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RE-DEFINING THE “CRIME OF AGGRESSION”: THE EVOLUTION OF AN OUTDATED IDEAL TO INCLUDE NON-STATE ACTORS

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INTRODUCTION

Imagine if authorities caught the “mastermind” of an attack that killed numerous sailors and injured hundreds more. The plot to blow up a small boat packed with explosives next to a destroyer sitting in port worked with ruthless effectiveness and inflicted severe damage.¹ The high profile apprehension of the “mastermind” produced States vying for the right to prosecute this criminal, each with their own claims and own agendas. What forum should hear these grievances? The international community created an international court to try criminals accused of heinous crimes away from politically charged states and potentially unfair tribunals. But what if this international court, created to deal with criminals such as the alleged “mastermind,” does not even have jurisdiction to prosecute the “mastermind” because he is unaffiliated with a State? The court’s inability to prosecute these types of situations essentially negates the purpose of providing this international forum.

The international court could take legal action if the attack was a war crime, crime against humanity, or genocide; however, because the attack fits the elements of a crime of aggression better than the previously listed crimes, the court cannot. This type of act usually invokes references to terrorism, the ever-increasing form of conflict favored by many non-state actors. The international court can prosecute acts of terrorism that result in civilian casualties as a crime against humanity; however, the court cannot prosecute this example as such because there were no civilian casualties.² This “mastermind” has no fear of any crime against humanity prosecution provided his act neither targets nor affects civilians. Similarly, the court cannot prosecute his actions as war crimes because sporadic acts of violence such as this attack do not constitute armed conflict.³ Hence, those responsible for the international court’s jurisdiction must close the loophole. Otherwise, criminals of this magnitude will continue to evade prosecution based on a technicality.

Current proposals to define the “crime of aggression” are incomplete because they fail to account for or incorporate non-state actors. The International Criminal Court (hereinafter ICC) was designed to provide a forum for enforcement of the entire body of international criminal law that emerged after World War II.⁴ The Rome Statute gives the ICC potential jurisdiction over four crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.⁵ The ICC obtained jurisdiction over the first three crimes via the Rome Statute, but not the crime of aggression.

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³ Id. art. 8, at 1006-09.
⁵ See Rome Statute, supra note 2, art. 5, at 1003-04.
aggression. Drafters left the crime of aggression undefined in the Rome Statute, withholding ICC jurisdiction until an agreement is reached on a provision that defines the crime and is consistent to relevant provisions of the Charter of the United Nations (hereinafter U.N.).

Throughout the years of debate, aggression has continually been applicable only to States or individuals with significant State affiliation. Definitions past and present neglect one important fact. Non-state actors are capable of committing a crime of aggression and should be included as potential actors in any definition of this crime.

Definitions limited to the possibility of only a State committing a crime of aggression, or an individual acting on behalf of or with the endorsement of a State, are deficient because of the increasingly globalized world we live in. The current, incomplete definition conforms to a traditional, outdated, state-centric model of aggression. In today’s world, sophisticated means of communication, coordination, and technology are no longer a State monopoly; State and non-state actors now have equal access to these powerful tools. Attacks such as 9/11 or the USS Cole, the actions of groups like the Taliban and al-Qaeda, and crimes by other radical organizations have proven repeatedly that we do not live in an era when only a State can act in an aggressive manner. The Taliban attacked the militaries of both Pakistan and Afghanistan from the isolated, de-regulated mountainous region between those two States in spring 2009; with regard to Pakistan, Taliban forces came within one hundred kilometers of Islamabad during

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6 See id. at 1004.
7 See id.
10 See Gurulé, supra note 1, at 28.
11 See id. at 25-26.
an offensive.\textsuperscript{12} It would be logical to conclude that the Taliban committed a crime of aggression, but their actions are legally insufficient because they lack State affiliation. Because of outdated beliefs, prosecution of these aggressive actions by a non-state actor is not possible in an international forum.

Because of the growing capabilities of non-state actors, many international laws and crimes are evolving in response to this emerging threat. Non-state groups increasingly commit terrorism, nuclear proliferation, and organized crime, and the international community has begun recognizing these groups as potential actors.\textsuperscript{13} The definitional language of other crimes under the jurisdiction of the ICC like genocide and crimes against humanity explicitly as well as implicitly account for non-state actors.\textsuperscript{14} It is time for the crime of aggression debate to catch up. The crime of aggression was once “the greatest menace of our times,”\textsuperscript{15} and remains a serious international crime today. Any definition must include non-state actors that are and will remain as substantial a threat to international peace and security as any State actor.\textsuperscript{16}

\textsuperscript{12} See generally CNN.com, Pakistan Offensive (May 24, 2009), http://www.cnn.com/2009/WORLD/meast/05/24/pakistan.swat.operation/index.html?iref=newssearch (last visited October 21, 2009) (discussing the Taliban offensive in Pakistan, the resulting distance from Islamabad, and the displacement of Pakistanis) [hereinafter Pakistan Offensive].


\textsuperscript{14} See Rome Statute, supra note 2, art. 6-7, at 1004-05.


\textsuperscript{16} For a discussion of whether a State reaction using force against a non-state actor in another country constitutes an act of aggression on the part of the State, see Keith A. Petty, Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict, 33 SEATTLE U. L. REV. 105 (2009).
Part I of this Note explores the historical definitions of aggression, including important steps taken by tribunals following World War II and continuing attempts by the U.N. to codify a suitable definition. Part II looks at the proposed definition of aggression for the ICC. Additionally, it lays out the current debate and obstacles to agreement on a definition, as well as what the current debate fails to include. Part III explains why non-state actors are capable of committing a crime of aggression, paralleling other international crimes that have begun to recognize non-state actors’ capabilities. Part IV proposes a definition of aggression that includes non-state actors, and explains why this inclusion should be easier for ICC member States to accept than other current points in controversy.

I. HISTORICAL DEFINITIONS OF AGGRESSION

The definition of aggression has been in a continuing state of progress since its first acknowledged existence. Since then, aggression became a central cog of international law and one of the most serious crimes that can be committed on an international level.

