

Washington University Global Studies Law Review

Volume 12

Issue 3 *The International Criminal Court At Ten (Symposium)*

2013

The Mens Rea of The Crime of Aggression

Noah Weisbord

Follow this and additional works at: http://openscholarship.wustl.edu/law_globalstudies



Part of the [Criminal Law Commons](#), [International Law Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Noah Weisbord, *The Mens Rea of The Crime of Aggression*, 12 WASH. U. GLOBAL STUD. L. REV. 487 (2013), http://openscholarship.wustl.edu/law_globalstudies/vol12/iss3/10

This Symposium is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Global Studies Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

THE *MENS REA* OF THE CRIME OF AGGRESSION

NOAH WEISBORD*

I. INTRODUCTION

This gathering is steeped in history. It is the hundredth birthday of Whitney Harris, one of the last original prosecutors of the Nazi leaders after World War II. We're commemorating Harris' remarkable life at the 2012 International Criminal Court at Ten Conference at the Whitney Harris World Law Institute at Washington University Law School. Under the leadership of Professor Leila Sadat, the Institute has played a formative role in the contemporary international justice project. The St. Louis conference also celebrates the tenth anniversary of the International Criminal Court, which has become an important feature in international affairs since its birth in 2002. The ICC is perhaps the most concrete expression of the Nuremberg legacy. Two years ago, against most expectations, the Assembly of States Parties agreed to incorporate the definition and jurisdictional conditions of the crime of aggression into the Rome Statute, thereby reviving the fourth and final Nuremberg crime.¹

In a very real sense, the future is contained in the past. ICC Judge Hans-Peter Kaul, in his St. Louis lecture memorializing his friend Whitney Harris, described how Harris crossed the raucous hall² at the adoption of the Rome Statute in 1998 to shake his hand and solemnly congratulate him. Without Germany's initiative, "the crime of aggression would not

* B.Sc. (McGill), B.S.W. (McGill), LL.B. (McGill), B.C.L. (McGill), M.S.W. (McGill), LL.M. Program (Harv.), S.J.D. (Harv.), Associate Professor of Law, Florida International University College of Law. The author was an independent expert delegate on the Special Working Group on the Crime of Aggression and at the ICC Review Conference. The author would like to thank Jonathan Graham and Robert Visca for their research and Marisol Floren for her assistance at the FIU College of Law Library.

1. The Crime of Aggression, Review Conference of the Rome Statute of the International Criminal Court, R.C. Res. 6 (June 11, 2010) [hereinafter *Kampala Outcome*].

2. Hans-Peter Kaul, Judge, Int'l Crim. Ct., Lecture in Honor of Whitney R. Harris Former Nuremberg Prosecutor at The International Criminal Court at Ten Conference: The Nuremberg Legacy and the International Criminal Court, at 3 (Nov. 11, 2012). Judge Kaul stated:

After the decisive vote on the Rome Statute, our founding treaty, there is some kind of explosion, an enormous outpouring of emotions, of relief among those present, unparalleled for such a conference: screams, stamping, exultation without end, tears of joy and relief; hard-baked delegates and journalists who have frowningly watched the entire conference hug each other in a state of euphoria.

Id.

have been included in the treaty.”³ Though the crime of aggression almost collapsed the negotiations, Harris considered it essential.⁴ In an eleventh hour compromise, jurisdiction over the crime of aggression was included in the Rome Statute, but the crime’s definition and jurisdictional conditions were left to be established later.⁵ It took twelve more years of intricate negotiations to build a consensus on the definition and jurisdiction of the crime.⁶ Kaul, head of the German diplomatic delegation in Rome and a stalwart proponent of criminalizing aggression, later became an ICC Judge and Vice President of the Court. He concluded his lecture in St. Louis speaking directly to his departed friend: “Whitney . . . [y]ou have shown us that power built on contempt of international law and aggression will not stand—we continue to hear you.”⁷

It’s likely that the crime of aggression will be reactivated in 2017 or soon after.⁸ I’ve been asked to contribute to the conference and this special symposium issue of the *Washington University Global Studies Law Review* by imagining future directions of the Court. Certainly, with 2017 rapidly approaching, the time for vigorous imagination is upon us. The Review Conference in Kampala gave us the bare skeleton of a crime and left a great deal to the imagination. The subject of my contribution, in honor of Whitney Harris, will be the *mens rea* of the crime of aggression. As all criminal lawyers know, when it comes to substantive crimes, *mens rea* issues are pivotal in determining responsibility and punishment. *Mens rea* is, after all, a “safeguard for beliefs firmly embedded ‘within . . . [the criminal law’s] traditions of individual liberty, responsibility and duty.’”⁹

3. *Id.* at 4.

4. *Id.* at 3.

5. Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT’L L.J. 161, 162 (2008).

6. See Stefan Barriga, *Negotiating the Amendments on the Crime of Aggression*, in CRIME OF AGGRESSION LIBRARY: THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION 3, 5 (Stefan Barriga & Claus Kreß eds., 2012) (discussing the negotiations from 1998 to 2010).

7. Kaul, *supra* note 2, at 16.

8. See David Scheffer, *Adoption of the Amendments on Aggression to the Rome Statute of the International Criminal Court*, AM. SOC’Y INT’L L. BLOG (June 13, 2010, 11:14 AM), <http://iccreview.asil.org/?p=174> (remarking that he “would be surprised if, by January 1, 2017, the 30-State Party requirement will not have been met”); Hans-Peter Kaul, *Is It Possible to Prevent or Punish Future Aggressive War-Making?*, FORUM FOR INT’L CRIM. & HUMAN. L. 1, 2 (2011) (“There is little doubt that this treaty, the Rome Statute, will soon have an article *8bis* and articles *15bis* and *15ter* incorporating the crime of aggression.”); William A. Schabas, *An Assessment of Kampala: The Final Blog*, THE ICC REVIEW CONFERENCE: KAMPALA 2010 (June 17, 2010, 10:09 AM), <http://iccreview.conference.blogspot.com/2010/06/assessment-of-kampala-final-blog.html> (“Although the amendment requires thirty ratifications and a positive decision by the States parties, this should not pose a serious problem, and both conditions should be fulfilled by 1 January 2017 or shortly thereafter.”).

