

advancing a 'duty to hold accountable' or a 'duty to end impunity'.<sup>16</sup> This move, coupled with a broader understanding of how impunity can be thwarted, vivifies a rich array of transitional justice mechanisms. For Steidl such mechanisms, including truth commissions, would do well to present the child soldier three-dimensionally as actor, victim, and witness. She notes that this has not happened as yet. Steidl laments how truth commissions have been inhibited in how they approach child soldiers because of fears that any conversation which they initiate portraying child soldiers as other than passive victims would be instrumentalized in abusive forms. It is wise to worry about this concern. We learn, nonetheless, from Steidl's detailed review of truth commissions in South Africa, Sierra Leone, and Liberia, that passive victim narratives approach children dismissively and even condescendingly by failing to fully explain the aetiology of violence and to build a vibrant culture of children's rights.

Steidl advocates for the restorative potential of truth commissions, and other justice modalities, which she sees as best actuated when these mechanisms speak in ways that transcend the constraints of preordained imagery and facile conceptions. Steidl posits a paradigm of 'restorative transitional justice'. The rub, of course, lies in the details. What does this mean on the ground? What does this look like in practice? Much of restorative justice literature is a bit tired: well-versed and often rehearsed. The bottom line, however, remains clear and Steidl is right to underscore it. Operational experiments with restorative transition justice will not be robust until the grip of criminal law on the imagination of post-conflict justice begins to relax.

Rowen flags truth commissions as a solution when there may be none other politically, while Steidl incubates these commissions where it may simply be the best fit ontologically. Both books differ in tone, style, and approach. Yet, when read together, these books make a vivid case for expanding justice beyond courtrooms and jailhouses. In this regard, both books are indispensable reads for

all those concerned with developing a meaningful transitional justice paradigm.

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Claus Kreß and Stefan Barriga (eds),  
*The Crime of Aggression: A Commentary*,  
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2016) 1583 pp. (Hardback) \$350 ISBN  
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A definition of the crime of aggression was reached at the Review Conference of the Rome Statute of the International Criminal Court (ICC) in Uganda in 2010.<sup>1</sup> The ICC Statute has been the subject of many commentaries,<sup>2</sup> the crime of aggression, which was left undefined during discussions in Rome,<sup>3</sup> certainly deserved its own commentary. This book is written to fill this gap. Its uniqueness is, therefore, unquestionable since considered alone, the crime of aggression has been the subject of countless international law

- 1 N. Blokker and C. Kreß, 'A Consensus Agreement on the Crime of Aggression: Impressions from Kampala', *23 Leiden Journal of International Law* (2010) 889.
- 2 See amongst others, W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn., Oxford University Press, 2016); O. Triffterer and K. Ambos, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn., C.H. Beck/Hart/Nomos, 2008), at 1954; A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), at 2018.
- 3 Art.5(2) ICCSt., which entered into force on July 2002, states that: 'The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.'

<sup>16</sup> *Ibid.*, at 277.

textbooks,<sup>4</sup> many of which were authored by many of the contributors to this book. The editors, Claus Kreß and Stefan Barriga, in collaboration with leading scholars, produced what they describe as a ‘landmark’ commentary, ‘which will be the authoritative guide for all practitioners, scholars and simply those who wish to get the bottom of the provisions’ legal complexities.’<sup>5</sup> This authority does not only lie in the fact that over 50 scholars contributed, the book has succeeded in bringing together those same experts who played an influential role in the drafting history of the crime of aggression. These experts were either members of the Special Working Group on the Crime of Aggression, which drafted the resolution amending the ICC Statute, or active negotiators and participants to the Review Conference. More than guidelines to interpreting the crime of aggression, this book provides a living account of the legislative history of one of the most challenging issues of international criminal law.

