

Hannah Lea Pfeiffer

The Crime of Aggression and the Participation Model
of the Rome Statute of the International Criminal Court

Kölner Schriften zum Friedenssicherungsrecht
Cologne Studies on International Peace and Security Law
Études colonaises sur le droit de la paix
et de la sécurité internationales
Herausgegeben von/Edited by/Éditées par
Claus Kreß
Band/Volume 7

Hannah Lea Pfeiffer

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and the Participation Model
of the Rome Statute of the
International Criminal Court

INSTITUTE FOR
INTERNATIONAL PEACE
AND SECURITY LAW



Diese Arbeit wurde von der Rechtswissenschaftlichen Fakultät der
Universität zu Köln im Jahre 2017 als Dissertation angenommen.

Referent: Prof. Dr. Claus Kreß LL.M. (Cambridge)

Korreferent: Prof. Dr. Bernhard Kempen

Tag der mündlichen Prüfung: 02.03.2017

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.dnb.de> abrufbar.

Bibliographic information published by the Deutsche Nationalbibliothek

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available in the Internet at <http://dnb.dnb.de>.

Information bibliographique de la Deutsche Nationalbibliothek

La Deutsche Nationalbibliothek a répertorié cette publication dans la Deutsche Nationalbibliografie; les données bibliographiques détaillées peuvent être consultées sur Internet à l'adresse <http://dnb.dnb.de>.

ISSN: 2195-5719 · ISBN: 978-3-86376-197-4 (Hardcover), 978-3-86376-198-1 (Paperback)

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Gedruckt auf säurefreiem Papier.

*To my parents Martin and Andrea
and to my sister Dinah Marie, to Malte, Anika
and my godmother Susanne*

Preface

First and foremost I want to express my deep gratitude towards my esteemed doctoral supervisor Professor *Claus Kreß* for making this doctorate possible.

From the very beginning of my law studies his criminal law lectures sparked my enthusiasm for criminal law which was subsequently extended to include the subjects of international law in general and international criminal law in particular. Furthermore, I would like to sincerely thank him for his substantial contribution to the success of this doctorate and for all the support throughout the past years, which began by including me in his wonderful research team and giving me the great opportunity to catch a glimpse of the world of academia beyond the mere writing of my doctoral thesis and for doing me the honour of working for and learning from him who is one of the most excellent both criminal and international lawyers there is. The time I spent at his institute has been full of formative and rewarding experiences!

Moreover, I would like to thank my second supervisor Professor *Bernhard Kempen* for having provided the second opinion very swiftly, which was an indispensable contribution to the success of my doctorate.

Beyond this, I am very grateful for all the support I received from my close friends and dear colleagues who have been accompanying me throughout the past years, be it by providing helpful advice, by proofreading, or by any other kind of assistance even if not directly linked with my doctoral project. In particular, I want to thank you, dear *Christina Nowak*, not only for having read my thesis very carefully but also for the fact that I can always rely on your help and for your ability to brighten up gloomy days with humour and the winking of an eye!

Not least, I owe special thanks to my beloved family, above all to my parents *Martin Pfeiffer* and *Andrea Pfeiffer*, my sister *Dinah Marie Pfeiffer* and my godmother *Susanne Nolden* for their unconditional support I can always count on as well as to my soulmate *Anika Neuhaus* and my boyfriend *Malte Langenbach* who are my indispensable companions.

Cologne, March 2017

Hannah Lea Pfeiffer

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List of abbreviations

ACIL	Amsterdam Center for International Law
AJIL	American Journal of International Law
ANZSOC	Australian and New Zealand Society of Criminology
ANZLH	Australia & New Zealand Law & History E-Journal
ARSP	Archiv für Rechts- und Sozialphilosophie
ASP	Assembly of States Parties
BGH	Bundesgerichtshof
BGHSt	Entscheidungssammlung des Bundesgerichtshofs in Strafsachen
B.C. Int'l & Comp. L. Rev.	Boston College International and Comparative Law Review
Cardozo Law Review	Cardozo L. Rev.
Case W. Res. J. Int'l L.	Case Western Reserve Journal of International Law
CJICL	Cambridge Journal of International and Comparative Law
CJIL	The Chicago Journal of International Law
Colum. J. of Transnat'l Law	Columbia Journal of Transnational Law
Crim. L. Forum	Criminal Law Forum
Duke J. Comp. & Int'l L	Duke Journal of Comparative & International Law
ECCC	Extraordinary Chambers in the Courts of Cambodia
ed.	editor
edn.	edition
eds.	editors
EJIL	European Journal of International Law
e.g.	for example
et al.	et altera
et seq.	et sequens
EU	European Union

