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Defining Aggression: An Opportunity to Curtail the Criminal Activities of Non-State Actors

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DEFINING AGGRESSION: AN OPPORTUNITY TO CURTAIL THE CRIMINAL ACTIVITIES OF NON-STATE ACTORS

INTRODUCTION

In 1999, the United Nations ("U.N.") passed resolution 1267, which created the "Al-Qaida and Taliban Sanctions Committee" tasked with monitoring sanctions placed against the Taliban.[1] Two years after the sanctions were put into place, terrorists belonging to and associated with Al-Qaida hijacked four United States airplanes in furtherance of a terrorist attack that would forever be remembered as "9/11."[2] Since 2001, the U.N. has passed seven additional resolutions modifying the sanctions regime to include individuals and entities associated with Osama bin Laden, Al-Qaida, and the Taliban.[3] Yet, between September 2001 and March 2004, Al-Qaida was accredited for seven additional terrorist attacks.[4]

A possible reason why U.N. sanctions have had a limited effect on Al-Qaida is because Al-Qaida is a non-state actor ("NSA"). The term NSA has a variety of different meanings; spanning from rebels and terrorists to businessman and religious groups.[5] The intuitive definition of a NSA is quite simple: any person or group that is not a state.[6] However, this Note is particularly interested in the category of NSAs defined as "armed

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1. Sanctions were initially levied against Taliban for their support of Al-Qaeda and Osama bin Laden. *Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, UNITED NATIONS, http://www.un.org/sc/committees/1267/index.shtml (last visited Feb. 18, 2011) [hereinafter *Security Council Committee Concerning Al-Qaida and Taliban*]; S.C. Res. 1267, U.N. Doc. S/Res/1267 (Oct. 15, 1999).

2. Hijacked airliners were flown into the Twin Towers and the Pentagon, claiming about 3,000 lives. An additional plane was believed to be heading towards the White House, but crashed outside of Pittsburgh. *In Depth: September 11 What Happened?*, CBC NEWS ONLINE (Sept. 11, 2007), http://www.cbc.ca/news/background/sep11/index.html (last visited Jan. 15, 2011).

3. Resolutions 1390(2002), 1455(2003), 1526(2004), 1617(2005), 1735(2006), and 1822(2008) were all passed so that sanctions would apply to designated individuals and groups associated with Osama bin Laden and/or the Taliban, irrelevant of their location. *Security Council Committee Concerning Al-Qaida and Taliban*, *supra* note 1.

4. *See* Mary Glendinning, *Timeline: Al-Qaida Attacks on Western Targets*, NAT'L PUB. RADIO (July 7, 2005), http://www.npr.org/templates/story/story.php?storyId=4733944 (last visited Jan. 15, 2011).

5. *See* Andrew Clapham, *Non-State Actors*, *in* POST CONFLICT PEACE-BUILDING: A LEXICON 200, 200 (Vincent Chetail ed., 2009).

6. *See id*.

groups that operate beyond state control."[7] This type of NSA includes, but is not limited to rebels, local militants, vigilantes, warlords, and civil defense forces.[8] Al-Qaida falls into this category of armed groups because they are an international terrorist organization that does not depend on the support of a political state.[9] Yet, Al-Qaida is just one example; the International Institute of Strategic Studies' armed conflict database currently lists eighty-four different NSA groups in the Middle East and North Africa alone.[10]

The problem that NSAs present to the international community is exemplified by Al-Qaeda: despite a slew of U.N. sanctions, Al-Qaida has persisted in terrorist activity. International humanitarian and human rights laws have been similarly ineffective with policing the criminal activities of NSAs.[11] This is troubling because the international climate has grown less state-centered, with increasing influence from NSAs.[12] As the threat presented by NSAs expands,[13] it is imperative that the international community recognize the changing dynamic of conflicts, internal and international, and adapt its laws accordingly.

One such opportunity to shape the laws of armed conflicts arose in 2010, when the Assembly of State Parties[14] ("ASP") to the International Criminal Court ("ICC") met to review the Rome Statute and define the

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7. Caroline Holmqvist, *Engaging Armed Non-State Actors in Post-Conflict Settings*, *in* SECURITY GOVERNANCE IN POST-CONFLICT PEACEBUILDING 45, 45 (Alan Bryden & Heiner Hanggi eds., 2005) (discussing the importance of including NSAs in peace talks once a conflict has concluded).

8. *Id*.

9. Laura Hayes et al., *Al-Qaeda: Osama bin Laden's Network of Terror*, INFOPLEASE.COM, http://www.infoplease.com/spot/al-qaeda-terrorism.html (last visited Jan. 15, 2011) (explaining the leadership and structure of Al-Qaida, and how Al-Qaida is different than "more traditional terrorist organizations").

10. *See Armed Conflict Database*, THE INT'L INST. FOR STRATEGIC STUDIES, http://acd.iiss.org/armedconflict/MainPages/dsp_ConflictList.asp (last visited Jan. 15, 2011).

11. *See* Marco Sassòli, Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law 2 (2003) (Armed Groups Conf., Conference Paper), *available at* http://www.genevacall.org/resources/other-documents-studies/f-other-documents-studies/2001-2010/2003-13nov-sassoli.pdf.

12. *Id*. at 2.

13. *See id.*

14. The ASP to the ICC refers to those countries that have ratified the Rome Statute, and make up the court's governing body. *In the News: What Should You Know About 2010 ICC Review Conference?*, GLOBAL SOLUTIONS, http://www.globalsolutions.org/issues/what_should_you_know_about_2010_icc_review_conference (last visited Jan. 31, 2011) [hereinafter *In the News*].

"crime of aggression."[15] Although not the formal definition, aggression refers to the legality of resorting to force.[16] This conference was significant, because how the crime is defined will determine whether NSAs, like Al-Qaida, can be prosecuted for attacks like 9/11. As it stands, Al-Qaida would have escaped prosecution. The adopted definition focuses entirely on state action, and reads in pertinent part:

> [T]he planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[17]

Though the amendment was passed in 2010, the ICC may only exercise jurisdiction over this crime subject to another vote to be held after January 1, 2017.[18] Going forward with such a definition would be a mistake. As the High-Level Panel on Threats, Challenges, and Change stated, "the norms governing the use of force by non-state actors have not kept pace with those pertaining to states."[19] With the laws of war continually growing outdated, adding such a provision to the Rome Statute is like placing a fresh brick atop a crumbling foundation.

Part I of this Note provides a background of the international laws governing conflicts, particularly those relating to NSAs. Part II criticizes the current international framework for conflict resolution. Specifically, Part II discusses why international law is too outdated to properly handle modern conflicts and how developments in international criminal law make it the best avenue for enforcing laws against NSAs. Part III focuses

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15. *Review Conference of the Rome Statute*, COAL. FOR THE INT'L CRIMINAL COURT, http://www.iccnow.org/?mod=review (last visited Feb. 2, 2011) [hereinafter *Review Conference of the Rome Statute*].

16. Frédéric Mégret, *International Criminal Law* 13 (Dec. 29, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1321253&download=yes (unpublished manuscript) (on file with the *Brooklyn Journal of International Law*).

17. Amendments to the Rome Statute of the International Criminal Court art 8(2), June 11, 2010, Depository Notification C.N.651.2010.Treaties-8 [hereinafter Rome Statute Amendments].

18. *Id*. art 15(2).

19. In a speech delivered before the General Assembly in September 2003, the Secretary-General of the U.N. announced that the member states needed to come to an agreement on the nature of the threats to collective security. With this goal in mind, the Secretary-General convened a panel including eminent persons to provide a comprehensive view on this subject, as well as advice on how to move forward. The results of this panel were presented to the General Assembly on December 2, 2004. The Secretary-General, *Report of the High-Level Panel on Threats, Challenges, and Change*, ¶ 159, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *High-Level Panel Report*].

on the Rome Statute and particularly the 2010 review. Given that this review amended the Rome Statute to define the crime of aggression, this Note discusses the implications and shortcomings of this amendment. Lastly, Part IV argues that by passing a state-focused definition of aggression, the international community missed a critical opportunity to reign in the illegal activities of NSAs.

I. INTERNATIONAL LAW AND CONFLICT RESOLUTION

According to its preamble, the goal of the U.N. is to promote global peace, "reaffirm faith in fundamental human rights," establish conditions under which justice can flourish, and "promote social progress and better standards of life."[20] It logically follows that the U.N. Charter charges the Security Council with the goal of restoring and maintaining global peace and security,[21] while not aggravating the situation.[22] So although the U.N. is an assembly of nations, to meet their responsibilities the U.N. must have certain tactics at its disposal for dealing with the threats presented by NSAs. In this vein, in 2006 the U.N. published a set of guidelines entitled "Humanitarian Negotiations with Armed Groups."[23] The manual lists international humanitarian law, international human rights law, and international criminal law as the three principle branches that frame the discussion for humanitarian negotiations with NSAs.[24] While criminal and humanitarian laws are specific to conflicts, international human rights law provides certain universal rights guaranteed to all people.[25] The guidelines of such negotiations are of special interest to this discussion since international humanitarian law is often used synonymously to describe the laws of war or proscribe appropriate conduct

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20. U.N. Charter pmbl.
21. *Id.* art. 39.
22. Article 40 of the U.N. Charter states:

> In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Id. art. 40.

23. U.N. Office for the Coordination of Humanitarian Affairs [OCHA], *Humanitarian Negotiations with Armed Groups: A Manual for Practitioners* (Jan. 2006) (by Gerald McHugh & Manuel Bessler) [hereinafter *Humanitarian Negotiations Manual*].
24. *Id*. at 30.
25. *Id.* at 33.

during wartime.[26] Thus, adherence to international humanitarian law is closely related to conflict resolution.

To avoid confusion, it is worth noting the difference between the terms "humanitarian principles" and "international humanitarian law." In general, humanitarian principles refer to alleviating human suffering wherever it may be found.[27] This term comes from, and is the focus of the International Committee of the Red Cross.[28] On the other hand, international humanitarian law is a set of rules which seeks to "limit the effects of armed conflicts."[29] To this extent, it looks to protect those that were not involved in, or are no longer involved in armed conflicts, and restricts the methods and tactics used to carry out a war.[30] This area of law is comprised of a number of treaties, as well as custom.[31] At its core, those treaties are the Geneva Convention of 1949, which binds nearly every state in the world,[32] and the additional protocols of 1977.[33] Of these treaties, the ones specific to NSAs are Common Article 3 of the Geneva Conventions, and Protocol Additional II.[34] Additionally, customary international humanitarian law is a set of rules and norms that has arisen out of regular practice, creating a general belief that such practice should be adhered to as a matter of law.[35]

It is important to remember that treaty-based international humanitarian law was enacted by states. Thus, in theory, NSAs are expected to follow and adhere to a set of rules and guidelines that they had no part in creating.[36] To complicate matters further, NSAs are typically involved in

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26. Int'l Comm. of the Red Cross [ICRC], Advisory Serv. on Int'l Humanitarian Law, *What is International Humanitarian Law?* (July 31, 2004), *available at* http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf (defining international humanitarian law) [hereinafter ICRC, *International Humanitarian Law*].

27. *See* Jean Pictet, *The Fundamental Principles of the Red Cross: Commentary*, ICRC (1979) (discussing the purpose of the Red Cross, a non-governmental organization that was founded to "bring[] assistance without discrimination to the wounded on the battlefield").

28. *Id*.

29. ICRC, *International Humanitarian Law*, *supra* note 26.

30. Some agreements specify the protection of children, or forbid the use of specific weapons and tactics. *Id*.

31. *Humanitarian Negotiations Manual*, *supra* note 23, at 30.

32. ICRC, *International Humanitarian Law*, *supra* note 26.

33. Other treaties of international humanitarian law include the Hague Conventions of 1907. *Humanitarian Negotiations Manual*, *supra* note 23, at 30.

34. *Id*.

35. *Id*. at 32 (pointing out that even if a state is not a signatory to a given treaty, it is still expected to adhere to the principle of not targeting buildings that are essential to civilian survival, such as water treatment plants).

36. *See* Sassòli, *supra* note 11, at 6.

fighting against the state that enacted the law that is supposed to bind them and by definition, are illegal in said state.[37] It logically follows that where the law was created with the problems and goals of only one party in mind, these laws will be less effective.[38] Given the vast number of NSAs around the world, and the fact that by their nature, it is impossible to predict which NSAs will exist in the future, lack of participation by NSAs in international treaties is unlikely to change. Furthermore, it is improbable that there will be any future conferences regarding this area of law, as the codification of international humanitarian laws has largely been completed.[39]

Customary international humanitarian law is considered binding on both sides of a conflict, irrelevant of ratification, and enjoys a higher degree of legitimacy.[40] Dubbed the "Marten's Clause," one of the most important rules of customary international humanitarian law comes from the preamble of Additional Protocol II. [41] It declares that "in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience." [42] So since customary international humanitarian law exists without formalized treaties, a nation's or individuals' approval of the law is theoretically immaterial to its application.

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37. *Id.* at 7.

