The Leadership Clause and Individual Conduct Element of the Crime of Aggression Under the Rome Statute

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## List of abbreviations

<table>
<thead>
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<th>Description</th>
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<tr>
<td>ASP</td>
<td>Assembly of States Parties to the Rome Statute</td>
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<td>e.g.</td>
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<td>ed./eds.</td>
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<td>et al.</td>
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<td><em>Ibid.</em></td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICJ/the Court</td>
<td>International Court of Justice</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY/the Court</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>ILC/the Commission</td>
<td>International Law Commission</td>
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<td>IMT/the Tribunal</td>
<td>International Military Tribunal</td>
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<td>IMTFE/the Tokyo Tribunal</td>
<td>International Military Tribunal for the Far East</td>
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<td><em>Ipsō facto</em></td>
<td>by the fact itself</td>
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<td>NMT/the Tribunals</td>
<td>Nuremberg Military Tribunals</td>
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<td>para./paras.</td>
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<td>Rome Statute/the Court</td>
<td>Rome Statute of the International Criminal Court</td>
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<td>SWGCA</td>
<td>Special Working Group on the Crime of Aggression</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of the Treaties</td>
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1 Introduction

1.1 Topic of the thesis

On 17 July 2018 the International Criminal Court’s (ICC) jurisdiction over the crime of aggression was activated marking a historic moment in the domain of international criminal law.¹ The origin of and predecessor to the crime of aggression – crimes against peace – had been included in the charters of the post-WWII Tribunals in Nuremberg and Tokyo to prosecute war criminals for their role in bringing about and waging wars of aggression.² It was not until 2010, however, that this international crime was again revived when the members of the ICC amended the Rome Statute, its founding treaty, to include detailed provisions on the crime of aggression.³ The Rome Statute now includes in its Article 8 bis a definition of the crime of aggression and in Article 15 bis and ter provisions outlining the conditions under which the Court can exercise its jurisdiction over the crime. The topic of this thesis concerns the definition of the crime of aggression as enshrined in Article 8 bis(1) of the Rome Statute. In relevant part, the provision reads:

“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”.

The provision criminalises the ‘planning’, ‘preparation’, ‘initiation’ or ‘execution’ of an act of aggression. These four words constitute the prohibited individual conduct of the crime of aggression. This means that a person engaging in conduct amounting to such action can be held criminally liable under the Rome Statute for a crime of aggression.⁴ But not any person can commit a crime of aggression. Article 8 bis(1) of the Rome Statute provides that only “a person in a position effectively to exercise control over or to direct the political or military action of a State” qualify as potential perpetrators of the crime. This element of the definition is of-

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¹ The decision to activate the Court’s jurisdiction was made at the 16th Assembly of States Parties to the Rome Statute, see ‘Activation of the jurisdiction of the Court over the crime of aggression Resolution’, ICC-ASP/16/Res.5, in ASP Official Records.


³ See Resolution RC/Res.6. Article 15 bis(3) and 15 ter(3) of the Rome Statute required that the Court would only exercise jurisdiction over the crime of aggression once it was activated by a decision of the Assembly of States Parties after 1 January 2017, see note 1.

⁴ Article 25(3) of the Rome Statute.
ten called the ‘leadership’ clause/requirement of the crime of aggression as it seeks to limit the circle of people who can be held liable for a crime of aggression.\textsuperscript{5}

In the present thesis, I seek to examine these two components, the leadership clause and the individual conduct element of the crime of aggression, as defined in Article 8 \textit{bis}(1) of the Rome Statute.

1.2 Research question

The aim of the thesis is to analyse the leadership clause and the individual conduct element of the crime of aggression under the Rome Statute of the ICC.

To this end, the thesis will attempt to answer the following questions:

1. Who can commit a crime of aggression under the Rome Statute?
2. What individual conduct must such persons engage in to fulfil the material elements of the crime of aggression under the Rome Statute?

1.3 Sources and methodology

According the Article 21 of the Rome Statute, the Court shall in the first place apply its own statute, the Elements of Crimes and the Rules of Procedure and Evidence as source when interpreting its provisions. However, as the Court has held, interpretation of the Rome Statute is to be governed by rules of treaty interpretation contained in Article 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).\textsuperscript{6}

In accordance with Article 31 of the VCLT I will in the first place analyse the relevant provisions of the Rome Statue on the basis of a textual approach. However, to further elucidate the meaning of the terms of the Statute I will draw on the case law of the ICC and ICJ, \textit{travaux préparatoires} of the crime of aggression and relevant legal literature. In Chapter four, where I will examine the individual conduct element of the crime, I will also analyse the jurisprudence of the Nuremberg tribunals in relation to crimes against peace. As the \textit{travaux préparatoires} and other sources are mostly silent on this question I have conducted a more thorough review

\textsuperscript{5} It is important to note, that the words ‘leader’ or ‘leadership’ do not appear in the definition of the crime of aggression.

of these trials as they represent the only relevant jurisprudence on the matter. I have decided to only briefly mention some aspects of the Tokyo tribunal, as a longer deliberation would not add any significant insight in answering the research question at hand.

1.4 Structure and demarcation

After this introductory chapter, I will turn my attention to Chapter two where I will clarify some relevant terminology, examine the historical background of the crime of aggression, and review the basic structure of the crime as defined in Article 8 bis(1) of the Rome Statute.

In Chapter three, I will consider the first research question by analysing the leadership clause of the crime of aggression. The central part of this inquiry will focus on the standard of ‘control’ necessary to qualify as a potential perpetrator. An analysis of the general jurisdiction ratione personae of the Court, falls outside the scope of this thesis.

In Chapter four I will consider the second research question by examining the individual conduct element of the crime of aggression, the actuus reus, namely the ‘planning’, ‘preparation’, ‘initiation’, or ‘execution’ of an act of aggression. I will closely examine the Nuremberg precedents related to this question assessing to what degree they might assist the Court in its own analysis. Sometimes the term ‘individual conduct’ is also used to refer to the mental element of the crime, the mens rea, and to modes of liability. These topics will not be considered in the present thesis. I will present conclusions after both Chapter three and Chapter four, but will additionally make some brief final remarks in Chapter five.

2 The Crime of Aggression

2.1 Background

2.1.1 State act, state responsibility, and individual criminal responsibility

Individual criminal responsibility and state responsibility are two separate concepts in international law.7 State responsibility arises from an internationally wrongful act attributable to a state.8 Conversely, international criminal law is not concerned with acts of states, but rather


with individual criminal responsibility. Such responsibility arises when individual conduct amounts to international crimes. Although a state act can lead to concurrent individual criminal responsibility and state responsibility, individual liability is not necessitated on international wrongful conduct by a state. The exception to this, however, is the crime of aggression.

The crime of aggression concerns the individual criminal responsibility for qualified violations of the prohibition of the use of force by states. This structure is unique amongst international crimes in that individual criminal responsibility is predicated on unlawful state conduct. The crime of aggression therefore seeks to hold responsible individuals who have been involved in bringing about certain state conduct deemed to violate one of the fundamental principles international relations, the prohibition of the use of force.

Today, the crime of aggression exists both in the conventional and customary corpus of international law. Following the Nuremberg and Tokyo trials in the aftermath of the Second World War it is generally recognised that individual criminal responsibility for wars of aggression became part of the body of customary international law. In its conventional form, the crime of aggression exists in Article 8 bis of the Rome Statue of the ICC. In the following chapter I will look closer at the historical background of the crime of aggression, before turning my attention to Article 8 bis of the Rome Statute. This will serve as a basis before looking closer at the leadership requirement of the crime in Chapter three and the individual conduct element in Chapter four.

2.1.2 The historical origins of the crime of aggression

The prohibition of the use of force and individual criminal liability for its violations are both relatively recent concepts. The catalyst which set off the modern doctrinal debate on criminalising aggression can be found in the aftermath of World War I. Until this time, the notion of *ius ad bellum*, namely a state’s sovereign right to go to war, dominated inter-state relations. Though in practice, as Brownlie points out, states would often justify their use of force. The question of the possible prosecution of the German Emperor, Kaiser Wilhelm II, for *inter alia*

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initiating the war, was considered thoroughly by the victorious powers at the 1919 Paris Peace Conference. As is clear from these negotiations the traditional right of war and immunity of state leaders could no longer unequivocally be ascertained.¹³ The resulting Article 227 of the Treaty of Versailles is a further testament of this development – formally arraigning the Kaiser for “a supreme offence against international morality and the sanctity of treaties.” However, as the Netherlands refused to extradite the Kaiser, his prosecution never came to fruition.