9. Kelly A. Swanson, *Criminal Law: Mens Rea Alive and Well: Limiting Public Welfare Offenses—In Re C.R.M.*, 28 WM. MITCHELL L. REV. 1265, 1267 (2002) (quoting *U.S. v. Cordoba-Hincapie*, 825 F. Supp. 485, 496 (E.D.N.Y. 1993)).

Today, most people deem a defendant who lacks a culpable mental state unworthy of punishment.¹⁰

The starting point for this exploration of the *mens rea* of the crime of aggression is its elements.¹¹ The elements are an official ICC document clarifying the culpable mental state that applies to each aspect of the conduct, consequences, and circumstances constituting the crime.¹² They are meant to “assist the Court in the interpretation and application” of the Rome Statute.¹³ According to Professor Roger Clark, the elements have been “central to the way the Chambers have been going about their tasks.”¹⁴

Fortunately, I won’t be the first scholar to brave the elements. The first, and still the most intrepid, was Clark himself. As a diplomatic representative for Samoa, he played a leading role in the drafting of the elements. Clark later wrote a paper in 2001 about this exercise—he called it an anthropology of treaty-making—which also amounted to an elaboration on the work of the Preparatory Commission.¹⁵ His 2008 article, published in the New Zealand Yearbook of International Law, examines the way the elements of crimes were employed by the judges in the early jurisprudence of the ICC.¹⁶ In an article published just before the ICC Review Conference, Clark writes about negotiating the elements of the fledgling crime of aggression.¹⁷ This 2009 paper includes a revealing, if brief, discussion of the *mens rea* of the crime.¹⁸

Two other sources are foundational to this analysis of the *mens rea* of the crime of aggression. In April 2009, as the work of the Special Working Group on the Crime of Aggression (“SWGCA”) was wrapping up, a small cadre of legal experts and diplomats was invited to an informal retreat in

10. See Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1308 (2011) (discussing how punishments are applied to crimes with varying mental states).

11. See generally Kampala Outcome, *supra* note 1.

12. See *Elements of Crimes: General Introduction*, INT’L CRIM. CT., http://www2.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf (last visited Feb. 10, 2013).

13. *Id.* ¶ 1.

14. Though the Pre-Trial Chamber I has, at least in Clark’s view, also departed from the structure of the Statute and Elements in important ways. See Roger S. Clark, *Elements of Crimes in Early Confirmation Decisions of Pre-Trial Chambers of the International Criminal Court*, 6 N.Z. Y.B. INT’L L. 209, 210 (2008).

15. Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 CRIM. L. F. 291, 292 (2001).

16. Clark, *supra* note 14, at 210.

17. Roger S. Clark, *Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It*, 20 EUR. J. INT’L L. 1103 (2009).

18. *Id.* at 1111–13.

Montreux by the Swiss Department of Foreign Affairs to draft the elements of the crime of aggression. Frances Angaddi, Greg French, and James Potter, legal experts and diplomatic representatives from Australia, contributed a chapter to the Crime of Aggression Library about this meeting.¹⁹ SWGCA Chair Christian Wenaweser and his team then based their *2009 Chairman's Non-paper on the Elements of Crimes*, the other foundational source, on the work of the Montreux group.²⁰ With only minor changes, the elements of the crime of aggression conceptualized in Montreux became the official elements adopted alongside the definition and jurisdictional conditions of the crime at the 2010 Review Conference in Kampala.²¹ The work of Clark, Anggadi *et al.*, and Chairman Wenaweser are, therefore, my starting point.

II. BRAVING THE ELEMENTS

Articles 30 and 32 of the Rome Statute are part of the so-called “general” part and, therefore, apply to all ICC crimes,²² including the newly defined crime of aggression. Article 30 pertains to the mental elements of the ICC crimes as distinguished from the material elements. The material element is equivalent to the *actus reus* in the common law, and the mental element serves the function of the *mens rea*.²³ Article 32 deals with mistakes of fact and law and is, therefore, also relevant when establishing the mental element of the crime of aggression because these defenses can negate the necessary mental element.²⁴

The material elements of ICC crimes can be broken down into conduct, consequences, and circumstances. These three terms are not defined in the Statute.²⁵ Clark, careful not to speak for the drafters, defines conduct as an act or omission.²⁶ Consequences, as Clark defines them, are the results of

19. Frances Anggadi, Greg French & James Potter, *Negotiating the Elements of the Crime of Aggression*, in CRIME OF AGGRESSION LIBRARY: THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION 58, 58 (Stefan Barriga & Claus Kreß eds., 2012).

20. *2009 Montreux Draft Elements of Crimes*, in CRIME OF AGGRESSION LIBRARY: THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION 669, 669 (Stefan Barriga & Claus Kreß eds., 2012).

21. Anggadi *et al.*, *supra* note 19, at 64.

22. Rome Statute of the International Criminal Court arts. 30, 32, July 1, 2002, 21 U.N.T.S. 90 [hereinafter Rome Statute].

23. Kari M. Fletcher, *Defining the Crime of Aggression: Is There an Answer to the International Criminal Court's Dilemma?*, 65 A.F.L. REV. 229, 258–59 (2010) (discussing the mental and material elements of the crime of aggression using common law terminology of *mens rea* and *actus reus*).

24. Rome Statute, *supra* note 22, art. 32.

25. Clark, *supra* note 15, at 306.

26. *Id.*

an act or omission.²⁷ Overlap between these terms, and confusion, occurs for people who take conduct to include causation and results.²⁸ The term “circumstances” is the most difficult of the three aspects of the material element of the crime to define. Clark points out that the problem of defining “circumstances,” or “attendant circumstances,” is not unique to the Rome Statute.²⁹ Legal scholars and the drafters of the Model Penal Code in the United States have also wrestled with the distinction between conduct and circumstances.³⁰ Clark takes some comfort in the fact that we know a circumstance when we see it: “If I kill a living being, it is only murder if the being is a human one.”³¹ This imperfect breakdown of the material element is nonetheless important—it becomes the basis for the mental element, or *mens rea*, of every ICC crime.