38. *See id.* at 6 (discussing that at least psychologically, people might have an easier time accepting a set of laws if they were involved or represented in the creation of the laws).

39. The Hague Conventions were in 1907, the Geneva Conventions were in 1949, and the Additional Protocols were enacted in 1977. Thus, there has not been a new treaty of international humanitarian law in forty-two years. *See generally Humanitarian Negotiations Manual*, *supra* note 23, at 30; *see also* Jean-Marie Henckaerts, *Binding Armed Opposition Groups Through Humanitarian Treaty Law and Customary Law*, 27 COLLEGIUM (SPECIAL ISSUE) 123, 128 (2003) [hereinafter Henckaerts, *Binding Armed Opposition Groups*] (discussing how involving NSAs in future treaties is not a likely remedy to the problem of NSAs being unrepresented in the treaties that currently govern international humanitarian law).

40. Henckaerts, *Binding Armed Opposition Groups*, *supra* note 39, at 128; *see also* Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 857 INT'L REV. OF THE RED CROSS 175, 198–212 (2005) [hereinafter Henckaerts, *Humanitarian Law*] (providing a description of the 161 rules recognized as binding customary international humanitarian law).

41. *Humanitarian Negotiations Manual*, *supra* note 23, at 32.

42. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) pmbl, June 8, 1977, 1125 U.N.T.S. 609.

Much like international humanitarian law, international human rights law is composed mostly of treaties, declarations, and covenants, which are signed and ratified by states.[43] The goal of these treaties and covenants is to define the "universal, interdependent and indivisible entitlements of individuals."[44] Unlike international humanitarian law, these laws are applicable during both peace and wartime, and can never be suspended.[45] Another difference is that international human rights laws only impose responsibility on the state to its citizens,[46] and as such, only the state is capable of violating human rights laws.[47] An opposing view is that although NSAs cannot be a party to the existing treaties, its members are expected to adhere to them and will be prosecuted accordingly for violations.[48] Thus, much like international humanitarian law, international human rights law excludes NSAs from the process, but expects them to abide by the results.

Of the three, international criminal law provides the most effective foundation for holding NSAs accountable for their international crimes.[49] This branch of law imposes criminal sanctions in an effort to protect a certain international order, or basic core values that pierce state borders.[50] Although international criminal law initially took aim at states housing international criminals, over time the focus has shifted to individual criminal responsibility.[51] Despite this focus on individual respon-

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43. These, among others, include the Universal Declaration of Human Rights (1948) and the International Covenants on Civil and Political Rights (1966). *Humanitarian Negotiations Manual*, *supra* note 23, at 33.

44. *Id.*

45. Henckaerts, *Humanitarian Law*, *supra* note 40, at 196.

46. *See* Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 863 INT'L REV. OF THE RED CROSS 491, 511 (2006) (presenting the arguments for why human rights laws do not actually bind NSAs).

47. *See* The High Comm'r for Human Rights, *The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, ¶ 18, *delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/2003/64 (Dec. 27, 2002) [hereinafter *The Right to a Remedy*] (discussing the right to a remedy for persons victimized by human rights violations, and finding such remedies are only available when the perpetrator is a state actor).

48. *See Humanitarian Negotiations Manual*, *supra* note 23, at 33 (acknowledging that it is the state's responsibility to enforce international human rights law, but NSAs can be prosecuted for their violation under applicable national law, or international criminal law).

49. "International crimes," does not necessarily have the same connotation as "international criminal law." As used here, it simply refers to any violation of international law.

50. Mégret, *supra* note 16, at 10–11.

51. *Id*. at 4; *see also* Rome Statute of the International Criminal Court art. 25(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (providing in pertinent part that

sibility, international criminal law still shares the same structure as other fields of international law; individuals can only be prosecuted for violating a law to which their state was a member.[52] International criminal law is derived from the general principles of international law, agreements by states on particular activities, and commonly recognized principles of national law.[53] Although treaty-based international criminal law is found in several agreements,[54] this Note focuses on the Rome Statute.

The Rome Statute holds special importance because it is considered the most comprehensive substantive piece of international criminal law and, in effect, codifies all of the "core crimes."[55] Furthermore, it is the instrument which created the ICC, the first permanent, international court.[56] The ICC was created to promote the rule of law and was given "the power to exercise its jurisdiction over persons for the most serious crimes of international concern."[57] Moreover, the Rome Statute provides the ICC with a list of sources of law to apply.[58] This is unique to the ICC because founding documents for other international criminal laws were focused on national state law.[59] On the other hand, Article 21 of the Rome Statute declares itself first among sources of law for the court to apply.[60] This bears special importance to NSAs because the Rome Statute establishes jurisdiction over individual[61] and specifically addresses non-international conflicts.[62] Thus, given its focus on individuals, and

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"a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute").

52. Mégret, *supra* note 16, at 5.

53. *Humanitarian Negotiations Manual*, *supra* note 23, at 34.

54. Examples include: The Rome Statute of the International Criminal Court (1998), The U.N. Convention Against Transnational Organized Crime (2000), and The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000). *Id*.

55. Mégret, *supra* note 16, at 7.

56. *Humanitarian Negotiations Manual*, *supra* note 23, at 35.

57. It further provides that the court will assume a complementary role to national criminal courts, and that the jurisdiction and functioning of the court is to be governed by the statute. Rome Statute, *supra* note 51, art. 1.

58. *Id*. art. 21.

59. *See* Mégret, *supra* note 16, at 6.

60. Only after applying the Rome Statute, "Elements of Crimes and its Rules of Procedure and Evidence," may the ICC look to pertinent treaties and rules from international law. Last amongst applicable law for the ICC are general principles that the court derives from national laws of legal systems around the world, particularly the states that might normally exercise jurisdiction. *See* Rome Statute, *supra* note 51, art. 21.

61. *Id*. art 1.

62. Article 8(2)(c) provides in sum and substance:

jurisdiction over NSAs, the ICC and amendments to the Rome Statute bear a special importance to the future of conflict resolution in the context of NSAs.

Although the laws are in place, they must still be enforced. Historically, international criminal law has been uniquely vulnerable to claims criticizing it for this very failure.[63] One reason for this problem is that strong international criminal law enforcement is typically linked to the strength of the organization behind it.[64] In this vein, the ICC has benefited substantially from backing by a coalition of "like minded" States.[65] Although the U.S. has been critical of the ICC, it has received support from the European Union as well as a number of Latin American and African States.[66] Moreover, the U.N. even acknowledged that "[i]n the area of legal mechanisms, there have been few more important recent developments than the Rome Statute creating the International Criminal Court."[67] Further U.N. support for the ICC is found in the Relationship Agreement between the International Criminal Court and the United Nations, adopted in 2004.[68] The preamble of this agreement recognizes the important role played by the ICC, and states the U.N.'s desire to establish a "mutually beneficial relationship."[69]

Another reason that international criminal law stands out amongst other branches of international law is International Military Tribunals

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> In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely . . .

Id. art. 8(2)(c).
Article 8(2)(f) further provides:

> . . . It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized groups or between such groups.

Id. art. 8(2)(f).

63. Mégret, *supra* note 16, at 22.

64. For instance, one reason that the prohibition on slave traffic in the 19th century was successful is that Britain threw its weight behind the prohibition, and threatened to use British forces to patrol the Atlantic to enforce the ban. *Id*.

65. *Id*.

66. *Id*.

67. *High-Level Panel Report*, *supra* note 19, ¶ 90.

68. Negotiated Relationship Agreement between the International Criminal Court and the United Nations, U.N. Doc. A/58/874/Annex (Aug. 20, 2004) [hereinafter Negotiated Relationship Agreement] (highlighting the ways in which the U.N. and the ICC are already connected, while providing future goals and areas of cooperation).

69. *Id*. pmbl.

("IMTs"). An IMT is typically created by the same treaty that put into force a given set of laws.[70] Historically, these tribunals were created *ad hoc* to adjudicate a specific situation and were limited either in territory, time, or personally.[71] For example, the Nuremberg IMT was created by the London Charter of the International Military Tribunal.[72] It was created in the wake of World War II with the specific purpose of trying crimes stemming from that war.[73] Although the Rome Statute's creation of the ICC is technically considered an IMT in the same regard as tribunals before it, it stands out as the only one established permanently and given universal jurisdiction.[74]

II. THE OUTDATED INTERNATIONAL MODEL

One of the chief issues that the international community has with policing NSAs is repercussions. Punishment is important, because as discussed in this Section, NSAs may not recognize the laws as applicable to them.[75] To adequately appreciate the shortcomings of the global system and the international laws governing war, the discussion should begin with the founding of the U.N. and its Charter. The preamble immediately evidences why the U.N. has problems dealing with NSAs: although the purpose of the U.N. is promoting global peace, the Charter was enacted by an assembly of governments.[76] Furthermore, the U.N. has since ad-

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70. Mégret, *supra* note 16, at 26.

71. *Id*.

72. Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement"), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg IMT].

73. *Id*. art. 6.

74. Mégret, *supra* note 16, at 27; *see also* Rome Statute, *supra* note 51, art. 1 (stating that the court is "hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern . . .").

75. *See* Clapham, *supra* note 46, at 511 (discussing the various arguments for why NSAs are bound by international law, and the responses those arguments will likely receive from the NSAs); *see also* Sassòli, *supra* note 11, at 3–6 (discussing how NSAs might respond to various arguments about being bound by international humanitarian or human rights laws).

76. The preamble of the U.N. Charter reads in pertinent part:

> To save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
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> To reaffirm faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

mitted that the primary goal of its creation was state security.[77] Thus, although the nations that gathered for the first assembly of the U.N. agreed to the Charter,[78] the various NSAs the Charter hopes to govern did not. So the U.N., acting as peace keeper for the globe, is challenged to monitor the actions of a variety of groups who never authorized it to exercise power over them.

The current architecture of international law is poorly equipped to prevent or resolve conflicts involving NSAs. The problem with the laws governing conflict resolution is that although the international reality grows more focused on NSAs, international laws remain focused on state responsibilities.[79] Moreover, even where the rules apparently apply to the NSA, there is seldom an actual international forum for the aggrieved party to seek relief and invoke the NSA's responsibility.[80] This is largely because the laws of war predate the recent explosion of NSAs onto the global stage. As neither international humanitarian nor international criminal law has seen development since 1998,[81] meaningful change does not happen often.

Even politicians that applaud the U.N.'s successes[82] stress that if the U.N. is to meet the challenges of providing collective security[83] in the

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> To establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
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> To promote social progress and better standards of life in larger freedom.

U.N. Charter pmbl.

77. Anand Panyarachun, Chairman of the High-Level Panel on Threats, Challenges, and Change, highlighted this problem in his report which was presented by the Secretary-General of the U.N. to the General Assembly. *High-Level Panel Report*, *supra* note 19, synopsis.

78. U.N. Charter, pmbl.

79. Sassòli, *supra* note 11, at 1–2 (arguing that not only are most of the international rules state-centered, but the implementation mechanisms are even more so).

80. This is true regardless of whether the aggrieved party is an individual, an injured State, an international organization, or a third party State. *See id*. at 2.

81. International humanitarian law, governed by the Geneva Conventions, was last altered in 1977 with the addition of Protocol II. International criminal law is largely governed by the Rome Statute which was passed in 1998, and entered into force in 2002. *Humanitarian Negotiations Manual*, *supra* note 23, at 30, 35.

82. Anand Panyarachun, the former Prime Minister of Thailand and the Chairman of the High-Level Panel on Threats, Challenges, and Change, starts his report to the Security Council by applauding the U.N. for past successes, and insisting it has been more successful than people give it credit for. *High-Level Panel Report*, *supra* note 19, transmittal letter.

83. At its founding, the U.N. thought of collective security as a collective response by its members should the security of a state be put in jeopardy. *High-Level Panel Report*, *supra* note 19, synopsis.

21st century, major changes are needed.[84] This is partially because the proliferation of NSAs has led observers to believe the importance of the state is diminishing.[85] For a demonstration of this fact, one only has to glance at a breakdown of the conflicts that have plagued the world between 1946 and 2002. In 1946 there were two inter-state wars as opposed to ten ongoing civil wars,[86] While the number of inter-state wars has never eclipsed six in a given year, the number of civil wars rose to fifty-two in 1992, before settling down to thirty in 2002.[87] Considering that the number of civil wars today is much higher than it was when the U.N. was founded, it would be foolish to keep shaping international law in its 1945 image.

To understand why NSAs present such a challenge to the U.N., it is important to consider the effectiveness of the laws discussed above. Part A of this Section examines the U.N.'s use of sanctions and discusses why they are an ineffective means of attaining compliance from NSAs. Next, Part B discusses how the failures of international humanitarian law and international human rights law stem from their being inapplicable. Finally, Part C argues that of the three, international criminal law provides the best hope for policing the criminal activities of NSAs.