A. Early Recognition

Recognition of aggression has occurred in one form or another since antiquity. Modern forms of aggression have developed from the principles known as *jus ad bellum*, or the doctrine of just war that emerged prominently after World War I. Instruments such as the Kellogg-Briand Pact began to prohibit the unlawful use of force as an extension of a States’ foreign policy around the same time. States were the only actors on the international stage, and were thus the only possible actors for purposes of aggression during this early period. Despite recognition of contemporary aggression in the aftermath of World War I, prosecution of

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17 See Petty, *supra* note 9, at 533.
18 See *id*.
19 See *id* at 533-34.
aggression did not begin until the International Military Tribunal at Nuremberg following World War II.\textsuperscript{20} The aforementioned Kellogg-Briand Pact provided the clearest legal basis for including crimes against peace, the functional equivalent of the crime of aggression\textsuperscript{21}, within the purview of the Tribunal at Nuremberg.\textsuperscript{22}

\textit{B. Post World War II}

The establishment of the Nuremberg Tribunal and the Tokyo Tribunal occurred in part to deal with the aggressive actions of Germany and Japan during World War II, despite the fact that there was no actual legal precedent on which to base a claim of aggression.\textsuperscript{23} One of the first definitions associated with aggression was contained in Article 6(a) of the London Agreement of August 8, 1945 for the Prosecution and Punishment of the Major War Criminals of the European Axis, which promulgated the Nuremberg Charter of the International Military Tribunal.\textsuperscript{24} Crimes against the peace encompassed aggressive acts, which included “the planning, preparing, initiating or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participating in a common plan or conspiracy to accomplish any of the foregoing.”\textsuperscript{25}

The Nuremberg Tribunal was the beginning of international recognition of aggression as a punishable offense. It commented on aggression as an important principle, stating “[t]o initiate

\textsuperscript{20} See Cassese, supra note 4, at 7; Petty, supra note 16, at 113.
\textsuperscript{23} Id.
\textsuperscript{24} Theodor Meron, Defining Aggression for the International Criminal Court, 25 SUFFOLK TRANSNAT’L L. REV. 1, 5 (2001).
\textsuperscript{25} Agreement between the United States of America and the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics respecting the prosecution and punishment of the major war criminals of the European Axis art. 6(a), August 8, 1945, 59 Stat. 1544, U.N.T.S. 279 [hereinafter London Agreement].
a war of aggression . . . is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”\textsuperscript{26} The Nuremberg Tribunal also dismissed a defense raised by defendants, the principle of legality known as \textit{nullum crimen sine lege},\textsuperscript{27} by stating that an attacker knows he is doing wrong and that it would be unjust to allow his wrong to go unpunished.\textsuperscript{28} The court determined that the defendants in this case knew their actions were wrong because they had acted in defiance of treaties and assurances to not attack without warning.\textsuperscript{29} Despite the significance of Nuremberg, it did not formulate an actual or lasting definition of the crime of aggression for the use of the international community.

\textbf{C. The 1974 Resolution}

The first attempt at actually defining aggression came from the United Nations General Assembly in 1974.\textsuperscript{30} While an achievement, some consider the proposed definition of aggression in Resolution 3314 as merely a political guide to use in identifying and neutralizing aggressive acts.\textsuperscript{31} Resolution 3314 defined aggression as “the use of armed forces 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.”\textsuperscript{32} Additionally, a non-exhaustive list was included, encompassing enumerated actions that would qualify as

\textsuperscript{26} William A. Schabas, \textit{The Unfinished Work of Defining Aggression, in THE PERMANENT INTERNATIONAL CRIMINAL COURT} 123 (Dominic McGoldrick et al. eds., 2004).

\textsuperscript{27} See Petty, \textit{supra} note 9, at 543. Nullum crimen sine lege refers to the principle that without a law there can be no punishment, and there was no law against aggression at the time defendants invoked this defense to charges during the Nuremberg Tribunal. \textit{Id}.

\textsuperscript{28} See Schabas, \textit{supra} note 26, at 123.

\textsuperscript{29} See \textit{id}.


\textsuperscript{31} See Dawson, \textit{supra} note 15, at 435; Petty, \textit{supra} note 16, at 114.

\textsuperscript{32} See G.A. Res. 3314, \textit{supra} note 30 (emphasis added).
aggression. The list included acts such as “invasion or attack by the armed forces of a State of the territory of another State,” “military occupation,” “bombardment or use of any weapons,” “blockade,” and so on. This Resolution explicitly provides that only States can commit aggression. While this was the first definition actually agreed upon by an international body, its intended use as a guide to the Security Council creates the impression that it is not a suitable definition for purposes of prosecution or for judicial use. Because a Security Council determination of aggression cannot result in a trial or conviction, the General Assembly did not intend Resolution 3314 for prosecutorial purposes or individual criminal liability.

Despite the importance of Resolution 3314, the U.N. General Assembly asked the International Law Commission (hereinafter ILC) to continue work on a definition of the crime of aggression that could serve a broader purpose. Work by the ILC resulted in multiple draft codes, but the 1996 Draft Code was the last and most influential. Article 16 of the 1996 Draft Code is an example of progress in international law, connecting the conduct of a State and the criminal behavior of individuals at that state’s policy-making level. But the 1996 Draft Code continued to emphasize that the rule of international law limits aggression to conduct by States; as a result, States and individuals playing a decisive role in State actions remain the only actors

33 See id.
34 See id.
35 See id.
36 See Dawson, supra note 15, at 435; Petty, supra note 16, at 114.
37 See generally Dawson, supra note 15, at 434-35 (stating that Res. 3314 was meant to formulate the basic principles concerning aggression and was not a definition for judicial use); Petty, supra note 9, at 545 (discussing the non-binding nature of Res. 3314 and the lack of individual accountability).
38 See Rayfuse, supra note 8, at 45. The U.N. General Assembly created the ILC in 1947. Id.
39 See generally William A. Schabas, An Introduction to the International Criminal Court 9 (3d ed. 2007); Cassese, supra note 4, at 8-9 (highlighting the ILC’s given tasks of formulating the principles of the Nuremberg Tribunal and a draft Code of Crimes Against the Peace and Security of Mankind, completed in 1996, as well as work on draft statute of international criminal court).
capable of committing aggression and violating international law.  This determination ultimately leaves a gap in international criminal law for non-state actors to slip through. This gap remained during the next step in defining the crime of aggression, the Rome Diplomatic Conference, which culminated in the Rome Statute and the creation of the ICC.

