RECONCILING QUASI-STATES WITH THE CRIME OF AGGRESSION UNDER THE ICC STATUTE

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ABSTRACT

On June 11, 2010, a binding definition of the crime of aggression was finally adopted at the Review Conference of the Rome Statute in Kampala, Uganda. The adopted definition of the crime of aggression in the Rome Statute reflecting on existing practice leads to the assumption that State-like entities which are lacking universal recognition will not be covered by the Court's jurisdiction of the crime of aggression. The fact that the term 'State' was not clearly defined under the Rome Statute gives the first indication of the implied exclusion of State-like entities from the scope of the crime of aggression. On the other hand, the most recent interpretation of the term "State" as provided by the International Criminal Court (ICC) delivers even more persuasive evidence, reinforcing the argument that these entities would not be covered by this amendment. This Article argues that uncertainty or explicit exclusion of these entities are both illegitimate; based on historical, legal and practical analyses respectively. Consequently, for the purpose of amending this illegitimate situation, the Article will examine how to reconcile these entities with the definition of the crime of aggression. It acknowledges that the explicit inclusion of such entities under the definition alongside States, yet, distinguishable from the latter, is the most favorable solution that better serves the wider objectives of international criminal justice and law.

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INTRODUCTION

In 1998, the Rome Statute of the International Criminal Court (ICC) was adopted at the Rome conference,[1] and the crime of aggression was included amongst the four international core crimes within its jurisdiction.[2] However, since a definition of the crime could not be agreed on then, the new ICC was not able to prosecute the crime of aggression when it became operational in 2002. It took until 2010, when after extensive discussions by the members of the Assembly of States Parties, the crime of aggression was finally defined as:

> 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.[3]

This definition of the crime of aggression, as adopted by the ICC, is influenced by the definition of the act of aggression articulated in the U.N. General Assembly (UNGA) Resolution 3314, which always exclusively addressed interstate aggression as international wars.[4] Likewise, the crime of aggression limited its scope of application in terms of criminal responsibility to state leaders only.[5]

The issue of determining the aggressor has concerned policy makers, scholars, diplomats and Statesmen for over a quarter of a century. Today, this question is still being debated among scholars and policy makers, and it is almost unanimous that attaining this objective is extremely difficult.[6] The ICC is restricted in its jurisdiction over aggression to state leaders only and does not provide a clear definition of what is to be considered a state. The only relevant stipulation of a state would be the definition used in the just mentioned UNGA Resolution 3314 which was used as source for outlining the crime of aggression,

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[1] U.N. GAOR, Final Act of the U.N. Dipl. Conf. of Plenipotentiarieson the Est. of an Intl. Crim. Ct., U.N. Doc. A/CONF.183/10 (July 17, 1998).

[2] Rome Statute of the International Criminal Court, art. 4, ¶ 4, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[3] International Criminal Court Assembly of States Parties Res. RC/Res.6, annex I (June 11, 2010) [hereinafter A.S.P. Res. RC/Res.6].

[4] A.S.P. Res. RC/Res.6, *supra* note 3, annex I, art. 8 *bis*, ¶ 2.

[5] ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 9, 18–19 (International Criminal Court 2011) (2002) (Articles 8 *bis* and 25(3) *bis* apply to as "a person in a position effectively to exercise control over or to direct the political or military action of a State . . . .").

[6] Memorandum submitted by Mr. Ricardo J. Alfaro on Question of Defining Aggression to the Int'l Law Comm'n, UN Doc. A/CN.4/L.8 (May 30, 1951) ("Referring to the work of the Committee on Arbitration in 1924, Mr. Adatci asserted: "The most difficult and most delicate task was that of defining the aggressor.").

whereas "in this Definition the term 'State': (a) is used without prejudice to questions of recognition or to whether a State is a member of the United Nations."[7]

The issue of this ambiguity stems from different contexts. Historically, these entities could be treated as States for the purpose of the act of aggression, and from a legal point of view, they could also be described as such and incur international responsibility especially in the area of armed conflicts. In modern times, Quasi-States have become a major actor in war and conflict.[8] However, since they are granted some but not all rights and obligations under international law, they cannot be described as fully-fledged states. Thus, Quasi-States have attained statehood to a certain extent, yet, they are not regarded as states due to the lack of universal recognition. The specific rights and obligations of Quasi-States include their compliance with the law applicable to armed conflicts, namely the jus *ad bellum* and the *jus in bello*.

Conflicts involving Quasi-States are strictly speaking not international, as the international community does not recognise these entities as states. Nor are such conflicts "purely internal," since Quasi-States are "separate, effective[ly] state-like [entities] having some level of international personality" against recognised states.[9] Hence, they are best described as Quasi International Armed Conflicts (QIACs),[10] such as the Sri Lankan civil war.[11] Therefore, referring to such hybrid interstate/internal armed conflicts without clear state definition questions the applicability of the crime of aggression on such conflicts. Currently, Quasi-States such as Somaliland, Western Sahara, Abkhazia, Transnistria, South Ossetia, Kosovo (which has become recognized under state custom since 2008), Palestine and finally the Islamic State in Iraq and Sham (IS) (until its collapse in 2017) exist on nearly every continent. They usually emerge through military means in the form of civil wars. The number of armed conflicts involving Quasi-States exceeds by far the number of (classical) interstate armed conflicts.[12] Thus, it is necessary from a practical point of view to clear the

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[7] G.A. Res. 3314 (XXIX), Definition of Aggression, Annex I, art. 1 (Dec. 14, 1974).

[8] Alexander G. Wills, *The Crime of Aggression and the Resort to Force against Entities in Statu Nascendi*, 10 J. INT'L CRIM. JUST. 83, 86–87 (2012) (as recent examples of armed conflicts involving Quasi-States, Wills mentions the Sri Lankan Civil War, the second Sudanese Civil War South Ossetian War and certain stages of the Yugoslav Wars).

[9] *Id*. at 86.

[10] *Id.*

[11] *Id.*; *see* Muttukrishna Sarvananthan, *In Pursuit of a Mythical State of Tamil Eelam: A Rejoinder to Kristian Stokke*, 28 THIRD WORLD Q. 1185 (2007).

[12] *See* Wills, *supra* note 8, at 83–84; *see also* Rep. of the High-level Panel on Threats, Challenges and Change, at 17, U.N. Doc. A/59/565 (2004) [hereinafter Rep. of the Rep. of the High-Level Panel].

ambiguity surrounding the legal position of Quasi-States, in order to overcome current challenges and attain a higher level of international peace.

This Article aims to reconcile Quasi-States with the crime of aggression under the Rome Statute and discusses their position under international law. It is argued that, based on historical, practical and legal considerations, Quasi-States should be included under the crime of aggression and this Article elaborates on how to reconcile Quasi-States with the crime of aggression. Following the introduction, part I will provide an evaluative overview of the historical evolution of the Crime of Aggression with a reflection on the historical meaning of 'State'. Part II discusses the concept of so called 'Quasi-States' under international law before turning to the interpretation of such entities by the ICC. Part III examines the ICC's interpretation of statehood and its stance towards 'Quasi States'. The last part, part IV reflects on the interpretative issues around the term 'State' before the current sociological changes to warfare. This Article concludes with the recommendation that the Rome Statute was to be amended to include 'Quasi-States'.

I. THE HISTORICAL EVOLUTION OF THE CRIME OF AGGRESSION

Beginning from the Nuremberg to the Rome Statute, the historical evolution of the crime of aggression will confirm that the definition in the Rome Statute is reflection of customary international law, and constitutes the consensus of the international community on the concept of aggression. Accordingly, redefining aggression is not a promising venue.[13]

A. The Nuremberg Trials and the Subsequent Efforts to Define Aggression.

In mid-1943, the idea of individual criminal responsibility for aggression began to take shape, when criminologist Aron Naumovich Trainin put forward in his book, *Defence of Peace and Criminal Law*, the proposition that individuals should be held accountable for initiating aggressive war.[14] His ideas inspired one of the major legal principles adopted by the Nuremberg and Tokyo International Military Tribunals (IMT): "'crimes against peace' through 'common plan or conspiracy'."[15]

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[13] Benjamin B. Ferencz, *Ending Impunity for the Crime of Aggression*, 41 CASE W. RES. J. INT'L L. 281, 285 (2009); Hyeyoung Lee, The Applicability of the Crime of Aggression to Armed Conflicts Involving Quasi-States (2014) (unpublished S.J.D. dissertation, Indiana University Maurer School of Law).

[14] KIRSTEN SELLARS, CRIMES AGAINST PEACE AND INTERNATIONAL LAW 49 (2013).

[15] *Id.* at 49–50.

At that point, the discussions that preceded the establishment of the Nuremberg Tribunals by virtue of its London Charter revealed that the inclusion of the "crimes against peace"—later to become the crime of aggression—under international law would not be widely encouraged.[16] As it had been agreed to give the Nuremberg IMT jurisdiction over such a crime,[17] the same approach was followed by the Tokyo IMT as Nuremberg's equivalent to the Far East.[18] The London Charter defined crimes against peace as the "planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."[19]

Since at this point in time no one had ever been charged with this crime, there was heated controversy around the legality of prosecuting such a crime as "new law." The Tribunal was faced with the objection of the accused that by applying crimes against peace, it was implementing the law *ex-post facto*[20] and as such, violating the non-retroactivity principle under international law.[21]

In this regard, the Tribunal referred to the aforementioned Kellogg-Briand Pact (Pact),[22] as foundation to emphasise that the waging of war in the late 1930s was a crime under international law.[23]

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[16] *Id.* at 50; *cf.* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 159–63 (1963) ("Some jurists and publicists asserted that it would be compatible with international law to hold a trial of government leaders responsible for launching the aggressive wars," however, "some of those who examined the problem concluded that aggressive war was not criminal according to existing law."), Sascha Dominik Bachmann, *The Legacy of the Nuremberg Trials – 60 Years on*, 2007 J. S. ARF. L. 532, 541–43 (2007) ("This argument finds support in the findings of the sub-committee of the legal committee of the United Nations war crimes commission in its majority report of 1945 whereby 'acts committed by individuals merely for the purpose of preparing and launching aggressive war, are *lege lata*, not war crimes.").

[17] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal art. 6 (a), Aug. 8, 1945, 59 Strat. 1544, 82 U.N.T.S. 279 [hereinafter London Agreement].

[18] International Military Tribunal for the Far East, art. 5, Jan. 19, 1946, T.I.A.S. No. 1589 [hereinafter Tokyo Charter].

[19] London Agreement, *supra* note 17, art. 6 (a).

[20] *See* ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 263 (2007); Sascha-Dominik Bachmann & Gerhard Kemp, *Aggression as Organized Hypocrisy - How the War on Terrorism and Hybrid Threats Challenge the Nuremberg Legacy*, 30 WINDSOR Y.B. ACCESS JUST. 235, 243–44 (2012). *See generally* Bachmann *supra* note 16, at 532–50 (on the Nuremberg Trials' legacy and its contemporary criticism).

[21] Leo Gross, *The Criminality of Aggressive War*, 41 AM POL. SCI. ASS'N 205, 205–06 (1947); Bachmann, *supra* note 16, at 543.

[22] Gross *supra* note 21, at 217–18.

