Vilnius University Faculty of Law

Department of Private Law

Diana Davydova,

II study year, International and European Law Programme Student

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From the Crime Against Peace to the Crime of Aggression: Differences and Similarities of Concepts under the Nuremberg Charter and Rome Statute of the International Criminal Court

Nuo nusikaltimo prieš taiką iki agresijos nusikaltimo: koncepcijų skirtumai ir panašumai pagal Niurnbergo Chartiją ir Tarptautinio Baudžiamojo Teismo Romos statute

Supervisor: dr. Gabija Grigaitė-Daugirdė

Reviewer: dr. Karolina Bubnytė-Širmenė

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ABSTRACT AND KEY WORDS

This work examines evolution of the crime against peace, established in the Article 6 of the Nuremberg Charter, to the crime of aggression, defined in the Article 8*bis* of the Rome Statute. It analyses and compares the key differences and similarities of the concepts of these crimes. This study pursues a goal of providing an extensive understanding of the international law adaptation to the ever-changing geopolitical environment while aiming to maintain global peace and security. The thesis describes the role of these concepts in the international law development, and prevention and prosecution of these crimes.

Key words: crime against peace, crime of aggression, criminal responsibility, Nuremberg Charter, Rome Statute.

Šiame darbe nagrinėjama Niurnbergo chartijos 6 straipsnyje įtvirtinto nusikaltimo taikai raida iki agresijos nusikaltimo, apibrėžto Romos statuto 8 bis straipsnyje. Joje analizuojami ir lyginami pagrindiniai šių nusikaltimų sampratų skirtumai ir panašumai. Šiuo tyrimu siekiama suteikti platų supratimą apie tarptautinės teisės prisitaikymą prie nuolat kintančios geopolitinės aplinkos, kartu siekiant išlaikyti pasaulinę taiką ir saugumą. Darbe aprašomas šių sąvokų vaidmuo tarptautinės teisės raidoje, šių nusikaltimų prevencija ir baudžiamasis persekiojimas.

Raktažodžiai: nusikaltimas taikai, agresijos nusikaltimas, baudžiamoji atsakomybė, Niurnbergo chartija, Romos statutas

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INTRODUCTION

Discussions over the crime of aggression, the procedures for holding those responsible for such crimes accountable have been reawakened by Russia's ongoing aggression against Ukraine, as well as the establishment of the Special tribunal for the crime of aggression committed by Russian leadership, emphasising on the insistent ***relevance of this topic***. This conflict is a clear reminder of the urgent need for a strong legal basis for the international community to address and prevent acts of aggression since this one is characterised by the use of force, sovereignty violation and extensive humanitarian consequences. Even with the Rome Statute's clear provisions, the international community still has difficulties in prosecuting crimes of aggression, especially when the involved state is not a party to the Statute or rejects the ICC's jurisdiction. Therefore, this situation reveals the gaps and limitations that are present in the current international legal framework, emphasising on the necessity of further development.

The evolution of international criminal law has been highlighted by significant developments aimed at establishing responsibility for the crimes that threaten the peace, security and well-being of the world. Such crimes pose a threat not only to a specific person, but also to the human community, the environment, as they violate the rules of human coexistence and are committed in particularly cruel forms of illegal behaviour. Thus, the development of the international criminal law concepts, namely from the concept of the crime against peace to the concept of crime of aggression, which descended from the Nuremberg Charter and were further expanded in the Rome Statute, and the prohibition on the use of force, crystallised with the adoption of the United Nations Charter, are the major elements in understanding of how the international community examines and prevents acts of war and aggression with joint efforts, thereby providing punishment of the guilty for the committed crimes.

Armed conflicts and wars have always had irreversible consequences for all humanity, as millions of citizens become victims of them, most of whom are civilians — women, children and other vulnerable sections of the population. The present time is no exception, when conflicts break out in one or another region of the planet, often turning into wars or armed conflicts.

The very concept of criminalisation of aggressive war evolved after World War I in 1918 raising the issue of the personal responsibility of national leaders for war

initiation. After World War II, the victorious Allies, led by the U.S and the Soviet Union, reconsidered and implemented this idea and prosecuted high-level German political officials and military authorities for war crimes and other wartime atrocities at the Nuremberg trials of the International Military Tribunal during 1945 - 1946.

All socially dangerous acts that took place during World War II were reflected in Article 6 of the Nuremberg Charter, namely crimes against peace, crimes against humanity and war crimes. The Nuremberg judges in their decisions declared crimes against peace as "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole" *[Judgement of the International Military Tribunal, 1946]*. This statement was meant to support the Allies prosecution strategy, although a number of acquittals have laid bare judicial reluctance to convict solely on this basis. Legal opinions differed; some believed it was required in exceptional cases, while others referred to it as an ex post facto law that the prosecution selectively applied *[Kirsten Sellars, 2013]*.

The Tokyo trials of the International Military Tribunal for the Far East, during 1946 - 1948, tried the Japanese leaders for war crimes, but echoed the principles of Nuremberg and faced the same legitimacy problems, such as ex post facto concerns, political influence and the limited accountability. In 1946 the UN the General Assembly affirmed "Nuremberg Principles", however the efforts to codify these principles stalled in the early 1950s and were largely abandoned for decades. Later on, the UN General Assembly adopted Resolution 3314 in 1974, in which not only provided the definition of aggression, but also mentioned that: "Aggression gives a rise to international responsibility" *[The UN General Assembly resolution 3314 (XXIX), 1974]*.

During the Cold War, it was believed that the Nuremberg and Tokyo trials were experimental and were unlikely to be set again *[Philippe Kirsch, 2006]*. However, the atrocities committed in Former Yugoslavia and Rwanda raised the problem of the necessity of a strong international mechanism to hold perpetrators responsible. Thus, during the work of the Rome conference in 1998, two significant events occurred: the signing of the Rome Statute of International Criminal Court, and the establishment of International Criminal Court. Thus crimes against humanity, war crimes and genocide were addressed in the Statute, but no definition of crime of aggression was included as it had to be decided by consensus among member states. However, after the Kampala

amendments at the Review Conference in 2010 states concurred on these articles addressing and defining the crime of aggression.

In this manner, this thesis ***aims*** to provide a detailed analysis and comprehensive understanding of the crime against peace under the Nuremberg Charter and the crime of aggression under the Rome Statute with a particular emphasis on the following ***objectives***:

- to **examine** the legal grounds of the crime against peace defined by the Nuremberg Charter;
- to **analyse** the development and codification of the crime of aggression within the framework of the Rome Statute;
- to **identify** the main differences and similarities of the concepts;
- to **consider** if the definition of the crime of aggression in the Rome statute could be considered as reflection of customary international law;
- to **suggest** the definition of the crime of aggression that the future Special Tribunal for the crime of aggression against Ukraine should rely on.

In order to investigate the topic of this thesis, the following research ***methods*** were used:

- **historical analysis** was used identify the evolution of international criminal law since World War II until the present time and occurrences that led to the codification of crimes against peace and the crime of aggression;
- **qualitative analysis** was used to examine primary legal sources, namely the Nuremberg Charter, the Rome Statute, and relevant United Nations resolutions;
- **comparative legal analysis** was used to compare the similarities and differences in the legal definitions, scope and application of crimes against peace and the crime of aggression;
- **synthesis** was used to integrate information from different sources and draw connections between historical developments, legal frameworks and contemporary issues;
- **doctrinal legal research** was used to provide a thorough understanding of the legal frameworks and judicial reasoning employed in both the Nuremberg and ICC contexts.

The ***scientific novelty*** of this thesis lies in a comprehensive comparative analysis of crimes against peace and the crime of aggression under two different legal frameworks.

While there are numerous studies on the Nuremberg Trials and the ICC legal framework individually, there is a lack of research regarding analysis of differences and similarities of these concepts. Since the beginning of Russia's aggression against Ukraine, the issue of understanding the meaning, scope and accountability of the responsible ones for committing the crime of aggression arose again within the international community. Since there are some challenges in prosecuting crimes of aggression within the ICC framework, there is a necessity of having this urgent problem to be solved. Therefore, this thesis contributes to a deeper understanding of the legal and practical implications of prosecuting these crimes during the contemporary ongoing armed conflict, seeks to advance a profound comprehension of international efforts to combat aggression and uphold justice on a global scale, attempts to respond if the crime of aggression reflects the customary international law, provides assumptions regarding the definition of aggression for the future Special Tribunal and presents a unique contribution to the academic field.

In order the tasks of the thesis are achieved, the ***structure of the thesis*** has been chosen to divide into three main parts. Thus, the research starts with Part I: Crime Against Peace under the Nuremberg Charter examines the historical background of the crime against peace, its legal definition, prosecution of the crime during the Nuremberg Trials, the concept of leadership clause and modalities of individual criminal responsibility. The second section is Part II: The Crime of Aggression under the Rome Statute, which examines the development of the crime of aggression within the Rome Statute and analyses its definition, elements, scope and modalities of individual criminal responsibility under this crime as well. The thesis ends with the Part III: Comparative analysis of relevant concepts, in which core differences and similarities between the crimes are identified and the concept of crime of aggression within the customary international law is analysed.

The ***most important sources*** used in this thesis are primary legal documents: the Nuremberg Charter(1945), the Rome Statute of the International Criminal Court(1998), the UN General Assembly Resolutions, and scholarly articles and books: Antonio Cassese "Affirmation of the Principles of international law recognised by the Charter of the Nuremberg Tribunal"(2009), Lumb R.D "Individual Responsibility for Aggressive War: The Crime against Peace"(1956), Robert Heinsch "The Crime of Aggression After Kampala: Success or Burden for the Future?"(2010), Carrie McDougall "Crime of Aggression" (2022a).

I. THE CRIME AGAINST PEACE UNDER THE NUREMBERG CHARTER

1.1. Definition of the crime against peace

The Nuremberg trials became a crucial element in international criminal law development as one of the central aims of the trials' efforts to hold accountable for the atrocities of war was the establishment of the concept of the crime against peace. The concept was a new-made "thing" for that time, but since its creation has made a significant contribution to the development of the international criminal law regarding the prohibition of aggressive warfare, acts of aggression and war crimes.

Thus, the very definition of the crime against peace is mentioned in the provisions of the Nuremberg Charter, namely in the Article 6 as follows:

"(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;" *[Charter of the International Military Tribunal, 1945]*.

Therefore, from this exact definition we can distinguish two different forms of crimes against peace under the Charter:

1) planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties agreements or assurances;

(2) participation in a common plan or conspiracy for the accomplishment of "any of the foregoing".

These two categories of crimes against peace have a common characteristic in that they are both connected with aggressive war or war in violation of international treaties, agreements or assurances. The Charter does not define the term "aggressive war", nor did the Tribunal find it necessary to give a definition of it and the retroactivity of the charges in the verdict *[The UN Secretary-General, 1949]*. The combative actions taken by Germany against 10 countries, which are Poland, Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia, Greece, the Soviet Union and the United States were all regarded by the Tribunal as aggressive wars, although it used different expressions to describe them, such as "invasion" or "aggression". On the other hand, in

the Court's indictment regarding occupation of Austria and Czechoslovakia was defined as the aggressive acts. The Tribunal stated: "The first acts of aggression referred to in the indictment are the seizure of Austria and Czechoslovakia; and the first war of aggression charged in the indictment is the war against Poland begun on 1 September 1939" *[The UN Secretary-General, 1949]*. The Court thus upheld the distinction between the sequence of aggressive wars, beginning with the invasion on Poland, and the aggressive action taken against Austria and Czechoslovakia as stated in the indictment. It seems that not every military attack or invasion was viewed as a war of aggression. The comparison between aggressive acts or actions and aggressive wars appears to suggest that the Court's interpretation of "aggressive war" does not apply to situations in which the victim offers little or no armed resistance and the attacker is the only one using force. For there to be an aggressive war, the aggressor's armed attack must have been met with armed resistance or a declaration of war from the targeted nation, resulting in a technically declared war. Nevertheless, the Court placed a significant restriction on the concept of "war of aggression" *[The UN Secretary-General, 1949]*.

1.1.1. Leadership clause as the element of the crime and the issue of personal immunities

Justice Robert H. Jackson, Chief Prosecutor for the United States in the Nuremberg trial, in his opening speech stated that the intention of the prosecution is not to incriminate the entire German people, but "to reach the 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" *[Opening Statement before the International Military Tribunal, 1945]*. Afterwards, he clarified that the drafters' goal at the London meeting, where the Nuremberg Charter was agreed, was to concentrate on the most influential leaders and absolve the followers of responsibility for aggression: "It 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" *[Robert H. Jackson, 1952]*.

The last paragraph of the Article 6 of the Nuremberg Charter provides with following:

"Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." *[Charter of the International Military Tribunal, 1945]*.

Although at first sight it may appear that each one of these acts constitutes a separate from crime against peace *[Greenspan, 1959]* in practice, however, the guilt of the defendants was judged on the basis of two counts whose precise limits are difficult to mark in specific cases. Count one involved conspiracy to plan and wage aggressive war, while count two focused on the specific acts of planning, preparing, initiating, and waging aggressive wars.

