

# Interpreting Crimes in the Rome Statute of the International Criminal Court

LEENA GROVER



CAMBRIDGE

INTERPRETING CRIMES  
IN THE ROME STATUTE OF  
THE INTERNATIONAL  
CRIMINAL COURT

LEENA GROVER



CAMBRIDGE  
UNIVERSITY PRESS

# CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107688773](http://www.cambridge.org/9781107688773)

© Leena Grover 2014

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2014

First paperback edition 2015

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloguing in Publication data*

Grover, Leena, author.

Interpreting crimes in the Rome Statute of the International Criminal Court / Leena Grover.

pages cm

Includes bibliographical references and index.

ISBN 978-1-107-06772-1 (hardback)

1. International criminal law. 2. Rome Statute of the International Criminal Court (1998 July 17) I. Title.

KZ7070.G76 2014

345'.02 – dc23 2014007599

ISBN 978-1-107-06772-1 Hardback

ISBN 978-1-107-68877-3 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

# INTERPRETING CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The Rome Statute of the International Criminal Court defines more than ninety crimes that fall within the Court's jurisdiction, including genocide, other crimes against humanity, war crimes and aggression. How these crimes are interpreted contributes to findings of individual criminal liability and moreover affects the perceived legitimacy of the Court. And yet, to date, there is no agreed-upon approach to interpreting these definitions. This book offers practitioners and scholars a guiding principle, arguments and aids necessary for the interpretation of international crimes. Leena Grover surveys the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) before presenting a model of interpretive reasoning that integrates the guidance within the Rome Statute into articles 31–33 of the Vienna Convention on the Law of Treaties (1969).

LEENA GROVER is a Habilitation Candidate in the Faculty of Law at the University of Zurich. She is a member of the Law Society of Upper Canada and has worked for a number of adjudicatory bodies including the ICTY and International Criminal Court.

For all who toil to nurture the international criminal  
justice enterprise

Practitioners and courts often seem not to regard it as a subject at all... Academics have not yet given sufficient attention to the doctrinal aspects... [W]e neglect issues of interpretation at our peril.<sup>1</sup>

<sup>1</sup> A Ashworth, 'Interpreting Criminal Statutes: A Crisis of Legality?' (1991) 107 Law Quart Rev 419, 449.



## FOREWORD

The Rome Statute of the International Criminal Court marks a turning point in the development of international criminal justice. That the Statute defines crimes in some detail instead of referring judges to customary international law is just one important innovation. And it gives rise to the challenge of interpreting these new treaty definitions. But is this really a challenge? In light of the well-established rules of interpretation in the *Vienna Convention on the Law of Treaties* (1969), one may wonder whether there is anything special or new about construing the relevant provisions of the Rome Statute. In Dr Leena Grover's well-considered view, the matter is not quite that simple, though. She believes that a treaty defining 'the most serious crimes of concern to the international community as a whole' does indeed pose specific questions of interpretation. She points out that the Rome Statute itself recognizes this fact by setting out several rules to assist judges with answering these questions. Her ambitious goal is to formulate a method for construing the definitions of crimes enshrined in the Rome Statute in accordance with the rules of interpretation contained therein, and to integrate this method into the general 'Vienna framework on treaty interpretation', thereby forming a coherent whole. International legal practitioners might question the usefulness of such an 'abstract' scholarly exercise, and judges perhaps even fear that an elaborate doctrine of interpretation could only unduly tighten their hands in the necessary development of the law. Dr Grover anticipates both possible concerns. To the first, she responds with the conviction that nothing is more useful for practitioners than an organized toolbox of interpretive principles, arguments and aids. Accordingly, her reflections, while certainly most inspiring from a scholarly perspective, are directly addressed to judges at the International Criminal Court, their teams and lawyers appearing before them. Dr Grover takes great pains to address the second possible objection. She does not dispute the fact that her doctrine of interpretation would restrain judicial development of the law to some degree. On the contrary, this is precisely the intended effect of her book. In Dr Grover's view, the first permanent international criminal court is exposed to a more stringent legitimacy test than its predecessors. It no longer suffices to refer to international criminal law's benign mission in order to justify the Court's decisions; in accordance with the overarching principle of legality, the latter

must also duly respect the protected liberties of the international *citoyen* and maintain a proper balance of powers on the international plane. These latter considerations, according to the author, require a methodology that enhances the foreseeability and transparency of judicial reasoning. In her search for a comprehensive doctrine of interpretation for the Court, Dr Grover covers vast ground, including some thorny territory, and many of the insights gained along the way are precious in themselves; I just mention her efforts to elucidate more precisely the Rome Statute's principle of strict construction and the significance of customary international law within the interpretive process. All of this eventually results in a thoughtfully composed and elegantly formulated interpretive doctrine. I very much hope that practitioners and scholars alike will soon subject this doctrine to close scrutiny. It would be pretentious to predict at this moment in time whether the edifice Dr Grover has erected will withstand all future objections. But it can be stated with confidence that the edifice is an impressive one, based on the courageous, rigorous and dedicated work of a very promising scholar.

