

INDIVIDUAL CRIMINAL  
LIABILITY FOR THE  
INTERNATIONAL CRIME  
OF AGGRESSION

Gerhard KEMP

2<sup>nd</sup> edition



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## Individual Criminal Liability for the International Crime of Aggression

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## FOREWORD TO THE SECOND EDITION

The crime of aggression is the criminalisation of the unlawful use of force. This is conduct that has a political dimension by definition and triggers sensitivity in the sense that even the slightest suggestion that the crime has been committed will be hotly debated and may lead to angry reactions. This will certainly be even more the case if it comes to an investigation or prosecution. It is therefore not an easy exercise to embark on writing a monograph on the crime of aggression. Very few books have been published on the extraordinary case of the crime of aggression, which is at the same time an international crime of particular relevance currently and one for which no prosecution has yet taken place. The crime was inserted into the Statute of the International Criminal Court in 2010.

The first edition of this book appeared in 2010 just before the Kampala review conference. The book was well received and frequently used. It played a role in the formulation of the definition of the crime. Gerhard Kemp now surprises the reader with a second edition. This second edition fully incorporates the results of the Kampala conference. It has kept the structure of the first edition to a large extent, but expanded on the newly inserted Articles *8bis*, *15bis* and *15ter* ICC Statute. In addition, the author has included a new Part V on the national and regional prosecution of the crime of aggression. That chapter provides case studies of the two European states that have been the most active in applying universal jurisdiction: Spain and Belgium. These examples demonstrate how disputed the use of universal jurisdiction is. States that do prosecute international crimes do not receive only applause, but must anticipate damage to their international relations or even fear reprisals. As may be expected, this risk is even greater where one state passes judgment on the conduct of another in the crime of aggression.

Gerhard Kemp acknowledges this in Chapter VIII, Concluding remarks: “The complementarity imperative is supposed to make the application of international criminal law before domestic courts the default option of the international criminal justice project. The crime of aggression poses legal and political complexities that put it in a different category than the other core crimes. Its nature as a leadership crime, and the conduct element that is reliant on state conduct, invoke rules and principles of international law that makes prosecution

of the crime of aggression before domestic courts difficult. The lack of actual prosecutions at the national level is proof of this.”

Another welcome extension to the first edition is the discussion of the criminal jurisdiction of the African Court on Justice and Human Rights. The 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights copied the crimes of the ICC Statute, including aggression, into the competence of the African Court. However, this was accompanied by certain immunities for heads of state. The author discusses the consequences of that protocol for the jurisdiction of the ICC.

Professor Gerhard Kemp is a leading South African criminal lawyer who publishes both on South African criminal law and procedure (i.e. *Criminal Law in South Africa* (2012) Oxford University Press, Cape Town) and on international criminal law (i.e. “The Implementation of the Rome Statute in Africa” in Werle, G, Fernandez, L & Vormbaum, M (eds) *Africa and the International Criminal Court – International Criminal Justice Series Vol I* (2014) Asser Press: The Hague & Springer Verlag: Berlin, and as a frequent commentator to the Annotated Leading Cases of International Criminal Tribunals).

The book is most informative in the sense that it provides the reader with the state of affairs of the crime of aggression. But it offers more. The author leads us through the opportunities and risks with the application of the definition of this new crime. The book provides us with an eloquent analysis of the foundations of the crime of aggression. It is critical in the sense that it also identifies the shortcomings of the choices made by the drafters.

The timing of the book is excellent as it appears the year before the ICC obtains jurisdiction over the crime of aggression. I strongly recommend the book as a thoughtful and thought-provoking study which raises important issues for our time.

André KLIP

Professor of criminal law, criminal procedure and the transnational aspects of crime, Maastricht University, the Netherlands

October 2015

## FOREWORD TO THE FIRST EDITION

Aggression has been a hot topic ever since it entered the realm of international criminal justice at the Nuremberg and Tokyo trials after the Second World War. It now belongs to the category of “the international core crimes”, together with war crimes, crimes against humanity and genocide. A – provisional – point of culmination in the legal status of aggression as an international crime is its inclusion in the list of crimes that come within the jurisdiction of the International Criminal Court.

Despite its status as the “supreme international crime”, suggesting that aggression is more serious than the other international crimes, aggression is not an uncontroversial crime. Ever since its appearance, there has been disagreement over its actual meaning. Unlike for war crimes and genocide, no specialised convention for aggression has been adopted after the Second World War. Whereas there seems to be a growing consensus that aggression is prohibited under customary international law, and while it is even an international crime giving rise to individual criminal responsibility, no generally accepted definition of aggression exists as yet.