[23] TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 218 (1947), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

> In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.[24]

German and other critics argue that the ratification of a pact forbidding a state from waging a war under international law could not lead to individual criminal responsibility being established "by a so-called 'Agreement'" among victors in disregard of a state's sovereignty and international law.[25] This view was based on the fact that the wording of the Pact, as well as its *travaux preparatoires*, did not address in any way the individual criminal liability for violating the States' obligation to resolve conflicts peacefully.[26]

Soon after that judgment, the newly established United Nations swiftly adopted The Principles of International Law Recognized by the Charter of the Nuremberg Tribunal.[27] Additionally, the UNGA requested the International Law Commission (ILC) to set a "Code of Offenses Against the Peace and Security of Mankind."[28] Today, the crime of aggression is not a novel crime only introduced by the ICC but a crime under international law for nearly a century (with the raised objections noted). Within the ILC, there was an extensive debate regarding who could be a victim of aggression or an aggressor.[29] At this stage, it was suggested that States and governments could both be aggressors and victims of aggression.[30] In 1954, the final draft failed to be adopted due to disagreement on varied issues such as the specification of armed force and regulation of indirect aggression,[31] although it was also unclear to what extent

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[24] *Id*. at 445.

[25] *Id*.; Bachmann & Kemp, *supra* note 20, at 243 (highlighting the state liability/tort character of Germany's "aggression"); *see also* Bachmann, *supra* note 16, at 542–43; *cf.* Sascha-Dominik Bachmann, *Today's Quest for International Criminal Justice – A Short Overview of the Present State of Criminal Prosecution of International Crimes*, *in* INTERNATIONAL LAW AND ARMED CONFLICT: CHALLENGES IN THE 21ST CENTURY 298, 298 (Noëlle Qunivet & Shilan Shah-Davis, eds., T.M.C. ASSER PRESS, 2010).

[26] Gross *supra* note 21, at 209–10.

[27] G.A. Res. 95 (I), Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal (Dec. 10, 1946) [hereinafter U.N.G.A. 1946].

[28] U.N. GAOR, 5th Sess., 308th plen. mtg. at 378 (V) B, Duties of States in the event of the outbreak of hostilities (Nov. 17, 1950); *see also* Draft Resolution on the Definition of Aggression, U.N. Doc A/C.1/608 (Nov. 4, 1950).

[29] *Summary Record of the 95th Meeting*, [1951] 1 Y.B. INT'L L. COMM'N 107, 108–16, U.N. Doc. A/CN.4/SR 95.

[30] *See id*. ¶ 5.

[31] *See* M. Cherif Bassioun et al., *Draft Code of Offenses Against the Peace and Security of Mankind*, 80 PROC. OF THE ANN. MEETING (AM. SOC. INT'L L.) 120, 120 (1986).

the introduction of the concept of governments as victims of aggression could have affected the final decision.

In 1968, the matter was raised again and the term "political entities" was introduced to cover aggressions from and against entities that were not recognized or whose statehood was controversial in some other way.[32] Following a prolonged debate, the Working Group of the Special Committee finally established that "the definition itself should refer to States only and not to political entities as referred to in the Six-Power draft."[33] The situation remained unchanged until 1974 when "aggression" was finally defined by UNGA Resolution 3314[34] and recommended to the Security Council for guidance. The accord was built around a wide definition: "*Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the U.N.*"[35] In an explanatory note, the resolution added that the term "'State' . . . is used without prejudice to questions of recognition or to whether a State is a member of the United Nations."[36] Nonetheless, the resolution did not provide a customary law definition for individual crimes of aggression; it only offered a mere distinction between a "war of aggression" and an "act of aggression," with any such act raising international State responsibility as a consequence.[37] The *jus ad bellum* had finally become a *jus contra bellum*, and this illegality of waging (unjustified) war had become a potential liability issue for the perpetrating state and state leader alike.[38]

B. The Crime of Aggression in the Rome Statute—Background

It is worth mentioning that since the Nuremberg Trials, the crime of waging a war of aggression has remained non-prosecutable until the adoption of the new definition in the ICC Statute and its entry into force in 2018.[39] This becomes clear when looking at the jurisdiction of recent and contemporary international criminal tribunals like the International Criminal Tribunal for the former

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[32] Wills, *supra* note 8, at 98.

[33] U.N. GAOR, 26th Sess., Rep. of the Special Comm. On the Question of Defining Aggression, annex III, ¶ 7, U.N. Doc. A/8419 (1971).

[34] G.A. Res. 3314 (XXIX), *supra* note 7.

[35] *Id*. art.1.

[36] *Id*. annex, art.1.

[37] *See id*. annex, arts. 2–3, 5, ¶ 2.

[38] *Id*. art.5, ¶ 2.

[39] *See* Assemb. of States Parties to the Rome Statute of the Int'l Crim. Ct., 16th Sess., U.N. Doc. ICC-ASP/16/L.10 (Dec. 14, 2017).

Yugoslavia (ICTY)[40] and its "judicial twin" the International Criminal Tribunal for Rwanda (ICTR),[41] as both do not proscribe aggression and accordingly do not establish individual criminal responsibility. Similarly, the Special Court for Sierra Leone (SCSL)[42] as a hybrid court of international and domestic criminal jurisdiction, in addition to the Extraordinary Chambers in the Courts of Cambodia (ECCC),[43] did not prosecute aggression either. The only stipulation about the crime of aggression could be found in the Statute of the Iraqi High Tribunal (IHT),[44] which, although it was not an international tribunal, considered this as a domestic Iraqi crime and not an international crime.[45]

Thus, advocates of the crime of aggression were concerned about the persistent lack of prosecution against that crime.[46] Subsequent to lengthy discussions, the crime of aggression was added to the jurisdiction of the ICC, but was not given effect until the Assembly of States Parties to the Rome Statute (ASP) defined the crime and the jurisdictional requirements for the Court to exercise its jurisdiction.[47] In 1998, Resolution F of the Final Act of the Rome Conference[48] called for the Preparatory Commission to prepare proposals for a provision on aggression to be presented to the ASP at a Review Conference.[49] For this purpose, the ASP created a Special Working Group on the Crime of Aggression (SWGCA) in 2002.[50] In turn, the SWGCA developed a definition, which exceptionally obtained consensuses not only from States Parties but also

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[40] S.C. Res. 827, art. 1, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (July 17, 1993).

[41] S.C. Res. 995, art. 2, Statute of the International Criminal Tribunal for Rwanda (Nov. 9, 1994); *cf.* Bachmann *supra* note 25, at 301.

[42] S.C. Res. 1315, art. 1, Statute of the Special Court of Sierra Leone (Aug. 14, 2000) [hereinafter SCSL Statute].

[43] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Cambodia-U.N., Oct. 27, 2004, NS/RKM/1004/006 [hereinafter ECCC Statute].

[44] Mark A Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains?*, 41 CASE W. RES. J. INT'L L. 291, 298 (2009) (quoting Law of the Supreme Iraqi Criminal Tribunal No. 10 of 2005). Originally established as Iraqi Special Tribunal by the U.S.-led Provisional Authority in Iraq in 2003, this court was abolished in October 2005 by Iraq's new government and re-established as the Supreme Iraqi Criminal Court. *See* Sascha-Dominik Bachmann, *The Quest for International Criminal Justice – The long road ahead*, 2007 J. S. AFR. L. 716, 717 (2007).

[45] *Id*.

[46] *Id*. at 292.

[47] Lee, *supra* note 13, Rome Statute, s*upra* note 2, art. 5.

[48] U.N. GAOR, Final Act of the U.N. Dipl. Conf. of Plenipotentiarieson the Est. of an Intl. Crim. Ct., U.N. Doc. A/CONF.183/10 (July 17, 1998).

[49] *Id*. annex. I.

[50] Benjamin B. Ferencz, *Ending Impunity for the Crime of Aggression*, 41 CASE W. RES. J. INT'L L. 281, 282 (2009).

non-Party States.[51] Furthermore, the question of the applicability of the crime of aggression to territorial entities lacking statehood was also addressed within the SWGCA.[52] Specifically, in the sixth meeting of the SWGCA in 2009, "the view was expressed that the reference to 'another State' [of the crime of aggression] might inadvertently omit acts committed against a territory that falls short of statehood, and that therefore, the word 'State' in that paragraph should be given a broad interpretation."[53]

Finally, in June 2010, an amendment to the Rome Statute was agreed upon by the States Parties to the Kampala Conference.[54] This amendment was designed to trigger the jurisdiction of the ICC over the "crime of aggression."[55] In theory, the Court could have begun hearing cases against individuals for aggression after 2017.[56] In December 2017, the Assembly of States Parties decided to activate the ICC's "jurisdiction over the crime of aggression as of 17 July 2018."[57] The consensus that had emerged favored a narrow definition with three major characteristics: "(1) that state action is central to the crime; (2) that acts of aggression involve interstate armed conflict; and (3) that criminal responsibility attaches only to very top political or military leaders."[58]

In addition, there have been discussions within the SWGCA about whether generic or specific approaches should be pursued.[59] Article 8*bis*(2) clearly presents aggression narrowly as involving international war that violates *jus ad bellum*.[60] In this sense, Article 8*bis*(2) appears as purely State-centric. Hence, the SWGCA approach is quite conservative.[61] The reason behind it is that such conservatism "offers an easier path to consensus."[62] Moreover, Theodor Meron underscored in the United States' statement regarding the crime of aggression that:

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[51] Noah Weisbord, *Conceptualizing Aggression*, 20 DUKE J. COMP. & INT'L L. 1, 27 (2009).

[52] Assemb. of States Parties to the Rome Statute of the Int'l Crim. Ct., Rep. of the Special Working Group on the Crime of Agg., U.N. Doc. ICC-ASP/7/20/Add.1, annex II, ¶ 16 (2009) [hereinafter SWGCA].

[53] *Id*. annex II, ¶ 16.

[54] A.S.P. Res. RC/Res. 6, *supra* note 3.

[55] *Id*. arts. 15*bis,* 15*ter*.

[56] *Id*. art. 15*bis*, ¶ 3.

[57] *Id*. art.15*bis*, ¶ 3; *see* Assemb. of States Parties to the Rome Statute of the Int'l Crim. Ct., 16th Sess., U.N. Doc. ICC-ASP/16/L.10 (Dec. 14, 2017).

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

[59] Assemb. of States Parties to the Rome Statute of the Int'l Crim. Ct., Rep. of the Special Working Group on the Crime of Agg. on Its Fifth Session, U.N. Doc. ICC-ASP/5/SWGCA/INF.1 (Sep. 5, 2006).

[60] Drumbl, *supra* note 58, at 305.

[61] *Id*.

[62] *Id*.

> [P]rudence displayed in Rome has proven wise. . . . [O]ne of the reasons why the list of crimes in the Statute of the ICC has attained such credibility and why that list has had such a significant impact on national legislations is exactly because of the high level of comfort that the general conformity of Articles 7-8 [*n.b.* has] with customary law . . .” And “[u]nder customary law is it only aggressive war that founds individual criminal responsibility.[63]

In addition, the historical evolution of the act of aggression itself has always been state-centric.[64] Ann V.W Thomas and A.J ThomasJr, two legal scholars commenting on the negotiations in the run-up to the 1974 definition of aggression elaborated that, “‘[s]ince the State has been the prime recipient of rights and duties at international law, it is the sovereign State which is usually regarded as the aggressor or the one against whom aggression is committed.’”[65] In that sense, codifying the law beyond the boundaries of custom may be controversial and may question the ICC’s legitimacy, at least in the short term.[66] Finally, succeeding in defining aggression, even narrowly, is a great achievement *per se*, allowing it to be recognized as part of international legal practice and for a spirted stand to be taken against the horrors of *unauthorized war-making*.[67]

C. Evaluation of the Historical Development of the Crime of Aggression

As outlined above, it has become clear that the inclusion of the crime of aggression under the Rome Statute is a reflection of international customary law. However, unlike the 2010 ICC amendment on the crime of aggression, the Nuremberg Statute’s definition of the “crime against peace” did not mention the term “State.”[68] Thus, State-centrism under the current definition of the crime of

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[63] *Id.* at 305–06 (emphasis in original) (internal citations omitted) (quoting Crime of Aggression: Statement by the United States (Theodor Meron) (Dec. 6, 2000)); *see also* ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 273 (2007).