The purpose of the leadership clause is to restrict criminal culpability to individuals who hold high positions of authority, such as government officials and military leaders. Since crimes against peace concentrate on those accountable for the larger political and military decision-making processes that result in aggressive war, they are differentiated from war crimes and crimes against humanity.

The Nuremberg trials were set on two fundamental principles:

1. individuals can and should be held accountable for the most serious international crimes. The judgement of the Nuremberg Tribunal famously declared, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced"[1]. Ensuring accountability is crucial in and of itself, but it's also critical because it can seriously jeopardise global peace if widespread or systematic atrocities are allowed to go unpunished.
2. individuals should only be punished after a fair trial that protects the accused's rights. In his opening speech, Robert Jackson made a statement to the Tribunal: "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well." *[Opening Statement before the International Military Tribunal, 1945]*.

A high-level position in the Nazi Party, government, or military was one of the key requisites in determining a defendant's responsibility for the crime against peace

[1] *Judgement of the International Military Tribunal. The Law of the Charter,* 1946

during the Nuremberg trials. The judges declared that "the disruption of the European order" and "the creation of a Greater Germany beyond the frontiers of 1914" were the two deliberate purposes of a conspiracy to commit crimes against peace *[Sergey Sayapin, 2014]*. The Nazi Party's Leadership Corps, the SS, the Gestapo, and the SD were declared illegal, however several subordinate echelons and subgroups were left out. The verdict only allowed for individual criminal responsibility if willing membership and knowledge of the criminal purpose could be proved, complicating denazification efforts *[Priemel, 2016]*. After long discussions, the charge of conspiracy was narrowed to a conspiracy to wage aggressive war. Only eight defendants were convicted on that charge; all of whom were also found guilty of crimes against peace. As a result, all 22 defendants were charged with crimes against peace, and 12 were found guilty of committing this crime *[Francine Hirsch, 2020]*.

Accordingly, the logical question of the concept of personal immunities (*ratione personae*) arises, which comes from the international customary law. The doctrine confers immunity on high-ranking officials, which grants protection to individuals occupying a specific position from the civil, criminal, and administrative jurisdiction while holding a particular office from the civil, criminal, and administrative prosecution. This concept is aimed at giving the possibility of the officials to perform their governmental and diplomatic duties without interference from foreign courts and tribunals.

As we can see from the earlier mentioned, the Nuremberg Charter contains the leadership clause and clearly identifies individuals in positions of power as responsible for aggressive acts of war. However, personal immunities provide a huge barrier to responsibility. In the majority of cases, for example in the case against Goering, Hess and von Rebbentropp, high-ranking officials who are most accountable for crimes against peace are frequently the ones who benefit immunity from punishment as long as they are in office. A number of leaders used their official immunity as a shield from accountability for their part in starting violent conflicts. For instance, in his defence, Hans Fritzsche, being a Head of the radio division of the German propaganda ministry, argued that he was performing his duties and does not have to be held accountable for the actions of the Nazi regime. Another defendant, who tried to escape from responsibility was a Head of the Nazi Party's foreign affairs department Alfred Rosenberg claimed that he was acting on behalf of the regime *[David Irving, 1996*].

Nevertheless, the evolution of international criminal law has somewhat addressed this dilemma. And we have a remarkable example of how the Nuremberg Trials made it clear that high-ranking officials could not claim immunity to escape from committing crimes against peace, stating that individuals in positions of authority may be held personally responsible for aggressive actions. The International Military Tribunal stated that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced" *[Robert Cryer, 2018]*.

1.1.2. Modalities of individual criminal responsibility

The concept of prosecuting individuals criminally responsible for committing crimes against peace gained a significant interest during the Nuremberg Trials. The main focus of international law prior to these trials was state responsibility and individual accountability for the committed crimes and there were few mechanisms (Hague conventions, Kellogg-Briand Pact) for prosecuting for acts of aggression. These mechanisms were primarily focused on state responsibility rather than individual criminal accountability. Thus, to bring charges against those responsible for the crimes, a new legal structure needed to be established due to the devastation caused by World War II and the committed atrocities.

The Nuremberg Charter introduced crimes against peace as a prosecutable one. According to the Article 6 (a) of the Charter, the Court charged major war criminals under Count 1 (participation in common plan to wage war or conspiracy) and Count 2 (participation in the planning and preparation, initiation and waging of specific aggressive wars). As to the distinctive characteristics of these two counts of crimes against peace, there were some discussions during the Trial. Nevertheless, most of the statements made by the Court in this respect concern the common plan or conspiracy *[Lumb R. D, 1956]*.

Regarding Count 1, the Court convicted eight German leaders, among which were Hess (deputy to Fuhrer), Goering, Keitel, Jodl and Raeder (military leaders), Ribbentrop and Von Neurath (foreign ministers) and Rosenberg (foreign affairs planner). When assessing the evidence, the Tribunal made reference to the Nazi regime's background. On February 24, 1920, the Nazi Party declared its policies, making its extreme program immediately clear. Abrogation of the Peace Treaty of Versailles, land acquisition for the German people's subsistence, and colonisation of the excess population in support of Nazi

racial ideology were some of its objectives. Between 1921 and 1939, the Nazi Party expanded its activity throughout Germany, employing every tactic at its disposal to force its will on the political, religious, and industrial spheres of German society. The Versailles Treaty's limitations on German rearmament were at the beginning cautiously lifted and then extensively in 1936.

The Court discussed detailed plans of the defendants in respect of various aggressive wars waged by Germany and discovered information regarding these plans in different papers, such as Hossbach papers. In these papers was a collection of minutes on the discussions which took place at the most important conferences where Hitler highlighted his plans for seizure of Czechoslovakia and Austria and waging aggressive war against ten countries.

Regarding the indictment's conspiracy count, the prosecution claimed that the activities that made up the conspiracy took place between 1919 (the year the Nazi party was founded) and the end of the war. The plan was carried out through the rearmament program, the war on the churches, and the capture of the state. The Tribunal applied the concept of conspiracy, but gave to it a restrictive definition as it was not defined by the Charter.

The Tribunal declared that the conspiracy had to be clearly outlined in its criminal purpose — it must not be too far removed from the time of decision and of action. It was not enough to just declare a party program; there needed to be a real strategy for waging war. The defence argument that common planning could not exist where there was a complete dictatorship was flawed. Hitler would not have been able to wage an aggressive war on his own; instead, he needed the assistance of statesmen, diplomats, military leaders, and industrialists. Hitler used these people, thus they shouldn't be considered innocent *[Lumb R. D, 1956]*.

According to the Court, conspiracy is "a concrete plan to wage war," which is clearly illegal and mostly aggressive war. As may be observed, it took a narrow interpretation of "aggressive war" and did not include "aggressive acts" like the occupation of Austria and Czechoslovakia. Therefore, the common concrete planning of "aggressive acts" would not be considered a criminal conspiracy. Traditionally, in the concrete planning of aggressive acts, several participants act together to create a plan and wage war. The level of involvement varies across participants — some may have leading roles, while others may only offer assistance. A leader's presence does not indicate a lack

of a plan. Therefore, each individual involved in a plan must be aware of its aggressive character and make significant contributions *[The UN Secretary-General, 1949]*.

Participation in the preparation only of particular acts of aggression were not considered to constitute participation in the conspiracy charges. Only taking part in the planning stages of certain aggressive wars was not seen as participation in a conspiracy. In the Funk case, The Court stated that he participated in "the economic preparation for certain of the aggressive wars, notably those against Poland and the Soviet Union" but found him guilty on a Count 2. On the other hand, in order to support its conviction that there was a criminal conspiracy in Germany The Tribunal stated that "continued planning, with aggressive war as the objective" had been proven beyond a reasonable doubt. As a result, it appears that the Court saw the employment of aggressive conflict as an general instrument of policy rather than specific acts of aggression as the main objective of a conspiracy [*The UN Secretary-General, 1949*].

From the prosecution statement: “Any significant participation in the affairs of the Nazi Party or government is evidence of a participation in a conspiracy that is in itself criminal”[2]. Therefore, as a result, the Tribunal convicted eight of the accused of participation in the common plan of waging war. The other defendants on this count were acquitted because of lack of sufficient proof of actual knowledge of plans because they did not attend main conferences of the “inner circle”.

On Count 2 the Court indicted defendants with charges of "committing specific crimes against peace by planning, preparing, initiating, and waging wars of aggression against a number of other States” *[The UN Secretary-General, 1949]*. Although it was sufficient to prove general aggressive intentions under Count 1, this Count required proof of specific preparations to invade one or more of the states specified in the Indictment.

The Court considered criminal military planning and preparation because it was taken by persons in influential positions. These military leaders were Goering, Keitel, Raeder and Jodl and were found guilty of this crime. Additionally, as well as the eight found guilty under Count 1, Funk (President of the Reichsbank), Doenitz (Second-in-command to Raeder), Frick (Minister for the Interior) and Seyss-Inquart (Governor of Austria and later of Holland), were also found guilty on this count.

[2] *Judgement of the International Military Tribunal. The Law as to the Common Plan or Conspiracy (1946)*

But on the other hand, for the preparation of aggressive wars, the Court did not find Doenitz guilty for this crime, although he created and trained the German submarine arm, which was an essential part of the German war machine. The Court stated: “He was a line officer performing strictly tactical duties. He was not present at the important conferences when plans for aggressive wars were announced, and there is no evidence he was informed about the decisions reached there”[3]. Therefore, the Court appears to have demanded awareness of the aggressive purpose of the planning as a background for criminal military planning.

According to the ruling, Goering was credited with spearheading the diplomatic machinations that preceded the war against Poland and was particularly recognised for his role in this process. Under the subject of crimes against peace, von Ribbentrop's involvement in the diplomatic efforts that preceded the Polish and other aggressive wars was discussed. In the same hearing, it was claimed that Rosenberg, as head of the Nazi Party's Office of Foreign Affairs, was crucial to the planning and preparation of the attack on Norway.

Regarding economic planning and preparation of aggressive wars, Funk was found guilty as those were against Poland and Soviet Union. However, Schacht who was considered by the Court as "a central figure in Germany's rearmament programme” was acquitted, because "... rearmament of itself is not criminal under the Charter. To be a crime against peace under article 6 of the Charter it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars”[4]. Consequently, the Court exercised extreme caution when extrapolating conclusions from the defendant's official position.

Considering initiation, The Court adopted the phrase "Goering was the moving force for aggressive war second only to Hitler”[5], which came the closest to defining “initiation”. Because Doenitz was merely a field officer at the time, carrying out purely tactical duties, he was specifically acquitted of starting such wars. Consequently, we can presume that the Court found Hitler alone as the initiator as his orders set in motion the several aggressive wars. The Tribunal said: "To initiate a war of aggression. . is not only an international crime; it is the supreme international crime differing only from other war

[3] *Judgement of the International Military Tribunal. Doenitz (1946)*
[4] *Judgement of the International Military Tribunal: Schacht* (1946)
[5] *Judgement of the International Military Tribunal. Goering (1946)*

crimes in that it contains within itself the accumulated evil of the whole"[6]. As a result, no single defendant was specifically convicted guilty of initiating aggressive wars.

In relation to the waging of aggressive war, according to its statement[7], the Court viewed Donitz's strategic significance and his continued support of the war effort as crucial proof of his guilt for waging an aggressive war. Similarly, because of their important roles in organising and carrying out military operations, other military chiefs like Goering, Keitel, Raeder, and Jodl were also judged guilty of waging an aggressive war.

The court also recognised that administrative actions could be a part of an aggressive war. For instance, Seyss-Inquart and Rosenberg were convicted because they had previously held offices dealing with occupied territories and making prescriptions for occupation. But while there was a distinction made by the court regarding military-action and economic activities, Speer was not convicted for having been culpable of waging an aggressive war even if he was at the centre of the development of military equipment. So, what distinguishes high-ranking officials from low-ranking military officers and civilians, according to the court, is the significant role they play in planning and execution of the war.

1.2. Post-Nuremberg development of international law and their implications for the concept of the crime against peace

Unquestionably, the Nuremberg Trials were a turning point in the development of international criminal law and set some sort of "precedent" for prosecuting high-ranking officials for committing international crimes. From the beginning it was planned for the

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[6] *Judgement of the International Military Tribunal* (1946), Volume 22, p.426

[7] In relation to the waging of aggressive war, the Court made the following statement: "It is true that until his appointment in January 1943 as Commander-in-Chief he was not an 'Oberbefehlshaber'. But this statement under-estimates the importance of Doenitz's position. He was no mere army or division commander. The U-boat arm was the principal part of the German fleet and Doenitz was its leader.... That his importance to the German war effort was so regarded is eloquently proved by Raeder's recommendation of Doenitz as his successor and his appointment by Hitler on 30 January 1943, as Commander-in-Chief of the Navy. Hitler, too, knew that submarine warfare was the essential part of Germany's naval warfare. From January 1943, Doenitz was consulted almost continuously by Hitler ... As late as April 1945, when he admits he knew the struggle was hopeless, Doenitz as its Commander-in-Chief urged the Navy to continue its fight. On 1 May 1945, he became the head of State and as such ordered the Wehrmacht to continue its war in the east, until capitulation on 9 May 1945 ... In the view of the Tribunal, the evidence shows that Doenitz was active in waging aggressive war" *[Judgement of the International Military Tribunal. Doenitz (1946)*

second international military tribunal for German high-ranking individuals, but it never happened because of the disagreements among the Allies.

