

## NOTES

**RECONCEPTUALIZING AGGRESSION**

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## ABSTRACT

*In 1947, the International Military Tribunals at Nuremberg and Tokyo declared that aggressive war was no longer a generic breach of international law implicating only state responsibility. It was the supreme international crime, one for which individuals could be prosecuted and punished. On the plane of international law, the decision was monumentally important. But for nearly seventy years, the promise it represented withered as the international community struggled to draw the precise contours of the offense. That promise was supposedly revived on June 11, 2010. At the close of the Review Conference of the International Criminal Court in Kampala, Uganda, the Assembly of States Parties to the International Criminal Court adopted the first precise, widely accepted definition of aggression. But rather than a groundbreaking achievement, the definition is anachronistic, dangerous, and unworkable. Its exclusive focus on state behavior creates an overly restricted conception of aggression that cannot be applied to the present reality of international armed conflict. Modern aggression is increasingly perpetrated by nonstate actors whose nature and characteristics place them outside the most widely accepted definition of the state. Even abandoning this traditional conception of statehood for a constructive interpretation cannot guarantee that the definition will encompass all relevant nonstate actors. This Note argues that the current state-centric approach thus creates a backward-looking definition that cannot be given practical effect without either weakening the international*

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*system or undermining efforts to prosecute aggression and suppress global terrorism. Consequently, the Assembly of States Parties should rewrite the definition of aggression to expressly include both states and nonstate groups.*

## INTRODUCTION

Among the four core international crimes, the crime of aggression—individual responsibility for illegal war—is considered supreme.<sup>1</sup> But unlike the other core offenses—genocide, crimes against humanity, and war crimes—a historical inability to draw its precise contours has largely relegated the prosecution of aggression to the annals of legal history. After nearly a decade of negotiations, however, the international community has made a breakthrough.<sup>2</sup> At the June 2010 Review Conference of the International Criminal Court (ICC) in Kampala, Uganda, the Assembly of States Parties to the International Criminal Court (ASP) adopted the first precise, widely accepted definition of the crime.

Unfortunately, this new definition is fundamentally flawed: it refers exclusively to state behavior.<sup>3</sup> Professor Noah Weisbord, an independent expert delegate to the Special Working Group on the Crime of Aggression (Special Working Group) that was charged by the ASP with drafting the new definition, recognizes this defect. He contends that by employing a dynamic conception of statehood, the definition can be extended beyond its literal text and applied to nonstate actors.<sup>4</sup> This solution is inadequate. The definition of

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1. Judgment of the International Military Tribunal Sitting at Nuremberg, Germany (Sept. 30, 1946), in 22 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY 411, 421 (1950). This Note uses the terms “aggression” and “the crime of aggression” interchangeably.

2. “International community” is used throughout this Note as shorthand for the society of states, international organizations, and nongovernmental organizations that regard themselves as bound by common rules in their dealings with each other, their pursuit of common interests and values, and their participation in common institutions. See generally HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 8–16 (1977) (outlining the concept of an international community).

3. Int’l Criminal Court [ICC], Assembly of States Parties, *The Crime of Aggression*, Annex I, art. 8 bis, ICC Doc. RC/Res.6 (advance version June 28, 2010).

4. Noah Weisbord, *Conceptualizing Aggression*, 20 DUKE J. COMP. & INT’L L. 1, 30 (2009) (“[T]he best . . . approach . . . is to read the word ‘State’ dynamically and incrementally to include state-like entities.”). In a previous telephone conversation, Professor Weisbord acknowledged that he did not particularly like the idea of a dynamic conception of statehood, but stressed that he believed it was the only practical means by which to extend the definition of

aggression should be rewritten to refer explicitly to both states and nonstate groups.<sup>5</sup> A formulation that expressly captures within its ambit both types of entities as separate categories mirrors the present reality of international armed conflict and is easily adapted to future scenarios. By contrast, failure to abandon the current state-centric approach will create a backward-looking definition that cannot be given practical effect without either weakening the international system or undermining efforts to prosecute aggression and suppress global terrorism.

This Note analyzes the consequences of accepting and applying the new definition of aggression, and offers a new approach. Part I provides the historical background that underscores the importance of the crime in international law and the difficulty of the task that was entrusted to the Special Working Group.<sup>6</sup> Part II highlights the evolution in the pattern of international armed conflict that mandates a non-state-based definition of aggression. International terrorism has emerged as the greatest contemporary threat to peace and security and represents the most prevalent form of aggression today. As such, it must be encompassed by any relevant definition of aggression.<sup>7</sup> Part III sets forth modern conceptions of statehood and demonstrates that terrorist organizations fall outside their bounds. Because terrorist groups cannot be construed as states, Part III demonstrates that the definition of aggression as presently conceived cannot be applied to all aggression scenarios. Part IV reveals that, even if these taxonomic difficulties are ignored, interpreting the current definition to refer constructively to nonstate groups will weaken the international system and will defeat efforts to prosecute aggression and eliminate international terrorism. Together, Parts II through IV demonstrate

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aggression to both state and nonstate entities.

5. In 2017, the ASP will revisit the definition of aggression and consider proposed amendments. *See* ICC, *supra* note 3, para. 4 (resolving “to review the amendments on the crime of aggression seven years after the beginning of the Court’s exercise of jurisdiction”). When it does, the ASP should strongly consider expanding the definition to expressly include nonstate entities.

6. Because several scholars have meticulously traced the development of the crime of aggression, the background provided in Part I is brief. For an in-depth historical analysis of the crime of aggression, see generally Benjamin B. Ferencz, *Enabling the International Criminal Court to Punish Aggression*, 6 WASH. U. GLOB. STUD. L. REV. 551, 551–60 (2007); Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT’L L.J. 161, 162–96 (2008).

7. *See* Weisbord, *supra* note 4, at 8 (“A backward-looking definition that fails to regulate important forms of aggression as they emerge is fated to become irrelevant. A definition that does not fit the sociological phenomenon it seeks to regulate is, and will be perceived to be, unjust.”).

the need to rewrite the definition of aggression to refer expressly to both states and nonstate groups. The concept of nonstate groups, however, must be properly bounded; it must be broad enough to allow effective prosecution of those entities capable of committing acts of aggression, but narrow enough to exclude ones that cannot perpetrate the crime. Part V concludes the analysis with some suggestions for achieving this limited conception of nonstate groups.

#### I. FROM NUREMBERG TO KAMPALA: THE HISTORICAL EVOLUTION OF THE DEFINITION OF AGGRESSION

In late March 1941, U.S. Attorney General Robert H. Jackson opined that waging aggressive war constituted an international crime. "Present aggressive wars," he argued, "are civil wars against the international community."<sup>8</sup> The International Military Tribunals, established four years later at Nuremberg and Tokyo, agreed.<sup>9</sup> In one of the most storied passages of their final judgment, the Nuremberg judges declared that a war of aggression was "essentially an evil thing," for "[t]o initiate a war of aggression . . . is not only an international crime; it is the supreme international crime differing from other war crimes in that it contains within itself the accumulated evil of the whole."<sup>10</sup> The import of these tribunals on the plane of international law was monumental.<sup>11</sup> "For the first time," Professor Danilo Zolo observes, "aggressive war was not conceived of as a generic breach of international law involving the liability of a state as

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8. Robert H. Jackson, U.S. Attorney Gen., Address Before the Inter-American Bar Association (Mar. 27, 1941), in 35 AM. J. INT'L L. 348, 353-55 (1941).

9. The Nuremberg Tribunal convicted twelve defendants of the crime of aggression. Judgment of the International Military Tribunal Sitting at Nuremberg, Germany, *supra* note 1, at 485-528. The Tokyo Tribunal convicted twenty-four. Judgment of the International Military Tribunal for the Far East, in 103 THE TOKYO MAJOR WAR CRIMES TRIAL: THE JUDGMENT, SEPARATE OPINIONS, PROCEEDINGS IN CHAMBERS, APPEALS AND REVIEWS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 49,773-851 (R. John Pritchard ed., 1998).

10. Judgment of the International Military Tribunal Sitting at Nuremberg, Germany, *supra* note 1, at 421.

11. Both tribunals have their critics. See, e.g., BULL, *supra* note 2, at 89 ("The world . . . after the Second World War witnessed the trial and punishment of German and Japanese leaders and soldiers for war crimes and crimes against the peace. . . . That these men and not others were brought to trial by the victors was [selective and] an accident of power politics."); Bert V.A. Röling, *The Nuremberg and the Tokyo Trials in Retrospect*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 590-615 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973) (contending that the Nuremberg and Tokyo tribunals were one-sided and were often used to achieve political and propagandistic ends).

such but as a real ‘international crime’” for which individuals could be prosecuted and punished.<sup>12</sup> The tribunals’ promising legacy has, however, been left unfulfilled. Since 1947, no one has been prosecuted for an alleged crime of aggression.<sup>13</sup>

The greatest impediment to effective prosecution of aggression has been the international community’s inability to define the offense.<sup>14</sup> Even the Nuremberg judges committed little ink to outlining the contours of the crime, grounding their conclusion that Germany had conducted a war of aggression largely on that country’s history of autocratic governance and its desire to disrupt the status quo embodied in the Treaty of Versailles.<sup>15</sup> Since 1947, there have been several attempts to define aggression,<sup>16</sup> but none have succeeded. The international community came close in 1974, when the U.N. General Assembly adopted a comprehensive definition.<sup>17</sup> But the General Assembly’s formulation was not legally binding on U.N. member states and had no noticeable effect on decisionmaking within the U.N. Security Council.<sup>18</sup> Moreover, the General

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12. Danilo Zolo, *Who Is Afraid of Punishing Aggressors?: On the Double-Track Approach to International Criminal Justice*, 5 J. INT’L CRIM. JUST. 799, 800 (2007).

13. *Id.* at 799.

14. See Rome Statute of the ICC art. 5, para. 2, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) (“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.”); BENJAMIN B. FERENCZ, *Reconciling Legitimate Concerns and Removing the Lock From the Courthouse Door* (May 2008), <http://www.benferencz.org/index.php?id=4&article=9> (“Aggression was included [in the Rome Statute of the ICC] as one of the four ‘core crimes’ but the ICC was prohibited from exercising jurisdiction over that offense . . . [because] the intransigent aggression problem was pushed to a back burner for later consideration . . . at a Review Conference which could deal with the definition . . .”).

15. See Judgment of the International Military Tribunal Sitting at Nuremberg, Germany, *supra* note 1, at 413–49 (detailing the rise of the Nazi party and Germany’s acts of war in violation of international treaties); Sabine Swoboda, *Defining Aggression and the Objectives of a Crime of Aggression*, 19 CRIM. L.F. 319, 322 (2008) (book review) (“[The International Military Tribunal] merely underlined Germany’s history and character as an autocratic military regime, its undemocratic internal constitution and Germany’s pursuit of the political aim of disrupting the world order as laid down in the Treaty of Versailles.” (footnote omitted)).

16. See, e.g., G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/29/3314 (Dec. 14, 1974) (declaring the General Assembly’s adoption of a “Definition of Aggression”); *Draft Code of Crimes Against the Peace and Security of Mankind* art. 16, in *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, 51 U.N. GAOR Supp. No. 10, at 9, U.N. Doc. A/51/10 (1996), reprinted in [1996] 2 Y.B. Int’l L. Comm’n 42, U.N. Doc. A/CN.4/L.532 (providing a definition for the “crime of aggression”).