[64] *Summary Records of the Ninety-Fifth Meeting*, [1951] 1 Y.B. INT’L L. COMM’N 107, 108, U.N. Doc. A/CN.4/SR 95 [hereinafter ILC Yearbook I]; U.N. GAOR, 24th Sess., Supplement 20, at 25–26, U.N. Doc. A/7620 [hereinafter UNGA Twenty Fourth Session]. B*ut cf.* Special Comm. on the Question of Def. Agg., Rep. of the Sixth Comm., U.N. Doc. A/7402, ¶ 20 (Dec. 13, 1968) [hereinafter UNGA Twenty Third Session] (noting that “some representatives considered that the definition should be expressly applicable to entities which were not generally recognized as States . . . .”).

[65] Weisbord, *supra* note 51, at 27 (quoting ANN V.W. THOMAS & A.J. THOMAS, JR., THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW 47 (1972)).

[66] Drumbl, *supra* note 58, at 306.

[67] 2 BENJAMIN B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE 566 (1975).

[68] Steve Beytenbrod, Comment, *Defining Aggression: An Opportunity to Curtail the Criminal Activities of Non-State Actors*, 36 BROOK. J. INT’L L. 647, 676 (2011).

aggression is questioned. Further, as the U.N. embraced the "principles of the international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal" in 1946,[69] this highlights that all States Parties to the U.N. at that time had not only accepted the definition provided by the Nuremberg IMT, but also agreed to its interpretation as given by the Tribunal.

On another note, the influence of the U.N.'s definition of aggression on the 2010 Kampala Conference is highly evident.[70] Tracing back the evolution of U.N. Resolution 3314 reveals that consensus was built around a generic definition[71] that was derived from Article 2(4) of the U.N. Charter,[72] which formulates an integral part of customary international law.[73] However, the wording of Resolution 3314 was slightly different from that of Article 2(4). For instance, unlike the Charter, the Resolution used the term "armed" instead of the term "force." Understandably, this modification intends to narrow the scope of aggression to exclude instances in which force is used without resorting to arms.[74]

Later, the International Court of Justice (ICJ) found that Article 3 (g) of Resolution 3314—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"—had become part of customary international law.[75] Accordingly, some might argue that this dictum may serve as an indication that the other portions of Articles 1 and 3 in Resolution 3314 may correspondingly constitute customary international law.[76]

Furthermore, this definition represents the consensus of the wider international community, as the SWGCA meetings were attended by both States and non-States parties alike. Therefore, the chosen definition of the Special Working Group, which was then followed by the ICC, "triggers opportunity costs."[77] This solution effectively represents the "least common denominator approach" which "underlines only the consensus that all State-parties agreed

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69 Rome Statute, *supra* note 2, art. 5.

70 Beytenbrod, *supra* note 68, at 676, 679.

71 G.A. Res. 3314 (XXIX) *supra* note 7, art. 1.

72 U.N. Charter art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

73 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 188 (June 27, 1986).

74 Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT'L L. 71, 96 (2010).

75 OSCAR SOLERA, DEFINING THE CRIME OF AGGRESSION 129 (2008).

76 *Id*.

77 Drumbl, *supra* note 44, at 310.

upon."[78] Drumbl concludes that while "there is considerable merit in getting a core definition in place, there are also numerous reasons for looking beyond it."[79]

Namely, throughout the historical debate over defining aggression, the issue of the applicability of the crime upon unrecognised entities was always raised;[80] and there was a wide consensus regarding the applicability of the crime on such entities.[81] However, the disagreement was on the express inclusion of such entities under the definition of the crime.[82] Accordingly, Resolution 3314 articulated that the term "State" is used without prejudice to questions of recognition or to whether a State is a member of the U.N.,[83] unlike the newly adopted definition of the crime of aggression under the Rome Statute which is silent on the issue.[84]

The examination of the historical development of the crime of aggression has made it clear that its inclusion in the ICC Statute reflects international customary law. The idea of including unrecognised entities under the definition of aggression was widely accepted until it was finally adopted under Resolution 3314. Accordingly, the idea of including Quasi-States under the definition of the crime of aggression falls within the ambit of international customary law and State-practice.

1. *The Historical Meaning of "State" Under the Developed Concept of Aggression*

In the aftermath of the First World War, there were numerous efforts to define aggression. The international community realized the paramount importance of regulating the use of armed forces in international relations. Accordingly, States attempted to establish standards concerning the lawful recourse to war.[85] They commenced by issuing the Kellogg-Briand Pact of 1928

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78 *Id*. at 310–11.

79 *Id*.

80 SOLERA, *supra* note 75.

81 *Id.* (providing a general discussion on the subject of including non-state entitites).

82 *Id.*

83 G.A. Res. 3314, *supra* note 7, annex art. 1.

84 Rome Statute, *supra* note 2, art. 8*bis*.

85 *See generally* 2 FERENCZ, *supra* note 67 (describing the efforts to define aggression in the 1920's and 1930's).

which established a general prohibition on the use of armed force.[86] However, the Pact did not offer a definition on aggression.[87]

Later, at the 1933 World Disarmament Conference, the Soviet delegation demanded the creation of a universal definition of aggression and put forward a draft definition.[88] The definition included the declaration of war against another State as an act of aggression.[89] During these deliberations, the argument that a concerned State lacks "certain attributes of State organization" was frequently used as a justification for armed attacks.[90] It is not obvious what the clause "certain attributes of State organization" means. Nevertheless, it is clear that the concept of "State" in the Soviet sense did not require the strict fulfilment of the criteria of statehood.

After the Second World War, regulating the use of armed force was approached through three different but related processes. The first was the total prohibition of the illegal use of armed force between States, which was included in the U.N. Charter in Article 2(4).[91] The second was to agree on a definition to guide the Security Council to ascertain whether certain acts constitute aggression.[92] The last was to end impunity and punish those individuals in charge of committing international crimes, which was swiftly realized by the international military tribunals.[93] Beginning with the U.N. Charter, although the drafting of the Charter limited perpetrators to States, the U.N. practice proved to include Quasi-States. North Korea, which at the time was not recognized as a State by the U.N., was held responsible for acts contrary to its terms.

Moreover, the U.N. position showed that unrecognized States could be parties to acts of aggression. For instance, "in 1948 the Arab States sent military forces into Palestine but elected to regard the 'State' of Israel as a rebellious minority in an independent nation which had requested the assistance of the Arab states in restoring law and order."[94] In reaction to the Arab States' contention,

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[86] SOLERA, *supra* note 75, at 32.

[87] *See* Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 59.

[88] 2 FERENCZ, *supra* note 67, at 201.

[89] *Id*. at 202.

[90] *Id*. at 203.

[91] SOLERA, *supra* note 75, at 38; Glennon, *supra* note 74, at 77.

[92] Benjamin B. Ferencz, *Defining Aggression: Where It Stands and Where It's Going*, 66 AM. J. INT'L L. 491, 493.

[93] Glennon, *supra* note 74, at 74–75.

[94] D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 153 (1958).

the majority of the Council members "disregarded the question of statehood and concentrated on the fact of invasion by states of territory not their own." [95]

The Security Council took the same view when with the attacks on Indonesia by the Netherlands in 1947.[96] The Security Council in these instances suggests that, "the U.N. organ will not interpret statehood too literally and limit the obligation of Art. 2(4) to cases of attack against a recognized state; more particularly, they will not allow the attacker, by withholding recognition from its victim, to evade the prohibition."[97]

2. *The International Law Commission and the Debates on Who Can Be an Aggressor or Victim*

Upon its establishment, the UNGA was handed the task of defining aggression.[98] Even at this early stage, disputes along the Yugoslavian border, blockades put in place by Eastern European socialist countries, and U.S. intervention in the Korean War were more than enough to convince the Soviet Union of the need to submit a new draft definition of aggression to the First Committee. The Soviet Union in its submission emphasized that "[a]ttacks . . . may not be justified . . . by the affirmation that the State attacked lacks the distinguishing marks of statehood."[99]

This proposal was hard to adopt because of the lack of consensus on the way of defining aggression.[100] Accordingly, the matter was assigned to the ILC.[101] Within the ILC many proposals were submitted, one of which was the proposal of the Panamanian politician and delegate to the U.N., Mr. Ricardo Alfaro. Alfaro defined aggression along these lines:

> Aggression is the use of force by one State or group of States, or by any Government or group of Governments, against the territory and people of other States or Governments, in any manner, by any methods, for any reasons and for any purposes, except individual or collective self-defence against armed attack or coercive action by the United Nations.[102]

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95 Glennon, *supra* note 74, at 74–75.

96 *Id*. at 150, 153.

97 *Id*. at 153–54.

98 Lee *supra* note 13; SOLERA, *supra* note 75, at 79.

99 *Id.* at 2.

100 SOLERA, *supra* note 75, at 88.

101 Lee, *supra* note 13.

102 *Memorandum submitted by Mr. Ricardo J. Alfaro*, ¶ 36, Intl' Law Comm'n, U.N. Doc. A/CN.4/L.8 (May 30, 1950), *reprinted in* [1951] 2 Y.B. Int'l L. Comm'n 37, U.N. Doc. A/CN.4/SER.A/1951/Add.1

Alfaro's memorandum demonstrates that the intention behind including the term "government" is to cover non-State entities that commit the crime of aggression:[103]

> The term of "by one State or group of States, or by any Government or group of Governments" is used in order to avoid any interpretation in the sense that only States can commit aggression and are capable of disturbing the peace of the world. *There may be governments of nations or people not organized or recognized as States, which may have at their disposal the armies, weapons and other means of committing aggression*. "(emphasis added)"[104]

Alfaro's definition might have been influenced by the Korean War given that North Korea had not yet achieved statehood, at least in the eyes of the U.N.[105] Despite the disagreement on the statehood of North Korea, the UNGA nonetheless deemed that the attack against South Korea was clearly an act of aggression.[106] The perception that the definition of aggression should include hostilities by North Korea, even if it was not a state, was approved by other participants.[107]

Mr. Cordova, the Vice Chairman of the ILC at the time, provided that "the words 'the authorities of a State'…or their equivalent were essential, if aggression such as that committed by North Korea, which was not a State, was to be made punishable."[108] The ILC representative from Brazil, Mr. Amado, and member of the International Law Commission stated "he had avoided using the word "State" so as not to limit its application to states alone."[109] The formulation "by a State or a Government" was at last adopted without any objection.[110]

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[103] Lee, *supra* note 13.

[104] *Memorandum submitted by Mr. Ricardo J. Alfaro*, *supra* note 101,¶ 46.

[105] Lee, *supra* note 13; G.A. Res. 46/1 (Sept. 17, 1991) (deciding to admit the Democratic People's Republic of Korea to membership in the U.N.).

[106] Lee, *supra* note 13; G.A. Res. 498 (V), ¶ 1 (Feb. 1, 1951) ("Finds that the Central People's Government of the People's Republic of China by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against United Nations forces there, had itself engaged in aggression in Korea.").

[107] Lee, *supra* note 13.

[108] *Summary Records of the 95th Meeting*, [1951] 1 Y.B. Int'l L. Comm'n 111, ¶ 59, U.N. Doc. A/CN.4/SER.A/1951 [hereinafter Summary Records of the 98th Meeting].

[109] *Id*. ¶ 60.

