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The crime of aggression and public international law

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Introduction

Criminalising the planning, preparation, initiation or waging of the (state) act of aggression, has been one of the most important developments in international law. Individuals can now be made criminally responsible for the crime of aggression. Individual criminal responsibility for the crime of aggression had emerged shortly after the Second World War, when the International Military Tribunal at Nuremberg (IMT) in 1946, the subsequent Nuremberg Trials pursuant to Control Council Law no.10 (NMT) in 1946-1949 and the International Military Tribunal for the Far East at Tokyo (IMTFE) in 1946-1948 indicted, prosecuted and subsequently convicted individuals for crimes against peace.¹ Many decades after Nuremberg, the International Criminal Court (ICC) was established, with jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression.

However, the crime of aggression was not defined in the Rome Statute of the International Criminal Court (Rome Statute). Pursuant to Article 5(2) of the Rome Statute, ‘the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 [amendments] and 123 [Review of the Statute] defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.’ This happened in 2010, at the Review Conference in Kampala, where amendments to the Rome Statute for the crime of aggression in Kampala (the Kampala Amendments) were adopted by consensus (Resolution RC/Res.6). At present, the ICC is the only international criminal forum that may potentially prosecute individuals who plan, prepare, initiate or execute an act of aggression, subject to the activation of the jurisdiction of the Court over the crime of aggression.

This crime is fundamentally different from the other core international crimes in Article 5(1) of the Rome Statute, i.e. genocide, crimes against humanity and war crimes. There are two significant differences. First, unlike genocide, crimes against humanity and war crimes, individual criminal responsibility for the crime of aggression is predicated upon state responsibility for an act of aggression.² This is because the legal definition of the crime of

¹ It should be noted that ‘crimes against peace’ and the ‘crime of aggression’ are synonymous and are used interchangeably.

² See Commentaries on the Draft Code of Crimes against the Peace and Security of Mankind 1996, Yearbook of the International Law Commission, 1996, vol. II, Part II, (hereinafter “Commentaries on the Draft Code of Crimes”),30.

aggression encompasses a state act of aggression as a substantive component of the crime.³ The IMT approached the issue by establishing that Germany had committed ‘wars of aggression’ against twelve nations prior to assessing individual criminal responsibility of the defendants for crimes against peace.⁴ The need to first establish the existence of aggression committed by the state prior to considering the conduct of the defendant has been incorporated in the Kampala Amendments.⁵ Therefore, an individual can only be found criminally responsible for the crime of aggression if it has been established that the aggressor state has committed an act of aggression.

Second, the victim of the crime of aggression is the aggressed state. This is the fundamental difference between the crime of aggression and the other core international crimes, as the victims of genocide, crimes against humanity and war crimes are natural persons. Arguably, the submission that the victim of the crime of aggression is a state does not necessarily affect any of the constitutive elements of the crime. Yet, the fact that the victim of the crime of aggression is a state, and not a natural person, has symbolic significance: under international law, a state can be a victim of an international crime. There is also legal significance, as the norms under international law that criminalise aggression serve to protect the aggressed state. Thus, when there is a breach of these norms, it is in the legal interest of the aggressed state that legal consequences are to be enforced against the perpetrator of the crime of aggression.

These two aspects of the crime of aggression, i.e. the unique relationship between state responsibility and individual criminal responsibility with respect to the crime of aggression, and the need to protect the legal interests of the aggressed state under international law, initiated my interest to conduct the present study. The crime of aggression has recently attracted considerable academic interest, especially in light of the negotiations on the definition of the crime of aggression and the conditions under which the ICC may exercise jurisdiction, which had spanned over a period of ten years. Stefan Barriga and Claus Kress have made a compilation of all relevant documents pertaining to the negotiation history of the Kampala Amendments, *Crime of Aggression Library: the Travaux Préparatoires of the Crime of Aggression*.⁶ In the specific

³ Article 6(a) Charter of the International Military Tribunal has defined crimes against peace as: planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances; Article 8 bis(1) Kampala Amendments has defined the crime of aggression as: planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

⁴ ‘Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nuremberg), Judgment and Sentences’ (1947) 41 American Journal of International Law 172, 186–214.

