

## RESPONSIBILITY OF PRIVATE INDIVIDUALS FOR COMPLICITY IN A WAR OF AGGRESSION

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### ABSTRACT

*The crime of aggression requires that the perpetrator be in a position effectively to exercise control over—or to direct—the political or military action of a state. This requirement, called the “leadership clause,” has led to the view that private individuals are excluded from criminal responsibility because they lack the necessary authority over the state policy. In this Essay, I argue against this dominant view and outline an analytical framework for criminal complicity in a war of aggression.*

### I. INTRODUCTION

Russia’s invasion of Ukraine has renewed global interest in prosecuting individuals responsible for the crime of aggression. There is reason to believe that the planning, preparation, initiation, or execution of an act of aggression that manifestly violates the United Nations Charter entails criminal responsibility under customary international law,<sup>1</sup> as well as under the Rome Statute.<sup>2</sup> Due to limitations on its jurisdiction, the International Criminal Court (ICC), seated in The Hague, may not prosecute the crime of aggression regarding the situation in Ukraine.<sup>3</sup> Nevertheless, there are alternative (national and international) “avenues for [individual] accountability”<sup>4</sup> that pose a set of difficult challenges for international criminal

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<sup>1</sup> Opinions of the Lord of Appeal for Judgment in the cause *R v. Jones* [2006] UKHL 16, [12], [19] (Lord Bingham), [44], [59] (Lord Hoffmann), [96] (Lord Rodger), [97] (Lord Carswell), [99] (Lord Mance); Claus Kreß & Leonie von Holtendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT’L CRIM. JUST. 1179, 1182 (2010); Bing Bing Jia, *The Crime of Aggression as Custom and the Mechanisms for Determining Acts of Aggression*, 109 AJIL 569, 571 (2015); but see Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT’L L. 71, 74 (2010).

<sup>2</sup> See Rome Statute, Art. 8*bis*, July 17, 1998, 2187 UNTS 90.

<sup>3</sup> Int’l Crim. Ct., Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have been closely following recent developments in and around Ukraine with increasing concern.” (Feb. 5, 2022), at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-been-closely-following>.

<sup>4</sup> Sergey Vasiliev, *Aggression Against Ukraine: Avenues for Accountability for Core Crimes*, EJIL:TALK! (Mar. 3, 2022), at <https://www.ejiltalk.org/aggression-against-ukraine-avenues-for-accountability-for-core-crimes>.

law.<sup>5</sup> One of those challenges is the scope of criminal responsibility, specifically, whether private individuals may be responsible for complicity in a war of aggression.

Aggression generally involves some degree of advance cooperation among those with power.<sup>6</sup> Prior to any interstate violence, plans are made, public debates are conducted, and advice is given by governmental and non-governmental experts. Moreover, third-state officials regularly meddle with internal state politics, media agencies distribute propaganda, the parliament may hold a vote, and eventually the military and political leadership gives the final command. In such a constellation, it is important to ask where the line should be drawn between the guilty and the innocent. On the one hand, a very narrow position that exclusively captures the top military and political leadership flouts the Nuremberg legacy that assumes responsibility for the crime of aggression beyond the formal state apparatus.<sup>7</sup> On the other hand, an overbroad approach may stretch criminal liability to the breaking point by allowing for excessive prosecutions for aggression across the state apparatus (and beyond).<sup>8</sup> Consequently, this will lead to overcriminalization that causes, among other things, the significant increase in unjust punishments.<sup>9</sup> Setting this threshold is, therefore, essentially about striking a fair balance.

In this Essay, I outline the outer limits of individual responsibility for the crime of aggression under international criminal law. The dominant view is that the new definition of the crime of aggression adopted at the Kampala Review Conference of the Rome Statute in 2010<sup>10</sup> effectively excludes private individuals from the remit of criminal liability.<sup>11</sup> This is incorrect. Anyone who played a decisive role in the formulation of the state policy to use armed force may be convicted of the crime of aggression (if they satisfy the necessary *actus reus* and *mens rea*), including individuals outside the formal state apparatus for aiding and abetting a war of aggression. The Essay is structured as follows. Part II briefly explains the leadership nature of the crime of aggression. According to current law, the accused can only be “a person in a position effectively to exercise control over or to direct the political or military action of a State.”<sup>12</sup> In Part III, I suggest normative content for the lower threshold of the leadership standard “control or direct” as an indispensable or “but for” contribution to the

<sup>5</sup> Tom Dannenbaum lists a few issues regarding jurisdiction, immunities, and the wisdom of pursuing an ad hoc tribunal. See Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, JUST SECURITY (Mar. 10, 2022), at <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine>.