There are only two culpable mental states in the Rome Statute: intent and knowledge.³² There is no mention in the statute of recklessness or negligence. The mental states of intent and knowledge apply in different ways to the material elements of conduct, consequences, and circumstances. For the conduct element of a crime, the defendant has the culpable mental state if he or she “means [i.e., intends] to engage in the conduct.”³³ For the consequence element, the defendant has the culpable mental state if he or she “means to cause that consequence or is aware [knows] that it will occur in the ordinary course of events.”³⁴ The culpable mental state for the circumstance element is also knowledge. A defendant who knows that a required circumstance exists, such as the existence of an armed conflict for war crimes, has the culpable mental state for this material element of the crime.³⁵

The elements of the crime of aggression, as contained in the Kampala Outcome (Annex II) are reproduced below:

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

27. *Id.*

28. *Id.*

29. *See id.*

30. *Id.*; *see generally* American Law Institute, Model Penal Code (1962).

31. Clark, *supra* note 15, at 306.

32. Rome Statute, *supra* note 22, art. 30; Elements of Crimes, *supra* note 12, ¶ 2.

33. Rome Statute, *supra* note 22, art. 30(2)(a).

34. *Id.* art. 30(2)(b).

35. *Id.* art. 30(3).

2. The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression—the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations—was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.³⁶

The first element sets out the culpable conduct of the crime of aggression. As a material element that concerns conduct, the culpable mental state is *intention*: “[t]hose who open books and sit down in easy chairs generally intend to read. . . . Certain acts require and entail having certain mental functions.”³⁷ The defendant must mean to (in other words, have the purpose to) plan, prepare, initiate, or execute an act of aggression. Planning, preparing, initiating, or executing is to the crime of aggression what pulling the trigger of a gun is to murder. Both are conduct that results in harmful consequences. A suggestion to have separate elements for each conduct verb was rejected by the majority of experts at Montreux as being unnecessarily complicated.³⁸ The experts also considered the issue of causation, or to what degree the defendant’s intentional planning, preparation, initiation, or execution must have caused the act of aggression in relation to other factors and participants in the act.³⁹ The group ultimately noted that the causation issue should be determined by the judges hearing a particular case.⁴⁰ Under this element, the defendant does not need to have the specific purpose to commit an act contrary to the UN

36. Kampala Outcome, *supra* note 1, Annex II, at 21.

37. Adam Candeub, *Motive Crimes and Other Minds*, 142 U. PA. L. REV. 2071, 2101 (1994).

38. Anggadi et al., *supra* note 19, at 65.

39. *Id.*

40. *Id.*

Charter. In fact, nowhere in any of the elements or in the definition of aggression itself is there a requirement that the perpetrator intend to violate the UN Charter.⁴¹ Element 4 and the special introduction to the elements of the crime of aggression address this subtle and potentially problematic issue more directly.

The second element sets out the leadership requirement. The crime of aggression can only be committed by a person “in a position [to effectively] exercise control over or to direct the political or military action of a State.”⁴² Followers cannot commit the crime. This is a material element that sets out an attendant circumstance that must be present for an act to be properly classified as a crime of aggression. Consequently, the defendant must *know* that he or she is a leader of a state, and is in a position to effectively exercise control (not merely formally, like a figurehead), or to direct the political or military action of a state.⁴³ A charismatic religious leader who has effective control over political action of a state (e.g., the state bureaucracy follows his edicts) but is not aware of the extent of his influence cannot, consequently, commit the crime of aggression. He does not have the *mens rea* required in the second element. More than one leader—an entire cabinet, for example—can be liable if each individual is aware that he is exercising control, even jointly.⁴⁴

The third element is the state or collective act of aggression. The individual conduct set out in Element 1 (planning, preparation, initiating or executing) causes the state act. The state act is a material element, not a mental one. It is not individual conduct. The passive voice in the statement, “[t]he act of aggression . . . was committed,” signals that Element 3 is not a conduct element.⁴⁵ The question, which remains unresolved, is whether Element 3 is a consequence⁴⁶ or circumstance element.⁴⁷ In a break with the pattern in the 2002 elements of the crimes, the next element, Element 4, sets out the culpable mental state required for Element 3. In this way, Element 4 renders moot the question of whether Element 3 is a consequence⁴⁸ or circumstance element.

41. See Kampala Outcome, *supra* note 1, Annex II, at 21.

42. Kampala Outcome, *supra* note 1, Annex II, at 21 (element 2).

43. Anggadi et al., *supra* note 19, at 67.

44. *Id.*

45. Anggadi et al., *supra* note 19, at 69 (discussing the drafters’ convention of using the active voice only for the individual participant, with other sentences in the passive voice).

46. Rome Statute, *supra* note 22, art. 30(2)(b).

47. *Id.* art. 30(3).

48. *Id.* art. 30(2)(b).

What Element 3 does resolve is the question of whether the state act needs to be perfected (must have actually occurred) for liability to attach to a leader who planned, prepared, initiated, or executed an act of aggression. The Montreux group agreed that culpable individual conduct committed purposefully will only result in liability if the state act of aggression actually occurs.⁴⁹ There will be no liability for an attempted crime of aggression that fails.⁵⁰ Nonetheless, an armed attack can arguably exist at the moment it is launched, when the attack is completed, or somewhere in between. This means that the smoking gun in Element 3, in the unforgettable words of Condoleezza Rice, does not need to be a mushroom cloud.⁵¹

Element 4 is the most intricate, and perhaps also the most impervious, of them all. It establishes that the mental state required for the state/collective act (Element 3), is knowledge.⁵² The difficult question is, *knowledge of what, exactly?* That a missile was fired? That it was fired across a border? That it was fired across a border without first obtaining a Security Council Resolution under Chapter VII of the UN Charter? Or that the Security Council explicitly warned against the use of military force in this dispute, and a missile was fired across a border anyway? The Montreux group wrestled with how much knowledge to require of a perpetrator before Element 3 is satisfied and how to avoid the legal problems inherent in a requirement to prove knowledge of law.⁵³ However, it follows from the criminal law that knowledge of fact, if left unchecked, forthwith fades into knowledge of law.⁵⁴

Under Element 4, the perpetrator needs to know about the “factual circumstances” that establish that such a use of armed force is

49. Anggadi et al., *supra* note 19, at 69.

50. Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, Int'l Crim. Ct., at 9–10, paras. 39–50, June 8–11, 2006, Doc. ICC-ASP/5/SWGCA/INF.1 (Sept. 5, 2006), available at http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/ICC-ASP-5-SWGCA-INF1_English.pdf.

