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Individual Criminal Responsibility  
for the Crime of Aggression:  
Tracking Down the Leaders of a  
State

JAMM04 Master Thesis

International Human Rights Law

30 higher education credits

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Term: Spring 2015

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## Preface

I have always thought that there is something inherently wrong with having an interest to pursue politics as a primary vocation. From my early age I disliked the idea of imposing a will or even one's own personal thoughts and beliefs on others. I find those who thirst for power throughout public institutions most responsible for creating an aggressive policy of a state, when such case occurs. Therefore, it has ever been an interest of mine to explore and put forward as much detriments caused by one's aspirations towards gaining and exercising authority. I use the prism of the crime of aggression to express my personal views on what is wrong with the (legal) world.

This work represents a product of many people who influenced me in different ways. I see my role as of a mere observer, who found an inspiration to record what was thought well enough by other respectful minds. First of all, I would like to express my gratitude to the Swedish Institute for providing me with the full study SI Scholarship for Western Balkans during these two years at Lund University. It would not be possible for me to study abroad without their financial support. Secondly, my colleagues and the professors from Lund University who inspired me with their ideas, expressed many times during different lectures and fika's, are one of those that I am thankful for.

Without the enduring support of my friends back home, to whom I owe everything, I would not be able to write this thesis. They believe in me more than I could ever possibly do so for myself. Therefore, I find it convenient to mention them by name: Marija, Roda, Mišo, Dragan, Mladen, Ceca, Mina, Bilja, Žela, Bane, Jovan, kum Šoki, kum Coa, Gruja, Aleksandar, Dejan, Sonja, Mika, Dario, Željko, Ognjen, Sale, Smilja, Vlajko, Zole, Bojke, Ognjen, Niki, Goxi, Martin, Nathalie and my dearest Lotta. I specially want to thank to my mom who thought me about the value of knowledge and the pleasures that come together with it. Without her love

and endless support I would not be able to accomplish much of what is generally accepted to be call as 'success'. However, as far as I am concerned, my greatest success is the friends that I am privileged to have.

Those above mentioned are to be credited for many joys that I have experienced since I started the master's course in Sweden. However, I express my deepest appreciation to my supervisor Professor Christoffer Wong who is the main 'culprit' for my academic development. I have been extremely lucky to have a supervisor who cared so much about my work, and who was so zealous in responding to my queries and questions. He was more than thoughtful and throughout my entire master studies he was my true academic inspiration. He inspired me to become a professor one day so I can treat my students same as he treated me.

## Abbreviations

Articles on State Responsibility	Articles on Responsibility of States for Internationally Wrongful Acts
ASP	Assembly of States Parties
ICC	International Criminal Court
ICC Statute; Rome Statute Court	Statute of the International Criminal Court
ICJ	International Court of Justice
ICTY	International Crime Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IMT; the Tribunal	Nuremberg International Military Tribunal
IMTFE; Tokyo Tribunal Far East	International Military Tribunal for the Far East
Law No. 10	Control Council Law No. 10
London Charter; IMT Charter Tribunal	Charter of the International Military Tribunal
NMT	Nuremberg Military Tribunal
SC	Security Council
SWGCA	Special Working Group on the Crime of Aggression
Tokyo Charter	Charter of the International Military Tribunal for the Far East
Tokyo Judgment	IMTFE Judgment
UN	United Nations
UN Charter; Charter	The Charter of the United Nations
UN General Assembly	United Nations General Assembly
USSR	Soviet Union
WWI	First World War
WWII	World War II
1974 Resolution	1974 UN General Assembly Resolution

## Summary

The Nuremberg Charter introduced the crime of aggression into international law. The American Chief Prosecutor Justice Robert Jackson gave a famous promise that offenders who commit acts of aggression shall be prosecuted and international criminal law would be applied against them. However, only at the first Review Conference of the ICC Statute in Kampala 2010, agreement on a universally accepted definition was reached. To this end, Articles 15*bis* and 15*ter* of the ICC Statute prescribe the possibility of the court to exercise its jurisdiction over the crime of aggression after 1 January 2017.

What distinguishes the crime of aggression from other core crimes under the ICC jurisdiction — namely, genocide, crimes against humanity and war crimes — is its leadership nature. According to Articles 8*bis*(1) and 25(3*bis*) ICC Statute, only a person in a position to 'direct or control' political or military action of a state could be found guilty for the crime of aggression. Notably, the structure of Article 25 ICC Statute — which articulates different modes of individual criminal responsibility for the under the ICC purview — is now limited to only a narrow group of people within a state, who could meet the leadership requirement.

The introduction of the 'direct or control' clause represents a novelty of the new definition of the crime of aggression. It is true that ever since the post-World War II trials the crime of aggression was somewhat 'reserved' only to the policy-makers. The opinion that hallmarked the discourse on individual criminal responsibility regarding this crime, advocated that low-ranking state officials lacked the requisite mental element in that by virtue of their position they may not know the aggressive plans of their country. Therefore, it would be at variance with the interests of justice to prosecute those individuals for aggression.

Not an every post-World War II tribunal set forth the leadership criteria explicitly. However, they all had a pattern they followed in tracing down potential perpetrators who could be regarded as leaders. After the *High Command* case, the Nuremberg Military Tribunal unequivocally stated that only individuals at the policy level could be convicted for the crime of aggression. By way of example, the leadership standard of 'shape or influence' was adopted for the first time in international criminal law.

The requirement of 'shape or influence' was highly disputed in scholarship as it captures a broad group of persons who could meet this criterion. On the other hand, the ICC's standard of 'direct or control' seems to suffice the interest of justice in a more coherent way. Or, in another key, in those terms the commitment of the crime of aggression will entail criminal responsibility only if the perpetrators were in a position of political or military leadership and organized or planned aggression. It captures only those individuals who have decision-making power on behalf of a state to carry out aggression. Accordingly, low-level state officials are excluded by adopting this standard, which was indeed the intention of the architects of international criminal law.

The leadership clause evolved but the purpose remained the same, i.e. the aim of the leadership requirement is to narrow down potential perpetrators for the crime of aggression only to persons who are regarded as policy-makers or simply 'leaders'. However, as the both terms 'direct' and 'control' have never been used in international criminal law, the scope of application is not quite clear from the wording of the ICC Statute. In order to consider this in depth, the author will firstly discuss the meaning and effects of the first standard of 'shape or influence', and subsequently consider its interpretation by post-World War II tribunals. After presenting this initial analysis, the thesis will ponder on the ICC's standard of 'direct or control'. Within the chapter that introduces leadership, in sake of producing a robust argument on identifying potential perpetrators who could meet this standard, there will be some theoretical considerations about the conceptual underpinnings of the leadership nature of a crime as such.



# 1. Introduction

## *A. Background*

It is perhaps rather difficult for one to understand why the international community after more than two millennia of history of warfare had to struggle to bring those who were seen as most responsible for the atrocities occurred during World War II (WWII) to face the trial. One of the reasons was the prevailing opinion concerning individual criminal responsibility prior to the wake of the 20<sup>th</sup> century, which was remarkably different from the one accepted today. In effect, state leaders enjoyed absolute impunity for most of the time throughout the course of history. Up until the end of WWII, it was held that emperors, kings, tsars etc. should not be responsible to other states for the crimes committed within the borders of their country.

During the Medieval period — more precisely, in the sixteenth century — the theory of state sovereignty emerged as a core principle in interstate relations.<sup>1</sup> It furthered this idea of impunity to the even greater extent. One of the main features was the state privilege to enjoy supreme authority over its own people within its borders. State leaders used it as a shield against individual responsibility for their personal wrongdoings as it was believed that they were acting in the name of the whole country. In that time, subjects of international law were only the states. Accordingly, individuals could not be internationally responsible and the only sovereign power that could try them was their own country. In reality, when one country conquers another or when the belligerents sign an armistice, leaders of both countries would be amnestied and allowed to return to their public life.

At the same time, there was an ongoing struggle between the two naturally confronted sides, i.e. the government authority on the one, and the human rights movement embodied in, what we call today — civil society, on the other. States did not want to give up their privileges so easily in favor of civil rights and freedoms. One among those privileges was the absolute impunity of their leaders. Civil wars all across Europe were mired in the

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<sup>1</sup> See J. Bodin, *Les Six Livres de la République*, Vol. 1 (Paris: Fayard, 1576) at 179–228.

transition from a ‘culture of impunity’ to a ‘culture of accountability’. Human rights movement praised many glories in different fields of civil liberties. However, the question of international criminal responsibility was finally brought to the table only after the First World War (WWI).

WWI is seen as the seminal event in the transposition of a ‘culture of impunity’ to a ‘culture of accountability’.<sup>2</sup> In the wake of war, the Allied countries started to promote the opinion that Kaiser Wilhelm II of Germany should face criminal responsibility for war crimes committed therein. The 1919 Treaty of Versailles provided the legal basis for the establishment of a special tribunal for Kaiser Wilhelm.<sup>3</sup> Those occurrences sparked the paradigm shift between the two cultures, which resulted in the first attempt to try individuals for international crimes. Nevertheless, proceedings never took place as the Netherlands refused to surrender the Kaiser to the Allies.<sup>4</sup>

The first international trial for what amounts to today’s crime of aggression was held before the Nuremberg International Military Tribunal (IMT; the Tribunal) following WWII, under the name of ‘crimes against peace’. Article 6(a) of the Charter of the International Military Tribunal (the London Charter; the IMT Charter)<sup>5</sup> defines crimes against peace as ‘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.’ The Tribunal held 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

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<sup>2</sup> P.G. Lauren, ‘From impunity to accountability: Forces of transformation and the changing international human rights context’, in R. Thakur and P. Malcontent (eds), *From Sovereign Impunity to International Accountability: The search for Justice in a World of States* (Tokyo: United Nations University Press, 2004) 15–42, at 15.

<sup>3</sup> M.C. Bassiouni, ‘World War I, “The War to End All Wars” and the Birth of a Handicapped International Criminal Justice System’, 30 *Denver Journal of International Law and Policy* (2002) 244, at 269–273.

<sup>4</sup> *Ibid.*

<sup>5</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, with annexed Charter of the International Military Tribunal, (hereinafter the ‘*London Charter*’), 82 UNTS 279, 59 Stat. 1544, 8 August 1945.

Law be enforced.’<sup>6</sup> This revolutionary sentence represented the official end of era of ‘culture of impunity’. No longer could state leaders hide behind the veil of state sovereignty as they became legitimate subjects of international law. Moreover, this wording hallmarked the emergence of international criminal law as a system of secondary provisions that should serve as a mechanism for enforcement primary norms of international law.

The effort that has been made during the trial in order to bring to justice individuals who were most responsible for mass atrocities, most certainly, puts the whole proceedings into praise. Nevertheless, the judgment failed to provide a plausible argument that the verdicts for this crime were in line with the fundamental principle of *nullum crimen sine lege*.<sup>7</sup> Even during the London Conference it was argued that no customary law existed which prohibited aggressive war. However, by dint of a few concessions general consensus was reached that the 1928 Kellogg-Briand Pact represents a material source, *viz.* legal basis under which the ‘crimes against peace’ were criminalized.

While acknowledging the flaws of the process and the shortcomings of the judgment, no one can really deny that the Nuremberg trial was the trigger for the international community to define the rules of waging war in a more detailed manner. Shortly after the judgment, the United Nations General Assembly (UN General Assembly) affirmed ‘the principle of international law recognized by the IMT Charter and the judgment of Tribunal’.<sup>8</sup> However, initial enthusiasm died somewhere on the road and the process of criminalizing aggression became rather onerous and daunting.

There are many reasons for the absence of international follow-up to the criminalization of aggression after WWII. One of them is the adoption of the Charter of the United Nations (UN Charter; the Charter),<sup>9</sup> which spelled

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<sup>6</sup> *United States et al. v. Göring et al., Trial of the Major War Criminals before the International Military Tribunal*, 14 November 1945 – 1 October 1946, Vol. I (1947), at 447 (hereinafter the ‘*IMT Judgment*’).

<sup>7</sup> See T. Weigend, “‘In general a principle of justice’: The Debate on the “Crime against Peace” in the Wake of the Nuremberg Judgment”, 10 *Journal of International Criminal Justice* (2012) 41–58, at 41.

<sup>8</sup> GA Res. 95 (I), 11 December 1946, para.1.