Kreß opens the book with an introduction, which aims to situate the crime of aggression within the broader international legal order. It provides an exhaustive and comprehensive overview of the main issues raised by the effort of the international community to incriminate aggression ranging from the end of First World War to the adoption of the ICC Statute in 1998. This introduction sets the scene for the historical part of the book in

which the key moments, actors and roles regarding the incrimination of aggression are assessed.<sup>6</sup> The introduction is written in a language accessible to lawyers as well as to other social scientists. Nevertheless, lawyers would have to read the book further to have an in-depth knowledge of theoretical and practical issues concerning the prosecution of the crime of aggression. Parts II and III of the book are devoted to tackling those matters.

The heart of the book rests in Part III, which concentrates on the main legal problems raised by the prosecution of aggression. For the remainder of the book, Part II on the history of the prosecution of aggression, Part IV on the crime of aggression and national law, and Part V on the crime of aggression and the future of the world order constitute an enrichment of the legal discussion through an interdisciplinary character. Addressing the subject of the prosecution of aggression demands no less. The crime of aggression, whatever can be said — its history is telling in this regard — is a political crime by nature. Expanding the debate — as the editors successfully do — to national,<sup>7</sup>

4 See, for instance, C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2013), at 382; S. Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (Springer, 2014), at 334; O. Solera, *The Crime of Aggression and the International Criminal Court: Lessons from the Past, Challenges for the Future* (Graduate Institution of International and Development Studies, 2006), at 524; M. Politi and G. Nesi, *The International Criminal Court and the Crime of Aggression* (Ashgate, 2004), at 193; P. Wilson, *Aggression, Crime and International Security: Moral, Political and Legal Dimensions of International Relations* (Routledge, 2009), at 192; L. May, *Aggression and Crimes against Peace* (Cambridge University Press, 2008).

5 C. Kreß and S. Barriga (eds), *Crime of Aggression: A Commentary*, Vol. I (Cambridge University Press, 2017), at xxxix.

6 K. Sellars, ‘The First World War, Wilhelm II and Article 227: The Origin of the Idea of “Aggression” in International Criminal Law’, in Kreß and Barriga (eds), *ibid.*, Vol. 1, 21; K. Sellars, ‘The Legacy of the Tokyo Dissents on “Crimes against Peace”’, in Kreß and Barriga (eds), *ibid.*, Vol. 1, 113; T. Bruha, ‘The General Assembly’s Definition of the Act of Aggression’, in Kreß and Barriga (eds), *ibid.*, Vol. 1, 142; N. Strapatsas, ‘The Practice of the Security Council Regarding the Concept of Aggression’, in Kreß and Barriga (eds), *ibid.*, Vol. 1, 178; D. Akande and A. Tzanakopoulos, ‘The International Court of Justice and the Concept of Aggression’, in Kreß and Barriga (eds), *ibid.*, Vol. 1, 214; J. Crawford, ‘The International Law Commission’s Work on Aggression’, in Kreß and Barriga (eds), *ibid.*, Vol. 1, 233; R.S. Clark, ‘Negotiations on the Rome Statute, 1995-98’, in Kreß and Barriga (eds), *ibid.*, Vol. 1, 244.

7 K. Turkovic and M. Munivrana Vajda, ‘Croatia’, in Kreß and Barriga (eds), *ibid.*, Vol. 1, 863; E. Hoven, ‘Germany’, in Kreß and Barriga (eds), *ibid.*, Vol. 1, 880; A. Parmas, ‘Estonia’, in Kreß and Barriga (eds), *ibid.*, Vol. 1, 895; S.V. Glotova, ‘Russia’, in Kreß and Barriga (eds), *ibid.*, Vol. 1, 922; R. O’Keefe, ‘United Kingdom’, in Kreß and Barriga (eds), *ibid.*, Vol. 1, 938; A.R. Coracini, ‘(Extended) Synopsis:

regional,<sup>8</sup> civil society,<sup>9</sup> and doctrinal perspectives,<sup>10</sup> account for the complexity of a subject for which an agreement within the international community has long been sought.