[110] Lee, *supra* note 13; Summary Records of the 98th Meeting, *supra* note 108, ¶¶ 52–53, 64.

II. THE CONCEPT OF QUASI-STATES

As mentioned above, the Kampala amendments presented a significant contribution to international criminal law, although not without fault. If the primary objectives of this amendment were to attain higher levels of international peace and security and enhance the efficiency of the international criminal justice system, then they were not duly fulfilled. This is due to the restriction of the definition of the crime to inter-State armed conflicts without properly interpreting what constitutes a State, or a clear guarantee that Quasi-States can be treated as States under the crime of aggression.

Therefore, there is clear uncertainty regarding the concept of Quasi-States and whether they fall within the remit of the crime of aggression. Since Quasi-States possess the required criteria for statehood but lack universal recognition, there are doubts surrounding their status under international law. However, as concluded from the historical discussion, there was always a wide consensus on the inclusion of such entities under the definition of aggression, either explicitly or impliedly. Quasi-States are involved in many modern armed conflicts;[111] it is hence crucial for the realization of international peace to reach a conclusion regarding the applicability of the crime of aggression upon these entities.

Consequently, this part will attempt to demarcate the concept of Quasi-States and prove that they can be considered as States since the elements that these Quasi-States are lacking do not prevent them from being described as States. Moreover, clarifying the concept of Quasi-States will assist in finding and examining the best possible solution for applying existing prohibitions against aggression to these particular entities.

A. General Characteristics of Quasi-States

Recent uses of the term "Quasi-State" have not always been correct: according to Kolstø "sometimes the term is taken to mean recognized states that fail[ed] to develop the necessary state structures to function as [a] fully fledged, 'real' states." [112] These are called "failed states."[113] Inversely, entities which did not acquire international recognition despite factually controlling their territories are called "Quasi-States."[114]

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[111] *See* Pål Kolstø, *The Sustainability and Future of Unrecognized Quasi-States,* 43 J. PEACE RES. 723, 726 (2006) (discussing several prominent examples of post-World War II conflicts involving quasi-states).

[112] *Id.* at 723.

[113] *Id.*

[114] Lee, *supra* note 13, at 25.

Scholars have adopted different positions when answering the question of Quasi-statehood. For instance, international law scholar Pål Kolstø lists three criteria for Quasi- statehood: First, the entity must be in control of most of the territory it lays claim to. Second, it must have pursued statehood but failed to acquire international recognition as a State. Third it should have persisted in such status of non-recognition for more than two years.[115] Kolstø argues that through stipulating the third requirement, the whole category of entities with political instability will be eliminated.[116]

Dutch writer Alexander G. Wills rejects Kolstø's second requirement, viewing it as too restrictive since it unnecessarily ignores state-like entities which condemn their subjection to foreign authority but do not necessarily claim statehood, such as Taiwan.[117] Accordingly, Wills only retains the requirement of rejecting foreign authority.[118] He argues that this criterion allows for a distinction between entities, which, on the one hand, actively assert their independence (e.g., Abkhazia, Somaliland, and Transnistria), and, on the other, do not (e.g. Hong Kong and Puntland).[119] Thus, it is clear that the common denominator for both authors is the rejection of foreign authority.

In the context of the crime of aggression, which aims at elevating international peace to a higher level, it will be more convenient to consider Wills' standpoint which expands the circle of potential Quasi-States. Wills replaced Kolstø's third criterion of excluding entities that persisted in a state of non-recognition for fewer than two years with the requirement of stable or peaceful existence.[120] As such, Wills and Kolstø agree on the same requirements to a certain degree regarding permanence or viability, but they disagree on the significance of the time element.

Again, Wills' perspective would be a better choice for achieving wider international peace and security, as it includes several Quasi-States that would be arbitrarily excluded if we were to apply Kolstø's two-year criteria for stability and viability. Finally, in addition to Kolstø's requirement of international denial of recognition to the entity's claim of statehood,[121] Wills requires a Quasi-State's statehood to be either "disputed or it is generally understood to be something

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115 *Id.* at 725–26. It is to be noted, however, that Kolstø developed this list for the purpose of examining the sustainability and future of unrecognised Quasi-States, and not for the purpose of aggression.

116 *Id.* at 726.

117 Wills, *supra* note 8, at 85.

118 *Id*.

119 *Id*.

120 *Id.*

121 Kolstø, *supra* note 111, at 726.

other than a state".[122] This requirement is the essential factor that differentiates Quasi-States from fully-fledged States. Hence, it is evident that there is no clear demarcation of what constitutes a Q-State, yet these criteria might help outline the concept of a Q-State. Quasi-States would normally possess some basic attributes, such as the exercise of control over a certain territory and the maintenance of a peaceful and/or viable existence. Further differentiating Quasi-States from fully recognized states is a degree of uncertainty concerning the entity's statehood either because it was disputed or largely denied by the international community.

Alternatively, it might be helpful to emphasise what Quasi-States are not. Quasi-States are neither disputed border territories like Ogaden[123] nor separatist movements, like in Quebec or in Catalonia which aim for sovereignty and independence.[124] They are also not semiautonomous territories like Hong Kong, nor are they ideological/religious extremist movements like the so called IS within their territorial gains.

B. Evaluating Statehood for Quasi-States

Based on the above, Quasi-States share some common characteristics with recognised States. However, there are slight differences between them, although these should not preclude Quasi-States from the statehood description. Nevertheless, due to the flawed nature of international law their statehood is usually put in question.

The purpose of the following analysis[125] is to: (a) demarcate the concept of Quasi-States, which assists in finding the most suitable solution; (b) highlight the difference between Quasi-States and States; (c) conclude that this variation between Quasi-States and States does not affect in any way the statehood statuses of these entities.

1. Traditional Criteria of Statehood

According to Article 1 of the Montevideo Convention, a State should possess: (a) a permanent population; (b) a defined territory; (c) a government;

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[122] Wills, *supra* note 8, at 86 (introducing his fourth criteria).

[123] Conciliation Resources, *History: Ogaden region*, CONCILIATION RESOURCES (Sept. 1, 2016), http://www.c-r.org/where-we-work/horn-africa/history-ogaden-region.

[124] Wills, *supra* note 8, at 86.

[125] Based on the statehood framework codified under Article I of the Montevideo Convention on Rights and Duties of States. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 70 (6th ed. 2008); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 45–46 (2d ed. 2006).

and (d) the capacity to enter into agreements with other States.[126] Moreover, in the opinion of the Arbitration Commission of the European Conference on Yugoslavia, a state is defined as "a community which consists of a territory and a population subject to an organised political authority . . . [and] is characterised by sovereignty". [127]

It is therefore clear that the concept of statehood revolves around territorial effectiveness. However, this provision under Article 1 of the Montevideo Convention did not offer an exhaustive list of the necessary criteria for acquiring statehood,[128] yet other factors, such as recognition and self-determination, might be relevant as well.[129]

In relation to the requirement of a permanent population,[130] it is not explicitly known what qualifies as a sufficient population. In fact, the issue of acceptable minimum population was a key question in the Falkland Islands conflict.[131] Resolving this matter might give good guidance as to the required minimum to fulfil the first criterion of statehood.

The second criterion of statehood is having a defined territory,[132] which focuses on determining a particular territory upon which the state should operate and not on settling or having a strictly defined territory.[133] Hence, there are some unrecognised states that are involved in disputes related to border demarcations, even though their statehood is not directly affected.[134] For example, Israel had multiple border disputes with its Arab neighbors both before and after the international community recognized its statehood, thus indicating an operational focus in satisfying this criterion rather than a strictly geographical one.[135]

The third criterion of statehood is the existence of some form of central control or a government, which is vital for an effective political society.[136] The

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126 Montevideo Convention on the Rights and Duties of States art. 1, *opened for signature* Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

127 Matthew C. R. Craven, *The European Community Arbitration Commission on Yugoslavia*, BRIT. Y.B. INT'L Law 333, 358 (1995), http://eprints.soas.ac.uk/2572/1/Badinter%20Commission.pdf (last visited Sep. 10, 2016).

128 MALCOLM N. SHAW, INTERNATIONAL LAW 198 (6th ed. 2014).

129 *Id.*

130 Montevideo Convention, *supra* note 125, art. 1.

131 SHAW, *supra* note 128, at 186.

132 Montevideo Convention, *supra* note 125, art. 1.

133 SHAW, *supra* note 128, at 145.

134 *Id.*

135 BROWNLIE, *supra* note 125, at 71.

136 Montevideo Convention, *supra* note 126, art. 1.

recognition of Bosnia and Herzegovina by the UNGA in 1992[137] took place in May 2002 after a whole month of open hostilities between governmental central forces and Bosnian Serb paramilitary forces along ethnic conflict lines. The fact that the central government had already lost control over a substantial part of their territories (over so-called Serb Autonomous Regions) was a clear negation of that requirement. This and the ill-advised decision of the European Community (EC), the predecessor of the European Union, to urge Bosnia and Herzegovina to apply for recognition as a sovereign state outside the former Yugoslav Republic in December 1991 might have led directly to the ensuing hostilities and eventually the Bosnian genocide.[138]

In such a case, it can be said that the lack of effective control was balanced by considerable international recognition.[139] Therefore, the rule of maintaining effective control as a requirement for statehood may not be absolute, and some exceptions may apply in cases where there is some international consensus. It seems as if the non-binding "principle of self-determination will today be set against the concept of effective government," a view which does not take into account the overriding U.N. Charter principle of state sovereignty and non-interference as enshrined in Art. 2(1) and Art. 2(7) of U.N. Charter.[140]

In application, some Quasi-States have maintained effective governments (e.g., Somaliland, Northern Cyprus, and Palestine prior to 2012 when 138 member states of the General Assembly voted in favour of upgrading the Palestinian Authority's "observer status at the United Nations to "non-member state")[141] while others have not established effective control (in terms of Article 1 of the Montevideo Convention) over their territory. Thus, their classification as States will be questioned, unless supported by universal recognition or a claim to self-determination—in which case, both situations can balance the requirement of possessing an effective government.

The last criterion for statehood under Montevideo is the capacity to enter into relations with other states.[142] Independence, which in this regard refers to "the right to exercise therein, to the exclusion of any other [s]tate, the functions

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137 G.A. Res. 46/237, Admission of the Republic of Bosnia and Herzegovina (July 20, 1992).

138 Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 I.L.M. 1488 (1992).

139 SHAW, *supra* note 128, at 145.

140 BROWNLIE, *supra* note 125, at 71; *see* G.A. Res. 50/172 (Feb. 27, 1996).

141 *Palestinians win implicit U.N. recognition of sovereign state,* REUTERS WORLD NEWS, (Nov. 29, 2012), https://www.reuters.com/article/us-palestinians-statehood/palestinians-win-implicit-u-n-recognition-of-sovereign-state-idUSBRE8AR0EG20121129.