Less than a decade later, the 1928 Kellogg-Briand Pact in its Article 1 and 2 renounced war as an instrument of national policy and obliged all parties to settle disputes by peaceful means.¹⁴ The pact constituted a complete break with the unruly state of affairs preceding World War I and the principle of ius ad bellum. Though it did not prevent the Second World War, it was an important forerunner to the UN Charter and what was to be fundamental principles of a new world order.

The First World War, often called “the war to end all wars”, turned out only to be a premonition of what was to come. With the Second World War, the world was turned to rubble once more. This time, however, the leaders of the victorious powers completed the cautious developments of international governance and law which had so haphazardly been attempted in the interwar period.¹⁵ The failed League of Nations, a child of the previous war, was replaced with the United Nations (UN) which in Article 2(4) of its Charter obliged all members to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”. Only in self-defence or through Security Council approval could force be used.¹⁶ The prohibition of the use of force by states had now become a reality and the cornerstone of international relations.

In the aftermath of World War II, criminal tribunals were set up in Nuremberg and Tokyo to prosecute war criminals of the losing powers. However, in negotiating the Nuremberg Charter¹⁷ stipulating the framework of the International Military Tribunal (IMT) at Nuremberg the prospect of attaching criminal responsibility to individuals for internationally wrongful state conduct was not at all clear from the outset. Early drafts of the charter did not make any ex-

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¹⁵ For a comprehensive history of international governance, see Mark Mazower, Governing the World: The History of an Idea (Penguin, 2013).

¹⁶ See Chapter VII and Article 51 of the UN Charter.

¹⁷ See note 2.
plicit reference to individual criminal responsibility. This was still an era where any wrongful state act would solely accrue state responsibility. Robert Jackson, the American negotiator, who would later become the Chief United States Prosecutor of the IMT trials, perceptively wrote:

“Of course, this principle of individual responsibility is a negation of the old and tenacious doctrine of absolute and uncontrolled sovereignty of the state and of immunity for all who act under its orders. The implications of individual accountability for violation of International Law are far-reaching and many old concepts may be shaken thereby.”

The resulting Charter of the IMT included in Article 6 the charge of crimes against peace. The major war criminals of the European Axis would be put on trial for the “planning, preparation, initiation or waging of a war of aggression”. Virtually the same charge was included in the charter of the International Military Tribunal for the Far East (IMTFE) set up to try the major war criminals of the Pacific theatre, and in Control Council Law. No. 10 which authorised zonal trials by the occupational powers in Germany.

Further developments of the crime of aggression, and generally of international criminal law, mostly took a hiatus during the Cold War. It was not until the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and for Rwanda (ICTR) in 1994 that this field was revitalised. In 1998, the Rome Statute of the International Criminal Court for the first time established a permanent international criminal court, reviving the concept of crimes against peace, now under its new name – the crime of aggression.

The crime of aggression was envisaged as one of the four core crimes under the jurisdiction of the ICC, together with genocide, crimes against humanity, and war crimes. However, agreeing on a definition of the crime proved difficult. It was therefore decided to include the crime of aggression as part of the Court’s jurisdiction in Article 5(1) of the Rome Statute with the reservation that it could only exercise its jurisdiction once states parties adopted a definition and

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20 Article 6 of the Nuremberg Charter.
21 See note 2.
22 Ibid.
the conditions under which the Court shall exercise its jurisdiction. Working under the authority of the Assembly of States Parties to the Rome Statute (ASP) the Special Working Group on the Crime of Aggression (SWGCA) was tasked with drafting and negotiating proposals on the crime of aggression.

It was not until 2010, at the Kampala Review Conference, that states parties to the ICC amended the Rome Statute, including these elements. The definition of the crime of aggression is now to be found in Article 8 bis of the Rome Statute and provisions for the Court’s exercise of jurisdiction over the crime in Article 15 bis and ter. On 17 July 2018 the Court’s jurisdiction over the crime of aggression was activated concluding an almost century-long legal development leading to the criminalisation of aggression as part of the conventional body of international law.

2.2 The crime of aggression under the Rome Statute

As mentioned, the Kampala amendments resulted in a new Article 8 bis of the Rome Statute containing the definition of the crime of aggression, Article 15 bis and ter stipulating the conditions under which the Court can exercise its jurisdiction over the crime. Additionally, a new Article 25(3) bis provides that the modes of individual liability under Article 25 of the Rome Statute only apply to persons “in a position effectively to exercise control over or to direct the political or military action of a State”.

The definition of the crime of aggression under the Rome Statute is constructed on the basis of two components: the state act element, namely the act of aggression, and the individual conduct element criminalising the ‘planning, preparation, initiation or execution’ of such an act.

Article 8 bis reads in full:

23 The now deleted paragraph 2 to Article 5 read: “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.”


25 This language is copied from the crime’s definition in Article 8 bis. Its effect is to apply the leadership requirement to all forms of liability under Article 25(3), and not only to the principal perpetrator(s) according to Article 25(3)(a). Also note that the Kampala amendments resulted in the deletion of Article 5(2) and the insertion of a reference to Article 8 bis in Article 9(1) and the chapeau of Article 20(3), see note 3.
**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 (UNGA) 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;

   (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.

Article 25(3)(a) of the Rome Statute provides that an individual will be criminally responsible if that person ‘commits’ a crime within the jurisdiction of the Court. An individual committing an act of aggression will do so through engaging in conduct amounting to the “planning, preparation, initiation or execution” of an act of aggression according to Article 8 bis(1) with the requisite mental element.26 However, according to Article 8 bis(1) only persons who are “in a position effectively to exercise control over or to direct the political or military action of a State” can commit an act of aggression. This requirement is meant to exclude lower-level civil and military individuals and defines the crime of aggression as a ‘leadership’ crime. An individual foot-soldier carrying out the unlawful use of force cannot commit a crime of aggression as he was not in a position to control or direct state action. This does not bar prosecution for other crimes within the jurisdiction of the ICC – e.g. war crimes.

Article 8 bis(2) incorporates Article 1 and 3 of the UNGA resolution 3314 (XXIX) which outlines the meaning of an act of aggression and provides a non-exhaustive list of examples amounting to such an act. Accordingly, an 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.” Additionally, an act of aggression must “by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations,” as stipulated in Article 8 bis(1). This threshold requirement was added so that only the most serious violations on the prohibition on the use of force would fall within the definition.27 Thus, as Kreß writes “The purpose of [the crime of aggression] is to protect the core of the prohibition of the use of force, as contained in article I of the 1928 Kellogg-Briand Pact, article 2(4) of the UN Charter and in customary law.”28

Having examined the historical background and basic structure of the crime of aggression I will turn my attention to the leadership nature of the crime of aggression contained in Article 8 bis(1).

26 See Rome Statute Article 30 which provides the requisite mental element.
28 Ibid., 412.
3 The Leadership Clause

3.1 Introduction

An act of aggression, e.g. the bombardment by one state of another state, is not physically carried out by the state itself. It can only be attributed to the state as a legal entity, in accordance with international law. Only natural persons can carry out the physical acts that result in a military aircraft delivering bombs on its target. Considering who can have contributed to such a result, one is left with a broad spectrum of potential culprits: the pilot who physically pushed the button for the bomb to drop, the commander who gave the green light to initiate the attack, intelligence officers who provided necessary political and military information, bureaucrats who advised on the mission and its potential consequences, and not least the top leaders of the state who made the ultimate decision to move forward with the bombing campaign. But the list is potentially even greater in size. What about the factory owner who produced the bombs? Or even the engineer who designed it? Or the banker who provided the necessary funds for the state to develop the weapons programme that provided the bombs?

The drafters of the Kampala amendments were acutely aware of these questions. Although, it was uncontroversial that the crime of aggression should contain a clause restricting liability to ‘leaders’, the issue remained: how should such an element be defined? The overarching goal of any definition was to exclude persons “who could not influence the policy of carrying out the crime”. The leadership clause in Article 8 bis(1) is thus meant to limit the circle of potential perpetrators to the individuals deemed most responsible for the commission of an act of aggression: persons “in a position effectively to exercise control over or to direct the political or military action of a State”.

It is important to note that the leadership clause does not prescribe the conduct a person must engage in for liability to incur. The prohibited individual conduct is the “planning, preparation, initiation or execution” of an act of aggression, which will be considered in Chapter four.

30 See note 5.
In the following, I will analyse the leadership clause in Article 8 bis(1) of the Rome Statute by trying to answer the question: who can commit a crime of aggression?