<sup>9</sup> *Charter of the United Nations*, 1 UNTS XVI, 24 October 1945.

out conditions and rules for the legal use of armed force. The UN Charter rejected the notion of the use of force as a means for settling disputes. Article 2(4) of the Charter recognizes the obligation to refrain in international relations ‘from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’ However, there are two exceptions from this fundamental principle. The right to self-defense represents the main exception to the prohibition on the use of force. It has been introduced in Article 51 of the UN Charter. Two requirements for the lawful application of this article are proportionality and necessity. The second exception to the prohibition on the use of force is authorization of the use of force by the Security Council (SC). The SC authorizes the use of force by United Nations (UN) peacekeeping or peace-enforcement missions or by coalition of forces of states.<sup>10</sup>

At the time of the adoption of the Charter, the international community was relying on its provisions in order to prevent future acts of aggression. For Antonio Cassese, this was one of the major factors that shaped the discourse in the process of criminalizing aggression.<sup>11</sup> Yet, the existence of norms enshrined in the UN Charter was only one of the reasons for the 60 yearlong quest for a definition of aggression.

In the second half of 20<sup>th</sup> century the Cold War occurred all across the world, as a state of political and military tension between two powers that took place. On the one side the United States with NATO and others created the so-called Western Bloc. On the other side, the Soviet Union (USSR) and its allies created the Eastern Block as opponent to the prior. During this period, the wartime alliance against Germany from the WWII was broken, leaving the communistic USSR and the capitalistic US with profound differences over democracy. The Cold War ‘prompted members of the two blocs to refrain from fleshing out the rules on the crime of aggression for fear that they might be used in the ideological and political struggle between

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<sup>10</sup> See *Ibid.*, Chapter VII.

<sup>11</sup> See A. Cassese, *International Criminal Law*, (3<sup>rd</sup> edn., Oxford: Oxford University Press, 2013), at 138.

the blocs...'<sup>12</sup> and rendered 'a general hesitancy by all major powers to elaborate upon aggression, so as to retain as much latitude as possible in the application of the rules on self-defense.'<sup>13</sup>

Nevertheless, the successor to the Nuremberg and Tokyo Tribunals<sup>14</sup> came only after almost half a century, when the crime of aggression became one of the four crimes within the jurisdiction of the International Criminal Court (ICC).<sup>15</sup> Article 5(2) of the Statute of the International Criminal Court (ICC Statute; Rome Statute)<sup>16</sup> prescribes however that the ICC may not exercise that jurisdiction until a 'provision is adopted ... defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.' The compromise for the definition has been finally reached at the first Review Conference of the ICC Statute in Kampala 2010. To this end, Articles 15*bis* and 15*ter* of the ICC Statute prescribes the possibility of the court to prosecute the crime of aggression after 1 January 2017.

### ***B. The Problem and the Questions of Research***

When it comes to the crime itself, same as for every other international crime, a person can be held responsible for the crime of aggression only if his conducts were unlawful (*actus reus*) and if he had the necessary intent and knowledge (*mens rea*). There is another requirement that makes the crime of aggression somewhat 'unique', different from any other international crime. Ever since the Nuremberg trials, aggression has been considered as a leadership crime.<sup>17</sup> According to the ICC Statute, the crime

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<sup>12</sup> *Ibid.*, at 139.

<sup>13</sup> *Ibid.*

<sup>14</sup> For the exhaustive list of trials, see United Nations War Crimes Commission, 15 Volumes of *Law Reports of Trials of War Criminals* (1947–1949), available at <http://www.unwcc.org/documents/> [accessed at 25 February 2015].

<sup>15</sup> Art. 5(1) ICCSt.

<sup>16</sup> A/CONF.183/9, 17 July 1998, and corrected by *proces-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 16 January 2001 and 17 January 2001 (entry into force: 1 July 2002).

<sup>17</sup> See K.J. Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression', 18 *The European Journal of International Law* (2007) 477–497, at 479.

of aggression 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’.<sup>18</sup>

However, problem could arise in the pursuit of individual criminal responsibility, as the leadership concept is somewhat fuzzy. What should be the key principle that will guide us in discovering who are the leaders, or to be more precise, who are those persons that are in a position to ‘control or direct’ military or political action of a state? Cohen posed a similar question arguing that mass carnages are

the product of collective, systematic, bureaucratic activity, made possible only by the collaboration of massive and complex organizations in the execution of criminal policies initiated at the highest levels of government. How, then, is individual responsibility to be located, limited, and defined within the vast bureaucratic apparatuses that make possible the pulling of a trigger or the dropping of a gas canister in some far-flung place?<sup>19</sup>

Arguably, the answer to this question represents the main challenge for the International Criminal Court in respect of the crime of aggression. Legal systems are different in every country and they could vary significantly. The first resort should be the examination of the Constitutional provisions in order to see who has the right to direct political or military actions of a state. It should be borne in mind that the leadership standard goes beyond *de jure* holders of power. For instance, if Hitler had survived the WWII, there is no doubt that he would face charges for the crimes against peace. On the other hand, Japanese Emperor was not considered responsible for the aggressive war that his country waged.

According to the ICC Statue, other public figures than the highest authority in a state are not precluded meet the standard of ‘control or direct’, e.g. economic or spiritual leaders. By way of example, it is clear that a lot of effort will be invested in capturing potential perpetrators and convicting them of the crime of aggression. The bottom line is that pursuing individual

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<sup>18</sup> Art. 8*bis*(1) ICCSt.

<sup>19</sup> D. Cohen, 'Beyond Nuremberg: Individual Responsibility for War Crimes', in C. Hesse and R. Post (eds), *Human Rights in Political Transitions: Gettysburg to Bosnia* (New York: Zone Books, 1999) 53–92, at 53.

criminal responsibility implies a different approach in every case of alleged aggression.

Hence, this work will dwell on the following questions:

*How does the leadership clause of the crime of aggression reflect on individual criminal responsibility and how to identify potential perpetrators that could meet the leadership requirement when an act of aggression occurs?*

### ***C. The Research Method and the Structure of the Work***

In the pursuit of answers for the posed questions, the current thesis will be delimited to the work of international criminal tribunals. The research will explore the relevant case law of the post-WWII trials in depth, as the only international jurisprudence regarding the crime of aggression is attached to those trials. Apart from that, the leadership clause from the ICC Statute will be examined together with its implications on individual criminal responsibility. Both terms that constitute the leadership — namely, 'control' and 'direct' — are taken from the Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility), thus Article 17 thereof will be examined accordingly. Moreover, the International Court of Justice (ICJ) tackled the issue of 'effective control', which is indeed pertinent to the research problem that I am posing in this paper. Hence, its reasoning will be acknowledged in this paper as well.

In this essay I will attempt to provide answers to the research problem by using the positivistic approach as a first recourse. Accordingly, I will strive to provide an accurate understanding on where the current international law stands in this area of study. It is indeed evaluative research and hence the law will be subjected to appraisal from the point of view of coherence with earlier law. To this end, the law being considered is the applicable law before the ICC of which the Rome Statute is the primary law. By using this methodology, I will explore and endeavor to explain the role of the leadership clause in identifying perpetrators for the crime of

aggression. In effect, in the empirical part of my research I will observe mainly the primary sources of law in order to examine the effects of leadership requirement on individual criminal responsibility. Moreover, I will avail myself of the opinions of respectful scholars in order to substantiate my argument and make it sounder. The empirical research is what has been employed primarily in this paper, however there will be some theoretical contemplation on the issue as well.

The structure of the essay is determined by its aim which is the analysis and application of the leadership clause in international criminal law. I will start by delegitimizing the crime and its importance in the second chapter. Other three core crimes under the jurisdiction of the ICC (genocide, crimes against humanity and war crimes) have indeed the potential to drag state leaders into the realm of individual criminal responsibility. However, I will put forward the reasons why I think it is important to prosecute aggression, as there will be a situation where other crimes could not suffice the interests of justice.

As I move forward, I will introduce the notion of individual criminal responsibility for the crime prior to the agreement on Kampala's amendments on the one hand, and I will shed some light on novelties that came out with the 2010 definition, on the other. In the last section of the second chapter I will examine the concept of leadership in international criminal law, which represents the essence of this research. Accordingly, I will discuss the scope of its implication on individual criminal responsibility and thus present a problem concerning the interpretation. Immediately after I introduce the leadership clause in this paper, I will ponder on conceptual understandings of the leadership nature of the crime of aggression. To that end, I will use the *Weberian theory of authority* with its implication in international criminal law. According to the ICC Statute, crime of aggression is attached exclusively to states, *viz.* only those entities could commit aggression. The Weberian legal-rational concept of authority provides a comprehensive study of behavioral choices of superiors and subordinates within a bureaucratic apparatus, thus providing me with a possibility to explore the notion of leadership from a sociological perspective. I will avail myself of this theory in order to elucidate why the



crime of aggression is reserved only for policy-makers. Moreover, this doctrine will help me to shed light on those bearers of power who could meet the policy-level requirement and therefore entail individual criminal responsibility if their state has carried out aggression.

Chapters three and four are reserved for the discussion about persons who are accorded with such authority that could meet the leadership standard. Firstly, I will analyze how the relevant post-WWII courts dealt with this issue. Some of them did not adopt the leadership requirements explicitly. However, they all had the pattern they followed in determining perpetrators in this respect. Important feature that links all the accused — who were eventually convicted for aggression — is nonetheless their leadership role. In the fourth chapter I will study the ICC's approach towards the crime of aggression. There has been a shift in the policy from the 'shape or influence' to 'direct or control', which I will put forward accordingly together with the reasons that I found. I will summarize that chapter by stating pros and cons of the ICC standard with the conclusion which clearly shows my inclinations towards the new approach.

By way of conclusion, I will sum up all the work that has been done in this thesis and give a general comment about the law that governs the leadership clause of the crime of aggression, which is indeed a central issue in this thesis.

## 2. Prosecuting Aggression

In this thesis, I shall focus on both normative and conceptual questions that concern substantive international criminal law. In my view, the scope of individual criminal responsibility for the new crime of aggression is unclear. My idea is to discuss only about one out of many aspects that in a way determine responsibility *viz.* the leadership requirement. However, not too many international lawyers are enthusiastic, that at least said, about the idea of prosecuting for this crime. Why they should be interested, not necessary enthusiastic, I will try to explain in next few paragraphs.

### A. *Delegitimizing the Crime*

In the immediate aftermath of WWII, international law emerged as a universally accepted system of norms with a primary goal to govern the peaceful relations between states. The UN Charter rejected the notion of the use of force as a means for settling disputes. Article 2(4) of the Charter recognizes the obligation to refrain in international relations ‘from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’

On the other hand, American Chief Prosecutor in Nuremberg, Justice Robert Jackson, gave a famous promise that the new international criminal law will stand as a bulwark against aggressive wars and that all violators will be tried for crimes against peace.<sup>20</sup> Jackson stated that

[t]he ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by other nations, including those which sit here now in judgment.<sup>21</sup>

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<sup>20</sup> See Opening Speech of the Chief Prosecutor for the United States, reprinted in *Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany* (Buffalo: William S. Hein & Co., 2001), at 45.

<sup>21</sup> *Ibid.*

At that time, the international community was shocked by the atrocities that have happened during WWII and therefore the focus was on bringing to justice those who were most responsible for commencing a war at the first place. During the Nuremberg and Tokyo trials, but also in the following years, it was believed that the crime of aggression is the quintessential crime in international criminal law. However, from the historical trajectory of international relations in the second half of 20<sup>th</sup> century, other conclusion can be reached than the one ostensibly intended. To give an answer to the question of: 'to what extent has the existence of the crime of aggression under customary international law deterred states in resorting to use of force?' that would praise the importance of the crime is almost impossible for several reasons. Certainly, the most obvious one is the absence of the international consensus on the definition at the first place.

On the other hand, the existence of other three other core crimes, which are under the jurisdiction of the ICC,<sup>22</sup> could indeed capture the conduct of high-state leaders and drag them into the realm of individual criminal responsibility. During the post-WWII trials, the indictments against accused were based on: crimes against peace, war crimes and crimes against humanity.<sup>23</sup> In 1948, the UN General Assembly adopted the Convention on the Prevention and the Punishment of the Crime of Genocide.<sup>24</sup> The crime of genocide was introduced as an intrinsic part of international criminal law. During the 1990's, conflicts in ex-Yugoslavia gave the necessary impetus to the birth of the first international tribunal since the post-WWII trials — namely, International Crime Tribunal for the former Yugoslavia (ICTY).<sup>25</sup> Notwithstanding the fact that the crime of aggression was not in the purview of the ICTY, most of the leaders who were responsible for mass carnages during the civil war were indicted before the court. The reason for that is perhaps best articulated in Mauro Politi's assertion that three 'core crimes'

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<sup>22</sup> See Art. 5 ICCSt.