The editors may have provided too much space to states' perspectives in this book. This criticism could be made for those chapters analysing selected national legislations on the crime of aggression and states' views in the context of the negotiations that led to the adoption of the current regime in Kampala. However, this choice is justified both by the nature of the crime — which interweaves states' and individuals' conduct — and by the need to prove that the agreement gained in the last minutes of the Review Conference on the conditions for the prosecution of the crime of aggression was not an unanimous one. Although states' views hold direct interest for political and international relations scientists, who are concerned with the power dynamics underpinning the prosecution of aggression, those states' views hold interest for lawyers determining the customary elements of the crime.

Part III examines the crime of aggression under current international law. This part opens with a chapter containing interpretative tools to interpret the crime of aggression.<sup>11</sup> The central argument is that the distinct

nature of the discipline of international criminal law — which simultaneously consists of international and criminal law — demands that interpretation of this crime under the ICC Statute is based on the principle of legality rather than on the systematic approach embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Leena Grover draws her analysis from Article 22 of the ICC Statute, which requires a strict interpretation of crimes and prohibits interpretation by analogy. For her, teleological interpretations must not be relied upon since it would give primacy to the fight against impunity to the detriment of the rights of the accused. This line of reasoning places too much emphasis on the criminal character of international criminal law, which instead, is foremost an international law matter. The provisions under the ICC Statute on crimes are drafted in diplomatic and political language specific to public international law, as opposed to criminal law. Hence, using the interpretative methods of the Vienna Convention would be common sense. The ad hoc tribunals built their success by heavily relying on these methods. The omissions contained in the definition of the crime of aggression make it likely that judges may be tempted to fill them in using these interpretative guidelines, which are customary law. In addition, this chapter only addresses the interpretation of crimes, while leaving unanswered the question of those interpretative tools applicable to procedural provisions of the crime of aggression. This topic was contested in Kampala and previously.

The legal framework of the crime of aggression, as analysed in Part III, is dialectical. On one hand, part of the regime is purely substantive or material, relating to the crime's elements. These material elements are addressed by two chapters of the book.<sup>12</sup> The principle of legality applies unquestionably to these elements, as discussed by Roger S. Clark, in Chapter 16. However, other methods of interpretation may come into play as state practice leaves open the possibility that the ICC may determine other acts of aggression, should they

The Crime of Aggression under Domestic Criminal Law', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 1038; 'Selected National Laws and Regional Instruments on the Crime of Aggression', in Kreß and Barriga (eds), *ibid.*, Vol. 2, 1079.

8 M.M. El Zeidy, 'The Arab World', in Kreß and Barriga (eds), *ibid.*, Vol. 2, 960; N.H.B. Jorgensen, 'Asia', in Kreß and Barriga (eds), *ibid.*, Vol. 2, 993.

9 N. Weisbord, 'Civil Society', in Kreß and Barriga (eds), *ibid.*, Vol. 2, 1310.

10 M. Koskeniemi, 'A Trap for the Innocent...!', in Kreß and Barriga (eds), *ibid.*, Vol. 2, 1359; J. MacMahon, 'Unjust War and the Crime of Aggression', in Kreß and Barriga (eds), *ibid.*, Vol. 2, 1386; F. Mégret, 'What is the Specific Evil of Aggression?' in Kreß and Barriga (eds), *ibid.*, Vol. 2, 1398; J.D. Ohlin, 'The Crime of Bootstrapping', in Kreß and Barriga (eds), *ibid.*, Vol. 2, 1454; D. Scheffer, 'Amending the Crime of Aggression under the Rome Statute', in Kreß and Barriga (eds), *ibid.*, Vol. 2, 1480.

11 L. Grover, 'Interpreting the Crime of Aggression', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 375.

12 C. Kreß, 'The State Conduct Element', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 412; R.S. Clark, 'Individual Conduct', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 565.

reach the intensity and severity of those listed in the definition adopted in Kampala.<sup>13</sup>

Regarding the manner of interpreting crimes within the ICC Statute, some contributions in the book have exaggerated the peculiarities of the crime of aggression.<sup>14</sup> They seem to draw this distinctiveness on the fact that aggression is the supreme international crime. However, in doing so, Grover may not have taken into account that the principle of legality has raised challenges not only with respect to the crime against peace, but also international crimes more generally. It is difficult to argue that the ad hoc tribunals have strictly applied the principle of legality. Rather, international criminal law has developed through an abundant reliance by the ad hoc tribunals to teleological rules of interpretation.