Professor Kemp’s book is the first comprehensive study of the subject with a focus on individual criminal responsibility. He starts by looking at aggression within the general framework of the collective security system of the United Nations set up after the Second World War, offering a detailed analysis of the various developments leading to the prohibition of the use of force in its normative and institutional perspective. Then follows an in-depth study of various steps leading to the criminalisation of aggression, comprising the transition from a State responsibility-oriented approach towards a greater emphasis on individual criminal responsibility. Hardly any progress has been made after Nuremberg and Tokyo as far as individual criminal responsibility is concerned. While the 1974 General Assembly Resolution defining aggression has a clear focus on State Responsibility, projects oriented towards introducing individual criminal responsibility for this crime did not materialise. None of the International Law Commission’s drafts defining aggression as an international crime made it into a treaty, and very little, if any, national legislation and jurisprudence exist on the “supreme international crime”. The latter is hardly surprising, as there are many legal obstacles and, perhaps more importantly, as it

is highly questionable whether national criminal courts are the adequate forum to try crimes of this nature. As a result, the only possible chance for such crimes to be brought to justice would be before an international criminal court or tribunal. Yet, the fusion of political and criminal justice responses to mass atrocities after the end of the Cold War, as evidenced by the creation of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, have not, as yet, comprised aggression. The Rome Statute for an International Criminal Court may look like a big step forward, yet the drafters fell short of defining the concept. Professor Kemp's study describes in great detail how the question of aggression was treated at Rome and how the drafters came to include aggression in the list of crimes subject to the jurisdiction of the Court, but deferred the definition to a later stage. The last Chapter, offers a number of interesting suggestions and submissions for a framework on individual criminal liability for the crime of aggression.

Professor Kemp, whom I have known as one of my very bright students at the University of Antwerp not so long ago, is a quickly rising star in the firmament of solid young publicists in the field of international criminal law. This study on individual criminal liability for the international crime of aggression shows the author at his best. It offers the reader an excellent guide through the labyrinth of various sources of law that are relevant to comprehend this extremely complex notion on the borderline between public international law and criminal law. Critical observations and constructive suggestions figure throughout the work. The book strikes the right balance between an in-depth analysis and a clear synthesis of the complex issues that are relevant to this very thorny subject, while at the same time presenting them in a format that is pleasant to read. This study on aggression deserves its place on the shelves of academics, practitioners, lawmakers, treaty-makers and all those who are committed to the cause of international criminal justice.

Professor Christine VAN DEN WYNGAERT  
Judge at the ICC  
15 January 2010

## PREFACE

At the time of writing the crises in Syria and Ukraine have gripped the attention of the international media. Both crises caused extensive instability and human misery in some of the most volatile regions of the world. In neither of the two situations the ‘international community’ seemed to be able to find any real solutions. In both situations the use of armed force under international law formed part of the narrative. In Syria’s case some presented the use of force as a *solution* (or at least as part of the solution) in order to stop an immoral and criminal regime from murdering its own people. Others objected to the use of force as a simplistic and prima facie unlawful way to solve a complex situation.<sup>1</sup> In the case of Ukraine the unlawful use of force (including a powerful neighbour’s use of armed force by proxy) was presented as the root *cause of the conflict*.<sup>2</sup>

The UN Charter-based collective security system provides for a strict framework on the prohibition of the use of force. Self-defence and the use of force as per Security Council authorisation are lawful. Other claims to lawfulness, including humanitarian intervention, pre-emptive self-defence and modern versions of the Just War doctrine are not lawful. Thus provides the modern *jus contra bellum* which emerged in the aftermath of the Second World War.

The crime of aggression is the criminalisation of the unlawful use of force. The quest to find a suitable definition for this most opaque of the so-called core crimes resulted in the Kampala Resolution on the Crime of Aggression, which provides for a definition of aggression and for conditions for the exercise of International Criminal Court jurisdiction over the crime of aggression. The drafting, diplomacy and eventual adoption of the package of proposals constituted an achievement in its own right and a worthy monument to the legacy of Nuremberg; the birthplace of modern international criminal law. But there are significant substantive and jurisdictional limitations that render the Kampala Resolution on the Crime of Aggression perhaps more of a sentimental achievement than any real tool in the quest to end impunity for the most serious

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<sup>1</sup> See submissions by Carsten Stahn ‘Syria and the semantics of intervention, aggression and punishment’ 11 *Journal of International Criminal Justice* (2013) 955–977.