<sup>23</sup> See e.g., *IMT Judgment*, at 12.

<sup>24</sup> UN General Assembly, Prevention and punishment of the crime of genocide, 9 December 1948, A/RES/260, available at: <http://www.refworld.org/docid/3b00f0873.html> [accessed 3 October 2014].

<sup>25</sup> Adopted SC Res. 827 (1993); as amended SR Res. 1166 (1998); as amended SR Res. 1329 (2000); as amended SR Res. 1411 (2002).

(war crimes, crimes against humanity and genocide) ‘normally accompany the commissions of an act of aggression and may equally be object of charges against high political and military leaders.’<sup>26</sup>

It is hard to perceive a situation where one will be accused solely for the crime of aggression. Jurisprudence of the ICTY shows that there are other means by which one could be brought before justice for commencing a war. The more the war is lasting, the less are the chances that there will be no violations of international law beside the prohibition of commencing a war. It is very hard to accept a rather naive opinion that during the long-lasting armed conflict one could be tried only for the crime of aggression and not for the others international crimes. The crime of aggression will be one among a few counts of the indictment, and perhaps, not even the first one.

Nevertheless, prosecuting aggression could indeed further the interests of justice in cases where other core crimes succumb to their limitations. There could be a situation where high-state official would declare a war and commit act of aggression against ‘the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations’<sup>27</sup> — thus invoking individual criminal responsibility for the crime of aggression — however, without breaching rules of International Humanitarian Law (IHL) and entailing responsibility for other international crimes. In this case, it should be borne in mind that there is a threshold requirement in the definition of aggression that in a way excludes criminal liability for ‘short wars’; thus, only a war that ‘by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations’ is criminalized.<sup>28</sup> The situation where the possibility for prosecuting aggression could be fully utilized is a ‘short war’; i.e. the war lasting for a short period of time which however represents a manifest violation of the UN Charter. Having in mind the technological and

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<sup>26</sup> M. Politi, ‘The ICC and the Crime of Aggression: A Dream that Came Through and the Reality Ahead’, 10 *Journal of International Criminal Justice* (2012) 267–288, at 270–271.

<sup>27</sup> Art. 8bis(2) ICCSt.

<sup>28</sup> See Art. 8bis(1) ICCSt.

military advances of certain states, we should not exclude the possibility of such occurrences to happen in a near future.

Finally, in sake of the legal certainty there should be predictability in the application of legal norms. Therefore, as the ICC included this crime in its purview, in the strict legal sense, there should be a clear legal framework that will guide the prosecution and the chamber in deciding whether one's actions entail individual criminal responsibility or not. According to the Rome Statute, conditions for asserting individual criminal responsibility in this respect have changed from the ones in the aftermath of WWII. International criminal law is now facing the new challenges and the interests of justice once again need to be preserved.

## ***B. Aggression and Individual Criminal Responsibility***

### *1. Individual Criminal Responsibility for the Crime of Aggression before 2010 Kampala Conference*

Before the Kampala Conference and the adoption of the definition of the crime of aggression, the main legal sources concerning individual criminal responsibility in this respect were the Nuremberg trial and the 1974 UN General Assembly Resolution (the 1974 Resolution).<sup>29</sup> The notion of individual criminal responsibility contains two essential injunctions — *actus reus* and *mens rea*. Accordingly, one could be held accountable for international crimes only if his conduct was unlawful and he had the necessary intent and knowledge.

#### **(a) Actus Reus**

The 1974 Resolution lists specific examples of acts of aggression, following the definition of aggression in a broad sense. Article 5(2) stipulates that 'a war of aggression is a crime against international peace. Aggression gives rise to international responsibility.' The 1974 Resolution comprises two basic approaches to aggression that have been disputed during the debates that preceded the adoption of the resolution.<sup>30</sup> Article 1 of the Resolution

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<sup>29</sup> GA Res. 3314 (XXIX), 14 December 1974 (hereinafter the '1974 Resolution').

<sup>30</sup> See G. Kemp, 'Individual Criminal Liability for the International Crime of Aggression' (PhD thesis at Stellenbosch University, Stellenbosch), at 162.

sets out the general definition of aggression: ‘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.’<sup>31</sup> Article 3 provides a list of acts that constitute aggression, such as invasion or attack, bombardment, the blockade of the ports or coasts, an armed attack etc.<sup>32</sup>

The basis for the 1974 Resolution is the UN Charter that provided the framework for the definition of act of aggression. The list of conducts prescribed in Article 3 has been used to guide the SC in deciding upon which wrongful uses of force amount to acts of aggression.

### (b) Mens Rea

Individual criminal liability is not envisaged in the 1974 definition of aggression. The Resolution was primarily oriented towards the responsibility of states. There is no element of *mens rea* in the definition and it cannot ‘really serve as a basis for individual criminal liability for the crime of aggression.’<sup>33</sup> At the first glance, the absence of provisions on individual criminal liability in the 1974 definition represents a *lacuna* from a criminal law perspective. However, it should be born in mind that the nature of the whole definition is state-centered and the definition itself cannot serve as the basis for individual criminal responsibility.<sup>34</sup>

In the period prior to Kampala, the judgment of the IMT was the key material source with regards to the criminal responsibility for aggression. Yoram Dinstein contended that a special kind of subjective element was developed around the concept of crimes against peace.<sup>35</sup> The IMT stated that *mens rea* was a vital part of a crime together with the *actus reus*.<sup>36</sup> Kriangsak Kittichaiseree reaffirmed that *mens rea* in the crime of aggression

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<sup>31</sup> Art. 1 of the ‘Definition of Aggression’, annexed to the 1974 Resolution.

<sup>32</sup> Art. 3 of the ‘Definition of Aggression’, annexed to the 1974 Resolution.

<sup>33</sup> Kemp, *supra* note 30, at 162.

<sup>34</sup> *Ibid.*, at 163.

<sup>35</sup> Y. Dinstein, *War, Aggression and Self-Defence* (4<sup>th</sup> edn., Cambridge: Cambridge University Press, 2005), at 136.

<sup>36</sup> *Ibid.*, at 137.

includes both intent and knowledge.<sup>37</sup> He quoted the *High Command* case<sup>38</sup> in order to substantiate his view. The US Military Tribunal held that offenders who have been accused of the crime of aggression must have

actual knowledge that an aggressive war is being intended and that if launched it will be an aggressive war. It requires in addition that the possessor of such knowledge, after he acquires it shall be in a position to shape or influence the policy that brings about its initiation or its continuance after its initiation, either by furthering, or by hindering or preventing it. If he then does the former, he becomes criminally responsible; if he does the latter to the extent of his ability, then his action shows the lack of criminal intent with respect to such policy...<sup>39</sup>

The 1974 definition deserves credits for bringing one closer to an understanding of the acts of aggression. However, as the subjective element was not included, after the post-WWII proceedings there is no legal document adopted in the international sphere specifying *mens rea* for the crime of aggression. In 2006, the House of Lords issued a judgment declaring that the crime of aggression is criminalized under customary international law.<sup>40</sup> Lord Bingham of Cornhill, Lord Hoffmann and Lord Mance held that the crime of aggression had a definition comprising both elements of *actus reus* and *mens rea* required for a criminal offence.

There has been little state practice in this respect, thus customary international law remains unchanged from the jurisprudence of Nuremberg and Tokyo trials.<sup>41</sup>

## *2. International Criminal Court and the Crime of Aggression*

The night of 11–12 June 2010 in Kampala will be remembered as a historical moment when the first Review Conference of the ICC Statute reached an agreement on the crime of aggression. Despite years of

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<sup>37</sup> K. Kittichaiseree, *International Criminal Law* (Oxford: Oxford University Press, 2001), at 221.

<sup>38</sup> *U.S. v. von Leeb et al.*, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Nuremberg, October 1946 – April 1949, Vol. XI (1950) (hereinafter the '*High Command case*').

<sup>39</sup> *Ibid.*, at 487.

<sup>40</sup> [2006] UKHL 16 *R. v. Jones and others*, para.19.

<sup>41</sup> R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (2<sup>nd</sup> edn., Cambridge: Cambridge University Press, 2010) at 321.

multilateral negotiations pre- and post-Rome, delegates arrived at Kampala with a whole set of contentious issues. Nevertheless, the definition of the crime of aggression enjoyed a shaky consensus.<sup>42</sup> When the presidential hammer went down, announcing the achievement of finding a compromise, an outburst of collective joy spread across the whole room.<sup>43</sup> The 60 year long process of criminalizing aggression finally reached its end. The definition is spelled out in the Article 8*bis* of the Rome Statute, which reads:

Article 8*bis*

Crime of aggression

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

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

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

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

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

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

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<sup>42</sup> B.v. Schaack, ‘Negotiating at the Interface of Power and Law: The Crime of Aggression’, 49 *Columbia Journal of Transnational Law* (2011) 505–601, at 513.

<sup>43</sup> C. Kress and L. v. Holtzendorff, ‘The Kampala Compromise on the Crime of Aggression’, 8 *Journal of International Criminal Justice* (2010) 1179–1217, at 1180.



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

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

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

By observing Article 8*bis* one may notice that it is structured in three levels. Firstly, the crime of aggression is defined in the first paragraph as 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.’ In this respect, several notions raise certain conceptual contention in the international criminal law discourse. One of them is the ‘control or to direct’ standard, which will be analyzed in a more detailed manner *infra*. Secondly, the nexus between individual criminal acts on the one side, and the acts of aggression of a state on another, has been made in the first paragraph of Article 8*bis*, whilst the definition of acts of aggression itself is spelled out in paragraph two therein. Finally, the third level of this structure is articulated in seven subparagraphs of paragraph two, which represent a list of acts qualifying as aggression pursuant to the 1974 Resolution.

It is important to stress that the occurrence of an unlawful act of aggression does not automatically entail the criminal responsibility of individuals involved in that act.<sup>44</sup> There are at least three conditions that need to be fulfilled in order for such responsibility to arise.<sup>45</sup> In the first place, the act of aggression must ‘... by its character, gravity and scale,

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<sup>44</sup> K. Ambos, ‘The Crime of Aggression after Kampala’, 53 *German Yearbook of International Law* (2011) 463–509, at 482.

<sup>45</sup> S. Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (The Hague: T.M.C. Asser Press, 2014), at 257.

constitutes a manifest violation of the Charter of the United Nations.’ Secondly, the ‘control or to direct’ requirement — with a purpose to narrow down potential perpetrators to a state’s high representatives — must be met. Finally, if an act of aggression occurs and a person in the dock is regarded as a leader — in terms of Article 8bis ICC Statute — he will be held criminally responsible only if his contribution to the ‘planning, preparation, initiation or execution’ of an acts of aggression is proven.<sup>46</sup>

While the definition of an act of aggression was taken in verbatim from the Resolution, there are at least two novelties in Article 8bis(1) ICC Statute.<sup>47</sup> The first novelty is the threshold requirement for prosecuting aggression only in regards to acts that ‘by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations’.<sup>48</sup> Obviously, the purpose is to exclude from criminalization minor incidents like border skirmishes or legally controversial cases like humanitarian intervention, both of which the Special Working Group on Crime of Aggression (SWGCA) considered should be dealt with outside the ambit of the ICC.<sup>49</sup> Secondly, the crime of aggression stipulates individual criminal responsibility with respect only to persons in a position to ‘control or direct’ state policy, contrary to the ‘shape or influence’ standard affirmed in customary international law.

Next section will ponder on the meaning of the ‘leadership clause’ and its reflections on individual criminal responsibility. Both normative and conceptual questions are going to be addressed. The new standard of ‘direct or control’ that was adopted in Kampala represents a shift in international policy with regards to the persons that should be brought to justice in this respect. The focus now is on the narrow circle of people among various state leaders.

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<sup>46</sup> *Ibid.*

<sup>47</sup> Ambos, *supra* note 44, at 466–467.

<sup>48</sup> *Ibid.*

<sup>49</sup> More about this point will be said in chapter 4.

