Making Aggression a Crime Under Domestic Law

On the Legislative Implementation of Article 8bis of the ICC Statute



Contents

1	Intr	oductio	on	1
	1.1	Releva	ance of the Topic	2
	1.2		Structure and Approach of this Book	4
	1.3	Termi	nology	6
		1.3.1	Crime of Aggression	6
		1.3.2	Domestic Implementation	7
	1.4	The P	ractice of the Implementers of the Kampala Amendments	7
	1.5	The Pa	articularities of the Crime of Aggression for the Purpose	
		of Imp	plementation	9
		1.5.1	Leadership Crime and Based on a State Act	9
		1.5.2	Restricted Jurisdictional Regime of the International	
			Criminal Court	10
		1.5.3	Limited State Practice	10
	1.6	Overv	iew of the Chapters	11
	Refe	erences		14
2	An	Obligat	ion to Criminalize Aggression Under Domestic Law?	17
	2.1	Introd	uction	18
		2.1.1	Obligation and Compliance	20
		2.1.2	Hardness and Softness of Law: Binding Form,	
			Precision and Enforcement	22
		2.1.3	Working Definition of "Aggression"	24
	2.2	Dome	stic Constitutional Law	24
		2.2.1	Hard Legal Obligation Under Constitutional Law	
			to Criminalize Aggression	24
		2.2.2	A Fortiori Obligation from the Constitutional	
			Prohibition of Incitement to War or Propaganda for War	26
		2.2.3	Inference from Other Pacifist Constitutional Provisions	28
		2.2.4	Inference from the Duty to Protect Fundamental Rights	29
		2.2.5	Conclusion to Domestic Constitutional Law	31

x Contents

	2.3	ICC S	Statute	32
		2.3.1	No Explicit Legal Obligation to Criminalize	33
		2.3.2	Implied Legal Obligation to Criminalize Due	
			to the Principle of Complementarity?	36
		2.3.3	Coercive Potential of Complementarity Irrespective	
			of an Obligation: The Threat of Judicial Interventions	41
		2.3.4	Conclusion to the ICC Statute	46
	2.4	Intern	ational Human Rights Law	48
		2.4.1	A Fortiori Obligation from the Obligation to Prohibit	
			Propaganda for War Under Article 20(1) of the ICCPR?	50
		2.4.2	From the Obligation to Ensure Human Rights	
			to the Obligation to Criminalize Serious Violations	51
		2.4.3	Human Rights Relevance of the Crime of Aggression	53
		2.4.4	Territorial Scope of the Obligation to Criminalize	
			Aggression	60
		2.4.5	Conclusion to International Human Rights Law	64
	2.5	Custo	mary International Law	66
		2.5.1	The Classical Inductive Approach: State Practice	
			and Opinio Iuris	66
		2.5.2	The Relationship Between the Obligation	
			to Criminalize, the Obligation to Exercise Jurisdiction	
			and the Obligation to Prosecute (or Extradite)	67
		2.5.3	Limited Aggression-Specific State Practice Supported	
			by Opinio Iuris on the Obligation to Criminalize	68
		2.5.4	No General Customary Obligation to Criminalize	
			"Crimes Under International Law" Under Domestic	
			Law	74
		2.5.5	Conclusion to Customary International Law	75
	2.6	Ius Co	ogens	76
		2.6.1	Definition and Characteristics of a <i>Ius Cogens</i> Norm	77
		2.6.2	Methodological Difference of the <i>Ius Cogens</i> Avenue	
			in Comparison to the Customary International Law	
			Avenue	77
		2.6.3	Aggression as a Crime Based on a <i>Ius Cogens</i> Norm	78
		2.6.4	Effects of a <i>Ius Cogens</i> Norm: An Obligation	
			to (Extradite or) Prosecute and an Inherent Obligation	
			to Criminalize?	82
		2.6.5	Conclusion to Ius Cogens	87
	2.7		usion	89
	Refe	rences		90
3	The	Core V	Wrong of the Crime of Aggression	105
			uction	106
			eaching the "Core Wrong" of a Crime	107