17. G.A. Res. 3314, *supra* note 16.

18. Sergey Sayapin, *A Great Unknown: The Definition of Aggression Revisited*, 17 MICH. ST. J. INT’L L. 377, 378 (2008); see also Ferencz, *supra* note 6, at 556 (“[T]he 1974 consensus

Assembly's definition is too steeped in Cold War-era concepts to carry any normative relevance today.<sup>19</sup> The 1998 Rome Statute of the International Criminal Court (Rome Statute) listed aggression among the crimes within the jurisdiction of the ICC, but it left the elements of the offense unspecified.<sup>20</sup> The delegates at Rome instead provided that the ASP must amend the Statute if it were to include a proper definition of the crime.<sup>21</sup>

Despite these struggles, the international community once again set out to define the crime of aggression. In 2002, the ASP established the Special Working Group to develop a definition of aggression that could be agreed upon by—and thus become legally binding on—the majority of states.<sup>22</sup> At the June 2010 Kampala Review Conference, the Special Working Group presented to the ASP the product of near-decade-long negotiations. With the draft definition of aggression before it, the ASP moved quickly to do what the international community had hitherto failed to achieve. On June 11, 2010, the ASP adopted the first precise, enforceable definition of the crime.<sup>23</sup>

The success of this endeavor was imperative. The greatest achievement of the Nuremberg and Tokyo tribunals was clearly articulating that war making was no longer an inherent right of states, but rather an international crime under certain circumstances.<sup>24</sup> That important legal advancement had to be sustained, for the crime of aggression remains one of the most critical concepts in international law.<sup>25</sup> As a strictly legal matter, the legitimate use of force is restricted

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definition of aggression bound no one.”). General Assembly resolutions on matters of international peace and security are not legally binding on U.N. member states. *See* U.N. Charter art. 11, paras. 1, 2 (authorizing the General Assembly to make recommendations regarding “the general principles of co-operation in the maintenance of international peace and security” and “any questions relating to the maintenance of international peace and security”); *see generally* C.J.R. Dugard, *The Legal Effect of United Nations Resolutions on Apartheid*, 83 S. AFR. L.J. 44, 46–48 (1966) (discussing the binding force of General Assembly resolutions).

19. *See* Ferencz, *supra* note 6, at 556 (“[The 1974 definition] reflected the fears, doubts, and hesitations of its time.”); Weisbord, *supra* note 4, at 22 (questioning whether certain aspects of the 1974 definition are normatively relevant in modern times, but not dismissing the formulation’s relevance altogether).

20. Rome Statute of the ICC, *supra* note 14, art. 5.

21. *Id.* art. 5, para. 2.

22. *See The Crime of Aggression*, COAL. FOR THE ICC, <http://www.iccnw.org/?mod=aggression> (last visited Oct. 13, 2010) (discussing the formation of the Special Working Group, as well as its purpose of continuing discussion of the definition of aggression).

23. *See* ICC, *supra* note 3, Annex I, art. 8 *bis* (defining the crime of aggression).

24. Ferencz, *supra* note 6, at 565–66.

25. Alberto L. Zuppi, *Aggression as International Crime: Unattainable Crusade or Finally*

to individual or collective self-defense,<sup>26</sup> unless authorized by the Security Council.<sup>27</sup> All other uses of force must therefore be prohibited by law and punished in court.<sup>28</sup> Benjamin B. Ferencz, a former prosecutor at Nuremberg, stressed this point on a normative level:

If peace is to be protected, it is essential that all national leaders be aware that individuals responsible for the crime of aggression will be held criminally accountable before the bar of international justice . . . . Unauthorized war-making is neither legal nor inevitable . . . . Many great military leaders have come to recognize that nations can no longer rely on the use of force but must turn to the rule of law if they are to survive. New forms of violence and terror pose increasing threats that emphasize the need for new thinking. As part of the movement toward a more just and humane world, those responsible for aggression must learn that they will no longer be immune . . . .<sup>29</sup>

The task before the ASP was indeed a vital one. Failure to adopt a workable definition would have extended to aggressors “a renewed license to wage illegal wars” with judicial impunity and would have sacrificed the combined efforts of the past sixty years.<sup>30</sup>

Yet despite the promise the new definition represents, there is reason for pause. As presently written, the definition of aggression focuses solely on state actors, providing, in relevant part, that the

“crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control

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*Conquering the Evil?*, 26 PENN ST. INT’L L. REV. 1, 2 (2007).

26. U.N. Charter art. 51.

27. *Id.* art. 39.

28. See Benjamin B. Ferencz, *Ending Impunity for the Crime of Aggression*, 41 CASE W. RES. J. INT’L L. 281, 288–89 (2009) (noting that the Security Council is institutionally incapable of remedying all breaches of international peace and that violent disputes are best adjudicated before a court of law).

29. Ferencz, *supra* note 6, at 566. Ferencz further recognizes that “punishing aggression . . . is an important component of a vast matrix which encompasses social justice, disarmament, and a system of effective enforcement,” all of which work toward eliminating wars. *Id.* Elsewhere, former U.S. President Dwight D. Eisenhower similarly warned, “[T]he world no longer has a choice between force and law. If civilization is to survive, it must choose the rule of law.” Statement by the President on the Observance of Law Day, 1958 PUB. PAPERS 362, 363 (Apr. 30, 1958).

30. Ferencz, *supra* note 28, at 290; see also Rome Statute of the ICC, *supra* note 14, pmbl. (“[T]he most serious crimes of concern to the international community as a whole must not go unpunished and . . . their effective prosecution must be ensured . . . to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . .”).

over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.<sup>31</sup>

The definition further refines the concept of an “act of aggression,” noting that it entails “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.”<sup>32</sup>

This definition is anachronistic, dangerous, and unworkable.<sup>33</sup> Its exclusive focus on state behavior creates an overly restricted conception of the crime that cannot be applied to the present reality of international armed conflict. Modern aggression is increasingly perpetrated by nonstate actors whose nature and characteristics place them outside the most widely accepted definition of the state. Even abandoning this traditional conception of statehood for a constructive interpretation cannot guarantee that the definition will encompass all relevant nonstate actors. Furthermore, applying a constructive interpretation of statehood to nonstate actors will generate one of two deleterious effects. If the constructive interpretation extends statehood to nonstate groups in the limited context of the Rome Statute, it will create an uncertain international environment in which a political entity can be simultaneously a state and a nonstate, and it will violate the fundamental principle of state sovereign equality. Alternatively, if the constructive interpretation extends statehood to nonstate groups in all contexts, it will inhibit the prosecution of aggression by entitling leaders of nonstate groups to sovereign immunity, and it will hamper efforts to eliminate international terrorism by granting terrorist organizations the right of self-preservation. Consequently, the ASP should rewrite the new definition of aggression to expressly include both states and nonstate groups.<sup>34</sup> This proposal would ensure that the definition is sufficiently

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31. ICC, *supra* note 3, Annex I, art. 8 *bis*, para. 1 (emphasis added).

32. *Id.* Annex I, art. 8 *bis*, para. 2 (emphasis added).

33. *See infra* Parts III–IV.

34. For example, the definition should read: “the ‘crime of aggression’ means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State or a Nonstate Group, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” Similarly, an act of aggression should be defined as “the use of armed force by a State or a Nonstate Group against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the



flexible to encompass the primary threat to international peace and security today—terrorism.

## II. SHIFTS IN THE STRUCTURE OF INTERNATIONAL ARMED CONFLICT

The structure of warfare is evolving. Though some commentators contend that the state remains an important, if no longer a dominant, actor,<sup>35</sup> the shift away from state centrism and toward a more decentralized form of conflict is evident.<sup>36</sup> As U.S. counterterrorism expert John Robb notes, “[W]ars between states are now, for all intents and purposes, obsolete.”<sup>37</sup> Instead, “[t]he real threat” is the rapid rise in global terrorism and the emergence of the independent, superempowered group.<sup>38</sup> Corroborating Robb’s prediction, Thomas X. Hammes, a retired U.S. Marine Corps colonel, observes, “[T]here have been major changes in who fights wars. The trend has been and continues to be downward from nation-states using huge, uniformed armies to small groups of like-minded people with no formal organization who simply choose to fight.”<sup>39</sup>

With the continuing decline of state-on-state warfare, independent terrorist organizations represent perhaps the greatest threat to international peace and security.<sup>40</sup> As demonstrated by the

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United Nations.”

35. See, e.g., PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 126, 146 (2008) (noting that asymmetric warfare is becoming the norm but suggesting that states will remain key players in international armed conflict, albeit in a different form).

36. See generally Weisbord, *supra* note 4, at 13–20 (providing an excellent and thorough summary of the structural, organizational, and methodological shifts warfare has undergone in the late twentieth and early twenty-first centuries).

37. JOHN ROBB, *BRAVE NEW WAR: THE NEXT STAGE OF TERRORISM AND THE END OF GLOBALIZATION* 7 (2007).

38. *Id.* Contra Tim Stephens, *International Criminal Law and the Response to International Terrorism*, 27 U. N.S.W. L.J. 454, 454 (2004) (“[T]he available statistics suggest that [terrorism] presents a less significant challenge to world order and wellbeing than is often supposed, and must therefore be kept in perspective alongside countless other global challenges to human security . . .”).

39. T.X. Hammes, *Fourth Generation Warfare Evolves, Fifth Emerges*, *MILITARY REV.*, May–June 2007, at 14, 20.

40. As used in this Note, “independent terrorist organizations” are those groups that are not merely extensions of a state. They may be sheltered, financed, or otherwise assisted by a state. They may be subject to a state’s laws and legal system, whether theoretically or in practice. But they operate independently of the state itself. Organizations like al Qaeda would be considered independent, whereas groups like Hamas would not. This Note is concerned exclusively with independent, non-state-sponsored terrorist organizations.

September 11, 2001, attacks on the United States; the July 7, 2005, attacks on the London transit system; and the bombings of trains in Spain and India on March 11, 2004, and July 11, 2006, respectively, independent terrorist groups are capable of inflicting significant harm on the states, communities, and individuals they target. Some, like al Qaeda, can launch attacks whose devastation rivals the military capabilities of many states.<sup>41</sup> For others, it is only a matter of time. “[A]s the leverage provided by technology increases,” Robb forecasts, the threat posed by international terrorism “will finally reach its culmination—with the ability of one man to declare war on the world and win.”<sup>42</sup>

The rise of global terrorism has cast doubt on the continued relevance of international law.<sup>43</sup> Former U.N. Secretary General Kofi Annan recognized the mounting crisis of faith in the international system, declaring before the General Assembly in 2003, “We have come to a fork in the road. This may be a moment no less decisive than in 1945 itself, when the United Nations was founded. . . . Now we must decide whether it is possible to continue on the basis agreed then, or whether radical changes are needed.”<sup>44</sup> Fundamentally, the task of defining the crime of aggression is an exercise in adaptation, reforming the international legal system to address contemporary threats to international peace and security.<sup>45</sup> To this end, the present definition is inadequate. Terrorism is essentially a belligerent activity<sup>46</sup> equivalent to the state-on-state violence proscribed by the current conception of aggression.<sup>47</sup> Therefore, terrorist organizations and like-minded groups should be expressly included in the definition of that offense.

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41. See Mark A. Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains?*, 41 CASE W. RES. J. INT'L L. 291, 306–07 (2009) (asserting that systemic attacks by nonstate actors like al Qaeda pose major threats to the international interests protected by criminalizing aggression: stability, security, human rights, and sovereignty).

42. ROBB, *supra* note 37, at 8.

43. Devika Hovell, *Chinks in the Armour: International Law, Terrorism and the Use of Force*, 27 U.N.S.W. L.J. 398, 398 (2004).

44. U.N. GAOR, 58th Sess., 7th plen. mtg. at 3, U.N. Doc. A/58/PV.7 (Sept. 23, 2003).

45. Cf. Rome Statute of the ICC, *supra* note 14, pmbl. (“[T]he most serious crimes of concern to the international community [including war crimes, crimes against humanity, genocide, and aggression] . . . must not go unpunished and . . . their effective prosecution must be ensured . . . to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . .”).