<sup>2</sup> For background and analysis see Ireneusz Kaminski ‘International law aspects of the situation in Ukraine’ in Klaus Bachmann and Igor Lyubashenko (eds) *The Maidan Uprising, separatism and foreign intervention* (2014) Peter Lang, Frankfurt am Main, 379–404.

crimes under international law. Having said that, it is also prudent to note that any small measure to end impunity is better than nothing. The open question is whether the ICC will be able to adjudicate the crime of aggression, which is the most political of the core crimes.

National and regional efforts to criminalise and prosecute aggression are part of the legal landscape. The ICC, arguably the single most important player in the international criminal justice project, is not the only player. It should not be, not by legal design and not in terms of good policy. It is however clear that the national and regional efforts to criminalise aggression are even more constrained than the regime provided for in terms of the amendments to the Rome Statute of the International Criminal Court, adopted at Kampala in 2010.

This book describes and analyse pertinent aspects of the complex crime of aggression; a crime for which individuals, in particular individuals in political and military leadership positions, can be held criminally liable. The crime is also rooted in state conduct which is the domain of policy and politics. The inherent tension and awkward co-existence of the *criminal justice response* and the *political response* to the unlawful use of force inform the various chapters in this book. The topic is addressed from an international, regional and comparative perspective with the author's native South Africa as the vantage point.

Gerhard KEMP  
Cape Town  
August 2015



# CONTENTS

<i>Foreword to the Second Edition</i> .....	v
<i>Foreword to the First Edition</i> .....	vii
<i>Preface</i> .....	ix
<i>List of Abbreviations</i> .....	xix

## PART I.

### INTRODUCTION AND FRAMEWORK OF ANALYSIS

<b>Introduction</b> .....	3
1. Research problem, rationale, and demarcation .....	3
1.1. Research problem and rationale .....	3
1.2. <i>Jus ad bellum</i> and <i>jus in bello</i> .....	4
1.3. The criminalisation of international aggression .....	5
2. Key concepts and debates .....	8
2.1 The main features and foundations of the evolving system of international criminal law .....	8
2.1.1. The international community's reaction to atrocities .....	8
2.1.2. Individual criminal liability .....	10
2.1.3. The importance of the principle of legality .....	12
2.2. State sovereignty .....	13

## PART II.

### COLLECTIVE SECURITY AND THE *JUS CONTRA BELLUM*

#### Chapter I.

<b>Aggression in the Context of Collective Security</b> .....	17
1. Collective security as a means to promote and sustain international peace and security .....	17
1.1. The Uniting for Peace Resolution .....	19
1.1.1. The Uniting for Peace Resolution and the Wall in the Occupied Palestinian Territory case .....	21
2. Collective security and the constitutionalisation of the international system .....	22

3.	The theory of collective security . . . . .	23
3.1.	Liberal theory of international relations and governance. . . . .	24
3.2.	Liberalism and realist critique. . . . .	25
4.	The features of the present collective security system . . . . .	26
4.1.	The legacy of the League of Nations . . . . .	26
4.2.	The United Nations as principal embodiment of collective security . . . . .	28
4.3.	Collective security and regional security arrangements . . . . .	36
4.3.1.	The notion of regional self-defence and the evolving role of NATO . . . . .	36
4.3.2.	Regional security arrangements under Article 52 of the UN Charter . . . . .	39
4.3.3.	The African Union as regional security organisation . . . . .	40
5.	Concluding remarks . . . . .	43

**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 <i>jus ad bellum</i> to <i>jus contra bellum</i> . . . . .	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)’ . . . . .	60
5.2.	The notion of humanitarian intervention . . . . .	64
5.3.	The responsibility to protect. . . . .	69
6.	Concluding remarks . . . . .	70

**PART III.**

**THE CRIMINALISATION OF AGGRESSION**

**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. . . . .	81
3.1.1.	A legislative history of the crime of aggression under the Nuremberg Charter . . . . .	84
3.2.	Judgment at Nuremberg. . . . .	88
3.2.1.	Political and legal problems at Nuremberg: Legality, foreign policy and Allied ‘complicity’ . . . . .	90
4.	The judgment of the Tokyo Tribunal . . . . .	93
5.	The proceedings in occupied Germany under the Control Council Laws . . . . .	97
6.	Concluding remarks . . . . .	99