### *C. The Leadership Clause*

Ever since the post-WWII trials, it has always been universally accepted that only high-ranking state agents can commit the crime of aggression. The ‘famous’ leadership clause articulates that the crime of aggression 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, of an act of aggression’.<sup>50</sup> The purpose of this provision is to narrow down the scope of potential perpetrators that can be prosecuted for the crime of aggression. According to the jurisprudence of international tribunals, both in Nuremberg and Tokyo, the judges were of the opinion that lower ranking state officials should not be held responsible in respect of this crime, because they are lacking in mental element.<sup>51</sup> In effect, common foot soldiers cannot be responsible for the crime of aggression.<sup>52</sup> The reasoning was that in most cases they could not be aware, by virtue of their position, of aggressive intentions of their superiors. Usually, only the top-ranking officers and public officials are aware of the aggressive plans of a country.

#### *1. The ‘Criteria’ for Leadership*

The IMT’s jurisdiction was restricted only to major war criminals and, at that point, the Tribunal did not set forth a leadership standard. It was accepted also that the non-governmental actors could commit the crime of aggression. The Tribunal assumed that individuals who were closely connected with the Nazi conspiracy — either by participating directly or conniving at the conspiracy and internationally furthered it — should be held criminally responsible.<sup>53</sup> Only after the *High Command* case, the crime of aggression became close to the one we have today. It transformed from the crime of knowledge and participation to the crime of leadership.

During the IMT proceedings, in theory, even the least important industrialist could be accountable for planning, preparing or initiating

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<sup>50</sup> Art. 8bis(1) ICCSt.

<sup>51</sup> Heller, *supra* note 17, at 478.

<sup>52</sup> M. Gillett, ‘The Anatomy of an International Crime: Aggression at the International Criminal Court’, 3 *International Criminal Law Review* (2013) 829–864, at 860.

<sup>53</sup> Heller, *supra* note 17, at 482.

aggression if he or she fulfilled the criteria ‘know about the Nazi conspiracy’. By the same token, yet ironically, the most important industrialist could be held responsible only after his or her membership or awareness of the Nazi conspiracy was proved in the court.<sup>54</sup> In the *High Command* case, the Nuremberg Military Tribunal (NMT) maintained for the first time that only individuals at the policy level could be accused for the crime of aggression:

When men make a policy that is criminal under international law, they are criminally responsible for so doing. This is the logical and inescapable conclusion. The acts of commanders and staff officers below the policy level, in planning campaigns, preparing means for carrying them out, moving against a country on orders and fighting a war after it has been instituted, do not constitute the planning, preparation, initiation and waging of war or the initiation of invasion that international law denounces as criminal<sup>55</sup>

The NTM held that the leadership standard of ‘shape or influence’ was amounting to individual criminal responsibility: ‘It is not a person’s rank or status, but his power to shape or influence the policy of his State, which is the relevant issue for determining his criminality under the charge of crimes against peace.’<sup>56</sup>

This ‘policy level’ introduced at Nuremberg trials underwent changes and the Special Working Group on the Crime of Aggression opted for ‘control or direct’ instead of ‘shape or influence’ standard. The new requirement is stricter than the former one and the list of potential perpetrators is now even more limited. According to Kai Ambos, the criterion ‘direct or control’ is justified since it has been proven that during the Nuremberg trial and the follow-ups, ‘shape or influence policy’ caused almost the same amount of trouble like the ‘major role’ standard, consequently leaving too large a group of people exposed, especially in democratic societies.<sup>57</sup> One opinion that should be seriously considered is that this so-called ‘retreat from Nuremberg’ would give impunity to non-

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<sup>54</sup> *Ibid.*, at 486.

<sup>55</sup> *High Command case*, at 490–491.

<sup>56</sup> *Ibid.*, at 489.

<sup>57</sup> Ambos, *supra* note 44, at 483–484.

political leaders.<sup>58</sup> However, it is for the prosecution to adduce evidence in court and to prove the level of effective control over aggressive policy for non-political actors that will amount to criminal responsibility. Textually, there are no legal impediments to prosecute non-political leaders before the ICC.

In view of the foregoing, one could be prosecuted and ultimately found guilty of the crime of aggression only if his real capacity to exercise control effectively has been shown; mere *de jure* power is not sufficient to entail individual criminal responsibility.<sup>59</sup> On the whole, political and military leaders have this kind of authority and they should be primarily responsible when an act of aggression occurs. Amendments to the ICC Statute that were introduced at the Kampala Conference do not refer to the level of control required, and the overall conclusion is that leadership analysis should be conducted on a case-by-case basis. One example of *de jure* power but without actual capacity to exercise ‘control over or to direct the political or military action of a state’, is the British queen in relation to the establishment of colonial system all over the world.<sup>60</sup> If there was a trial, the Queen could not be found responsible for the colonization simply because there was no real authority towards the military and political establishment in the colonized countries.

It is clear, however, that the policy level is more stringent at the ICC that it was during WWII follow-up trials. Therefore, one cannot rely upon NMT’s reasoning in order to drag potential perpetrators into the realm of individual criminal responsibility. Accordingly, a new approach is needed in order to identify those who fulfill the criterion of ‘control or direct’.

## *2. Conceptual Underpinnings of the Leadership Clause*

Conceptual roots of the leadership clause are to be found in the theoretical conception of leadership set out by the German sociologist Max Weber.<sup>61</sup>

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<sup>58</sup> For a broader discussion, see Heller, *supra* note 17, at 497.

<sup>59</sup> Gillett, *supra* note 52, at 860.

<sup>60</sup> *Ibid.*

<sup>61</sup> See N. Weisbord, ‘Conceptualizing Aggression’, 20 *Duke Journal of Comparative & International Law* (2009) 1–68, at 44.

This theory served as a guiding principle for determination individual criminal responsibility for aggression during the post-WWII trials. In *Politic as Vocation*, Weber set forth three ideas of political authority.<sup>62</sup> The *traditional type of leadership* is bound to the idea of the ‘eternal yesterday’.<sup>63</sup> The patriarch and the patrimonial prince of yore exercised this authority.<sup>64</sup> People obey them by virtue of tradition. Their power was legitimized mainly by religiously sanctified tradition. The second type of authority is the *charismatic leadership*.<sup>65</sup> Domination is legitimate because the leader has a ‘gift of grace’ or charisma. People obey the leader because of his personal qualities such as position in military (military leaders), heroism, demagoguery etc. For Weber, devotion to the charisma of a leader means that people chose to obey him because they believe he is ‘called’ leader of men. Finally, there is a type of leadership in which domination is legitimized by virtue of *legality*.<sup>66</sup> This idea of authority is made by acceptance of the legal system of a state and ‘functional “competence” based on rationally created rules.’<sup>67</sup> Weber asserted that this type of leadership — which in his opinion emerged in modern states at the first half of the 20<sup>th</sup> century — is obeyed in accordance with statutory obligations.

The *Weberian legal-rational type of leadership* was implemented for the first time in the London Charter with respect to the definition of aggression. The SWGCA used the same principle because it commensurate with the bureaucracy that is widely accepted as a means of coordinating the large organization, such as state. Thus the wording of Article 8*bis* ICC statute reads: ‘For the purpose of this statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position

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<sup>62</sup> See M. Weber, ‘Politic as Vocation’, H.H. Gerth and C. Wright Mills (eds), *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1946) (hereinafter ‘*Politic as Vocation*’) available online at [http://socialpolicy.ucc.ie/Weber\\_Politics\\_as\\_Vocation.htm](http://socialpolicy.ucc.ie/Weber_Politics_as_Vocation.htm) [accessed 21 October 2014], at 77–128.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

effectively to exercise control over or to direct the political or military action of a state, of an act of aggression...’

At this juncture, I want to intersperse two important observations. Firstly, the crime of aggression is, according to the Rome Statute, attached only to state actors. In international law, a state is a nonphysical juridical entity, which has the authority over specific territory and is represented by one centralized government.<sup>68</sup> Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States provides that:

The State as a person of international law should possess the following qualifications:

- (a) a permanent population;
- (b) a defined territory;
- (c) government; and
- (d) capacity to enter into relations with other states.

Today, there are 193 member states within the United Nations system.<sup>69</sup> The 'Montevideo criteria' should be the first recourse in determining the statehood of an entity. However, fairly educated international lawyer witnessed most creative interpretations from judges in various international courts. It would at least not be surprising if the leaders from an entity with some characteristics of the statehood, however not with all, will be processed before the ICC. Regrettably, further discussion will be purposely omitted as this question is beyond the scope of this thesis.

My observation is that the theory of legal-rational concept of authority is employable for the process of identifying leaders of a state before the ICC, however, not in the same extent as it was used during the post-WWII trials. Weber in his lectures about *Politics as Vocation* mainly argued about dissemination of power within the state organization. Weber saw a state as a large bureaucratic organization as we, most likely, see it today. For him the main characteristic of a state, which distinguishes it from other forms of organizations, is the monopoly of the legitimate use of physical force within state territory. I have purposely used the term 'most likely' since the notion

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<sup>68</sup> See M. Craven, 'Statehood, Self-Determination and Recognition', in M.D. Evans (ed.), *International Law* (4th edn., Oxford: Oxford University Press, 2014) 201–248.

<sup>69</sup> See Official site of the United Nations, *Member States of the United Nations*, available at <http://www.un.org/en/members/> [accessed 30 October 2014].

of state governance underwent changes from the period of the first trials for aggression. Nowadays, civil society has more influence on the state policy and the motives that define actions of those leaders are different than incentives of the state's formal high-officials. Nevertheless, as I stated, this theory is applicable to some extent and it can certainly help us to grasp the general notion of leadership.

The second observation is the political nature of the question of directing or controlling state actions that amount to aggression. This remark largely hinges on one's perception of the concept of politics. From a sociological aspect, the broad definition of politics could be narrowed to the every form of independent leadership in action. To that end, whenever there is an example of exercise of the authority, the context is always political, however with different variations. State organization is a form of a leadership concept and the leadership concept is quintessential political structure. A state represents relation between different groups in which men and women are dominating other men and women, and where leaders thereof have the legitimate right to use violence if subordinates do not respect their will.<sup>70</sup> This idea in a way represents the very essence of a stable state organization. Weber held that

“[p]olitics” for us means striving to share power or striving to influence the distribution of power, either among states or among groups within a state. This corresponds essentially to ordinary usage. When a question is said to be a “political” question, when a cabinet minister or an official is said to be a “political” official, or when a decision is said to be “politically” determined, what is always meant is that interests in the distribution, maintenance, or transfer of power are decisive for answering the questions and determining the decision or the official's sphere of activity.<sup>71</sup>

In a modern state, one who is disturbing the power (e.g. from a position to direct or control political and military actions of a state) is actually disseminating own political ideas. He strives to impose his will using the legal-rational authority that he enjoys among subordinates. Political leaders, for instance, use demagoguery as means in order to convey their will. Demagoguery is a political tool that purports political decisions. Military

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<sup>70</sup> See Weber, *supra* note 62, at 77–128.

<sup>71</sup> *Ibid.*



leaders, as well as politicians, are disseminating political will however with different means. What is a war if not an instrument of a state policy employed in imposing political will upon confronted political organization, such as other states or similar entities? In most cases in modern states, military leaders are in the lower position in the state hierarchy than political leaders. However, they still have a level of digression in their purview and they could meet the requirement of ‘direct or control’ and thus be reliable for the crime of aggression.

There is an opinion that ponders on the limits of the Weberian theory, which indeed commensurate with my conceptual observations. For Noah Weisbord, this sociological approach is more state-centric and, inter alia, it could not be employed as a guiding principle in determining criminal responsibility of leaders of post-bureaucratic organizations, such as terroristic organizations.<sup>72</sup> As the state is a more vertical organization which articulates the clear distinction between superiors and subordinates — a notion that represents the nucleus of bureaucracy — organizations such as paramilitary ones do not poses that kind of a distinction. Superiors within a state are attributed with effective control over their subordinates, which is not the case with the post-bureaucratic organizations. Arguably, Weber's charismatic type of leadership can be applied as a theoretical approach in identifying those power-holders. However, as the crime of aggression from the Rome Statute is referring only to the states, regrettably, further discussion on this topic will be omitted. Having in mind the incentive of states to claim exclusive jurisdiction to prosecute individuals for participation in a terroristic or paramilitary organizations — if the crime occurred within their national systems — it is highly disputable to what extent questions concerning the crime of aggression will be at the table in this respect.