List of abbreviations

FICHL	Forum for International Criminal and Humanitarian Law
Fla. J. Int'l L.	Florida Journal of International Law
Fordham Int'l L.J.	Fordham International Law Journal
FS	Festschrift
GA	Goldammer's Archiv für Strafrecht
GoJIL	Goettingen Journal of International Law
GYIL	German Yearbook of International Law
Harv. Int'l L.J.	Harvard International Law Journal
HICLR	Hastings International and Comparative Law Review
HRQ	Human Rights Quarterly
Ibid.	ibidem
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
IMT Judgment	Judgment of the International Military Tribunal for the Trial of German Major War Criminals
IMTFE	International Military Tribunals for the Far East
IMTFE Judgment	Judgment of the International Military Tribunal for the Far East
Int. Crim. L. Rev.	International Criminal Law Review
IRRC	International Review of the Red Cross
JICJ	Journal of International Criminal Justice
JZ	Juristen Zeitung

KJ	Kritische Justiz
KritV	Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft
LJIL	Leiden Journal of International Law
London Charter	Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis
marginal no.	marginal number
Melb. UL R.	Melbourne University Law Review
MPEPIL	Max Planck Encyclopedia of Public International Law
MüKo	Münchener Kommentar
NCLR	New Criminal Law Review
NILR	Netherlands International Law Review
no.	number
Northwestern JIHR	Northwestern Journal of International Human Rights
Nr.	Nummer
NStZ	Neue Zeitschrift für Strafrecht
Nuremberg Charter	Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis
N.Y. L. Sch. J. Int'l & Comp. L.	N.Y. Law Journal of International and Comparative Law
NZYIL	New Zealand Yearbook of International Law
p.	page
Pace Int'l L. Rev.	Pace International Law Review
para.	paragraph
Penn St. Internat'l L. Rev.	Penn State International Law Review
RGSt	Entscheidungen des Reichsgerichts in Strafsachen
Rome Statute	Rome Statute of the International Criminal Court

List of abbreviations

Santa Clara J.Int'l L.	Santa Clara Journal of International Law
SCSL	Special Court for Sierra Leone
SCU Law Review	Southern Cross University Law Review
St. Louis-Warsaw Transatlantic L.J.	St. Louis-Warsaw Transatlantic Law Journal
StR	Strafrecht
Stan. L. Rev.	Stanford Law Review
Suffolk Transnat'l L. Rev.	Suffolk Transnational Law Review
SWGCA	Special Working Group on the Crime of Aggression
TWC	Trials of War Criminals before the Nürnberg Military Tribunals
U.N.	United Nations
U.N. Doc.	United Nations Documents
U. Queensland LJ	University Queensland Law Journal
UJIEL	Utrecht Journal of International and European Law
U.S.	United States
Vol.	Volume
v.	versus
VStGB	Völkerstrafgesetzbuch
Wash. U. Global Stud. L. Rev.	Washington University Global Studies Law Review
YJIL	Yale Journal of International Law
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft

Introduction

Since 1945, Article 2 (4) of the Charter of the United Nations bans the use of force by one state against another. This rule is also recognised by customary international law. It is the fundamental principle of modern international law and one which is widely believed to form part of *jus cogens*.¹

Considering this fact, it would appear that criminalising conduct leading to flagrant forms of an inter-state use of force is an obvious necessity. Individuals who are responsible for such conduct threaten international peace and security most severely.

Yet, throughout the history of international law, individual criminal responsibility in general and particularly in respect to the crime of aggression has been highly controversial. This is due to the fact that its rationale and requirements have been strongly debated ever since. Inter-state aggression used to be an occurrence an individual person could not be held accountable for. It is a relatively novel idea that states may not interfere with the sovereignty, territorial integrity and political independence of other states. Traditionally, states used to have a right to wage war, referred to as *jus ad bellum*. For centuries, the use of force was regarded as a legitimate means for a state to enforce its national interests. It can thus be considered a landmark in the history of international law that the international community finally decided not only to condemn states who commit acts of aggression but also to hold the individuals to account.

