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The Applicability of the Crime of Aggression to Armed Conflicts Involving Quasi-States

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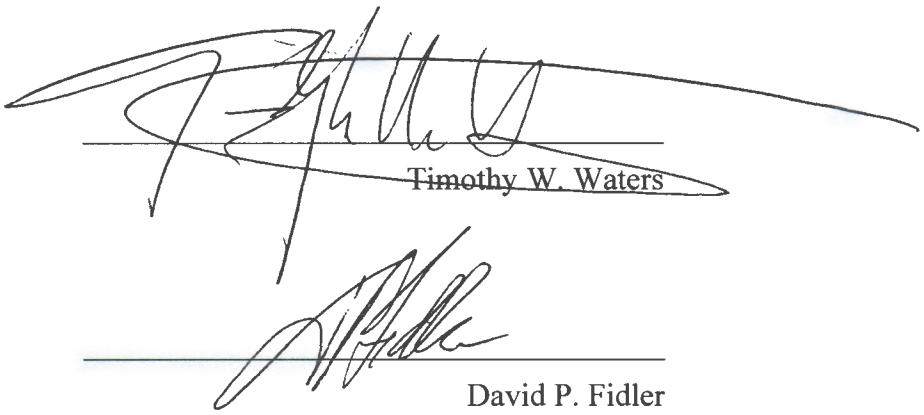

Timothy W. Waters

David P. Fidler

Joseph L. Hoffmann

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To My Parents

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This dissertation would not have been possible without the help of my supervisor and many others who provided their insight and support.

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two critical comments. First, he expressed his concern that my ambitious proposal tried to address too many different types of armed conflicts. His invaluable advice allowed me to set a more realistic goal, and led me to focus on only armed conflicts involving quasi-states. Second, he asked whether it is necessary to prosecute illegal uses of armed force involving heterodox state units or non-state actors as crimes of aggression. I took his question as critical, and tried to answer it in Chapter 3.

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THE APPLICABILITY OF THE CRIME OF AGGRESSION TO ARMED CONFLICTS INVOLVING QUASI-STATES

Hyeyoung Lee

The *crime of aggression*, as defined in the Rome Statute of the International Criminal Court, is only applicable to inter-state armed conflicts. There is, however, a gray area when an armed conflict erupts in the territory of a recognized state and initially looks like civil war, but has international elements such as the involvement of a quasi-state whose status and rights are disputed in international law. Resolving the issue of whether the crime of aggression is applicable to disputes involving quasi-states is important because (1) there are many quasi-states throughout Europe, Asia, and Africa; and (2) quasi-states are a major source of war due to the inherent nature of their militarized society and the long-term tensions that exist between a quasi-state, its mother state, and its external patron state.

The applicability of the crime of aggression to quasi-states depends on the interpretation of the meaning of "state" in the context of aggression. The meaning of "state" reflects a contradiction, because although state-like entities exist regardless of whether they receive recognition, recognition performs a function in determining which entities are qualified to join institutional clubs. Like recognized states, unrecognized quasi-states have been both perpetrators and victims of aggression. Yet, because they lack recognition, they have neither been protected nor prosecuted under the crime of aggression. This dissertation offers a suggestion for how "state" should be defined in the crime of aggression, and consequently, how the crime of aggression should be applied to armed conflicts involving quasi-states.

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INTRODUCTION

What if the war-making leader of a state was prosecuted by the International Criminal Court ("ICC") for aggression committed against another state? What if a civil war broke out because the leader of a rebel group committed an armed attack against his own government, subsequently causing the government to respond by sending authorities to restore domestic security? What if the leader of an unrecognized quasi-state, whose statehood and rights are disputed in international law, committed an armed attack against his mother state, leading to a war between the quasi-state and its mother state?

These scenarios have occurred in nearly every period of history and have gravely damaged peace and security in the affected regions, ultimately harming human life and dignity. While each of these instances involves the illegal use of armed force, the definition of the crime of aggression in the Rome Statute—which limits its scope only to "the use of armed force *by a State against…another State*"[1] –seems to clearly apply to only the first case: an attack by a recognized state on another recognized state.

While the first example is unambiguous, the crime of aggression is also clearly inapplicable to the second example—a conflict between rebels and governmental authorities—because it is a civil war. It is much less certain, however, whether the crime of aggression is applicable to the third case—a conflict between a quasi-state and its recognized mother state—because the conflict is neither purely international nor purely internal. Thus, a gray area exists in the third scenario: although the armed conflict erupts in a territory of a recognized state (and may initially look like a civil war), there are

[1] Review Conference of the Rome Statute, Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, annex I, art. 8 *bis,* para 2, RC/Res.6 (June 11, 2010) [hereinafter *Kampala Amendment*] [emphasis added].

international elements because the status and rights of the involved quasi-states are disputed in international law.

Resolving the issue of whether the crime of aggression is applicable to disputes involving quasi-states is important. There are many quasi-states throughout Europe, Asia, and Africa.[2] Almost all quasi-states come into existence by military means through civil war, and the military leaders of the civil war generally take political power of the quasi-state.[3] In many cases, the military leaders of quasi-states devote a large part of their state's resources to the military to protect the quasi-state from its mother state. This often leads to "a militarization of society."[4] When the mother state is a well-functioning and strong state, matters become even more complicated; quasi-states usually have a strong external patron supporting them against their mother state,[5] and this triangular relationship generally is subject to long-term tensions. As a result, quasi-states are a major source of war.[6] If the meaning of "state" in the context of the crime of aggression were limited to only recognized states, there would be a large number of violent conflicts outside the reach of international criminal justice.

The applicability of the crime of aggression to quasi-states depends on the interpretation of the meaning of "state" in the context of aggression. A quasi-state is, by its name, a state-like entity. Because of the controversies surrounding statehood in international law, including international criminal law, the question arises whether the

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[2] Pål Kolstø, *The Sustainability and Future of Unrecognized Quasi-States*, 43 J. PEACE RES. 6, 723, 726 (2006).
[3] *Id.* at 731-32.
[4] *Id.* at 732.
[5] *Id.*
[6] Alexander G. Wills, *The Crime of Aggression and the Resort to Force against Entities, in Statu Nascendi,* 10 J. CRIM. JUST. 83, 86-87 (2012). Recent examples of armed conflicts involving quasi-states include the latter stage of the Sri Lankan Civil War, the conflict between Georgia and South Ossetia in 2008, the Second Sudanese Civil War, and certain stages of the Yugoslav Wars.

crime of aggression is applicable to quasi-states. Thus, the main questions become: how is "state" defined for the crime of aggression, and does a quasi-state qualify as a state under that crime?

Under the current definition, even if a quasi-state is considered a non-state actor, there is an occasion when the illegal use of armed force by a quasi-state could be prosecuted as a crime of aggression. That is, if the acts of a quasi-state could be attributed to an external recognized state, the external state bears responsibility for the quasi-state's armed group and the acts carried out by it.[7] However, this occasion has limitations in that it is only applicable to armed conflicts committed *by* a quasi-state, and not *against* a quasi-state—which remains beyond the reach of international criminal law. In addition, although this occasion provides a way to impose responsibility on external patron states for the conduct carried out by a quasi-state, it does not allow the ICC to prosecute the leaders of the quasi-state who actually planned and initiated the armed attacks. According to the Rome Statute, only "a person in a position effectively to exercise control over or to direct the political or military action *of a State*"[8] can commit a crime of aggression. To prosecute the leader of a quasi-state that committed illegal armed attacks, therefore, the definition of "state" in the crime of aggression would have to include unrecognized quasi-states. The purpose of this dissertation is to offer a suggestion for how "state"

[7] Kampala Amendment, *supra* note 1, art. 8 *bis,* para 2 (g) ("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:…(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."). Due caution should be exercised in distinguishing between the attribution of actions carried out by armed groups of quasi-states to external states and the responsibility of the external states for their own conducts of training, arming, equipping armed groups of a quasi-state (*See* ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Merits*), judgment of June 27, 1986, at paras. 105-115; Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EJIL 649, 652-653 (2007)).

[8] Kampala Amendment, *supra* note 1, art. 8 *bis,* para 1 [emphasis added].

should be defined in the crime of aggression, and consequently, how the crime of aggression should be applied to armed conflicts involving quasi-states.

With those purposes in mind this dissertation will proceed as follows. Chapter One will examine the historical development of the crime of aggression from the Nuremberg Trials to the Rome Statute, and will explain why this dissertation limits itself to the definition of the crime of aggression in the Rome Statute of the ICC. This requires an examination of how to interpret the Rome Statute to cover quasi-states rather than proposing an alternative definition of "state." The historical development of the crime of aggression will reveal that the definition in the Rome Statute (1) reflects customary international law on the prohibition of inter-state aggression, and (2) represents the international community's consensus on aggression.

Chapter Two will identify the uncertainties surrounding the applicability of the crime of aggression to armed conflicts involving quasi-states. This Chapter will briefly introduce what a quasi-state is and explain that the applicability of the rule of the crime of aggression to a quasi-state is ambiguous because of the absence of a provision defining "state" in the Rome Statute. This Chapter will examine (1) whether a quasi-state is a state according to the criteria of statehood in international law, and (2) what the Rome Statute says about the scope of "state" for the purpose of international criminal law.

Chapter Three will examine whether it is necessary to prosecute illegal armed conflicts involving quasi-states as crimes of aggression rather than as genocide, crimes against humanity, war crimes, or international terrorism. In many cases, illegal uses of armed force involving quasi-states could constitute genocide, war crimes, crimes against humanity, and terrorism because these other crimes can be committed without a

connection to international conflicts. The individual who waged such an armed attack could therefore be prosecuted for all of those crimes at the discretion of the Prosecutor. But planning and initiating such uses of armed force involving quasi-states cannot be prosecuted as crimes of aggression if the meaning of "state" in the context of aggression is not broad enough to include quasi-states. This discrepancy between the scope of crimes of aggression and the scope of other international crimes produces an odd conclusion: although the underlying nature of illegal uses of armed force constitutes aggression, only the rule on aggression does not cover the situation while other substantive crimes cover it.

Furthermore, whether the fundamental nature of acts of aggression—e.g., illegal uses of armed force—can be fully covered by other international crimes rather than by the crime of aggression is questionable. Although other international crimes cover the uses of illegal armed force involving quasi-states, it is nevertheless necessary to prosecute illegal uses of armed force as crimes of aggression for two reasons.

First, some armed attacks involving quasi-states are not covered by those crimes, but rather are covered only by the crime of aggression. Second, there are risks of prosecuting these acts as different crimes because making the illegal use of armed force punishable as other crimes overlooks the different nature of the different crimes. Particularly, due to the special nature of it, the crime of aggression has many limitations—both in the definition of the crime and in the jurisdictional requirements—limitations the other crimes do not have. Therefore, if armed force that amounts to aggression is prosecuted as a different crime, then that could be used as a way to avoid the special requirements of the crime of aggression.

Chapter Four will introduce different interpretation approaches asserted in International Criminal Law ("ICL") by international lawyers. ICL is a specialized branch of the international legal discipline that reconciles the principles from different laws: universalism from public international law, teleological approach from international human rights and humanitarian law, and the principle of legality from criminal law.[9] These different principles are often conflicting, thereby posing challenges when interpreting the term "state" in the Rome Statute.[10] Universalists aspire for a unified concept of statehood that can be applied to all contexts of international law.[11] Teleologists, who mostly have experience in human rights law, advocate a broad interpretation of "state."[12] Criminalists, who advocate for a criminal law perspective and who focus on the principle of legality, would support a strict literal interpretation of the term "state" (although there are still controversies as to what a literal interpretation of "state" means in the context of the Rome Statute).[13]

After reviewing the different interpretations asserted by scholars, this Chapter will argue that the interpretive principles from different laws do not actually suggest different interpretive approaches. Stated differently, internal inconsistency in interpretation has been caused by people who advocate a preferential interpretation and not by the principle itself. Every interpretive approach, whether grounded on public international law, human rights/humanitarian law, or criminal law, concludes that the term "state" in the Rome Statute should be interpreted to balance its textual, contextual, and purposive meanings.

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[9] Carsten Stahn & Larissa van den Herik, *'Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?, in* THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW 21, 23-24 (Larissa van den Herik et al. eds., 2012).
[10] *See* Chapter IV, Section 1.
[11] *See* Chapter IV, Section 1.
[12] *See* Chapter IV, Section 1.
[13] *See* Chapter IV, Section 1.

In a balanced interpretation, the term "state" should have the ordinary meaning accepted by the doctrine of the crime of aggression. This doctrinal analysis should be conducted by (1) an analysis of the moral imperatives of the crime of aggression, and (2) a historical analysis on the scope of the crime of aggression.

Chapter Five will argue that the definition of "state" for the purpose of the crime of aggression is broad enough to include quasi-states. This argument will be based on the two analyses suggested in Chapter Four: (1) an analysis of the moral imperatives and underlying interests that motivate the rule of the crime of aggression; and (2) a historical analysis to see which meaning was given to "state" by the drafters of the rule of aggression.

The moral analysis will be based on scholars' examinations of justifications for criminalizing acts of aggression. The underlying interests that motivated the rule making for the crime of aggression will suggest that the same interests are threatened by armed attacks by or against quasi-states that actually maintain control over their territory; thus, the term "state" for the crime of aggression should be used broadly to include quasi-states. Second, a historical analysis on the crime of aggression will suggest the same conclusion: the concept of aggression developed throughout the last 70 years, and the accepted doctrine of the crime of aggression as agreed by drafters, shows that the term "state" in the context of the crime of aggression clearly includes quasi-states whose statehood is disputed. In conclusion, the moral justification and the historical analysis require the crime of aggression to be applicable to armed conflicts involving quasi-states.

I. BACKGROUND: THE DEFINITION OF THE CRIME OF AGGRESSION IN KAMPALA AMENDMENT OF THE ROME STATUTE OF THE ICC

1. The Historical Background on the Development of the Crime of Aggression: From Nuremberg to Rome

The crime of aggression, one of the core international crimes over which the ICC has jurisdiction,[14] did not develop in a vacuum. Instead, it is a concept "that may only be fully understood taking into account its historical evolution."[15] To understand the core elements of the crime it is necessary to examine its historical development.

A historical examination is particularly important in explaining why this dissertation limits itself to the definition of the crime of aggression in the Rome Statute of the ICC. This requires an examination of how to interpret the Rome Statute to cover quasi-states rather than proposing an alternative definition of "state" outside the Statute. The definition of the crime of aggression in the Rome Statute is the only existing definition for individual criminal liability for aggression that is widely accepted in international law. Therefore, the discussion for the purpose of this dissertation will be based on the interpretation of the definition in the Rome Statute.

From the Nuremberg Trials to the Rome Statute, the historical development of the crime of aggression will reveal that the definition in the Rome Statute (1) reflects customary international law on the prohibition of inter-state aggression, and (2) represents the international community's consensus on aggression. Furthermore, given that it took around 70 years to reach consensus on the definition of aggression (due to the

[14] ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE, 312 (2nd ed. 2010).
[15] OSCAR SOLERA, DEFINING THE CRIME OF AGGRESSION, 15 (2007); Keith A. Petty, *Sixty Years in the Making: the Definition of Aggression for the International Criminal Court*, 31 HASTINGS INT'L & COMP. L. REV. 531, 533 (2008).

political nature of the crime), proposing an alternative definition of aggression is not a promising avenue for practical reform.[16]

A. The Nuremberg Trials and Subsequent Efforts to Define Aggression[17]

The first international trial for aggression was before the International Military Tribunal ("IMT") at Nuremberg following World War II ("WWII"). Prosecutors brought the trial under article 6(a) of the London Charter, which gave the Nuremberg IMT jurisdiction over "crimes against peace."[18] Twelve defendants were ultimately convicted.[19] The London Charter defined crimes against peace as the "planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."[20] This provision, however,

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[16] Benjamin B. Ferencz, *Ending Impunity for the Crime of Aggression*, 41 CASE W. RES. J. INT'L L. 281, 285 (2009) ("It is the duty of the ICC judges to interpret the Statute and the applicable precedents and work papers—if and when the need arises. The eighteen members of the Court, elected to balance gender and different judicial systems, can be relied upon for a just interpretation of the law, precedents and commentaries. Indeed, the Rome Statute requires them to do so. If the judges feel that new amendments or clarifications are needed, they can make such proposals to the Assembly of States Parties (ASP)… Accepted improvements are surely welcomed, but *after so many years of intense debate, it should be obvious that the crime of aggression has already been adequately discussed and improvements are not really necessary*.") [Emphasis added].

[17] For the detailed historical development after WWII on the crime of aggression, *See* 1 BENJAMIN B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE (1975); 2 BENJAMIN B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE (1975); SOLERA, *supra* note 15; YORAM DINSTEIN, WAR AGGRESSION AND SELF-DEFENCE, (4th ed., 2005); GERHARD KEMP, INDIVIDUAL CRIMINAL LIABILITY FOR THE INTERNATIONAL CRIME OF AGGRESSION (2010); Rogers S. Clark, *Nuremberg and the Crime Against Peace,* 6 WASH., U. GLOBAL STUD. L. REV. 527 (2007); Noah Weisbord, *Prosecuting Aggression,* 49 HARV. INT'L L. J. 161 (2008); Petty, *supra* note 15.

[18] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex, art. VI(a), Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288; 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946, at 279-366 (1947).

[19] Michael J. Glennon, *The Blank-Prose Crime of Aggression,* 35 YALE J. INT'L L. 71, 74 (2010) (quoting, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946, AT 279-366 (1947)).

[20] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex art. VI(a), Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288.

did not contain a definition of a "war of aggression,"[21] because the Allies—who had different political agendas in regulating the use of armed forces—were not able to reach an agreement.[22] The lack of agreement on the meaning of aggression did not change in the following fifty years.[23] The subsequent trials, like the Tokyo IMT and the allied tribunals convened in Germany under Control Council Law No. 10 also prosecuted individuals for crimes against peace[24] but those charters did not contain a definition of aggression either, because an agreement on its meaning was not reached.

Because the Nuremberg Trial was the first time in international law that a political or military leader of a state was held individually accountable for the actions of his state, the defendants strongly argued that the Charter created a new law to which they were being improperly subjected *ex post facto.*[25] The Tribunal responded that aggressive war had been recognized as a crime under many multilateral treaties like the Briand-Kellogg Pact.[26] But, "it could not—in the eyes of some observers—convincingly prove that waging war had been a crime that incurred personal liability."[27] Nevertheless, judgment was passed and precedent was set.[28]

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[21] Matthias Schuster, *The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword,* 14 CRIM. L. F. 1, 5-6 (2003).
[22] *Id.* ("The United States had pressed for a precise definition that could be applied in the future, while the Soviet Union, possibly culpable of aggression against Finland and Poland itself, wanted to limit the general principle with something more vague.").
[23] *Id*.
[24] CRYER ET AL., *supra* note 14, at 313 ("The Charter for the Tokyo IMT defined crimes against peace as "the planning, preparation, initiation, or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances …"); Control Council Law No. 10, Dec. 20, 1945, art. II, *in* 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at xvi (1949) (Control Council Law N. 10 Art. II(a) began: "Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning …").
[25] *See* CRYER ET AL., at 313; Schuster, *supra* note 21, at 6; Clark, supra note 17, at 539-541.
[26] See Clark, at 539-541.
[27] Schuster, *supra* note 21, at 6; CRYER ET AL., *supra* note 14, at 313; International Military Tribunal (Nuremberg) Judgment and Sentences, reprinted in (1947) 41 AJIL 172, 218.
[28] *See* CRYER ET AL., at 314 ("Now, it is widely accepted that the crime of aggression is a part of customary international law."); Ferencz, *supra* note 16 at 282 (2009) ("The Nuremberg Charter and Judgment were

Following the judgment at Nuremberg, the recently formed General Assembly ("GA") unanimously affirmed "the principles of international law recognized by the Nuremberg judgment and the London Charter."[29] In addition, the GA asked the International Law Commission ("ILC") to prepare a Code of Offenses Against the Peace and Security of Mankind. The ILC did not fulfill this mandate in the prescribed time because the drafters were not able to reach an agreement on the exact meaning of aggression. The ILC suspended its efforts to reach an agreement in 1954.[30]

Consequently, the GA took over the task of defining aggression again,[31] appointing a "Special Committee on the Question of Defining Aggression" to lead its efforts.[32] In 1974, after years of intense negotiations, the GA reached an agreement by consensus on the definition of aggression and adopted Resolution 3314.[33] The consensus was built around a generic definition: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the UN."[34] This general definition was based on article 2(4) of the Charter of the United Nations ("UN"),[35] which "ha[d] become an integral part of customary international law."[36]

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adhered to by 19 more nations and unanimously affirmed by the first General Assembly of the United Nations.").

[29] *See* CRYER ET AL., at 314.

[30] Glennon, *supra* note 19, at 78. Chapter V will examine the discussions in the ILC.

[31] SOLERA, *supra* note 15, at 110-111.

[32] Ferencz, *supra* note 16, at 282.

[33] G.A. Res. 3314 (XXIX), U.N. Doc. A/9631 (Dec. 14, 1974) [hereinafter *GA 3314*]

[34] GA 3314, annex, art. 1.

[35] Charter of the United Nations, art. 2(4), 59 Stat. 1031 [hereinafter *UN Charter*] ("All Members shall refrain in their international relations from 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.").

[36] DINSTEIN, *supra* note 17, at 92; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits),* ICJ Reports, Judgment of June 27, 1986*,* at 99-101.

Compared with article 2(4) of the UN Charter, the words as they appeared in GA Res 3314 were only slightly changed. The term "armed" was added to modify the term "force," and the term "sovereignty" was added as one of the underlying interests to be protected. The term "armed" was added to narrow the breadth of the aggression "by excluding instances in which force is used without resort to arms."[37] The term "sovereignty" was added "[to close] all eventual cracks through which a state may claim that it did not commit aggression because it had not attempted against the territorial integrity or political independence of another state."[38] It was believed that including the concept of sovereignty would ensure that an armed attack against another state would constitute an act of aggression.[39]

In addition to the general definition contained in article 1 of the Resolution, article 3, paragraphs (a) to (g), of the GA 3314 also provided a list of acts that qualified as an act of aggression; including invasion, military occupation, bombardment, blockade, attack, and sending armed bands, respectively.[40] Later, the International Court of Justice ("ICJ") declared that paragraph (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"[41]—was a part of customary international law.[42] This may indicate that other portions of articles 1 and 3 in GA Res 3314 may equally constitute customary international law.[43]

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[37] Glennon, *supra* note 19, at 96.
[38] SOLERA, *supra* note 15, at 180.
[39] *Id.*
[40] GA 3314, *supra* note 33, annex. art. 3.
[41] *Id*, annex, art. 3, para (g).
[42] SOLERA, *supra* note 15, at 129
[43] *Id.*

B. Defining the Crime of Aggression in the Context of the ICC[44]

Despite the ongoing negotiations over how to define the crime of aggression after the IMT Trials, the trials following WWII were "the first and only time that the crime of aggression ha[d] been prosecuted."[45] The *ad hoc* international criminal tribunals, i.e., the International Criminal Tribunal for the former Yugoslavia ("ICTY")[46] and the International Criminal Tribunal for Rwanda ("ICTR"),[47] did not prosecute anyone for aggression because the crime of aggression had not yet been proscribed by statute, nor did the Special Court for Sierra Leone ("SCSL")[48] or the Extraordinary Chambers in the Courts of Cambodia ("ECCC")[49] for the same reason.[50] The one exception to the lack of jurisdiction over aggression was the statute of the Iraqi High Tribunal ("IHT"), which "include[d] aggression, but not as an international crime."[51] Advocates of the crime of

[44] For the detailed negotiations on the crime of aggression in the context of the ICC, See Silvia Fernández de Gurmendi, *The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*, 25 FORDAM INT'L L. J. 589 (2001-2002); THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION (Stefan Barriga et al. eds., 2009); Young-Sok Kim, *A Review of the Recent Discussions on the Crime of Aggression under the ICC Statute,* 16 SEOUL INT'L L. ACADEMY [서울국제법연구] 1 (2009); Claus Kress and Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression,* 8 J. INT'L CRIM. JUST. 1179 (2010); Claus Kress, *The Crime of Aggression before the First Review of the ICC Statute,* 20 LJIL 851 (2007); Roger S. Clark, *Negotiating Provisions Defining the Crime of Aggression, Its Elements and the Conditions for ICC Exercise of Jurisdiction over It*, 20 EUR. J. INT'L L. 1103 (2009).

[45] Glennon, *supra* note 19, at 75.

[46] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993) [hereinafter *ICTY Statute*].

[47] Statute of the International Criminal Tribunal for Rwanda, SC res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994) [hereinafter *ICTR Statute*].

[48] Statute of the Special Court for Sierra Leone, 2178 UNTS 138, 145; 97 AJIL 295; UN Doc. S/2002/246, appendix II [hereinafter *SCSL Statute*].

[49] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (2001) (Cambodia), as amended by NS/RKM/1004/006 (Oct. 27, 2004) (unofficial translation) [hereinafter *ECCC Statute*]

[50] Mark A. Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains?*, 41 CASE W. RES. J. INT'L L. 291, 298 (2009)

[51] *Id.* ("Aggression is proscribed by Part 5 (entitled "Violations of Stipulated Iraqi Laws"), where it is limited under article 14(c) to "[t]he abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country [in accordance with domestic law].").

aggression were concerned about the continuance of the lack of prosecution for the crime of aggression.[52]

Advocates strongly argued for the inclusion of the crime of aggression in the Rome Statute of the ICC during the Rome Conference, which took place for the purpose of establishing the permanent ICC.[53] During the Rome Conference, three major issues were raised regarding the crime of aggression: "(1) whether or not to include aggression under the jurisdiction of the ICC, (2) how to define aggression, and (3) what role, if any, should the United Nations have in determining aggression."[54] After extensive debates, the State Parties decided to accept a "codified impasse."[55] That is, aggression was added to the core crimes over which the ICC had jurisdiction, but was not given effect until the Assembly of State Parties to the Rome Statute ("ASP") adopted both a definition of the crime and the conditions under which the Court would exercise jurisdiction.[56]

In 2002, the ASP created a Special Working Group on the Crime of Aggression ("SWGCA") to prepare a draft definition of the crime and the conditions under which the Court would exercise its jurisdiction.[57] The discussions over the crime of aggression "gained unanticipated traction"[58] after the SWGCA took over the task. The SWGCA "met formally at UN Headquarters and in The Hague, and informally at Princeton University, to comb through the details."[59] The informal meeting at Princeton was

[52] *Id.* at 292 (2009). (quoting, M. Cherif Bassiouni & Benjamn B Ferencz, *The Crime Against Peace and Aggression: From its Origins to the ICC,* 1 INTERNATIONAL CRIMINAL LAW 45 (3d ed. 2008)).
[53] Gurmendi, *supra* note 44, at 589.
[54] Major Kari M. Fletcher*, Defining the Crime of Aggression: Is There an Answer to the International Criminal Court's Dilemma?* 65 A.F.L.REV. 229, 241 (2010).
[55] Gurmendi, *supra* note 44, at 589.
[56] Rome Statute of the International Criminal Court, art. 5, para 2, July 17, 1998, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 [hereinafter *Rome Statute*].
[57] Ferencz, *supra* note 16, at 283; Gurmendi, *supra* note 44, at 589-590.
[58] Noah Weisbord, *Judging Aggression*, 50 COLUM. J. TRANSNAT'L L. 82, 85 (2011).
[59] *Id.* at 86.

amazingly productive.[60] The SWGCA at Princeton was exceptional in that the meeting was open to both States Parties and Non-Party States on equal footings.[61] Therefore, the consensus for the definition represented not only State Parties but also Non-Party States:

> In light of the fact that the SWGCA was open to States Parties and Non-State Parties on equal footings, its consensual outcome is also highly significant in more a general way: Given the controversy over the question of aggression at the Rome Conference, the SWGCA's process and outcome reflect a remarkable acceptance of the notion that the ICC could one day effectively exercise jurisdiction over this crime, far beyond the group of States that voted in favor of, signed or ratified the Statute. At no point during the Group's work was the mandate and ultimate goal of the process put into question by any of the delegations.[62]

Furthermore, non-governmental organization ("NGO") representatives actively participated in the meetings with government delegates.[63] NGO representatives had special expertise, and their participation improved the quality of the meetings.[64] In February 2009, after years of productive negotiations, the SWGCA submitted a proposal for a provision on aggression to the ASP of the ICC, thereby fulfilling its mandate.[65]

The SWGCA's definition of the act of aggression was based on GA resolution 3314. There were arguments that the GA resolution was drafted to guide the Security Council in determining state responsibility for aggression and not to prosecute individuals for aggression, thus making it an inappropriate basis for the definition of the

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[60] *Id.* at 85-86; For the details of the meetings, *See* THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION, *supra* note 44.
[61] Stefan Barriga, *Against the Odds: The Result of the Special Working Group on the Crime of Aggression*, *in* THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION 1, 5-6 (STEFAN BARRIGA ET AL. EDS., 2009). It is not clear how many Non-State Parties in fact took part. Because the SWGCA was open to all governments from all states, "any Non-State Party that would actually be opposed, as a matter of principle, to the Court's exercising jurisdiction over the crime of aggression as clearly missed the best moment for objection…It should be noted, however, that the United States did not participate in the SWGCA." (Stefan Barriga, at 5-6)
[62] *Id.*
[63] *Id*. at 4.
[64] *Id*.
[65] *Id*. at 1.

crime of aggression.[66] However, GA Res 3314 was adopted and repurposed by the SWGCA. GA Res 3314 "was seen by most delegations in the SWGCA as the appropriate basis for definition of aggression in the Statute, given the fact that it constituted a consensual and time-tested document adopted by the General Assembly on this extremely delicate topic."[67] Article 1 of the Resolution that defines aggression and article 3 of the Resolution that provides a list of acts qualifying as aggression were directly incorporated into the definition of the act of aggression.[68]

In June 2010, the SWGCA's draft on the definition of the crime of aggression was adopted without changes at the Review Conference at Kampala, and the ASP reached a consensus on the conditions under which the Court would exercise its jurisdiction and the conditions for the entry into force of the amendments.[69] At the earliest, the ICC can exercise jurisdiction over the crime of aggression after January 1, 2017.[70] The UN immediately welcomed the Kampala outcome, announcing: "[t]he Secretary-General fully supports the 'Kampala Declaration'…[t]he compromise text is a significant step forward in the fight against impunity and towards an age of accountability."[71] To date, the Kampala definition of the crime of aggression (contained in the Rome Statute) is the

[66] GA 3314, *supra* note 33, at para 4 ("The General Assembly,... [c]alls the attention of the Security Council to the Definition of Aggression, as set out below, and recommends that it should, as appropriate, take account of that Definition as guidance in determination, in accordance with the Charter, the existence of an act of aggression."). Chapter V will deal with this question.
[67] Barriga, *supra* note 61, at 9.
[68] *Id.* at 10.
[69] Weisbord, *supra* note 58*,* at 86.
[70] Kampala Amendment, *supra* note 1, art. 15 *bis,* para 2-3, and art. 15 *ter,* para 2-3. Three conditions should be met for the entry into force of the Kampala amendment. First, thirty states parties must ratify or accept the amendment. Second, two-thirds of the ASP should adopt the amendment. Third, the Court can exercise jurisdiction over the crime of aggression after 1 January 2017.
[71] Secretary-General, Statement Attributable to the Spokesperson for the Secretary-General on the Outcome of the ICC Review Conference in Kampala, 14 June 2010, available at www.un.org/apps/sg/sgstats.asp?nid=4617.

only definition widely accepted in international law for finding individual criminal liability.