A. To Sanction, or Not to Sanction?

No proper discussion of the penalties associated with disregarding international law would be complete without an overview of U.N. based sanctions. Following the Cold War, "peacemaking, peacekeeping and post-conflict peacebuilding in civil wars [became] the operational face of the United Nations in international peace and security."[88] During this same time period, the U.N. has turned to the use of sanctions with increasing frequency.[89] Its power to implement sanctions stems from Chapter VII of the U.N. Charter, which governs actions in response to a

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84. *High-Level Panel Report*, *supra* note 19, transmittal letter.

85. *See generally* Muhittin Ataman, *The Impact of Non-State Actors on World Politics: A Challenge to Nation-States*, ALTERNATIVES: TURKISH J. OF INT'L RELATIONS, vol. 2, no. 1, 2003, *available at* http://www.alternativesjournal.net/volume2/number1/ataman2.htm.

86. *See High-Level Panel Report*, *supra* note 19, fig.I.

87. *See id*. fig.I.

88. *Id.* ¶ 84.

89. For example, the United Nations imposed sanctions on Iraq to force it out of Kuwait, to compel Serbia to stop aiding the Bosnian rebels, and to topple the Haitian military. *See generally* Renee B. Agress et al., *The Effects of Economic Sanctions on Internal Conflict: The Capacity and Preferences of Domestic Groups in Target States* (paper presented at the annual meeting of Southern Political Science Association, Jan. 6, 2005); *see also* Robert A. Pape, *Why Economic Sanctions Do Not Work*, 22 INT'L SEC. 90 (1997).

breach of the peace.[90] Specifically, Article 41 provides for the use of measures not involving force, "[including] complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."[91]

At the discretion of the U.N. Security Council, sanctions can be broken up into two categories: mandatory and voluntary.[92] While voluntary sanctions are imposed at the discretion of the state,[93] mandatory sanctions are binding international law, and states must enact legislation to put them into effect.[94] This is because Article 24(1) of the U.N. Charter states that the Security Council's responsibility is to maintain international peace and security, and to this extent, grants the Security Council power to act on behalf of the other states.[95] Furthermore, Article 25 of the Charter provides that members of the U.N. "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[96] While both brands of sanctions are at the U.N.'s disposal, the literature,[97] as well as this Note, focuses on mandatory sanctions. In the years spanning 1991 to 1994, the U.N. Security Council imposed mandatory sanctions eight times, as opposed to twice between 1945 and 1990.[98]

Yet, sanctions in general are a questionable practice and are particularly ineffective in the case of NSAs. Despite the U.N.'s turning to sanc-

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90. U.N. Charter ch. VII.

91. U.N. Charter art. 41. The Security Council also has the power to call on the parties involved to comply with the measures it deems necessary. *Id.* art. 40. The Security Council is also allowed to call for the use of force if it deems Article 41 measures to be inadequate. *Id.* art. 42.

92. Andrea Charron, UN Targeted Sanctions: Changing the Lens from Sanctions to the Crisis Context 8 (paper presented at the annual meeting of the ISA's 50th Annual Convention, "Exploring the Past, Anticipating the Future," May 22, 2009), *available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/3/1/1/4/1/p311419_index.html (discussing how the methodology and targets of the sanctions are important to gauge success).

93. Since the sending state has the right to ignore voluntary sanctions, it becomes much more difficult to keep track of voluntary sanctions. Additionally, it is difficult to determine the effectiveness of voluntary sanctions, since the discretionary element implies that they will not be applied uniformly. *See id*.

94. *Id*.; *see also* U.N. Charter arts. 24, 25.

95. U.N. Charter art. 24, para. 1.

96. *Id.* art. 25.

97. Voluntary sanctions have largely been ignored by literature on sanctions for a variety of reasons. Among them is that the term "sanctions" typically refers to mandatory sanctions. Furthermore, it is empirically easier to leave out voluntary sanctions because mandatory sanctions provide clearer data. *See* Charron, *supra* note 92, at 8.

98. Pape, *supra* note 89, at 90.

tions with increasing frequency, it is still unclear how frequently sanctions actually bring about the desired changes in the target regime.[99] Although proponents typically argue that sanctions can be as effective as military force,[100] the first wave of research indicated that they were not.[101] Logic dictates that the purpose behind sanctions is that the economic burden placed on the sanctioned nation's population will cause those citizens to grow dissatisfied with their government.[102] This would in turn cause the nation's citizens to place internal pressure on the regime to make the necessary changes desired by the U.N., leading to the lifting of the sanctions.[103] Although recent studies have shown sanctions to be more successful, that is largely because the definition of "success" has been modified in a way that makes failure impossible.[104] One economic analyst, David Baldwin, argues that whenever the target of attempted influence is forced to pay any price for noncompliance, the sanctions should be considered at least partially successful.[105] Yet, this is blatantly a circular definition of success. If a sanction is the imposition of some burden on a country, and success is defined as burdening a noncompliant country, every instance of a sanction must be, by definition, a success. Baldwin's definition is further flawed because it judges when "attempted" influence is successful. Clearly, when success is attained by attempting something, it is not very difficult to achieve this standard. The problem with such an over-inclusive definition is that it clouds the real issue of whether desired changes actually resulted from the sanctions.

In avoiding the trap of defining sanctions too broadly, it is important to distinguish between economic pressure and economic sanctions. Economic pressure tends to refer to one of three strategies: (1) economic sanctions,[106] (2) trade wars,[107] and (3) economic warfare.[108] Of the three,

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99. Agress, *supra* note 89, at 1.

100. Although reasonable people might differ on how effective war is as an "instrument of policy," it is hard to argue for unnecessary wars. As such, the argument goes that sanctions present a more humane alternative to resolving conflicts. *See* Pape, *supra* note 89, at 91 (citing DAVID A. BALDWIN, ECONOMIC STATECRAFT, 373 (1985)).

101. The first major wave of research done on the effectiveness of sanctions occurred during the 1960s and 1970s. Pape, *supra* note 89, at 91; *see also* Johan Galtung, *On the Effects of International Economic Sanctions: With Examples from the Case of Rhodesia*, 19 WORLD POL. 378, 380 (1967).

102. Agress, *supra* note 89, at 1.

103. Under this view, economic sanctions might cause the citizens of a nation to engage in activities such as strikes, demonstrations, riots, and maybe even civil war. *See id.*; *see also* Pape, *supra* note 89, at 94.

104. Pape, *supra* note 89, at 95.

105. *Id.* (citing DAVID A. BALDWIN, ECONOMIC STATECRAFT, 373 (1985)).

106. Defined *infra* note 109.

only economic sanctions seek to lower the economic well-being of a target for the purpose of coercing the target to change its political behavior.[109] So while some lump all three categories under the term economic sanctions, this is ill-advised.[110] What policy-makers are actually interested in is when economic pressure brings about desired policy changes.[111] If the barometer for success remains focused on bringing about an actual regime or policy change, then the results remain less optimistic.[112] Historically, U.N. sanctions regimes[113] that target intrastate conflicts tend to place the bulk of the sanctions against the state, despite the fact that the focus of the literature is on the importance of targeted sanctions and sanctioning individuals and entities.[114] In a case study of various sanctions regimes, regimes involving intrastate conflicts[115] were in place longer than those involving interstate conflicts.[116] Furthermore, of the civil wars occurring between 1993 and 2003 that triggered U.N.-led mediation, settlement resulted only about twenty-five percent of the time.[117] As such, when sanctions are considered in an appropriate context, their effectiveness when NSAs are involved is questionable at best.

A possible explanation for why NSAs are not as responsive to sanctions is that they do not have the same responsibilities to their 'citizens'

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107. A trade war is when a state threatens to, or actually inflicts, economic harm against another state in an attempt to persuade the other state to agree to terms that are more favorable to the coercing state. JOHN A. CONYBEARE, TRADE WARS: THE THEORY AND PRACTICE OF INTERNATIONAL COMMERCIAL RIVALRY 3–6 (1987).

108. Economic warfare is the strategic weakening of a target's economy to in turn afflict its military capabilities. This is typically done during a peacetime arms race or during war. Pape, *supra* note 89, at 94.

109. *Id.*

110. *Id.*

111. Placing economic pressure on a state carries one or both of two purposes: punishing the target by depriving them of some material good, or making the target comply with some goal that the punishing parties feel is important. As achieving both these goals will not always be possible, it is imperative for the policy-maker to determine which one is more important. *See* Galtung, *supra* note 101, at 379.

112. Pape, *supra* note 89, at 95; *see also* Galtung, *supra* note 101, at 380 (pointing out that merely punishing a person is not likely to cause that person to comply with a given set of goals).

113. A sanction regime refers to the totality of Security Council resolutions creating, altering, or terminating sanctions that target a particular group or state. Charron, *supra* note 92, at 4.

114. *Id.* at 15.

115. Intrastate conflicts are confined within the borders of one state. *Id.* at 3.

116. Interstate conflicts involve two or more countries. *Id* at 3, 16.

117. *High-Level Panel*, *supra* note 19, ¶ 86.

as an actual government.[118] Often times, breeding discontent with the ruling government might actually be their goal.[119] Thus, the dissatisfaction with the regime that the U.N. is hoping to foster by sanctioning the state may be the very same goal as the NSA's. This is evidenced by the fact that sanctions placed on regimes that had pre-existing political or economic problems were of limited effect.[120] Historically, these targeted regimes frequently stood to gain from persisting with their illegal activities.[121] Some extremist groups actually stand to gain from regional instability resulting from conflicts, since state collapse or the emergence of ungoverned regions can create safe havens for NSAs.[122] Intuitively, it makes little sense for an organization that is dedicated to illegal activity to start adhering to the law simply because the U.N. has asked them to. Sanctions are an exercise of international law, and criminals, by the nature of their name, are law breakers.

B. IHL and IHRL: Do They Even Apply?

Hoping that NSAs will adhere to given rules or principles falsely presupposes that they are actually bound by them. This is the biggest problem with holding NSAs responsible for violating international human rights law. International human rights law binds states,[123] and this becomes the focus of the argument when NSAs enter the picture. Even prominent defenders of human rights admit there are good reasons that international human rights law does not apply to NSAs.[124] For instance, human rights activist Liesbeth Zegveld acknowledges that it is inappropriate to hold NSAs responsible for violating international human rights

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118. For instance, NSAs are unlikely to have the capacity to provide their members with certain rights like the access to courts. *See* Clapham, *supra* note 46, at 502.

119. This is the logical implication of a situation where the NSA is a rebel group seeking to challenge the State's power. *See id*. at 511.

120. Agress, *supra* note 89, at 11.

121. In some cases, warlords generate such a degree of profit from their economic networks, that they can actually withstand the economic sanctions. That is, it is more profitable for the warlords to persist in spite of the sanctions than to listen to the U.N. *See id*. at 11.

122. These were observations made by the U.S. Department of Defense in its annual strategy report in 2008. U.S. DEP'T OF DEF., NATIONAL DEFENSE STRATEGY, 2–3 (2008) [hereinafter U.S. DEFENSE STRATEGY], *available at* www.defense.gov/news/2008%20national%20defense%20strategy.pdf.

123. *See Humanitarian Negotiations Manual*, *supra* note 23, at 33.

124. There is some support indicating that NSAs do have human rights obligations, but the majority of the support stems from international soft law bodies, pronouncements of NGOs, and scholarly writing. *See* Sassòli, *supra* note 11, at 3.

law, as these are rights that people hold exclusively against the state.[125] While some scholars argue that NSAs have responsibilities under human rights law because some of them have elements of government authority,[126] this argument still leaves the door open for rebel groups that do not take on such authority to circumvent these obligations.[127]

Despite the fact that the Universal Declaration of Human Rights says that "everyone has duties to the community,"[128] the traditional view is that human rights laws bind states, not individuals.[129] A report from the U.N. Economic and Social Council admitted that although all parties felt that NSAs should be responsible for violations of international humanitarian law and international criminal law, some felt that only states could violate international human rights law.[130] As such, the Council found it important to proceed with caution, so as not to mistakenly suggest that NSAs may be accountable under international human rights law.[131] If the U.N. does not believe that NSAs should be held accountable for violations of human rights laws, there is little reason to think that the NSAs will take the prerogative and bind themselves to these laws.

On the question of whether international humanitarian law binds NSAs, those that argue in the affirmative point to Common Article 3 of the Geneva Conventions.[132] Specifically, Article 3 includes the wording "each Party to the conflict shall be bound to apply, as a minimum, the following provisions."[133] At face value, this indicates that NSAs should

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125. Clapham, *supra* note 46, at 503 (citing LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW, 49–51 (2002)).

126. *Id.* at 502 (citing Christian Tomuschat, *The Applicability of Human Rights Law to Insurgent Movements*, *in* KRISENSICHERUNG UND HUMANITARER SCHUTZ—CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION 573–91, 588 (Horst Fisher et al. eds., 2004)) (arguing that in some instances, elements of government authority might fall into the hands of a rebel movement).

127. *See id.* at 502 (pointing out that it is a well-known principle that governments and international organizations are reluctant to admit that rebel groups are acting in a government-like way).

128. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(III), art. 29 (Dec. 10, 1948).

129. William A. Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 FORDHAM INT'L L. J. 907, 908 (2003).

130. *The Right to a Remedy*, *supra* note 47, ¶ 18.