In abstract terms, individual responsibility for the crime of aggression arises when a person commits an act which threatens the interests or values protected under the relevant provisions of international law.² This abstract observation does not meet the requirements of a criminal law definition, but it may serve as a starting point for further clarification on how aggression should be construed for the purpose of criminal prosecution.

¹ *Dinstein*, 99; ICJ, *Nicaragua v. United States of America*, Judgment, para. 188 et seq. (June 27, 1986).

² *Shukri*, in: Bellelli, 519 (521).

In order to comprehend the rationale and purview of the crime of aggression, it is essential to examine its conception within the Rome Statute of the International Criminal Court (ICC) given that modern international criminal law³ is concentrated around the International Criminal Court as its linchpin.

A. Object of Research: The Crime of Aggression and the Participation Model of the Rome Statute

On 11 June 2010, a historic achievement was accomplished. At the Review Conference in Uganda's capital Kampala, the States Parties to the ICC adopted a set of amendments to the Rome Statute defining the crime of aggression. As the result of long-term and exhaustive negotiations between members of various delegations from a plurality of states, a consensus was reached on an issue that, for a long time, seemed to be far too controversial to ever become the object of a broad agreement: a legal norm establishing individual liability for inter-state aggression, applicable not only in a specific situation after the facts, but in all cases brought before the ICC. At the time of writing, it is possible that the Court may activate its jurisdiction over the crime of aggression fairly shortly.⁴

I. The Definition of the Crime of Aggression in Article 8bis (1) ICC Statute

The finally adopted definition of the crime⁵ is set out in Article 8bis paragraph 1 ICC Statute. It reads:

‘1. For the purpose of this Statute, ‘crime of aggression’ means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State,

³ The term is used in a narrow sense encompassing only International Criminal Law *stricto sensu* which means individual criminally responsibility directly under international law, ‘directly’ meaning not depending on a act of transformation into domestic criminal law. For further definition of the term *see Kreß*, in: Wolfrum, 717 (717 et seq.)

⁴ Up to the present day, 30 States have ratified the amendments, *see* UN Treaty Collection, Chapter XVIII

Penal Matters, 10 .b Amendments on the crime of aggression to the Rome Statute of the International Criminal Court.

⁵ As opposed to the *act* of aggression which is further elaborated on in paragraph 2 of the provision, *see* below.

of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.⁶

Article 8bis ICC Statute is the central provision governing the crime of aggression under the Rome Statute as it contains the crime's material elements.⁶

In combination with the subjective or mental elements, objective elements determine what it means to be responsible for violating the norm. The prosecution must establish each of these elements in order to overcome the presumption of innocence⁷ and to meet the onus to prove the guilt of the accused.⁸

1. The Material Elements

Material or objective elements, in common law referred to as *actus reus*, are generally composed of conduct, consequence and circumstance elements. They represent the 'external side of criminal conduct'.⁹ While 'conduct' consists of an act or of an omission¹⁰ contrary to an international rule that imposes a certain behaviour,¹¹ 'consequences' are the results of such an act or omission.¹² A consequence can consist in harm that has actually occurred or in the mere endangerment of a protected right.¹³ 'Circumstances' can be defined as additional conditions which, although not necessarily required explicitly, must be present for a conduct to be classified as a certain crime.¹⁴ They form part of the scene against which the perpetrator engages in a specific conduct.¹⁵

⁶ Material elements are also referred to as 'objective' and 'physical elements'.

⁷ The validity of the principle within the Rome Statute is expressed in Article 66 ICC Statute.

⁸ See 2002 Proposal by Samoa, para. 5.

⁹ Fletcher, 43.

¹⁰ By some, the term is understood to include causation and results, but, in order to avoid ambiguity, it should be defined narrowly, as only referring to 'pure conduct, that is, to mean the actual physical movement of the actor', see Robinson/Grall, 35 Stanford Law Review, 681, 719-720 (1983).

¹¹ Cassese/Gaeta, 153.