142 *See, e.g.*, SHAW, *supra* note 128, at 202–04.

of a [s]tate,"[143] is the foundation of such capacity.[144] It could be formal, in the sense that the state enjoys exclusive internal and external sovereignty,[145] or actual, which according to international scholar James Crawford is "the minimum degree of real governmental power at the disposal of the putative state that is necessary for it to qualify as independent."[146]

Arguably, a degree of actual, as well as formal independence may be necessary for statehood.[147] As Crawford puts forth, even when it is obvious that formal independence exists, it is necessary to further investigate the actual or effective independence of the putative state.[148] It should be mentioned that actual independence is relative in that it is a matter of degree.[149] Nowadays, many Quasi-States have weak political structures, frail defense capabilities and poor economies and are thus often sustained by support from external patrons.[150] Kosovo is supported by NATO, and the U.S. provided emergency aid to Southern Sudan before it gained formal independence in 2011.[151] However, if the degree of external control is proven to be substantial to the extent that the Quasi-State could be described as a puppet state, then it lacks real independence and can be called neither a state nor a Quasi-State.[152] As for the meaning of "substantial," scholars have emphasized that "the question is that of foreign control overbearing the decision-making of the entity concerned on a wide range of matters of high policy and doing so systematically and on a permanent basis."[153]

An example of the complexities that such a process may encounter appeared in the Lithuanian unilateral declaration of independence on March 11, 1990. This declaration was unanimously refused by the international community, despite being issued during a period of increasing disintegration within the Soviet Union.[154] It was premature to talk about Lithuanian independence at a time where the Soviets were maintaining considerable control within that authority.

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143 *Island of Palmas Case* (Neth. v. U.S.), 2 U.N. Rep. Int'l Arb. Awards 829, 838 (1928).
144 Wills, *supra* note 8, at 89.
145 CRAWFORD, *supra* note 125, at 67.
146 *Id.* at 72.
147 SHAW, *supra* note 128, at 147.
148 CRAWFORD, *supra* note 124, at 72.
149 *Id.*
150 Kolstø, *supra* note 113, 728–33.
151 Wills, *supra* note 8, at 90.
152 CRAWFORD, *supra* note 125, at 74–76.
153 BROWNLIE, *supra* note 125, at 72.
154 SHAW, *supra* note 128, at 182.

In conclusion**,** the authors submit the following definition of a Quasi-State: an entity having a modest permanent population and a defined territory, even if its borders are disputed while exercising effective governmental control over that same territory. The latter requirement can be balanced with wide universal recognition or a claim to self-determination, whereby a lower degree of governmental control could be acceptable. This entity must also enjoy a degree of independence, otherwise substantial external control can preclude it from acquiring statehood.

Therefore, it is submitted that Quasi-States are similar to fully-fledged states in the sense that they fulfil the criteria of statehood as set in the Montevideo Convention in a strictly technical sense.[155] Where they differ from states is in the degree of fulfilment of the criteria. It should be noted in this context that if a fully-fledged state suddenly does not fulfil one of the criteria for statehood, like effective control for example, it does not become a Quasi-State but rather a "failed state."

In this regard, the difficulty of reaching the correct legal description for Quasi-States stems from their varied degrees of fulfilment of the criteria, which may or may not qualify them for statehood. This process is very complex, as shall be seen in the forthcoming part, as those who have the duty to carry this process out will usually be reluctant in doing so, particularly, when concluding on the existence of an effective government and on independence.[156] Further, due to the existence of issues such as the definition of territories and permanent population, which are not given much attention, it will be hard to uphold a clear-cut distinction between Quasi-Statehood and traditional statehood.[157]

Nevertheless, in some other instances, the entity may fully attain all the required criteria for statehood, yet not be universally recognized as a state. For example, Somaliland has a population of over three and a half million settled over a territory covering around 137,600 km^2.[158] It is also led by a government situated in Hargeisa with *de facto* control over the territory since 1991,[159] but it has yet to be accepted as a state within the international community. Thus, it is crucial to study the effect of non- recognition on such entities.

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[155] *See* Montevideo Convention, *supra* note 126, art. 1.

[156] OFFICE OF LEGAL AFFAIRS, SUMMARY OF PRACTICE OF THE SECRETARY-GENERAL AS DEPOSITARY OF MULTILATERAL TREATIES 23 (1999).

[157] BROWNLIE, *supra* note 125, at 70.

[158] Allison K. Eggers, *When is a State a State – The Case for Recognition of Somaliland*, 30 B.C. INT'L COMP. L. REV. 211, 213 (2007).

[159] Hussein M. Adam, *Formation and Recognition of New States: Somaliland in Contrast to Eritrea*, 21 REV. AFR. POL. ECON., 21, 21–22 (1994).

It is also important to consider whether the attainment of the criteria for statehood in an unlawful way, like in the case of Taiwan, impairs claims for statehood.[160] Before looking at the effect of those additional factors on the issue of statehood in international law, the following section will examine whether the lack of recognition of Quasi-States could impair their statehood; if recognition serves as an essential requirement for statehood, then a Quasi-State would not qualify as a state under any circumstances.

2. *The Effect of Non-Recognition and the Development of Statehood Among Quasi-States*

Recognition is a means of acknowledging a certain factual situation and granting it legal significance.[161] Somewhat ironically, one of the major functions of official recognition has more to do with the recognizing State rather than the newly recognized State; namely, the recognition itself is a reflection of the official position of the recognizing State (in that it recognizes that the newly recognized State has fulfilled certain criteria that qualify it for statehood.[162] By contrast, non-recognition conveys the idea that the particular entity did not attain the required degree of independence and control entitling it to be identified as a state.[163] It is also to be mentioned that recognition in this sense is merely indicative of the recognizing States' individual positions vis-à-vis any newly recognized state, and such recognition has no binding effect on other states.[164] It is solely pointing to the position states might have in the matter of helping new entities be regarded as an international subject.

In the context of developing statehood, recognition may be perceived as constitutive or declaratory.[165] According to the former theory, a state cannot come into being without recognition even if it fulfils all other required criteria for statehood,[166] while the latter maintains that recognition is more of a political rather than legal act. Therefore, a new state emerges once it satisfies the prerequisites of a state even if it is not recognized.

The modern tendency in international law is towards supporting the declaratory approach,[167] which is due to the contradiction of the constitutive

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160 CRAWFORD, *supra* note 125, at 133.
161 SHAW, *supra* note 128, at 185.
162 ANTONIO CASSESE, INTERNATIONAL LAW, 74 (2d ed., Oxford University Press 2005).
163 *Id.*
164 *Id.*
165 CRAWFORD, *supra* note 125, at 93.
166 J.D. Van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9, 16 (1991).
167 SHAW, *supra* note 128, at 185, 390.

theory with the principle of effectiveness, whereby effective status quo is fully legitimized by international law.[168] Moreover, this theory may even be in conflict with the U.N. principle of the sovereign equality of states, as it grants the existing states unjustified authority to decide when a new entity which exhibits all requirements of a state to the international community can be admitted.[169]

Finally, this theory will ultimately result in inconsistency in international relations since a certain entity will be perceived as a state with regard to the states which recognized it while at the same time lacking legal personality as far as other states are concerned.[170] This does not mean that the declaratory theory is free from criticism. According to this theory, the concept of the state is regarded as a mere matter of fact. Yet despite this objective posturing, declaratory theory fails to justify the existence of some states despite lacking factual prerequisites for statehood.[171] For example, Guinea-Bissau, Congo, and Ethiopia achieved universal recognition as states without having either independent or effective governments.[172]

Recognition is usually affected by international politics as it evolves gradually, especially, in cases where the new entity is born out of the wounds of prior political and military struggle with the parent state. Due to political considerations, a fragment of the international community may hold aloof, thus, extending the period during which recognition is granted.[173] In conclusion, both theories do not adequately justify the factual existence of *de facto* states or the practical function of recognition as a tool for granting admission to institutions.[174]

Despite the inadequacy of both theories, it is clear that recognition cannot vitiate the statehood of a Quasi-State with effective sovereignty. However, this is not always the case as non-recognition has various reasons with distinct legal effects, whether it is due to political reasons or serious doubts about the statehood status of an entity, or even if states are under a duty not to recognize unlawful situations.[175]

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168 CASSESE, *supra* note 162, at 74.

169 William T. Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT'L REV. 115, 120 (2009).

170 CASSESE, *supra* note 162, at 74.

171 CRAWFORD, *supra* note 125, at 3.

172 *Id.* at 128.

173 CASSESE, *supra* note 162, at 76.

174 CRAWFORD, *supra* note 124, at 5.

175 *Id.* at 157–58.

Unlike for political reasons, non-recognition due to serious doubts about the entity's statehood should be carefully scrutinized by the deciding body, while further analysing the degree of fulfilment of the statehood criteria. Further, non-recognition in compliance with the international obligation of denying unlawful situations will be examined below.

Moreover, in the context of admission to international organizations, lack of recognition may hinder such entities from joining institutions like the ICC. For example, the United Nations Secretary-General (UNSG), when considering whether an entity is a State for the purpose of its adhesion to a treaty, applies the so-called "Vienna Formula."[176] According to the framework, an entity can be considered a state for the purpose of joining the treaty if it is a member of the U.N., specialized agencies, or even party to the Statute of the ICJ. If an entity conforms to the scope of this formula, then the UNSG will consider it to be a state.[177] The applicability of this formula will be further examined in section C. Accordingly, recognition can be seen as the second distinctive factor between Quasi-States and States. An entity fulfilling the elements of statehood and having universal recognition will be designated as a fully-fledged state, while one fulfilling Montevideo's criteria but lacking international recognition may qualify for Quasi-Statehood, depending on the reason behind their denied recognition.

3. Emergence of Quasi-States Through the Illegal Use of Force

A doctrine on non-recognition has been developing since the 1930s where the factual conditions required by many states for recognition have changed.[178] In the past, exercising effective control over a population in a particular territory was sufficient to accept a new state into the international community.[179] In the 1930s, a further requirement developed, whereby the emergence of a new state must not contradict with the fundamental morality and legality of the international community[180] (such as the illegality/prohibition of the use of war/ renunciation of war as emerging principles of international law).[181] This

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[176] U.N. OFFICE OF LEGAL AFFAIRS, SUMMARY OF PRACTICE OF THE SECRETARY-GENERAL AS DEPOSITARY OF MULTILATERAL TREATIES, at 22–23, U.N. Doc. ST/LEG/7/Rev.1, U.N. Sales No. E.94.V.15 (1999).

[177] *Id.* at 23–25.

[178] CASSESE, *supra* note 162, at 75; SHAW, *supra* note 128, at 390.

[179] CASSESE, *supra* note 162, at 75.

[180] *Id.* at 75; SHAW, *supra* note 128, at 390.

[181] The growing consensus among Europe's nations in the interwar years regarding the illegality of the use of force (prior to the prohibition of the use of force under Article 2 (4) UN Charter in 1945) is being highlighted

requirement was reinforced by the principle that legal rights cannot stem from an illegal situation (*ex-injuria jus non oritur*).[182] Crawford further articulated that if the existence of the entity is based on a serious breach of the peremptory norms of international law, then it is justifiable not to treat such an entity as a state, regardless of its degree of effectiveness.[183] Northern Cyprus, for example, was established after the illegal invasion of Turkey, thus it cannot assumed to be independent.[184] There are many entities that were created as a result of the unlawful use of force by foreign states, as is arguably the case in South Ossetia, Kosovo and Northern Cyprus.

Three situations should hence be distinguished: when foreign intervention takes the form of mere assistance to local insurgents; when foreign powers intervene directly in a conflict; and when an existing Quasi-State relies on foreign military support for its continued independence.[185] When foreign intervention goes beyond the mere provision of assistance and takes on the character of direct military action, the unlawful use of force is central to the existence of such an entity. Consequently, the emergence of such an entity significantly violates the peremptory norms of international law; thus, this entity will not be considered a state.[186] On the other hand, when an independent entity emerges from foreign occupation, then this entity can be treated as a state, assuming it is lawfully exercising the right to self-determination.[187] Between the requirement of effectiveness—mentioned previously—and the emerging principle of withholding legitimacy, an anomalous situation may exist.[188] The coexistence of these two principles may give rise to an ambiguous result by which an entity may meet all the requirements for statehood but nevertheless is deprived of international intercourse.[189] This is due to the principle of withholding legitimacy's inability to displace its predecessor (the principle of effectiveness).[190]

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in the creation of the Kellogg Briand Pact (General Treato on the Renunciation of War) of 1928 supra note 87 and the above discussed attempts to ban the use of force in international relations.