46. Caleb Carr, “*Terrorism*”: *Why the Definition Must Be Broad*, WORLD POL'Y J., Spring 2007, at 47, 47.

47. Drumbl, *supra* note 41, at 306–07.

Recognizing the “sociological changes in the character of modern war,” Professor Weisbord agrees that the new definition should be applied to nonstate groups.<sup>48</sup> Rather than expressly include these entities in the definition of aggression, however, he contends that so long as they possess statelike characteristics, the best course is to interpret the definition’s use of the term “State” constructively to encompass them.<sup>49</sup> The reasoning is sound. The delegates to the ASP are reluctant to reopen the debate when widespread acceptance of the current formulation has been achieved. Weisbord’s novel approach heeds these political concerns by infusing enough flexibility into the definition to allow it to adapt while largely preserving its original focus on state action.<sup>50</sup>

But this solution is problematic. Nonstate groups should be explicitly included in the definition of aggression alongside, but distinguishable from, states. Otherwise, the definition cannot be given proper effect because most independent terrorist organizations lack the characteristics necessary for classification as a state.<sup>51</sup>

### III. MODERN CONCEPTIONS OF STATEHOOD AND THEIR INAPPLICABILITY TO TERRORIST ORGANIZATIONS

It is easy to understand why many equate global terrorist organizations with the political and territorial entities traditionally considered states. Not only can they operate on the international plane in ways similar to many states—and often more effectively<sup>52</sup>—but they also possess many of the attributes associated with statehood. They are often well-funded and well-organized, command trained and willing forces, and have the potential to unleash devastating attacks whose character and scale would constitute a violation of the U.N. Charter if perpetrated by a state.<sup>53</sup> Some terrorist organizations, like Hamas and Hezbollah, have even gained significant governmental power.<sup>54</sup> Moreover, state officials have

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48. Weisbord, *supra* note 4, at 27.

49. *Id.* at 30.

50. *Id.* at 29–30.

51. *See infra* Part III.

52. LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE 306 (2008).

53. *See* Greg Travalio & John Altenburg, *Terrorism, State Responsibility, and the Use of Military Force*, 4 CHI. J. INT’L L. 97, 109, 115 (2003) (discussing the nature and characteristics of modern terrorist organizations).

54. Hamas has successfully wrested control of the Palestinian government in the Gaza Strip from other political parties. MAY, *supra* note 52, at 306.

blurred the distinction between these groups and their state supporters. Addressing the nation immediately following the events of September 11, 2001, President George W. Bush resolved to “make no distinction between the terrorists who committed these acts and those who harbor them.”<sup>55</sup> Echoing his superior’s call, Vice President Dick Cheney warned that “if you provide sanctuary to terrorists, you face the full wrath of the United States of America.”<sup>56</sup>

Being similar to a state, however, is not the same as being a state. “Since the development of the modern international system, statehood has been regarded as the paramount type of international personality . . . .”<sup>57</sup> It both implies a particular legal status and confers a panoply of rights and obligations that do not attach to nonstate actors. As demonstrated in the remainder of this Part, both legal and policy arguments militate against confounding terrorist organizations with states.<sup>58</sup>

#### A. *Difficulties Inherent in Classifying Terrorist Organizations as States under the Montevideo Convention*

Though statelike in many respects, international terrorist organizations lack the indicia that are legally dispositive of statehood. Perhaps the clearest and most widely accepted definition of statehood was adopted in Uruguay on December 26, 1933, in the Montevideo Convention on Rights and Duties of States (Montevideo Convention).<sup>59</sup> Article 1 enumerates four qualities that all states should possess: (1) a permanent population, (2) a defined territory, (3) an effective government, and (4) the capacity to enter into relations with other states.<sup>60</sup> Though the product of a regional agreement, these criteria have developed into customary international law and become a touchstone for the definition of a

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55. President George W. Bush, Address to the Nation on the Terrorist Attacks, 2 PUB. PAPERS 1099, 1100 (Sept. 11, 2001).

56. *Meet the Press* (NBC television broadcast Sept. 16, 2001) (transcript available at <http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20010916.html>).

57. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, at ix (2d ed. 2006).

58. *See infra* Part III.A–B.

59. Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19; *see also* Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403, 415 (1999) (“[C]itation to the Convention in contemporary discussions of statehood is nearly a reflex.” (footnote omitted)).

60. Convention on Rights and Duties of States, *supra* note 59, art. 1.

state.<sup>61</sup> Until they are supplanted as the authoritative statement of customary law on the subject, they should be employed to determine statehood whenever that designation is in question.<sup>62</sup> Under these four requirements, however, independent terrorist organizations do not qualify as states. To illustrate this conclusion, this Section will consider each element and its inapplicability to terrorist groups.

1. *Permanent Population.* States are inherently “aggregates of individuals,” and no state can exist without a permanent population.<sup>63</sup> In general, the bounds of this requirement are flexible. Neither the Montevideo Convention nor customary international law mandates a minimum population size,<sup>64</sup> and the international community does not require that a population be settled to be considered permanent.<sup>65</sup> Under this criterion, a region inhabited entirely by wandering nomads, for example, would be as eligible for statehood as any other.<sup>66</sup> In at least one important respect, however, this first requirement is strict: an entity’s population must reside within some territory over which that entity has exclusive governmental control.<sup>67</sup>

2. *Defined Territory.* In addition to being a collection of individual citizens, states are fundamentally “territorial entities.”<sup>68</sup> And as with the requirement of a permanent population, the strictures placed on this territorial prerequisite are few. Borders need not be clearly defined or undisputed, and the territory need not be

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61. See JOSHUA CASTELLINO, *INTERNATIONAL LAW AND SELF-DETERMINATION: THE INTERPLAY OF THE POLITICS OF TERRITORIAL POSSESSION WITH FORMULATIONS OF POST-COLONIAL ‘NATIONAL’ IDENTITY* 77 (2000) (“The Montevideo Convention is considered to be reflecting, in general terms, the requirements of statehood in customary international law.”).

62. *But see* Grant, *supra* note 59, at 434–47 (acknowledging that some authors question the normative reach of the Montevideo Convention and summarizing the main challenges to its general applicability).

63. CRAWFORD, *supra* note 57, at 52.

64. See JOHN DUGARD, *INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* 83 (3d ed. 2005) (noting that no minimum population is required for statehood).

65. Pamela Epstein, *Behind Closed Doors: “Autonomous Colonization” in Post United Nations Era—The Case for Western Sahara*, 15 ANN. SURV. INT’L & COMP. L. 107, 119–20 (2009).

66. *Id.* at 120.

67. See Lucian C. Martinez, Jr., *Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?*, 44 TEX. INT’L L.J. 123, 149 (2008) (“If the territorial element of sovereignty is absent, the requirement of a permanent population is at best abstract.”).

68. CRAWFORD, *supra* note 57, at 46.

contiguous.<sup>69</sup> Nor is there any minimum area over which an entity must exercise full governmental control.<sup>70</sup> Indeed, Vatican City—the world’s smallest state—possesses a mere 0.25 square miles.<sup>71</sup>

Despite these lax conditions, however, independent terrorist organizations—including al Qaeda, the most formidable among them—cannot fulfill the territorial requirement. They persist instead in a parasitic relationship with a host state that is unwilling or unable to dislodge them. A “condition of [the] organizational existence” of independent terrorist groups, writes Professor Philip B. Heymann, is “a sheltering country such as Syria, Iraq, or Iran.”<sup>72</sup> The terrorists who executed the attacks of September 11 “needed a haven, Afghanistan, that would permit the planning and financing of an attack.”<sup>73</sup> Somewhere, terrorists must develop their plans, store their weapons and provisions, train, house, and feed their fighters, and hide their leaders.<sup>74</sup> In short, they must operate from the territory of some state, for independent terrorist organizations possess none of their own.<sup>75</sup>

3. *Effective Government.* Even assuming that a terrorist organization could claim a permanent population and a defined region, it could not qualify as a state unless it exercised full governmental control over its territory, independent of any external authority.<sup>76</sup> International law does not specify any particular form, nature, or extent of this control, but it does mandate that a state government maintain at least some degree of law and order and establish basic institutions.<sup>77</sup> Unlike states, independent terrorist organizations are concerned with neither of these goals. They are “led by individuals who . . . display an utter disregard for both human life and the rule of law.”<sup>78</sup> Perhaps more importantly, the illegality of their existence dictates that they must maintain secrecy to evade capture.<sup>79</sup>

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69. DUGARD, *supra* note 64, at 83.

70. CRAWFORD, *supra* note 57, at 46.

71. *See id.* at 47 tbl.1 (noting that Vatican City possesses 0.4 square kilometers).

72. Philip B. Heymann, *Dealing with Terrorism: An Overview*, 26 INT’L SECURITY 24, 25 (2001).

73. *Id.* at 26.

74. Travalio & Altenburg, *supra* note 53, at 98.

75. *Id.*

76. DUGARD, *supra* note 64, at 83–84.

77. CRAWFORD, *supra* note 57, at 59.

78. Travalio & Altenburg, *supra* note 53, at 115.

79. Heymann, *supra* note 72, at 28, 33–37.

Terrorist organizations are consequently highly decentralized entities with no permanent institutions, infrastructure, or any other indicia of a coherent form of overarching government.<sup>80</sup> Al Qaeda, for instance, is comprised of “hundreds of mercurial cells”<sup>81</sup> that form “a loosely knit, diffuse, informal network, spread over many countries.”<sup>82</sup> In short, the objectives and organizational structure of terrorist groups are readily distinguishable from those of any known form of viable state government. Effective governmental control, however, represents the central element of statehood, for it is the criterion on which the other three indicia depend.<sup>83</sup> As such, the inability of independent terrorist organizations to meet this requirement is particularly dispositive of their disqualification for statehood.<sup>84</sup>

4. *Capacity to Enter into Relations with Other States.* Finally, to be considered a state, a political entity must possess the capacity to enter into relations with other states. Although this power is no longer an exclusive state prerogative,<sup>85</sup> it nonetheless remains a useful criterion insofar as it combines the requirement of governmental control with an element of independence.<sup>86</sup> As the former has been elucidated already,<sup>87</sup> only the latter will be discussed here.

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80. See Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1799 (2005) (“It is unlikely . . . that members of a single Al Qaeda cell will know of the existence, much less the particular activities, of any other cell; that is the very point of organizing a movement into a clandestine network of cells.”); Weisbord, *supra* note 4, at 16 (“It is less complex to attack a government, which has permanent institutions and infrastructure, than the hundreds of mercurial cells that make up al Qaeda.”); *Meet the Press*, *supra* note 56 (noting that while Osama bin Laden organized and heads al Qaeda, it is really “a very broad, kind of loose coalition of groupings”).

81. Weisbord, *supra* note 4, at 16.

82. Osiel, *supra* note 80, at 1799. See generally DANIEL BENJAMIN & STEVEN SIMON, *THE AGE OF SACRED TERROR: RADICAL ISLAM’S WAR AGAINST AMERICA* 167–70 (2003) (describing the evolution of al Qaeda’s organizational structure and highlighting its lack of discernable command and control).

83. CRAWFORD, *supra* note 57, at 56.

84. See *id.* at 62 (“Independence is the central criterion for statehood.” (footnote omitted)).

85. See Manuel Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 44 BRIT. Y.B. INT’L L. 111, 123 (1970) (“International organizations have concluded treaties, . . . convened international conferences with representatives of States and other international organizations, . . . sent diplomatic representatives to member and nonmember States and received permanent missions from member States.”).

86. CRAWFORD, *supra* note 57, at 62.

87. See *supra* Part III.A.3.

Independence is comprised of two subelements. The first is the entity's separate existence within the international community, borne out by the exercise of effective governmental control over a permanent population and a defined territory.<sup>88</sup> As previously explained, terrorist organizations can rarely fulfill these conditions.<sup>89</sup> Nor can they demonstrate the second subelement of independence—freedom from the authority of another state.<sup>90</sup> Although terrorist groups may be independent insofar as their operations are not dictated by any particular state, the existence of most such organizations is predicated on the willingness of states to support and shelter them.<sup>91</sup> The U.S. Congress implicitly recognized this when it authorized the use of military force against both terrorist organizations and the states that assist them.<sup>92</sup> Other terrorist organizations operate within the borders of a state that is unaware of their existence or unable to control their presence. Regardless of which scenario prevails, all of these entities are necessarily within the domain of a state and are therefore subject to external control.<sup>93</sup> An entity may demonstrate considerable freedom in both internal and external affairs and yet remain formally dependent on another entity and subject to that other entity's control.<sup>94</sup>

Furthermore, the level of independence an entity must demonstrate is heavily dependent on context. According to Professor James Crawford, "it is important to distinguish independence as an initial qualification for statehood and as a condition for continued existence. A new State . . . will have to demonstrate substantial independence . . . before it will be regarded as definitively created," whereas an existing one will not.<sup>95</sup> An independent terrorist organization would have to be recognized as a new state and would

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88. CRAWFORD, *supra* note 57, at 66.

