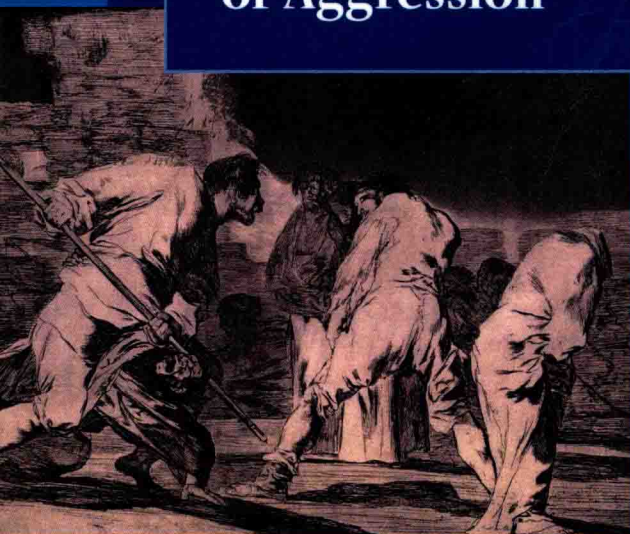


Gerhard Kemp

Individual Criminal Liability for the International Crime of Aggression



2nd edition



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INDIVIDUAL CRIMINAL LIABILITY FOR THE INTERNATIONAL CRIME OF AGGRESSION

Gerhard KEMP

2nd edition



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INDIVIDUAL CRIMINAL LIABILITY FOR THE INTERNATIONAL CRIME OF AGGRESSION

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 8*bis*, 15*bis* and 15*ter* 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 indepth 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.¹ 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*.²

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

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

² 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

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 |

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