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Punishing Aggression as a Crime Against Humanity: A Noble but Inadequate Measure to Safeguard International Peace and Security

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**PUNISHING AGGRESSION AS A CRIME
AGAINST HUMANITY: A NOBLE BUT
INADEQUATE MEASURE TO SAFEGUARD
INTERNATIONAL PEACE AND SECURITY***

CHET TAN**

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I. INTRODUCTION

The Rome Statute of the International Criminal Court (“ICC”),¹ as summed up by its Preamble, is based upon a recognition that certain crimes “threaten the peace, security and well-being of the world,” and an affirmation that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”² It was in this spirit that, almost a decade after the entry into force of the Rome Statute, a definition for the crime of aggression was finally adopted at the Review Conference held in Kampala, Uganda in 2010.³ However, under the amendments adopted therein,⁴ the ICC can only have jurisdiction over crimes of aggression “committed one year after the ratification or acceptance of the amendments by thirty States Parties,” and the exercise of such jurisdiction will be subject to review of these amendments by the Assembly of States Parties (“States Parties”) “seven years after the beginning of the Court’s exercise of jurisdiction.”⁵ In essence, this means that the ICC will only be able to take notice of cases involving aggression that occur not earlier than 2017, assuming the amendments survive review by the States Parties.⁶

Despite the current unavailability of Article 8*bis* as a remedy to prosecute aggression, Professor Benjamin Ferencz has declared that “[n]ational leaders suspected of planning or committing the crime of aggression may simultaneously be charged with Crimes Against Humanity and War Crimes—which carry the same maximum sentence as aggression.”⁷ Working from this proposition, this brief

1. Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 183/9, July 17, 1998, 2187 U.N.T.S. 90, available at <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> [hereinafter Rome Statute].

2. *Id.* pmbl.

3. Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, May 31–June 11, 2010, 17 [hereinafter Kampala Conference].

4. *Id.* at 17.

5. *Id.* at 17, 19.

6. *Id.* at 19–20.

7. Benjamin B. Ferencz, *Ending Impunity for the Crime of Aggression*, 41

article has two main goals: (1) examining the acts punishable as crimes of aggression in the context of the Kampala Amendments, and (2) determining whether any of the acts of aggression could already fall within the purview of the Rome Statute's provisions on crimes against humanity.

II. AGGRESSION: CIRCA 2017

Although the Rome Statute's provisions outlawing aggression are not yet in force, it is conceivable that *the* purpose behind these provisions can, in the interim, be accomplished in other ways—namely, by prosecuting them under provisions that are currently in force.⁸ Accordingly, the first step of this analysis is to identify the particular actions that the treaty seeks to outlaw and the persons the treaty will punish for their commission.

Article 8*bis* defines aggression 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.”⁹ The States Parties understood this to mean that “the three components of character, gravity and scale must be sufficient to justify a ‘manifest’ determination,” and that “[n]o one component can be significant enough to satisfy the manifest standard by itself.”¹⁰

The second paragraph of Article 8*bis* defines an act of aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”¹¹ It then goes on to enumerate specific “acts of aggression”:

- a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

CASE W. RES. J. INT'L L. 281, 289 (2009).

8. Kampala Conference, *supra* note 3, at 19–20.

9. *Id.* at 18.

10. *Id.* at 22.

11. *Id.* at 18.

- b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- c) The blockade of the ports or coasts of a State by the armed forces of another State;
- d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.¹²

A person is deemed to have committed the crime of aggression when that person commits one of the acts of aggression enumerated in Article 8*bis*, paragraph 2 and that person participated in the “planning, preparation, initiation or execution” of that crime.¹³

Professor Noah Weisbord has suggested that the acts of aggression enumerated in Article 8*bis* is not exhaustive.¹⁴ Recognizing that Article 8*bis* crimes of aggression are outlawed “in accordance with U.N. General Assembly Resolution 3314 (XXIX) of 14 December 1974”—from which the enumerated acts are seemingly drawn—Weisbord convincingly notes that Resolution 3314’s Article 4 states “[t]he acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under

12. *Id.*

13. *Id.*

14. Noah Weisbord, *Judging Aggression*, 50 COLUM. J. TRANSNAT’L L. 82, 93 (2011) (explaining that the gaps in the definition of the crime of aggression will allow for judicial interpretation, which will “not only determine the outcome of, [but also] shape the international legal order”).

the provisions of the Charter.”¹⁵

With respect to persons who may be prosecuted for aggression, Article 25(3)*bis* limits them “only to persons . . . in a position effectively to exercise control over or to direct the political or military action of a State.”¹⁶ As a result, this provision categorically excludes persons that are further down the chain of command, specifically the individual soldiers on the ground and at the front lines.