C. Elements of the Crime of Aggression in the Kampala Definition[72]

The definition adopted in the Kampala Declaration succeeded in extending individual criminal responsibility from the conventional perception of a "war of aggression" (that limits the scope of the crime to armed conflicts that have risen to the level of "war"), to the more general concept of "acts of aggression."[73] But, it also remains conservative because the concept of aggression is limited to interstate conflicts.[74]

This limitation is contained in the definition as "the use of armed force *by a State* against the sovereignty, territorial integrity or political independence *of another State*,"[75] and in the leadership clause as "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."[76] Similarly, according to the definition of the crime of aggression in article 8 *bis* of the Rome Statute, the collective act of aggression by a state against another state is a precondition for an individual's criminal liability.[77]

According to the definition adopted in the Kampala Declaration, the elements of the crime of aggression require that the crime be committed (i) by an individual in

[72] For details for the elements of the crime of aggression, *See* Kampala Amendment, *supra* note 1; David Scheffer, *The Complex Crime of Aggression under the Rome Statute,* 23 L.J.I.L 4, 897 (2010); Weisbord, *supra* note 58; Kress & Holtzendorff, *supra* note 44.
[73] Carsten Stahn, *The 'End', the 'Beginning of the End' or the 'End of the Beginning'? Introducing Debates and Voices on the Defining of 'Aggression'*, 23 LJIL 875, 876 (2010).
[74] *Id.*
[75] Kampala Amendment, *supra* note 1, ann. I, article 8 *bis,* para 2 [emphasis added].
[76] *Id.* at ann I, art. 8 *bis,* para 1 & ann. II, Amendment to the Elements of Crimes, Elements, para 2. [emphasis added].
[77] Chapter V will discuss the meaning of "state" from the historical perspective.

leadership positions in a state (ii) who has participated in (iii) the collective act of aggression by a state, (iv) which is a manifest violation of the UN Charter.

Several points follow from this definition. First, aggression is a leadership crime. Only "a person in a position effectively to exercise control over or to direct the political or military action of a State"[78] can commit a crime of aggression. An ordinary foot soldier, for example, could not be held criminally liable for the collective act of aggression.[79] Therefore, "somewhere between the dictator and supreme commander of the military forces of the nation and the common soldier is the boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it."[80]

Second, the individual who is in a leadership position must participate by planning, preparing, initiating, or executing the act of aggression carried out by the state.[81] These four conduct verbs were directly borrowed from the definition of the crime against peace (the predecessor to the crime of aggression) contained in the London Charter at the Nuremberg Trial.[82]

Third, the collective act of aggression must be committed by a state against another state. The Rome Statute defines an act of aggression as "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." The Rome Statute also provides a list of acts that qualify as an act of aggression, which was borrowed directly from article 3 of the annex to GA Res 3314.

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[78] Kampala Amendment, *supra* note 1, ann I, art. 8 *bis,* para 1.
[79] Weisbord, *supra* note 58, at 91.
[80] CRYER, ET AL., *supra* note 14, at 319 (quoting, XII Law Reports, Trials of War Criminals, 67).
[81] Kampala Amendment, *supra* note 1, ann I, art. 8 *bis,* para 1.
[82] Weisbord, *supra* note 58, at 91.

Fourth, only an act of aggression "which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations"[83] comes within the scope of the crime of aggression (leaving out many other uses of armed force in interstate relationships). According to the "Understanding Regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression," ("Understanding") aggression is "the most serious and dangerous form of the illegal use of force."[84] Further, "a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences."[85] The Understanding also clearly provides that "the three components of character, gravity and scale must be sufficient to justify 'manifest' determination."[86] Furthermore, "[n]o one component can be significant enough to satisfy the manifest standard by itself."[87] By this test, the crime of aggression does not apply to smaller scale acts of aggression.[88] For example, "border skirmishes, cross-border artillery, armed incursions, and similar situations should not fall under the definition of aggression."[89]

2. Significance of the Kampala Definition of the Crime of Aggression

It cannot be stressed strongly enough how significant the Kampala definition is. The Kampala definition of the Rome Statute is the culmination of 70 years of intense

[83] Kampala Amendment, *supra* note 1, ann I, art. 8 *bis*, para 1.
[84] Understanding Regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Annex III to Resolution RC/Res.6, para 6, Adopted at the 13th Plenary meeting, on 11 June 2010 [hereinafter *Understanding*].
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *See* Keith A. Petty, *Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict*, 33 SEATTLE U. L. REV. 105 (2009).
[89] Gurmendi, *supra* note 44, at 597.

negotiations on the definition of aggression. It is based on consensual and time-tested documents—the UN Charter 2(4) and the GA Res 3314—which have been declared customary international law by the ICJ.[90] Further, this definition represents consensus in the broader international community; the SWGCA meetings were open to both state parties and non-party states, leading to a consensus on the definition of aggression. So far, the Kampala definition is the only definition that is intended to create individual criminal liability for the crime of aggression in international law.

There is another definition of aggression that is worth mentioning for comparison. The African Union Non-Aggression and Common Defence Pact provides a definition of aggression, which "refers not just to state actors committing aggression, but also non-state actors."[91] The expansion of the crime to acts by non-state actors was ambitious, and was not supported during the negotiations of the SWGCA.[92] During the negotiations of the SWGCA, the issue arose as to whether armed attacks by or against non-state groups fell within the scope of the crime of aggression.[93] Some thought that limiting the "crime of aggression" to only interstate conflicts was outdated and not fully reflective of the reality of war;[94] however, the great majority held that limiting culpability to just state

[90] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits),* ICJ Reports, Judgment of June 27, 1986, at 99-101.
[91] Jutta Bertram-Nothnagel et al, *Evolutions of the Jus ad Bellum: the Crime of Aggression in* PROCEEDINGS OF THE ANNUAL MEETING-AMERICAN SOCIETY OF INTERNATIONAL LAW. 103, 435 (Annual 2009); The African Union Non-Agression and Common Defence Pact, enacted at 01,31, 2005, art. 1, para 3 ("*'Aggression'* means the use, intentionally and knowingly, of armed force or any other hostile act by a State, a group of States, an organization of States or non-State actor(s) or by any foreign or external entity, against the sovereignty, political independence, territorial integrity and human security of the population of a State Party to this Pact, which are incompatible with the Charter of the United Nations or the Constitutive Act of the African Union. The following shall constitute acts of aggression, regardless of a declaration of war by a State, group of States, organization of States, or non-State actor(s) or by any foreign entity…").
[92] CRYER ET AL., *supra* note 14, at 318.
[93] Kress & Holtzendorff, *supra* note 44, at 1190; also *see* Michael Anderson, *Reconceptualizing Aggression*, 60 DUKE L. J. 411, 412 (2010).
[94] *See*, Anderson, at 412; Noah Weisbord, *Conceptualizing Aggression*, 20 DUKE J. COMP. & INT'L L. 1 (2009).

actors was reflective of *lex lata* ("the law as it exists"). Thus, the final draft proposed by the SWGCA limited the crime of aggression to only state-to-state conflicts.

Although the Rome Statute contains the most representative and authoritative definition of aggression, the prosecution of the crime is not limited to the ICC. The ICC was not established on the principle of universal jurisdiction, but rather on a state's consent-based jurisdiction system with the only exception of the Security Council's referral.[95] Article 12 of the Rome Statute deals with the precondition to the exercise of jurisdiction which requires either that a state accedes to the Rome Statute, pursuant to Article 12(1), or a state submits *ad hoc* consent to the ICC jurisdiction, pursuant to Article 12(3)[96]. If such an accession or *ad hoc* consent is made by "the [s]tate on the territory of which the conduct in question occurred or,… the [s]tate of which the person accused of the crime is a national,"[97] the ICC may exercise jurisdiction when a situation is referred by a State Party or the OTP based on its *proprio motu* power.[98]

The Rome Statute also provides that the ICC "shall be complementary to national criminal jurisdiction."[99] This principle of complementarity allows States to claim primary

[95] Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute*, 8 J. INT'L CRIM. JUST. 329, 331 (2010) ("Two main theory can be evoked to legitimize the operation of international criminal court—universalism and delegation."); Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AJIL 1, 1 (2011) ("Under universal jurisdiction, any state in the world may prosecute and try the core international crimes…without any territorial, personal, or national-interest link to the crime in question when it was committed."); Yuval Shany, at 329, 331 (Therefore, under universal jurisdiction, the ICC can exercise jurisdiction over the core international crimes without the consent of a state that has territorial, personal, or national-interest link to the crime. In contrary, under a delegation-based jurisdiction, the ICC can exercise jurisdiction "that was delegated to [the ICC] by those states that had an internationally recognized right to prosecute the crimes in question before their own domestic courts."); Rome Statute, *supra* note 56, at art. 12 and 13 (The ICC was established on this delegation based system but it has one exception. When the Security Council refers a case to the ICC, the ICC exercises jurisdiction without the consent of a state that has territorial or personal-interest link to the crime).
[96] *See* Rome Statute, art. 12.
[97] *Id.* at art. 12(2).
[98] *Id.* at art. 13,14 and 15.
[99] *Id*. at preamble and art. 1.

jurisdiction (ahead of the ICC) "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."[100] Therefore, ICC jurisdiction could be further restrained by the principle of complementarity.

The crime of aggression has special jurisdictional limitations in addition to those applicable to other core crimes over which the ICC has jurisdiction. The ICC can only exercise jurisdiction over an act of aggression committed by State Parties which did not opt out of the ICC's jurisdiction over aggression unless the Security Council refers a situation to the ICC.[101] In other words, the ICC cannot exercise jurisdiction over an act of aggression committed by Non-Party States or by State Parties which opted out of the ICC's jurisdiction over aggression. Other crimes do not have such a limitation. The ICC has jurisdiction over other crimes—including genocide, crimes against humanity and war crimes—if the crime was committed on the territory of a state party or by nationals of a state party.[102]

Due to those restrictions, ICC jurisdiction over aggression is highly likely to be fragmented.[103] For instance, an act of aggression committed by non-state parties is not subject to the ICC jurisdiction, so victim states are limited to exercising their domestic jurisdiction.[104] Further, some party-states might not ratify the Kampala amendment at all because they oppose the ICC having jurisdiction over the crime of aggression.[105] Some others could accept the Kampala amendments but choose to opt-out of ICC jurisdiction over aggression. Finally, there could be also states that do not oppose ICC jurisdiction

[100] *Id.* at art. 17
[101] *Id.* at art. 15 *bis,* para 4 and 5.
[102] *Id.* at art. 12 (2).
[103] Stahn, *supra* note 73, at 879.
[104] *Id.*
[105] *Id.*

over the crime of aggression but who prefer to have referrals sent to the ICC by the Security Council, and thus choose not to ratify the Kampala amendments.[106]

However, efforts to interpret the Kampala definition of the crime of aggression and to clarify its scope—including, as this dissertation will discuss, whether it includes quasi-states—is relevant to the prosecution of the crime in front of any venue, because the definition of the crime in the Rome Statute is still the only definition that is reflective of the *lex lata* of the crime of aggression.

[106] *Id.*

II. THE UNCERTAINTY OF THE APPLICABILITY OF THE CRIME OF AGGRESSION TO ARMED CONFLICTS INVOLVING QUASI-STATES

The generally accepted definition of aggression in ICL clearly holds that the crime of aggression only regulates international armed conflicts between states.[107] According to the current definition of the crime of aggression contained in article 8 *bis* of the Rome Statute, a state's action is central to the finding of aggression.[108] In principle, only a state can be the author of the act of aggression, and only a state can be the victim of such an act.

Entities whose legal status is clear raise no question as to the applicability of the crime of aggression. By contrast, pure non-state actors are not governed by the crime of aggression because they do not fit the concept of "state" in international law. Scholars generally agree that non-state actors include: "(1) groups that pursue ideological purposes by violent means and that are referred to as 'terrorists,' (2) groups that seek to obtain profit by the use of violence that are referred to as 'organized crime' groups and, (3) groups that are parties in conflicts of a purely internal and non-international character."[109] However, uncertainties remain regarding entities that do not fall into any of those clear-cut categories. A gray area exists over armed conflicts that erupt in the territory of a recognized state, and initially look like civil war, but have international elements because of the involvement of a quasi-state whose status and rights are disputed in international law.

[107] Kampala Amendment, *supra* note 1, art. 8 *bis,* para 2.
[108] Drumbl, *supra* note 50, at 293.
[109] M. Cherif Bassiouni, *The Future of Human Rights in the Age of Globalization,* 40 DENV. J. INT'L L. & POL'Y 22, 32 (2011-2012).

1. Quasi-states

Internationally recognized, full-fledged states enjoy dual sovereignty; internally, they effectively control the population in their territory, and externally, they independently represent the people who inhabit the territory in international forums.[110] Most UN member states enjoy this dual sovereignty. In contrast to universally recognized, full-fledged states, there are entities that have only one aspect of sovereignty. First, there are entities that possess external sovereignty, but who fail to exercise control over their population effectively; these are called "failed states."[111] Somalia could be an example.[112] Although they lack effectiveness in international law, there is no doubt that they are nevertheless states.[113] By contrast, there are entities that fail to gain international recognition as states although they have *de facto* control over the territories they claim. They are called "quasi-states."[114] Because the international community does not universally recognize their statehood, it is controversial whether they are actually "states" under international law.

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[110] Kolstø, *supra* note 2, at 724.
[111] *Id.* at 724-727.
[112] *Id.*
[113] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW, 59, 700 (2nd ed, 2006); *See* Chapter II, Section 2-A
[114] Kolstø, *supra* note 2, at 724-726; Wills, *supra* note 6, at 84-86. (Some scholars have tried to provide conditions for qualification as a quasi-state. Professor Pål Kolstø suggested three conditions for quasi-statehood: "its leadership must be in control of (most of) the territory it lays claim to, [and] it must have sought but not achieved international recognition as an independent state." He also "exclude[s] those that have persisted in this state of non-recognition for less than two years." However, his list was devised just for the purpose of his research, which was to examine the sustainability and future of unrecognized quasi-states, and not for the context of aggression. Alexander G. Wills later modified the Kolstø's list and used it for the purpose of aggression. He required four conditions for quasi-statehood in the context of the crime of aggression: "(1) it has control over a distinct territory, (2) it is (or has been) stable or at peace, (3) it rejected the imposition of outside authority, and (4) either its statehood is disputed or it is generally understood to be something other than a state." Although his list cannot be free from the charge that it is arbitrarily designed for his own analytical and normative purposes, these criteria might help to roughly outline the concept of quasi-state.).

Quasi-states have existed in nearly every period of history and throughout the world.[115] Some of them have disappeared, either by achieving international recognition as an independent state (e.g., Eritrea), or by becoming a part of an independent state (e.g., Tamil Eelam and Republika Srpska).[116] Some quasi-states still exist: South Ossetia and Abkhazia in Georgia, Somaliland, Kosovo, Transnistria, the Turkish Republic of Northern Cyprus, Taiwan, Palestine, and Southern Sudan.[117] Thus, armed attacks by Israel against Palestine, by Serbia and Montenegro against Kosovo, and by China against Taiwan, are recent examples of armed conflicts involving quasi-states. The Saharan Democratic Arab Republic and the Chechen Republic of Ichkeria are borderline cases because both quasi-states only control small parts of the territory they claim, and most parts of the territory are occupied and controlled by its neighboring state; Morocco occupies most of the territory of West Sahara and Russia controls most of the territory of Chechnya.[118] Because a state (and a quasi-state) is a territorial-based entity, and the lack of control over the territory is a decisive factor for statehood, West Sahara and Chechnya cannot be called quasi-states before they retain control.

2. Are Quasi-states Actually States According to General International Law?

This Part is intended to answer the question of whether a quasi-state can meet the criteria of being a state, notwithstanding its lack of recognition in international law. To this end, three criteria should be examined: (1) whether a quasi-state meets the traditional criteria of statehood contained in the Montevideo Convention; (2) whether a lack of

[115] *See* Kolstø, at 723, 726.
[116] *Id.*
[117] *Id.* at 86; Wills, *supra* note 6, at 86.
[118] *See* Kolstø, at 726 ("An independent Chechen republic of Ichkeria was proclaimed in 1990, but controls today only part of the countryside in this Russian republic, mostly in the high mountain valleys.").

recognition could vitiate the effective sovereignty of a claimant state; and (3) whether and to what extent international practices on self-determination and illegality during the creation of a quasi-state affects an entity's statehood.

If a quasi-state qualifies as a state according to these criteria of international law, it must be considered a state under the crime of aggression, despite the lack of universal recognition. However, if a quasi-state does not meet those criteria of international law, and therefore is not considered as a state, the next question is whether a quasi-state could nevertheless be considered a state for the purpose of the crime of aggression in the context of international criminal law. Chapter IV and V will deal with the meaning of "state" in the narrow context of the crime of aggression.

A. The Traditional Criteria for Statehood from the Montevideo Convention

The classical starting point for determining statehood in international law is article 1 of the 1933 Montevideo Convention, which has been accepted as customary international law.[119] It requires that entities possess four qualifications to be considered a state: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."[120] Traditionally, "independence" is also a central criterion of statehood, despite not explicitly appearing in the text of the four conditions of the Montevideo Convention. Some interpret the third criterion of "government" to imply an independent government,[121] while others interpret the fourth

[119] Montevideo Convention on the Rights and Duties of States, art. 1, 165 L.N.T.S. 19, 25 (1936) [hereinafter *Montevideo Convention*]; LORI F. DAMROSCH ET AL., INTERNATIONAL LAW CASES AND MATERIALS, 301 (5th ed, 2009); Restatement (Third) § 201; See also *Western Sahara Advisory Opinion*, I.C.J. reports 1975; *North Sea Continental Shelf Case* I.C.J. reports, 1969.
[120] *See* Montevideo Convention, at art. 1.
[121] DAMROSCH ET AL., *supra* note 119, at 309-310; League of Nations O.J., Spec. Supp. 3, at 8-9 (1920).

criterion, the "capacity to enter into relations with others," to mean independence.[122] No matter what category it is in, "independence" is also a criterion of statehood.

Permanent population. A state is an aggregate of individuals, and therefore a permanent population is necessary requirement,[123] however there is no minimum number of people required for statehood.[124] Quasi-states certainly do not lack a permanent population, and because there is not a minimum population requirement to be considered a state, a quasi-state having a relatively small population cannot be dispositive of its statehood.[125]

Defined territory. States are evidently territorial entities and thus must have a defined territory.[126] It has been universally accepted that the requirement of "a defined territory" does not have to be "fixed and determinate or a particular size."[127] Therefore, a relatively small size of territory, or its unsettled frontier, cannot be dispositive of statehood.

Government. The third criterion has been regarded as the core criteria of statehood since all the others—population, territory, and capacity to enter into relations with other states—depend upon it.[128] The requirement of government is construed to

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[122] Wills, *supra* note 6, at 89 ("The last Montevideo criterion is the capacity to enter into relations with other states, more properly understood as independence."); CRAWFORD, *supra* note 113, at 62. ("[C]apacity to enter relations with other States, in the sense in which it might be a useful criterion, is a conflation of the requirement of government and independence.").
[123] *See* CRAWFORD at 52; Montevideo Convention, *supra* note 119, at art. 1.
[124] *See* CRAWFORD at 52 (Vatican City has 768 people. Tuvalu has 9,743, Nauru has 11,218, Palau has 21,092, San Marino has 30,472, Monaco has 33,084, and Liechtenstein has 34,927 people.).
[125] *Id.* at 52-55.
[126] *Id.* at. 46; Montevideo Convention, *supra* note 119, at art. 1.
[127] Errol Mendes*, Statehood and Palestine for the Purposes of Article 12(3) of the ICC Statute: A Contrary Perspective,* p. 5, Mar. 30, 2010, available at http://www.icc-cpi.int/NR/rdonlyres/553F5F08-2A84-43E9-8197-6211B5636FEA/281876/OTPErrolMendesNewSTATEHOODANDPALESTINEFORTHEPURPOS.pdf; DAMROSCH ET AL., *supra* note 119, at 306-310.
[128] CRAWFORD, *supra* note 113, at 56.

mean an "effective government."[129] The requirement of "effective government" indicates two different aspects of state sovereignty; internally, a government should establish effective control over the territory it claims to govern, and externally, a government should exercise its rights independently with respect to other states.[130]

When a new state is created by secession, the requirement of effective government is traditionally construed strictly.[131] The case of Finland, from 1917 to 1918, is considered a classic example where the stringent effectiveness element was applied to Finland's claim for statehood. After Finland declared independence from the Russian Empire, the situation showed that Finland had not established an effective government:

> In the midst of revolution and anarchy, certain elements essential to the existence of a State, even some elements of fact, were lacking for a fairly considerable period. Political and social life was disorganized; the authorities were not strong enough to assert themselves; civil war was rife; further, the Diet, the legality of which had been disputed by a large section of the people, had been dispersed by the revolutionary party, and the Government had been chased from the capital and forcibly prevented from carrying out its duties; the armed camps and the police were divided into two opposing forces, and Russian troops, and after a time Germans also, took part in the civil war.[132]

The international committee of jurists, entrusted by the Council of the League of Nations, concluded that Finland did not gain statehood "until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign

[129] DAMROSCH ET AL., *supra* note 119, at. 309-310.
[130] CRAWFORD, *supra* note 113, at 55.
[131] *Id.* at 58.
[132] DAMROSCH ET AL., *supra* note 119, at 309-310; League of Nations O.J., Spec. Supp. 3, at 8-9 (1920)

troops."[133] This approach has been considered a standard of the effectiveness element for statehood.

However, practices have shown that the strict standard of effectiveness has not been technically applied to the subsistence or extinction of an established State. [134] With the creation of new state the element of effective government is applied more strictly.[135] But, for the extinction of state, "a state is not necessarily extinguished by substantial changes in territory, population or government, or even, in some cases, by a combination of all three."[136] When a state gains universal recognition, and later fails to continuously effect control over the territory, it is called a "failed state," which is nevertheless considered a state.[137]

If a quasi-state never established an effective government strong enough to assert itself throughout its territories without the assistance of foreign troops, it cannot be considered a new state. While some quasi-states do have effective governments (e.g., Taiwan, Northern Cyprus, and Somaliland), some other quasi-states have not established effective control over their territory, and thus, are not qualified as states under this criterion (e.g., Palestine).

In addition to the extinction of a state, numerous practices also show that the strict standard of effectiveness has not been technically applied to cases involving colonial independence. [138] That is, practices show that the principle of self-determination

[133] *See* DAMROSCH ET AL., at 309-310; League of Nations O.J., Spec. Supp. 3, at 8-9 (1920)
[134] CRAWFORD, *supra* note 113, at 59
[135] *Id.*
[136] *Id.* at 700.
[137] *Id.* at 59, 700.
[138] *Id.* at 57.

compensates for effectiveness in the colonial context.[139] Section 2-C of this Chapter will examine this matter separately.

Capacity to enter into relations with other states. The capacity to enter into relations with other states is no longer a useful criterion for statehood because it is "no longer, if it ever was, an exclusive State prerogative."[140] Practically, this criterion depends partly on the effectiveness of a government and partly on the independence of the entity.[141] Thus, we must turn to the next criterion, independence.

Independence. Independence is one of the core criteria of statehood that goes along with effective government. Independence can be categorized in one of two dimensions: formal independence and actual independence.[142] In a meaningful sense, actual independence (not formal independence) determines an entity's statehood.[143] International practice shows that the following characteristics do not derogate from actual independence: diminutive size and resources, political alliances and policy orientation between States, belligerent occupation, and illegal intervention.[144] By contrast, if an entity is *created* in violation of fundamental international law or under belligerent

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[139] Mendes, *supra* note 127, at 11; CRAWFORD, *supra* note 113, at 128.
[140] *See* CRAWFORD. at 61.
[141] *Id.* at 62.
[142] *Id.* at 67-72 ("Formal independence exists where the powers of government of a territory (in internal and external affairs) are vested in the separate authorities of the putative State… The following types of situation are not regarded as derogating from formal independence, although if extend far enough, they may derogate from actual independence[:]… [c]onstitutional restrictions upon freedom of action.., [m]unicipal illegality of the government of a State…, [t]reaty obligations…, [m]ilitary bases or other territorial concessions…, [e]xercise of governmental competence on a basis of agency…, [p]osession of joint organs for certain purposes…, [m]embership of international organizations possessing coercive authority…, [o]ther special relations: devolution and its residue…Two basis situations may be regarded as derogating from what would otherwise be formal independence[:] [t]he existence of a special claim of right to exercise of governmental authority over the putative State…,[d]iscretionary authority to intervene in the internal affairs of the putative State.")
[143] *Id.* at. 72 ("[Real or actual independence] may be defined as the minimum degree of real governmental power at the disposal of the authorities of the putative State that is necessary for it to qualify as 'independent.'").
[144] *Id.* at 72-74.

occupation, the entity is presumed not to possess actual independence.[145] For example, Northern Cyprus was created under the invasion of Turkey, so it is presumed not to be independent. However, although there is illegality of origin, if it later evolves into an independent state and proves its independence, the presumption could be overturned.

Substantial external control of the State also derogates from actual independence.[146] The substantial external control of a State is limited to the most extreme case, like a puppet state. To assert that an entity lacks actual independence, "one must show 'foreign *control* overbearing the decision-making of the entity concerned on a wide range of matters and doing so systematically and on a permanent basis.'"[147] Today, many quasi-states have a weak state structure, a poor economy, and a weak defense capability; thus, these quasi-states are sustained by support from external patrons.[148] South Ossetia and Abkhazia are supported by Russia.[149] Northern Cyprus relies on the support of Turkey.[150] Nagorno-Karabakh is supported by Armenia and Somaliland by Ethiopia.[151] "While quasi-states jealously guard their formal independence, the nature and degree of actual dependence on foreign protection may raise the question of whether a particular quasi-state is truly 'independent' in any meaningful sense."[152] If the substantial external control of a foreign patron is so extreme that a quasi-state is called puppet state, its lack of independence vitiates its statehood.

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[145] *Id.* at 74-88.
[146] *Id.* Substantial external control of the State includes protected States, puppet States and governments, purported grants of colonial independence and other cases of absence or loss of actual independence.
[147] *Id.* at 85-86 (quoting Brownie, *Principles* (2nd edn), 76 (his emphasis); ibid (6th edn) 72-4).
[148] Kolstø, *supra* note 2, at 728-733.
[149] *Id.* at 733.
[150] *Id.*
[151] Wills, *supra* note 6, at 90.
[152] *Id.*

If applying the Montevideo criteria to existing quasi-states, some qualify as states and some do not. Palestine is an example because it lacks effective government control over its territory.[153] For those entities that do not meet the Montevideo Convention criteria, it should be examined further whether the right to self-determination could compensate for their lack of effectiveness. For those entities that meet the Montevideo Convention, such as Somaliland[154] or Taiwan,[155] it should be examined whether the illegality of their creation, if any, could vitiate their statehood under current international law. Before turning to those additional criteria of statehood in international law, the next section will briefly examine whether the lack of recognition of quasi-states could vitiate their statehood; if recognition is required for statehood, a quasi-state cannot be qualified as a state under any circumstances.

B. The Role of Recognition

Two conflicting theories have been asserted with regard to the role of recognition in statehood. Under the declarative theory, a state may exist regardless of its recognition.[156] The declarative theory provides that "the existence of a state depends on the facts and on whether those facts meet the criteria of statehood laid down in international law."[157] A majority of scholars, academic literature, and international

[153] John Quigley, *The Palestine Declaration to the International Criminal Court: The Statehood Issue,* p. 5 (May 19, 2009), available at http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281882/QuigleyPalestinedeclarationandtheICC1.pdf; European Centre for Law and Justice, *Legal Memorandum Opposing Accession to ICC Jurisdiction by Non-State Entities*, p. 18 (Sep. 9, 2009), available at http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281869/OTPlegalmemorandum1.pdf

[154] Dimitrios Lalos*, Between Statehood and Somalia: Reflections of Somaliland Statehood*, WASH. 10 U. GLOBAL STUD. L. REV, 789, 806 (2011).

[155] Brad R. Roth, *Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order*, 4 E. ASIA L. REV. 91, 98 (2009)

[156] DAMROSCH ET AL., *supra* note 119, at 304.

[157] *Id.*

practice support the declarative theory.[158] By contrast, under the constitutive theory, recognition actually constitutes statehood.[159] However, neither theory can explain modern practice by misinterpreting the role of recognition for the concept of statehood.[160] In other words, both theories fail to appreciate the reality of the existence of *de facto* states, and the role of recognition as a tool for granting admission to institutions.

First, according to the declarative theory, an entity's statehood should be determined based solely on whether it meets the four conditions of the Montevideo Convention—e.g., a permanent population, a defined territory, a government, and the capacity to enter into relations with other states—regardless of whether it receives international recognition.[161] Although the declarative theory correctly apprehends the existence of a *de facto* state, regardless of whether it receives recognition or not, it misinterprets the concept of "state." The declarative theory premise is that "territorial entities can readily, by virtue of their mere existence, be classified as having one particular legal status."[162] By assuming that statehood is a mere matter of fact, it confuses a factual concept with a legal concept. "A state is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices."[163]

If the concept of "state" is a mere matter of fact, then this theory cannot explain why certain entities are regarded as states, despite lacking the factual conditions of statehood. For example, Congo, Rwanda, Burundi, and Guinea-Bissau gained universal

[158] *Id.* at 304.
[159] *Id.*
[160] CRAWFORD, *supra* note 113, at 5.
[161] *Id.* at 57.
[162] *Id.* at 5.
[163] *Id.*

recognition as states without having first established effective and independent governments.[164] In addition, the declarative theory also does not explain why "non-effective states have been regarded as continuing to be States: for example, the various entities unlawfully annexed in the period 1936 to 1940 (Ethiopia, Austria, Czechoslovakia, Poland, the Baltic States)."[165] It cannot be assumed that the mere existence of a territorial entity is *ipso facto* proof that the entity possesses the legal status of statehood.[166] Although the concept of statehood is grounded on factual effectiveness, it is nonetheless a legal concept attached to a factual status by virtue of legal rules and principles.[167] Statehood is not a mere matter of fact; certain rules of international law on statehood affect the legal status of an entity.[168]

Second, according to the constitutive theory, statehood is not automatic, but rather requires recognition. In other words, "the act of recognition by other states itself confers international personality on an entity purporting to be a state."[169] Although the constitutive theory "draws attention to the need for cognition, or identification, of the subjects of international law, and leaves open the possibility of taking into account relevant legal principles not based on 'fact',"[170] it erroneously associates cognition with political recognition.[171] Recognition is a political act that depends largely on the self-interest of other states and the political persuasions of their leaders. It is an act of political approval and accommodation to declare that a certain state deserves to participate in making international law. Particularly, recognition is a tool for granting admission to

[164] *Id.* at 56-57, 97.
[165] *Id.* at 97.
[166] *Id.* at 5.
[167] *Id.*
[168] *Id.* at 97.
[169] DAMROSCH ET AL., *supra* note 119, at 304.
[170] CRAWFORD, *supra* note 113, at 5
[171] *Id.*

institutions, like the UN or the ICC, but it is not a legal rule or practice that gives legal status to an entity.

The constitutive theory also cannot explain the contradictory reality that states that do not recognize Israel and North Korea as states still treat them as subjects of international law.[172] The UNESCO Constitution explicitly provides that "[S]tates not members of the United Nations Organization may be admitted to membership of the Organization… by a two-thirds majority vote of the General Conference."[173] This indicates that there are states that are not admitted to UN membership. In reality, an entity's statehood is determined regardless of whether it receives recognition; the role of recognition is a tool to grant admission to institutional clubs and to prevent certain entities from participating in them.

In conclusion, neither theory fully explains the factual existence of *de facto* states or the practical function of recognition as a tool for granting admission to institutions. They both sought answers to doctrinal questions of statehood rather than apprehending the fairly obvious alternative—that state-like entities exist regardless of whether they receive recognition—but also that recognition performs a function to determine which entity is qualified to join institutional clubs. This apparent doctrinal problem is resolved by decomposing it. Neither theory explains the reality of "state" as it exists. One obvious issue is that the lack of international recognition cannot vitiate the effective sovereignty of a claimant state, and thereby cannot vitiate the statehood of quasi-states that fulfill the

[172] *Id.* at 26. "States do not in practice regard unrecognized States as exempt from international law; indeed failure to comply with international law is sometimes cited as a justification for non-recognition. And they do in fact carry on relations, often substantial, with such States, extending even to joint membership of inter-State organizations such as the United Nations."
[173] Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO), art II (2), 4, UNTS 275 [hereinafter *UNESCO Constitution*].

criteria of international law. However, the lack of recognition can prevent a quasi-state from joining institutional clubs, including the ICC, if state parties do not recognize it as a state.

The next inquiry is about the additional criteria for statehood in international law; that is, whether the right to self-determination and the illegality of creation of an entity could affect its statehood.