1.2.1. Post-Nuremberg trials

Consequently, a couple of months after the Nuremberg Tribunal rendered its judgement, the Allied Powers issued Control Council Law No. 10[8] empowering the occupying government in each of the zones of occupation to establish tribunals to punish war criminals and other similar offenders not addressed in the IMT verdict. In the same courtroom that had housed the International Military Tribunal, the United States organised twelve military trials solitary during 1946 - 1949. The United States forces arrested almost 100 000 Germans for committing the war crimes, among which almost 2500 main war criminals were identified.

Among these twelve subsequent trials were four main cases, such as Industrialist case against Krupp and others, the High Command case against high-ranking members of the Wehrmacht, the so-called Ministries case against diplomats and functionaries of the German Foreign Office and the most interesting and famous one — the IG Farben trial.

In the IG Farben trial[9], the chambers restated the Nuremberg approach that a government and its armed forces are headed by people in charge of decisions that could result in an aggressive war, and that the crime of aggression is the result of these people's actions. This trial emphasised the crucial role played by the industrial leaders in facilitating aggressive wars and expanded the scope of accountability beyond only political and military leaders to include prominent industrialists who make a substantial contribution to war preparations. However, the tribunal declared, that in order to avoid the potentiality of mass punishments, the aggression as a crime must be only applicable to "only major war criminals-that is, those persons in the political, military and industrial

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[8] *Nuremberg Trials Final Report Appendix D : Control Council Law No. 10* (1945). Washington, DC : Government Printing Office, 1949

[9] This case involved 24 board members of IG Farben, the biggest industrial company in Europe at the time, which were sued by the United States. Judge Herbert emphasised in his concurring opinion the vital role that the IG Farben corporation played in the war effort, arguing that the Third Reich's policy makers would not have thought to launch an aggressive war without the vital commodities that the company supplied. Among the accused were men who had attained a high level of expertise in their respective fields: doctors, chemists, engineers, and lawyers. Judge Herbert noted that the defendants (industrial leaders) "acting through the corporate instrumentality, furnished Hitler with substantial financial support…[and] carried out activities indispensable to creating and equipping the Nazi war machine" [*Judgement of the International Military Tribunal. The IG Farben Trial, (1948)* in Trials of War Criminals Before the Nuremberg Military Tribunals, Vol. VIII, p. 1296]

fields, for example, who were responsible for the formulation and execution of policies" *[The IG Farben Trial, 1948]*. Eventually, due to the court's dissatisfaction with the evidence regarding the *mens rea* (criminal intent) requirement, all defendants were ultimately found not guilty of any crimes against peace.

The Krupp trial is a case against the giant steel concern which provided materials for the German war effort. The manager and eleven company officials were charged with of committed crimes against peace in what they:

1. participated in the initiation of invasion of other countries and wars of aggression in violation of international laws and treaties
2. used their high positions to encourage and commit crimes against peace and took part in the development and implementation of aggressive war plans *[Lumb R. D, 1956]*.

The defendants were also accused of committing crimes against humanity and participating in a common plan or conspiracy to commit future crimes. During the judicial investigation, charges for crimes against peace were dropped due to lack of evidence. However, all of the defendants were found guilty for committing crimes against humanity.

In other one of the twelve trials, the High Command trial[10], the accused were 14 high-ranking generals of the German Wehrmacht (including two field marshals of the Army, one field marshal of the air force and one general admiral), some of whom were members of the High Command of Nazi Germany's military forces. They were accused of participation, planning or helping to carry out the many war crimes and atrocities carried out in nations that the German forces had conquered throughout the war, conspiracy and crimes against humanity.

There were two necessary criteria for responsibility. First, there needed to be concrete evidence that an aggressive war was planned and the second, the person who received that information needed to be in a position to use it to influence or shape policy[11] *[Lumb R. D, 1956]*.

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[10] The German High Command Trial (1947) in Law reports of trials of war criminals, volume XII , London, 1949.

[11] "Anybody who is on the policy-making level and participates in the war policy is liable to punishment. But those under them cannot be punished for the crime of others. The misdeed of the policy makers is all the greater in as much as they use the great mass of the soldiers and officers to carry out an international crime; however, the individual soldier or officer below the policy level is but the policy makers' instrument, finding himself, as he does, under the rigid discipline which is necessary for and peculiar to military organisation." [*The IG Farben Trial, 1948*]

The Kellogg-Briand pact had this point of view as well and proscribed that the war which was carried out is an instrument of national policy and the liable ones are only those who participated in policy-making decisions. Hitler frequently consulted with his higher army officers and their advice often encouraged him to escalate military operations. So, even if not on the higher policy-making level, their guidance was so crucial that they should bear some responsibility for the preparation and waging of wars of aggression *[Lumb R. D, 1956]*.

In its decision, the court acquitted all defendants on the charges of crimes against peace, because of the evidence presented to the Court, the defendants had not participated at the policy-making level. However, all of them except two, were found guilty of war crimes and crimes against humanity.

The only finding of guilt on the aggressive war count was in the Ministries trial, in which most of the accused were senior government ministers. The defendants were accused of crimes against peace, crimes against humanity, war crimes, conspiracy and membership in a criminal organisation. In its discussion of the crimes against peace charge, the Tribunal stated that the accused must have knowledge that a specific aggressive war is being planned or waged *[The Ministries Trial, 1949]*. As a result, all of the defendants, except two were found guilty on at least one count, among which five of the accused were found guilty on a count of crimes against peace.

The other trials, also made very few convictions for committing the crime against peace. This outcome is most likely the result of the limitations the Nuremberg Tribunal placed on the definition of the crime: industrialists or diplomats whose main contribution was to pressuring foreign governments to rearmament Germany or to devising or carrying out the plans for an aggressive war, or to those who, from a position of authority, directly and with full awareness of the consequences, devised or carried out the plans for an aggressive war, would not be considered perpetrators of the crime against peace. Essentially, the Tribunal's definition demanded that in order to be held liable for the crime of aggression, a person must take immediate action and be fully aware of the consequences *[Weigend, Thomas, 2012]*.

The trials of IG Farben, Krupp, High Command and Ministries open a new chapter in the development of crimes against peace. These judgments supplement the Nuremberg judgment and, in many aspects, broaden its guiding principles. In other

words, it recognises that businessmen and military personnel could be held responsible whenever the elements of crimes are met..

Meanwhile, following the model of the Nuremberg Trials, the International Military Tribunal for the Far East, also known as Tokyo Tribunal, was established in Japan to try leaders of the Empire of Japan for committing crimes against peace, war crimes and crimes against humanity. The main focus of the Tokyo Tribunal was crime against peace, committed against states other than the United States, as the Tribunal was mainly initiated by the United States in response to the huge Japanese attack on Pearl Harbor[12]. In contrast with the Nuremberg Tribunal, the jurisdiction of the Tokyo Tribunal was limited to the "Class A" war criminals, who were to be charged with the crime against peace. Other criminals ("Class B" and "Class C") were prosecuted in many domestic courts *[Robert Cryer, 2018]*.

Accordingly to the Charter of the International Military Tribunal for the Far East, the crime against peace is mentioned in the Article 5, which provides with following:
"Jurisdiction Over Persons and Offences. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organisations are charged with offences which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility…" *[Charter of the International Military Tribunal for the Far East, 1946]*.

Article 5(a) is clearly modelled on the Nuremberg Charter's Article 6(a) and grants the Tribunal its jurisdiction over the crime. In its provision is provided competence of the Tribunal over: "Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;" *[Charter of the International Military Tribunal for the Far East, 1946]*.

Moreover, turning back to the leadership clause, the Tokyo Tribunal in a comment to their judgement stated that: "The principle of international law which under certain

[12] Only after realisation that the other states would not support the Tribunal that was exclusively concerned with that attack the proposed scope of the Tribunal was expanded. As a result charges of aggression against other States (many of whom were the colonial authorities of the relevant territories, such as the United Kingdom in Burma and India, the Netherlands in what is now Indonesia, and the United States in the Philippines) along with charges of murder and war crimes *[Robert Cryer, 2018]*.

circumstances protects the representative of a state cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings" *[Judgment of the International Military Tribunal for the Far East, 1948]*.

Unlike the Nuremberg Trials, the charge of crime against peace was prerequisite to prosecution, which means that only those individuals whose crimes included crimes against peace could be prosecuted by the Tribunal *[Yuma Totani, 2010]*. In total, the Tokyo Tribunal charged twenty-eight major leaders in the military, political, and diplomatic sphere, including current and former prime ministers, cabinet members and military commanders, who were charged with fifty-five different counts, including crime against peace. The majority judgement convicted all the accused for the violation of international treaties and waging an aggressive war and carrying out crimes against peace and humanity. It held individuals have criminal liability for the collective actions of the state. In result, the Court found twenty five of the defendants guilty under ten counts, which included the conspiracy charge, waging of war and others[13] *[Sudiksha Saakshi, 2021]*.

Thereby, we can clearly notice that the Tokyo Tribunal emphasised once more on a responsibility of high-rank officials, followed the Nuremberg Trials and replicated its point of view and approach of their prosecution and judgement, thereby setting out another precedent for determining individual criminal liability for the crime of aggression *[Yuma Totani, 2010]*.

1.2.2. UN General Assembly resolution on Nuremberg principles and its role

Following the Nuremberg Trial judgement in 1946, the UN General Assembly adopted resolution 95 (I) on 11 December 1946, which affirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgement of the Tribunal

[13] The sufficient evidence showed that successive Japanese leaders participated in a common plan to wage aggressive war between 1928 and 1945 with the goal to secure Japan's military, political, and economic domination over East Asia, the western and south-western Pacific, and the Indian Ocean. Additionally,in pursuit of the common plan, they also committed the substantive offence of crimes against peace: the waging of aggressive war *[Yuma Totani, 2010]*.

("the Nuremberg principles"). By "affirming" those principles, the General Assembly, which at the time consisted of fifty-five Member States, made it apparent that it supported and approved the general ideas and legal frameworks of criminal law that could be derived from the Nuremberg Charter either explicitly or implicitly. In terms of legislation, this endorsement and backing meant that the international community had firmly started the process of transforming the contested ideas into universal norms of customary law that should be enforceable by all of its member states *[Antonio Cassese, 2009]*.

Although the UN General Assembly according to the UN Charter lacks legislative powers and its resolutions generally are not binding for the Member States or binding in international law at large , they have recommendatory powers. Considering the fact that the General Assembly resolutions are being adopted by the consensus of the Member States or accepted by the majority of the General Assembly, they play a significant role in the development of international law. Moreover, the General Assembly resolutions frequently mirror the practices and actions of many states and the support for the resolution's principles is demonstrated by a state's vote in favour of it, which is considered state practice. Thereby, if the resolutions are observed in the states' practice, they are evidence of international customary law *[Stephen M. Schwebel, 1979]*.

Turning back to the resolution 95 (I), in the this resolution the General Assembly also instructed the Committee on the Progressive Development of International Law and its Codification, which was established by resolution 94 (I), to "treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal." *[United Nations General Assembly Resolution 95(I), 1946]*.

The General Assembly then adopted a second resolution 177 (II) on November 21, 1947, which directed the newly established International Law Commission ("the Commission"), which had been established by resolution 174 (II), to develop these principles and a draft Code of Offences against the Peace and Security of Mankind ("the draft Code").

Mr. Jean Spiropoulos, which was appointed by the Commission as a Special Rapporteur, submitted to the Commission his the report in which he made a distinction between the principles *stricto sensu* (which was about the responsibility of accomplices, the precedence of international law over inconsistent domestic law, the rejection of

immunity for individuals who acted in an official capacity, the prohibition of the defence of superior orders, and the right to a fair trial) and the crimes (such as crimes against peace, war crimes and crimes against humanity). However, later this distinction was cancelled by the Commission which in 1950 adopted "the Nuremberg principles". The Nuremberg principles were not formally adopted by the General Assembly in their expanded version after the Commission's text was submitted — the Commission only requested observations from Member States, but the very principles were not developed any further *[Yearbook of the International Law Commission, 1950]*.

