, Boston, BRILL, 2016, 66.

¹⁷⁷ Article 8(1) Rome Statute.

¹⁷⁸ C. LAUCCI, *The Annotated Digest of the International Criminal Court: 2009*, Leiden, Koninklijke Brill N.V., 2009, 49; Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean Pierre Bemba Gombo (PT), 15 June 2009 (Eng), paras. 211, 266; G.A. KNOOPS, *Mens Rea at the International Criminal Court*, Boston, BRILL, 2016, 74, 77; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 139.

¹⁷⁹ G.J.A. KNOOPS, *Mens Rea at the International Criminal Court*, Boston, BRILL, 2016, 77.

¹⁸⁰ Art. 8 (2) (b) (xxii)-1 (3), (xxii)-2 (3), (xxii)-3 (3), (xxii)-4 (2), (xxii)-5 (3) and (xxii)-6 (4) ICC Elements of Crimes; art. 8 (2) (e) (vi)-1 (3), (vi)-2 (3), (vi)-3 (3), (vi)-4 (2), (vi)-5 (3) and (vi)-6 (4) ICC Elements of Crimes; C. BYRON, *War crimes and crimes against humanity in the Rome Statute of the International Criminal Court*, Manchester, Manchester University Press, 2009, 14; H. VAN DER WILT, "War Crimes and the Requirement of a Nexus with an Armed Conflict Tribute Issue", *J. Int'l Crim.* 2012, 1116.

¹⁸¹ Art. 8 (2) (b) (xxii)-1 (4), (xxii)-2 (4), (xxii)-3 (4), (xxii)-4 (3), (xxii)-5 (4) and (xxii)-6 (5) ICC Elements of Crimes; art. 8 (2) (e) (vi)-1 (4), (vi)-2 (4), (vi)-3 (4), (vi)-4 (3), (vi)-5 (4) and (vi)-6 (5) ICC Elements of Crimes; K. DORMANN, L. DOSWALD-BECK and R. KOLB, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, 55.

¹⁸² Art. 8 Introduction ICC Elements of Crimes; K. DORMANN, L. DOSWALD-BECK and R. KOLB, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, 55.

armed conflict in the Rome Statute or the Elements of Crimes.¹⁸³ The IMT Charter defines war crimes based on International Humanitarian Law as follows: "violations of the laws or customs of war."¹⁸⁴

56. On March 14, 2012, the International Criminal Court (ICC) Trial Chamber I handed down its verdict convicting Thomas *Lubanga* Dyilo, a rebel leader in the Democratic Republic of the Congo (DRC). Lubanga was convicted of war crimes.¹⁸⁵ In the Lubanga case, it was stated that it is necessary "to determine whether there was a relevant armed conflict, and if so, whether it was international or non-international in character."¹⁸⁶ The Court mentions the lack of definition of an armed conflict in the Elements of Crimes, the Rome Statute, and also in the Geneva Conventions. It therefore adopts a definition derived from the *Tadic* case, which was the first case to expressly establish a view on war crimes. Since then, the case has risen to prominence as the leading example of war crimes.¹⁸⁷ The following definition got established:

*"An armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State."*¹⁸⁸

57. An international armed conflict (hereafter: IAC) occurs when one or more States use armed force against another, as recognised in the *Lubanga case*, irrespective of the reasons for or severity of the conflict. It does not matter how long the conflict lasts or how many individuals are killed.¹⁸⁹ A formal declaration of war is not required.¹⁹⁰ Additional Protocol I includes violent conflicts in which people fight for their right to self-determination against colonial supremacy, foreign occupation, or racist regimes.¹⁹¹ Non-international armed conflicts (hereafter: NIAC) are defined as armed conflicts involving one or more non-State armed groups in Article 3 of the Geneva Conventions of August 12, 1949. Depending on the circumstances, hostilities could occur between governmental armed forces and non-State armed organisations.¹⁹² Two conditions must be met for these situations to be classified as NIACs: (1) the intensity of the hostilities must be kept to a minimum; and (2) non-

¹⁸³ G.J.A. KNOOPS, *Mens Rea at the International Criminal Court*, Boston, BRILL, 2016, 67.

¹⁸⁴ Article 6(b) IMT Charter; O.A. HATHAWAY, P.K. STRAUCH, B.A. WALTON and Z.A.Y. WEINBERG, "What is a war crime", *Yale J. Int.L.* 2019, 82.

¹⁸⁵ M.A. DRUMBL, "Chapter 5: The Effects of the Lubanga Case on understanding and preventing Child Soldiering", in H. KRIEGER (ed.), *Yearbook of International Humanitarian Law*, Cambridge, Cambridge University Press, 2013, 87-88.

¹⁸⁶ *Prosecutor v. Lubanga Dyilo*, "Judgement", ICC (Trial Chamber II), 14 March 2012, ICC-01/04-01/06-2842, paras. 503-504.

¹⁸⁷ O.A. HATHAWAY, P.K. STRAUCH, B.A. WALTON and Z.A.Y. WEINBERG, "What is a war crime?", *Yale J. Int.L.* 2019, 71.

¹⁸⁸ *Prosecutor v. Lubanga Dyilo*, "Judgement", ICC (Trial Chamber II), 14 March 2012, ICC-01/04-01/06-2842, para. 533; citing *Prosecutor v. Tadić*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", ICTY (Appeals Chamber), 2 October 1995, IT-94-1-AR72, para. 70; O.A. HATHAWAY, P.K. STRAUCH, B.A. WALTON and Z.A.Y. WEINBERG, "What is a war crime?", *Yale J. Int.L.* 2019, 87.

¹⁸⁹ *Prosecutor v. Delalić*, "Judgement", ICTY (Trial Chamber II), 16 November 1998, IT-96-21-T, para. 208.

¹⁹⁰ Common Article 2 Geneva Convention I; Geneva Convention II; Geneva Convention III; Geneva Convention IV; *Prosecutor v. Lubanga Dyilo*, "Decision on the confirmation of charges", ICC (Pre-Trial Chamber I), 29 January 2007, ICC-01/04-01/06, para. 209; International Committee of the Red Cross, *International Armed Conflict*, https://casebook.icrc.org/a_to_z/glossary/international-armed-conflict (Consulted on 25 April 2023).

¹⁹¹ Article 1(4) *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, UNTS, vol. 1125, 3 (1978); International Committee of the Red Cross, *International Armed Conflict*, https://casebook.icrc.org/a_to_z/glossary/international-armed-conflict (Consulted on 25 April 2023).

¹⁹² Common Article 3 Geneva Convention I; Geneva Convention II; Geneva Convention III; Geneva Convention IV; *Prosecutor v. Lubanga Dyilo*, "Decision on the confirmation of charges", ICC (Pre-Trial Chamber I), 29 January 2007, ICC-01/04-01/06, para. 233; International Committee of the Red Cross, *Non-international Armed Conflict*, https://casebook.icrc.org/a_to_z/glossary/non-international-armed-conflict (Consulted on 25 April 2023).

governmental organisations involved in the conflict must be considered "parties to the conflict," meaning they have organised armed troops.¹⁹³

58. In the *Kunarac* case, the Appeals Chamber found that 'there is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war', adding that 'a violation of the laws or customs may therefore occur at a time when and in a place where no fighting is actually taking place'. Subsequently, the Appeals Chamber took the time to explain what was meant by the nexus requirement and went on to identify a number of parameters that could be considered in determining whether or not the act in question is sufficiently related to an armed conflict.¹⁹⁴

War Crimes under Article 8(2)(a) Rome Statute

59. Article 8(2)(a) Rome Statute concerns grave breaches of the 1949 Geneva Conventions. A list is compiled of the various acts that pertain to this type of breach. All these acts contain the same four elements.

First of all, the common element, as mentioned above, for all the war crimes under Article 8 Rome Statute is that the grave breaches must occur "in the context of" and be "connected with" an international armed conflict.¹⁹⁵ The PrepCom (Preparatory Commission for the International Criminal Court) adopted the approach taken by the ICTY's Appeals Chamber in the *Tadić* case, in which it was determined that the concept of grave breaches applied only to international armed conflicts.¹⁹⁶ Secondly, the common element for all war crimes is that "*the perpetrator was aware of factual circumstances that established the existence of an armed conflict*".¹⁹⁷ Besides, there are the elements common to all grave breaches listed in Article 8(2)(a). Under the Geneva Conventions of 1949, war crimes must be committed against protected persons or Geneva Conventions-protected

¹⁹³ International Committee of the Red Cross, *Non-international Armed Conflict*, https://casebook.icrc.org/a_to_z/glossary/non-international-armed-conflict (Consulted on 25 April 2023).

¹⁹⁴ (...) the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties; *Prosecutor v Kunarac, Kovac and Vukovic*, "Appeals Judgment", ICTY (Appeals Chamber), 12 June 2002, IT-96-23 and IT-96-231, paras. 57-59.

¹⁹⁵ Article 8 Introduction Elements of Crimes ICC; C. BYRON, *War crimes and crimes against humanity in the Rome Statute of the International Criminal Court*, Manchester, Manchester University Press, 2009, 14; K. DORMANN, L. DOSWALD-BECK and R. KOLB, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, 17.

¹⁹⁶ Preparatory Commission for the International Criminal Court, 14 July 1999, <https://www.legal-tools.org/doc/d8ff04/pdf> (Consulted on 22 February 2023); K. DORMANN, *War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the negotiations on the Elements of Crimes*, Leiden, Koninklijke Brill N.V., 2003, 357; *Prosecutor v. Tadić*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", ICTY (Appeals Chamber), 2 October 1995, IT-94-1-AR72, para. 80.

¹⁹⁷ Article 8 Introduction Elements of Crimes ICC; K. DORMANN, *War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the negotiations on the Elements of Crimes*, Leiden, Koninklijke Brill N.V., 2003, 361; K. DORMANN, L. DOSWALD-BECK and R. KOLB, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, 17.

property. Article 4 of Geneva Convention IV defines protected persons.¹⁹⁸ There is no available definition of protected property.¹⁹⁹

Then, each of the acts has additional unique components that will not be described further.

War Crimes under Article 8(2)(b) Rome Statute

60. Under Article 8(2)(b), covering other serious violations of the laws and customs applicable in international armed conflict, the same previous two elements apply. The violations must occur "in the context of" and be "connected with" an international armed conflict, and the perpetrator must be aware of the factual circumstances that established the existence of an armed conflict.²⁰⁰

War Crimes under Article 8(2)(c) Rome Statute

61. Serious violations of Article 3 common to the four 1949 Geneva Conventions are covered by the offences described in Article 8(2)(c).

The first thing that all war crimes have in common is that the conduct must have occurred during or have some association with an armed conflict that was, in this case, not of an international nature.²⁰¹ In the EoC Introduction section on war crimes, a paragraph is provided to limit the Court's jurisdiction in the case of a non-international armed conflict. The paragraph makes reference to Article 8(2)(d) for the war crimes under Article 8(2)(c).²⁰² The same mental element concerning the perpetrator's awareness of the factual circumstances that established the existence of an armed conflict applies here.²⁰³ Specifically, this Article mentions those who may be victims of a war crime for the purpose of Article 8(2)(c) Rome Statute: "(...) committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause."²⁰⁴

¹⁹⁸ "(...) those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."; K. DORMANN, L. DOSWALD-BECK and R. KOLB, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, 19; C. BYRON, I. SCOBBIIE, D. MCGOLDRICK and J. D'ASPROMONT, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court*, Manchester, Manchester University Press, 2009, 22.

¹⁹⁹ K. DORMANN, L. DOSWALD-BECK and R. KOLB, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, 33.

²⁰⁰ K. DORMANN, *War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the negotiations on the Elements of Crimes*, Leiden, Koninklijke Brill N.V., 2003, 377-378; C. BYRON, I. SCOBBIIE, D. MCGOLDRICK and J. D'ASPROMONT, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court*, Manchester, Manchester University Press, 2009, 14.

²⁰¹ K. DORMANN, L. DOSWALD-BECK and R. KOLB, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, 383-384.

²⁰² Art. 8, Introduction paragraph 1 ICC Elements of Crimes; K. DORMANN, L. DOSWALD-BECK and R. KOLB, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, 382.

²⁰³ C. BYRON, I. SCOBBIIE, D. MCGOLDRICK and J. D'ASPROMONT, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court*, Manchester, Manchester University Press, 2009, 14.

²⁰⁴ C. LAUCCI, *The Annotated Digest of the International Criminal Court: 2009*, Leiden, Koninklijke Brill N.V., 2009, 50.

Pre-Trial Chamber I, based on Additional Protocol II to the Geneva Conventions and the ICTY *Tadić* case, determined that the involvement of armed groups with some degree of organisation and the ability to plan and carry out sustained military operations characterises an armed conflict not of an international character.²⁰⁵

War Crimes under Article 8(2)(e) Rome Statute

62. Article 8(2)(e) of the Statute addresses other serious violations of the laws and customs applicable in non-international armed conflicts.

Again, the conduct must have occurred during or have some association with an armed conflict that was, in this case, not of an international nature. Paragraph 1 of the introduction section on war crimes in the EoC limits the Court's jurisdiction, making reference to Article 8(2)(f) Rome Statute.²⁰⁶ The contextual element, concerning those who may be victims, is copied from the set of elements for war crimes under Article (8)(2)(c).²⁰⁷

B. Mental element

63. Article 30 of the Statute, which provides the general requirements of the *mens rea*, applies, according to paragraph 2 of the general introduction in the Elements of Crimes. The accused must have committed the crime with 'intent' and 'knowledge'.²⁰⁸ Numerous war crimes listed in Article 8 of the Statute involve a more specific component of *mens rea* than Article 30. A few examples are "wilfully causing great suffering, or serious injury to body or health" "intentionally directing attacks against buildings" and "intentionally launching an attack (...)".²⁰⁹ These requirements highlight the need for the intent to encompass both the actual conduct and the consequences.²¹⁰ The court must decide whether the standard set forth in Article 30 and the term "wilful" coincide.²¹¹

²⁰⁵ *Prosecutor v. Lubanga Dyilo*, "Judgement", ICC (Trial Chamber II), 14 March 2012, ICC-01/04-01/06-2842, para. 535.

²⁰⁶ Art. 8, Introduction paragraph 1 ICC Elements of Crimes; K. DORMANN, L. DOSWALD-BECK and R. KOLB, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, 382.

²⁰⁷ K. DORMANN, *War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the negotiations on the Elements of Crimes*, Leiden, Koninklijke Brill N.V., 2003, 400.

²⁰⁸ K. DORMANN, *War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the negotiations on the Elements of Crimes*, Leiden, Koninklijke Brill N.V., 2003, 352.

²⁰⁹ Art. 8 (2)(a)(iii), (2)(b)(iv), (2)(b)(ix), (2)(b)(xxiv), (2)(e)(ii), 2(e)(iv) ICC Rome Statute; G.J.A. KNOOPS, *Mens Rea at the International Criminal Court*, Boston, BRILL, 2016, 66-67; United Nations, *Definitions*, <https://www.un.org/en/genocideprevention/war-crimes.shtml#:~:text=War%20crimes%20contain%20two%20main,act%20and%20the%20contextual%20element> (Consulted on 11 February 2023).

²¹⁰ G.J.A. KNOOPS, *Mens Rea at the International Criminal Court*, Boston, BRILL, 2016, 67.

²¹¹ K. DORMANN, *War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the negotiations on the Elements of Crimes*, Leiden, Koninklijke Brill N.V., 2003, 353.

3.1.4 Crime of aggression

64. The crime of aggression was heavily debated during the drafting of the Rome Statute. Various proposals on the crime were sent to the Rome Conference. Eventually, Article 5(1) ICC Statute mentioned the crime of aggression as one of the crimes falling under the jurisdiction of the Court, however, paragraph 2 of Article 5 added the following:

*"The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."*²¹²

Finally, in 2010, agreement on the crime was reached at the Review Conference in Kampala by the Assembly of States Parties. The crime fell under the jurisdiction of the Court on July 17, 2018, and paragraph 2 of Article 5 was deleted.²¹³ The definition of a crime of aggression is laid down in Article 8bis Rome Statute, which must be read together with Articles 15bis and 15ter concerning the exercise of jurisdiction over the crime of aggression.²¹⁴ At the time of writing, 45 Parties have ratified the amendments on the crime of aggression.²¹⁵

65. However, this concept is not entirely new. At Nuremberg, prosecutions took place for 'crimes against peace', which employed almost the same definition as the crime of aggression.²¹⁶ The definition is as follows: *"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."*²¹⁷

66. A distinction must be made between the crime of aggression and the act of aggression. The term "act of aggression" is defined in paragraph 2 of Article 8bis, which also lists particular offences

²¹² W. A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 132; R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 300; M. GILLET, "The Anatomy of an International Crime: Aggression at the International Criminal Court", *International Criminal Law Review* 2013, 2.

²¹³ M. S. WONG, "Aggression and state responsibility at the International Criminal Court", *International & Comparative Law Quarterly* 2021, 961-962; W. A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 131.

²¹⁴ M. S. WONG, "Aggression and state responsibility at the International Criminal Court", *International & Comparative Law Quarterly* 2021, 970; W. A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 131.

²¹⁵ United Nations Treaty Collection, *Status of Treaties*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=XVIII-10-b&chapter=18&clang=en (Consulted on 11 February 2023).

²¹⁶ Article 6(a) Nuremberg Charter: *"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"*; W.A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 133; R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 297; M. GILLET, "The Anatomy of an International Crime: Aggression at the International Criminal Court", *International Criminal Law Review* 2013, 3-4.

²¹⁷ Article 8bis (1) Rome Statute.

that fall under this category.²¹⁸ An act of aggression is a type of State conduct, whereas the crime of aggression centres around individual criminal responsibility. To prosecute someone for the crime of aggression, it must first be proven that there was aggression by a State.²¹⁹ If an act of aggression has been proven to have taken place, the Court will consider the additional criteria in Article 8bis to decide individual criminal responsibility.²²⁰

A. Material elements

The act of aggression

67. Before the ICC considers the provisions of Article 8bis's first paragraph, a specific act must first constitute an act of aggression. The second paragraph of Article 8bis defines what is to be understood as an 'act of aggression'. Following an initial broad interpretation of the term, it lists a number of specific acts that, by definition, constitute an act of aggression.²²¹ Art. 8bis(2) Rome Statute is mainly based on United Nations General Assembly Resolution 3314 (XXIX).²²² Though the International Criminal Court is a judicial institution that deals with individual criminal responsibility, Article 8bis does suggest that a State's international collective conduct is an element of the crime of aggression.²²³ The act of aggression can be interpreted in two steps.

68. First of all, there must be a use of force by a State within the meaning of Article 2(4) of the UN Charter, which goes as follows:

*"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."*²²⁴

The use of force does not imply the use of weapons, the death or injury of people, or the physical destruction of property. Instead, the international presence of a State's military with hostile intent may likewise constitute the use of force.²²⁵ As can be read in Article 2(4) UN Charter, force must be used "against the territorial integrity or political independence of any State". There have been

²¹⁸ Article 8bis (2) Rome Statute.

²¹⁹ M. GILLET, "The Anatomy of an International Crime: Aggression at the International Criminal Court", *International Criminal Law Review* 2013, 7; C. MCDOUGALL, *The Crime of Aggression Under the Rome Statute of the International Criminal Court*, Cambridge, Cambridge University Press, 2013, 178.

²²⁰ M. GILLET, "The Anatomy of an International Crime: Aggression at the International Criminal Court", *International Criminal Law Review* 2013, 22; M. S. WONG, "Aggression and state responsibility at the International Criminal Court", *International & Comparative Law Quarterly* 2021, 961.

²²¹ M. GILLET, "The Anatomy of an International Crime: Aggression at the International Criminal Court", *International Criminal Law Review* 2013, 8.

²²² United Nations General Assembly Resolution 3314 (XXIX) (14 December 1974), *UN Doc. A/RES/3314* (1974); R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 299.

²²³ C. KREB, "The State Conduct Element" in C. KREB and S. BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, Cambridge University Press, 2016, Vol I., 412; 966; G. KEMP, *Individual Criminal Liability for the International Crime of Aggression*, Cambridge, Intersentia, 2015, 178.

²²⁴ Article 2(4) UN Charter.

²²⁵ T. RUYS, "The Meaning of "Force" and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?" , *American Journal of International Law* 2014, 189; C. KREB, "The State Conduct Element" in C. KREB and S. BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, Cambridge University Press, 2016, Vol I., 424; ; I.K. MULLER-SCHIEKE, "Defining the Crime of Aggression Under the Statute of the International Criminal Court", *Leiden Journal of International Law* 2004, 417.

arguments by certain scholars that an exception must be made when the use of force is for a benign purpose. However, this interpretation is contradicted by the preparatory works of Article 2(4).²²⁶ Paragraph 2 of Article 8(bis) of the Rome Statute provides a list of specific acts that qualify as acts of aggression. The list is not exhaustive.²²⁷

69. Secondly, the use of force must be unlawful. The UN Charter recognises two situations where the use of force is lawful. The first one is the use of force on the basis of collective security. However, it is only lawful when the State gets prior authorization.²²⁸ The second situation is in cases of self-defence pursuant to Article 51 UN Charter. The use of individual or collective self-defence is lawful against an armed attack occurring against a member State.²²⁹ The terms of self-defence are not explicitly stated in the Charter, but according to international law, the use of force must be both necessary and proportionate in order for self-defence to be legal.²³⁰

70. Article 8bis, paragraph 2, of the Rome Statute defines what is meant by an act of aggression and lists a number of specific acts.²³¹

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

71. In 1945, the Allied Control Council drafted Law No. 10, which recognised invasions as crimes of aggression—crimes against peace at the time.²³² The Council was called to decide on a number of post-war plans for Europe. The term "invasion" was discussed and defined in the *High Command case* and in the *Ministries case*.²³³ The latter Tribunal also made reference to the following definition from Webster's Unabridged Dictionary:

*"Act of invading, especially a warlike or hostile entrance into the possessions or domains of another; the incursion of an army for conquest or plunder."*²³⁴

²²⁶ W.M. REISMAN, "Coercion and Self-Determination: Construing Charter Article 2(4)", *American Journal of International Law* 1984, 642-645.

²²⁷ R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 305; C. KREB, "The State Conduct Element" in C. KREB and S. BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, Cambridge University Press, 2016, Vol I., 435.

²²⁸ Article 43 UN Charter.

²²⁹ Article 51 UN Charter; C. KREB, "The State Conduct Element" in C. KREB and S. BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, Cambridge University Press, 2016 vol I. 456; I.K. MULLER-SCHIEKE, "Defining the Crime of Aggression Under the Statute of the International Criminal Court", *Leiden Journal of International Law* 2004, 418.

²³⁰ R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 307.

²³¹ M. GILLET, "The Anatomy of an International Crime: Aggression at the International Criminal Court", *International Criminal Law Review* 2013, 8.

²³² Art. II (1)(a) Law No. 10 Control Council regarding the punishment of persons guilty of war crimes, crimes against peace and against humanity; C. KREB, "The State Conduct Element" in C. KREB and S. BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, Cambridge University Press, 2016, Vol I., 438-439.