Chapter 16 examines the application of general principles of criminal law, as enshrined in the ICC Statute, to the crime of aggression, which were not amended in Kampala, with the exception of the addition of Article 25(3)*bis* of the ICC Statute to confirm that principles of individual criminal responsibility should apply to the crime of aggression. Chapter 16 may, therefore, be covering unnecessary ground considering that the Review Conference in Kampala did not add anything to the general principles. The same may be said of other chapters in this edited collection, which rehearse issues which are not specific to the crime of aggression.<sup>15</sup> Instead of focusing on interpreting the adopted provisions on aggression, some chapters tackle the *travaux préparatoires* at length, which represents an overlap with earlier literature.<sup>16</sup>

The two main substantive elements of the crime of aggression, namely, the conduct of states and individuals, do not represent new law. They were borrowed and reshaped from principles inherited from the Nuremberg and Tokyo judgments, General Assembly Resolution 3314 (XXIX), 14 December 1974, and the works of the International Law Commission.<sup>17</sup> Indeed, the crime of aggression was a crime under customary law prior to the Review Conference.<sup>18</sup> The Review Conference should be regarded as a codification process designed to bring clarity to a legal regime, which may, at times, be entangled with the use of force regime. The space devoted to these two forms of conduct is amply deserved. The prosecution of aggression necessitates a determination of what type of use of force is accepted as legal under the law of nations. This issue is complicated by recent developments on humanitarian interventions and the responsibility to protect, which may have softened the prohibition on use of force of the United Nations Charter.<sup>19</sup> In a convincing line of argument, Kreß draws the necessary nuances between the acts of aggression, by reference to General Assembly Resolution 3314 (XXIX), and other situations, within which legality or triggering conditions remain highly contested. These situations concern collective security, self-defence or use of force by, or in support of, national liberation movements.

Analogous to state conduct, individual conduct also represents a codification of customary law. It requires that the prosecuted individual be in a 'leadership position', that is, 'in a position effectively to exercise control over or to direct the political or military action

13 Art. 8*bis*(2)(g) ICCSt.

14 A. Reisinger Coracini and P. Wrangle, 'The Specificity of the Crime of Aggression', in Kreß and Barriga (eds), *supra* note 5.

15 H. Kreicker, 'Immunities', in Kreß and Barriga (eds), *supra* note 5, Vol. 1, 675; P. Wrangle, 'The Crime of Aggression, Domestic Prosecutions and Complementarity', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 704.

16 See, S. Barriga and C. Kreß, *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), at 835. This is a pernicious effect of the fact that most of the contributors are living actors of the drafting history of the crime of aggression. Their enthusiasm may justify their tendency to expand their

commentaries far beyond mere interpretation of the amended provisions. After all, supplementary means of interpretation of treaty provisions include the recourse to 'the preparatory work of the treaty and the circumstances of its conclusion', Art. 32 Vienna Convention on the Law of Treaties.

17 See Draft Code of Crimes against the Peace and Security of Mankind, Part II, including the Draft Statute for an International Criminal Court, *Yearbook of the International Law Commission*, Vol. II (1996), § 46.

18 C. Kreß, 'The State Conduct Element', in Kreß and Barriga (eds), *supra* note 5, Vol. 1, X, at 421.

19 Art. 2(4) United Nations Charter.

of a State'.<sup>20</sup> Indeed, from the failure after the First World War to indict Willem II to the Nuremberg and Tokyo tribunals, attempt or prosecution of the crime of aggression has consistently targeted the abuse of military power by state leaders.<sup>21</sup> The Review Conference reaffirmed this principle with more clarity. Nevertheless, scholars have not waited until the adoption of amendments to the ICC Statute on crime of aggression to investigate these topics at length.<sup>22</sup> The real novelty with this crime does not lie in its constitutive elements, but the conditions of its prosecution considering links with the collective security regime. The doctrinal contribution of the book should be assessed in this regard.

