

# THE DEFINITION OF THE CRIME OF AGGRESSION AND ITS RELEVANCE FOR CONTEMPORARY ARMED CONFLICT

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## ABSTRACT

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Despite the difficulties with defining the crime of aggression spanning decades, the Rome Statute of the International Criminal Court included the crime of aggression into its jurisdiction *ratione materiae*. After twelve years of negotiations, in 2010 the States Parties reached a breakthrough in defining the crime of aggression through consensus. The aggression amendments are expected to go into force in January 2017. However, its relevance can be questioned. The current definition requires state action or involvement of a state in order for it to be considered a crime of aggression. Nevertheless, the new war theory by Kaldor points out that new wars show a diminishing role of the nation state. Hence, contemporary armed conflicts do not necessarily fit within the Clausewitzian, state-centric approach and can therefore not be understood through traditional terms. This paper considers whether the current definition of the crime of aggression indeed fails to capture 'contemporary' acts of aggression perpetrated during new wars in order to determine its relevance for the future. It finds that the definition's literal text cannot be stretched to include non-state actors that do not possess state-like characteristics, and hence, that the current definition is indeed doomed to become irrelevant. This paper therefore suggests that the widely celebrated breakthrough in reaching a definition of the crime of aggression could be considered an inadequate addition to the ICC's jurisdiction in its attempt to fight impunity and prevent future crimes of aggression. As such, the author contends that the discussion on the definition of the crime of aggression should be re-opened in order to consider redefining the definition to explicitly include non-state actors as possible perpetrators of the crime of aggression.

## I. INTRODUCTION

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In the face of the cruelties that took place during World War I, World War II, and later during the 1990s, a growing support emerged for the establishment of an international criminal court.<sup>1</sup> The international community became more aware that competing needs, ideologies, and aspirations inevitably give rise to international friction and conflict.<sup>2</sup> The need to prevent the most serious crimes of international concern from occurring in the future together with the desire to put an end to impunity for the perpetrators of these crimes initiated the campaign to establish a

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<sup>1</sup> S. Anoushirvani, 'The Future of the International Criminal Court: The Long Road to Legitimacy Begins with the Trial of Thomas Lubanga Dyilo', 22 *Pace International Law Review* (2010) 213. Available online at <http://digitalcommons.pace.edu/pilr/vol22/iss1/6>; and United Nations, 'Establishment of an Criminal Court – Overview', *United Nations Treaty Collection*, available online at [untreaty.un.org/cod/icc/general/overview.htm](http://untreaty.un.org/cod/icc/general/overview.htm)

<sup>2</sup> B. B. Ferencz, 'The Coming of International Law and Order', 14 *Whole Earth Papers* (1980). Available online at [www.benferencz.org/index.php?id=4&article=31](http://www.benferencz.org/index.php?id=4&article=31)

permanent international criminal court.<sup>3</sup> After complex negotiations, on July 21, 1998, 120 nations adopted the Rome Statute for the establishment of the International Criminal Court ('ICC').<sup>4</sup> According to Kofi Annan, "the adoption of the Rome Statute is a gift of hope to future generations and a giant step forward in the march towards universal human rights and the rule of law".<sup>5</sup> Hence, the creation of the ICC is generally seen as an important achievement of international law.

The crime of aggression is one of the four core international crimes under the jurisdiction of the ICC, entailing the individual responsibility for illegal war.<sup>6</sup> Although the Nuremberg Tribunal stated that aggression is "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole", it was not until the 2010 Kampala Review Conference on the Rome Statute that the States Parties were able to reach consensus on an exact definition of the crime of aggression.<sup>7</sup> While the aggression amendments will only go into force after 1 January 2017, the Kampala definition is already regarded to be a significant development in international criminal law.<sup>8</sup>

Nevertheless, one can question the established definition's relevance for contemporary armed conflict. As the notion of the criminality of waging aggressive war is based on the 'legacy' of the Nuremberg Tribunal, the crime of aggression exclusively focuses on state behaviour.<sup>9</sup> The current definition establishes that only state leaders and state officials with enough authority to

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<sup>3</sup> *Rome Statute of the International Criminal Court* ['Rome Statute'], signed 17 July 1998, (entered into force 1 July 2002), Preamble; D. Roche, 'Truth Commission Amnesties and the International Criminal Court', 45 *British Journal of Criminology* (2005) 565, doi:10.1093.bjc.azi038; and D. Kaye, 'Who is Afraid of the International Criminal Court?', 90 *Foreign Affairs* (2011) 118. Available online at [http://heinonline.org/HOL/Page?handle=hein.journals/fora90&div=52&g\\_sent=1&collection=journals](http://heinonline.org/HOL/Page?handle=hein.journals/fora90&div=52&g_sent=1&collection=journals)