II. PROPOSED DEFINITION OF AGGRESSION FOR THE ICC

While the inclusion of the crime of aggression in the jurisdiction of the ICC was one of the most contentious issues in the planning and negotiations of the Rome Conference, the crime of aggression remains a serious international crime that must have an agreed upon definition. The current proposed definition of the crime of aggression continues to exclude non-state actors, and the Special Working Group on the Crime of Aggression (hereinafter SWGCA) must remedy this oversight.

A. Rome Statute and ICC Jurisdiction

The Rome Statute gives the ICC jurisdiction over the most serious international crimes, including the crime of aggression in Article 5(1) (d). The Rome Statute explicitly defines genocide, crimes against humanity, and war crimes. The drafters left the crime of aggression undefined, but Article 5(2) clarified their intention. Article 5(2) states that the ICC “[s]hall 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

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41 Id.
42 See Schabas, supra note 26, at 131.
43 See Gaja, supra note 22, at 431. The compromise of the Rome Conference left the crime of aggression within the ICC’s potential jurisdiction and confirmed its place under international law, but did not define the crime and withheld actual jurisdiction for a period because of uncertainty over a definition. Id.
44 See Rome Statute, supra note 2, art. 5, at 1003-04.
45 See id. art. 6-8, at 1004-09.
46 See id. art. 5, at 1004.
respect to this crime." The Rome Conference decided that the crime of aggression was still worthy of ICC jurisdiction eventually, pending agreement on a definition. This is where the SWGCA emerged, created in 2002 by the Assembly of State Parties to the ICC to continue discussion on the definition, elements and jurisdictional conditions of the crime of aggression.

The latest proposed definition, coming from the Chairman of the SWGCA on May 14, 2008 and shaping subsequent discussion by the SWGCA, defines an act of aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.” The Chairman’s Discussion Paper then states that the crime of aggression encompasses “the planning, preparation, initiation, or execution” of the definition above “by a person in a position effectively to exercise control over or to direct the political or military action of a State.” This definition will be the basis for discussion at the review conference tentatively scheduled for May 2010, where debate over a definition will continue.

B. United Nations Authority

Article 2(4) of the Charter of the United Nations states: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the

47 See id.
48 See Schabas, supra note 26, at 136-37.
51 Id.
52 If the 2010 Review Conference adopts the current proposed definition, the issue of including non-state actors remains viable because the current proposed definition recognizes only State actors. For more information regarding the Review Conference, see Glennon, supra note 21, at 72; Petty, supra note 16, at 105.
United Nations.” The U.N. Charter also creates a Security Council in Article 23, which is given the power to “determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.” In other words, the Security Council has the power to determine an act of aggression, a step aided by Resolution 3314. However, neither the U.N. Charter nor the Security Council has created a universal definition for the crime of aggression; this is the task, however problematic, that the ICC must undertake to obtain jurisdiction.

C. Contentious Issues with the Definition

The drafters at the 1998 Rome Diplomatic Conference did not agree on a definition of the crime of aggression, and a definition remains in debate today because of a few unresolved issues. These unresolved issues comprise the remaining obstacles to a definition. But even agreement on these issues could leave the ICC lacking, as far as prosecuting all actors who commit aggression in the future.

1. Role of the Security Council

One major problem facing the SWGCA in defining the crime of aggression is the role of the U.N. Security Council in relation to ICC jurisdiction. Article 5(2) of the Rome Statute gives the ICC jurisdiction after adoption of a provision that “shall be consistent with the relevant provisions of the Charter of the United Nations.” Some commentators contend that the Security Council must determine the existence of an act of aggression as a precondition to

53 U.N. Charter art. 2, para. 4.
54 U.N. Charter art. 23, para. 1.
56 See Petty, supra note 9, at 536.
57 See Rome Statute, supra note 2, art. 5, at 1004.
prosecution by the ICC; other commentators argue that the Security Council’s power to determine the existence of aggression is not exclusive.\(^{58}\) While the official role of the Security Council remains undetermined, a special relationship still exists between the ICC and the U.N. even if the ICC is not a U.N. body or court.

A current proposal regarding the role of the Security Council introduces two options, a “judicial green light” and a “soft green light.”\(^{59}\) The “judicial green light” option would require the Security Council to determine a breach of the peace resulting from the use of armed force, which would then trigger a judicial option for the ICC or the International Court of Justice (hereinafter ICJ) to determine whether an act of aggression has occurred.\(^{60}\) The “soft green light” option would allow the Security Council to refer what they determine to be a breach of the peace situation to the ICC prosecutor, who can then launch an investigation under a General Assembly resolution or ICJ judgment recognizing the occurrence of an act of aggression.\(^{61}\)

These proposals represent new ways to handle Security Council involvement because, although problematic, the Security Council must have some level of participation.

Potential options for ICC jurisdiction in the absence of a Security Council finding of aggression include allowing other international organs like the ICJ or the U.N. General Assembly to make recommendations of whether aggression has occurred.\(^{62}\)

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\(^{60}\) Id. at 401.

\(^{61}\) Id. at 408.

\(^{62}\) See Petty, *supra* note 9, at 538-39.
discussions regarding avenues to take absent some Security Council determination have outlined
similar options, with the ICJ generally being preferred.\textsuperscript{63}

This preference results from the ICJ being a court of law, in addition to being a non-
political body. The ICJ also has some level of precedent to decide issues of this type, after
deciding a 1986 case involving Nicaragua and the United States.\textsuperscript{64} In that case, the ICJ decided
that the United States had breached customary international law involving the interference in
affairs of, use of force against, and violation of sovereignty of, the Republic of Nicaragua by
training, arming, equipping, financing and supplying the Contra forces fighting the
government.\textsuperscript{65} Although not involving the crime of aggression per se, this case shows the ICJ
has the capability to make a decision involving similar principles required in an aggression case.

