

John Dotson, Brian C. Chao, Brian Zhang

China, Taiwan and the Crime of Aggression



An International Criminal Law
Analysis of China's Military Operations
in the Indo-Pacific Region

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CHAPTER 1. INTRODUCTION

I. OVERVIEW

This volume examines China's conduct in the Indo-Pacific region through the prism of the crime of aggression. It focuses on Chinese military operations and gray zone tactics, with a focus on the South China Sea and the Taiwan Strait, with a view to determine whether such operations involve a use of force that rises to the level of an armed attack for purposes of the crime of aggression.

While this study focuses on China's conduct towards Taiwan, it also examines a range of other states in the Asia Pacific region, to include the Philippines, Japan, South Korea and Australia, with a view to determine whether senior leaders of the People's Republic of China could be held liable under international criminal law for the crime of aggression. After examining the historical context of Taiwan (the Republic of China) *vis-à-vis* the People's Republic of China, the author concludes that Taiwan fulfills the criteria for statehood under both the declaratory and constitutive theories of statehood under public international law and, therefore, that Taiwan could be a victim of the crime of aggression.

Following a detailed review of a range of military analyses, government investigations and think tank reports examining Chinese kinetic attacks and cyberattacks against Taiwan and neighboring states, this treatise concludes that the conduct of China's senior leaders towards Taiwan and neighboring states meets the elements of the crime of aggression under international criminal law.

II. HISTORICAL OVERVIEW OF THE REPUBLIC OF CHINA

A. Overview

After multiple attempts to topple the imperial Qing court, a military uprising known as the Xinhai Revolution (the Chinese Revolution of 1911) was successful. The Republic of China, Asia's first republic, was formally established on 1 January 1912, a successor to the Qing Dynasty governing mainland China.

Meanwhile, across the Taiwan Strait, Japan, as a colonial power, controlled Taiwan beginning in 1895. Japan held *de jure* sovereignty over the island when it surrendered to the Allies at the end of the Second World War in 1945. Upon its surrender, Japan ceded its control of Taiwan to the Nationalist-led government of China, the Republic of China ("ROC"). With the San Francisco Peace Treaty, which went into force on 28 April 1952, Japan's renunciation of its title to Taiwan was finalized.

Therefore, modern-day Taiwan was the territory of Japan, a sovereign state, throughout the Second World War and until Japan's surrender in 1945. Japan's cession of the territory of Taiwan to the Republic of China occurred during the Chinese Civil War, before the Nationalists lost the Chinese Civil War to the Communists in 1949.¹ At the end of the civil war in 1949, the defeated Nationalist government retreated to Taiwan, where it regrouped itself as the Chinese state's government in exile, continuing its historic claim to statehood since the Republic of China was proclaimed in 1912. When the San Francisco Peace Treaty was signed in 1951 and went into force in 1952, Japan's cession of Taiwan was formalized.

The 1947 Republic of China's amended Constitution continues to be Taiwan's fundamental law today. Since 1949, mainland China and Taiwan have had separate governments. When Japan formalized its

¹ Dr Ming-Sung Kuo, "Democracy and the (Non)Statehood of Taiwan," EJIL: Talk! (3 Nov. 2022), available at <<https://www.ejiltalk.org/democracy-and-the-nonstatehood-of-taiwan/>>.

renunciation to the island in 1952, that territory was ceded to the ROC, not the People's Republic of China ("PRC"), and it was the ROC, not the PRC, that was a founding member of the United Nations. In fact, Article 23 of the United Nations Charter continues to refer to the "Republic of China," not the "People's Republic of China," as a founding member of the United Nations. Nonetheless, a battle for international recognition and legitimacy started between the government led by Mao from Beijing and the government led by Chiang Kai-shek from Taipei, which was still recognised widely in the West as the only legitimate government of China.

In the context of war in Korea and the U.S.'s war against communism, the U.S. formed an alliance with Chiang-Kai-shek. In 1955, President Eisenhower signed a congressional joint resolution authorizing military force to protect Formosa, as Taiwan was then called by the U.S. government.²

B. UN General Assembly Resolution 2758 (1971), Replacing the ROC with the PRC as the Lawful Representative of the Chinese State

As Mao's China became of increasing importance to the U.S. during the Cold War, Chiang Kai-shek's influence diminished. Under UN General Assembly Resolution no. 2758 (1971), PRC government representatives replaced the ROC government representatives as the lawful representative of the Chinese state at the UN.