The ICC’s Elements of Crimes notes that a crime of aggression is composed of the following elements:

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression—the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations—was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.¹⁷

As a result, acts of aggression are only outlawed if the individual

15. *Id.* at 154; *see also* G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 19, U.N. Doc. A/9619art. 4 (Dec. 14, 1974).

16. Kampala Conference, *supra* note 3, at 18.

17. Elements of Crimes, Review Conference of the Rome Statute of the Int’l Criminal Court, ICC-ASP/1/3 and Corr.1, U.N. Doc. PCNICC/2000/1/Add.2 (2010), *available at* <http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf> [hereinafter Elements of Crimes].

satisfies the “material elements of the crime, conceived as conduct, consequences and circumstances,” which “are committed with the requisite intent and knowledge.”¹⁸ The underlying intent of the States Parties in enacting Article 8*bis* can be gleaned from the Rome Statute’s Preamble, which contains a reaffirmation of “the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain 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.”¹⁹ Professor Beth Van Schaack points out that “both Article 2(4) of the U.N. Charter and Resolution 3314 envision unlawful uses of force as existing along a continuum, with aggression at the far end of egregiousness.”²⁰ Thus, identification of specific categories of acts of aggression in Article 8*bis* represents what Weisbord calls the Kampala Conference’s “distinction between a just and an unjust war.”²¹

Having considered the intent behind the provisions punishing aggression and the different acts of aggression, this article will further discuss only the following specific aggressive acts: invasion, bombardment, blockade, allowing territory to be used for acts of aggression, and sending armed groups. It will analyze whether they could be prosecuted under the Rome Statute’s prohibition of crimes against humanity in Article 7 because these are acts of aggression that can be readily targeted at a civilian population. Although it is conceivable that the other enumerated forms of aggression in Article 8*bis* could result in civilian casualties, those categories of aggression, standing alone, do not constitute widespread or systematic attacks against a civilian population as to place them squarely within the purview of Article 7;²² furthermore, any civilian casualties would still be caused by some form of invasion or attack, which is among

18. Weisbord, *supra* note 14, at 92 (citing Roger Clark, *Elements of Crimes in Early Confirmation Decisions of the Pretrial Chambers of the International Criminal Court*, 6 N.Z.Y.B. INT’L L. 209 (2008)).

19. Rome Statute, *supra* note 1, pmb1.

20. Beth Van Schaack, *Negotiating at the Interface of Power and Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT’L L. 505, 521 (2011); *see also* G.A. Res. 3314, *supra* note 15, at 143 (declaring that aggression is the most serious and dangerous form of the illegal use of force).

21. Weisbord, *supra* note 14, at 90.

22. Rome Statute, *supra* note 1, art. 7.

the acts of aggression which this article will consider.

III. CRIMES AGAINST HUMANITY

As noted before, Article 7 of the Rome Statute defines a crime against humanity as an act that is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.²³ Paragraph 2 further defines “attack directed against any civilian population” as a “course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”²⁴

Article 7 enumerates subcategories of acts that could form the basis for a crime against humanity, which include murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, enforced disappearance, apartheid, and other inhumane acts.²⁵ In contrast to the list of acts of aggression in Article 8*bis*, the list of acts that can constitute crimes against humanity is exclusive.²⁶

Note that the definition does not require that the acts outlawed be connected to any armed conflict.²⁷ Commenting on this departure from the traditional formulations of the crime, Professor Bassiouni surmises that “the events of the last 50 years have revealed that ‘crimes against humanity’ occur mostly outside the context of a conflict of an international character, and mostly in internal conflicts and by tyrannical regime victimization.”²⁸ The fact that crimes against humanity need not be committed in the context of an armed

23. *Id.* art. 7.

24. *Id.* art. 7(2)(a).

25. *Id.* art. 7(1).

26. See William Schabas, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE*, 150, 157 (2010) (indicating that Article 7’s supplemental list of punishable acts paired with the ICC’s Elements of Crimes provides an exhaustive enumeration of acts that are punishable as crimes against humanity). *But see*, Jordan J. Paust, *The International Criminal Court Does Not Have Complete Jurisdiction Over Customary Crimes Against Humanity and War Crimes*, 43 J. MARSHALL L. REV. 681, 712 (2010) (arguing that the ICC’s lists of crimes are “not meant to be exclusive or to limit in any way the customary definitions of crimes against humanity and war crimes or the reach more generally of customary international law”).