²³³ "an invasion of one state by another is the implementation of the national policy of the invading state by force even though the invaded state, due to fear or a sense of the futility of resistance in the face of superior force, adopts a policy of non-resistance and thus prevents the occurrence of any actual combat."; C. KREB, "The State Conduct Element" in C. KREB and S. BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, Cambridge University Press, 2016, Vol I., 438-439.

²³⁴ C. KREB, "The State Conduct Element" in C. KREB and S. BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, Cambridge University Press, 2016, Vol I., 439.

72. According to common understanding of the term and precedents, invasion requires that armed troops of one State breach the borders of another State with hostile intent, regardless of whether shots are fired, or real conflict occurs. 'Invasion' connotes a large-scale military operation.²³⁵ According to Article 8(bis)(a) Rome Statute, 'an attack' may also be considered an act of aggression. An attack necessitates the use of weapons that are capable of inflicting physical harm. This applies not only to technically classified weapons but also to other instruments such as a civil aircraft or a computer.²³⁶

Both forms of aggression must occur on land that is under the sovereign control of another State, and the operation must be of a certain magnitude. The military occupation that follows such an invasion or attack is a third act that constitutes an act of aggression under this provision, however temporary.²³⁷ When negotiating Article 3 of the Annex to 1974 Resolution 3314 on a definition of aggression, the qualification of a military occupation as an act of aggression was controversial.²³⁸ Article 42 of the Hague Regulations Respecting the Laws and Customs of War on Land can be used to define a military occupation:

"Territory is considered occupied when it is actually placed under the authority of the hostile army."

Unlike an invasion, it does not require physical damage to be inflicted. Instead, it is sufficient for a State to have its armed forces present on another State's territory with hostile intent.²³⁹

73. Another act that could be considered an act of aggression under Article 8bis(2)(a) of the Rome Statute is the annexation of another State's territory or a part of it with force. Annexed territory is defined as territory that a State has illegally taken over from another State. The land in question must actually be occupied, and there must be a clear desire to annex it permanently. The annexation of foreign territory is impossible under current international law.²⁴⁰ As a result, a State's declaration of annexation cannot change the legal status of the territory in question. If the State declares its intention to annex the territory in question, the military occupation will continue.²⁴¹

²³⁵ Ibid., 439-440.

²³⁶ Ibid. 439.

²³⁷ Article 8bis(2)(a) Rome Statute.

²³⁸ C. KREB, "The State Conduct Element" in C. KREB and S. BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, Cambridge University Press, 2016, Vol I., 440.

²³⁹ Ibid.

²⁴⁰ R. HOFMANN, "Annexation", in R. WOLFRUM (ed.), *The Max Planck Encyclopedia of Public International Law*, 2012, 411; C. KREB, "The State Conduct Element" in C. KREB and S. BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, Cambridge University Press, 2016, Vol I., 442.

²⁴¹ C. KREB, "The State Conduct Element" in C. KREB and S. BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, Cambridge University Press, 2016, Vol I., 442.

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

74. Bombardments have been used in warfare for centuries. Bombardment can be defined as “any attack from land, sea, or air bases with heavy weapons which, like artillery, missiles, or aircraft, are capable of destroying enemy targets at a greater distance beyond the battle lines.”²⁴² It does not necessitate the entry or presence on the territory of the victim State.²⁴³ The expression “any weapons” is very broad and used without making a distinction between different types of weapons, as agreed by the Special Committee on the Question of Defining Aggression.²⁴⁴

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

75. A blockade is “a belligerent operation to prevent vessels and/or aircraft of all nations, enemy and neutral, from entering or exiting specified ports, airports, or coastal areas belonging to, occupied by, or under the control of an enemy nation.” Blockades are put in place to prevent the enemy from using neutral and hostile ships and planes to transport troops and supplies into or out of enemy territory.²⁴⁵

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

76. This concerns an attack, as mentioned in (a), but in this case, the difference is that this provision defines acts directed not to the territory of the State but to its armed forces or sea and air fleet, for example, a military base.²⁴⁶

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

77. Two actions in this provision could be considered acts of aggression. First, a State stationed on another State's territory in violation of that State's consent requirements. Second, armed forces of one State staying in another State's territory longer than originally planned.²⁴⁷

²⁴² A. MCDONALD and T. BRUHA, “Bombardment” in R. WOLFRUM (ed.), *The Max Planck Encyclopedia of Public International Law*, 2011, 987-989; C. KREB, “The State Conduct Element” in C. KREB and S. BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, Cambridge University Press, 2016, Vol I., 442.

²⁴³ C. KREB, “The State Conduct Element” in C. KREB and S. BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, Cambridge University Press, 2016, Vol I., 442.

²⁴⁴ Special Committee on the Question of Defining Aggression, Official Records of the General Assembly, 29th Session, supplement No.19, A/9619 and Corr. 1, para. 20; C. KREB, “The State Conduct Element” in C. KREB and S. BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, Cambridge University Press, 2016, Vol I., 442-443; M. ARRONSON-STORRIER, “Article 8bis: The Crime of Aggression”, in M. KLAMBERG (ed.), *Commentary on the Law of the International Criminal Court*, Brussels, Torkel Opsahl Academic EPublisher, 2017, 158, note 160.

²⁴⁵ W. HEINTSCHEL VON HEINEGG, “Blockade”, in R. WOLFRUM (ed.), *The Max Planck Encyclopedia of Public International Law*, 2015, 925-926.

²⁴⁶ C. KREB, “The State Conduct Element” in C. KREB and S. BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, Cambridge University Press, 2016, Vol I., 444.

²⁴⁷ *Ibid.*, 445.

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

78. This type of aggression does not always involve the use of force. All that occurs here is a State opening up its territory to another State, which then commits an act against a third State that constitutes an act of aggression.²⁴⁸

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

79. Two conditions must be met for an act to be considered an act of aggression under Article 8bis(2)(g). First, armed bands, groups, irregulars, or mercenaries must commit acts of armed violence that are serious enough to constitute the act enumerated in Article 8bis(2) of the Statute. Second, these private individuals must be directed by or on behalf of a State, or the State must be substantially involved in the actions.²⁴⁹

"Planning, preparation, initiation or execution"

80. According to Article 8bis (1) Rome Statute and the EoC, the perpetrator must have *planned*²⁵⁰, *prepared*²⁵¹, *initiated*²⁵² or *executed*²⁵³ an act of aggression.²⁵⁴ This differs from the other core crimes, in that it discusses the potential roles that an individual may play in the crime rather than just stating the objective crime itself. These terms are almost verbatim copied from Article 6(a) of the Charter of the International Military Tribunal at Nuremberg.²⁵⁵ Article 8 bis (1), unlike Article 6(a) of the Nuremberg Charter, does not criminalise 'participation in a common plan or conspiracy'. The charge of conspiracy didn't differ much from planning and preparation; the accusation of conspiracy was therefore unnecessary.²⁵⁶ Participation in meetings where plans to attack another

²⁴⁸ W.A. SCHABAS, *The International Criminal Court: A commentary on the Rome Statute*, Oxford, Oxford Press University, 2016, 316.

²⁴⁹ C. KREß, "The State Conduct Element" in C. KREß and S. BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, Cambridge University Press, 2016, Vol I., 448-449.

²⁵⁰ Planning can be defined as "to arrange in advance (an action or proposed proceeding); to devise, contrive, or formulate (a project or manner of proceeding); to lay out in a plan"; Planning. In Oxford English Dictionary, <https://www-oed-com.mu.idm.oclc.org/view/Entry/145023?rskey=ZDsDmT&result=1#eid> (Consulted on 11 February 2023).

²⁵¹ Preparation is defined as "Things done to get ready for an event or undertaking; preparatory measures"; Preparation. In Oxford English Dictionary, <https://www-oed-com.mu.idm.oclc.org/view/Entry/150437?redirectedFrom=preparation#eid> (Consulted on 11 February 2023).

²⁵² "The action of beginning, entering upon, or 'starting' something"; Initiation. In Oxford English Dictionary, <https://www-oed-com.mu.idm.oclc.org/view/Entry/96069?redirectedFrom=initiation#eid> (Consulted on 11 February 2023).

²⁵³ Execution stands for "the action of carrying into effect", which includes decisions taken after the beginning of the conduct, such as occupying and annexing territory; Execution. In Oxford English Dictionary, <https://www-oed-com.mu.idm.oclc.org/view/Entry/66007?rskey=Gaiq8L&result=1&isAdvanced=false#eid> (Consulted on 11 February 2023); M. KLAMBERG, *Commentary on the Law of the International Criminal Court*, Brussels, Torkel Opsahl Academic EPublisher, 2017, 154; C. MCDUGALL, *The Crime of Aggression Under the Rome Statute of the International Criminal Court*, Cambridge, Cambridge University Press, 2013, 188.

²⁵⁴ Article 8bis(1) Rome Statute; Article 8bis(1) Elements of Crime; R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 304.

²⁵⁵ Article 6(a) Nuremberg Charter; N.R. HAJDIN, "International Criminal Courts and Tribunals: The actus reus of the Crime of Aggression", *Leiden Journal of International Law* 2021, 493.

²⁵⁶ R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 304.

State are formulated, for example, can constitute planning an act of aggression.²⁵⁷ Preparing for an act of aggression entails a multitude of activities that culminate in a State having the capacity and capability to commit the act. This includes military, economic, and diplomatic conduct.²⁵⁸ The decision taken immediately before committing an act of aggression is referred to as the act's initiation.²⁵⁹

Leadership requirement

81. Although aggression appears to be a collective State act, it is actually carried out by individuals. However, it is not always possible to prosecute every individual for his or her conduct.²⁶⁰ The crime of aggression can therefore only be committed by 'a person in a position effectively to exercise control over or to direct the political or military action of a State'.²⁶¹ The same is repeated in Article 25(3bis) Rome Statute concerning individual criminal responsibility. No other crime in the Rome Statute restricts the concept of perpetrators in this way.²⁶² The perpetrator must have planned, prepared, initiated, or executed the act; he does not have to participate throughout the entire process.²⁶³ Aggression carried out by non-State actors or individuals not sponsored by a State does not fall within this article.²⁶⁴

Threshold requirement

82. According to Article 8bis, only those uses of force "which by its character, gravity, and scale constitute a manifest breach of the Charter of the United Nations" are criminally punishable as acts of aggression.²⁶⁵

²⁵⁷ M. ARRONSON-STORRIER, "Article 8bis: The Crime of Aggression", in M. KLAMBERG (ed.), *Commentary on the Law of the International Criminal Court*, Brussels, Torkel Opsahl Academic EPublisher, 2017, 153, note 152; C. MCDUGALL, *The Crime of Aggression Under the Rome Statute of the International Criminal Court*, Cambridge, Cambridge University Press, 2013, 187-188.

²⁵⁸ M. KLAMBERG, *Commentary on the Law of the International Criminal Court*, Brussels, Torkel Opsahl Academic EPublisher, 2017, 153-154.

²⁵⁹ M.A. SHUKRI, "Individual Criminal Responsibility for the Crime of Aggression", in R. BELLELLI (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to its Review*, Farnham, Ashgate, 2010, 528; C. MCDUGALL, *The Crime of Aggression Under the Rome Statute of the International Criminal Court*, Cambridge, Cambridge University Press, 2013, 188; M. KLAMBERG, *Commentary on the Law of the International Criminal Court*, Brussels, Torkel Opsahl Academic EPublisher, 2017, 154.

²⁶⁰ I.K. MULLER-SCHIEKE, "Defining the Crime of Aggression Under the Statute of the International Criminal Court", *Leiden Journal of International Law* 2004, 419; M. KLAMBERG, *Commentary on the Law of the International Criminal Court*, Brussels, Torkel Opsahl Academic EPublisher, 2017, 153.

²⁶¹ Article 8bis(1) Rome Statute; Article 8bis(2),(2) Elements of Crimes.

²⁶² W.A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 134.

²⁶³ M. ARRONSON-STORRIER, "Article 8bis: The Crime of Aggression", in M. KLAMBERG (ed.), *Commentary on the Law of the International Criminal Court*, Brussels, Torkel Opsahl Academic EPublisher, 2017, 153, note 151.

²⁶⁴ R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 304; M. ARRONSON-STORRIER, "Article 8bis: The Crime of Aggression", in M. KLAMBERG (ed.), *Commentary on the Law of the International Criminal Court*, Brussels, Torkel Opsahl Academic EPublisher, 2017, 153, note 149.

²⁶⁵ Article 8bis (1) Rome Statute; Article 8(bis) (5) Elements of Crimes; R. CLARK, "Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It" *EJIL* 2009, Vol. 20 No. 4, 1105.

83. An Annex was agreed upon with the Kampala provisions at the Kampala conference and contains seven "Understandings about the amendments to the Rome Statute of the ICC on the crime of aggression".²⁶⁶ These understandings comprise a significant component of the discussions and give insight into the perspectives of the negotiating States, even though it is unclear to what degree they have any legal consequences.²⁶⁷ Understanding 6 states that "(...) a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations."²⁶⁸ In Understanding 7 to Annex III of the Resolution, the States Parties clarified that in order for an act of aggression to constitute a manifest violation, all three components of character, gravity, and scale must be sufficient to determine a manifest violation.²⁶⁹ The majority of scholars believe that if two of the three qualifiers are strongly present, this may be sufficient.²⁷⁰ Yet, if only one component is established, it will not be sufficient.²⁷¹

84. Scale refers to the magnitude of the act of aggression. A quantitative evaluation may take into account the quantity and type of soldiers, weapons, and other military resources employed by the aggressor State, as well as the geographic scope and duration of the operation. However, there is no minimum threshold regarding the scale of the act.²⁷² The factor of gravity concerns the impact of the act of aggression. It is evaluated both quantitatively and qualitatively. The use of gravity and scale appears to rule out even obvious violations of the jus ad bellum if they are not severe enough.²⁷³ The character component is not as easy to define. It could be regarded as a reference to certain conduct or as a demand for evidence of mala fides. But there is no proof to back up the assertion that the Special Working Group on the Crime of Aggression (SWGCA) intended either interpretation. The more reasonable interpretation would be that the component "character" refers to the need to prove an unmistakable violation of Article 2(4).²⁷⁴

²⁶⁶ *Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, Ann. III to Res. ICC-RC/Res.6.

²⁶⁷ C. KREB, "Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus", *European Journal of International Law* 2009, 1138; K.J. HELLER, "The Uncertain Legal Status of the Aggression Understandings", *Journal of International Criminal Justice* 2010, 235.

²⁶⁸ *Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, Understanding 6, Ann. II to Res. ICC-RC/Res.6; R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 310.

²⁶⁹ *Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, Understanding 7, Ann. III to Res. ICC-RC/Res.6.

²⁷⁰ C. MCDOUGALL, *The Crime of Aggression Under the Rome Statute of the International Criminal Court*, Cambridge, Cambridge University Press, 2013, 128-130; M. ARRONSON-STORRIER, "Article 8bis: The Crime of Aggression", in M. KLAMBERG (ed.), *Commentary on the Law of the International Criminal Court*, Brussels, Torkel Opsahl Academic EPublisher, 2017, 155, note 157.

²⁷¹ N.R. HAJDIN, "International Criminal Courts and Tribunals: The actus reus of the Crime of Aggression", *Leiden Journal of International Law* 2021, 498; M. GILLET, "The Anatomy of an International Crime: Aggression at the International Criminal Court", *International Criminal Law Review* 2013, 25.

²⁷² M. GILLET, "The Anatomy of an International Crime: Aggression at the International Criminal Court", *International Criminal Law Review* 2013, 25.

²⁷³ R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 310.

²⁷⁴ C. MCDOUGALL, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge, Cambridge University Press, 2013, 127-128.

85. It is up to the Court to objectively assess whether the act constitutes a manifest violation.²⁷⁵ The use of pre-emptive self-defence or humanitarian intervention is a "grey area". There is no consensus as of yet on whether this will be considered a 'manifest violation' or not.²⁷⁶

B. Mental element

86. As previously stated, if the conditions of Article 8bis of the Statute are met, an individual can be held liable for planning, preparing, initiating, or executing an act of aggression. The constitute the material elements of the individual's responsibility. To be held liable, a mental element must be present in addition to these material elements. Because the mental element is not defined in Article 8bis of the Rome Statute, the general rule in Article 30 of the Statute applies.²⁷⁷ The material elements must be committed with intent and knowledge, according to Article 30 of the Rome Statute.²⁷⁸ Article 30 paragraphs 2 and 3 further clarify the components 'intent' and knowledge'. A person will have intent when "*In relation to conduct, that person means to engage in the conduct; In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.*" Knowledge means "*awareness that a circumstance exists, or a consequence will occur in the ordinary course of events.*"²⁷⁹

87. The specific mental elements required for the crime of aggression are mentioned in the Elements of Crime.²⁸⁰ There is no obligation to demonstrate that the perpetrator considered whether the use of force was legitimate or whether the breach of the UN Charter was a 'manifest violation'. It will be necessary to demonstrate that the perpetrator was aware of the factual circumstances that established that the use of armed force was inconsistent with the United Nations Charter and the factual circumstances establishing a manifest violation of the Charter of the United Nations.²⁸¹ Each of the previous material elements has a corresponding mental requirement. However, it is not required that both intent and knowledge be proven for each material element of a crime. Only the mental element relevant to the specific material element (i.e., intent, knowledge, or both) must be proved.²⁸² Regarding the first component of the crime of aggression, the individual must have wilfully intended the planning, preparation, initiation, or execution of the act of aggression.²⁸³ The second

²⁷⁵ Introduction, Para.3, Ann. II to Res. ICC-RC/Res.6.

²⁷⁶ M. ARRONSON-STORRIER, "Article 8bis: The Crime of Aggression", in M. KLAMBERG (ed.), *Commentary on the Law of the International Criminal Court*, Brussels, Torkel Opsahl Academic EPublisher, 2017, 155, note 157.

²⁷⁷ D. ZIUKELIS, "Establishing the Mens Rea of the Crime of Aggression in the Rome Statute of the International Criminal Court", *Austl. INT'L L.J.* 2018, 138; N. WEISBORD, "The Mens Rea of the Crime of Aggression", *Washington University Global Studies Law Review* 2013, 490.

²⁷⁸ I.K. MULLER-SCHIEKE, "Defining the Crime of Aggression Under the Statute of the International Criminal Court", *Leiden Journal of International Law* 2004, 421.

²⁷⁹ Article 30(2) and (3) Rome Statute.

²⁸⁰ Article 8(bis)(4) and (6) Elements of Crimes.

²⁸¹ Introduction (2) and (4) Elements of Crimes; Articles 8(bis)(4) and (6) Elements of Crimes; M. GILLET, "The Anatomy of an International Crime: Aggression at the International Criminal Court", *International Criminal Law Review* 2013, 27.

²⁸² N. WEISBORD, "The Mens Rea of the Crime of Aggression", *Washington University Global Studies Law Review* 2013, 490-491; C. MCDUGALL, *The Crime of Aggression Under the Rome Statute of the International Criminal Court*, Cambridge, Cambridge University Press, 2013, 190; N.R. HAJDIN, "International Criminal Courts and Tribunals: The actus reus of the Crime of Aggression", *Leiden Journal of International Law* 2021, 490.

²⁸³ D. ZIUKELIS, "Establishing the Mens Rea of the Crime of Aggression in the Rome Statute of the International Criminal Court", *Austl. INT'L L.J.* 2018, 139; C. MCDUGALL, *The Crime of Aggression Under the Rome Statute of the International*

component is the leadership requirement. This requirement is a circumstance in which the individual is or should be in when committing a crime. The mental component to be proven for this element is the individual's knowledge of the position they are in. It is required that the individual realises that he or she is in a position to exercise effective control over or direct the political or military action of the State concerned.²⁸⁴ The requirement that an act of aggression be committed corresponds to the mental element specified in the fourth element of the EoC. This element necessitates that the individual be aware of the factual circumstances surrounding the collective act of aggression as well as the inconsistency of the use of force with the UN Charter.²⁸⁵

3.2. Jurisdiction *ratione temporis*

88. The ICC can exercise its jurisdiction over crimes committed after the Statute entered into force on July 1, 2002. Crimes committed before this date cannot be submitted to the Criminal Court.²⁸⁶ Therefore, the non-retroactivity concept serves as the foundation for the ICC Statute, and the Court's temporal authority is prospective.²⁸⁷ The prohibition of retroactive crimes and punishment—also known under the expression *nullum crimen nulla poena sine lege*—is one of the fundamental principles of international human rights law. The principle is laid down in Articles 22 and 23 of the Rome Statute.²⁸⁸ In this regard, the ICC differs from all of its predecessors. Although some have been awarded prospective jurisdiction, previous international criminal tribunals were mostly created to deal with crimes committed before their establishment.²⁸⁹

89. If a State joins the Statute subsequent to its entry into force, the corresponding ratification date of the State shall be the reference for the Court to exercise its jurisdiction.²⁹⁰ In accordance with Article 12(3) of the Statute, it is possible for States that are not Parties to the Rome Statute to bring crimes committed on their territory under the jurisdiction of the Court on an ad hoc basis. This creates an exception to the general rule regarding the temporal application of the Statute. Such declarations would appear to be retroactive by their very nature.²⁹¹ The Court acquires jurisdiction

Criminal Court, Cambridge, Cambridge University Press, 2013, 190; N. WEISBORD, "The Mens Rea of the Crime of Aggression", *Washington University Global Studies Law Review* 2013, 492.

²⁸⁴ C. MCDUGALL, *The Crime of Aggression Under the Rome Statute of the International Criminal Court*, Cambridge, Cambridge University Press, 2013, 190; N. WEISBORD, "The Mens Rea of the Crime of Aggression", *Washington University Global Studies Law Review* 2013, 493.

²⁸⁵ C. MCDUGALL, *The Crime of Aggression Under the Rome Statute of the International Criminal Court*, Cambridge, Cambridge University Press, 2013, 190; Assembly of States Parties, "Informal inter-sessional meeting on the crime of aggression 8-10 June 2009, 28 May 2009", https://asp.icc-cpi.int/sites/asp/files/asp_docs/SWGCA/Non-paper-Elements-of-the-CoA-28May2009-ENG.pdf (Consulted on 20 February 2023).

²⁸⁶ Article 11(1) and 126(1) Rome Statute; P. DE HERT, et al., *Handboek internationaal en Europees strafrecht*, Mortsel, Intersentia, 2014, 482-483.

²⁸⁷ M. KLAMBERG, "Article 11: Jurisdiction Ratione Temporis", in M. KLAMBERG (ed.), *Commentary on the Law of the International Criminal Court*, Brussels, Torkel Opsahl Academic EPublisher, 2017, 167, note 173.

²⁸⁸ Article 22 and 23 Rome Statute; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 55-56.

²⁸⁹ *Ibid.*, 53.

²⁹⁰ Article 11(2) Rome Statute; M. KLAMBERG, "Article 11: Jurisdiction Ratione Temporis", in M. KLAMBERG (ed.), *Commentary on the Law of the International Criminal Court*, Brussels, Torkel Opsahl Academic EPublisher, 2017, 167, note 174; P. DE HERT, et al., *Handboek internationaal en Europees strafrecht*, Mortsel, Intersentia, 2014, 483.