<sup>4</sup> Roche, *supra* note 3; E. Jimenez, 'Seeking Global Reform: The United Nations Security Council, the International Criminal Court, and Emerging Nations', 30 *Macalester International* (2012) 84. Available at <http://digitalcommons.macalester.edu/macintl/vol30/iss1/10>; and B. B. Ferencz, 'Misguided Fear About the International Criminal Court', 15 *Pace International Law Review* (2003) 223. Available online at <http://digitalcommons.pace.edu/pilr/vol15/iss1/7>

<sup>5</sup> K. Annan, 'Statement at the Opening of the Preparatory Commission of the International Criminal Court' (Speech Presented at the Preparatory Commission, New York, NY, February, 1999). Available online at <http://www.ngos.net/un/icc.html>; and Kaye, *supra* note 3.

<sup>6</sup> N. Weisbord, 'Conceptualizing Aggression', 20 *Duke Journal of Comparative and International Law* (2009) 1. Available online at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1053&context=djCIL>; and M. Anderson, 'Reconceptualising Aggression', 60 *Duke Journal of Comparative and International Law* (2010) 411, at 412. Available online at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1478&context=dj>

<sup>7</sup> *ibid.*; S-D. Bachmann & G. Kemp, 'Aggression as 'Organized Hypocrisy' – How the War on Terror and Hybrid Threats Challenge the Nuremberg Legacy', 30 *The Windsor Yearbook of Access to Justice* (2012) 233. Available online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1871912](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871912); A. L. Zuppi, 'Aggression as International Crime: Unattainable Crusade or Finally Conquering the Evil?', 26 *Pennsylvania State International Law Review* (2007) 1. Available online at <https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=26+Penn+St.+Int'l+L.+Rev.+1&srctype=smi&srcid=3B15&key=ac8a51ac5e408efc7432edec556be9f3>; and International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal* (Nuremberg, Germany, 1947), at 186.

<sup>8</sup> A. G. Wills, 'The Crime of Aggression and the Resort to Force Against Entities in Statu Nascendi', 10 *Journal of International Criminal Justice* (2012) 83, at 83, doi:10.1093/jicj/mqr062; and M. Gillet, 'The Anatomy of an International Crime: Aggression at the International Criminal Court', *International Criminal Law Review* (2013) 1. Available online at <http://ssrn.com/abstract=2209687>

<sup>9</sup> Bachmann & Kemp, *supra* note 7, at 233.

engage the state's forces into aggressive action can be considered for the crime of aggression.<sup>10</sup> Hence, an individual acting alone without state action or the involvement of a state cannot commit a crime of aggression under the ICC's jurisdiction.<sup>11</sup> However, this state-centred approach arguably does not reflect the present reality of armed conflict. In *New and Old Wars, Organized Violence in a Global Era*, Mary Kaldor finds that there has been a decline in what she refers to as 'old wars' – "war[s] involving states in which battle is the decisive encounter".<sup>12</sup> Instead, she argues that during the last decades of the twentieth century a new type of war has developed, so called 'new wars'.<sup>13</sup> These new wars involve a blurring of the distinctions between war, organised crime, and large-scale violations of human rights, and as such involve networks of both state and non-state actors where most violence is directed against civilians.<sup>14</sup>

In case Kaldor's new war theory correctly describes changes in modern day war, the current state-centric demarcation of the crime of aggression is in fact backward-looking and hence, out-dated. Consequently, this could severely undermine efforts to prosecute aggression. As such, the crime of aggression as currently established in the Rome Statute would thwart the ICC's ability to achieve its objectives to end impunity and prevent future crimes. This paper will therefore explore the current definition's relevance for contemporary armed conflict by assessing Kaldor's new war theory. Firstly, the development of the concept of the crime of aggression as well as the current definition will be further explored. This section will describe the development of the criminalisation of waging a war of aggression and explore how aggression has come to be seen as having the potential to prevent the suffering caused by armed conflict. Subsequently, Kaldor's theory will be considered; what does she propose and what consequences could this have for the applicability of the crime of aggression? Thirdly, the current definition's limitations will be further explored: is it possible to stretch its literal text to include the non-state actors as described by Kaldor's new war theory? Finally, the paper will conclude whether the current, widely celebrated definition of the crime of aggression truly constitutes a relevant addition to the ICC's jurisdiction in its attempt to fight impunity and prevent future crimes of aggression.