89. *See supra* Part III.A.1–3.

90. CRAWFORD, *supra* note 57, at 66.

91. *See supra* notes 72–75 and accompanying text.

92. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)) ("[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.").

93. *See* Travalio & Altenburg, *supra* note 53, at 98 (noting that terrorist organizations must operate from "the territory of *some* state").

94. CRAWFORD, *supra* note 57, at 66.

95. *Id.* at 63.



thus carry a heavy burden to prove its independence. Given the numerous factors weighing against independence for terrorist organizations, few would surmount this obstacle.

In sum, whether an international terrorist organization can fulfill these four widely accepted characteristics of statehood is doubtful. Not only do these entities frequently lack a permanent population and a defined territory, but they also rarely display the governmental control and independence that represent the most vital elements of statehood. Unable to meet any of the four requirements of the Montevideo Convention, most terrorist organizations cannot be considered states.

*B. Difficulties Inherent in Applying a Dynamic Conception of Statehood*

Because the four criteria of the Montevideo Convention collectively represent the customary and most widely recognized benchmarks of statehood, they should be used to interpret the term “State” in the definition of aggression. Yet the law governing the creation of states is exceedingly complex,<sup>96</sup> and the four factors enumerated in 1933 have been the subject of intense scrutiny.<sup>97</sup> Although numerous scholars have argued that a mechanical application of the Montevideo Convention is not alone dispositive of statehood, most avoid supplanting the Convention altogether, choosing instead to de-emphasize some of its criteria while appending new ones.<sup>98</sup> But at least one academic commentator suggests that it is outright irrelevant. Professor Philip Bobbitt, a renowned military historian and legal scholar, argues that “[t]he State has undergone many transformations in . . . the basis for [its] legitimacy . . . [and n]ow it is about to undergo another.”<sup>99</sup> Bobbitt inquires whether al Qaeda

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96. *See id.* at x (recognizing that numerous factors beyond mere effectiveness must be considered); DUGARD, *supra* note 64, at 82–83 (suggesting that emerging states must now demonstrate compliance with the standards and expectations of the international community on issues of human rights and self-determination in addition to the traditional criteria of the Montevideo Convention); William Thomas Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT’L L.J. 115, 158 (2009) (acknowledging that there is a lack of consensus within the international community on the criteria for statehood).

97. *See generally* Grant, *supra* note 59, at 434–47 (surveying the charges levied against the Montevideo Convention).

98. *See id.* at 434–53 (outlining the approaches of several different schools of thought and implicitly demonstrating that none rejects the Montevideo Convention completely).

99. BOBBITT, *supra* note 35, at 126.

could exemplify this new concept of statehood.<sup>100</sup> Professor Weisbord responds in the affirmative, arguing that “Bobbitt’s dynamic conception of the state may offer diplomats drafting the definition of the crime [of aggression] and jurists interpreting it a way to include acts by al Qaeda-like groups within its ambit.”<sup>101</sup> For the reasons set forth in this Section, this view is not as promising as it initially appears; in fact, it carries several adverse effects. Thus, the scope of the term “State” as used in the definition of aggression should instead be restricted by close adherence to the Montevideo Convention.

Professor Bobbitt asserts that statehood is based on constitutional orders and that those orders invariably change when the foundations on which they rest are no longer viable.<sup>102</sup> The dominant constitutional order today is the nation-state, which is built on maximizing the welfare of its people.<sup>103</sup> To fulfill this promise, the nation-state must guarantee national security and shield its society from transnational perils.<sup>104</sup> The shift in strategic threats facing states,<sup>105</sup> however, has undermined their ability to achieve those ends.<sup>106</sup> As Bobbitt observes, “Bandits, robbers, guerillas, [and] gangs have always been part of the domestic security environment. What is new is their access to mechanized weapons . . . and the unique political role of such groups . . . . Against these threats, the nation-state is too muscle-bound and too much observed to be of much use.”<sup>107</sup> As a result, the present constitutional order is slowly decaying, and “a new form is being born.”<sup>108</sup> That new form is the market-state, a constitutional order premised not on securing the welfare of the people, but on maximizing the opportunities available to them.<sup>109</sup> What exactly constitutes opportunity maximization depends on the

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100. *Id.*

101. Weisbord, *supra* note 4, at 15.

102. See PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 346–47 (2002) (providing a graphical outline of Bobbitt’s thesis); *cf. id.* at 213 (“The reason that the constitutional order of the nation-state is undergoing a transformation is that it faces a crisis of legitimation.”).

103. *Id.* at 61–63.

104. *Id.* at 228.

105. See *supra* Part II.

106. See BOBBITT, *supra* note 102, at 16–17 (observing that the new strategic environment that now prevails has a significant impact on the state and is causing the nation-state to wither).

107. *Id.* at 219.

108. *Id.* at 17.

109. *Id.* at 229.

shared values of a particular political entity.<sup>110</sup> If opportunity maximization is the sole indication of statehood in this new constitutional order, then terrorist organizations are correctly captured by the term “State” in the definition of aggression. These groups are political entities whose members share common values and objectives, however reprehensible they may be. As such, terrorist organizations can be said to maximize opportunities for their adherents and therefore to qualify as states. But to reach this conclusion is to commit two errors. First, it is to discount another indicium of state legitimacy that has not faltered with the passing of the nation-state: the legitimate use of violence. Second, it is to ignore the widely divergent forms that terrorism can adopt and the consequent difficulty of capturing them all within a coherent conception of statehood. This Section considers each in turn.

Professor Bobbitt stresses throughout his work the importance of violence in the rise and fall of constitutional orders and the existence of states within them. Encapsulating this argument, he contends that “[t]he constitutional order of a state and its strategic posture toward other states together form the inner and outer membrane of a state. That membrane is secured by violence; without that security, a state ceases to exist.”<sup>111</sup> A political entity, however, must exercise force in accordance with the strictures of international law: “What is distinctive about the State is the requirement that the violence it deploys on its behalf must be legitimate; that is, it must be accepted within as a matter of law, and accepted without as an appropriate act of state sovereignty.”<sup>112</sup>

The violence employed by terrorist organizations does not meet this requirement. Although it may be accepted within a terrorist organization—and without, by similar collectives and a few states—the international community as a whole has denounced terrorist violence as per se illegitimate. In December 1984, for example, the General Assembly, the only U.N. organ in which all member states have equal representation, passed Resolution 39/159, which “[r]esolutely condemns policies and practices of terrorism in relations between States as a method of dealing with other States and peoples.”<sup>113</sup> By the end of the following year, the General Assembly

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110. See *id.* at 669 (giving examples of different conceptions of opportunity maximization).

111. *Id.* at 16–17.

112. *Id.* at 17.

113. G.A. Res. 39/159, ¶ 1, U.N. Doc. A/RES/39/159 (Dec. 17, 1984).

had extended an unequivocal denunciation to all acts of international terrorism.<sup>114</sup> With a Comprehensive Convention on the International Suppression of Terrorism currently being drafted,<sup>115</sup> it is evident that the international community's stance on global terrorism has not weakened. Unable to exercise legitimate force, a terrorist organization cannot secure the constitutional order and strategic posture necessary to be considered a state under Bobbitt's construction.

Second, even if Professor Bobbitt's interpretation of statehood successfully captured some current nonstate groups, it is too narrow to encompass all of them. The author himself emphasizes that "just what particular form of the State ultimately emerges from" the transition between the nation- and the market-state "cannot confidently be predicted."<sup>116</sup> That some formidable groups of political dissidents will remain outside the new constitutional order is unavoidable, for although the underlying basis of state legitimacy has evolved over time,<sup>117</sup> international terrorism has persisted as a largely nonstate-driven phenomenon.<sup>118</sup> Thus, it is unlikely that most terrorist organizations would be captured in a dynamic theory of statehood:

[Terrorism exists] in different shapes and contexts, with different actors and different modes of operation. When it seemed that the only kind of terrorism we should focus upon was the global 'innovative' terrorism of September 11, the recent events in Iraq, Palestine, and Lebanon remind us that . . . the plague of terrorism can become virulent and acute after periods of dormancy, and that it can reappear with mutant strains, against which antibodies and existing drugs turn out to be impotent.<sup>119</sup>

Because "the same concept of 'terrorism' is applied to radically different phenomena," capturing each of its iterations in a single

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114. G.A. Res. 40/61, ¶ 1, U.N. Doc. A/RES/40/61 (Dec. 9, 1985) ("[The General Assembly] [u]nequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed . . .").

115. U.N. GAOR, 6th Comm., 55th Sess., Agenda Item 166, U.N. Doc. A/C.6/55/1 (Aug. 28, 2000).

116. BOBBITT, *supra* note 102, at 233.

117. *See supra* note 102 and accompanying text.

118. *See* Audrey Kurth Cronin, *Behind the Curve: Globalization and International Terrorism*, 27 INT'L SECURITY 30, 34-42 (2002) (discussing the origins and historical evolution of international terrorism).

119. Roberto Toscano, *A War Against What?*, WORLD POL'Y J., Spring 2007, at 40, 40.

model of statehood is impossible.<sup>120</sup> Abandoning the Montevideo Convention in favor of Bobbitt's dynamic conception of statehood thus provides no guarantee that all terrorist organizations will be included within the definition of aggression. Some will inevitably remain beyond the fray.

Consequently, a definition of the crime of aggression that makes exclusive reference to state behavior will not extend to these entities. This outcome would be acceptable if terrorist organizations traditionally posed little danger to the existence of sovereign states, with the modern threats representing a historical anomaly that will be erased by the emergence of the market-state. Professor Bobbitt's own extensive survey of the historical record, however, demonstrates that international terrorism has not lain dormant since its ancient inception, but instead has thrived in its ability to challenge the survival of states, irrespective of their form.<sup>121</sup> From Gavrilo Princip's assassination of Austrian Archduke Franz Ferdinand, to Osama bin Laden's attacks of September 11, international terrorism has repeatedly sparked the epochal wars to which Bobbitt attributes the shifts in constitutional order.<sup>122</sup> Hence, even if one interpreted "State" dynamically, there is every indication that the terrorist groups excluded from its reach would be able to threaten the new market-state as well. The definition of aggression should therefore be expanded to expressly account for them.

In short, Professor Bobbitt's unique understanding of statehood provides little assistance to those who would attempt to use a dynamic conception of the state to generate flexibility in the definition of aggression. Bobbitt's approach ignores the fact that many nonstate entities—including terrorist organizations—cannot legitimately use force and leaves at least some potential nonstate aggressors beyond the definition's reach. Whether terrorist

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120. *Id.* Evincing the difficulty of capturing all forms of terrorism in a single definition, the Draft Comprehensive Convention on International Terrorism defines the phenomenon with regard to the acts that terrorists commit—death or serious bodily harm, or serious damage to a state or government facility or to public infrastructure, caused with the intent of intimidating a population or compelling a government or international organization to act or refrain from acting—rather than with regard to any organizational attributes that terrorist groups share. U.N. GAOR 6th Comm., *supra* note 115, art. 2, para. 1.

121. *See* BOBBITT, *supra* note 102, at 346–47 (demonstrating that the rise and fall of constitutional orders has historically coincided with, and been dictated by, the outcome of epochal wars).

122. *See id.* (listing the epochal wars sparked by these events and illustrating their connection with the rise and fall of constitutional orders).

organizations can be considered states is as questionable under this approach as it is under the Montevideo Convention. What is more, any reinterpretation—or outright abandonment—of the Convention for use in the definition of aggression should be avoided. Although developed outside the international criminal law context,<sup>123</sup> the multifactor test established by the Montevideo Convention remains the most widely accepted formulation of statehood.<sup>124</sup> Applying the Convention, however, generates problems of its own. Not only do independent terrorist organizations by their nature fall outside the Convention's parameters,<sup>125</sup> but forcing them into that framework also threatens to undermine the notion of statehood in international law and jeopardizes efforts to prosecute aggression and combat terrorism.