²⁹¹ *Prosecutor v. Abd-Al-Rahman*, "Prosecution's Response to the Defence Appeal against the "Decision on the Defence 'Exception d'incompétence'", ICC (Appeals Chamber), 29 June 2021, ICC-02/05-01/20, para 39; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 54.

ex post facto, that is, after the alleged crime has been committed as a result of such a declaration.²⁹² However, the Court only has jurisdiction after the crime was committed if the crime was “a customary international law crime over which there is universal jurisdiction”.²⁹³ This principle is also incorporated in Article 22(1) Rome Statute.²⁹⁴

3.3. Exercise of jurisdiction

3.3.1 General

90. The articles underpinning the ICC’s jurisdiction resulted in some of the most contentious negotiations at the Rome Conference.²⁹⁵ During the creation of the Statute, it was discussed whether certain crimes, such as genocide, should have jurisdiction based on the universality principle while other crimes should have a different regime. Universal jurisdiction is “*jurisdiction over offences regardless of the place where they were committed and the nationalities of the alleged perpetrator or the victims*”.²⁹⁶ Despite the fact that many favoured this regime, the Court’s jurisdiction is ultimately based on the principles of nationality (*personae*) and territoriality (*loci*).²⁹⁷ Article 12, paragraph 1, of the Rome Statute states that the ICC has ipso facto jurisdiction over State Parties.²⁹⁸ Paragraph 2 establishes the prerequisites that one State Party must grant either territorial or national jurisdiction in order for the Court to exercise its authority.²⁹⁹ In accordance with paragraph 3, the Court may also bring cases against nationals of non-Party States that recognise its jurisdiction on an ad hoc basis.³⁰⁰

91. Pursuant to Article 12(2)(a) of the Statute, the Court will have jurisdiction over every person who is committing one of the core crimes listed in Article 5(a) through (c), if they were committed on the territory of a State Party or on a vessel or aircraft that flies the flag of a State Party or is registered in a State Party.³⁰¹ This is the territoriality principle. Nationality does not come into play

²⁹² M. MILANOVIC, “Gallant on Legality and the Rome Statute”, *EJIL Talk*, 5 October 2011, <https://www.ejiltalk.org/gallant-on-legality-and-the-rome-statute/> (Consulted on 11 May 2023).

²⁹³ K.S. GALLANT, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge, Cambridge University Press, 2010, 352, 357–358, 364–365; P. KAR, “Addition of New War Crimes in the ICC Statute – A critical analysis” *International Journal of Law Management & Humanities* 2020, Vol. 3 Issue 3, 526-527.

²⁹⁴ Article 22(1) Rome Statute.

²⁹⁵ M. WAGNER, “The ICC and its jurisdiction – Myths, Misperceptions and Realities”, in A. VON BOGDANDY and R. WOLFRUM (eds.), *Max Planck Yearbook of United Nations Law*, Leiden, Brill Nijhoff, 2003, Vol. 7, 476.

²⁹⁶ International Committee of the Red Cross, *Universal Jurisdiction over War Crimes*, 2014, <https://www.icrc.org/en/doc/assets/files/2014/universal-jurisdiction-icrc-eng.pdf> (Consulted on 27 January 2023).

²⁹⁷ Article 12 Rome Statute; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 46; M. WAGNER, “The ICC and its jurisdiction – Myths, Misperceptions and Realities”, in A. VON BOGDANDY and R. WOLFRUM (eds.), *Max Planck Yearbook of United Nations Law*, Leiden, Brill Nijhoff, 2003, Vol. 7, 482.

²⁹⁸ Article 12(1) Rome Statute; S. BABAIAN, *The International Criminal Court – An international criminal world court?*, Switzerland, Springer, 2018, 25.

²⁹⁹ Article 12(2) Rome Statute; S. BABAIAN, *The International Criminal Court – An international criminal world court?*, Switzerland, Springer, 2018, 25.

³⁰⁰ Article 12(3) Rome Statute; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 29; S. BABAIAN, *The International Criminal Court – An international criminal world court?*, Switzerland, Springer, 2018, 25.

³⁰¹ Article 12(2)(a) Rome Statute; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 29; S. BABAIAN, *The International Criminal Court – An international criminal world court?*, Switzerland, Springer, 2018, 25.

here.³⁰² In accordance with Article 12(2)(b), the Court has jurisdiction over nationals of a State Party or a national of a State that has accepted the jurisdiction of the court and who are accused of committing a crime, regardless of where the alleged crime was committed.³⁰³ This is the nationality principle, or, to be more specific, the active nationality principle. It is the perpetrator's nationality that matters, not the victim's.³⁰⁴

92. If a situation is referred to the Court by either a State Party (cf. Article 13(a)) or the Prosecutor proprio motu (cf. Article 13(c)) of the Rome Statute, the Court may exercise its jurisdiction if one of the States is a Party to the Statute. When a non-State Party national commits a crime on the territory of a non-State Party, the Article 12 preconditions for exercising jurisdiction can be met through a declaration under Article 12(3).³⁰⁵ While accepting some legal obligations, a State that makes a declaration pursuant to Article 12(3) does not automatically acquire all of the rights of a State Party. The declaration under Article 12(3), in particular, does not immediately "trigger" the Court's exercise of jurisdiction in the same manner as a State Party referring a situation pursuant to Article 14.³⁰⁶ Otherwise, the ICC may only exercise its jurisdiction when the Security Council refers a case to the Court under Chapter VII of the UN Charter. Only through such a referral can the Security Council grant jurisdiction over crimes committed on the territory of non-State Parties or by the nationals of non-States-Parties.³⁰⁷ The foundation for the quasi-global reach of the ICC is laid out in the Preamble, which affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished."³⁰⁸ So far, eight declarations have been made in accordance with Article 12(3). Côte d'Ivoire submitted three, Uganda one, the Palestinian Authority one, the State of Palestine one, and Ukraine two.³⁰⁹

93. The Rome Statute adheres to the model of automatic acceptance, which means that a State Party accepts jurisdiction over all core crimes.³¹⁰ An exception can be found in Article 124. This article states that war crimes can be excluded for a period of seven years. The crime of aggression

³⁰² S. BABAIAN, *The International Criminal Court – An international criminal world court?*, Switzerland, Springer, 2018, 25.

³⁰³ W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 59; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 29; M. WAGNER, "The ICC and its jurisdiction – Myths, Misperceptions and Realities", in A. VON BOGDANDY and R. WOLFRUM (eds.), *Max Planck Yearbook of United Nations Law*, Leiden, Brill Nijhoff, 2003, Vol. 7, 481; E.C. BARBOUR and M.C. WEED, "The International Criminal Court (ICC): Jurisdiction, Extradition, and U.S. Policy", *Congressional Research Service*, 16 March 2010, <https://sgp.fas.org/crs/row/R41116.pdf> (Consulted on 27 January 2023).

³⁰⁴ W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 46-47; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 29.

³⁰⁵ Article 12(2),(3) and 13 Rome Statute; M. WAGNER, "The ICC and its jurisdiction – Myths, Misperceptions and Realities", in A. VON BOGDANDY and R. WOLFRUM (eds.), *Max Planck Yearbook of United Nations Law*, Leiden, Brill Nijhoff, 2003, Vol. 7, 476; E.C. BARBOUR and M.C. WEED, "The International Criminal Court (ICC): Jurisdiction, Extradition, and U.S. Policy", *Congressional Research Service*, 16 March 2010, <https://sgp.fas.org/crs/row/R41116.pdf>, (Consulted on 27 January 2023); J. CHAN, "Judicial oversight over Article 12(3) of the ICC Statute", *FICHL Policy Brief Series No.11*, 2013, <https://www.toaep.org/pbs-pdf/11-chan> (Consulted on 17 April 2023).

³⁰⁶ W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 71.

³⁰⁷ M. WAGNER, "The ICC and its jurisdiction – Myths, Misperceptions and Realities", in A. VON BOGDANDY and R. WOLFRUM (eds.), *Max Planck Yearbook of United Nations Law*, Leiden, Brill Nijhoff, 2003, Vol. 7, 483.

³⁰⁸ M. WAGNER, "The ICC and its jurisdiction – Myths, Misperceptions and Realities", in A. VON BOGDANDY and R. WOLFRUM (eds.), *Max Planck Yearbook of United Nations Law*, Leiden, Brill Nijhoff, 2003, Vol. 7, 483.

³⁰⁹ W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 71.

³¹⁰ Article 12(1) Rome Statute.

is another exception, with a more complicated opt-in system.³¹¹ In the case of amendments to the definitions of crimes, Article 121(5) states that the Court may not proceed either on the basis of territory or nationality with respect to a State Party that has not accepted the amendment. As a result, even a crime committed on the territory of a State Party to the amendment that has accepted the amendment is not subject to prosecution with respect to alleged perpetrators who are nationals of States Parties that have not ratified the amendment.³¹²

3.3.2 Crime of aggression

94. The exercise of jurisdiction over the crime of aggression is governed by Articles 15bis and 15ter of the Rome Statute. Referral to the Court by the Security Council is governed by Article 15ter, whereas referral to the Court by a State Party or exercise of jurisdiction at the initiative of the Prosecutor acting *proprio motu* is governed by Article 15bis.³¹³ The Court's jurisdiction over the crime of aggression is determined by the manner in which it is triggered.³¹⁴ Upon referral by the Security Council in accordance with Article 15ter in conjunction with Article 13(b) of the Statute, the Court may exercise jurisdiction over the crime of aggression committed anywhere, even in a conflict involving non-State Parties to the Rome Statute.³¹⁵ Certain requirements must be met in order for the Security Council to use its power of referral. The Security Council can only act if it first determines that there is a threat to the peace, a breach of the peace, or an act of aggression, and the measures taken must aim to maintain or restore international peace and security. These two important conditions are directly derived from Article 39 of the Charter.³¹⁶ A referral by the Security Council cannot extend the Court's jurisdiction to crimes that occurred before its entry into force on July 1, 2002.³¹⁷ On the basis of State referrals and investigations *proprio motu*, non-State Parties and aggression perpetrated on their territory or by their nationals are not subject to the Court's jurisdiction. In order for the ICC to have jurisdiction over the crime of aggression, both the victim State and aggressor State must be either parties to the Statute or have accepted the Court's jurisdiction over the crime of aggression.³¹⁸

³¹¹ R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 149.

³¹² W.A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 59-60.

³¹³ *Ibid.*, 131, 137.

³¹⁴ M.S. WONG, "Aggression and state responsibility at the International Criminal Court", *International & Comparative Law Quarterly* 2021, 973.

³¹⁵ M.S. WONG, "Aggression and state responsibility at the International Criminal Court", *International & Comparative Law Quarterly* 2021, 975; G. KEMP, *Individual Criminal Liability for the International Crime of Aggression*, Cambridge, Intersentia, 2015, 182.

³¹⁶ Article 39 UN Charter; L. CONDORELLI AND S. VILLALPANDO "Trigger Mechanisms" in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, 630-631; I.K. MULLER-SCHIEKE, "Defining the Crime of Aggression Under the Statute of the International Criminal Court", *Leiden Journal of International Law* 2004, 421.

³¹⁷ L. CONDORELLI AND S. VILLALPANDO "Can the Security Council Extend the ICC's Jurisdiction?" in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, 581.

³¹⁸ W.A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 138-139; M.S. WONG, "Aggression and state responsibility at the International Criminal Court", *International & Comparative Law Quarterly* 2021, 973-974.

95. The prosecutor must first establish if the Security Council has determined that an act of aggression has occurred before moving further on her own initiative or at the request of a State Party. This is because the Security Council's referral is given priority. If the Security Council has not determined the occurrence of an act of aggression, the Prosecutor must wait six months before taking any further action. By using Article 16 of the Statute, the Security Council may also stop prosecutions from proceeding.³¹⁹

96. On May 8, 2013, the Kampala amendments governing the crime of aggression were adopted. State Parties have the option to approve or reject any amendments to Article 5 under Article 121(5). Consequently, even when the crime of aggression should have been defined and recognised by seven-eighths of the State Parties as required by Article 121(4), a State Party may reject the Court's jurisdiction over it.³²⁰

3.4. Jurisdiction *ratione personae*

3.4.1 Introduction

97. As stated in Article 25(1) of the Statute, the Court has jurisdiction over natural persons, not institutions or organisations. Whether or not to include juridical persons was a point of contention during the Rome negotiations. These were ultimately excluded.³²¹ For individuals who were under the age of eighteen at the time of the offence, the Rome Statute clearly lays out an exemption to the general rule of jurisdiction over nationals.³²²

3.4.2 Modes of liability

A. General

98. Following World War II, the idea that individuals, and not just States, might be the recipients of obligations, commit crimes, and thereby directly incur criminal responsibility under international law, was established.³²³ Individual responsibility for crimes under international law was recognised in the Charter and the Nuremberg Tribunal's judgement: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."³²⁴ Because of the recognition of this principle, it is possible to prosecute and punish individuals for major violations of international law.³²⁵

³¹⁹ Article 15(bis)(6),(7),(8) Rome Statute; W.A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 137.

³²⁰ H.P. KAUL, "Preconditions to the exercise of jurisdiction" in A. CASSESE, P. GAETA and R.W.D. JONES, *The Rome Statute of the International Criminal Court*, Oxford, OSAIL, 2002, 605.

³²¹ M. WAGNER, "The ICC and its jurisdiction – Myths, Misperceptions and Realities", in A. VON BOGDANDY and R. WOLFRUM (eds.), *Max Planck Yearbook of United Nations Law*, Leiden, Brill Nijhoff, 2003, Vol. 7, 481; S. BABAIAN, *The International Criminal Court – An international criminal world court?*, Switzerland, Springer, 2018, 34.

³²² Article 26 Rome Statute.

³²³ C. MELONI, "Individual Criminal Responsibility", *Oxford Bibliographies*, 28 October 2020, <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0215.xml#obo-9780199796953-0215-bibItem-0002> (Consulted on 15 April 2023).

³²⁴ *France et al. v. Goring et al.*, "Nuremberg judgement", IMT, 1 October 1946, 447.

³²⁵ W.A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 211; C. MELONI, "Individual Criminal Responsibility", *Oxford Bibliographies*, 28 October 2020,

In order to ensure individual criminal responsibility, other important principles have been established, like the exclusion of an individual's official position, including that of a head of State or other high-level official.³²⁶

99. Article 25 is connected to the elements of a crime. To prove a perpetrator's criminal responsibility, both the *actus reus* and the *mens rea* must be present.³²⁷ The ICTY's Trial Chamber confirmed this in the *Delalić* judgement.³²⁸

Article 25(3) lists the applicable modes of liability. Article 25 (3)(a) of the Statute entails three different types of commission: perpetration as an individual, joint perpetration, and perpetration through another person. Perpetration as an individual, also called "direct perpetration", means that the perpetrator acts alone, without relying on another person.³²⁹ On the other hand, "joint perpetration" does require multiple perpetrators and a division of criminal tasks between them.³³⁰ Perpetration "through another person" means the use of a person who physically carries out the crime.³³¹ An act of "ordering,"³³² "soliciting,"³³³ or "inducing"³³⁴ the commission of a crime is referred

<https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0215.xml#obo-9780199796953-0215-bibItem-0002> (Consulted on 15 April 2023).

³²⁶ R. GALLMETZER and M. KLAMBERG, "Individual Responsibility for Crimes under International Law: the UN Ad Hoc Tribunals and the International Criminal Court", *The Summer School on International Law*, 2005, https://www.academia.edu/1988918/Individual_Responsibility_for_Crimes_Under_International_Law_The_Un_Ad_Hoc_Tribunals_and_the_International_Criminal_Court (Consulted on 15 April 2023).

³²⁷ A. DUFF, *Answering for Crime: Responsibility and Liability in the Criminal Law*, Oxford, Hart Publishing, 2009, 202-207.

³²⁸ "It is apparent that it is a general principle of law that the establishment of criminal culpability requires an analysis of two aspects. The first of these may be termed the *actus reus* – the physical act necessary for the offence. (...) The second aspect of the analysis of any homicide offence relates to the necessary mental element, or *mens rea*; Prosecutor v. Zejnil Delalić, "Judgement", ICTY (Trial Chamber II), 16 November 1998, IT-96-21-T, paras. 424-425.

³²⁹ This also includes cases in which other parties to the crime are only making accessory contributions to the direct perpetrator's commission; A. CASSESE, *International Criminal Law*, Oxford, Oxford University Press, 2008, 189.

³³⁰ All participants in the crime partake of the same criminal conduct and the attendant *mens rea*; A. CASSESE, *International Criminal Law*, Oxford, Oxford University Press, 2008, 189.

³³¹ It takes more than inciting or soliciting someone to commit a crime, as otherwise this kind of perpetration would be difficult to distinguish from incitement under Article 25(3)(b) of the ICC Statute. For this kind of perpetration, there must be use of force, exploitation of an error or any other handicap of the person physically carrying out the offence. It makes no difference whether this person is criminally responsible for the crime; N. SHULZHENKO and S. ROMASHKIN, "Types of individual criminal responsibility according to Article 25(3) of Rome Statute", *Judicial Tribune* 2021, Vol. 11 Issue 1, 76; R. GALLMETZER and M. KLAMBERG, "Individual Responsibility for Crimes under International Law: the UN Ad Hoc Tribunals and the International Criminal Court", *The Summer School on International Law*, 2005, https://www.academia.edu/1988918/Individual_Responsibility_for_Crimes_Under_International_Law_The_Un_Ad_Hoc_Tribunals_and_the_International_Criminal_Court (Consulted on 15 April 2023).

³³² Ordering implies a position of authority and subordination between the accused and the actual perpetrator; K. AMBOS, "Individual Criminal Responsibility" in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos Verlagsgesellschaft, 1999, 480; R. GALLMETZER and M. KLAMBERG, "Individual Responsibility for Crimes under International Law: the UN Ad Hoc Tribunals and the International Criminal Court", *The Summer School on International Law*, 2005, https://www.academia.edu/1988918/Individual_Responsibility_for_Crimes_Under_International_Law_The_Un_Ad_Hoc_Tribunals_and_the_International_Criminal_Court (Consulted on 15 April 2023).

³³³ Soliciting is defined as ordering, authorising, urging, inciting, requesting, or advising another person to commit a crime; K. AMBOS, "Individual Criminal Responsibility" in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos Verlagsgesellschaft, 1999, 480; R. GALLMETZER and M. KLAMBERG, "Individual Responsibility for Crimes under International Law: the UN Ad Hoc Tribunals and the International Criminal Court", *The Summer School on International Law*, 2005, https://www.academia.edu/1988918/Individual_Responsibility_for_Crimes_Under_International_Law_The_Un_Ad_Hoc_Tribunals_and_the_International_Criminal_Court (Consulted on 15 April 2023).

³³⁴ Inducing a crime refers to the process of influencing someone's behaviour by persuasion or reason; K. AMBOS, "Individual Criminal Responsibility" in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos Verlagsgesellschaft, 1999, 480; R. GALLMETZER and M. KLAMBERG, "Individual Responsibility for Crimes under International Law: the UN Ad Hoc Tribunals and the International Criminal Court", *The Summer School on International Law*, 2005, https://www.academia.edu/1988918/Individual_Responsibility_for_Crimes_Under_International_Law_The_Un_Ad_Hoc_Tribunals_and_the_International_Criminal_Court (Consulted on 15 April 2023).

to in Article 25(3)(b) of the ICC Statute. The International Law Commission stated that "The superior who orders the commission of the crime is in some respects more culpable than the subordinate who merely carries out the order and thereby commits a crime that he would not have committed on his own initiative."³³⁵ A superior-subordinate relationship is not required for the mode of "inducing," unlike the case of "ordering."³³⁶ According to Article 25(3)(c) of the ICC Statute, anybody who aids in the commission of a crime against international law is criminally liable. It is not required that the assistance has substantial effect on the commission of the crime. The aider and abettor must behave "purposefully" with regard to aiding in the commission of the crime, they must wish for the assistance to aid in the commission of a crime.

100. By employing the phrase "in any other way contributes to [...] a crime", subparagraph (d) appears to give the lowest objective requirement for participation under Article 25. It is required that the contribution is provided to a group of people and this contribution is intentional. The contribution can be provided in two ways: first, with the intention of aiding the criminal activity or criminal purpose of the group, or second, with knowledge of the group's intention to commit the crime. It is required that the contribution is made to a group of people and that this contribution is made on purpose.³³⁷ The criminal liability of a person who attempts to commit a crime within the Court's jurisdiction is provided for in Article 25(3)(f). Only when all three elements are present can a person become criminally responsible for attempting to commit a crime.³³⁸

101. Article 28 Rome Statute entails command responsibility. The criminal responsibility provided in Article 28 of the Statute is distinct from that found in article 25(3)(a) of the Statute. According to article 28, a superior may be held liable for the unlawful conduct of his subordinates if he fails to carry out his obligation to stop, punish, or report the behaviour to the appropriate authorities.³³⁹

³³⁵ Report of the International Law Commission on the Work of its Forty-Eighth Session (6 May - 26 July 1996) *UN Doc. A/51/10*, (1996), 20 para. 8.

³³⁶ K. AMBOS, "Individual Criminal Responsibility" in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos Verlagsgesellschaft, 1999, 480; R. GALLMETZER and M. KLAMBERG, "Individual Responsibility for Crimes under International Law: the UN Ad Hoc Tribunals and the International Criminal Court", *The Summer School on International Law*, 2005, https://www.academia.edu/1988918/Individual_Responsibility_for_Crimes_Under_International_Law_The_Un_Ad_Hoc_Tribunals_and_the_International_Criminal_Court (Consulted on 15 April 2023).

³³⁷ Article 25(d)(i),(ii) Rome Statute.

³³⁸ The three elements are: the intent to commit a specific crime, an act intended to accomplish that crime, and the failure to complete the crime due to circumstances unrelated to the perpetrator's will. An individual is not criminally liable if they abandon the effort to committing the crime or prevent it from being completed. The clause is ambiguous regarding when an abandonment is still permitted throughout the commission process and when it is voluntary; R. GALLMETZER and M. KLAMBERG, "Individual Responsibility for Crimes under International Law: the UN Ad Hoc Tribunals and the International Criminal Court", *The Summer School on International Law*, 2005, https://www.academia.edu/1988918/Individual_Responsibility_for_Crimes_Under_International_Law_The_Un_Ad_Hoc_Tribunals_and_the_International_Criminal_Court (Consulted on 15 April 2023).

³³⁹ C. LAUCCI, *The Annotated Digest of the International Criminal Court: 2009*, Leiden, Koninklijke Brill N.V., 2014, 117-118.