**Chapter IV.**

**The ‘Legacy of Nuremberg’: Establishing Individual Criminal Liability for the Crime of Aggression . . . . . 101**

1.	Introduction . . . . .	101
2.	Efforts to consolidate the jurisprudential legacy of Nuremberg and Tokyo . . . . .	102
2.1.	Creating a new international legal order: The UN Charter and the Nuremberg Principles. . . . .	102
2.2.	Building on the Nuremberg Principles: The further work of the International Law Commission: Searching for a definition of aggression . . . . .	106
2.2.1.	The Draft Code of Offences against Peace and Security of Mankind (1954). . . . .	106
2.2.2.	The Draft Code of Crimes against the Peace and Security of Mankind (1991). . . . .	108
2.2.3.	The Draft Code of Crimes against the Peace and Security of Mankind (1996). . . . .	112
2.3.	The UN General Assembly ‘Consensus Definition’ of Aggression (1974). . . . .	114
2.3.1.	The Definition in perspective . . . . .	114
2.3.2.	Some observations on the usefulness of the Definition from an international criminal law perspective: Elements of criminal liability . . . . .	118
2.3.2.1.	<i>Actus reus</i> . . . . .	118
2.3.2.2.	<i>Mens rea</i> . . . . .	119
3.	Concluding remarks: Attempts to define aggression in the light of the Nuremberg legacy. . . . .	120

PART IV.  
THE INTERNATIONAL CRIMINAL COURT AND THE CRIME  
OF AGGRESSION

**Chapter V.**  
**The Inclusion of Aggression in the Rome Statute of the International  
Criminal Court . . . . . 125**

1. Introduction: The International Criminal Court . . . . . 125

    1.1. The importance of the principle of complementarity . . . . . 127

    1.2. The risk of politicised trials or abuse of process . . . . . 128

    1.3. The role of the ICC in international peace and security . . . . . 129

2. An overview of the legislative history of the Rome Statute  
of the International Criminal Court, 1998 . . . . . 130

    2.1. The road(s) to Rome . . . . . 130

    2.2. The drafting history of the Rome Statute with respect  
to the crime of aggression . . . . . 134

        2.2.1. An overview of some of the main concerns at the  
Diplomatic Conference in Rome . . . . . 135

        2.2.2. Inclusion of the crime of aggression, The compromise  
text of Article 5 . . . . . 143

3. The quest to draft a definition of aggression, and conditions  
under which the ICC can exercise jurisdiction over the crime  
of aggression . . . . . 144

    3.1. The context: Political and criminal justice responses  
to international aggression . . . . . 144

    3.2. The Special Working Group on the Crime of Aggression . . . . . 146

**Chapter VI.**  
**Drafting and Diplomacy: The Special Working Group on the Crime  
of Aggression . . . . . 147**

1. The process to adopt a definition of aggression and conditions  
for the exercise of jurisdiction by the ICC . . . . . 147

    1.1. In the aftermath of the Rome Diplomatic Conference:  
The proposals at the Preparatory Commission . . . . . 147

    1.2. The Assembly of States Parties' Special Working Group  
on the Crime of Aggression . . . . . 148

2. The main proposals emerging from the Special Working Group  
on Aggression . . . . . 149

    2.1. The crime of aggression: Two approaches taken at the Special  
Working Group . . . . . 149

    2.2. Defining the conduct of the individual . . . . . 151

2.2.1. Variant (a): The differentiated approach . . . . .	151
2.2.2. Variant (b): The ‘monistic’ approach . . . . .	156
2.3. The act of aggression and the conduct of the state . . . . .	157
2.4. Conditions for the exercise of jurisdiction by the ICC . . . . .	161
2.4.1. The role of the Security Council . . . . .	161
2.4.2. Procedural considerations . . . . .	164
2.4.2.1. Security Council determination as a condition for the exercise of ICC jurisdiction. . . . .	164
2.4.2.2. Procedural options in the absence of a Security Council determination. . . . .	166
2.5. Consolidation and refinement: The proposed amendments to the Rome Statute, and the draft elements of the crime of aggression (November 2009) . . . . .	169
2.5.1. ‘Crime’/‘act’/‘gravity’ . . . . .	172
2.5.2. The mental element, and the element of unlawfulness . . . . .	173
2.5.3. The list of acts of aggression . . . . .	173
2.5.4. Conditions for the exercise of jurisdiction . . . . .	174
2.5.5. Aggression as a leadership crime . . . . .	174
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 . . . . .	174

## Chapter VII.

<b>The Crime of Aggression under the Rome Statute of the ICC . . . . .</b>	<b>177</b>
1. The Kampala Review Conference . . . . .	177
2. The definition of aggression . . . . .	178
2.1. The state act of aggression . . . . .	178
2.2. The crime of aggression . . . . .	179
3. Conditions for the exercise of ICC jurisdiction over the crime of aggression . . . . .	181
3.1. Security Council referrals. . . . .	182
3.2. State referrals and <i>proprio motu</i> investigations by the ICC Prosecutor . . . . .	182
4. Entry into force of the aggression amendments . . . . .	184
5. Evaluating the crime of aggression under the Rome Statute . . . . .	185
5.1. The crime of aggression, its dual nature, and the threshold clause: Conduct and mental elements considered . . . . .	186
5.2. The conduct element: Extremely broad, not broad enough, or just right? . . . . .	187
5.3. Acts of preparation . . . . .	188