The United States actively worked to prevent the adoption of Resolution 2758. It coordinated efforts among like-minded states to defeat similar draft resolutions for many years prior to 1971. And in 1971, it continued expressing its strong opposition to the Resolution, even though it and like-minded States were ultimately outvoted.

However, the impact of Resolution 2758 should not be overemphasized. It did not deny Taiwan's status as a state, nor did it recognize the PRC as a state. In fact, the UN does not recognize states;

² "Remembering Eisenhower's Formosa AUMF," Lawfare (29 January 2019), available at <<https://www.lawfaremedia.org/article/remembering-eisenhowers-formosa-aumf>>. Eisenhower's resolution was repealed twenty years later in 1975.

it is states that recognize states. Rather, Resolution 2758 merely dealt with which state was credentialed to represent “China” at the UN.

C. Shanghai Communiqué (1972)

In addition, the U.S. policy on Taiwan in 1972 was expressed in the Shanghai communiqué which stated that “all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is part of China. The U.S. Government does not challenge that position.”³

D. U.S. Shift of Diplomatic Recognition of the PRC (1979) and Passage of Taiwan Relations Act (1979)

In 1979, the U.S. shifted diplomatic recognition to Mao’s China. At the same time, the U.S. passed the Taiwan Relations Act in 1979, under which the U.S. provides Taiwan with arms of a defensive character and shall maintain the capacity of the U.S. to resist any resort to force or other forms of coercion that would jeopardize the security, or social or economic system, of the people of Taiwan.⁴ This demonstrated that while the Carter administration wished to establish diplomatic relations with the PRC for economic reasons, Congress and President Carter did not want to abandon Taiwan altogether. Rather, they wished to have relations with both the PRC and Taiwan, and shifting diplomatic relations to the PRC while enacting the Taiwan Relations Act was the means of achieving this objective.

The fact that the U.S. passed the Taiwan Relations Act in the very same year that it shifted diplomatic recognition to Beijing demonstrates the reality of the international relations of China and Taiwan. States, including the U.S., give to Beijing the lip service it demands. They call the “PRC” China; they allow the PRC to represent China at the UN; they even establish diplomatic relations with Beijing. But if one looks to what states actually do, the reality is very different. The U.S. shifted diplomatic relations to China in 1979, but in that very same year, the

³ Foreign Relations of the United States, 1969-1976, Vol XVII, China, 1969-1972, Joint Statement following discussions with leaders of the People’s Republic of China

⁴ Taiwan Relations Act, available at <<https://www.congress.gov/bill/96th-congress/house-bill/2479>>.

U.S. passed a law that obligated it to maintain the capacity to resist any resort to force that would jeopardize Taiwan's security or social or economic system. This is crystal clear proof that the U.S. never ceased its *de facto* recognition of Taiwanese statehood, despite the Shanghai Communiqué of 1972 and diplomatic recognition of China in 1979. A state cannot both recognize the "One-China Policy," with Beijing the capital of that one China, while establishing military ties with Taiwan, agreeing to protect Taiwan should Beijing invade. If the U.S. truly recognized Taiwan as a part of China, any agreement to defend it would need to be sanctioned by Beijing. Here, it is not only that Beijing did not approve the Taiwan Relations Act, but also, it was Beijing that was threatened by that very act, which was designed to deter Beijing from invading and forcibly uniting Taiwan with Beijing.

E. Democratic Progressive Party of Taiwan (1980s)

The 1980s saw the birth of an opposing party in Taiwan, the Democratic Progressive Party ("DPP") which supported the idea of an independent Taiwan and a series of constitutional reforms. In 1988, Lee Teng-Hui became president of Taiwan. In 1991, the National Assembly held the first democratic elections. From then, there was a growing desire from a part of the population in Taiwan to become a separate State from China. A constitutional amendment to Article 11 prescribed that "rights and obligations between the people of the Chinese mainland area and those of the free area [Taiwan], and the disposition of other related affairs may be specified by law." In accordance with this provision, the Act Governing Relations between the People of Taiwan Area and Mainland Area was enacted by the Legislative Yuan (Taiwan's unicameral Congress) in 1992 as an instrument to regulate relations between the people of Taiwan and the PRC. Taiwan has undergone a series of constitutional reforms and these reforms have effectively withdrawn its claim over mainland China. According to

these reforms, Taiwan's governmental body would only represent Taiwan people.⁵

This sentiment was *not* shared by China. In 1996, China used its military might to threaten Taiwan by conducting missile tests in the Taiwan strait. And in 2005, China passed an anti-secession law outlining the possibility of taking Taiwan by force if Taiwan declared independence.