131. Principle 3 of the report sought to distinguish between international humanitarian and human rights law, and between state actors and NSAs. The report admits that legal and administrative measures may not always be sufficient for prevention purposes. *Id.* ¶¶ 14–21.

132. *See* Sassòli, *supra* note 11, at 3.

133. Geneva Conventions Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316.

be bound by international humanitarian law. However, that claim also completely overlooks reasoning from the perspective of NSAs for why they are not. Specifically, arguments that they are bound to international treaties may be rejected by parties that had no role in the process of their enactment.[134]

Some scholars argue that it is a simple matter of the NSAs being a component of a state which accepted a treaty and, as such, are compelled to abide by said treaty.[135] However, arguments that they should be bound by national laws are irrelevant considering many NSAs refuse to acknowledge the state's legitimacy to make laws in the first place.[136] While some NSAs may be coerced to follow international laws if they have aspirations of becoming the governing state, many others are simply content with gaining control over specific areas or the opportunity to "run organized criminal activity."[137] Thus, it intuitively follows that where a group's specific goal is to violate a given set of laws, they are both aware of the repercussions and are either not concerned, or are willing to accept them. In either scenario, where the law's purpose is to prevent violation by parties who refuse to accept its legitimacy, it is destined to fail.

There is, however, the argument that since customary international humanitarian law is founded on practice and is applicable against everyone, the fact that NSAs did not ratify these customary laws is irrelevant.[138] Yet currently, only state activities can create customary international law.[139] The activities of NSAs are only considered when they succeed in becoming the ruling government of their state.[140] Thus, this argument is defective because it still tries to pigeon hole NSAs in a set of laws they have no part in creating. Whether the laws are signed on paper and created formally or enacted in a de facto manner, they are still a

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134. Clapham, *supra* note 46, at 511; *see also* Sassòli, *supra* note 11, at 17.

135. This idea suggests that the state has accepted a rule and is bound by that rule. In turn, the state is made up of not only the government, but of the entire population including both individuals and collective groups. *See* Eric David, *International Humanitarian Law and Non-State Actors: Synopsis of the Issue*, 27 COLLEGIUM (SPECIAL ISSUE) 27, 35 (2003).

136. *See* Clapham, *supra* note 46, at 511.

137. *Id.*; *cf.* David, *supra* note 135, at 35–36 (arguing that international humanitarian law applies to national liberation movements where they seek to be recognized as the legitimate government).

138. *See* Henckaerts, *Binding Armed Opposition Groups*, *supra* note 39, at 128.

139. *Id*.

140. This limitation ignores the important role that activities of NSAs who do not succeed in becoming the official government play in international law. Given that by definition, a NSA must be involved in non-international armed conflicts, failed rebel groups could dictate the conduct of future NSAs in such conflicts. *Id.*

creation of states. Furthermore, even if the argument to give customary law universal recognition is accepted, this still overlooks the fact that when the laws are applicable to NSAs, there is seldom a forum to enforce the laws against them.[141] As the next Section points out, the creation of such forums is one reason why international criminal law is so important for holding NSAs accountable for breaking the law.

C. The Best Hope

Given that the antiquity of the law is one of the problems with policing NSAs, international criminal law is particularly interesting because of the recent opportunity for development. When the Rome Statute was put into force on July 1, 2002,[142] it included a predestined review.[143] For this purpose, from May 31 to June 10, 2010, Kampala, Uganda hosted a conference for the ASP to the ICC.[144] One item on the agenda at this review was establishing a legal definition for the crime of aggression.[145] Prior to this review, the Rome Statute failed to define the term aggression, making jurisdiction over the crime inoperable.[146] Although the ASP drafted an amendment defining the crime, the court cannot exercise this jurisdiction until January 1, 2017 at the earliest.[147] Since international criminal law is arguably the most capable branch of law at dealing with NSAs, the ASP missed a unique opportunity to update the legal mechanisms governing conflicts by adopting a state focused definition of aggression. One reason international criminal law stands out from international humanitarian and human rights law is because at its core, it is criminal law. Unlike the other two branches of law, criminal law is implicitly applied against people that disagree with it. The emergence of international criminal law is related to the rise of a strong central international power in the same way that national criminal law is linked to the rise of the state.[148] For example, in a local government, laws criminalizing murder and arson are created by the public for the welfare of the public, irrelevant of how

141. Sassòli, *supra* note 11, at 2.

142. Rome Statute, *supra* note 51.

143. This review is planned to include, but not be limited to, "the list of crimes contained in article 5," and is to be open to "those participating in the ASP." *Id.* art. 123.

144. *Review Conference of the Rome Statute*, *supra* note 15.

145. Also planned for Uganda is: a discussion of the court's performance thus far, a review of article 124 which allows nations to postpone the court's exercise of jurisdiction over war crimes, and two amendments to the Rome Statute proposed by Belgium and Mexico. *Id.*

146. *Id.*

147. *See* Rome Statute Amendments, *supra* note 17, art. 15.

148. Mégret, *supra* note 16, at 2.

murderers and arsonists feel about them. Expanding this idea to the international context, international criminal law represents certain values that the international community holds with such esteem that they "transcend its typical value neutrality."[149] Since this area of law is geared to criminalize individual misconduct, there is no reason it cannot criminalize the misconduct of individuals not associated with the state.[150] Where the argument that NSAs never agreed to the treaties might effectively explain why international humanitarian or human rights law do not apply, the idea of international criminal law is to police individuals, not the states.[151] Thus, there are no legal or logical problems with criminalizing aggression by NSAs;[152] the only obstacle comes from the actual definition. In contrast to the typical pattern of state-centered international law, defining aggression under international criminal law means individuals can be charged with the crime.[153]

For this reason, the definition of aggression adopted by the ASP to the Rome Statute limits the powers of the branch of law most effective at policing NSAs. In contrast to the laws of international armed conflicts, parallel laws in internal armed conflicts were poorly developed until the 1990s.[154] Prior to the Rwanda and Yugoslavia tribunals,[155] there was no international treaty even imposing criminal responsibility on individuals not associated with the state, let alone actually holding them accountable.[156] In the same vein that these tribunals have been used to prosecute

149. This usually results from a "densification" of the international system. In such a situation certain principles become so prized that they "pierce through the sovereign veil" and criminalize conduct that would traditionally be left entirely to national governments. *See id.* at 2–3.

150. Antonio Cassese, *On Some Problematic Aspects of the Crime of* Aggression, 20 LEIDEN J. OF INT'L L. 841, 846 (2007).

151. Mégret, *supra* note 16, at 4.

152. As a general principle, international criminal law seeks to protect the international community from the acts of specific individuals. Thus, there is nothing in the functioning of this branch of law that would restrain a court from prosecuting a NSA for a particular crime. *See* Cassese, *supra* note 150, at 846.

153. *Id.* (arguing that crime of aggression should be applicable to NSAs, since the body of law that is defining the crime is already focused on individuals).

154. ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 257 (2008).

155. These tribunals, established in the early 1990s, will be discussed in detail, *infra* Part III.

156. There is a distinction between responsibility and accountability. Responsibility refers to when a law is applicable to a given person, whereas accountability refers to actually enforcing the laws after a person violates them. Without first establishing responsibility, there can be no accountability. *See* Liesbeth Zegveld, *Accountability of Non-State Actors in International Law*, 27 COLLEGIUM (SPECIAL ISSUE) 153, 153–54 (2003).

NSAs for violating international criminal law, the Rome Statute has empowered the ICC to enforce similar rules.[157] As such, the jurisprudence flowing from the Rwanda and Yugoslavia tribunals, as well as the definition of war crimes under the Rome Statute are accredited as predominant reasons for the merger of the laws of international armed conflicts and the laws governing non-international conflicts.[158] Currently, with limited exceptions, there is at least a presumption that the laws of international armed conflict apply to internal conflicts.[159]

In this manner, international criminal law has actually been used as a vehicle of enforcement for other branches. Genocide,[160] crimes against humanity and war crimes are among the crimes listed under the Rome Statute.[161] Crimes against humanity are the wide spread targeting of civilians for acts of murder, enslavement, torture, etc.[162] War crimes are in turn defined as any grave violation of the Geneva Conventions of 1949.[163] The U.N. has explicitly found that genocide is a violation of human rights,[164] and acts such as torture and enslavement have been called human rights violations by the International Covenant on Civil and Political Rights.[165] Additionally, since the Geneva Conventions of 1949 is one of the central treaties of international humanitarian law,[166] war crimes are clearly also a violation of humanitarian law. Thus, the ICC has recognized that at least certain violations of international humanitarian and human rights law are criminal. The Commission on Human

157. *Id.* at 155; *see also* Rome Statute, *supra* note 51, art. 28.

158. Internal armed conflicts implicitly involve NSAs, and armed conflicts implicitly involve the use of force. Thus, developments in this area of law provide analogous support for how the use of force by NSAs should be treated in an international setting. KOLB & HYDE, *supra* note 154, at 259–60.

159. These exceptions are the status of combatants and prisoners of war, and the laws of occupied territories. *Id.* at 259.

160. In sum and substance, this crime is defined as an act of violence committed with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group." Rome Statute, *supra* note 51, art. 6.

161. *Id.* art. 5.

162. *Id.* art. 7.

163. *Id.* art. 8.

164. The U.N. has also found that the crimes which constitute genocide might also qualify as crimes against humanity or war crimes, depending on the context in which they are committed. OFFICE OF THE SPECIAL ADVISOR ON THE PREVENTION OF GENOCIDE http://www.un.org/preventgenocide/adviser/genocide.shtml (last visited Feb 22, 2011).

165. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (recognizing that individuals have duties and responsibilities to others in the community to which they belong).

166. *See Humanitarian Negotiations Manual*, *supra* note 23, at 30.

Rights has also formally acknowledged that individual responsibility for human rights violations should be pursued by criminal courts.[167] The implication of this recognition is that while scholars debate whether those branches of law apply to NSAs, the ICC already stands as an institute capable of prosecuting NSAs for those violations.

As such, international criminal law has become arguably the main vehicle used for ensuring NSAs are held accountable for international crimes.[168] Examples include a UK conviction of an Afghan warlord for torture.[169] Further evidence is offered by the Rwanda and Yugoslavia tribunals' prosecution of members from various NSAs accused of committing crimes against humanity.[170] The aforementioned tribunals claimed their first successful conviction of a leader of a non-state group in 1999.[171] To date, Yugoslavia has adjudicated 121 cases (both NSAs and state actors)[172] while Rwanda has adjudicated 49.[173] As such, both courts are recognized as an important step in holding NSAs accountable for international crimes.[174] Furthermore, the ICC should build on what these other IMTs have started. As the Rome Statute's entry into force in 2002 marked an important step in deterring war crimes,[175] the ICC has the opportunity to expand on the success of past tribunals because its reach is not limited territorially or by time.

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167. Schabas, *supra* note 129, at 908; *see also* Impunity, U.N. Commission on Human Rights, C.H.R. res. 1998/54, ESCOR Supp. No. 3, at 177, U.N. Doc. E/CN.4/1998/54 (Apr. 17, 1998) (discussing methods for combating impunity towards human rights violations).

168. *See* REDRESS TRUST, TORTURE BY NON-STATE ACTORS: A PRIMER (2006) [hereinafter TORTURE BY NON-STATE ACTORS], *available at* http://www.irct.org/Files//Filer/IPIP/training/Torture_by_Non-State_Actors-Primer.pdf.

169. *Id.*

170. *Id.*

171. Zegveld, *supra* note 156, at 155.

172. Eleven people were acquitted, sixty-one were sentenced, thirteen were referred to national jurisdictions for prosecution, and thirty-six had their indictments withdrawn or are deceased. *Key Figures of ICTY Cases*, INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, http://www.icty.org/sections/TheCases/KeyFigures (last visited Jan. 15, 2011).

173. Thirty-one cases ended in a successful prosecution, nine are pending appeal, eight resulted in acquittals, and one person died before the trial ended. *See* International Criminal Tribunal for Rwanda, *Status of Cases*, INT'L CRIMINAL TRIBUNAL FOR RWANDA, http://www.unictr.org/Cases/tabid/204/Default.aspx (last visited Jan. 15, 2011).

174. *See In-Depth Reports: Civilian Protection in Armed Conflict*, IRINNEWS.ORG (March 2003), http://www.irinnews.org/InDepthMain.aspx?InDepthId=31&ReportId=70542 (last visited Jan. 15, 2011).

175. *Id.*

At present, the ICC is monitoring four situations: The Democratic Republic of Congo, The Central African Republic, Uganda, and Darfur, Sudan.[176] Of a combined thirteen cases in these four situations, the ICC has five of their targets in custody, either standing or awaiting trial.[177] Although the outcomes of these cases are far from determined, the fact that these men have been removed from the arena where they committed an assortment of horrifying crimes is a positive step. That they will be forced to face justice is even more reason to applaud the efforts and potential of the ICC.