⁵ Articles 15 bis (6) – 15 bis (9), Resolution RC/Res.6.

⁶ Stefan Barriga and Claus Kress, *Crime of Aggression Library: The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press 2012).

context of the ICC and the crime of aggression, Carrie McDougall has published a monograph on *The Crime of Aggression under the Rome Statute of the International Criminal Court*,⁷ and Mauro Politi and Giuseppe Nesi have edited a volume on *The International Criminal Court and the Crime of Aggression*.⁸ Writing before the proliferation of international criminal tribunals, Cornelis Pompe examined the criminalisation of aggression from the Nuremberg Trials to the implementation of the ‘Nuremberg Principles’ in *Aggressive War and International Criminal Law*.⁹ In a similar vein, Kirsten Sellars traces the historical criminalisation of aggression, from its origins after the First World War, to the post-war tribunals at Nuremberg and Tokyo in *‘Crimes against Peace’ and International Law*.¹⁰

With respect to a more general overview of the crime of aggression, several monographs have recently been published: Patrycja Grzebyk, *Criminal Responsibility for the Crime of Aggression*;¹¹ Sergey Sayapin, *The Crime of Aggression in International Criminal Law, Historical Development, Comparative Analysis and Present State*;¹² Gerhard Kemp, *Individual Criminal Liability for the International Crime of Aggression*;¹³ Larry May, *Aggression and Crimes Against Peace*.¹⁴ Broadly speaking, these studies examine the prohibition of the use of force under *jus ad bellum*, the historical origins of the norms that criminalise aggression, and prosecution in domestic courts and at the ICC.

Although any study pertaining to the crime of aggression involves an examination of the laws on the use of force (*jus ad bellum*), existing literature appears to be written from a predominantly international criminal law perspective. The position taken in this dissertation is that this gives rise to an incomplete understanding of the crime of aggression for the main reason that the study of this crime from an international criminal law perspective can only acknowledge that individual criminal responsibility is predicated upon state responsibility, without examining this special feature of the crime in depth. Yet, this feature is important not only from a conceptual perspective, but also from a practical perspective, as a lack of understanding of the

⁷ Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press 2013).

⁸ Mauro Politi and Giuseppe Nesi (eds), *The International Criminal Court and the Crime of Aggression* (Ashgate 2004).

⁹ Cornelis Pompe, *Aggressive War: An International Crime* (Martinus Nijhoff 1953).

¹⁰ Kirsten Sellars, *‘Crimes against Peace’ and International Law* (Cambridge University Press 2013).

¹¹ Patrycja Grzebyk, *Criminal Responsibility for the Crime of Aggression* (Routledge 2013).

¹² Sergey Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (Springer 2013).

¹³ Gerhard Kemp, *Individual Criminal Liability for the International Crime of Aggression* (Intersentia 2010).

¹⁴ Larry May, *Aggression and Crimes Against Peace* (Cambridge University Press 2008).

relationship between individual criminal responsibility and state responsibility may cause apprehension with respect to carrying out the prosecution of this crime.

There is an intrinsic link between the state act of aggression and the crime of aggression, and state responsibility for aggression and individual criminal responsibility for the crime of aggression, which upholds a relationship between the aggressor state and the perpetrator of the crime. To better understand this intrinsic link, there is need to return to the broader framework of public international law, as it is necessary to study the primary level of norms under international law that prohibit aggression and the norms that criminalise aggression, which in effect, shape the way that the concomitant norms interplay on the secondary level of responsibility.

In this regard, there is a lack of clarification in present academic literature in relation to two issues. First, the legal definition of the crime of aggression is predicated upon the interplay between the norms that prohibit aggression and the norms that criminalise aggression on the primary level. Second, the concomitant norms interplay on the secondary level of responsibility so that individual criminal responsibility can only be found upon state responsibility. The problem is that the constitutive elements within the definition of the crime of aggression encompass two separate wrongful conducts by different actors, and it does not become immediately clear how international responsibility is attributed to the aggressor state and the individual accordingly.

