

Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge: 2017, pp. 1488

ISBN 978-1-107-01526-5

Since the dawn of history, aggression has constituted the most serious crime a State could commit against another State. However, only after the First World War did the international community recognize that the crime of aggression should be penalized as a crime that affects not only the sovereignty of a State but also constitutes a criminal act against the population of that State, which suffers from the scourge of war. The regulation of the crime of aggression was also present in the discussions during the Rome Conference on the International Criminal Court (ICC) Statute. Even though States could not reach agreement upon the regulation of aggression during the Conference, immediately afterwards a Preparatory Commission was established which commenced drafting the appropriate amendments to the Statute.<sup>1</sup> The culmination of these efforts was Resolution RC/Res.6 of 11 June 2010, adopted by consensus during the Kampala Review Conference, which introduced Article 8 *bis*, as well as Articles 15 *bis* and *ter* to the Rome Statute, granting the Court jurisdiction over the crime of aggression.<sup>2</sup>

Even though there is a rich scholarship surrounding these provisions, the book under review – *The Crime of Aggression: A Commentary*, edited by Claus Kreß and Stefan Barriga – claims to be the only commentary to the regulations introduced to the Rome Statute by the Kampala Conference. At the same time, it is much more than that. It offers not only insightful and detailed perspectives on the crime of aggression, both from the theoretical and the practical standpoints, but also presents the history of the regulation of aggression under general international law and criminal law, discusses examples from selected national legislations, as well as indicates the links between international criminal law and extra-legal factors like politics and morality. It is not the monumental volume of the book, but first and foremost its content – examining every aspect of the crime of aggression – which makes it, as promised in the Foreword by Christian Wenaweser and Zeid Ra'ad Zeid Al-Husseini, the authoritative guide for anyone interested in developments in international criminal law. However, as always in the case of any book containing contributions by many authors and covering a wide variety of topics, there are some minor inaccuracies or ambiguities, which however do not deprive the book of its value.

The book has fifty-three chapters in total, in addition to the concluding personal memoir by Benjamin B. Ferencz. This impressive number of topics concerning the

<sup>1</sup> See S.A. Fernández de Gurmendi, *The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*, 2 Fordham International Law Journal 25 (2010).

<sup>2</sup> Available at: <https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf> (accessed 30 June 2018).

crime of aggression is grouped into five Parts, devoted to the history of the penalization of aggression; theoretical issues; the crime of aggression under current international law; regulation of the crime of aggression under the national law of different States; as well as the future world order with regulation of the crime of aggression.

Part I of the book starts with the input by Kirsten Sellars concerning the first attempt to launch a criminal proceeding against a State's leader, Wilhelm II, for committing the crime of aggression. Next the crime against peace is discussed, which Carrie McDougall, the author of this chapter, claims is essential to understand the current provisions of the Rome Statute, as well as the heritage of the Nuremberg International Military Tribunal (IMT) and International Military Tribunal for the Far East (IMTFE). The chapter contributes not only to the understanding of the crime of aggression, but also to the undefined notion of "war" as used before 1945, the history of the term "aggression", as well as the model of responsibility applied to defendants before the above-mentioned tribunals. Thus, what may be confusing is the title of the chapter – the 'crime against peace' is in fact mentioned only a few times in the chapter, and while it could serve as a good reason to discuss important issues connected with the crime of aggression, the chapter is rather focused on the legacy of the IMT and IMTFE. Since the very next chapter, also by Kirsten Sellars, is devoted to the dissenting opinions to the IMTFE judgment, these two chapters together form a coherent narration. The next chapter of this Part, authored by Thomas Bruha, examines the work upon the definition of aggression by the UN GA. The ensuing one, by Nicolaos Strapatsas, concerns the practice of the UN Security Council (UN SC) regarding the concept of aggression and offers an interesting and detailed examination of the UN SC resolutions which refer, or could potentially refer, to the crime of aggression. Next Dapo Akande and Antonios Tzanakopoulos make an interesting observation on the practice of the International Court of Justice (ICJ) concerning the crime of aggression and argue that, despite the fact that the ICJ never qualified the unlawful use of force as an act of aggression, its jurisprudence, especially including its discussion of the prohibition of the use of force and armed attack, is important for understanding of the notion of aggression. James Crawford, the former Chairman of the Working Group on a Draft Statute for the International Criminal Court, discusses the International Law Commission's work on aggression. In the final chapter of Part I, Roger S. Clark gives an account of the negotiations on the Rome Statute.