#### IV. DANGERS OF CONFERRING STATEHOOD UPON TERRORIST ORGANIZATIONS

The consequences of classifying terrorist organizations as states suggest that the ASP should reconsider the new definition. Regardless of how it is applied in practice, the current formulation carries drawbacks that militate strongly against its use. On the one hand, extending statehood to terrorist groups for the limited purpose of prosecution before the ICC generates uncertainty in the international system and undermines the equality of states. But on the other, the alternative of conferring statehood on terrorist organizations for all purposes endangers both the effective prosecution of aggression and the long-term success of the international community's battle against terrorism. In light of these challenges, the ASP should amend the new definition of aggression and its exclusive reference to state behavior and should instead explicitly include both states and nonstate groups within the scope of the offense.

##### A. *Risks Posed by Conferring Limited Statehood*

Professor Weisbord notes that no one believes that the ICC can independently confer statehood. Using the definition of aggression as presently written, ICC judges would instead determine an entity's

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123. See Convention on Rights and Duties of States, *supra* note 59, pmb1. (stating that the agreement was an effort to outline the rights and duties of states); Grant, *supra* note 59, at 414–18 (tracing the origins and development of the Montevideo requirements).

124. See *supra* note 59 and accompanying text.

125. See *supra* Part III.A.

status as a state strictly for the purpose of criminal prosecution before the court.<sup>126</sup> For two significant reasons, this restricted approach is flawed.

Although signed in 1933, the Montevideo Convention still provides the most widely accepted definition of statehood.<sup>127</sup> Producing a new framework for exclusive use in international criminal law risks creating what renowned international legal scholar Hersch Lauterpacht described as a “grotesque spectacle”<sup>128</sup>—namely, a legal milieu in which an entity is simultaneously a state and a nonstate.<sup>129</sup> It leaves the international community to wonder which legal status prevails in which contexts. Such ambiguity is undesirable in an international system predicated on order and stability.<sup>130</sup> Not only is this uncertainty a “grave reflection upon international law” that counsels strongly against developing a new concept of statehood for use exclusively with the Rome Statute,<sup>131</sup> but interpreting statehood differently in different contexts also violates sovereign equality.

The equality of states is a foundational principle of international law.<sup>132</sup> Some legal theorists attribute its existence to the inherent quality of the state as an international person. Others avoid the difficulty of pinpointing its origins and merely accept its existence.<sup>133</sup> Whatever its roots, the meaning of sovereign equality is clear: all political entities considered states possess equal rights and

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126. E-mail from Noah Weisbord, Visiting Assistant Professor, Duke Univ. School of Law, to Author (Jan. 7, 2010) (on file with the *Duke Law Journal*).

127. See *supra* note 59 and accompanying text.

128. HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 78 (1947).

129. Commenting on a previous draft of this Note, Professor Weisbord cautioned that perhaps it is not the definition of aggression that is antiquated, but rather the Montevideo Convention. Whether this is accurate is somewhat beside the point. The task of the ASP was not to reformulate the conception of statehood, but to adopt a definition of aggression that accords with accepted international law. Supplementing that definition with a special test for determining statehood risks creating uncertainty in other contexts in which statehood is not specifically defined. See DUGARD, *supra* note 64, at 91 (observing that classifying an entity as a state in some contexts but not in others generates unwanted ambiguity). Given that a generally accepted definition of a state already exists, if it is to be modernized, it should be done through the agreement of the international community as a whole.

130. *Id.*; see also BULL, *supra* note 2, at 96–97 (noting that order in social life is a necessary condition for secondary goals like justice).

131. LAUTERPACHT, *supra* note 128, at 78.

132. EDWIN DEWITT DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 100 (1920).

133. See *id.* at 101–03 (summarizing the views of prominent publicists on the origin and existence of sovereign equality).

obligations.<sup>134</sup> Practical reality, however, dictates that such absolute equality is impossible.<sup>135</sup> The proper understanding of sovereign equality is therefore that “all [states] have potentially the same rights, that they have an equal power of realizing them, and that they ought to be able to [realize and] exercise them with the same inviolability.”<sup>136</sup> Classifying terrorist organizations as states exclusively for prosecution before the ICC, as Professor Weisbord suggests the ICC judges will do, directly contradicts this accepted norm. It confers upon these groups the duties and obligations of statehood with none of the rights, relegating them to a position of inferiority.

This effect is neither just nor valid under international law. Irrespective of the comparative size or strength of states, any superiority or limitation not common to all is unlawful.<sup>137</sup> “What is lawful or unjust for one state,” agreed Argentine publicist and historian Carlos Calvo, “is equally lawful or unjust for all other states, regardless of which states are powerful or which states possess only a secondary rank.”<sup>138</sup> No characteristic can justify the slightest deprivation of the moral or juridical personality of a state.<sup>139</sup> If terrorist organizations are to be considered states under the definition of aggression, they must be automatically entitled to every right attaching to that legal status. To conclude otherwise is to violate accepted norms of international law. Worse, it is to destroy the very foundations upon which the international system is built, for to violate the sovereign equality of states, Italian jurist Giuseppe Carnazza-Amari observed, “is to destroy the very constitution of human kind and of states.”<sup>140</sup>

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134. *Id.* at 108 (quoting 1 PASQUALE FIORE, TRATTATO DI DIRITTO INTERNAZIONALE PUBBLICO 289 (4th ed. 1904)).

135. *See id.* at 106 (“Of course the publicists do not really mean that states have identical legal rights and obligations, for that is manifestly inconceivable.”).

136. *Id.* at 107 (quoting 2 PAUL PRADIER-FODÉRE, TRAITÉ DE DROIT INTERNATIONAL PUBLIC EUROPÉEN ET AMÉRICAIN § 449 (Paris, G. Pedine-Launel 1885)).

137. *Id.* at 108 (quoting FIORE, *supra* note 134, at 289) (“Whether states are great or small, weak or strong, a superiority or limitation not common to all cannot be lawful.”).

138. CHARLES [CARLOS] CALVO, DICTIONNAIRE MANUEL DE DIPLOMATIE ET DE DROIT INTERNATIONAL PUBLIC ET PRIVÉ 161 (Lawbook Exch., Ltd. 2009) (1885) (translated from the French: “Ce qui est licite ou injuste pour un Etat l’est également pour tous les autres, sans distinction des nations qui sont puissantes ou de celles qui n’occupent qu’un rang secondaire . . .” (Author’s translation)).

139. *Id.*

140. DICKINSON, *supra* note 132, at 107 (quoting GIUSEPPE CARNAZZA-AMARI, TRATTATO SUL DIRITTO INTERNAZIONALE PUBBLICO DI PACE 278 (Milano, V. Maisner E. Compagnia Editori 2d ed. 1875)); *see also* BULL, *supra* note 2, at 91 (“The structure of



Defining the crime of aggression exclusively with regard to states and classifying terrorist organizations as such for prosecution before the ICC but for no other purpose is unjust and invalid. As the judicial embodiment of the international community, the ICC can ill afford to undermine the system it represents, particularly considering the court's quest for legitimacy<sup>141</sup> and the "mounting crisis of faith facing the international system."<sup>142</sup> But as demonstrated in this Section, developing a new concept of statehood for use exclusively with the Rome Statute does precisely that. ICC judges should therefore abandon this approach. If terrorist organizations are to be considered states under the definition of aggression, then they must be accorded statehood for all other purposes and with all attendant rights and obligations. Yet, although designating terrorist organizations as states in one context but not others should be avoided, the alternative—conferring full statehood upon them—is equally undesirable.

### *B. Risks Posed by Conferring Complete Statehood*

Treating terrorist organizations as states in all contexts creates two substantial problems. First, it threatens the effective prosecution of aggression. The ICC's jurisdictional constraints suggest that national legal systems must carry the primary responsibility for prosecuting aggression.<sup>143</sup> In fact, the court is explicitly predicated on the primacy of national courts.<sup>144</sup> If terrorist organizations were granted complete statehood, terrorist leaders who commit the crime of aggression would likely be able to bar domestic jurisdiction by invoking sovereign immunity and thus escape prosecution for their actions.<sup>145</sup> Second, conferring complete statehood on terrorist groups

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international coexistence . . . itself depends on norms or rules conferring rights and duties upon states . . .").

141. This is demonstrated by the desperate concern for the court's legitimacy conveyed by international legal scholars. See, e.g., Claus Kress, *The Crime of Aggression Before the First Review of the ICC Statute*, 20 LEIDEN J. INT'L L. 851, 862–63 (2007) (exploring legitimacy concerns in the context of aggression proceedings).

142. Hovell, *supra* note 43, at 399; see also *id.* (noting that the international community is questioning the continued efficacy of the current international legal framework and its long-term viability in contemporary world affairs).

143. See *infra* Part IV.B.1.a.

144. See Rome Statute of the ICC, *supra* note 14, art. 1 (providing that the ICC's jurisdiction complements, but does not supersede, national criminal jurisdiction); *Implementation of the Rome Statute*, COAL. FOR THE ICC, <http://www.iccnw.org/?mod=romeimplementation> (last visited Oct. 13, 2010) (noting that the ICC is a court of last resort).

145. See *infra* Part IV.B.1.b.

endangers the success of the worldwide struggle against them, for it provides those entities with the right of self-preservation.<sup>146</sup> Both considerations demonstrate that the only solution is a remodeling of the crime.

1. *Threats to Effective Prosecution of Aggression.*

*a. Jurisdictional Limitations.* The ICC is intended to complement national criminal courts and provide an overarching judicial structure that guarantees the effective prosecution of the four core international crimes.<sup>147</sup> To this end, its jurisdictional provisions are far-reaching.<sup>148</sup> With respect to the crime of aggression, in particular, Article 15 of the Rome Statute—as amended at the Kampala Review Conference—creates a broad jurisdictional structure that allows the ICC to exercise jurisdiction when a case is referred to the ICC Prosecutor by the Security Council or a state party to the Rome Statute, or when the Prosecutor initiates an investigation *proprio motu*.<sup>149</sup> But under this complex jurisdictional fabric, the ICC’s ability to try acts of aggression is limited in two critical respects. First, a state that is not party to the Rome Statute may not refer, and the ICC Prosecutor may not investigate *proprio motu*, alleged crimes of aggression committed on the territory of that nonparty state. Second, a state party to the Rome Statute may not refer, and the Prosecutor may not investigate *proprio motu*, alleged crimes of aggression committed by the nationals of a nonparty state.<sup>150</sup> In the contemporary context of international terrorism, both jurisdictional constraints curtail the ICC’s ability to prosecute acts of aggression.

Many major targets of international terrorism, including the United States, Russia, Israel, India, and Pakistan, are not parties to the Rome Statute. Neither is a host of other countries that have been

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146. See *infra* Part IV.B.2.

147. See Rome Statute of the ICC, *supra* note 14, pmbl., art. 5.

148. See *id.* arts. 12, 13 (establishing broad jurisdictional provisions and noting that the court may exercise jurisdiction if a matter is referred to the ICC Prosecutor by a state party or by the Security Council acting under Chapter VII of the U.N. Charter, or if the Prosecutor initiates an investigation *proprio motu*); ICC, *supra* note 3, Annex I, art. 15 (amending Article 15 of the Rome Statute to create a broad jurisdictional provision that applies specifically to the crime of aggression).

149. ICC, *supra* note 3, Annex I, art. 15.

150. *Id.* Annex I, art. 15 *bis*, para. 5 (“In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.”)

targets of large-scale terrorist attacks, including China, Iraq, Turkey, and Sudan.<sup>151</sup> The first jurisdictional limitation will bar these states from referring potential cases of aggression to the ICC Prosecutor and will prevent the Prosecutor from initiating investigations *proprio motu*. But because some major target states, including Afghanistan and the United Kingdom, are party to the Rome Statute and likely to adopt the new definition of aggression, the constraints imposed by this first limitation will be somewhat mitigated.