III. THE 2010 FALLOUT: THE CRIME OF AGGRESSION

In 2010, the ASP to the Rome Statute met to review the ICC and amend the Rome Statute.[178] Article 5 of the Rome Statute gives the ICC jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and aggression.[179] However, while the court exercises authority over the first three crimes, Article 5(2) provides that the ICC will only exercise jurisdiction over aggression after it is defined.[180] Created at the same time as the Rome Statute's enactment, a Special Working Group ("SWG") was tasked with filling this void.[181] In 2008, a discussion paper was distributed by the SWG containing its proposed definition of aggression.[182] The definition that passed in 2010 is identical to the one distributed in 2008 and establishes the elements of the crime as: (1) the planning, preparation, initiation or execution of the use of armed force, (2) a crime conducted by an individual who has a high-level of control over the political or military actions of a state, and (3) committed against another sovereign state.[183] The two most disappointing aspects of this amendment are that it focuses exclusively on individuals in a policy-

176. *See ICC: All Situations*, INT'L CRIMINAL COURT, http://www2.icccpi.int/Menus/ICC/Situations+and+Cases/Situations/ (last visited Jan. 15, 2011).

177. *See ICC: All Cases*, INT'L CRIMINAL COURT, http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/ (last visited Jan. 15, 2011).

178. For details of this conference, see *supra* Part II(c).

179. Rome Statute, *supra* note 51, art. 5.

180. This was even accounted for by the Rome Statute. Article 121 provides procedures for amending the statute, while Article 123 provides for a mandatory review seven years after the Statute goes into force. Rome Statute, *supra* note 51, arts. 121, 123.

181. The review session scheduled for 2010 was likewise agreed upon at the same time this group was created. *In the News*, *supra* note 14.

182. Int'l Criminal Court [ICC], *Discussion Paper on the Crime of Aggression Proposed by the Chairman (Revision June 2008)*, ICC-ASP/6/SWGCA/2 (May 14, 2008) [hereinafter ICC Discussion Paper].

183. *Compare id.*, *with* Rome Statute Amendments, *supra* note 17, art. 15(2).

making capacity and restricts the crime of aggression to something only states are capable of.

Given the current international climate, this amendment falls short of meeting the goals of the original Rome Statute and international criminal law in general and fails to keep up with the reality of evolving conflict patterns. Part A of this Section discusses the impact of a working definition of aggression and which parties will be implicated by the new definition. Next, Part B points out that this definition steps away from the norms and principles which have governed international criminal law practically since its creation.

A. Aggression: What's in a Word?

Formally defining the act of aggression under the Rome Statute puts the initiation of military action within the purview of the law. Aggression differs from other war crimes because it is a crime of *jus ad bellum*, while the others are crimes of *jus in bello*.[184] Whereas the latter refers to criminal violations during the execution of a war, the former refers to criminal violations in initiating a war.[185] Thus, even if a state was to conduct a military operation in a legal manner, its mere initiation might be against the law. This idea is not new; dating back to the Nuremberg IMT, aggression was called the "mother of all crimes."[186] Furthermore, the U.N. General Assembly met specifically to define the crime, highlighting the importance of a definition for the "most serious and dangerous form of the illegal use of force."[187] The General Assembly adopted a definition of aggression in 1974.[188]

In adopting the 2010 amendment on aggression, the ASP missed a valuable opportunity to improve the laws policing NSAs. By enacting an amendment defining the crime of aggression, the ICC will finally be able to exercise the inoperable jurisdiction it has held since 2002.[189] The conference had the opportunity to update the outdated norms governing the

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184. Mégret, *supra* note 16, at 13.

185. *Id.*

186. Under the Nuremberg IMT, aggression was embodied by the larger crime of "crimes against the peace." *See id.*

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

188. In sum and substance, the U.N. defined 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, as set out in this Definition." *Id.* art. 1.

189. *See id.*; *see also In the News*, *supra* note 14. This is contingent on approval by the State Parties to the Rome Statute come Jan 1, 2017. Rome Statute Amendments, *supra* note 17, art 15(2).

use of force by NSAs[190] while improving the international community's ability to hold NSAs accountable for humanitarian violations. Yet, the definition which was accepted overlooks the reality that NSAs are increasingly responsible for acts violating international laws. As the High-Level Panel on Threats, Challenges, and Change stated, "[t]he norms governing the use of force by non-state actors have not kept pace with those pertaining to states."[191] Thus, the question that must be considered is whether aggression is a crime that only states are capable of committing. With this question in mind, an examination of past conflicts indicates that the amendment, if approved in 2017,[192] will lead to undesirable outcomes.

For instance, activities of terrorist groups indicate that NSAs are capable of using armed force on an international level. Article 51 of the U.N. Charter provides for the use of self-defense when a state suffers an armed attack.[193] Using self-help measures is allowed so long as the Security Council has not taken action yet.[194] Although the Security Council never explicitly approved of the U.S. attack on Afghanistan, there is little doubt that the 9/11 terrorist act was of sufficient gravity to constitute an armed attack under the U.N. Charter.[195] Thus, it is evident that at least some NSAs are capable of using armed force on an international level. Yet, while the purpose of criminalizing aggression is to police the initiation of force, using the new definition retrospectively evidences that members of Al-Qaida would escape responsibility for criminal aggression. Given that the resultant damages are the same, it is difficult to accept such an outcome.

On the other hand, humanitarian intervention[196] might be a criminal act. Again looking to the past, in 1999 the North Atlantic Treaty Organization ("NATO") bombed Yugoslavia without authority from the U.N.

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190. *High-Level Panel*, *supra* note 19, ¶ 159.

191. *Id.*

192. Rome Statute Amendments, *supra* note 17, art 15(2).

193. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. Charter art. 51.

194. Norman G. Printer Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT'L L. & FOREIGN AFF. 331, 354 (2003).

195. *Id.* at 353.

196. Humanitarian intervention envisions the use of armed force, not in self-defense, but rather as a means of preventing widespread human rights violations. Sean D. Murphy, *Criminalizing Humanitarian Intervention*, 41 CASE W. RES. J. INT'L L. 341, 341 (2009).

Security Council.[197] This was defended by former U.S. President Clinton as "just and necessary," and done in reaction to ethnic cleansing of Albanians in the Serbian province of Kosovo.[198] Despite such rationalizations, NATO is an organization of states, this type of bombing is actually listed as an example of unlawful aggression,[199] and Yugoslavia was a sovereign state.[200] As such, NATO's efforts to end the ethnic cleansing[201] may very well have constituted criminal aggression.[202] Whether unilateral humanitarian intervention should ever be justified is a controversial issue and most scholars and states believe it should not.[203] This Note makes no attempt to weigh in on that debate, but criminalizing humanitarian intervention while simultaneously tying the ICC's hands with regards to large-scale terrorist attacks hardly seems like a consistent way of policing the use of armed force.

In the same manner that the new amendment is under-inclusive, there is an argument that including NSAs under the crime of aggression might have undesirable consequences. Mainly, there is concern about how developments in criminalizing aggression might affect the right to armed struggle.[204] The right to armed struggle refers to people under "occupation, apartheid, and alien domination," and their ability to use armed force against a suppressive regime.[205] Ignoring that whether there is a right to armed struggle is contested by some,[206] this is not a compelling

197. Gavin Murray-Miller, Beyond Tragedy: NATO's Intervention in the Former Yugoslavia 20–21 (unpublished thesis, California State University, Fresno) (on file with California State University, Fresno, History Department).

198. *Id.* at 21 (justifying the humanitarian intervention in Kosovo against claims that it was merely an act of the U.S. and NATO exporting their own ideals).

199. "Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State." ICC Discussion Paper, *supra* note 182, art. 8 bis(2)(b).

200. *See* Murray-Miller, *supra* note 197, at 22.

201. *See id.* at 20.

202. Murphy, *supra* note 196, at 366–367 (arguing that if the ICC does not prosecute attacks like NATO's incursion into Kosovo as aggression under the SWG's definition of the crime, they will in a sense be showing approval of unilateral humanitarian intervention).

203. *Id.* at 345.

204. Liaquat Ali Khan, *Legal Commentary: The Changing Right of Armed Struggle*, BALT. CHRON. & SENTINEL (Sept. 16, 2005), www.baltimorechronicle.com/2005/091605AliKhan.shtml (last visited Feb. 18, 2011) (discussing how developments in international law, particularly in response to terrorism and the war on terror, are muddling the right to armed struggle).

205. *See id.*

206. *See High-Level Panel Report*, *supra* note 19, ¶ 160 (discussing the major stopping points for coming to an agreement for a definition of terrorism).

reason to have a blanket exclusion of NSAs from the crime of aggression. The ICC has a built in discretionary valve; it can only hear cases for "the most serious crimes."[207] Additionally, the new definition of aggression is restricted to acts "which by its character, gravity and scale, constitutes a manifest violation of the Charter of the [U.N.]."[208] The use of threshold language like 'most serious' in the Rome Statute[209] and 'manifest violation' in the amendment[210] indicates that the ICC will be allotted discretion in prosecution. Thus, it is imaginable that if a liberation movement were to come to the ICC's attention, they could choose to not prosecute them for aggression. Since the right to armed struggle is presently unimpeded by the U.N. Charter or Resolution 3314,[211] there is no reason to think that discretionary prosecution under the ICC would impact this right. Thus, whereas the ICC can work around an over-inclusive definition covering all NSAs, an under-inclusive definition completely carving out NSAs leaves the court no say in the matter.

Another potential problem with recognizing NSAs as capable of aggression is the implications on the right to self-defense. Recognizing something as an act of aggression implies an armed attack occurred,[212] and an armed attack typically implicates reprisal under Article 51 of the U.N. Charter.[213] Since a NSA exists within the boundaries of a state, there is concern about retaliation against a state that houses the NSA, but who was not involved in the attack.[214] Ignoring that the U.S.'s reaction to 9/11 already suggests the legality of such responses,[215] which is not necessarily a bad outcome. One state's sufferance of another's sovereignty requires that each polices the activities of its residents that might harm civilians within and without its borders.[216] A core principle of interna-

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207. Rome Statute, *supra* note 51, art. 1.

208. Rome Statute Amendments, *supra* note 17, art 8(1).

209. Rome Statute, *supra* note 51, art. 1.

210. Rome Statute Amendments, *supra* note 17, art 8(1).

211. Kahn, *supra* note 204, at 2 (arguing that despite the developments associated with the war on terror, international law has not formally "repudiated the right to armed struggle").

212. Under the SWG's proposed definition of aggression, the crime involves the use of armed force. *See* ICC Discussion Paper, *supra* note 182, art 8 bis(2).

213. U.N. Charter art. 51 (the occurrence of an armed attack is the necessary trigger to justify a state engaging in self defense).

214. Eric A. Heinze, *Nonstate Actors in the International Legal Order: The Israeli-Hezbollah Conflict and the Law of Self-Defense*, 15 GLOBAL GOVERNANCE 87, 88 (2009).

215. *See id.*

216. *See* Lloyd R. Cohen, *The Missing Currency of Israeli/Palestinian Negotiations* 3 (Geo. Mason L. & Econ., Research Paper No. 09-45, 2009), *available at* http://ssrn.com/abstract=1467863 (discussing a hypothetical situation in which terrorists based in Canada conducted attacks across the border into the U.S. on a regular basis).

tional law is that when one state fails to protect its neighbors from criminal activity stemming from within that state's borders, it forfeits its right to have its sovereignty respected.[217]

While such a principle might seem unduly harsh, it could in fact serve a positive purpose. For instance, states may be discouraged from acquiescing in the illegal activities of NSAs within their borders.[218] Where a state knows it will be the target of retaliatory self-defense, it might be motivated to take decisive steps to actively circumvent NSAs suspected of engaging in the illegal use of force.[219] To prevent such situations, many states have provisions in their criminal codes forbidding the state's citizens from engaging in aggressive acts against other sovereign states.[220] Furthermore, there is still the threshold issue. Including NSAs in the definition of criminal aggression would not automatically trigger the right to self-defense against all NSAs; the ICC has discretion to charge an individual of committing the crime. In a situation where the ICC does not charge a NSA with committing aggression, armed conflicts under Article 51 would not be implicated. Thus, the normative framework of the ICC is equipped to handle the potential dangers of finding NSAs capable of aggression.

B. State vs. State . . . Really?

Given that both international criminal law and the Rome Statute focus on the individual, irrelevant of his or her affiliation, this amendment's focus on the state is contradictory to international criminal law. The Rome Statute declares it "shall apply equally to all persons without any distinction based on official capacity."[221] Yet, the SWG insisted on keeping the "control or direct" requirement as part of the definition, claiming it coincides with the Nuremberg and Tokyo IMTs.[222] However, the actual

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217. *See id*.

218. *See id.* at 4.

219. *See id.*

220. Japan makes it a crime to prepare or plot to "wage war privately upon a foreign State." Austria's criminal code forbids anyone on its soil from undertaking in acts to "change the constitution of a foreign state or to divide territory which is part of a foreign state by force or threat of force." Sweden forbids a person from, "by violent means or foreign aid, [causing] a danger of the Realm being involved in a war or other hostilities." Joachim Gewehr, Defining Aggression for the International Criminal Court: A Proposal (Jan. 2003) (unpublished L.L.M. dissertation, University of Cape Town) (on file with University of Cape Town).

