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## **The crime of aggression and public international law**

Wong, M.S.

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**Author:** Wong, Meagan Shanzhen

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## Conclusion

This dissertation studied the crime of aggression from a public international law perspective. Part I examined the criminalisation of aggression under international law. Part II considered how the primary norms under international law that prohibit an act of aggression interplay with the norms that criminalise aggression, and how this gives rise to responsibility on the secondary level in such a way that individual criminal responsibility is predicated upon state responsibility. Part III examined whether and to what extent international law protects the interests of the aggressed state by means of prosecution at either the ICC or in domestic courts.

This dissertation has delineated how responsibility for the crime of aggression should be attributed under international law to the aggressor state and the perpetrator of the crime by focusing upon the intrinsic link between the state act of aggression and the crime of aggression. It is by better understanding this intrinsic link that it can be appreciated how the breach of the primary norms that prohibit aggression and the norms that criminalise aggression give rise to legal consequences at the secondary level of individual criminal responsibility (Chapter IV). Adopting the premise that the aggressed state as the victim of the crime of aggression has a legal interest in the enforcement of criminal sanctions against the perpetrator (Chapter V), this dissertation considered the extent to which the ICC (Chapter VI) and domestic courts (Chapter VII) are able to protect this interest.

In my view, the most important findings of this dissertation can be stated in the following terms. First, this dissertation has examined the definition of the crime of aggression under international law (Part I). The present definition of the crime of aggression under customary international law originated from the definition of crimes against peace pursuant to the Nuremberg principles (Chapter II). There are two substantive components of the crime: the state act element of the crime (the state act of aggression) and the elements of the crime pertaining to individual conduct (planning, preparation, initiation or waging/execution; and *mens rea*).

The structure of the definition of the crime of aggression is formed by the primary norms that prohibit aggression and the norms that criminalise aggression. These norms place obligations on states to refrain from an act of aggression (Chapter I) and on individuals to refrain from conduct pertaining to the state act of aggression,

respectively (Chapters II and III). The definition of the crime demands that an act of aggression must be established to exist before the conduct of the individual can be assessed (Chapters II and III).

It is generally assumed that the crime of aggression is a leadership crime that may only be committed by persons in a sufficiently high-ranking position. Although the definition of the crime of aggression in the Kampala Amendments has specified a leadership element as a substantive component of the crime (“control or direct”), this is not entirely consistent with the definition under customary international law (“shape or influence”).

Second, this dissertation has explained the intrinsic link between the state act of aggression and the crime of aggression that is part of the definition of the crime of aggression (Chapter IV). It explains that the intrinsic link exists on two levels. On the primary level, there are three inter-related points of distinction between the norms that prohibit aggression and the norms that criminalise aggression: i) there are two different conducts under international law (act of aggression and crime of aggression); ii) there are two different legal personalities under international law (aggressor state and perpetrator of the crime); iii) there are two different legal frameworks that are applicable (*jus ad bellum* and international criminal law). This is why in a situation of aggression there is a violation of both sets of norms, and both the aggressor state and perpetrator of the crime have failed to perform their duties to comply with their respective obligations under international law. Yet, this does not explain the intrinsic link.

Instead, it is the point of intersection between the norms that prohibit aggression and the norms that criminalise aggression, which clarifies why the crime of aggression is predicated on an act of aggression. The act of aggression committed by the aggressor state was facilitated *by* the conduct of the individual in his/her participation in one of the modes of perpetration, as part of his/her official capacity as part of the organ of the state. By identifying this intersection, it can be understood that the crime of aggression is predicated on the act of aggression because the norms that prohibit the modes of perpetration, planning, preparation, initiation or waging, run in parallel with the norms that prohibit an act of aggression, and each set of norms cannot exist independently of each other.

On the secondary level, the linkage between individual criminal responsibility and state responsibility whereby the latter gives rise to the former has the purpose of

identifying a breach on the primary level of the norms that prohibit aggression and the norms that criminalise aggression. Thus, state responsibility of the aggressor state is indicative of the defendant having acted in breach of the parallel set of obligations to refrain from the modes of perpetration. This should satisfy the state act element of the crime. For example, the elements pertaining to individual conduct, i.e. the *actus reus* and *mens rea* will need to be established in addition to the state act element of the crime, in order for the perpetrator to be found criminally responsible for the crime of aggression.