B. Aggression

102. Article 8bis(1) concerning the definition of the crime of aggression states that a perpetrator is "a person in a position effectively to exercise control over or to direct the political or military action of the State that committed the act of aggression." This requirement is reiterated in Article 25(3) bis. Therefore, when evaluating criminal responsibility for the crime of aggression, the leadership requirement also applies.³⁴⁰ The liability of accessories stipulated by Article 25(3)(b-d), such as committing, ordering, aiding and abetting, contributing, and inciting, is not applicable to the crime of aggression because it is a leadership crime.³⁴¹ Since the elements of the crimes explicitly say that an act of aggression must have been committed in order for there to be an offence under the Rome Statute, it is unclear whether it is possible to attempt to commit an offence under Article 25(3)(f).³⁴²

103. Only "presidents, prime ministers, and top military leaders such as ministers of defence and commanding generals" are subject to prosecution for the crime of aggression. As a result, it appears that the individual soldiers who carried out "orders of aggression" are exempt from legal action before the ICC.³⁴³ Because of this, Article 28, which allows superiors or military leaders to be held accountable for the crimes committed by subordinates, no longer seems relevant.³⁴⁴ The term "effective control" is used in the definition of Article 25 (3 bis), which means that a superior or military commander may be held criminally liable for crimes committed by subordinates who are effectively under his authority and control.³⁴⁵ Determining whether conduct was carried out "under the direction or control" of a State raises more complicated issues. The conduct in question will only be attributed to the State if the State directed or controlled the particular operation and the conduct was a crucial component of that operation.³⁴⁶ At the Tribunal in Nuremberg, it was said that "*Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats, and business men.*"³⁴⁷ Therefore, it was not only Hitler who was prosecuted; more than twenty other high-ranking officials in Hitler's circle were also prosecuted.³⁴⁸ The same can be illustrated in the 'High Command Case', in which the American Military Tribunal explained

³⁴⁰ M. ARRONSON-STORRIER, "Article 25: Individual criminal responsibility", in M. KLAMBERG (ed.), *Commentary on the Law of the International Criminal Court*, Brussels, Torkel Opsahl Academic EPublisher, 2017, 272, note 274; A. CASSESE, "On Some Problematic Aspects of the Crime of Aggression", *Leiden Journal of International Law* 2007, Vol. 20 No.4, 848.

³⁴¹ G.J.A. KNOOPS, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study. Second Revised Edition*, Leiden, BRILL, 2014, 69-70.

³⁴² S. BARRIGA, "Negotiating the Amendments on the Crime of Aggression" in S. BARRIGA and C. KRESS (eds.), *The Travaux Préparatoires of the Crime of Aggression*, Cambridge, Cambridge University Press, 2012, 23-24.

³⁴³ N.R. HAJDIN, "International Criminal Courts and Tribunals: The actus reus of the Crime of Aggression", *LJIL* 2021, 490; I. K. MULLER-SCHIEKE, "Defining the Crime of Aggression Under the Statute of the International Criminal Court", *LJIL* 2004, 420.

³⁴⁴ G.J.A. KNOOPS, *An Introduction to the Law of International Criminal Tribunals: A Comparative Study. Second Revised Edition*, Leiden, BRILL, 2014, 69-70.

³⁴⁵ *Ibid.*, 70.

³⁴⁶ United Nations, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2008, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (Consulted on 11 February 2023).

³⁴⁷ *France et al. v. Goring et al.*, "Nuremberg judgement", IMT, 1 October 1946, 448; I. K. MULLER-SCHIEKE, "Defining the Crime of Aggression Under the Statute of the International Criminal Court", *Leiden Journal of International Law*, 2004, 419; K. J. HELLER, "Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression", *European Journal of International Law* 2007, Volume 18 Issue 3, 480.

³⁴⁸ I.K. MULLER-SCHIEKE, "Defining the Crime of Aggression Under the Statute of the International Criminal Court", *Leiden Journal of International Law*, 2004, 419.

that “*criminality does not attach to every individual in this chain of command(...)*”³⁴⁹ and “anybody who is on the policy level and participates in the war policy is liable to punishment”.³⁵⁰

3.4.3 Immunities

104. International law lays down two categories of immunities: functional (*ratione materiae*) immunities and personal (*ratione personae*) immunities.³⁵¹ Immunity *ratione materiae* applies to official acts committed by state agents in their official capacity on behalf of the State to which they belong. This mode of immunity benefits state officials performing official acts, especially heads of state. Because immunity *ratione materiae* attaches to official conduct as such, it is effective beyond the term of office.³⁵² Immunity *ratione personae* is granted to a small group of incumbent high-ranking state leaders, including heads of state, and covers both official and private conduct. Only incumbent heads of government who perform the substantial tasks of a head of state are entitled to immunity *ratione personae*. All other members of the government are only granted *ratione materiae* immunity.³⁵³

105. The accused cannot invoke his functional and personal immunity under Article 27 of the Rome Statute before the International Criminal Court.³⁵⁴ Article 27 paragraph 1 of the Statute prescribes that “*official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*” Article 98 Rome Statute concerning obligations of cooperation, does provide for immunities. However, Article 98 concerns the situation where a State Party is asked to hand over a person who has immunities granted by a third-State. Under this Article, the third-State may waive the immunity of its State officials.³⁵⁵

Sudanese President Omar Al-Bashir was the first sitting head of State to be indicted by the International Criminal Court.³⁵⁶ For the first time, the Court concluded that the position of an official of a non-State party has no effect on the Court’s jurisdiction over the case.³⁵⁷ In 2016, judges unanimously found Jean-Pierre Bemba, a former vice president, businessman, and militia leader in

³⁴⁹ J.J. DOUGLASS, “High Command Case: A Study in Staff and Command Responsibility”, *The International Lawyer* 1972, 699.

³⁵⁰ *The United States of America v. Wilhelm von Leeb et al.* “High Command Trial”, US Military Tribunal Nuremberg, 27 October 1848, 381-382; I. K. MULLER-SCHIEKE, “Defining the Crime of Aggression Under the Statute of the International Criminal Court”, *Leiden Journal of International Law*, 2004, 419.

³⁵¹ R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 508.

³⁵² R. PEDRETTI, *Immunity of Heads of State and State Officials for International Crimes*, Leiden, Koninklijke Brill N.V., 2014, 2-3.

³⁵³ *Ibid.*, 3; H. KREICKER, “immunities”, in C. KREB, and S. BARRIGA (eds.), *Crime of Aggression Under Current International Law*, Cambridge, Cambridge University Press, 2017, 675-676.

³⁵⁴ M.C. BASSIOUNI, *Introduction to International Criminal Law*, Leiden, Koninklijke Brill N.V., 2012, 74.

³⁵⁵ R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 522-523; A.S. GALAND, *UN Security Council Referrals to the International Criminal Court: legal nature, effects and limits*, Leiden, Koninklijke Brill N.V., 2019, 182.

³⁵⁶ International Criminal Court, *ICC Issues a warrant of arrest for Omar Al Bashir, President of Sudan*, 4 March 2009, <https://www.icc-cpi.int/news/icc-issues-warrant-arrest-omar-al-bashir-president-sudan> (Consulted on 7 May 2023).

³⁵⁷ *Prosecutor v. Al-Bashir*, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, ICC (Pre-Trial Chamber I), 4 March 2009, ICC-02/05-01/09, para. 41.

the Democratic Republic of Congo, guilty of war crimes and crimes against humanity. Bemba was the most senior leader to be successfully convicted by the ICC.³⁵⁸

3.4.4 Trial in absentia

106. The principle of trial in absentia does not concern the court's jurisdiction but rather its procedures. Nonetheless, it indirectly encompasses the offender's person.

107. The right of the accused to attend the trial is acknowledged in Article 67(1)(d) of the Statute, though Article 63 obligates the accused to be present. The question of whether to permit *in absentia* trials was heavily debated during the Statute's writing. Some argued that the inclusion of trials *in absentia* was incompatible with the idea of a fair trial as stated in ICCPR Article 14 (3)(d). Others believed that in absentia trials were especially significant in the context of international justice because of the educational effect as well as the extremely practical challenges associated with demanding presence at trial.³⁵⁹ Apart from the Nuremberg trials, the Ad Hoc International Tribunals prohibited trials *in absentia*.³⁶⁰

108. Article 63(1) Rome Statute states that the accused shall be present during the trial, there is only one exception possible to this principle mentioned in paragraph 2. The accused can be removed if he continues to disrupt the trial, however, this possibility "shall only be used in exceptional circumstances after other reasonable alternatives have proved inadequate".³⁶¹ However, this exception can only be used when the accused is already present at trial and the Court has already gained physical control over him. The cooperation of States with the ICC is necessary for the Court to arrest the accused.³⁶² Despite this, there is a provision in the Rome Statute that does allow for some form of pre-trial *in absentia*. According to Rome Statute article 61(2), "the Pre-Trial Chamber may hold a hearing in the person's absence to confirm the charges on which the Prosecutor intends to seek trial." The Prosecutor may take the initiative to schedule such a hearing, or the Pre-Trial Chamber may make the request on its own motion. This mini pre-trial in the accused's absence can only be used if the defendant has waived their right to be present, has fled, or cannot be located.³⁶³

³⁵⁸ J. POWDERLY, "Introductory note to Prosecutor v. Jean-Pierre Bemba Gombo: Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to article 74 of the Statute", *Int'L Crim. Ct.*, 2018, 1031.

³⁵⁹ W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 285-286.

³⁶⁰ E. HERATH, "Trials in Absentia: Jurisprudence and Commentary on the Judgment in Chief Prosecutor v. Abul Kalam Azad in the Bangladesh International Crimes Tribunal", *HILJ* 2014, Vol. 55, 1-2.

³⁶¹ Article 63(2) Rome Statute.

³⁶² C. TIRIBELLI, "Judgment *in absentia* in International Criminal Law: its admissibility before the Ad Hoc Tribunals, the International Criminal Court and the European Arrest Warrant", *Sri Lanka Journal of International Law* 2006, Vol. 18, 369-385.

³⁶³ *Ibid.*

4. Admissibility

109. The issue of admissibility aims to determine whether a case over which the Court has proper jurisdiction should be litigated before it.³⁶⁴ The Court's jurisdiction over an international crime does not, in fact, automatically imply that it can exercise its jurisdiction.³⁶⁵ The preamble of the Statute states that "*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*".³⁶⁶ Where two legal systems can exercise jurisdiction over the same issues, some sort of mechanism must be created to determine which legal system comes first. It is the national legal systems that have priority over the ICC.³⁶⁷ The International Criminal Court intervenes when national systems fail; these situations are laid out in Article 17 of the Statute.³⁶⁸ Article 17 of the Rome Statute addresses the issue of admissibility³⁶⁹. The conditions set out in Article 17 have both a negative and a positive effect. A case is ruled inadmissible when it must be or has been investigated or prosecuted by a State with jurisdiction. On the contrary, whenever the State that has jurisdiction "is unwilling or unable genuinely to carry out the investigation or prosecution", the case is deemed admissible.³⁷⁰ It is the Court itself that shall determine the admissibility of a case.³⁷¹ Article 18 — preliminary rulings on admissibility — applies once a State Party referral has resulted in the Prosecutor's decision to initiate an investigation or when the Prosecutor has initiated an investigation as authorised by the Pre-Trial Chamber. All parties to the matter must be notified by the Prosecutor, as well as any other States that could typically have jurisdiction over it. Importantly, the Prosecutor has the discretion to provide notice in confidence and to restrict the scope of information provided to States.³⁷² While Article 18 will be applied in the situation of a preliminary admissibility challenge, Article 19 will become applicable if the admissibility of concrete cases is challenged.³⁷³

³⁶⁴ W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 68; M. IYASU and J.N. ASTON, "Admissibility of the International Criminal Court", *Indian Law Institute* 2011, 626.

³⁶⁵ G. M. PIKIS, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, Leiden, Koninklijke Brill N.V., 2010, 54; M. IYASU and J.N. ASTON, "Admissibility of the International Criminal Court", *Indian Law Institute* 2011, 626.

³⁶⁶ Paragraph 6 Preamble Rome Statute; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 171; S. BABAIAN, *The International Criminal Court – An international criminal world court?*, Switzerland, Springer, 2018, 75, M. IYASU and J.N. ASTON, "Admissibility of the International Criminal Court", *Indian Law Institute* 2011, 626.

³⁶⁷ W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 169; M.C. BASSIOUNI, *Introduction to International Criminal Law*, Leiden, Koninklijke Brill N.V., 2012, 683; G. M. PIKIS, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, Leiden, Koninklijke Brill N.V., 2010, 54.

³⁶⁸ W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 169; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 208; M. IYASU and J.N. ASTON, "Admissibility of the International Criminal Court", *Indian Law Institute* 2011, 626.

³⁶⁹ Article 17(1) Rome Statute; W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 171; R.B. PHILIPS, "The International Criminal Court Statute: Jurisdiction and Admissibility", *Criminal Law Forum* 1999, 77-80.

³⁷⁰ M. IYASU and J.N. ASTON, "Admissibility of the International Criminal Court", *Indian Law Institute* 2011, 628; G. M. PIKIS, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, Leiden, Koninklijke Brill N.V., 2010, 55; R.B. PHILIPS, "The International Criminal Court Statute: Jurisdiction and Admissibility", *Criminal Law Forum* 1999, 64.

³⁷¹ Article 19(1) Rome Statute.

³⁷² R.B. PHILIPS, "The International Criminal Court Statute: Jurisdiction and Admissibility", *Criminal Law Forum* 1999, 80-81.

³⁷³ S. BABAIAN, *The International Criminal Court – An international criminal world court?*, Switzerland, Springer, 2018, 115.

4.1. Principle of complementarity

110. Complementarity is a relatively new concept in international criminal law. The ICC's predecessor ad hoc tribunals, the ICTY and ICTR, had priority over national jurisdictions. The complementarity principle is implemented and implicated throughout the Statute.³⁷⁴ Article 1 of the Statute, as well as Preamble Paragraph 10, lay down the principle for the Court: the ICC "shall be complementary to national criminal jurisdictions."³⁷⁵ The Preamble also reminds States of their obligation to exercise their criminal jurisdiction over those who commit international crimes.³⁷⁶ As a result, the complementarity principle not only defends the right of States to self-determination, but it was also created to encourage an efficient national system of criminal justice that would put an end to impunity and help avoid similar crimes.³⁷⁷

111. The concept of complementarity has frequently been described as pivotal and even said to be "the cornerstone of the ICC in world affairs", but it is not defined in the Rome Statute.³⁷⁸ The practical application of the complementarity principle is explained in Article 17 of the Rome Statute. Article 17(1)(a) through (c) expresses that whenever a national Court is already prosecuting or investigating a case or has decided not to prosecute the person in question, the case will be inadmissible. As mentioned earlier, this only applies as long as there is no inability or unwillingness.³⁷⁹ An important case in this regard is *Prosecutor v. Katanga*. It gave the ICC its first opportunity to interpret the concept of complementarity. In this case, it was Katanga who argued in his defence that Congo had been "willing" to try him and that he had been charged with crimes against humanity.³⁸⁰ The following was stated in order to determine whether the Court may legitimately declare that a State is either unwilling or unable to prosecute the perpetrators in good faith:

"Under article 17 (1) (a) and (b) of the Statute, the question of unwillingness or inability has to be considered only (1) when there are, at the time of the proceedings in respect of an admissibility challenge, domestic investigations or prosecutions that could render the case inadmissible before the Court, or (2) when there have been such investigations and the State having jurisdiction has decided not to prosecute the person concerned."³⁸¹

³⁷⁴ R.B. PHILIPS, "The International Criminal Court Statute: Jurisdiction and Admissibility", *Criminal Law Forum* 1999, 64.

³⁷⁵ Article 1 Rome Statute; Preamble paragraph 10 Rome Statute; S. BABAIAN, *The International Criminal Court – An international criminal world court?*, Switzerland, Springer, 2018, 75; R.B. PHILIPS, "The International Criminal Court Statute: Jurisdiction and Admissibility", *Criminal Law Forum* 1999, 63; T. MCHENRY, "Complementarity Issues", *ASIL* 2011, 157.

³⁷⁶ Paragraph 6 Preamble Rome Statute.

³⁷⁷ S. BABAIAN, *The International Criminal Court – An international criminal world court?*, Switzerland, Springer, 2018, 115.

³⁷⁸ J.M. CZARNETZKY and R. J. RYCHLAK, "An Empire of Law?: Legalism and the International Criminal Court", *Notre Dame L. Rev.* 2003, Vol.79 Issue 1, 94; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 207; M.A. FAIRLIE, "Establishing Admissibility at the International Criminal Court: Does the Buck Stop with the Prosecutor, Full Stop?", *The National Lawyer* 2005, Vol. 39 No. 4, 817.

³⁷⁹ T. MCHENRY, "Complementarity Issues", *ASIL* 2011, Vol. 105, 157.

³⁸⁰ ICTY, *What is complementarity*, <https://www.ictj.org/sites/default/files/subsites/complementarity-icc/#:~:text=In%20reality%2C%20everything%20that%20falls,sufficiently%20mirrors%20the%20ICC's%20case> (Consulted on 1 March 2023); M.C. BASSIOUNI, *Introduction to International Criminal Law*, Leiden, Brill N.V., 2012, 683.

³⁸¹ *Prosecutor v. Katanga*, "Judgement", ICC (Appeals Chamber), 25 September 2009, ICC-01/04-01/07, para. 1.

112. According to Article 17(1)(d) of the Rome Statute, a case may be ruled inadmissible if the case is “not of sufficient gravity to justify further action by the Court”.³⁸² The criterion of ‘sufficient gravity’ does not require the existence of national proceedings. Only the gravest atrocities shall be dealt with by the Court, as stipulated by the Prosecutor.³⁸³

113. Article 17.2 of the Statute clarifies the indicators implying a State's unwillingness to prosecute a case. A State is unwilling when:

- (a) The State undertakes the proceedings for the purpose of shielding the person from the ICC’s jurisdiction;
- (b) There is an unjustified delay in the proceedings that is inconsistent with an intent to bring the person to justice; and
- (c) The proceedings are not conducted independently or impartially.³⁸⁴

This language is reiterated in the exceptions listed in Article 20 concerning the *ne bis in idem* principle.³⁸⁵

114. The Court will determine inability in a case, “when there is a total or substantial collapse or unavailability of the national judicial system or inability to arrest the accused or gather evidence” due to which the State is unable to properly prosecute a case.³⁸⁶ The Court is directed to have “regard to the principles of due process recognised by international law” in determining unwillingness or inability. It directs the Court to compare national judicial criminal processes to the highest international standards of due process.³⁸⁷

4.2. Ne bis in idem

115. The *ne bis in idem* principle is a necessary consequence of the complementarity principle.³⁸⁸ One cannot be prosecuted or tried twice for the same criminal conduct, by the same or another court.³⁸⁹ A person who has previously been convicted or acquitted by a national court for conduct

³⁸² Article 17(1)(d) Rome Statute.

³⁸³ *Prosecutor v. Bosco Ntaganda*, “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, ICC (Pre-Trial Chamber I), 10 February 2006, ICC-01/04-01/07, para. 51; Report of the Preparatory Committee on the Establishment of an International Criminal Court (15 April 1998), A/CONF.183/2/Add. (1998), <https://digitallibrary.un.org/record/267438?ln=en#record-files-collapse-header> (Consulted on 25 February 2023); M. IYASU and J.N. ASTON, “Admissibility of the International Criminal Court”, *Indian Law Institute* 2011, 629; R.B. PHILIPS, “The International Criminal Court Statute: Jurisdiction and Admissibility”, *Criminal Law Forum* 1999, 78.

³⁸⁴ Article 17(2) Rome Statute; G. M. PIKIS, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, Leiden, Koninklijke Brill N.V., 2010, 55; M.C. BASSIOUNI, *Introduction to International Criminal Law*, Leiden, Koninklijke Brill N.V., 2012, 683.

³⁸⁵ R.B. PHILIPS, “The International Criminal Court Statute: Jurisdiction and Admissibility”, *Criminal Law Forum* 1999, 82.

³⁸⁶ Article 17(3) Rome Statute; M.C. BASSIOUNI, *Introduction to International Criminal Law*, Leiden, Koninklijke Brill N.V., 2012, 683.

³⁸⁷ R.B. PHILIPS, “The International Criminal Court Statute: Jurisdiction and Admissibility”, *Criminal Law Forum* 1999, 79.

³⁸⁸ M.C. BASSIOUNI, *Introduction to International Criminal Law*, Leiden, Koninklijke Brill N.V., 2012, 683; C. VAN DEN WYNGAERT and T. ONGENA, “Issues of Admissibility and Jurisdiction” in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, 721-722.

³⁸⁹ Article 20(1)(2) Rome Statute; *Ne bis in idem*. Oxford Reference, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100226645> (Consulted on 2 March 2023).

that constitutes a crime under the Statute may not be prosecuted by the Court.³⁹⁰ Exceptions to the latter are when the proceedings in the national court “were to shield the person concerned from criminal responsibility” or when the national proceedings were not conducted independently or impartially.³⁹¹

³⁹⁰ Article 20(3) Rome Statute.

³⁹¹ Article 20(3)(a),(b) Rome Statute; M.C. BASSIOUNI, *Introduction to International Criminal Law*, Leiden, Koninklijke Brill N.V., 2012, 684-685.

CHAPTER 3 What are the possible obstacles to putting Putin on trial before the International Criminal Court?

1. Jurisdiction *ratione materiae*

116. The descriptive research method was used in Chapter 2 to describe the main crimes, how they came about, and what the elements are. These crimes will be applied to the situation in Ukraine in this Chapter. It will be assessed whether Putin committed a crime of aggression and/or war crimes.

1.1. Crime of aggression

117. To determine whether Putin committed a crime of aggression against Ukraine, all of the previously outlined elements must be applied to the situation.

1.1.1 Act of aggression

118. Article 8bis, paragraph 2, of the Rome Statute defines what is meant by an act of aggression and lists a number of specific acts. Compliance with just one of these specific acts is enough to constitute an act of aggression.³⁹²

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

119. The Russian invasion of Ukraine took place in February 2022. The UN considers this attack to be against the principles of the UN Charter and quickly appointed a crisis coordinator.³⁹³ The ICC Prosecutor opened an investigation for war crimes and crimes against humanity.³⁹⁴ It is apparent that an invasion took place. Another evident fact is that Ukraine was attacked. Several attacks immediately followed the invasion and continued to take place. For example, an attack on energy infrastructure took place in October 2022, civilians have been attacked while walking the street, a Ukrainian hospital got attacked by a Russian shell...³⁹⁵

In the context of this article, the invasion can be considered an annexation, at least with regard to the Donbas Region. In one of his speeches, Putin clearly rejects the idea that Ukraine ever had "real

³⁹² M. GILLET, "The Anatomy of an International Crime: Aggression at the International Criminal Court", *International Criminal Law Review* 2013, 8.

³⁹³ These principles are outlined in Article 2 of the UN Charter; United Nations, *The UN and the war in Ukraine: key information*, 9 March 2023, <https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/> (Consulted on 17 March 2023); Human Rights Watch, *Ukraine: one year of Russian crimes*, 21 February 2023, <https://www.hrw.org/video-photos/video/2023/02/21/ukraine-one-year-russian-crimes> (Consulted on 17 March 2023).

³⁹⁴ International Criminal Court, *Ukraine*, <https://www.icc-cpi.int/ukraine> (Consulted 17 March 2023).