For years, commentators and countries have called decisions of the Security Council into
question in general and particularly regarding aggression.\textsuperscript{66} Since the creation of the U.N.,
numerous international armed conflicts have occurred during a period where the Security
Council retained exclusive authority to determine aggression.\textsuperscript{67} During this period, the Security
Council has referred to aggression only in the instances of Israel and South Africa.\textsuperscript{68} The
Security Council has repeatedly ignored Resolution 3314 and failed to condemn as aggression
several prime examples of aggressive acts, such as the Soviet invasion of Afghanistan and the

\textsuperscript{63} See Petty, supra note 9, at 541-42; Sayapin, supra note 40, at 390-91.
\textsuperscript{64} Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).
\textsuperscript{65} Id.
\textsuperscript{66} See e.g. Troy Lavers, [Pre]Determining the Crime of Aggression: Has the Time Come to Allow the International
Criminal Court its Freedom?, 71 ALB. L. REV. 299, 306-08 (2008) (questioning political motives generally and of
Security Council veto states); Petty, supra note 9, at 537-38 (purely political questions of Security Council);
Sayapin, supra note 40, at 394 (stating Security Council is political body whose actions follow the interests of its
permanent members).
\textsuperscript{67} See Sayapin, supra note 40, at 385-86.
\textsuperscript{68} See id.
Iraqi invasion of Kuwait. As a result, many critics conclude that the Security Council is a politically motivated body whose only consistent theme in determining aggression is to send “the message that it is angry at politically disfavored states or groups.” Thus, the deep controversy regarding Security Council decisions involving aggression in the context of ICC jurisdiction will not be easily resolved.

2. General v. Specific

Another problem is whether the definition adopted should be general or more specific. Some commentators believe a definition should incorporate general language, while others think it should include a list of potential aggressive actions similar to Resolution 3314. This debate also encompasses another issue, where to set the threshold of aggression, because the threshold issue includes a general option and a more specific option in the Chairman of the SWGCA’s Discussion Paper. The first option is the manifest violation requirement, a general definition that an act “by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”; the second option would be more narrow, by listing many but not all examples of what would constitute manifest violations.

Proponents of a general definition believe that the manifest violation requirement will properly prevent borderline cases from going before the ICC, while critics could question whether being too broad would actually allow questionable cases into the ICC and diminish the integrity of the court. Meanwhile, proponents of a specific option argue that it gives further

69 See id. at 386.
70 See Stein, supra note 58, at 8.
71 See Petty, supra note 9, at 544-46; Sayapin, supra note 40, at 392-96.
72 See Petty, supra note 16, at 107-12.
73 See Discussion Paper, supra note 50, at 3-4.
74 See id. at 3.
75 See Petty, supra note 9, at 542-43.
guidance to the ICC because the Rome Statute does not allow for extensive interpretation of 
crimes within its jurisdiction,\textsuperscript{76} while critics believe this would be unjustifiably restrictive and 
limit ICC ability to prosecute aggression of anything short of armed conflict.\textsuperscript{77} Points of view 
differ regarding which form a definition should take in providing the ICC the best method of 
identifying and prosecuting aggression, but this is not the end of the current debate.

3. \textit{Individual Culpability}

Lastly, the question of how to recognize individual culpability reflects the evolution away 
from the State as the only recognized actor on the international level. The basis for this 
distinction emerged from the Nuremberg Judgment, which stated, “[c]rimes against international 
law are committed by men, not abstract entities, and only by punishing individuals who commit 
such crimes can the provisions of international law be enforced.”\textsuperscript{78} The current draft definition 
maintains a leadership requirement that necessitates an individual be in a position to effectively 
exercise control over the actions of a State,\textsuperscript{79} excluding any individual without State affiliation. 
The failure of this condition to hold non-civil servants and non-state actors liable might prohibit 
the prosecution of modern forms of aggression.\textsuperscript{80} While the inclusion of non-state actors might 
affect this particular topic of debate, the leadership requirement could function similarly even 
with inclusion of non-state actors. By requiring that individuals exercise control over the actions 
of a non-state group, the leadership requirement could remain intact. Thus, a broader 
interpretation of the relevant actors would hold the non-state leadership in the same position as 
State leadership, responsible for acts of aggression.

\textsuperscript{76} See Sayapin, supra note 40, at 395.
\textsuperscript{77} See Petty, supra note 9, at 543; Petty, supra note 16, at 109.
\textsuperscript{78} 1 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 223 (1947), \textit{available at} http://avalon.law.yale.edu/imt/judlawch.asp. \textit{See also} Dawson, supra note 15, at 422; Petty, supra note 9, at 546.
\textsuperscript{79} See Discussion Paper, supra note 50, at 3.
\textsuperscript{80} See Petty, supra note 9, at 548.
4. Problems with the Current Debate

Because extensive scholarship has previously explored the aforementioned issues, they are not discussed at length in this Note and for the most part would be unaffected by the inclusion of non-state actors in a definition. Nevertheless, those responsible for defining the crime of aggression for the ICC will focus only on these issues. In doing so, they fail to account for non-state actors, an essential element given our current world.

III. EQUAL CAPABILITIES OF NON-STATE ACTORS

Non-state actors have proven repeatedly over the last decade that they are capable of committing acts of aggression against States, in the manner described by the current working definition of the crime of aggression. But those debating the crime of aggression refuse to recognize the capabilities of non-states actors in failing to incorporate a broader definition. This must change. It is no longer viable to ignore the evolution of international criminal law and fail to recognize the capabilities of non-state actors in the debate over a definition of the crime of aggression.

A. Embracing Today’s Realities

The world has changed since the catastrophic events of WWII and the beginning of punishing aggression on the international level. States are no longer the only players on the international stage, they do not hold a monopoly on the latest technology and weaponry, and they cannot remain the only actors capable of committing a crime of aggression. The SWGCA must recognize the reality that non-state actors have reached the equivalent of State actors when defining the crime of aggression. If not, it might leave the international community scrambling when a non-state actor commits an act that would otherwise constitute a crime of aggression.