*Claus Krefß*

Director of the Institute of International Peace and Security Law,  
University of Cologne



## ACKNOWLEDGEMENTS

The kindness of many people made this book possible. Starting at the beginning, it was Morten Bergsmo at the Office of the Prosecutor (OTP) of the International Criminal Court who sowed the seed to pursue doctoral studies and relentlessly nurtured it in the early days. The result is this book. Thank you Morten, Gilbert Bitti, Christine Chung and other members of the OTP, as well as Susanne Malmström and everyone in Trial Chamber I at the International Criminal Tribunal for the former Yugoslavia for invaluable exposure to the practice of international criminal law, including its interpretation.

My most profound gratitude goes to Professor Claus Kreß, who has immeasurably enriched my life. Beyond supervising my doctoral work for four years, he has supported me professionally in every way possible. He is a teacher who dreams big dreams for his students and inspires them daily through his keen intellect, integrity, kindness and passion for the study and practice of international law. To my good friends at the University of Cologne, thank you for going above and beyond to make Germany feel like my second home. A third home was found at the University of Zurich thanks to Professor Helen Keller, now judge at the European Court of Human Rights, who introduced me to the fascinating work of the United Nations Human Rights Committee, as well as my friends at her chair, who made me feel so welcome.

An enormous thank you is warmly extended to Professor Angelika Nußberger for serving as the second corrector of my doctoral thesis despite her very demanding schedule as judge at the European Court of Human Rights. Several other people also gave of their precious time to read portions of this manuscript, comment on a related article published in the *European Journal of International Law* or help with footnotes. I therefore wish to convey my heartfelt thanks to Professors Dapo Akande, Roger Clark, Anne Peters, Darryl Robinson, Richard Vernon, Thomas Weigend and Joseph Weiler, as well as Nicole Bürli, Nikolaos Gazeas, Till Gut, Mareike Herrmann, Raji Mangat and Leigh Salsberg.

During the course of writing this book, I had the incredibly good fortune of working as a legal adviser to Ambassador Christian Wenaweser, His Royal Highness Prince Zeid Ra'ad Zeid Al-Husseini and Deputy Ambassador Stefan Barriga on the crime of aggression negotiations within the Court's Assembly of States Parties and at the first Review Conference of the Rome Statute. I

am forever grateful for this exhilarating once-in-a-lifetime opportunity to experience how, through multilateral negotiations, international crimes are defined. I am also deeply indebted to Benjamin and Don Ferencz for so generously supporting this work.

It is with immense gratitude that I acknowledge the Canadian Council on International Law for funding my research, as well as Professor Peter Hogg and Dean Mayo Moran in Canada for their academic support and encouragement. To Elizabeth Spicer, Cassie Tuttle and the entire Cambridge University Press team, I wish to express my sincere appreciation for your belief in and work on this project. For their most constructive comments and time, I kindly thank the manuscript's blind reviewers. This book was initially completed in March 2011. I am therefore indebted to Professor Christian Walter and members of his chair at Ludwig Maximilian University in Munich for providing me with an ideal environment in which to update it.

Finally, a book is not written in a bubble – life intervenes. I therefore wish to acknowledge the wonderful support of friends and family near and far, especially Susan, Kelly, Gerli, Wolfgang, Sasha and mom. Christian, my greatest blessing, words fail me; you make all dreams possible and I can never thank you adequately. Julian, our lives know no greater love or joy than you.