<sup>6</sup> See Jens David Ohlin, *The Crime of Bootstrapping*, in *THE CRIME OF AGGRESSION: A COMMENTARY* 1454, 1467–68 (Claus Kreß & Stefan Barriga eds., 2017).

<sup>7</sup> During the Nuremberg trials, both formal and non-formal state leaders were prosecuted for the crime of aggression. See Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 EUR. J. INT'L L. 477 (2007).

<sup>8</sup> Without limitations on the scope of criminal responsibility, everyone who took part in a war of aggression down to foot soldiers and common civilians would be open to prosecution. See NEIL BOISTER & ROBERT CRYER, *THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL* 151–52 (2008).

<sup>9</sup> For other detrimental effects of overcriminalization, see DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3–54 (2007).

<sup>10</sup> See ICC-RC/Res.6.

<sup>11</sup> Heller, *supra* note 7; CARRIE MCDUGALL, *THE CRIME OF AGGRESSION UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 181–83 (2013); Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L.J. 357, 363 (2012); Keith A. Petty, *Sixty Years in the Making: The Definition of Aggression for the International Criminal Court*, 31 HASTINGS INT'L & COMP. L. REV. 531, 548 (2008).

<sup>12</sup> Rome Statute, *supra* note 2, Art. 8bis.

formulation of the state policy on the use of armed force. Part IV sets out the analytical framework for the complicity of private individuals in a war of aggression. Part V concludes.

## II. THE LEADERSHIP NATURE OF THE CRIME OF AGGRESSION

International crimes are often described as being marked by an organizational context. As opposed to “ordinary” domestic crimes, international crimes have a unique, systemic nature in that they are typically part of a collective wrongdoing.<sup>13</sup> Behind the actual perpetration, there is a state or state-like organization that generates the normative climate that allows atrocities to occur.<sup>14</sup> Rank-and-file soldiers directly carry out the crimes, whereas the leaders who create the policies are usually “far behind the scenes” with “no blood on their hands.” Drawing a connection between the conduct of leaders—sometimes seen as “most responsible”<sup>15</sup>—and the underlying criminal acts puts enormous pressure on the capacity to attribute individual criminal responsibility.

Unlike other international crimes, the crime of aggression is a policy crime predicated by a so-called *leadership clause*, meaning that a person can be held criminally responsible only if he or she is “in a position effectively to exercise control over or to direct the political or military action of a state.”<sup>16</sup> Because *followers* are categorically eliminated from prosecution, it may be easier to hold leaders criminally liable for the acts for which they would ordinarily avoid accountability. This important feature of prosecuting aggression was explicitly recognized by the German delegation during the negotiation process of the Rome Statute in 1997,<sup>17</sup> and reacknowledged in a recent statement issued by a group of prominent lawyers and public figures in relation to the war in Ukraine.<sup>18</sup>

The leadership nature of the crime is absolute in that it applies to all modes of criminal responsibility.<sup>19</sup> The leadership clause as such is a prerequisite for criminal liability of both perpetrators and accomplices.<sup>20</sup> Since the Nuremberg trials, it has been generally accepted that only high-ranking state agents can be held criminally responsible for aggression.<sup>21</sup> In his opening speech, Justice Robert H. Jackson, chief U.S. prosecutor of the International Military Tribunal in Nuremberg that was established after World War II, stated that the prosecution did not intend to incriminate the entire German people but instead “to reach the

<sup>13</sup> Elies van Sliedregt, *The Curious Case of International Criminal Liability*, 10 J. INT’L CRIM. JUST. 1171, 1174 (2012).

<sup>14</sup> See André Nollkaemper, *Introduction*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW 6 (André Nollkaemper & Harmen van der Wilt eds., 2009).

<sup>15</sup> See ELIES VAN SLIEDREGT, *INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW* 80 (2012).

<sup>16</sup> Rome Statute, *supra* note 2, Art. 8*bis*.

<sup>17</sup> *1997 Proposal by Germany (February)*, reprinted in THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION 233, 235 (Claus Kreß & Stefan Barriga eds., 2011).

