INDIVIDUAL CRIMINAL LIABILITY FOR THE INTERNATIONAL CRIME OF AGGRESSION

Gerhard Kemp
University of Stellenbosch
TABLE OF CONTENTS

FOREWORD .......................................................................................... v

ACKNOWLEDGEMENTS .................................................................. vii

LIST OF ABBREVIATIONS .......................................................... xvii

PART I
INTRODUCTION AND FRAMEWORK OF ANALYSIS ......................... 1

INTRODUCTION .................................................................................. 3

1. Research problem, rationale, and demarcation .............................. 3
   1.1. Research problem and rationale ........................................... 3
   1.2. *Jus ad bellum* and *jus in bello* ......................................... 4
   1.3. The criminalisation of international aggression .................... 5

2. Methodology .................................................................................. 8

3. Key concepts and debates ............................................................. 9
   3.1. The main features and foundations of the evolving system of
        international criminal law .................................................. 9
      3.1.1. The international community’s reaction to atrocities ....... 9
      3.1.2. Individual criminal liability ........................................... 10
      3.1.3. The importance of the principle of legality .................... 12
   3.2. State sovereignty .................................................................. 14

PART II
COLLECTIVE SECURITY AND THE JUS CONTRA BELLUM ................... 17

CHAPTER I
AGGRESSION IN THE CONTEXT OF COLLECTIVE SECURITY ........... 19

1. Collective security as a means to promote and sustain international
   peace and security ...................................................................... 19
   1.1. The Uniting for Peace Resolution ....................................... 21
Table of Contents

1.1.1. The Uniting for Peace Resolution and the Wall in the Occupied Palestinian Territory case ........................................ 23

2. Collective security and the constitutionalisation of the international system ......................................................... 24

3. The theory of collective security .................................................. 26
   3.1. Liberal theory of international relations and governance ........ 26
   3.2. Liberalism and realist critique ....................................... 28

4. The features of the present collective security system ............... 29
   4.1. The legacy of the League of Nations ............................... 29
   4.2. The United Nations as principal embodiment of collective security ................................................................. 31
   4.3. Collective security and regional security arrangements .......... 39
      4.3.1. The notion of regional self-defence and the evolving role of NATO ......................................................... 39
      4.3.2. Regional security arrangements under Article 52 of the UN Charter .................................................. 41
      4.3.3. The African Union (AU) as regional security organisation ................................................................. 43

5. Concluding remarks ............................................................... 45

CHAPTER II
FROM JUS AD BELLUM TO JUS CONTRA BELLUM: THE PROHIBITION OF THE USE OF FORCE IN NORMATIVE AND INSTITUTIONAL PERSPECTIVE ........................................... 47

1. Introduction: The shift from *jus ad bellum* to *jus contra bellum* ........ 47

2. The prohibition of the use of force as a peremptory norm in international law ......................................................... 48

3. The prohibition of the use of force in institutional perspective ........ 49

4. The role of the General Assembly in relation to UN Charter provisions on the use of force ........................................... 52

5. A brief overview of the content of the prohibition of the use of force, and some developments that might affect the interpretation of this prohibition .......................................................... 55
   5.1. An evolving concept of self-defence? ............................... 57
      5.1.1. The use of force and the ‘war on terror(ism)’ .......... 59
   5.2. The notion of humanitarian intervention .......................... 64
   5.3. The responsibility to protect (‘R2P’) ............................... 68