## II. THE CRIME OF AGGRESSION

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The concept of the crime of aggression is not entirely new to the world stage.<sup>15</sup> Prior to World War I, Carl von Clausewitz described war as "a mere continuation of state politics".<sup>16</sup>

<sup>10</sup> J. Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference', 11 *International Criminal Law Review* (2011) 49, at 58. doi:10.1163/157181211X543920; Bachmann & Kemp, *supra* note 7, at 246; and Zuppi, *supra* note 7, at 30.

<sup>11</sup> *Ibid.*, at 57; and *Charter of the United Nations* ['U.N. Charter'], signed 26 June 1945 (entered into force 24 October 1945), Art. 2(4).

<sup>12</sup> M. Kaldor, *New and Old Wars - Organized Violence in a Global Era* (3<sup>rd</sup> edn., Polity Press, 2012), at vi.

<sup>13</sup> *Ibid.*, at 1.

<sup>14</sup> *Ibid.*, at vi and 2.

<sup>15</sup> Trahan, *supra* note 10, at 53.

<sup>16</sup> Carl Von Clausewitz, *On War* (Book 1, trans by Col JJ Graham, N Trübner, 1873).

Hence, war was seen as an inherited 'right' of the state.<sup>17</sup> However, this changed when the Peace Treaty of Versailles of 1919 condemned aggressive war as "a supreme offence against international morality and sanctity of treaties".<sup>18</sup> The Kellogg-Briand Pact of 1928 went a step further, "condemn[ing] recourse to war for the solution of international controversies, and renounc[ing] it, as an instrument of national policy in their relations with one another".<sup>19</sup> Finally, after World War II, the London Charter that established the Nuremberg Tribunal criminalised the waging of a war of aggression by including the 'crime against peace'.<sup>20</sup> Soon thereafter the General Assembly of the United Nations ('UNGA') recognised the Nuremberg Principles as international law, after which Nuremberg served as a model for the Tokyo judgment in 1948.<sup>21</sup> Hence, by recognising the London Charter as international law, the UNGA had made clear that war making was no longer seen as an inherent right of states but could under certain circumstances be regarded an international crime.<sup>22</sup>

However, as the crime of aggression is intertwined with other, unresolved historical debates within the field of international law, it proved to be exceptionally difficult to define.<sup>23</sup> Therefore, it was not until 1974 that a definition of an 'act of aggression' was adopted by the UNGA in Resolution 3314.<sup>24</sup> However, as this definition was established during the Cold War, it is riddled with anachronistic concepts that undermine its normative significance. During the negotiations for the establishment of the definition, all delegates sought to regulate the forms of armed conflict that were the main threat of that time –such as nuclear wars and struggles of peoples for independence– while at the same time the competing blocs aimed to advance their political-strategic interest through the act of aggression.<sup>25</sup> As such, the definition of aggression was seen as a strategic asset that states sought to control in order to be able to one day mobilise it against their geopolitical opponents. Consequently, as Kreß and Von Holtzendorff point out, "none of the international or internationalised criminal tribunals established since the 1990s to deal with specific situations of macro-criminality included the crime of aggression", as the strategic interests influenced the definition too much.<sup>26</sup> Hence, the Nuremberg Tribunal's

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<sup>17</sup> Bachmann & Kemp, *supra* note 7, at 241.

<sup>18</sup> *The Treaty of Versailles*, signed 28 June 1919 (entered into force 21 October 1919), Part VII Penalties, Art. 227.

<sup>19</sup> *Kellogg-Briand Pact*, signed 27 August 1928 (entered into force 24 July 1929), Art. 1.

<sup>20</sup> C. Kreß & L. Von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression', 8 *Journal of International Criminal Justice* (2010) 1179, at 1181. doi:10.1093/jicj/mqq069.

<sup>21</sup> *Ibid.*

<sup>22</sup> Anderson, *supra* note 6, at 416.

<sup>23</sup> Weisbord, *supra* note 6, at 2.