221. Rome Statute, *supra* note 51, art. 27(1).

222. *See* Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 EUR. J. OF INT'L L. 477, 479 (2007).

case law flowing from these tribunals tells a different story.[223] The jurisprudence of international tribunals and courts as well as relevant practice indicates that NSAs can incur criminal responsibility, both independently and through the grounds of command responsibility.[224] It is an anomaly that this amendment defines aggression as a crime that is committed not only by states, against states, but also only by individuals in "a position effectively to exercise control over or to direct the political or military action of a State."[225]

Both historically and today, the prime subject of international criminal law is the individual.[226] The Nuremburg Trials famously pointed out that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[227] Not only was the use of "abstract entities" presumably a reference to states, but this dictum is often cited as the birth of contemporary international criminal law.[228] Furthermore, the Nuremberg IMT provided that the crime of aggression could be committed by people not formally associated with the Nazi party,[229] and that "Hitler could not make aggressive war by himself. He had to have cooperation of statesman, military leaders, diplomats, and businessman."[230] Clearly the inclusion of businessman with statesman and military leaders shows the Nuremberg IMT was not preoccupied with state actors, let alone exclusively with high level leaders. By restricting the focus of an international crime under the purview of the ICC in accordance with the 2010 amendment, the very principles on which international criminal law was founded are put into question.

Following World War II, the Statutes of the Nuremburg and Tokyo IMTs were amongst the first to take aim at making the initiation of mili-

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223. *See id*.

224. *See* TORTURE BY NON-STATE ACTORS, *supra* note 168 (comparing the international frameworks of international humanitarian, human rights, and criminal law, and their application to NSAs).

225. ICC Discussion Paper, *supra* note 182, 8 bis(1).

226. *See* Mégret, *supra* note 16, at 4.

227. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: PROCEEDINGS 466 (1946), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XXII.pdf.

228. It is also believed that the founding principle of the Nuremberg IMT is the punishment of the individual, not the associated state. *See* Mégret, *supra* note 16, at 4.

229. *See* Heller, *supra* note 222, at 480.

230. WAR CRIMES AND CRIMES AGAINST HUMANITY, INTERNATIONAL MILITARY TRIBUNALS, NUREMBURG, U.S. GOVERNMENT PRINTING OFFICE, 62 (1947) *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Nazi-opinion-judgment.pdf.

tary conflicts an international crime.[231] Specifically, the Statute for the Nuremberg IMT described "crimes against the peace" as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participating in a common plan or conspiracy for the accomplishment of the foregoing."[232] This definition is particularly interesting because, in addition to explicitly using the term "aggression," it does not mention the state, nor does it reference rank. Thus, comparing the definition found in the Statute of the Nuremberg IMT against the one in the 2010 amendment indicates that the ICC is stepping away from principles elucidated by the Nuremberg IMT.

A more liberal reading of the Nuremberg IMT's definition is evidenced by the successful prosecution of Artur Greiser for crimes against the peace. While serving as one of the leaders of the Nazi party in Danzig, Greiser and other Danzig Leaders worked in conjunction with the Central German Authorities to plan, direct, and execute attacks against Poland.[233] He was prosecuted by the Supreme National Tribunal of Poland, which relied on various elements of International Law, including the Statute of the Nuremberg IMT.[234] Despite linking Greiser to Hitler as a co-conspirator, the Tribunal also held that his violations of international law were a result of "Hitler's orders," and came as a result of "direct and indirect orders from the accused."[235] The Tribunal's finding that Greiser violated international law by acting on Hitler's orders seems to implicitly signal that they did not consider him acting in the capacity of a policy-maker.[236] In the context of the new definition, the conviction of Artur Greiser shows that international criminal law has long committed itself to

231. Mark Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains?*, Washington & Lee University School of Law, Working Paper No. 2008-43, 4 (2008), *available at* http://ssrn.com/abstract=1301003 (providing a background on the crime of aggression to provide context for the present debate over the SWG's definition).

232. Nuremberg IMT, *supra* note 72, art. 6(a).

233. Drumbl, *supra* note 231, at 9.

234. Sources of law that the Tribunal relied on included: international treaties, the Covenant of the League of Nations, the Statute of the Nuremberg IMT, and a non-aggression pact signed between Germany and Poland in 1934. *Id.*

235. *See* Trial of Gauleiter Artur Greiser, vol. 13 LAW REPORTS OF TRIALS OF WAR CRIMINALS 70, 92 (1949), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-13.pdf (charging Artur Greiser with a number of crimes, including aggression).

236. Although the court did not directly address the issue of policy-maker, the fact that the court found that Greiser carried out Hitler's orders implies that he was not responsible for the policies behind such orders. *See* Drumbl, *supra* note 231, at 11.

holding the individual responsible for their own actions, rather than just targeting the relevant policy-maker through command responsibility.

Further evidence on the Nuremberg IMT's liberal stance on defining aggression is provided by the prosecution of two NSAs. Although both men were acquitted, Hjalmar Schacht[237] and Albert Speer[238] were both businessmen prosecuted for crimes against the peace.[239] In both cases, the IMT specifically stated that private economic actors could be responsible for the crime of aggression.[240] Schacht was only acquitted because the prosecution failed to prove he had actually taken part in the Nazi Party's plan to wage aggressive war, or that he had knowledge that his work to rearm Germany was part of such a plan.[241] Similarly, Speer was acquitted because he began his work after the war had commenced, so he could not have been part of the conspiracy to wage aggressive war.[242] What both have in common is that they were acquitted because the prosecution failed to prove elements of the crime charged, not because of their status as private economic actors. While neither man belonged to a non-state armed group, both were recognized as capable of committing the crime of aggression while serving in a non-government capacity.[243]

International law following the Nuremberg IMT also indicates that NSAs can commit the crime of aggression. The principles established by the Nuremberg IMT were reaffirmed two months later when the Allied Powers enacted Control Council Law No. 10 ("CCL 10").[244] CCL 10 was meant to codify the underlying principles of the IMT judgments,[245] while establishing additional IMTs in the occupied German zones under

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237. Schacht was the President of the Reichbank from 1933–1939, Minister of economics from 1934–1937, and Plenipotentiary General for War Economy from 1935–1937. However, he began to lose authority in 1936, had no important government position by 1939, and was in a concentration camp from 1944 until the end of the war. Secretariat, *Historical Review of Developments Relating to Aggression*, 38–49, U.N. Doc. PCNICC/2002/WGCA/L.1 (Jan. 24, 2002) [hereinafter *Historical Review*].

238. Speer became the "Reich Minister of Armaments and a member of the Central Planning Board in 1942." *Id*. at 41.

239. These two men are accredited for being the most responsible for Germany's rearmament. *See* Heller, *supra* note 222, at 480.

240. *Id*.

241. Thus, given that the crime has a *mens rea*, it is the prosecution's job to prove every element. So although Schacht participated in the rearmament, the prosecution could not show he had subjective knowledge of the purpose of the rearmament. *See id.* at 481.

242. *Id.*

243. *See id.* at 480; *see also Historical Review*, *supra* note 237, at 39, 41.

244. CCL 10 was passed two months after the IMT defendants were sentenced. Heller, *supra* note 222, at 482.

245. *Id.*

U.S. and French control.[246] In this vein, the definitions for "crimes against the peace" were very similar under the Nuremberg IMT and CCL 10,[247] with the latter arguably taking an even more liberal approach. CCL 10 stated that the actions listed, which constituted waging aggressive war, were non-exhaustive.[248] The law provided that the crime of aggression could be committed by a person who "held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country."[249] Since the Nuremberg IMT found NSAs were capable of committing the crime of aggression, it logically follows that CCL 10's more expansive definition does as well. Moreover, the fact that the terms "co-belligerents or satellites" are listed in addition to Germany and its allies provides further evidence that the crime encompassed NSAs.

The results of the post-World War II IMTs reached beyond the Allied Powers, and were formally indoctrinated by the U.N. On December 11, 1946, the U.N. passed Resolution 95, which affirmed the "principles of the international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."[250] As such, all states that were party to the U.N. at that time accepted the definitions provided by the Nuremberg IMT, as well as how such definitions were interpreted.[251]

Between the IMTs relating to World War II and the creation of the ICC are the International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for Former Yugoslavia ("ICTFY"). Prior to 1990, the question of command responsibility for the leaders of NSAs had never come before an international tribunal.[252] In the Aleksovski case[253] of 1999, the ICTFY ignored arguments that command responsi-

246. *See id.*; *see also Historical Review*, *supra* note 237, at 44.

247. *See Historical Review*, *supra* note 237, at 44.

248. *Id.* at 45.

249. NUREMBERG TRIALS FINAL REPORT APPENDIX D: CONTROL COUNCIL LAW NO. 10 art. II (2)(f) (Dec. 20, 1945), *available at* http://avalon.law.yale.edu/imt/imt10.asp.

250. Cassese, *supra* note 150, at 842; *see also* G.A. Res. 95(1), U.N. Doc. A/RES/95 (I) (Dec. 11, 1946).

251. *See* Cassese, *supra* note 150, at 842.

252. Zegveld, *supra* note 156, at 154.

253. In *The Prosecutor v. Zlatko Aleksovski*, the accused was a prison warden, who was responsible for subjecting prisoners to "excessive and cruel interrogation, physical and psychological harm, forced labour (digging trenches), in hazardous circumstances, being used as human shields and some were murdered or otherwise killed." Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgment, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1999) [hereinafter Aleksovski, Case No. IT-95-14/1-T], *available at* http://www.unhcr.org/refworld/pdfid/4146e8ba2.pdf.

bility could only apply to people in official roles.[254] The court held that "superior responsibility is thus not reserved for official authorities," and instead extended liability to an individual "acting *de facto* as a superior."[255] Furthermore, the court paid no attention to whether the conflict was internal or international, and thus ignored whether the accused was a state actor.[256] Although neither of these tribunals took aim at the crime of aggression, they are important for demonstrating that historically, international criminal law has not discriminated based on state affiliation.

Moving the focus to the 2010 amendment's definition, while some might point to the U.N.'s definition of aggression[257] as support for the state focused approach, this argument is unconvincing. To begin with, the U.N. definition passed into law in 1974,[258] pre-dating the Rome Statute by twenty-four years. When the U.N. definition and the new definition are held side-by-side, they are nearly identical.[259] In fact, Section two, Article eight of the SWG's discussion paper cites directly to U.N. General Assembly Resolution 3314.[260] Yet, it is worth noting that the assembled states that initially enacted the original Rome Statute did not utilize the U.N. definition. When the Rome Statute was being drafted, the Resolution 3314 definition was considered by some as a mere political guide, unsuitable for prosecution purposes.[261]

Furthermore, Resolution 3314 was passed in an era when newly formed states were worried about the abuses of colonialism.[262] These nations were concerned with interference by the major world powers that took place during the Cold War.[263] Since the passing of U.N. Resolution

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254. *See* Zegveld, *supra* note 156, at 154.

255. Aleksovski, Case No. IT-95-14/1-T, ¶ 76.

256. *See* Zegveld, *supra* note 156, at 154–55.

257. This definition, adopted in 1974, defines 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, as set out in this Definition." G.A. Res 3314 (XXIX), *supra* note 187, art. 1.

258. G.A. Res 3314 (XXIX), *supra* note 187.

259. *Compare* G.A. Res. 3314 (XXIX), *with* Rome Statute Amendments, *supra* note 17, art 8(2).

260. "Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression." ICC Discussion Paper, *supra* note 182, art. 8 bis(2).

261. LAWYERS COMM. FOR HUMAN RIGHTS, ESTABLISHING AN INTERNATIONAL CRIMINAL COURT: MAJOR UNRESOLVED ISSUES IN THE DRAFT STATUTE 13 (1996), *available at* http://www.coalitionfortheicc.org/documents/2PrepCmtEstablishICCLCHR.pdf.

262. Specifically, the resolution was passed in 1974, during the Cold War. During this time, many states found themselves threatened by the pressures of Soviet and U.S. influence. *See* Murphy, *supra* note 196, at 5.

263. *Id.*

3314, the U.N. itself has been critical of the inadequacies of the laws governing NSAs. In a General Assembly meeting of the U.N., it was admitted that when they were founded in 1945, the major concern was to prevent the outbreak of another World War.[264] Now, however, the High-Level Panel on Threats, Challenges, and Change has recognized that in the decades to come, the threats facing the world go beyond "states waging aggressive war," and include dangers like internal wars, terrorism, and transnational criminal organizations.[265] Furthermore, these threats stem from both NSAs as well as states.[266] When the U.N. has implicitly acknowledged the weaknesses of their definition of aggression, it is nonsensical for the ASP to turn around and adopt identical language as its own. Rather than ensuring the norms governing NSAs in the conflict context remain up to par with states, the ASP chose to maintain an inadequate status quo.