3.2 ‘by a person’

The planning, preparation, initiation or execution of an act of aggression must be carried out ‘by a person’ in a position to control or direct state action. Read literally, it could be taken to mean that only one person can be held liable for any given aggressive act. This is not the case as the Elements of Crimes for the crime of aggression provides in a footnote that more than one person can be in a position to fulfil the criteria in the leadership clause.33

3.3 ‘in a position’

To be able to commit a crime of aggression a person has to be ‘in a position’ to effectively exercise control over or to direct the political or military action of a state. On the understanding of this element, McDougall suggests two interpretations: (1) that the perpetrator must hold a position formally enabling control or direction of state action, or (2) that the perpetrator, regardless of position, is ‘able’ to conduct such action.34

The object and purpose, as well as the context in which the element appears seems to support alternative (2) as the correct interpretation.35 An example can illustrate: a business leader who has de facto control over or can direct a state’s political and military action, however without retaining an official position, could under alternative (1) not be held liable for a crime of aggression. The business leader would fulfil the ‘control or direct’ test (see section 3.5), but would due to the lack of a government position not incur criminal liability. Given that the ‘control or direct’ test already constitutes a high threshold by which to define the policy-making strata of a state, such a result seems contrary to the Rome Statute’s goal of ending impunity.36


35 See General rule of interpretation, Article 31 of the VCLT.

36 Paragraph 5 of the Rome Statute’s preamble reads: “Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.

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Further, this question was also raised during the work of the SWGCA where several delegations were of the view that the language of the provision was sufficiently broad to include persons “outside formal government circles”. The requirement that a person must be ‘in a position’ to control or direct state action therefore seems to refer to a person’s actual ability to do so and not their formally invested powers.

3.4 ‘effectively’

A potential perpetrator of a crime of aggression must be in a position to ‘effectively’ control or direct the political or military actions of a state. ‘Effectively’ was inserted into the leadership clause as a result of a 2002 proposal in the Preparatory Commission for the International Criminal Court. Though, the rationale of the proposing countries doesn’t clarify the term’s intended effect, according to Clark, the reason for its inclusion was to remove responsibility for ‘figurehead leaders’ who hold formal powers, but who are not de facto decision makers of the state. As I have concluded that a person who is ‘in a position’ to control or direct the political or military actions of a state refers to the actual ability of such conduct, the term ‘effectively’ is seemingly redundant in this regard.

3.5 ‘control or direct the political or military action of a State’

3.5.1 Preliminary considerations

A person carrying out the requisite conduct of the crime of aggression, namely the ‘planning, preparation, initiation or execution’ (see Chapter four) of an act of aggression must be in a position to effectively exercise ‘control over or to direct’ the political or military action of a state. This requirement is the essence of the leadership nature of the crime of aggression.

‘Control’ is defined as, “to exercise power or authority over”; “to determine the behaviour or action of”; “to direct or command”; “to regulate or govern”; or “to exercise restraining or

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37 See December 2007 SWGCA Report. See also, Coalition for the International Criminal Court, Report of the CICC Team on the Crime of Aggression (2006), 30–31; McDougall’s own notes from the SWGCA also indicates that a majority of the working group were of this opinion, see McDougall, "The individual conduct elements of the crime." 179.

38 Incorporating the crime of aggression as a leadership crime into the definition, Proposal submitted by Belgium, Cambodia, Sierra Leone and Thailand, 8 July 2002, UN Doc. PCNICC/2002/WGCA/DP.5.


directing influence over”.41 ‘Direct’ is defined as, “to give directions”; “to order, appoint, prescribe (a thing to be done or carried out)”;42 “to point, extend, or project in a specified line or course”; “to regulate the activities or course of” or “to dominate and determine the course of”.43,44

The difference between the two terms is not obvious as both words indicate authority to decide and determine state action. ‘Control’ could indicate a general authority to decide state action, while ‘direct’ could indicate an active role of ordering and supervising state action. However, if ‘control’ is to be understood as a form of general authority it would also seem to include the authority to ‘direct’: a person in a position to “direct” state action would by necessity also have the requisite control to perform such acts. For example, a Minister of Foreign Affairs would typically have general authority to control state action within the ambit of his responsibilities. The power to direct state action, through instruction and supervision of state organs, is derived from this general authority.

Support for such an approach is found in the work of the International Law Commission (ILC). The origin of the element ‘control or direct’ is to be found in the Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts.45 According to Draft Article 8 the conduct of a person or group of persons is attributable to the state if they are “acting on the instructions of, or under the direction or control [emphasis added] of, that State…”. Additionally, according to Draft Article 17 a state can be held internationally responsible if it “directs and controls [emphasis added] another State in the commission of an internationally wrongful act”.

On the meaning of the terms, the ILC commented that ‘control’ “refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern.” Further the Commission stated that ‘direct’ “does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind.”46

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44 Using different dictionaries, McDougall produces somewhat different results: See, McDougall, "The individual conduct elements of the crime," 180.
The ILC’s definition of ‘control’ here seems to include within it the term ‘direct’: a state which dominates the commission (‘controls’) of wrongful conduct of another state would do so through providing operative direction (‘directs’). On the basis of the foregoing analysis, I will in the following utilize the term ‘control’ when referring to the ‘control and direct’ requirement of the leadership clause.

The degree of control necessary to qualify as a potential perpetrator should be informed by the object of control. Article 8 bis(1) provides that a person has to be in a position to control the ‘political or military action’ of a state. As McDougall points out, state ‘action’ must be understood as limiting the circle of potential perpetrators as it refers to the ability to “dictate quite specific outcomes” of the political and military structures of a state; lesser forms of influence would not suffice to meet this threshold requirement.47

Several approaches have been put forward for interpreting the control requirement of the leadership clause. Ambos has proposed drawing on control theories of indirect perpetration according to Article 25(3)(a) and command/superior responsibility according to Article 28 of the Rome Statute.48 Hajdin, although approving of Ambos’ approach, has also suggested giving heed to the theories of effective and overall control as developed by the ICJ and ICTY.49 It must be noted that these theories do not directly concern control over state action, as is the case with the leadership clause. Any value which can be derived from their analysis must therefore be applied mutatis mutandis to the crime of aggression. The nature of these control theories and relevance to the leadership clause of the crime of aggression will be considered in the following.

3.5.2 Indirect control: ‘control over an organisation’

Article 25(3) of the Rome Statute details the various forms of individual criminal liability for perpetrators of crimes under the Statute. The various forms of liability can be divided into principal liability which is detailed under subparagraph (a), and accessory liability detailed in subparagraph (b)–(d).50 In distinguishing between principal and accessory forms of liability the ICC has endorsed an approach founded on a theory of ‘control over the crime’.51 This ap-

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51 This approach was first adopted by the Pre-Trial Chamber in Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06, Pre-Trial Chamber I, Decision on the Confirmation of Charges (29 January 2007), 111-116 and
Indirect perpetration, or perpetration by means, is a form of principal liability for perpetrators of crimes regulated under the Rome Statute. According to Article 25(3)(a) of the Rome Statute a person can inter alia ‘commit’ a crime within the jurisdiction of the Court “through another person, regardless of whether that other person is criminally responsible”. The notion of such a form of liability is that a direct perpetrator of a crime can be an instrument of an indirect perpetrator who is the mastermind of the criminal conduct. Although, often removed from the scene of the crime, the mastermind will be held criminally liable due to the control exercised over the direct perpetrator, and consequently the crime. Indirect perpetration is therefore a form of liability which seeks to hold liable the persons who the de facto rendered the crime possible.

Relevantly, such a relationship between a direct and indirect perpetrator can also exist when crimes are committed by organised power structures, namely organisations. For example, if it can be shown that a commander, removed from the scene of the crime, ordered and oversaw the commission of the criminal acts, he or she can be held liable as a principal for indirect perpetration. In applying the general theory of ‘control over the crime’, which underpins ICC jurisprudence on modes of liability under Article 25(3) of the Rome Statute, to forms of indirect perpetration committed within organisational structures, the Court has adopted the theory of ‘control over the organisation’. Organisations falling within the ambit of this theory must be hierarchical in nature and operate on the basis of ‘functional automatism’. Functional automatism is understood as the organisation’s automatic compliance with superiors’ directives. Even in the situation of non-compliance by a member of the organisation, the person

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Proctor v. Germain Katanga and Mathieu Ngudjolo Chui, No. ICC-01/04-01/07, Pre-Trial Chamber I, Decision on the Confirmation of Charges (30 September 2008), 161-164 and later confirmed on the appeals level in Proctor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06 A 5, Appeals Chamber, Judgement (1 December 2014), 165-172.