182 SHAW, *supra* note 128, at 390.

183 CRAWFORD, *supra* note 125, at 158.

184 *See generally, e.g.*, Suzanne Palmer, *The Turkish Republic of Northern Cyprus: Should the United States Recognize it as an Independent State*, 4 B.U. INT'L L.J. 423 (1986).

185 CRAWFORD, *supra* note 125, at 135.

186 *Id.* at 381–82, 389–90.

187 *Id.* at 127–28.

188 CASSESE, *supra* note 162, at 76.

189 *Id.*

190 *Id.*

III. QUASI-STATES AND THE ICC

The following part will critically examine the ICC's interpretation of statehood and underline the uncertainties surrounding the organization's position towards Quasi-States. This will most probably exclude Quasi-States from the ICC's jurisdiction, which is not only legally and historically unjustified but also practically undesirable for its effect on the functioning and efficiency of the international criminal justice system. Hence, this further emphasises the need to explicitly include Quasi-States under the definition of the crime of aggression.

A. The Palestinian Case: A Deviation of the Prosecutor's Interpretation of Statehood

1. Background

On January 22, 2009, Ali Khashan, in his capacity as Minister of Justice, representing the Palestinian Fatah government (Palestinian Authority), made a declaration accepting the exercise of the ICC's jurisdiction over Palestinian territory dating back to July 1, 2002.[191] Three years later, the ICC's Prosecutor issued a decision rejecting the Palestinian Authority's request to recognize the court's jurisdiction.[192] The Prosecutor based his decision on the application of Article 12 of the Rome Statute, which stipulates that only *states* can "confer" jurisdiction upon the Court.[193]

In his decision, Prosecutor Ocampo argued that it was the UNSG that is responsible for determining the term "state."[194] However, he did not refer the matter to the UNSG, rather he decided on the matter by applying what he thought the UNSG would have decided.[195] He added that, in case of controversy concerning whether an applicant constitutes a "state" or not "it is the practice of the Secretary-General to follow or seek the General Assembly's directives on the matter."[196] Accordingly, the Prosecutor analyzed the question of interpreting

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[191] PALESTINIAN NATIONAL AUTHORITY, DECLARATION RECOGNIZING THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (2009), https://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf

[192] Office of the Prosecutor, Situation in Palestine, International Criminal Court, ¶ 6 (Apr. 3, 2012), https://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf.

[193] *See id.* ¶ 4.

[194] *See id.* ¶ 5.

[195] *See id*.

[196] *Id.*

Palestinian statehood as follows: the UNGA during that period of time granted the Palestinian Liberation Organization "observer" status only, and not "non-member state" status, so the Prosecutor concluded that Palestine was not a state, hence not entitled to recognize the Court's jurisdiction. Therefore, the absence of recognition by the UNGA was treated as a hindrance to acquiring statehood.[197] If the UNSG's methodology when considering statehood is examined, it will show that it depends on the Vienna Formula.[198] In other words, if an entity is a member of the U.N. or its specialized agencies, or Party to the Statute of the ICJ then it will be considered a state for the purpose of admission to a treaty.[199]

In practice, UNSG recognized statehood for the Cook Islands and Niue on the grounds that both of them were admitted to the World Health Organization (WHO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), regardless of the fact that both lacked a UNGA resolution recognizing their statehood.[200] Applying the same framework to the Palestinian case, the Prosecutor should have accepted Palestine's declaration based on its admission to UNESCO, which occurred one year prior to his decision.[201] However, contrary to what the Prosecutor claimed about following UNSG practice, which would have accepted Palestine's declaration, he devised his own interpretation of the term "state." In fact, while UNSG adopted a wider interpretation of the term "state," the Prosecutor embraced a narrower one. As proof of the ICC's insistence on its wrongful position, a few months after the refusal of the Palestinian declaration, the UNGA voted to recognize Palestine as a "state."[202] Consequently, Prosecutor Bensouda emphasized that "Palestine would be able to accept the jurisdiction of the [ICC] from 29 November 2012 onward."[203] Therefore, the Prosecutor considered that Palestine had gained statehood on that day, which is in itself contrary to the UNSG practice to consider Palestine a state from the date it was admitted to the UNESCO in 2011. In this sense, the Prosecutor's standpoint towards recognition, as a precondition

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197 *See id.* ¶ 7.

198 *See* U.N. OFFICE OF LEGAL AFFAIRS, SUMMARY OF PRACTICE OF THE SECRETARY-GENERAL AS DEPOSITARY OF MULTILATERAL TREATIES, at 22–23, U.N. Doc. ST/LEG/7/Rev.1, U.N. Sales No. E.94.V.15 (1994).

199 *See id.*

200 *See id.* at 24.

201 *Palestine*, UNITED NATIONS EDUC., SCI. AND CULTURAL ORG. (UNESCO), http://en.unesco.org/countries/palestine (last visited Sept. 1, 2016) (discussing Palestine joining UNESCO on November 23, 2011).

202 G.A. Res. 67/19, at 3 (Dec. 4, 2012).

203 Press Release, Office of the Prosecutor, The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine, ICC Press Release ICC-OTP-20150116-PR1083 (Jan. 16, 2015), https://www.icc-cpi.int/Pages/item.aspx?name=pr1083.

for statehood, deviated from the agreed upon practice regarding the role of recognition as previously articulated. Moreover, even when the Prosecutor considered recognition as a prerequisite for statehood, he disregarded the Vienna Formula and only accepted recognition from the UNGA as evidence for the entity's statehood.

2. The Uncertain Position of Quasi-States under the Crime of Aggression Resulting from the Prosecutor's Interpretation of the Term "State"

The term "State" was mentioned in four different places within the Rome Statute: (a) a state that could accede to the Court;[204] (b) a non-party state which is willing to accept the *ad-hoc* jurisdiction of the Court through a declaration;[205] (c) a state that through its wrongful policy supports the commission of crimes against humanity and/or genocide;[206] and (d) a state in the context of war crimes and the crimes of aggression.[207] From the aforementioned practices of the ICC's Prosecutors, it is clear that the term "State" in the first and second contexts refers to the State which is recognized by the UNGA. Looking at the fourth instance, which is more relevant to the topic of this Article, it is important to account for the interpretation of the term "State" that could be adopted by the Prosecutor, and its respective legal implications on the scope and applicability of the crime of aggression. The possible interpretation of statehood for the purpose of aggression that could be adopted is as articulated above; to include recognition by UNGA as an essential prerequisite for statehood. However, upon closer examination of the historical evolution of the crime, it can be inferred that recognition is not necessary for determining statehood for the purpose of aggression. For example, during the Korean war in 1950, the UNGA considered the attack of North Korea on South Korea as an example of aggression,[208] despite the status of North Korea at the time which was still in *statu nascendi*.[209] Furthermore, an explanatory note annexed to the definition of "aggression" was included in UNGA Resolution 3314 (XXIX) to clarify that "the term '[s]tate' . . . [i]s used without prejudice to questions of recognition or to whether a State is a member of the [U.N.] . . . ."[210] As mentioned previously, this Resolution was

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204 *See* Rome Statute, *supra* note 2, arts. 125–26.

205 See *id.* art. 87(a)–(b).

206 *See id.* art. 7(2)(a).

207 *See id.* art. 8(2)(f); *see* A.S.P. Res.RC/Res.6, *supra* note 3, art. 8*bis* (June 11, 2010).

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

209 *See* G.A. Res. 376 (V), at 9 (Oct. 7, 1950); *see* S.C. Res. 82, ¶ 2 (June 25, 1950).

210 G.A. Res. 3314 (XXIX), at 143 (Dec. 14, 1974).

later used as the basis for defining an "act of aggression" under the Rome Statute.[211]

Hence, the normal understanding of the term "State" for the purpose of the crime of aggression shows that recognition is not a precondition for statehood. As such, the interpretation of the term "State" adopted by the Prosecutor in the Palestinian case, is different than that applied in the context of aggression. As a result, this may lead to some peculiar situations whereby the nature of the crime covers armed conflicts involving Quasi-States. Nevertheless, the ICC would eliminate them until they receive recognition from the UNGA. The other odd situation would be extending statehood status for an entity which is not entitled to accept the ICC's jurisdiction. This second situation represents a serious breach of the international law principle of sovereign equality, as an entity would be granted statehood status with the international obligation attached to it, while at the same time, being precluded from the rights assigned to this status; such as joining international institutions like the ICC.

B. The Practical Necessity of Including Quasi-States under the Scope of the Crime of Aggression

In 1947, there were ten ongoing civil wars in contrast to only two interstate wars.[212] De-colonialization and the subsequent establishment of new states post-independence as well as the end of the Cold War in 1991 led to a multiplication of such internal wars. Most of these new states encountered violent challenges of their state capacity and legitimacy,[213] and thus, internal wars were the prevalent form of warfare during the 1980ies and early 1990s.[214] This is highlighted by the observation that, while the number of international wars never exceeded six per year, the aggregate of internal conflicts reached fifty-two in 1992.[215] This rough augmentation in the second half of the twentieth century was a normal outcome of the struggle for viability on behalf of new states emerging out of colonial systems.[216] Given the continuous radical transformation in the type of armed conflicts, it would be irrational not to revisit the exclusion of Quasi-States from the scope of the crime of aggression. Although there has been increasing armed conflicts involving Quasi-States,[217]

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211 A.S.P. Res. RC/Res.6, *supra* note 3, art. 8 *bis*(2), at 18 (June 11, 2010).
212 Rep. of the Rep. of the High-Level Panel, *supra* note 12, at 17.
213 *Id.* at 17.
214 *Id.*
215 *Id.*
216 *Id.* at 16.
217 *See* Wills, *supra* note 8, at 83–84.

the new Kampala amendments failed to guarantee their inclusion under the ambit of the crime of aggression.

The importance of explicitly incorporating Quasi-States under the Rome Statute stems from the need to pursue the broad objectives of international criminal justice and public international law. Originally, the initiative of defining the crime of aggression was motivated by the necessity to address the contemporary threats to international peace and security.[218] Criminalizing aggression aims at protecting four major interests: (a) stability; (b) security; (c) human rights; and (d) sovereignty.[219] As a result of inter-state and intra-state aggression since the end of the twentieth century, more than a billion individuals now lack access to clean water, more than two billion are denied adequate sanitation, and more than three million die every year from water-related diseases.[220] In addition, globally, 821 million people faced hunger in 2017[221] and over 35 million people are living with HIV according to estimates by the World Health Organization. [222] Many of those issues arose not only from international but also internal conflicts and contribute significantly to the modern challenges of globalization in terms of poverty, the lack of access to food, water and health care. It is now time for the international community to take a stance and consider Quasi-States as key participants in modern aggression.[223] Some might argue that Quasi-States can be prosecuted for crimes against humanity or genocide, all of which are individual crimes without necessarily involving states. However, this does not guarantee the utmost degree of international peace and security. According to the Nuremberg tribunal's judgment, "War is essentially an evil thing . . . . To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[224] This is true as defining the act of aggression under the Rome Statute places the waging of military action within the purview of the law.[225] Besides, aggression is a crime

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[218] Michael Anderson, *Reconceptualizing Aggression*, 60 DUKE L.J. 411, 420 (2010).

[219] Drumbl, *supra* note 44, at 306; *see* LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE 4 (Cambridge University Press 2008).