³⁹⁵ Human Rights Watch, *Ukraine events of 2022*, <https://www.hrw.org/world-report/2023/country-chapters/ukraine> (Consulted on 14 March 2023); Human Rights Council, *Report of the Independent International Commission of Inquiry on Ukraine*, 15 March 2023, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf (Consulted on 16 March 2023); J. WU, J. CARMAN, E. EINHORN and M. HERSHER, "Ukraine attacked: Map of sites targeted by Russia's invasion", *NBC News*, 25 February 2022, <https://www.nbcnews.com/specials/ukraine-attacked-sites-targeted-russia-invasion/index.html> (Consulted on 9 May 2023).

statehood", claiming that it is a vital part of Russia's "own history, culture, and spiritual space."³⁹⁶ On September 30, 2022, Putin signed "accession treaties of the Donetsk People's Republic, the Lugansk People's Republic, the Zaporozhye Region and the Kherson Region" formalising Russia's annexation and applying Russian legislation in these territories.³⁹⁷ In a resolution adopted on October 13, 2022, the United Nations General Assembly condemned the organisation of illegal "referenda" and demanded that the Russian Federation revoke its annexation declaration. It states that the Russian Federation's illegal actions have no legal validity under international law.³⁹⁸ The European Council also issued a statement condemning Russia's actions, declaring, "We do not and will never recognise the illegal 'referenda' that Russia has engineered as a pretext for this further violation of Ukraine's independence, sovereignty and territorial integrity, nor their falsified and illegal results. We will never recognise this illegal annexation."³⁹⁹

This thesis does not discuss the military occupation and annexation of Crimea.

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

120. Several cases of bombardment have been reported during the conflict.⁴⁰⁰ For example, the bombing of a theatre in Mariupol on March 16, 2022.⁴⁰¹ The Crisis Response team at Amnesty International interviewed numerous survivors and gathered extensive digital evidence of the bombardment. It was considered almost certain that Russia carried out the attack, dropping two 500-kg bombs.⁴⁰² Also, other cities, apartment buildings and hospitals, etc. have been reported to have been bombed.⁴⁰³ Four independent NGO's have called on the United Nations Independent

³⁹⁶ B. PERRIGO, "How Putin's denial of Ukraine's Statehood Rewrites History", *Time*, 2022, <https://time.com/6150046/ukraine-statehood-russia-history-putin/> (Consulted on 22 April 2023).

³⁹⁷ United Nations Human Rights Office of the High Commissioner, *Report on the Human Rights Situation in Ukraine: 1 August 2022 – 31 January 2023*, 24 March 2023, <https://www.ohchr.org/sites/default/files/documents/countries/ukraine/2023/23-03-24-Ukraine-35th-periodic-report-ENG.pdf> (Consulted on 25 April 2023).

³⁹⁸ Resolution ES-11/4 adopted by the United Nations General Assembly (12 October 2022), *UN Doc. A/RES/ES-11/4* (2022); X, "Ukraine: UN General Assembly demands Russia reverse course on 'attempted illegal annexation'", *United Nations News*, 12 October 2022, <https://news.un.org/en/story/2022/10/1129492> (Consulted on 25 April 2023); United Nations Human Rights Office of the High Commissioner, *Report on the Human Rights Situation in Ukraine: 1 August 2022 – 31 January 2023*, 24 March 2023, <https://www.ohchr.org/sites/default/files/documents/countries/ukraine/2023/23-03-24-Ukraine-35th-periodic-report-ENG.pdf> (Consulted on 25 April 2023).

³⁹⁹ European Council, *Statement by the Members of the European Council*, 30 September 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/09/30/statement-by-the-members-of-the-european-council/> (Consulted on 25 April 2023).

⁴⁰⁰ Human Rights Watch, *Ukraine events of 2022*, <https://www.hrw.org/world-report/2023/country-chapters/ukraine> (Consulted on 14 March 2023).

⁴⁰¹ Human Rights Watch, *Ukraine: Mariupol Theater hit by Russian Attack Sheltered Hundreds*, 16 March 2022, <https://www.hrw.org/news/2022/03/16/ukraine-mariupol-theater-hit-russian-attack-sheltered-hundreds#:~:text=Ukraine%3A%20Mariupol%20Theater%20Hit%20by%20Russian%20Attack%20Sheltered%20Hundreds,-Serious%20Concerns%20for&text=Update%3A%20Local%20officials%20in%20Mariupol,16%20attack%20on%20the%20theater> (Consulted on 9 May 2023).

⁴⁰² Amnesty International, *Ukraine: deadly Mariupol theatre strike 'a clear war crime' by Russian forces*, <https://www.amnesty.org/en/latest/news/2022/06/ukraine-deadly-mariupol-theatre-strike-a-clear-war-crime-by-russian-forces-new-investigation/> (Consulted on 14 March 2023).

⁴⁰³ United Nations Human Rights Office of the High Commissioner, *Situation of Human Rights in Ukraine in the context of the armed attack by the Russian Federation*, 29 June 2022, <https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-06-29/2022-06-UkraineArmedAttack-EN.pdf> (Consulted 14 March 2023); J. WU, J. CARMAN, E. EINHORN and M. HERSHER, "Ukraine attacked: Map of sites targeted

International Commission of Inquiry on Ukraine (hereafter: the IICIU) to investigate the bombings that have happened at multiple hospitals.⁴⁰⁴ The ICCIU examined some of the situations and identified certain weapons used, including bombs dropped from aircraft, missiles, cluster munitions...⁴⁰⁵ The United Nations Human Rights Office of the High Commissioner (hereafter: the OHCHR) also identified the use of these weapons in a report.⁴⁰⁶

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

121. Whether Russia has been blocking ports or the coast of Ukraine is disputed. It has often been said in the media that Russia has blockades on the Black Sea, impacting the export of grain.⁴⁰⁷ However, FINK questioned whether this could be considered a blockade under the law of naval warfare. He argued that this 'blockade' is not a blockade in the legal sense of naval warfare law.⁴⁰⁸

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

122. It has been reported a couple of times that military bases and control centers were targeted. An example of this, as covered by the media, is the Russian attack on a Ukrainian military base that happened on March 13, 2022. At least 35 people were killed and more than 100 were injured in the incident.⁴⁰⁹

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

123. Russian armed forces have never had consent or agreement to use Ukrainian territory. As a result, this is not applicable.

by Russia's invasion", *NBC News*, 25 February 2022, <https://www.nbcnews.com/specials/ukraine-attacked-sites-targeted-russia-invasion/index.html> (Consulted on 9 May 2023).

⁴⁰⁴ Physicians for Human Rights, "NGOs Call on New UN Commission to Investigate Russia's Bombardment of Ukrainian Hospitals", 22 September 2022, <https://phr.org/news/ngos-call-on-new-un-commission-to-investigate-russias-bombardment-of-ukrainian-hospitals/> (Consulted on 14 March 2023); Physicians for Human Rights, "Joint Submission to the United Nations Independent International Commission of Inquiry on Ukraine", September 2022, https://phr.org/wp-content/uploads/2022/09/UN_CoI_Ukraine_submission_Attacks-on-Health.pdf (Consulted on 14 March 2023).

⁴⁰⁵ Human Rights Council, *Report of the Independent International Commission of Inquiry on Ukraine*, 15 March 2023, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf (Consulted on 17 March 2023).

⁴⁰⁶ United Nations Human Rights Office of the High Commissioner, *Situation of Human Rights in Ukraine in the context of the armed attack by the Russian Federation*, 29 June 2022, <https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-06-29/2022-06-UkraineArmedAttack-EN.pdf> (Consulted 14 March 2023).

⁴⁰⁷ M. SCHWIRTZ, M. STEVIS-GRIDNEFF and M. MPOKE BIGG, "First Cargo Ship Passes Russia's Black Sea Blockade Under Grain Deal", *The New York Times*, 1 August 2022, <https://www.nytimes.com/2022/08/01/world/europe/ukraine-russia-grain-ship.html> (Consulted on 16 March 2023); K. AHMED, G. BLIGHT, L. FORD and L. MCMULLAN, "The Black Sea Blockade: mapping the impact of war in Ukraine on the World's food supply", *The Guardian*, 9 June 2022, <https://www.theguardian.com/global-development/ng-interactive/2022/jun/09/the-black-sea-blockade-mapping-the-impact-of-war-in-ukraine-on-the-worlds-food-supply-interactive> (Consulted on 16 March 2023).

⁴⁰⁸ M. FINK, "Naval Blockade and the Russia-Ukraine conflict", *Netherlands International Law Review*, 13 December 2022, 411.

⁴⁰⁹ NPR Staff, "Russia-Ukraine war: What happened today (13 March)", *NPR*, 13 March 2022, <https://www.npr.org/2022/03/13/1086365144/russia-ukraine-war-what-happened-today-march-13> (Consulted on 16 March 2023); J. WU, J. CARMAN, E. EINHORN and M. HERSHER, "Ukraine attacked: Map of sites targeted by Russia's invasion", *NBC News*, 25 February 2022, <https://www.nbcnews.com/specials/ukraine-attacked-sites-targeted-russia-invasion/index.html> (Consulted on 9 May 2023).

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

124. It has been reported by several media outlets that Belarus has been providing its territory for Russia to launch missiles against Ukraine.⁴¹⁰ However, Belarus' involvement is not part of this thesis. Therefore, this section is irrelevant.

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

125. Russia has a known group of mercenaries called the Wagner Group. Until January 2023, the Wagner Group was purposely unregistered, allowing the Russian authorities to deny ties to the group. However, in November 2022, the Group opened its center in St. Petersburg and registered as a legal entity in January 2023. This group has been involved in Russian military operations in many countries, including Ukraine. Within a year of the full-scale war in Ukraine, the Wagner Group grew from 1,000 to 50-60,000 strong.⁴¹¹ According to experts of the Working Group on the Use of Mercenaries, the Working Group on Enforced or Involuntary Disappearances, and other Special Rapporteurs, the Wagner Group has recruited both Russian and foreign nationals serving sentences in correctional facilities.⁴¹²

The Council of the European Union has already implemented several measures against certain members of the Wagner Group for, amongst others, fighting for pro-Russian separatist forces, carrying out missile attacks, coordinating and planning the activities of Wagner members, etc.⁴¹³

⁴¹⁰ F. PLEITGEN, Z. ULLAH, C. OTTO and R. PICHETA, "Belarus claims it won't send troops to Ukraine unless it is attacked, as tensions escalate at border", *CNN*, 16 February 2023, <https://edition.cnn.com/2023/02/16/europe/belarus-ukraine-troops-russia-border-intl/index.html> (Consulted on 14 March 2023); European Parliament, *At a glance: Russia-Belarus military cooperation*, 24 February 2023, [https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/739348/EPRS_ATA\(2023\)739348_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/739348/EPRS_ATA(2023)739348_EN.pdf) (Consulted on 14 March 2023); S. KUZNETSOV, "Putin bolsters Belarus as Kyiv eyes assault from the north", *Politico*, 19 December 2022, <https://www.politico.eu/article/russia-vladimir-putin-bolsters-belarus-alexander-lukashenko-kyiv-eyes-assault-from-the-north/> (Consulted on 14 March 2023).

⁴¹¹ F. BRYJKA, "Wagner Group transforms in the Wake of the War in Ukraine", *The Polish Institute of International Affairs Bulletin*, 7 March 2023, https://www.researchgate.net/publication/369093808_Wagner_Group_Transforms_in_the_Wake_of_the_War_in_Ukraine (Consulted on 14 March 2023).

⁴¹² Report of the Human Rights Council Working group on Enforced or Involuntary disappearances on its 17th Session (22 July 2022), A/HRC/WGEID/127/1 (2022); X, "Rights experts 'deeply disturbed' by Russian Wagner Group recruitment of prisoners", *United Nations News*, 10 March 2023, <https://news.un.org/en/story/2023/03/1134447> (Consulted on 14 March 2023); United Nations Human Rights Office of the High Commissioner, *Russian federation: UN Experts alarmed by recruitment of prisoners by "Wagner Group"*, 10 March 2023, <https://www.ohchr.org/en/press-releases/2023/03/russian-federation-un-experts-alarmed-recruitment-prisoners-wagner-group> (Consulted on 14 March 2023); F. BRYJKA, "Wagner Group transforms in the Wake of the War in Ukraine", *The Polish Institute of International Affairs Bulletin*, 7 March 2023, https://www.researchgate.net/publication/369093808_Wagner_Group_Transforms_in_the_Wake_of_the_War_in_Ukraine (Consulted on 14 March 2023).

⁴¹³ Council of the European Union, *EU imposes restrictive measures against the Wagner Group*, <https://www.consilium.europa.eu/en/press/press-releases/2021/12/13/eu-imposes-restrictive-measures-against-the-wagner-group/> (Consulted on 14 March 2023).

1.1.2 Material elements

A. "Planning, preparation, initiation or execution"

126. The Court must prove that the perpetrator was involved in the planning, preparation, initiation or execution of an act of aggression.⁴¹⁴ This element can be demonstrated by the many events that took place before and during the invasion of Ukraine.

127. On February 24, 2022, the day of the invasion of Ukraine by Russia, Putin delivered a speech announcing a special military operation.⁴¹⁵ Putin lays out his plan and motivation for this military operation in his speech. The following brief excerpts from Putin's speech might demonstrate that he planned and prepared the invasion and subsequent actions in Ukraine: "In these circumstances, we have to take bold and immediate action"; "No matter how the events unfold, we are ready. All the necessary decisions in this regard have been taken"; "This means that the decisions that I made will be executed, that we will achieve the goals we have set".⁴¹⁶

128. Preparations began months before the invasion, as satellite images from November 2021 show Russian troops exercising and building military forces near the Ukrainian border.⁴¹⁷ Putin's speech can also be seen as the initiation of an act of aggression, as the speech was followed by an invasion. The initiation of an act means "*the action of beginning, entering upon, or 'starting' something*".⁴¹⁸ The plan eventually got executed, and Russia invaded Ukraine and committed a series of crimes.

B. Leadership requirement

129. The leadership requirement is relatively easy to demonstrate in this case. It is said that the crime of aggression can only be committed by 'a person in a position effectively to exercise control over or to direct the political or military action of a State'.⁴¹⁹ Only leaders can be prosecuted. Putin is the current President of Russia and has been elected President of Russia since 2000.⁴²⁰ Putin is

⁴¹⁴ Article 8bis (1) Rome Statute; W. VON BEDROW, "State Sovereignty and the Legitimacy of Aggression" in S. BOCK and E. CONZE (eds.), *Rethinking the Crime of Aggression*, The Hague, Asser Press, 2022, 162.

⁴¹⁵ J. MANKOFF, "Russia's war in Ukraine", *CSIS*, 2022, https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/220422_Mankoff_RussiaWar_Ukraine.pdf?tGhbft.eyo9DdEsYZPaTWbTZUtGz9o2 (Consulted on 7 March 2023).

⁴¹⁶ Kremlin, Moscow, *Address by the President of the Russian Federation*, 24 February 2022, <http://en.kremlin.ru/events/president/news/67843> (Consulted on 4 May 2023); Atlantic Council, *Our experts decode the Putin speech that launched Russia's invasion of Ukraine*, <https://www.atlanticcouncil.org/blogs/new-atlanticist/markup/putin-speech-ukraine-war/> (Consulted on 7 March 2023).

⁴¹⁷ T. LISTER, "Satellite photos raise concerns of Russian military build-up near Ukraine", *CNN*, 4 November 2021, <https://edition.cnn.com/2021/11/04/europe/russia-ukraine-military-buildup-intl-cmd/index.html> (Consulted on 7 March 2023).

⁴¹⁸ Initiation. In Oxford English Dictionary, <https://www-oed-com.mu.idm.oclc.org/view/Entry/96069?redirectedFrom=initiation#eid> (Consulted on 11 February 2023).

⁴¹⁹ Article 8bis (1) Rome Statute; Article 8bis (2)(2) Elements of Crimes; C. HENRICHS, "Negotiating Aggression: from Rome over Kampala to New York", in S. BOCK and E. CONZE (eds.), *Rethinking the Crime of Aggression*, The Hague, Asser Press, 2022, 6.

⁴²⁰ He served as Russia's Prime Minister from 2008 to 2012. Official Internet Resources of the President of Russia, *About President*, <http://www.en.kremlin.ru/structure/president> (Consulted on 7 March 2023).

therefore certainly in a position to 'exercise control over or direct political or military action' in Russia. The requirement is met.

C. Threshold requirement

130. The threshold requirement allows the ICC to focus on the most serious crimes.⁴²¹ According to paragraph 1 of Article 8bis of the Rome Statute, an act of aggression "by its character, gravity, and scale constitutes a manifest violation of the Charter of the United Nations."⁴²² It is said in Understanding 7 Annex III to Resolution RC/Res.6 on the crime of aggression that all three components must be met in order to determine a manifest violation.⁴²³ However, the majority of scholars also believe that if two of the three components are strongly present, this may also suffice.⁴²⁴

131. The scale component refers to the magnitude of the aggressive act. What weapons are used, how many and what kind of soldiers are there, how large is the attack, how long will the operation last, and so on.⁴²⁵ It has been over a year since Russia invaded Ukraine, and armed attacks continue in many parts of the country at the time of writing, including Chernihiv, Kharkiv, Kyiv, Mariupol, Odessa...⁴²⁶ Putin assembled over 150,000 troops on Ukraine's border in 2022, with approximately 90% of the forces invading.⁴²⁷ In August 2022, it was reported that Putin sought to increase that number to 1.15 million soldiers but failed to do so.⁴²⁸ Currently, 97% of the Russian army is in Ukraine.⁴²⁹ Human Rights Watch has already reported the use of lethal weapons such as cluster munitions, landmines, and vacuum bombs.⁴³⁰ The invasion has often been referred to as a "full-

⁴²¹ B.O. JARCA, "Triggering the International Criminal Court's Jurisdiction for Alleged Crimes Committed Across Ukraine, including in Crimea and Donbas" in S. SAYAPIN and E. TSYBULENKO (eds.), *The use of force against Ukraine and International Law*, The Hague, Asser Press, 2018, 360; W. VON BEDROW, "State Sovereignty and the Legitimacy of Aggression" in S. BOCK and E. CONZE (eds.), *Rethinking the Crime of Aggression*, The Hague, Asser Press, 2022, 162.

⁴²² C. HENRICH, "Negotiating Aggression: from Rome over Kampala to New York", in S. BOCK and E. CONZE (eds.), *Rethinking the Crime of Aggression*, The Hague, Asser Press, 2022, 6.

⁴²³ *Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, Understanding 7, Ann. III to Res. ICC-RC/Res.6.

⁴²⁴ C. MCDUGALL, *The Crime of Aggression Under the Rome Statute of the International Criminal Court*, Cambridge, Cambridge University Press, 2013, 128-130; C. KREB, "The State Conduct Element" in C. KREB and S. BARRIGA (eds.), *The Crime of Aggression: A Commentary*, Cambridge, Cambridge University Press, 2016, vol. I. 511.

⁴²⁵ M. GILLET, "The Anatomy of an International Crime: Aggression at the International Criminal Court", *International Criminal Law Review* 2013, 25.

⁴²⁶ Human Rights Watch, *Ukraine: A Year of Atrocities, Justice Essential*, <https://www.hrw.org/video-photos/interactive/2023/02/23/ukraine-a-year-of-atrocities-justice-essential> (Consulted on 8 March 2023).

⁴²⁷ J. GARAMONE, "Russian Invasion Stalled in Ukraine's North, Progress in South", *US Department of Defense*, 3 March 2022, <https://www.defense.gov/News/News-Stories/Article/Article/2954548/russian-invasion-stalled-in-ukraines-north-progress-in-south/> (Consulted on 8 March 2023).

⁴²⁸ J. GARAMONE, "Russian Efforts to Raise Numbers of Troops 'Unlikely to Succeed,' U.S. Official Says", 29 August 2022, <https://www.defense.gov/News/News-Stories/Article/Article/3143381/russian-efforts-to-raise-numbers-of-troops-unlikely-to-succeed-us-official-says/> (Consulted on 9 May 2023).

⁴²⁹ J. FITZGERALD, "Wallace: 97% of Russian army is in Ukraine", *BBC*, 14 February 2023, <https://www.bbc.com/news/live/world-europe-64634760> (Consulted on 9 May 2023).

⁴³⁰ M. HIZNAY and A. BRAUNSCHWEIGER, "Interview: Weapons of War in Ukraine", *Human Rights Watch*, 24 March 2022, <https://www.hrw.org/news/2022/03/24/interview-weapons-war-ukraine> (Consulted on 8 March 2023); Human Rights Watch, *Ukraine banned landmines harm civilians*, 31 January 2023, <https://www.hrw.org/news/2023/01/31/ukraine-banned-landmines-harm-civilians> (Consulted on 8 March 2023); M. WAREHAM, "Intense and Lasting Harm: Cluster Munition Attacks in Ukraine", *Human Rights Watch*, 11 May 2022, <https://www.hrw.org/report/2022/05/11/intense-and-lasting-harm/cluster-munition-attacks-ukraine> (Consulted on 8 March 2023).

scale invasion".⁴³¹ Given the number of troops sent to invade Ukraine, the weapons used, and the geographical scope of the attack, the scale of the act can be argued to be significant.

132. Gravity, on the other hand, concerns the impact of an act of aggression.⁴³² The impact in this case is undeniably significant. Since the Russian invasion on February 24, 2022, it has been confirmed that at least 8.000 civilians have been killed and nearly 13.300 injured. The true figure is almost certainly much higher. Besides, as a result of the ongoing attacks, approximately 18 million people require humanitarian assistance.⁴³³ In addition to the human impact, there is also an economic impact with early national data indicating that the economy collapsed by more than 30% in 2022.⁴³⁴

133. The character element is not as easy to define and determine. It is widely assumed that this refers to the need to prove an unmistakable violation of Article 2(4) of the UN Charter.⁴³⁵ In his speech of February 24, 2022, Putin describes the use of force as an act of self-defence.⁴³⁶ Self-defence may render an armed attack lawful. Self-defence includes both preventing attacks from happening and defending oneself against them once they have occurred.⁴³⁷ Although whether this was actually a case of self-defence is debatable. Early Western uses of force mentioned in Putin's speech do not constitute an armed attack on Russia or even an imminent threat of force. Some of these uses of force date back nearly 25 years, making them practically irrelevant to the current state of affairs in Ukraine, which is a result of tensions that first surfaced in 2013–2014.⁴³⁸ Furthermore, there is little evidence to support the argument that Russia is threatened by new members of NATO and the EU. In the same way, there is no proof that a "genocide" was intended for or carried out against the ethnic Russian people of (East) Ukraine. Additionally, there was no imminent or immediate danger of violence prior to the start of Russia's "special military operation" against Russian citizens.⁴³⁹ Therefore, Russia's invasion of Ukraine cannot be justified as acting in self-defence.

⁴³¹ Council of the EU, *One year of Russia's full-scale invasion and war of aggression against Ukraine, EU adopts its 10th package of economic and individual sanctions*, 25 February 2023, <https://www.consilium.europa.eu/en/press/press-releases/2023/02/25/one-year-of-russia-s-full-scale-invasion-and-war-of-aggression-against-ukraine-eu-adopts-its-10th-package-of-economic-and-individual-sanctions/> (Consulted on 8 March 2023).

⁴³² R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 310.

⁴³³ United Nations, "UN rights chief deplores Ukraine death toll one year after Russian invasion", 21 February 2023, <https://news.un.org/en/story/2023/02/1133737> (Consulted on 8 March 2023); United Nations Human Rights Office of the High Commissioner, "Türk deplores human cost of Russia's war against Ukraine as verified civilian casualties for last year pass 21.000", 21 February 2023, <https://www.ohchr.org/en/press-releases/2023/02/turk-deplores-human-cost-russias-war-against-ukraine-verified-civilian> (Consulted on 8 March 2023).