In 2016, pro-independence presidential candidate Tsai In-wen of the DPP was elected. She was re-elected in 2020. In an interview with the BCC following her second electoral victory, asked whether she was in favour of Taiwan becoming an independent State, she replied that Taiwan was already an independent State and there was no need for a declaration of independence.⁶ Yet, at the beginning of 2024, in his New Year's address, President Xi stated that China's reunification with Taiwan is inevitable.⁷

III. CHINA, CYBERWARFARE AND GRAY ZONE TACTICS

China has worked towards the development of weapons and technologies to be used to launch cyberattacks targeting the infrastructure of Taiwan, the U.S. and a range of other states. China's deployment of these weapons is detailed throughout this volume, including in Chapter 4.I.C ("China's Gray Zone Operations against Taiwan") and Chapter 4.IV.D ("Chinese Cyberwarfare against U.S. InterestsChapter 4.IV.D"). Given the scale and effects of these attacks, China's use of cyberattacks constitutes a use of force commensurate with the gravity, scale and consequences of kinetic force. Cyberweapons that have been developed by China have the potential

⁵ For detailed information concerning the constitutional reform of Taiwan, *see* Liu Yulin, "Statehood Theory and China's Taiwan Policy" 2 *Tsinghua China Law Review* (2009), p. 7.

⁶ "Taiwan Tensions: In Conversation with President Tsai Ing-Wen," BBC Interview (2020), available at <<https://www.youtube.com/watch?v=cFdnygITNog>>.

⁷ "China's Xi says 'reunification' with Taiwan is inevitable," Reuters (1 January 2024), available at <<https://www.reuters.com/world/asia-pacific/china-calls-taiwan-president-frontrunner-destroyer-peace-2023-12-31/>>.

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to cause the same level of damage to infrastructure as conventional weapons. Therefore, they should be treated as attacks using chemical weapons for purposes of the analysis of the crime of aggression.

CHAPTER 2. THE CRIME OF AGGRESSION

I. DEFINITION UNDER THE ROME STATUTE

A. Text of Article 8bis

Article 8bis of the SICC states as follows:

Article 8bis. Crime of aggression

1. For the purpose of this Statute, “crime of aggression” means the 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.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any

extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

B. Text of the ICC Elements of Crimes

The ICC Elements of Crimes (2013) states as follows:

Article 8 bis Crime of aggression

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.

2. The perpetrator was a person⁸ in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.

4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.

5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

C. Meaning of “Armed Force” against a State

1. Any Weapon Can Constitute “Armed Force”

Element 3 of the crime of aggression requires “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with

⁸ With respect to an act of aggression, more than one person may be in a position that meets these criteria.

the Charter of the United Nations.” According to the Council of Advisers’ Report on the Application of the Rome Statute of the International Criminal Court to Cyberwarfare,⁹ the requirement of “armed force” can be satisfied through the use of any weapon, but attacks must be conducted “through kinetic methods of warfare.” In other words, an attack that disables another state’s military or economic infrastructure through a cyberattack or other means that does not use kinetic force would not qualify as an act of aggression. According to the Council of Advisers’ Report on the Application of the Rome Statute of the International Criminal Court to Cyberwarfare:

In discussing the meaning of the word “armed,” the Council of Advisers agreed that any use of force regardless of the specific weapon used, would satisfy the use of “armed force” element for what constitutes an act of aggression under Article 8bis. The International Court of Justice in its advisory opinion about nuclear weapons makes clear that use of force may be accomplished “regardless of the weapons employed.”²⁴ There is no reason to treat the situation differently from equivalent attacks conducted through kinetic methods of warfare.¹⁰