IV. IMPROPER DEFINITION: AN OPPORTUNITY MISSED

By enacting the 2010 amendment to the Rome Statute, the international community has missed a critical opportunity to improve the laws policing NSAs. In 1974, the U.N. proffered several reasons for why it was exigent to define aggression: 1) deterrence of aggression, 2) simplifying identification of the crime, 3) simplifying measures for suppressing aggression, and 4) facilitating the protection of the rights and lawful interests of victims.[267] The proliferation of NSAs and the threat they pose to collective security make these reasons just as, if not more, relevant today.

Part A of this Section criticizes the ASP for embracing an outdated definition of criminal aggression, virtually mimicking the one adopted by the U.N. in 1974, while completely ignoring the shifting dynamic of international conflicts. This Section further points out that this is problematic because opportunities to update international law do not come frequently. Part B focuses on why the amendment's definition is inferior to other potential definitions that better align themselves with the norms of international criminal law. Finally, Part C points out that excluding NSAs from this definition undermines both the goals of the U.N. and of criminalizing aggression.

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264. At the initial creation of the U.N., the founding members considered collective security in the traditional sense. That is, aggression against one would provoke a unified response against the perpetrator. *See High-Level Panel Report*, *supra* note 19, synopsis.

265. *Id.* (urging that "[t]he central challenge for the twenty-first century is to fashion a new and broader understanding . . . of what collective security means . . .").

266. *Id.*

267. G.A. Res 3314 (XXIX), *supra* note 187.

A. As the World Turns . . .

In a world where the boundaries of statehood continually evaporate, both in business and conflicts, the amendment's definition seems to completely ignore international trends. Confining the crime of aggression to conflicts between states commits the ICC's jurisdiction over the crime to the same shortcomings that already plague international law. The failings of international humanitarian laws have often been pinpointed to their being highly state-centric, despite the evolving non-state order.[268] Furthermore, in 2008, the U.S. Department of Defense's National Defense Strategy described an environment "defined by a global struggle against a violent extremist ideology that seeks to overturn the international state system."[269] It makes little sense to focus the crime of aggression on states, when aggression seeking the explicit overthrow of statehood has become, at least from the U.S.'s purview, the world's largest problem.

Although the term NSA as used in this article admittedly encompasses a broader array of groups than those discussed by the U.S. Department of Defense,[270] those groups that were discussed offer an appropriate example. Much like the threats of Communism and Fascism which threatened the global order in the past, the violent extremists of today not only reject international law, but look to overthrow it.[271] These groups explicitly reject ideas like borders and state sovereignty.[272] Conversely, without principles like state sovereignty, the very notion of an international community that comes together to create law is undermined.

This problem has existed for decades, and the only new development about conflicts between a state and a NSA is the frequency with which they occur. Napoleon's campaigns in Spain during the 19th century, German forces that occupied the Balkans during World War II, the conflict between Britain and Ireland, and the ongoing fighting between Israel and the Occupied Palestinian Territories are all examples of such con-

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268. Marco Sassòli, *Engaging Armed Nonstate Actors with International Humanitarian Law*, 6 CANADIAN CONSORTIUM ON HUMAN SECURITY, no. 2, 2008, at 15, *available at* http://www.humansecurity.info/#/vol62-sassoli/4527407461.

269. U.S. DEFENSE STRATEGY, *supra* note 122, at 2.

270. The Department of Defense report was largely concerned with reacting to the proliferation of terrorist organizations, citing the 9/11 attacks in its introduction, and discussing violent extremist ideology that is not necessarily applicable to all NSAs. Although terrorist organizations fall within the purview of the term NSA, as the term is used in this Note it encompasses a broader range of groups. *Id.*

271. *See id.*

272. *See id.*

flicts.[273] However, those are examples spread across hundreds of years. Today, one need only pick up a newspaper to see several such conflicts around the globe.[274] Just nine days after the Bali Bombing[275] on October 12, 2002, fourteen people were killed in a suicide bombing in Israel.[276] Meanwhile, Mounir El Motassadeq, a suspected member of Al-Qaida operating in Hamburg, was standing trial in Germany as an accomplice to the 9/11 attacks.[277] As the number of incidents involving NSAs increases, so does the frequency with which the legal system must deal with them. Yet the2010 amendment's definition neither attempts to predict future problems, nor does it react to emerging ones; instead, ASP chose to react to problems that faced the U.N. thirty-five years ago.

Further recognition of the threat presented by NSAs can be gleaned from developments in the laws of war. According to the Yugoslavia tribunal, the laws of armed conflict have shifted from protecting state sovereignty to protecting human rights.[278] The African Union signed the Non-Aggression Common Defense Pact, defining aggression as the use of armed force by a state, an organization of states, or non-state actors.[279]

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273. Anthony Rogers, *Asymmetric Warfare: Some Personal Reflections*, 27 COLLEGIUM (SPECIAL ISSUE) 15, 15 (2003).

274. *Id.* at 16.

275. The bombing took place at a bar in the town of Kuta, killing 202 people and injuring 209. The group thought to be responsible was Jemaah Islamiyah, an Islamist group linked to Al-Qaida. Other Indonesian officials believe that Al-Qaida was directly responsible. *2002 Bali Terrorist Bombings*, KNOWLEDGERUSH, http://www.knowledgerush.com/kr/encyclopedia/2002_Bali_terrorist_bombing/ (last visited Jan. 15, 2011).

276. On October 21, 2002, fourteen people were killed as the result of a suicide bombing. The attack was carried out by an explosive-laden Jeep. *Terrorism Against Israel in 2002*, KNOWLEDGERUSH, http://www.knowledgerush.com/kr/encyclopedia/Terrorism_against_Israel_in_2002/ (last visited Jan. 15, 2011).

277. Mounir El Motassadeq was initially charged on August 29, 2002, and was convicted for complicity in the 9/11 attacks on February 18, 2003. *Profile: Mounir El Motassadeq*, HISTORY COMMONS, http://www.historycommons.org/entity.jsp?entity=mounir_el_motassadeq (last visited Jan. 15, 2011).

278. *See* KOLB & HYDE, *supra* note 154, at 258.

279. African Union Non-Aggression and Common Defence Pact, Afr. Union, Jan. 31, 2005, 4th Ord. Sess. (not yet entered into force), *available at* http://www.africa-union.org/root/AU/Documents/Treaties/text/Non%20Aggression%20Common%20Defence%20Pact.pdf. The tragedies in Africa make it a marquee example of the implications of the crime of aggression, as there have been over nine million internally displaced people, and hundreds of thousands of deaths resulting from a variety of conflicts and civil wars.

Additionally, countries like France have restructured their armies to be better suited for asymmetric warfare,[280] rather than traditional warfare where the assembled forces of two or more states confront each other.[281] Thus, as the landscape of war continues to change, it is important that the rules governing warfare do likewise.

Discussions by the U.N. also support including NSAs under the definition of aggression. It is worth noting that since adopting Resolution 3314, the U.N. Security Council has specifically condemned a NSA for committing the crime of aggression. Security Council Resolution 405 condemned the mercenary group[282] which attacked Benin on January 17, 1977, for "the act of armed aggression."[283] This resolution makes no reference to a state sponsor.[284] The International Law Commission viewed the coup in the Comoros Islands in a similar vein.[285] The coup was conducted by mercenaries not affiliated with any state, causing the commission to fear they would not be guilty of aggression under a state-centered definition.[286] Additionally, the U.N. recognized that the norms governing the use of force by NSAs have not kept up with their state-centered equivalents.[287] This report, compiled by the Chair of the High-Level Panel on Threats, Challenges and Change called on the U.N. to "achieve the same degree of normative strength concerning non-state use of force as it has concerning state use of force."[288] The ASP to the Rome Statute should build upon this emerging awareness rather than ignore it.

Anup Shah, *Conflicts in Africa*, GLOBAL ISSUES (Aug. 21, 2010), http://www.globalissues.org/issue/83/conflicts-in-africa.

280. Asymmetric warfare typically refers to situations where well-trained regular troops are pit against poorly trained irregular troops. Rogers, *supra* note 273, at 15.

281. *Id.* at 16.

282. A group of roughly 100 persons, partly comprised of twenty-seven Africans and sixty-two European mercenaries, conducted a poorly organized assault on Cotonou. They departed via private jet three hours after conducting a small arms assault of the presidential palace. *History—Benin—Growth, Future, Power, Sector*, ENCYCLOPEDIA OF NATIONS, http://www.nationsencyclopedia.com/Africa/Benin-HISTORY.html (last visited Feb. 18, 2011).

283. S.C. Res 405, ¶ 2, U.N. Doc. S/RES/405 (Apr. 14, 1977); *see also* Keith A. Petty, *Sixty Years in the Making: The Definition of Aggression for the International Criminal Court*, 31 HASTINGS INT'L AND COMP. L. REV. 16 (2008).

284. S.C. Res 405, *supra* note 283, ¶ 2.

285. *See* Rosemary Rayfuse, *The Draft Code of Crimes Against the Peace and Security of Mankind: Eating Disorders at the International Law Commission*, 8 CRIM. L.F. 43, 59 (1997).

286. *See id.*

287. *High-Level Panel Report*, *supra* note 19, ¶ 159.

288. *Id.*

It was a mistake to allow an opportunity to address these issues pass because it is not often that the laws governing conflicts see meaningful change.[289] Given the complexity of the issues involved and the countless interests represented,[290] enacting an international treaty takes a long time. This is evident from the four year gap between the establishment and entering into force of the Rome Statute,[291] as well as the seven year gap between the court's creation and the first review.[292] Furthermore, it was not until twenty-nine years after the passage of the U.N. Charter that a definition to aggression was added.[293] Thirty years later, the norms governing NSAs in a conflict context are still criticized by the U.N.[294] As such, since the ASP to the Rome Statute adopted a definition of aggression without addressing NSAs, it may be years, if not decades, before another opportunity presents itself. As a result, the international community is committed to dealing with NSAs who engage in unlawful force, without adequate dispute resolution mechanisms.

B. Individuals? No. Criminal Organizations? No.

The accepted definition of aggression represents a missed opportunity for the international community for two reasons. The definition restricts prosecution to individuals who "exercise control over or [] direct the political or military action of a state."[295] Thus, the ICC will have no jurisdiction over NSAs, regardless of their capacity, [296] and as such, will not be able to levy any sort of judgment against the organization with which a suspected criminal is involved. To fully appreciate the shortcomings of

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289. The Geneva Conventions were adopted in 1949. Twenty-eight years passed before the two Additional Protocols were adopted. Since 1977, no new additions have been made to that branch of law. *Humanitarian Negotiations Manual*, *supra* note 23, at 30. *See also* Henckaerts, *Binding Armed Opposition Groups*, *supra* note 39, at 128 (pointing out that as far as international humanitarian law is concerned, formalizing it into treatises is all but over).

290. The U.N. Database of documents associated with defining the crime of aggression for the ICC includes over a dozen different definitions for the crime, including proposals from: Greece, Portugal, Germany, Egypt, Cuba, and the Russian Federation. *Rome Statute of the International Criminal Court: Documents on the Crime of Aggression*, UNITED NATIONS (Sept. 9, 2003), http://untreaty.un.org/cod/icc/documents/aggression/aggressiondocs.htm.

291. *Humanitarian Negotiations Manual*, *supra* note 23, at 35.

292. Rome Statute, *supra* note 51, art. 123.

293. *See* G.A. Res 3314 (XXIX), *supra* note 187.

294. *High-Level Panel Report*, *supra* note 19, ¶ 159.

295. Rome Statute Amendments, *supra* note 17, art 8(1).

296. *See id.*

this definition, it is important to consider the implications of an alternate definition.

In this regard, the accepted definition of aggression steps away from the foundations of international criminal law, rather than looking to them as a guideline. The Nuremberg IMT not only took aim at the crime of aggression, but defined it in a manner substantially different than the ASP.[297] For starters, the statute took aim specifically at individuals and further explained that an individual's position will not factor into the question of guilt.[298] Moreover, although the statute was meant to prosecute war criminals in the aftermath of World War II,[299] the statute actually took aim specifically at NSAs. Where the IMT found an individual was associated with an illegal group or organization, it empowered the IMT to declare that they were criminal organizations.[300] This in turn allowed the state harboring such organizations to treat any known affiliates as criminals and prosecute them accordingly.[301] In such further prosecutions, the criminal nature of the organization was not considered and the IMT's decision was taken as final.[302]

It is clear that this statute meant to take aim at individuals and the groups they were associated with, irrelevant of state affiliation. In a modern context, if a definition similar to the one utilized by the Nuremberg IMT replaced the 2010 amendment, it would vastly improve the ICC's power over NSAs. Not only would the court be allowed to hear the cases of individuals brought before them, but a successful prosecution would trigger state jurisdiction over criminals that happen to be part of the same organization. Theoretically, if the Nuremberg IMT's definition applied, the ICC could prosecute a member of Al-Qaida who was involved in the 9/11 attack, irrelevant of his status as a policy-maker. Furthermore, if the prosecution was successful, it would trigger criminal status in every nation that Al-Qaida is located. Given that Al-Qaida has known affiliations in the Philippines, Eritrea, Algeria, Afghanistan, Chechnya, Tajikistan, Kashmir, Somalia, and Yemen, this would be a

297. Nuremberg IMT, *supra* note 72, art. 6(a); *cf* ICC Discussion Paper, *supra* note 182.

298. Although the fact that a person was only acting under orders might be considered as a mitigating factor, it had no bearing on actual guilt. *See* Nuremberg IMT, *supra* note 72, arts. 6,7.