<sup>18</sup> Justice for Ukraine, *Statement Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine* (Mar. 4, 2022), available at <https://justice-for-ukraine.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration-English.pdf>.

<sup>19</sup> See Claus Kreß, *The Crime of Aggression Before the First Review of the ICC Statute*, 20 LEIDEN J. INT’L L. 851, 855 (2007).

<sup>20</sup> See Rome Statute, *supra* note 2, Art. 25(3*bis*).

<sup>21</sup> Matthew Gillett, *The Anatomy of an International Crime: Aggression at the International Criminal Court*, 13 INT’L CRIM. L. REV. 829, 860 (2013); see also Roger S. Clark, *Negotiating Provisions Defining the Crime of Aggression, Its Elements and the Conditions for ICC Exercise of Jurisdiction Over It*, 20 EUR. J. INT’L L. 1103, 1105 (2010).

planners and designers, the inciters and leaders without whose evil architecture the world would not have been for so scourged with the violence and lawlessness . . . of this terrible war.”<sup>22</sup> Later he made it clear during the London Conference (at which the Nuremberg Charter was adopted) that the intention of the drafters was to exclude followers from responsibility for aggression: “[i]t never occurred to me, and I am sure it occurred to no one else at the conference table, to speak of anyone as ‘waging’ a war [of aggression] except topmost leaders who had some degree of control over its precipitation and policy.”<sup>23</sup>

Limiting individual responsibility for the crime of aggression to leaders makes sense from a criminal law perspective. States are run by leaders, and we cannot plausibly hold everyone accountable for state actions. Doing so runs the risk of overcriminalization that hurts the sensibilities and effectiveness of criminal law.<sup>24</sup> Another reason for requiring leadership responsibility is the nature of the norms violated by the crime of aggression. The crime of aggression is, among other things, a violation of *jus ad bellum*,<sup>25</sup> which is not the kind of crime committed by common foot soldiers or even lower-ranking state officers.<sup>26</sup> Only state leaders are typically aware that the state policies that they created are illegal, and therefore it would be unfair to hold their followers responsible for something that the latter did not have any knowledge of. An admiral who gives orders for an unlawful attack knows much more than the regular soldiers who carry out that attack. Moreover, the actions are normatively distinctive because the latter are in no position to decisively influence the state policy on the use of force, so they should not be blamed for the crime of aggression.<sup>27</sup>

The modern definition of the crime of aggression was adopted at the first Review Conference of the Rome Statute in Kampala in 2010.<sup>28</sup> While the limited scope of criminal liability was criticized during the negotiation proceedings, the leadership nature of the crime of aggression has never been contested, confirming its customary international law status.<sup>29</sup>

### III. DEFINING THE LEADERSHIP CLAUSE

Prosecuting state leaders for the formulation of aggressive state policies is the core idea motivating the criminalization of aggression. Since the first trials in the post-World War II era, it has been clear that anyone below the policy level is beyond the scope of criminal liability

<sup>22</sup> See *Opening Speech of the Chief Prosecutor for the United States, reprinted in THE TRIAL OF GERMAN MAJOR WAR CRIMINALS BY THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY* 45 (2001), available at <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal>.

<sup>23</sup> Robert H. Jackson, “*The United Nations Organization and War Crimes*,” by Mr. Justice Robert H. Jackson, 46 ASIL PROC. 196, 198 (1952).

<sup>24</sup> See LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE 231–32 (2008); HUSAK, *supra* note 9.

<sup>25</sup> *Jus ad bellum* is the law of recourse to force that justifies the conversion from peace to war. See Carsten Stahn, “*Jus ad Bellum*,” “*Jus in Bello*” . . . “*Jus Post Bellum*”?—*Rethinking the Conception of the Law of Armed Force*, 17 EUR. J. INT’L L. 921 (2007).

<sup>26</sup> See MAY, *supra* note 24, at 16.

<sup>27</sup> Tom Dannenbaum, *The Criminalization of Aggression and Soldiers’ Rights*, 29 EUR. J. INT’L L. 859, 867 (2018).

<sup>28</sup> ICC-ASP/16/Res.5.