51. See *Top Bush Officials Push Case Against Saddam*, CNN (Sept. 8, 2002), http://articles.cnn.com/2002-09-08/politics/iraq.debate_1_nuclear-weapons-top-nuclear-scientists-aluminum-tubes?_s=PM:ALLPOLITICS (quoting Condoleezza Rice, acknowledging that uncertainty lies in knowing how close an opponent is to possessing the capability to launch a nuclear attack, nevertheless advocating a preemptive position and stating “[w]e don’t want the smoking gun to be a mushroom cloud.”).

52. Kampala Outcome, *supra* note 1, Annex II, at 5 (element 4).

53. Anggadi et al., *supra* note 19, at 71.

54. See Clark, *supra* note 15, at 309–10 (Even in domestic legal systems, “where the lines lie between fact and law is often hard to discern. . . . It is no defence to bigamy to claim a belief that polygamy is lawful, but there is a defence for the actor who believes that the previous marriage had terminated in divorce, even where this involves some mistake as to the laws of divorce.”) (footnote omitted).

inconsistent with the Charter of the United Nations. The special introduction to the Elements narrows the meaning of Element 4 somewhat by making it clear that no legal evaluation as to whether the use of armed force is inconsistent with the Charter of the United Nations is necessary to establish knowledge.⁵⁵ The participants at Montreux were concerned that leaders would deliberately avoid requesting legal advice pertaining to the use of force or remain willfully blind to it in order to insulate themselves from legal accountability.⁵⁶ In domestic criminal law, willful blindness, “cutting off of one’s normal curiosity by effort of the will,” is a standard culpable mental state.⁵⁷ The U.S. experience with the so-called torture memos, where political pressure skewed the content of supposedly objective legal advice, was also fresh on the participants’ minds.⁵⁸

The SWGCA Chairman, in his 2009 *Non-paper on the Elements of Crimes*, trims some more uncertainty at the other end of the knowledge spectrum when he writes:

To satisfy proposed Element 4, it would not be sufficient merely to show that the perpetrator knew of facts indicating that the State used armed force. It would also be necessary to show that the perpetrator knew of facts establishing the inconsistency of the use of force with the Charter of the United Nations.⁵⁹

The Chairman’s examples of relevant facts that the defendant must know about to satisfy Element 4 can be characterized as brackish, or semi-legal:⁶⁰ “the fact that the use of force was directed against another State, the existence or absence of a Security Council resolution, the content of a Security Council resolution, the existence or absence of a prior or imminent attack by another state.”⁶¹

55. Kampala Outcome, *supra* note 1, Annex II, Intro., at 21, para. 2.

56. Anggadi et al., *supra* note 19, at 71; *see also* 2009 Chairman’s Non-Paper on the Elements of Crimes, in CRIME OF AGGRESSION LIBRARY: THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION 677, 682, para. 18 (Stefan Barriga & Claus Kreß eds., 2012) (discussing how a perpetrator may actively avoid legal advice, as well as rely on disreputable advice about the legality of State acts).

57. Shawn D. Rodriguez, *Caging Careless Birds: Examining Dangers Posed by the Willful Blindness Doctrine in the War on Terror*, 30 U. PA. J. INT’L L. 691, 718 (2008) (quoting United States v. Carrillo, 435 F.3d 767, 780 (7th Cir. 2006)).

58. Neil A. Lewis, *A Guide to the Memos on Torture*, N.Y. TIMES, http://www.nytimes.com/ref/international/24MEMO-GUIDE.html?_r=0 (last visited Apr. 26, 2013).

59. 2009 Chairman’s Non-Paper, *supra* note 56, at 683, para. 20.

60. The same phenomenon of brackish legal-factual knowledge arises in relation to certain war crimes and crimes against humanity. *See* Rome Statute, *supra* note 22, art. 7(1)(d) (elements 2–3), art. 8(2)(a)(i) (elements 2–3).

61. 2009 Chairman’s Non-Paper, *supra* note 56, at 683, para. 20.

The knowledge requirement in Element 4 becomes even subtler when it is read in conjunction with Article 32(2) of the Rome Statute, the section providing a mistake of law defense.⁶² Under Article 32(2), a mistake of law may be a ground for excluding criminal responsibility if it negates the mental element of a crime.⁶³ In his 2001 article on the mental element in international criminal law, Roger Clark contributed a helpful rule of thumb: the mistake of law defense that “‘works’ is normally a mistake about some law which is collateral to the central criminal proscription”⁶⁴ Arguably, a mistake about the existence of a Security Council resolution authorizing the use of armed force, at least one that is analogous to the bigamist’s mistake of law defense that his prior marriage had been legally terminated in divorce, would fit the bill.

Yet, as the chairman rightly notes in his 2009 *Non-paper on the Elements of Crimes*, requiring knowledge of factual circumstances, as Element 4 does, may limit the availability of mistake of law defenses.⁶⁵ A leader who fired a missile in response to an imminent attack, a legal grey area in international law, is precluded from claiming mistake of law if simple knowledge that his state’s missile was fired across a neighbor’s border is enough to establish the culpable mental state for Element 4. As Clark points out, limiting the scope of mistake of law defenses in this way could possibly be found by the Court to violate the Rome Statute:⁶⁶ “The Court itself has the ultimate word on whether creative elements such as these are consistent with the Statute.”⁶⁷

Anggadi, French, and Potter seem satisfied that Elements 5 and 6 resolve the problem of identifying the culpable mental state of the perpetrator of the crime of aggression when it comes to the state/collective act.⁶⁸ Element 5 is a material element requiring that the state act of aggression, by its character, gravity, and scale, constitute a “manifest” violation of the UN Charter.⁶⁹ Element 6, the mental element that goes with Article 5, requires that the perpetrator *knows* of the factual circumstances amounting to a “manifest” violation of the UN Charter.⁷⁰

62. See Clark, *supra* note 15, at 308–12, for a revealing commentary on Article 32 of the Rome Statute.

63. Rome Statute, *supra* note 22, art. 32(2).

64. Clark, *supra* note 15, at 310 (quotation marks in original).

65. 2009 *Chairman’s Non-Paper*, *supra* note 56, at 683, para. 21.