Unfortunately, the effects of the second jurisdictional limitation will be much less restrained. If terrorist organizations were granted full statehood, they would have to accede to the Rome Statute and accept the new definition of aggression before a state party could refer, or the ICC Prosecutor could investigate *proprio motu*, an act of violence committed by them. This would almost certainly not occur. Terrorist groups resort to frequent use of force; indeed, their very existence is premised on violence.<sup>152</sup> Because signing onto the Rome Statute would subject their leaders to prosecution for the large-scale attacks they orchestrate, and might even jeopardize their continued existence,<sup>153</sup> no terrorist organization would take the risk.<sup>154</sup> Together,

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151. See 3 UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, at 179–81, U.N. Doc ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009) (listing the countries that are parties to the Rome Statute). See generally UNIV. OF MD. GLOBAL TERRORISM DATABASE, <http://www.start.umd.edu/gtd> (last visited Oct. 13, 2010) (providing a detailed database of terrorist incidents worldwide); *Worldwide Incidents Tracking System*, NAT'L COUNTERTERRORISM CENTER, <https://wits.nctc.gov/FederalDiscoverWITS/index.do?N=0> (last visited Oct. 13, 2010) (providing another database of terrorist incidents worldwide).

152. See Roberto Toscano, *More on Defining Terror*, WORLD POL'Y J., Fall 2007, at 111, 111 (suggesting that terrorist groups resort to force and violence to achieve their objectives (referencing historian Caleb Carr)).

153. See S.C. Res. 1373, ¶ 2(e), U.N. Doc. S/RES/1373 (Sept. 28, 2001) (requiring that, as a means of eliminating terrorism, all states criminalize it and prosecute its perpetrators).

154. Some may argue that terrorist organizations, as weak states, have an incentive to accede to the Rome Statute and accept the new definition of aggression in order to obtain the legal protections the Statute and definition provide. See, e.g., Ferencz, *supra* note 14 (noting that, when drafting the Rome Statute, “[w]eak states” supported the inclusion of aggression in Article 5(2) because they “wanted a firm legal shield to protect them from aggressors”). Indeed, terrorism is a tactic employed by those too weak to achieve their objectives through legal or otherwise legitimate means. By becoming parties to the Rome Statute and adopting the new definition of aggression, these weak entities might obtain some of the legal protections they need to fulfill their goals without resorting to violence. The contention here, however, is that the terrorist organizations capable of committing acts of aggression are fundamentally unique entities whose needs and desires cannot be satiated by legal guarantees. The objective of these groups is not to coexist with the larger, more powerful states, but to shape and direct their policies or destroy them altogether. See Max Abrahms, *What Terrorists Really Want: Terrorist*

these observations suggest that, if granted complete statehood, terrorist organizations would often escape prosecution before the ICC by targeting states that are not parties to the Rome Statute and by refusing to accede to that agreement themselves. The result would be that many cases would evade the court's jurisdiction.

Perhaps recognizing the deleterious effects these two limitations would have on the ICC's ability to exercise jurisdiction over independent terrorist groups, amended Article 15 expands the court's jurisdictional reach under two alternative conditions: the ICC Prosecutor may initiate a case involving any act of transnational violence committed by any state if (1) the Security Council refers the case,<sup>155</sup> or (2) the Security Council declares the violence an act of aggression.<sup>156</sup> Unfortunately, however, both provisions are themselves quite restricted.

First, the Security Council has referred only one case to the ICC Prosecutor since the Rome Statute entered into force in 2002.<sup>157</sup> It is therefore unclear how often the court's jurisdictional limitations will be circumvented by this method. Second, the Security Council historically has been unable or unwilling to recognize an armed attack as an act of aggression. From its inception, it has expressly

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*Motives and Counterterrorism Strategy*, 32 INT'L SECURITY 78, 82, (2008) (“[T]errorist organizations . . . seldom seize opportunities to become productive nonviolent political parties . . . [and] reflexively reject compromise proposals offering significant policy concessions by the target government.”); Toscano, *supra* note 152, at 111 (defining terrorism as “warfare deliberately waged against civilians with the purpose of destroying their will to support either leaders or policies that the agents of such violence find objectionable” (quoting historian Caleb Carr)); Travalio & Altenburg, *supra* note 53, at 97 (“Al Qaeda’s goals are not to conquer territory, control resources, nor even further traditional political or ideological purposes. They seek weapons of mass destruction—not as deterrents against the actions of other states—but for use at times and in places calculated to cause maximum destruction and horror.”). Signing onto the Rome Statute and the new definition of aggression might protect these terrorist organizations from attacks by stronger states, but it would also rob them of the primary means by which they can achieve their ends—deliberate violence against civilian targets.

155. See ICC, *supra* note 3, Annex I, art. 15 *ter*, para. 1 (providing that the ICC may exercise jurisdiction over crimes of aggression in accordance with Article 13(b) of the Rome Statute).

156. *Id.* Annex I, art. 15 *bis*, para. 7 (“Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.”).

157. *Communications and Referrals*, ICC, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Referrals+and+communications> (last visited Oct. 13, 2010). The Council referred the situation in Darfur, but it did not specifically allege a crime of aggression. See generally S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (deciding “to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court,” but never alleging any specific crime).

condemned aggression a mere thirty-one times.<sup>158</sup> More importantly, the Security Council has generally refrained from recognizing acts of international terrorism as aggression.<sup>159</sup> Not even the attacks of September 11 were given that designation.<sup>160</sup> Instead, the Council prefers terming armed attacks as threats to international peace and security, breaches of international peace and security, or unlawful uses of force.<sup>161</sup>

Theoretically, this contemporary practice places few limits on the ICC's jurisdiction. Regardless of what language the Security Council employs to describe a given instance of transnational violence, the ICC may determine for itself whether it and the Prosecutor have been properly authorized to proceed under paragraph 7 of amended Article 15.<sup>162</sup> But in reality, the Council's linguistic decisions may

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158. Weisbord, *supra* note 6, at 169 (citing Nicolaos Strapatsas, *Rethinking General Assembly Resolution 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, 178 (Olaoluwa Lousanya ed., 2007)). Of the thirty-one recognized acts of aggression, nineteen condemned South Africa for attacks against other African states; six condemned Southern Rhodesia for attacks against other African states; two condemned acts of aggression committed against the Seychelles; two condemned Israeli attacks against Tunisia; one condemned acts of aggression against Benin; and one condemned Iraq for attacks against Kuwait. *Id.* Major conflicts like the Korean War, the Six Day War, the Iran-Iraq War, the Falklands War, the NATO bombings of Yugoslavia, and countless other incidents of transnational violence were either labeled euphemistically or not named at all. *See id.* (listing several major *prima facie* acts of aggression that were never explicitly recognized by the Security Council).

159. Not until the 1990s did the Security Council begin to characterize international terrorist attacks as threats to international peace and security. Even then, the Council never expressly recognized such violence as an act of aggression. *See* Andrea Bianchi, *Security Council's Anti-Terror Resolutions and Their Implementation by Member States: An Overview*, 4 J. INT'L CRIM. JUST. 1044, 1045 (2006) (noting that the Security Council characterized several high-profile international terrorist attacks in the 1990s as threats to international peace and security).

160. *See* S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (regarding the September 11 terrorist attacks, "like any act of international terrorism, as a threat to international peace and security").

161. *See* David Scheffer, *A Pragmatic Approach to Jurisdictional and Definitional Requirements for the Crime of Aggression in the Rome Statute*, 41 CASE W. RES. J. INT'L L. 397, 404 (2009) ("The Security Council rarely resorts to 'aggression' terminology and . . . has used the term to describe relatively minor uses of military force while using other U.N. Charter terminology . . . to describe far more significant uses of military force classically regarded as aggression." (footnote omitted)); *id.* at 406 (noting the possibility that the Security Council "may never again" formally recognize an act of aggression); *see also supra* notes 158–60; *cf.* Jochen Abr. Frowein & Nico Krisch, *Article 39*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 717, 719 (Bruno Simma ed., 2d ed. 2002) (finding that the Security Council enjoys significant discretion in determining whether a threat to peace, a breach of peace, or an act of aggression exists).

162. Some authors posit that the Security Council's recognition of a threat to or breach of

greatly affect the ICC's jurisdictional reach. The U.N. Charter implicitly distinguishes between a threat to or breach of the peace and an act of aggression, for it provides in Article 39<sup>163</sup> that “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression.”<sup>164</sup> Professor David Scheffer, chief negotiator of the U.S. delegation at Rome, bolsters this conclusion: “The modern world describes what is occurring in the field . . . as breaches of the peace which sometimes—although . . . infrequently—would embrace the classic understanding of ‘aggression’ and yet more often would be defined as uses of armed force falling short of ‘aggression.’”<sup>165</sup> Allowing “breach of the peace” or similar alternative language to act as the functional equivalent of “aggression” when the two are in fact distinct ignores the intent of the Security Council<sup>166</sup> and creates a legal fiction not supported by practice. Worse, it risks negatively impacting the Security Council's decisionmaking process<sup>167</sup> and promises to weaken state support for the ICC.<sup>168</sup> In light of these dangers, the ICC may be reluctant to interpret these terms interchangeably and permit prosecutions of

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international peace and security, or an unlawful use of force, can be interpreted as a de facto determination that an act of aggression has been committed if the language is memorialized in a declaration pursuant to Chapter VII of the U.N. Charter. *See, e.g.*, Scheffer, *supra* note 161, at 404 (“Once the Security Council determines that a breach of the peace has occurred, often by condemning it, that determination memorialized in a resolution should be sufficient to trigger a process that can determine whether an act of state-on-state aggression per se has occurred, which then would enable the ICC to investigate persons for purposes of individual criminal culpability.”); *id.* at 408 (“If the Security Council determines that a breach of the peace has occurred and has identified the offending state in a Chapter VII resolution embodying the determination, then the Council for all intents and purposes has denied the legitimacy of any rationale for the use of armed force by the offending state in the particular situation . . .”). Chapter VII denotes the circumstances under which the use of force may be authorized. U.N. Charter ch. VII.

163. Article 39 is the first article in Chapter VII.

164. U.N. Charter art. 39 (emphasis added).

165. Scheffer, *supra* note 161, at 407.

166. It risks initiating a prosecution the Security Council never intended to allow. ICC, Assembly of States Parties, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, ¶ 30, ICC Doc. ICC-ASP/6/SWGCA/INF.1 (July 25, 2007) (“[U]nder such an approach a Council decision might be interpreted as [a] de facto determination of an act of aggression, irrespective of the Council's intention.”).

167. Scheffer, *supra* note 161, at 405. (warning that such an approach “might . . . negative[ly] impact . . . the decision-making within the Council, which might adjust the way it used certain terms”).

168. *See id.* at 406–07 (noting that the strategy of allowing the ICC to exercise jurisdiction when the Security Council recognizes a threat to, or breach of, the peace resulting from the threat or use of armed force by one state against another lacks widespread support).

nonstate parties without clear authorization from the Security Council.

The purpose of the preceding argument is not to show that the ICC could never prosecute an act of aggression committed by a terrorist group. The court in fact possesses remarkably broad jurisdiction.<sup>169</sup> Rather, this analysis reveals that the ICC's reach is far from universal. Coupled with its role as a court of last resort,<sup>170</sup> the ICC's imperfect jurisdictional triggers suggest that primary responsibility for prosecuting aggression will rest with national legal systems. Through the principle of complementarity,<sup>171</sup> municipal courts will be prepared to fulfill this duty. Although the issue is still vigorously debated, conservative predictions indicate that the definition of aggression as adopted by the ASP will be transplanted into the domestic law of those states parties to the Rome Statute that accept the new formulation.<sup>172</sup> Should the task of prosecuting aggression fall to them, those countries' domestic courts will have a clearly defined crime with which to work. But if that definition requires that terrorist organizations be classified as states before their leaders can be charged with aggression—as the present conception does—and if so classifying those groups requires conferring statehood upon them for all purposes to which that designation is relevant—as it should—then terrorist leaders who commit the crime will likely escape domestic jurisdiction by invoking sovereign immunity.