In the next two chapters I will analyze how the primary sources of law engaged the issue of leadership in international criminal law. For scholars at least, it is essential to track the roots of this concept in order to understand how the state policy is being controlled and directed. Therefore, subsequent

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<sup>72</sup> See Weisbord, *supra* note 61, at 47.

chapter will shed some light on the incentive of international community to bring to justice those who were seen as most responsible for carnages during WWII. Moreover, the original concept of 'shape or influence' will be examined together with the reasons for eliding the leadership standard at the first international trial for war criminals in modern times.

### 3. First Steps after the World War II

The international community disputed shortly after WWII whether there should be an organized trial for the responsible individuals who caused mass atrocities to happen, or, they should be simply hanged as the punishment for their deeds. By dint of a few concessions, it was decided that everyone who was the alleged perpetrator of crimes during the war should face justice before an internationally recognized court, having the opportunity to be legally represented.<sup>73</sup>

There were at least two challenges that all the post-war courts were facing with respect to the crimes against peace. The first and foremost was the challenge to ‘legalize’ the crime itself. This daunting task initially appeared as an insurmountable obstacle for the judges, which they nevertheless overcome.<sup>74</sup> The second — more pertinent to this paper — was the establishment of the legal justification that will serve as a notion which connects all the accused for aggression, i.e. setting forth the criteria common for all the individuals that have been prosecuted for the crimes against peace.

The Nuremberg International Military Tribunal maintained that lower ranking state agents should not be held responsible for the crime of aggression. As only the major war criminals were under the purview of the London Charter, there was no need for the Tribunal to adopt the leadership standard. The IMT held that: ‘Hitler could not make aggressive war by himself. He had to have cooperation of statesmen, military leaders, diplomats, and businessmen’<sup>75</sup> The International Military Tribunal for the Far East (IMTFE; the Tokyo Tribunal) followed mainly the path of jurisprudence of Nuremberg. The judgment allotted 1079 pages to crimes against peace, in comparison with Nurnberg’s 21 pages.<sup>76</sup>

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<sup>73</sup> See *London Charter*.

<sup>74</sup> For the criticism of Nuremberg Judgment see Weigend, *supra* note 7.

<sup>75</sup> *IMT Judgment*, at 223.

<sup>76</sup> *United States et al. v. Araki et al., The Tokyo War Crimes Trial*, 4 November 1948, (hereinafter the ‘*IMTFE Judgment*’).

Soon after the IMT delivered its judgment the Allied Powers enacted Control Council Law No. 10 (Law No. 10)<sup>77</sup> in order to empower the occupying authority in each of the zones of occupation to establish military tribunals to prosecute offenders for crimes committed during the war. The *High Command* case<sup>78</sup> and *Ministries* case<sup>79</sup> addressed the issue of leadership in a more detailed manner, adopting for the first time the policy level requirement that should capture the common characteristics of individuals who were most responsible for commencing the war.

This chapter will analyze the leadership standard ('shape or influence') that permeates through the trials at the immediate aftermath of WWII. Although the leadership clause is explicitly stated only in some cases and not in others, it is highly evident that there are some similar characteristics of the defendants that make them suitable to be held responsible for the crime of aggression. Moving forward chronologically with the argument, chapter after the next one will attempt to decipher the 'direct or control' concept that is employed at the ICC, and thus open a door for a theoretical contemplation.

### ***A. The Nuremberg International Military Tribunal***

The IMT did not spell out the specific criteria for determining who are the individuals that should be held responsible for the crimes against peace. Instead, the court went on analyzing each and every accused for his participation and hierarchy level, concluding that he did participate or did not participate in aggression. Nevertheless, there are some traces indicating how the tribunal determined who are the leaders most responsible for the aggression.

To embark upon the analysis, in order to understand what was the guiding principle for prosecuting individuals, it is essential to begin with an

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<sup>77</sup> Allied Control Council Law No. 10, 20 Dec. 1945, 15 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (1951), 23–28 (hereinafter Law No. 10).

<sup>78</sup> See *High Command case*.

<sup>79</sup> See *U.S. v. von Weizsäcker et al.*, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Nuremberg, October 1946 – April 1949, Vol. XIV (1949) (hereinafter the '*Ministries case*').

examination of the reasons for the absence of leadership clause. First of all, the Tribunal was, according to the London Charter, founded for the purpose of trying the major criminals of the European Axis whose crimes had no particular geographical location. The expression ‘major’ is again mentioned in the London Charter under the section III, with the title: ‘Committee for the Investigation and Prosecution of Major War Criminals.’ It was clear then that at the first trial after WWII only the top ranking German leaders would be prosecuted and adopting any sort of policy requirement would be superfluous. The second reason for eliding the leadership clause is the fact that the trial conducted in Nuremberg was the first international trial in respect of the crime of aggression. The judges, the prosecution, and everyone else participating in this historic enterprise did not anticipate the need for having a set of criteria that will guide both the trial and prosecution chamber in determining criminal liability. However, this ‘blunder’ did not diminish the significance of the trial as the goal was ultimately reached — most responsible men were convicted.

There are two counts of the indictment referring to aggression. Count one charges the defendants with conspiring or having a common plan to commit crimes against peace; count two charges the accused for committing specific crimes against peace by planning, preparing, initiating, and waging wars of aggression against a number of other states.<sup>80</sup> The court considered both counts together in order to illuminate the importance of Hitler’s associates in crafting a common plan and waging a war. Among the 22 for whom a judgment was rendered, eight defendants were convicted of both counts and four of count two only. The analysis below shows that the Tribunal did not have a clear standard according to which it determine individual criminal responsibility. It is perhaps convenient to present on this point, without disputing the facts of the case, the court’s step-by-step reasoning why this specific group of people was found guilty for the crimes against peace.

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<sup>80</sup> *IMT Judgment*, at 421.

The defendant Göring<sup>81</sup> was convicted of counts one and two because of his close relationship with Hitler. He had high-level position both in the Nazi Party and the Government. The Tribunal argued that he possessed knowledge of the aggressive plans and he participated in the acts of aggression and aggressive war. The IMT held that he was: ‘the planner and prime mover in the military and diplomatic preparation for war which Germany pursued.’<sup>82</sup>

The defendant Hess<sup>83</sup> was found guilty of counts one and two of the indictment. He was a deputy to Hitler and he was a top man in the Nazi party, with the primary responsibility to handle all party matters acting in Hitler’s name on all question of leadership. The Tribunal maintained that he had knowledge of the aggressive plans and he participated in the aggressive war.<sup>84</sup>

The defendant von Ribbentrop<sup>85</sup> was found guilty of counts one and two of the indictment after the Nuremberg Tribunal considered his relationship with Hitler and his high-level positions in the Government. The Nuremberg Tribunal held that he was in possession of knowledge of the aggressive plans and he participated in the acts of aggression and aggressive war.<sup>86</sup>

The defendant Keitel<sup>87</sup> was convicted of counts one and two because it was proven that he had knowledge of the aggressive plans and that he

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<sup>81</sup> Göring was Commander-in-Chief of the Luftwaffe and Plenipotentiary for the Four-Year Plan.

<sup>82</sup> *IMT Judgment*, at 485–486.

<sup>83</sup> Hess joined the Nazi Party in 1920. He was imprisoned with Hitler in the Landsberg fortress in 1924 and became Hitler’s closest personal confidant. On 21 April 1933, he was appointed Deputy to the Führer, and on 1 December 1933 he was made Reich Minister without Portfolio. On 4 February 1938, he was appointed member of the Secret Cabinet Council and a member of the Ministerial Council for the Defense of the Reich.

<sup>84</sup> *IMT Judgment*, at 487–488.

<sup>85</sup> Ribbentrop joined Nazi Party in 1932. He has been made as Foreign Policy Adviser to Hitler and representative of the Nazi Party on foreign policy in 1933. He was appointed Delegate for Disarmament Questions and in 1935 Minister Plenipotentiary at Large. In 1936 he was appointed Ambassador to England. In 1938 he succeeded von Neurath as Reich Minister for Foreign Affairs.

<sup>86</sup> *IMT Judgment*, at 489–490.

<sup>87</sup> Keitel was Chief of Staff to the Minister of War. In 1938 he became Chief of the High Command of the Armed Forces.

participated in the acts of aggression and aggressive war, base on his high-level position in the military.<sup>88</sup>

Considering the four other accused that have been convicted of counts one and two of the indictment (Rosenberg,<sup>89</sup> Raeder,<sup>90</sup> Jodl<sup>91</sup> and von Neurath<sup>92</sup>), the IMT based its reasoning on the same three criteria as it did for four above: high-level position, possession of knowledge of the aggressive plans and the participation in the acts of aggression and aggressive war.<sup>93</sup>

The Nuremberg Tribunal directed a verdict of acquittal on count one for the four defendants (Frick<sup>94</sup>, Funk<sup>95</sup>, Dönitz<sup>96</sup>, Seyss-Inquart<sup>97</sup>) and convicted them on count two of the indictment. The court held that they all had the knowledge of the aggressive plans and they all participated in the acts of aggression and aggressive war, the same as the eight accused who

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<sup>88</sup> *IMT Judgment*, at 491–492.

<sup>89</sup> Rosenberg joined the Nazi Party in 1919. He was recognized as the Party's ideologist and he developed and spread Nazi doctrines in the newspapers *Völkischer Beobachter* and *NS Monatshefte*, which he edited.

<sup>90</sup> Raeder became Chief of Naval Command in 1928. In 1939, Hitler made him Gross-Admiral. He was a member of the Reich Defense Council. In 1943 he stepped down and became Admiral Inspector of the Navy, a nominal title.

<sup>91</sup> Jodl was Chief of the National Defense Section in the High Command from 1935 to 1938. In 1939 he became Chief of the Operations Staff of the High Command of the Armed Forces. His superior was Keitel, but he reported directly to Hitler on operational matters.

<sup>92</sup> Von Neurath was a professional diplomat who served as German Ambassador to Great Britain from 1930 to 1932. In 1932 he was appointed Minister of Foreign Affairs. He has been made Reich Minister without Portfolio, President of the Secret Cabinet Council and a member of the Reich Defense Council on 4 February 1938. From 1939 to 1941 he was appointed Reich Protector for Bohemia and Moravia.

<sup>93</sup> *IMT Judgment*, at 495–524.

<sup>94</sup> Frick was recognized as the chief Nazi administrative specialist and bureaucrat. He was appointed Reichminister of the Hitler's first Cabinet. Among all positions that he obtained, he was Reich Director of Elections, General Plenipotentiary for the Administration of the Reich and a member of the 'Three-Man Council.'

<sup>95</sup> Funk joined the Nazi Party in 1931 and shortly after became one of Hitler's personal economic advisers. He took office as Minister of Economics and Plenipotentiary General for War Economy in 1938, and as President of the Reichsbank in 1939.

<sup>96</sup> Dönitz took command of the first U-boat flotilla in 1935. In 1943 he was appointed Commander-in-Chief of the German Navy. In 1945 he became the Head of State, succeeding Hitler.

<sup>97</sup> Seyss-Inquart was Austrian attorney who was appointed State Councilor in Austria in 1937. He officially joined Nazi Party in 1938. He was appointed Austrian Minister of Security and Interior with control over the police.

were found guilty of both counts.<sup>98</sup> Except for Seyss-Inquart, where the Tribunal omitted to elucidate the reasons why he was acquitted of count one, the rest of defendants were exonerated because they lacked in knowledge about the common plan. Frick was exonerated after court's findings that he was not a member of a common plan or conspiracy to wage aggressive war because he was not present during the conferences at which Hitler outlined his aggressive plans. Funk was acquitted of count one because he had become an active participant in aggressive war only after the aggressive plans were defined.<sup>99</sup> The defendant Dönitz was acquitted of count one because it was not proven that he possessed knowledge about the plans to wage aggressive war and he had not been privy to the conspiracy.<sup>100</sup>

The structure of the Tribunal's judgment shows that the court did not set out the leadership standard explicitly. There are no strict criteria that have been followed in the assessment of the participation in crimes against peace of each accused. However, if one glimpses for a second the analysis provided above, he will most likely notice that there are indeed some guidance in the judgment that the Tribunal was following through its reasoning. Expressions like 'knowledge of the aggressive plans' and 'high-level position', give us a clue that this judgment actually has paved the way for the leadership clause that we have today. Further to this statement is the fact that the Tribunal emphasized the importance of *de facto* authority, rather than *de jure power*. For instance, the IMT validate the importance of Dönitz's position, his leadership role, decision-making authority and his significant contribution to waging aggressive war rather than his title.<sup>101</sup>

If we take a closer look at the reasoning of the court, we are likely to notice that for each defendant who was convicted for crimes against peace, regardless of count one or two, the Tribunal found that he was in possession of knowledge of the aggressive plans and he participated in the acts of aggression and aggressive war. Every one of them was, in the court's own wording, in high-level position whether in the Nazi Party, the Government

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<sup>98</sup> *IMT Judgment*, at 499–521.