[220] *See* WORLD HEALTH ORG., *Water, sanitation and hygiene links to health*, http://who.int/water_sanitation_health/publications/facts2004/en/ (last visited Nov. 2014).

[221] *See* FAO, *Food Security & Nutrition around the World*, http://www.fao.org/state-of-food-security-nutrition/en/ (last visited Sept. 2018).

[222] *See* WORLD HEALTH ORG., *Number of People (All Ages) Living with HIV Estimates by WHO Region*, http://apps.who.int/gho/data/view.main.22100WHO?lang=en (last updated July 11, 2018).

[223] *See* Anderson, *supra* note 218, at 420.

[224] 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 247 (1947), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XXII.pdf.

[225] Beytenbrod, *supra* note 68, at 670.

of *jus ad bellum,* while the other crimes relate to *jus in bello.*[226] This means that aggression relates to the initiation of armed conflict, whereas war crimes are sanctions on violations during the execution of the war.[227] Thus, aggression can be seen as the main door for all other international crimes, which might help in deterring future atrocities, as military leaders will fear using force as it might then endanger them personally.[228]

Solving the issue of whether the crime of aggression is applicable to conflicts involving Quasi-States is of major importance. Quasi-States exist throughout Africa, Europe and Asia;[229] nearly all of them came into existence by military means through civil war against their mother state,[230] and are a major source of war.[231] Accordingly, nowadays, the structure of warfare is shifting towards a more decentralized form, the state remains an important actor, yet, not the dominant contributor.[232] Not extending the scope of the ICC's jurisdiction over aggression from or against Quasi-States is an indefinite guarantee of continuous impunity. It delivers the message "that international aggression is not blameworthy,"[233] and Benjamin Ferencz (the renowned former U.S. prosecutor for the Nuremberg tribunal) stresses the failure to prosecute aggression is a step backwards and a repudiation of Nuremberg.[234]

IV. A WIDER INTERPRETATION OF THE TERM "STATE"

Many scholars recognize the incompatibility of the current state-centric structure adopted by the ICC with the current sociological changes in the form of warfare. However, the disagreement revolves around the methodology used in resolving this issue.[235] The first group of scholars is in favor of adopting a wider interpretation of the term "state," yet they disagree on the extent to which

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[226] Frederic Megret, *International Criminal Law* 12 (Dec. 28, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1321253&rec=1&srcabs=1006089&alg=1&pos=4; *see* Yoram Dinstein, *Panel II Discussion—Jus in Bello*, 79 INT'L STUD. SERIES U.S. NAVAL WAR C. 247, 247 (2003).

[227] *See id*.

[228] *See* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 AM. J. INT'L L. 7, 7 (2001).

[229] Kolstø, *supra* note 111, at 723–26.

[230] *Id.* at 732.

[231] *See* Wills, *supra* note 8, at 86–87 (discussing the Sri Lankan Civil War, the second Sudanese Civil War South Ossetia War and certain stages of the Yugoslav Wars as recent examples of armed conflicts involving Quasi-States).

[232] Weisbord, *supra* note 51, at 13–20; *See* PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY 146 (2008).

[233] Weisbord, *supra* note 51, at 3.

[234] 2 FERENCZ, *supra* note 67, at 290.

[235] *See* Wills, *supra* note 8, at 99.

the meaning should be broadened; some support limiting it to the exclusive inclusion of Quasi-States,[236] while others argue that the term "state" could encompass most non-state actors.[237] In parallel, the other group of scholars is calling for the amendment of the Rome Statute to explicitly mention the term "Non-State Actors" (NSA).[238] This part will explain why the interpretative approach, adopted by the first group, is not favoured, and the following part will discuss the possible amendments of the Rome statue to solely include Quasi-States and not NSAs.

Professor Weisbord, an independent expert delegate to the Special Working Group on the Crime of Aggression, is amongst the scholars who criticised such state-centrism. He proposed instead the adoption of a wider interpretation of the term "State" as solution to include NSAs.[239] He argues that so long as NSAs possess state-like characteristics, it would be best to include them under the "State" category.[240] Since, the ASP had already reached widespread acceptance on the current formulation of the crime of aggression, this methodology would be beneficial in avoiding taking any other steps towards amending that definition. Thus, Weisbord's approach provides enough flexibility for the definition to be compatible with the current international situation while also being helpful in preserving its original state-centrism.[241] If Weisbord's argument is true and the word "State" could include NSAs, then incorporating only Quasi-States would, by default, be highly difficult. It would in turn increase the technical hitches in the ICC's work, as well as jeopardize the efficiency of the international criminal justice system. If this proves to be correct, then it would support the argument of this Article to explicitly include Quasi-States under the definition of the crime aggression alongside "States," albeit under a different bracket.

A. Applicability of Montevideo's Conception of Statehood on Terrorist held Territories and Groups

To answer this question one must consider and then apply the four criteria required for statehood to the prevalent general characteristics of terrorist groups. When those terrorist groups, as one type of NSA, exercise de facto control over

236 *Id.*
237 *See* Weisbord, *supra* note 51, at 25.
238 Beytenbrod, *supra* note 68, at 687.
239 Weisbord, *supra* note 51, at 30.
240 *See id.*
241 *Id.* at 29–30.

an otherwise illegally held territory, they could theoretically attain statehood under the Rome Statute.

Firstly and with regard to the requirement of permanent population, a specific condition that will be relevant to terrorist groups would be that an entity's population must inhabit some territory over which the NSA would have to have exclusive (quasi-governmental) control.[242] In practice, due to these NSAs' illegal and often covert existence, their members or affiliated population maintain secrecy and inhabit remote places such as mountains to evade capture.[243] This was the case, for example, with the Taliban post-Operation Iraqi Freedom,[244] Al Qaeda, [245] and the various terrorist groups in the Sinai desert in Egypt.[246] However, nowadays, the nature of terrorist groups has evolved and those groups have started inhabiting certain territories with more or less permanent populations. For example, at the height of its reign in 2016, IS controlled 68,300 square kilometers of territory, inhabited by their affiliates as well as indigenous people.[247] Hence, with the continuous development in the nature and significance of terrorist group activities, it is likely to see them fulfilling this condition in the near future.

Closely related to the first requirement is the necessity of having a defined territory.[248] Based on the above, with the exception of IS, the rest of the examples cannot fulfil the territorial requirement. Professor Philip B. Heymann writes that a "condition of [the] organizational existence" of independent terrorist groups, is "a sheltering country such as Syria, Iraq, or Iran."[249] Thus, these groups operate on the territory of other states, without having a territory of

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[242] Lucian C. Jr. Martinez, *Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against Holy See in Clerical Sexual Abuse Cases*, 44 TEX. INT'L L.J. 123, 149 (2008); *see also* CRAWFORD, *supra* note 125, at 48.

[243] *See* BBC, *The Afghan-Pakistan Militant Nexus*, BBC NEWS (Feb. 5, 2013), http://www.bbc.co.uk/news/world-asia-21338263.

[244] *Id.* Omar Lamrani, *Why the U.S. Won't Be Leaving Afghanistan Any Time Soon,* STRATFOR WORLDVIEW (last visited Sept. 25, 2018), https://worldview.stratfor.com/article/why-us-wont-be-leaving-afghanistan-any-time-soon.

[245] Anti-Defamation League, *Al Qaeda*, https://www.adl.org/resources/profiles/al-qaeda (last visited Oct. 1, 2018); *see* Peter Bergen, *The Account of How We Nearly Caught Osama bin Laden in 2001*, NEW REPUBLIC (Dec. 30, 2009), https://newrepublic.com/article/72086/the-battle-tora-bora.

[246] *See* Middle East Institute*, Special Feature: Terrorism in Sinai*, MIDDLE EAST INST. http://www.mei.edu/sinai-terrorism (last visited Sept. 1, 2016).

[247] *Daesh Territory Shrinks 12 Percent Since Start of 2016: IHS*, ARAB NEWS, http://www.arabnews.com/node/951606/middle-east (last updated July 10, 2016, 9:02 PM).

[248] CRAWFORD, *supra* note 125, at 46.

[249] Philip B. Heymann, *Dealing with Terrorism: An Overview*, 26 INT'L SECURITY 24, 25 (2001).

their own.[250] Nowadays, however, with the increasing number of failed states, terrorist groups are able to conquer more territories and attain the second requirement of statehood. For instance, within Syria there are various terrorist groups with their own distinctive territories.[251] Moreover, the Houthi group in Yemen has conquered and continues to hold parts of the territory where most of the population lives[252] and the Libya Dawn Militia Alliance have also taken over nearly half of the Libyan territory.[253] Nevertheless, even if these groups are able to fulfill the aforementioned criteria, still, they cannot qualify as states without exercising full governmental control over their territory. The requirement of full governmental control is central for statehood as all the other conditions revolve around it.[254] International law does not provide any specific form, nature, or extent for this control, but it does express that a state government should provide at least some degree of law and order and establish essential institutions.[255] Terrorist organizations in most cases disregard these objectives.[256] They are "led by individuals who . . . display an utter disregard for both human life and the rule of law."[257] Accordingly, terrorist group held territories, lacking this requirement, will certainly not qualify for statehood.[258]

Finally, given the factors mentioned above which stand against independence for terrorist groups, it would be hard to assume that they could achieve the fourth criterion of Montevideo: to enter into relations with other states. Furthermore, since it is very clear that the violation of international norms is very prominent and central to their emergence, it is of international duty not to recognize them, which impedes such group-held territories from achieving statehood in such a way.

In conclusion, it is impossible for such NSA-held territory to fulfill the widely accepted criteria of statehood, even if nowadays we can see some terrorist groups with a permanent population and defined territory. They are still,

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250 Greg Travalio & John Altenburg, *Terrorism, State Responsibility, and the Use of Military Force*, 4 CHI. J. INT'L L. 97, 98 (2003).

251 *Guide to the Syrian Rebels*, BBC NEWS (Dec. 13, 2013), http://www.bbc.co.uk/news/world-middle-east-24403003.

252 *See* Daniel L. Byman, *Saudi Arabia and the United Arab Emirates Have a Disastrous Yemen Strategy*, BROOKINGS (Sept. 7, 2018, 5:19 PM), https://www.brookings.edu/blog/order-from-chaos/2018/07/17/saudi-arabia-and-the-united-arab-emirates-have-a-disastrous-yemen-strategy/.

253 *See Guide to Key Libyan Militias*, BBC NEWS (Jan. 11, 2016), http://www.bbc.co.uk/news/world-middle-east-19744533.

254 CRAWFORD, *supra* note 125, at 62, 66.

255 *Id*. at 55.

256 *See* Travalio & Altenburg, *supra* note 250, at 115.

257 *Id.* at 115.

258 CRAWFORD, *supra* note 125, at 59, 62.

however, far from attaining governmental control and capacity in order to enter into relations with other states, which is pivotal for statehood. Thus, most terrorist groups cannot be described as states under the Montevideo convention.

B. The Dynamic Conception of Statehood and Terrorist Groups

The fact that Montevideo's criteria for statehood represents customary law and the most widely accepted benchmarks of statehood is undisputed. Therefore, the term "State" should be interpreted in light of these criteria. However, this area of law is remarkably complex.[259] Most scholars have opted for deemphasizing some of its criteria while attaching new ones, rather than opting for a complete replacement of the convention.[260] Nonetheless, the well-known military historian Philip Bobbitt introduced a new conception for "States" which totally deviates from Montevideo's.[261] He argues that the concept of a state is now about to witness a seismic change.[262] He emphasized that, today, the prevalent constitutional order is the nation state, which is based on maximizing the welfare of its people.[263] Hence, it must ensure national security and safeguard its society from transnational hazards.[264] Nevertheless, in the past decade, there has been a shift from one constitutional order to another—from the nation state to the "Market State," due to challenges that the nation state cannot overcome.[265] For instance, the globalisation of markets reduced the ability of the State to manage its currency and its own economy. It also motivated rapid economic growth that lead to some transnational consequences such as climate change and inequality, thus undermining the legitimacy of the nation state due to its inability to provide continuous improvements to the material wellbeing of its citizens.[266] In defence of its legitimacy, the nation state will make use of private enterprises and nongovernmental organisations to supplement traditional governmental operations,[267] and deregulate industries to establish more dynamic and fruitful markets.[268] As Bobbitt observed, in 2005, American private policy was

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[259] *See* Worster, *supra* note 169, at 158.