C. Self-determination and Statehood

In recent decades, some scholars have asserted that quasi-states should be qualified as states not based on effectiveness, but rather on people's right to self-determination.[174] They claim that a quasi-state has the right of self-determination, and that this right to self-determination compensates for governmental ineffectiveness.[175]

According to this view, if the creation of a state is based on right to self-determination, the requirement of 'government' is not applied technically. This recognizes that the traditional criterion for statehood is essentially based on the principle of effectiveness. Thus, in many cases, an entity should possess some degree of governmental function, such as maintenance of law and order and the establishment of basic institutions; however, this accepts that the principle of effectiveness is less strictly applied to situations where an entity's creation is compensated for by the principle of self-determination. The people of Congo, Rwanda, and Burundi were colonial peoples, entitled to self-determination, and their rights to self-determination compensated for their

[174] For example, *See* Quigley, *supra* note 153, at 5; Philip S. Hadji, *The Case for Kurdish Statehood in Iraq*, 41 CASE W. RES. J. INT'L L. 513 (2009);Peter Daniel DiPaola, *A Noble Sacrifice? Jus ad Bellum and the International Community's Gamble in Chechnya* , 4 IND. J. GLOBAL LEGAL STUD. 435, 459-464 (1997).
[175] *Id.*

lack of effective government.[176] The case of Guinea-Bissau was also similar in that it gained UN membership when Portugal agreed to withdraw.[177] The international community widely recognized its independence based on its rights to self-determination, and not their effectiveness in the colonial context.

Here, a question arises as to whether self-determination compensates for the lack of effective government of a quasi-state that was created outside the colonial context. In the era of decolonization, many colonies actually gained statehood based on their right to self-determination, even when they had not yet established an effective and independent government. Numerous practices in the era of decolonization weakened the traditional standards of effectiveness for statehood, and left a legal question about the relationship between the principle of self-determination and statehood.

The right to self-determination has two different dimensions: *external* self-determination and *internal* self-determination.[178] The Final Act of the Conference on Security and Co-operation in Europe provides: "[b]y virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish, their political, economic, social and cultural development."[179] First, *external* self-determination indicates the right to choose international status—that is, the right to form an independent state (or association or integration with another state).[180] By contrast, *internal* self-determination indicates that

[176] CRAWFORD, *supra* note 113, at 56-57, 97.
[177] Quigley, *supra* note 153, at 5.
[178] *See* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES, A LEGAL REAPPRAISAL (1995).
[179] Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292, 1295 [hereinafter Helsinki Final Act], Principle VIII.
[180] CASSESE, *supra* note 178, at 72-74; International Covenant on Civil and Political Rights, adopted 16 Dec. 1996, entered into force 23 Mar. 1976, 999 U.N.T.S. 171; International Covenant on Economic,

the people living in sovereign states could freely choose their internal status—that is, to choose their form of government, rules, and leaders on a basis of equality, and to freely pursue their political, economic, social and cultural development.[181] Whether self-determination compensates for the ineffectiveness of a quasi-state outside the colonial context, is only related to *external* self-determination.

Wilson's formulation as a political and moral ideal. The concept of *external* self-determination dates back to a formulation created by Woodrow Wilson. Wilson's formulation "recognized the right of ethnic groups to form states on the territories they inhabited, without relying on existing borders, and explicitly rejected subordination of people's interests to territorial concerns."[182] Wilson's formulation put an emphasis on the right of ethnic groups to form states and also safeguarded minority rights for those who were not included in new states.[183] He also proposed plebiscites as a tool to resolve border disputes.[184] Wilson's notion that recognized the right of an ethnic group to form an independent state was, however, conceived as merely a "political and moral ideal."[185] There were no recognized precedents indicating the existence of a legal right to grant ethnic groups the right to determine their international status.[186]

Social and Cultural Rights, adopted 16 Dec. 1996, entered into force 3 Jan. 1976, 993 U.N.T.S. 3. ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); Laurence S. Hanauer, *The Irrelevance of Self-Determination Law to Ethno-national Conflict: A New Look at the Western Sahara Case*, 9 EMORY INT'L L. REV. 133, 153-155 (1995).

[181] *See* CASSESE, at 59-60, 74; *Report of the Human Rights Committee,* UN Doc. A/39/40, 1984, 143 ("States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination.")

[182] Timothy William Waters, *Contemplating Failure and Creating Alternatives in the Balkans: Bosnia's Peoples, Democracy, and the Shape of Self-Determination*, 29 YALE J. INT'L L. 423, 432 (2004).

[183] *Id.*

[184] *Id.*

[185] Hanauer, *supra* note 180, at133.

[186] *Id.* at 133, 138-139.

The decolonization formulation as a legal right. During the decolonization after World War II, self-determination was codified by the UN Charter, many General Assembly Resolutions, and many human rights treaties (e.g., the human rights covenants and the Helsinki Final Acts), and was dealt with by the World Court many times.[187] Seventy years of legal precedent established "a legal right to self-determination."[188] However, the process of codification and the accrued practices from the decolonization period showed that both the substantive concept and the application of self-determination have been significantly changed from Wilson's original formulation.[189] Wilson's formulation could not be adopted as written because Wilson's model threatens the status quo of existing state borders.[190] Unlike Wilson's focus on ethnicity, a self-determination unit was consequently defined "within pre-defined borders."[191] The doctrine of *uti possidetis* was adopted "both to convert former colonial boundaries into international frontiers and to forestall any further secession from newly independent territories."[192] Therefore, the legal right to self-determination, developed through seventy years of legal precedents, is limited to the whole population of colonies within pre-defined borders of a given territory, without linkage to the ethnic, linguistic, or cultural ties of the

[187] *Id.* at 133.
[188] *Id.* at 151-153. ("The only documents referring to self-determination that create binding obligations are the UN Charter and the two human rights covenants—all having the status of treaties and, thus, acting as source of positive law…Yet, as discussed, none of the sections of the human rights covenants or of the Charter that mention the principle of self-determination define the term explicitly enough to create concrete obligations. Further definition of this term and of others in the Charter was left to the General Assembly… Advisory opinion rendered by the International Court of Justice, which are delivered upon the request of the General Assembly, also contribute to the codification of international law. Individual General Assembly resolution and I.C.J. advisory opinions are not binding… Collectively, however, in combination with the Charter and human rights covenants, and after years of evolving state practice, they have developed a set of norms of self-determination that have achieved the status of customary international law.").
[189] Waters, *supra* note 182, at 434.
[190] *Id.*
[191] *Id.*
[192] *Id.*

population.[193] Due to this historical background, *external* self-determination is thought of "as the right of colonial territories to independence."[194]

External self-determination outside the colonial context. There is one recognized exception where external self-determination can be invoked outside the colonial context. International practice and UN documents make it clear that "external self-determination is a right belonging not only to colonial peoples but also to peoples subject to foreign occupation."[195] The UN Declaration on Friendly Relations "refers to two situation which give rise to the right to [external] self-determination: colonialism and 'subjection of peoples to alien subjugation, domination and exploitation, which may exist outside a colonial system.'"[196]

In addition, there is controversy as to whether racial or religious groups may attempt secession when their internal self-determination and equal rights have been hindered. The UN Declaration on Friendly Relations seemingly implies the possibility:

> Nothing in the foregoing paragraphs [with regard to the people's right to self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity of political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or color.[197]

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[193] Timothy William Waters, *Indeterminate Claims: New Challenges to Self-Determination Doctrine in Yugoslavia,* SAIS REVIEW, 111, 119 (2000); CASSESE, *supra* note 178, at 90; *See Western Sahara Advisory Opinion*, I.C.J. reports 1975.

[194] Waters, *supra* note 182, at 434.

[195] ANTONIO CASSESE, p. 90 "This notion [that external self-determination is a right belonging also to peoples subject to foreign occupation], which had already been put forward… in the 1960 UN Declaration on the Independence of Colonial Peoples, and then implicitly upheld in article 1 common to the two UN Covenants on Human Rights of 1966…was spelled out in 1970, in the UN Declaration on Friendly Relations."

[196] CASSESE, *supra* note 178, at 90.

[197] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, Annex, principle 5, para 7, GA 2625 (XXV), 25 UN GAOR Supp. 18 122; 65 AJIL 243 (1971) [hereinafter *Friendly Relations Declaration*].

It could be read that this clause allows racial and religious minorities to exercise *external* self-determination by unilateral secession when their internal self-determination is hindered by a parent state. However, many scholars' interpretation and state practice show that this exceptional right to external self-determination should be limited to the most serious and oppressive situations.[198]

> A racial or religious group may attempt secession, a form of external self-determination, when it is apparent that internal self-determination is absolutely beyond reach. Extreme and unremitting persecution and the lack of any reasonable prospect for peaceful challenge may make secession legitimate.[199]

Furthermore, such a limited expansion of external self-determination to extremely oppressed people has not completely matured into a customary international law; only the rights of persecuted *racial* groups are recognized under customary law, but *religious* group's rights have not yet risen to the level of customary law.[200]

The expansion of the scope of external self-determination. In the wake of the recent dissolution of the Soviet Union and Yugoslavia, and the ethnic conflicts in Bosnia, Rwanda, and many other places, many authors have tried to expand the scope of external self-determination to justify internal secession of distinct groups of people who share the same ethnical, cultural, or religious characteristics.[201] In other words, there have been demands that the law of self-determination needs to evolve to reflect the reality of the

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[198] Waters, *supra* note 182, at 436.
[199] CASSESE, *supra* note 178, at 120.
[200] CASSESE, *supra* note 178, at 120-124.
[201] *See* Waters, *supra* note 182; Waters, *supra* note 193, at 132-133; Richard F. Iglar, *The Constitutional Crisis in Yugoslavia and the International Law of Self-determination: Slovenia's and Croatia's Right to Secede*, 15 B. C. INT'L & COMP. L. REV. 213 (1992); Thomas D. Grant*, Extending Decolonization: How the United Nations Might Have Addressed Kosovo,* 28 GA. J. INT'L & COMP. L. 9 (1999-2000); Holly A. Osterland, *National Self-Determination and Secession: The Slovak Model,* 25 CASE W. RES. J. INT'L L. 655 (1993); Mitchell A. Hill, What the Principle of Self-Determination Means Today, 1 ILSA J. INT'L & COMP. L. 119 (1995).

numerous secessions in the international community in recent decades.[202] Claims to expand the scope of external self-determination are grounded on plausible moral and political ideals, but have not yet evolved to applicable legal rights.[203]

In conclusion, external self-determination can only be exercised by (1) colonies, (2) people occupied by foreign states. With regard to extremely oppressed racial or religious groups, only persecuted racial groups may have the external right to self-determination under customary law as a remedial right.[204] Fulfilling the qualifications of self-determination does not automatically form a new state; to do so an entity must secede. Therefore, two conditions should be met for an ineffective quasi-state to claim statehood: (1) a quasi-state must be either a colonized territory, a territory occupied by foreign states, or a persecuted racial group; and (2) a quasi-state must secede from a parent state.

For example, Palestine possesses the right to external self-determination based on the foreign occupation by Israel.[205] After Palestinian National Council declared the statehood of Palestine in 1988, the GA adopted resolution 43/177 that "acknowledge[d] the proclamation of the State of Palestine by the Palestine National Council."[206] Although its effectiveness is sometimes questionable, the right to self-determination compensated

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[202] *Id.*
[203] Iglar, *supra* note 201, at 239; Hill, *supra* note 201, at 132; Hanauer, *supra* note 180, at 133.
[204] This situation is limited to the most extreme cases.
[205] *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004* I.C.J. 136. The Court found that Palestian people have right to self-determination and Israel has obligation to respect that right.
[206] GA Res. 43/177, A/RES/43/177 (1988), U.N. GAOR, 43d Sess., Supp. (No.49), at 62, U.N. Doc. A/43/49 (1989).

for its ineffectiveness.[207] The fact that UNESCO and the UN GA officially recognize Palestine as a state is a strong indication that it has gained statehood.[208]

It seems, however, that no other current quasi-states fit into the strictly narrow scope of *external* self-determination. Since secession is neither prohibited nor allowed in international law, a quasi-state can gain statehood only when it successfully secedes and establishes effectiveness. In other words, because most quasi-states do not have a plausible self-determination claim, they must secede and establish effectiveness to obtain statehood.

D. Illegality in the Creation of States and Statehood

One of the major reasons why many quasi-states fail to gain universal recognition is related to the illegality implicated in their creation. In international law, a duty has been created to not recognize an entity "when it has come into existence in violation of fundamental principles of international law."[209] Particularly, the international community tends to not recognize entities created by the unlawful use of force or in violation of the self-determination of peoples. For example, the Turkish Republic of Northern Cyprus was created under the Turkish invasion of Cyprus in 1974;[210] no states other than Turkey

[207] Quigley, *supra* note 153, at 5.
[208] Steven Erlanger & Scott Sayare, *Unesco Accepts Palestinians as Full Members,* THE NEW YORK TIMES, October 31, 2011, available at http://www.nytimes.com/2011/11/01/world/middleeast/unesco-approves-full-membership-for-palestinians.html?pagewanted=all&_r=0; UNESCO Constitution, *supra* note 173, art II (2) ("[S]tates not members of the United Nations Organization may be admitted to membership of the Organization… by a two-thirds majority vote of the General Conference."); UN GA, 67th Sess., 44th & 45th plen. mtg, GA/11317 (Nov. 29, 2012), available at http://www.un.org/News/Press/docs/2012/ga11317.doc.htm; Louis Charbonneau, *Palestinians Win Implicit U.N. Recognition of Sovereign State*, Nov 29, 2012, available at http://www.reuters.com/article/2012/11/29/us-palestinians-statehood-idUSBRE8AR0EG20121129
[209] DAMROSCH ET AL., *supra* note 119, at 320.
[210] *Id.* at 323.

have recognized Northern Cyprus.[211] More recently, in the International Court, counsel for Bosnia asserted that "the Republika Srpska was not a State because of multiple, if related, factors: 'the creation or maintenance of an entity purporting to be a state in violation of the prohibition of the use of force, or all other rules of *jus cogens*, such as the prohibition of apartheid, and it is submitted, the obligation not to perpetrate genocide, cannot have legal consequences.'"[212] Arguably, Abkhazia, South Ossetia, Nagorno-karabakh, Transnistria, and Kosovo could all be subject to the same accusation that they were created as a result of the illegal use of armed force by a foreign state.[213]

However, while it is true that the lack of recognition might be based partially on the illegal acts of the entity, it is difficult to conclude that the illegality implicated in their creation or continuation vitiates the effective sovereignty of a claimant state.[214] "Even in the ashes of the Second World War, it was assumed there would be, as there is a German state."[215] In other words, the method adopted to exercise a right cannot extinguish the right itself. Furthermore, "even if a situation is fully voided by the illegal nature of its creation, the continuation of that situation through time may create a habitualized acceptance, culminating ultimately in other members of the international community recognizing the validity of the situation."[216]

The lack of actual independence of the putative state could be an acceptable cause that vitiates statehood. "An entity claiming statehood but created during a period of

[211] *Id.* at 323; Security Council Res. 541, para. 7 (Nov. 18, 1983) (The Security Council called upon all states "not to recognize any Cypriot State other than the Republic of Cyprus."); CRAWFORD, *supra* note 113, at 144-145.
[212] *See* CRAWFORD, at 133.
[213] Wills, *supra* note 6, at 92.
[214] CRAWFORD, *supra* note 113, at 131-148.
[215] Waters, *supra* note 182, at 451.
[216] *Id.* at 452.

foreign military occupation will be presumed not to be independent."[217] Under this criterion of independence, the Turkish Republic of Northern Cyprus could be not be considered a state if it is continuously dependent on Turkey. The European Court of Human Rights held that the Turkish administration exercised effective overall control on the territory of the Turkish Republic of Northern Cyprus.[218] Illegal uses of force in the creation of a state are often accompanied by a lack of independence; many entities have been created with extensive military support from foreign states. In this case, an entity may not be considered a state because of a lack of actual independence, not because of the illegality implicated in its creation.

E. Conclusion

Whether a quasi-state is a state according to international law should be based on the traditional standard of effectiveness, with consideration given to existing international rules on statehood. Although many quasi-states have control over the territory they claim, they are not states if they do not have effective government and actual independence. Unless foreign states occupy quasi-states, or quasi-states are persecuted racial groups, principles of self-determination cannot compensate for the lack of effective government for a quasi-state that was created outside the colonial context. Even if a quasi-state came into existence in violation of fundamental international law, such as the prohibition of unlawful armed force or peoples' self-determination, the illegality involved in its creation cannot defy its effectiveness. However, those quasi-states created by foreign state's

[217] CRAWFORD, *supra* note 113, at 148.
[218] *Id.* at 133; *Cyprus v Turkey,* 35 EHRR 30, 969, 120 ILR 12, 39 (para 77) ("[H]aving effective overall control over northern Cyprus, [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support.")

armed force are presumed not to be actually independent; based on their lack of independence their statehood could be denied.

For quasi-states that meet the criteria of statehood, they must be regarded as a state despite the lack of universal recognition, and they must be accepted as a state for the purpose of the crime of aggression as well. However, for quasi-states that do not meet the criteria for states in general international law, it should be examined whether they could be nevertheless considered a state for the purpose of the crime of aggression. The answer depends on the scope of the term "state" for the purpose of the crime of aggression, and the first analysis should be focused on the Rome Statute.

3. Ambiguity in the Definition of a "State" for the Crime of Aggression

The current provision of the Rome Statute does not clearly define the meaning of the term "state" for the purpose of aggression, and leaves open the question of whether the concept of "state" is broad enough to include quasi-states. Unlike the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), which defines the term "state" as including "a self-proclaimed entity *de facto* exercising governmental functions, whether recognized as a State or not,"[219] the ICC has no provision of the definition of the term "state." The only relevant provision would be an explanatory note in GA resolution 3314 that was used as the basis for the definition of the act of aggression. It states, "[i]n this Definition the term 'State': (a) is used without prejudice to questions of recognition or to whether a State is a member of the United

[219] Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 2, Nov. 19, 2009. IT/32/Rev.48 [hereinafter *Rules of ICTY*]

Nations."[220] Under this note, the fact that an entity is not officially recognized as a state cannot prevent that entity from being subject to the rule of the crime of aggression.

There could be divergent interpretations of the underlying intention of the explanatory note in GA resolution 3314. First, it could be read that the note confirms that recognition is not a requirement of statehood. In other words, the definition of a state in international law is so clear that it is not dependent on recognition by the UN or other states. Under this interpretation, the definition of state should be strictly construed to be the same as the meaning of "state" in international law; thus, if an entity is not a state according to international law, it is not a state for the purpose of aggression. On the contrary, it could be read that the definition of a "state" indicates that the scope of "state" for the purpose of aggression is broad enough to include entities whose statehood is controversial.

Furthermore, there has been argument that although GA resolution 3314 was used as the basis of the definition of the act of aggression, the purposes underlying the GA resolution and the Rome Statute are different. According to this argument, the GA resolution was drafted to guide the Security Council in determining state responsibility for aggression, and not to prosecute individuals for aggression.[221]

Before turning to the question of how to interpret the term "state" in the context of the crime of aggression, Chapter 3 will briefly examine whether it is necessary to prosecute illegal uses of armed force as crimes of aggression, rather as crimes against humanity, war crimes, or international terrorism. This question should be primarily

[220] GA 3314, *supra* note 33, annex, explanatory note of art. 1.
[221] *Id,* para 4 ("The General Assembly,... [c]alls the attention of the Security Council to the Definition of Aggression, as set out below, and recommends that it should, as appropriate, take account of that Definition as guidance in determination, in accordance with the Charter, the existence of an act of aggression."). Chapter V will deal with this question.

answered in order to provide the rationale of the practical uses of this study on the applicability of the crime of aggression to quasi-states. Chapters 4 and 5 will examine how to interpret the term "state" in the context of the crime of aggression, and whether the definition of "state" contained in GA resolution 3314 is relevant to the crime of aggression.

III. THE NECESSITY FOR THE CRIME OF AGGRESSION TO ADDRESS QUASI-STATES: IS IT NECESSARY TO PROSECUTE ILLEGAL USES OF ARMED FORCE INVOLVING QUASI-STATES AS CRIMES OF AGGRESSION, RATHER THAN AS GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES, OR INTERNATIONAL TERRORISM?

In many cases, illegal uses of armed force involving quasi-states could constitute genocide, war crimes, crimes against humanity, and terrorism because these crimes can be committed without a connection to international conflicts. For example, if a military leader of a quasi-state planned and initiated systematical armed attacks against civilian populations in other states, in furtherance of a quasi-state's policy, the individual's act could constitute crimes against humanity and war crimes. If such an individual committed the armed attacks with a special intent to destroy a group in whole or in part, the act also constitutes genocide. If the attack was carried out in order to provoke a state of terror in a population, that individual's acts could also constitute international terrorism. The individual who waged such an armed attack could therefore be prosecuted for all of those crimes at the discretion of the Prosecutor. But planning and initiating such uses of armed force involving quasi-states cannot be prosecuted as crimes of aggression if the meaning of "state" in the context of aggression is not broad enough to include quasi-states. This discrepancy between the scope of crimes of aggression and the scope of other international crimes produces an odd conclusion: although the underlying nature of illegal uses of armed force constitutes aggression, only the rule on aggression does not cover the situation while other substantive crimes cover it.

Furthermore, whether the fundamental nature of acts of aggression—e.g., illegal uses of armed force—can be fully covered by other international crimes rather than by the crime of aggression is questionable. Although other international crimes cover the uses of illegal armed force involving quasi-states, it is nevertheless necessary to

prosecute illegal uses of armed force as crimes of aggression for two reasons: (1) there are limitations on prosecuting armed attacks as other crimes because certain types of armed attacks involving quasi-states are not adequately covered by those crimes; and (2) there are risks to prosecuting armed attacks involving quasi-states as these other crimes because doing so overlooks the unique nature of different crimes.

Before turning to the limitations and risks of prosecuting aggression as genocide, crimes against humanity, war crimes, or terrorism, the next section will first identify a number of areas where aggressive acts involving quasi-states could satisfy the elements of those other international crimes.

1. Identifying Areas Where Illegal Uses of Armed Force Involving Quasi-States Satisfy the Constitutive Elements of Other International Crimes

Substantive categories of actions covered by genocide, crimes against humanity, war crimes, and international terrorism overlap with the actions of quasi-states (or actions against them) in different ways. Genocide and crimes against humanity show the close overlap between coverage of states and of quasi-states. However, there is considerably greater separation for war crimes, which traditionally have distinguished between cross-border and internal conflicts. Terrorism also shows the close overlap between coverage of states and of quasi-states.

This section is intended to show that other international crimes show overlap between coverage of states and of quasi-states in different ways, and none of the elements of those international crimes actually presuppose a formal state. We should, therefore, think substantively about what these crimes seeks to regulate, and perhaps even more importantly, what quasi-state populations and actors these crimes seek to affect.

A. Illegal Uses of Armed Force and Genocide

Genocide is defined as committing prohibited acts "with the intent to destroy, in whole or in part, a national ethnical, racial or religious group, as such."[222] The prohibited acts include killing, causing serious bodily or mental harm, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, imposing measures intended to prevent births, and forcibly transferring children of the group.[223] None of these material elements of genocide requires us to distinguish violence involving state actors from violence involving non-state actors.

With regard to the nature of genocide, it has been controversial whether an isolated single murder with the requisite intent, but without the connection with any organizational policy, could be labeled as genocide.[224] "[A]lthought it is not a formal element of the crime that there be a genocidal plan, the Tribunals have noted that it would be difficult to commit genocide without one."[225] In other words, it is generally considered that genocide has a collective nature. It should be noted that the nature of a genocidal plan does not presuppose the formal state. As long as it meets the collective nature, this requirement covers some entity other than a state, which includes quasi-states.

The definition of genocide requires that genocide be committed against only a national, ethnic, racial or religious group; this list is exhaustive.[226] In *Krstić* case, the ICTY recognized that "the list is exhaustive but to accept that the four groups were not

[222] CRYER ET AL, *supra* note 14, at 204; Rome Statute, *supra* note 56, at art. 6; Convention on the Prevention and Punishment of the Crime of Genocide, art. II, 78 UNTS 277 [hereinafter *Genocide Convention*].
[223] *Id.*
[224] CRYER ET AL, *supra* note 14, at 206-7.
[225] *Id.* at 207.
[226] *Id.* at 208-9.

given distinct and different meanings in the Convention."[227] In particular, the tribunal concluded, "the preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognized, before the second world war, as 'national minorities', rather than to refer to several distinct prototypes of human groups."[228] The protected group does not need to be a part of a recognized state. Therefore, genocide can be committed against quasi-states.

In conclusion, the underlying nature and the elements of genocide do not make a distinction between state violence and violence involving entities other than states. Therefore, if illegal uses of armed force involving quasi-states entail killing or other prohibited acts with the requisite genocidal intent, that violence could be prosecuted as genocide.

B. Illegal Uses of Armed Force and Crimes Against Humanity

Crimes against humanity have evolved to include crimes committed outside the scope of interstate conflicts. For crimes against humanity, the Charter of the IMT required a nexus between crime and war, meaning that crimes against humanity could be only committed "before and during the war."[229] This was largely a result of context, however, because the Chater's definition of crimes against humanity was formulated in in the aftermath of the Second World War.[230] Approximately 50 years later, in 1993, the

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[227] *Id.* at 210.
[228] *Id.* at 211; *Prosecutor v. Radislav Krstić (Trial Judgement*), ICTY, paras 555-6, Aug. 2, 2001.
[229] M. CHERIFF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 158 (2nd ed., 2013); Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex, art. VI(c), Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288 (Art. 6(c) defined "crimes against humanity" as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, *before or during the war*…") [emphasis added].
[230] MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES : NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT, 274 (2002).

ICTY Statute extended the scope of the crime by providing that a crime against humanity could be "committed in armed conflict, whether international or internal in character."[231] The ICTR Statute went further and abolished the requirement of a nexus to armed conflict,[232] and in 1998, the Rome Statute finally rejected any such requirement.[233]

Article 7 of the Rome Statute defines "crimes against humanity" as certain prohibited acts committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[234] The prohibited acts in Article 7 include murder, extermination, enslavement, deportation, torture, rape, persecution, enforced disappearance, apartheid, and other inhumane acts.[235] "'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts…against any civilian population, pursuant to or in furtherance of *a State or organizational policy* to commit such attack."[236] The use of the disjunctive 'State or organizational' indicates that some entity other than a state can meet the requirements of this element; this would clearly include quasi-states. Further, the crime can be directed against *any* civilian population, which doesn't require it be the population of a state as such, and even less of a recognized state; this would also clearly include civilian populations of unrecognized quasi-states.

Nothing in the elements of crimes against humanity requires us to distinguish between states and quasi-states. If an armed attack involving a quasi-state included any of these prohibited acts as part of a widespread or systematic attack directed against any

[231] ICTY Statute, *supra* note 46, art. 5; CRYER ET AL., *supra* note 14, at 234.
[232] ICTR Statute *supra* note 47, art. 3; *See* CRYER ET AL., at 235.
[233] Rome Statute, *supra* note 56, art. 7; ROBERT CRYER ET AL., p. 234-235.
[234] *See* Rome Statute, art. 7 (1).
[235] *Id.*
[236] *Id*, art. 7, para 2(a) [emphasis added].

civilian population, with knowledge of the attack, then the attack constitutes crimes against humanity. For example, in 2008, South Ossetia forces killed, persecuted, and unlawfully detained many Georgian civilians after Georgian forces withdrew from South Ossetia.[237] The report of the Human Rights Watch ("HRW") concluded that "[t]o the extent that a number of these prohibited acts [committed by South Ossetia force] were committed as part of a widespread or systematic attack directed against the civilian population, they may be prosecuted as crimes against humanity."[238]

C. Illegal Uses of Armed Force and War Crimes

Whereas crimes against humanity show a close overlap between states and quasi-states, there is considerably greater separation for war crimes, which traditionally have distinguished between cross-border and internal conflicts. When it comes to war crimes, until 1990, it was generally considered that war crimes did not apply to internal armed conflicts because two provisions applicable to internal armed conflicts—Common Article 3 of 1949, and Additional Protocol II of 1977—did not have a grave breaches provision.[239] The lack of a grave breaches provision led many to conclude that war crimes committed during internal armed conflicts constitute violations of international

[237] For example, *See* Human Rights Watch, *Up In Flames, Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia,* p. 3-4, Jan. 2009, available at, http://www.hrw.org/sites/default/files/reports/georgia0109web.pdf "After Georgian forces withdrew from South Ossetia on August 10, South Ossetian forces over a period of weeks deliberately and systematically destroyed ethnic Georgian villages in South Ossetia that had been administered by the Georgian government. They looted, beat, threatened, and unlawfully detained numerous ethnic Georgian civilians, and killed several, on the basis of the ethnicity and imputed political affiliations of the residents of these villages, with the express purpose of forcing those who remained to leave and ensuring that no former residents would return. From this, Human Rights Watch has concluded that South Ossetian forces attempted to ethnically cleanse these villages. Approximately 22,000 villagers, the majority of whom had fled South Ossetia before the conflict started, remain displaced."

[238] *Id.* at 3-4.

[239] CRYER ET AL., *supra* note 14, at 276.

humanitarian law but not violations of criminal law.[240] Changed political circumstances, however, have allowed and encouraged the extension of criminalization to internal conflicts that have long been occurring.

The ICTR Statute was the first step for the criminalization of internal conflicts. Because Rwanda was an internal conflict, the Security Council had to decide whether the Statute includes the provisions of war crimes applicable to internal conflicts. "The [C]ouncil included in the Statute serious violations of common Article 3 and core provisions of AP II, thus expressly recognizing a criminalization of these prohibitions."[241]

The *Tadić* decision, concluded by the ICTY, "had a considerable impact on the development of the law in this area [by concluding] that traditional stark dichotomy between international and internal conflict was becoming blurred, and that some war crimes provisions were now applicable in internal armed conflicts."[242] Now, according to the ICC Statute, "rough[ly] half of the provisions from international conflicts were transplanted to internal conflicts in the ICC Statute."[243] Specifically, the Rome Statute provides that 46 war crimes are applicable to international conflicts, and of those 25 are provided for internal armed conflicts.[244]

Whether a quasi-state is considered as a state for the purpose of war crimes is not entirely clear because practices are not consistent. Practice in other judicial instances suggests that unrecognized states and non-UN members are treated as states too. For

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[240] *Id.* at 276.
[241] *Id.* at 277.
[242] *Id.*; *Prosecutor v. Duško Tadić aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction),* ICTY, IT-94-1, Oct. 2, 1995.
[243] *See* CRYER ET AL., at 278.
[244] Deidre Willmott, *Removing the Distinction between International and Non-international Armed Conflict in the Rome Statute of the International Criminal Court*, 5 MELB. J. INT'L L. 196, 199 (2004).

example, the Rules of the Procedures and Evidence of the ICTY defines a "state" for crimes against humanity and war crimes as including "a self-proclaimed entity *de facto* exercising governmental functions, whether recognized as a State or not."[245] By contrast, in the 2008 conflict in Georgia, South Ossetia was generally considered as non-state for purpose of war crimes. For example, according to the report of the HRW, "[s]ince South Ossetia is recognized as part of Georgia, fighting between the non-state South Ossetian forces and militia and Georgian forces falls under the laws applicable to noninternational (internal) armed conflict."[246]

If a quasi-state is considered as a state for the purpose of war crimes, all provisions applicable to an international armed conflict would apply to it. Even if a quasi-state is not considered a state, however, provisions for international armed conflicts would still apply if armed groups from a quasi-state act on behalf of an external State.[247] Considering that most quasi-states are dependent on an external patron state,[248] it might often be the case that their armed attacks could be considered international armed conflicts. But if a quasi-state is not considered a state, and there is no external patron state, then the only provisions of war crimes applicable to non-international armed conflicts will apply.