<sup>99</sup> *Ibid.*, at 502–503.

<sup>100</sup> *Ibid.* at 507.

<sup>101</sup> *Ibid.*



or in the military. Furthermore, disputably, the first signpost for the Tribunal was the close relationship with Hitler in determining who were the leaders most responsible for the aggression. For instance, the IMT held that Göring, Hess and Ribbentrop had the influence on German aggressive policy because they were close to Hitler.

There is another test that has been conducted in assessing who were the leaders responsible for planning the aggression, which was applied in assessing the responsibility on count one of the indictment. The Tribunal stated:

Evidence from captured documents has revealed that Hitler held four secret meetings, to which the Tribunal proposes to make special reference, because of the light they shed upon the question of the common plan and aggressive war. These meetings took place on 5th November 1937, 23rd May 1939, 22nd August 1939, and 23rd November 1939. At these meetings important declarations were made by Hitler as to his purposes, which are quite unmistakable in their terms.<sup>102</sup>

We can conclude from this reasoning that the attendance at these four meetings was somewhat of a telltale for the IMT of who were the “founding fathers” of the common plan for waging the war.

Although the Nuremberg Tribunal did not adopt the leadership clause, it had some principles that it followed in proving the leadership positions. As I endeavored to elucidate, there are at least three tests that served the court in determining individual criminal responsibility for the aggression. This was the first international trial for the crime of aggression and the first international trial ever. Situation has changed considerably in the following trials, since the leadership clause emerged as an intrinsic part of the crime of aggression.

### ***B. The International Military Tribunal for the Far East***

The Tokyo Tribunal was founded so that the major war criminals in the Far East could face the trial for offences committed during WWII.<sup>103</sup> Whereas

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<sup>102</sup> *Ibid.*, at 423.

<sup>103</sup> *Charter of the International Military Tribunal for the Far East*, Trial of Japanese War Criminals: Documents, p. 39, Department of State Publication No. 2613, United States Government Printing Office, 1946 (hereinafter the ‘*Tokyo Charter*’).

the International Military Tribunal at Nuremberg was established pursuant to an agreement, the IMTFE foundation was based on the Special Proclamation of General Douglas MacArthur, Supreme Commander for the Allied Powers. The Charter of the International Military Tribunal for the Far East (the Tokyo Charter) envisaged the crimes against peace as one of the core crimes:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

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.<sup>104</sup>

In comparison with the Nuremberg Tribunal, the IMTFE Judgment (the Tokyo Judgment)<sup>105</sup> allotted about 70% of the whole to the crimes against peace, and the rest was devoted to the war crimes and crimes against humanity.<sup>106</sup> What remained disputable for many more years after the trial is the fact that Allies decided not to prosecute Emperor Hirohito. If Hitler did not commit suicide on 30 April 1945, there would be no question of his exposure in Nuremberg. The Allies held that Emperor Hirohito had a rather symbolic role in shaping the aggressive politic in Japan.<sup>107</sup>

The indictment lodged on 29 April 1946 encompassed three groups of charges against 28 accused and 55 counts were devoted to aggression.<sup>108</sup> For the purpose of this thesis, the most important is group one that contains counts 1 to 36 and it concerns the crimes against peace. Counts 1 to 5 addressed the common plan or conspiracy to commit crimes against peace; counts 6 to 17 addressed the planning and preparation of wars of aggression;

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<sup>104</sup> Art. 5(2)(a) *Tokyo Charter*.

<sup>105</sup> See *IMTFE Judgment*.

<sup>106</sup> Sayapin, *supra* note 45, at 179.

<sup>107</sup> *Ibid.*

<sup>108</sup> *IMTFE Judgment*, at 48,447–48,453.

counts 18 to 26 addressed the initiation of wars of aggression; and counts 27 to 36 addressed the waging of wars of aggression.<sup>109</sup>

The IMTFE considered the individual criminal liability of the 25 defendants and all of them were found guilty of the crimes against peace. As its predecessor in Nuremberg, the Tokyo Tribunal failed to define the leadership standard. Though it devoted an immense part of its judgment to the aggression, the court did not set out the standard that would bring closer to understanding individual criminal responsibility of the individuals. However, by analyzing the judgment we may conclude that there are some principles that were followed in determining leadership positions of the accused.

Sadao Araki<sup>110</sup> was convicted of counts 1 and 27 after the Tokyo Tribunal found that he was one of the leaders of the conspiracy and participated in waging aggressive war. The court based its reasoning on his prominent position both in military (he was a high-ranking officer, General) and the government.<sup>111</sup> Kenji Dohihara<sup>112</sup> was convicted of crimes against peace, after the court found that he was one of the leaders who were involved in aggressive plans and policies. He was Colonel and General in the Japanese Army.<sup>113</sup> The Tokyo Tribunal maintained that the defendant Kiichiro Hiranuma<sup>114</sup> was guilty of crimes against peace after it found that he was a leader since he assumed high-level positions in the government.<sup>115</sup> The accused Koki Hirota<sup>116</sup> was found guilty of aggression because he participated in the common plan or conspiracy to wage aggressive wars as a

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<sup>109</sup> *Ibid.*

<sup>110</sup> Araki was recognized as one of the prominent leaders of the Army movement. He assumed office as Minister of War in December 1931. He was Minister of Education from 1938 to 1939.

<sup>111</sup> *IMTFE Judgment*, at 49,774–49,776.

<sup>112</sup> Dohihara was a Colonel in the Japanese army and by April 1941 he had attained the rank of General.

<sup>113</sup> *IMTFE Judgment*, at 49,777–49,779.

<sup>114</sup> Hiranuma was a President of the Privy Council from 1936 until 1939, when he became Prime Minister. Later, he was the Minister Without Portfolio and Home Minister in the Second and third Konoye Cabinets.

<sup>115</sup> *IMTFE Judgment*, at 49,786–49,787.

<sup>116</sup> Hirota was Foreign Minister between 1933 and 1936 when he became Prime Minister. In 1937 he again assumed office as Foreign Minister in the First Konoye Cabinet.

Foreign Minister. During his tenure of office in the Government, the court found that he occupied high-level position and that he was a 'forceful leader'.<sup>117</sup>

By way of example, the Tokyo Tribunal followed the same pattern in determining their criminal liability. Undoubtedly, there was a nexus between their leadership positions and the criminal responsibility for crimes against peace. There are two more defendants that are certainly worth examining, because the reasoning of the IMTFE in their case is somewhat different.

For the defendant Kenryo Sato<sup>118</sup> the Tokyo Tribunal considered two important prerequisites in order for one to be held responsible for common plan or conspiracy to commit crimes against peace.<sup>119</sup> The court stated:

It was thus not until 1941 that Sato attained a position which by itself enabled him to influence the making of policy, and no evidence has been adduced that prior to that date he had indulged in plotting to influence the making of policy. The crucial question is whether by that date he had become aware that Japan's designs were criminal, for thereafter he furthered the development and execution of those designs so far as he was able.<sup>120</sup>

In the next few passages the court maintained that the answer to this question is positive and it is beyond any doubt as Sato delivered a speech in August 1938, where he has shown complete familiarity with the aggressive plans of Japan. As we can see, the criteria for the leadership in Sato's case was the possibility to influence the making of aggressive policy of Japan. The second criterion, which relates to the leadership standard in general, is the knowledge of the aggressive policy and the development and execution of those designs by the accused.

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<sup>117</sup> *IMTFE Judgment*, at 49,788–49,792.

<sup>118</sup> Sato was promoted to the rank of Lieutenant Colonel in 1937. He was 'explainer' in the General Mobilization Law to the Diet. In 1941 he was appointed Chief of the Military Affairs Section of the Military Affairs Bureau. From 1942 until 1944 he was the Chief of the Military Affairs Bureau.

<sup>119</sup> *Historical Review on Development relating to Aggression*, New York: United Nations, 2003, 215 (hereinafter '*Historical Review*').

<sup>120</sup> *IMTFE Judgment*, at 49,826.

The reasons for Heitaro Kimura's<sup>121</sup> criminal responsibility are by far the most intriguing part of the Tokyo Judgment. The IMTFE convicted him of crimes against peace, even though the Tribunal stated that he was not a leader. By the court's findings, Heitaro was a valuable accomplice in the conspiracy to wage aggressive wars, as he was Vice-Minister of War. Although he was not a leader, he possessed knowledge of the Government's plans and preparations for the Pacific War and hostilities in China. He contributed to the aggressive policy by giving advice based on his wide experience, and developing and formulating aggressive plans which he initiated.<sup>122</sup> Notwithstanding the fact that he was not a high-level officer, the court found that his contribution was crucial and sufficient, which entailed his criminal liability in respect of crimes against peace.

As we can see by the wording of the IMTFE, determination of the leadership positions was the crucial point in substantiating the liability for crimes against peace. There is only one exception — the defendant Hitaro. For most of the accused, the Tokyo Tribunal considered their leadership position in the virtue of their position. Some of them were prominent military officers and others were high-level Government officials. During their incumbency they shaped the aggressive policy of Japan. In Sato's case, the court directed his criminal liability in virtue of his position from which he was enabled to influence the making of aggressive policy. This was most certainly one of the indicators for future international trials, where the courts were struggling to define the leadership component of the accused in respect to the crimes against peace.

### ***C. Nuremberg Military Tribunal***

Only a couple of months after the IMT rendered its judgment, the Allied Powers issued Law No. 10 authorizing the occupying authority in each of the zones of occupation to establish tribunals in order to prosecute war

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<sup>121</sup> Kimura became Vice-Minister of War in 1941. He was appointed Councilor of the Planning Board and Councilor of the Total War Research Institute. In 1944 he became Commander in Chief of the Burma Area Army which post he held until the surrender of Japan in 1945.

<sup>122</sup> *IMTFE Judgment*, at 49,807–49,810.

criminals and other similar offenders that were left out by the Nuremberg judgment. For the American zone in Germany, the United States founded military tribunals pursuant to the foregoing law. There were 12 trials in the period between 1946 and 1949. Only on four of these cases defendants were prosecuted of crimes against peace.<sup>123</sup>

For the purpose of this thesis, it is rather unnecessary to discuss in any detail those cases except for the *High Command* case. It is the only trial where the court took into consideration the leadership clause and tackled the related issues giving substantive explanations. In the *Ministries* case, the Nuremberg Military Tribunal accepted the leadership standard that has been previously established in the *High Command* case.

In the *High Command* case, 14 officers with high positions in the German military were prosecuted for aggression.<sup>124</sup> This was the first trial for crimes committed during WWII where the court addressed the issue of leadership in a more detailed manner, under the section ‘Count One of the Indictment — Aggressive War’.<sup>125</sup> The NMT spelled out criteria for assessing criminal liability in respect of crimes against peace by centralizing leadership position as an intrinsic part, without which one could not be held responsible:

There first must be actual knowledge that an aggressive war is intended and that if launched it will be an aggressive war. But mere knowledge is not sufficient to make participation even by high ranking military officers in the war criminal. It requires in addition that the possessor of such knowledge, after he acquires it shall be in a position to shape or influence the policy that brings about its initiation or its continuance after initiation, either by furthering, or by hindering or preventing it. If he then does the former, he becomes criminally responsible; if he does the latter to the extent of his ability, then his action shows the lack of criminal intent with respect to such policy.<sup>126</sup>

As we can see, the court maintained that mere knowledge of an aggressive war does not entail criminal liability if an accused is not in a position to shape or influence the policy that brings about its initiation. Moreover, the

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<sup>123</sup> *Historical Review*, at 69.

<sup>124</sup> *Historical Review*, at 84.

<sup>125</sup> *High Command case*, at 484.