27. Rome Statute, *supra* note 1, art. 7(1).

28. M. Cherif Bassiouni, *Crimes Against Humanity*, in 3 INTERNATIONAL CRIMINAL LAW 437, 476 (M. Cherif Bassiouni ed., 3d ed. 2008).

conflict is significant because the proscription against acts of aggression finds its roots in the international community's efforts to outlaw the waging of aggressive war.²⁹

Professor M. Cherif Bassiouni distills the requisite elements of a crime against humanity as follows: (1) the acts in question must be part of a State policy; (2) the policy must be to commit specific crimes enumerated in Article 7(1) of the Rome Statute; and (3) the commission of these crimes must be "widespread or systematic."³⁰ He adds that the definition "evidences the need to show a connection between such widespread or systematic violations and a policy by the state directed against a civilian population."³¹ The commission of a crime against humanity in an international context would likely involve some degree of invasion or attack of another State's territory so as to put the aggressor in a position that will physically allow him to inflict the contemplated crime against humanity on the civilian population of the invaded or attacked state. Furthermore, any attempt by the aggressor to perpetrate any of the other crimes against humanity is likely to meet at least some resistance and cause casualties among civilians. Thus, among the different crimes defined in Article 7, this article will consider only murder and extermination.³²

A. MURDER

Murder under Article 7, Paragraph 1(a) has the following elements: (1) the perpetrator killed one or more persons; (2) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (3) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.³³

In a footnote, the Elements of Crimes clarify that "[t]he term 'killed' is interchangeable with the term 'caused death,'" and the

29. See M. Cherif Bassiouni & Benjamin B. Ferencz, *The Crime Against Peace and Aggression: From Its Origins to the ICC*, in 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 207 (M. Cherif Bassiouni ed., 3d ed. 2008).

30. *Id.* at 462.

31. *Id.* at 476.

32. Rome Statute, *supra* note 1, art. 7(1)(a).

33. Elements of Crimes, *supra* note 17, at 5.

same notion is made to apply “to all elements which use either of these concepts.”³⁴ Quoting the ICC, Professor William Schabas notes that murder in this context “may be committed either by act or by omission.”³⁵

With respect to the element of intent, Schabas opines that “[t]he Prosecutor must establish that the perpetrator meant to cause death or was aware that death would occur in the ordinary course of events.”³⁶ However, Schabas also recognizes that intent can be inferred from certain actions, including the use of firearms against unarmed persons.³⁷

B. EXTERMINATION

Extermination under Article 7, Paragraph 1(b) has the following elements:

1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.
2. The conduct constituted, or took place as part of a mass killing of members of a civilian population.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.³⁸

Article 7, Paragraph 2(b) includes within the definition of extermination the “intentional infliction of conditions of life, *inter*

34. *Id.* at 5 n.7.

35. Schabas, *supra* note 26, at 158 (citing Prosecutor v. Bemba, Case No. ICC-01/05–01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 132 (June 15, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>; Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07 Decision on the Confirmation of the Charges, ¶ 287 (Sept. 30 2008), available at <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>).

36. *Id.* at 158.

37. *Id.* (citing Prosecutor v. Bemba, Case No. ICC-01/05–01/08, at ¶ 138).

38. Elements of Crimes, *supra* note 17, at 6.

alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.”³⁹ Footnotes to the Elements of Crimes further elucidate the meaning of the terms used for the elements of extermination as a crime against humanity. The first of these states that the prohibited acts of the perpetrator can “be committed by different methods of killing, either directly or indirectly,” while the second restates the content of Article 7, Paragraph 2(b).⁴⁰ A third footnote expounds on the meaning of the terms “as part of” in the second element, stating that the same “would include the initial conduct in a mass killing.”⁴¹ Schabas explains that this last footnote was meant to counter any claims by perpetrators of initial killings in what would later amount to a mass killing that, at the time they committed their acts, they were not yet participating in a mass killing.⁴²

As noted, the Elements of Crimes characterize extermination as “a mass killing of members of a civilian population.”⁴³ The International Criminal Tribunal for the Former Yugoslavia has held that “there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population.”⁴⁴ Citing the International Criminal Tribunal for Rwanda (“ICTR”), Schabas states that “[i]t is similar to the crime against humanity of murder, except that the killing takes place on a large scale.”⁴⁵ Responsibility for a single or a limited

39. Rome Statute, *supra* note 1, art. 7(2)(b).

40. Elements of Crimes, *supra* note 17, at 6 nn.8–9; *see also* Schabas, *supra* note 26, at 159 (describing the components of the Article 7 crime of extermination).