<sup>29</sup> For an argument for the customary status of the leadership clause, see Nikola Hajdin, *The Leadership Clause in the Crime of Aggression and Its Customary International Law Status*, JUST SECURITY (Mar. 17, 2022), at <https://www.justsecurity.org/80696/the-leadership-clause-in-the-crime-of-aggression-and-its-customary-international-law-status>.

for aggression. According to the leadership standard at the Nuremberg and Tokyo trials, only a person in a position “to shape or influence the policy that brings about” the initiation of the war of aggression may be criminally responsible for such an outcome.<sup>30</sup> During the drafting process prior to the first Review Conference of the Rome Statute in Kampala in 2010, the new “control or direct” leadership clause replaced Nuremberg’s “shape or influence.”

But what exactly does “leadership” mean in this context? Both “leaders” and “followers” are abstract concepts that do not give much guidance. During the Nuremberg trials, a line separating

the guilty from the innocent . . . was set below the planners and leaders, such as Goering, Hess, von Ribbentrop, Rosenberg, Keitel, Frick, Funk, Doenitz, Raeder, Jodl, Seyss-Inquart, and von Neurath, who were found guilty of waging aggressive war, and above those whose participation was less and whose activity took the form of neither planning nor guiding the nation in its aggressive ambitions.<sup>31</sup>

The responsibility of private individuals outside of formal state structures (such as industrialists) was explicitly recognized: “We do not hold that industrialists as such, could not under any circumstances be found guilty upon such charges.”<sup>32</sup>

The first explicit mention of the leadership requirement in an international document was in the International Law Commission’s (ILC) Draft Code of Crimes against the Peace and Security of Mankind in 1996.<sup>33</sup> Calling on the Nuremberg precedent, the ILC reaffirmed that both government and private sector leaders may be responsible for aggression if they played a *decisive role* in committing the aggression.<sup>34</sup> The following year, during the negotiations preceding the adoption of the Rome Statute, the new leadership clause “control or direct” was introduced.<sup>35</sup> However, the precise normative content was never established. Crucially, however, the drafters clearly understood the language “control or direct” as sufficiently broad to include persons outside the state’s formal leadership. In 2009, the Special Working Group on the Crime of Aggression of the Assembly of States Parties report stated the following:

[T]here was general agreement on the inclusion of draft article 25, paragraph 3 bis, which would ensure that the leadership requirement would not only apply to the principal perpetrator, but to all forms of participation. It was noted that this provision was crucial to the structure of the definition of aggression in its current form. The view was also expressed that the language of this provision was sufficiently broad to include persons

<sup>30</sup> *U.S. v. von Leeb et al.*, 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, NUREMBERG, OCTOBER 1946–APRIL 1949, at 487 (1948).

<sup>31</sup> *United States v. Carl Krauch et al. (Judgment)*, 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1126 (1948) [hereinafter *IG Farben*].

<sup>32</sup> *Order of the Tribunal Acquitting the Defendant of the Charges of Crimes Against Peace, United States v. Krupp Von Bohlen und Halbach et al., Military Tribunal III*, 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 393 (1950).

<sup>33</sup> Report of the International Law Commission on the Work of Its 48th Session, at 42, UN Doc. A/51/10 (1996) (Art. 16).

<sup>34</sup> *Id.* at 43.

<sup>35</sup> See 1997 Proposal by Germany (February), reprinted in THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION, *supra* note 17, at 223.

with effective control over the political or military action of a State but who are not formally part of the relevant government, such as industrialists.<sup>36</sup>

Directing someone or something denotes ordering or commanding that person or thing with a very high degree of control over their conduct. Therefore, the term “direct” implies control that is close to absolute domination and requires in addition active participation in executing state policy.<sup>37</sup> “Control,” on the other hand, is a looser term. The ILC has reasoned—in the context of the commission of wrongful conduct in international law—that “control” denotes “domination over the commission . . . and not simply the exercise of oversight, still less mere influence or concern.”<sup>38</sup> This is precisely how control should be understood in the definition of the crime of aggression: more than mere influence but less than absolute domination (the latter is more akin to the concept of “direct”).