1. Defining a State
Most definitions of a State for international purposes consist of a few vital elements:

“[a] state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”\(^{81}\) These elements are generally required for recognition of a State under international law.\(^{82}\) This traditional definition lacks clarity by purporting to require formal relations only between States and by potentially limiting the acceptance of federated states, such as the republics making up the former Soviet Union, as States under international law.\(^{83}\) While the State has traditionally been the actor held responsible for an act of aggression, the London Agreement and the Nuremberg Charter recognized that individuals commit international crimes and international law must hold them accountable.\(^{84}\) This has led to a belief system that continues in today’s debate where punishment can occur if individuals are “in a position to effectively exercise control over or to direct the political or military action of a State.”\(^{85}\)

While the acknowledgment of individual culpability is important in achieving justice, it still maintains the status quo of an outdated, traditional, state-centric concept of international criminal responsibility.\(^{86}\) Using the State as a starting point for any discussion of the crime of aggression, or international law in general, is no longer adequate in an era of highly advanced, non-state affiliated groups.\(^{87}\) These non-affiliated groups have capabilities that were unimaginable to those involved with the Nuremberg Tribunal. The requirement of State action

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\(^{81}\) Restatement (Third) of Foreign Relations §201 cmt. a (1987).
\(^{83}\) *Id.* at 348-49.
\(^{84}\) See Dawson, *supra* note 15, at 422.
\(^{85}\) See Petty, *supra* note 9, at 548.
\(^{86}\) See Rayfuse, *supra* note 8, at 60.
for a crime of aggression fails to account for many of the foremost threats in the world today. The “mastermind” of the attack killing and injuring sailors controlled no defined territory, was not part of any government, and did not have formal relations with any State; yet, he was able to coordinate and carry out a brutal attack that in no way involved State aid or backing. The failure to account for such an individual indicates the SWGCA must adapt to today’s world.

2. The Globalized World of Today

Technology and information travel with ease in our current society, thanks to modern advances. This has created a world where billions of dollars of global wealth can transfer electronically in a matter of seconds or where a Taliban militant can obtain the latest in modern technology and suicide bomb materials. These advances have changed the scale, aspirations, and methods used by non-state groups. The international community faces new vulnerabilities in this new era of expanding globalization. Anyone in today’s world can obtain the coordination, communication, and technology that in previous periods had been exclusively available to States. This makes non-state actors much more powerful than they had been during prior periods of debate over the crime of aggression, accounting for their previous absence but failing to explain today’s rationale. The aggression debate has yet to incorporate this evolution, leaving any potential definition of the crime of aggression behind international law and resistant to the current state of society.

3. Modern Conflict

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89 See supra Introduction (discussing USS Cole hypothetical).
91 Id.
The concept of aggression as a crime of States was acceptable during a time when
conflict entailed one State’s infantry fighting another State’s infantry. The time of this
conventional conflict has long since past. Today, we live in a world where suicide bombings,
guerilla warfare, and militia groups are the norm, which has forced States to reorganize and
restructure their militaries to defend against this new threat.93 Dangerous groups evade potential
captors by basing their efforts in small, calculated attacks. Potential actions of non-state entities
are now the primary threat to peace and security.94 These threats come in the forms of rogue
states, failed states, terrorist organizations and the proliferation of weapons of mass destruction
technology.95 Non-state groups are also capable of wielding violence for political ends in ways
that were previously available only to States.96 Commentators recognized the ability of non-state
actors to undermine political stability and affect peace and security as early as the situation
involving the Contras in Nicaragua.97 Yet, as non-state actors have continued to exert their ever-
increasing power and influence, the SWGCA and others with the power to confront these new
challenges have continued to downplay the role of non-state actors.

The U.N., responsible for keeping peace and security in the world, is subject to criticism
for being out of date and ill suited to meet the changing nature of warfare.98 The U.N. system of
collective security continues to function without fully confronting the threats that today rest
outside the traditional state vs. state framework.99 Too often, the U.N. fails to neutralize
increasing threats from failed states that allow terrorist cells to operate or rogue states providing

94 See Delahunty & Yoo, supra note 88, at 45; Petty, supra note 16, at 149; Noah Weisbord, Conceptualizing
95 See Delahunty & Yoo, supra note 88, at 45.
96 See id.
97 See Rayfuse, supra note 8, at 60.
98 See Delahunty & Yoo, supra note 88, at 44.
99 See id. at 46.
radical groups with dangerous technology because of a non-interventionist belief except in cases of self-defense. Some commentators have even used the example of defining and criminalizing aggression itself under the Rome Statute as amounting to an admission that the U.N. Charter’s methods for constraining aggression have failed. This inability of the U.N. to adapt to modern trends in conflict also characterizes the failure of the SWGCA and those responsible for drafting a definition of the crime of aggression to deal with the issue of non-state actors. While the crime of aggression debate remains unchanged, international law has begun the process of evolving to meet the threat posed by non-state actors in other areas.

B. Evolving International Crimes

International law, being a vast and complicated undertaking, is usually slow in recognizing and reacting to new developments in the world. Nonetheless, international criminal law has become very important in the prosecution of non-state actors, given their lack of affiliation with any State and their ability to affect multiple nations with any action. State’s domestic criminal law extends only to its borders and citizens, necessitating transnational criminal law to deal with offenders whose crimes transcend the individual state.

Many international crimes, including those within the ICC’s jurisdiction, have begun accounting for non-state actors in their definitions. Genocide, war crimes, and crimes against humanity expressly and implicitly hold non-state actors accountable for their actions. Terrorism is a relatively new phenomenon, constituting a hybrid crime under which the ICC can

\[100\] See id. at 42-46.
\[101\] See id. at 41.
\[103\] See Rome Statute, *supra* note 2, art. 6-8, at 1004-09.
prosecute non-state actors for crimes against humanity or war crimes; however, this can only occur under certain circumstances. Commentators have also begun or continued advocating for similar changes in other serious international crimes not necessarily covered by the ICC, like organized crime acts and nuclear proliferation. This is the current direction of international criminal law and the crime of aggression should pursue a similar path, to avoid a situation where the international court cannot prosecute an individual such as the “mastermind.”

1. Genocide

The ICC maintains jurisdiction over genocide, a crime that encompasses non-state actors. Genocide, under the Rome Statute, includes acts such as killing or causing serious bodily or mental harm “with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.” Similar to other international crimes, there is no reference to a State or a requirement that a State commit or be affiliated with an individual who commits these heinous acts. General language, similar to that of crimes against humanity, allows for the real possibility that non-state groups or actors will be the ones committing these crimes. Instead of following these examples and using language that is more inclusive of all potential threats, the proposed definition on the crime of aggression continues to maintain a State requirement.