⁴³⁴ United Nations, *One year of the war in Ukraine leaves lasting scars on the global economy*, 6 March 2023, <https://www.un.org/en/desa/one-year-war-ukraine-leaves-lasting-scars-global-economy> (Consulted on 9 May 2023).

⁴³⁵ C. MCDUGALL, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge, Cambridge University Press, 2013, 127-128.

⁴³⁶ Atlantic Council, *Our experts decode the Putin speech that launched Russia's invasion of Ukraine*, <https://www.atlanticcouncil.org/blogs/new-atlanticist/markup/putin-speech-ukraine-war/> (Consulted on 7 March 2023).

⁴³⁷ Article 51 UN Charter; I.K. MULLER-SCHIEKE, "Defining the Crime of Aggression Under the Statute of the International Criminal Court", *Leiden Journal of International Law*, 2004, 418-420.

⁴³⁸ A. SALARI and S.H. HOSSEINI, "Russia's attack on Ukraine: a review of the international criminal court's capacity to examine the crime of aggression", *Access to justice in Eastern Europe* 2023, Vol. 6 Issue 1, 8-9.

⁴³⁹ T.D. GILL, "The *ius ad bellum* and Russia's "Special Military Operation" in Ukraine", *Journal of International Peacekeeping* 2022, 125.

134. However, as previously stated, the presence of two of the three components is sufficient to constitute a manifest violation. In this case, the scale and gravity of the attack are prominent. The character element is most likely to be fulfilled as well.

1.1.3 Mental element

135. The act of aggression must be committed with intent and knowledge.⁴⁴⁰

A person will have intent when he “means to use armed forces against the sovereignty, territorial integrity or political independence of a state.”⁴⁴¹ Knowledge, on the other hand, means “*awareness that a circumstance exists, or a consequence will occur in the ordinary course of events.*”⁴⁴²

136. In his speech from February 2022, Putin discusses the history of the conflict between Russia and Ukraine and rejects the idea that Ukraine ever had “real statehood”, claiming that it is a vital part of Russia’s “own history, culture, and spiritual space.”⁴⁴³ He also said the following: “the leading NATO countries are supporting the far-right nationalists and neo-Nazis in Ukraine, those who will never forgive the people of Crimea and Sevastopol for freely making a choice to reunite with Russia.” This was one of his reasons to invade Ukraine.⁴⁴⁴ This demonstrates Putin’s intention to use force to undermine Ukraine’s sovereignty, territorial integrity, and political independence.⁴⁴⁵

Putin also mentioned Article 51 of the UN Charter in his speech, knowing that if he pleaded self-defence, his acts of aggression could be ruled lawful.⁴⁴⁶ However, it is already demonstrated above that this act of aggression does not constitute self-defence. This shows that he was aware of the factual circumstances that established that such use of force is inconsistent with the UN Charter.⁴⁴⁷

1.1.4 Conclusion

137. Compliance with any one of the acts listed in Article 8bis (2) of the Rome Statute is sufficient to constitute an act of aggression. Several crimes committed within Ukrainian territory fall under the acts mentioned in this article. There was certainly an invasion, attacks and bombardments occurred, and mercenaries were sent. Putin planned, prepared, and initiated the invasion and the following acts. As head of State, he meets the condition that only leaders be able to commit acts of aggression.

⁴⁴⁰ Article 30 Rome Statute.

⁴⁴¹ Article 8bis (2) Rome Statute; D. GUILFOYLE, *International Criminal Law*, Oxford, Oxford University Press, 2016, 306.

⁴⁴² Article 30(2)(3) Rome Statute.

⁴⁴³ B. PERRIGO, “How Putin’s denial of Ukraine’s Statehood Rewrites History”, *Time*, 2022, <https://time.com/6150046/ukraine-statehood-russia-history-putin/> (Consulted on 22 April 2023).

⁴⁴⁴ Kremlin, Moscow, *Address by the President of the Russian Federation*, 24 February 2022, <http://en.kremlin.ru/events/president/news/67843> (Consulted on 4 May 2023); Atlantic Council, *Our experts decode the Putin speech that launched Russia’s invasion of Ukraine*, <https://www.atlanticcouncil.org/blogs/new-atlanticist/markup/putin-speech-ukraine-war/> (Consulted on 7 March 2023).

⁴⁴⁵ Article 8bis (2) Rome Statute.

⁴⁴⁶ Kremlin, Moscow, *Address by the President of the Russian Federation*, 24 February 2022, <http://en.kremlin.ru/events/president/news/67843> (Consulted on 4 May 2023); Atlantic Council, *Our experts decode the Putin speech that launched Russia’s invasion of Ukraine*, <https://www.atlanticcouncil.org/blogs/new-atlanticist/markup/putin-speech-ukraine-war/> (Consulted on 7 March 2023).

⁴⁴⁷ Art. 8bis (4) ICC Elements of Crimes.

138. Furthermore, the act must be a clear violation of the United Nations Charter by its character, gravity, and scale. A large number of troops have entered Ukrainian territory, numerous weapons have been used, and thousands of civilians have been killed or injured. It is apparent that the act is taking place on a significant scale and with great gravity. The character element is somewhat more difficult to establish. Even though a majority of scholars believe that the presence of two of the three components is sufficient, the presence of the character element is also most likely. Despite Putin's claim of self-defence, there is insufficient evidence to corroborate the claim that the act was in fact self-defence. As a result, the material elements are met.

139. Aside from the material elements, the mental element must also be met. Extracts from Putin's speech demonstrate that he clearly intended to use force to undermine Ukraine's sovereignty, territorial integrity, and political independence. The knowledge factor can also be demonstrated to be present based on his speech.

It therefore seems that Putin can be accused of committing a crime of aggression against Ukraine.

1.2. War crimes

The same approach as for the crime of aggression will be used to determine whether Putin committed war crimes.

1.2.1 Material elements

A. Armed conflict

140. Only crimes committed during armed conflict can be classified as war crimes. The ICC adopts the following definition derived from the *Tadić* case: "An armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State."⁴⁴⁸ There are two types of armed conflicts: international armed conflicts and non-international armed conflicts.

An armed conflict has been going on in Crimea as well as between Ukraine and the self-proclaimed 'People's Republics' of Donetsk and Luhansk since 2014. Russia denied any involvement at the time; hence, the conflict was solely considered a NIAC. If Russia had effectively controlled the separatists, it would have been occupying the territory they controlled militarily, giving rise to the possibility of classifying the conflict as international, as clarified in the *Tadić case*.⁴⁴⁹ Once Russia annexed the four regions of Donetsk, Luhansk, Kherson, and Zaporizhzhia in September 2022, it began exerting

⁴⁴⁸ *Prosecutor v. Lubanga Dyilo*, "Judgement", ICC (Trial Chamber II), 14 March 2012, ICC-01/04-01/06-2842, para. 533; citing *Prosecutor v. Tadić*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", ICTY (Appeals Chamber), 2 October 1995, IT-94-1-A, para. 70; O.A. HATHAWAY, P.K. STRAUCH, B.A. WALTON and Z.A.Y. WEINBERG, "What is a war crime?", *Yale J. Int.L.*, 2019, 87.

⁴⁴⁹ *Prosecutor v. Tadić*, "Appeals Judgement", ICTY (Appeals Chamber), 15 July 1999, IT-94-1-A, para. 131; M.N. SCHMITT, "Ukraine Symposium – Classification of the conflict(s)", *Lieber Institute West Point*, 14 December 2022, <https://lieber.westpoint.edu/classification-of-the-conflicts/> (Consulted on 27 April 2023).

overall control over the separatist groups, making it an IAC.⁴⁵⁰ What is even more obviously an international armed conflict is the invasion in February 2022 and the crimes that followed. Russia and Ukraine are the two States involved in the conflict, and Russia clearly resorted to armed force, using their national army, against Ukraine.⁴⁵¹ Because the situation is classified as an international armed conflict, Articles 8(2)(a) and (b) apply rather than (c), (d), (e), and (f).

141. Not all crimes committed during an armed conflict are considered war crimes. It is held that criminal conduct must be 'closely linked to the armed conflict' in order to qualify as a war crime.⁴⁵² It can be noted that the crimes listed below, have taken place in context of the armed conflict, and are associated with it.

B. Acts

142. The act has to be considered a war crime. During armed conflicts, IHL rules apply to all forces.⁴⁵³ In particular, the four 1949 Geneva Conventions and, for Parties, Additional Protocol I to those Conventions apply.⁴⁵⁴ The Rome Statute lists acts of violation of the Geneva Conventions that are considered war crimes.⁴⁵⁵ The clearest violations will be discussed.

143. For a crime to constitute a war crime under Article 8(2)(a) Rome Statute, it must be committed against protected persons and property. According to the Geneva Conventions, protected persons are sick, wounded and shipwrecked persons not taking part in hostilities, prisoners of war and other detainees and civilians. Protected property is civilian objects.⁴⁵⁶

⁴⁵⁰ RULAC, *International Armed Conflict in Ukraine*, 2023, <https://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine#collapse1accord> (Consulted on 27 April 2023).

⁴⁵¹ International Committee of the Red Cross, *International Armed Conflict*, <https://casebook.icrc.org/a-to-z/glossary/non-international-armed-conflict> (Consulted on 25 April 2023); International Committee of the Red Cross, *Non-international Armed Conflict*, <https://casebook.icrc.org/a-to-z/glossary/non-international-armed-conflict> (Consulted on 25 April 2023); *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the confirmation of charges", ICC (Pre-Trial Chamber I), 29 January 2007, ICC-01/04-01/06, para. 209.

⁴⁵² R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 274.

⁴⁵³ M.N. SCHMITT, "Ukraine Symposium – Classification of the conflict(s)", *Lieber Institute West Point*, 14 December 2022, <https://lieber.westpoint.edu/classification-of-the-conflicts/> (Consulted on 27 April 2023).

⁴⁵⁴ Ibid.

⁴⁵⁵ Article 8(2)(a) Rome Statute.

⁴⁵⁶ Articles 12, 13, 21, 24-26, 53-56, 59 and 60 Geneva Convention I; Articles 11, 13-16, 36 and 37 Geneva Convention II; Article 4 Geneva Convention III; Articles 4 and 20 Geneva Convention IV; International Committee of the Red Cross, *Protected persons*, <https://www.icrc.org/en/war-and-law/protected-persons> (Consulted on 10 May 2023).

a) Grave breaches of the Geneva Conventions

- Article 8(2)(a)(i): *Wilful killing*;

144. Since the invasion, powerful weapons such as bombs, cluster munitions, missiles... have been used to cause casualties.⁴⁵⁷ Russian military reportedly killed hundreds of people from the outset of the conflict, according to the UN.⁴⁵⁸ The HRMMU in Ukraine had confirmed at least 6,919 civilian deaths by early January 2023.⁴⁵⁹ Up to March 13, 2023, the OHCHR recorded 8.231 civilians killed in the conflict.⁴⁶⁰ The Fourth Geneva Convention provides protection for civilians in areas of armed conflict and occupied territory.⁴⁶¹

- Article 8(2)(a)(ii): *Torture or inhumane treatment, including biological experiments*;

145. The UN Human Rights Council established the Independent Commission of Inquiry on Ukraine to investigate violations and abuses of human rights or humanitarian law, and other crimes that may have occurred as a result of Russia's aggression against Ukraine.⁴⁶² A report was published on March 15, 2023, by the Commission.⁴⁶³ The Commission stated in this report that it discovered a widespread pattern of torture and inhumane treatment by Russian authorities against those held in the regions of Chernihiv, Donetsk, Kharkiv, Kherson, Kyiv, Sumy, and Zaporizhzhia. Both civilians and prisoners of war (hereafter: POWs) were tortured. The Commission discovered that more diverse but similar methods of torture were being used systematically in detention facilities across Ukraine. The torture was mainly intended to gather information but also to inflict punishment. Victims' hands and legs were frequently tied or handcuffed, their eyes covered with tape, or garments or sacks thrown on their heads. Victims witnessed the deaths of co-detainees as a result of brutal torture.⁴⁶⁴

⁴⁵⁷ Human Rights Council, *Report of the Independent International Commission of Inquiry on Ukraine*, 15 March 2023, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf (Consulted on 28 April 2023).

⁴⁵⁸ United Nations Human Rights Office of the High Commissioner, "UN Report details summary executions of civilians by Russian troops in Northern Ukraine", 7 December 2022, <https://www.ohchr.org/en/press-releases/2022/12/un-report-details-summary-executions-civilians-russian-troops-northern> (Consulted on 28 April 2023).

⁴⁵⁹ Human Rights Watch, *Ukraine events of 2022*, <https://www.hrw.org/world-report/2023/country-chapters/ukraine#:~:text=As%20of%20early%20January%202023,the%20actual%20figures%20were%20higher>. (Consulted on 28 April 2023).

⁴⁶⁰ United Nations Human Rights Office of the High Commissioner, *Ukraine: Civilian casualty update 13 March 2023*, <https://www.ohchr.org/en/news/2023/03/ukraine-civilian-casualty-update-13-march-2023> (Consulted on 28 April 2023).

⁴⁶¹ Red Cross, *Summary of the Geneva Conventions of 1949 and Their Additional Protocols*, April 2011, https://www.redcross.org/content/dam/redcross/atq/PDF_s/International_Services/International_Humanitarian_Law/IL_SummaryGenevaConv.pdf (Consulted on 28 April 2023).

⁴⁶² United Nations General Assembly, *Situation of human rights in Ukraine stemming from the Russian aggression*, 4 March 2022, A/HRC/RES/49/1; United Nations Human Rights Council, *Independent International Commission of Inquiry on Ukraine*, <https://www.ohchr.org/en/hr-bodies/hrc/iicir-ukraine/index> (Consulted on 28 April 2023).

⁴⁶³ Human Rights Council, *Report of the Independent International Commission of Inquiry on Ukraine*, 15 March 2023, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf (Consulted on 28 April 2023).

⁴⁶⁴ Human Rights Council, *Report of the Independent International Commission of Inquiry on Ukraine*, 15 March 2023, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf (Consulted on 28 April 2023).

- Article 8(2)(a)(iii): *Wilfully causing great suffering, or serious injury to body or health;*

146. According to the same report of the Commission, the Russian Federation caused great suffering and serious injuries to Ukrainian citizens, or POWs. The victims claimed that the perpetrators caused them immense suffering, both physically and mentally. They have described being beaten with rifle butts or batons, receiving electric shocks from tasers, being raped, and being exposed to the cold for extended periods of time. Sometimes, executions would follow torture.⁴⁶⁵

- Article 8(2)(a)(iv): *Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;*

147. Since February, Russian forces have frequently bombed and attacked civilian areas in an indiscriminate and disproportionate manner. Human Rights Watch documented the attacks, which destroyed or seriously damaged residential buildings, businesses, schools, health care facilities, and other institutions.⁴⁶⁶ These are protected properties under the Geneva Conventions.⁴⁶⁷ The World Health Organisation had documented over 700 attacks on healthcare facilities as of October.⁴⁶⁸

- Article 8(2)(a)(vi): *Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;*

148. According to IHL rules, POWs can only receive a lawful sentence if the Third Geneva Convention's judicial provisions are followed.⁴⁶⁹

149. The OHCHR interviewed several prisoners of war who were facing criminal charges after being indicted, tried, and/or sentenced in Donetsk by so-called "courts" of Russian-affiliated armed organisations. In a report, it concluded the following: All of the POWs who were interviewed said that they had been subjected to torture or other cruel treatment by so-called "prosecutors" of armed groups with ties to Russia, either to force them to confess or to sign records of the interrogations that contained assertions they had not made.⁴⁷⁰ Due to a lack of accessible lawyers, five of them were required to waive their legal counsel during the investigation.⁴⁷¹ Three POWs were put on trial on camera by a so-called 'court'.⁴⁷² One of the POWs who was sentenced to death in his "trial" was not brought in for hearings.⁴⁷³ In addition, four POWs claimed that their lawyers offered them no

⁴⁶⁵ Ibid.

⁴⁶⁶ Human Rights Watch, "Ukraine: Russian Invasion Causing Widespread Suffering for Civilians", 12 January 2023, <https://www.hrw.org/news/2023/01/12/ukraine-russian-invasion-causing-widespread-suffering-civilians> (Consulted on 28 April 2023).

⁴⁶⁷ Articles 12, 21, 53-56, 59 and 60 Geneva Convention I; Articles 11 and 14-16 Geneva Convention II.

⁴⁶⁸ World Health Organization, "Statement – Winter in Ukraine: people's health cannot be held hostage", 21 November 2022, <https://www.who.int/europe/news/item/21-11-2022-statement---winter-in-ukraine--people-s-health-cannot-be-held-hostage> (Consulted on 28 April 2023).

⁴⁶⁹ Geneva Convention *relative to the Treatment of Prisoners of War*, UNTS, vol. 75, 135 (1950).

⁴⁷⁰ Article 17(4) Geneva Convention III.

⁴⁷¹ Article 105 Geneva Convention III.

⁴⁷² United Nations Human Rights Office of the High Commissioner, *Treatment of Prisoners of War and Persons Hors de Combat in the Context of the Armed Attack by The Russian Federation against Ukraine*, 24 March 2023, <https://www.ohchr.org/sites/default/files/documents/countries/ukraine/2023/23-03-24-Ukraine-thematic-report-POWs-ENG.pdf> (Consulted on 29 April 2023).

⁴⁷³ Article 99 Geneva Convention III.

legal advice and only encouraged them to enter guilty pleas.⁴⁷⁴ Although he sought an English translation, a POW who did not understand Russian well was given the Russian version of his indictment.⁴⁷⁵ POWs who were put on trial in Donetsk said that the 'judges' were obviously biased against them and only used certain portions of their evidence to convict them.⁴⁷⁶ And so on.

- Article 8(2)(a)(vii): *Unlawful deportation or transfer or unlawful confinement*;

150. There is strong evidence that children were illegally deported from occupied areas of Ukraine to the Russian Federation. Several international organisations raised concerns and started investigations.⁴⁷⁷ In May 2022, the Ukrainian Commissioner for Children's Rights reported that at least 180 000 children had been illegally moved to seized territory, while the Russians admitted that more than 183 000 children had arrived in Russia since the start of the 'special military operation.' The UN High Commissioner for Human Rights raised concerns with the Human Rights Council in June 2022 about the disappearance of children in temporarily controlled regions, notably children from institutions.⁴⁷⁸ According to the Institute for the Study of War, the Russian government transferred Ukrainian children to Russia to be adopted by Russian families.⁴⁷⁹ A report by the Yale School of Public Health's Humanitarian Research Lab (HRL) in February 2023 collected information on at least 6,000 children kept in camps and other institutions in Russia.⁴⁸⁰ A Human Rights Watch (HRW) report on the Crime of Forcibly Transferring Ukrainian Civilians to Russia published in September 2022 described the forcible movement of Ukrainian civilians from Mariupol and the Kharkiv area to Russia and Russia-occupied areas, as well as their 'filtration' process. Testimonies from Ukrainian civilians are included in the report.⁴⁸¹ In November 2022, Amnesty International released a similar report documenting the forced transportation of children.⁴⁸² As a result, the ICC decided to issue an arrest warrant against Putin on March 17, 2023.⁴⁸³

⁴⁷⁴ Article 105 Geneva Convention III.

⁴⁷⁵ Article 107 Geneva Convention III.

⁴⁷⁶ Article 84 Geneva Convention III.

⁴⁷⁷ European Parliament, *Briefing: Russia's war on Ukraine Forcibly displaced Ukrainian Children*, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/747093/EPRS_BRI\(2023\)747093_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/747093/EPRS_BRI(2023)747093_EN.pdf) (Consulted on 28 April 2023).

⁴⁷⁸ X, "UN's Bachelet concerned over Ukraine orphans 'deported' to Russia for adoption", *United Nations News*, 15 June 2022, <https://news.un.org/en/story/2022/06/1120412> (Consulted on 28 April 2023).

⁴⁷⁹ K. HIRD, K. STEPANENKO, G. MAPPE, G. BARROS and F.W. KAGAN, "Russian Offensive Campaign Assessment", *Institute for the Study of War*, August 2023, <https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-august-23> (Consulted on 28 April 2023).

⁴⁸⁰ Yale School of Public Health's Humanitarian Research Lab, *Russia's systematic program for the re-education & adoption of Ukraine's Children*, 14 February 2023, <https://hub.conflictobservatory.org/portal/sharing/rest/content/items/97f919ccfe524d31a241b53ca44076b8/data> (Consulted on 28 April 2023).

⁴⁸¹ B. WILLE, T. LOKSHINA, et. al, "We had no choice: "Filtration" and the Crime of Forcibly Transferring Ukrainian Civilians to Russia", *Human Rights Watch*, 1 September 2022, <https://www.hrw.org/report/2022/09/01/we-had-no-choice/filtration-and-crime-forcibly-transferring-ukrainian-civilians> (Consulted on 28 April 2023).

⁴⁸² Amnesty International, "Like a prison convoy, Russia's unlawful transfer and abuse of civilians in Ukraine during 'filtration'", November 2022, https://amnestyfr.cdn.prismic.io/amnestyfr/5a606ecd-6bd4-40db-8e61-f49deef785f8_EUR+5061362022+-+EN+-+Forcible+Transfers+-+Embarqoed+10+Nov+2022.pdf (Consulted on 28 April 2023).

⁴⁸³ An arrest warrant also got issued against Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation; International Criminal Court, *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, 17 March 2023, <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> (Consulted on 28 April 2023).

The Independent Commission of Inquiry on Ukraine established unlawful confinement in regions controlled by Russian armed forces. The Commission stated in its report that the procedural standards for detention were not followed, and the conditions were inhuman. Relatives were not informed, the reasons for imprisonment were not communicated clearly, people were forced to sleep on the floor or in turns due to overcrowding in the cells, there was a lack of light and ventilation, and there was no warmth in frigid conditions. The Commission has found, based on the large number of cases, that Russian authorities have unlawfully imprisoned a wide range of civilians and other protected persons.⁴⁸⁴

b) *Other serious violations of the laws and customs applicable in international armed conflict*

151. In addition to violations of the Geneva Conventions, violations of the laws and customs applicable in international armed conflict might constitute a war crime. Article 8(2)(b) of the Rome Statute contains an extensive list of these acts. Several violations were clearly committed.

152. Articles 8(2)(b)(i),(ii),(iii), (ix), and (xxiv) address specific types of unlawful attacks against protected persons or protected objects. A result is not required. This includes not only attacks against civilians but also attacks that are not directed at a specific military objective or combatants, or attacks that use indiscriminate weapons, attacks that are carried out without taking the necessary precautions to spare the civilian population or individual civilians.⁴⁸⁵ As mentioned above, the HRMMU in Ukraine had confirmed at least 6,919 civilian deaths by early January 2023.⁴⁸⁶ Up to March 13, 2023, the OHCHR recorded 8.231 civilians killed in the conflict.⁴⁸⁷

153. Article 8(2)(b)(iv) mentions “intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not military objectives.” It has already been argued that hospitals, schools, and museums have been bombed. UNESCO also made a statement, saying that up to this point, over 150 cultural sites have been partially or totally destroyed.⁴⁸⁸

154. Pillaging is another serious violation of the laws and customs applicable in international armed conflict, as mentioned in Article 8(2)(b)(xvi) of the Statute. HRW reported a case where

⁴⁸⁴ Human Rights Council, *Report of the Independent International Commission of Inquiry on Ukraine*, 15 March 2023, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf (Consulted on 28 April 2023).