Despite the parallel existence of state responsibility and individual criminal responsibility for aggression, there should be a dichotomy between both sets of responsibilities with respect to legal consequences against the aggressor state and the perpetrator of the crime of aggression. For the purpose of prosecution, the establishment of state responsibility for an act of aggression is to find a breach of primary obligations by the defendant, and not to invoke legal consequences against the aggressor state. That said, an open question is whether this may nevertheless amount to satisfaction against the aggressor state. Whatever the best view may be, prosecution for the crime of aggression is intended to enforce legal consequences against the perpetrator of the crime, and not against the aggressor state.

It is submitted in this dissertation that the attribution of conduct to the relevant duty-bearer with respect to the definition of the crime of aggression is demarcated into the ‘act of aggression’ (aggressor state) and ‘planning, preparation, initiation or waging/execution’ (perpetrator of the crime). The significance of this demarcation is that the definition of the crime of aggression preserves a dualist structure of responsibility whereby the aggressed state has a legal interest to invoke legal consequences against both the aggressor state (state responsibility) and the perpetrator of the crime (individual criminal responsibility). Prosecution of the crime of aggression does not absolve the responsibility of the aggressor state or protect the legal interests of the aggressed state in relation to the legal consequences pursuant to the secondary norms of state responsibility.

Third, this dissertation establishes that the aggressed state is the victim of the crime of aggression because it is the rights-holder of the enjoyment of the protection afforded by the norms that criminalise aggression, and has suffered from the breach of primary obligations by the perpetrator of the crime (Chapter V). Although this is fairly uncontested, it is nevertheless an important submission because the general

assumption under international criminal law is that victims of international crimes are natural persons. Not wanting to depart entirely from the general concept of victims in international criminal law, it is suggested that natural persons who are injured in a situation of aggression (as a result of the act of aggression and crime of aggression) should be qualified as the victims of war crimes (provided the constitutive elements of war crimes are present) and not the crime of aggression. This is consistent with the applicable legal framework in a situation of aggression (*jus ad bellum* and *jus in bello*). Be that as it may, it is also suggested that natural persons may be considered as indirect victims of the crime of aggression, and may thus be recognised as beneficiaries of the enjoyment of protection from the implementation of the norms that criminalise aggression. It is submitted that the status of natural persons as beneficiaries to receive reparations at the ICC is a tertiary right conferred by the Rome Statute. Thus, it is unlikely that natural persons may be entitled to such reparations for the crime of aggression in another forum.

Fourth, this dissertation examines the enforcement mechanisms that international law relies upon to execute criminal sanctions against perpetrators for the crime of aggression (Part III), with particular reference to whether, and to what extent, the legal interests of the aggressed state are protected. The first part of the question, i.e. ‘whether’, refers to whether prosecution of the crime of aggression can take place at the ICC or domestic courts. It is anticipated that prosecutions may take place at the ICC subject to the activation of its jurisdiction in or after 2017, and following 30 ratifications (Chapter VI), and that prosecutions may take place in domestic courts provided the forum state has codified the crime of aggression in its domestic legislation (Chapter VII).

Although in principle, prosecution of the crime of aggression may be carried out at the ICC or in domestic courts, such prosecution may be rather unlikely in practice. The jurisdiction of the Court may remain dormant if there are insufficient ratifications of the Kampala Amendments. There is also the possibility that neither aggressor state nor aggressed state intends to initiate proceedings in their domestic courts for the crime of aggression. Be that as it may, the assumption is that in principle, prosecution of the crime of aggression may take place in both the ICC and domestic courts.

The second part of the question (to what extent are the legal interests of the aggressed state protected) may appear rather theoretical as the jurisdiction of the ICC remains to be activated, and despite the codification of the crime of aggression in the

domestic legislation of some states, there is no practice of domestic prosecution for the crime of aggression. Be that as it may, in accordance with the principle of complementarity (Article 17 Rome Statute), in situations of concurrent jurisdiction between the ICC and a domestic court of a State Party, the latter has priority of prosecution. Indeed, some of the States Parties that have ratified the Kampala Amendments have already incorporated the crime of aggression into their domestic legislation. Thus, domestic prosecution for the crime of aggression may become an issue of practical importance.