¹² Clark, 12 Crim. L.R., 291, 306 (2001).

¹³ Werle/Jeßberger, 173, marginal no. 455.

¹⁴ Ibid., 174, marginal no. 457.

¹⁵ Heller, in: Heller/Dubber, 593 (603), describing a 'circumstance' element as an additional - either factual or legal - state of affairs that must exist for the prohibited conduct and consequence to be criminal.

Article 8bis ICC Statute contains the following objective elements for perpetration of the crime:

- (1) the conduct verbs, namely the planning, preparation, initiation or execution of the act of aggression (conduct element),
- (2) a person in a position effectively to exercise control over or to direct the political or military action of a state (circumstance element)¹⁶,
- (3) an act of aggression by a state (consequence or circumstance element)¹⁷ which,
- (4) by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations (consequence or circumstance element).¹⁸

2. The Mental Element

Besides the fulfilment of a crime's objective elements, the Rome Statute requires the existence of a certain state of guilty mind. This mental element or, in common law tradition, *mens rea*¹⁹ represents the 'internal side'²⁰ of the crime.

Article 30 (1) ICC Statute contemplates that 'unless otherwise provided', criminal responsibility requires intent and knowledge in respect of the material elements. The terms 'intent' and 'knowledge' are further elaborated in Article 30 (2) and (3) ICC Statute:

'2. For the purposes of this article, a person has intent where:

- (a) In relation to conduct, that person means to engage in the conduct;
- (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.'

The realisation of the *mens rea* of the crime of aggression requires that the perpetrator acts with the mental element as set out in Article 30 ICC Statute.

¹⁶ This requirement is known as the 'leadership clause'.

¹⁷ The classification of this element will be dealt with in a subsequent part of this study.

¹⁸ This requirement is known as the 'threshold requirement'.

¹⁹ *Prosecutor v. Bemba Gombo*, Confirmation of Charges, para. 351 (June 15, 2009).

²⁰ *Fletcher*, 43.

A special (individual) intent in the sense of an *animus aggressionis* is not necessary.

II. The Act of Aggression as the Reference Point of the Individual Conduct

The parameters of individual responsibility for the crime of aggression cannot be determined in complete isolation from the state act of aggression. Rather, the latter constitutes the reference point of the individual conduct. Strong arguments support the (controversial) position that individual criminal responsibility for a crime of aggression requires the completion of an act of aggression by a state.²¹ Accordingly, this study adopts the assumption that the state act of aggression is an indispensable element for any form of criminally relevant individual participation in the crime.²²

In paragraph 2, Article 8*bis* defines the act of aggression by a state as follows:

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

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

²¹ This issue will be discussed in greater detail in Part Three of this study.

²² *Gooma*, in: *Politi/Nesi*, 55 (65-66).

- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.⁶

The wording of Article 8*bis* (2) essentially reflects the definition of an act of aggression as contained in Articles 1 and 3 of the annex to Resolution 3314 of the UN General Assembly.²³ In essence, an act of aggression is defined as the use of armed force by one state against another state without the justification of self-defence or authorisation by the Security Council.²⁴ Article 8*bis* (1) combines the reference to the definition of an act of aggression as contained in Resolution 3314 of the UN General Assembly²⁵ with the threshold requirement ‘by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations’ in Article 8*bis* (1). These ‘sub-elements’ read together form the definition of the state conduct element for the purpose of the ICC Statute as a constituting part of the crime of aggression. The text does not preclude a state act which does not fall under one of the listed examples to be classified as an act of aggression by the judges as long as it meets the threshold requirement. At the same time, cases of interstate use of force whose legality is disputed – such as genuine humanitarian

²³ *Kreß/von Holtzendorff*, 8 JICJ, 1179, 1190 (2010).

²⁴ See Coalition for the International Criminal Court, *The Crime of Aggression*, online available at <http://www.iccnw.org/?mod=aggression> (last visited August 20, 2015).

²⁵ Annex to U.N. Doc. A/RES/3314 (XXIX), Dec. 14, 1974.

intervention²⁶ – are excluded. The illegality must be reasonably uncontroversial.²⁷ This is made clear by the word ‘character’ as an element of the threshold requirement.²⁸ Cases of insufficient gravity and scale are excluded by the other two elements. This prevents that minor border incidents will be subjected to the ICC’s jurisdiction.