*b. Sovereign Immunity for High-Ranking Terrorist Leaders.* By virtue of their position, high-ranking officials of every state are entitled to sovereign immunity, both functional and personal. In its most basic form, the principle of *ratione materiae*—functional immunity—frees sitting senior state officials from personal legal responsibility for any act committed in the exercise of their official duties.<sup>173</sup> Because functional immunity rests on the notion that actions

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169. See *supra* notes 148–49 and accompanying text.

170. See *supra* note 144 and accompanying text.

171. Under the principle of complementarity, states parties to the Rome Statute are expected to implement domestically each provision of that agreement. This principle and its implications are discussed in further detail in Part IV.B.1.b, *infra*.

172. See generally Roger S. Clark, *Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute*, 41 CASE W. RES. J. INT'L L. 413 (2009) (elaborating on the issue of complementarity and the debate surrounding it).

173. DUGARD, *supra* note 64, at 253.

taken by a state official are attributable only to the state,<sup>174</sup> both current and former state officials may invoke its protection.<sup>175</sup> The scope of the protection, however, is decidedly narrow. A state official is relieved of liability if, and only if, the official's actions are performed while in office and fall within the official's delegated authority.<sup>176</sup>

Immunity *ratione personae*—personal immunity—operates quite differently. Unlike functional immunity, personal immunity is a procedural defense.<sup>177</sup> That is, although an act committed by the state official is legally imputable to him, the official is immune from civil or criminal jurisdiction.<sup>178</sup> This protection extends to all actions taken by a serving state official; however, because it does not deflect legal responsibility from the individual to the state, personal immunity no longer exists once the official ceases to hold office.<sup>179</sup>

Together, functional and personal immunity provide robust protection for high-ranking state officials.<sup>180</sup> According to the International Court of Justice (ICJ), this degree of immunity is necessary for the proper direction of state and foreign affairs,<sup>181</sup> however, it also stifles the effective prosecution of aggression in domestic courts.

Fundamental principles of international law strongly suggest that all rights attaching to statehood—including sovereign immunity for

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174. As the District Court for the Northern District of California summarized in *Lyders v. Lund*, 32 F.2d 308 (N.D. Cal. 1929), “suits [against high-ranking state officials] based upon official, authorized acts, performed within the scope of their duties on behalf of the foreign state . . . are actions against” that state as a whole, and not against the official as an individual. *Id.* at 309.

175. DUGARD, *supra* note 64, at 253.

176. ILIAS BANTEKAS & SUSAN NASH, *INTERNATIONAL CRIMINAL LAW* 101 (3d ed. 2007).

177. Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 *EUR. J. INT'L L.* 853, 863–64 (2002).

178. *See id.* at 862–63 (noting that under functional immunity, legal responsibility cannot be attributed to the individual, but suggesting that under personal immunity it can).

179. *Id.* at 863–64.

180. Functional and personal immunity operate in tandem such that one often fills the gaps left by limitations imposed upon the other. But they do not offer any protection in the domestic courts of the official's state, or when the official's state has waived these immunities. Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) (*Arrest Warrant Case*), 2002 I.C.J. 3, 25 (Feb. 14). Terrorist organizations, however, are unlikely to try their own leaders or waive their immunities. Those groups instead “display an utter disregard for . . . the rule of law.” Travalio & Altenburg, *supra* note 53, at 115.

181. In a recent case, the ICJ opined that “the immunities accorded to [high-ranking state officials] are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States.” *Arrest Warrant Case*, 2002 I.C.J. at 21.



senior state officials—should be conferred upon entities that are designated as states.<sup>182</sup> Thus, if terrorist organizations were considered states under the current definition of aggression, then their leaders would acquire functional and personal immunity. This may appear to pose little threat to the effective prosecution of aggression. Under the principle of complementarity, states parties to the Rome Statute are expected to implement domestically each provision of that agreement.<sup>183</sup> Included among those provisions is Article 27, which eliminates all immunities that would otherwise exempt an individual from prosecution for one of the four core international crimes.<sup>184</sup>

The validity under international law of any domestic analogue to Article 27, however, is questionable. Relevant case law<sup>185</sup> and the writings of prominent international legal scholars<sup>186</sup> indicate that personal immunity unconditionally protects serving state officials from national jurisdiction, regardless of the nature and gravity of their actions. As long as they hold their positions, therefore, senior leaders of terrorist organizations that are considered states in all contexts would be completely immune from prosecution in foreign municipal courts, whether they commit aggression, another core international crime, or some lesser offense. Once a senior terrorist leader ceases to hold office, though, personal immunity will no longer offer any protection. But functional immunity may still bar prosecution for the crime of aggression.

Whether functional immunity ceases to apply when the act in question is a core international crime—like aggression—is uncertain. National and international courts alike continue to adopt differing

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182. *See supra* Part IV.A.

183. COAL. FOR THE ICC, FACTSHEET: ICC IMPLEMENTING LEGISLATION 1 (2006), available at <http://www.iccnw.org/documents/FS-CICC-Implementation-Legislation.pdf>.

184. Rome Statute of the ICC, *supra* note 14, art. 27.

185. *See, e.g.*, R v. Bow St. Metro. Stipendiary Magistrate, *ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (H.L.) 201–02 (appeal taken from Q.B.) (“Th[e] immunity enjoyed by a head of state in power . . . is a complete immunity . . . rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state.”); *Arrest Warrant Case*, 2002 I.C.J. at 24 (finding no exceptions to the rule that gives immunity from criminal prosecution to serving officials).

186. *See, e.g.*, Cassese, *supra* note 177, at 864 (“[E]ven when [a senior state official] is faced with [charges of committing a core international crime, the official] is inviolable and immune from prosecution on the strength of the international rules on *personal* immunities.”); Steffen Wirth, *Immunity for Core Crimes? The ICJ’s Judgment in the Congo v. Belgium Case*, 13 EUR. J. INT’L L. 877, 883 (2002) (“[I]mmunity *ratione personae*, is . . . all-encompassing . . . regardless of the conduct in question.”).

approaches.<sup>187</sup> A recent ICJ decision, however, hinted that it does not. In *Arrest Warrant of 11 April 2000 (Arrest Warrant Case)*,<sup>188</sup> the court decided that after a high-ranking state official ceases to hold office, he can be tried in a foreign national court “in respect of acts committed prior or subsequent to his . . . period of office, as well as in respect of acts committed during [his] period of office *in a private capacity*.”<sup>189</sup> Though this reasoning is ultimately dicta, that the court “carefully examined State practice, including national legislation and those few decisions of national higher courts” before arriving at its conclusion<sup>190</sup> suggests that this public-private distinction may represent the prevailing judicial view. Several municipal courts and judges have in fact espoused this understanding.<sup>191</sup>

If the language in the *Arrest Warrant Case* indeed represents the dominant approach, and if terrorist organizations were classified as states in all contexts, then their former leaders could not be prosecuted for aggression in foreign national courts unless their acts were considered private. This private-act exception is unlikely to be met, for the crime of aggression is inherently a public act.<sup>192</sup> As

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187. See, e.g., Gaddafi Case, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Mar. 13, 2001, 125 I.L.R. 490, 490–510 (Fr.) (holding that sovereign immunity protected Libyan Arab Republic leader Muammar al-Gaddafi from prosecution for the terrorist bombing of a UTA flight on September 19, 1989); *Ex parte Pinochet Ugarte*, [1999] 1 A.C. at 201–06 (holding that former Chilean President Augusto Pinochet had immunity for acts of torture committed prior to the United Kingdom’s 1988 ratification of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, but no immunity for acts of torture committed after that ratification); *Arrest Warrant Case*, 2002 I.C.J. at 25 (relying on a public-private-act distinction in asserting that sovereign immunity for incumbent or former heads of state does not bar criminal prosecution in all circumstances); Wirth, *supra* note 186, at 884–85 (describing the case of Suriname head of state Dési Bouterse, in which the Gerechtshof Amsterdam denied Bouterse immunity for crimes he allegedly committed while in office in the 1980s).

188. Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) (*Arrest Warrant Case*), 2002 I.C.J. 3 (Feb. 14).

189. *Id.* at 25 (emphasis added).

190. *Id.* at 24. In fact, Belgium, the complainant in the case, had in its domestic law at the time a provision abrogating all immunities for individuals charged with core international crimes. Damien Vandermeersch, *The ICC Statute and Belgian Law*, 2 J. INT’L CRIM. JUST. 133, 143 (2004). The ICJ found this insufficient to destroy the functional and personal immunity enjoyed by both serving and former senior state officials.

191. E.g., *Ex parte Pinochet Ugarte*, [1999] 1 A.C. at 201–06; Wirth, *supra* note 186, at 884–85.

192. See *Draft Code of Crimes Against the Peace and Security of Mankind*, *supra* note 16, at 43 (“Individual responsibility for [the crime of aggression] is intrinsically and inextricably linked to the commission of aggression by a State. . . . [S]uch a violation of the law by a State is a *sine qua non* condition for the possible attribution to an individual of responsibility for a crime of

international criminal law scholar Antonio Cassese acknowledges, the position and rank occupied by senior state officials places them “in a position to order, instigate, or aid and abet or culpably tolerate or condone” the criminal acts they perpetrate.<sup>193</sup> It would be artificial to declare international crimes committed by these officials to be private acts, for “[t]his would mean . . . that . . . crimes against peace . . . should be regarded as ‘private acts . . .’”<sup>194</sup> Echoing Cassese’s observation, Professor Claus Kress, a German delegate to the Special Working Group, stresses that “the crime of aggression” is “intimately linked to state policy.”<sup>195</sup> Without the use of artificial legal constructs, the crime of aggression cannot be considered a private act. Consequently, personal immunity will protect terrorist leaders while they hold their positions, and functional immunity will likely shield them when they do not.<sup>196</sup> If global terrorist organizations are classified as states in all contexts, therefore, the present definition of aggression will likely permit leaders of the greatest contemporary threat to international peace and security to escape punishment for their transgressions.

Defining the crime of aggression with exclusive reference to state behavior is consequently dangerous. If, on the one hand, it requires that terrorist organizations be classified as states solely for purposes of prosecuting aggression, an exclusively state-centric formulation creates a grotesque legal milieu in which a political entity can be simultaneously a state and a nonstate. As applied to terrorist organizations, a state-centric definition also disregards the sovereign equality of states by imposing obligations of statehood on entities that are entitled to none of the associated rights. If, on the other hand, such a definition requires conferring statehood upon terrorist organizations for all purposes, then it increases the likelihood that leaders of terrorist organizations would be able to prevent effective prosecution in municipal courts by invoking sovereign immunity.<sup>197</sup>

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aggression.”).

193. Cassese, *supra* note 177, at 868.

194. *Id.* at 870.

195. Kress, *supra* note 141, at 862.

196. The argument here is not that a customary norm dissolving immunities for core international crimes could never exist. The law in this field is entirely too flexible for such absolutism. Rather, the gravamen of the preceding analysis is that a core-international-crimes exception to functional and personal immunities does not presently exist.

197. Judge Damien Vandermeersch of the Court of First Instance in Brussels concurs, noting that the ICJ’s ruling in the *Arrest Warrant Case* dictates that the ICC’s jurisdiction is no longer concurrent with that of national courts, but is “exclusive in respect of those who can

Perhaps worse, it also undermines global efforts to suppress these groups by guaranteeing their right to preserve their existence.

2. *Threats to the Global Struggle against Terrorism.* Historically, the international community has followed a law-enforcement approach to suppressing terrorism, a method predicated on capturing terrorists and prosecuting them under domestic law and in domestic courts.<sup>198</sup> But the events of September 11, 2001, and the new era of international terrorism they ushered in, demand a different strategy.<sup>199</sup> Instead of relying solely on national law and disjointed domestic judicial processes, many states have shifted their focus to the use of force against terrorist organizations.<sup>200</sup> This new approach is fundamentally affected by a definition of aggression that classifies terrorist organizations as states in all contexts.