See for example Prosecutor v. Germain Katanga, No. ICC-01/04-01/07, Trial Chamber II Judgement (7 March 2014, paras. 1403-1412. The theory has its origin in the work of the German jurist Claus Roxin under the name Organisationsherrschaft. For an overview of the history of the theory and its main characteristics see Claus Roxin, "Crimes as Part of Organized Power Structures (with introductory notes by Gerhard Werle and Boris Burghardt)," Journal of International Criminal Justice 9, no. 1 (2011).

can be replaced with another member who can execute the order. As stated by the Trial Chamber in Katanga, it is this functional automatism which “propels the apparatus of power” and which is “[t]he key to the superior’s securing of control over the crime”.

The theory of ‘control over the organisation’ as applied to indirect perpetration under Article 25(3)(a) of the Rome Statute is highly relevant to the interpretation of the control requirement of the leadership clause in Article 8 bis(1) of the Rome Statute. The fundamental approach of this theory is to analyse the control exerted over the crime through the power structures which made the crime possible. Similarly, state action does not take place in the vacuum of a decision-maker and an implementer, but through the hierarchy of state institutions operating within the dynamics of functional automatism. Additionally, the ‘control over the organisation’ theory is well positioned to clarify the control element of the leadership clause given its support by ICC jurisprudence.

In stipulating the degree of control that must be exerted over an organisation for liability to incur for indirect perpetration, the ICC Trial Chamber in Katanga stated that an indirect perpetrator must:

“use at least part of the apparatus of power subordinate to him or her, so as to steer it intentionally towards the commission of a crime, without leaving one of the subordinates at liberty to decide whether the crime is to be executed.”

Further, the Trial Chamber stated:

“Persons wielding control over the apparatus of power, therefore, are unquestionably those in the organisation who conceived the crime, oversaw its preparation at different hierarchical levels, and controlled its performance and execution.”

Applying this test mutatis mutandis to the leadership clause of the crime of aggression would mean that persons with control over state action are in a position to decide whether state action should take place and to oversee its implementation. It is, furthermore, not necessary for a person to have ultimate control over all state action: a person in a position to control parts of

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56 Ibid., para 1408.
58 Ibid., para 1412.
a state apparatus, which can produce state action of a qualified nature,\textsuperscript{59} would similarly meet the control test.

3.5.3 Article 28 of the Rome Statute: effective control

Article 28 of the Rome Statute provides an additional form of liability, namely command and superior responsibility. Under subparagraph (a), a commander can be held criminally liable for crimes within the jurisdiction of the Court committed by forces “under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces”. For non-military superior-subordinate relationships, subparagraph (b) provides that a superior can be held criminally liable for Rome Statute crimes committed by subordinates “under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates”. Similar to the requirement in the leadership clause, command and superior responsibility concern individuals in a position of \textit{de facto} authority over subordinates.\textsuperscript{60}

Although this form of omission liability arises from the failure to \textit{exercise} proper control over subordinates, its relevance for the crime of aggression lies in the premise that a superior must have had the \textit{ability} to exercise ‘effective command and control’ or ‘effective authority and control’ over subordinates. Regarding the understanding of the terms ‘effective command and control’ and ‘effective authority and control’, the ICC has held that the degree of control required is the same for both terms.\textsuperscript{61} Building on ICTY jurisprudence the ICC has held that effective control is a superior’s “‘material ability [or power] to prevent and punish” the commission of offences”.\textsuperscript{62} Lower forms of control, such as “the simple ability to exercise influence over forces or subordinates, even if such influence turned out to be substantial”, are not sufficient in meeting this test.\textsuperscript{63}

A person in a position to control state action under Article 8 \textit{bis}(1) of the Rome Statute, would almost certainly have the ability to prevent and repress action by subordinates and discipline them for such acts. From this, however, one cannot draw the conclusion that such ability would, \textit{ipso facto}, be sufficient to meet the required degree of control over state action.

\textsuperscript{59} See section 3.5.1 on the term “political or military action of a State”.
\textsuperscript{60} \textit{Prosecutor v. Jean-Pierre Bemba Gombo}, No. ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo (15 June 2009), paras. 406 and 409.
\textsuperscript{61} Ibid., paras. 412-413.
\textsuperscript{62} Ibid., para. 415 (quotation marks and brackets added by Pre-Trial Chamber).
\textsuperscript{63} Ibid.
Still, in practice, the ability to prevent and punish subordinates would be a strong indicator of the *de facto* control exercised over the state. As such, the factors that would determine if such an ability exists would also be of high relevant for the establishment of control over state action for the crime of aggression.  

3.5.4 ICJ and ICTY: effective and overall control

The ‘effective control’ test was first developed by the International Court of Justice (ICJ) in the *Military and Paramilitary Activities in and against Nicaragua* case. The Court had to decide if activities of the *contras*, a set of rebel groups operating in Nicaragua, were attributable to the United States. The ICJ analysed the issue as a question of the degree of control exercised by the United States over the *contras*. In this regard the Court stated:

> “Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.”

Further, the Court held that the general control exercised by the United States over forces highly dependent on it could not *ipso facto* give rise to legal responsibility “without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.” It is this ‘direction or enforcement’ which the Court deemed to constitute effective control. For responsibility to arise it was therefore necessary to show that the United States had decided if (‘enforced’) and how (‘directed’) specific illegal acts were to take place.

In *Tadić* the ICTY rejected the ‘effective control’ test and developed the standard of ‘overall control’. The relevant question before the Tribunal was whether Bosnian Serb forces could be considered *de facto* organs of Yugoslavia. This issue was considered as a question of what degree of authority or control is required for the Tribunal to render such a finding. The ICTY defined overall control as:

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64 For a list of such relevant factors se ibid., para. 417.
67 Ibid., p. 62, para. 109 (emphasis added).
68 Ibid., p. 64–65, para. 115.
69 Ibid.
71 Ibid., p. 62, para. 145.
“going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.”

The ‘overall control’ requirement as defined in the Tadić case lowers the threshold to establish that control was exercised, for the purpose of state attribution. It differs from the ‘effective control’ test in the Nicaragua case as it does not require a state to issue “specific orders or instructions” relating single military action.

It is clear that a potential perpetrator of a crime of aggression who is in a position to direct state action, by deciding if and how it is to take place, as required by the ‘effective control’-test, would control state action under Article 8 bis(1) of the Rome Statute. The question is rather if the ‘effective control’-test is too strict and if the less demanding ‘overall control’-test that would broaden the group of potential perpetrators, is compatible with the leadership clause. As I will show, this is not the case.

First, it is important to note that in both the Nicaragua case and the Tadić case, the relevant issue concerned the degree of control exercised over an organisation by an entity external to the organisation. As such, the test is not very helpful in assessing if the degree of control exercised by government officials over state action is sufficient to meet the control test of the leadership clause.

Second, applying the ‘overall control’-test to persons outside the government is also problematic as it would significantly widen the group of potential perpetrators. According to the ‘overall control’-test, as applied to the crime of aggression, a person will not have the requisite control over state action simply by financing or providing in kind support to the state. Rather, it would also have to be proved that the person participated in the planning and supervision of state action. Such a standard does not require a person to have any impact on the actual policy of a state. Planning and supervision are not conduct reserved for the policy-making level of a state, but can be engaged in by a number of people on all levels of a hierarchy. The ‘overall control’-test rather seems to provide some factors which, together with more evidence, could reveal the degree of control exercised, by a person outside the organisation of

72 Ibid.
73 Ibid.
the state, over state action. As a stand-alone test, however, it is better applied in questions of attribution for the purpose of determining state responsibility.

3.6 Conclusion

The above analysis has shown that the leadership clause of the crime of aggression captures persons with de facto ability to control state action, irrespective of their official position. This broadens the scope of potential perpetrators. Conversely, it is safe to say that the control requirement establishes a high threshold test that can be met only by very few individuals, thus limiting potential liability for the crime of aggression.

In determining the degree of control necessary to establish that a person is in a position to exercise control over state action, I believe the ‘control over the organisation’ theory as adopted by ICC jurisprudence as a form of indirect perpetration, provides a standard of control transferable to the crime of aggression. The strength of this theory is that the term control is interpreted on the basis of the same structural factors that are applicable to the leadership clause under Article 8 bis(1), namely (1) de facto control is exercised, (2) control is exercised through an organisation as an intermediary, and (3) the ultimate object of control is organisational action.