Nevertheless, the "Principles of international law recognised in the Charter of the Nuremberg Tribunal and in the judgement of the Tribunal" contained seven principles:

- Principle I — "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment" — refers to individual responsibility for committing crimes under international law.
- Principle II — "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law" — is considered to be an extension to the Principle I and states that even if a domestic law does not penalise an act that is considered as international crime, criminal responsibility nevertheless exists under international law.
- Principle III — "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law" — is based on the Article 7 of the Nuremberg Charter and denies immunity for committing crimes for high-ranking officials.
- Principle IV — "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him" — was already mentioned in the provisions of the Article 8 of the Nuremberg Charter. However, the content of these two texts is quite different: in this principle the Commission added the element of "moral choice" and changed in the text of principle the last phrase of the Article 8 considering that "the question of mitigating punishment is a matter for the competent Court to decide" *[Yearbook of the International Law Commission, 1950]*.

- Principle V — "Any person charged with a crime under international law has the right to a fair trial on the facts and law" — was also established in the Nuremberg Charter and accordingly to the Commission, the term "fair trial" has to be understood in the light of provisions of chapter four of the Nuremberg Charter.
- Principle VI codifies the crimes following the Article 6 of the Nuremberg Charter — crimes against peace, war crimes and crimes against humanity. Neither the Nuremberg Charter or judgement had defined the "war of aggression", the Commission also didn't give a definition to it. However, following the Nuremberg judgement, the Commission, in its commentary, emphasised that the waging of a war of aggression could be committed only by "high ranking military personnel and high state officials" *[Yearbook of the International Law Commission, 1950]*.
- Principle VII — "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law" — only contains complicity, does not define other modes of accountability such as planning, instigating or ordering; nor does the principle include responsibility by omission (so-called "command responsibility"). Therefore, from the commentary of the Commission it is not clear what types of responsibility "complicity" entailed *[Robert Cryer, 2005]*.

Additionally, the Commission was directed to consider the feedback provided by governments and their representatives considering creating the draft Code. However, the draft Code adopted by the Commission in 1954 followed a similar fate as "The Nuremberg principles" did. The General Assembly decided to postpone further consideration of the draft Code until the new Special Committee on the Question of Defining Aggression had submitted its report in resolution 897 (IX) of December 4, 1954, since it was believed that the draft Code raised issues that were closely related to those of the definition of aggression. This issue was not taken up for more than twenty years until the early 1980s. By adopting resolution 36/106 on December 10, 1981, the General Assembly instructed the Commission to continue working on the proposed draft Code. The Commission's efforts led to the "draft Code of Crimes against the Peace and Security of Mankind" being adopted in 1996 *[Yearbook of the International Law Commission, 1996]*.

It can be clearly noticed that some of the principles were some sort of innovative in that time. Although "the Nuremberg principles" formulated by the Commission were never adopted or rejected by the General Assembly, all of them — in slightly different and more detailed form — have been reaffirmed and developed in the statutes of the international criminal tribunals and in international and national case law.

At the same time, attempts have been made to reach international agreement on the meaning of aggression by member states. The definition was not agreed and accepted from the first time and in some way the Security Council had failed to determine the act of aggression as it is given to it in the Article 39 of the UN Charter. It took more than twenty years when a definition of aggression was finally adopted by the General Assembly on 14 December 1974 by consensus in the resolution 3314 (XXIX).

Accordingly to the Article 1 of the resolution 3314: "Aggression is 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, as set out in this Definition" *[The UN General Assembly resolution 3314 (XXIX), 1974]*. The acts listed in article 3 are considered acts of aggression, but they are also subject to the rules of article 2, which provide that the Security Council may choose not to declare certain acts to be acts of aggression based on a variety of factors, such as the acts' lack of sufficient gravity. According to Article 4, the list is not exhaustive and the Security Council has the authority to declare that further actions qualify as aggression. Moreover, Article 5 provides a provision which gives a rise of international responsibility: "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility" *[The UN General Assembly resolution 3314 (XXIX), 1974]*.

Therefore, it can be clearly seen that the Nuremberg principles have considerably influenced the development of international criminal law and as a consequence the concept of individual criminal responsibility has become a well-established concept. It was once associated with the end of the theory that held that only states had rights and obligations or that they possessed legal personality. Likewise, the right to a fair trial, the principle of the irrelevance of official capacity, the fact that action under superior orders does not relieve an individual from responsibility for criminal acts were inserted in the statutes of subsequent international judicial institutions, such as statutes of ad hoc tribunals namely the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and statute of the

International Criminal Court (ICC). However, the crime of aggression was not included in the statutes of the ICTY and ICTR, despite the Nuremberg precedent and the fact that there were components of aggression in the contexts of the former Yugoslavia *[Antonio Cassese, 2009]*.

Nowadays, the Nuremberg principles are widely considered to represent customary international law, since they are also laid down in various human rights treaties, such as the International Covenant on Civil and Political Rights (right to a fair trial in the Article 14), the American Convention on Human Rights (right to a fair trial in the Article 8) and the European Convention on Human Rights (right to a fair trial in the Article 6), and in national and international case law (for example, in the ICTY's Tadic case[14] the Court has distinguished between the modes of responsibility of committing, planning, ordering, instigating, aiding and abetting, and acknowledging joint criminal enterprise as a form of commission under customary international law) *[Antonio Cassese, 2009]*.

To conclude the information that I have provided in the Part I, which was delved into the establishment and prosecution of the crime against peace under the Nuremberg Charter, the legal principles laid during the Nuremberg Trials made a significant push in the development and shaping of the international criminal law. Therefore, by analysing the definition of the crime, leadership clause, modalities of individual criminal responsibility and post-Nuremberg legal processes, several critical insights have occurred.

First, the Nuremberg Trials introduced the concept of the crime against the peace and provided a comprehensive definition of the crime, thereby encompassing the modalities of the crime, namely planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties agreements or assurances, participation in common plan or conspiracy.

Secondly, the Nuremberg Trials brought to public attention the leadership clause and created a legal precedent of criminal responsibility for persons in positions such as leaders, which was quite new, as previous legal norms were mainly directed towards the state responsibility. The emphasis on high-level officials underlined the idea that those with significant authority and capacity to make decisions were primarily accountable for

[14] Prosecutor v. Dusko Tadic (Appeal Judgement) (1999), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999

initiating and maintaining acts of aggression. This method represented an important change in the direction of personal accountability at the highest ranks of military and political authority.

Third, the Nuremberg legacy regarding crimes against peace was later seen during the subsequent trials and in the UN General Assembly resolutions. Thus, the Nuremberg principles such as individual criminal responsibility and a right to a fair trial, maintain the direction of international criminal prosecutions and endorse the goal of justice for aggression victims.

Consequently, the analysis of the concept of the crime against peace provided in the Nuremberg Charter establishes a ground for examining its development in subsequent legal frameworks. Thereby, the research of Part I provides a fundamental background of the crime of aggression under the Rome statute, which will be further analysed in the Part II of this thesis.

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II. THE CRIME OF AGGRESSION UNDER THE ROME STATUTE

As it was discovered from the previous part, the major purpose of the Nuremberg Trials was to prosecute Nazi leaders for crimes against peace and waging aggressive war, which was called during the trials as "supreme international crime" *[Judgement of the International Military Tribunal, 1946]*. These trials were never intended to be just a historical event, they were a beginning of a new era of accountability for international crimes, thus making a huge contribution to development of international criminal law.

For more than forty years, the Cold War blocked the establishment of any international court. During these long years, undoubtedly, many serious crimes were cottoned, but went unpunished. So the legacy of the Nuremberg Trials was unsuccessful. However, the situation changed with the end of the Cold War in 1989 and international criminal justice again became a realistic capability *[Philippe Kirsch, 2006]*.

The United Nations established two ad hoc tribunals as a reaction to the atrocities in the Former Yugoslavia and Rwanda. These are the International Court for Former Yugoslavia (ICTY), established in 1993 in response to large-scale atrocities committed by armed forces during the Yugoslav Wars, and the International Court for Rwanda (ICTR), established in 1994 following the Rwandan genocide, which are the descendants of the Nuremberg Trials and showed once again that responsibility for international crimes is possible. They were established for the prosecution of responsible ones for genocide and other violations of international humanitarian law. However, these tribunals could partially fulfil the Nuremberg legacy because they faced some limitations to their jurisdiction *[Philippe Kirsch, 2006]*.

First, according to the statutes of the ICTY and the ICTR, the tribunal had authority to prosecute and try individuals on genocide, crimes against humanity, violations of the laws or customs of war and breaches of the Geneva Conventions. Therefore, they had no jurisdiction of the prosecution over crimes against peace and crimes of aggression, because in relation to these conflicts there were no committed crimes of aggression.

Second, these tribunals have solely addressed a specific country or area. These tribunals are not able to punish crimes that happen somewhere else.

Third, these tribunals deal mainly with former occurrences. In general terms, they are not built to deal with upcoming crimes.

Fourth, the political will of the world society at large determines their creation. These tribunals have thus been the exception rather than the rule.

Therefore, punishment for international crimes requires a permanent, genuinely international criminal court. Furthermore, the only court that can successfully prevent future offences is one that is permanent and easily accessible. Thus, to fulfil this necessity, the UN General Assembly in the conference in Rome in 1998 adopted the Rome Statute and established the International Criminal Court, which entered into force in 2002 and has jurisdiction over four types of crimes: genocide, crimes against humanity, war crimes and crimes of aggression.

2.1. Definition of the crime of aggression and its elements

The crime of aggression was once again a point of contention between states at the 1998 Rome Conference on the Establishment of an International Criminal Court. The states disagreed on both its definition and the conditions that would allow the newly established court to have jurisdiction over the crime. The crime was once completely removed from the proposed statute. But in the end, most Conference attendees refused to approve a statute that deleted the crime, arguing that such a move would be irrelevant *[Carrie McDougall, 2022a]*.

Although, the crime of aggression was nevertheless included in the jurisdiction of the International Criminal Court in the Article 5 (1), the Article 5(2)[15] postponed the Court's implementation of jurisdiction over the crime, making the crime a "sleeping beauty" *[Robert Heinsch, 2010]* and stating that:

"The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations" *[Rome Statute of the International Criminal Court, 1998]*.

In order to continue negotiations regarding the definition of the crime of aggression following the Rome Statute's implementation, the ICC's Assembly of States Parties (ASP) formed the Special Working Group on the Crime of Aggression (SWGCA),

[15] This paragraph was deleted from the Statute in accordance with the Kampala amendments in 2010.

which would take over the task of preparing a proposal for a definition of this crime. The SWGCA met during 2003 and 2009 at least once a year, and at its final meeting in 2009 presented the “Proposal for a provision on aggression elaborated by the Special Working Group on the Crime of Aggression”. Jurisdictional concerns arose during the SWGCA's work, as long-time opponents of the crime of aggression—roughly representing some of the most militarily engaged States—turned their focus to restricting the Court's authority *[Carrie McDougall, 2022a]*. However, the most remarkable achievement of the SWGCA was a definition of the crime of aggression, which was reached by the consensus on the proposed Article 8*bis*. Thereby, at the Rome Statute Review Conference in Kampala, Uganda in 2010, states finally reached an agreement on articles concerning the crime of aggression and now, for the first time, we have a definition of the crime of aggression in the international treaty.

The Article 8*bis* consists of two paragraphs: paragraph 1 defining the "crime of aggression" and establishing the foundation for potential perpetrators' individual criminal responsibility and paragraph 2 defining the "act of aggression" and enumerating certain acts that were previously typically related to a state's obligation but may now allow for the prosecution of an individual for such acts of aggression *[Robert Heinsch, 2010]*.

Thus, the Article 8*bis* (1) provides with following definition of the crime: “crime of aggression means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations” *[Rome Statute of the International Criminal Court, 1998]*. Additionally, the Article 30 (1) states that: "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge" *[Rome Statute of the International Criminal Court, 1998]*.

Thereby, according to these provisions, following elements of the crime can be outlined: the act of aggression, the manifest violation threshold, the leadership qualifier, the individual conduct and mental element.

According to the Article 8*bis* (1), the “act of aggression” requires to be planned, prepared, initiated or executed and accordingly to the paragraph 2 of this article “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" *[Rome Statute of the International Criminal Court, 1998]*. It can be clearly seen that this definition of aggression is based on the Article 2 (4) of the UN Charter[16]. Furthermore, paragraph 2 of the article reproduces the Article 3 of the UN General Assembly resolution 3314 on the "Definition of Aggression" and provides with the list of examples that are to be considered as acts of aggression.