In his concurring opinion in *IG Farben* at the Nuremberg Military Tribunal, Judge Paul M. Hebert held that the defendants (economic actors) “carried out activities indispensable to creating and equipping the Nazi war machine.”<sup>39</sup> This is the line that should draw the outer limits of criminal responsibility for aggression and separates “the guilty from the innocent”: an indispensable, “but for” contribution to the formulation of the state *policy* to use armed force. Absolute domination over the state conduct, which is assumed only by the highest echelon of state leadership, is not required. Consequently, the term “leader” denotes a normative determination that the individual played (at a minimum) a decisive role, one that made an indispensable contribution to the formulation of the state’s policy (decision) on the use of armed force. McDougall is right to say that leadership means “decisive say over . . . the political or military establishments of a State.”<sup>40</sup> This authority, however, ought not to be confined to the apex of the formal state military or political structure but should include anyone who played a decisive role in committing aggression, that is, whose contribution was indispensable for the creation of aggressive state policies.

#### IV. AIDING AND ABETTING

Complicity is a mode of criminal responsibility for participating in or contributing to the perpetrator’s crime.<sup>41</sup> Like principals, accomplices actively engage in the complex action of bringing about the criminal result. The latter do not carry out the acts of perpetration but still contribute to the offense in a criminally relevant way.<sup>42</sup> Pursuant to the basic structure of international crime,<sup>43</sup> perpetrators commit the crime—that is, perpetrators carry out the criminal act—whereas accomplices aid, abet, or otherwise assist or influence the perpetrators’

<sup>36</sup> 2009 SWGCA Report, reprinted in THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION, *supra* note 17, at 655–56 (emphasis added).

<sup>37</sup> For a concurring opinion, see Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT’L L. 649, 663 (2007).

<sup>38</sup> Report of the International Law Commission on the Work of Its 53rd Session, at 69, UN Doc. A/56/10 (2001).

<sup>39</sup> *IG Farben*, *supra* note 31, at 1297.

<sup>40</sup> McDougall, *supra* note 11, at 257.

<sup>41</sup> Cf. MILES JACKSON, *COMPLICITY IN INTERNATIONAL LAW* 11 (2015) (“[complicity is] a particular way of contribution to wrongdoing”).

<sup>42</sup> GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 636 (2000).

<sup>43</sup> Nikola R. Hajdin, *The Actus Reus of the Crime of Aggression*, 34 LEIDEN J. INT’L L. 489, 491–92 (2021)

conduct.<sup>44</sup> According to Sanford Kadish, “[v]arious terms are used to capture the central notions of assistance and influence. Assistance is sometimes expressed as helping, aiding, or abetting. . . . Influence is expressed in a greater variety of terms.”<sup>45</sup> Kadish gives examples of influence such as advice, persuasion, command, and inducement. However, he concludes that these linguistic categorizations are rarely of legal importance,<sup>46</sup> since assisting and influencing are the quintessential modes of complicity and can manifest in infinite potential ways in reality.

Assisting, sometimes termed “aiding and abetting,”<sup>47</sup> is usually what private actors are accused of when their criminal responsibility for aggression is questioned. In his concurring opinion in *IG Farben*, Judge Hebert described how business executives assisted the aggressive war:

Farben and these defendants (members of the Vorstand), acting through the corporate instrumentality, furnished Hitler with substantial financial support which aided him in seizing power and contributed to keeping him in power; that they worked in close cooperation with the Wehrmacht in organizing and preparing mobilization plans for the eventuality of war; that they participated in the economic mobilization of Germany for war including the performance of a major role in the Four Year Plan; that they carried out activities indispensable to creating and equipping the Nazi war machine; that they participated in the stockpiling of critical war materials; that they engaged in vital propaganda, intelligence and espionage activities; that they used their business connections and cartels to strengthen Germany and to weaken the war potential of other countries; that they camouflaged and utilized assets abroad for war purposes; that they planned to take over the chemical industry of Europe and participated in plunder and spoliation of occupied countries; and, that they participated in the utilization of slave labor on a vast scale to strengthen the German war machine.<sup>48</sup>

With the adoption of the modern definition of the crime of aggression, complicity became the point of contestation among commentators concerned with the question of who may be prosecuted for aggression. A number of scholars have expressed fears that the new leadership clause “control or direct” deviates from the Nuremberg legacy, as it limits the scope of individual criminal responsibility too narrowly.<sup>49</sup> In his influential article, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, Kevin Jon Heller argues that the new definition effectively removes private individuals from criminal responsibility for aggression.<sup>50</sup> Heller contends that the *IG Farben* defendants’ (economic leaders’)

<sup>44</sup> K. J. M. SMITH, *A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY* 7 (1991).