66. Rome Statute, *supra* note 22, art. 9(3).

67. Clark, *supra* note 17, at 1112.

68. Anggadi et al., *supra* note 19, at 75–76.

69. Kampala Outcome, *supra* note 1, Annex II, at 21 (element 5).

70. *Id.* (element 6).

Anggadi, French, and Potter's point is that arguing mistake of law is difficult for a defendant to do when he is involved in a *manifest* violation of the UN Charter.⁷¹ The complication, however, is that establishing the defendant knew that a manifest violation of the UN Charter took place seems to require proving that the defendant had some knowledge of the law of the Charter, not just factual circumstances—the requirement in Elements 4 and 6.⁷²

The special introduction to the Elements of the Crime of Aggression⁷³ explains that “manifest” is an objective determination and therefore up to the Court to establish by considering what a reasonable leader should know.⁷⁴ The challenge in Montreux was to imagine a scenario where a state committed an act of aggression that a leader could reasonably believe *did not* amount to a manifest violation of the UN Charter. The scenario envisaged by the participants at Montreux was a leader who planned, and therefore had knowledge of, a small-scale border skirmish that got out of control and, unbeknownst to him, resulted in a large-scale invasion of a neighboring state (a manifest violation of the UN Charter).⁷⁵ The Montreux group acknowledged that the leader in a scenario like this, arguably, should not be subject to criminal liability.⁷⁶ If the Court finds that a reasonable leader would not have known that the act of aggression would be a manifest violation of the UN Charter, he would be absolved of individual criminal responsibility for the crime of aggression.⁷⁷ A more troubling scenario will arise when a leader deploys armed force in what she, in good faith, thinks is self-defense or justified humanitarian intervention, and the Court finds that it is, objectively, a manifest violation of the UN Charter. Though ignorance of the law is never an excuse in domestic criminal law regimes, an “honest and reasonable” mistake often is.⁷⁸ Under the elements, the Court will be expected, on a case-by-case basis, to distinguish between objectively reasonable defensive or humanitarian actions and manifestly illegal ones.

71. See Anggadi et al., *supra* note 19.

72. The special introduction to the elements explains, “[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to the ‘manifest’ nature of the violation of the Charter of the United Nations,” but it is hard to imagine how the defendant can know that the state act is a manifest violation without some knowledge of the law of the Charter. Kampala Outcome, *supra* note 1, Annex II, Special Introduction, at 21, para 4.

73. Kampala Outcome, *supra* note 1, Annex II, Special Introduction, at 21, para. 3.

74. Kampala Outcome, *supra* note 1, Annex II, Special Introduction, at 21, para. 3–4.

75. Anggadi et al., *supra* note 19, at 76.

76. *Id.*

77. State responsibility for a violation of the UN Charter may still exist as a possible recourse.

78. See Clark, *supra* note 15, at 308–09.

In most legal systems in the world, a court in a criminal case can impute knowledge.⁷⁹ Absent honest disclosure, it is simply not possible to get at the internal mental state of a defendant without inferring it from external cues. The statement of this principle in Illinois criminal law, for example, is found in the case of *People v. Conley*: “[i]ntent can be inferred from the surrounding circumstances.”⁸⁰ The ordinary presumption, writes Professor Joshua Dressler in his discussion of *Conley*, “is that a person ‘intends the natural and probable consequences of his actions.’”⁸¹ Words, actions, the minutes of meetings attended, the armaments used in an attack, and other factors that shed light on the mental state of the defendant as he commits the material elements of the crime are all relevant. It follows that knowledge, as required in Elements 2, 4, and 6 of the crime of aggression, will be inferred from surrounding circumstances as well.

III. *MENS REA* DEFENSES

Mens rea is an important, even central, consideration when judging whether a defendant has satisfied all of the elements of the crime of aggression. There are different ways that *mens rea* can come into play in an aggression case. When the defendant successfully demonstrates that the prosecution has not satisfied one or more of the elements of the crime, it can be said that the defendant has mounted a successful “failure of proof” defense.⁸² It is a failure of proof defense to show, for example, that a leader-defendant was not aware of the factual circumstances that establish that the use of armed force by his military was inconsistent with the Charter of the United Nations. In such a case, Element 4 is not proven.

The exculpatory defenses of justification and excuse may also arise in aggression cases.⁸³ Justification and excuse defenses can succeed even when the prosecution establishes all of the elements of the crime.⁸⁴ There is a rich literature that tries to capture the essence of these defenses and

79. See generally Shane Darcy, *Imputed Criminal Liability and the Goals of International Justice*, 20 LEIDEN J. INT’L L. 377, 380 (2007).

80. *People v. Conley*, 543 N.E.2d 138, 143 (Ill. App. Ct. 1989).

81. JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 156 (5th ed. 2009).

82. Paul Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 203–05 (1982).

83. See Clark, *supra* note 15, at 318–19.

84. See, e.g., *id.*; Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1171 (1987); JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 207 (6th ed. 2012) (“[t]oday, justified and excused actors are . . . acquitted of the offense and neither is punished for her conduct”); Transcript of Judge’s Order, *People v. Lagrou*, No. 85-000098 (Mich. Dist. Ct. Mar. 22, 1985).

their distinguishing features.⁸⁵ According to Joshua Dressler, “[i]n its simplest form . . . justified conduct is conduct that is ‘a good thing, or the right or sensible thing, or a permissible thing to do.’”⁸⁶ The defendant causes a legally recognized harm but, as Paul Robinson explains, “that harm is outweighed by the need to avoid an even greater harm or to further a greater societal interest.”⁸⁷ “Whereas a justification negates the social harm of an offense,” writes Dressler, “an excuse negates the moral blameworthiness of the actor for causing the harm.”⁸⁸ Robinson posits that the deed may be wrong, but the actor is not responsible for his deed and should therefore be excused.⁸⁹

A number of defenses are contained in Part 3 of the Rome Statute, the general section applicable to all ICC crimes. The excuses of insanity,⁹⁰ intoxication,⁹¹ duress,⁹² and superior orders (narrowly conceived)⁹³ are all specifically set out in Part 3. Mistake of fact and law, which usually qualify as failure of proof defenses that vitiate the *mens rea* element of the crime, are also included.⁹⁴ Self-defense and defense of others, familiar justification defenses in most criminal law jurisdictions, make an appearance in Part 3 of the Rome Statute as well.⁹⁵ Perhaps most significantly, the Court may consider other grounds for excluding criminal responsibility that are not explicitly included in the Rome Statute.⁹⁶ It is either here, in Article 31(3), and/or in Article 22 on *nullum crimen sine lege*⁹⁷ that Michael Glennon’s legality challenge may one day be leveled.⁹⁸

Not all of these are *mens rea* defenses. Most excuses vitiate the *actus reus* of the crime.⁹⁹ Bentham’s view is that excuses exclude punishment for “conduct [that] is nondeterrable,” lest the law cause “unnecessary

85. See Dressler, *supra* note 84, at 1155.

86. *Id.* at 1161.