III. The Elements of the Crime of Aggression

The Elements of Crimes elaborate on the definitions of the Rome Statute crimes, thereby assisting the judges in their interpretation and application. The Elements of the crime of aggression read as follows:

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1. It is understood that any of the acts referred to in article 8*bis*, paragraph 2, qualify as an act of aggression.
2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term ‘manifest’ is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the ‘manifest’ nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.

²⁶ The demarcation problem between aggression and humanitarian interventions is still unresolved, *see e.g. Maogoto*, 6 SCU Law Review, 278, 315, footnote 119 (2002), stressing the significance of the motive behind the military action making it improbable to ever find an absolute definition of aggression.

²⁷ *Kreß/von Holtzendorff*, 8 JICJ, 1179, 1193 (2010).

²⁸ *Ibid.*

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.‘

Element No. 2 is complemented by a footnote clarifying that ‘[W]ith respect to an act of aggression, more than one person may be in a position that meets these criteria’.

IV. The Provisions on Individual Participation of the Rome Statute

Since individual participation in the commission of a crime may differ in terms of quality and magnitude, modes of participation serve as legal mechanisms by which individuals can be held criminally responsible²⁹ for a variety of contributions.

The modes of participation relevant for the purpose of the Rome Statute are established in Article 25 (3) (a) to (d):

‘3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose

²⁹ *Gillett*, 13 Int'l Crim. L. Rev., 829, 861 (2013).

involves the commission of a crime within the jurisdiction of the Court; or

- (ii) Be made in the knowledge of the intention of the group to commit the crime; [...].⁶

Particular importance must be ascribed to the fact that a subparagraph (3)*bis* was inserted into Article 25 ICC Statute which reads:

‘3*bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.’⁶

In addition, Article 28 ICC Statute establishes responsibility of commanders and other superiors. This mode of liability entails different forms of command responsibility for crimes committed by subordinates. Article 28 ICC Statute attributes the conduct of inferiors to their superiors and is therefore also a leadership provision.³⁰

V. The Initial Point of the Upcoming Analysis

From the above it follows that individual criminal responsibility for the crime of aggression requires the following: First, an evidently unlawful and grave use of force by a state must have occurred. Secondly, the individual concerned must have been in a position effectively to exercise control over or to direct the political or military actions of the state concerned. Thirdly, this individual’s conduct must amount to the planning, preparation, initiation or execution of an act of aggression.

The individual conduct requirement in Article 8*bis* (1) of the ICC Statute must be read in conjunction with the different forms of participation listed in 25 (3) ICC Statute.³¹ This solution has been criticised from two angles. The first questionmark concerns the potential incompatibility of Article 25 (3)(a) to (d) ICC Statute and the leadership character of the crime. Secondly, it has been held that a combined reading of some of the modes of liability and the conduct verbs in Article 8*bis* leads to overlap and ambiguities. The scepticism thus stems from the crime’s nature as an absolute leadership crime and to the collective nature of the different forms of conduct referred to in the crime’s definition.

³⁰ *Clark*, 15 LJIL, 859, 885 (2002).

³¹ *King*, in: Brown, 114 (123).

B. Objective and Methodology

The objective of this study is to provide an answer to the question of whether Article 8*bis* ICC Statute can be read meaningfully in conjunction with the modes of liability as set out by Article 25 (3)(a) to (d) ICC Statute. This requires an in-depth analysis of whether and how potential frictions between the provisions can be avoided or resolved when applying the different modes of liability to the definition of Article 8*bis* ICC Statute. It is particularly important first to determine the classes of potential perpetrators and participants, because it is only within these classes of persons that the question of individual criminal liability for the crime of aggression arises.

The interplay between Article 28 and Article 8*bis* ICC Statute will not be addressed in any detail in this study. Suffice it to say that Article 28 ICC presupposes the existence of a ‘base crime’ to be committed by a military or other subordinate who cannot be a perpetrator of or a participant in the crime of aggression.³² The classes of potential perpetrators of and participants in the crime of aggression are limited to exactly those persons who usually have superior responsibility.³³ For this reason, it is argued by some that the application of this mode of liability is ‘nonsensical’³⁴ or even ‘logically impossible’³⁵. Others are more nuanced in their assessment.³⁶ However, it seems to be a widely shared assumption that Article 28 ICC Statute will hardly be of practical relevance³⁷ even though its application is not explicitly excluded.