Thus, following the sub-chapter (a) of the Article 8*bis* (2) military occupations resulting from invasions will be considered as the act of aggression, which, however, appears to leave out situations like the German occupation of Austria and Czechoslovakia during World War II, which did not include the use of force *[Carrie McDougall, 2022a]*. This is an odd omission considering that invasions are included in the definition of crimes against peace in Control Council Law No. 10, which regulated the trials conducted by national military tribunals in Germany after World War II, and that the Ministry's Case involved their prosecution. Sub-chapter (b) refers to the bombardment, use of any weapons and military occupation by the armed forces of a state against the territory of another state. Sub-chapter (c) refers to the blockade of the coasts or ports, meanwhile sub-chapter (d) refers to the attack by the armed forces on the land, sea and air forces, marine and air fleet. The use of one state's armed forces on another's territory with that state's consent "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" is referred to in sub-paragraph (e). Compared to previous illustrative acts, this one does not appear to be as serious. In fact, if the mention of military occupation in sub-paragraph (a) had not been restricted to those brought on by invasion or attack, it may have been left out *[Carrie McDougall, 2022a]*. The specific aspect regarding sub-paragraph (f) is that it seems to confuse using force with providing assistance. In this matter, in the ICJ's Nicaragua case, the Court made a distinction between direct armed attacks and assisting rebel groups. Thus, the Court decided that the United States' assistance to the Contras qualified as unlawful use of force and intervention rather than an armed attack[17]*[Nicaragua v. United States of America, 1986]*. Another problematic matter is

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[16] Article 2 (4) - Prohibition of threat or use of force in international relations. Article 2 (4) of the Charter prohibits the threat or use of force and calls on all Members to respect the sovereignty, territorial integrity and political independence of other States *[The UN Charter, 1945]*.

[17] According to the ICJ, the mere provision of logistical support or financial assistance will not constitute an armed attack giving rise to self-defense according to Article 51 of the UN Charter. Consequently, such a differentiation will assist in clarifying what might constitute "providing assistance" from actions that will constitute direct "use of force *[Nicaragua v. United States of America,1986]*.

regarding sub-paragraph (g), which refers to the "sending" of armed bands but leaves out any mention of the "support" or "organisation" of such groups, suggesting a limited range of activities. However, the reference to a State's "substantial involvement therein" confounds this conclusion, raising the question of what activity the substantial involvement must concern. For example, in the ICJ's Nicaragua case clarified that the USA's "substantial involvement" in Nicaragua's internal affairs, namely organising, training and equipping rebel forces, even though it is not recognised as an armed attack, constitutes a violation of international obligations and can be considered as the act of aggression. In this way, the "organisation" and "support" of armed groups may serve as a significant part in shaping acts of aggression.

The idea of the manifest violation threshold according to the Article 8*bis* (1) requires the act of aggression "by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations" *[Rome Statute of the International Criminal Court, 1998]*. The "manifest violation" threshold clause was intended to prevent criminalisation related to minor incidents and circumstances that are legally contentious[18]. The terms "gravity" and "scale" were meant to preclude border conflicts and similar situations, while "character" must exclude circumstances that are actually legally contentious *[Marieke de Hoon, 2018]*.

For instance, this problem can be seen in a relatively recent case of Democratic Republic of the Congo v. Uganda, where one State stated that it had begun a legitimate war, whereas the State it was attacking asserted that it was protecting itself from the war of aggression *[Democratic Republic of the Congo v. Uganda, 2005]*. In this case, the International Court of Justice (ICJ) relied on its earlier decision on the Nicaragua case, in which held that in order to support or oppose an insurgent attempt states can not intervene in another state's internal affairs. In the Congo v. Uganda case the ICJ ruled that Uganda could not claim self-defence or defence of others and at the same time escape the charge of aggression only because it crossed the Congo's border to engage a guerilla organisation engaged in an insurrection *[Larry May, 2008]*. Thus, it can be clearly seen that the ICJ made a difference regarding the actions of the Uganda's troops: on the one hand it was not an aggressive war if the troops were fighting the insurgents at the request or under the

[18] The report of the June 2008 Special Working Group meeting: 'Delegations supporting this threshold clause noted that it would appropriately limit the Court's jurisdiction to the most serious acts of aggression under customary international law, thus excluding cases of insufficient gravity and falling within a grey area' *[Report of the Special Working Group on the Crime of Aggression,* 2008*]*.

guidance of the Congolese government, where on the other hand, however, this would be considered as an act of aggressive war if the forces were really an occupying force *[Larry May, 2008]*.

Concerning the leadership qualifier, as we discovered in the Part I had its genesis during the Nuremberg Trials. Accordingly to the Article 8*bis* (1), the crime can be committed only by a " person in a position effectively to exercise control over or to direct the political or military action of a State" *[Rome Statute of the International Criminal Court, 1998]*. This leadership requirement is applied to all types of criminal responsibility under the Article 25 (3*bis*), which means that not only the primary offenders but also those who, for instance, aid, abet, or assist in the commission of crimes of aggression must comply with this requirement *[Carrie McDougall, 2022a]*.

As for the individual conduct, the principal perpetrator that meets the leadership qualifier must have planned, prepared, initiated or executed the State act element of the crime of aggression, that is an act of aggression that meets the manifest violation threshold. As it can be noticed, regarding the first three acts, the definition adopts the provisions of Article 6(a) of the Nuremberg Charter, only replacing the phrase "waging of a war" in the Nuremberg Charter with "execution". However, the inclusion of these acts of commission does not preclude the use of other modalities of participation. Thus, besides the leadership qualifier, the Article 28 points out the superior responsibility for the crime of aggression that makes superiors, including military commanders, criminally accountable for the crimes of the forces they effectively command and control. Moreover, the Article 25 (3) provides with the list of acts for committing which a person will be criminally responsible and liable for punishment for a crime within the jurisdiction of the International Criminal Court.

There are no particular requirements regarding the mental components that must be fulfilled in Article 8*bis*. Therefore, the general meaning found in Article 30 of the Rome Statute must be stated rather than the special intent that is necessary for the crime of genocide *[Robert Heinsch, 2010]*. However, the relatively newly drafted Elements of Crimes[19] provide with the additional qualification of the mental elements of the crimes of aggression, namely:

[19] Elements of Crimes of the International Criminal Court, 2010

- it is not necessary to provide evidence that the perpetrator lawfully considered the use of force was a "manifest" violation of the UN Charter or incompatible with it;
- according to the Article 32(2) of the Rome Statute, legal mistakes do not release of criminal responsibility;
- the perpetrator must understand the facts that prove the use of force is incompatible with and a manifest violation of the UN Charter.

Consequently, the Elements of Crimes contribute to the mental component of the crime of aggression and serve the primary purpose of making the meaning of the relevant articles clear.

2.1.1. Leadership clause as the element of the crime and the issue of personal immunities

As I have mentioned before, the Article 8*bis* requires the perpetrator of the crime of aggression to be in a position to control or direct the action of a state, making this crime a "leadership crime". Therefore, in contrast with other three crimes the crime of aggression will be different since crimes against humanity, war crimes and genocide do not have this limitation considering the group of people being in a state of committing the crime[20]. In this regard, whereas the main point of these three crimes lies on the protection of individuals, the protected legal value of the crime of aggression is focused on the prevention of the use of force against another state's political independence, territorial integrity or sovereignty *[Robert Heinsch, 2010]*.

This focus on the top officials evolved during the working process of the the Special Working Group on the Crime of Aggression, where two different opinions regarding the scope of the leadership clause arose. The first one suggested that every person in the position to perform the crucial impact on the state's policy should be criminally responsible. In this context, the crucial impact originally appeared in the Nuremberg Trials, where not only high-ranking decision makers, but also social, business and spiritual leaders should be responsible for the crime of aggression. On the other hand, the scope of the leadership should be more narrow, thus for example legal advisors would

[20] These three crimes have a limitation concerning the possible group of victims of the crime, such as "protected persons" for war crimes, the "civilian population" for the crimes against humanity, or a national, ethnical, racial or religious group for the crime of genocide.

not be prosecuted as they do not have control over the state's actions. However, in this regard it would be more problematic to establish criminal responsibility for those who are not directly in charge *[Nikola Hajdin, 2017]*.

Therefore, the SWGCA considered both of the approaches and worked to develop a solution that would satisfy the State Parties of the Rome Statute, which would ultimately determine whether to accept the definition suggested by the Group. Thus, the SWGCA followed the Nuremberg precedent, however with a distinct phrasing than in the High Command case, and now only a person "in a position effectively to exercise control over or to direct the political or military action of a State" *[Rome Statute of the International Criminal Court, 1998]*.

Additionally, following the Nuremberg Trials it is known that individuals with economic powers are also able to support, or assist in preparation of aggressive war. Thus, the question whether it was required to restrict this group of potential perpetrators to those who manage the state's "political or military" actions arises, since it is also possible to take into consideration religious leaders who significantly impact a state's policy. The answer to this question regarding the limitation of perpetrators category can be clarified following the provision in the paragraph 2 of the Article 8*bis* with the definition of the "act of aggression" where it requires the use of armed force, which is often primarily coordinated by a state's military or political leaders.

Moreover, the SWGCA stated in its earliest documents that the crime of aggression is "reserved" for high-ranking political and military leaders. In this regard, low-ranking state agents, who are incapable of being aware of aggressive plans of their state due to their position, can not be responsible for the crime of aggression, as they do not have the important mental element — awareness *[Nikola Hajdin, 2017]*. Thus, the potential group of individuals that fit into the category of leaders will include heads of states and governments, such as presidents and prime ministers, along with military leaders namely ministers of defence or generals commanding the armed forces [*Robert Heinsch, 2010]*.

In this manner, the provisions of the Article 8*bis* directly contradict the concept of personal immunities (*ratione personae*), which as I mentioned in the Part I, are procedural rules based on customary law or international treaties that forbid states to execute jurisdiction over those to whom they have been granted. Therefore, the following question whether the International Criminal Court has jurisdiction to prosecute those

individuals who possess the immunity arises. The answer to this question is simple as the Article 27 (2) of the Rome Statute determines immunities to be inapplicable within its jurisdiction: "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person" *[Rome Statute of the International Criminal Court, 1998]*.

Additionally, the Rome Statute is an international agreement signed by the States Parties to the Statute and treaties do not create any obligations for non-party (third State) withouts its consent. By signing the Rome Statute, State Parties agreed on the Article 27(2) thereby dismissing all immunities of their officials, namely personal immunities (immunities *ratione personae*) and functional immunities (immunities *ratione materiae*), with regard to the jurisdiction of the Court. Therefore, State Parties adjusted that no immunity can hinder prosecutions over individuals with respect to crimes of aggression when according to the Article 15*bis* the Court performs its jurisdiction if a State Party refers the situation to the Prosecutor or if the Prosecutor initiates an investigation *proprio motu*.

Furthermore, Ukraine is not a State Party to the Rome Statute, but has accepted the ICC jurisdiction by the declaration over alleged crimes committed by the Russian Federation (which is not a State Party as well) under the Rome Statute occurring on Ukraine's territory. In 2023 the ICC Pre-Trial Chamber II according to the Article 27 (2) issued an arrest warrant for the President of the Russian Federation Vladimir Putin for committed war crimes, namely unlawful deportation of population and their transfer from occupied areas of Ukraine to the Russian Federation *[ICC-01/22]*.

Moreover, the ICC issued an arrest warrant for Israeli Prime Minister Benjamin Netanyahu, while Israel is not a signatory to the Rome Statute as well. Regarding this arrest warrant, France claimed that the warrant issued against the Israeli Prime Minister for war crimes is invalid since Israel is not a state-party of the Rome Statute, being centred around Article 98 of the Rome Statute. This claim once could be considered as a strong argument, but in the Appeals Chamber ruling in 2019, the Court clarified the ambiguity created by Article 98 regarding non-member states[21]. Additionally, France did

[21] In that case, Omar al-Bashir, the former president of Sudan, was issued with an arrest warrant. Sudan is not a party to the Rome Statute, much like Israel. However, the court came to the conclusion that, whether a state is a third party or not, it precludes immunity for heads of state under customary international law *[The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-397, 2019]*

not argue about the arrest warrant for Putin in 2023, vice versa supporting it and stating that no one can escape justice for committed crimes, thereby presenting France's double standards and selective interpretations of the ICC Statute.

Therefore, in the current international law, a difficult balance between leaders' accountability and granted immunities for officials from prosecution is a difficult subject that affects the ICC's ability to serve as a universal justice instrument. However, the ICC's recent case law against high-ranking leaders demonstrates its jurisdictional flexibility regarding the prosecution of non-member states for committed crimes and dedication of deterring severe crimes in spite of the member states concerned.

2.1.2. Modalities of individual criminal responsibility

Following the leadership qualifier, which is required by the Article 25 (3*bis*) for individuals to be criminally prosecuted, the Rome Statute followed the Nuremberg Charter regarding modalities of individual criminal conduct as well. Thus, to be criminally responsible for the crime of aggression an individual must plan, prepare, initiate or execute the State act element of the crime of aggression as it mentioned in the Article 8*bis*.

In this regard, the "planning" of the act of aggression can be understood as a participation in meetings where plans to attack another state are being formulated. Although it is not necessary for the individual to have planned the act alone, it does not appear to be enough for someone in a powerful position to have verbally approved a plan that existed already, unless their actions would be covered by Article 25 (3).

The "preparation" indicates a variety of actions that provide a state with the capacity and potential for committing the act of aggression. Following the history of the Nuremberg, it is known that the planning can cover diplomatic, economic and military actions. For example, it can be gathering of forces on the border of the state that is to be attacked, likewise manoeuvres like obtaining weapons and selling off state-owned assets in order to purchase them when done with the intention of conducting the act of aggression. Moreover, it involves diplomatic efforts to cover up the State's plans to obtain military dominance prior to an attack *[Marie Aronsson-Storrier, 2017]*.