299. *See* Heller, *supra* note 222, at 480.

300. Nuremberg IMT, *supra* note 72, art. 9.

301. *Id.* art. 10.

302. Although the group/organization would be allowed to bring an appeal to the IMT questioning its criminality, until such an appeal was won, the issue was sealed. *See id.*

major accomplishment.[303] In addition to being responsible to the ICC, national courts in those nations would have jurisdiction over Al-Qaida members, and the question of the group's criminal nature would be predecided. Conversely, under the new definition, if the ICC managed to get a hold of the person directly responsible for the 9/11 attacks, they would not be able to prosecute him, let alone his underlings or foreign associates.

C. Undermining its Own Goals

It is important to remember that changes to the Rome Statute not only affect the ICC, but also have implications for the U.N. Both the U.N. and the ICC have recognized the goal of reaching a "mutually beneficial relationship," formalized in an agreement between both parties.[304] The agreement dictated that the two entities should cooperate closely in furtherance of performing their respective responsibilities.[305] This relationship is evidenced by the Security Council's right to refer cases to the ICC[306] and the U.N.'s obligation to provide the ICC with documents relevant to a given case.[307] Implicit to such a symbiotic relationship is that fulfillment of the goals of one party benefits the other. While updating the norms that govern the use of force by NSAs is a U.N. interest,[308] it is a goal that the ASP to the Rome Statute had an opportunity to accomplish. Furthermore, the effects of this relationship have already been recognized. The report from the High-Level Panel on Threats, Challenges and Change points out that early indications showed that the Security Council's willingness to use its power under the Rome Statute might deter parties from violating laws of war.[309] The report argued that the U.N.'s role in preventing wars would be improved by developing the legal regimes and dispute resolution mechanisms.[310] Because of this, the

303. Hayes et al., *supra* note 9 (highlighting the complexity of Al-Qaida's infrastructure).

304. Negotiated Relationship Agreement, *supra* note 68.

305. *Id.* art. 3.

306. Rome Statute, *supra* note 51, art. 13(b) (listing "a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council . . ." as one way in which the ICC can exercise jurisdiction).

307. The U.N. commits itself "to cooperate with the Court and to provide the Court such information or documents as the Court may request pursuant to article 87, paragraph 6, of the Statute." Negotiated Relationship Agreement, *supra* note 68, art. 15.

308. *See High-Level Panel Report*, *supra* note 19, ¶ 159.

309. *See id.* ¶ 90.

310. *See id.* ¶ 89.

Rome Statute is one of the most important recent developments in terms of legal mechanisms.[311]

With the ramifications on the U.N. and global community in mind, a definition of aggression that excludes NSAs undermines the purpose of criminalizing the act. This is particularly troubling because states and NSAs are equally capable of the threats a definition of aggression seeks to avert. Surely, where the goals of the U.N. were to deter, identify, and suppress aggression,[312] the source of the aggression should be irrelevant. A NSA that has the capabilities of using force on the global scale can just as easily threaten peace and national security as a state entity.[313]

Even in purely internal conflicts, aggression by NSAs can undermine a state government, with the resultant instability creating a threat to international peace and security.[314] An armed attack carried out by a NSA is still an armed attack, and the threat presented to a nation's security is in no way lessened because it stems from an entity not recognized by international law.[315] For example, in 1974, under Resolution 3314, the U.N. highlighted the existence of weapons of mass destruction as a reason for why defining aggression was so important.[316] Incidentally, a report to the U.N. General Assembly thirty years later highlighted that amongst the challenges facing collective security was the possibility of NSAs obtaining nuclear or biological weapons.[317] Given the gravity of the crime of aggression, ignoring NSAs' very real capabilities of carrying out criminal aggression is simply inconsistent with the goals of the U.N. and the ASP to the Rome Statute.

Similarly, if by defining aggression the goal is to protect victims' rights and access to remedies,[318] the state-centered approach is again, counterintuitive. The 1974 resolution reaffirmed a duty that states not use armed force to deprive people of their rights and freedoms or disrupt the territorial integrity of a victim state.[319] Yet, the High-Level Panel on

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311. *See id.* ¶ 90.

312. *See* G.A. Res 3314 (XXIX), *supra* note 187.

313. *See* Printer, *supra* note 194, at 348 (highlighting the damage that a NSA such as a terrorist organization is capable of causing).

314. *See* Rayfuse, *supra* note 285, at 59–60.

315. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 204 (4th ed. 2005) (discussing that to qualify as an armed attack under the U.N. Charter, an attack must be carried out against a state, not necessarily by a state); *see also* Printer, *supra* note 194, at 348.

316. G.A. Res 3314 (XXIX), *supra* note 187.

317. *See High-Level Panel Report*, *supra* note 19, ¶ 112 (discussing specifically, the danger of a terrorist organization acquiring weapons of mass destruction).

318. *See* G.A. Res 3314 (XXIX), *supra* note 187.

319. *Id.*

Threats, Challenges, and Change reports that the ideals behind terrorism are an attack on the U.N.'s respect for human rights.[320] Additionally, the report cites the rise of civil wars as the predominant form of warfare as evidence that new states[321] face crises of capacity and legitimacy.[322] Recognizing these facts evidences that NSAs are capable of causing the very problem a definition of aggression hopes to avert. Thus, given the victim oriented nature of this goal, it is irrational to think the victim would be concerned with whether the person violating his rights had state association. It is hard to rectify affording a villager in some Bosnian valley certain protections from having his rights violated by a foreign aggressor, but denying them to civilians living in a valley plagued by internal conflict.[323]

Considering that NSAs fall outside the scope of the U.N. Charter,[324] it is even more imperative to hold them criminally responsible under international law. As discussed above, the idea of international criminal law is to punish crimes that pierce state value-neutrality.[325] It logically follows that if the U.N.'s purpose is to maintain peace and promote national security, then groups bent on undermining those principles should be the focus, not the exception.[326] Yet, for example, Al-Qaida is considered the first instance of a sophisticated terrorist network,[327] and has publicly stated that the U.N. is one of its enemies and stands as an obstacle to its goals.[328] Such declarations are not hollow rhetoric as Al-Qaida was responsible for attacks against ten members of the U.N. across four continents between 1999 and 2004.[329] Ignoring such groups is an acquiescence of a threat to international stability, something that the U.N. hopes to avoid,[330] and is an interest of the ASP to the Rome Statute in defining

320. *High-Level Panel Report*, *supra* note 19, ¶ 145.

321. The Panel uses the term "new states" to refer to states that emerged in the second half of the U.N.'s existence. *Id.* ¶¶ 2–3.

322. *Id.*

323. KOLB & HYDE, *supra* note 154, at 68 (arguing that common civilians, who are likely going to be the victims of criminal aggression, should be afforded the same rights irrelevant of who their assailant is).

324. The U.N. Charter was enacted by, and governs the states party to it. By definition, NSAs are excluded. *See supra* Part II.

325. *See* Mégret, *supra* note 16, at 2.

326. *See* Printer, *supra* note 194, at 350.

327. *High-Level Panel Report*, *supra* note 19, ¶ 146.

328. *Id.*

329. *Id*.

330. *See* Printer, *supra* note 194, at 350 (arguing that if a NSA is going to seek to use force on a global scale, maintaining global peace and security demand that the U.N.'s policies govern that group's actions).

aggression.[331] Given the "piercing state value-neutrality" principle for defining an activity as an international crime, if the ASP to the Rome Statute finds that endangering one of the founding principles of the U.N. does not constitute such a crime, it is difficult to imagine what does.

In updating the laws governing the use of force, the goal should be creating parity between states and NSAs.[332] Instead, holding NSAs outside the scope of criminal aggression presents a problem of symmetry. There is no question that once a state has been attacked by a NSA such as a terrorist, that state will be bound by the U.N. Charter.[333] Specifically, Article 51 of the Charter allows the use of force in self-defense if an armed attack occurs.[334] Since a state could target a NSA under this article as it does not limit the targets of lawful self-defense,[335] this would mean one party to the conflict has to conduct hostilities within the scope of a set of laws, while the other does not. This double standard does not make sense; the U.N. should work towards establishing normative rules concerning the use of force by NSAs that match state equivalents.[336] Just as there is no question that the U.S. was bound by Article 51 of the Charter following 9/11,[337] it is agreed that the attacks carried out by Al-Qaeda were of severe enough quality to constitute an armed attack, triggering retaliation under Article 51.[338] The new definition formally recognizes that in the ensuing conflict between the U.S. and Al-Qaida, one party was bound by all relevant laws of the U.N. Charter, whereas the other remains an anomaly in international jurisprudence.

CONCLUSION

Regulating criminal activity and ensuring collective security is one of the chief goals of the international community. Yet, it is a problem that grows more complex with the proliferation of NSAs and is compounded by the fact that laws governing these groups are an anachronism of international law. Branches of law such as international humanitarian and human rights law are a holdover from a time when the most pressing concern of the international community was the outbreak of another

331. Drumbl, *supra* note 231, at 14 (claiming the four interests involved in defining aggression are stability, security, human rights, and sovereignty).

332. *See High-Level Panel Report*, *supra* note 19, ¶ 161.

333. *See* Printer, *supra* note 194, at 351 (pointing out that Article 51 of the U.N. Charter does not limit the targets of lawful self defense).

334. *See* U.N. Charter art. 51.

335. *See id.*; *see also* Printer, *supra* note 194, at 351.

336. *See High-Level Panel Report*, *supra* note 19, ¶ 159.

337. Printer, *supra* note 194, at 353.

338. *Id.*

world war and, as such, focus entirely on the state.[339] The U.N. itself was created under the daunting shadow of World War II and was essentially a direct response to the catastrophic event.[340] Thus, it is not surprising that many of the principles formalized by its charter completely ignore the threats created by NSAs.

Going forward, it is important to recognize the weaknesses of the present legal framework so that future laws do not succumb to the same problems. Of the three principle branches of international law associated with armed conflicts, two arguably do not apply to NSAs. International human rights law is recognized as only incurring state responsibility[341] and NSAs can properly contest international humanitarian law as inapplicable because they had no part in its enactment.[342] International criminal law alone has managed to pierce state borders by targeting individuals rather than abstract, collective entities.[343]

Given an international climate where some of the most pressing dangers stem from terrorism and transnational criminal organizations, it is important to preserve international criminal law's role in prosecuting NSAs. In the realm of international criminal law, there is no more important establishment than the ICC. The ICC is the first and only permanent international court that is the functional equivalent of the transient IMTs of the past.[344] The Rome Statute, which empowers and confers jurisdiction to the ICC, explicitly targets NSAs as capable of committing three of the four recognized crimes: war crimes, crimes against humanity, and genocide.[345] The fourth crime, aggression, was undefined until 2010.

The definition of aggression agreed on by the ASP to the Rome Statute is nonsensical on numerous levels, the most basic of which is that it contradicts the principles of international criminal law. Starting with the IMTs following World War II through those established to prosecute the atrocities in Yugoslavia, international criminal law has focused on the individual, irrelevant of state association. The amendment definition makes aggression the lone crime for which the ICC cannot prosecute NSAs.

Moreover, in adopting a criminal definition of aggression, the ASP to the Rome Statute apparently ignored the problems afflicting the present and future in favor of combatting the issues of the past. The goals of de-

339. *See High-Level Panel Report*, *supra* note 19, synopsis.
340. *See id*.
341. *See supra* Part II.B.
342. *See id.*
343. *See* TORTURE BY NON-STATE ACTORS, *supra* note 168.
344. *Humanitarian Negotiations Manual*, *supra* note 23, at 35.
345. *See* Rome Statute, *supra* note 51, arts. 5(1), 25(2).

fining aggression are to police the unlawful use of armed force, preserve collective security, and provide relief for victims of unlawful aggression.[346] Yet when considering these reasons, it is patently clear that a NSA is just as much a threat as a state actor. The growth of organizations such as Al-Qaida clearly demonstrates that in the modern era, NSAs are capable of disrupting international security in the same manner as states. Furthermore, it is clear that any victim-based reasons should see no distinction in state-affiliation. If a group of villagers lose their home or loved ones as a result of the unlawful use of force, the legal affiliation of those who caused their loss is likely a distant afterthought.

Thus, when the ASP to the Rome Statute gathered in 2010 it had a unique opportunity to update international law. A proper definition of aggression would have improved the legal mechanisms for policing NSAs for their international crimes. It could also have helped eliminate the disparities between the laws of armed conflict as they apply to states and NSAs. Instead, these opportunities were missed and there is no telling when there will be another such chance.

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346. *See* G.A. Res 3314 (XXIX), *supra* note 187.

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