In order to shed light on the compatibility of Article 25 (3)(a) to (d) ICC Statute as currently interpreted and applied at the ICC and Article 8*bis* ICC Statute, the accepted standards of interpretation will be followed. In accordance with the general rule of interpretation, as laid down in Article 31 of the Vienna Convention on the Law of Treaties,³⁸ this study will take into account the ordinary meaning of the relevant terms, the historical development of the

³² *Ambos*, 53 GYIL, 463, 493 (2010).

³³ *Gillett*, 13 Int'l Crim. L. Rev., 829, 863 (2013).

³⁴ *Weisbord*, 20 Duke J. Comp. & Int'l L., 1, 57 (2009).

³⁵ *Ambos*, 53 GYIL, 463, 493 (2010).

³⁶ *See e.g. McDougall*, 183-185.

³⁷ *Kreß/Holtzendorff*, 8 JICJ, 1179, 1189 (2010).

³⁸ Para. 1 of the Article provides: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’

crime including its drafting history, the context in which the crime of aggression is embedded in the Rome Statute as well as object and purpose of its criminalisation.

Part One lays out the historical development of the concept of individual criminal responsibility for the crime of aggression in order to outline the customary international law status of the relevant questions.³⁹ This is a significant step in assessing how to interpret the liability concept of the crime of aggression under the Rome Statute. According to Article 21 (2)(b) ICC Statute, the ICC judges will consider customary international law when interpreting the crime of aggression as laid down in the Rome Statute. This is particularly relevant because the Court may have to decide cases in which citizens of non-member states are indicted.⁴⁰ It is thus important to examine how the crime of aggression was conceptualised in the past in order to draw conclusions on the crime's character and legal determinants. Attention is paid to the concept of 'crimes against peace', the legal predecessor of the crime of aggression in the trials following World War II before the International Military Tribunal (IMT), the International Military Tribunal for the Far East (IMTFE), and the follow-up trials conducted in the occupied German zones not least because these precedents provided crucial guidance in defining the crime.⁴¹

Part Two of the study contains systematic considerations on the establishment of individual criminal responsibility for the crime of aggression as an international core crime. The characteristics of international core crimes are analysed in order to reveal the challenges of addressing macro-criminal phenomena by means of international criminal law. An overview is given over the concepts discussed in facing these challenges. In this context, particular attention will be paid to Article 25 (3)(a) to (d) ICC Statute and its current interpretation by the ICC judges. Subsequently, the peculiarities of the crime of aggression including its conceptual specificity are elaborated on in order to illustrate the difficulties arising from an application of Article 25 (3)(a) to (d) ICC Statute to the crime of aggression as opposed to the other core crimes under the Rome Statute.

³⁹ The position has been prominently taken that the jurisprudence of the Nuremberg tribunals codified customary international law in respect of the crime of aggression, *see e.g.* 2005 Report of the Special Working Group on the Crime of Aggression, ICC-ASP/4/SWGCA/1, Annex II.A, para. 26.

⁴⁰ E.g. in cases where a situation is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations, *see* Article 13 (b).

⁴¹ *Kreß/von Holtzendorff*, 8 JICJ, 1179, 1188 (2010).

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Part Three is dedicated to an in-depth analysis of individual criminal responsibility for the crime of aggression as it has been defined in Kampala. A special focus will be placed on the *travaux préparatoires* of the crime of aggression. In a first step, the leadership clause in Article 8bis (1) ICC Statute is examined. Its relevant terms are defined and its scope is determined. Although in international law, the genesis of a legal text is only of secondary importance for its interpretation, it is still helpful to reveal what the drafters of Article 8bis ICC Statute had in mind when deciding on the present wording of the crime. Secondly, an analysis is undertaken to define what it actually means for an individual to *commit* the crime of aggression given that the *commission* of a crime constitutes the starting point for the determination of meaning and scope of any other form of participation. This will provide a basis for examining the relationship between Article 8bis ICC Statute and Article 25 (3)(a) to (d) ICC Statute can be conducted. In a third step, the focus is finally shifted to a combined reading of Article 8bis and Article 25 (3)(a) to (d) ICC Statute. The question of what impact the specificity of the crime of aggression actually has on the application of the Rome Statute's participation model is analysed as is whether certain modes must be (re-) interpreted in order to reasonably apply to Article 8bis ICC Statute or even should be discarded on the whole for not 'fitting' the crime.