The "initiation" denotes the decision that was made just prior to the act of aggression to actually carry it out. This includes strategic recommendations, but not

necessarily tactical or operational ones. For instance, it might make it illegal for a president, military leader, or defence minister to give final orders to carry out an act *[Marie Aronsson, 2017]*.

The “execution” is a term that replaced “waging" from the Nuremberg Charter and refers to the decisions made after the operation has started, for example annexing the occupied area or occupying territory following a first act of aggression. Notably, this can encompass actions taken by those who had no involvement in the act's initial phases *[Carrie McDougall, 2022a]*.

Moreover, the Article 25 regulates individual criminal responsibility in detail, more specifically — section 3(a)-(d) is certainly the core of this Article, where commission, ordering, instigating and aiding and abetting are confirmed as modes of participation. This article does not simply enumerate the different modes of participation, but also classifies them. Thus, it provides with a distinction of four modes of criminal responsibility: first — the commission of a crime, second — ordering and instigating, third — assistance and fourth — contribution to a group crime.

As for commission of a crime, it is explained as committing an act or failing to act when the person clearly knew or should have known the act or omission was illegal. The Article 25 (3)(a) provides three different forms of commission — commission as an individual, joint commission and commission through another person.

Commission as an individual directly follows from the Article 25 (3)(a) and refers to the actions which a person executes according to the definition of the crime of aggression, meets the requirement of the *mens rea* and is certainly accountable under international criminal law as a principal.

The joint commission should be explained as follows: if multiple people commit a crime "jointly with another" under the international law — each of them bears personal responsibility for the crime. Thereby, criminal cooperation with a common plan or design is crucial for co-perpetration. In connection with this cooperation, each co-perpetrator has responsibility for the actions of all other co-perpetrators. This implies that each co-perpetrator bears responsibility for the entire crime performed within the structure of the common plan *[Gerhard Werle, 2007]*. Following the Article 25, the two elements of ‘committing’ and ‘jointly with another’ can be distinguished: the first one is objective element, which is a participation in the crime's actual physical commission, a plurality of persons and a common plan involving the commission of a crime under international law,

and the second one is subjective element, which is an agreement between the co-perpetrators, namely common plan, purpose of design.

If a person uses another person to commit a crime under international law — that means commission of a crime “through another person” (in other words perpetrator-by-means) and is a basis for international criminal responsibility. This concept had never been regulated by international criminal law nor examined by international judicial institutions before the entrance into force of the Rome Statute *[Gerhard Werle, 2007]*. However, under international criminal law, actions that justify personal accountability for the crime as a perpetrator-by-means have always been punishable, at least as it was during the Nuremberg Trials regarding planning, ordering or instigating the crime.

The next mode of international criminal responsibility is ordering and instigating. Following the Article 25 (3)(b) of the Rome Statute, any person who instigates (more precisely ‘solicits’ or ‘induces’) to commit a crime or orders a commission of a crime is criminally accountable.

According to the ad hoc tribunals, an instigator is a person who "prompts" any other person to violate international law, which can also happen by omission. The crime and the instigation must be causally related and it is sufficient if the instigation had a significant impact on the crime. The mental element requires that the accused knew there was a significant chance their actions would lead to a crime or that they meant to incite or encourage the crime. According to the Rome Statute, the instigator does not need to share the perpetrator's special intent, but they should be aware of it *[Robert Heinsch, 2010]*.

As for ordering, it is a special form of instigation and assumes existence of a superior-subordinate-relationship between the one giving and the one receiving the order. Thus, a person who orders uses their authority to incite another person to commit a crime. Subjectively, an order must be given with the intention that the crime be carried out or with the knowledge that there is a "substantial likelihood" that the crime would be committed as a result of the person's actions *[Gerhard Werle, 2007]*. Additionally, if the person providing orders does not meet all the mental requirements, they cannot be considered as a perpetrator of a crime (not even under the concept of perpetration by means).

According to the Article 25 (c), anyone who “aids, abets or otherwise assists” in the commission of a crime is criminally liable. The responsibility for assisting the primary perpetrator has been clarified by the ad hoc tribunals. According to the case law of ad hoc

tribunals, assistance should have a substantial effect on the commitment of crime *[Shulzhenko, Romaskin, 2021]*. The ad hoc tribunals have, however, interpreted that aspect broadly, holding that moral support or encouragement of the perpetrator — in certain cases, even just being present at the crime scene — can be sufficient *[Gerhard Werle, 2007]*.

On the other hand, the Rome Statute does not require that the assistance has a substantial effect on the commission of the crime. The level of individual involvement in the criminal actions and therefore the degree of individual criminal responsibility is established by the mode of participation. Assistance includes actions that did not have the necessary *mens rea* for the crime or were not necessary to produce the criminal outcome *[Shulzhenko, Romaskin, 2021]*. Thus, although their assistance makes the crime easier to do, the assistant has no direct control over the crime's execution. Even if they hadn't contributed, the crime could still have been committed. As for the *mens rea*, the individual providing assistance needs to understand that their actions facilitate the crime's commission. Consequently it is sufficient that they know of such intent of a crime *[Gerhard Werle, 2007]*. For example, if a person provides with the weapons — they are assisting and abetting in the commission as long as they know of the perpetrator’s intent. Thus, assistance entails a rather low degree of personal criminal responsibility than commission of crime or instigating and ordering.

Contribution to a group crime or an attempted crime by a group is a new form of participation established in the Article 25 (d). By a group it is understandable as an association of at least three persons who act in furtherance of a ‘common purpose’. The contribution to the group crime can be in any way. This applies to indirect forms of assistance, for example financing the group, which do not merit accountability for aiding and abetting or co-perpetration since, according to international law, they have no substantial impact on the crime's commission. Therefore, contribution to a group crime should be interpreted as a subsidiary mode of participation entailing the weakest form of responsibility *[Gerhard Werle, 2007]*.

Furthermore, the Article 28 determines a superior responsibility for military commanders and non-military (civilian) superiors for any crimes carried out by forces that they effectively command and control. In order to prove that the military commander is responsible the prosecution has to establish whether the perpetrator was in the effective command and control (namely the capacity to prevent or suppress criminal activity or to

report the issue to the appropriate authorities for investigation and prosecution), failed to prevent and punish (which are necessary and reasonable measures depending on their effective control), fulfils a necessary mental element (namely they knew or should have known that the crime going or being committed) and there was a causal element (which means that the potential of the crimes being committed must have increased due to the superior's lack of action) *[International Criminal Law Services, 2014]*. The element of the crime for the civilian superiors are remain the same except the mental element, which differs from the superior responsibility of the military commanders and consist of that the civilian superior "knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit crimes" *[Rome Statute of the International Criminal Court, 1998]*.

Additionally, the superior responsibility can also apply together with the direct individual criminal responsibility for the crime of aggression, as these two modalities of responsibility complement one another to ensure criminal liability for committing the crime of aggression. For instance, a military commander can be accused of planning directly and executing an act of aggression (direct responsibility) as well as not having prevented further acts of aggression by subordinates (superior responsibility). In this way, the application of different modalities of individual direct responsibility and superior responsibility for the perpetrators empowers the ICC to effectively prosecute the crime of aggression and guarantee that justice is done at all levels of command and responsibility.

2.2. Gravity test

Throughout the 20th century, diplomatic discussions over the definition of aggression have shown that "aggression" is considered a more specific category rather than the same as "illegal use of force." Not all unlawful use of force is considered aggression, but all aggression is the illegal use of force. Therefore, unless it is also a manifest violation of the UN Charter, the unlawful use of force is not a crime of aggression even though it is prohibited *[Marieke de Hoon, 2018]*.

As I have mentioned in the previous chapter, the act of aggression according to the Article 8*bis* (1) "by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations". The term "manifest violation" in the context of aggression is new, as the threshold of the use of force can not be found in the UN Charter

or in the Resolution 3314 on the Definition of Aggression. Since there is no applicable precedent regarding exactly like this threshold in the history of prosecution of the crime of aggression, it is stated that narrowing the crime only to the manifest violations could have a negative impact on the prohibition on using force since it would allow for any aggressive behaviour that is not manifest and it is not clear which types of "manifest" violations that one ought to anticipate *[Robert Heinsch, 2010]*. Thus, this question must be processed by the Court when dealing with such cases of aggression.

Additionally, this qualifier that limits a crime to serious violations is not completely undetermined to international law, since a classical example of such approach can be found as “grave breaches” of the Geneva Conventions. According to this, individual criminal accountability only applies to those violations of international humanitarian law specified in the corresponding articles of the Geneva Conventions or the Additional Protocol I *[Robert Heinsch, 2010]*. However, the difference in comparing the manifest violations of the crime of aggression and the grave breaches regime in the area of international humanitarian law is that Geneva Conventions, unlike the Rome Statute, actually provide with a distinct list of these “grave breaches”. The paragraph 2 of the Article 8*bis* does not provide with a list of manifest violations, but only provides with a list of possible acts of aggression.

The issue of how an act of aggression might "by its character, gravity, and scale" be a manifest violation of the UN Charter is one that needs to be clarified by the Court's judges. According to the draughting history, the purpose of this qualifier was "to exclude some borderline cases” *[Robert Heinsch, 2010]*. In this regard, following the paragraph 7 of “Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression”[22] (the Understandings) the question whether the two components can be sufficiently to present a manifest violation arises. It can be noticed that the Understandings provide with “the three components of character, gravity and scale must be sufficient to justify a ‘manifest’ determination” and it indicates that all three components must be fulfilled. However, the following provision of this paragraph states that no single element can be important enough to meet the manifest criteria on its

[22] “It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a ‘manifest’ determination. No one component can be significant enough to satisfy the manifest standard by itself.” *[Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, 2010]*

own. Additionally, in the paragraph 6 of the Understandings[23] the terms “gravity” and “consequences” are put in pair, however the last one is not mentioned in the original definition of the crime of aggression in Article 8*bis*. However, since "manifest" violations are not specifically mentioned in this part of the Understandings, it is reasonable to presume that this refers to a further evaluation of all the relevant factors.Thus, the Understandings appear to be an example of adding ambiguity to a statement that could have been understood more simply without them.

On the other hand, the question of the legal relevance of the Understandings arises. The Understandings were unknown till the Review Conference and are not referred to by the amendments of the Conference. While the Article 9 of the Rome Statute explicitly states that the "Elements of Crimes" “shall assist the Court in the interpretation and application of Articles 6, 7, and 8” and Article 21 enumerates them in paragraph 1(a) following the Statute in the law which the Court shall apply. Furthermore, the resolution's paragraph 6 is intended to change Article 9 (1) of the Rome Statute by substituting the new wording for the old text: “Elements of Crimes shall assist the Court in the interpretation and application of Articles 6, 7, 8, or 8*bis*”.

Moreover, the purpose behind this qualifier is to eliminate those violations of the prohibition that are debatable and, therefore, not "manifest" violations of the UN Charter. In this context, examples that spring to mind are "humanitarian intervention" situations, such as the Kosovo War, or anticipatory self-defence situations, where the attacker appears to have proof of an impending attack, but this proof ultimately proves to be untrustworthy after the "defensive" action against another nation has occurred. Even while these instances mostly pertain to “character," one may also consider the mere exchange of fire after a border incident or a short-term violation of the territorial sovereignty when referring to the “gravity and scale” of the manifest violation. Yet, it is important to consider that some analysts have already questioned whether even "low scale" infractions of the prohibition of the use of force qualify as aggression under the original definition *[Robert Heinsch, 2010]*.

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[23] “It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations”*[Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, 2010]*

Therefore, it can be said that this issue becomes even more divergent. Since the crime of aggression attempts to differentiate between two categories of unlawful force use — illegal and aggressive force use, on the one hand, and illegal and non-aggressive force use, on the other — it covers both the legitimacy and legality of using force, even in a criminal court. Disagreement over how the UN Charter's goals should be read is thus reflected in the question of whether a use of force is not only unlawful but also manifestly breaches the Charter due to its character, gravity and scale *[Marieke de Hoon, 2018]*.

Additionally, taking in consideration Russia's aggression against Ukraine, that characterised as using of force, ongoing military operations, occupation of territories and annexation of Crimea constitutes a direct "manifest violation" of the UN Charter. These actions, in particular full-scale invasion started in February 2022 meet the criteria of "character, gravity and scale" to violate the provisions of the Charter. In this matter, the UN General Assembly in its Resolution ES-11/1[24] recognised the aggression of Russia against Ukraine as a violation of Article 2 (4) of the UN Charter. Moreover the action taken in certain areas of the Donetsk and Luhansk regions of Ukraine were declared as a violation of the territorial integrity and sovereignty of Ukraine, which are inconsistent to the principles provided in the Charter.