Under the current international system, the ICC could prosecute a non-state actor such as the “mastermind” for genocide if his agenda had been to attack a national or ethnic group with the intent to destroy them. Because the “mastermind” attacked a government ship and killed

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104 See id. art. 7-8, at 1004-09.
106 See supra Introduction (discussing USS Cole hypothetical).
107 See Rome Statute, supra note 2, art. 6, at 1004.
seventeen non-civilians, prosecution for genocide in an international forum is unavailable.\footnote{108 See supra Introduction (discussing USS Cole hypothetical).}

The ICC recognizes that non-state actors are serious threats to peace and security, just not in all situations.

2. War Crimes

War crimes are another international offense within the ICC’s jurisdiction that covers non-state actors. The Rome Statute defines war crimes as “[g]rave breaches of the Geneva Conventions of 12 August 1949,” committed against people or property under Geneva protections.\footnote{109 See Rome Statute, supra note 2, art. 8, at 1006.} This protects individuals from crimes such as “willful killing,” “torture or inhuman treatment,” and “willfully causing great suffering or serious injury,” among others.\footnote{110 See id.}


The basic interpretation of war crimes requires armed conflict between two States, conforming to the traditional understanding of conflict. Article 8(2) (b) of the Rome Statute regulates war crimes during international armed conflict, which in practice occurs between
States.  However, Article 8(2) (c) and (e) refer to cases of armed conflict not of an international character. By their very nature, non-international conflicts involve State and non-state actors. These sections cover any situation that does not conform to the traditional model of international armed conflict, giving recognition to the changing nature of warfare and those capable of committing war crimes in our current society. Furthermore, section (f) covers armed conflicts taking place within the territory of a State between governmental authorities and organized armed groups. This indicates that organized armed groups, or non-state groups, are within the purview of the ICC under the category of war crimes. Thus, the ICC has broad discretion in determining who has committed a war crime and prosecutorial power over both State and non-state actors.

As such, the ICC would have jurisdiction to prosecute the “mastermind” if his action falls under the protections against war crimes. His attack was against governmental authorities, and he is part of an organized armed group, which seem to fall within the elements of a war crime. However, this situation fails the requirement of armed conflict. Article 8(2) (d) of the Rome Statute does not recognize isolated and sporadic acts of violence as armed conflict of a non-international character. While this crime may evoke the imagery of what a war crime could be when occurring under the guise of the “War on Terror,” the Rome Statute specifically defined what constitutes armed conflict and the individuals protected via the Geneva

113 See Rome Statute, supra note 2, art. 8, at 1006.
114 See id. at 1008-09.
115 See id. at 1009.
116 See id. at 1008.
Conventions. The ICC cannot prosecute the “mastermind” for war crimes because this act does not take place during an armed conflict.

3. Crimes Against Humanity

Crimes against humanity are the final international crime under current ICC jurisdiction that incorporates non-state actors. The Rome Statute defines a crime against humanity as one of a number of acts such as “murder, extermination, torture, rape, and enslavement when committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Nothing in this general language purports to acknowledge only States as potential actors. While not explicitly stating that non-state actors can commit a crime against humanity, it does not limit prosecution to a State or those individuals acting on behalf of a state. By leaving the language general, it allows for the possibility of prosecuting non-state actors for crimes against humanity.

Situations qualifying as crimes against humanity require an “attack directed against any civilian population.” Under Article 7(2) (a), an “attack directed against any civilian population” is committed “pursuant to or in furtherance of a State or organizational policy to commit such an attack.” By stating that such an attack can result from an organizational policy, this emphasizes that non-state actors have organizational policies they follow in furtherance of their objectives. There is no State involvement requirement to limit the prosecution of non-state actors under a crime against humanity. The ICC can prosecute a situation where a non-state actor attacks a civilian target, if the attack fulfills requirements of certain predicate acts.

118 See Rome Statute, supra note 2, art. 8, at 1008-09.
119 See id. art. 7, at 1004.
120 See id. art. 7, at 1004-05.
121 See id. at 1005.
Two of the possible predicate acts for a crime against humanity are “torture” and “enforced disappearance of persons.”\textsuperscript{122} Torture is a predicate act that includes neutral language, allowing for an implicit interpretation of including non-state actors. Under Article 7(2) (e) “torture,” the inflicted wrong occurs “upon a person in the custody or under the control of the accused.”\textsuperscript{123} This definition does not even mention state action; however, the U.N. Convention against Torture (hereinafter CAT), generally the international standard on torture, requires official state action.\textsuperscript{124} Article 1 of CAT requires that torture be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”\textsuperscript{125} The definition of torture under crimes against humanity in the ICC does not distinguish between torture occurring under the authority of the United States or under the authority of al-Qaeda, whereas CAT does. Under this broader ICC definition, there is no difference between State actors and non-state actors for the purpose of torture under a crime against humanity prosecution. This places the ICC in a more favorable position to recognize and prosecute all individuals inflicting torture throughout the world, not just those with State affiliation.

Another predicate act is Article 7(2) (i), the “enforced disappearance of persons”, which is committed “by, or with the authorization, support, or acquiescence of, a State or a political organization.”\textsuperscript{126} While this definition again includes a State as an actor, it also specifies the actions of a political organization. Most non-state actors, including al-Qaeda,\textsuperscript{127} the Taliban,\textsuperscript{128}

\textsuperscript{122} See id. at 1004-05.
\textsuperscript{123} See id. at 1005.
\textsuperscript{124} Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85.
\textsuperscript{125} Id.
\textsuperscript{126} See Rome Statute, supra note 2, at 1005.
\textsuperscript{127} See generally Gurulé, supra note 1, at 25 (providing basic information about al-Qaeda).
or the Lord’s Resistance Army, are organizations that have a political drive to their agendas. In the case of al-Qaeda or the Taliban, they advocate for the implementation of a radical form of Islamic law in addition to furthering other goals. Most non-state actors have a political agenda, or at least some semblance of one. That makes their actions politically motivated in part, enabling their categorization as a political organization. Thus, the definition of enforced disappearance also allows the prosecution of non-state actors under crimes against humanity.