87. Robinson, *supra* note 82, at 213.

88. Dressler, *supra* note 84, at 1163.

89. Robinson, *supra* note 82, at 221.

90. Rome Statute, *supra* note 22, art. 31(1)(a).

91. *Id.* art. 31(1)(b).

92. *Id.* art. 31(1)(d).

93. *Id.* art. 33.

94. *Id.* art. 32.

95. *Id.* art. 31(1)(c).

96. *Id.* art. 31(3).

97. “No crime without law.” This principle, like the principle of legality or nonretroactivity, stands for the idea that an individual can only be held responsible for acts that were illegal at the time of their commission. See, e.g., Rehan Abeyratne, *Superior Responsibility and the Principle of Legality at the ECCC*, 44 GEO. WASH. INT’L L. REV. 39, 41 (2012).

98. See Michael Glennon, *The Blank Prose Crime of Aggression*, 35 YALE J. INT’L L. 71 (2010).

99. They vitiate both the *actus reus* and the *mens rea*.

evil.”¹⁰⁰ According to H.L.A. Hart, excuses limit liability to people who have freely chosen to act.¹⁰¹ Under either theoretical explanation, people who commit crimes—including the crime of aggression—while not in their right mind, can raise an exculpatory excuse defense. Insanity,¹⁰² intoxication,¹⁰³ superior orders,¹⁰⁴ and duress that impedes free choice, unlike situations involving a choice of evils, all overcome the will. Consequently, crimes committed in this state cannot be deterred.¹⁰⁵ These defenses are, consequently, outside the scope of this *mens rea* discussion.

Self-defense,¹⁰⁶ defense of others,¹⁰⁷ and duress that involves a choice of evils (rather than duress impeding free choice)¹⁰⁸ are all justification defenses that may one day be raised in an aggression case. Dressler explains, “[a] justified act is one that ‘the law does not condemn, or even welcomes.’”¹⁰⁹ Paul Robinson states, “[a]ll justification defenses have the same internal structure: *triggering conditions* permit a *necessary and proportional response*.”¹¹⁰ Justification defenses pertain specifically to *mens rea* because, unlike most excuse defenses, the defendant has made a meaningful choice. In the context of an aggression case, self-defense and defense of others are relevant in two of the most important grey-area scenarios: anticipatory self-defense in response to an imminent attack and humanitarian intervention.

Article 31(1)(c) of the Rome Statute, on self-defense and the defense of others, is reproduced here in relevant part:¹¹¹

100. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 160–62 (J. Burns & H. L. A. Hart eds., 1970), *quoted in* Sanford Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 263 (1987).

101. H. L. A. Hart, *Legal Responsibility and Excuses*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 46–49 (2008).

102. Rome Statute, *supra* note 22, art. 31(1)(a).

103. *Id.* art. 31(1)(b) (“unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court”).

104. *Id.* art. 33; Clark, *supra* note 17, at 1110 (calls Article 33 of the Rome Statute “a very badly drafted provision which permits a defence of superior orders in some cases, perhaps only in the case of war crimes.”). Clark refers to Otto Triffterer, *Article 33, Superior Orders and Prescription of Law*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT—OBSERVERS’ NOTES, ARTICLE BY ARTICLE 915 (2d ed. 2008).

105. It should, however, be noted that behavior that placed the defendant in the mentally or morally compromised situation (i.e., voluntarily induced intoxication) can sometimes be deterred.

106. Rome Statute, *supra* note 22, art. 31(1)(c).

107. *Id.* art. 31(1)(c).

108. *Id.* art. 31(1)(d).

109. DRESSLER, *supra* note 84, at 208.

110. Robinson, *supra* note 82, at 216 (emphasis in original).

111. This excludes the language that is specific to war crimes.

The person acts reasonably to defend himself or herself or another person . . . against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person. . . . The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph¹¹²

This provision raises a number of legal questions that concern the minimum triggering conditions to activate the defense, the imminence of the threat (the necessity criterion), the unlawfulness of the threat, and the proportionality of the defensive response. The key *mens rea* question involved, however, pertains to the reasonableness requirement¹¹³ and how far the Court should go in taking the defendant's specific predicament and characteristics into account in its judgment. In other words, is the "reasonable person" a purely objective or a mixed standard in Article 31(1)(c)?

In the U.S. case of *State v. Leidholm*, for example, the court announced this mixed reasonableness standard when evaluating a self-defense claim: "an accused's actions are to be viewed from the standpoint of a [reasonable] person whose mental and physical characteristics are like the accused's and who sees what the accused sees and knows what the accused knows."¹¹⁴ This mixed reasonableness standard can be contrasted with a purely objective standard that evaluates the defendant's mental state against the ideal of the reasonable person, remaining deliberately blind to context, the knowledge possessed by the defendant, and his personal characteristics.¹¹⁵ The *Leidholm* standard can also be contrasted with a subjective standard that takes the defendant's actual context, knowledge, and personal characteristics into account when determining the applicability of Article 31(1)(c) defenses.

There has been a tendency in the criminal law, at least when it comes to women who kill their abusive husbands, to move toward an increasingly subjective-looking mixed standard in self-defense claims.¹¹⁶ The Canadian

112. Rome Statute, *supra* note 22, art. 31(1)(c).

113. Presumably an honesty requirement will be read into Article 31(1)(c). For self-defense to succeed in national jurisdictions, the defendant must have acted in an "honest and reasonable" belief that the threat was imminent. See Clark, *supra* note 15, at 308–09 (discussing the inclusion of an honesty and reasonableness of mistake requirement in the ICC negotiations).

114. *State v. Leidholm*, 334 N.W.2d 811, 818 (N.D. Sup. Ct. 1983).