In Part Four, the proposed solutions are tested in a fictional case study in order to illustrate the consequences of a combined reading of Article 8bis and Article 25 (3)(a) to (d) ICC Statute – as it is suggested in this study – for individual criminal responsibility of participants in acts of aggression.

In the end, the main findings of the analysis are summarised and an assessment is given of whether Article 25 (3)(a) to (d) and Article 8bis ICC Statute can form a reasonable regime of individual criminal responsibility for the crime of aggression under the Rome Statute.

C. Relevance of Findings

Even though the issue was considered not to be ‘one of substance’⁴², an answer to the question as to whether the modes of participation set out in Article 25 (3)(a) to (d) ICC Statute are compatible with Article 8*bis* ICC Statute needs to be provided. The fact that the debate was considered a foremost technical matter⁴³ and some delegations in Kampala ‘indicated along the lines that they were flexible at this issue’⁴⁴ only demonstrates that there were more controversial subjects under negotiation.⁴⁵ Compared to questions surrounding the definition of the state act of aggression as well as jurisdiction issues, the individual conduct element and its compatibility with the Rome Statute’s general part was not considered a politically sensitive matter. However, it does not render moot the necessity to shed light on yet unresolved aspects of the latter.

Whether the decision to declare Article 25 (3)(a) to (d) ICC applicable to Article 8*bis* ICC Statute broadens or narrows the reach of the crime was not predictable during the negotiations.⁴⁶ In the scholarly debate, it has been argued that the modes of liability in the Rome Statute considerably extend the reach of the prohibition against aggression.⁴⁷ The validity of this estimation depends on the content and scope of the conduct verbs in Article 8*bis* (1) ICC Statute. If any kind of individual contribution to the act of aggression was encompassed by the definitions of the terms ‘planning’, ‘preparation’, ‘initiation’ or ‘execution’, the application of Article 25 (3)(a) to (d) ICC Statute would indeed be redundant. The answer to this question depends on whether

⁴² Informal inter-sessional meeting of the SWGCA, held at Lichtenstein Institute on Self-Determination, Woodrow Wilson School, at Princeton University, New Jersey, United States, from 12 to 15 June 2005; Report of the CICC Team on the Crime of Aggression, 4.

⁴³ See *Barriga*, in: Bellelli, 621 (627).

⁴⁴ See Assembly of States Parties to the Rome Statute of the International Criminal Court, Special Working Group on the Crime of Aggression, Resumed fifth session, New York, Jan. 29-Feb. 1, 2007, Annex II: SWGCA Report, para. 9, ICC-ASP/5/35.

⁴⁵ See CICC Background Paper in Preparation for the Review Conference, Kampala, 31 May-11 June 2010, 6: ‘The [...] formulation of this definition [...] is relatively more settled than other parts of the proposed amendments.’

⁴⁶ *Weisbord*, 49 *Harv. Int’l L.J.*, 161, 193 (2008).

⁴⁷ *Gillett*, 13 *Int’l Crim. L. Rev.*, 829, 862 (2013).

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such a broad interpretation is desirable and whether it would be consistent with the principle of legality as laid down in Article 22 to 24 ICC Statute.

In consideration of the present uncertainties, clarification on the crime's concept and scope is indispensable for the legitimacy and success of future aggression cases before the ICC. Legal indeterminacies impede the ICC Prosecutor's work when building an aggression case until the Court rules.⁴⁸ In the ICC's future case law, judges will have to evaluate the participation of individual leaders in instances of an unlawful inter-state use of force. In order to be able to do so, requirements which go beyond the pure wording of the Rome Statute in terms of precision and concreteness must be formulated.