# CONTENTS

<i>Foreword by Claus Krefß</i>	page xi
<i>Acknowledgements</i>	xiii

<b>1</b>	<b>Introduction</b>	<b>1</b>
1.1	Introduction	1
1.2	Interpretation	3
1.2.1	Operative interpretation	3
1.2.2	Interpretation versus gap filling	6
1.3	Sources of interpretive problems	8
1.3.1	Linguistic	10
1.3.2	Background principles	14
1.3.3	Internal structure	15
1.3.4	Inadequate design	16
1.3.5	Value conflicts	18
1.3.6	Methodology	19
1.3.7	Special features of the case	20
1.3.8	Drafting errors	20
1.3.9	Inherent indefiniteness	21
1.3.10	The Elements of Crimes	21
1.3.11	The Rome Statute and other treaties	22
1.3.12	The Rome Statute and customary law	23
1.3.13	Subsequent agreements, practice and law	24
1.4	Legal methodology	24
1.5	Method for developing a legal methodology	28
1.5.1	International dimension	28
1.5.2	Logical progression	31
1.6	Practical merits of this study	33
1.7	How to use this book	36
<b>2</b>	<b>The state of the art</b>	<b>38</b>
2.1	Introduction	38
2.2	Articles 31–33 of the <i>Vienna Convention</i> (1969)	39
2.3	Jurisprudence of the ICTY and ICTR	48
2.3.1	Interpretive principles and arguments	49
2.3.2	Aids to interpretation	64

2.4	Features of the Rome regime	68
2.4.1	Drafting of the Rome Statute	69
2.4.2	Division of powers	74
2.4.3	Dialogue and political constraint	79
2.4.4	Nature of the Rome Statute and Court	80
2.4.5	Selection and removal of judges	84
2.5	Conclusions	88
	Annex: Aids to interpretation	89
<b>3</b>	<b>Guiding interpretive principle</b>	<b>102</b>
3.1	Introduction	102
3.2	Normative tensions that influence the interpretation of crimes	102
3.3	Legality and article 22	106
3.4	Internationally recognized human rights and article 21(3)	112
3.5	Reconciling articles 21(3) and 22	119
3.6	Systemic integration dilemma	124
<b>4</b>	<b>Challenges to the principle of legality</b>	<b>134</b>
4.1	Introduction	134
4.2	Interests protected by the legality principle	137
4.2.1	Fair notice	137
4.2.2	Rule of law	141
4.2.3	Separation of powers	145
4.2.4	Prior law as the basis for punishment	149
4.2.5	Conclusions	151
4.3	Arguments that undermine the legality principle	151
4.3.1	Higher order justice	152
4.3.2	Immorality	154
4.3.3	World order	157
4.3.4	Illegality	159
4.3.5	Reclassification of the offence	162
4.3.6	Criminal law in a changing world	165
4.3.7	Purposive or teleological reasoning	167
4.3.8	Foreseeability and accessibility	170
4.3.9	Essence of the offence	173
4.3.10	Interpretive aids	174
4.3.11	Conclusions	183
<b>5</b>	<b>Operationalizing the principle of legality</b>	<b>186</b>
5.1	Introduction	186
5.2	Drafting history	186
5.3	Criminal responsibility 'under this Statute'	189
5.4	Non-retroactivity	190
5.5	Strict construction	192
5.5.1	National history	193
5.5.2	International history	196
5.6	Ambiguity and favouring the accused	205

5.7	Analogous reasoning	208
5.7.1	National history	209
5.7.2	International history	212
5.8	Legality without prejudice	216
5.9	Conclusions	217
<b>6</b>	<b>Custom as an aid to interpretation</b>	<b>220</b>
6.1	Introduction	220
6.2	Need for a codification study	221
6.3	Codification	231
6.4	Codification benefits, drawbacks and indicia	243
<b>7</b>	<b>Internal indicia of codification</b>	<b>246</b>
7.1	Introduction	246
7.2	Material jurisdiction (article 5)	246
7.3	Personal jurisdiction (articles 12 and 13)	250
7.4	Temporal jurisdiction (articles 11 and 24)	256
7.5	Legality (article 22(1))	259
7.6	Applicable law (article 21)	262
7.7	The Rome Statute's relationship to international law (articles 10 and 22(3) and Understanding 4)	263
7.8	Definitions of crimes (articles 5–8 <i>bis</i> )	269
7.8.1	'For the purpose of this Statute'	270
7.8.2	Aggression	271
7.8.3	Genocide	274
7.8.4	Crimes against humanity	275
7.8.5	War crimes	279
7.9	Elements of Crimes (article 9)	286
7.10	Mental elements of crimes (article 30)	295
7.11	Conclusions	301
<b>8</b>	<b>External indicia of codification</b>	<b>303</b>
8.1	Introduction	303
8.2	Drafting history	303
8.3	Ratifications, reservations, denunciations and revisions	318
8.3.1	Ratifications	318
8.3.2	Reservations	320
8.3.3	Denunciations	325
8.3.4	Revisions	326
8.4	Conduct of States	328
8.4.1	States Parties	329
8.4.2	Non-States Parties	333
8.5	Jurisprudence	337
8.6	Doctrinal writings	339
8.7	Conclusions	343