<sup>45</sup> Sanford Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 343 (1985).

<sup>46</sup> *Id.*

<sup>47</sup> See Rome Statute, *supra* note 2, Art. 25(3)(c).

<sup>48</sup> *IG Farben*, *supra* note 31, at 1297.

<sup>49</sup> See Mauro Politi, *The Debate Within the Preparatory Commission for the International Criminal Court*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* 43, 46–47 (Mauro Politi & Giuseppe Nesi eds., 2004). Mark A. Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains*, 41 CASE W. RES. J. INT’L L. 291, 314 (2009).

<sup>50</sup> See Heller, *supra* note 7. He repeats his position in more recent scholarship. Kevin Jon Heller, *Who Is Afraid of the Crime of Aggression?*, 19 J. INT’L CRIM. JUST. 999, 1008–09 (2021).

contributions were “but for,” i.e., indispensable to the realization of the aggressive policies.<sup>51</sup> However, since the normative appreciation of the *IG Farben* defendants’ role was one of *aiding*, Heller argues that they could never satisfy the control (and direct) criterion. Accomplices, the argument goes, “merely” contribute to and do not “control or direct” the political or military action of a state; thus, they fall short of the new leadership requirement and therefore ought not to be responsible for aggression.<sup>52</sup> By appraising the role of business and religious leaders in the context of state aggression, Carrie McDougall frames this matter pragmatically:

A typical industrialist might produce defence materiel to enable acts of aggression, but would not in and of himself or herself qua industrialist exercise will that would cause the political or military machinery of the State to act to achieve a particular objective. Similarly, while a religious leader might fill multiple roles within a State, such that he or she provides both religious and political or military leadership (the former leader of Iran, the Grand Ayatollah Sayyed Ruhollah Musavi Khomeini, comes to mind), absent a de facto or de jure political or military leadership role, a religious leader in and of himself or herself would not meet the definition of potential perpetrator by, for example, exhorting the use of force to achieve religious conversions or to defeat proponents of competing ideologies.<sup>53</sup>

In short, Heller, McDougall, and others in their camp find “control” (as a lower threshold in the leadership clause) irreconcilable with aiding and abetting. This seems to be a dominant position in the literature.<sup>54</sup>

This position is, in my view, mistaken. Under customary international law, industrialists and other (let us call them) civil society leaders may satisfy the “control or direct” requirement and may be prosecuted for (complicity in) a war of aggression. If the criterion of “decisive influence (manifested in an indispensable, ‘but for’ contribution) on the formulation of the state policy to use armed force” is accepted as the outer limits of criminal responsibility for aggression,<sup>55</sup> there are no conceptual constraints on the prosecution of accomplices for aiding and abetting a war of aggression. Put simply, by decisively influencing the formulation of aggressive state policy, aiders and abettors control the political or military action of a state irrespective of the accessorial nature of their contribution. If *A* did not provide the means, *P* would not have committed aggression.

“Control” from the definition of the crime of aggression must not be confused with other “control” criteria from various theories in criminal law. One example is the ICC’s “control over the crime theory” (Control Theory), which centers on its own concept of “control” as a common denominator for ascribing *perpetration*.<sup>56</sup> The Control Theory equates the roles of

<sup>51</sup> See Heller, *supra* note 7, at 491.

<sup>52</sup> See *id.* at 493.

<sup>53</sup> MCDUGALL, *supra* note 11, 230.

<sup>54</sup> In a recent post, Linde Bryk and Göran Sluiter lightly dismissed the possibility of prosecuting aiding and abetting for aggression due to the “control or direct” constraints. See Linde Bryk & Göran Sluiter, *Why Corporations Should Cease Business Activities with Russia*, EJIL:TALK! (Mar. 22, 2022), at <https://www.ejiltalk.org/why-corporations-should-cease-business-activities-with-russia>.

<sup>55</sup> See Part III above.