41. Elements of Crimes, *supra* note 17, at 6 n.10.

42. Schabas, *supra* note 26, at 159.

43. Elements of Crimes, *supra* note 17, at 6 n.10.

44. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 503 (Aug. 2, 2001), *available at* <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>; *see also* Schabas, *supra* note 26, at 160.

45. Schabas, *supra* note 26, at 159 (citing Prosecutor v. Ntakirutimana, Case Nos. ICTR-96-10 and ICTR-96-17-A, Judgment, ¶ 542 (Dec. 13, 2004), *available at* http://www.unict.org/Portals/0/Case%5CEnglish%5CNtakirutimanaE%5Cdecision2%5C041213_appeal_judgement.pdf; Musema v. Prosecutor, Case No. ICTR-96-13-A, Appeals Judgment, ¶ 366 (Nov. 16, 2001), *available at* <http://www.unict.org/Portals/0/Case%5CEnglish%5CMusema%5Cdecisions%5C011116-apl-judg.pdf>; Prosecutor v. Brdjanin, Case No. IT-99-36-T, Judgment, ¶ 388 (Sept. 1, 2004), *available at*

number of killings is insufficient.⁴⁶ To prove what constitutes the appropriate scale of causalities, Schabas adds that “any attempt to set a minimum number of victims in the abstract will ultimately prove unhelpful: the element of massive scale must be assessed on a case-by-case basis in light of the proven criminal conduct and all relevant factors.”⁴⁷

IV. AGGRESSION AS A CRIME AGAINST HUMANITY

Having analyzed what constitutes prohibited acts of aggression and those related crimes against humanity, murder and extermination, questions arise as to whether the former can be absorbed by, and theoretically prosecuted under, the latter. Because the States Parties codified these different acts into provisions punishing different crimes, it should be assumed that the acts of aggression were not meant to be punishable as crimes against humanity, barring occasional overlaps. However, because Article 8*bis* has yet to come into force, it is useful to consider whether certain prohibited acts of aggression could currently be prosecuted under Article 7. Thus, this article will advocate that the liberal application of Article 7 to acts of aggression will take precedence over any attempt to adhere to the intent of the States Parties.

As a preliminary matter, since aggression can only be committed by a person in a position to effectively exercise control over or to direct the political or military action of a State,⁴⁸ all such acts should satisfy the requirement for crimes against humanity of having been committed pursuant to or in furtherance of a State or organizational policy, as required by Article 7(2)(a).⁴⁹

A. INVASION OR ATTACK AS A CRIME AGAINST HUMANITY

An invasion, attack, occupation, or annexation, as contemplated by

tj040901e.pdf).

46. *Id.*

47. *Id.* at 160 (citing Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, ¶ 573 (Jan. 17, 2005), available at http://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf).

48. Kampala Conference, *supra* note 3, at 6; G.A. Res. 3314, *supra* note 15, art. 1.

49. Rome Statute, *supra* note 1, art. 7(2)(a).

Article 8*bis*(2)(a), can constitute murder under Article 7(1)(a) if such act kills one or more persons.⁵⁰ The invasion, occupation, or annexation of another State's territory can easily be considered a widespread attack, as such acts will inevitably cause civilian casualties, especially if the territory invaded, occupied, or annexed has a substantially large civilian population. However, an attack by armed forces alone would have to be part of a broader or more coordinated campaign of attacks before it could be considered "widespread or systematic" under Article 7.⁵¹ As for the elements of knowledge and intent, it stands to reason that the person responsible for the planning, preparation, initiation, or execution of the invasion, attack, occupation, or annexation would be intimately familiar with the scope and objectives thereof.

If the number of civilian casualties caused by an invasion, attack, occupation, or annexation amounts to a mass killing as contemplated by the Elements of Crimes, these acts can also constitute extermination under Article 7(1)(b) in the same manner as murder.⁵² As observed by the ICTR, "the only element that distinguishes these offences is the requirement of the offence of extermination that the killings occur on a mass scale."⁵³

B. BOMBARDMENT AND WEAPON USE AS CRIMES AGAINST HUMANITY

Under Article 8*bis*(2)(b), bombarding the territory of another State, or the use of any weapons by a State against the territory of another State, can also be subsumed under the crime against humanity of murder if one or more persons are killed in the bombardment or killed as a result of the perpetrator's use of weapons.⁵⁴ However, it will have to be established that the bombardment or use of weapons is part of a widespread or systematic attack directed against a civilian population.⁵⁵

50. Kampala Conference, *supra* note 3, at 6; Rome Statute, *supra* note 1, art. 7(1)(a).

51. Rome Statute, *supra* note 1, art. 7(1).

52. Elements of Crimes, *supra* note 17, at 6.

53. Schabas, *supra* note 26, at 160 (citing Prosecutor v. Ntakirutimana, Case Nos. ICTR-96-10 and ICTR-96-17-A, at ¶ 542).