If the applicability of Article 25 (3)(a) to (d) ICC Statute would indeed lead to a wider range of actions to be embraced by the scope of Article 8*bis* ICC Statute,⁴⁹ the judges will be faced with the challenge to draw the lines between varying degrees of responsibility and to define the outer limits of liability. Furthermore, the ICC would be able and obliged to investigate in a greater number of cases which would increase both the relevance of criminalisation of aggression and its intricacy. All of this demonstrates that the relevance of the issue at stake goes beyond mere legal formality.

⁴⁸ *Weisbord*, 49 *Harv. Int'l L.J.*, 161, 195 (2008).

⁴⁹ *Weisbord* even assumes a potential risk of exploitation of the 'conceptual confusion' by progressive prosecutors in order 'to capture a wider range of perpetrators and participants than the signatories [...] intended', see *Weisbord*, 20 *Duke J. Comp. & Int'l L.*, 1, 62 (2009).

Part One

The Historical Development of the Crime

The notion of individual criminal responsibility for the crime of aggression can be traced back to the very beginnings of international criminal law which precede its famous ‘hour of birth’ at Nuremberg and Tokyo in the aftermath of World War II.

In this section, the historical development of individual criminal responsibility for the crime of aggression will be recaptured in order to analyse the customary international law status of individual criminal responsibility for the crime and modes of participation therein. It is relevant for the modern definition of the crime because the drafters of the Rome Statute agreed to take into consideration customary law when defining the Statute’s *ratione materiae*.¹ So, in order to achieve an understanding of its underlying concept and characteristics, attention must be paid to the historical development of the crime that has been referred to as the ‘supreme international crime’² and the ‘mother of international crimes’³.

A. First Appearances of the Crime of Aggression prior to the Second World War

The trials of the Military Tribunals for Nuremberg (IMT) and Tokyo (IMTFE) are known as the first criminal proceedings in which individuals were convicted of ‘crimes against peace’, the historical predecessor of the crime of aggression. Less famous is the fact that the notion of criminal responsibility for waging war leads back to Ancient Greece where war was

¹ *Kreß/von Holtzendorff*, 8 JICJ, 1179, 1188 (2010).

² This expression was used by the judges of the International Military Tribunal at Nuremberg.

³ *Shukri*, in: Bellelli, 519 (519).

considered illegal and even punishable unless the gods authorised the armed contest.⁴

In the middle ages, the victors of a ‘just’ war were allowed to punish their opponent blamed for initiating the war even if this opponent was a monarch.⁵ This way of thinking was discarded when the concept of state sovereignty developed which included the *jus ad bellum* of every sovereign. This was supplemented by sovereign immunity of statesmen as is reflected in an ancient English principle which says: ‘The King can do no wrong’. Since the emergence of the Westphalian system⁶, which refers to the *Peace of Westphalia* of 1648, it was generally accepted that states had an unrestricted right to go to war and to acquire territory by right of conquest⁷ All the more, individual criminal responsibility for ‘acts of states’ was disregarded by traditional international law.⁸ The idea of individual criminal responsibility for war in its very first form experienced a regression which would last for a long time though the issue remained a subject of interest in philosophical debate and the accusation of aggression remained a concomitant of armed conflict for centuries.⁹

In the 18th century, the German philosopher *Immanuel Kant* devoted in-depth attention to the question of the state’s right to go to war. In his work ‘Zum ewigen Frieden’, he wrote that the way in which states pursue their right could only be by war, but at the same time clarified that justice could not be determined by victory.¹⁰

It was not until the 19th century that the idea of individual responsibility for war of aggression reemerged when Allied European countries stated in the 13 March 1815 Declaration at the Vienna Conference that they would prosecute *Napoleon* for waging war against other European countries.¹¹ In the absence of a legal text which could serve as a basis for such a prosecution, the Allies composed a protocol during a congress in Aachen on 21 November 1818 depriving *Napoleon* of the right to enjoy certain amenities which were

⁴ Phillipson, 167.

⁵ Bauer, 21.

⁶ Schuster, 14 Crim. L. Forum, 1, 3 (2003).

⁷ See Rifaat, 27 et seq.

⁸ See Shukri, in: Bellelli, 519 (522).

⁹ See Glennon, 35 YJIL, 71, 73 (2010).

¹⁰ Kant, *passim*.

¹¹ Shukri, in: Bellelli, 519 (522).