The editors dedicated seven chapters to analysing the conditions of exercise of jurisdiction by the ICC over the crime of aggression.<sup>23</sup>

Specific contributions address peripheral issues such as immunity,<sup>24</sup> complementarity,<sup>25</sup> and victims' rights.<sup>26</sup> The importance of such issues cannot be questioned. However, the key issue on jurisdiction remains institutional relations between the regimes of collective security — with the Security Council situated at the top — and international criminal law, as guarded by the ICC. To have a glimpse of this issue, the reader should turn to specific chapters in the book.<sup>27</sup> In particular, Chapter 17, authored by Stefan Barriga and Niels Blokker,<sup>28</sup> argues that decision to separate a state's referral and prosecutor's *proprio motu* investigations from referral by the Security Council was reached only at the final stage of the negotiations in Kampala. In the drafting history of the crime of aggression, this is the sole issue on which the Working Group could not rely on previous practice.

The entry into force of the amendments on the crime of aggression was not an easy issue prior to and during the Review Conference.<sup>29</sup> This question is addressed — somewhat confusedly — in the ICC Statute, which provides

20 Art. 8bis(1) ICCSt.; Kreß, *supra* note 18, at 585.

21 This was the opinion of the Special Working Group on the crime of aggression. However, for an opposing view see K.J. Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression', 18 *European Journal of International Law* (2007) 477.

22 I.K. Müller-Schieke, 'Defining the Crime of Aggression Under the Statute of the International Criminal Court', 14 *Leiden Journal of International Law* (2001) 409; C. Kreß, 'The Crime of Aggression before the First Review of the ICC Statute', 20 *Leiden Journal of International Law* (2007) 851; N. Blokker, 'The Crime of Aggression and the United Nations Security Council', 20 *Leiden Journal of International Law* (2007) 867; A. Cassese, 'On Some Problematical Aspects of the Crime of Aggression', 20 *Leiden Journal of International Law* (2007) 841; L. May, 'Act and Circumstance in the Crime of Aggression', 15 *Journal of Political Philosophy* (2007) 169; A. Paulus, 'Second Thoughts on the Crime of Aggression', 20 *European Journal of International Law* (2009) 1117; N. Goussac, 'Territoriality and the Crime of Aggression', 6 *New Zealand Yearbook of International Law* (2009) 169; N. Strapatsas, 'The Crime of Aggression', 16 *Criminal Law Forum* (2005) 89.

23 S. Barriga and N. Blokker, 'Entry into Force and Conditions for the Exercise of Jurisdiction: Cross-Cutting Issues', in Kreß and Barriga (eds), *supra* note 5, Vol. 1, 621; N. Blokker and S. Barriga, 'Conditions for the Exercise of Jurisdiction Based on Security Council Referrals', in Kreß and

Barriga (eds), *ibid.*, Vol. 1, 646; S. Barriga and N. Blokker, 'Conditions for the Exercise of Jurisdiction Based on State Referrals and *Proprio Motu* Investigations', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 652; Kreicker, *supra* note 15; Wrangle, *supra* note 15; E. Chaitidou, F. Eckelmans and B. Roche, 'The Judicial Function of the Pre-Trial Division', in Kreß and Barriga (eds), *supra* note 5, Vol. 1, 752; E. Pobjie, 'Victims of the Crime of Aggression', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 816.

24 Kreicker, *supra* note 15.

25 Wrangle, *supra* note 15.

26 Pobjie, *supra* note 23.

27 S. Barriga and N. Blokker, 'Entry into Force and Conditions for the Exercise of Jurisdiction: Cross-Cutting Issues', in Kreß and Barriga (eds), *supra* note 5, Vol. 1, 621; N. Blokker and S. Barriga, 'Conditions for the Exercise of Jurisdiction Based on Security Council Referrals', in Kreß and Barriga (eds), *ibid.*, Vol. 1, 646; S. Barriga and N. Blokker, 'Conditions for the Exercise of Jurisdiction Based on State Referrals and *Proprio Motu* Investigations', Kreß and Barriga (eds), *ibid.*, Vol. 1, 652.