<sup>24</sup> *United Nations General Assembly Resolution 3314 (XXIX). Definition of Aggression* ["Resolution 3314"], adopted 14 December 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". The term 'State' is used "without prejudice to questions of recognition or to whether a State is a member of the United Nations" and "includes the concept of a 'group of States' where appropriate". Weisbord, *supra* note, at 22; and Kreß & Von Holtzendorff, *supra* note 18.

<sup>25</sup> Weisbord, *supra* note 6, at 22.

<sup>26</sup> Kreß & Von Holtzendorff, *supra* note 20, at 1181.

promising legacy had been left unfulfilled and no other alleged perpetrator of the crime of aggression was prosecuted since 1947.<sup>27</sup>

Despite the many difficulties surrounding the establishment of a definition, the crime of aggression was widely recognised among scholars and participants in the Rome Conference in 1998 as being a significant addition to the ICC's jurisdiction *ratione materiae*.<sup>28</sup> As Professor Noah Weisbord –an independent expert delegate to the Special Working Group on the Crime of Aggression ('Special Working Group')– explains, “the premise of the majority of the participants, stated broadly, [was] [...] that an implemented definition [would] [...] advance the goals of peace and justice set out in the preamble to the Rome Statute that established the ICC”.<sup>29</sup> As such, the crime was recognised under the Rome Statute as one of the “most serious crimes of concern to the international community as a whole”.<sup>30</sup> However, the ICC was precluded from exercising jurisdiction until a definition was established.

During the first session of the Assembly of States Parties ('ASP') in 2002, a Special Working Group was established with the duty to prepare a future meeting in which a draft would be considered that addressed several of the main problems arising with the crime of aggression.<sup>31</sup> The Special Working Group's proposals for a provision on aggression were finalised in 2009 and became the definition that was eventually adopted at the Kampala Review Conference in 2010.<sup>32</sup> The crime of aggression, as mentioned in Article 8*bis* of the Rome Statute, provides:

#### **Article 8 bis**

##### **Crime of aggression**

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
  - a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

<sup>27</sup> Anderson, *supra* note 6, at 415.

<sup>28</sup> Kreß & Von Holtendorff, *supra* note 20, at 1182.; and Zuppi, *supra* note 7, at 22.

<sup>29</sup> Weisbord, *supra* note 6, at 3.

<sup>30</sup> Kreß & Von Holtendorff, *supra* note 20, at 1182; and Rome Statute, *supra* note 3, preamble.

<sup>31</sup> Zuppi, *supra* note 7, at 25; and Kreß & Von Holtendorff, *supra* note 20, at 1184.

<sup>32</sup> Kreß & Von Holtendorff, *supra* note 20, at 1184; and Trahan, *supra* note 10, at 55.

- b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- c) The blockade of the ports or coasts of a State by the armed forces of another State;
- d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.<sup>33</sup>

The definition is derived from the 1974 UNGA Definition, which delegates in Rome choose to use as the basis for the definition of the crime.<sup>34</sup> Furthermore, Article 2(4) of the United Nations Charter ('U.N. Charter') –banning “the threat or use of force against the territorial integrity or political independence of any state”– was used for defining a ‘crime of aggression’.<sup>35</sup> Hence, most of the definition of the Kampala Conference has been derived from pre-existing sources.

Unlike other crimes under the ICC jurisdiction, an individual acting alone, without state action or the involvement of a state, cannot commit the crime of aggression.<sup>36</sup> Thus, aggression is a ‘leadership crime’ for which only state leaders and state officials with enough authority to direct the state’s forces into aggressive action can be considered.<sup>37</sup> Furthermore, the crime of aggression is only applicable to ‘manifest’ U.N. Charter violations for which one must assess the ‘character, gravity, and scale’ of the violation.<sup>38</sup> According to the U.N. Charter states are solely allowed to use force when it is an act of self-defence or when it is sanctioned by the Security Council of the United Nations ('UNSC').<sup>39</sup> Hence, the subparagraphs (a)–(g) describe acts of aggression but for the act to be considered a crime of aggression it needs to satisfy the ‘manifest violation’ requirement.<sup>40</sup>

The current definition of the crime of aggression thus rests upon the idea as first coined at the Nuremberg Tribunal that the planning, preparation, initiation or execution of aggression

<sup>33</sup> Rome Statute, *supra* note 3, at Art. 8.

<sup>34</sup> Weisbord, *supra* note 6, at 21.

<sup>35</sup> Trahan, *supra* note 10, at 57; and U.N. Charter, *supra* note 12, at 2(4).