⁴⁸⁵ K. DÖRMANN, L. DOSWALD-BECK, and R. KOLB, *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003, 131-132.

⁴⁸⁶ Human Rights Watch, *Ukraine events of 2022*, <https://www.hrw.org/world-report/2023/country-chapters/ukraine#:~:text=As%20of%20early%20January%202023,the%20actual%20figures%20were%20higher.> (Consulted on 28 April 2023).

⁴⁸⁷ United Nations Human Rights Office of the High Commissioner, “Ukraine: Civilian casualty update 13 March 2023”, <https://www.ohchr.org/en/news/2023/03/ukraine-civilian-casualty-update-13-march-2023> (Consulted on 28 April 2023).

⁴⁸⁸ UNESCO, *Ukraine: over 150 cultural sites partially or totally destroyed*, 23 June 2022, https://www.unesco.org/en/articles/ukraine-over-150-cultural-sites-partially-or-totally-destroyed?TSPD_101_R0=080713870fab20000abf1c0017229e904251614a7ca7a577f515fcef2d248fa7452bc2192837db2e0823535b4b143000749b766352e29c62b5d77ae0e0974698aebadb5b21b2326dc5cefd1c8d9561d6133e2f74441a338bde49a677e1c0236d (Consulted on 1 May 2023).

Russians pillaged art and artefacts in cultural institutions in Kherson. More specifically, the Kherson Regional Art Museum, the Kherson Regional Museum, St. Catherine's Cathedral, and the Kherson Region National Archives all got pillaged.⁴⁸⁹

1.2.2 Mental element

155. A war crime necessitates the presence of intent, which indicates that the individual must intend to participate in conduct and have the means to cause the consequences or be aware that they will occur in the normal course of events and have knowledge that a circumstance exists or a consequence will occur.⁴⁹⁰ For each of the individual crimes, knowledge and intent will have to be established. This is not easy to prove. It has to be proven that certain attacks were intended to target civilians and that there were no military targets nearby.⁴⁹¹

1.2.3 Conclusion

156. Only crimes committed during armed conflict can be classified as war crimes. Russia and Ukraine are the States involved, hence why it is an IAC. It is a war crime to target protected persons or protected objects. Several organisations have already reported on the wilful killing, torture, inhumane treatment, etc. of civilians and POWS, as well as the destruction of apartment buildings, hospitals, museums,... A violation of the Geneva Conventions as well as the laws and customs applicable in international armed conflict took place. With regard to one war crime, the ICC has already issued an arrest warrant, namely the unlawful deportation of population (children). However, it still has to be proven that the protected person and/or object were the targets, and no military targets were nearby. Once this can be proven, it is clear that Putin committed several war crimes.

⁴⁸⁹ Human Rights Watch, *Ukraine: Russians pillage Kherson Cultural Institutions*, 20 December 2022, <https://www.hrw.org/news/2022/12/20/ukraine-russians-pillage-kherson-cultural-institutions> (Consulted on 10 May 2023).

⁴⁹⁰ Article 30(2)(3) Rome Statute.

⁴⁹¹ L.W. GOTTBATH, "What counts as a war crime and why they're so hard to prosecute", *Axios*, 23 March 2022, <https://www.axios.com/2022/03/22/russia-putin-war-crimes-icc-ukraine> (Consulted on 10 May 2023).

2. Jurisdiction *ratione temporis*

2.1. Application

157. The jurisdiction of the Court has no retroactive effect. The ICC will only have jurisdiction over crimes committed after the Statute entered into force on July 1, 2002. In the case of States that become Parties to the Rome Statute after the above-mentioned date, the ratification date of the State will be the reference for the ICC to have jurisdiction.⁴⁹² The focus here is on alleged crimes committed on Ukrainian territory by Russia. Both Ukraine and Russia are not signatories to the Statute.⁴⁹³

158. States that are not Parties to the Statute may bring crimes committed on their territory under the Court's jurisdiction on an ad hoc basis by lodging a declaration with the Registrar. The declaration deviates from the general rule and is retroactive.⁴⁹⁴ The ad hoc declaration can only be made for crimes committed after the Statute has entered into force; it is under no circumstances possible for the ICC to try crimes before the Statute's entry into force.⁴⁹⁵ Rule 44(2) of the RPE mentions that States making a declaration are required to follow the Rules of Procedure and Evidence and the Statute's overall framework.⁴⁹⁶

Ukraine first made such a declaration in 2014 for crimes committed between November 21, 2013, and February 22, 2014.⁴⁹⁷ A second declaration was made in 2015 that open-endedly extended the original declaration's time frame to include alleged crimes that are still being investigated across the entirety of Ukraine as of February 20, 2014.⁴⁹⁸

⁴⁹² Article 11 and 126 Rome Statute; *Prosecutor v. Abd-Al-Rahman*, "Prosecution's Response to the Defence Appeal against the "Decision on the Defence 'Exception d'incompétence'", ICC (Appeals Chamber), 29 June 2021, ICC-02/05-01/20, para 39; W.A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 53-54; V. TSILONIS, *The Jurisdiction of the International Criminal Court*, Switzerland, Springer, 2019, 60; R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 150.

⁴⁹³ International Criminal Court, *The States Parties to the Rome Statute*, <https://asp.icc-cpi.int/states-parties> (Consulted on 12 March 2023).

⁴⁹⁴ Article 12(3) Rome Statute; *Prosecutor v. Abd-Al-Rahman*, "Prosecution's Response to the Defence Appeal against the "Decision on the Defence 'Exception d'incompétence'", ICC (Appeals Chamber), 29 June 2021, ICC-02/05-01/20, para 39; W.A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 54; L. CONDORELLI AND S. VILLALPANDO "Trigger Mechanisms" in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, 636; S. BOURGON, "Jurisdiction Ratione Temporis" in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, 552.

⁴⁹⁵ Article 11(1) Rome Statute; R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 150; S. BOURGON, "Jurisdiction Ratione Temporis" in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, 548.

⁴⁹⁶ C. STAHN and H. OLASOLO, "The International Criminal Court's Ad Hoc Jurisdiction Revisited", *The American Journal of International Law* 2005, 53.

⁴⁹⁷ Declaration on the Recognition of the International Criminal Court, 9 April 2014, <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf> (Consulted on 12 March 2023); International Criminal Court, *Ukraine*, <https://www.icc-cpi.int/ukraine> (Consulted on 12 March 2023).

⁴⁹⁸ Declaration on the Recognition of the International Criminal Court, 8 September 2015, https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine (Consulted on 12 March 2023); International Criminal Court, *Ukraine*, <https://www.icc-cpi.int/ukraine> (Consulted on 12 March 2023).

2.2. Conclusion

159. The ICC has the jurisdiction to prosecute crimes committed after July 1, 2002. The invasion and subsequent crimes occurred in 2022 and later. Despite the fact that Ukraine and Russia are not signatories to the Statute, Ukraine filed a declaration in 2014 and 2015, bringing the crimes within the Court's jurisdiction within the required time frame. There are no obstacles to prosecuting Putin before the ICC based on the Court's *ratione temporis* jurisdiction.

3. Exercise of jurisdiction

3.1. General

160. Because Ukraine and Russia are not Parties to the Statute, the general principles of nationality and territoriality mentioned in Article 12(2)(a)(b) do not apply here. However, in accordance with Article 12(3) of the Statute, Ukraine made a declaration accepting the Court's jurisdiction. Ukraine's declaration recognises the Court's jurisdiction over crimes against humanity and war crimes, as clearly stated in the second declaration.⁴⁹⁹ This means that the ICC can investigate any possible war crimes committed on Ukrainian territory after February 20, 2014. Ukraine does not become a member by making such a declaration, nor is Russia required to be a member of the Statute.⁵⁰⁰

3.2. Crime of aggression

161. The declaration does not mention the crime of aggression. According to some authors, it is simply not possible to accept the Court's jurisdiction for the crime of aggression on an ad hoc basis, as Article 15bis (5) seems to implicitly exclude this possibility.⁵⁰¹ However, according to others, Article 44 RPE indicates otherwise. Pursuant to Article 44(2) RPE, "the Registrar shall inform the State concerned that the declaration under Article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in Article 5 of relevance to the situation, and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply." In the authors' opinion, this would suggest that the Court's jurisdiction is not limited to the crimes listed in the declaration of the non-member State.⁵⁰² The Pre-Trial Chamber in the *Gbagbo* case seems to follow this view.⁵⁰³

⁴⁹⁹ Declaration on the Recognition of the International Criminal Court, 8 September 2015, https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine (Consulted on 12 March 2023).

⁵⁰⁰ S. BOURGON, "Jurisdiction Ratione Temporis" in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, 552-553; R. CRYER, D. ROBINSON and S. VASILIEV, *An Introduction to International Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2019, 150.

⁵⁰¹ Article 15bis (5) Rome Statute; T. RUYSS, "Defining the Crime of Aggression: the Kampala Consensus", *Revue De Droit Militaire Et De Droit De La Guerre* 2010, 129; D. AKANDE and A. TZANAKOPOULOS, "Treaty Law and ICC Jurisdiction over the Crime of Aggression", *EJIL* 2018, Vol 29 No. 3, 954-955.

⁵⁰² A. SALARI and S.H. HOSSEINI, "Russia's attack on Ukraine: a review of the international criminal court's capacity to examine the crime of aggression", *Access to justice in Eastern Europe* 2023, Vol. 6 Issue 1, 14.

⁵⁰³ Rule 44 RPE was adopted in order to ensure that States that chose to stay out of the treaty could not use the Court "opportunistically". In light of the above, it is clear, in the view of the Chamber, that while States may indeed seek to define the scope of its acceptance, such definition cannot establish arbitrary parameters to a given situation as it must

162. Regardless of whether a non-member State can accept the Court's jurisdiction over the crime of aggression on an ad hoc basis, the ICC cannot exercise its jurisdiction over Russia as mentioned under Article 15bis (5). The Court only has jurisdiction over the crime of aggression when it concerns State Parties who ratified the amendments and thus recognised the crime of aggression as falling under the Court's jurisdiction.⁵⁰⁴ In the case of an act of aggression committed by a State that has not ratified the ICC Statute, such as Russia, the UN Security Council must refer the relevant situation to the Court in accordance with Article 15ter in conjunction with Article 13(b) of the ICC Statute before the Prosecutor of the ICC can begin an investigation into an act of aggression.⁵⁰⁵ Pursuant to Article 23 of the United Nations Charter, the Security Council is composed of five permanent members: China, France, Russia, the United Kingdom, and the United States.⁵⁰⁶ These all have the "right to veto".⁵⁰⁷ Herein lies the first difficulty. The UN Security Council, according to the conditions, should refer a situation when it determines there is a threat to peace and must take appropriate measures to restore or maintain international peace and security.⁵⁰⁸ However, often, political motivations could be at stake.⁵⁰⁹ A situation can only be referred when there is a unanimous vote from all five permanent members or an abstention from some.⁵¹⁰ But as said above, Russia is one of those members. As long as Putin is in power and thus controls the exercise of Russia's veto power, Russia will certainly never refer the situation to the ICC, meaning that the Court cannot investigate acts of aggression occurring in Ukraine.

163. There have been several voices calling for a reform of the UN Security Council, especially in light of the veto power of the permanent members. Although the General Assembly has already convened to debate this issue, Member States have strong disagreements on the topic.⁵¹¹ Article 108 of the UN Charter also provides that a reform would require the vote of two-thirds of the

encompass all crimes that are relevant to it; *Prosecutor v. Laurent Gbagbo*, "Situation in the Republic of Côte D'Ivoire", ICC (Trial-Chamber I), 15 August 2012, ICC-02/11-01/11, para. 59.

⁵⁰⁴ G. KEMP, *Individual Criminal Liability for the International Crime of Aggression*, Cambridge, Intersentia, 2015, 184; Coalition for the International Criminal Court, *Factsheet the Crime of Aggression within the Rome Statute of the International Criminal Court*, 2019, https://www.coalitionfortheicc.org/sites/default/files/cicc_documents/CICC-%20Factsheet%20Crime%20of%20Aggression%20Final-%20changes%2027Nov2019.pdf (Consulted on 12 March 2023).

⁵⁰⁵ M.S. WONG, "Aggression and state responsibility at the International Criminal Court", *International & Comparative Law Quarterly*, 2021, 975; G. KEMP, *Individual Criminal Liability for the International Crime of Aggression*, Cambridge, Intersentia, 2015, 182.

⁵⁰⁶ W.A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 149.

⁵⁰⁷ United Nations Security Council, *Voting System*, <https://www.un.org/securitycouncil/content/voting-system> (Consulted on 12 March 2023).

⁵⁰⁸ Article 39 UN Charter; L. CONDORELLI AND S. VILLALPANDO "Trigger Mechanisms" in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, 630-631; I.K. MULLER-SCHIEKE, "Defining the Crime of Aggression Under the Statute of the International Criminal Court", *Leiden Journal of International Law*, 2004, 421.

⁵⁰⁹ L. CONDORELLI AND S. VILLALPANDO "Trigger Mechanisms" in A. CASSESE, P. GAETA and J.R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court*, Oxford, Oxford University Press, 2002, 632; A.S. GALAND, *UN Security Council Referrals to the International Criminal Court: legal nature, effects and limits*, Leiden, Koninklijke Brill N.V., 2019, 219-220.

⁵¹⁰ United Nations, *UN Voting*, <https://research.un.org/en/docs/unvoting/sc> (Consulted on 12 March 2023).

⁵¹¹ When it came to the Council's membership, several Member States supported expanding both the permanent and non-permanent member categories. Furthermore, many speakers supported adding more seats for Africa. France proposed that the five permanent Council members forego the use of the veto in circumstances of mass atrocities; Ukraine and Poland emphasised the importance of Security Council reforms, claiming that one country abuses its status as a permanent member of the Security Council, referring to Russia; United Nations, "Concluding Debate on Security Council Reform, Speakers in General Assembly Urge More Representation for Developing Countries, Ending of Permanent Members' Veto Power", 18 November 2022, <https://press.un.org/en/2022/qa12473.doc.htm> (Consulted on 12 March 2023); P. NADIN, "United Nations Security Council Reform", 2014, <https://unu.edu/publications/articles/united-nations-security-council-reform.html> (Consulted on 12 March 2023).

members of the General Assembly and must be ratified by two-thirds of the members of the UN, including all the permanent members of the Security Council. Hence, a reform is unlikely to happen soon. During a congress in Buenos Aires in November 2022, Parliamentarians for Global Action urged all States Parties to take action to realign the jurisdiction of the ICC with that of the other three crimes and remove paragraphs 4 and 5 of Article 15bis Rome Statute.⁵¹² Another commonly mentioned solution is for the UN General Assembly to make a referral to the ICC when the UN Security Council is blocked from acting by a permanent member's veto. An amendment to the Statute can be made via Article 121 Rome Statute by the Assembly of States Parties.⁵¹³

3.3. Conclusion

164. The Court's jurisdiction over possible war crimes taking place on Ukrainian territories poses no problems. Even though Ukraine and Russia are not signatories to the Statute, there is still the possibility of lodging a declaration and accepting the Court's jurisdiction. Ukraine did so, accepting the Court's jurisdiction over war crimes beginning on February 20, 2014.

The fact that Ukraine and Russia are not State Parties does create a problem for the Court's jurisdiction over the crime of aggression. The Court only has jurisdiction when it concerns State Parties who ratified the amendments and thus recognised the crime of aggression as falling under the Court's jurisdiction. The only way for the ICC to investigate the crime of aggression involving a non-State party is through Article 13(b) Rome Statute when a situation is referred by the UN Security Council, of which Russia is a permanent member and has a right to veto.

⁵¹² Parliamentarians for Global Action, *Plan of Action on the Universality and Effectiveness of, and political support for, the Rome Statute system against impunity*, <https://www.pgaction.org/pdf/annual-forum/2022/buenos-aires-poa-2022-en.pdf> (Consulted on 12 March 2023); C. KRESS, S. HOBE and A. NUBBERGER, "The Ukraine War and the Crime of Aggression: How to fill the gaps in the International Legal System", *Just Security*, 23 January 2023, <https://www.justsecurity.org/84783/the-ukraine-war-and-the-crime-of-aggression-how-to-fill-the-gaps-in-the-international-legal-system/> (Consulted on 12 March 2023).

⁵¹³ T. DANNENBAUM, "Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine", *Just Security*, 10 March 2022, <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/> (Consulted on 12 March 2023); C. KRESS, S. HOBE and A. NUBBERGER, "The Ukraine War and the Crime of Aggression: How to fill the gaps in the International Legal System", *Just Security*, 23 January 2023, <https://www.justsecurity.org/84783/the-ukraine-war-and-the-crime-of-aggression-how-to-fill-the-gaps-in-the-international-legal-system/> (Consulted on 12 March 2023).

4. Jurisdiction *ratione personae*

4.1. Introduction

165. The ICC only has jurisdiction over natural persons over the age of eighteen.⁵¹⁴ This thesis does not concern Russia as a State but only Putin as head of State. Putin meets these requirements.

4.2. Modes of liability

4.2.1 General

166. Because of the principle of individual responsibility, it is possible to prosecute and punish individuals for major violations of international law.⁵¹⁵ Article 25 of the Statute lists different modes of liability.

Putin is not carrying out crimes himself on Ukrainian territory. However, Putin can be held directly responsible for ordering his subordinates to commit unlawful acts, as mentioned in a report of the International Law Commission.⁵¹⁶ Proving Putin ordered certain crimes may be difficult. For at least one war crime, the ICC has already acknowledged Putin's criminal responsibility under Article 25(3)(a) Rome Statute. According to the arrest warrant issued for Putin, there are "reasonable grounds to believe that Mr. Putin bears individual criminal responsibility" for the alleged crimes, for having committed them directly alongside others, and for "his failure to exercise control properly over civilian and military subordinates who committed the acts."⁵¹⁷

167. Another responsibility Putin bears is the command responsibility mentioned in Article 28 Rome Statute. Command responsibility is a *sui generis* mode of liability that holds military superiors criminally liable for the crimes committed by their subordinates.⁵¹⁸ Three essential elements must be met in order to establish command responsibility.

First, there must be a superior-subordinate relationship. The superior should be viewed as part of a hierarchy that includes the idea of control.⁵¹⁹ Putin is head of State and commander-in-chief of Russia's armed forces, thus holding a position of superiority. Second, the superior knew or had reason to believe that one or more of his or her subordinates had committed or were about to

⁵¹⁴ Article 25(1) Rome Statute; Article 26 Rome Statute.

⁵¹⁵ W.A. SCHABAS, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2017, 211; C. MELONI, "Individual Criminal Responsibility", *Oxford Bibliographies*, 28 October 2020, <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0215.xml#obo-9780199796953-0215-bibItem-0002> (Consulted on 15 April 2023).

⁵¹⁶ Report of the International Law Commission on the Work of its Forty-Eighth Session (6 May - 26 July 1996) *UN Doc. A/51/10*, (1996), 20 para. 8.

⁵¹⁷ International Criminal Court, *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, 17 March 2023, <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> (Consulted on 2 May 2023).

⁵¹⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgement Pursuant to Article 74 of the Statute", ICC (Trial Chamber III), 21 March 2016, ICC-01/05-01/08, paras. 171 and 174.

⁵¹⁹ J.A. WILLIAMSON, "Some considerations on command responsibility and criminal liability", *International Review of the Red Cross* 2008, Vol. 90 No. 870, 306-307.

commit criminal conduct.⁵²⁰ Given the global media attention, it's difficult to believe Putin is unaware of the crimes that are taking place. Austrian Chancellor Karl Nehammer reportedly discussed such crimes with Putin during their meeting and stated that Mr. Putin had shown knowledge of these reports by denying them. Nehammer also said Putin had blamed the Ukrainians for "being responsible for the crimes in Bucha". Even though footage shows Russian forces gunning down a civilian there.⁵²¹ Furthermore, the United Nations Security Council, General Assembly, and Human Rights Council have all addressed Russian atrocities in Ukraine with Russian delegates present.⁵²² Thirdly, the superior did not take the necessary and reasonable steps to prevent or punish the crimes committed.⁵²³ As mentioned above, Putin has repeatedly denied any involvement of Russia in certain crimes and declared reports of war crimes to be "fake", indicating to Russian troops that they should not be concerned about doing them since the Kremlin will deny them or help cover them up. Even more, Putin praised the Russian military troops accused of massacring residents of Bucha, calling their "skillful and resolute actions" an "example of military duty, courage, selflessness, and high professionalism."⁵²⁴

4.2.2 Crime of aggression

168. When evaluating criminal responsibility for the crime of aggression, the leadership requirement applies.⁵²⁵ This requirement is mentioned in both Article 8bis (1) and Article 25(3bis) of the Statute: "a person in a position effectively to exercise control over or to direct the political or military action of a State". Only "presidents, prime ministers, and top military leaders such as ministers of defence and commanding generals" are subject to prosecution for the crime of aggression.⁵²⁶ Putin is president of Russia and thus meets the requirement.

⁵²⁰ J.A. WILLIAMSON, "Some considerations on command responsibility and criminal liability", *International Review of the Red Cross* 2008, Vol. 90 No. 870, 307.

⁵²¹ K. ROTH, "Building a War-Crimes Case against Vladimir Putin", *Human Rights Watch*, 27 April 2022, <https://www.hrw.org/news/2022/04/27/building-war-crimes-case-against-vladimir-putin> (Consulted on 2 May 2023); B. ANDERSON, A. POURAHMADI and A. WOODYATT, "Austria's Chancellor met with Putin to 'confront' him with atrocities he saw in Ukraine", *CNN*, 13 April 2022, <https://edition.cnn.com/2022/04/13/europe/nehammer-putin-meeting-connect-the-world-intl/index.html?msclkid=aa247e23bbcc11ecbfe067d2de946f61> (Consulted on 2 May 2023).

⁵²² K. ROTH, "Building a War-Crimes Case against Vladimir Putin", *Human Rights Watch*, 27 April 2022, <https://www.hrw.org/news/2022/04/27/building-war-crimes-case-against-vladimir-putin> (Consulted on 2 May 2023).

⁵²³ J.A. WILLIAMSON, "Some considerations on command responsibility and criminal liability", *International Review of the Red Cross* 2008, Vol. 90 No. 870, 307; International Committee of the Red Cross, *Command responsibility and failure to act*, 2014, https://reliefweb.int/attachments/6bcef776-351f-321e-afb8-92d97fcd5ee8/dp_consult_37_command_responsibility_and_failure_to_act.pdf (Consulted on 2 May 2023).

⁵²⁴ K. ROTH, "Building a War-Crimes Case against Vladimir Putin", *Human Rights Watch*, 27 April 2022, <https://www.hrw.org/news/2022/04/27/building-war-crimes-case-against-vladimir-putin> (Consulted on 2 May 2023); A. PATIL, "What Happened on Day 54 of the War in Ukraine", *The New York Times*, 11 May 2022, <https://www.nytimes.com/live/2022/04/18/world/ukraine-russia-war-news#putin-honors-the-russian-military-unit-accused-of-mass-civilian-killings-in-bucha> (Consulted on 2 May 2023).