[260] *See* Thomas D. Grant, *Defining statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 447 (1999).

[261] BOBBITT, *supra* note 232, at 87–88.

[262] *Id.*

[263] *See id*. at 86.

[264] *See id*.

[265] *See id*.

[266] *Id*. at 87.

[267] *See id*. at 121.

[268] *See* KLM Inc., *The New Market State and Corporate Social Responsibility*, KLM, INC. MANAGEMENT CONSULTATION (Aug. 16, 2011), http://klminc.com/ethics/the-new-market-state-and-corporate-social-responsibility.

privatised to a great extent, and public-private partnership projects were evident by the presence of approximately 50,000 private contractors—during the U.S. invasion to Iraq—performing functions that used to be carried out by a principal administrative division of the military.[269] Therefore, the present constitutional order is gradually decaying and being replaced by a new one.[270] This new form, the "Market State," will be driven by market dynamics where businesses are more involved with social and cultural responsibilities, not to secure the welfare of the people but to maximize the opportunities available to them.[271] If opportunity maximization is the main driven factor of new statehood then it is suitable to capture terrorist organisation under the term "State." As Bobbitt questions if al Qaeda could match this novel concept of statehood,[272] Professor Weisbord responds affirmatively, arguing that "Bobbitt's dynamic conception of the [S]tate may offer diplomats drafting the definition of the crime [of aggression] and jurists interpreting it a way to include acts by al Qaeda-like groups within its ambit."[273] Moreover, he explains that by using a dynamic conception of statehood, it is possible that the definition could be expanded beyond its literal text and applied to NSAs.[274]

This supposition bears a number of risks that could result in unfavorable consequences. Despite the fact that this assumption is too narrow and would not capture all types of terrorist groups, it could be successful in including some. Thus, the scope of the term "State" should closely follow Montevideo Convention, otherwise, any expansion in its interpretation bears the risk of encompassing a number of terrorist groups, especially within the current evolution of their nature, contexts, and types. Therefore, what are the possible risks that can be derived from this inference?

C. Risks Attached to Granting Statehood Status to Terrorist Groups

Following the previous analysis and complexities surrounding the question of statehood, if the ASP were to adopt a wider interpretation of the term "State" in order to resolve the issue of Quasi-States, an exceedance of the limits of this interpretation could occur, and a terrorist organisation could wrongly be classified as a state. This methodology threatens the equality of states and undermines the efforts to prosecute terrorism. Extending statehood for the

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269 *See generally* BOBBITT, *supra* note 232, at 123.
270 *See id*. at 88.
271 *Id*. at 124–25.
272 *See id*. at 122.
273 Weisbord, *supra* note 51, at 15.
274 *Id*. at 30.

purpose of prosecuting aggression may take one of these two forms: a circumscribed extension limited to the narrower scope of prosecuting aggression before the ICC, or, alternatively, a broader extension that would confer most, if not all, the rights and obligations of statehood.Both cases have serious risks attached to their application as shall be examined below. Professor Hersch Lauterpacht stresses that the creation of a framework for exclusive use within international criminal law risks creating a "grotesque spectacle,"[275] in other words, a legal milieu where the same entity is considered both a state and a non-state.[276] This will not only result in inconsistency in international relations, but also undermine the principle of sovereign equality.[277] Simply put, the statehood status carries rights and obligations. However, conferring statehood on terrorist groups for the purpose of aggression only means that they would be burdened with obligations without having any rights, which is a clear violation of the principle of sovereign equality.[278] Pursuant to this principle, all political entities recognised as states are equal in rights and obligations.[279] What is illegal or unjust for one state should be illegal for all other states, regardless of their economic power, size, population number or military potentials.[280] This was enshrined as one of the founding principles on which the U.N. was established.[281] On the other hand, conferring statehood on terrorist groups—in all contexts—is also detrimental. In fact, if terrorist organisations were to be granted statehood then this would entitle their military leaders to sovereign immunity, which would hinder the national and international jurisdictions from prosecuting them in some cases, thus subverting the efforts to prosecute terrorism.[282]

Even if the ICC was able to exclude terrorist groups from the adopted interpretations, it would certainly be confronted with the same legal milieu with regard to Quasi-States. This is particularly true in the context of the Palestinian case as examined in the previous section, since incorporating Quasi-States under the "States" umbrella for the purpose of aggression will result in prosecuting this entity for aggression without conferring upon it the right to join the ICC or accept its declaration. In addition to that, in this case, the entity would be granted

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275 HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 78 (1948).

276 *See id*.

277 *See* U.N. Charter art. 2, ¶ 1, http://www.un.org/en/sections/un-charter/un-charter-full-text/.

278 *See* G.A. Res. 375 (IV), Draft Declaration on Rights and Duties of States (Dec. 6, 1949), http://legal.un.org/ilc/texts/instruments/english/commentaries/2_1_1949.pdf.

279 *Id*.

280 *Id*.

281 *See* U.N. Charter, *supra* note 277.

282 *See* Anderson, *supra* note 218, at 441–48.

statehood in the context of aggression, yet not be capable of joining multinational entities inasmuch as it would have been rejected for lacking statehood. Such inconsistency is unfavorable to the efficiency and transparency of the international criminal system. Further, conferring statehood on Quasi-States in all contexts is practically impossible to achieve and will certainly encounter widespread rejection from international subjects. Nonetheless, granting these entities some rights while distinguishing them from states in return for specific obligations is a more rational and practical solution that corresponds to their status under international law.

In December of 2017, when the ASP revisited the definition of aggression and considered proposed amendments it should also have considered acknowledging Quasi-States.[283] A definition of aggression which comprises the concept of an entity not recognized as a state would have been useful but did not materialize. As explained above, this omission will turn out to be harmful. To establish a different status for the same entity in different settings would create undesirable ambiguity that would negatively affect the order and stability of international relations.[284] Therefore, the ASP could have avoided this by choosing to amend the current definition of aggression while explicitly including Quasi-states under it.

CONCLUSION AND RECOMMENDATIONS

This Article recommends an amendment to the Rome Statute to include Quasi-States in the definition of aggression, so that the crime of aggression could be applied to armed conflicts involving such entities. If this amendment is accepted, the ICC could then prosecute aggressions committed between Quasi-States such as Cyprus and the Turkish Republic of Northern Cyprus as the former ratified the amendments to the crime of aggression.[285] This amendment would affect the role and powers of the UNSC as well, as the latter would then be in a position where it could declare the use of force involving Quasi-States as illegal under Art 2(4) of the UN Charter, and consequently find it to be an act of aggression and accordingly, refer the situation to the ICC. At present, such stigmatization and criminalization of the use of force against or between Quasi-States is not possible due to the controversial statehood of Quasi-States. More

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283 *See* International Criminal Court Assembly of States Parties Draft Res. ICC-ASP/16/L.10 (Dec. 14, 2017).

284 *See* Anderson, *supra* note 218, at 433.

285 *See* Press Release, International Criminal Court, Andorra, Cyprus, Slovenia, and Uruguay ratify amendments to the Rome Statute on the crime of aggression and Article 8, ICC-ASP-20131001-PR946 (Oct. 1, 2013), https://www.icc-cpi.int/Pages/item.aspx?name=pr946.

importantly, Quasi-States' acts of aggression could be prosecuted under the Rome Statute, allowing for a potentially wider scope of future prosecutions against leaders of current day entities such as IS, Boko Haram and the Taliban. However, even with such an amendment, the possibility that the UNSC condemns acts of aggression committed by or against Quasi-States is unlikely: of the estimated 313 armed conflicts that erupted between 1945 and 2008,[286] the Council only passed resolutions condemning aggression on only a handful of occasions.[287] Since Quasi-States are not members of the ICC, the effect of this amendment in light of UNSC practice will not be far-reaching, and it is still likely that aggression between Quasi-States and states will continue.

Political motives will always threaten the efficiency of prosecuting crimes of aggression and will hinder the application regarding ongoing and future aggressions. Most of the major powers (such as China, Russia, and the U.S.) are unwilling to sign/ratify the Rome Statute, and it remains to be seen how willing the State Parties are to accept an amendment that would increase the efficiency of the international criminal justice system. There is no historical, legal or practical impediment to treating Quasi-States and states equally regarding the crime of aggression. This Article calls for legally assigning a status for unrecognised entities on the international level. Including Quasi-States in the crime of aggression will certainly frustrate states, particularly those facing ongoing conflicts within its borders, and consequently they will most probably refrain from ratifying the amendment.[288] Because of the political nature of the crime of aggression, the international community, excluding Quasi-States, spent more than half a century trying to reach consensus on the current definition Quasi-States. However, throughout the extensive historical debate over the crime of aggression, it was agreed that the crime of aggression was broad enough to include unrecognised entities. This was obvious in the SWGCA debates which were open to member and non-member States.[289] Therefore, the inclusion of Quasi-States under the definition of crime of aggression would be possible in the opinion of the authors. The incorporation of Quasi-States would also police secessionist movements regarding the use of non-peaceful measures in that process and stress the necessity of peacefulness in the context of self-determination. A major obstacle in the application of this amendment is the issue of determining the status of Quasi-States. As demonstrated in the Article, the

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[286] *See* M.Cherif Bassiouni, *Crimes Against Humanity: The Case For A Specialised* Convention, 9 WASH. U. GLOB. STUD. L. REV. 575, 580 (2010).

[287] *See* SHAW, *supra* note 128, 948–49.

[288] *See* Wills, *supra* note 8, at 108.

[289] *See* SWGCA, *supra* note 52.

issue is complex and requires exhaustive examination. This issue will interplay with numerous variables that need to be evaluated according to the circumstances of each case. Numerous NSAs like terrorist groups are not far from attaining Quasi-Statehood, as witnessed in Syria, Iraq, and Libya, where terrorist groups have been in control of considerable parts of the respective territories. In the absence of a competent authority that ought to be responsible for deciding on the question of Quasi-Statehood, the matter will become even more problematic. In this regard, this issue could be resolved by the UNSG establishing a list similar to that of the non-self-governing territories.[290]

Law is not a static but a "living organism" that is always developing; normative commands applicable in the past may change in the present or the future. The objective of any legal system is to serve society, whether on the national or international level, and the efficiency of any legal system should be assessed in light of this objective. Service to society entails peace, security, stability and the rule of law. The inability of the current international system to face these ongoing challenges is striking and should be looked at more closely and actively. The disturbance of peace and stability in one area will certainly affect the international community in its entirety. Thus, it is of prime importance to prosecute this core crime in situations involving Quasi-States, as this would be one step towards maximizing what international criminal justice can achieve in terms of contributing to global peace and security as well as prosperity. Considering the different variables that affect the decision-making process of global players and the historical and legal arguments that were presented throughout the Article, we submit that the explicit inclusion of Quasi-States is the only practical solution for an otherwise unresolved dilemma of current international criminal justice.

[290] *See* Wills, *supra* note 8, at 106–07.