<sup>36</sup> *Ibid.*

<sup>37</sup> Trahan, *supra* note 10, at 58; Bachmann & Kemp, *supra* note 7, at 246; and Zuppi, *supra* note 7, at 30.

<sup>38</sup> Trahan, *supra* note 10, at 58.

<sup>39</sup> U.N. Charter, *supra* note 11, see chapter VII, Art. 39-51.

<sup>40</sup> *Ibid.*, at 59.

'contains within itself the accumulated evil of the whole' and is a combination of the 1974 UNGA Definition and Article 2(4) of the U.N. Charter. Hence, the objective behind the decision to include the crime of aggression in the jurisdiction of the ICC is to prevent the suffering caused by armed conflict by deterring *state* actors from using aggressive force that does not constitute an exception as stated in the U.N. Charter.

### III. OLD & NEW WARS

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The current definition of the crime of aggression focuses solely on the suffering caused by armed conflict through the actions by state actors. Thereby, the state is seen as a weapon used by the state leaders or state officials against another state.<sup>41</sup> However, nowadays, there are and there will be weapons other than the state and aggressors other than state actors that the current definition arguably fails to capture. According to Kaldor, state actors are becoming of less importance for the use of force, as the capacity of states to make use of force unilaterally against other states has been greatly weakened.<sup>42</sup> This is mainly caused by "the growing destructiveness of military technology and the increasing interconnectedness of states, especially in the military field".<sup>43</sup> Furthermore, she believes that the prohibition on the use of force by, among others, the U.N. Charter, has also played a role in this weakening capacity. However, while inter-state wars are decreasing in number, Kaldor identifies a growing amount of 'new wars'. New wars differ from classic inter-state- and civil wars in three respects: their goals, modes of warfare, and source of finance.

Firstly, new wars are based on identity politics –"the claim to power on the basis of a particular identity".<sup>44</sup> According to Kaldor, globalisation has led to the breakdown or erosion of modern state structures, which has resulted in the formation of political groupings all around the world on the basis of an exclusive identity.<sup>45</sup> This shared identity often stems from nostalgia, i.e. they are based on memories of an heroic past, injustices, famous battles and so on.<sup>46</sup> These groupings subsequently acquire meaning through insecurity or through a sense of being threatened by those who do not belong to the same identity. As Kaldor points out, "[e]very exclusive identity necessarily generates a minority. At best, identity politics involves psychological discrimination against those labelled differently. At worst it leads to population expulsion and genocide".<sup>47</sup> Importantly, these groupings are not always limited to the boundaries of a state, as fast communication and new technologies has resulted in an important role for diasporas in the formation and development of identity politics; "diaspora groups provide ideas,

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<sup>41</sup> Weisbord, *supra* note 6, at 23.

<sup>42</sup> Kaldor, *supra* note 12, at 6.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, at 8.

<sup>45</sup> *Ibid.*, at 81.

<sup>46</sup> *Ibid.*, at 80.

<sup>47</sup> *Ibid.*



money, arms, and know-how often with disproportionate effects”.<sup>48</sup> Hence, new wars are fought by networks of both state and non-state actors.<sup>49</sup>

Secondly, the mode of warfare differs between old and new wars. As new wars aim to control the population by clearing society from everyone of a different identity and by instilling terror, the strategic goal is to mobilise extremist politics grounded in fear and hatred.<sup>50</sup> As such, new wars involve “population expulsion through various means, such as mass killing and forcible resettlement, as well as a range of political, psychological, and economic techniques of intimidation”.<sup>51</sup> John Robb, the former United States counterterrorism operation planner and commander, agrees that the traditional methods of warfare –such as those described in the subparagraphs (a)–(g) of the definition of the crime of aggression– are increasingly being supplemented by other methods of intimidation.<sup>52</sup> According to him, ‘systems disruption’ will soon become the primary, destructive method of warfare. It involves the disruption or sabotage of critical systems such as electricity, telecommunications, gas, water, or transport, causing the collapse of that system without the reliance on arms.<sup>53</sup> As systems disruption makes warfare affordable, cyber warfare is poised to become an important method of aggressive states, small groups, and individuals.<sup>54</sup> Kaldor also identifies the terrorism experienced in New York, London, Madrid, Israel and Iraq as a variant of the new strategies of the new wars.<sup>55</sup> The use of spectacular, often gruesome, violence in these, and possibly future terrorism attacks creates fear and conflict.<sup>56</sup> Hence, in most of the modes of warfare that are used in new wars, such as cyber warfare and terrorism, ‘violence’ is directed at civilians.