<sup>126</sup> *Ibid.*, at 487.

court held that what counts is one's *de facto* power to shape or influence the policy of a state; mere rank or status should serve only as an indication, not as a conclusive evidence.<sup>127</sup> Furthermore, there could be a situation where a leader was not in a possession of knowledge that the planning and preparation for invasion and wars were not in violation with international law.<sup>128</sup> In that case, a defendant who lacked such knowledge cannot be guilty of an offence.<sup>129</sup>

The NMT made a clear distinction between the persons with leadership characteristics and common foot soldiers. Individuals on the lower level of the state policy often serve as instruments of high-level state officials who are in position to shape or influence aggressive policy.<sup>130</sup> As the Tribunal stated,

[i]nternational law condemns those who, due to their actual power to shape and influence the policy of their nation, prepare for, or lead their country into or in an aggressive war. But we do not find that, at the present stage of development, international law declares as criminals those below that level who, in the execution of this war policy, act as the instruments of the policy makers. Anybody who is on the policy level and participates in the war policy is liable to punishment. But those under them cannot be punished for the crimes 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 organization.<sup>131</sup>

On the other hand, the court made an important distinction between commanders and leaders. Not every commander is a leader; what matters most is the policy level, which I analyzed earlier in the light of the 'shape or influence' standard. The act of those commanders that could be interpreted as planning, preparing, giving orders and fighting a war, do not amount to those one that have been prescribed in count one of the indictment.<sup>132</sup>

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<sup>127</sup> *Ibid.*, at 488.

<sup>128</sup> *Ibid.*, at 487–488.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Historical Review*, at 92.

<sup>131</sup> *High Command case*, at 488.

<sup>132</sup> *Ibid.*, at 490.

What I find interesting and unusual for all the international trials in the aftermath of WWII is the court's reasoning related to the question of morality of a leader that is closely connected with the respect for human rights. The NMT stated that 'it would have been eminently desirable had the commanders of the German armed forces refused to implement the policy of the Third Reich by means of aggressive war ... had they done so, they would have served their fatherland and humanity also.'<sup>133</sup> The court is insinuating that individual in a leadership position should have borne in mind that the question of legality is not the same as the question of legitimacy with respect to human rights, *viz.* though the orders were legally given by the state's authority, no one has the legitimacy to direct actions towards encroachment of a human dignity, not even a democratic elected government. A high-level officer should have had affinity to disobey those orders, as most probably, this kind of affinity brought him to that position. Everyone who did not act with such due diligence should be held responsible and for this reason the objection of following orders does not stand. This reasoning might be used as guidance in future trials for crime of aggression in the process of identifying one's individual criminal responsibility.

To sum up, in the *High Command* case, the NMT set out the three-limb test in the pursuit of criminal responsibility of crimes against peace.<sup>134</sup> First of all, the perpetrator must have the knowledge that an aggressive war is intended, which is illegal according to the norms of international law and treaties. Secondly, mere knowledge is insufficient and only a person in a position to shape or influence the aggressive policy of a state could be liable for the crime. Finally, a perpetrator must have taken some actions in furtherance of the aggressive policy.

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<sup>133</sup> *Ibid.*, at 488.

<sup>134</sup> Heller, *supra* note 17, at 486.



## 4. Rome Statute of the International Criminal Court

At the final stage of 1998 Rome Conference there has not been a universally accepted definition on the crime of aggression. It was unquestionable that the crime of aggression would fall within the jurisdiction of the ICC, but the opinions were segregated concerning the details of the crime. The differences were mainly oriented around the definition itself and the procedural facet of the crime.<sup>135</sup> As the Rome Conference came to a close, members of the Non-Aligned Movement proposed a seemingly workable solution.<sup>136</sup> Aggression was included in the purview of the International Criminal Court, but the definition and certain conditions for the exercise of jurisdiction were left out. The outcome was the adoption of Article 5 ICC Statute, which reads

### Article 5

#### Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

2. 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.

The Rome Statute entered into force on 1 July 2002 and it was up to the future review conference to find a closure to this issue, which would be held

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<sup>135</sup> Sayapin, *supra* note 45, at 57.

<sup>136</sup> N. Weisbord, 'Prosecuting Aggression', in W. Schabas (ed.), *International Criminal Law* (Northampton: Edward Elgar Publishing, 2012) 466–526, at 467.

not before 1 July 2009<sup>137</sup> By Resolution F of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries of an International Criminal Court, the Preparatory Commission for the Establishment of an International Criminal Court was founded with a primary task to define the crime of aggression.<sup>138</sup>

The Preparatory Commission made the first concrete step at its third session, establishing the Working Group on Aggression directed by the judges of the ICC. There was no real significant contribution made by this group, other than a summary of the main positions towards the crime of aggression that have been encompassed in the Coordinator's Discussion Paper of 11 July 2002<sup>139</sup> The Assembly of States Parties (ASP)<sup>140</sup> made the second step and created the Special Working Group on the Crime of Aggression.<sup>141</sup> Spanning from 2003 to the turn of 2009, SWGCA met several times and finally in 2009 made a proposal for the definition of the crime of aggression, which ultimately has been adopted in Kampala Conference.

This chapter provides, indeed remotely, the insight on how the SWGCA interspersed the leadership clause and what was the incentive to avoid the Nuremberg standard 'shape or influence'. In the second part it strives to decipher the meaning of both components 'direct' and 'control' in terms of contemporary international law understandings.

### ***A. Special Working Group on the Crime of Aggression***

Guided by the jurisprudence of the Nuremberg and Tokyo tribunals, the SWGCA reaffirmed in its earliest papers that the crime of aggression is 'reserved' only for high-ranking state officials. Persons who are unable to 'influence the policy of carrying out the crime' should be excluded from

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<sup>137</sup> Arts 5(2), 121, 123 ICCSt.

<sup>138</sup> U.N. Doc. A/CONF.183/10, Annex I (F).

<sup>139</sup> UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2.

<sup>140</sup> Art. 112 ICCSt.

<sup>141</sup> ICC-ASP/I/Res. 1 adopted by consensus at the 3rd Plenary Meeting on 9 September 2002, ICC-ASP/I/3, 328.

criminal responsibility.<sup>142</sup> In another key, by the virtue of their position, lower ranking state agents cannot be aware of aggressive plans. Since they do not possess the cognitive segment of mental element — the awareness — they could not be liable for the crime of aggression. This observation most likely satisfied most of the international lawyers who took into review the work of SWGCA.

In its earliest stage, the SWGCA confronted two different approaches concerning the scope of the leadership concept. The main question at the table was: which levels of power constitute the leadership circle? On the one hand, there was an opinion advocating that all persons who are in a position to exert decisive influence over the policies of the state ought be criminally liable.<sup>143</sup> That would include more than a top-ranking decision makers, such as social, business and spiritual leaders. On the other hand, it was suggested that the scope of leadership should be understood more restrictively, narrowed to only the high-ranking state officials, excluding for instance legal advisers who could not obtain effective control over state's military actions.<sup>144</sup> The argument against the latter proposal was that inserting such standard it would be rather difficult to prove the criminal liability of persons outside of the circle of direct leaders.<sup>145</sup>

The SWGCA took into consideration both facets and strived to find a solution that would be satisfactory to both the international experts and states, which are the ultimate subject that should decide whether the definition is acceptable or not. The upshot was a leadership clause that remained true to the Nuremberg precedent, however slightly modified due to the arguments that could not be neglected. Only the high-ranking state officials were considered as 'leaders', thus, the 'shape or influence' standard from the *High Command* case was supplanted with 'direct or control'.<sup>146</sup>

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<sup>142</sup> ICC-ASP/4/SWGCA/INF.1, § 19.

<sup>143</sup> ICC-ASP/3/SWGCA/INF.1, § 49.

<sup>144</sup> *Ibid.*

<sup>145</sup> ICC-ASP/6/SWGCA/INF.1, § 12.

<sup>146</sup> Art. 8bis(1) ICCSt.

## ***B. The ‘Control or Direct’ Standard***

The roots of the terms ‘direct’ and ‘control’ can be found in the Articles on State Responsibility. Article 17 reads

### **Direction and control exercised over the commission of an internationally wrongful act**

A state which directs and controls another state in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) that state does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.<sup>147</sup>

In 2008, the International Law Commission offered interpretation of the terms and articles on State Responsibility.<sup>148</sup> As they noticed, the term ‘controls’ coincides with ‘domination over the commission ... and not simply the exercise of oversight, still less mere influence or concern.’<sup>149</sup> The term ‘direct’ is not mere incitement or suggestion, ‘but rather connotes actual direction of an operative kind.’<sup>150</sup>

Before I embark upon the analysis of the terms, I find it rather convenient to make a short caveat at this juncture. ‘Effective control’ is the concept that served the International Court of Justice in 1986, as an instrument in assessing the United States’ accountability for acts carried out by Contra guerillas in Nicaragua.<sup>151</sup> That said, the legal document from which ‘effective control’ standard derives is somewhat inadequate to be applied here since it is not related to the conduct of individuals but rather to states. This notwithstanding, it could yet be useful, to some extent indeed, in interpreting the standard that constitutes leadership in the crime of

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<sup>147</sup> Art. 17 Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter: Articles on State Responsibility).

<sup>148</sup> *Report of the International Law Commission on the work of its fifty-third session*, UN Doc. A/56/10, 2008 (hereinafter the ‘Report of the Law Commission’).

<sup>149</sup> *Ibid.*, para.7, at 69.

<sup>150</sup> *Ibid.*

<sup>151</sup> ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits), judgment of 27 June 1986.

aggression. The ICJ held that: ‘at least at one period, (Contra forces) been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States.’<sup>152</sup> In this case the relationship between Contra forces and the U.S. Government was tested. The finding of the Court was that the U.S. Government had effective control over the Contra forces because the Contras were ‘so dependent’ that without the U.S. they could not carry out their conducts. On the other hand, when it comes to the definition of the crime of aggression, the relationship between potential offender (individual) and state policy is at stake. If we use the interpretation given by the ICJ, we might come to the following conclusion: if the role of individual was so crucial in committing the acts of aggression, and without such role those acts would not occur, than that person is in a position of effective control over the political or military action of a state.

In assessing the leadership standard that has been put forward by the SWGCA, one can notice that both ‘direct’ and ‘control’ encompass the factual power over state conduct. Mere influence of a person who is in a position of leadership would not entail individual criminal responsibility. The term ‘control’ should serve as a criterion for capturing persons into the ambit of criminal liability, without whose participation state action that amounts to act of aggression would not be committed. This conclusion was drawn from the ICJ's interpretation elaborated afore. On the other hand, ‘direct’ alternative of the leadership clause should exclude persons who are in a position to influence the decision-makers, however without actual power towards the state policy. Likewise the International Law Commission stated: ‘the word “directs” does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind’,<sup>153</sup> it should be understood that assistants, advisers, best friends or spouses of the high-ranking state officials, could not be found guilty for the crime of aggression. In all probability, a leader who merely directs political or

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<sup>152</sup> *Ibid.*, para.111.

<sup>153</sup> Report of the Law Commission, para.7, at 69.

military policy of a state will not be on such a high level in the state leadership as a person who is in a position to 'control' it.

### ***C. New v. Old — ‘Pro et Contra’***

Article 8*bis* of the ICC Statute stipulates individual criminal responsibility for the crime of aggression. The long-awaited definition is constructed in three parts with at least two novelties in comparison with its customary counterpart. The new leadership clause, which represents one of those novelties, asserts that if a person is not in a position to direct or control state policy, he cannot be held responsible for aggression though his conducts were unlawful (*actus reus*) and if he had the necessary intent and knowledge (*mens rea*) required in this respect. There is a stark difference between the ICC standard and the one from the WWII follow-up trials, i.e. ‘shape or influence’ standard was broader and persons that were fulfilling this criteria could not suffice for ‘direct or control’. Many scholars advocated the latter concept as the more appropriate one, since — according to some of them — in those terms the commitment of the crime of aggression will entail criminal responsibility only if the perpetrators were in positions of political or military leadership and organized or planned aggression.<sup>154</sup> Perpetrators for the crime of aggression could be only those who have decision-making power on behalf of a state.<sup>155</sup> Accordingly, low-level political, low-ranked military officials and people acting in a private capacity should be excluded from criminal liability.

The practical implications of interpretation set out above favor the ‘control or direct’ standard over the ‘shape or influence’. In reality, there are people who could influence the state policy, and maybe even shape it, but they are not directly involved in the governmental apparatus. According to the German historian Heike B. Görtemaker, Eva Braun was the central

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<sup>154</sup> See M. Politi, ‘The Debate within the Preparatory Commission for the International Criminal Court’, in M. Politi and G. Nesi (eds), *The International Criminal Court and the Crime of Aggression* (Aldershot: Ashgate Publishing Limited, 2004) 43–51, at 46–47.