Contents xi

	3.2.1	The Offense Definition and the "International	
		Element"	107
	3.2.2	The Theory on Protected Legal Interests	
		(Rechtsgüterlehre)	109
	3.2.3	Protected Legal Interests and Type of Attack	110
3.3	State S	Sovereignty as a Protected Legal Interest	112
	3.3.1	The State Interests Mentioned in Article 8bis(2)	
		of the ICC Statute	112
	3.3.2	The Underlying Acts Against Another State in Article	
		8bis(2) of the ICC Statute	113
	3.3.3	The Need to Move Beyond the Bilateral Sphere	114
3.4		ational Peace as a Protected Legal Interest	114
511	3.4.1	The Multifaceted Concept of Peace	115
	3.4.2	The Preambular Presumption of the ICC Statute:	110
	3.4.2	Peace as an Overarching Protected Legal Interest	116
	3.4.3	The Underlying Prohibition of the Use of Force	110
	5.7.5	as a Means to Protect Peace	116
	3.4.4	The Crime of Aggression as the Post-Nuremberg	110
	3,7,7	Version of the "Crime Against Peace"	118
3.5	Individ	dual Interests as Protected Legal Interests	119
3.5	3.5.1	The Protection of Individual Interests by Crimes	113
	3.3.1	Under International Law?	120
	252	The Humanization of International Law	120
	3.5.2		122
	3.5.3	Humanized Sovereignty: The Protection of State	
		Sovereignty to Protect Rights of Those Living Within	107
	0.5.4	the State	125
	3.5.4	The "Manifest" Threshold Cannot be Fulfilled	405
		Without Affecting Individuals	127
	3.5.5	Lower Level of Protection of Individual Interests	
		by Triggering International Humanitarian Law	133
	3.5.6	Conclusion to Individual Interests as Protected Legal	
		Interests	136
3.6		ype of Attack on the Protected Legal Interests	138
	3.6.1	Use of Armed Force by a State	138
	3.6.2	The Aggressive Use of Armed Force: A Manifest	
		Violation of the <i>Ius ad Bellum</i>	140
	3.6.3	Committed by Persons from the Leadership Circle	
		of a State	144
	3.6.4	Conclusion to the Type of Attack	147
3.7	Conclu	usion	148
- 4			

xii Contents

4	Ma	pping t	he Normative Gaps Under Domestic Law	159
	4.1	Introd	luction	160
		4.1.1	An Illustration of the Limits of the "Minimalist	
			Approach" to Implementation	16
		4.1.2	Types of Criminal Offenses Under Domestic Lex Lata	162
		4.1.3	The Reference and the Comparative Factors	
			for the Gap Analysis	163
		4.1.4	No Normative Gaps Due to the Direct Applicability	
			of Aggression as a "Crime Under International Law"?	164
	4.2	Trease	on	165
		4.2.1	General Understanding of Treason	165
		4.2.2	Protected Interests: "Oldest Crime Against the State"	166
		4.2.3	Type of Attack: Force of a Certain Threshold, Attack	
			"from Within", Owing Allegiance	166
	4.3	Other	Ordinary Criminal Offenses	167
		4.3.1	Criminal Offenses that Capture Individual Acts	
			that Make Up the State Act of Aggression	168
		4.3.2	Protected Interests: Primarily Individual Interests	169
		4.3.3	Type of Attack: No Integration in a State Act or of	
			Ius ad Bellum Considerations	169
		4.3.4	The Combatant's Privilege as an Obstacle?	169
		4.3.5	Conclusion to Other Ordinary Criminal Offenses	172
	4.4	The "	Preliminary Offenses" of Incitement to War	
		and P	ropaganda for War as Informed by the ICCPR	173
		4.4.1	General Understanding of Incitement to War	
			and Propaganda for War	173
		4.4.2	Protected Interests: In Principle the Same as Those	
			Violated by War	174
		4.4.3	Type of Attack: Preliminary Crime, Communicative	
			Conduct, No Leadership Clause	175
	4.5		Crime of Aggressive War Modelled on the Nuremberg	
		and To	okyo Precedents	177
		4.5.1	General Understanding	177
		4.5.2	Protected Legal Interests: In Principle the Same	
			as Those Protected by the Kampala Definition	178
	4.6		cide, Crimes Against Humanity and War Crimes	
			Products of Crimes of Aggression	180
	4.7		of Aggression as a War Crime: "Excessive Attack"	
			ateway for Ius ad Bellum Considerations?	182
		4.7.1	General Understanding	183
		4.7.2	Protected Interests: Civilians and International Peace	184
		4.7.3	Type of Attack: <i>Ius ad Bellum</i> Violation Reflected	
			in "Excessive Attack"?	185
		4.7.4	Conclusion to the Crime of Aggression as a War Crime	100