In result, it is important to consider the qualifier of "manifest violation" of the UN Charter as a necessary compromise in order to reach a consensus regarding the definition as such. However, there are more problems raised by the term "manifest" than by the Geneva Conventions' grave breaches regime, both approaches are theoretically similar. Despite the numerous political ramifications, it is a significant indication that the "manifest violation" has been criminalised for such a long period and has been handled with extreme caution, which, undoubtedly, will present an extra difficulty for the ICC judges to interpret the relevant qualifier in a reasonable manner.

To sum up all things considered in the Part II, the Rome Statute followed the principles laid down in the Nuremberg Charter and emphasised once more that no one is above the law. Just as the Nuremberg Trials did, so too the International Criminal Court upholds the idea that high-ranking officials despite their official position or granted immunities can be held criminally accountable for committing international crimes.

[24] UN General Assembly Resolution ES-11/1, 2022

Additionally, the Rome Statute followed the Nuremberg Charter regarding modes of individual criminal responsibility, however Article 25 provides a list of various forms of participation in committing a crime of aggression. By defining and categorising all these modes of liability, the statute has provided a strong legal base for the prosecution of a person who is responsible for the crime of aggression.

Moreover, while the element of aggressiveness was already set in the Nuremberg Charter, the Rome Statute went further, improved it and set the term "manifest violation", which entails certain motivation connecting it to the aggressive intent. This qualifier is intended to create important breaches as compared to lesser violations, as did the system of grave breaches of the Geneva Conventions. As opposed to specific categories applicable to the Geneva Conventions, there is no clear list of what constitutes a manifest violation under the Rome Statute. The adoption of this qualifier creates a very much-needed compromise to reach consensus on the definition of the crime of aggression. This distinction between legitimacy and legality with respect to the use of force underscores the ongoing tension the ICC must navigate when judging cases of aggression. This is the new hurdle which affects the manifest violation threshold that aims to clarify and specify the prosecution of the crime of aggression and creates the vast interpretive challenges it presents for the ICC.

Consequently, the concept and the elements of the crime of aggression of the Rome Statute examined in this part provides a comprehensive understanding of this crime. Thereby, the research of Part II contributes to the essential background for comparative analysis of the concepts of crime against peace and crime of aggression, which will be further provided in the Part III of this thesis.

III. COMPARATIVE ANALYSIS OF THE CONCEPTS

3.1. Main differences and similarities of the concepts

As the concepts of the crime against peace and crime of aggression were carefully studied in the previous parts of this thesis, now it is possible to provide a comparative analysis of the elements, namely the definitions of the act of aggression, issues of leadership clause and personal immunities and modalities of individual criminal responsibility, and the application of these concepts. Although these concepts are often used as interchangeable ones, as both of them contribute to the further development of legal norms aimed at preventing and prosecuting acts of aggression, they have distinct characteristics in their legal definitions, scope and application.

To start with the similar features, both of the concepts were evolving and developing through different times and different geopolitical environments, however both of them, obviously, share a common goal — to increase chances and prevent committing future crimes that threaten peace and security of international society.

Additionally, crime against peace and crime of aggression are both provided in significant international legal documents, namely the Nuremberg Charter and the Rome Statute, representing the consensus of the international community on criminalisation of one state's aggressive acts on another.

To continue with the common features, it can be noticed that both of the concepts are based on the fundamental principle of prohibition of the use of force provided in the Charter of the United Nations, which forbids threats or use of force against the political independence, territorial integrity or sovereignty of any state.

Moreover, both the documents and courts are focused on the individual criminal responsibility and consider these crimes as clear leadership crimes dealing with the issue of personal immunities. Thus, the Nuremberg Trials completely rejected the immunities and it can be seen because Germany had been completely defeated and the Allies were exercising their own authority over it, so the problem of personal immunity was easily resolved, while the Rome Statute left the gap regarding this issue. The drafters of the ICC Statute tried to achieve the balance with objectives by which the Court intends to prosecute serious international crimes with respect to established international legal

principles, state sovereignty and the political matters in the Articles 27 and 98, but still this presents a challenge for the ICC.

Furthermore, both of the concepts involve common modalities of holding individuals criminally responsible, namely planning, preparation and initiation of aggressive acts.

Finally, although the crime against peace was not immediately accepted as a generally accepted norm, crime of aggression eventually clarified legal principles for the prosecution of acts of aggression committed by states under command of their political and military leadership. Therefore, both the crime against peace and the crime of aggression significantly contributed to the development of customary international law regarding the recognition of aggressive war and acts of aggression as an international crime.

Switching to the differences between the concepts, looking at the provisions of the concepts it is clearly seen that each of them have distinct aspects of the interpretation of their definitions. Thus, taking into consideration the scope of the crimes, the crime against peace primarily addresses aggressive wars and conspiracies that lead to war, while crime of aggression is more specific and provides with the exact actions that constitute aggression and encompasses “softer forms” of the use of force in according to the UN Charter, for example economic blockade or small-scale military operations, thereby anticipating more clear legal standards for the prosecution.

What’s more, for the act to be prosecuted under the provision of the crime against peace it was necessary to be in breach of any international agreements or treaties, while for the crime of aggression — the act is supposed to manifest violation of the exactly defined international treaty, namely the Charter of the United Nations, therefore providing a narrow threshold for the prosecution compared to the more broad defined regarding the crime against peace.

Additionally, while crime against peace covered mostly conspiracy and planning of wagging aggressive wars counts, the crime of aggression includes the commission as a modality of individual criminal responsibility as well, which according to the Article 25 (3)(a) can be individual, joint or through another person.

Furthermore, the defendants under the crime against peace were prosecuted not only for the time of the World War II, but also years before that war, that is a sign of the ex post facto law which implies pursuing individuals legally for conduct that has not

been defined in international law as constituting a crime at the time when that conduct has been undertaken. While the crime of aggression according to the Article 11 foresees the principle of non-retroactivity, stating that: “The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute” *[Rome Statute of the International Criminal Court, 1998]*. The Kampala amendments came into force in July 2018, so the ICC can only prosecute the crimes of aggression after this date.

Finally, the crimes against peace were not codified into a permanent legal framework and, thus being influential and confirming the aim of their creation, did not lead to the setting of the further functioning international body or a universally binding treaty. While the crime of aggression came through decades of extensive negotiations and is finally codified into the ICC legal framework, thereby indicating a more structured and consensual way for definition and prosecution of the crime.

Consequently, the evolution from the more broad and less defined crime against peace to more accurate and definite crime of aggression represents the development of international criminal law and, although with some distinct divergences in their legal definitions, scope and application, represents a dedication of the international community of keeping global peace and security.

3.2. Crime of aggression in the Rome Statute as definition of customary international law

As it was studied in the previous part, the acts that refer to aggression specified in the paragraph 2 of Article 8*bis* of the Rome Statute are copied from the Article 3 of the UN General Assembly Resolution 3314. Even if this explanation was made outside the purview of a criminal prosecution, it is still relevant to the debate over whether the Rome Statute's principles on aggression are similar to those found in customary international law.

In past times, custom served as a foundation for criminalisation of war crimes. The developing nature of international criminal law at the time and the restrictions of specific treaties, such as the *erga omnes* provision of the Hague Conventions on Laws and Customs of War (1899,1907), should be taken into consideration. Consequently, the definition of war crimes in the Article 6(b) of the Nuremberg Charter made reference to

the laws and customs of war. Custom was not mentioned in connection with the crime against peace, which was the forerunner of the up-to-date crime of aggression. This was because, at the time, criminalising aggression was a new international legal norm without a long-standing, widespread and consistent state practice to substantiate its existence *[Patrycja Grzebyk, 2023]*.

However, since the Nuremberg Trials defined the crimes, including the crime against peace, as "the supreme international crime" *[Judgement of the International Military Tribunal, 1946]*, the tribunal initiated customary norms development within the crime of aggression. As it was mentioned in previous parts, the crime of aggression continued to be considered in different international documents. Thus, the UN General Assembly Resolution 95 (I) (1946) and Resolution 3314 (1974) affirmed the principles recognised by the Nuremberg Charter and Judgement and provided a definition of aggression adherently, therefore giving a stronger legal standing for aggression as a punishable offence. Although the resolutions are not binding, they incited state practice and has significantly contributed to the crystallisation of such crime as the crime of aggression into a customary norm.

Additionally, in 1970 the UN General Assembly in the "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations" stated that "war of aggression constitutes a crime against peace, for which there is responsibility under international law" *[The UN General Assembly Resolution 2625, 1970]*. Notably, in the 1986 Nicaragua judgement, the International Court of Justice used the Resolution 2625 as an example that customary international law had developed in relation to the restriction on the use of force *[Yoram Dinstein, 2018]*.

Later on, the ICTY and ICTR statutes relied on customary law and the tribunals in practice examined whether a treaty norm had an equivalent customary norm. However, the crime of aggression was not included to the jurisdiction of these tribunals, they penalised violations of the laws and customs of war and listed relevant examples, at the same time noting that the enumeration was not exhaustive *[Patrycja Grzebyk, 2023]*.

The drafters of Article 8*bis* of the Rome Statute decided to develop custom instead of merely codifying it *[Bing Bing Jia, 2017]*. Therefore, unless they are incorporated into the system of customary law by later state practice and *opinio juris*, the new definitional components of Article 8*bis* will continue to be treaty-based . The Article 10 of the Rome

Statute, which states that “nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute” *[Rome Statute of the International Criminal Court, 1998]* does, in fact, foreshadow this circumstance. Similarly, the Kampala negotiators seemed to expect to influence customary law, insofar as they included the definitional elements of aggression from Resolution 3314 to Article 8 *bis*(2).

In addition, although the Rome Statute does not mandate the implementation of core crimes, certain states maintain that it is imperative to reconcile national legislation with international provisions prior to their formal acceptance. While other states do not adopt pertinent implementing legislation (whether mandatory or not) until they have formally accepted the corresponding international provision. Regarding the crime of aggression, The national legislation of Austria, Croatia, the Czech Republic, Finland, Luxembourg, and Slovenia incorporated the definition from the Rome Statute into their criminal law. Germany and Estonia also included the crime of aggression as defined in the Rome Statute, in this way ensuring its national legislation aligns with the international legal framework. On the other hand, however, certain states in the Arab and Asian regions have demonstrated minimal success in the adoption of the Rome Statute’s definition, which indicates that the complexity of international law and domestic legal frameworks, along with political factors, have affected the speed and scope of implementation [Astrid Reisinger Coracini, 2016]. Nevertheless, despite the different situations and practices regarding the implementation of the crime of aggression in different states, it still indicates the state’s contribution to the crystallization of the definition of the crime of aggression into customary international law.

Moreover, the state and individual conduct, the two major important elements underlying the crime of aggression, as for now do not constitute a new legislation. These concepts derived from the Nuremberg and Tokyo rulings, General Assembly Resolutions and the International Law Commission's publications were taken and adjusted. Additionally, before the Kampala Review Conference in 2010, the crime of aggression was, in fact, considered as a crime under customary law *[Alain-Guy Sipowo, 2016]*. It is important to understand the Review Conference as a codification process that aims to clarify a legal framework that occasionally becomes confused with the use of force regime. It is well worth the space given to these two types of conduct. Determining what kind of use of force is permitted by international law is necessary for the prosecution of

aggression. In such circumstances, it will be more focused on collective security, self-defence or the use of force by or in support of national liberation movements. Individual conduct is a codification of customary law, much like the state conduct. It demands the prosecuted individuals to be in a "leadership position", meaning that they must be able to effectively manage or guide a state's military or political actions. This principle was more clearly reaffirmed at the Review Conference.

Although the Rome Statute permits the application of "principles and rules of international law, including the established principles of the international law of armed conflict" *[Rome Statute of the International Criminal Court, 1998],* it does not specifically mention customary law as one of the sources of laws that the ICC applies. On the one hand, this provision can be understood as a reference to customary law, since the definition of the last is an internationally recognised norm. However, on the other hand, as only Article 8 of the ICC Statute related to war crimes makes direct reference to customs, it could be seen as an example of a careful approach to customary law as a source of international individual criminal accountability. No other article of the Statute, including the one on the law applicable by the Court, points out the idea of custom or customary law.

Moreover, accordingly to the Understandings, the definition of the crime of aggression is addressed solely for the purposes of the Rome Statute. This means that the definition does not always apply in other contexts or legal frameworks other than the ICC. In this way, the drafters of the Rome Statute gave the member states ability to develop and interpret the crime of aggression in ways which correspond with their legal systems and interpretation of customary international law.

Additionally, the Rome Statute criminalises a wide range of specific state acts of aggression involving the use of armed forces that, according to their "character, gravity, and scale constitute… a manifest violation of the Charter of the United Nations" *[Rome Statute of the International Criminal Court, 1998],* whereas customary law exclusively covers wars of aggression. Therefore, even though the Statute may seem to bridge a customary law distinction between wars of aggression and regular acts of aggression, the "manifest violation" threshold may be expected to limit prosecutions for aggression, maintained for serious breaches of the peace *[Donald M. Ferencz, 2017]*.