115. *Id.* at 816–17.

116. See, e.g., *R v. Lavallee*, [1990] 1 S.C.R. 852 (Can.); *People v. Humphrey*, 921 P.2d 1, 6–10 (Cal. Sup. Ct. 1996) (holding that evidence of battered woman's syndrome is relevant to the reasonableness and subjective existence of a battered woman's need to defend herself against her

case of *R. v. Lavallee* is representative.¹¹⁷ Lavallee shot her abusive partner in the back of the head as he walked away and claimed that she feared for her life and saw no other alternative. Even though the threat did not meet the traditional imminence threshold, Lavallee was acquitted because, for a person suffering from battered woman's syndrome, it was reasonable, in light of the pattern of interactions between her and the deceased, to perceive the threat as imminent and to see no other escape. The idea gained some traction in the international law literature and culminated in a discussion of "battered nation syndrome."¹¹⁸ In spite of the indelicate catchphrase title, this idea is likely to have an influence on the interpretation of the Kampala Outcome if and when the perception of imminence becomes a legal issue. It remains to be seen whether the Court hearing an aggression case will adopt an objective or a mixed standard when faced with a self-defense or defense of others claim.

Like self-defense and defense of others, duress becomes a *mens rea* issue when the defendant claiming it has deliberately chosen to cause the prohibited social harm.¹¹⁹ When distinguishing self-defense and defense of others (Article 31(1)(c) defenses) from duress (an Article 31(1)(d) defense), one might imagine that a villain is holding a gun to the head of the leader or his child and threatening to shoot unless that leader gives the order to launch a missile at another state. Like self-defense and defense of others, duress can only succeed as a defense if the threat is imminent.¹²⁰ Presumably, the question of the appropriate reasonableness standard, objective, or mixed that arises in 31(1)(c) will also surface in duress cases. The threat should not have to be caused by another person. Many domestic jurisdictions extend the defense to situations of necessity, where a threat is caused by natural, rather than man-made, circumstances. A leader who orders an invasion of another state to rescue his citizens from a culminating tsunami that only his oceanographers are aware of should be able to raise a defense.

abusive husband); *Bechtel v. State*, 840 P.2d 1, 10–13 (Okla. Crim. App. 1992) (applying Oklahoma's "hybrid" subjective and objective standard in a battered woman syndrome murder prosecution).

117. See generally *Lavallee*, 1 S.C.R. at 852.

118. See Michael Skopets, *Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law*, 55 AM. U. L. REV. 753 (2006); Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 215–16 (2004); Shana Wallace, Comment, *Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defense*, 71 U. CHI. L. REV. 1749, 1751 (2004).

119. Duress is an *actus reus* issue when it vitiates the will and the defendant acts automatically, because such a defendant lacks the volition to act. See, e.g., *State v. Utter*, 479 P.2d 946, 947–48 (Wash. Ct. App. 1971).

120. DRESSLER, *supra* note 84, at 298.

An important *mens rea* criterion that the Court faced with a duress defense will need to consider, one that does not arise in self-defense and defense of other cases, is whether the defendant “intend[ed] to cause a greater harm than the one sought to be avoided.”¹²¹ The proportionality criteria in self-defense and defense of other cases is similar, but not exactly the same. In duress cases, for example, the prosecution will need to prove that the defendant intended to cause a greater harm and, therefore, knew that it was a greater harm than the one sought to be avoided.¹²² Presumably the duress defense would have failed in the 2006 case of Gilad Shalit, the Israeli soldier captured by Hamas, who Israel launched a large-scale armed conflict, in part, to free.¹²³ The duress defense might have succeeded, however, following the 1986 Entebbe Airport raid, conducted by Israel to free over one hundred Israeli and Jewish passengers from a hijacked Air France plane when Ugandan leader Idi Amin refused to act.¹²⁴ In the Entebbe raid, the harm caused—a geographically narrow and time-limited invasion and the deaths of the hijackers—was calculated to be less than the one sought to be avoided, the death of many passengers. This is unlike the return of Gilad Shalit, which involved large-scale armed conflict, was not geographically narrow or time limited, and advanced other strategic goals beyond the eventual return of Shalit.¹²⁵

According to Roger Clark, “[i]t is, for example, here [Article 31(1)(d)] that arguments about the legality of humanitarian intervention may need to be structured.”¹²⁶ The leader caused the social harm—the invasion of another state—but it was necessary to prevent a larger harm: a large-scale humanitarian disaster. The act of aggression was therefore justified and can succeed as a complete exculpatory defense.

Thomas Franck, in *Recourse to Force*,¹²⁷ makes a similar argument that humanitarian intervention amounts to necessity but adds a creative modification of potential use to the Court in an aggression case.¹²⁸ Franck bases his reasoning on the nineteenth century lifeboat cases of *The Queen*

121. Rome Statute, *supra* note 22, art. 31(1)(d).

122. *Id.*

123. See Orly Halpern, *What the Gaza War Meant for Israel*, ALJAZEERA, <http://www.aljazeera.com/focus/gazaoneyearon/2010/2010/01/201011392050370701.html> (last updated Jan. 19, 2010).

124. *BBC On This Day: 4 July 1976: Israelis Rescue Entebbe Hostages*, BBC, http://news.bbc.co.uk/onthisday/hi/dates/stories/july/4/newsid_2786000/2786967.stm (last visited Dec. 11, 2012).