<b>9</b>	<b>The Vienna Convention (1969) and aids to interpretation</b>	<b>345</b>
9.1	Introduction	345
9.2	Articles 31(3)(a) and (c) and relevant and applicable aids to interpretation	346
9.2.1	Customary law	349
9.2.2	The Rome Statute customary law presumption	350
9.2.3	Treaty law	357
9.2.4	General principles of law	360
9.2.5	Judicial decisions and teachings of publicists	361
9.2.6	Elements of Crimes	363
9.2.7	Interpretive Understandings	366
9.3	Articles 31(3) and (4) and time	373
9.3.1	Crystallization	374
9.3.2	Intertemporality	375
9.3.3	Crimes in the Rome Statute	380
9.3.4	Article 31(4) and special meanings of 'ordinary' words	382
9.3.5	Article 31(3)(b) and subsequent practice	387
9.4	Article 32 and supplementary means of interpretation	392
9.5	Article 33 and treaties authenticated in two or more languages	396
<b>10</b>	<b>Conclusions</b>	<b>398</b>
10.1	Introduction	398
10.2	Article 31(1) and legality	398
10.3	Article 31(1) and interpretive devices for safeguarding legality	400
10.4	Article 31(2) and context	404
10.5	Article 31(3)(a), the Elements of Crimes and the interpretive Understandings	404
10.6	Article 31(3)(b) and subsequent practice	405
10.7	Article 31(3)(c) and relevant and applicable rules of international law	407
10.7.1	Custom	407
10.7.2	Treaty law	410
10.7.3	General principles	411
10.7.4	Judicial decisions and teachings of publicists	411
10.7.5	Internationally recognized human rights	412
10.8	Article 31(4) and terms with special meanings	414
10.9	Article 32 and preparatory work	416
10.10	Article 33 and differences in authenticated texts	418
10.11	Conclusions	419
	<i>Bibliography</i>	421
	<i>Index</i>	445



## Introduction

### 1.1 Introduction

Interpretation is central to the practice of law. Sometimes a legal victory or defeat turns on the meaning a judge attributes to a single word in a legal text. The stakes may be low or incredibly high. For example, the International Court of Justice (ICJ) in its *Genocide Decision* (2007) held that the killing of approximately 7,000 Muslim men in Srebrenica between 13 and 15 July 1995 was an act of genocide and that Serbia was responsible for failing to prevent and punish the individuals involved.<sup>1</sup> For conduct to qualify as genocide in a legal sense, the victim group must be protected by the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) (*Genocide Convention*).<sup>2</sup> Accordingly, the judges had to satisfy themselves that the victims formed whole or 'part' of a national, ethnical, racial or religious 'group'.

The parties disputed inter alia whether the death of 7,000 Muslim men satisfied this element of the crime. Given the gravity of genocide, does the killing of 7,000 men result in the destruction of 'part' of a group? If the argument is that the number of people forming 'part' of the group is substantial in a quantitative sense, should this be assessed in absolute terms or relative to the size of the whole group? On this point, can 'group' be defined in geographically limited terms even if large diasporas of persons exist who share the same nationality, ethnicity, race or religion as the victim group? Ultimately, one important justification for the ICJ's finding that genocide occurred in Srebrenica was its interpretation of the words 'part' and 'group'.

Judges deciding cases at the International Criminal Court (Court) will be forced to engage in similar interpretive exercises. The difference is that their decisions will be used to justify findings of individual culpability for the most serious crimes of concern to the international community as a whole. Indeed, one judge of the International Criminal Tribunal for the former Yugoslavia

<sup>1</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)* Judgment (26 February 2007).

<sup>2</sup> 78 UNTS 277 (adopted 9 December 1948, entered into force 12 January 1951).

(ICTY) described the task of interpreting the law as ‘both the most challenging and the most anxiety-ridden part of the job’.<sup>3</sup> These decisions could lead to the imprisonment of individuals and the compensation of victims, contribute to or disturb transitional justice efforts in situation countries, influence the development of customary international law, encourage or dissuade Non-States Parties to join the Court and help to strengthen or undermine the Court’s legitimacy as an independent and impartial international judicial organ.