The central research question of this dissertation aims to analyse the conditions of responsibility relating to the crime of aggression to the State and the individual. Delineation of responsibility of these very different subjects provides an analytical perspective for engaging with the legal interests of the aggressed state in the context of the establishment and implementation of individual criminal responsibility against the individual who has committed the crime of aggression.

This research is conducted from a positivist international law perspective, and thus relies on treaty law, customary international law and judicial decisions as the principal sources. In particular, the travaux préparatoires of the Kampala Amendments is examined extensively as a necessary step towards a better understanding of the *sui generis* nature of the jurisdictional regime of the Court over the crime of aggression and how these amendments to the Rome Statute affect the legal interests of States Parties to the original treaty.

In this regard, this dissertation can be seen to encompass both conceptual and practical elements. The conceptual element of this dissertation is the delineation between the norms that prohibit aggression and the norms that criminalise aggression on the primary level, and the concomitant explanation of how the secondary norms should be interpreted with respect to state

responsibility and individual criminal responsibility in a situation of prosecution of the crime of aggression. The more practical elements of the present research encompass the contemplation of whether and to what extent the crime of aggression can be prosecuted at the ICC and domestic courts.

This research intends to contribute to scholarship by studying the crime of aggression from a public international law perspective, with particular reference to the intrinsic link between the state act of aggression and the crime of aggression. By a public international law perspective, this dissertation will assert that individual criminal responsibility for the crime of aggression should not be understood as a phenomenon exclusive to international criminal law, but as part of the broader context of international responsibility for wrongful conduct. This study will give priority to three main issues.

First, the better understanding of how the norms of international law on the primary level prohibit and criminalise aggression (the act of aggression and the crime of aggression), and how the breach thereof gives rise to legal consequences under the secondary level of international responsibility (state responsibility and individual criminal responsibility). This will put into perspective how the intrinsic link between the state act of aggression and the crime of aggression should be understood in relation to how the interplay between state responsibility and individual criminal responsibility should be interpreted during the prosecution of the crime of aggression.

Second, the relevant actors should be identified, that is to say, the duty-bearers of the norms that criminalise aggression and the rights-holders of the enjoyment of the protection of these norms. It is submitted that the former are individuals, whilst the latter are states. It is further submitted that it is within the legal interests of the latter to enjoy the protection afforded by these norms; and in situations when the former has failed to comply with the duty to refrain from such conduct, that legal consequences by means of criminal sanctions are enforced.

Third, there is need to examine how the norms that criminalise aggression are enforced under international law. Enforcement refers to ensuring that duty-bearers comply with their obligations to respect the norms that criminalise aggression; and that in the event of breach thereof, legal consequences can be enforced directly against the duty-bearer. The general argument is that, by attaching legal consequences to the breach of the norms that criminalise aggression, the duty-bearer will feel compelled to respect obligations to refrain from the relevant prohibited conduct. In a situation of breach of obligations, it is of course in the interests of the rights-holder that legal consequences are invoked against the duty-bearer. Therefore, the protection of the legal interests of the aggrieved state as the victim of the crime of aggression

refers to ensuring that legal consequences are enforced against the perpetrator of the crime of aggression.

In adopting the outlined approach of examining the crime of aggression, the study of this crime is advanced in both the fields of public international law and international criminal law. In the context of public international law, this dissertation contributes to the ongoing study of international responsibility for wrongful conduct, particularly in the light of international crimes committed by individuals. By clarifying how the norms that prohibit aggression and the norms that criminalise aggression interplay on the primary level, it can be understood how the relationship between state responsibility and individual criminal responsibility should be interpreted with respect to the crime of aggression. With respect to international criminal law, this dissertation contributes to the ongoing study of prosecution of the crime of aggression at both the ICC and domestic courts. In particular, the hypothesis that the ICC should have *de facto* exclusive jurisdiction over the crime of aggression¹⁵ is challenged.¹⁶ Against the backdrop of international criminal law, the acknowledgment that the victim of the crime of aggression is the aggressed state is important, as this is indicative of the concept that the concept of a victim of an international crime may encompass both states and natural persons. Furthermore, an unusual asymmetry is brought to light, i.e. that the perpetrator of the crime is a natural person, whilst the victim is a state. The ramifications of this insight are examined in the context of the normative framework of victims' rights and the regime of the ICC with respect to victim participation and reparations.