War crimes are roughly placed into three different categories. First, the most representative war crimes are related to the use of violence and mistreatment against non-

[245] Rules of the ICTY, *supra* note 219, at Rule 2.
[246] Human Rights Watch, *supra* note 237, at 28.
[247] *See Prosecutor v. Duško Tadić aka "Dule" (Trial Chamber Decision on the Prosecutor's motion Requesting Protective Measures for Victims and Witnesses),* para 137-145, IT-94-1-T, Aug. 10, 1995; CRYER ET AL., *supra* note 14, at 282.
[248] Kolstø, *supra* note 2, at 733 (For example, Taiwan has the support from the US against the People's Republic of China. Transdniestria, Ossetia, and Abkhazia all have the support of Russia. Northern Cyprus has Turkey).

combatants.[249] The protective principle underlying this type of war crime is that belligerents are required to distinguish between military objectives and other attacks against non-military targets,[250] and "non-combatants must be treated humanely."[251] The war crime of killing protected persons like civilians is prohibited in both international and internal conflicts.[252] "Torture, inhumane treatment, mutilation, and biological, medical or scientific experiments are also prohibited in any armed conflict."[253] In addition, the war crime of "committing outrages upon personal dignity, in particular humiliating and degrading treatment, … applies in any armed conflict."[254] Therefore, the protective principle of war crimes of the use of violence or mistreatment against non-combatants does not make a distinction between recognized states and entities that lack statehood, including quasi-states.

Second, several war crime provisions address crimes involving extensive destruction of property that is not justified by military necessity and is committed

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[249] CRYER ET AL., *supra* note 14, at 299. This includes any armed attacks that were intended to murder non-combatants including civilians, prisoners of war, and wounded or sick former combatants (CRYER ET AL., at 299 290; Rome statute, *supra* note 56, art. 8(2)(a)(i), 8(2)(e)(i); ICTY Statute, *supra* note 46, art. 2(a); ICTR Statute, *supra* note 47, art. 4(a); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 147, Aug. 12, 1949, 75 UNTS 287 [hereinafter *Geneva Convention IV*]; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), common art. 3, Aug. 12, 1949, 75 UNTS 135 [hereinafter *Common Article 3 to the Geneva Coventions*]). Willfully causing great suffering or serious bodily injury to non-combatants is also included (CRYER ET AL., at 291 ("Under the ICC Statute, the provision applies only in international armed conflict.");Rome Statute, art. 8(2)(a)(iii); ICTY Statute, art. 2(c); Geneva Convention IV, art. 14). Waging armed attacks that were directed against prohibited targets constitutes a war crime. Those targets include hospitals, undefended buildings, and personnel and vehicles involved in humanitarian assistance (CRYER ET AL., at 296; Rome Statute, art. 8 (2)(b)(v), 8(2)(b)(ix), 8(2)(e)(iv), 8(2)(b)(xxiv), 8(2)(e)(ii), 8(2)(b)(iii) and 8 (2)(e)(iii)).

[250] *See* CRYER ET AL., at 295,6

[251] *Id*. at 290.

[252] *Id*; Rome statute, *supra* note 56, art. 8(2)(a)(i), 8(2)(e)(i); ICTY Statute, *supra* note 46, art. 2(a); ICTR Statute, *supra* note 47, art. 4(a); Geneva Convention IV, *supra* note 249, art. 147; Common Article 3 to the Geneva Conventions, *supra* note 249.

[253] *See* CRYER ET AL., at 291; Rome Statute, art. 8(2)(a)(ii), 8(2)(b)(x), 8(2)(c)(i), 8(2)(e)(xi); ICTY Statute art. 2(b), reflecting the grave breach provision (e.g., art. 147 Geneva Convention IV), common art. 3, and art. 11 Additional Protocol I.

[254] *See* CRYER ET AL., at 291; Rome Statute, art. 8(2)(b)(xxi), art. 8(2)(c)(ii).

unlawfully.[255] War crimes of property destruction distinguish between international and internal conflicts. In the Rome Statute war crimes "include() destruction, appropriation, seizure and pillage in international conflict, but in internal conflict it includes only the long-established prohibition on pillage."[256] Therefore, the laws on war crimes still distinguish between destruction of property involving state actors and the same conduct involving entities that lack former statehood.

Third, the provisions against war crimes restrict methods and means of conducting hostilities that cause unnecessary suffering and damage. These provisions are different in that "*combatants* are also beneficiaries of the protections granted."[257] With regard to the means of warfare, the use of weapons is inherently indiscriminate and causing unnecessary suffering is criminalized.[258] For this, the ICC Statute regulates the use of certain weapons only in international conflicts.[259] However, the emerging rule on the prohibition of certain weapons in the context of internal armed conflicts allows the ICC to prosecute those who violate the prohibition.[260] War crimes also criminalize certain prohibited methods of warfare. The ICC Statute recognizes and prohibits killing or wounding a combatant *hors de combat,*[261] treacherous killing,[262] declaring no quarter,[263] improper use of flags and symbols,[264] and the use of human shields[265] in international

[255] *See* CRYER ET AL., at 302.
[256] *Id*; Rome Statute, *supra* note 56, art. 8(2)(a)(iv), 8(2)(b)(xiii), 8(2)(3)(xii), 8(2)(b)(xvi) and 8(2)(e)(v).
[257] *See* CRYER ET AL., at 303.
[258] *Id.*
[259] *Id*. at 304; Rome Statute, *supra* note 56, art. 8(2)(b)(xvi)-(xix).
[260] *See* CRYER ET AL., at 304; Rome Statute, art. 8(2)(b)(xvi)-(xix); *Prosecutor v. Duško Tadić aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction),* paras. 119-24, ICTY, IT-94-1, Oct. 2, 1995 (specifically finding weapons prohibitions applicable in internal conflicts); Rome Statute, art. 10 ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.").
[261] Rome Statute, art. 8(2)(b)(vi).
[262] *Id.* art. 8(2)(b)(xi) and (e)(ix).
[263] *Id.* art. Art. 8(2)(b)(xii) and (e)(x); ICC Elements, art. 8(2)(b)(xii).
[264] *Id.* art. 8(2)(b)(vii).

conflicts, while it only recognizes and prohibits treacherous killing and declaring no quarter in internal conflicts.[266]

Although war crimes have distinguished between international conflicts and internal conflicts and apply different sets of law, "the general essence of those rules [applicable to international conflicts]" is applicable to internal conflicts. Illegal uses of armed force involving quasi-states could be prosecuted as war crimes either under the law of international conflicts or internal conflicts.

D. Illegal Uses of Armed Force and International Terrorism

Under the current international legal framework, there are two ways to prosecute an individual for terrorist acts: either as a discrete crime of international terrorism or as a subcategory of war crimes or of crimes against humanity.[267] International terrorism as a discrete crime shows a close overlap between states and quasi-states.

a. International Terrorism as a Discrete Crime

There is no generally agreed-upon treaty rule establishing a comprehensive definition of terrorism as a discrete crime of international terrorism.[268] Although there are

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[265] *Id*. art. 8(2)(b)(xxiii).
[266] CRYER ET AL., *supra* note 14, at 308.
[267] Antonio Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law*, 4 J. INT'L CRIM. JUST, 933, 950 (2006).
[268] CRYER ET AL., *supra* note 14, at 338-339 ("One of the earliest attempts at agreeing on an international prohibition of terrorism was the 1937 Convention for the Prevention and punishment of Terrorism, which was negotiated within the League of Nations following the assassination of King Alexander I of Yugoslavia in 1934. The Convention defined acts of terrorism as 'criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public' and listed acts to be criminalized by States Parties, including those causing death, serious injury, or loss of liberty to heads of States and public officials, damage to public property of another State, and risk to the lives of members of the public. The Convention never received sufficient ratifications to enter into force.").

eleven global agreements[269] and many regional agreements[270] to address international terrorism, each of them only focuses on the particular kinds of terrorist threats frequently occurring at the time the agreements were reached, and thus, no general definition of terrorism is contained in any of those agreements.[271]

There has been controversy as to whether there exists a customary law on the definition of international terrorism. Scholars argue that many aspects of terrorism are still controversial, and therefore, there is no agreed-upon definition of international terrorism as a form of customary law.[272] Nonetheless, when comparing descriptions of terrorism from different conventions and negotiations among scholars, there exists a widespread consensus on a definition of terrorism applicable during times of peace.[273] Therefore, it may be safely argued that "at least trans-national, state-sponsored or state-

[269] *Id,* at 339; Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, UN Treaty Series 1973; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, 974 UNTS 177; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, No. 15410; International Convention against the Taking of Hostages, 17 November 1979, No. 21931; Convention on the Physical Protection of Nuclear Material, 26 October 1979, No. 24631; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 27 ILM 668 (1988); 1678 UNTS 221; International Convention for the Suppression of Terrorist Bombings, 15 December 1997, No. 37517; International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, No. 38349; and International Convention for the Suppression of Acts of Nuclear Terrorism, 13 April 2005, A/59/766.

[270] *See* CRYER ET AL., at 341; League of Arab States, Arab Convention on the Suppression of Terrorism, 22 April 1998; Organization of the Islamic Conference (OIC), Convention of the Organisation of the Islamic Conference on Combating International Terrorism, 1 July 1999, Annex to Resolution No: 59/26-P; Council of Europe, European Convention on the Suppression of Terrorism, 27 January 1977, ETS No. 90; Organization of American States (OAS), Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance, 2 February 1971; Organization of African Unity (OAU), OAU Convention on the Prevention and Combating of Terrorism , 14 June 1999; South Asian Association for Regional Cooperation (SAARC), Regional Convention on the Suppression of Terrorism, South Asian Association for Regional Cooperation (SAARC), 4 November 1987; Regional Treaties, Agreements, Declarations and Related, Treaty on Cooperation among the States; and Council of Europe, European Convention on the Suppression of Terrorism, 27 January 1977, ETS No. 90.

[271] *See* CRYER ET AL., at 339.

[272] *Id.* at 344.

[273] *Id;* Cassese, *supra* note 267, at 935

condoned terrorism amounts to an international crime and is already contemplated and prohibited by international customary law as a distinct category of such crimes."[274]

The following are the elements of the generally accepted definition of international terrorism in times of peace:

> [T]errorism consists of (i) acts normally criminalized under any national penal system [including massive killing, bombing, acts of violence against persons or aircraft or ship], or assistance in the commission of such acts whenever they are performed in time of peace; those acts must be (ii) intended to provoke a state of terror in the population or to coerce a state or an international organization to take some sort of action, and finally (iii) are politically or ideologically motivated, i.e. are not based on the pursuit of private ends.[275]

Since nothing in the definition of a discrete crime of terrorism presupposes that the act should be committed by or against recognized states, the substantive category of actions covered by this definition overlaps with the actions of quasi-states (or actions against them).

b. International Terrorism as a Sub-category of War Crimes or Crimes against Humanity

With regard to acts of terrorism performed during either an international or an internal armed conflict, the international court or tribunal has jurisdiction to prosecute the terrorist act if it falls within one of the crimes against humanity or war crimes. As a matter of fact, "the organized use of terror was considered as both a war crime and a crime against humanity [since] the Nuremberg Tribunal."[276]

In times of war, armed attacks performed by combatants—regardless of whether they are members of the armed forces of a state, quasi-state, rebels, or non-state entity—

[274] *See* Cassese, at 994.
[275] *Id.* at 937.
[276] CRYER ET AL., *supra* note 14, at 349.

against civilians or other protected persons, that are intended to spread terror, may amount to war crimes.[277] Although the ICC Statute does not explicitly include acts of terrorism as a war crime,[278] it is obvious that acts of terrorism against civilians or protected persons with the intent to spread terror fall within the scope of developing and existing customary law of war crimes. For example, the ICTR Statute and the SCSL Statute includes 'acts of terrorism' as war crimes.[279] The ICTY took the same position. In the *Galić* case, the ICTY ruled that acts of terrorism against civilian populations trigger individual criminal liability.[280] When terrorist acts constitute war crimes, different laws of war crimes would be applicable according to whether armed conflicts involving quasi-states are qualified as international conflicts or not. In any circumstances, the law of war crimes would cover the essence of terrorist acts by or against quasi-states but in a different way.

Terrorist acts may fall under the category of crimes against humanity, regardless of whether they are perpetrated in time of war or peace, as long as the acts satisfy the constituent elements of crimes against humanity.[281] Terrorist acts could be prosecuted as crimes against humanity when the criminal conduct was carried out as a part of a widespread or systematic attack against civilians.[282] Because nothing in the elements of crimes against humanity requires us to distinguish between and states and quasi-states, [t]o the extent that terrorist acts involving quasi-states were committed as part of a

[277] Cassese, *supra* note 267, at 943-948.
[278] *See* Cassese, at 945; Rome Statute, *supra* note 56, art. 8.
[279] *See* Cassese, at 945-946.
[280] *Id.* at 945; *Prosecutor v. Stanilav Galić (Trial Judgement and Opinion*), paras 113-129, ICTY, IT-98-29-T, Dec. 5, 2003.
[281] *See* Chapter III, Section 1-B.
[282] *See* Chapter III, Section 1-B.

widespread or systematic attack directed against the civilian population, the acts could be prosecuted as crimes against humanity.

c. Acts of Freedom Fighters in Armed Conflict Involving Quasi-States and Terrorism

One of the most controversial issues in international terrorism is whether "'freedom fighters' involved in armed conflict against a foreign belligerent, a national authority allegedly oppressing them or an occupying power may be exempt from criminal responsibility when they engage in acts that would normally be termed terrorist."[283] This issue is especially relevant to armed conflicts involving quasi-states because many quasi-states identify themselves as "freedom fighters," fighting against oppressive powers that oppose their independence.

There are three different opinions held among states about international terrorism and freedom fighters. The first is that any act by freedom fighters waging wars of self-determination cannot be labeled as terrorism, even when the attack is against a civilian population.[284] The second is that, while any criminal act by freedom fighters in wars of national liberation should not be labeled as terrorism, international humanitarian law should nevertheless govern those acts.[285] The third position is in the middle of the two others. That is, if armed attacks carried out by combatants (including freedom fighters) are directed at military objectives in accordance with international humanitarian law,

[283] Cassese, *supra* note 267, at 950-951.
[284] *Id.* at 951-952 (The first position was taken by Pakistan, Egypt, Jordan and Syria.).
[285] *Id.* at 952-954 (The second position was taken by the Secretary-General of the Arab League, Mr Amre Moussa, and Member States of the Islamic Conference participating in the UN negotiations for the elaboration of a Comprehensive Convention on Terrorism.).

those attacks are lawful and cannot be labeled as terrorism. However, if their attacks are directed at civilian populations, the acts are terrorism and not war crimes.[286]

There used to be no consensus on any of the three positions above. However, the second and third positions are supported by many states.[287] Regardless of which of the two is preferred, the result is the same: armed attacks against civilian populations are criminalized as either international terrorism or as war crimes.[288] Since international terrorism or war crimes cover actions of quasi-states (and actions against quasi-states), the status of quasi-state does not affect the prosecution.[289]

E. Implications of the Overlapping Crimes

This section has shown that how and to what extent illegal uses of armed force covered by genocide, crimes against humanity, war crimes and international terrorism overlap with the action of quasi-states or actions against them. Except for war crimes, the protective principles underlying these crimes do not make a distinction between violence involving recognized states and violence involving quasi-states. Although war crimes distinguish between cross-border and internal conflicts and apply different sets of law, the general essence of rules applicable to international conflicts is applicable to

[286] *Id.* at 955-956 (The third position was "shared by 150 out of the 153 current parties to the [UN] Convention [for the Suppression of the Financing of Terrorism]. The same view is laid down in Canadian legislation on terrorism and has also been put forward by some Italian courts, as well as the Israeli Foreign Minister. It would seem plausible to contend that this stand is shared by the UN Secretary-General.").
[287] *Id.* at 956 ("Negotiations in New York at the UN on the Comprehensive Convention on terrorism show that the second position is gradually mustering increasing support. On the other hand, the third position is shared… by the 150 States Parties to the Convention on the Financing of Terrorism which all support, at least with regard to the specific but important issue of financing of terrorism, the blending and simultaneous application of norms on terrorism and humanitarian law.").
[288] *Id.*
[289] When actions are prosecuted as war crimes, different law of war crimes would be applicable accoding to whether quasi-states are qualified as states for the purpose of war crimes.

internal conflicts. There is also heavy overlapping between international violence and non-international violence in war crimes.

Unlike those other international crimes, the crime of aggression is only applicable to state-to-state conflicts and excludes internal conflicts. In this regard, if quasi-states are not considered as states for aggression, planning and initiating armed attacks against or by quasi-states is deemed beyond the reach of international law. This discrepancy between the scope of crimes of aggression and the scope of other international crimes produces a very odd conclusion: although the underlying nature of illegal uses of armed force involving quasi-states is not different from state's aggression, only the rule on aggression does not cover the situation while other substantive crimes cover it.

It has been noted that all international crimes other than the crime of aggression are moving toward abolishing the distinction between state violence and non-state violence. Genocide, crimes against humanity, and war crimes have already evolved to cover non-state violence as much as state violence. This move toward breaking the dichotomy between state violence and non-state violence suggests that it has been accepted that the protective principles underlying those international crimes do not make a distinction between state action and non-state actions. In this regard, if the crime of aggression is considered as addressing only recognized states and excludes entitles other than recognized states, the crime of aggression cannot be immune from the criticism that this crime is so anachronistic that it cannot address the war as it is fought.

2. The Limitations of Prosecuting Illegal Uses of Armed Force as Other Crimes

Because other international crimes are overlapping with crimes of aggression, there may be an argument that it is not necessary to regulate illegal uses of armed conflict involving quasi-states as crimes of aggression.[290] This argument is based in part on the premise that there will always be other international crimes—including genocide, war crimes, crimes against humanity or terrorism—where there is also aggression.[291] This question is not limited to quasi-state violence but related to the broader argument of the value and the utility of the crime of aggression in general.

No individual could argue that individual criminal liability for genocide, crimes against humanity, war crimes or terrorism should be excluded because these crimes were committed in a state's "self-defense," or for a just cause such as humanitarian intervention.[292] By contrast, an individual could and would effectively argue that his criminal liability of aggression should be excluded because the aggression was carried out in exculpatory circumstances.[293] Because of the special exculpatory circumstances that are only applicable to the crime of aggression, "perpetrators of aggression… who are also likely to commit one of the other core crimes… can be tried more effectively under these [other] offences."[294]

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[290] E.g., *See* Schuster, *supra* note 21, at 14; L. Sadat Wexler, *Committee Report on Jurisdiction, Definition of Crimes and Complementarity*, 25 DENV. J. INT'L L. & POL'Y 221, 224 (1997).
[291] *See* Schuster, at 14 (quoting, Wexler, at 224 (1997)).
[292] *Id.*
[293] The universally accepted exceptions on the prohibition of aggression are, "first, individual or collective self-defence and, second, force authorized by the Security Council acting under Chapter VII of the Charter. There is controversy over whether there is also an exception for humanitarian intervention (CRYER ET AL., *supra* note 14, at 322)."; UN Charter, *supra* note 35, art. 51 "Nothing in the present Chapter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security…"
[294] Schuster, *supra* note 21, at 14.

Although there are significant areas where the crimes overlap, crimes of aggression obviously differ from crimes against humanity, war crimes, and international terrorism. Unlike other crimes, it concerns *jus ad bellum.* The crime of aggression is directly linked to the prohibition of the use of armed force as such that is a manifest violation of the UN Charter; "it is embedded in peace maintenance even more deeply than the other core crimes."[295] The wrongful characteristic of aggression is the inherent nature of recourse to armed force instead of peaceful resolution, which inevitably endangers peaceful maintenance in the affected region and mostly entails the commission of atrocities and humanitarian abuses.[296] This was the reason why the London Charter named the crime as a crime against peace, and why the Nuremberg Tribunal declared "[t]o initiate a war of aggression…is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[297]

Due to its special nature, the crime of aggression is different in many aspects from other international crimes. One of the distinctions is that the crime of aggression is grounded on a total ban of the use of illegal armed force, regardless of whether it is directed against civilians or military targets.[298] By contrast, other international crimes do not criminalize the recourse to armed force *per* se, but rather criminalize attacks that satisfy certain conditions. Genocide requires the attacks to entail killing or prohibited acts

[295] Stahn, *supra* note 73, at 875-876.
[296] Id, at 875; LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE, 6-7 (2008).
[297] International Military Tribunal (Nuremberg Trial), Judgment (1946), 1 IMT 171, 186.
[298] UN Charter, *supra* note 35, art. 2(4); Kampala amendment, *supra* note 1, annex I, art. 8 *bis,* para 2; Weisbord, *supra* note 58, 73-77; CRYER ET AL., *supra* note 14, at 322 ("The only exceptions universally admitted are, first individual or collective self-defence and, second, force authorized by the Security Council acting under Chapter VII of the Charter. There is controversy over whether there is also an exception for humanitarian intervention.").

with a special intention to destroy in whole or in part a protected group.[299] Crimes against humanity require the attacks be directed against civilian populations.[300] War crimes require the attacks be directed against non-combatants or any protected targets.[301] International terrorism requires the attacks to be menacing enough to provoke a state of terror in the population.[302] While these other international crimes criminalize certain kinds of improper behavior associated with the use of force, aggression criminalizes the use of force itself. In particular, it is entirely possible that a given attack might be conducted with a scrupulous regard for human rights and abide by rules of war—and thus, not include any acts of terrorism, genocide, crimes against humanity, or war crimes—but nonetheless violate the norm against aggression. For example, the crime of aggression covers armed attacks against uninhabited islands, as long as those attacks are an invasion of another state's territory.[303]

Another major difference of the crime of aggression is that unlike other international crimes, it criminalizes not only acts of aggression but also acts preparatory to aggression. That is, the crime of aggression covers "planning, preparation, initiation or execution of an act of aggression."[304] Therefore, if an individual joined in the planning or preparation of an act of aggression, then that person could be prosecuted for a crime of aggression without having to prove their direct responsibility, command responsibility, or complicity-based responsibility. This makes it easier for the leadership of a state to be prosecuted for crimes of aggression. Crimes against humanity and war crimes do not

[299] See Chapter III, Section 1-A.
[300] *See* Chapter III, Section 1-B.
[301] *See* Chapter III, Section 1-C.
[302] *See* Chapter III, Section 1-D.
[303] Larry May, *Aggression, Humanitarian Intervention, and Terrorism*, 41 CASE W. RES. J. INT'L L. 321, 322-324 (2009).
[304] Kampala amendment, *supra* note 1, annex I, art. 8 bis, para1.

cover preparatory acts unless those preparatory acts are identified as direct responsibility, command responsibility, complicity-based responsibility or joint criminal enterprise responsibility to the actual criminal acts, which are sometimes difficult to prove.[305] Therefore, if a person in a position of military or political leadership in a state is involved in any phase of the planning or preparation of a military operation to carry out illegal armed attacks, the individual could be prosecuted for the crime of aggression without proving his involvement in the armed attacks. However, the leader could not be prosecuted for a war crime or a crime against humanity unless it was proven that he controlled or directed the armed attacks. With international terrorism, there is a possibility that some preparatory acts (that is, assistance in the commission of criminal acts, like collecting funds or forging documents) could be prosecuted as terrorism.[306] But only specified acts of assistance listed in the terrorism convention are covered by terrorism, while any kind of preparation or planning is covered under the crime of aggression. Furthermore, there should also be evidence that the person participated in the planning or preparation activities with a clear intention to assist in the commission of criminal acts.

3. The Risks of Prosecuting Illegal Uses of Armed Force as Other Crimes

Because of the dissimilarities between the crime of aggression and other crimes, prosecuting acts amounting to aggression as other crimes not only has its limitations, but also poses some danger. Due to its special nature, the crime of aggression has many

[305] It is hard to prove that the link between an individual in a position of military or political leadership and the criminal acts committed by foot soldier has been established beyond reasonable doubt. For example, *Prosecutor v. Thomas Lubanga Dyil, Decision on Sentence Pursuant to Article 76 of the Statute,* para 67, ICC-01/04-01/06-2901 (July 10, 2012).

[306] Cassese, *supra* note 267, at 956 (Preparatory acts including collecting funds or forging documents may be criminalized in the case of terrorism).

limitations, both in its definition and in its jurisdictional requirements, that the other crimes do not. Therefore, if the recourse to the use of armed force that amounts to aggression were prosecuted as another crime, that could be used as a way to avoid the special requirements of the crime of aggression.

For one, the drafters of the Kampala definition in the Rome Statute intended for the crime of aggression to only apply to "a person in a position effectively to exercise control over or to direct the political or military action of a State."[307] In other words, the crime of aggression is a leadership crime that can only be committed by high-level policy-makers.[308] By contrast, there is no such limitation for prosecutions under crimes against humanity, war crimes, or international terrorism. If armed attacks amounting to aggression are prosecuted as those other crimes, an ordinary foot soldier could be prosecuted for planning or waging illegal uses of force under the purview of crimes against humanity, war crimes, and international terrorism.[309] This consequence is not in accordance with the intention of the drafters of the crime of aggression because an ordinary foot soldier is not involved in the decision-making process for initiating acts of aggression. Prosecuting an ordinary foot soldier who was not personally involved and did not participate in deciding the recourse to aggression violates the principle of personal culpability, "namely that persons are held responsible only for their own conduct."[310]

In addition, the drafters of the definition intended for the crime of aggression to only apply to manifest violations of the UN Charter, that is, an armed attack "which, by

[307] Kampala amendment, *supra* note 1, annex I, art. 8 *bis*, para 1.
[308] CRYER ET AL., *supra* note 14, at 318.
[309] Chet Tan, *Punishing Aggression as a Crime Against Humanity: A Noble but Inadequate Measure to Safeguard International Peace and Security,* 29 AM. U. INT'L L. REV. 145, 162 (2013).
[310] Darryl Robinson, *The Two liberalisms of International Criminal Law*, *in* FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE (Carten Stahn ed., 2010), 115, 118; "The principle also requires sufficient knowledge and intent in relation to the conduct that we may find the person 'personally reproachable'."

its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."[311] Other crimes, however, do not have such a high threshold. Although genocide, crimes against humanity and war crimes are considered the most serious crimes of international concern over which the ICC has jurisdiction,[312] and although international terrorism is considered as one of the serious offences amounting to the level of an international crime,[313] those crimes do not require a manifest violation of the UN Charter with regard to their character, gravity, or scale. If aggressive acts that fall short of a manifest violation of the UN Charter are prosecuted as other crimes, it may open a way to criminalizing those acts (which fall short of aggression) in violation of the intention of the drafters of the crime of aggression,[314] and may ultimately blur the distinction between different crimes.

There is also a special jurisdictional limitation that only applies to the crime of aggression in the ICC Statute. According to the Rome Statute, the ICC cannot have jurisdiction over the leaders of non-party states or over state parties who have previously declared to opt-out of the ICC jurisdiction for the crime of aggression, unless the Security Council refers the situation to the ICC.[315] Other crimes do not have such a limitation. The ICC has jurisdiction over other crimes, including crimes against humanity and war crimes, if the crime was committed on the territory of a state party or by nationals of a state party.[316] Therefore, if armed attacks that amount to aggression are prosecuted as other crimes in the ICC, that prosecution could be used as a means to evade the

[311] Kampala amendment, *supra* note 1, annex I, art. 8 *bis*, para 1.
[312] Rome Statute, *supra* note 56, Preamble and art. 1.
[313] Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EJIL 5, 993, 994 (2001); CRYER ET AL., *supra* note 14, at 334 (There are controversies on the status of international terrorism as to whether it is trans-national crime or international crime).
[314] Tan, *supra* note 309, at 163.
[315] Rome Statute, *supra* note 56, art. 15 *bis,* para 4 &5, and art. 15 *ter.*
[316] *Id,* art. 12 (2).

jurisdictional requirement over the crime of aggression (violating the intention of the drafters of the ICC Statute).

There is one more special limitation of the jurisdiction power of the ICC that only applies to the crime of aggression. According to the Rome Statute and the UN Charter, the primary authority for determining whether acts of aggression are committed lies within the Security Council.[317] Therefore, the OTP should first ascertain whether the Security Council has made such a determination before it proceeds with an investigation of aggression.[318] Although the Prosecutor could proceed with an investigation with the authorization of the Pre-trial Division (when the Security Council keeps silent on the matter for six-months),[319] the primary authority to determine the existence of an act of aggression lies with the Security Council. However, if armed attacks involving quasi-states are prosecuted as war crimes or crimes against humanity, the Security Council does not have the same rights. In conclusion, prosecuting armed attacks involving quasi-states as other crimes carries the risk of frustrating the intention of drafters of the Rome Statute and blurring the dissimilarity between crimes. Therefore, it is necessary to prosecute planning and waging uses of illegal armed force by or against quasi-states as crimes of aggression.

[317] *Id.* art. 15 *bis,* para 6, 7 ("Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned… Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression."); *Id,* art. 15 *bis,* para 8 (In the event of the Security Council is silent, "the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article16."); UN Charter, *supra* note 35, art. 39.
[318] Rome Statute, art. 15 *bis,* para 6, 7, and 8
[319] *Id,* art. 15 *bis,* para 8.

IV. INTERPRETIVE APPROACHES OF THE MEANING OF "STATE" IN THE CRIME OF AGGRESSION

1. Different Interpretive Approaches Asserted in ICL

ICL, a specialized branch of the international legal discipline, reconciles many different laws: public international law, international human rights/humanitarian law, and criminal law.[320] Many scholars have argued that ICL, as a blended branch of law, is inherently grounded in an internal inconsistency because different principles guide different laws.[321] This internal inconsistency can be found in the way in which ICL is interpreted.

Depending on what principles of law they find overriding, international scholars and lawyers advocate different interpretive approaches. Universalists aspire for a unified concept of statehood that can be applied to all contexts of international law.[322] They are thus often concerned with the so-called 'fragmentation' between the *lex generalis* and the *lex specialis.*[323] By contrast, teleologists, who mostly have experience in human rights

[320] Stahn & Herik, *supra* note 9, at 23-24.
[321] *Id.* at 22-24; Alexander K. A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063 (2011); Andrew Clapham, *Concluding Remarks: Three Tribes Engage on the Future of International Criminal Law, in Symposium: The Influence of the European Court of Human Rights' Case Law on (International) Criminal Law,* 9 J. INT'L CRIM. JUST. 689 (2011).
[322] *See* Stahn & Herik, at 23-24; Bruno Simma*, Universality of International Law from the Perspective of a Practitioner,* 20 EUR. J. INT'L L. 265 (2009).
[323] *See* Stahn & Herik, at 24-25; Simma, 265; ILC, Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law, Report of the study group of the International Law Commission, UN. Doc A/CN.4/L.682 (Apr. 13, 2006); Bruno Simma, *Fragmentation in a Positive Light, Diversity or Cacophony: New Sources of Norms in International Law Symposium: Introduction,* 25 MICH. J. INT'L L. 845 (2003-2004); Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law,* 25 MICH. J. INT'L L. 849 (2003-2004); Annika Tahvanainen, *Commentary to Professor Hafner,* 25 MICH. J. INT'L L. 865 (2003-2004); Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation,* 25 MICH. J. INT'L L. 929 (2003-2004); William Burke-White, *International Legal Pluralism,* 25 MICH. J. INT'L L. 963 (2003-2004); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2003-2004); Karel Wellens, *Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap*, 25 MICH. J. INT'L L. 1159 (2003-2004).

law, advocate a broad interpretation of "state."[324] They tend to prefer victim-focused, purposive interpretations, placing special emphasis on protecting human rights, and for some, judicial creativity, dynamic interpretation, and evolutionary interpretation are all acceptable as means to address as many human rights infringements as possible.[325] Criminalists, who advocate for a criminal law perspective and who focus on the principle of legality, would support a strict literal interpretation of the term "state." [326] They assert that ICL should be interpreted in a way "which requires that definitions not be applied retroactively and that they be strictly construed in order to provide fair notice to individual actors."[327] Under this interpretation, judicial creativity must be rejected to prevent arbitrariness.