The ‘effective control’-test as provided by the command/superior responsibility mode of liability under Article 28 of the Rome Statute also provides useful insight as this form of liability is based on the same notion of de facto control over an organisation. However, the standard of control developed by international jurisprudence, namely “the material ability or power to prevent and punish the commission of offences”\(^\text{74}\), is not well adapted for the crime of aggression. While apt for the purposes of command/superior responsibility, it shifts the focus from the ability to formulate plans for or institute action by a state, to the ability to repress it. In practice, though, such abilities are closely associated, and factors stipulated in jurisprudence to establish a commander/superior’s level of control will therefore be of high value.

Similarly, the jurisprudence developed by the ICJ and the ICTY on ‘effective control’ and ‘overall control’, respectively, can be relevant in identifying factors that indicate the level of control exercised over state action. This is particularly true with regard to control exercised by individuals without official state positions over a state hierarchy.

\(^{74}\) See note 62.
In answering the question of who can commit the crime of aggression, a list of potential perpetrators cannot be produced. Rather, in accordance with the ‘control over the organisation’-test, a person must be in a position to decide whether and how state action is to take place. The respective individual must be able to use at least certain parts of the state apparatus in order to achieve this goal. Additionally, the state action that the person is able to produce must be of a qualified nature.\textsuperscript{75} It is difficult to imagine individuals outside the highest offices of the political and military structures of a state being able to meet this threshold requirement. Private economic actors, that exclusively functioning as such, would certainly fall outside the scope of the leadership clause. But should a private economic actor amass such influence over the state hierarchy that he or she will be in a \textit{de facto} position to exercise the level of control described above, they will qualify as a potential perpetrator of the crime of aggression.

Having considered a theoretical standard of control for the purposes of Article 8 \textit{bis}(1), the existence of such control will ultimately be a question of evidence.

4 Individual Conduct Element

4.1 Introduction: ‘planning, preparation, initiation or execution’

In the previous Chapter I have considered who can commit a crime of aggression. For a person in ‘a position effectively to exercise control over or to direct the political or military action of a State’ to be held criminally liable for an act of aggression, that individual must also engage in certain \textit{conduct} which is deemed illegal. Article 8 \textit{bis}(1) of the Rome Statute provides that for a crime of aggression the prohibited conduct is the “planning, preparation, initiation or execution” of an act of aggression. These ‘conduct words’ stipulate what a person must \textit{do} in relation to an act of aggression to ‘commit’ a crime of aggression according to Article 25(3)(a) of the Rome Statute.

In the following, I will more closely examine the four conduct words in Article 8 \textit{bis}(1) of the Rome Statute. First, I will consider the conduct words according to their ordinary meaning. Then, I will look closer at what content they were given in the post-WWII case law. Finally, I will consider work by the ILC on the subject. As the \textit{travaux préparatoires} of the crime of aggression are mostly silent on the meaning of the conduct words of the crime, I will not consider them separately.

\textsuperscript{75} See section 3.5.1 on the term “political or military action of a State”.

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4.2 The words’ ordinary meaning

According to Article 31 of the Vienna Convention on the Law of Treaties a treaty shall be interpreted in ‘good faith’ according to the ‘ordinary meaning’ to be given to the terms of the treaty their ‘context’ and in the light of its ‘object and purpose’.

The dictionary definitions of planning contains, “to devise, contrive, or formulate (a project or manner of proceeding)”; “to intend or propose to do something”,\(^{76}\) or “to arrange the parts of”.\(^{77}\) The dictionary definitions of preparation contains: “to bring into a suitable condition for some future action or purpose”; “to make ready in advance”;\(^{78}\) or “to work out the details of”.\(^{79}\) Finally, the dictionary definitions of initiation contains: “To begin, commence, enter upon”;\(^{80}\) “to cause or facilitate the beginning of”; “set going”.\(^ {81}\) The dictionary definitions of execution contains: “To follow out, carry into effect”,\(^ {82}\) “to carry out fully”; or “put completely into effect”.\(^ {83,84}\)

From this starting point a few issues can already be derived. First, reading the conduct words in the context they appear, an analysis of them must necessarily be restricted to conduct which is typically performed by persons “in a position effectively to exercise control over or to direct the political or military action of a State”.\(^ {85}\) The Special Working Group on the Crime of Aggression (SWGCA) in the same vein noted that the conduct words “reflected the typical features of aggression as a leadership crime”.\(^ {86}\)

Based on the ordinary meaning of planning and preparation an airtight distinction between the two concepts cannot be discerned. Planning would seem to represent the initial and lowest threshold of activity where a person could incur criminal liability while preparation for an act of aggression would temporally end with the state being operationally ready to commit such an act. Typical activities could include deliberations amongst civilian and military leaders on

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\(^{77}\) Merriam-Webster: [https://www.merriam-webster.com/dictionary/plan](https://www.merriam-webster.com/dictionary/plan) [01.11.2018]


\(^{84}\) See also, McDougall, "The individual conduct elements of the crime,” 187. The author produces somewhat different results due to the use of other dictionaries.

\(^{85}\) Article 8 bis(1) of the Rome Statute; See Chapter 3.

\(^{86}\) June 2006 SWGCA report, para 92.
the desirability and feasibility of the use of force and coordinating financial, human and military resources to this end.

The distinction between preparation and initiation is likewise not clear-cut. An order commanding troops and military vehicles move to the border of the victim state, however, without engaging in military combat, can both be considered as part of the preparatory phase and as the initiation of the act of aggression which ultimately takes place.

Similarly, initiating and executing an act of aggression seem to be somewhat overlapping concepts. Both conduct words indicate actions related to the commencement of the use of force deemed to be an act of aggression, e.g. the start of a bombing campaign against another state.\(^87\) However, execution could be interpreted as also including acts which would typically sustain the act of aggression – going beyond its mere initiation. For example, according to Article 8 bis(2)(a) of the Rome Statute ‘any occupation’ of another state qualify as an act of aggression. The continued sustention of such an occupation could therefore be considered falling within the ambit of ‘execution’. Based on the foregoing it seems that ‘planning’, ‘preparation’, ‘initiation’ and ‘execution’ fall within an idealised timeline of typical steps performed by ‘leaders’ that result in a state committing or sustaining an act of aggression.

Second, a person can presumptively commit a crime of aggression without fulfilling all four material elements of the individual conduct. The conjunction ‘or’, connecting the conduct words, indicates that criminal liability can be incurred by conduct fulfilling only one or a combination of the material elements. This begs the question if a person can be held liable for planning or preparing for an act of aggression that doesn’t come to fruition. Element 3 of the Elements of Crime for the crime of aggression provides that an act of aggression must have been committed for individual responsibility to incur.\(^88\) Therefore, planning or preparing for a crime of aggression can only lead to individual criminal responsibility according to Article 25(3)(a) of the Rome Statute if an act of aggression has been completed. A different issue is if a person can be convicted of an attempted crime of aggression according to Article 25(3)(f) of the Rome Statute.\(^89\)

Thirdly, a question arises as to the level of activity required for a person to be held criminally liable. Will any activity falling within the ambit of the conduct words, regardless of the extent of its contribution to the actual act of aggression, suffice for liability to incur? The wording of

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87 See Article 8 bis(2)(b) of the Rome Statute.
88 See note 33.
89 For a thorough analysis of the question see McDougall, "The individual conduct elements of the crime," 200-2.
Article 8 bis(1) of the Rome Statute does not clarify this point. However, only the most serious crimes of concern to the international community are within the jurisdiction of the Court.\(^90\) It would therefore seem counter to the object and purpose of the Statute for liability to incur for only moderate contributions to an eventual act of aggression. This suggests that activity falling within the ambit of the conduct words must be of a qualified nature.

### 4.3 The Nuremberg and Tokyo precedents

After a few introductory remarks, I will look at how the Nuremburg Tribunals, set up to prosecute war criminals in the aftermath of World War II, interpreted the individual conduct element of the crime of aggression – then known under the name ‘crimes against peace’. I will only briefly highlight some points from Tokyo Tribunal as does not add much to the present discussion.\(^91\) It is important to note that there is not a complete congruence between crimes against peace as applied post-WWII and crimes of aggression as it is defined in the Rome Statute. As McDougall writes:

> “Indeed, the definition of the crime of aggression is much broader than its crimes against peace predecessor. Conversely, the class of potential perpetrators captured under the Rome Statute definition is narrower than those who could be held individually criminally responsible for crimes against peace.”\(^92\)

This difference, though important for the relevance of the jurisprudence for the state act element and leadership requirement in Article 8 bis of the Rome Statue, does not render the tribunal’s deliberations and application of the individual conduct words irrelevant. For this reason, the post-WWII precedents will most likely be of interest to the ICC when evaluating the individual conduct element of the crime of aggression.