The second part of the book, focused on theoretical aspects, starts with an interesting comment from Larry May on the links between the 'just war' theory and the crime of aggression. The chapter by Florian Jeßberger on the modern doctrinal debate over the crime of aggression includes an engaging account of the origins of this discussion. Next Astrid Reisinger Coracini and Pål Wrange explore the most important traits of the crime of aggression. Part II closes with a thought-provoking chapter by William A. Schabas on aggression and human rights, wherein he discusses, *inter alia*, the right to peace, and also touches upon the indifference of human rights non-governmental organizations (NGOs) towards the works on regulation of the crime of aggression.

The third, and the core part of the book, concerns the crime of aggression under current international law. The opening article of this part by Leena Grover offers guidance for judges on the interpretation of the regulation of the crime of aggression as included in the Rome Statute. The most elaborate chapter of this part, authored by the book's editor Claus Kreß, is an insightful, detailed, and engaging analysis of the State conduct element. The author meticulously discusses all elements of the crime of aggression as defined in the Rome Statute, also offering an analysis of many related side issues, like the use of force, consent for the use of force, term "international relations", the collective security system, the right to self-defence, and many others. In the next chapter, Roger S. Clark points out aspects connected with individual conduct that contributes to the crime of aggression and general principles of international criminal law. Then Stefan Barriga and Niels Blokker discuss the transitional provisions and the entry into force of Article 15 *bis* and 15 *ter*. The next two chapters focus on the conditions for the exercise of jurisdiction based on the UN SC referrals, State referrals, and *proprio motu* investigations. They are followed by a chapter on immunities, authored by Helmut Kreicker, which provides a brief overview of the topic of immunities. What is missing in this chapter is perhaps a more profound analysis of particular cases when domestic courts have faced difficult questions on immunities. H. Kreicker does refer to the ICJ judgment in *Jurisdictional Immunities of the State*<sup>3</sup> and observes that, according to the ICJ, State practice does not allow for bringing civil law actions against States before the courts of foreign states, denying the existence of a customary international law exception to State immunity in cases of crimes. At the same time however, he claims that "it would be wrong to deny a criminal law exception to state immunity simply by referring to this decision of the ICJ." Unfortunately the author does not refer to some important domestic court judgements to support his findings, such as Judgment no. 238 of the Italian Constitutional Court of 2014, which clearly rejected the option that Italian judges may be obliged to comply with the ICJ *Jurisdictional Immunities* judgment, finding that such an approach "requires that Italian courts deny their jurisdiction in case of acts of a foreign State constituting war crimes and crimes against humanity, in breach of inviolable human rights."<sup>4</sup> Thus, a reference to this domestic case law would be beneficial not only for the coherence of the article, but also could help build up the author's arguments. In the next chapter, Pål Wrange discusses in detail domestic prosecutions and the principle of complementarity, providing insightful remarks not only on these issues from the perspective of the crime of aggression, but also more generally on complementarity, the *par in parem non habet imperium* principle, the notion of jurisdiction, and many others. Next Eleni Chaitidou, Franziska Eckelmans and Barbara Roche provide an account of the judicial function of the pre-trial division of the ICC. Finally, in the last chapter of this part Erin Pobjie explores, in an engaging way, the problem whether individuals as well as States may be victims of the crime of aggression under the Rome Statute.

<sup>3</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Rep. 2012, p. 99.

<sup>4</sup> Available at: <https://bit.ly/2qnKfWN> (accessed 30 June 2018).

Part IV of the book is devoted to regulation of the crime of aggression under domestic law, discussing in detail examples of legislation from such States as Croatia, Germany, Estonia, Russia, the United Kingdom, and then, much more generally, the Arab States' attitude towards the crime of aggression. This is followed by a chapter which briefly examines also the domestic law of some of the Asian States (e.g. Tajikistan, Kazakhstan, Uzbekistan, Mongolia, Vietnam, India, Pakistan, Bangladesh, Sri Lanka). Unfortunately, the choice of States' domestic regulations to be examined in the book is not accompanied by any explanation why the Authors of the book decided to explore precisely these domestic legislations. One may ask, for example, why the Polish national legislation was not explored in the book, as among the examples of civil law national regulations presented in the book, the Polish instance would be the only one which does not refer explicitly to the "crime of aggression", as Article 117 of the Polish Criminal Code's chapter, titled "Offences against peace, humanity, and war crimes", penalizes the crime called "wojna napastnicza" (literally translated as "a war started by assault").<sup>5</sup> Moreover, Poland has a rich case law in this respect, dating from the 1940s.<sup>6</sup> Thus the Polish example could be very interesting, given that a State on which initiative the League of Nations adopted the Declaration concerning wars of aggression<sup>7</sup> and is one of the few States which has procedural experience in this regard, yet currently does not have a regulation concerning the crime of aggression.<sup>8</sup> The final Chapter of this part, authored by Astrid Reisinger Coracini, offers an extended synopsis of the crime of aggression under domestic criminal law which, as the title of the chapter suggests, extends the analysis far beyond the examples discussed in previous chapters. Once again however, this part of the book seems to lack precise organization, as this final chapter not only expands upon but also highlights considerably different issues than those discussed in the previous chapters. Here one may mention the section entitled "The Arab Model Law for Crimes within the Court's Jurisdiction", which not entirely overlaps with the chapter on the legislation of the crime of aggression in the Arab World.