However, prosecution of the “mastermind” for a crime against humanity could not occur in the ICC because of the explicit definition in the Rome Statute. A crime against humanity requires a widespread or systematic attack directed against a civilian population. Therefore, if the attack is not widespread, not systematic, or directed against a purely military target, prosecution for a crime against humanity is not possible. The “mastermind” coordinated and carried out an attack against a purely military target, without harming civilians. As such, the ICC cannot prosecute him for a crime against humanity. Even though crimes against humanity cover non-state actors, the ICC jurisdiction over crimes against humanity does not cover all attacks and does not cover all acts of aggression. This necessitates a new definition of aggression, one that covers actors such as the “mastermind” and gives the ICC ability to bring them to justice.

4. Terrorism

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128 See generally id. at 25-26 (providing basic information about the Taliban).
131 See Rome Statute, supra note 2.
132 See supra Introduction (discussing USS Cole hypothetical).
Terrorism may be the most relevant recent development in regards to modern warfare, but the Rome Statute does not explicitly cover it. Suicide bombings, coordinated offensives of rebel groups, and al-Qaeda or Taliban acts headline the news every day. The “War on Terror” became synonymous with war itself during the Bush Administration. To complicate defining and prosecuting terrorism, the adage “one man’s terrorist is another man’s freedom fighter” illustrates the difficulties in deciding how and who to prosecute. Terrorists also no longer fit the caricature of a ragtag group of revolutionaries, as would have been true in yesteryears; they are now organized, well-funded, multinational bodies. Despite the confusion, terrorists are usually unaffiliated with a State. When the average person hears talk about a non-state actor these days, the tendency is to think about a terrorist or terrorist organization, even though non-state actors consist of any actor on the international stage other than a sovereign state. This positions terrorists and terrorism at the forefront of the non-state actor category of international criminal law.

Terrorism undoubtedly has many definitions, given the complexity of the issue. One basic definition is that “terrorism is violence committed by State or non-state actors directed against civilians or their property for political purposes.” While this definition does not encapsulate everything associated with terrorism, it provides a useful framework from which to proceed. State and non-state actors receive equal recognition of their abilities to commit terrorism in this definition, while the crime of aggression debate has yet to acknowledge or

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133 See Nanda, supra note 117, at 513. See generally Bush Speech, supra note 117 (indicating reference to “War on Terror”).
134 See Burgess, supra note 102, at 297.
135 See id.
136 See O’Connell, supra note 13, at 446.
137 See id. at 437.
accept the truth of this equality. The definition of terrorism also emphasizes that most, but not all, acts of terrorism involve action against civilians, coinciding with acts of terrorism that the ICC might prosecute.

Most acts of terrorism generally fall under the categories of war crimes or crimes against humanity, as far as prosecuting terrorism under international criminal law is concerned.139 Generally, most terrorist acts involve targeting and subsequently killing civilians in the furtherance of some political agenda. But terrorist organizations can also commit attacks without harming civilians. The act committed by the “mastermind” did not harm any civilians, but instead attacked individuals working on a ship on behalf of a State.140 Prosecution of the “mastermind” for committing a crime against humanity is not possible unless the attack harmed civilians.141 Similarly, prosecution for war crimes is not possible because there was not an armed conflict.142 Thus, the ICC cannot prosecute the “mastermind” under any of the aforementioned crimes. This leaves a gap in ICC jurisdiction, and prevents the international criminal court from prosecuting those responsible for some of the most serious international crimes. We cannot allow these types of individuals, responsible for atrocious violence, to escape punishment at the international level.

5. Organized Crime Acts

The ICC does not prosecute organized crime acts, although some advocate that an international criminal court should have jurisdiction over these potential crimes.143 Most people learn what they know about organized crime from watching “The Godfather” or any of the

140 See supra Introduction (discussing USS Cole hypothetical).
141 See Rome Statute, supra note 2.
142 See id. art. 8, at 1008.
143 See Yacoubian et al., supra note 105, at 168; Smith, supra note 13, at 1113.
multitude of movies involving the Mafia or other similar groups. However, the power and influence of these types of organizations on an international stage is much less known to the ordinary individual. The structure, economic power, and political power of organized crime syndicates make them capable of committing atrocities on an international scale, not merely a domestic one. As a result, proposals that the ICC should prosecute organized crime acts as crimes against humanity reflect the recognition of non-state actors committing serious international crimes.

Organized crime groups act as major participants in global economic activity by meeting a demand for illicit goods and services. This leads transnational organized crime groups to assert influence in a political arena, exploiting weak and corrupt states. The United Nations Convention against Transnational Organized Crime has acknowledged and addressed this problem, requiring states to criminalize certain organized crime activities and provide international cooperation. Despite this recognition, domestic criminal laws are not fully adequate to address this transnational problem. Some acts by organized crime groups such as human trafficking, drug trafficking, and murder, may fall under the categories of crimes against humanity. But other acts may not.

Advocates have long encouraged the establishment of an international court or amendment of the Rome Statute in a way that would explicitly and more effectively cover such crimes. In 1989, Trinidad and Tobago advocated for an international entity to address

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144 See Smith, supra note 13, at 1112.
145 See id. at 1113.
146 See id. at 1115.
147 See id.
148 See id. at 1118-19.
international drug trafficking as a crime before the ICC was even in existence. While the international entity Trinidad and Tobago advocated for became a model for the current ICC, the ICC was not given the power to prosecute international drug trafficking. International drug trafficking was a problem then, and remains a problem now, whether committed by State or non-state actors.

Despite remaining a problem, the ICC does not and will not have jurisdiction regarding international drug trafficking as a whole. But recognition of certain transnational organized crime acts under ICC crimes is a possibility. Although this would not necessarily address attacks like that of the “mastermind,” ICC jurisdiction could serve as an important additional prosecutorial tool when states are unwilling or unable to prosecute organized crime.

Categorizing some transnational organized crime acts committed by non-state actors as ICC crimes would advance the general principle that non-state actors are capable of committing the most serious international crimes. Holding non-state actors accountable for every serious international crime they are capable of committing should be of utmost priority.