Included among the rights guaranteed to all states is the right to continued existence unhindered by others.<sup>201</sup> The Montevideo Convention, for instance, expressly declares that “[t]he fundamental rights of states are not susceptible [to] being affected in any manner whatsoever,”<sup>202</sup> and thus “[n]o state has the right to intervene in the internal or external affairs of another.”<sup>203</sup> This rule permits every state to actively defend its sovereignty. The U.N. Charter enshrined this principle in Article 51, guaranteeing states their inherent right to self-defense.<sup>204</sup>

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invoke their immunity before national courts that have initiated proceedings against them.” Vandermeersch, *supra* note 190, at 144. Given the number of cases that will fall to national courts because of the ICC’s role as a court of last resort and its imperfect jurisdictional triggers, coupled with the emergence of international terrorism as the gravest threat to global peace and the most prevalent form of aggression, *see supra* Part II, this result is troubling.

198. Travalio & Altenburg, *supra* note 53, at 98; *see also* John Dugard, *International Terrorism: Problems of Definition*, 50 INT’L AFF. 67, 67–74 (1974) (providing a succinct history of international efforts made since the nineteenth century to curtail the rise and spread of global terrorism).

199. *See* Travalio & Altenburg, *supra* note 53, at 98–100 (noting that the law-enforcement approach has historically dominated, but that recent events now require a more forceful response to terrorism).

200. *See id.* at 106 (“As the threat of transnational terrorism became more apparent, . . . the world community became more tolerant of military actions against states that supported terrorism.”). The United States’ War on Terror provides evidence of this transition.

201. *See* MAY, *supra* note 52, at 310 (questioning whether terrorist organizations are legitimate enough to be classified as states and thus to be guaranteed a continued existence free of any external interference).

202. Convention on Rights and Duties of States, *supra* note 59, art. 5.

203. *Id.* art. 8.

204. *See* U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent

Under a definition of aggression that confers statehood in its entirety on terrorist organizations, this privilege must extend to them.<sup>205</sup> This extension, however, jeopardizes international efforts to actively eradicate terrorism, as it confers upon terrorist groups the right to preserve their existence when threatened.<sup>206</sup> Classifying terrorist organizations as states for purposes of the crime of aggression may thus generate enormous policy concerns. From condemnation in the General Assembly, to the Draft Comprehensive Convention on the International Suppression of Terrorism, to the War on Terror, the international community has manifested a desire to destroy these groups. But by classifying them as states for all purposes, the international community would be stripped of its ability to pursue this goal, and much of the progress made against terrorism would be lost.

In sum, the current approach of defining the crime of aggression with exclusive reference to state behavior is troublesome. Independent, transnational terrorist organizations have emerged as the prevailing threat to international peace and security. They are capable of unleashing devastating attacks that not only rival the military strength of many states but that also can be legitimately called acts of aggression.<sup>207</sup> At the Kampala Review Conference, the international community could not have afforded to let another opportunity to finally define the crime of aggression slip through its fingers; however, adopting an antiquated definition was the wrong solution. As Professor Weisbord recognizes, “[a] backward-looking definition that fails to regulate important forms of aggression as they emerge is fated to become irrelevant. A definition that does not fit the sociological phenomenon it seeks to regulate is, and will be perceived to be, unjust” and illegitimate.<sup>208</sup> Despite Weisbord’s novel constructive argument, the definition of aggression as currently formulated continues to be backward looking, for it does not mirror the present reality of international aggression.<sup>209</sup> Even ignoring the taxonomic difficulties of broadening the term “State” to include

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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 the measures necessary to maintain international peace and security.”).

205. *See supra* Part IV.A.

206. MAY, *supra* note 52, at 310.

207. *See supra* Part II.

208. Weisbord, *supra* note 4, at 8.

209. *See supra* Part II.

terrorist organizations,<sup>210</sup> doing so either undermines the ICC and the international system on which it rests, or jeopardizes efforts to destroy terrorist groups and bring their leaders to justice.<sup>211</sup> The current definition causes more problems than it resolves, and it should be reconsidered. State centrism should be abandoned, and both states and nonstate groups should be expressly included within the ambit of the crime. Only this approach can avoid the negative consequences enumerated in this Part.

## V. PROPERLY RESTRICTING THE CONCEPT OF NONSTATE GROUPS

Beyond political apprehensions, the primary concern with redrafting the definition of aggression to explicitly include both states and nonstate groups is that it would create a framework so boundless in scope that it could not be reasonably applied in practice. An overly broad conception of aggression would permit excessive prosecutorial discretion,<sup>212</sup> result in liability that exceeds the scope of moral culpability,<sup>213</sup> and rob the ICC of institutional legitimacy. These risks are particularly acute in the contemporary context, given the difficulty of delineating the contours of international terrorism. Not only can the phenomenon be expressed in innumerable forms, but it is also largely indistinguishable from mere criminal activity. As Colonel Hammes explains, “[w]e have slid so far away from national armies that often it is impossible to tell [terrorist organizations] from simple criminal elements. Many of the former are, in fact, criminal elements—either they use crime to support their cause or they use their cause to legitimize their crime.”<sup>214</sup> Confronted with these challenges, the scope of the term “nonstate groups” as used in the proposed definition must be sufficiently limited.

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210. See *supra* Part III.

211. See *supra* Part IV.

212. See generally Osiel, *supra* note 80, at 1801 (discussing the risks of relying on prosecutorial discretion to temper an overly broad theory of liability).

213. See *id.* at 1772 (“[Making it too easy to convict defendants as participants in a joint criminal enterprise] increasingly lures international law to a point where liability threatens to exceed the scope of moral culpability.”).

214. Hammes, *supra* note 39, at 20; see also Osiel, *supra* note 80, at 1799–1800 (“Much ordinary crime today clearly displays a profusion of global linkages . . . [T]he growing and dangerous links between terrorist groups, drug traffickers and their paramilitary gangs’ which have resulted ‘in all types of violence’ across several continents . . . sew all these into a single, seamless enterprise of worldwide wrongdoing.” (footnotes omitted) (quoting Emmanouela Mylonaki, *The Manipulation of Organized Crime by Terrorists: Legal and Factual Perspectives*, 2 INT’L CRIM. L. REV. 213, 230 (2002))).

Perhaps the best approach is to first assess what conduct the international community seeks to criminalize as aggression, and then reason backward through its definitional implications to arrive at a satisfactorily restricted conception of nonstate groups. In this regard, the evolution of the definition of aggression is instructive. From the formulation adopted by the General Assembly in 1974,<sup>215</sup> to the conclusion reached by the International Law Commission in 1996,<sup>216</sup> to the current definition, all conceptualizations have been dominated by a fixation on the state. Even when the actions of nonstate groups were captured within the scope of the 1974 definition—the only formulation to ever include them—the groups were considered state agents rather than independent actors.<sup>217</sup> This history demonstrates that the archetypical understanding of aggression is an armed attack by one state on another.<sup>218</sup> A definition of aggression that expressly includes nonstate groups can therefore be adequately bounded by encompassing only those entities that are capable of acting like a state in their use of force.<sup>219</sup>

In determining what it means to act like a state, judges must not focus on organizational or leadership structure. To act like a state, a group need not structurally resemble one. Concluding otherwise would defeat the purpose of extending the definition of aggression to nonstate groups. As previously explained, these entities often lack the physical characteristics or legal order that are indicative of statehood.<sup>220</sup> Furthermore, the bureaucratic organizational structure that typically characterizes a state does not extend to modern war-making groups like independent terrorist organizations. These entities are instead based on extensive, decentralized networks in which one acquires power and leadership not by any formal position, but by one's centrality within the network and ability to influence

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215. G.A. Res. 3314, *supra* note 16.

216. *Draft Code of Crimes Against the Peace and Security of Mankind*, *supra* note 16, at 43.

217. See G.A. Res. 3314, *supra* note 16, art. 3, para. g (providing that if a state sends a nonstate group to exercise armed force against another state, and if that group executes an attack that is sufficiently grave that it would have constituted an illegal act of war if it had been committed by the sending state itself, the attack will be considered an act of aggression committed by the sending state).

218. See MAY, *supra* note 52, at 307 (“States are the paradigm case of entities that can wage war.”).

219. Professor Larry May agrees, noting that “if there are other entities that can act like States, then perhaps they too can wage war.” *Id.* This would include groups like al Qaeda that today pose the greatest threat to international peace and security. *Id.* at 307–08.

220. See *supra* Part III.A.

others.<sup>221</sup> Including nonstate groups in the definition of aggression but requiring that they resemble state actors before they can be prosecuted for the crime would rob the concept of its elasticity and produce a formulation as irrelevant as one that excludes nonstate entities altogether.

Instead, the judges' inquiry must concentrate on behavior, focusing on whether the scale and nature of the act, not the group that committed it, is sufficiently statelike to constitute aggression.<sup>222</sup> Although seemingly broad in scope, this approach is in fact quite narrow. The ability to act like a state is a high threshold. Rarely does an individual or group possess the coordination and structure to do anything even remotely statelike.<sup>223</sup> This is particularly true for major international crimes. "[These] wrongs are radically different from the garden-variety crime in response to which standard legal doctrines were developed. These differences rise to a level that may not be merely numerical, but categorical."<sup>224</sup> Beyond this general observation, exactly what constitutes an act of aggression exceeds the scope of this Note. But whatever aggression entails, only a limited range of nonstate actors can commit it. And when leaders of those nonstate entities initiate violence that crosses the threshold of aggression, they may, and must, be prosecuted for the crime.

Thus, developing a narrow, workable conception of nonstate groups is not the daunting task it may initially appear to be. The interpretive method proposed in this Part offers a means by which the ASP can expressly include those entities in the definition of aggression without broadening the scope of the crime beyond its

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221. See Weisbord, *supra* note 4, at 16–17 (detailing the shifts in the structure of war-making organizations).

222. A separate, but related, debate concerns whether the definition of aggression should include only armed attacks, or whether it should encompass economic aggression, systems disruptions, and other means of unarmed attack. See, e.g., Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT'L L. 224, 224–28 (1977) (analyzing the debates over economic aggression during the negotiations regarding the 1974 definition and finding that the issue was left unresolved); Weisbord, *supra* note 4, at 37–43 (setting forth more generally the competing sides of the present debate over unarmed aggression and arguing that the present draft definition conceives of aggression too narrowly). This debate is beyond the scope of this Note.

223. MAY, *supra* note 52, at 307; see also Larry May, *Aggression, Humanitarian Intervention, and Terrorism*, 41 CASE W. RES. J. INT'L L. 321, 336–40 (2009) (concluding that some terrorist groups are statelike in their ability to use violence, but most more closely resemble criminal gangs).

224. Osiel, *supra* note 80, at 1765.



useful limits. Now, the most formidable obstacle to a flexible, accurate definition of aggression is the absence of political will.

#### CONCLUSION

Since the Nuremberg and Tokyo tribunals of the mid-1940s, sporadic progress has been made toward ending impunity for aggressors. As the ASP has now adopted the first precise definition of the crime of aggression, it should be lauded for its achievement. Nevertheless, the international community's work remains incomplete. In contemporary world affairs, a definition of aggression focused exclusively on state behavior carries little normative value. The modern transformations in warfare and the rise of independent terrorist organizations indicate that a state-centric conception of the offense cannot reach the greatest contemporary threat to international peace and security. Even considering the novel approach proposed by Professor Weisbord, the shortcomings of the present formulation persist. Encompassing independent war-making groups like terrorist organizations within the bounds of the present definition contradicts customary international law, is unworkable even under new and dynamic conceptions of statehood, and should thus be avoided. Otherwise, either the certainty and order of the international system will be undermined and the sovereign equality of states will be violated, or the effective prosecution of aggression will be inhibited and global efforts to suppress international terrorism burdened. To avoid these problems, the ASP should rewrite the definition of aggression to expressly apply to both states and nonstate groups. Achieving this new formulation will be difficult. The delegates to the ASP will likely balk at calls for reassessment after so much progress has been made. But the legal consequences and policy implications of applying the definition of aggression in its current form evince the need for reconceptualizing the offense. Otherwise, the breakthrough for which many have worked so hard will in fact be a setback, and the legal triumphs achieved at Nuremberg and Tokyo more than sixty years ago will be forfeited.