These contradictory interpretations pose challenges when applied to the term "state" in the Rome Statute. Universalist aspirations for a unified concept of statehood demand a consistent concept of statehood that applies to all contexts of international law.[328] Teleological interpretations advocate that the overriding purpose of the Rome Statute is ending impunity, and that a broad interpretation of "state" would enable the ICC to address a variety of armed conflicts that bring massive human rights violations;[329] thus, they would advocate a broad interpretation that covers all state-like entities.[330] By contrast, Criminalists focus on the principle of legality would argue that "state" be

[324] *See* Stahn & Herik, at 24-25; Robinson, *supra* note 310, at 135-147; Françoise Tulkens, *The Paradoxical Relationship between Criminal Law and Human Rights,* 9 J. INT'L CRIM. JUST. 577 (2011).
[325] *See* Robinson, at 135-147; *See* Stahn & Herik, at 68-74.
[326] *See* Stahn & Herik, at 25-26.
[327] Robinson, *supra* note 310, at 119.
[328] *See* Chapter IV, Section 2 and Section 3-A.
[329] *See* Chapter IV, Section 2 and Section 3-B.
[330] *Id.*

narrowly interpreted,[331] although there are still controversies as to what a literal interpretation of "state" would mean in the context of the Rome Statute.[332]

2. "State" in the Rome Statute: The OTP's Decision Regarding Palestine

The OTP made a decision recently on the meaning of "state" in the context of Article 12(3) of the Rome Statute, which enables a "state" to accept the ICC's jurisdiction without actually acceding to the Rome Statute.[333] In January 2009, the Palestinian National Authority ("PNA") submitted an *ad hoc* declaration to accept the exercise of jurisdiction by the ICC in accordance with Article 12(3) for alleged international crimes committed in the territory of Palestine.[334] Article 12(3) enables only "a state" to delegate its criminal jurisdiction to the Court without actually acceding to the Rome Statute.[335] Following the acceptance of the declaration, the OTP obtained submissions on the question as to whether Palestine could be considered a state under article 12(3).[336] The OTP received suggestions from several groups (e.g., the League of Arab States, the International Association of Jewish Lawyers and Jurists, the European

[331] *See* Chapter V, Section 2 and Section 3-C.
[332] *See* Chapter V, Section 2 and Section 3-C.
[333] The Office of the Prosecutor, Situation in Palestine (Apr. 3, 2012), http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf [hereinafter *Palestine Decision*]; Rome Statute, *supra* note 56, art. 12(3)
[334] Minister of Justice of Palestine National Authority, Declaration Recognizing the Jurisdiction of the International Criminal Court (2009), *available at* http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf
[335] Rome Statute, *supra* note 56, art. 12(3).
[336] *Id.* art. 15 and 53. The OTP was firstly in charge of a preliminary examination to decide whether there is a reasonable basis to proceed with an investigation into the Palestine situation. The OTP was initially obligated to determine whether Palestine was "a state" that could accept the ICC jurisdiction.

Centre for Law and Justice, and various scholars), and it released a "Summary of Submissions" and an "Annex of the list of Submissions."[337]

All of the submissions addressed the interpretation of the term "state" within the meaning of Article 12(3), and its application to Palestine.[338] The submissions from human rights groups strongly promoted a broad interpretation of "state,"[339] arguing that because the concept of "state" is context-dependent and lacks "ordinary meaning," the Court should determine the meaning of the term in a manner that fulfills the purpose of ending impunity (which does not need to match the concept of statehood generally adopted in public international law).[340] In making this argument, human rights groups

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[337] The Office of the Prosecutor, Summary of Submissions on Whether the Declaration Lodged by the Palestinian National Authority Meets Statutory Requirements, para 3, 22-25 (Mar. 5, 2010), http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/282852/PALESTINEFINAL201010272.pdf [hereinafter *Summary of Submissions*]
See also, Annex: List of Submissions, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pecdnp/palestine/Pages/summary%20of%20submissions%20on%20whether%20the%20declaration%20lodged%20by%20the%20palestinian%20nati.aspx

[338] Summary of Submissions, at paras 1-9.

[339] *Id.* at para 3, 22-25 (2010); John Quigley, *Memo to the Prosecutor* (23 March 2009); John Quigley, *Additional Memo*, (May. 20, 2010); John Quigley*, The Palestine Declaration to the International Criminal Court: The Statehood Issue*, *and The Statehood of Palestine: law and sovereignty in the Middle East Conflict* (May 19, 2009); Al Haq, *Position Paper on Issues Arising from the PA Submission of a Declaration to the Prosecutor of the ICC under Article 12(3) of the Rome Statute*, (Dec. 14 2009); Alain Pellet, *Les effets de la reconnaissance par la Palestine de la compétence de la CPI* [The Effects of Palestine's Recognition of the International Criminal Court's Jurisdiction], (Feb. 18, 2010); Mendes, *supra* note 127. The full-text of these submissions are available at http://www.icc-cpi.int/fr_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-cdnp/palestine/Pages/summary%20of%20submissions%20on%20whether%20the%20declaration%20lodged%20by%20the%20palestinian%20nati.aspx

[340] Summary of Submissions, para 3, 22-25 (2010) ("Arguments based on a teleological or functional interpretation suggest that the term 'State' in article 12(3) should be examined primarily in the context of the Statute and in the light of the Statute's object and purpose. Citing with approval the commentary of the International Law Commission on its final draft articles on the law of treaties, it is observed that "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the object and purposes of the treaty demand that the former interpretation should be adopted." Because the term 'State' is subject to variable defining characteristics, it is argued that it lacks an unambiguous or 'ordinary' meaning and should therefore be examined in the light of the Statute's object and purpose. Accordingly, the authors submit that the meaning of the term 'State' for the purpose of the Rome Statute differs from the interpretation of statehood generally under public international law, and the Court can limit itself to examining the fulfilment by the PNA of the statutory requirements without pronouncing itself on the broader issue of Palestinian statehood. It is argued that the

relied on Article 21(3) of the Rome Statute which provides "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights."[341] Advocates of a teleological interpretation also concluded that an entity whose statehood is disputed under public international law could nevertheless be a state for the purpose of ICL.[342]

By contrast, there were advocates for a consistent concept of statehood for all contexts of international law strongly opposed adopting a broad concept of "state," and instead suggested a strict, literal interpretation.[343] Relying on the principle of interpretation in public international law contained in the Vienna Convention on the Law of Treaties ("VCLT"), they suggested that the term be interpreted in accordance with its "ordinary meaning."[344] Supporters of this literal interpretation further argued that the Rome Statute does not allow the OTP to define the term "state" to include non-recognized states like Palestine, because the broad concept of statehood is not ordinary in

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Court, in the light of its inherent power to determine the scope of its own jurisdiction and competence, should interpret the meaning of the term 'State' in a manner that will enable the treaty to fulfil its objectives. This objective is said to be located in the preamble to the Statute, which affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished.").

[341] *Id,* para 3, 22-25 (2010); Rome Statute, *supra* note 56, art. 21(3).

[342] Summary of Submissions, para 24-25 (2010).

[343] *Id,* para 4, 26-29 (2010) ("A number of other submissions argue that an ordinary meaning of the term 'State' exists according to the rules of treaty interpretation, thereby limiting the exercise of jurisdiction by the Court pursuant to article 12(3). In particular, it is recalled that article 31(4) of the Vienna Convention on the Law of Treaties provides "[a] special meaning shall be given to a term if it is established that the parties so intended." Since the Rome Statute gives no special meaning to the term 'State', it is observed that there is no express provision to support or infer an interpretation that includes entities that do not qualify as such under the general rules of international law. It is therefore argued that the existence of a generally recognised State of Palestine is a prerequisite for the application of the provision."); European Centre for Law and Justice, *supra* note 153; The International Association of Jewish Lawyers and Jurists*, Opinion in the matter of the jurisdiction of the ICC with regard to the Declaration of the Palestinian authority*, (Sep. 9, 2009); Daniel Benoliel and Ronen Perry, *Israel, Palestine and the ICC*, (Nov. 5, 2009); David Davenport et al., *The Palestinian Declaration and ICC jurisdiction,* (Nov. 19, 2009); Malcolm Shaw*, Supplementary opinion,* Oct. 18, 2010. The full-text of these submissions are available at http://www.icc-cpi.int/fr_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-cdnp/palestine/Pages/summary%20of%20submissions%20on%20whether%20the%20declaration%20lodged%20by%20the%20palestinian%20nati.aspx

[344] Summary of Submissions, para 26.

public international law;[345] "[i]t is therefore argued that the existence of a generally recognised State of Palestine is a prerequisite for the application of the provision."[346] They also warned of the risk of politicizing the Court should the Court make a determination on a matter that is politically sensitive.[347]

Other submissions focused on the contextual meaning of the term "state,"[348] suggesting that the OTP only needs to determine the meaning of "state" within the context of Article 12(3). They concluded that "Article 12(3) does not require an assessment of the statehood of the entity making the declaration, but rather an assessment of whether the entity itself exercises sovereign criminal jurisdiction, such that this jurisdiction can be delegated to the Court."[349] They further suggested that to determine whether Palestine exercises sovereign criminal jurisdiction, the OTP only needs to examine the legal effect of the Oslo agreement that effectively excluded Israeli nationals from the remit of Palestinian courts.[350]

After the OTP reviewed the submissions, it ultimately rejected Palestine's declaration accepting the exercise of jurisdiction by the ICC in April 2012.[351] The OTP decided that the authority to determine the meaning of "state" within Article 12 as a

[345] *Id*, para 3, 26.
[346] *Id*.
[347] *Id*. para 29 (2010) ("Several authors submit that an interpretation of article 12(3) that is not in conformity with the strict wording of the Statute risks compromising the ICC and creating perceptions of politicisation. It is submitted that it is not for the Court to involve itself in political issues, nor to truncate international and bilateral processes through the unilateral ascription of statehood. It is suggested that acceptance of the declaration would constitute a *de facto* recognition of Palestinian statehood, whether direct or implied, and that this would counter delicate agreements and on-going international mediation efforts. It is suggested that it could also open a 'Pandora's box′ vis ‐ à ‐ vis other potential non ‐ State claimants before the ICC."); Pellet, *supra* note 339; Shany, *supra* note 95, at 329-343.
[348] Summary of Submissions, para 5-6, 30-33.
[349] *Id*, para. 5.
[350] *Id*, paras 5-6*;* Shany, *supra* note 95, at 329-343.
[351] Palestine Decision, *supra* note 333.

whole (without distinguishing between accession under Article 12(1)[352] and declaration under Article 12(3))[353] rests with the UN Secretary General—the depository of the treaty under Article 125 of the Statute.[354] The OTP rejected the declaration based on what it understood the Secretary General's position to be;[355] whether Palestine was a state was determined by its status in the GA, since the OTP found that "it is the practice of the Secretary-General to follow the General Assembly's directives on the matter."[356] The OTP also decided that Palestine's status was as an 'observer' and not as a 'non-member state,' according to the GA's resolutions.

The OTP's decision to refrain from making a judgment on the matter was based in part on concerns that if made an autonomous decision its action would contradict a statutory limitation in the Rome Statute, and would contradict the Secretary-General's practice in discharging his duty as a depositary. This decision was, however, questionable for three reasons.

First, the OTP ascertained that it was the intention of the drafters of the Rome Statute to impose a limitation on the OTP's authority to define "state," by designating the Secretary-General as a depositary of the Statute in Article 125.[357] However, Article 125 of the Rome Statute only requires that accession under Article 12(1) go through the Secretary General; without accession, acceptance of jurisdiction under Article 12(3) is

[352] Rome Statute, *supra* note 56, art. 12(1) ("A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.").
[353] *Id,* art. 12(3).
[354] *Id.* art. 125; Palestine Decision, *supra* note 333.
[355] *See* Palestine Decision.
[356] *Id.* at para. 5.
[357] *Id*. para. 5-6 ("[C]ompetence for determining the term "State" within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of General Assembly.")

not required to go through the Secretary General.[358] Under the strict reading of the Statute, there is no need to follow the guidance of the Secretary-General or the GA Resolution. The OTP was initially obligated to determine whether Palestine was a "state" that could accept ICC jurisdiction, and thus, whether Palestine's declaration met the statutory requirement of the preconditions to the exercise of jurisdiction, because the OTP was in charge of the preliminary examination to decide whether there was a reasonable basis to proceed with an investigation of the Palestine situation under Articles 15 and 53 of the Rome Statute.[359] Therefore, the OTP had no statutory limitation that forced it to follow the GA guidance, and was certainly authorized to make its own decision as to the validity of Palestine's declaration without reference to the Secretary-General.

Second, although the OTP said it had no authority to decide on the definition of "state," it actually did make a decision as indicating only UN-recognized states, by producing a deferential evaluation of what it believed the Secretary General has or would have decided.

Third, in determining the meaning of "state," the OTP did not fully reflect the practice of the Secretary-General. According to Summary of Practice of the Secretary-General ("Summary"), it is the practice of the Secretary-General to consider changes in the status of UN specialized agencies like the World Health Organization ("WHO") and the United Nations Educational, Scientific, and Cultural Organization ("UNESCO"),

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[358] William A. Schabas, *Palestine Should Accede to the Rome Statute Now*, OCCUPIED PALESTINE (Oct. 31, 2011), http://occupiedpalestine.wordpress.com/2011/11/01/palestine-should-accede-to-the-rome-statute-now/; Rome Statute, *supra* note 56, art. 125(3) ("[i]nstruments of *accession* shall be deposited with the Secretary-General of the United Nations.") *Also See,* Rome Statute, art. 12(1) and (3). ("1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5…. 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.").

[359] Rome Statute, art. 15 and 53; Rules of Procedure and Evidence of the International Criminal Court, Rule 48, 2000, U.N. Doc. PCNICC/2000/1/Add.1.

whose membership could be regarded as representative of the international community despite contradictory General Assembly resolutions.[360] The Summary provided examples of cases, particularly Cook Island and Niue,[361] which the Secretary-General considered as being included in the "all-state" formula in discharging his duty as a depositary of a treaty after they were admitted to WHO and UNESCO, despite the GA's previous contradictory resolution.[362] UNESCO accepted Palestine as a member state in 2011, a year before the OTP rejected Palestine's declaration,[363] which is a strong indication of a change in the status of Palestine in the UN system. Under Article II (2) of the UNESCO Constitution,[364] Palestine gained membership in UNESCO in 2011. A few months after the OTP rejected Palestine's declaration, even the UN GA finally voted to officially recognize Palestine as a state to reflect recognitions it had received from the international community.[365] Thus, the rationales the OTP provided for its decision were grounded in incorrect assumptions.

It is also noteworthy that such a problematic decision did not actually follow any interpretation principles stemming from ICL. The decision did not follow the general concept of statehood in public international law; the opinion held by the majority of scholars is that the practice of international law does not require recognition by UN or

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[360] U.N. Treaty Section of the UN Office of Legal Affairs, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, ST/LEG/7/Rev. 1, para 85-86, http://untreaty.un.org/ola-internet/Assistance/Summary.htm [hereinafter *SC Practice*]

[361] SC Practice, at para 85-86.

[362] *Id.*

[363] Steven Erlanger and Scott Sayare, *Unesco Accepts Palestinians as Full Members,* THE NEW YORK TIMES, (Oct. 31, 2011), *available at* http://www.nytimes.com/2011/11/01/world/middleeast/unesco-approves-full-membership-for-palestinians.html?pagewanted=all&_r=0

[364] UNESCO Constitution, *supra* note 173, art II (2) ("[S]tates not members of the United Nations Organization may be admitted to membership of the Organization… by a two-thirds majority vote of the General Conference.").

[365] U.N. General Assembly, 67th Sess., 44th & 45th plen. mtg, GA/11317 (Nov. 29, 2012), *available at* http://www.un.org/News/Press/docs/2012/ga11317.doc.htm; Louis Charbonneau, *Palestinians Win Implicit U.N. Recognition of Sovereign State*, Nov 29, 2012, available at http://www.reuters.com/article/2012/11/29/us-palestinians-statehood-idUSBRE8AR0EG20121129

UN membership for statehood.[366] Also, the UNESCO Constitution and practices indicate that it is textually clear that states do not necessarily have to be members of the UN.[367] For that reason as well, it is problematic to rely on the recognition by GA for statehood, since the GA is only considering a subset of states.

The OTP decision also did not follow the teleological interpretation supported by human rights groups. By limiting the scope of "state" to only UN-recognized states, the OTP created an impunity zone—an area that is outside the reach of the ICC. This is contradictory to the Court's overriding purpose, which is to end impunity for the most serious international crimes. Furthermore, the decision did not follow the principles of legality advocated by criminal lawyers; it seems highly unlikely that any individual actor could have imagined that the term "state" would only include UN-recognized states.

Why did the OTP make such a baseless decision? The OTP was likely concerned about the consequences of answering such a highly political question and, thus, acted in a politically cautious manner. Engaging with such a highly-politicized question has the consequent risk of politicizing the Court—which could seriously disappoint state-parties that support or oppose secessionist movements, and could discourage non-state parties from joining the ICC. The OTP may also have been trying to avoid controversy by attributing the decision to the Secretary General, providing a deferential evaluation of what it believed the Secretary General has or would have decided.

The OTP (and later, the Court) will be asked again to determine the meaning of a "state" in a different context, namely, the context of the crime of aggression. To prevent

[366] DAMROSCH ET AL., *supra* note 119, at 304.
[367] UNESCO Constitution, *supra* note 173, art II (2) ("[S]tates not members of the United Nations Organization may be admitted to membership of the Organization… by a two-thirds majority vote of the General Conference.").

the ICC from repeating the same outsourcing to the UN, well-reasoned guidelines for the interpretation of the term "state" are necessary. More importantly, an interpretive approach is needed that could reconcile the principles from public international law, human rights/humanitarian law, and criminal law.

3. Interpretive Approaches of the Meaning of "State" in the Crime of Aggression

Given that principles from different disciplines promote varying interpretive approaches of ICL, a question arises as to whether the nature of the supposed internal inconsistency inherent in ICL is an insuperable obstacle, and whether making a balanced interpretation that reconciles the three different principles is almost impossible. If the nature of the inconsistency is an insuperable obstacle, the interpretation approach of ICL may not be able to harmonize all three principles, but may be able to emphasize overriding principles. However, it is possible too that those who advocate the strongest for their preferred, overriding purpose, have overstated the internal contradiction that affects the interpretation approach.

The following section is intended to illustrate that the interpretation principles from different laws do not actually suggest different interpretive approaches; rather, internal inconsistency in interpretation has been caused by people who advocate a preferential interpretation, and not by the principle itself. Every interpretation approach—whether it is grounded on public international law, human rights/humanitarian law, or criminal law—concludes that the term "state" in the Rome Statute should balance the textual, contextual, and purposive meanings of the term.

A. Interpretation under Public International Law: Universalism and the Principle of Interpretation in the VCLT

Scholars who put more emphasis on the universality of public international law tend to argue that the principles stemming from public international law require an identical concept of statehood applicable to all contexts of international law, and that an identical concept of statehood should only mean those entities whose statehood is obvious and not disputed.[368] Those who put more focus on the universal concept of statehood emphasize that (1) the term in the context of ICL should also follow the dominant principle of interpretation in public international law, contained in the Vienna Convention on the Law of Treaties ("VCLT"), which requires terms to be interpreted in accordance with their "ordinary meaning"; [369] and (2) the "ordinary meaning" of "state," as defined in international law, excludes quasi-states that lack universal recognition.[370] The interpretation of the Rome Statute should follow the VCLT principle, but these advocates overstate the VCLT function to exclude quasi-states from the meaning of "state."

Their claim is that for the purpose ICL, the term in the Rome Statute should follow the principle of interpretation contained in the VCLT in accordance with the

[368] For a general explanation on the universality of international law, *See* Simma, *supra* note 322, *at* 265; This approach was largely raised in Palestine situation in the context of the ICC. *See* Summary of Submissions, *supra* note 337, para 26 (2010) ("it is observed that there is no express provision to support or infer an interpretation that includes entities that do not qualify as such under the general rules of international law. *It is therefore argued that the existence of a generally recognised State of Palestine is a prerequisite for the application of the provision.*") [emphasis added]). Also *See* The International Association of Jewish Lawyers and Jurists, *supra* note 343, at 25 ("In a situation of an increasing number of States in the international community and in the fact of a number of controversial entities claiming statehood, a critical benchmark today of such status is considered to be membership of the UN... It cannot be maintained that the reference to the term "State"… is to be interpreted in a matter inconsistent with international law so as to include claimant or putative States.").

[369] Summary of Submissions, *supra* note 337, at para 4 and 26; also See European Center for Law and Justice, *supra* note 153, at 15; The International Association of Jewish Lawyers and Jurists, *supra* note 343, at 25.

[370] *Id.*

judgment of the ICC. Some international criminal lawyers oppose the application of the VCLT to ICL, because the VCLT "deals with interpretation of obligations undertaken between states rather than criminal prohibitions directed against individuals."[371] However, the ICTY and the ICC explicitly declared that the VCLT is a governing principle in ICL.[372] Since the ICC declared that the VCLT is a governing principle in interpreting the Rome Statute, it should be considered as a governing principle.

Article 31(1) of VCLT provides that, "[a] treaty shall be interpreted in good faith in accordance with *the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*,"[373] unless a special meaning was given to a term by the parties of the treaty.[374] The "ordinary meaning to be given to the terms of the treaty" is modified by "in their context" and by "in the light of its object and purpose." This shows that the VCLT provides "fairly self-evident factors"[375] of interpretation—namely, that the term should be interpreted according to its textual, contextual, and purposive meaning.[376] According to the principle of interpretation contained in the VCLT, the term should therefore be interpreted in consideration of all three aspects of textual, contextual, and purposive meaning in a balanced way. In no way does doing so automatically excludes quasi-states.

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[371] Robinson, *supra* note 310, at 137.
[372] Stahn & Herik, *supra* note 9, at 68-69; *See e.g., Prosecutor v. Duško Tadić aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*), para 18, ICTY, IT-94-1, 2 October 1995; *Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, para 126, ICC-02/05-01/09 (March 4, 2009).
[373] Vienna Convention on the Law of Treaties, art. 31 (1), UNTS Vol. 1155, p. 331 [emphasis added] [hereinafter *VCLT*]
[374] VCLT, art. 31 (4).
[375] Robinson, *supra* note 310, at 137.
[376] *See* Robinson, at 137; For recent study on the treaty interpretation based on the VCLT, *See* Michael Waibel, *Demystifying the Art of Interpretation*, 22 EUR. J. INT'L L. 571 (2011).

Regarding the textual and contextual meaning of "state," it should be first examined whether the nature of the concept of "state" is purely a matter of fact. If statehood is only a matter of fact, then its factual existence cannot be altered according to the context, and therefore, the nature of statehood is exclusive and universal.[377] However, as discussed in Chapter Two, the concept of statehood is not purely a matter of fact.[378] It cannot be assumed that the mere existence of a territorial entity is *ipso facto* classifies that entity as possessing a particular legal status of statehood.[379] Although the concept of state is grounded on factual effectiveness, it is nonetheless a legal status attached to a factual status, by virtue of legal rule or principle.[380]

While concluding that the concept of a state is not purely a matter of fact, but rather a legal concept, it is still questionable whether the concept of state in international law is absolute and uni-contextual. There have been two opposing opinions on the nature of the concept of statehood as to whether it is absolute or context-dependent. Some scholars argue that the meaning of the term "state" varies indefinitely according to the context.[381] By contrast, there are scholars who support an absolutist notion of statehood.[382] According to the absolutist assertion, an agreed concept of statehood in international law should be applied to all contexts because the nature of the legal concept of statehood is exclusive.[383]

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[377] This position is based on traditional public international lawyers. *See* CRAWFORD, *supra* note 113, at 3-6**;** Oppenheim (1st ed), vol 1, 264, **§**209; (8th ed), vol 1, 544 §209
[378] See Chapter II, Section 2-B.
[379] CRAWFORD, *supra* note 113, at 5.
[380] *Id.*
[381] *Id.* at 40 (quoting, CfWeissberg, *International Status of the United Nations*, 193-4; Anzilotti, *Corso di Diritto Internazionale* (3rd edn), vol I, 163-6).
[382] *Id.* (quoting, CfHiggins, *Development,* 11-17, 42-5, 54-7; Riphagen (1975) 6 NYIL 121).
[383] *Id.*

At the empirical level, an answer may be found in the middle of the two extremes. There certainly exists an internationally accepted concept of a "state" governed by international law and practices;[384] generally the term "state" means the internationally agreed-upon concept of "state." Yet, this concept is not an absolute notion that does not allow any other interpretation. Practices show that the term "state" in one context of international law could be differently defined in other contexts.[385] "Many legal issues subsumed under the rubric of 'statehood' may be able to be resolved in their own terms—often this will take the form of interpretation of a treaty or other document."[386] The standard for when the term should be interpreted strictly and when the term should be interpreted broadly could be allowed is as follows:

> The term 'State' should be more strictly interpreted where the context indicates plenitude of functions—as for example in Article 4(1) of the UN Charter. Conversely, if a treaty or statute is concerned with a specific issue, the word 'State' may be construed liberally—that is, to mean 'State for the specific purpose' of the treaty or statute.[387]

Said differently, where the term "state" is used in a context that requires a plenitude of functions, and all of those functions together could only be served by a full-fledged state, the term "state" should be strictly limited to a stringent concept of statehood that fulfills the standard of effectiveness.[388] For example, in order to gain UN

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[384] *See* Chapter II, Section 2-A; In public international law, there exists a general criteria of statehood contained in the Montevideo Convention of 1933, that requires a permanent population, a defined territory, effective government and capacity to enter into relations with other states. However, scholars split over on the interpretation of the Montevideo criteria. Scholars provide different opinions on the extent and legal effects of recognition. (DAMROSCH ET EL., *supra* note 119, at 300-311).
[385] CRAWFORD, *supra* note 113, at 31.
[386] *Id.*
[387] *Id.* at 43
[388] *See* Chapter II, Section 2-A. For the purpose of this Chapter, a stringent standard of statehood requires an entity to fulfill both (1) the criteria of Montevideo including the requirement of the effective government; and (2) universal recognition. A full-fledged state means an entity that fulfills this stringent standard of statehood.

membership, a state must have gained recognition by the UN as a state that fulfills the stringent standard of statehood. By contrast, where the term "state" is used in a context that has also been served by entities other than full-fledged states, the term "state" could be interpreted broadly to include entities that do not come within the traditional concept of statehood. Therefore, to determine the meaning of "state," it should be required to examine the context in which the term is used.

Here, a question arises as to whether the context of the term "state" should be constituted by the Rome Statute as a whole, or limited to a more narrow context. It is generally regarded that "the context of the provision is constituted by the Rome Statute as a whole,"[389] and thus, that the term "state" in the Rome Statute is presumed to have the same meaning wherever it appears in the same treaty.[390] In other words, the contextual meaning given to terms in the same treaty should be consistent.

However, it should be noted that the VCLT provides that "[a] term shall be interpreted…in accordance with the ordinary meaning to be given to the *terms* of *the treaty* in *their* context and in the light of *its* object and purpose."[391] The usage and correspondence of the singular/plural nouns and pronouns show that "their" which modifies "the context" refers to the "terms," while "its" which modifies "object and purpose" refers to "the treaty." While the purposive meaning of the terms is constituted by the Rome Statute as a whole, the contextual meaning of the terms should be construed narrowly in a consideration the usage of terms in the treaty.[392] In other words, the context

[389] European Center for Law and Justice, *supra* note 153, at para 71.
[390] *Id*; Weisbord, *supra* note 58, at 106. Professor Weisbord stated that the meaning of the term "state" for the purpose of the crime of aggression would be determined by the ICC's decision on the term "state" within the meaning of article 12(3) in the Palestine situation. "[T]he word "state" has already given risen to an as yet unresolved debate in the context of the Palestinian Authority's referral of its situation to the ICC."
[391] VCLT, *supra* note 373, art. 31 (1). [emphasis added].
[392] General Principles of International Law, Treaty Interpretation, 1(4) International Judicial Monitor,

is modified by "terms," and not by "the treaty" as whole, and therefore, the same terms could express different meanings even in the same treaty. Therefore, "even for the purposes of the Rome Statute itself, the term 'state' may be understood differently in different contexts."[393]

Since the OTP stipulated that the decision was within the meaning of Article 12, the direct effect of its decision affects only the meaning of the term "state" in Article 12. In the Palestine situation, the OTP clearly emphasized that the decision was within the meaning of Article 12, and thereby implied that the direct effect of its decision would affect only the meaning of the use of "state" in Article 12. Thus, the OTP did not make a decision that determined the meaning of state for other provisions of the Rome Statute.

With regard to the term "state," in the Rome Statute, the term "state" appears more than 400 times. The term "state," however, expresses two different meanings within the Rome Statute: (1) "a state" that is eligible to accept the jurisdiction of the Court and thereby could be a party to the Rome Statute, which could be referred as a state for the purpose of Article 12;[394] and (2) a "state" whose wrongful policy enables individual to commit crimes against international law (in Articles 7, 8, and 8 *bis* of the Rome Statute).[395]

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available at: http://www.judicialmonitor.org/archive_0906/generalprinciples.html ("Textualism can be a form of contextual reading of different provisions in a treaty text, in order to reach a sensible result… [There is] the third school of interpretation: seeking to effectuate the purpose of a treaty, rather than slavishly following the text or attempting to divine the intent of the drafters."); Shany, *supra* note 95, at 331. ("Furthermore, even for the purposes of the Rome Statute itself, the term 'state' may be understood differently in different contexts."); Pellet, *supra* note 339, at para 5-15.

[393] *See* Shany, at 331 (2010); Pellet, at para 5-15.

[394] Rome Statute, *supra* note 56, art 12. Although there have been arguments that article 12(1) and 12(3) serve different functions, this Dissertation will now group these two in the same category for the purpose of this discussion because both provisions deal with the preconditions of the ICC jurisdiction, and share distinctive functions from the term "state" in articles 7, 8, and 8 *bis*.

[395] *Id,* art. 7, 8, and 8 *bis*.

With regard to the first category, the meaning of "state" is up to the discretion of state parties to the treaty because the context deals with granting admission to the institution (the ICC). Each institution that is only open to states has different rules to determine whether they accept an entity's application for admission or participation. Usually, an institution provides a provision that requires members' collective decision on the matter.[396] For example, UN Charter II, Article 4(2) says that "[t]he admission of any [peace-loving] state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."[397] Another example could be the UNESCO Constitution, which provides that "states not members of the United Nations Organizations may be admitted to membership of the Organization…by a two-third majority vote of the General Conference."[398]

However, the Rome Statute of the ICC does not have a provision that provides a tool for deciding an entity's statehood, and thereby its membership. In Palestine's situation, the OTP chose to take a deferential determination of what it believed the Secretary General would have decided on the meaning of "state." The best course for the OTP might have been to call ASP to open a discussion on how to determine an entity's statehood when entities seek admission or participation.

By contrast to the first category of "state," the second category is not related to the question of gaining membership to an international organization. Rather, it is related to the element of crime, which is subject to a judicial interpretation. That the elements of a particular crime are interpreted and clarified by the Court is common and desirable. In interpreting the term, judges need to determine whether "state" is used in a context that

[396] DAMROSCH, ET AL., *supra* note 119, at 303.
[397] U.N. Charter, *supra* note 35, II, art. 4(2).
[398] UNESCO Constitution, *supra* note 173, art II (2).

requires a plenitude of functions (that could be only served by a universally recognized definition) or if the provision merely addresses a specific issue.[399]

It is obvious that the term "state" in the context of the crime of aggression does not require a plenitude of functions that could be only served by an internationally recognized state. The term "state" in the context of the crime of aggression indicates two parties of aggression: (1) on the active end, a "state" that can be an author of the act of aggression that is a precondition of the individual's criminal liability; or (2) on the passive end, a "state" that can be a victim of the act of aggression by other states.

On the active end, it should be examined whether a quasi-state can be the author of an act of aggression. It is generally accepted that to gain statehood in general international law an entity must have an effective government that controls its territory effectively and independently. However, for the purpose of aggression, an entity has to only control its armed bands effectively enough to commit an armed attack; there is no need for an effective government with well-functioning state structure. The former one would require higher level of effectiveness than the latter one. Therefore, if considering only capability, it seems that a quasi-state that does not meet the traditional effectiveness standard for statehood could also be considered as a state for the specific purpose of the crime of aggression. Even if some quasi-states lack effective governments, they are nevertheless capable of committing a serious armed attack against the territorial inviolability of another state.

On the passive end, it should be examined whether a quasi-state can be a victim of an act of aggression. For the crime of aggression, armed attacks must be conducted against the sovereignty, territorial integrity, or political independence of another state. A

[399] CRAWFORD, *supra* note 113, at 43.

quasi-state could certainly be the subject of armed attacks by other states, and its territorial integrity, political independence, and sovereignty could be endangered or destroyed by such armed attacks. Likewise, the term "state" in the context of the crime of aggression merely requires particular functions to have been served by entities other than internationally recognized states, so the term "state" could be interpreted broadly to include entities that do not come within the traditional concept of statehood.