The origin of three of the conduct words (‘planning’, ‘preparation’ and ‘initiation’) constituting the individual conduct element in Article 8 bis(1) can be traced back to Article 6(a) of the 1945 Nuremberg Charter which set up the IMT.\(^93\) According to this provision, major war criminals from the European Axis powers could be found guilty of crimes against peace by “planning, preparation, initiation or waging” a war of aggression or “a war in violation of in-

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\(^{90}\) Paragraph 9 of the Rome Statute’s preamble in relevant part reads: “Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court … with jurisdiction over the most serious crimes of concern to the international community as a whole”.


\(^{93}\) See note 2.
ternational treaties, agreements or assurances” or “participation in a common plan or conspiracy for the accomplishment of any of the foregoing”. The same conduct words were also included, in a similar language, in Control Council Law No. 10, which was the legal basis for the post-war trials conducted in the occupational zones, most notably in the American zone by the Nuremberg Military Tribunal (NMT).\textsuperscript{94} Lastly, crimes against peace, with the same conduct words, were included in the Tokyo Charter which established the IMTFE that was set up to prosecute the major war criminals in the Pacific theatre.\textsuperscript{95}

A quite conspicuous difference between the individual conduct words of the crime of aggression as defined in the Rome Statute and of the crime against peace as defined in the Nuremberg Charter, Control Council Law No. 10, and the Tokyo Charter is the replacement of ‘waging’ with ‘execution’. Similarly, ‘war of aggression’ is traded in for ‘act of aggression’ in the Rome Statute. As the quote from McDougall above already has noted, an act of aggression is much broader than state acts falling under the scope of wars of aggression. For our purposes, we must ask whether the individual conduct of ‘waging’ a war of aggression is to be understood differently than ‘executing’ an act of aggression. As reviewed by Clark, the published preparatory materials do not seem to explain this change.\textsuperscript{96} His conclusion is that ‘execution’ simply was a better fit with ‘act of aggression’\textsuperscript{97} This indicates that the change to ‘execution’ should not be considered material. Several scholars are also of this view.\textsuperscript{98}

In the following three sections, I will consider the jurisprudence of the IMT, the NMT, and the IMTFE in relation to the individual conduct element of crimes against peace.

4.3.1 The International Military Tribunal at Nuremberg (IMT)

Crimes against peace were charged in two of four counts by the Nuremberg prosecution. Count One charged all twenty-four defendants with participation in a “common plan or conspir-
spiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes, and Crimes against Humanity ….”.\textsuperscript{99} Eight defendants were convicted of this crime.\textsuperscript{100} Count Two charged sixteen defendants with crimes against peace.\textsuperscript{101} Twelve were convicted.\textsuperscript{102} The IMT pointed out that the distinction between Count One and Two, in relation to crimes against peace, only was a reflection of the wording of the Nuremberg Charter. It therefore considered both counts together as “they are essentially the same.”\textsuperscript{103} The Tribunal’s judgement is therefore relevant in relation to both counts for the present analysis.

The Tribunal does not conduct any general analysis of the type of actions which could constitute ‘planning’, ‘preparation’, ‘initiation’ or ‘waging’ a war of aggression. Some conclusions can, however, be drawn based on a contextual analysis and the Tribunal’s application of the crime to individual defendants. It can seem that in referring to the criminalised individual conduct the IMT truncates the four conduct words, often only referring to \textit{planning or waging} wars of aggression. For example, in its introductory remarks considering if the wars of aggression were also in violation of international treaties, the Tribunal states: “The Charter defines as a crime the \textit{planning or waging} of war that is a war of aggression or a war in violation of international treaties.”\textsuperscript{104} Similarly, the Tribunal in referencing the charges in the indictment finds it sufficient to reference only planning and waging: “The charges in the Indictment that the defendants \textit{planned and waged} aggressive wars are charges of the utmost gravity.”\textsuperscript{105} However, in considering the charge of a common plan or conspiracy, ‘prepare’ is used instead of ‘planning’. The Tribunal states: ”In the opinion of the Tribunal, the evidence establishes the common planning to \textit{prepare and wage} war by certain of the defendants.”\textsuperscript{106}

The Tribunal does not seem to place much emphasis on the four individual conduct words found in the Nuremberg Charter. In only using ‘planning’/‘preparing’ and ‘waging’ the IMT seems rather to denote a timeline divided between an \textit{ex-ante} and an \textit{ex-post} phase where conduct contributing to a war of aggression is to be considered. How that conduct is to be


\textsuperscript{100} These were Hermann Göring, Rudolf Hess, Alfred Jodl, Wilhelm, Keitel, Konstantin von Neurath, Erich Raeder, Joachim von Ribbentrop and Alfred Rosenberg.

\textsuperscript{101} Nuremberg Judgement, 42.

\textsuperscript{102} These were Karl Dönitz, Wilhelm Frick, Walther Funk, Hermann Göring, Rudolf Hess, Alfred Jodl, Wilhelm Keitel, Konstantin von Neurath, Erich Raeder, Joachim von Ribbentrop, Alfred Rosenberg and Arthur Seyss-Inquart.

\textsuperscript{103} Nuremberg Judgement, 224.

\textsuperscript{104} Ibid., 216, 219 (emphasis added).

\textsuperscript{105} Ibid., 186 (emphasis added).

\textsuperscript{106} Ibid., 225 (emphasis added).
assessed is not elucidated by the IMT. I therefore turn to the IMT’s application of the crime against peace to the individual defendants.

The Tribunals application of the crime against peace to individual defendants does not provide much for the interpretation of the individual conduct words. However, what is clear is that the IMT convicted defendants based on their participation, in various ways, in the political, military, economic and diplomatic planning and preparation to wage aggressive war. I shall subsequently highlight some of the judgement’s most important findings.

In relation to Göring the Tribunal concludes that “there can remain no doubt that Göring was the moving force for aggressive war, second only to Hitler. He was the planner and prime mover in the military and diplomatic preparation for war which Germany pursued.”107 The Tribunal shows that Göring attended important conferences as part of preparations for aggressive war and planned military campaigns as Luftwaffe chief. The IMT also recounts Göring’s command of the Luftwaffe in the attack on Poland and throughout the aggressive war that followed,108 but as McDougall points out, the IMT did not explicitly attribute his conduct as initiating and/or waging in addition to planning and preparing.109 Also Von Ribbentrop’s diplomatic activity was considered culpable by the Tribunal. In this respect the IMT points to Von Ribbentrop’s ‘significant role’ in the diplomatic activity leading to the invasion of Poland.110

Both Raeder and Jodl were convicted of military planning/preparation for aggressive war. Raeder, as the commander-in-chief for the Navy, took active part in important meetings and discussion with Hitler on plans for aggressive war, especially with concern of the invasion of Norway.111 With respect to Jodl, the Tribunal states that “In the strict military sense, Jodl was the actual planner of the war and responsible in large measure for the strategy and conduct of operations.”112 Additionally, Dönitz, as the leader of the submarine arm of the German Navy, and Raeder were convicted of waging aggressive war.

Funk was convicted of economic preparation for aggressive war, especially those against Poland and the Soviet Union.113 His contribution to the economic preparation of aggressive wars

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107 Ibid., 280.
108 Ibid.
110 Nuremberg Judgement, 286.
111 Ibid., 315-16.
112 Ibid., 322.
113 Ibid., 305.
was made through his positions as the Minister of Economics and Plenipotentiary General for War Economy and as President of the Reichsbank. Funk’s conviction must also be tied to the fact that he was well aware of overall goal of the economic policy he instituted. His Under Secretary of the Ministry of Economics participated in a meeting in May 1939 where detailed plans were made for the financing of the war. Additionally, in an October 1939 speech he stated that secret economic preparations for war had been conducted for over a year by the German state.

Conversely, Schacht was acquitted for economic preparation for the aggressive war through his involvement in the German rearmament effort. The Tribunal states:

“It is clear that Schacht was a central figure in Germany's rearmament program, and the steps which he took, particularly in the early days of the Nazi regime, were responsible for Nazi Germany's rapid rise as a military power. But rearmament of itself is not criminal under the Charter. To be a Crime against Peace under Article 6 of the Charter it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars.”

The quote is significant because the Tribunal clarifies that rearmament cannot ipso facto be construed as planning or preparing for a war of aggression. This actus reus must be accompanied by the necessary mens rea that the activity was conducted as part of “plans to wage aggressive wars.”