The final part of the book, titled "Crime of aggression and the future world order" is divided into two subsections: "Actor's views" and "Scholarly reflections." The first of these subsections provides an account of the Kampala Conference and of the regulation of the crime of aggression in the ICC Statute from the high governmental officials from

---

<sup>5</sup> "Wojna napastnicza" is sometimes translated as "aggressive war." However, "aggressive war" in Polish would be "wojna agresywna", while the Polish Criminal Code stipulates the crime of "wojna napastnicza" ("wojna" – war, "napastnicza" – caused by an assault). "Aggression" is thus a broader term than the "assault", given the Article 3 definition of aggression contained in UN GA Resolution 3314 (XXIX) (Annex).

<sup>6</sup> See P. Grzebyk, *Criminal Responsibility for the Crime of Aggression*, Routledge, Abingdon: 2013, pp. 182-188.

<sup>7</sup> Declaration concerning wars of aggression, Resolution adopted by the Assembly on September 24th, 1927, A. 119.1927.IX.

<sup>8</sup> It should be noted that the Polish legislation is mentioned in Chapter 31, in the section 31.3.1.1, p. 1055, although this section erroneously enumerates Poland as among "twenty states [which] implemented aggression as a crime under customary international law", while in fact, as stated above, the Polish Criminal Code does not mention aggression.

different States, each presenting their viewpoint on the topic.<sup>9</sup> Thus, the reader may learn the stance of such States as Brazil, China, France, Germany, India, Iran, Israel, Japan, the Republic of Korea, Norway, Russia, South Africa, the United Kingdom, the United States and Egypt. Despite the fact that these chapters certainly constitute a very interesting input and provide material that every academic would find valuable, once again one may question the lack of the Central European perspective. The final chapter of this subsection focuses on the views of civil society, presenting the attitudes of different NGOs. Finally, subsection B, which presents the reflections of scholars, includes articles by Martti Koskenniemi, Jeff McMahan, Frédéric Mégret, Jens David Ohlin and David Scheffer. Here one can enjoy the discussion of the overlapping areas of the law of the use of force and international criminal law (e.g. the articles of Jeff McMahan and Martti Koskenniemi); on the inseparable links between international law and politics (Martti Koskenniemi's contribution); on killing from the perspective of law and morality (Jens David Ohlin's article); as well as on the proposition of amending the regulation of the crime of aggression under the ICC Statute (David Scheffer's article).

The Epilogue of the book presents the personal memoir by Benjamin B. Ferencz, titled "The Long Journey to Kampala", which contains a fascinating account of Professor Ferencz's experiences as the Chief Prosecutor in the *Einsatzgruppen* case during the Nuremberg trials, and the comparison of those experiences with the drafting of the regulation on the crime of aggression in the Rome Statute. The memoir is a must-read for every lawyer who seeks to understand the essence of international criminal law.

To summarize, the book edited by Claus Kreß and Stefan Barriga offers an engaging narrative which explores every aspect of the crime of aggression, as it discusses not only theory and history, but also as many practical aspects as possible. It will certainly find a well-deserved place on the shelves of many practitioners and academics. What may constitute a drawback is that some chapters overlap, stressing different elements, which may leave the reader confused about what deserves emphasis. Moreover, the choice of national legislations discussed in the book seems to be too selective and in particular, as pointed out, ignores the Central European standpoint. However, given the ambitious nature of this work these are minor drawbacks, and the book should be wholeheartedly recommended.

*Agata Kleczkowska\**

DOI 10.7420/pyil2017r

---

<sup>9</sup> However, the majority of these chapters include a note that the views expressed therein "do not necessarily represent those of the government" of the respective State.

\* Ph.D., Assistant professor at the Institute of Law Studies of the Polish Academy of Sciences, Warsaw (Poland), email: agata.kleczkowska@inp.pan.pl.