28 See Barriga and Blokker, *supra* note 27.

29 Art. 5(2) ICCSt., spoke of amendments 'in accordance with articles 121 and 123'.

for a multiple-step system on entry into force. First, the individual state accepts the amendments. Secondly, the 30th instrument of ratification is required to be deposited. Even there, there is an ulterior Rubicon to be crossed, namely the activation of the jurisdiction of the Court, which will depend on the cumulative conditions of the deposition of the 30th instrument of ratification and the formal decision of state parties, as from January 2017, to allow the Court to take aggression cases. Consequently, up until that activation, the crime of aggression would remain dormant as if the Review Conference and the entry into force have both never taken place.

The importance gained by the issue of entry into force explains why that of jurisdictional filters was less contentious in Kampala. Prior to the Review Conference, it had been agreed that the non-determination of the existence of an act of aggression by the Security Council should not prevent the Court from ascertaining its jurisdiction, the entry into force remained the only way where states could retake control over the prosecution of aggression.

Chapter 17 engages with Articles 15 *bis*(7) and 15 *bis*(8) of the ICC Statute, which govern the interaction between the ICC and the Security Council for the prosecution of aggression. The only jurisdictional filter remaining is the requirement that the prosecutor should seek approval for prosecution, in cases where the Security Council fails to determine the existence of an act of aggression. The adopted provisions make it specific to this crime that the green light would be given by the ICC's Preliminary Division six months after the prosecutor has notified the Security Council of a potential crime of aggression for investigation and the Council has remained silent.<sup>30</sup> In addition, with no outside determination of an act of aggression prejudicing the ICC's own finding,<sup>31</sup> it appears that beyond a jurisdictional filter, this represents institutional coordination between the ICC and the Security Council. However, it cannot be claimed — at least for now — that such coordination would be successful. The book provides a useful guide for a

common understanding of the respective roles held by the ICC and the Security Council.

In a nutshell, *Crime of Aggression: A Commentary* should be the cornerstone volume on the crime of aggression. The editors have succeeded in a risky task: to account for the complexity of interpreting the crime of aggression in a language accessible to a wider audience. The richness of the book lies in the editors' endeavour to provide the readers with all elements needed to comprehensively interpret the crime of aggression. This work is essential reading for international criminal lawyers and other social scientists. In 2016, Palestine became the 30th state to ratify the amendments on the crime of aggression. The year after, in its final hours on 14 December 2017, the 16th Assembly of States Parties to the ICC Statute decided to activate the Court's jurisdiction over the crime of aggression to take effect on 17 July 2018.<sup>32</sup> Despite remaining controversies,<sup>33</sup> it is hoped that — particularly in such times where the use of force in international relations may be trivialized — state parties to the ICC Statute find in this book an encouragement to launch a first case to the ICC.

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32 ASP, *Activation of the Jurisdiction of the Court over the Crime of Aggression*, Res. ICC-ASP/16/Res.5, adopted at the 13th Plenary Meeting, 14 December 2017.

33 N. Stürchler, 'The Activation of the Crime of Aggression in Perspective', EJIL: Talk! Blog of the European Journal of International Law, 26 January 2018, available online at <https://www.ejiltalk.org/the-activation-of-the-crime-of-aggression-in-perspective/> (visited 16 February 2018); D. Akande, 'The International Criminal Court Gets Jurisdiction Over the Crime of Aggression', EJIL: Talk! Blog of the European Journal of International Law, 15 December 2017, available online at <https://www.ejiltalk.org/the-international-criminal-court-gets-jurisdiction-over-the-crime-of-aggression/> (visited 16 February 2018).

30 Art. 15*bis*(8) ICCSt.

31 Art. 15*bis*(9) ICCSt.