⁵²⁵ M. ARRONSON-STORRIER, "Article 25: Individual criminal responsibility", in M. KLAMBERG (ed.), *Commentary on the Law of the International Criminal Court*, Brussels, Torkel Opsahl Academic EPublisher, 2017, 272, note 274; A. CASSESE, "On Some Problematic Aspects of the Crime of Aggression", *Leiden Journal of International Law* 2007, Vol. 20 No.4, 848.

⁵²⁶ N.R. HAJDIN, "International Criminal Courts and Tribunals: The actus reus of the Crime of Aggression", *LJIL*, 2021, 490.

4.3. Immunities

169. Putin has been Russia's head of State since 2012. He was also President of Russia from 2000 until 2008.⁵²⁷ As Russia's current head of State, he has both personal and functional immunity. Personal immunity based on his status, as long as he is in office, and functional immunity based on his actions carried out in his function, even after he leaves office. According to Article 27 of the Rome Statute, his immunity will not protect him from ICC prosecution, as it does not come into play.⁵²⁸ It is widely accepted that by ratifying the Rome Statute, States parties to the Rome Statute removed their immunity from prosecution by the ICC.⁵²⁹ However, because Russia is not a signatory to the Rome Statute, Article 98 applies to Putin.⁵³⁰ According to Article 98, Third States may waive the immunity of State officials under an arrest warrant.⁵³¹ Similar to the case of *Al-Bashir*, the ICC will therefore have to depend on Russia to cooperate with the Court. However, it will be unlikely for Russia to waive Putin's immunity and cooperate with the Court. In the *Al-Bashir case*, South Africa declined to enforce an ICC warrant for the arrest of the Sudanese dictator.⁵³² The fact that immunity does not come into play before the ICC is consequently not enough to prosecute a serving head of State. To successfully prosecute a serving head of State, cooperation with other State Parties is important for the Court.⁵³³ When a non-State Party official travels to a State party, it is highly debated whether this State should carry out arrest warrants. The ICC can request that State Parties arrest the accused if he appears on their territory; if the State refuses, they violate their obligations.⁵³⁴ However, the majority of States uphold the international legal principle that officials enjoy legal immunity from other courts. The ICJ determined in the *Arrest Warrant Case* that States violate their obligation under international law towards another State if "they fail to respect the immunity" of officials.⁵³⁵ On the other hand, the Appeals Chamber stated in the Jordan Appeal case that "international courts act on behalf of the international community as a whole. Accordingly, the principle of *par in parem non habet imperium*, which is based on the sovereign equality of States, finds no application in relation to an international court such as the International Criminal Court". Which means that the Appeals Chamber believes that state officials have never had such vertical immunity from international courts.⁵³⁶ However, this all remains controversial.

⁵²⁷ He served as Russia's Prime Minister from 2008 to 2012; Official Internet Resources of the President of Russia, *About President*, <http://www.en.kremlin.ru/structure/president> (Consulted on 7 March 2023).

⁵²⁸ A.H. EKORI and P.S. MASUMBE, "Putin on Trial: The Reality of Heads of State Immunity before International Criminal Courts", *Polit Journal* 2022, 31-32.

⁵²⁹ Article 27(2) Rome Statute; A.S. GALAND, *UN Security Council Referrals to the International Criminal Court: legal nature, effects and limits*, Leiden, Koninklijke Brill N.V., 2019, 181.

⁵³⁰ D. AKANDE, "International Law Immunities and the International Criminal Court", *The American Journal of International Law* 2004, 421.

⁵³¹ A.S. GALAND, *UN Security Council Referrals to the International Criminal Court: legal nature, effects and limits*, Leiden, Koninklijke Brill N.V., 2019, 182.

⁵³² N. WINDELL, *South Africa's Refusal to Arrest Omar Al-Bashir*, 2017, TOAEP, <https://www.toaep.org/pbs-pdf/85-nortje/> (Consulted on 30 October 2022).

⁵³³ A.H. EKORI and P.S. MASUMBE, "Putin on Trial: The Reality of Heads of State Immunity before International Criminal Courts", *Polit Journal* 2022, 33.

⁵³⁴ Article 89 Rome Statute.

⁵³⁵ *Democratic Republic of the Congo v. Belgium*, "Arrest Warrant of 11 April 2000", ICJ Reports 2002, 14 February 2002, paras. 54 and 70; A.S. GALAND, *UN Security Council Referrals to the International Criminal Court: legal nature, effects and limits*, Leiden, Koninklijke Brill N.V., 2019, 177.

⁵³⁶ *Prosecutor v. Al-Bashir*, "Judgment", ICC (Appeals Chamber), 6 May 2019, ICC-02/05-01/09 O.A.2, para. 115; Y. LIU, "Do States Party to the International Criminal Court Statute have the obligation to Arrest Vladimir Putin?", 14 April 2023,

4.4. Trial in absentia

170. Article 63(1) Rome Statute states that the accused shall be present during the trial. For a trial to take place, Putin would have to either agree to appear voluntarily at the ICC or be detained and taken into the Court's custody. It is unlikely Putin will appear voluntarily, or Russia will arrest him. Putin currently holds unchallenged power in Russia. And after all, the Kremlin has denied on multiple occasions that Russian forces committed any acts of atrocity in Ukraine.⁵³⁷ Even if Putin were to lose power, a new government would still be prohibited by the Russian Constitution from extraditing its nationals.⁵³⁸ Though Putin could be arrested if he leaves the country. The cooperation of States with the ICC is necessary for the Court to arrest the accused.⁵³⁹ Yet, considering that his freedom of movement is already severely restricted by international sanctions, he is unlikely to appear in a country that wishes to put him on trial. He has only visited eight countries since the invasion. Seven of them are part of Russia's "near abroad," according to Putin, as they were constituent parts of the Soviet Union. Iran was the other country he visited in July 2022. However, Iran aided Russia's war effort with military equipment.⁵⁴⁰

171. If he does travel abroad, to one of the 123 State Parties, how likely is it that he will be arrested? As previously stated, the ICC issued an arrest warrant for Putin, obliging State Parties to arrest him for prosecution before the Court.⁵⁴¹ Even so, it is not clear how many States would be willing to arrest the President of a State with a history of seeking revenge and an active nuclear arsenal.⁵⁴² Former President Dmitry Medvedev, who is now the deputy chairman of Putin's security council, warned unequivocally that "any attempt to detain Putin, though, would be a declaration of war."⁵⁴³ The editor-in-chief of a Kremlin-funded Russian television network, Margarita Simonyan, even said she would, "like to see a country that would arrest Putin under the ruling of The Hague. In about eight minutes, or whatever the [missile] flight time to its capital." As evidenced by the *AI-*

<https://www.ejiltalk.org/do-states-party-to-international-criminal-court-statute-have-the-obligation-to-arrest-vladimir-putin/> (Consulted on 9 May 2023).

⁵³⁷ R. PLUMMER, "Will Vladimir Putin ever face a war crimes trial?", *BBC*, 17 March 2023, <https://www.bbc.com/news/world-64994992#:~:text=Can%20President%20Putin%20be%20arrested,no%20risk%20of%20being%20arrested>

(Consulted on 6 May 2023); J. WHALEN, R. DIXON and M. ILYUSHINA, "Russia denies and deflects in reaction to Bucha atrocities, 4 April 2022, *The Washington Post*, <https://www.washingtonpost.com/world/2022/04/04/russia-bucha-atrocities-war-crimes/> (Consulted on 6 May 2023); Al Jazeera, "Russia envoy denies atrocities, blames West for Ukraine's misery", 3 March 2022, <https://www.aljazeera.com/news/2023/3/3/russia-envoy-denies-atrocities-blames-west-for-ukraines-misery#:~:text=Kelin%20bluntly%20denied%20that%20Russian,Ukraine%27s%20Bucha%2C%20Irpin%20and%20Mariupol> (Consulted on 6 May 2023).

⁵³⁸ Article 61 Constitution of the Russian Federation.

⁵³⁹ C. TIRIBELLI, "Judgment *in absentia* in International Criminal Law: its admissibility before the Ad Hoc Tribunals, the International Criminal Court and the European Arrest Warrant", *Sri Lanka Journal of International Law*, Vol. 18 2006, 369-385.

⁵⁴⁰ R. PLUMMER, "Will Vladimir Putin ever face a war crimes trial?", *BBC*, 17 March 2023, <https://www.bbc.com/news/world-64994992#:~:text=Can%20President%20Putin%20be%20arrested,no%20risk%20of%20being%20arrested>

(Consulted on 6 May 2023).

⁵⁴¹ Article 89(1) Rome Statute.

⁵⁴² P. MCCAUSLAND and D. DE LUCE, "Putin is a wanted man – a trial isn't imminent, but the world is closing in", *NBC News*, 18 March 2023, <https://www.nbcnews.com/news/world/vladimir-putin-war-crimes-arrest-warrant-international-criminal-court-rcna75526> (Consulted on 7 May 2023).

⁵⁴³ G. FAULCONBRIDGE, "Any attempt to arrest Putin would be declaration of war on Russia, ally says", *Reuters*, 23 March 2023, <https://www.reuters.com/world/europe/russias-medvedev-says-west-wont-leave-russia-china-alone-tass-2023-03-23/> (Consulted on 10 May 2023).

Bashir case, developing countries are particularly hesitant to cooperate when requests for arrest are made against current leaders of State or government, as well as other senior government officials. In this case, High Court Judge Mlambo ruled that South Africa had disregarded international law by not arresting Al-Bashir in order to maintain relations with the African Union, which had been pressing Member States not to cooperate with the ICC due to its "African bias" at the time.⁵⁴⁴ This again highlights the importance of cooperation with State Parties.

Aside from political and military constraints, certain economic dependencies may cause States to be concerned about potential economic consequences.⁵⁴⁵

4.5. Conclusion

172. There are several obstacles to the Court's jurisdiction *ratione personae* against Putin. Putin is subject to the Court's jurisdiction as a natural person over the age of eighteen. He can bear both individual criminal responsibility for ordering his subordinates to commit an unlawful act and command responsibility as head of State. Putin must be in a position of leadership to bear criminal responsibility for the crime of aggression, which he does. So far, no obstacles have surfaced.

173. An obstacle could arise due to Putin's immunity. As head of state, he has personal and functional immunity; while immunity does not apply before the ICC, it does play a role. It is highly debated whether a non-State party official's immunity should be respected when they enter a Third State. According to the ICC, regardless of immunity, State Parties have an obligation to carry out an arrest warrant. Putin's arrest is necessary as the ICC cannot conduct trials in absentia. An arrest warrant has been issued against Putin for one specific war crime, obliging State parties to arrest him if he appears on their territory. Though his immunity may prevent States from doing so. Another hurdle is Putin's reputation for seeking revenge. On multiple occasions, he has threatened to use nuclear weapons if another country gets involved. Other States might be threatened by this. However, before these States can even consider arresting Putin, he must first leave Russia. The chances of him leaving Russia are small, and the chances of him turning up on the territory of an ICC State party are even smaller.

⁵⁴⁴ X, "South Africa criticised over Sudan's Omar Al-Bashir's exit", *BBC*, 24 June 2015, <https://www.bbc.com/news/world-africa-33254003> (Consulted on 7 May 2023); M. MULAUDZI and D. FLANAGAN, "A David and Goliath Scenario: Power Dynamics Involved in the Execution of ICC Arrest Warrants", *OpinioJuris*, 7 April 2023, <https://opiniojuris.org/2023/04/07/a-david-and-goliath-scenario-power-dynamics-involved-in-the-execution-of-icc-arrest-warrants/> (Consulted on 7 May 2023); L. CHENWI and F. SUCKER, "Lessons from the Al-Bashir Debacle: Four Issues for ICJ Clarification", *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 2018, Vol. 51, No. 2, 242.

⁵⁴⁵ M. MULAUDZI and D. FLANAGAN, "A David and Goliath Scenario: Power Dynamics Involved in the Execution of ICC Arrest Warrants", *OpinioJuris*, 7 April 2023, <https://opiniojuris.org/2023/04/07/a-david-and-goliath-scenario-power-dynamics-involved-in-the-execution-of-icc-arrest-warrants/> (Consulted on 7 May 2023); A. FLECK, "Countries that Depend on Russia for Trade", *Statista*, 4 May 2022, <https://www.statista.com/chart/27367/countries-most-dependent-on-russia-for-trade/> (Consulted on 7 May 2023).

5. Admissibility

174. The admissibility of the case has already been determined by the Court. In 2014, Ukraine lodged a declaration accepting the Court's jurisdiction over crimes committed on its territory between November 21, 2013, and February 22, 2014. As a result, the Office of the Prosecutor (hereafter: OTP) chose to open a preliminary investigation. Ukraine lodged a second declaration accepting the Court's jurisdiction from February 20, 2014, and onwards. On September 29, 2015, the Prosecutor announced the extension of the preliminary examination into the situation in Ukraine to encompass suspected crimes committed after February 20, 2014.⁵⁴⁶

The situation in Ukraine was under preliminary examination from April 25, 2014, until December 11, 2020. The examination of the situation was completed by the ICC Prosecutor after more than six years.⁵⁴⁷ During that time, the OTP completed its admissibility assessment in terms of complementarity and gravity, ruling that possible cases originating from an investigation into the problem would be admissible. Finally, on February 28, 2022, the ICC Prosecutor announced that he would open an investigation into the situation in Ukraine based on the OTP's preliminary examination. He added that his investigation would include any new alleged crimes falling under the Court's jurisdiction committed by any party to the conflict on Ukrainian territory on an ongoing basis.⁵⁴⁸

175. In the report of the preliminary situation, the admissibility of the case was established. There was an assessment of complementarity and gravity, as required in Article 17 of the Statute. The OTP's determination of complementarity is divided into two categories based on the level of domestic engagement by both the competent Ukrainian and Russian authorities: (i) the unwillingness of the authorities to identify the criminally responsible or (ii) the authorities' inability to attain the accused or to carry out their proceedings.⁵⁴⁹ To make this determination, the OTP requested information on proceedings. Ukraine provided this information, specifying that it had initiated a number of domestic criminal proceedings related to both Crimea and Donbas. Since 2014, 214 criminal proceedings originating from the armed conflict have been registered, of which 10 cases have been referred to national courts and two verdicts have been issued. It has been established that Ukraine, at least with regard to eastern Ukraine, carried out proceedings against both Ukrainian Government Forces and members of pro-Russian separatist entities.⁵⁵⁰ Due to its evaluation, the OTP rendered Ukrainian

⁵⁴⁶ International Criminal Court, *Ukraine*, <https://www.icc-cpi.int/ukraine> (Consulted 7 May 2023).

⁵⁴⁷ International Criminal Court, *Report on Preliminary Examination Activities 2020*, 14 December 2020, <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> (Consulted on 7 May 2023); International Criminal Court, *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine*, 11 December 2020, <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine> (Consulted on 7 May 2023).

⁵⁴⁸ International Criminal Court, *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation"*, 28 February 2022, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening> (Consulted on 7 May 2023); International Criminal Court, *Information for victims*, <https://www.icc-cpi.int/victims/ukraine> (Consulted on 7 May 2023).

⁵⁴⁹ International Criminal Court, *Report on Preliminary Examination Activities 2020*, 14 December 2020, <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> (Consulted on 7 May 2023).

⁵⁵⁰ I. MARCHUK and A. WANIGASURIYA, "The ICC concludes its preliminary examination in Crimea and Donbas: What's next for the situation in Ukraine?", *EJIL Talk*, 16 December 2020, <https://www.ejiltalk.org/the-icc-concludes-its->

authorities truly unable to obtain any accused or relevant evidence due to its lack of control over areas of its territory. Russia provided no such information. The Statute, however, assigns inability to "total or substantial collapse or unavailability of its national judicial system,"⁵⁵¹ which Russia does not appear to have. However, one can constitute an unwillingness on their part to carry out proceedings and address the alleged crimes.

176. According to the OTP, the potential cases identified had sufficient gravity.⁵⁵²

177. The OTP continues to evaluate new information connected to these events to determine if the preliminary evaluation it made in its 2015 report requires revision.⁵⁵³ Numerous new crimes have been committed since then. Nevertheless, it is still possible to determine that the case is admissible given the "unavailability" of Ukrainian judicial systems due to the armed conflict and Russia's unwillingness to carry out proceedings.

5.1. Conclusion

178. Due to a preliminary examination that began in 2014, an admissibility evaluation has been carried out in 2020. According to the principle of complementarity, the ICC can only prosecute the case if Ukraine and Russia are unable or unwilling to carry out proceedings. Due to the ongoing conflict, Ukraine is unable to obtain any accused or relevant evidence. Russia, on the other hand, is able to carry out proceedings but seems rather unwilling to do so. The case was deemed to be of sufficient gravity.

[preliminary-examination-in-crimea-and-donbas-whats-next-for-the-situation-in-ukraine/](#) (Consulted on 7 May 2023); International Criminal Court, *Report on Preliminary Examination Activities 2019*, 5 December 2019, <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> (Consulted on 7 May 2023);

⁵⁵¹ Article 17(3) Rome Statute.

⁵⁵² International Criminal Court, *Report on Preliminary Examination Activities 2020*, 14 December 2020, <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> (Consulted on 7 May 2023).

⁵⁵³ Ibid.

Conclusion

179. Ukraine and Russia have a long history together. What is now Kiev was known as 'Kyivan Rus' in 882, and it eventually became a recognised European power, encompassing the majority of what is now Ukraine, Belarus, and European Russia. It does not, however, remain a power for long, as it gradually falls apart and the land repeatedly gets divided and conquered by belligerents. But, even in the sixteenth century, there were vocal supporters for their own "Ukrainian" social, political, and religious rights, known as the Cossacks. This quest for a more complete Ukrainian identity persists decades later. However, the area of Ukraine that was under Russian authority at the time was denied this identity, as there was a ban on using Ukrainian in state schools and media. Ukrainians were referred to as "Little Russians". World War I breaks out, causing the once-mighty Russian empire to crumble. However, not for long, since the Soviet-era began soon after. Some of the most horrific events in human history occurred during this time. Simultaneously, Kiev society organisations established a Central Rada, which declared Ukraine's full independence. The Bolsheviks, a Russian communist party, refused to allow Ukraine to secede and recaptured Kiev. The Russian Empire was on the verge of civil war. In 1922, the Soviet Union became a world superpower when Ukraine joined Russia, Belarus, and the Transcaucasian Federation of Georgia, Armenia, and Azerbaijan to form the USSR. To the relief of some, Germany invaded Ukraine during World War II but was met with a counteroffensive by the Soviets, who regained control of the country. The USSR eventually fell apart in 1991, and Ukraine became independent once again.

180. In 2013, Ukraine reached an association agreement with the European Union, but then pro-Russian president of Ukraine, Viktor Yanukovich, eventually refused to sign it, causing a divide between Eastern and Western Ukraine. Russia takes over Crimea, which then holds a referendum in which the majority allegedly votes in favour of Crimea's reunification with Russia. Following Russia's success in Crimea, an operation in Donetsk and Luhansk was launched. In May 2014, both regions held referendums on their independence and eventually declared their independence. For years, Putin has maintained control over these areas, preventing Ukraine from drawing closer to the West. However, Russia attacked Ukraine in 2022, as predicted. Several attacks occur, bombs are dropped, and people are forced to flee the country or look for shelter. Putin believes that this "special military mission" is necessary to keep Russia safe and that Ukraine should join Russia because the two countries have a long history together.

181. The ICC was established specifically for these types of conflicts, for the "most serious crimes of international concern." The ICC will only be able to conduct investigations and possibly trials if the national courts of the countries involved are unable or unwilling to do so themselves. This is the principle of complementarity which applies. The Court has jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression, that have to be committed after the entry into force of the Statute on July 1, 2002. If a State joins the Statute subsequent to its entry into force, the corresponding ratification date shall be the reference for the Court to exercise its jurisdiction. Apart from the crime of aggression, the ICC can only exercise this jurisdiction in relation to a crime committed on the territory of a State party or a crime committed by a national of a State party.

Non-State parties, on the other hand, can accept the Court's jurisdiction on an ad hoc basis, or the UN Security Council might refer a situation to the Court. Immunities do not apply in front of the ICC. If jurisdiction and admissibility are established, the Court must first locate the alleged perpetrator because it does not conduct trials in absentia.

182. Putin will not be tried immediately before the ICC just yet. A number of obstacles are at the foundation of this. There appear to be no obstacles to the Court's *ratione materiae* jurisdiction over the crime of aggression, as Putin is a leader who planned, prepared, and initiated several acts of aggression that are a clear violation of the UN Charter, the most obvious of which was the invasion in February 2022 and several attacks on Ukrainian territory. It is also possible to say that the mental element has been met. The jurisdiction *ratione temporis* also seems to not be an issue; the invasion and related crimes occurred after July 1, 2002, and two declarations by Ukraine accepting the Court's jurisdiction in 2014 and 2015 brought these crimes within the required time period. However, there is a major obstacle regarding the crime of aggression: the Court lacks jurisdiction because Russia is not a State party. Ukraine is not a State party either, but it has submitted two declarations accepting the Court's jurisdiction, albeit not for the crime of aggression. The Court can only begin an investigation into an act of aggression if the UN Security Council refers the case to it. However, because Russia is one of the five permanent members with a "right to veto," such a referral is unlikely to occur.

183. The Court's jurisdiction over war crimes, on the other hand, faces other challenges. As previously stated, Ukraine lodged two declarations accepting the Court's jurisdiction over war crimes. As a result, the Court can investigate such crimes in Ukraine, which it is now doing. The Rome Statute lists crimes that are considered war crimes. Because that conflict is an IAC, the crimes must be in violation of either the Geneva Conventions or the laws and customs applicable in international armed conflict. To be considered a war crime, the crime must target protected people or protected objects. Civilians and POWs are both protected groups. There are numerous crimes that may fall into one of these categories. The ICC has previously examined and issued an arrest warrant against Putin for one specific war crime: the unlawful deportation of children. Other crimes that could be classified as war crimes include inhumane treatment of prisoners of war and willful killing of civilians. According to the arrest warrant, Putin bears individual criminal responsibility for the unlawful deportation of children. However, there's also another criminal responsibility Putin may bear as head of State, command responsibility. One issue that could arise is the mental element that must be satisfied. It must be demonstrated that Putin intended to attack protected people and/or objects in each war crime. This could lead to evidence issues.

184. Putin is Russia's president and thus enjoys immunity. This immunity is said to not come into play before the ICC. But since Russia is not a State party, Russia will be obliged to waive Putin's immunity. This is unlikely to happen. Also, if Putin travels to a State-party, this could cause problems. Even though there is an arrest warrant out for Putin and states are required to arrest him if he appears on their territory, Putin's immunity may prevent them from doing so. This takes us to possibly the most significant obstacle: the Court does not hold trials in absentia. As it is clear that

Russia will not arrest Putin, he will need to travel to one of the State-parties before he can be tried before the Court. States, though, may be reluctant to arrest Putin because he has repeatedly threatened to use nuclear weapons. Political reasons might prevent countries from arresting him.

185. In light of the foregoing, it is reasonable to conclude that obstacles need to be overcome before Putin may be tried at the ICC. These obstacles, though, may be significant.

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