PART V.  
 NATIONAL AND REGIONAL CRIMINALISATION AND PROSECUTION  
 OF THE CRIME OF AGGRESSION

**Chapter VIII.**

**National and Regional Prosecution of the Crime of Aggression . . . . . 191**

1.	The crime of aggression and the complementarity imperative . . . . .	191
2.	The relationship between international (criminal) law and national law. . . . .	192
2.1.	The monism/dualism debate . . . . .	196
2.2.	International law in South Africa (considering Roman-Dutch, English and recent constitutional law). . . . .	197
2.3.	The application of international criminal law in national courts. . . . .	199
2.3.1.	The theoretical framework: Incorporation and transformation of treaties . . . . .	199
2.3.2.	In the absence of statutory law on aggression: Possibilities presented by customary international law . . . . .	202
2.3.3.	Proving custom, and the customary status of aggression as a crime under international law . . . . .	203
2.3.4.	The elements of the crime of aggression under customary international law . . . . .	210
2.3.5.	Prosecuting crimes under customary international law in South African courts. . . . .	215
2.3.5.1.	The legality principle versus the application of customary international (criminal) law in South African courts . . . . .	217
2.3.6.	Case study: The application of customary international (criminal) law in English law, with specific reference to the crime of aggression . . . . .	222
2.4.	Prosecuting the crime of aggression in national courts, state sovereignty and the Act of State doctrine . . . . .	226
3.	Application of international criminal law in the context of the universality principle, or universal jurisdiction . . . . .	231
3.1.	Prosecution of international crimes on the basis of universal jurisdiction . . . . .	231
3.1.1.	Case study: The Belgian universal jurisdiction law: Principles, practice and politics . . . . .	231
3.1.2.	The <i>Arrest Warrant</i> case ( <i>DRC v Belgium</i> ) before the ICJ . . . . .	234
3.1.3.	The notion of universal jurisdiction in the wake of <i>DRC v Belgium</i> . . . . .	236

3.1.4. Case study: Universal jurisdiction in Spain: Law and legality .....	243
3.1.5. South Africa and universal jurisdiction .....	245
3.1.6. The impact of immunities on the application of international criminal law in national courts .....	248
4. Regional courts and the prosecution of the crime of aggression .....	251
4.1. The criminal jurisdiction of the African Court on Justice and Human Rights .....	251
4.2. Jurisdiction over the crime of aggression .....	253
4.3. The impact of immunities .....	255
5. Concluding remarks .....	256

## PART VI.

## ANNEXES

<i>Annex I. Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression .....</i>	259
<i>Annex II. Amendments to the Elements of Crimes, Rome Statute of the International Criminal Court .....</i>	263
<i>Annex III. Understandings regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression. ....</i>	265
<i>Case Register .....</i>	267
<i>Bibliography .....</i>	271

## LIST OF ABBREVIATIONS

AIDP	Association Internationale de Droit Penal
AJIL	The American Journal of International Law
All ER	All England Law Reports
ASIL	American Society of International Law
AU	African Union
BC Int'l & Comp L Rev	Boston College International and Comparative Law Review
ECC	Extraordinary Chambers of Cambodia
ECOWAS	Economic Community of West African States
EJIL	European Journal on International Law
EU	European Union
Fordham Int'l LJ	Fordham International Law Journal
GA	(United Nations) General Assembly
GG	Government Gazette (South Africa)
ICC	International Criminal Court
ICJ	International Court of Justice
ICLQ	The International and Comparative Law Quarterly
ICLR	International Criminal Law Review
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East at Tokyo
ILR	Israel Law Reports
IST	Iraqi Special Tribunal
JICJ	Journal of International Criminal Justice
LJIL	Leiden Journal of International Law
NAM	Non-Alignment Movement
NATO	North Atlantic Treaty Organization
NILR	Netherlands International Law Review
NLR	New Left Review



NYIL	Netherlands Yearbook of International Law
OAU	Organisation for African Unity
PrepCom	Preparatory Committee on the Establishment of an International Criminal Court
SACJ	South African Journal of Criminal Justice
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAYIL	South African Yearbook of International Law
SC/UNSC	United Nations Security Council
SLSC	Sierra Leone Special Court
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaags Romeins-Hollandse Reg
UBLJ	University of Botswana Law Journal
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
USA	United States of America