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978-1-107-06772-1 - Interpreting Crimes in the Rome Statute of the International Criminal Court

Leena Grover

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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).

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For all who toil to nurture the international criminal
justice enterprise

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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.¹

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

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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

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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

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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-Hussein 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

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