There is also the question of whether natural persons who have suffered injury in a situation of aggression may be considered as victims of the crime of aggression. The assessment of injury to natural persons in a situation of aggression (as the result of the state act of aggression and the crime of aggression) involves examining the legal framework applicable in a situation of aggression, and delineating between *jus ad bellum* and *jus in bello*. From a broader public international law perspective, this illustrates how the three separate legal frameworks, international criminal law, *jus ad bellum* and *jus in bello* interplay in a situation of aggression.

The findings of this research are also important from a practical perspective. First, the aggressed state may rightfully identify itself as the rights-holder of the enjoyment afforded from the protection of the norms that prohibit aggression and the norms that criminalise aggression.

¹⁵ Article 8, Draft Code of Crimes against the Peace and Security of Mankind 1996 ("Draft Code of Crimes"); see also Commentaries on the Draft Code of Crimes, 27-28; see also Beth Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (2012) 10 Journal of International Criminal Justice 133.

¹⁶ This will be examined in Section 5.3 in Chapter V.

The aggressed state may thus understand better its legal interests under international law in relation to legal consequences against the aggressor state for the act of aggression, and the alleged perpetrator(s) of the crime of aggression.

Second, the jurisdiction of the ICC over the crime of aggression is yet to be activated. States Parties to the Rome Statute (State Parties) have raised questions relating to the entry-into-force of the Kampala Amendments and the jurisdictional regime of the Court over the crime of aggression.¹⁷ This dissertation examines how the entry-into-force of the Kampala Amendments and the jurisdictional regime of the ICC over the crime of aggression should be interpreted, which is of interest to both academics and practitioners.

Third, from a practitioner's perspective, it may be useful to understand the legal positions of the aggressor state, aggressed state, the perpetrator of the crime of aggression, and natural persons in a situation of aggression. This way the legal position of each of these subjects can be taken into consideration when deciding upon the need to enforce legal consequences under the secondary rules of responsibility, with particular reference to individual criminal responsibility.

This dissertation is conducted in three parts. Part I provides the background to the crime of aggression. The aim is to study the definition of the crime of aggression under international law, with particular reference to the norms that prohibit aggression and the norms that criminalise aggression, thereby placing obligations on states to refrain from an act of aggression and obligations on individuals to refrain from conduct relating to the crime of aggression. Part I consists of three chapters.

Chapter I addresses the state act of aggression from the perspectives of both the aggressor state and the aggressed state in the light of the framework of collective security and the United Nations. This Chapter examines how international law places obligations on states to refrain from an act of aggression pursuant to the applicable legal framework, i.e. *jus ad bellum*. The scope and nature of these obligations will be studied, with particular reference to the duty-bearers and rights-holders of the protection from the norms that prohibit aggression. This puts into perspective how responsibility can be attributed to the aggressor state under international law for the act of aggression.