Finally, combat units fund themselves through plunder, hostage-taking and the black market or through external assistance, such as remittances from the diaspora, taxation of humanitarian assistance, support from neighbouring governments, or illegal trade in arms, drugs, or valuable commodities such as oil or diamonds or human trafficking.<sup>57</sup> Hence, war provides a legitimate cause for various criminal activities for personal gain, while at the same time these are essential sources of finance to sustain the war. Another characteristic of new war economies is the blurred distinction between zones of war and peace. As relatively few people actually participate in new wars, it becomes difficult to distinguish between the political and economic,

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<sup>48</sup> *Ibid.*, at 88.

<sup>49</sup> *Ibid.*, at 161.

<sup>50</sup> *Ibid.*, at 9.

<sup>51</sup> *Ibid.*, at 9.

<sup>52</sup> Weisbord, *supra* note 6, at 18.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> It is, however, important to note that many feel that terrorism should not be considered an act of war but rather a criminal act. From this point of view, terrorism should be dealt with by (international) criminal law. See S. G. Jones & M. C. Libicki, *How Terrorist Groups End: Lessons for Countering al Qaeda* (Rand Corporation, 2008) or M. E. O’Connell, ‘The Choice of Law Against Terrorism’, 4 *Journal of National Security Law & Policy* (2010) 343. Available online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1654049](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654049).

<sup>56</sup> Kaldor, *supra* note 12, at 9.

<sup>57</sup> *Ibid.*, at 10.

public and private, military and civil, and finally, between war and peace.<sup>58</sup> Therefore, despite the war, “there are regions where local state apparatuses continue to function, where taxes are raised, services are provided and some production is maintained”.<sup>59</sup>

According to Kaldor, the failure to prevent new wars from arising is due to “misperception, the persistence of inherited ways of thinking about organized violence, [and] the inability to understand the character and logic of the new warfare”.<sup>60</sup> As new wars are both global and local, and are usually characterised by the erosion or breakdown of state power, the current Clausewitzian, state-centred approach to these wars arguably poses an obstacle to appropriate action.<sup>61</sup> Hence, new wars cannot be understood in traditional terms. Kaldor instead argues for a more political response to new wars and calls for an increased focus on international principles and legal norms to counteract the criminal activities by the warlords.<sup>62</sup> Thus, Kaldor recognises the potential of international tribunals such as the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia, as well as the ICC to counter the arising of new wars, but condemns its current emphasis on state sovereignty as the basis of international relations.<sup>63</sup>

In line with Kaldor’s theory, the crime of aggression’s current definition, at first sight, seems to focus solely on old wars, where state sovereignty and state action play a decisive role. Furthermore, the acts of aggression as listed in subparagraphs (a)-(g) are seemingly out-dated, as new wars involve new modes of warfare that do not necessarily involve (state) armed forces. Hence, it arguably cannot be applied to the present reality of armed conflicts. Thereby, the definition could form an obstacle to appropriate action, as efforts to prosecute ‘contemporary’ acts of aggression would be severely hindered. Consequently, this would be detrimental to the objective behind the decision to include the crime of aggression into the jurisdiction of the ICC. The clear reference to the state in the current definition would arguably allow for the aggressive use of force by non-state actors in new wars without any (international) judicial consequence. Not only would this obstruct the States Parties’ objective to prevent the suffering caused by armed conflict, but it would also thwart the ICC’s ability to achieve its objectives to end impunity and prevent future crimes. Thus, the exclusive focus of the definition of the crime of aggression on state behaviour seems to be inadequate

#### IV. NEW WARS & THE CRIME OF AGGRESSION

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<sup>58</sup> *Ibid.*, at 117.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, at 120.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

Although Weisbord as a member of the Special Working Group recognises that at first sight the current definition seems to be limited to state behaviour, he contends that when you further explore the definition, it can in fact be stretched beyond its literal text and applied to non-state actors.<sup>64</sup> This section will therefore consider whether the state is the only political unit subject to the definition or whether it might still be possible to interpret the definition as including non-state actors by thoroughly exploring the current definition's demarcations.

