INDIVIDUAL CRIMINAL LIABILITY FOR THE INTERNATIONAL CRIME OF AGGRESSION

Gerhard KEMP
University of Stellenbosch



TABLE OF CONTENTS

FC	REWORD
ΑC	KNOWLEDGEMENTSvi
LIS	ST OF ABBREVIATIONS xvi
	RT I TRODUCTION AND FRAMEWORK OF ANALYSIS
IN	TRODUCTION
 2. 3. 	Research problem, rationale, and demarcation. 1.1. Research problem and rationale 1.2. Jus ad bellum and jus in bello. 1.3. The criminalisation of international aggression Methodology. Key concepts and debates. 3.1. The main features and foundations of the evolving system of international criminal law. 3.1.1. The international community's reaction to atrocities. 3.1.2. Individual criminal liability 3.1.3. The importance of the principle of legality. 1.2. State sovereignty. 1.3.3.
	RT II LLECTIVE SECURITY AND THE JUS CONTRA BELLUM 12
	APTER I GRESSION IN THE CONTEXT OF COLLECTIVE SECURITY 19
1.	Collective security as a means to promote and sustain international peace and security

Intersentia ix

Table of Contents

		1.1.1.	The Uniting for Peace Resolution and the Wall in the			
			Occupied Palestinian Territory case	23		
2.	Colle	ective se	curity and the constitutionalisation of the international			
	syste	m	·	24		
3.	The t	theory o	of collective security	26		
	3.1.	Libera	l theory of international relations and governance	26		
	3.2.		lism and realist critique			
4.	The features of the present collective security system					
	4.1.	The leg	gacy of the League of Nations	29		
	4.2.	The U	nited Nations as principal embodiment of collective			
		securit	ty	31		
	4.3.	Collec	tive 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.	Con	cluding	remarks	45		
FR		US AD I	BELLUM TO JUS CONTRA BELLUM: THE PROHIBITIO	N		
			F FORCE IN NORMATIVE AND INSTITUTIONAL			
PEI	RSPE	CTIVE		47		
1.	Intro	aduction	n: The shift from jus ad bellum to jus contra bellum	. 47		
2.			ion of the use of force as a peremptory norm in			
		-	l law	48		
3.			ion of the use of force in institutional perspective			
4.			he General Assembly in relation to UN Charter			
			n 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					
	5.1.	An ev	olving concept of self-defence?	57		
		5.1.1.	The use of force and the 'war on terror(ism)'			
	5.2.	The no	otion of humanitarian intervention	64		
	5.3.	The re	sponsibility to protect ('R2P')	68		
6.	Con	cluding	remarks	69		

X Intersentia

	RT II. IE CR		LISATION OF AGGRESSION 71			
		ER III US CON	TRA BELLUM TO THE CRIMINALISATION OF			
AG	GRE	SSION.				
1.	Intro	oduction	n 73			
2.	Prec	ursors to	o Nuremberg and Tokyo: Historical attempts to establish			
	indi		riminal liability for the unlawful use of force			
	2.1.		bate: Should states or individuals be held criminally			
			for crimes under international law?			
	2.2.		uremberg efforts to establish individual criminal liability			
_			international crime of aggression			
3.		-	nce and meaning of the Nuremberg-precedent			
	3.1.	3.1.1.	narter of the IMT Nuremberg			
		3.1.1.	Nuremberg Charter			
	3.2.	Iudøm	ent at Nuremberg. 89			
		3.2.1.	Political and legal problems at Nuremberg: Legality,			
			foreign policy and Allied 'complicity'			
4.	The	judgmer	nt of the Tokyo Tribunal (IMTFE)			
5.	The	The proceedings in occupied Germany under the Control				
			rs			
6.	Con	Concluding remarks				
		ER IV GACY (OF NUREMBERG': ESTABLISHING INDIVIDUAL			
			BILITY FOR THE CRIME OF AGGRESSION 103			
1.	Intro	oduction	1 103			
2.	Efforts to consolidate the jurisprudential legacy of Nuremberg					
	and Tokyo					
	2.1.		ng a new international legal order: The UN Charter and aremberg Principles			
	the Nuremberg Principles					
	2.2.	Intern	ng on the Nuremberg Principles: The further work of the ational Law Commission: Searching for a definition of			
		aggres	sion			
		2.2.1.	The Draft Code of Offences against Peace and Security			
		0.0.2	of Mankind (1954)			
		L.L.L.	The Draft Code of Crimes against the Peace and Security of Mankind (1991)			

Intersentia xi

Table of Contents

		2.2.3.	The Draft Code of Crimes against the Peace and			
			Security of Mankind (1996)			
	2.3.	The Ul	N General Assembly 'Consensus Definition' of			
			ssion (1974)			
		2.3.1.	The Definition in perspective			
		2.3.2.	Some observations on the usefulness of the Definition			
			from an international criminal law perspective: Elements			
			of criminal liability			
			a. Actus reus			
			b. Mens rea			
3.	Conc	cluding	remarks: Attempts to define aggression in the light of the			
			legacy 122			
		O	0 7			
PA	RT IV	-				
TE	IE CR	IME OF	AGGRESSION AND NATIONAL LEGAL SYSTEMS 125			
	IAPTI					
NA	TION	IAL CO	URTS AND THE PROSECUTION OF AGGRESSION 127			
1.	Introduction: The relationship between international (criminal)					
	law and national law					
	1.1.		onism/dualism debate			
	1.2.		ational law in South Africa (considering Roman-Dutch,			
	English and recent constitutional law)					
	1.3. The application of international criminal law in national					
	1.5.					
		1.3.1.	The theoretical framework: Incorporation and			
		21012.	transformation of treaties			
		1.3.2.	In the absence of statutory law on aggression: Possibilities			
			presented by customary international law			
		1.3.3.	Proving custom, and the customary status of aggression			
		2.0.0	as a crime under international law			
		1.3.4.	The elements of the crime of aggression under customary			
		2,012	international law			
		1.3.5.	Prosecuting crimes under customary international			
			law in South African courts			
			a. The legality principle versus the application of			
			customary international (criminal) law in South African courts			