Chapter II examines crimes against peace pursuant to the Charter and judgment of the IMT, which mark the origins of the crime of aggression. Indeed the IMT signifies the turning point in international law when individuals were prosecuted and convicted for crimes against peace. It

¹⁷ This is background information gathered from personal experience when I was accredited to the Liechtenstein delegation to attend the 11th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court 2012 and spoke to various States Parties with respect to the ratification and implementation of the Kampala Amendments.

will be suggested that the norms that criminalise aggression did not exist prior to the formation of the Charter of the IMT or the judgment of the Tribunal. Yet, both the Charter and judgment of the IMT (“the Nuremberg principles”)¹⁸ have gradually gained customary international law status.¹⁹ This means that there are now norms under international law that impose obligations directly on individuals to refrain from conduct relating to a state act of aggression, and attach sanctions directly for the breach thereof, i.e. the criminalisation of aggression. The subsequent Nuremberg Trials pursuant to Control Council Law no.10 were directly bound by the judgment of the IMT and had further developed the Nuremberg principles. For these reasons, only the IMT and NMT will be examined in this Chapter in relation to understanding the origins of the norms that criminalise aggression. This Chapter aims to delineate the contours of the crime at Nuremberg (and thus customary international law), with particular reference to the state act element of the crime (the state act of aggression), and the elements of the crime pertaining to individual conduct (*actus reus* and *mens rea*). It is beyond the scope of this dissertation to include an analysis of the IMTFE.

Chapter III examines the definition of the crime of aggression in the Kampala Amendments. Upon examining the legal nature of the Kampala Amendments, it is submitted *inter alia* that the definition of the crime under Article 8 *bis*(1) has not attained customary international law status. Therefore, the legal definition of the crime of aggression under customary international law is still the substantive definition of crime against peace pursuant to the Nuremberg principles. By comparing the definition of the crime of aggression in the Kampala Amendments with the definition of crimes against peace at Nuremberg, the legal definition of the crime of aggression can be studied in the context of whether, and how, the scope of the crime has developed in international law.

Part II considers the more conceptual aspects of the present study. This involves examining the relationship between the aggressor state for committing an act of aggression and the perpetrator of the crime of aggression, to understand better how the norms that prohibit aggression and the norms that criminalise aggression interplay on the primary and secondary level, and how they should be interpreted with respect to the crime of aggression. As such, it can be better understood how the obligations placed on states to refrain from an act of aggression are interconnected with the obligations on individuals to refrain from conduct relating to the crime of aggression, and how this should be interpreted with respect to individual criminal

¹⁸ GA Resolution 95(1) 1946.

¹⁹ Principles of International Law recognized in the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal (1950), Yearbook of the International Law Commission, 1950, vol. II, para. 97.

responsibility for the latter. The aggressed state is identified as the rights-holder of the enjoyment of the protection from the norms that criminalise aggression, which has suffered from the failure of the relevant duty-holder to comply with obligations to refrain from conduct relating to the crime of aggression. Thus, it is submitted that enforcement of sanctions against the perpetrator(s) of the crime of aggression by means of criminal prosecution is in the direct legal interests of the aggressed state. Part II comprises two chapters.

Chapter IV examines the relationship between the aggressor state and the perpetrator of the crime of aggression. It examines the intrinsic link between the act of aggression and the crime of aggression (primary level), whereby individual criminal responsibility for the crime of aggression is predicated upon state responsibility for the act of aggression (secondary level). This Chapter identifies the points of distinction between the norms that prohibit aggression and the norms that criminalise aggression to delineate how these norms interplay on the primary level. It then continues to elaborate the point of intersection between the norms that prohibit aggression and the norms that criminalise aggression to understand how the obligations on states to refrain from an act of aggression interplay with the obligations on individuals to refrain from conduct which relates to the act of aggression. The aim is to shed light on the relationship between state responsibility for aggression and individual criminal responsibility for the crime of aggression to explain how the former is *sine qua non* for the latter.

Chapter V submits that the victim of the crime of aggression is the aggressed state because it is the rights-holder of the enjoyment of the protection afforded by the norms that criminalise aggression, who has suffered from the breach of obligations by the relevant duty-holder. As such, enforcement of sanctions (prosecution) against the perpetrator of the crime of aggression is in the direct legal interests of the aggressed state. That said, this submission appears to depart from the general concept of victims in international criminal law, which usually pertains to natural persons. Thus, it will be examined whether natural persons may also be considered as victim(s) of the crime of aggression. As the victim of the crime of aggression is the aggressed state, the question is how this can be reconciled with the normative framework of victims' rights (which pertains to individuals). In particular, it will be addressed whether and to what extent the aggressed state may be a beneficiary to reparations for the crime of aggression from the perpetrator of the crime (individual civil responsibility).