According to Weisbord, the best way to include non-state groups in the definition would be by accompanying the word 'State' with 'or Group' or '/Group'. However, since he expects the delegates to be reticent or maybe even unwilling to reopen the definition debate he proposes two ways to interpret the current definition, stretching it to include those non-state groups.<sup>65</sup> Firstly, he points out that the reference to the 1974 UNGA Definition could be read as including armed groups independently of the state.<sup>66</sup> The addition of the phrase "in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974" to Article 8*bis* (2) does not prescribe whether and in what way the provisions –besides article 1 and 3 describing the crime of aggression– may be applicable for the ICC.<sup>67</sup> Interpreting the 1974 UNGA Definition as a whole, the states covered do not necessarily need to be universally recognised.<sup>68</sup> In fact, it was left to the UNSC to decide whether an entity should be considered a state or not for the purposes of Resolution 3314.<sup>69</sup> This can be explained by the fact that the 1974 UNGA Definition was established during the Cold War, when many recently independent states, as well as the Soviet Union with its client states held the view that wars of national liberation were an exception to Article 2(4) of the U.N. Charter.<sup>70</sup> Consequently, the 1974 UNGA Definition includes the idea that groups should be able to fight –by means of armed force– for self-determination.<sup>71</sup> It therefore appears that the 1974 UNGA Definition is applicable to either fully recognised states, states lacking recognition for political reasons, and other state-like entities on which the UNSC may decide in individual cases.<sup>72</sup> Although this approach might stretch the definition of the crime of aggression as described in the Rome Statute a bit beyond its literal text, it still limits the definition to states and groups struggling for self-determination. Hence, the definition continues to include backward-looking, traditional terms that do not seem to capture the variety of aggressive groups as described by Kaldor.

Secondly, Weisbord proposes "to read the word 'State' dynamically and incrementally to include state-like entities".<sup>73</sup> He argues that as the modern state transforms over time, the

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<sup>64</sup> Weisbord, *supra* note 6; and Anderson, *supra* note 6, at 412.

<sup>65</sup> Weisbord, *supra* note 6, at 28.

<sup>66</sup> *Ibid.*, at 29.

<sup>67</sup> Rome Statute, *supra* note 3, at Art. 8*bis* (2); and Kreß & Von Holtendorff, *supra* note 20, at 1191-1192.

<sup>68</sup> Wills, *supra* note 8, at 101; and Resolution 3314, *supra* note 24.

<sup>69</sup> Wills, *supra* note 8, at 101.

<sup>70</sup> Bachmann & Kemp, *supra* note 7, at 247.

<sup>71</sup> Resolution 3314, *supra* note 24, see Art. 7.

<sup>72</sup> Wills, *supra* note 8, at 101.

<sup>73</sup> Weisbord, *supra* note 6, at 30.

definition of the crime of aggression should be adaptable to capture the conceptual evolution. Currently, the clearest and most widely accepted definition of statehood is laid down in the Montevideo Convention on the Rights of Duties of States of 1933, identifying four characteristics of a state: (i) a permanent population; (ii) a defined territory; (iii) an effective government; and (iv) the capacity to enter into relations with other states.<sup>74</sup> However, in case the word ‘State’ would be read dynamically and incrementally, “new political-military organisations that do not control territory but that attack states [could] [...] be included within the ambit of the definition”.<sup>75</sup> Hence, it would broaden the scope of the definition beyond recognition. However, similar to the first interpretation focusing on the 1974 UNGA Definition, this interpretation still requires non-state groups to possess state-like characteristics. According to Anderson, this interpretation would therefore still be problematic in the case of terrorist organisations, as these organisations “lack the characteristics necessary for classification as a state”.<sup>76</sup> Although the definition of statehood might change over time, a change in the meaning of ‘statehood’ would also call for an alteration of the legitimate use of violence as laid down in the U.N. Charter. The use of violence by, for instance, terrorist organisations, is not likely to ever become a ‘legitimate use of force’ under the U.N. Charter.<sup>77</sup> Consequently, as Anderson concludes, “a definition of the crime of aggression that makes exclusive reference to state behaviour will not extend to these entities”.<sup>78</sup>

Concluding, the current definition of the crime of aggression cannot –and arguably should not– be stretched beyond its literal text to include aggression by non-state groups. Only in the case of groups that are very much state-like in their characteristics, the ICC might be able to extend the definition. Therefore, even though new wars will continue to unleash destructive attacks that could easily be considered acts of aggression, its perpetrators will be able to evade prosecution by the ICC.