The Tribunal’s acquittal of Speer for crimes against peace for his role in armament production, is also noticeable. The IMT did not consider that Speer’s activities amounted to “initiating, planning, or preparing wars of aggression” because he was elevated to the Minister of Armaments and Munitions (Armaments and War Production after September 2, 1943) “well after all of the wars had been commenced and were under way.” In relation to the question if Speer had waged a war of aggression the Tribunal states:

“His activities in charge of German armament production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war; but the Tri-

114 Ibid., 304.
115 Ibid., 305.
116 Ibid., 308-9 (emphasis added).
117 Ibid., 330.
bunal is not prepared to find that such activities involve [...] waging aggressive war[.].”

The Tribunal seems to have been of the opinion that any war effort of a more supportive character fell outside the ambit of ‘waging’.

The preceding analysis has shown that the Nuremberg Judgement of the NMT does not contribute much to the explication of the conduct words. However, the Judgement supports the notion the conduct words represent a preparatory phase before aggression is commenced and an execution of phase after the hostilities have started. Additionally, the various ways in which the defendants participated in the political, military, economic and diplomatic planning/preparation or waging of aggressive war will likely also be of interest to the ICC. I will now consider if the trials of the NMT can contribute to the clarification of the conduct words of the crime of aggression.

4.3.2 The Nuremberg Military Tribunal (NMT)

The IMT only indicted the 24 most high-ranking people it considered most responsible for the crimes committed by Germany. But still, many more who had been active in Nazi atrocities were now detained in one of the four allied occupational zones. In the American zone alone, nearly 100'000 Germans were held. The Allied Control Council therefore approved Control Council Law No. 10 giving the occupational powers the authority to prosecute war criminals in their respective zones. On this basis, the Nuremberg Military Tribunals prosecuted 185 individuals in the American Occupational Zone in a series of twelve trials.

The only comprehensive analysis of the resulting jurisprudence of the NMT is conducted by Kevin John Heller in The Nuremberg Military Tribunals and the Origins of International Criminal Law (2011). The present analysis will therefore rely heavily on this work. In the following I will look at the most noteworthy findings from the NMT for the purposes of the present chapter.

118 Ibid., 330-31.
120 Ibid., 37.
Crimes against peace were charged in four of the cases before the NMT: in Farben121, Krupp122, High Command123 and Ministries124. Only in the Ministries trial did the charges lead to convictions.125 However, two of the five convictions were later set aside.126

Like the IMT, the NMT did not conduct a thorough legal analysis of the individual conduct words. However, the Tribunals seemed to distinguish between stages leading up to the aggressive war (planning, preparing and initiating) and executing such a war (waging).127 In many instances, the Tribunals are not consistent in their use of the conduct words – not distinguishing between planning, preparing and initiating wars of aggression.128

Heller rightly shows to the Farben case in deducing that the Tribunal considered that only members of the Nazi ‘common plan’ could be convicted of ‘planning’ – as the tribunal in essence viewed these concepts as the same.129 In this regard, the Farben Tribunal held that, “it must be shown that…[the defendants]…were parties to the plan or conspiracy, or, knowing of the plan, furthered its purpose and objective by participating in the preparation for aggressive war.”130 Knowledge of a plan for aggressive war, and activity in furthering such a plan would therefore only be considered as ‘preparation’.131

In the Ministries case, all defendants were acquitted for crimes against peace as part of a common plan or conspiracy (Count Two). The Tribunal only dealt with defendants’ participation in the ‘planning’, ‘preparation’, ‘initiation’ or ‘waging’ wars of aggression under Count One. In acquitting von Weizsaecker for the invasion of Greece the Tribunal stated that “there is no evidence that von Weizsaecker planned, prepared for, or initiated the war, or that he

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125 These were Hans Lammers, Paul Koerner and Wilhelm Keppler.
126 Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law, 179. Upon motions for correction of the judgement Weizsaecker and Woermann’s convictions were set aside.
127 Ibid., 189.
128 Ibid.
129 Ibid., 190-91.
130 Farben case, 16.
took any substantial part in it”.\textsuperscript{132} “Planning” therefore seems to have been part of the \textit{actus reus} of the crime against peace independent of a common plan or conspiracy.\textsuperscript{133}

In relation to ‘preparation’, Heller is of the view that the Tribunals jurisprudence draws a line between what constitutes ‘planning’ and what constitutes ‘preparation’.\textsuperscript{134} Preparations starts where planning ends. When a decision is made to wage aggressive war one leaves the planning phase and enters the preparation phase.\textsuperscript{135} To support this view Heller points to the acquittal of Woermann in the \textit{Ministries} case where the Tribunal stated: “The evidence, however, does not show that Woermann either initiated or implemented the plans for such aggression.”\textsuperscript{136} Implementation of a plan, in Heller’s view, equates to preparations for the plans ultimate goal.

To hold such a view would be to give too much credit to the Tribunal’s inconsistent use of the conduct words. In relation to Lammers the Tribunal holds that he was a “criminal participant in the formulation, implementation and execution of the Reich's plans and preparations of aggression against those countries.”\textsuperscript{137} If Heller’s view is correct, it would beg the question why the Tribunal found it necessary to refer both to the implementation of the Reich’s plan and the preparation for aggression.

The Tribunal’s unclear use of the conduct words is further illustrated by the use of the term ‘execution’. For example, in acquitting Woermann for aggression against Czechoslovakia, the Tribunal refers to the defendant’s contribution to the “plan or the execution thereof”.\textsuperscript{138} In finding him guilty of aggression against Poland the Tribunal refers to Woermann’s participation “in the diplomatic preparations for, and […] execution of the aggression against Poland.”\textsuperscript{139} Execution of a plan and execution of aggression are two rather different concepts. While the execution of a plan could also involve the preparatory part before action is taken – execution of aggression would be closer in meaning to ‘initiation’ or ‘waging’ of aggressive war.

\begin{footnotes}
\item[132] \textit{Ministries} case, 380 (emphasis added).
\item[134] Ibid.
\item[135] Ibid.
\item[136] Ibid.
\item[137] \textit{Ministries} case, 416.
\item[138] Ibid., 393.
\item[139] Ibid., 396.
\end{footnotes}
‘Initiation’ of aggressive war was mostly overlooked by the Tribunals, but the most relevant statements regarding its understanding came in Farben\textsuperscript{140} and High Command. The Tribunal in the Farben case held that the defendant Krauch could not be found guilty of initiating wars of aggression because “he was informed of neither the time nor method of initiation.”\textsuperscript{141} This would indicate that ‘initiating’ wars of aggression refers to the moment in time were plans and preparations, however defined, are set into motion. However, what conduct such initiation might constitute is not further elaborated by the Tribunal. The Tribunal in the High Command trial was more specific, clearly separating initiation and waging: “When war is formally declared or the first shot is fired the initiation of the war has ended and from then on there is a waging of war between the two adversaries.”\textsuperscript{142}

The Ministries Tribunal refers to many forms of conduct which amounted to ‘waging’ war, including:

“signing decrees that altered the legal status of occupied territory, such as the decree that that incorporated Poland into the Reich: establishing Nazi authority over an invaded country, such as installing Frank as the Governor-General of Poland; and taking steps to ensure that occupied territory would be economically exploited, such as transforming the economic staff that planned Operation Barbarossa into an organization responsible for ‘extracting the maximum quantities of goods required for the war effort.’”\textsuperscript{143}

This shows clearly that ‘waging’ was not constrained to Germany’s military campaigns, but also included the administration of invaded and occupied territories. Of significance is also how the NMT viewed the level of participation required to be found guilty of crimes against peace. The Tribunal in the Ministries case, in acquitting Woermann for participation in aggressive war against Poland, stated:

“His guilt or innocence, therefore, depends upon whether or not what he did was a substantial cooperation or implementation of the aggressive plans and acts. To say that any action, no matter how slight, which in any way might further the execution of a plan for aggression, is sufficient to warrant a finding of guilt would be to apply a test too strict for practical purposes”.\textsuperscript{144}

\textsuperscript{140} Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law, 192.

\textsuperscript{141} Farben case, 36.

\textsuperscript{142} High Command case, 67.

\textsuperscript{143} Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law, 192 (footnotes omitted).

\textsuperscript{144} Ibid., 188.; Ministries case, Order and Memorandum on Motion for Correction, 966.
The Tribunal was therefore of the opinion that conduct amounting to ‘planning’, ‘preparation’, ‘initiation’ or ‘waging’ aggressive war was not *ipso facto* enough to fulfil the material element of the crime against peace. For individual criminal responsibility to incur there was an additional requirement that acts amounting to the prohibited conduct was a *substantial contribution* to the plans or acts aggressive war.