6. Nuclear Proliferation

Nuclear proliferation is not an ICC crime, but remains a serious international concern. Many dangerous non-state actors in the world today pose threats by attempting to obtain nuclear weapons and nuclear technology. These actors include terrorist groups, failed and rogue states, and militias, who seek to upend the natural order by procuring these weapons to produce or threaten potentially cataclysmic events. Terrorist groups have even sought to obtain nuclear

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149 See Yacoubian et al., supra note 105, at 168.
150 See id.
151 See Smith, supra note 13, at 1122.
weapons following the belief that it is part of their religious duty.\textsuperscript{153} Despite the severity of this threat, the international controls on proliferation do not cover non-state actors.

The Treaty on the Nonproliferation of Nuclear Weapons is a seemingly comprehensive attempt to control the spread of nuclear materials and expertise,\textsuperscript{154} but it is not comprehensive enough. Everyone in the world is aware that countries such as the United States, Russia, and the other three nuclear weapon States control nuclear weapons.\textsuperscript{155} There are disincentives, such as economic sanctions, that prevent these States from participating in the nuclear black market; while important, these disincentives have no effect on non-state groups.\textsuperscript{156} While the threat of any State having nuclear weapons is real and serious, the more dangerous proposition is for nuclear weapons or the expertise to create nuclear weapons to fall into the hands of a non-state actor determined to change the world. The nuclear black market poses a serious threat to international peace and security. As a result, there is significant support for amending any non-proliferation treaty that fails to account for non-state actors.\textsuperscript{157}

Nuclear proliferation is thus another international crime that is beginning to recognize the importance of potentially prosecuting non-state actors. International criminal law has evolved to establish prosecutorial power over non-state actors when they commit certain serious international crimes. The crime of aggression can be the next international crime to address this potential threat, and take steps to adapt accordingly.

IV. PROPOSING A DEFINITION THAT INCORPORATES NON-STATE ACTORS

\textsuperscript{153} See Burch, \textit{supra} note 13, at 86.
\textsuperscript{154} See \textit{id.} at 96.
\textsuperscript{155} See \textit{id.} at 97.
\textsuperscript{156} See \textit{id.} at 85.
\textsuperscript{157} See \textit{id.}
No longer should international law limit a crime of aggression to State actors. The SWGCA must amend the current proposed definition for the crime of aggression to follow the trend of including non-state actors in international criminal law. The inclusion of non-state actors in a definition will help avoid situations that leave dangerous criminals beyond prosecution, and allow that agreed upon definition to remain relevant in the future.

Changes to the current proposed definition of the crime of aggression must allow for the prosecution of non-state actors. A more inclusive definition would define aggression as “the use of armed force by a State [or non-state actor] against the sovereignty, territorial integrity or political independence of a State, or in any other manner inconsistent with the Charter of the United Nations.” This definition accounts for all prospective actors, recognizing the relatively newfound capabilities of non-state actors in our globalized society.

Adoption of a definition including non-state actors should not be as controversial as current issues are for State Parties to the ICC. The inclusion of non-state actors does not involve the potential threat to national sovereignty and domestic law that current issues do. The expanded definition would not directly expose States to further liability or place their authority at risk, unlike current issues. Therefore, the proposal to include non-state actors in a definition for the crime of aggression should not be as complicated as issues like the role of the Security Council. In addition to provoking less disagreement, this proposal also brings the crime of aggression debate into the reality of our world and recognizes the serious threat that non-state actors pose.

159 See id.
160 See Discussion Paper, supra note 50 (emphasis added).
161 See Burch, supra note 13, at 103-4.
Under this new definition, many recent actions would have qualified as crimes of aggression. However, the ICC could not look backwards and attempt to prosecute these actions when it does obtain jurisdiction because the ICC does not have retroactive jurisdiction.\textsuperscript{162} While the ICC cannot currently prosecute any crime of aggression, a proposed jurisdiction with this broader definition of aggression may deter these types of future actions by non-state actors.\textsuperscript{163} The ICC prosecutor could have brought a case against the “mastermind” for committing a crime of aggression had an agreed definition been in place at the time and included non-state actors. Instead, justice cannot prevail with a trial charging the “mastermind” in front of the international community within legitimate proceedings.\textsuperscript{164}

The example of the Taliban offensive in Afghanistan and Pakistan serves as another prime example of an aggressive act that falls into the current gap in the definition of aggression. Taliban fighters attacked military forces, attempting to gain areas of control, and caused thousands of refugees to flee their homes in order to seek safety.\textsuperscript{165} But this would not be considered a crime of aggression under the current draft definition. We would have a different outcome if this example referred to Afghanistan attacking Pakistan instead, because both are State actors. Moreover, if this example referred to the period when the Taliban controlled Afghanistan, the Taliban would have been capable of committing a crime of aggression because of their control over a State. However, the Taliban do not currently have State affiliation and are thus not capable of aggression under the current proposed definition. Something is wrong with this reasoning on a very basic level. The definition of aggression proposed here represents a solution.

\textsuperscript{162} See Stein, \textit{supra} note 58, at 1203.
\textsuperscript{163} See Petty, \textit{supra} note 16, at 143.
\textsuperscript{164} See \textit{supra} Introduction (discussing USS Cole hypothetical).
\textsuperscript{165} See Pakistan Offensive, \textit{supra} note 12.
CONCLUSION

If the definition of the crime of aggression encompassed non-state actors, criminals such as the “mastermind” would be unable to evade international prosecution because of a jurisdictional loophole. The ICC, after obtaining jurisdiction over the crime of aggression, would be able to prosecute non-state actors under all of its given crimes. This would recognize the important place non-state actors have assumed in today’s world, and respond to them accordingly.

All of the other serious international crimes the ICC has jurisdiction over allow the court to prosecute non-state actors. If the SWGCA reaches an agreement on the narrow proposed definition, the crime of aggression would earn distinction as the only ICC crime that would not allow the court to prosecute non-state actors. Based on inclusiveness and the legitimacy of the ICC to prosecute those responsible for committing heinous international crimes, the crime of aggression cannot stand alone in neglecting non-state actors. Recognition of the capabilities of non-state actors in a definition for the crime of aggression must follow the evolution of international criminal law. There must be agreement on a definition for the crime of aggression, and that definition must include non-state actors to allow the ICC to fulfill its rightful place in international law.