Contents xiii

	4.8	"Other	of Aggression as a Crime Against Humanity: r Inhumane Acts" as a Gateway for <i>Ius ad Bellum</i>	
		Consid 4.8.1	derations?	191
		4.8.2	for Assessing "Other Inhumane Acts" Protected Legal Interests: Civilians, Humanity	192
		4.8.3	and International Peace	193
		4.8.4	in "Other Inhumane Act"?	193
			Against Humanity	196
	4.9		usion	198
	Refe	rences		200
5	The	Restri	cted Jurisdictional Regime of the International	
	Crir	ninal C	Court	207
	5.1		uction	208
		5.1.1	Why the Jurisdictional Reach of the International	
			Criminal Court Matters for Domestic Implementation	208
		5.1.2	The Restrictions of the "Ordinary" Jurisdictional	
			Regime Depending on the Operationalization	200
		£ 1.2	of Consent	209
		5.1.3	The Requirement of Consent from the Perspective	
			of International Adjudication and Criminal Adjudication	210
		5.1.4	Chronological Structure and Focus on Jurisdictional	210
		5.1.4	Regime upon State Referral and <i>Proprio Motu</i>	
			Investigations	212
	5.2	The R	ome Compromise: Single-Ratification Regime	213
		5.2.1	Ratification by the Territorial State or National State	
			of the Accused	213
		5.2.2	Drafting History: Compromise Between Universal	
			Jurisdiction and More Consensual Forms	
			of Jurisdiction	214
		5.2.3	Inclusion of Nationals of Non-States Parties Under	
			Territorial Jurisdiction	215
		5.2.4	Inclusion of Territory and Nationals of Non-States	
			Parties by Ad Hoc Acceptance, Article 12(3)	
		505	of the ICC Statute	217
		5.2.5	Difference in Reach in Case of a UN Security Council Referral	217
		5.2.6	Referral Critical Account of the Jurisdictional Reach Under	217
		J.2.U	the Single-Ratification Regime	210
	5.3	The K	Eampala Compromise: Soft Consent-Based Regime	218
	5.5		otas Domias	221

xiv Contents

		5.3.1 5.3.2	In Principle: Single-Ratification Regime	222
		5.3.3	of the ICC Statute	223
			of Non-States Parties, Article 15bis(5) of the ICC	
		5.3.4	Possibility for Non-States Parties to Declare an Ad Hoc Acceptance Under Article 12(3) of the ICC	229
			Statute?	230
		5.3.5	Difference in Reach in Case of UN Security Council	
			Referral, Article 15ter of the ICC Statute	231
		5.3.6	Critical Account of the Jurisdictional Reach Under	
			the Soft Consent-Based Regime for States Parties	232
	5.4		ew York City Resolution: Strict Consent-Based Regime	225
			Opt-Out Option for States Parties?	235
		5.4.1	Content of the Activation Resolution	237
		5.4.2	Drafting History: No Compromise between Strict	220
		£ 4.2	Consent-Based Regime and Opt-Out Regime	238 242
		5.4.3	Legal Value of the Activation Resolution	242
		5.4.4	Interpretation of Article 15bis(4) of the ICC Statute in Light of Its Amendment Procedure	245
		5.4.5	Critical Account of the Jurisdictional Reach Under	243
		3.4.3	the Strict Consent-Based Regime with Additional	
			Opt-Out Option for States Parties	250
	5.5	Conch	usion	252
				255
				200
6			r Incorporating the Definition of the Crime	
			on into Domestic Law	263
	6.1		uction	264
		6.1.1	The Principle of Complementarity and the Decisions	065
		610	of Whether and How to Implement	265
		6.1.2	Implementation as an Act to Integrate an International Crime Definition into the Domestic Legal Order	200
		6.1.3	The Advantages of Complete Implementation	266
		0.1.5	and Modified Implementation	268
		6.1.4	The Different Understandings of the Principle	208
		0.1.4	of Legality as a Source of Tension	270
	6.2	Impler	mentation by Copying	273
	6.3	-	mentation by Reference	274
	0.5	6.3.1	Different Types of References as Illustrated	217
		5.0	by the Samoan Implementation	274
		6.3.2	Tensions with the Principle of Legality?	276
		6.3.3	Conclusion	280
	6.4		ied Implementation	281
			- · · · · · · · · · · · · · · · · · · ·	