<sup>56</sup> See Elies van Sliedregt, *Perpetration and Participation in Article 25(3) of the Statute of the International Criminal Court*, THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 499, 500 (Carsten Stahn ed., 2015).

intellectual perpetrators (those who are “far behind the scenes”) and those who physically commit the offense (direct perpetrators “with blood on their hands”) based on their position of control over the *commission* of the offense. Accordingly, perpetrators either: (1) physically carry out the objective elements of the offense (direct perpetrators); (2) control the will of those who carry out the objective elements of the offense (indirect perpetrators); or (3) control the commission by reason of the essential tasks assigned to them (co-perpetrators).<sup>57</sup> Others who satisfy the conditions of criminal responsibility without, however, control over the crime, are regarded as accomplices.<sup>58</sup>

The leadership clause of the crime of aggression does not have any of those requirements. The notion of “control” in the Control Theory and the notion of “control” in the leadership clause of the crime of aggression are different concepts that serve different purposes and do not generally coincide. Consequently, an individual may satisfy one requirement and not the other. The leader who meets the “control” criterion in the definition of the crime of aggression does not necessarily satisfy the criterion of “control” in the Control Theory.

According to the Control Theory, “control” means that the perpetrator’s conduct is *constituent* in the *commission* of the crime,<sup>59</sup> whereas “control” in the leadership clause denotes decisive influence (an indispensable, “but for” contribution) on the formulation of the state *policy* or decision to use armed force.<sup>60</sup> The former speaks to the nature of contribution, while the latter refers to the degree of causation. It follows that, without being constituent in the commission of the crime of aggression, the aider and abettor’s conduct may decisively influence the state’s decision to use armed force. Consider a few examples that reflect the difference between the two notions of control. A pilot may be in control over a particular act of commission of the use of armed force (bombardment) but not the state policy to use armed force. Conversely, an industrialist may satisfy the leadership clause by being in a position to decisively influence the formulation of the state policy to carry out the use of armed force even though his conduct (help or influence) is not constituent to the commission of the act of use of armed force itself. Or, the editor in chief of a mainstream newspaper creates the necessary “consent” among the population that proved to be indispensable for the state to resort to armed force. Such media influence may have decisively helped the state to resort to violence, but the actual decision to use armed force was made by someone else.<sup>61</sup>

To sum up, the notion of leadership in the context of the crime of aggression lends itself to the determination of a position of control over or to direct the state *policy* to use armed force and not the actual *act of commission* of the use of armed force. An individual, therefore, may satisfy the leadership requirement of the crime of aggression due to his indispensable

<sup>57</sup> Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, para. 332 (Jan. 29, 2007).

<sup>58</sup> On the conditions of criminal responsibility, see NIKOLA R. HAJDIN, *INDIVIDUAL RESPONSIBILITY FOR THE CRIME OF AGGRESSION* 43–73 (2021).

<sup>59</sup> See Alicia Gil & Elena Maculan, *Current Trends in the Definition of “Perpetrator” by the International Criminal Court: From the Decision on the Confirmation of Charges in the Lubanga Case to the Katanga Judgment*, 28 LEIDEN J. INT’L L. 349, 365 (2015).

<sup>60</sup> The crime of aggression is after all a policy crime that focuses exclusively on the state policymakers’ conduct. See ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST, *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 318 (2d ed. 2010).

<sup>61</sup> On the role of media in carrying out a state-supportive propaganda function without coercion, see EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* (1988).

(decisive) role in the formulation of state policy, yet his contribution to the actual criminal result may be normatively characterized as the “mere” participation of an accomplice, who helps or influences the commission. The difference between perpetrators and accomplices in the crime of aggression, therefore, lies not in the *degree* but in the *nature* of their causal contributions: while both contribute *sine qua non*, perpetrators commit the crime, accomplices help or influence the commission.<sup>62</sup>

## V. CONCLUSION

This Essay has sought to demonstrate that private individuals may meet the “control or direct” leadership requirement and consequently be criminally liable for aiding and abetting aggression if their contribution to the formulation of aggressive state policies was truly indispensable. The lower threshold of criminal responsibility for the crime of aggression advocated here does not necessarily cast a wider net than was ostensibly envisaged with the adoption of the leadership clause. The prosecution still needs to prove the necessary *actus reus* and *mens rea*, which will dramatically limit the scope of criminal responsibility to only a few individuals with the greatest responsibility for the aggressive war. This proposition keeps the balance fairly struck between preserving the Nuremberg legacy and sharply focusing international criminal law on the most culpable.

<sup>62</sup> According to the Control Theory, perpetrators’ conduct *constitutes* the commission of the crime, whereas the conduct of accomplices is merely *connected* to the crime of the former. See Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Trial Chamber Judgment, para. 1384 (Mar. 7, 2014).