125. See Halpern, *supra* note 123.

126. See Clark, *supra* note 17, at 1110.

127. THOMAS FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 174–75 (2002).

128. *Id.*

*v. Dudley and Stephens*¹²⁹ and *United States v. Holmes*¹³⁰ where shipwrecked sailors killed and ate one of their crewmembers to survive at sea. Article 31(1)(d) is a complete exculpatory defense to aggression and the other ICC crimes. Yet, in these lifeboat cases, necessity did not succeed as a complete exculpatory defense to murder. As Franck notes, circumstances amounting to necessity “effectively mitigated the penalties imposed on those whose acts were found to have been illegal but, in the extreme circumstances, justifiable.”¹³¹ Ignoring for the moment the theoretical problem of whether a legitimately justified act can actually be illegal,¹³² Franck’s mitigation of penalties theory amounts to a supplementary or alternative defense alongside the exculpatory duress defense set out in Article 31(1)(d) of the Rome Statute and invoked by Roger Clark in the context of humanitarian intervention.¹³³

An interesting idiosyncrasy of the Kampala amendments is that the self-defense and defense of others issues can surface at various stages of the proceedings, not only when it comes to *mens rea* defenses. The question of whether a particular state act amounts to aggression, self-defense, or humanitarian rescue first becomes a central consideration as early as the jurisdictional phase.¹³⁴ The Court addresses the question again when considering the substantive crime and, in particular, Element 3, concerning the state act. This substantive determination is independent of the determination for the purposes of jurisdiction and can even contradict it.¹³⁵

The questions of self-defense and/or humanitarian rescue will conceivably arise again after the Court determines that aggression has occurred. Pursuant to Elements 5 and 6, the Court must then evaluate whether the act of aggression was a “manifest” violation of the UN Charter. A particular use of force can, under the Kampala Outcome, be illegal without amounting to a manifest violation of the UN Charter. The paradigmatic examples are self-defense in response to an imminent attack and genuine humanitarian rescue. But not even the substantive determination that the state committed a manifest violation of the UN

129. *R v. Dudley & Stephens*, [1884] 14 Q.B.D. 273 (Eng.).

130. *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Penn. 1842).

131. FRANCK, *supra* note 127, at 179.

132. *See Dressler, supra* note 84, at 1161 (“A justification . . . negates the social harm of an offense.”).

133. *See Clark, supra* note 17, at 1110.

134. Kampala Outcome, *supra* note 1, at 19–20, arts. 15 *bis*, 15 *ter*.

135. *Id.* at 19, art. 15 *bis*, para. 9 (“A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.”).

Charter puts the issue to rest. As discussed earlier, self-defense and defense of others are also exculpatory defenses for a leader in the dock. A judge hearing an aggression case, especially one adopting a mixed reasonableness standard as discussed above, could find that the state committed a manifest violation of the UN Charter, but the defendant-leader who ordered the attack honestly and reasonably believed he was acting in self-defense or to defend others (his people). Finally, a Court that adopts Thomas Franck's mitigation of penalties theory might decide to consider self-defense or defense of others issues at sentencing. Given this range of options for the defense, a defense lawyer who is unable to figure out where to fit his self-defense or humanitarian intervention argument should get stronger spectacles.

Roger Clark thinks that it is extremely unlikely that the final enumerated defense, the defense of superior orders contained in Article 33 of the Rome Statute, will ever work in an aggression case.¹³⁶ Clark's reasoning is that aggression is a leadership crime and is, by definition, inapplicable to followers.¹³⁷ Certainly, it is difficult, though probably not impossible, to imagine a situation where all three requirements of the superior orders defense are met for a leader. For the defense to succeed, the leader-defendant must fulfill the following criteria: be under a legal obligation to obey the orders of his Government; not know that the order was unlawful; and the order cannot be manifestly unlawful.¹³⁸ Even if it is possible to imagine a scenario where a leader with sufficient authority to satisfy Element 2 follows an order (I think it is, particularly in a democracy), the requirement that there be no manifest unlawfulness essentially guarantees that the leader will be acquitted on other grounds (see the preceding paragraph) before the defendant has a chance to raise the superior orders defense. The crime of aggression, recall, requires a manifest violation of the UN Charter.

IV. CONCLUSION

Ultimately, the most important *mens rea* question will be whether, taken as a whole, the mental element satisfies our notions of culpability for the wrong. Is the phenomenon defined in 2010 as the crime of aggression, when scrutinized, sufficiently blameworthy to warrant serious stigma and punishment?

136. Clark, *supra* note 17, at 1110.

137. *Id.*; Kampala Outcome, *supra* note 1, Annex II, at 21 (element 2).

138. Rome Statute, *supra* note 22, art. 33(1)(a-c).

A number of zones within the *mens rea* structure of the crime of aggression may pose a challenge to traditional notions of culpability. The fact that a leader need not mean (have the purpose) to commit a state act of aggression (knowledge will suffice)¹³⁹ may trouble some who are accustomed to criminal law systems which require intent of criminal conduct before punishment will be imposed. The “knowledge of factual circumstances” gloss in Elements 4 and 6 also challenges contemporary notions of culpability in certain scenarios.¹⁴⁰ A leader who has knowledge of a military operation but does not intend to violate the UN Charter can still be punished under some circumstances.¹⁴¹ This creative *mens rea* standard is especially troubling in grey-area scenarios where the exact contours of international law on the use of force are in dispute. Three important examples are self-defense in response to an imminent attack, humanitarian rescue, and cyber-attacks.¹⁴² The fact that grey area scenarios are excluded under the “manifest violation” qualifier offers some comfort. However, “manifest violation” is an objective standard—a rarity in domestic criminal law systems where incarceration or other serious punishment is involved. If knowledge that a missile was fired across a border is enough to satisfy Elements 4 and 6, a Court can simply reject a leader’s honest belief that his state’s acts were defensive or humanitarian, whatever proof he may offer. Furthermore, the “knowledge of factual circumstances” gloss may preclude a mistake of law defense, offending some criminal lawyers.¹⁴³

None of this necessarily crosses the line, even if some aspects of the *mens rea* of the crime of aggression may push against it. Perhaps some challenges to traditional criminal law doctrines are inevitable when conceptualizing a new crime that attributes individual responsibility for a large-scale collective act such as aggression. Certainly, the judges are being asked to chart a new course. It will be up to them, hearing concrete aggression cases and reasoning from existing jurisprudence, to keep the *mens rea* elements within the bounds of contemporary criminal law and to ensure that the fledgling crime accords with evolving notions of culpability.

139. Kampala Outcome, *supra* note 1, Annex II, at 21 (elements 3–4).

140. However, the fact that the “knowledge of factual circumstances” gloss exists in other parts of the Rome Statute in relation to other crimes buttresses the use of this language somewhat.

141. Kampala Outcome, *supra* note 1, Annex II, at 21 (elements 4, 6).

142. Noah Weisbord, *Judging Aggression*, 50 COLUM. J. TRANSNAT’L L. 82, 149–67 (2011).

143. This is so unless the Court accepts the SWGCA Chairman’s interpretation of “knowledge of factual circumstances.” 2009 Chairman’s Non-Paper, *supra* note 56, at 683, para. 20.