Therefore, in the words of the Council of Advisers’ Report, the use of “armed force” under the Rome Statute is satisfied through “any use of force regardless of the specific weapon used.” Employing cyber attacks is not to be treated “differently from equivalent attacks conducted through kinetic methods of warfare.”¹¹

In other words, both attacks using kinetic means of warfare as well as kinetic attacks may constitute acts of aggression. Any other conclusion would be inapposite. It would be illogical for international law to hold that the launch of a missile that crossed through the territorial airspace of a state constituted a use of armed force, but a

⁹ “Council of Advisers’ Report on the Application of the Rome Statute of the International Criminal Court to Cyberwarfare,” Permanent Mission of Liechtenstein to the United Nations (Aug. 2021), para. 2.

¹⁰ “The Council of Advisers’ Report on the Application of the Rome Statute of the International Criminal Court to Cyberwarfare,” Permanent Mission of Liechtenstein to the United Nations (August 2021), p. 10.

¹¹ “The Council of Advisers’ Report on the Application of the Rome Statute of the International Criminal Court to Cyberwarfare,” Permanent Mission of Liechtenstein to the United Nations (August 2021), p. 10.

cyberattack that neutralized the entire electrical grid of a state, its energy, food and transportation infrastructure and all of a military's communications, and caused thousands of deaths, would not constitute an "armed attack." Here, international law elevates the substance of an attack over its form, looking to the gravity and scale of the attack rather than whether it has technically used a conventional weapon employing kinetic force.

2. *Cyberattacks as Acts of Aggression*

a. *Cyberattacks as a "Use of Force"*

To qualify as a crime of aggression under the Rome Statute, an act must constitute a use of "armed force" by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the UN. In addition, the act must constitute a manifest violation of the Charter of the UN.

The *Tallinn Manual 2.0* states as follows with respect to the use of force:

Rule 10 – Prohibition of Threat or Use of Force

A cyber operation that constitutes a threat or use of force against the territorial integrity or political independence of any State, or that is in any other manner inconsistent with the purpose of the United Nations, is unlawful.

Rule 11 – Definition of Use of Force

A cyber operation constitutes a use of force when its scale and effects are comparable to non-cyber operations rising to the level of a use of force.

The definition in the *Tallinn Manual* makes clear that cyber operations can constitute a use of force. Therefore, a cyberattack by one state against another could potentially constitute a violation of Article 2.4 of the UN Charter, which prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

b. *Cyberattacks as “Armed Attacks”*

A cyberattack could constitute an act of aggression under the Rome Statute if the cyberattack’s “use of force” constitutes “armed force.” The *Tallinn Manual 2.0* discusses the distinction between a “use of force” and an “armed attack,” articulating the two alternative positions addressed below.

i. A Use of Force Constitutes an Armed Attack Based on Its Gravity

Under the first position, a use of force constitutes an armed attack if it crosses a threshold of gravity. The Group of Experts characterizes an “armed attack” as a more severe form of a use of force, one that triggers the right to self-defense:

In determining whether an act constitutes a ‘use of force’, it is useful to consider the notion of ‘armed attack’, which is the threshold at which a State may lawfully use force in self-defence (Rule 13). In the *Nicaragua* Judgment, the International Court of Justice distinguished the ‘most grave’ forms of the ‘use of force’ (those constituting an ‘armed attack’ for the purposes of the law of self-defense) from other less grave forms. The International Group of Experts agreed, therefore, that any cyber operation which rises to the level of an ‘armed attack’ in terms of scale and effects pursuant to Rule 13, and which is conducted by or otherwise attributed to a State, qualifies as a ‘use of force’.¹²

On this basis, it can be concluded that a cyberattack that constitutes a “use of force,” based on its scale and effects, could also constitute an “armed attack” for purposes of the crime of aggression, depending on the gravity of the attack.

ii. Uses of Force Are Interchangeable with Armed Attacks

The Group of Experts articulates a contrary position, which equates a “use of force” with an “armed attack,” treating them interchangeably:

[T]he distinction between the two concepts is either so narrow as to be insignificant or nonexistent. This position, articulated by the United States after the *Nicaragua* decision, asserts that any illegal use of force can qualify as an armed attack triggering the right of self-defense; there is no gravity threshold distinguishing illegal uses of force from armed

¹² *Tallinn Manual 2.0*, p. 48-49, para. 6.