6. Concluding remarks ............................................................... 69
# Table of Contents

**PART III**

**THE CRIMINALISATION OF AGGRESSION** ................................. 71

**CHAPTER III**

**FROM JUS CONTRA BELLUM TO THE CRIMINALISATION OF AGGRESSION** ........................................ 73

1. Introduction ................................................................. 73
2. Precursors to *Nuremberg* and *Tokyo*: Historical attempts to establish individual criminal liability for the unlawful use of force ........................................ 74
   2.1. The debate: Should states or individuals be held criminally liable for crimes under international law? ........................................ 75
   2.2. Pre-Nuremberg efforts to establish individual criminal liability for the international crime of aggression ........................................ 79
3. The importance and meaning of the *Nuremberg*-precedent ............... 81
   3.1. The Charter of the IMT Nuremberg ........................................ 82
      3.1.1. A legislative history of the crime of aggression under the Nuremberg Charter ........................................ 85
   3.2. Judgment at Nuremberg ........................................ 89
      3.2.1. Political and legal problems at Nuremberg: Legality, foreign policy and Allied ‘complicity’ ........................................ 91
4. The judgment of the Tokyo Tribunal (IMTFE) ........................................ 94
5. The proceedings in occupied Germany under the Control Council Laws ........................................ 98
6. Concluding remarks ......................................................... 100

**CHAPTER IV**

**THE 'LEGACY OF NUREMBERG': ESTABLISHING INDIVIDUAL CRIMINAL LIABILITY FOR THE CRIME OF AGGRESSION** .............. 103

1. Introduction ................................................................ 103
2. Efforts to consolidate the jurisprudential legacy of Nuremberg and Tokyo ........................................ 104
   2.1. Creating a new international legal order: The UN Charter and the Nuremberg Principles ........................................ 104
   2.2. Building on the Nuremberg Principles: The further work of the International Law Commission: Searching for a definition of aggression ........................................ 108
      2.2.2. The Draft Code of Crimes against the Peace and Security of Mankind (1991) ........................................ 111
2.2.3. The Draft Code of Crimes against the Peace and Security of Mankind (1996) .................................................. 115
2.3. The UN General Assembly ‘Consensus Definition’ of Aggression (1974) ......................................................... 116
  2.3.1. The Definition in perspective ........................................ 116
  2.3.2. Some observations on the usefulness of the Definition from an international criminal law perspective: Elements of criminal liability .................................................. 120
    a. Actus reus ....................................................... 120
    b. Mens rea ....................................................... 121
3. Concluding remarks: Attempts to define aggression in the light of the Nuremberg legacy ........................................ 122

PART IV
THE CRIME OF AGGRESSION AND NATIONAL LEGAL SYSTEMS .... 125

CHAPTER V
NATIONAL COURTS AND THE PROSECUTION OF AGGRESSION ... 127
1. Introduction: The relationship between international (criminal) law and national law ........................................ 127
  1.1. The monism/dualism debate ........................................ 131
  1.2. International law in South Africa (considering Roman-Dutch, English and recent constitutional law) .................. 132
  1.3. The application of international criminal law in national courts ................................................................. 134
    1.3.1. The theoretical framework: Incorporation and transformation of treaties .................................................. 134
    1.3.2. In the absence of statutory law on aggression: Possibilities presented by customary international law ................. 137
    1.3.3. Proving custom, and the customary status of aggression as a crime under international law .......................... 138
    1.3.4. The elements of the crime of aggression under customary international law .................................................. 144
    1.3.5. Prosecuting crimes under customary international law in South African courts .......................................... 149
      a. The legality principle versus the application of customary international (criminal) law in South African courts ...... 151
1.3.6. Case study: The application of customary international (criminal) law in English law, with specific reference to the crime of aggression ........................................... 156

2. Prosecuting the crime of aggression in national courts, state sovereignty and the Act of State doctrine ................................................................. 159

3. Application of international criminal law in the context of the universality principle, or universal jurisdiction ............................................. 165
   3.1. Prosecution of international crimes on the basis of universal jurisdiction ............................................................................................................. 165
   3.1.2. The Arrest Warrant case (DRC v Belgium) before the ICJ ................................................................. 168
   3.1.3. The notion of universal jurisdiction in the wake of DRC v Belgium ................................................................. 170
   3.1.4. Case study: Universal jurisdiction in Spain: Law and legality................................................................................................. 177

4. The impact of immunities on the application of international criminal law in national courts ................................................................. 179

5. Concluding remarks ................................................................. 182

PART V
THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION ................................................................. 183

CHAPTER VI
THE INCLUSION OF AGGRESSION IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ................................................................. 185