This dissertation has considered whether and to what extent concerns that arise in relation to domestic prosecution for the crime of aggression may be overcome (Chapter VII). It is suggested that the procedural bar to jurisdiction, *par in parem non habet imperium*, is not applicable in a situation where the forum state is the aggressed state as its legal interest in the enforcement of legal consequences against a subject that has committed an internationally wrongful act against its territory should not be precluded. That said, it is entirely at the discretion of the forum state whether *par in parem non habet imperium* is applicable, which would thereby preclude the former from initiating proceedings over the crime of aggression.

As it is highly likely that the defendant is a state official, there is the question of whether immunities from criminal jurisdiction may be successfully pleaded. It is submitted that if a defendant is able to plead immunity *ratione personae*, this will be upheld in the domestic court of the forum state. In the event that a defendant is able to plead immunity *ratione materiae*, the norms that allow this exception to jurisdiction are not applicable as the rule of customary international law that allows for legal consequences to be enforced against an individual for an international crime should prevail. Furthermore, such an exception to jurisdiction should not be applicable, as it would have the effect of precluding the aggressed state from its legal interests to enforce legal consequences.

It is difficult to conclude with certainty that the procedural bars to jurisdiction, i.e. *par in parem non habet imperium* and immunities of state officials for international crimes, are not applicable when the forum state is not the aggressor state. There is a possibility that they may be applicable, thereby precluding the forum state from initiating proceedings over the crime of aggression. However, there is also a possibility that they may not be applicable, thus allowing the forum state to prosecute the crime of aggression.

The general rule is that domestic prosecution for the crime of aggression should be considered on a case-by-case basis. It is at the discretion of the forum state (aggressor state or aggressed state) whether to prosecute the crime of aggression or not. Although both states have a legal interest in acting as the forum state, this does not necessarily mean they will initiate proceedings, as other internal and external factors come into play, e.g. public interest/opinions and political considerations with respect to foreign states. This dissertation has left open the question whether a bystander state has a legal interest to act as a forum state and exercise jurisdiction over the crime of aggression.

The findings of this dissertation in relation to prosecution at the ICC (Chapters III and VI) suggest that it will be rather difficult for an act of aggression to be prosecuted as a crime of aggression. First, the definition of the crime of aggression in Article 8 *bis* (1) encompasses a rather high threshold for the state act element of the crime to be satisfied. Thus, it is clear that not all acts of aggression committed by States can satisfy the state act element within the definition of the crime of aggression pursuant to Article 8 *bis* (1) of the Kampala Amendments. Only an act of aggression by its “character, gravity and scale” constitutes a “manifest violation” of the UN Charter. (Chapter III). For the purposes of specificity, Article 8 *bis* (2) encompasses a definition of an act of aggression, which upon closer examination, is the incorporation of Articles 1 and 3 of the definition pursuant to GA Resolution 3314 (XXIX)1974. Concerns with regard to the specificity of the provisions of GA Resolution 3314 (XXIX)1974 as a basis for individual criminal responsibility are refuted by pointing out that the definition of an act of aggression in Article 8 *bis*(2) of the Kampala Amendments does not give rise to individual criminal liability because it is not the state act element of the crime *per se*; the latter is found in Article 8 *bis*(1). Further, the SWGCA had adopted the most pragmatic approach by relying on the normative definition of aggression under international law pursuant to GA Resolution 3314 (XXIX)1974. In any event, the act of aggression under Article 8 *bis* (2) must be read in the light of the threshold under Article 8 *bis* (1) to qualify for the state act element of the crime of aggression.

Indeed, the threshold for the use of force to be considered as an act of aggression for the purposes of fulfilling the state act element of the crime of aggression appears to be set higher than the threshold under *jus ad bellum*. This has led to concerns that the normative definition of an act of aggression under *jus ad bellum* pursuant to GA

Resolution 3314(1974) may be diluted or eclipsed. A related concern has also been put forward that a high threshold of the state act element will have the unintended effect of indirectly condoning the use of force and acts of aggression. Both of these concerns have been rejected as obligations on States pursuant to the prohibition of the use of force under *jus ad bellum* are unaffected by the definition of the state act element under Article 8 bis (2) of the Kampala Amendments. Regardless of whether individuals who are part of the state organ may face criminal prosecution for the crime of aggression, the prohibition against an act of aggression is peremptory in nature, which in addition to obligations *erga omnes* on States to refrain from the use of force, entails particular legal consequences under the secondary rules of state responsibility against the aggressor state (Chapter I).