While concluding that the term "state" in the context of the crime of aggression could be broader than the traditional concept of statehood, it is still questionable how broad the meaning of "state" should be. To determine the applicability of the crime of aggression, a close examination of the doctrine of the crime of aggression is therefore required. Specifically, a doctrinal analysis should be done with two different but related analyzes: (1) moral analysis is required to see whether the underlying interests that motivate the rule of the crime of aggression are consistent with expanding the scope of "state" to quasi-states; and (2) historical analysis is required to see whether the drafters' intent from the historical context supports a broad interpretation of the term "state."[400]

Article 32 of the VCLT provides a supplementary means of interpretation, "including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31…leaves the meaning ambiguous or obscure."[401] The textual meaning of "state" in the Rome Statute is no clearer than it is elsewhere in international law, or at least does not itself indicate what parts of international law govern the interpretation; this is not the kind of word that can

[400] Chapter Five will conduct these two analysis and show that the definition of a "state" for the purpose of the crime of aggression is broad enough to include quasi-states.
[401] VCLT, *supra* note 373, art. 32.

be read without a context. Therefore, the circumstances in which the definition of the crime of aggression was concluded is required to determine the meaning of "state."[402]

B. Interpretation under Human Rights Law: The Teleological Interpretation

Human rights groups tend to put more emphasis on the distinct nature of ICL as a human rights treaty and tend to support the purpose-oriented interpretation that is commonly used in the field of human rights law.[403] Various international adjudicatory bodies have given different weight to the text and purpose of the treaty.[404] For comparison, while dispute settlement bodies like the World Trade Organization tend to prefer a textual interpretation,[405] human rights bodies (like the European Court of Human Rights or the Inter-American Court of Human Rights) prefer a teleological interpretation.[406] In the field of human rights law, the teleological interpretation is usually justified given the desire "to acknowledge or remedy harm suffered by individuals and ensure greater respect for fundamental freedoms and human dignity."[407] Because ICL has elements of human rights law, some international lawyers with a background in human rights law argue that ICL should be interpreted in the same way as human rights law—with a teleological interpretation.[408]

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[402] *Id*; Enrico Zamuner, *International Treaties Authenticated in Two or More Languages,* p. 60, available at: http://webfolder.eurac.edu/EURAC/LexALP_shared/media/zamuner.pdf
[403] Stahn & Herik, *supra* note 9, at 23-24; Robinson, *supra* note 310, at 135-136.
[404] *See* Stahn & Herik, at 69-71.
[405] *Id.*; ILC, Report of the Commission on the Work of its Sixty-Third Session, Chapter XI, "Treaties over Time', A/66/10, p. 281-282.
[406] Stahn & Herik, *supra* note 9, at 69-71; ECtHR, Ireland v. UK, 18 January 1978, Ser. A no. 25, para. 239; IACtHR, the Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, 24 September 1982, Ser. A No. 2, para, 19; IACtHR, The Right to Information on Consular Assistance, Advisory Opinion OC-16/99, 1 October 1999, para. 58.
[407] *See* Stahn & Herik, at 69-71.
[408] *Id* ("The ILC recognized the special nature of the 'Interpretation of treaties on human rights and international criminal law.'"); ILC, Treaties over Time, p. 281-282.

Those who prefer a teleological interpretation emphasize that the purpose of the ICC is to end impunity for the most serious international crimes, and thereby to support a broad interpretation of the treaty.[409] The preamble of the Rome Statute of the ICC illustrates its main purpose, affirming that "the most serious crimes of concern to the international community as a whole must not go unpunished," and that "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[410] According to the teleological approach, the term "state" should therefore be interpreted broadly to guarantee as many prosecutions as possible.[411]

However, it is only partly right to say that interpreting the term broadly, thus increasing the rate of prosecution, fulfills the purpose of the Rome Statute, because ending impunity is not its only purpose. Rather, the Rome Statute aims for a balance between ending impunity, protecting state sovereignty, and preserving the principle of legality.[412]

If ending impunity were the only purpose of the Rome Statute, it would have included universal jurisdiction and authorized the Prosecutor to investigate any case without a state's consent. However, the ICC was not established on the principle of universal jurisdiction, but rather on a state's delegation-based jurisdiction system (with the only exception being on the Security Council's referral).[413] The ICC, therefore, only

[409] Summary of Submissions, *supra* note 337, at para 3, 22-25.
[410] Rome Statute, *supra* note 56, Preamble
[411] Robinson, *supra* note 310, at 135-147.
[412] European Center for Law and Justice, *supra* note 153, at 21.
[413] Shany, *supra* note 95, at 331 ("Two main theory can be evoked to legitimize the operation of international criminal court—universalism and delegation." Under universal jurisdiction, the ICC can exercise jurisdiction over the core international crimes without the consent of a state that has territorial, personal, or national-interest link to the crime. In contrary, under a delegation-based jurisdiction, the ICC can exercise jurisdiction "that was delegated to [the ICC] by those states that had an internationally recognized right to prosecute the crimes in question before their own domestic courts.); Langer, *supra* note 95, at 1 ("Under universal jurisdiction, any state in the world may prosecute and try the core international

exercises criminal jurisdiction when a state, possessing an internationally recognized right to prosecute crimes before its own domestic courts, delegates its jurisdictional authority to the ICC, or when the UN Security Council refers the case.[414]

The Rome Statute also explicitly aims for the protection of a defendant's right to a fair trial. Article 22 of the Rome Statute declared the principle of *nullum crimen sine lege* as its governing principle. According to Article 22, "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."[415] Paragraph two further provides, "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."[416]

Therefore, a teleological approach requires that the term be interpreted in light of all three interests of the Court in a balanced way. More specifically, the term should be interpreted in consideration of the victim's interests by punishing perpetrators of international crimes, the defendants' interests by avoiding arbitrary interpretation of the Statute, and the state's interests by interpreting the term as agreed on by the State Parties that drafted the Statute; the teleological approach supports a balanced interpretation.

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crimes…without any territorial, personal, or national-interest link to the crime in question when it was committed."); Rome Statute, *supra* note 56, art. 12 and 13 (The ICC was established on this delegation based system but it has one exception. When the Security Council refers a case to the ICC, the ICC exercises jurisdiction without the consent of a state that has territorial or personal-interest link to the crime.).

[414] *See* Shany, at 331-333.

[415] Rome Statute, *supra* note 56, art. 22 (1).

[416] *Id,* art. 22 (2).

C. Interpretation under Criminal Law: The Principle of Legality

Some international lawyers, especially those who have a background in domestic criminal law, argue that the principle of legality is a governing principle in ICL, and thus that the term "state" should be strictly limited to entities whose statehood is not disputed.[417] They are correct that the principle of legality is a governing principle of ICL, but they overstate that the principle of legality excludes an entity whose statehood is disputed.

Although neither the Nuremberg Tribunal nor the Tokyo Tribunal accepted the principle of legality as a part of international law,[418] the juridical situation today clearly confirms that the principle of legality is a governing principle in ICL.[419] In Article 22, the Rome Statute declared the principle of *nullum crimen sine lege* as a governing principle.[420]

Some criminal lawyers argue that the meaning of "state" in the definition of the crime of aggression should be limited to an entity whose statehood is not disputed; otherwise, the term "state" contains ambiguity.[421] If ambiguous, the provision of the crime of aggression in Rome Statute might not give an individual fair notice of the crime because it contains an indeterminate term.[422] Their concern is right in that the term "state" requires judges to determine the meaning of the term through judicial interpretation, and therefore is *prima facie* indeterminate. However, their concern is overstated; accepting

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[417] *See* Glennon, *supra* note 19, at 71.
[418] 1 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, at 219 (The principle of legality "is not a limitation of sovereignty, but is in general a principle of justice.").
[419] Glennon, *supra* note 19, at 87.
[420] Rome Statute, *supra* note 56, art. 22.
[421] Glennon, *supra* note 19, at 96-102. According to Glennon's analysis, the definition of the crime of aggression should not contain uncertain concepts.
[422] *Id.* at 85.

the possibility that the term has ambiguities, which will be filled through judicial interpretation, does not *ipso facto* violate the principle of legality. In criminal law, it is natural for a disputed concept to be resolved through judicial interpretation—which does not contravene the principle of legality. The principle of legality "does not prevent a court from interpreting and clarifying the elements of a particular crime."[423] "Nor does it preclude the progressive development of the law by the court."[424] What it does prevent, however, is the creation of a new law by the Court through judicial interpretation, by interpreting existing law "beyond the reasonable limits of acceptable clarification."[425] To say that a provision of the crime of aggression that contains an indeterminate concept violates the principle of legality is tantamount to saying "the crime of murder has no content because countries disagree over whether abortion qualifies."[426]

Whether a particular judicial interpretation violates the principle of legality should be measured by the "foreseeability" of the prosecution for the act through criminal law, not by the possibility of different interpretation.[427] The key element is therefore "foreseeability." It is the responsibility of the Court to determine the scope of the term "state" to be foreseeable in the context of the crime of aggression. To make a decision that meets the "foreseeable test" for the principle of legality, the term "state" should be interpreted as the ordinary meaning accepted by the doctrine of the crime of aggression,

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[423] *Prosecutor v Milutinović (Milan) and ors, (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - Joint Criminal Enterprise),* para 38, ICTY, IT-99-37-AR72, ICL 59 (ICTY 2003), May 21, 2003, Appeals Chamber. (quoting *Aleksovski Appeal Judgment*, paras 126-127).
[424] *Id*
[425] *Id*.
[426] Weisbord, *supra* note 58, at 34 (quoting, Kevin John Heller, *Thoughts on Glennon's "Blank-Prose Crime of Aggression,"* OPINIO JURIS, http://opiniojuris.org/2010/01/29/thoughts-on-glennons-blank-prose-crime-of-aggression/).
[427] *Prosecutor v Milutinović (Milan) and ors, (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - Joint Criminal Enterprise),* para 39, ICTY, IT-99-37-AR72, ICL 59 (ICTY 2003), May 21, 2003, Appeals Chamber. (quoting *Aleksovski Appeal Judgment*, paras 126-127).

and should not exclude disputed entities from the scope of definition solely because they are disputed. Judges will not be accused of violating the principle of legality for deciding upon a well-rounded definition for the meaning of "state."

In conclusion, each approach (public international law, human rights/humanitarian law, and criminal law) reaches the same conclusion—that the term "state" in the Rome Statute should be interpreted with a balanced focus on the textual, contextual, and purposive meaning of the term. For a balanced interpretation, the term "state" in the doctrine of the crime of aggression should be given its ordinary meaning. A doctrinal analysis should be done with two different (but related) analyzes: (1) an analysis of the moral imperatives and underlying interests that motivated the rule of the crime of aggression must be done to draw a line distinguishing aggression from the many other kinds of armed attacks; (2) a historical analysis must be done to see how the concept of the crime of aggression has been understood and developed, which in turn informs how we should understand the meaning of "state" in the Rome Statute.

V. DETERMINING THE MEANING OF "STATE" IN THE CRIME OF AGGRESSION: MORAL JUSTIFICATION AND HISTORICAL ANALYSIS

To determine the meaning of "state" in the context of the crime of aggression, two different but related analyses need to be completed. First, an examination of the underlying interests that motivated the rule of the crime of aggression must be completed, thereby drawing a line between aggression and other attacks less severe than aggression. Second, a historical analysis is required to see how the concept of the crime of aggression has been understood and developed, which in turn informs how we should understand the meaning of "state" in the Rome Statute.

1. Moral Justification: The Underlying Interests Motivating the Rule of the Crime of Aggression

Examining the *moral* analysis on the crime of aggression is as important as examining the developed *legal* concept of the crime of aggression, because "legal texts may only imperfectly and incompletely embody our moral ideas, but without moral ideas, we would not be able to write legal texts."[428] The development of just war theory came before the development of the law of war, and they interact with each other in clarifying the illegality of aggression in international relations.[429]

Compared to state responsibility for the crime of aggression, the notion of individual responsibility for the crime of aggression is relatively recent; as a result not many moral analyses have been done.[430] However, a few philosophers and scholars have

[428] Michael Walzer, *The Crime of Aggressive War*, 6 WASH. U. GLOBAL STUD. L. REV. 635, 635 (2007).
[429] *Id.*
[430] There have been extensive moral analyses done on *jus ad bellum,* the legality of aggression for state responsibility. The distinction between 'just war' (*bellum justum*) and 'unjust war' (*bellum injustum*) can be traced back to Christian theories of just war, which were formulated by St. Augustine and St. Thomas Aquinas. (DINSTEIN, *supra* note 17, at 64). The Christian authors "distinguished very clearly between conflicts within a group (rebellion), and conflicts between groups, (for example, conflicts between

recently analyzed the doctrine of the crime of aggression by examining the underlying interests that motivated the rule. By doing so, these scholars have tried to draw a line to distinguish an act of aggression from many other kinds of armed attacks. This Chapter will particularly examine the moral analyses done by Michael Walzer, Larry May, and Mark Drumbl, and will show that acts of aggression committed by quasi-states can trigger individual criminal liability.[431]

Walzer argued that of the many of the wars since 1945, only some of them were aggressive wars that could have triggered criminal prosecutions. In his study, Walzer asked the question, "what is the specific wrong that constitutes aggression?"[432] The answer was that "the wrong was to force people to fight and die in defense of the state

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independent Princes), and differentiated the norms applicable to the two situations." (LAURA PERNA, THE FORMATION OF THE TREATY LAW OF NON-INTERNATIONAL ARMED CONFLICTS, 1 (2006)). For conflicts between independent Princes, Christian authors developed so-called just war theory to provide guidance as to under which conditions war could be justified. St. Thomas Aquinas provided three criteria for war to be just: "(i) the war had to be conducted not privately but under the authority of a prince (auctoritas principis); (ii) there had to be a 'just cause' (causa justa) for the war; and (iii) it was not enough to have a just cause from an objective view point, but it was necessary to have the right intention (intentio recta) to promote good and to avoid evil." (DINSTEIN, at 64; St. Thomas Aquinas, *Summa Theologiae*, Secunda Secundae, Questio 40, 1). Meanwhile, regarding internal armed conflicts triggered by rebellion, Christian authors treat it very differently from international conflicts (Aquinas, *Summa Theologica* II/II, Quest, 42, art.1). Christian theory tended "either to support an unlimited fight or to put restraint only upon rebels." (PERNA, at 2). The reasons behind such a different treatment were based on two facts. First, it was difficult for an internal armed conflict to meet the conditions required by the just war theory, because it was devised by scholars who had only international war in mind. (PERNA, at 2, 3-6). Especially, "[o]nly a dependent Prince with no superior had, in fact, the competent authority to declare war [under the just authority requirement]." (PERNA, at 3) Second, "the interpretation of the Scriptures was used to serve different political purposes." (PERNA, at 2). This position was later confirmed by Martin Luther, Calvin, and John Knox. (PERNA, at 5-9). With regard to the relevancy of the just war theory to quasi-states, it should be noted however that the just war theory was formulated by scholars who had an ancient concept of city-states in mind. It is therefore hard to see that wars between Princes in the Middle Ages and wars between sovereign states today are the same things. While it is clear that the just war theory distinguished wars between independent princes from internal wars, it is not crystal clear whether the just theory includes the notion of *de facto* state, as understood today. "[Until the beginning of the 20th century], the attempt to differentiate between just and unjust wars in positive international law was discredited and abandoned. States continued to use the rhetoric of justice when they went to war, but the justification produced no legal reverberations.
(DINSTEIN, at 67). After experiencing WWI, legal regulation on the use of force has been greatly changed. After states signed the Kellogg-Briand Pact, and then later the UN Charter, international law progressed from *jus ad bellum* to *jus contra bellum,* and ancient just war theory was re-examined." (DINSTEIN, at 67).

[431] Weisbord, *supra* note 94, at 5-6. Professor Weisbord considers those three scholars to be a representative sample of scholars who conducted the moral analyses on the crime of aggression.

[432] Walzer, *supra* note 428, at 635.

that protects their common life and the territory on which that common life is lived."[433] He further explained, "[i]t is not just the crossing of the border that constitutes the wrong but the threat—to the community and its members—that the crossing signifies."[434] In other words, "[t]he moral meaning of aggression requires that there is common life being lived on this piece of territory, which this state protects, and which the attacking state puts at risk."[435] According to Walzer's analysis, the existence of a common life that is worth defending is the most important interest that the international community agrees to protect.

Interestingly, Walzer identified the common lives not by the legal citizenship of a recognized state but by the ethnic and cultural bond of the people.[436] Therefore, under Walzer's analysis, a state could be defined as an entity, protecting a community that shares a common life; thus, if an armed attack threatens those common lives, the attack should constitute an act of aggression from a moral standpoint. Although not explicitly mentioned, if we read his analysis logically, his concept of a state in the context of the crime of aggression could be defined broadly to include a quasi-state, because a quasi-state (by definition) controls the territory it claims and protects the populations that share a common life on the territory. In other words, whether the entity gained recognition or not does not have a meaningful implication in a moral analysis.

Larry May, author of the book "Aggression and Crimes against Peace," provides that "aggression is morally wrong because it destabilizes States that generally protect

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[433] *Id*. at 635.
[434] *Id*.
[435] *Id*. at 639.
[436] As example, he provided that Serbs and Kosovars shared no common life, and the Belgrade regime did not protect the common life of the Kosovars. (*See* Walzer, at 639). He also found there to be no common life shared by Iraqi Kurds and other Iraqis, and the Saddam Hussein regime did not protect the common life of Iraqi Kurds. (Walzer, at 641-642).

human rights more than they curtail them."[437] In other words, "it is not the violence *per se* that is the wrong-making characteristic of State aggression but the effect on humanity."[438] Under May's analysis, a sovereign state is an entity that protects human rights in a given territory. A state that is a protector of human rights is therefore obligated not to wage armed attacks against other states because of their mutual respect for human rights. Thus, as long as a state-like entity actually controls the territory and protects human rights on the territory, it could qualify as a state in the context of the crime of aggression. Throughout his book, May used the term "state" to include any state-like entities;[439] for example, he defined "state aggression" as "a form of war, that is, the violent use of force by one State (or State-like entity) against another."[440] He further provided that state aggression is a collective act, "an act of a state or state-like entity that has the ability to make war on another collective entity."[441] Therefore, according to May's analysis, the crime of aggression is certainly applicable to armed conflicts involving quasi-states.

Mark Drumbl, the third of the scholars mentioned above, asked the question, "what are the international interests we hope to protect by criminalizing aggression?" He then posited four key interests: "(1) stability, (2) security, (3) human rights, and (4) sovereignty."[442] He further argued that those key interests are threatened not only by international armed attacks, but also by internal armed conflicts involving non-state actors.[443] According to Drumbl's analysis, only criminalizing international aggression

[437] MAY, *supra* note 296, at 6-7.
[438] *Id.*
[439] *Id.* at 7.
[440] *Id.*
[441] *Id.* at 234.
[442] Drumbl, *supra* note 50, at 306.
[443] *Id.* at 306-307.

does not capture the challenges that the international community is currently facing. Therefore, if we agree that the four interests he posited are at play, there is no reason to exclude armed conflicts involving quasi-states from the scope of the crime of aggression.

These analyses of the underlying interests that motivate the rule of the crime of aggression suggest that the same interests are threatened whether an armed attack is committed by or against a recognized state, or if an armed attack is committed by or against a quasi-state that maintains control over a territory. From the point of view of the *moral* justification, no scholars or philosophers have explicitly argued that the notion of aggression should only apply to recognized states. If considering only the moral justification for criminalizing aggression, there is no reason to exclude quasi-states from the scope of the crime.

However, there are scholars that oppose quasi-states being included in the scope of the definition of "state," not from the point of view of *moral* justification, but from a *legal* analysis.[444] Their rationale is, by and large, based on the assumption that the *legal* concept of aggression has been developed only to address international armed conflict by or against states that satisfy the objective criteria for statehood in international law.[445] Although these scholars generally admit that recognition is not required for a "state" in the context of aggression, they require entities to fulfill the objective criteria of statehood strictly.[446] However, their assumption neither coincides with the developed *legal* concept

[444] E.g., OLIVER CORTEN, The Law Against War, 151-160 (2010); DINSTEIN, *supra* note 17, at 6.
[445] *Id*. However, their argument that the developed legal concept of aggression does not include quasi-states was not based on thorough examinations of the historical development of the crime of aggression. The next Part will prove that the developed legal concept of aggression actually includes situations involving quasi-states.
[446] *See* DINSTEIN, at 6 ("It is immaterial whether each belligerent recognizes the adversary's statehood. War may actually be the device through which one challenges the sovereignty of the other. As long as both belligerents satisfy objective criteria of statehood under international law, any war between them should be characterized as inter-State.").

of aggression nor the practice of the UN. The next section examines a historical development of the legal concept of aggression.

2. Historical Context: The Developed Legal Concept of Aggression and the Meaning of "State"

To examine the historical development of the concept of aggression, this section will follow chronological order and will not divide the subject between two of its contexts, namely, the process and debates for defining aggression for state responsibility within the UN process, and the process for defining the crime of aggression for individual criminal liability in the context of international criminal tribunals (including the ICC). It might be preferable to separate aggression into two different contexts because a rule regulating aggression for state responsibility may not fully coincide with a rule criminalizing aggression for individual criminal purposes.[447] In other words, "[b]oth processes respond to different contexts, to different political requirements and, thus, to different standards."[448] Nevertheless, with regard to the definition of aggression, the two contexts cannot be separated.

This section will examine the development of the notion of aggression according to the historical linear development of the doctrine of aggression, without making a clear separation according to the contexts in which this notion is going to be used for two reasons. The first rational is based on the special nature of the crime of aggression. A crime of aggression is different from any of the other international crimes because it is inherently grounded on an act of aggression by a state as a precondition to the crime. According to the ICC definition, the Prosecutor must decide if the Security Council made

[447] SOLERA, *supra* note 15, at 11.
[448] *Id.*

a decision about whether an act of aggression was committed. In other words, an individual's criminal liability for planning or waging aggression is not fully free from the executive branch's determination on an act of aggression committed by a state, which is closely related to the Security Council's determination on act of aggression by a state for state responsibility. As we will see in this section, drafters of the ICC definition of the crime of aggression chose to use the definition of aggression in GA Resolution 3314 (which aimed to help the Security Council in determining the existence of aggression for state responsibility) as the basis of the definition in the context of the crime of aggression. Therefore, it is neither realistic nor desirable to try to understand the notion of aggression for the purpose of the crime of aggression separately from the development of the notion of aggression for state responsibility.

As we will see in the following section, no one can deny that the process for defining aggression for state responsibility has a profound effect on the evolution of a legal rule on the crime of aggression.[449] "What started as an essentially political phenomenon developed into a legal discussion on the role of aggression in international law in general and in international criminal law in particular."[450] The process for defining state responsibility for aggression was initiated in San Francisco (to create the UN Charter), which set the stage for the GA discussions, and finally enabled the GA to adopt Resolution 3314—which was the culmination of the thirty years worth of consensus on the notion of aggression. "The importance of this process is not only that a definition was reached, but also that it raised awareness of the necessity to punish those acts."[451] And,

[449] *Id.* at 56.
[450] *Id.*
[451] *Id.*

the drafters of the ICC definition on the crime of aggression used Resolution 3314 as the basis for the definition of aggression in the crime of aggression.

A. The First Attempts to Define International Aggression during the Inter-War Years and the Issue of Statehood

The effort to define aggression dates back to the inter-war period. After experiencing the horror of the First World War, states realized the need for rules to regulate the use of armed force in international relations and tried to establish standards concerning the recourse to war. Although those initiatives were not enough to establish any concrete outcomes in a meaningful way,[452] they paved the way to establishing a general prohibition on the use of armed force in the Briand–Kellogg Pact of 1928.[453] The Pact provided that, "[t]he High Contracting Parties…condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another."[454] This was a turning point in the history of the legal regulation on the use of force, from *jus ad bellum* to *jus contra bellum*.[455]

During the negotiations for the Briand-Kellogg Pact, certain delegations felt it was necessary to define aggression, but failed to reach an agreement on the matter.[456] They agreed that "trying to define the notion of aggressor…would be both

[452] E.g., The Covenant of the League of Nations, 1923 Draft Treaty of Mutual Assistance, and 1925 Geneva Protocol for the Pacific Settlement of International Disputes, and Locarno Treaty of Mutual Guarantee.
[453] SOLERA, *supra* note 15, at 21.
[454] Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, art. 1 94 LNTS 57, concluded Aug 27, 1928. This Pact later served as the legal basis of the crime against peace in the Nuremberg Trials.
[455] DINSTEIN, *supra* note 17, at 83.
[456] SOLERA, *supra* note 15, at 31.

counterproductive and very difficult in practical terms,"[457] and adopted a formula of "recourse to war" instead of referring to aggression.[458]

The lack of a definition for aggression led commentators to interpret the Pact differently.[459] Some argued that the "recourse to war" included all aggressive acts including those acts short of war, but others asserted that only a war in the formal sense is prohibited by the Pact.[460] Therefore, with the absence of a definition for aggression, the pact could be "interpreted both as allowing and prohibiting forcible measures short of war."[461] In line with this limitation, the Soviet Government, following the Briand-Kellogg Pact, felt it was important to adopt a definition of aggression to provide a guide for distinguishing between "aggression, self-defence and action adopted under the League's Council recommendation."[462] Particularly, at the 1933 World Disarmament Conference, the Soviet delegate called on the establishment of organs that are capable of making an impartial determination as to who committed an act of aggression, and argued for the creation of a universally agreed definition of aggression.[463] The Soviet delegate then proposed a draft definition of aggression.[464]

The USSR proposed a definition of aggression that included declaration of war against another state, invasion without declaration of war, bombarding, and the landing in

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[457] *Id.*
[458] *Id.* ("The Briand-Kellogg Pact crystalised the new spirit that informed the relations between France and the United States….Finally, both governments coincided in their view that trying to define the notion of aggressor or wars of aggression would be both counterproductive and very difficult in practical terms. Instead of referring to aggression, France accepted using the formula of war as an instrument of national policy, in the understanding that this meant war as '*a means of carrying out their own spontaneous independent policy*…The representatives of 15 powers finally signed the treaty in August 1928 Paris.'")
[459] *Id.* at 32.
[460] *Id.*
[461] *Id.*
[462] *Id*. at 30, 33, "The Soviet efforts to define the notion of aggression during the 1930s served as the first example of systematization of the rules of regulating the use of force." "It would take over 40 years for the Soviet proposals, with modifications, to be accepted."
[463] 1 FERENCZ, *supra* note 17, at 29.
[464] *Id*. at 30.

or the establishment of a naval blockade of the territory of another State.[465] The proposed definition provided several excuses frequently used to justify aggression, and explicitly rejected them as valid justifications for armed attacks.[466] One of those situations, for example, is where an involved state lacks "certain attributes of state organization."[467]

It is not entirely clear what the clause "certain attributes of State organization" means. However, it is evident that the concept of "state" in the Soviet draft of the definition of aggression does not require an entity to fulfill the criteria of statehood in a stringent way. Later, in 1950, when the Soviets proposed a slightly modified definition to the General Assembly's First Committee, the clause had been modified to "by the affirmation that the State attacked lacks the distinguishing mark of statehood."[468] This clause is also vague. What is a "distinguishing mark of statehood?" Does it merely mean recognition or does it indicate factual effectiveness as a criterion of statehood? That clause left open the possibility of different interpretations, but it is nevertheless clear that the draft of definition of aggression proposed by the USSR defined the term "state" as including entities whose statehood is disputed.

The Soviet's first attempt to define aggression, which offered a systematic model of inquiry for what could be regarded as aggression, failed to gain enough support from Conference Committee due to concerns that its enumerative definition did not have the flexibility to cover the various kinds of aggressive acts.[469] Many opposing delegates

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[465] *Id*. at 202-203.
[466] *Id*. at 30.
[467] Specifically, the proposed definition declared, "no reference…to the alleged absence of certain attributes of State organization in the case of a given country, shall be accepted as justification of aggression as defined in Clause I." (*Id*. at 203).
[468] Union of Soviet Socialist Republics: Draft Resolution on the Definition of Aggression, para 2, UN Doc. A/C.1/608 of November 4, 1950.
[469] SOLERA, *supra* note 15, at 37.

argued that the definition "should be of a general character,"[470] meaning they thought the Soviet proposal was too narrow. No one explicitly expressed doubt regarding the provision that allowed an entity lacking "certain attributes of State organization" to be a party to aggression.

Although the Soviet draft was not adopted, its method of analysis for defining aggression provided a model, and its substance was duplicated in the following treaties during 1930s.[471] Above all, the draft paved the way for the discussion of what constitutes aggression and how it can be defined, which took place years later in the UN GA.[472]

B. Efforts to Define "Aggression" After WWII

The efforts to regulate the use of international force during the inter-war period did not prevent another World War. The experience of the Second World War triggered three distinctive but related processes to regulate the use of international force.[473] The first process aimed for the total ban on the illegal use of armed force by a state against another state, which was finally adopted in the UN Charter.[474] The second was an effort to agree upon a definition of aggression to guide the Security Council (which is in charge of deciding if aggression was committed).[475] The last process aimed to end impunity by punishing individuals who are liable for international crimes, which was relatively

[470] *Id*. at 37; "The draft Act failed to secure approval in the Committee, due to the doubts expressed, by the British delegation, among others. The latter's position was that the League's Council should have the flexibility to make a determination of the aggressor, as provided in the covenant and in the Pact of Paris, and therefore if a definition was required, it should be of a general character."
[471] *Id*. E.g., The 1933 Convention for the Definition of Aggression signed by the Soviet Union, Afghanistan, Estonia, Latvia, Iran, Poland, Romania, and Turkey.
[472] *See* SOLERA, at 38.
[473] *Id*. at 44.
[474] *Id*.
[475] *Id*.

quickly realized at the International Military Tribunals.[476] While the first and third aims were achieved in short order, the second was far from a success.

The first attempt to define aggression after WWII was made by representatives of Czechoslovakia, Bolivia, and the Philippines at the San Francisco conference.[477] Those three states presented three different proposals of how aggression should be defined.[478] The substances of the drafts were different,[479] and it seemed obvious that no consensus was going to be reached on the definition of aggression at the San Francisco Conference. Neither the UN Charter nor London Charter of the International Military Tribunal could adopt a definition of aggression because of the lack of consensus on the matter.

The UN Charter did not contain the definition of "aggression," but the concept of aggression appeared indirectly in Article 2(4) of the Charter. Article 2(4) provides that, "[a]ll Members shall refrain in their international relations from 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."[480] The meaning of both "all [m]embers" as perpetrators of aggression and "any state" as victims of aggression were clarified through UN practices.

First, on the active end, although the text of the Charter limited perpetrators to member states, UN Practices included non-member states (and non-member quasi-states) as possible perpetrators. "It is worth noting, in passing, that neither the Republic of South Korea, nor the 'authorities of North Korea' (the latter unrecognized as a state by the

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[476] *Id*.
[477] *Id*. at 56, 60-61.
[478] *Id*. Philippine proposal used the term "nation" instead of "state": "Any nation should be considered as threatening the peace or as an aggressor, if it should be the first party to commit any of the following acts…against another nations." (3 UNCIO documents, p. 538).
[479] *See* SOLERA, at 56.
[480] UN Charter, *supra* note 35, art. 2(4).

United Nations) were members of the United Nations, yet…the later was determined to be responsible for, and the former the victim of what was certainly action contrary to its terms."[481]

On the passive end, the UN Practice showed that unrecognized states could be a victim of aggression. Despite that, there have been a few instances where the attacking state did not recognize victim's statehood, and thereby denied the application of Art. 2(4).[482] For example, "in 1948 the Arab States sent force into Palestine but elected to regard the 'State' of Israel as a rebellious minority in an independent nation which had requested the assistance of the Arab states in restoring law and order."[483] In response to the Arab States' argument, the majority of the Council members "disregarded the question of statehood and concentrated on the fact of invasion by states of territory not their own."[484] The Security Council took the same position in addressing the situation when the Netherlands committed armed attacks against Indonesia in 1947.[485] The Security Council's position in these instances suggests that, "the U.N. organ will not interpret statehood too literally and limit the obligation of Art. 2(4) to cases of attack against a recognized state; more particularly, they will not allow the attacker, by withholding recognition from its victim, to evade the prohibition."[486] This position could be also interpreted to mean "the test of *de facto* occupation ought to be applied, so that

[481] D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW, 153 (1958).
[482] *Id*.
[483] *Id*.
[484] *Id*. (quoting, Off. Res. S.C., 3rd Year, 293rd-299th Meeting. At the 302nd Meeting on May 22, 1948, the Security Council rejected a determination under Art. 39, and adopted a resolution calling upon 'all governments and authorities' to abstain from hostile military action. U.N. Doc. S/773).
[485] *Id*. at 150, 153 (quoting, *International Organization,* Vol. II (1948), pp. 80-85, 297-99, 500-02. Also *U.N. rep. of Practice*, Vol. I, p. 115 *et seq*.).
[486] *Id*. at 153-154.

the threat or use of force against territory in *de facto* occupation of another state should be characterized as delictual under Art. 2(4)."[487]

In the same period, the Nuremberg Trials prosecuted an individual for aggression for the first time.[488] However, the London Charter failed to adopt a definition of "aggression," and the lack of definition was a major difficulty for the prosecution.[489] The Prosecutor and Tribunal used the terms inconsistently; they used the term "wars of aggression," "aggressive wars," "aggressive acts," "acts of aggression," "acts of aggressive war," and "wars *tout court"* without clarification.[490] In its final conclusion, "the tribunal found a way to bypass the task of defining aggression by stating that irrespective of the definition, the waging of war is unlawful and criminal."[491] There was no question on the applicability of the crime against peace to conflicts involving quasi-states, because wars carried out by Germany were against recognized states, and thereby were clearly international.