Given the often inconsistent use of the conduct words by the NMT, it is difficult to draw any profound conclusions as to their substance. However, like the IMT, the NMT seemed to distinguish between conduct before the outbreak of hostilities and the waging of aggressive war. Moreover, the *High Command* trial’s conclusion that ‘initiation’ ends, and waging begins, at the commencement of hostilities, might prove useful in separating the preparatory phase from the ‘execution’ phase. Of similar interest to the ICC is the statement of the Tribunal in the Ministries case requiring substantial contribution for liability to incur. I to the IMTFE and will briefly highlight some aspects of the Tokyo Tribunal’s judgement.

### 4.3.3 The International Military Tribunal for the Far East (IMTFE)

Like the IMT and NMT the IMTFE did not consider the conduct words at any length. The Tokyo Tribunal did not even consider the charges relation to ‘planning’ and ‘preparation’ finding it unnecessary in addition to charges of participating in a conspiracy to wage aggressive or unlawful war.\(^ {145} \)

Similarly, the Tribunal did not consider charges relating to ‘initiating’, finding them duplicative of the charges of ‘waging’ aggressive war.\(^ {146} \) The Tribunal stated that the indictment had defined initiating aggressive war as “commencing the hostilities. In this sense it involves the actual waging of the aggressive war.”\(^ {147} \) Although, the Tribunal found it unnecessary to consider charges related to ‘initiation’ separate from charges related to ‘waging’ the Tribunals view is seems to correspond to the those held in the *High Command* cases referred to above.

I will now turn to the International Law Commission, considering if their work can illuminate the conduct words any further.

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146 Ibid.

147 Ibid.
4.4 International Law Commission

The ILC was mandated by the UN General Assembly to “formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.” Principle VI(a)(i) of the Nuremberg Principles incorporates the definition of crimes against peace in the Charter of the Nuremberg Tribunal as a crime under international law. In its commentary to the Principles the ILC writes on the terms ‘planning’ and ‘preparation’:

“The terms “planning” and “preparation” of a war of aggression were considered by the Tribunal as comprising all the stages in the bringing about of a war of aggression from the planning to the actual initiation of the war. In view of that, the Tribunal did not make any clear distinction between planning and preparation. As stated in the judgment, “planning and preparation are essential to the making of war”.”

This analysis corresponds with the conclusions drawn in the above examination of the IMT Judgement (see section 4.3.1). It supports the view that the Tribunal analysed conduct through the prism of an ex-ante and ex-post timeline, where it considered conduct leading up to aggressive war under one banner and conduct in the furtherance of ongoing aggression as ‘waging’. As to the content of ‘waging’ the ILC restricted its comments to the leadership nature of the crime and did not consider its definition or content.

Contrary to how it interpreted the IMT Judgement, the ILC in its 1951 Draft Code of Offences against the Peace and Security of Mankind considered ‘initiation’ as part of the commission of an act of aggression and not as preparatory conduct. Under Article 2(1), “any act of aggression” was considered an international crime. According to the Commission, this provision was inter alia meant to incorporate the ‘initiation’ and ‘waging’ elements of crimes against peace as defined in Article 6(a) of the Nuremberg Charter.

The ‘planning’ and ‘preparation’ elements of the crimes against peace were incorporated in Article 2(2) of the Draft Code by prohibiting the “preparation by the authorities of a State for...”

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149 Ibid., 376, para. 116.
150 Ibid.
152 Ibid., 135.
the employment of armed force against another State”. The ILC commented: “As used in this paragraph the term ‘preparation’ includes ‘planning’. It is considered that ‘planning’ is punishable only if it results in preparatory acts and thus becomes an element in the preparation for the employment of armed force.”153 Though, Article 8 bis(1) of the Rome Statute includes ‘planning’ alongside ‘preparation’ as conduct words, the above quote shows that the ILC considered planning as an element temporally taking place before preparatory acts.

In 1996, the ILC produced a Draft Code of Crimes against the Peace and Security of Mankind154 as part of the drafting process for the ICC statute. Crimes against peace had now become the ‘crime of aggression’ and were defined as: “An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.” In its brief comment on the conduct words, the ILC stated: “These different phases are not watertight. Participation in a single phase of aggression is enough to give rise to criminal responsibility.”155

4.5 Conclusion

To fulfil the material element of the crime of aggression a person meeting the leadership requirement has to ‘plan’, ‘prepare’, ‘initiate’ or ‘execute’ an act of aggression. Although these words are unproblematic when used in everyday life, they have proven somewhat more difficult to interpret in the context of Article 8 bis(1) of the Rome Statute.

As the textual analysis, the SWGCA156, and the review of post-WWII jurisprudence has shown, the conduct words must be understood as representing the typical behaviour of ‘leaders’ resulting in a state committing or perpetuating an act of aggression. Furthermore, the conduct words are best understood as chronological steps taken in relation to an act of aggression. Within this timeline ‘planning’ represents the initial and lowest threshold of activity, while ‘execution’ falls at the opposite end of the timeline, including acts which would typically sustain an ongoing act of aggression. The conjunction ‘or’ connecting the conduct words imply that conduct amount to one or a combination of the conduct words will suffice for liability to incur. Furthermore, the ICC will probably require that conduct fulfilling the material element of the crime meet a threshold level of activity. However, it is uncertain if the Court

153 Ibid.
155 Ibid., 43.
156 See section 4.2.
will follow the Tribunal in the *Ministries* case and require a ‘substantial contribution’ to the act of aggression.\textsuperscript{157}

Further to these general conclusions, the ICC still has to consider if an accused’s conduct amounts to the ‘planning’, ‘preparation’, ‘initiation’ or ‘execution’ of an act of aggression. Both the textual analysis and the ILC support the view that the conduct words are mostly overlapping in nature and clear distinctions cannot easily be identified between each conduct word. Typical activities constituting ‘planning’ can include deliberations on the desirability and feasibility of the use of force amongst civilian and military leaders, ‘preparation’ could mean a more concrete effort to ready a state for aggressive acts through the coordination of financial, human and military resources. Here the judgement of the IMT is illuminating to the type of acts this may include in practice.\textsuperscript{158}

‘Initiation’ is a somewhat ambiguous term, falling between two rocks. On one side it can be viewed as part of the preparatory phase, on the other side it overlaps with actual ‘execution’ of aggressive acts. However, the Tribunals in the *High Command* and *Farben* trials are helpful in defining ‘initiation’ more precisely. According to the Tribunal in *High Command* it is when “war is formally declared or the first shot is fired” that initiation ends and waging begins.\textsuperscript{159} This draws a clear line in the sand between ‘initiation’ and ‘execution’. That the Tribunal in the *Farben* case held that Krauch could not be found guilty of initiating wars of aggression because “he was informed of neither the time nor method of initiation” indicates that ‘initiation’ refers to conduct which set into motion the plans and preparations to commit an act of aggression.\textsuperscript{160} Conduct amounting to ‘execution’ would temporally take place after the outbreak of hostilities and include conduct which contributes to or perpetuates an ongoing act of aggression.

As the preceding analysis of this chapter has shown, it is difficult to draw any clear conclusions from the jurisprudence from the IMT and NMT, apart from those already mentioned. While it seems that both sets of trials distinguished between preparatory acts leading to a war of aggression, and acts in furtherance of an ongoing war of aggression, neither the IMT nor the NMT clearly defined the conduct words and were generally inconsistent in their use. Therefore, the post-WWII jurisprudence regarding the individual conduct element of crimes against peace, will most likely not be of major value to the ICC.

\textsuperscript{157} See section 4.3.2.

\textsuperscript{158} See section 4.3.1.

\textsuperscript{159} *High Command* case, 67.

\textsuperscript{160} *Farben* case, 36.
5 Conclusion

When the first case concerning the crime of aggression reaches the ICC the Court will undoubtedly grapple with both the leadership clause and the individual conduct element of the crime. In large part, these two components of the crime of aggression are distinct and require separate legal analysis, as the present thesis has attempted to produce. In section 3.6 and section 4.5, respectively, I have summarised my findings in relation to both these matters attempting to answer the research questions initially posed.

In practice, however, a potential perpetrator's degree of control over state action will most probably be informed by the degree of participation in the ‘planning’, ‘preparation’, ‘initiation and ‘execution’ of an act of aggression. The conduct, which the Court will evaluate, assessing if it amounts to the material element of the crime, will naturally be revealing as to a potential perpetrator's degree of control over state action. So, while largely distinct questions in law, the leadership clause and the individual conduct element of the crime of aggression will certainly be ‘joined at the hip’ in fact.
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