## V. CONCLUSION

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During a time of increasingly more friction and violence on an international level, the need to prevent the most serious crimes of international concern from occurring together with the desire to put an end to impunity led to the adoption of the Rome Statute for the establishment of the ICC in 1998. One of the four crimes under the jurisdiction of the ICC as agreed upon in the Rome Statute is the crime of aggression. In the face of the cruelties that took place during World War I and World War II the Nuremberg Tribunal stated that aggression is the supreme international crime. Hence, it was widely recognised among the delegates in Rome that the crime

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<sup>74</sup> *Montevideo Convention on the Rights and Duties of States*, signed 26 December 1933 (entered into force 26 December 1934).

<sup>75</sup> Weisbord, *supra* note 6, at 30..

<sup>76</sup> Anderson, *supra* note 6, at 421.

<sup>77</sup> *Ibid.*, at 429-430.

<sup>78</sup> *Ibid.*, at 431.

would be a significant addition to the ICC's jurisdiction *ratione materiae*. The crime of aggression is thought to have the potential to prevent the suffering caused by armed conflict by deterring state actors from using aggressive force. However, the crime turned out to be exceptionally difficult to define. It was therefore not until the 2010 Kampala Review Conference on the Rome Statute that the States Parties were able to reach consensus on an exact definition, which is expected to go into force after 1 January 2017.

Even though the established definition is regarded to be a significant step in international criminal law, this paper has considered its relevance for contemporary armed conflict. The current definition is derived from pre-existing sources that all require state or state-like entities' behaviour in order for it to be considered an act or crime of aggression. The Rome Statute's definition therefore requires the action or involvement of a state in order for an individual to be prosecuted for a crime of aggression. However, modern aggression is arguably increasingly perpetrated by non-state actors whose nature and characteristics place them outside the most widely accepted definition of the state. According to the new war theory by Kaldor, there is a decreasing amount of wars that solely involve states with battle as the decisive encounter, while there is an increasing number of 'new wars'. New wars differ from classic inter-state- and civil wars in three respects: (i) as new wars are based on identity politics they are fought by networks of both state and non-state actors, stretching beyond the boundaries of a state; (ii) the mode of warfare is aimed at instilling terror in order to mobilise extremist politics based on fear and hatred, as such, the traditional methods of warfare are increasingly being supplemented by (new) methods of intimidation; and (iii) new wars are funded through various criminal activities as well as through external assistance. Therefore, in line with Kaldor's theory, new wars cannot be understood in traditional terms.

The current definition's sole focus on 'old wars', where state sovereignty and state action play a decisive role, could therefore form an obstacle to effectively prosecute and as such, prevent future crimes of aggression. This would not only obstruct the States Parties' objective for the crime of aggression, but it would also thwart the ICC's ability to function according to its purposes. Hence, a backward-looking and out-dated definition would be detrimental to the ICC's functioning and objectives, as it would fail to capture destructive attacks that are unleashed in contemporary armed conflict and as such, would grant perpetrators of 'contemporary' acts of aggression the ability to evade prosecution by the ICC.

Despite the out-dated approach by the ICC to focus solely on state action, Kaldor does recognise the potential of the ICC to counter future new wars. In order to be able to do this, however, it should not treat new wars according to traditional terms. Weisbord proposes two possible solutions that would stretch the current definition of the crime of aggression beyond its literal text to include non-state actors. By considering the pre-existing sources to which the definition refers to, one could argue that indeed, the definition could be stretched to state-like

entities and groups struggling for self-determination. However, this still requires certain state-like characteristics which new wars actors do not (necessarily) possess.

Hence, although the current definition will be applicable to some of the wars arising in the 21<sup>st</sup> century in case they fit within the Clausewitzian, state-centred approach to war, this article suggests that the definition is inadequate to address 'contemporary' acts of aggression by non-state actors during new wars. Accordingly, the findings in this article imply that the only way to capture the acts perpetrated during contemporary armed conflicts within the definition of the crime of aggression is by redefining the crime of aggression to include both state and non-state actors. Without a redefinition of the crime of aggression, this article seriously puts into question the crime of aggression's relevance for the future. As such, this article implies that the widely celebrated breakthrough in reaching a definition of the crime of aggression could in fact be considered to be an inadequate addition to the ICC's jurisdiction in its attempt to fight impunity and prevent future crimes of aggression.

Time will tell whether new wars will indeed continue to increase in number and whether the amount of wars that can be understood through traditional terms will continue to decline. However, as these new wars are becoming more prominent, experts as well as the States Parties to the Rome Statute should start to consider new ways to define the crime of aggression in order to prevent it from becoming irrelevant.