Second, state referrals and *proprio motu* investigations (Article 15 *bis*) require the need for prior external determination of an act of aggression, which must be satisfied before the Prosecutor may proceed with the investigation in respect of a crime of aggression. The Security Council is given the primary role to determine an act of aggression. It is presumed that determination of an act of aggression is retrospective in this regard, and not for the purposes of making recommendations under Chapter VII for the maintenance of international peace and security. Be that as it may, it is unlikely that the Security Council would reach such a determination in practice. In the absence of a determination, the Prosecutor may seek the Pre-Trial Division's authorization for the commencement of the investigation in respect of a crime of aggression after six months after the date of notification. The ICC may reach a different decision than the Security Council with regard to the determination of an act of aggression. The political and procedural implications of having two external determining mechanisms suggest that prosecution of the crime of aggression may be a long process. Furthermore, the Security Council may defer an investigation or prosecution of the crime of aggression for a period of 12 months.

Third, the *sui generis* jurisdictional regime raises the question of (aggressor) state consent with regard to the exercise of jurisdiction over its nationals for the crime of aggression. This is directly relevant to the question as to whether the aggressor state must ratify the Kampala Amendments in order for the jurisdictional regime to be applicable over its nationals for the crime of aggression. It is submitted that the consent of the aggressor state should be upheld because prosecution of the crime of aggression at the ICC can be regarded as a form of satisfaction for the act of

aggression. That said, consent need not necessarily be expressed through the act of ratification the Kampala amendments. The *sui generis* jurisdictional regime over the crime of aggression is premised on implied state consent of States Parties to the Rome Statute, as evident by the exclusion of non-states parties and the opt-out declaration provided in Article 15 *bis*(4).

Thus, for the jurisdictional regime over the crime of aggression to be applicable, it suffices that either the aggressor state or the aggressed state has ratified the Kampala Amendments so that the underlying jurisdictional links can be established under the national or territorial principle. Notably, the aggressor State must not have opted-out of the jurisdictional regime entirely. Be that as it may, the jurisdictional regime over the crime of aggression appears nevertheless to be rather limited in scope as it excludes non-states Parties, and allows States Parties to opt-out. It can be assumed that the role of the ICC as an enforcement mechanism against the perpetrators of the crime of aggression is expected to be rather limited in practice. That said, it is perhaps premature to assess the effectiveness of the Court as an enforcement mechanism as it remains to be seen whether the jurisdiction of the ICC over the crime of aggression will be activated in or after 2017. In the meantime, the symbolic significance of the adoption of the Kampala Amendments by consensus should not be undermined.

As a general observation, it can be said that while the contemporary international legal order recognises the importance of legal interests of the aggressed State, that legal consequences are invoked against the perpetrator of the crime of aggression, it has not yet generated structures and institutions that would be necessary to effectively implement responsibility for conduct affecting these interests. Notwithstanding, it is hoped that the findings of this dissertation contribute to a comprehensive understanding of the crime of aggression in public international law. In addition to clarifying the conceptual elements of the crime of aggression, it is hoped that this dissertation has helped to clarify at least some of the uncertainties that practitioners may have with respect to the crime of aggression.

The recognition of individual responsibility for a crime that is addressed solely at the protection of the aggressed State, and not individuals, may be read to suggest a significant shift in the structure of the international legal order. The proposition that individuals are subjects, and States objects or beneficiaries of rules of international

law certainly seems to be a striking departure from the orthodox view that States were exclusive subjects of international law. However, the intrinsic link between individual and State responsibility demonstrated in this thesis ensures that the crime of aggression simultaneously fits within the traditional inter-State model of international law and confirms the shift of the contemporary legal order towards greater legal appreciation of various roles that individuals may play.

As there is still general disagreement by States Parties with respect to the entry-into-force of the Kampala Amendments and the jurisdictional regime of the ICC over the crime of aggression, it is hoped that the findings of this research in relation to these issues will help to clarify the situation. It is also hoped that this research may put into perspective the legal interests of the aggressor state, the aggressed state and the perpetrator of the crime of aggression in a situation of aggression. From a practitioner's perspective, the assessment of injury to natural persons in a situation of aggression (as a result of an act of aggression and crime of aggression) in accordance with the applicable legal framework may also be useful in relation to legal proceedings. Last but not least, it is hoped that the findings of this research will help an aggressed state to understand better its legal interests under international law in relation to legal consequences for the aggressor state that has committed an act of aggression, and for the alleged perpetrator of the crime of aggression.