1. Introduction: The International Criminal Court ................................................................. 185
   1.1. The importance of the principle of complementarity ................................................................. 187
   1.2. The risk of politicised trials or abuse of process ................................................................. 188
   1.3. The role of the ICC in international peace and security ................................................................. 189

   2.1. The road(s) to Rome ................................................................................................................................. 190
   2.2. The drafting history of the Rome Statute with respect to the crime of aggression ................................................................................................................................. 194
   2.2.1. An overview of some of the main concerns at the Diplomatic Conference in Rome ................................................................................................................................. 195
2.2.2. Inclusion of the crime of aggression: The compromise text of Article 5 ........................................ 203

3. The road ahead: The quest to draft a definition of aggression; and conditions under which the ICC can exercise jurisdiction over the crime of aggression ........................................ 204

3.1. The context: Political and criminal justice responses to international aggression ..................................... 204

3.2. The Special Working Group on the Crime of Aggression ....... 206

CHAPTER VII
DRAFTING AND DIPLOMACY: THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION ........................................ 207

1. The process to adopt a definition of aggression and conditions for the exercise of jurisdiction by the ICC ............ 207

1.1. In the aftermath of the Rome Diplomatic Conference:
   The proposals at the Preparatory Commission ............... 207

1.2. The Assembly of States Parties’ Special Working Group on the Crime of Aggression .......................... 208

2. The main proposals emerging from the Special Working Group on Aggression ........................................ 209

2.1. The crime of aggression: Two approaches taken at the Special Working Group ...................................... 209

2.2. Defining the conduct of the individual ........................... 211

2.2.1. Variant (a): The differentiated approach ..................... 212

2.2.2. Variant (b): The ‘monistic’ approach ....................... 216

2.3. The act of aggression and the conduct of the state ............. 218

2.4. Conditions for the exercise of jurisdiction by the ICC ....... 222

2.4.1. The role of the Security Council .............................. 222

2.4.2. Procedural considerations ...................................... 225

   a. Security Council determination as a condition for the exercise of ICC jurisdiction .............................. 225

   b. Procedural options in the absence of a Security Council determination ............................ 227

2.5. Consolidation and refinement: The proposed amendments to the Rome Statute, and the draft elements of the crime of aggression (November 2009) ........................................ 231

2.5.1. ‘Crime’/’act’/’gravity’ ........................................ 234

2.5.2. The mental element, and the element of unlawfulness ... 235

2.5.3. The list of acts of aggression ................................. 235

2.5.4. Conditions for the exercise of jurisdiction .................. 236
Table of Contents

2.5.5. Aggression as a leadership crime .......................... 236
2.5.6. The elements of the crime of aggression, in particular
the manifest nature of the violation of the Charter of the
United Nations ................................................. 237

PART VI
CONCLUSION AND SUBMISSIONS ........................... 239

CHAPTER VIII
A PROPOSED FRAMEWORK FOR INDIVIDUAL CRIMINAL
LIABILITY FOR THE INTERNATIONAL CRIME OF AGGRESSION ... 241

1. Aggression in historical, institutional and legal perspective ........ 241
   1.1. The core crime of aggression .................................. 241
   1.2. Expanding the crime of aggression: ‘Acts of aggression’ (short
        of ‘war’) affecting interests other than the international
        community’s responses to ‘aggressive war’ .................... 244
        1.2.1. A shift from war to non-war armed conflicts ............ 244
        1.2.2. A rational basis for the criminalisation of aggression .... 245

2. Submission on the elements of the ‘crime of aggression’ for purposes
   of ICC jurisdiction ............................................. 248
   2.1. War of aggression ............................................. 249
   2.2. Other ‘acts of aggression’ .................................... 249
   2.3. The subjective element: Mens rea ................................ 251

3. Submission on the conditions for the exercise of jurisdiction by
   the ICC over the crime of aggression ................................ 252
   3.1. Should the Security Council play a role? ........................ 252

4. Prosecuting the crime of aggression in national courts ............... 254

5. Concluding remarks .............................................. 255

CASE REGISTER .............................................. 257

BIBLIOGRAPHY ............................................ 261