C. The ILC and Disputes Ignited: Who Can be an Aggressor or a Victim?

The task of establishing an agreed upon definition of aggression was handed over to the GA in the first year of its existence.[492] At that time, Yugoslavia was experiencing a blockade executed by the Eastern European socialist countries, and was troubled with several border incidents with many countries.[493] In an effort to find a way to resolve such a crisis, Yugoslavia asked the UN General Assembly to confirm state duties in hostilities,

[487] *Id*. at 154.
[488] Schuster, *supra* note 21, at 5-6.
[489] SOLERA, *supra* note 15, at 231.
[490] *Id*. at 244, 247-248.
[491] *Id*. at. 250.
[492] *Id*. at 79.
[493] *Id*. at 81.

and to provide guidance on the matter.[494] In addition, the Soviet Union was motivated by the United States' intervention in the Korean War, and again presented a draft definition of aggression to the First Committee.[495] In its modified proposal, the Soviet Union asserted that "[a]ttacks…may not be justified…by the affirmation that the State attacked lacks the distinguishing marks of statehood."[496] With regard to the Soviet proposal, however, the First Committee could not find a way to adopt it because of the increasing political tensions and the lack of consensus on the way to define aggression.[497] It thus decided to hand over the question to the International Law Commission ("ILC") because the ILC had already undertaken the work on the Draft Code of Offences.[498]

The ILC created a comprehensive debate as to who may be an aggressor or a victim of aggression. Among the many different draft proposals submitted, Mr. Ricardo Alfaro's draft proposal functioned as a basis for the discussion.[499] Alfaro's definition was as follows:

> Aggression is the use of force *by one State or group of States, or by any Government or group of Governments, against the territory and people of other States or Governments,* in any manner, by any methods, for any reasons and for any purposes, except individual or collective self-defence against armed attack or coercive action by the United Nations.[500]

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[494] *Id*. at 81.
[495] *Id*."The Soviet proposal was very similar to its 1933 text, although with slight differences."
[496] *Id*. at 82; Union of Soviet Socialist Republics: Draft Resolution on the Definition of Aggression, UN Doc. A/C.1/608 of 4 November 1950.
[497] *See* SOLERA, at 82.
[498] *Id*. at 80; UN General Assembly Res. 378 (V) B of 17 November 1950; Accepting Syria's proposal, the General Assembly decided "to refer the proposal of the Union of Soviet Socialist Republics and all the records of the First Committee dealing with this question to the International Law Commission, so that the latter may take them into consideration and formulate its conclusions as soon as possible."
[499] *See* SOLERA, at 88.
[500] Document A/CN.4/L.8 of 30 May 1950; 2 Yearbook of the ILC, 1951, p. 37, para 36 [emphasis added]

For the aggressor, Alfaro's draft provides that states and governments could commit aggression, and provided a rationale of designating "state or government" to a possible perpetrator of aggression.

According to the memorandum submitted by Alfaro, he intentionally chose to include "government" to encompass entities capable of committing aggression other than states:

> [The term of "by one State or group of States, or by any Government or group of Governments"] is used in order to avoid any interpretation in the sense that only States can commit aggression and are capable of disturbing the peace of the world. *There may be governments of nations or people not organized or recognized as States, which may have at their disposal the armies, weapons and other means of committing aggression*.[501]

He further confirmed the possibility of an aggressor other than a state in the 95th meeting of the ILC on discussion on the definition of aggression:

> Mr. ALFARO explained that he had chosen the above terms, [by one State or group of States, or by any Government or group of Governments], in order to be more explicit. He had wished to avoid leaving unpunished political entities not recognized as States. For instance, those who did not consider that North Korea was a State, would not be able to declare its aggression punishable without the use of the word "government." He would however, agree to the deletion of those words should the Commission consider that the word "State" was sufficiently comprehensive in itself.[502]

Alfaro kept the Korean War in mind in devising the draft definition, because when North Korea committed armed attacks against South Korea in 1950, North Korea had not yet attained statehood—at best, in the international community it was an entity in

[501] 2 Yearbook of the ILC, *supra* note 500, at 38, para 46 [emphasis added].
[502] 1 Yearbook of the ILC, 1951, p. 111, para 51.

statu nascendi.[503] Given the lack of consensus on the statehood of North Korea, the GA nevertheless considered that its attack against South Korea was a clear example of aggression.[504] Other attendees also agreed that the definition of aggression should cover the invasion by North Korea, even if it were not a state. Mr. Cordova said that "the words 'the authorities of a State'…or their equivalent were essential, if aggression such as that committed by North Korea, which was not a State, was to be made punishable."[505] Mr. Amado also said "he had avoid using the word "State" so as not to limit its application to states alone.[506] The phrase "by a State or a Government" was finally adopted without objection.[507]

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[503] After Korea gained independence from Japan in 1945, the UN General Assembly resolutions advocated for the goal of a unified government in the sovereign state of Korea. The 1950 UN GA Resolution 376 (V) states that "the essential objective of the resolutions…was the establishment of a unified, independent and democratic Government of Korea." (1950 UN GA Resolution 376 (V), also see 1947GA Res. 112(II), 1948 GA Res. 195 (III), 1949 GA Res. 293 (IV)); the GA also recommended that "[a]ll constituent acts be taken…for the establishment of a unified, independent and democratic *government in the sovereign State of Korea"* (1950 UN GA Resolution 376 (V), also see 1947GA Res. 112(II), 1948 GA Res. 195 (III), 1949 GA Res. 293 (IV)) [emphasis added]. However, these efforts failed, and the Korean War broke out in 1950. "The Korean armistice agreement, signed July 27, 1953, brought an end to hostilities in the 3-year-old Korean War. The text of the agreement said it would bring about 'a complete cessation of hostilities and of all acts of armed force in Korea until a final peaceful settlement is achieved.' That has never happened, and the border dividing the two Koreas remains." (http://articles.latimes.com/2013/jul/27/world/la-fg-korea-anniversary-20130728). North Korea later gained statehood and received recognition as such, which became obvious when the UN admitted it as a member state in 1991.

[504] The GA Resolution adopted on Feb. 1, 1951 "finds that the Central People's Government of the People's Republic of China by giving direct aid and assistance to *those who were already committing aggression in Korea* and by engaging in hostilities against United Nations forces there, had itself engaged in aggression in Korea." (A/1771) [emphasis added]. The Report of the Secretary-General provides that "[s]everal armed conflicts have occurred since the United Nations was established including that involving the new State of Israel and the neighbouring Arab States. Only once, however—in the case of the Korean war—has the Security Council pronounced on the question of aggression." (2 FERENCZ, *supra* note 17, at 140). The Security Council also determined that the armed attack against South Korea by force of North Korea constitutes a breach of the peace, although without referring to aggression. (S/PV.474, p. 4). North Korea's attack upon the territory of South Korea has been cited as a representative example of aggression by many international authors. For example, Michael Walzer stated, "[t]he only wars that the U.N. has called aggressive are the North Korean invasion of South Korea and the later Chinese intervention." (Walzer, *supra* note 428, at 635).

[505] 1Yearbook of the ILC, *supra* note 502, at 111, para 59.

[506] *Id.* para 60.

[507] *Id.* para 52, 53, and 64 ("Mr. Hudson's proposal to delete the phrase under discussion and substitute the phrase 'by a State or a Government' was adopted.")

Second, on the passive end of aggression, the original draft proposed by Alfaro used the phrase "*against the territory and people of other States or Governments.*"[508] During the discussion on the proposed draft, attendees agreed that the terms "States or Governments" would be enough to cover "the territory, people, armed forces and all other components of a State,"[509] and therefore, deleted "against the territory and people of."[510]

Attendees of the discussion were more concerned about keeping the term "government;" because the attendees agreed that civil war between two governments belonging to the same country was not within the scope of international aggression,[511] they were concerned about the consequent possibility of misinterpretation. In particular, the Chairman expressed his concern about using the term "government," which could lead to the incorrect conclusion that armed attacks by a government against another government belonging to the same state constitute aggression:

> The CHAIRMAN wondered whether it would be wise to say that the use of force against a Government constituted aggression. The result of such a wording would be that an attack against the Communist Government in China would be aggression.[512]

In response to this, Alfaro made it clear that if armed attacks were committed by a government against another government belonging to the same state, that situation should be considered as a civil war which does not constitute aggression:[513]

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[508] 2 Yearbook of the ILC, *supra* note 500, at 37, para 36 [emphasis added].
[509] 1 Yearbook of the ILC, *supra* note 502, at 111, para 71, 74.
[510] *Id.* para 71, 74.
[511] *Id.* at 111, para 57; "Mr. ALFARO remarked that there was no aggression in the international sense of the word unless the act under consideration were committed by one State against another State. If force were used by one party against another, there was no international aggression."
[512] *Id.* at 111, para 76.
[513] *Id.* at 111, para 77. "Mr. HUDSON pointed out that there were two Governments in China, and that if one were to attack the other, that would be civil war."

> Mr. ALFARO said that Mr. Hudson had asked him whether a Government could attack another Government belonging to the same country. In his opinion, such an attack would constitute a civil war of the kind that had taken place in the United States in the nineteenth century. If, however, during the war of secession one of the contending Governments had attacked Jamaica, that would have constituted aggression. In China there were two Governments, the Communist Government and that of Formosa. Should the latter attack the Communist Government, it would constitute civil war. If, on the other hand, Mao Tse-tung attacked Siam, that would be aggression."

Alfaro further suggested that "[t]he best solution would be to delete the word 'Government,' and explained in the commentary that it was to be understood that the words 'aggression by a State' covered aggression committed by any Government or entity not constituting a State, but capable of committing aggression."[514]

In sum, the attendees agreed that a civil war between two governments belonging to the same state does not constitute aggression, and the attendees also accepted the possibility that a government or a state-like entity could commit aggression. Although attendees were somehow divided on whether the term "government" should be added on the passive end of aggression, or if the term "state" was comprehensive enough, they all agreed that aggression should cover armed attacks committed by "governments of nations or people not organized or recognized as States."[515] However, they were concerned about including the term "government" on the passive end of aggression because the wording could be read in a way that includes a civil war between two governments belonging to the same country as aggression.

Considering this concern, Mr. Alfaro "proposed that the Commission say 'against another State or Government', and awaited Mr. Hudson's proposal for the elimination of

[514] *Id.* at 111, para 79.
[515] 2 Yearbook of the ILC, *supra* note 500, at 38, para 46.

the word 'Government'."[516] At the end of discussion, the wording "against another State or Government" was provisionally adopted.[517] The final proposal read as follows:

> Aggression is the threat or use of force *by a State or government against another State*, in any matter, whatever the weapons employed and whether openly or otherwise, for any reason or for any purpose other than individual or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.[518]

This final text produced a very unfortunate distinction between the definition of perpetrator and of victim. The final draft failed to be adopted due to the lack of consensus on many issues like whether to require the force be "armed," whether to include "threat of" in the use of force, how to regulate "indirect aggression," and whether to require the clause, "the reasons and purpose of aggression."[519] Whether the divergent wording on perpetrators and victims of aggression affected the final decision was unclear, but considering that there was a lack of consensus on the wording for victims of aggression, it could have had an effect. Although the ILC failed to adopt a definition of aggression outside the context of the framework of the draft code of offenses against the peace and security of mankind, its discussions shed light on the scope of perpetrators and victims of aggression.

Many discussions led by the ILA shed light on the very difficult elements of the definition, and paved a way for the GA. In addition, "the Commission's work is one of the very few occasions in which the focus was on the legal aspects of aggression and not only on its political implications."[520] Although the ILA failed to adopt a final rule, "its

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[516] 1 Yearbook of the ILC, *supra* note 502, para 98.
[517] *Id.* para 99.
[518] Sixth Session, Supp. No. 9 (A/1858)—Report of the International Law Commission, May 16—July 27, para. 49; 2 FERENCZ, *supra* note 17, at 84; SOLERA, *supra* note 15, at 107 [Emphasis added].
[519] *See* SOLERA, at 81-108.
[520] *Id.* at 108.

ideas survived the 24-year process that was launched by the discussion of the Commission's report in the General Assembly."[521]

D. The General Assembly Takes Over: The Last Push towards GA 3314

After the failure to adopt a definition of aggression, the ILC decided that it would refrain from defining aggression outside the context of the draft code of offenses against the peace and security of mankind.[522] Consequently, the GA was given the task of defining aggression again.[523] The effort in the GA to define aggression between 1950 and 1974 was not entirely smooth.[524] With the backdrop of the Cold War, the early GA discussions on defining aggression were mainly along ideological lines, and did not make any meaningful progress.[525] However, after the 1960s, the independence movements in Africa and the rise of so-called Third World countries significantly affected the power balance within the GA, revitalizing the process for defining aggression.[526] The discussions gained new energy after 1968.[527]

The discussion as to who can be an aggressor or a victim was raised in earnest in 1968 at the debates of the Sixth Committee.[528] Some representatives asserted:

> [T]he definition should be expressly applicable to entities which were not generally recognized as States or whose status in international law could be contested on some other grounds, but which were required to respect

[521] *Id*.
[522] *Id*. at 110.
[523] *Id*. at 110, 111.
[524] *Id*. at 111.
[525] *Id*.
[526] *Id*.
[527] *Id*.
[528] Report of the Sixth Committee, 23rd sess., Agenda Item 86, UN Doc. A/7402, para 20 (December 13, 1968); 2 FERENCZ, *supra* note 17, at 323.

> the fundamental obligations imposed by international law with regard to the use of force.[529]

When the Special Committee resumed in New York in 1969, three new drafts on the definition of aggression were proposed: the Soviet draft proposal, a thirteen-Power draft,[530] and a six-Power draft.[531] Among them, the six-Power draft proposal raised discussions on the matter as to who can be an aggressor or a victim. The six-Power draft defined aggression as follows:

> The term "aggression" is applicable…to the use of force in international relations…by a State against the territorial integrity or political independence of any other State, or in any other manner inconsistent with the Purposes of the United Nations. *Any act which would constitute aggression by or against a State likewise constitutes aggression when committed by a State or other political entity delimited by international boundaries or internationally agreed lines of demarcation* against any State or *other political entity so delimited and not subject to its authority.*[532]

The US representative explained this text:

> [A] rebellious dependent Territory might become an aggressor against its neighbors even though its claims to statehood were not universally recognized or were even universally denied. The fact that a political entity consisted of a part of a country divided by international agreement did not absolve it from its fundamental obligations or deprive it of its rights under international law regarding the use of force, and a definition must adequately take that into account.[533]

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[529] Report of the Sixth Committee, 23rd sess., Agenda Item 86, UN Doc. A/7402, para 20 (December 13, 1968); 2 FERENCZ, *supra* note 17, at 323. In the Report, it was not revealed which countries provided certain opinions. The Report anonymously introduced opinions provided by representatives.

[530] See 2 FERENCZ, at 331. The thirteen-Power draft was proposed by Colombia, Cyprus, Ecuador, Ghana, Haiti, Iran, Madagascar, Mexico, Spain, Uganda, Uruguay, and Yugoslavia.

[531] Report of Special Committee, 24th sess., Supp. No. 20, A/7620, 24 Feb-3 Apr, 1969, para 8-12 (2 FERENCZ, at 329-335). The six-Power draft was proposed by Australia, Canada, Italy, Japan, the United States, and the United Kingdom. (2 FERENCZ, at 333).

[532] Draft Proposal Submitted by the Following Six Countries: Australia, Canada, Italy, Japan, the United States, and the United Kingdom (A/AC.134/L.17); 2 FERENCZ, at 333 [emphasis added].

[533] CORTEN, *supra* note 444, at 151, 153. ("In the context of the time, it was clearly the Vietnam War that was at issue, with North and South Vietnam then having contested legal status, with as a consequence some doubt over the applicability of the rule stated in article 2(4) for governing relations between them.").

This position was defended by some states, but met opposition from many others.[534] Without a consensus on the matter, the discussion of the phrase "political entities" contained in the six-Power draft was handed over to the 25th session of the Special Committee in 1970.[535]

According to the report of the Special Committee in 1970, supporters of the concept of political entities strongly asserted that that "definition should contain a provision which would place on the same footing States and political entities that are not universally recognized as States but which are delimited by international frontiers or internationally agreed lines of demarcation."[536] They emphasized the frequency of armed conflicts involving such political entities since the Charter was adopted, and asserted that there was a practical necessity to cover such entities in the definition of aggression.[537] They also appealed to the obligation of international life, arguing that "entities whose statehood was challenged but which exercised governmental authority over a territory were bound by the obligations of international life, and in particular by Article 2, paragraph 4, of the Charter."[538] For them, it would not account for the reality of international life to assert that entities whose statehood was disputed could not be the victims or perpetrators of aggression. The only alternative they could have accepted without adopting the term "political entities" was to interpret the term "state" broadly so as to cover those entities.[539]

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[534] *Id.* at 153.
[535] Report of the Special Committee, 25th sess., Supp. No. 19, UN Doc. A/8019, July 13—August 14, 1970, para 23 (2 FERENCZ*, supra* note 17, at 379).
[536] *Id.*
[537] *Id.* 63 (2 FERENCZ, at 379).
[538] *Id.*
[539] *Id.*

Those who opposed the concept of political entities provided three rationales.[540] First, they criticized adopting the concept of political entities because the concept was not found in the Charter of the UN (which, they argued should be the basis of the definition of aggression).[541] According to them, although armed attacks could be committed by political entities other than states, those situations involving other political entities should be covered by other regimes of international law, because the concept of aggression established by the UN Charter was not designed for situations involving political entities other than states.[542] In response to this criticism, some representatives argued "it would be pedantic literalism to suggest that Article 2, paragraph 4, of the Charter could not accordingly apply to an entity whose statehood was disputed."[543]

Second, those who opposed the concept of "political entities" argued that almost all entities that were described as political entities were actually sovereign States.[544] Since recognition is not a criterion of statehood in international law, those political entities that lack recognition are nevertheless sovereign states.[545] According to them, using the term "political entities" could have a consequent risk of implicitly denying the statehood of such entities, which could cause serious confusion in the concept of "state." [546] Also, "[t]he inclusion [of the concept of political entities in the

[540] In the Report, it was not revealed which countries provided certain opinions. The Report anonymously introduced opinions provided by representatives.
[541] Report of the Special Committee, 25th sess., Supp. No. 19, UN Doc. A/8019, July 13—August 14, 1970, para 24 (2 FERENCZ, at 379).
[542] *Id.*
[543] *Id.*
[544] *Id.* The Report did not mention specific entities, though.
[545] *Id.*
[546] *Id.*.

definition]…might lead to the attribution of a more restrictive meaning to the term 'State' in all other texts where the term appeared."[547]

Third, the opponents to the concept of political entities were concerned about the possibility of overreaching beyond the limit of the right to self-determination.[548] This concern was raised because the six-Power draft did not contain a provision that "none of the preceding paragraphs may be interpreted as limiting the scope of the Charter's provisions concerning the right of peoples to self-determination, sovereignty, and territorial integrity."[549] Because some representatives believed that an armed attack in the exercise of self-determination did not constitute aggression (even if the attack violated some demarcation or armistice line), they were concerned about the possible prejudice to the right of all peoples to self-determination by adopting the term "political entities."[550] In other words, they were concerned about the possibility that the legitimate exercise of the right to self-determination could be considered as an act of aggression.

In response to those concerns, supporters of the six-Power draft responded favorably to a suggestion submitted by one representative, to replace the words "other political entities" in paragraph 2 of the draft, with the words "a State whose statehood was disputed."[551] They believed that the words "a state whose statehood was disputed" would cover exactly what the supporters of the six-Power draft had in mind.[552] However, there were also debates as to whether to include the words "a State whose statehood was

[547] Report of the Special Committee, 25th sess., Supp. No. 19, UN Doc. A/8019, July 13—August 14, 1970, para 64 (2 FERENCZ, at 393-95).
[548] *Id.*
[549] Thirteen-Power draft proposal (A/AC.134/L.16 and Corr.1 and Add.1 and 2), para 10, (2 FERENCZ, at 333).
[550] Report of the Special Committee, 25th sess., Supp. No. 19, UN Doc. A/8019, July 13—August 14, 1970, para 64 (2 FERENCZ, at 394).
[551] *Id.* 67 (2 FERENCZ, at 395).
[552] *Id.*

disputed" in the definition of aggression, or to add annexation to the definition of aggression to clarify the meaning of "state."[553] The subsequently organized Working Group of the Special Committee noted that representatives tried to find a point of compromise, that "if the text did not expressly include States whose statehood was disputed, an explanatory note should be annexed to the definition to the effect that the term "States" included States whose statehood was disputed."[554]

In the Report of the Sixth Committee considering the Special Committee's 1970 Report, this issue of whether to include "political entities" in the definition of aggression was raised again. It seems that both sides had a common ground that armed conflicts involving entities whose statehood is disputed constitute aggression, but they were divided as to whether the term "political entity" should be adopted in the definition of aggression.[555] As a compromise, some representatives supported the alternative that "an explanatory note should be annexed to the definition to the effect that the term "State" included those whose statehood was disputed."[556]

The Twenty-Sixth Session of the Special Committee in 1971 again dealt with the question as to whether it was advisable to refer to political entities in the definition of aggression.[557] Several representatives emphasized that the term "state," as used in the Charter, is comprehensive enough to cover all situations involving non-recognized entities.[558] Thus, they opposed adopting the use of the term "political entities" that

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[553] *Id.*
[554] Report of the Working Group, Annex II to the Report of Special Committee, 25th sess., Supp. No 19, UN Doc. A/8019, 13 July-14 August 1970, para 6 (2 FERENCZ, at 432)
[555] Report of the Sixth Committee, 25th sess., Agenda Item 87, UN Doc. A/8171, November 19, 1970, 3-4, para 17 (2 FERENCZ, at 442).
[556] *Id.*
[557] Report of Special Committee, 26th sess., Supp. No. 19, A/8419, Feb 1—Mar 5, 1971, para 22-25 (2 FERENCZ, at 452-453).
[558] *Id.*

"would give rise to a restrictive interpretation of the term 'State' and blur the distinction between international conflicts and civil wars."[559] It seemed clear that the representatives agreed that the term "state" in the Charter was broad enough to include entities whose statehood was disputed, and as a result who lacked recognition from a majority of members of the international community.[560]

The Working Group of the Special Committee following the 26th session finally agreed that "the definition itself should refer to States only and not to political entities as referred to in the six-Power draft."[561] With regard to the meaning of "state," the Working Group confirmed that parties were willing to adopt an explanatory note annexed to the definition to clarify the drafter's intention to include entities whose statehood was disputed. After many discussions, the Working Group suggested the text of the explanatory note read: "The term 'State' is without prejudice to the question of the recognition of States or to whether or not a State is a Member of the United Nations."[562]

The Report of the Sixth Committee of the 26th session in November 1971, summarized the controversies on the issue:

> To ensure that the definition was given the widest possible application, some representatives suggested resorting to the compromise solution envisaged in paragraph 8 of the Working Group's 1970 report (ibid.,

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[559] *Id.*

[560] *Id*. Only one representative (it was anonymous) argued that a definition of aggression should be applied to only UN member states, but many representatives "considered that the solution might raise substantial difficulties in cases where the Security Council would have to apply a definition which was so limited that it would not take into account the situations involving non-member States."

[561] Report of the Working Group, Annex III to the Report of Special Committee, 26th sess., Supp. No. 19, UN Doc. A/8419, para 7 (2 FERENCZ, at 469).

[562] *Id.* para 8 (2 FERENCZ, at 469) ("Representatives of the co-sponsors of the six-Power draft considered, however, that the explanatory note should relate clearly, as did the corresponding part of the six-Power draft, to the case of political entities delimited by international boundaries or internationally agreed lines of demarcation." However, "Some delegations noted that any extension of the so-called political entity concept to cover territories which had not yet achieved independence raised problems which have a direct bearing on national liberation movements; others denied the existence of a connection with national liberation movements and recalled that the concept, as stated in the six-Power draft, related to political entities delimited by international boundaries or internationally agreed lines of demarcation.").

> annex III), namely to annex the definition an explanatory note whose statehood was disputed. Other representatives expressed reservations regarding that solution, arguing that if it was to be complete, the definition should include the concept of political entities.[563]

At the Special Committee in 1972, annexing an explanatory note to the definition of aggression was preferred. The note was included without further explanation in the report of the Working Group to the Special Committee in 1972,[564] and the note was reprinted in Resolution 3314 (XXIX).[565] The final version of the explanatory note adopted in Resolution 3314 was exactly the same as the Report of the Working Group of the Special Committee in its 26th session:

> In this Definition the term "State":
> (a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations and includes the concept of a "group of States."[566]

This analysis of the discussions to adopt the explanatory note to the resolution shows that the definition of "State" clearly includes entities whose statehood is disputed. The lack of recognition where an entity's statehood is disputed cannot alter the status of its statehood for the purpose of aggression. Ultimately, according to the developed notion of aggression, the crime of aggression is applicable to any quasi-state that controls the territory it claims, but who lacks recognition because its statehood is disputed.

E. Defining Aggression in the Context of the ICC

At the end of the Rome Conference in 1998, which took place for the purpose of establishing the permanent ICC, the delegates agreed to include the crime of aggression

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[563] Report of the Sixth Committee, 26th sess., Agenda Item 89, UN Doc. A/8525, November 19, 1971, at para 22. (2 FERENCZ, at 488).
[564] Report of the Special Committee, 27th sess., Supp. No 19. UN Doc. A/8719, January 31—March 3, 1971 Annex II, Appendix A. (2 FERENCZ, at 501).
[565] GA 3314, *supra* note 33, annex, explanatory note of article 1.
[566] *Id.*

within the crimes in the ICC's jurisdiction.[567] However, they failed to adopt an agreed upon definition of the crime of aggression and the conditions under which the Court could exercise jurisdiction.[568] Therefore, the crime of aggression was not given effect until the Assembly of States Parties to the Rome Statute ("ASP") adopted both the definition of the crime and the conditions under which the Court would exercise jurisdiction.[569]

In 2002, the ASP created a Special Working Group on the Crime of Aggression ("SWGCA") to prepare a proposal for a definition of the crime of aggression and the conditions under which the Court could exercise jurisdiction over aggression.[570] In the SWGCA, the issue as to whether the crime of aggression is applicable to territorial entities that fall short of statehood was addressed. In particular, in the sixth meeting of the SWGCA in 2009, "the view was expressed that the reference to 'another State' of the crime of aggression might inadvertently omit acts committed against a territory that falls short of statehood, and that therefore, the word 'State' in that paragraph should be given a broad interpretation."[571] In response to this concern, the SWGCA confirmed that explanatory note 1 of article 1 of the definition of aggression in GA Resolution 3314 is relevant; therefore the meaning of "state" should be interpreted broadly for the purpose of the crime of aggression:

> In this regard, it was observed that the General Assembly Declaration on Friendly Relations recognized that Non-Self Governing territories had a

[567] Gurmendi, *supra* note 44, at 589.
[568] Rome Statute, *supra* note 56, art. 5, para 2.
[569] *Id.*
[570] Gurmendi, *supra* note 44, a 590.
[571] Report of the Special Working Group on the Crime of Aggression, para 16, ICC-ASP/7/20/Add.I, Annex II, (Feb, 2009); Also *See* Proposals for a provision on aggression elaborated by the Special Working Group on the Crime of Aggression, Draft resolution (to be adopted by the Review Conference), ICC-ASP/7/SWGCA/2, annex I, article 8 bis, Crime of Aggression, para 2. This draft amendment was adopted in the Review Conference of the ICC without change.

> distinct status under the Charter of the United Nations. A discussion of the statehood issue also took place during the drafting of General Assembly resolution 3314 (XXIX) and was reflected in the explanatory note to article 1 of the definition of aggression. It was recalled that some other understandings recorded in the context of the adoption of the resolution might also still be relevant.[572]

During the SWGCA negotiations, the issue of the relevancy of GA Resolution 3314 to the Rome Statute has been addressed several times. There have been doubts about the relevance of GA Resolution 3314 to the Rome Statute. Resolution 3314 was originally adopted to serve as a guideline for the Security Council when deciding whether an act of aggression by a state against another state had occurred. The drafters of the resolution never had in mind that the resolution would be used for determining individual criminal liability. Nevertheless, the SWGCA considered it as the proper basis for defining an "act of aggression," because it found that GA Resolution 3314 "constituted a consensual and time-tested document" [573] and was the culmination of years of negotiations on defining aggression.[574] After the SWGCA came to an agreement to rely on GA Resolution 3314 as the basis for determining the definition of aggression, it discussed how to use the GA resolution in the context of considering the crime of aggression.[575]

The solution reached at Kampala was to directly borrow language from Articles 1 and 3 of the resolution, without adding to the number of articles. To preserve the integrity

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[572] Report of the Special Working Group on the Crime of Aggression, para 16, ICC-ASP/7/20/Add.I, Annex II, (Feb, 2009).
[573] BARRIGA, *supra* note 61, at 9.
[574] *Id*
[575] *Id.* at 9-10; "One important criterion was to preserve the integrity of GA resolution 3314 (XXIX) as a comprehensive and delicately balanced text, and therefore a simple reference to Article 1 and 3 (containing the actual definition of acts of aggression) was rejected as 'pick and choose'. At the same time, one could also not simply refer to GA resolution 3314 (XXIX) in its entirety, without quoting from its text, nor do the opposite, namely incorporate the lengthy definition into the Rome Statute as a whole, including some of its articles that only make sense in the context of the resolution's original purpose."

of the resolution[576] it was decided to refer to it with the phrase "in accordance with the United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974."[577] Therefore, it is desirable to read the definition of an act of aggression "in conjunction with other parts of the resolution that address relevant issues, such as statehood (Article 1), self-determination (Article 7), and the principle that the provisions of the resolution are interrelated and must be read together (Article 8)."[578] In particular, the explanatory note to Article 1 of GA Resolution 3314 should be taken into consideration for how to define the term "state" in the crime of aggression.[579]

Since, Resolution 3314 includes entities whose statehood is disputed, it is therefore clear that "state" for the purpose of the crime of aggression is not limited to recognized states, but also includes non-recognized quasi-states.

[576] *Id*, at 10.
[577] *Id*. at 9-10; Rome Statute, *supra* note 56, art. 8 *bis*. Para 2.
[578] BARRIGA, at 10
[579] *Id*.

CONCLUSION

This dissertation suggests that for the purpose of the crime of aggression, the term "state" should be interpreted broadly to include unrecognized quasi-states, and thus, the crime of aggression should be applicable to armed conflicts involving quasi-states. What are the implications of this study, and what effects could be expected if this interpretation was adopted? And, if there are political or legal obstacles that would hinder prosecution, what are they?