Contents xv

		6.4.1	Over-Inclusive and Under-Inclusive Implementations	281
		6.4.2	Modifications with Respect to the Underlying Act	200
		(12	of Aggression	283
		6.4.3	Modifications with Respect to the "Manifest"	•
			Threshold	288
		6.4.4	Modifications with Respect to the Leadership Clause	299
		6.4.5	Modification with Respect to the Individual Conduct	304
		6.4.6	Conclusion to Modified Implementation	309
	6.5		usion	311
	Refe	rences		313
7			Specification of the Geographical Ambit of Domestic	
			urisdiction	321
	7.1		uction	322
		7.1.1	Jurisdiction and Its Various Expressions	323
		7.1.2	The Lotus Case and the Framework of International	
			Law for Domestic Criminal Jurisdiction	325
		7.1.3	Consequences of Excessive Implementation	327
	7.2	The P	rinciples of Jurisdiction and Their Broader	
		Catego	orization	328
		7.2.1	The Nature of the Crime and Principles of Jurisdiction	329
		7.2.2	Principles of Territorial and Extraterritorial	
			Jurisdiction	330
		7.2.3	"Aggressor State Jurisdiction" and "Other State	
			Jurisdiction"?	331
	7.3	Princi	ple of Territoriality	333
		7.3.1	General Understanding and Applicability to the Crime	
			of Aggression	333
		7.3.2	The Locus Delicti of the Crime of Aggression: Even	
			"Third State" Jurisdiction due to the Ambiguous	
			Constituent Element of "Gravity"?	334
	7.4	Nation	nality Principle	336
		7.4.1	General Understanding and Applicability to the Crime	
			of Aggression	336
		7.4.2	The Nationality of the Aggressor: Does Aggressor	
			State Jurisdiction Equal Nationality Jurisdiction?	337
	7.5	Protec	tive Principle	338
		7.5.1	General Understanding and Applicability to the Crime	
			of Aggression	338
		7.5.2	Whose Interests Are Affected: The Victim State	
			and Its Allies?	340
	7.6	Passiv	re Personality Principle	341
		7.6.1	General Understanding	341
		7.6.2	Applicability to the Crime of Aggression: A Crime	•
			Committed Against Individuals?	242

xvi Contents

	7.7	Unive	ersal Jurisdiction	344
		7.7.1	General Understanding	344
		7.7.2	Closely Related Principle of Representation	_
			and Principle of Treaty-Based Jurisdiction	345
		7.7.3	Methodological Framework for Determining	
			the Applicability to the Crime of Aggression Under	
			Customary International Law	347
		7.7.4	Inductive Approach: Aggression-Specific State	
			Practice and Opinio Iuris	352
		7.7.5	Deductive Approach: Principle-Based Reasoning	375
		7.7.6	Conclusion: Applicability of Universal Jurisdiction	
			to the Crime of Aggression	386
	7.8	Concl	usion	386
				390
				400
8	_		llenges for Foreign Adjudicative Jurisdiction	403
	8.1		luction	404
		8.1.1	Legal Challenges as a Response to the Unique	
			Character of the Crime of Aggression?	406
		8.1.2	Sovereignty as the Origin of Most Legal Challenges	408
		8.1.3	Presumption of Congruency Between Prescriptive	
			and Adjudicative Jurisdiction Unless Prohibitive Rule	408
	8.2	The P	rinciple of Par in Parem non Habet Imperium	410
		8.2.1	The Claim in Article 8 of the 1996 Draft Code	
			of Crimes of the International Law Commission	410
		8.2.2	A Principle with a Different Original and an Uncertain	
			Current Understanding	411
		8.2.3	No General Practice Accepted as Law in Support	
			of the Claimed Restriction to the Aggressor State	413
		8.2.4	Conclusion to the Principle of Par in Parem non	
			Habet Imperium	417
	8.3	Person	nal Immunity from Foreign Criminal Jurisdiction	418
		8.3.1	Rationale: Smooth Conduct of International Relations	419
		8.3.2	Limited Personal, Limited Temporal and Absolute	
			Material Scope	419
		8.3.3	Applicability Even If Commission of Crime	
			of Aggression	421
		8.3.4	Conclusion to Personal Immunity	421
	8.4	Functi	ional Immunity from Foreign Criminal Jurisdiction	422
		8.4.1	Rationale: Consequence of State Immunity	
			or Something Else?	424
		8.4.2	Limited Material, Broad Personal and Broad	
	•		Temporal Scope	425

Contents xviii

	8.4.3	Methodological Framework for Determining the	
		(In-)Applicability to the Crime of Aggression Under	
		Customary International Law	427
	8.4.4	Legal Nature of Functional Immunity	429
	8.4.5	Inductive Approach: Aggression-Specific State	
		Practice	430
	8.4.6	Deductive Approach: Principle-Based Reasoning	449
8.5	The M	Ionetary Gold Doctrine	457
	8.5.1	The Origin of the Doctrine: Contentious Proceedings	
		of the International Court of Justice	458
	8.5.2	Extension of the Doctrine to All International	
		Tribunals?	458
	8.5.3	Extension to Domestic Aggression Proceedings?	459
8.6	Concl	usion	461
Refe	rences		463
Summa	ry and	Final Conclusions	473
Annex:	Domes	tic Legislation	481
Index .			507