attacks. On this view, no gap exists between an unlawful use of force and an armed attack.¹³

The commentary to Rule 11 goes on to discuss the criteria for determining when a cyberattack constitutes an armed attack. It draws on the same criteria that it cites for determining when a cyberattack constitutes a use of force; one must examine the “scale and effects” of the attack:

In discussions regarding the appropriate threshold for a use of force, the International Group of Experts took notice of the *Nicaragua* Judgment. In that case, the International Court of Justice stated that ‘scale and effects’ are to be considered when determining whether particular actions amount to an ‘armed attack’ (Rule 13). The Experts found the focus on scale and effects to be an equally useful approach when distinguishing acts that qualify as uses of force from those that do not.¹⁴

Under this second position, a cyberattack could constitute both a use of force and an armed attack, based on an analysis of its scale and effects.

iii. Conclusion: Cyberattacks Could Constitute “Armed” Attacks

Regardless of which position one adopts, it is clear that a cyberattack, on its own, could constitute an “armed attack” for purposes of the crime of aggression.

D. Analysis of the Definition of Aggression

The crime of aggression under the Rome Statute has six elements. Three elements define the requisite *actus reus*; one applies to the perpetrator’s position as a person who exercises control over state action; and two apply to the perpetrator’s state of mind (*mens rea*).

1. Perpetrator’s Responsibility

The perpetrator must be in a position effectively to exercise control over or to direct the political or military action of the state which

¹³ *Tallinn Manual 2.0*, p. 49, para. 7.

¹⁴ *Tallinn Manual 2.0*, p. 47, para. 1.

committed the act of aggression. This element is met when the perpetrator is the head of a state's political or military apparatus.

2. The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

2. *Actus Reus*

The *actus reus* elements of the crime of aggression apply to the perpetrator's planning, preparation, initiation or execution of an act of aggression and the actual commission of the act of aggression, which must constitute a manifest violation of the UN Charter. The ICC Elements of Crimes state in element 3 that the act of aggression must be "inconsistent with the Charter of the United Nations", but this element is subsumed within element 5, which states that the act of aggression must constitute a "manifest violation of the Charter of the United Nations." An act cannot be a manifest violation of the Charter of the United Nations without being inconsistent with the Charter of the United Nations.

Therefore, for purposes of *actus reus*, a prosecution must only prove the following:

- the perpetrator planned, prepared, initiated or executed an act of aggression (a use of armed force by a state in a manner that is inconsistent with the UN Charter); and
- the act of aggression was a manifest violation of the UN Charter.

3. *Mens Rea*

The *mens rea* standard established by the Rome Statute for the crime of aggression is knowledge. A prosecution does not need to prove negligence, recklessness or purpose. Knowledge can refer to awareness with respect to circumstances, conduct or the results of conduct. The ICC Elements of Crimes refer to knowledge with respect to circumstances only; a prosecution does not need to prove the

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perpetrator's knowledge of conduct or the results of said conduct. A prosecution is only required to prove the following:

- The perpetrator's awareness of the factual circumstances that established that a use of armed force was inconsistent with the UN Charter; and
- The perpetrator's awareness of the factual circumstances that established a manifest violation of the of UN Charter by virtue of the use of force.

International criminal case law does not require the prosecution to enter into the mind of the perpetrator to demonstrate knowledge; such knowledge can be inferred through circumstances. For example, where the armed forces of a commander are responsible for military incursions into a neighboring state and the incursions are subject to widespread media coverage, knowledge can be imputed to the commander as it would not be possible for the commander to not know. Similarly, *mens rea* can be inferred in international criminal law through patterns of conduct.

II. DEFINITION UNDER CUSTOMARY INTERNATIONAL LAW

A. The Nuremberg Principles as Customary International Law

The Nuremberg Principles, which have been reaffirmed in the statutes of international criminal tribunals, are widely considered to represent customary international law. At the time the International Military Tribunal was founded, there of course was no Rome Statute to try the crime of aggression, nor was there any other treaty that enunciated the elements of the crime of aggression. Rather, when drafting the Statute of the IMT, the drafters relied upon customary international law. Custom was the sole basis for the principles set forth in the Statute of the IMT, and these principles set forth the foundation for what would become the architecture of international criminal

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