<sup>155</sup> *Ibid.*

figure in Adolf Hitler's private life.<sup>156</sup> He dreamed to live with her in Linz after the war is over and to pass on the leadership position to a new younger man. She gradually garnered power within Hitler's inner circle, though her identity was kept as a secret for most of the WWII period. Görtemaker did not have any doubt that Braun knew about Hitler's plans to invade Poland, for instance. Taking into account the nature of their relationship, one might consider the influence of Eva Braun upon Hitler according to which she presumably have had shaped or influenced policy of the Third Reich. In that manner, if she lived through the post-war trials, she could be prosecuted because she fulfilled the 'shape or influence' criteria.

There goes another argument for the 'control or direct' concept. It is abundantly clear that this concept is stringent than the one from the *High Command* case. As I endeavored to present, broadness of the 'shape or influence' formulation renders various difficulties. Spanning from the difficulties to prove the role of individuals outside of the decision-making circle on the one side, to having a too wide concept pursuant to which numerous people would be subjected to criminal liability on the other. Nevertheless, there is one persuasive argument against the 'direct or control' standard that has to be borne in mind while praising disappearance of all the shortcomings that were embedded in the 'shape or influence' concept. According to Heller, private economic actors and third-state officials could never suffice for the 'control or direct' standard.<sup>157</sup> Contrary to this view, I must say that I am more inclined towards other lawyers who argued that by adopting the 'direct or control' requirement — as a nucleus of the leadership concept — the definition would also capture leaders who do not occupy any formal position but who are able to control political or military action of a state by informal means. To this end, economic and religious leaders could be held responsible for aggression.<sup>158</sup>

Notwithstanding previously said about the 'control or direct' standard, the clear mechanism is lacking in the process of identifying leaders of a

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<sup>156</sup> See H. Görtemaker, *Eva Braun: Leben mit Hitler* (Munich: Verlag C.H. Beck, 2010).

<sup>157</sup> For a broad discussion on the point, see Heller, *supra* note 17, at 488–497.

<sup>158</sup> See Weisbord, *supra* note 61, at 46–47.

state in terms of international criminal law. As the analysis above implicates, different approach should be adopted than the one from the post-WWII trials. 'Direct or control' standard is for the first time employed in international criminal law and there is no judicial practice in this respect — national or international — that will lead the ICC towards identifying leadership circle. Both terms 'direct' and 'control' do not have normative content within international criminal law.



## 5. Final Remarks

Criminal law was brought to the international level for the first time during post-WWII trials. The ‘crimes against peace’, today’s crime of aggression, was regarded as a ‘supreme crime’— the crime that triggers mass carnages which occur during the warfare. During that time, the individuals that were seen most responsible for commencing a war were in the focus of the proceedings. Justice Robert Jackson asserted that most responsible persons are those who are standing at the highest level in a state’s chain of command. There is not much doubt that the crime of aggression from that moment and on was ‘reserved’ only for the top-ranking state agents. The leadership clause indeed serves to that cause. It reflects on individual criminal responsibility by way of putting it in a different context; i.e. only a person that is regarded as a state leader, according to this standard, could be found responsible for the crime of aggression. Hence, the main incentive of having such clause is to narrow down the scope of potential perpetrators as only a small, well-coordinated group has the authority to drag the state into a war.

At the first trial in Nuremberg, the IMT did not specify what criteria was needed to be fulfilled in order for one to be considered as a leader of the state. Instead, the court analyzed separately actions of an every accused and founding guilty those who had a nexus with the aggressive plans. All of the accused that were convicted for aggression were in a high position whether in the Nazi Party, the Government or in the military. Close relationship with Hitler seemed to be a first indication for the IMT of who are the perpetrators. This, however, was only the first recourse. The possession of knowledge of aggressive plans was inevitable feature for all convicted in this respect. In spite of not having a clear standard, the IMT unequivocally set out that only a person from a leadership circle could be found liable for aggression.

In the Tokyo trial, the IMTFE followed the path of jurisprudence established before the IMT. Again, there were no specific leadership criteria that — when fulfilled — would entail individual criminal responsibility for

aggression. However, determining the leadership role in the state apparatus was crucial moment for the accused in the process of proving their guilt. By contrast to the Nuremberg judgment, the first recourse in considering defendants' criminal liability was the virtue of their position from which they were enabled to shape the aggressive policy of Japan. Primarily, positions in the military and the Government were discussed. One of the defendants, Heitaro Kimura, was not a leader according to the court and still was found guilty for aggression. The IMTFE held that from a position of Vice-Minister of War he possessed necessary knowledge of the Japan's aggressive plans, and hence he was regarded as an accessory in the conspiracy to wage aggressive war. The IMTFE found that his conducting verbs were advices, development and formulation of aggressive plans, which he initiated. At that time that was sufficiently enough to entail individual criminal responsibility.

The first time ever where the issue of leadership was addressed explicitly was in the *High Command* case before the NMT. The court maintained that only a person in a position to 'shape or influence' state policy could be found guilty for the crimes against peace. What was considered is *de facto* power of the accused; mere high position would not suffice this standard. Accordingly, additional effort should be made in producing the argument on one's leadership status and the strict legal approach would not suffice in this respect.

Scholars argued many issues regarding the 'shape or influence' standard, which has been ultimately abandoned by the SWGCA. Some of them have been explained in this paper, favoring the ICC's standard of 'control or direct'. One example where the IMT could have had difficulties — if the trial has ever took the place — is Eva Braun and her influence upon Hitler. Theoretically, she could be held reliable for the crime of aggression according to this standard, as she did or she might have had advised Hitler about aggressive acts. From this argumentation stems the main issue regarding this requirement — the broadness of potential perpetrators that could suffice for it. This concept would capture variety of people outside the power-holders' circle, where the actual decisions upon commencing a war

are deliberated. That would leave room for wide interpretation, which is indeed not desirable in the court.

After Kampala in 2010 and the adoption of universal definition of aggression, a new leadership clause has been introduced in both Articles 8*bis*(1) and 25(3*bis*) ICC Statute respectively. The ‘old’ concept was replaced with the ‘control or direct’ criteria. The leadership clause evolved but the purpose remained the same. In effect, not only the conducting verbs articulated in Article 8*bis* ICC Statute are attached to a person vested with the leadership authority, but an every mode of criminal liability set out in Article 25(3) ICC Statute could only be attributed to a person that is in a position to ‘control or direct’ state political or military action. Consequently, every issue regarding individual criminal responsibility in this respect should be placed into the leadership context.

The SWGCA opted justifiably for this approach over the ‘shape or influence’, as it focuses more directly on narrow a leadership circle where decisions about the war are being made. Broadening the ambit of individual criminal responsibility would not commensurate with the primary post-WWII Allies’ aspiration, where incentive was to bring to justice only the most responsible individuals for mass atrocities. Moreover, the promise of the American Chief Prosecutor Justice Robert Jackson could be hardly understood as a wish to put on a trial every person with some forms of authority that participated in furthering the war. Rather, it was a wish expressed in order to prosecute only the power-holders that could influence more severely state policy and lead it into the war. It seems that ‘control or direct’ standard lives up to such expectations. Both terms are related to the factual power over a state. ‘Control’ implies that a person accorded with such power is a leader, because without his or her participation acts of aggression would not occur. On the other hand, role of the term ‘direct’ is a rather negative one; i.e. it excludes from criminal liability persons who are in a position to influence actual power-holders, but without being in a such position. Arguably, this interpretation represent the milestone in the discourse situated around the crime of aggression, as the focus now is strictly on a very narrow circle of power-berries that have the actual power to lead their state into war.

Problems with the ICC leadership standard are many. First of all, there is no any case law, international nor national, that could be employed in this respect. Secondly, and more importantly, terms ‘control’ and ‘direct’ have been taken outside of international criminal law. It would be very difficult to argue that this would not render issues in criminal proceedings, as lawyers of defendants will most probably avail themselves of the lack of a clearly established interpretation. Finally, provision which asserts that only a person who is regarded as a leader could be found responsible for the crime of aggression, does not however, yet unfortunately, say much of how to assess that position and to determine who are the perpetrators. Strictly legal approach could be employed in furthering that cause, i.e. looking into the Constitution of a country is perhaps logically the first step in identifying position of a leadership. Nevertheless, as stressed above, the factual power is what matter and the exclusive legal analysis will fall short at some point.

One of the proposed solutions is the practical application of the Weberian theory of authority. Weber spelled out three types of political leadership from which the legal-rational concept was allocated with the most attention in this paper. It is unquestionably mainly state orientated concept and the scope of its application could be hardly employed in the post-bureaucratic organizations, such as non-state actors. However, according to the ICC definition acts of aggression could be committed only by a state, and therefore state conducts represent constraint to the analysis in this thesis.

As I attempted to elucidate, this concept undergirds the modern state governance since it is applicable to the large bureaucratic organization. People obey their superiors because of the fear of legal repercussions on the first place, which are legitimate in this system of authority. By contrast, persons in a leadership position have different incentives. Mainly, their conducts are defined by their idealistic or personal aspirations. In the light of the definition of aggression, only those power-holders that are in a position to ‘control or direct’ state policy are to be regarded as leaders. By implementing this sociological principle with other related theories, leadership with such authority could be indeed traced in the vast bureaucratic apparatus, such as state organization.

Purposely, and yet remotely, I mentioned 'other related theories' that could guide us to identify perpetrators for this crime. Purposely I say because, pure sociological perception is not sufficient tool for the court in determining which individuals that are most responsible for aggression. In assessing a large organization, one could find himself or herself lost if he or she follows only traces of authority from the lowest to the highest. Combination with the legal approach seems as a workable solution. Practically, starting point for the court would be to look at the legal system and then by using the sociological theory trace the highest authority in a state.

Remotely I say because, in furthering the answer to the posed questions in this thesis, I have mainly put an effort to place the individual criminal responsibility in the leadership concept and from there I have embarked upon identifying those who could meet this standard. What drew my interest the most was the Weberian theory that has been somewhat used in the past. A few scholars have already reflected on this concept and that was my foundation for the analysis. I have acknowledged their opinion, and yet endeavored to provide a new facet to this issue. I am of the opinion that different theories of leadership, such as political or ethical, would entail more research that would overstep the analytical approach, which is required in the master's thesis.

According to the Rome Statute, the ICC may prosecute aggression starting from 2017. There are however many different governmental systems in the world where some of them resemble others and third ones are fundamentally different than those ones. Therefore, in every case the court should assess individual criminal responsibility differently. Several problems might impede prosecution since in the moment of writing this thesis there has not been even one serious discussion within the ICC regarding the issue of individual criminal responsibility in this respect.

Firstly, normative content of the terms 'control' and direct' is lacking. As I mentioned earlier, both terms came from outside of international criminal law instruments and they could be interpreted differently than in the area from which they are taken from. I strongly believe that a comprehensive analysis is needed in this respect, since the legal systems within the purview

of the ICC vary significantly. The sociological, political or ethical theories about the leadership in a combination with the legal approach could certainly bring one closer to understanding of who are those that push entities into the war.

Secondly, when the leadership is determined, the next step is to place modes of individual criminal liability into that context. As Article 25(3*bis*) ICC Statute stipulates that primary and secondary perpetrators could be found guilty for this crime only if they are regarded as leaders. In other key, influence upon the state policy through another person could not entail criminal responsibility. One could be prosecuted for aiding and abetting only if there is a nexus between that person and the state governance itself, i.e. he or she is in a position to 'control or direct' political or military actions of the state. The ICC should pay special attention to this problem since leaders have different incentives than subordinate, and thus their conducts are expressed in different forms.

Having in mind these issues, prosecuting aggression could be indeed onerous for the ICC since the adequate scholarship follow-up to the Kampala Conference never took the place in this respect. From the jurisprudence of the ICTY we have learned that a sparse legal doctrine could render uncertainty in international law and thus affect the legitimacy of the court's proceedings. As for the crime of aggression, there is no conspicuous case law that the ICC could rely upon in future trials. It is thus necessary to set out a clear limitations to the terms employed in this respect, as without those there is a broad leeway for interpretation. It will ultimately weaken the rule of law and to the same extent shake already jeopardized authority of the ICC. More research is needed in this area.

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