If a broad interpretation of the meaning of "state" is acceptable, it could affect the ICC's practices on the crime of aggression by making it possible to sanction the illegal use of armed force by or against quasi-states. The OTP could prosecute armed attacks involving quasi-states as the crime of aggression. As an example, if armed attacks are committed between Cyprus and the Turkish Republic of Northern Cyprus, the OTP could prosecute those attacks as the crime of aggression because Cyprus ratified the amendment to the crime of aggression.[580]

Broadly interpreting the application of the crime of aggression to include quasi-states would also be relevant to cases before other Tribunals. As mentioned in Chapter 1, considering the special jurisdictional restrictions imposed on the crime of aggression in the ICC context,[581] jurisdiction over aggression is highly likely to be fragmented.[582] Accepting the interpretation advanced in this dissertation, the ICC can hear cases involving quasi-states when it has jurisdiction. But when the ICC does not, other types of

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[580] *See,* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&lang=en

[581] Rome Statute, *supra* note 56, art. 15 *bis,* para 4 and 5. The ICC can only exercise jurisdiction over an act of aggression committed by a state party who did not opt-out of the ICC's jurisdiction over aggression

[582] Stahn, *supra* note 73, at 879.

Tribunals that otherwise have jurisdiction over the crime, including hybrid courts or domestic courts, could rule on the applicability of the crime of aggression to quasi-states.

Furthermore, a broad interpretation could affect the practices of the UN, allowing the Security Council to condemn illegal uses of armed force involving quasi-states under the name of "aggression," and to refer those situations to the ICC. No state could then argue that its armed attacks were not subject to the laws on aggression because the statehood of the victim was controversial. No quasi-state could go to war without concerns for the legal reverberations of its actions.

There may be skeptical views—for example, that meaningful sanctions for aggression involving quasi-states (either in the ICC or the UN) would not be realized, even if a broad interpretation including quasi-states were accepted. This skepticism might be grounded in the lack of meaningful sanctions in the area of the *jus ad bellum* and the crime of aggression sufficient to enforce respect for legal norms.

Since 1945, international aggression has not only been prohibited by the U.N. Charter and by customary international law, but was also criminalized in the Nuremberg Trials. In other words, international law on the illegality and criminality of aggression has been well established. But the war-torn history of the last 70 years raises doubts as to whether establishing international law and criminalizing aggression has actually had an impact on the conduct of states. For instance, one study revealed that 313 armed conflicts occurred between 1945 and 2008.[583] States seem to have continuously waged wars "for the purpose of overpowering each other and imposing such conditions of peace as the

[583] Weisbord, *supra* note 58, at 100 (quoting Christopher Mullins, *Conflict Victimization and Post-Conflict Justice 1945-2008*, in THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 67, 67 (M. Cherif Bassiouni ed., 2001)).

victor pleases."[584] In addition, the International Tribunals following WWII were the first and last tribunals to actually prosecute aggression.[585] This paucity of prosecution shows that states are either unable to or unwilling to prosecute, whether in their domestic courts or in international tribunals.

The passive and cautious attitude of international organizations during the last 70 years reinforces such skepticism. Considering the previous prosecutor's decision to reject Palestine's request for admission, it would be hard to expect the OTP to prosecute armed conflicts involving quasi-states that are neither recognized by the UN nor State Parties to the ICC. Furthermore, the possibility that the Security Council might declare that an act of aggression was committed by or against a quasi-state is slim. The Security Council has refrained from using the term "aggression" for political reasons, and prefers to rely on the phrase "a threat to the peace or a breach of the peace."[586] Of the 313 armed conflicts that erupted between 1945 and 2008,[587] the Council only passed resolutions directly condemning aggression thirty-one times, and most of which concerns just two cases—South Africa and Rhodesia.[588]

Therefore, it is not surprising that skepticism is prevalent regarding the impact of the amendment on the crime of aggression adopted by the ASP of the ICC. Although

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[584] L. OPPENHEIM, INTERNATIONAL LAW, II, 202 (H. Lauterpacht ed, 7th ed, 1952).
[585] Glennon, *supra* note 19, at 74-75.
[586] Scheffer, *supra* note 72, at 901.
[587] Weisbord, *supra* note 58, at 100 (quoting Christopher Mullins, *Conflict Victimization and Post-Conflict Justice 1945-2008*, in THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 67, 67 (M. Cherif Bassiouni ed., 2001)).
[588] *See* Noah Weisbord, Judging Aggression, Florida International University Legal Studies Research Paper No. 11-15, p.24). (quoting Nicolaos Strapatsas, Rethinking General Assembly Resoltuion 3314 (1974) as a Basis for the Definition of Aggression under the Rome Statute of the ICC, in RETHINKING INTERNATIONAL CRIMINAL LAW: THE SUBSTANTIVE PART 155 (Olaoluwa Lousanya ed., 2007)) ("[N]ineteen condemning South Africa for aggression against several African States (between 1976 and 1987); six condemning the minority regime of Southern Rhodesia for aggression against various African States (between 1973 and 1979); two condemning acts of aggression perpetrated against the Seychelles (in 1981 and 1982); two condemning Israel for aggression against Tunisia (in 1985 and 1988); one condemning aggression against Benin (in 1977); and one condemning Iraq for aggression against Kuwait (in 1990)")

supporters for the crime of aggression expressed enthusiasm for the definition, and expected this definition to have a great impact on state conduct, many others were skeptical about its actual impact. Even if the Kampala amendment goes into force after 2017,[589] the ICC can only exercise jurisdiction over an act of aggression committed by State Parties that did not opt-out of the ICC's jurisdiction over aggression, unless the Security Council refers the situation.[590]

This dissertation is not immune to such an inherent skepticism against the utility of the crime of aggression. Even if the meaning of "state" is interpreted broadly to include unrecognized quasi-states, it is highly probable that states and quasi-states will continue to go to war against each other. War-making states will never ratify the amendment, and no tribunal will be held for their acts of aggression. The Security Council and the OTP of the ICC may keep silent on this politically sensitive issue, and there seems to be no practical way to compel states to punish those who commit aggression by or against quasi-states.

In other words, the concerns about the efficacy of the rule of aggression are plausible and real. The question about the efficacy of the rule of aggression cannot be resolved in the frame of this dissertation. But whatever the problems are, they are general—they logically apply to international law's ability to regulate recognized state's violence as much as quasi-state violence. Stated differently, if one believes there is value in international law on aggression, regardless of its efficacy, the plausibility and value of applying the law to quasi-states should also be considered. There is no moral, legal, or

[589] The Court will not be able to exercise its jurisdiction over the crime of aggression until "at least 30 States Parties have ratified or accepted the amendments; and a decision is taken by two–thirds of States Parties to activate the jurisdiction at any time after 1 January 2017." (Rome Statue, art. 15 *bis* and 15 *ter*).
[590] Rome Statute, *supra* note 56, art. 15 *bis,* para 4 and 5.

historical reason to differentiate quasi-states from recognized states in the context of aggression. This dissertation on the applicability of the crime of aggression to quasi-states could be a meaningful start for establishing the rule of law on the illegal uses of armed force by or against quasi-states. Perhaps this study will help on the margins, in delegitimizing the use of force, signaling the status of unrecognized actors, and providing a framework in which unrecognized actors can locate themselves legally and diplomatically.

There may be a concern that a broad interpretation could have a negative impact on the value and utility of the definition of aggression. The possibility that the crime of aggression is applicable to quasi-states might discourage fully recognized states, especially those facing secessionist movements, from ratifying the amendment.[591] It took almost 70 years to reach consensus on the definition of the crime of aggression due to the political nature of the crime, and this was without the added factor of quasi-state participation. If the suggested interpretation served to discourage states from accepting the definition, supporters of criminalization might condemn the broad interpretation on pragmatic grounds. There may also be a concern that a broad interpretation that gives some kind of rights and status to quasi-states would encourage secessionist movements.[592]

However, those who oppose the amendment based on the risk of encouraging secessionist movements have overstated such a negative consequence. The long history of the efforts to define aggression show that the meaning of "state," and the applicability of the rule to quasi-states, has already been discussed exhaustively many times in many

[591] Wills, *supra* note 6, at 108.
[592] *Id.*

different forums,[593] many of which (particularly the SWGCA, which consisted of state parties and non-state parties) agreed that the crime of aggression is broad enough to include entities whose statehood is controversial.[594] Therefore, the applicability of the broad interpretation is not a novel theory because many states had accepted in the SWGCA and the GA that the broad interpretation is plausible and valid.[595] Moreover, some of the concern is pretextual: those states that have continuously showed concern for the consequence of the amendment on the crime of aggression would not ratify the definition regardless of whether it includes quasi-states or not.

Another remaining challenge with the applicability of the crime of aggression to quasi-states is addressing who should decide which entities are protectable and by what means.[596] Although this Dissertation demonstrated in Chapter 2 that quasi-states are entities with *de facto* control over their territory, the reality might be not as simple as described. Distinguishing between protectable quasi-states and other non-state actors may be very difficult. "[T]here are numerous separatist movements active at any given moment, enjoying varying degrees of international legitimacy and fluctuating levels of control over territory."[597] Many non-state actors, including terrorist groups or rebel groups in a civil war, might at any stage gain control over a territory and rise to the level of quasi-states. Especially when a civil war is protracted, rebel groups may actually come to control considerable parts of the territory. The question thus becomes: when do such groups rise to the level of quasi-states?

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[593] *See* Chapter V, Section 2.
[594] *See* Chapter 5, Section 2-D, 2-E.
[595] *See* Chapter 5, Section 2-D, 2-E
[596] Wills, *supra* note 6, at 106-107.
[597] *Id.* at 106.

This question becomes even more complicated since there is no authoritative institution that determines the status of the entity. It would be helpful for authoritative institutions like the Security Council to create something similar to the list of non-self-governing territories.[598] If not, the GA or ILA could try to establish standards for drawing the line between quasi-states and other non-state actors.[599]

Although there are numerous grounds for skepticism about effective means for enforcing the crime of aggression, the obstacles for its prosecution, and the lack of guidance on its applicability, these concerns should not be the core questions that determine the rule of law. International law has always been subject to skepticism and concern for its lack of means for enforcement and has met many political obstacles. Nevertheless, international law has continued to develop by grounding itself on value-oriented views. From such a perspective, if one agrees with the value of the law of aggression, there is no reason to exclude unrecognized quasi-states from the scope of protection and obligation. Just as in recognized states, there is no acceptable political, economic, moral, or legal justification for cornering people in quasi-states into deadly situations through the illegal use of armed force.

The fact that quasi-states lack recognition cannot vitiate the effective sovereignty over their territory. The lack of recognition for quasi-states cannot make the peace and

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[598] *Id.* at 107.

[599] *See* Chapter II, Section 1. Some scholars have tried to provide conditions for qualification as a quasi-state. Professor Pål Kolstø suggested three conditions for quasi-statehood: "its leadership must be in control of (most of) the territory it lays claim to, [and] it must have sought but not achieved international recognition as an independent state."[599] He also "exclude[s] those that have persisted in this state of non-recognition for less than two years."[599] However, his list was devised just for the purpose of his research, which was to examine the sustainability and future of unrecognized quasi-states, and not for the context of aggression. Alexander G. Wills later modified the Kolstø's list and used it for the purpose of aggression. He required four conditions for quasi-statehood in the context of the crime of aggression: "(1) it has control over a distinct territory, (2) it is (or has been) stable or at peace, (3) it rejected the imposition of outside authority, and (4) either its statehood is disputed or it is generally understood to be something other than a state." Although his list cannot be free from the charge that it is arbitrarily designed for his own analytical and normative purposes, these criteria might help to roughly outline the concept of quasi-state.

security of their region and their lives and human dignity less important. The principle that disputes should be resolved by peaceful means, and not by the recourse to armed force, should be also kept in relation to quasi-states. The crime of aggression—the supreme international crime—must not be left unpunished in situations involving quasi-states.[600]

[600] International Military Tribunal (Nuremberg Trial), Judgment (1946), 1 IMT 171, 186 ("To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.")

BIBLIOGRAPHY

1. Primary Sources

International Criminal Court

Elements of Crimes of the International Criminal Court, ICC-ASP/1/3, U.N. Doc. PCNICC/2000/1/Add.2 (2000)

Proposals for a provision on aggression elaborated by the Special Working Group on the Crime of Aggression, Draft resolution (to be adopted by the Review Conference), ICC-ASP/7/SWGCA/2

Prosecutor v. Thomas Lubanga Dyil, Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901 (July 10, 2012)

Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09 (Mar. 4, 2009)

Report of the Special Working Group on the Crime of Aggression, ICC-ASP/7/20/Add.I, (Feb. 2009)

Review Conference of the Rome Statute, Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, RC/Res.6 (June 11, 2010)

Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90

Rules of Procedure and Evidence of the International Criminal Court, 2000, U.N. Doc. PCNICC/2000/1/Add.1

Palestine Situation Related Documents in the International Criminal Court

Al Haq, *Position Paper on Issues Arising from the PA Submission of a Declaration to Prosecutor of the ICC under Article 12(3) of the Rome Statute* (Dec. 14, 2009)

Alain Pellet, *Les effets de la reconnaissance par la Palestine de la compétence de la CPI* [The Effects of Palestine's Recognition of the International Criminal Court's Jurisdiction], (Feb. 18, 2010)

Daniel Benoliel and Ronen Perry, *Israel, Palestine and the ICC,* (Nov. 5, 2009)

David Davenport et al., *The Palestinian Declaration and ICC Jurisdiction* (Nov. 19, 2009)

Errol Mendes, *Statehood and Palestine for the Purposes of Article 12(3) of the ICC Statute: A Contrary Perspective* (Mar 30, 2010)

European Centre for Law and Justice, *Legal Memorandum Opposing Accession to ICC Jurisdiction by Non-State Entities* (Sep. 9, 2009)

John Quigley, *Memo to Prosecutor* (Mar. 23, 2009); John Quigley, *Additional Memo,* (May. 20, 2010); John Quigley, *The Palestine Declaration to the International Criminal Court: The Statehood Issue, and The Statehood of Palestine: Law and Sovereignty in the Middle East Conflict* (May 19, 2009)

Malcolm Shaw, *Supplementary Opinion* (Oct. 18, 2010)

Minister of Justice of Palestine National Authority, Declaration Recognizing the Jurisdiction of the International Criminal Court (2009)

The International Association of Jewish Lawyers and Jurists, *Opinion in the Matter of the Jurisdiction of the ICC with regard to the Declaration of the Palestinian authority* (Sep. 9, 2009)

The Office of the Prosecutor, Situation in Palestine (Apr. 3, 2012)

The Office of the Prosecutor, Summary of Submissions on Whether the Declaration Lodged by the Palestinian National Authority Meets Statutory Requirements (Mar. 5, 2010)

International Military Tribunals

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288

Control Council Law No. 10, Dec. 20, 1945, *in* 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, (1949)

International Military Tribunal (Nuremberg) Judgment and Sentences (1946), 1 IMT 171, reprinted in 41 AJIL 172 (1947)

1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946 (1947)

International Criminal Tribunal for the former Yugoslavia

Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Nov. 19, 2009. IT/32/Rev.48

Prosecutor v. Radislav Krstić (Trial Judgement), Aug. 2, 2001

Prosecutor v. Duško Tadić aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, Oct. 2, 1995

Prosecutor v. Duško Tadić aka "Dule" (Appeal Judgement), IT-94-1-A, July 15, 1999

Prosecutor v. Duško Tadić aka "Dule" (Trial Chamber Decision on the Prosecutor's motion Requesting Protective Measures for Victims and Witnesses), IT-94-1-T, Aug. 10, 1995

Prosecutor v. Stanilav Galić (Trial Judgement and Opinion), IT-98-29-T, Dec. 5, 2003

Prosecutor v Milutinović (Milan) and ors, (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - Joint Criminal Enterprise), IT-99-37-AR72, May 21, 2003

Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Nov. 19, 2009. IT/32/Rev.48

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC res. 827, UN SCOR 48th sess., 3217th mtg. (1993); 32 ILM 1159 (1993)

International Criminal Tribunal for Rwanda

Statute of the International Criminal Tribunal for Rwanda, SC res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994)

Special Court for Sierra Leone

Statute of the Special Court for Sierra Leone, 2178 UNTS 138, 145; 97 AJIL 295; UN Doc. S/2002/246

Extraordinary Chambers in the Courts of Cambodia

Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (2001) (Cambodia), as amended by NS/RKM/1004/006 (Oct. 27, 2004) (unofficial translation)

International Court of Justice

Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Merits*), ICJ Reports, *Judgment* of June 27, 1986

Western Sahara Advisory Opinion, ICJ Reports, 1975

Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports, 2004

North Sea Continental Shelf Case ICJ Reports, 1969

Other Cases

Cyprus v Turkey, 35 EHRR 30, 969, 120 ILR 12, 39

ECtHR, *Ireland v. UK*, Jan. 18, 1978, Ser. A no. 25

IACtHR, *the Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion* OC-2/82, Sep. 24, 1982, Ser. A No. 2

IACtHR, *The Right to Information on Consular Assistance, Advisory Opinion* OC-16/99, Oct. 1, 1999

UN Documents

A/AC.134/L.17

Charter of the United Nations, 59 Stat. 1031; TS 993

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA 2625 (XXV), 25 UN GAOR Supp. 18 122; 65 AJIL 243 (1971)

GA Res. 195 (III) (1948)

GA Res. 293 (IV) (1949)

GA Res. 112(II) (1950)

GA Res. 376 (V) (1950)

GA Res. 378 (V) (1950)

GA Res. A/1771 (1951)

G.A. Res. 3314 (XXIX), U.N. Doc. A/9631 (Dec. 14, 1974)

GA Res. 43/177, A/RES/43/177 (1988), U.N. GAOR, 43d Sess., Supp. (No. 49), U.N. Doc. A/43/49 (1989)

GA, 67th Sess., 44th & 45th plen. mtg, GA/11317 (Nov. 29, 2012)

International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967)

International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967)

Report of the Human Rights Committee, UN Doc. A/39/40, 1984, 143

Report of the Sixth Committee, 23rd sess., Agenda Item 86, UN Doc. A/7402 (Dec. 13, 1968)

Report of Special Committee, 24th sess., Supp. No. 20, A/7620 (Feb 24 – Apr. 3, 1969)

Report of the Special Committee, 25th sess., Supp. No. 19, UN Doc. A/8019 (July 13 – Aug. 14, 1970)

Report of Special Committee, 26th sess., Supp. No. 19, A/8419 (Feb. 1 – Mar. 5, 1971)

Report of the Working Group, Annex III to the Report of Special Committee, 26th sess., Supp. No. 19, UN Doc. A/8419

Report of the Sixth Committee, 26th sess., Agenda Item 89, UN Doc. A/8525 (Nov. 19, 1971)

Report of the Special Committee, 27th sess., Supp. No 19. UN Doc. A/8719 (Jan. 31 – Mar. 3, 1971)

Secretary-General, Statement Attributable to the Spokesperson for the Secretary-General on the Outcome of the ICC Review Conference in Kampala, 14 June 2010, *available at* www.un.org/apps/sg/sgstats.asp?nid=4617

Security Council, S/PV.474

S.C. Res. 541 (Nov. 18, 1983)

Union of Soviet Socialist Republics: Draft Resolution on the Definition of Aggression, UN Doc. A/C.1/608 (Nov. 4, 1950)

U.N. Treaty Section of the UN Office of Legal Affairs, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, ST/LEG/7/Rev. 1

International Law Commission

ILC, *Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law, Report of the study group of the International Law Commission*, UN. Doc A/CN.4/L.682 (Apr. 13, 2006)

ILC, *Report of the Commission on the Work of its Sixty-Third Session, Chapter XI, "Treaties over Time',* A/66/10

1 Yearbook of the International Law Commission, (1951)

2 Yearbook of the International Law Commission (1951)

Other International Treaties

Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292

Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO), 4 UNTS 275

Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277

Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, UN Treaty Series 1973

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sep. 23, 1971, 974 UNTS 177

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, No. 15410

Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, No. 24631

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 27 ILM 668 (1988); 1678 UNTS 221

Council of Europe, European Convention on the Suppression of Terrorism, Jan. 27, 1977, ETS No. 90

Council of Europe, Council of Europe Convention on the Prevention of Terrorism, May. 16, 2005, ETS No. 196

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 75 UNTS 287

Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 75 UNTS 135

International Convention against the Taking of Hostages, Nov. 17, 1979, No. 21931

International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, No. 37517

International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, No. 38349

International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, A/59/766

League of Arab States, Arab Convention on the Suppression of Terrorism, Apr. 22, 1998

Montevideo Convention on the Rights and Duties of States, 165 L.N.T.S. 19 (1936)

Organization of the Islamic Conference (OIC), Convention of the Organisation of the Islamic Conference on Combating International Terrorism, July 1, 1999, Annex to Resolution No: 59/26-P

Organization of American States (OAS), Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance, Feb. 2, 1971

Organization of African Unity (OAU), OAU Convention on the Prevention and Combating of Terrorism , June 14, 1999

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 UNTS 3

Regional Treaties, Agreements, Declarations and Related, Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, 1999, June 4, 1999

South Asian Association for Regional Cooperation (SAARC), Regional Convention

on the Suppression of Terrorism, South Asian Association for Regional Cooperation (SAARC), Nov. 4, 1987

The African Union Non-Agression and Common Defence Pact, enacted at Jan. 31, 2005

Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, 94 LNTS 57, concluded Aug. 27, 1928

Vienna Convention on the Law of Treaties, UNTS Vol. 1155

2. Secondary Sources

Books

ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES, A LEGAL REAPPRAISAL (1995)

1 BENJAMIN B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE (1975)

2 BENJAMIN B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE (1975)

Carsten Stahn & Larissa van den Herik, *'Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?, in* THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW 21 (Larissa van den Herik et al. eds., 2012).

Christopher Mullins, *Conflict Victimization and Post-Conflict Justice 1945-2008*, in THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 67 (M. Cherif Bassiouni ed., 2001).

Darryl Robinson, *The Two liberalisms of International Criminal Law*, *in* FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE (Carten Stahn ed., 2010)

D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW (1958)

GERHARD KEMP, INDIVIDUAL CRIMINAL LIABILITY FOR THE INTERNATIONAL CRIME OF AGGRESSION (2010)

IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2nd ed.); (6th ed.)

JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (2nd ed., 2006)

Jutta Bertram-Nothnagel et al, *Evolutions of the Jus ad Bellum: the Crime of Aggression in* PROCEEDINGS OF THE ANNUAL MEETING-AMERICAN SOCIETY OF INTERNATIONAL LAW. 103 (Annual 2009)

2 L. OPPENHEIM, INTERNATIONAL LAW(H. Lauterpacht ed., 7th ed., 1952); 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE (1st ed.); 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE (8th ed.)

LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE (2008)

LAURA PERNA, THE FORMATION OF THE TREATY LAW OF NON-INTERNATIONAL ARMED CONFLICTS (2006)

M. CHERIFF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (2nd ed., 2013)

MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES : NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (2002)

LORI F. DAMROSCH ET AL., INTERNATIONAL LAW CASES AND MATERIALS (5th ed., 2009)

Nicolaos Strapatsas, *Rethinking General Assembly Resoltuion 3314 (1974) as a Basis for the Definition of Aggression under the Rome Statute of the ICC*, *in* RETHINKING INTERNATIONAL CRIMINAL LAW: THE SUBSTANTIVE PART 155 (Olaoluwa Lousanya ed., 2007)

OLIVER CORTEN, THE LAW AGAINST WAR (2010)

OSCAR SOLERA, DEFINING THE CRIME OF AGGRESSION (2007)

ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (2nd ed. 2010)

Stefan Barriga, *Against the Odds: The Result of the Special Working Group on the Crime of Aggression*, *in* THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION 1 (STEFAN BARRIGA ET AL. EDS., 2009)

THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION (Stefan Barriga et al. eds., 2009)

THOMAS AQUINAS, SUMMA THEOLOGIAE, SECUNDA SECUNDAE

YORAM DINSTEIN, WAR AGGRESSION AND SELF-DEFENCE (4th ed., 2005)

Articles

Alexander K. A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063 (2011)

Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2003-2004)

Andrew Clapham, *Concluding Remarks: Three Tribes Engage on the Future of International Criminal Law, in Symposium: The Influence of the European Court of Human Rights' Case Law on (International) Criminal Law,* 9 J. INT'L CRIM. JUST. 689 (2011)

Annika Tahvanainen, *Commentary to Professor Hafner,* 25 MICH. J. INT'L L. 865 (2003-2004)

Antonio Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law*, 4 J. INT'L CRIM. JUST, 933 (2006)

Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law,* 12 EJIL 993 (2001)

Alexander G. Wills, *The Crime of Aggression and the Resort to Force against entities, in Statu Nascendi,* 10 J. CRIM. JUST. 83 (2012)

Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EJIL 649 (2007)

Benjamin B. Ferencz, *Ending Impunity for the Crime of Aggression*, 41 CASE W. RES. J. INT'L L. 281 (2009)

Brad R. Roth, *Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order*, 4 E. ASIA L. REV. 91 (2009)

Bruno Simma, *Fragmentation in a Positive Light, Diversity or Cacophony: New Sources of Norms in International Law Symposium: Introduction,* 25 MICH. J. INT'L L. 845 (2003-2004)

Bruno Simma*, Universality of International Law from the Perspective of a Practitioner,* 20 EUR. J. INT'L L. 265 (2009)

Carsten Stahn, *The 'End', the 'Beginning of the End' or the 'End of the Beginning'? Introducing Debates and Voices on the Defining of 'Aggression'*, 23 LJIL 875 (2010)

Chet Tan, *Punishing Aggression as a Crime Against Humanity: A Noble but Inadequate Measure to Safeguard International Peace and Security,* 29 AM. U. INT'L L. REV. 145 (2013)

Claus Kress, *The Crime of Aggression before the First Review of the ICC Statute,* 20 LJIL 851 (2007)

Claus Kress and Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression,* 8 J. INT'L CRIM. JUST. 1179 (2010)

David Scheffer, *The Complex Crime of Aggression under the Rome Statute,* 23 L.J.I.L 4 (2010)

Deidre Willmott, *Removing the Distinction between International and Non-international Armed Conflict in the Rome Statute of the International Criminal Court*, 5 MELB. J. INT'L L. 196 (2004)

Dimitrios Lalos*, Between Statehood and Somalia: Reflections of Somaliland Statehood*, WASH. 10 U. GLOBAL STUD. L. REV, 789 (2011)

Françoise Tulkens, *The Paradoxical Relationship between Criminal Law and Human Rights,* 9 J. INT'L CRIM. JUST. 577 (2011)

Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law,* 25 MICH. J. INT'L L. 849 (2003-2004)

Holly A. Osterland, *National Self-Determination and Secession: The Slovak Model,* 25 CASE W. RES. J. INT'L L. 655 (1993)

Karel Wellens, *Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap*, 25 MICH. J. INT'L L. 1159 (2003-2004)

Keith A. Petty, *Sixty Years in the Making: the Definition of Aggression for the International Criminal Court*, 31 HASTINGS INT'L & COMP. L. REV, 531 (2008)

Keith A. Petty, *Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict*, 33 SEATTLE U. L. REV. 105 (2009)

L. Sadat Wexler, *Committee Report on Jurisdiction, Definition of Crimes and Complementarity*, 25 DENV. J. INT'L L. & POL'Y 221 (1997)

Larry May, *Aggression, Humanitarian Intervention, and Terrorism*, 41 CASE W. RES. J. INT'L L. 321 (2009)

Laurence S. Hanauer, *The Irrelevance of Self-Determination Law to Ethno-national Conflict: A New Look at the Western Sahara Case*, 9 EMORY INT'L L. REV. 133 (1995)

M. Cherif Bassiouni, *The Future of Human Rights in the Age of Globalization,* 40 DENV. J. INT'L L. & POL'Y 22 (2011-2012)

Major Kari M. Fletcher*, Defining the Crime of Aggression: Is There an Answer to the International Criminal Court's Dilemma?* 65 A.F.L.REV. 229 (2010)

Mark A. Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains?*, 41 CASE W. RES. J. INT'L L. 291 (2009)

Matthias Schuster, *The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword,* 14 CRIM. L. F. 1 (2003)

Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AJIL, 1 (2011)

Michael Anderson, *Reconceptualizing Aggression*, 60 DUKE L. J. 411 (2010)

Michael J. Glennon, *The Blank-Prose Crime of Aggression,* 35 YALE J. INT'L L. 71 (2010)

Michael Waibel, *Demystifying the Art of Interpretation*, 22 EUR. J. INT'L L. 571 (2011)

Michael Walzer, *The Crime of Aggressive War*, 6 WASH. U. GLOBAL STUD. L. REV. 635 (2007)

Mitchell A. Hill, *What the Principle of Self-Determination Means Today,* 1 ILSA J. INT'L & COMP. L. 119 (1995)

Noah Weisbord, *Conceptualizing Aggression*, 20 DUKE J. COMP. & INT'L L. 1 (2009)

Noah Weisbord, *Judging Aggression*, 50 COLUM. J. TRANSNAT'L L. 82, 85 (2011)

Noah Weisbord, *Prosecuting Aggression,* 49 HARV. INT'L L. J. 161 (2008)

Pål Kolstø, *The Sustainability and Future of Unrecognized Quasi-States*, 43 J. PEACE RES, 723 (2006)

Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation,* 25 MICH. J. INT'L L. 929 (2003-2004)

Peter Daniel DiPaola, *A Noble Sacrifice? Jus ad Bellum and the International Community's Gamble in Chechnya* , 4 IND. J. GLOBAL LEGAL STUD. 435 (1997)

Philip S. Hadji, *The Case for Kurdish Statehood in Iraq*, 41 CASE W. RES. J. INT'L L. 513 (2009)

Richard F. Iglar, *The Constitutional Crisis in Yugoslavia and the International Law of Self-determination: Slovenia's and Croatia's Right to Secede*, 15 B. C. INT'L & COMP. L. REV. 213 (1992)

Rogers S. Clark, *Nuremberg and the Crime Against Peace,* 6 WASH. U. GLOBAL STUD. L. REV. 527 (2007)

Roger S. Clark, *Negotiating Provisions Defining the Crime of Aggression, It's Elements and the Conditions for ICC Exercise of Jurisdiction over It*, 20 EUR. J. INT'L L. 1103 (2009)

Silvia Fernández de Gurmendi, *The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*, 25 FORDAM INT'L L. J. 589 (2001-2002)

Timothy William Waters, *Contemplating Failure and Creating Alternatives in the Balkans: Bosnia's Peoples, Democracy, and the Shape of Self-Determination*, 29 YALE J. INT'L L. 423 (2004)

Timothy William Waters, *Indeterminate Claims: New Challenges to Self-Determination Doctrine in Yugoslavia,* SAIS REVIEW, 111 (2000)

Thomas D. Grant*, Extending Decolonization: How the United Nations Might Have Addressed Kosovo,* 28 GA. J. INT'L & COMP. L. 9 (1999-2000)

William Burke-White, *International Legal Pluralism,* 25 MICH. J. INT'L L. 963 (2003-2004)

Young-Sok Kim, *A Review of the Recent Discussions on the Crime of Aggression under the ICC Statute,* 16 SEOUL INT'L L. ACADEMY [서울국제법연구] 1 (2009)

Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute*, 8 J. INT'L CRIM. JUST. 329 (2010)

Internet Sources & News Articles

General Principles of International Law, Treaty Interpretation, 1(4) International Judicial Monitor, available at: http://www.judicialmonitor.org/archive_0906/generalprinciples.html

Human Rights Watch, *Up In Flames, Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, January 2009, available at, http://www.hrw.org/sites/default/files/reports/georgia0109web.pdf

Jung-yoon Choi, *North and South Korea mark 'world's longest cease-fire*', LOS ANGELES TIMES, July 27, 2013, available at http://articles.latimes.com/2013/jul/27/world/la-fg-korea-anniversary-20130728

Kevin John Heller, *Thoughts on Glennon's "Blank-Prose Crime of Aggression,"* OPINIO JURIS, available at http://opiniojuris.org/2010/01/29/thoughts-on-glennons-blank-prose-crime-of-aggression/).

Louis Charbonneau, *Palestinians Win Implicit U.N. Recognition of Sovereign State*, Nov 29, 2012, available at http://www.reuters.com/article/2012/11/29/us-palestinians-statehood-idUSBRE8AR0EG20121129

Steven Erlanger & Scott Sayare, *Unesco Accepts Palestinians as Full Members,* THE NEW YORK TIMES, Oct. 31, 2011, available at http://www.nytimes.com/2011/11/01/world/middleeast/unesco-approves-full-membership-for-palestinians.html?pagewanted=all&_r=0

William A. Schabas, *Palestine Should Accede to the Rome Statute Now*, OCCUPIED PALESTINE (Oct. 31, 2011), available at http://occupiedpalestine.wordpress.com/2011/11/01/palestine-should-accede-to-the-rome-statute-now/