Part III examines the enforcement of the norms that criminalise aggression, with particular reference to the enforcement mechanisms under international law, the ICC and domestic courts. This Part will examine the question whether and to what extent international law protects the

legal interests of the aggressed state. In other words, whether and to what extent prosecution can take place at either the ICC level or in domestic courts. This Part has two chapters.

Chapter VI examines prosecution of the crime of aggression at the ICC. The aim of this chapter is to understand to what extent the ICC as enforcement mechanism, is representative of the legal interests of the aggressed state (and the international community) to prosecute the crime of aggression. In order to do so, it is necessary to delineate the jurisdictional regime of the ICC over the crime of aggression (Articles 15 *bis* and 15 *ter*, Kampala Amendments) as this encompasses the contours of situations that may be prosecuted at the Court. As will be discussed, the jurisdictional regime over the crime of aggression at the Court is different from the jurisdictional regime over the other crimes in Article 5(1) of the Rome Statute: it is *sui generis* in nature. Another important and contentious issue that will be contemplated is the question of the consent of the aggressor state with respect to the jurisdictional regime of the ICC over the crime of aggression.

Chapter VII examines prosecution of the crime of aggression in domestic courts. As a preliminary issue, this Chapter challenges and rejects the hypothesis that suggests that domestic courts are not competent fora for the prosecution of the crime of aggression, and that the ICC should have de facto exclusive jurisdiction. It will be submitted that domestic courts and the ICC may have concurrent jurisdiction over the crime of aggression as international law relies on both enforcement mechanisms to prosecute the perpetrator of the crime of aggression. This Chapter will examine the concerns that arise with respect to domestic prosecution for the crime of aggression and whether and to what extent they may be overcome.

Before engaging with the topic of research, few conceptual clarifications are in order. First, the terms ‘crimes against peace’ and the ‘crime of aggression’ are synonymous and will be used interchangeably throughout this dissertation. Although there has been a change in terminology, this is limited only to nomenclature and has no effect on the substantive components of the crime. Second, the terms ‘state act of aggression’ and ‘state act element of the crime’ both refer to an act of aggression committed by the aggressor state. This can be juxtaposed with the ‘elements of the crime pertaining to the conduct of the individual’, which refers to the behaviour of the individual. Third, it is commonly known that the term ‘war’ is rather anachronistic and has been replaced with the term ‘use of force.’ Yet, a ‘war of aggression’ is the state act element of crimes against peace pursuant to the Charter and judgment at the IMT (and thus customary international law). As such, a ‘war of aggression’ will be referred to in this dissertation in the context of the state act element for crimes against peace at the IMT, the NMT and the Nuremberg Principles under customary international law. Fourth, the primary/secondary level

distinction refers to the norms on the primary level under international law that impose obligations on the relevant actor to refrain from an act of aggression (norms that prohibit aggression) or a crime of aggression (norms that criminalise aggression), and the norms on the secondary level that govern the responsibility of the relevant actors for the breach of obligations on the primary level.

In this dissertation, it is submitted that the intrinsic link between the state act of aggression and the crime of aggression within the definition of the crime exists on two levels. On the primary level, the intrinsic link can be explained by identifying the point of intersection between the norms that prohibit aggression and the norms that criminalise aggression, as this demonstrates that both sets of norms run in parallel, and cannot exist separately from each other. On the secondary level, the intersection between state responsibility and individual criminal responsibility serves as an indicator that there has been a breach of both sets of norms on the primary level. The reason why state responsibility of the aggressor state is a necessary prerequisite of the crime of aggression is because it demonstrates that the individual(s) has acted in breach of the parallel set of obligations to refrain from conduct pertaining to the state act of aggression. As such, the individual is only responsible under international law for the breach of the set of obligations relating to prohibited conduct, and not the state act of aggression.