Thus, aligning the Kampala definition with customary international law becomes a major challenge: it must be both flexible enough to accommodate different forms of

aggression and precise enough to comply with the standards of *nullum crimen sine lege* principle (no crime without law). Moreover, the terms "character, gravity, and scale", as well as "manifest violation" are lacking of clarity and open to interpretation, therefore this vagueness might result in serious legal ambiguities and difficulties when prosecuting individuals for crime of aggression. Additionally, other issues are brought up by the criminal law principle of non-retroactivity, which affects both the ICC's jurisdiction over actions committed prior to ratification of the amendments and how the Kampala definition applies to them. The ICC's exercise of jurisdiction over matters involving aggression raises additional jurisdictional and procedural concerns, particularly when the non-state parties or acts were committed prior to the amendments' enactment *[Marko Milanovic, 2011]*.

Moreover, generally, for the norm to be established in a customary international law consistent governmental practice and a sense of legal obligation (*opinio juris*) are necessary *[Yoram Dinstein, 2018]*. Thus, during the Review Conference the USA, which is not a State Party, thought that the definition does not reflect custom. Considering the fact that not many countries in the world are more focused on the laws pertaining to the use of force in general and aggression in particular, like the United States — constructive cooperation with the US was essential to achieving the Kampala compromise, as demonstrated by the development of the interpretive interpretations appended to the amendments *[Marko Milanovic, 2011]*.

To sum up, there is no question about the crime of aggression being a reflection of international customary law. The definition of the crime of aggression is based on widespread states' agreement and combines the codification and progressive nature of international law. It remains to be seen if the definition in its whole will be accepted as a definition of customary international law. Since the provisions of the Rome Statute and norms of customary law are open for development, the ICC in its future work will be able to consider a lot of the issues that governments have brought up on its future conferences.

One of the present issues is an establishment of the Special Tribunal for the crime of aggression against Ukraine and the definition of the crime of aggression that the tribunal has to undertake. Firstly, as it was researched in the previous part, the ICC lacks jurisdiction over the crime of aggression regarding this case of aggression, besides the day after the Russia's full-scale invasion, the ICC prosecutor officially stated that his

office can only prosecute the was crimes, crimes against humanity and acts of genocide on the Ukraine's territory and the ICC can not exercise jurisdiction over the crime of aggression in this case[25]. So the establishment of the ad hoc tribunal for Russia's aggression in Ukraine is the best available option and the only fast way to prosecute and to hold perpetrators accountable for the committed crimes. Moreover, the future tribunal should only be focused on the crime of aggression and the ongoing situation in Ukraine, in order not to undermine the ICC regarding any different cases *[Carrie McDougall, 2022b]*.

Secondly, a constitutive document of the future tribunal should replicate the definition of the crime of aggression provided in the Article 8*bis* of the Rome Statute, since the crime of aggression went through decades to be finally consensually defined by the states, facing difficulties on its agreement, this definition provides with legal clarity on the crime and aligns with customary international law. By doing so, the tribunal will enforce international legal norms, provide a transparent and efficient framework for holding Russia's leaders accountable and thereby strengthen the fact that the definition of the crime of aggression in the Rome Statute is a reflection of customary international law.

Thereby, the establishment of the Special Tribunal for the crime of aggression will represent the international community's dedication to develop existing legal norms and hold criminals accountable for committed crimes.

[25] Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine, 2022.

CONCLUSIONS AND PROPOSALS

Having carefully researched and studied the topic of this thesis "From the Crime Against Peace to the Crime of Aggression: Differences and Similarities of Concepts under the Nuremberg Charter and Rome Statute of the International Criminal Court" a comprehensive analysis of the evolution and historical development, elements, application and comparison of the crime against peace and crime of aggression was provided with a view of former and current legal framework and perspectives for the future prosecution and prevention of these crimes.

In this manner, there is a number of conclusions regarding the research of this thesis:

1. The Nuremberg Charter in the Article 6 established the concept of the crime against peace, provided a comprehensive definition of the crime and emphasised on individual criminal responsibility of high-ranking officials for committing this crime, thereby withdrawing personal immunities and creating an important legal precedent for subsequent development of international criminal law.
2. The Nuremberg Charter pointed out on the modalities of individual criminal responsibility for political and military leaders, highlighting planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties agreements or assurances, participation in common plan or conspiracy as a crime against peace.
3. The legacy of the Nuremberg Charter and trials was later inherited by the subsequent Nuremberg trials and the UN General Assembly resolutions. Thus, the subsequent trials were set on according to the Control Council Law No. 10 and to the principles laid down by the Nuremberg Charter, and expanded the circle of responsible high-ranking officials to include industrialists, who contributed to the aggressive warfare. The UNGA resolutions 95 and 3314 affirmed the Nuremberg principles and defined the crime of aggression, thereby presenting international support in preventing the future crimes and contributing to the future development and establishment of the crime of aggression.
4. The crime of aggression was included under Article 5 to the Rome Statute during the Rome Conference in 1998 and after decades of hard work and negotiations, the Rome

Statute with the Kampala amendments defined the crime of aggression in the Article 8*bis*. Thus, the Article 8*bis*(2) provides with a list of acts that are considered to be a crime of aggression, namely invasion, attack, annexation or bombardment of territories, blockade of the ports or coasts and sending armed groups that carry out acts of armed force.

5. The Rome Statute followed the Nuremberg legacy regarding holding high-ranking officials accountable despite their personal immunities for committing international crimes, emphasising on the international justice to be made, and modalities of individual criminal responsibility, however forms of participation are expanded by the Article 25, highlighting three types of commission (commission as an individual, joint commission and commission through another person).
6. Article 8*bis* points put on the "manifest violation" threshold, more precisely the requirement for act to be by its character, gravity and scale a manifest violation of the UN Charter. This threshold was intended to escape from grey zones of the scope of the crime and for major breaches, however the Rome Statute does not provide with a list of what acts can clearly constitute a manifest violation, thereby leaving a gap in ICC's legal framework.
7. The concepts of crime against peace and crime of aggression are often used as the same concept and aim to prosecute and prevent acts of aggression, they still have distinctive characteristics in their legal definitions, scope and application. Thus, both of the concepts are intended to keep international peace and security, represent a consensus regarding this crimes, based on the principle of prohibition of use of force, focused on individual criminal responsibility, share common modalities of this responsibility and contribute to the recognition of crime of aggression as a reflection of customary international law.
8. These concepts differ in a scope of the crimes, that is the crime against peace addresses the aggressive wars, while the crime of aggression of more precise and specific, providing with a list of acts that constitute aggression and encompasses "softer forms" of the use of force. The crime against peace was supposed to be in violation of any international treaty and the crime of aggression has to be in violation of the UN Charter. Moreover, the Nuremberg Charter did not have a non-member state issue, while the Rome Stature requires both the affected and accused state to be

a State Party to the Statute. The crime against peace covered an ex post facto law, while the crime of aggression foresees the principle of non-retroactivity.

9. The crime of aggression under the Rome Stature can be considered as a reflection of customary international law since its definition went through decades of negotiations, based on the widespread states' agreement and combines the codification and progressive nature of international law. However, whether the definition of the crime of aggression will be totally accepted as a customary norm remains to be seen on future conferences.
10. The future Special Tribunal for the crime of aggression against Ukraine should rely on the definition of the crime provided in the Article 8*bis* of the Rome Statute, it represents a consensus of international community on this definition and aligns with customary international law. In this way a constitutive document of the tribunal will establish a transparent and efficient mechanism for holding Russian officials accountable, therefore reinforcing that the definition of the crime of aggression in the Rome Statute reflects customary international law.

In order to solve present problems in current legal framework, it is necessary to redefine and clarify the problems of the crimes of aggression under the Rome Statute so that they can be depended upon in the face of evolving geopolitical changes. Moreover, broader ratifications of the Rome Statute and its amendments, along with state cooperation regarding the prosecution of high-ranking officials for the crimes of aggression, would signify the international community's credibility in advancing legal standards and enforcing accountability for crimes. Furthermore, establishment of ad hoc tribunals will prove to be an effective mechanism for ensuring justice in such cases where the ICC is incapacitated jurisdictionally and otherwise, such as in the case of Russia's aggression. Finally, the definition of the crime of aggression should be defined broadly as a the customary international law principles since it will make it more legitimate and enforceable in future prosecutions.

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SUMMARY

From the Crime Against Peace to the Crime of Aggression: Differences and Similarities of Concepts under the Nuremberg Charter and Rome Statute of the International Criminal Court

Diana Davydova

The topic of this thesis, more precisely, the crime of aggression, has brought attention of the international community once again since the beginning of Russia's aggression against Ukraine. Thus, this master thesis provides an extensive research on the evolution, development and codification of the crimes concerning aggression through careful examination of legal documents, case law and doctrine. This paper analyses the foundational definitions of the crimes under the Nuremberg Charter and the Rome Statute and highlights the present problems in current international legal framework in a light of ongoing Russian aggression against Ukraine.

This thesis examines the definition of the crime against peace established by the Nuremberg Charter, its elements, scope and application. It also analyses the modalities of individual criminal responsibility of the crime against peace and the issue of personal immunities within the leadership clause during the Nuremberg Trials, establishing a legal precedent for future criminal prosecution of this crime. This work provides a coherent research of application of the crime of aggression during the subsequent trials and following UN General Assembly performance.

The paper analyses the development and codification of the crime of aggression under the Rome Statute. It also provides a clear exploration of the definition of the crime of aggression, its elements, scope, application and jurisdictional limitations of the ICC concerning this crime, specifically in a case of Russian aggression. This thesis outlines the wide range of modes of individual criminal responsibility and addresses the leadership clause and a problem of personal immunities regarding the crime of aggression in current international legal framework.

Through a comparative analysis, this thesis provides a substantial examination of the concepts of crime against peace and crime of aggression, specifically the elements, including definitions of the act of aggression, issues of leadership clause and personal immunities and modalities of individual criminal responsibility, and their application. This study also indicates whether the crime of aggression can be considered as a reflection of customary international law and suggests the definition of the crime of aggression, which the future Special Tribunal for the crime of aggression against Ukraine should apply in its framework.

SUMMARY

Nuo nusikaltimo prieš taiką iki agresijos nusikaltimo: koncepcijų skirtumai ir panašumai pagal Niurnbergo Chartiją ir Tarptautinio Baudžiamojo Teismo Romos statute

Diana Davydova

Šios baigiamojo darbo tema, tiksliau – agresijos nusikaltimas, tarptautinės bendruomenės dėmesį vėl patraukė nuo pat Rusijos agresijos prieš Ukrainą pradžios. Taigi šiame magistro darbe pateikiamas išsamus nusikaltimų, susijusių su agresija, raidos, raidos ir kodifikavimo tyrimas, atidžiai išnagrinėjus teisinius dokumentus, teismų praktiką ir doktriną. Šiame darbe analizuojami pagrindiniai nusikaltimų apibrėžimai pagal Niurnbergo chartiją ir Romos statutą ir išryškinamos dabartinės tarptautinės teisinės sistemos problemos, atsižvelgiant į vykstančią Rusijos agresiją prieš Ukrainą.

Šiame darbe nagrinėjamas Niurnbergo chartijoje nustatytas nusikaltimo taikai apibrėžimas, jo elementai, apimtis ir taikymas. Jame taip pat analizuojami individualios baudžiamosios atsakomybės už nusikaltimą taikai būdai ir asmeninio imuniteto klausimas vadovaujantis Niurnbergo proceso metu, taip sukuriant teisinį precedentą būsimam baudžiamajam persekiojimui už šį nusikaltimą. Šiame darbe pateikiamas nuoseklus agresijos nusikaltimo taikymo tyrimas vėlesniuose teismuose ir po JT Generalinės Asamblėjos veiklos.

Straipsnyje analizuojama agresijos nusikaltimo raida ir kodifikacija pagal Romos statutą. Jame taip pat pateikiamas aiškus agresijos nusikaltimo apibrėžimo, jo elementų, taikymo srities, taikymo ir TBT jurisdikcijos apribojimų, susijusių su šiuo nusikaltimu, tyrimas, ypač Rusijos agresijos atveju. Šioje disertacijoje apžvelgiamas platus individualios baudžiamosios atsakomybės būdų spektras ir nagrinėjama lyderystės sąlyga bei asmens imuniteto agresijos nusikaltimo atžvilgiu problema dabartinėje tarptautinėje teisinėje sistemoje.

Atlikus lyginamąją analizę, šioje baigiamajame darbe iš esmės išnagrinėtos nusikaltimo taikai ir agresijos nusikaltimo sąvokos, ypač elementai, įskaitant agresijos akto apibrėžimus, vadovavimo sąlygos ir asmeninio imuniteto bei individualios baudžiamosios atsakomybės ypatybės, ir jų taikymas. Šiame tyrime taip pat nurodoma, ar agresijos nusikaltimas gali būti laikomas paprotinės tarptautinės teisės atspindžiu, ir siūloma agresijos nusikaltimo apibrėžimas, kurį būsimasis Specialusis agresijos nusikaltimų prieš Ukrainą tribunolas turėtų taikyti savo rėmuose**.**