xii Intersentia

		1.3.6.	Case study: The application of customary international		
			(criminal) law in English law, with specific reference		
_	_		to the crime of aggression	150	
2.		_	the crime of aggression in national courts, state		
			and the Act of State doctrine	159	
3.	Application of international criminal law in the context of the				
			principle, or universal jurisdiction	165	
	3.1.		ution of international crimes on the basis of universal		
		jurisdi	ction	165	
		3.1.1.	Case study: The Belgian universal jurisdiction law:		
			Principles, practice and politics	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 i	impact o	f immunities on the application of international		
	crim	inal law	in national courts	179	
5.	Cond	cluding i	remarks	182	
PA	RTV				
TH	E INT	TERNAT	TONAL CRIMINAL COURT AND THE		
CR.	ІМЕ (OF AGG	RESSION	183	
CH	APTI	ER VI			
TH	EINC	CLUSIO	N OF AGGRESSION IN THE ROME STATUTE		
OF	THE	INTER	NATIONAL CRIMINAL COURT	185	
_	_				
1.			: The International Criminal Court		
	1.1.		portance of the principle of complementarity		
	1.2.		k of politicised trials or abuse of process		
	1.3.		e of the ICC in international peace and security	189	
2.	An overview of the legislative history of the Rome Statute of the				
	Inter		Criminal Court, 1998		
	2.1.		nd(s) to Rome	190	
	2.2.		afting history of the Rome Statute with respect to the		
			of aggression	194	
		2.2.1.	An overview of some of the main concerns at the		
			Diplomatic Conference in Rome	195	

Intersentia xiii

Table of Contents

		2.2.2.	Inclusion of the crime of aggression: The compromise text of Article 5			
3.	The road ahead: The quest to draft a definition of aggression; and conditions under which the ICC can exercise jurisdiction over the					
	crim		ression			
		interna	tional aggression			
	3.2.		ecial Working Group on the Crime of Aggression 206			
СН	APTI	ER VII				
DR	AFTI	NG AN	D DIPLOMACY: THE SPECIAL WORKING GROUP			
ON	THE	CRIME	OF AGGRESSION 207			
1.			o adopt a definition of aggression and conditions for the			
			risdiction by the ICC			
	1.1.		aftermath of the Rome Diplomatic Conference:			
			oposals at the Preparatory Commission			
	1.2.		sembly of States Parties' Special Working Group on			
_			me of Aggression			
2.	The main proposals emerging from the Special Working Group on					
	-					
	2.1.		me of aggression: Two approaches taken at the Special			
			ng Group			
	2.2.		ng the conduct of the individual			
			Variant (a): The differentiated approach			
			Variant (b): The 'monistic' approach			
	2.3.		of aggression and the conduct of the state			
	2.4.		ions for the exercise of jurisdiction by the ICC \dots 222			
		2.4.1.	The role of the Security Council			
		2.4.2.				
			a. Security Council determination as a condition			
			for the exercise of ICC jurisdiction			
			b. Procedural options in the absence of a Security			
			Council determination			
	2.5.	Conso	lidation and refinement: The proposed amendments			
			Rome Statute, and the draft elements of the crime of			
	aggression (November 2009)					
		2.5.1.	'Crime'/'act'/'gravity'			
		2.5.2.	The mental element, and the element of unlawfulness 235			
		2.5.3.	The list of acts of aggression			
		2.5.4.	Conditions for the exercise of jurisdiction 236			

xiv

	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		
PA	RT VI				
		AND SUBMISSIONS	239		
СН	APTER VIII				
A P	ROPOSED F	FRAMEWORK FOR INDIVIDUAL CRIMINAL			
LIA	BILITY FOI	R THE INTERNATIONAL CRIME OF AGGRESSION \dots 2	41		
1.	Aggression i	in historical, institutional and legal perspective 2	241		
		ore crime of aggression			
	1.2. Expan	ding the crime of aggression: 'Acts of aggression' (short			
	of 'wa	r') affecting interests other than the international			
	comm	unity's responses to 'aggressive war'	44		
	1.2.1.	A shift from war to non-war armed conflicts 2	44		
	1.2.2.	A rational basis for the criminalisation of aggression 2	45		
2.	Submission	on the elements of the 'crime of aggression' for purposes			
	of ICC jurise	diction	48		
	2.1. War o	f aggression	49		
	2.2. Other	'acts of aggression'	49		
	2.3. The su	bjective element: <i>Mens rea</i>	251		
3.	Submission on the conditions for the exercise of jurisdiction by				
	the ICC over	r the crime of aggression	252		
	3.1. Should	d the Security Council play a role?	252		
4.	Prosecuting	the crime of aggression in national courts 2	54		
5.	Concluding	remarks 2	:55		
CA	SE REGISTE	R 2	.57		
BIF	BLIOGRAPH	Y 2	261		

Intersentia XV