The Rome Statute has to date been ratified by 122 States Parties, thirteen of which have ratified the aggression amendments and sixteen the recently added crimes committed in the course of a non-international armed conflict. The Court is seized of situations in Uganda, the Democratic Republic of the Congo, Darfur (the Republic of the Sudan), the Central African Republic, Kenya, Libya and Cote d’Ivoire. It is investigating eight situations, conducting preliminary examinations of an additional eight, is considering the appeals of two cases, has acquitted one individual, has one ongoing trial, is scheduled to commence two more trials, has several cases that are at the pretrial stage and has twelve arrest warrants that remain outstanding, the oldest ones dating back to 2005 (e.g., Joseph Kony).<sup>4</sup>

Given that the Court is the world’s first permanent international criminal court, the legitimacy factor is a serious concern. As a young judicial body that only came into existence in 2004, it does not have the luxury of being able to rest on its laurels as an established and well-respected institution. Unlike domestic criminal courts, any missteps the Court might make will occur under the watchful gaze of those who thumb their noses at the international criminal justice enterprise and would welcome the Court’s failure. Unfortunately, judges do not currently have an agreed method for interpreting the more than ninety international crimes that fall within the Court’s jurisdiction. One of its strongest critics suggested that ‘the Court’s discretion ranges far beyond normal or acceptable judicial responsibilities, giving it broad and unacceptable powers of interpretation that are essentially political and legislative in nature’.<sup>5</sup>

The purpose of this book is to offer judges of the Court and counsel appearing before them a tool known as a ‘legal methodology’ for interpreting

<sup>3</sup> PM Wald, Interview for The Third Branch (2002), [www.uscourts.gov/News/TheThirdBranch/02-03-01/An\\_Interview\\_with\\_Judge\\_Patricia\\_Wald.aspx](http://www.uscourts.gov/News/TheThirdBranch/02-03-01/An_Interview_with_Judge_Patricia_Wald.aspx), accessed 23 April 2014.

<sup>4</sup> Report of the International Criminal Court to the UN General Assembly (13 August 2013), UN Doc. A/68/314, 2, 4; The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, ‘Status of Ratification and Implementation’, <http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/>, accessed 23 April 2014.

<sup>5</sup> JR Bolton, former Under Secretary for Arms Control and International Security, ‘The United States and the International Criminal Court’, Remarks to the Federalist Society in Washington, DC, 2002, [www.iccnw.org/documents/USBoltonFedSociety14Nov02.pdf](http://www.iccnw.org/documents/USBoltonFedSociety14Nov02.pdf), accessed 2 November 2013.

the definitions of crimes that fall within the Court's jurisdiction. The Rome Statute of the International Criminal Court (Rome Statute or Statute) grants the Court jurisdiction to hear cases of genocide, other crimes against humanity, war crimes and, once States Parties activate the Court's jurisdiction for this crime not earlier than 2017, aggression.<sup>6</sup> These crimes are currently defined in articles 6, 7, 8 and 8 *bis* of the Rome Statute.<sup>7</sup> These provisions resemble a criminal code of sorts. Part III of the Statute sets out general principles of criminal law, and articles 55, 66 and 67 contain various due process guarantees for individuals. Other parts of the Rome Statute deal with diverse subject matter. For example, part IV is concerned with the composition and administration of the Court, part IX with international cooperation and judicial assistance, part X with enforcement and part XII with financing. A method of interpretation for these other parts of the Rome Statute might well differ from anything developed for crimes in the Rome Statute and be informed *inter alia* by international institutional law.

To understand the exact scope of this study and its import, this introductory Chapter will set out the following: (1) a working definition of interpretation; (2) sources of interpretive problems; (3) a working definition of legal methodology; (4) an explanation of the method for developing this methodology; (5) the practical benefits of this study; and (6) how to use this book.

## 1.2 Interpretation

In this section and the one that follows, a working definition of 'interpretation' will be introduced in three stages. First, the concept of operative interpretation will be defined. Second, this concept will be distinguished from gap filling and other judicial responsibilities. Finally, the line between operative interpretation and gap filling will be brought into sharper relief by introducing the reader to all of the interpretive problems that are covered by this study.

### 1.2.1 Operative interpretation

Every time a court publicly expresses its view on how a legal text should be construed, it engages in the act of interpretation.<sup>8</sup> Recognizing that no universally accepted legal definition of interpretation exists, the following definition of 'operative interpretation' will be adopted in this study:

<sup>6</sup> Article 5, Rome Statute for the Establishment of the International Criminal Court, 2187 UNTS 90 (adopted 17 July 1998, entered into force 1 July 2002).

<sup>7</sup> See also First Review Conference of the Rome Statute, Official Records, Resolution on the Crime of Aggression (adopted 11 June 2010) RC/Res.6, [www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf), accessed 2 November 2013.

<sup>8</sup> Z Bankowski, DN MacCormick, RS Summers and J Wróblewski, 'On Method and Methodology' in DN MacCormick and RS Summers (eds.), *Interpreting Statutes: A Comparative Study* (Ashgate 1991) 9, 12.