54. Kampala Conference, *supra* note 3, at 18.

55. Rome Statute, *supra* note 1, art. 7(1).

Furthermore, the person responsible for the planning, preparation, initiation, or execution of the bombardment or weapons use must have known that such acts were part of or intended to be part of a widespread or systematic attack directed against a civilian population.⁵⁶ As with attacks under Article 8*bis*(2)(a), bombardment or weapon use can also lead to liability for extermination if such acts result in a significant number of civilian deaths amounting to a mass killing.⁵⁷

C. BLOCKADE AS A CRIME AGAINST HUMANITY

This article also argues that blockading as defined by Article 8*bis*(2)(c) can be prosecuted as the crime against humanity of extermination. States can inflict conditions of life calculated to bring about the destruction of part of a population by using its armed forces to blockade the ports or coasts of a another state, thereby depriving targeted civilian populations of access to food and medicine.⁵⁸ Such an act can cause the death of numerous civilians and be considered a mass killing as the term is understood in the Elements of Crimes. Thus, if the blockade was part of a widespread or systematic effort to deprive a civilian population of access to food and medicine and the perpetrator knew that the blockade was part of or intended to be part of such effort, then the blockade constitutes extermination.⁵⁹

D. ALLOWING TERRITORY TO BE USED FOR ACTS OF AGGRESSION AS A CRIME AGAINST HUMANITY

In rare situations, even the “action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against

56. *Id.*; Kampala Conference, *supra* note 3, at 18; *see also* Elements of Crimes, *supra* note 17, at 5 (clarifying that the intent requirement does not necessitate that the perpetrator knew precise details of the attack, but is satisfied if the perpetrator intended to further the attack).

57. *Compare* Kampala Conference, *supra* note 3, at 18 (defining bombardment as a crime of aggression), *with* Elements of Crimes, *supra* note 17, at 6, *and* Rome Statute, *supra* note 1, art. 7(2)(b) (setting out the requirements for extermination as a crime against humanity).

58. Kampala Conference, *supra* note 3, at 18; Elements of Crimes, *supra* note 17, at 6 n.9.

59. Elements of Crimes, *supra* note 17, at 6 n.9.

a third State,” per Article 8bis(2)(f), could be prosecuted as a crime against humanity.⁶⁰ Allowing the use of territory in this manner can render the responsible parties liable for crimes against humanity that result from such acts. A footnote to the Elements of Crimes adopted by Preparatory Commission notes that a state or organizational policy which has a civilian population as the object of the attack can “in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack.”⁶¹ Thus, liability herein would be akin to that of the general penal law concept of principal by indispensable participation, the common law conspiracy and felony murder doctrines, or the international criminal law concept of Joint Criminal Enterprise.⁶²

However, it should be noted that the link which imputes liability to persons responsible for allowing territory of a State or the “Host State” to be used in this manner is expressly provided for in Article 8bis(1)(f). In contrast, Article 7 and the Elements of Crimes do not codify such a link between persons responsible for allowing territory of a Host State to be used by another party to commit crimes against humanity against third parties.⁶³ Thus, some sort of agency or other relationship may have to be established to hold persons responsible for allowing territory of a Host State to be used by another party to commit crimes against humanity against third parties. Such liability will only be imputed in “exceptional circumstances.”⁶⁴ Furthermore, the person responsible for allowing the territory of the Host State to

60. Kampala Conference, *supra* note 3, at 18.

61. M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 508–09 (2003) [hereinafter INTRODUCTION TO INTERNATIONAL CRIMINAL LAW] (citing Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court, U.N. Doc. PCNICC/2000/ 1/ (Nov. 2, 2000), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/723/17/PDF/N0072317.pdf?OpenElement>).

62. See generally Michael P. Scharf, *Joint Criminal Enterprise, the Nuremberg Precedent, and the Concept of “Grotian Moment”*, in ACCOUNTABILITY FOR COLLECTIVE WRONGDOING 119 (Tracy Isaacs & Richard Vernon eds., 2012).

63. Rome Statute, *supra* note 1, art. 7; see also Elements of Crimes, *supra* note 17, at 5–12 (indicating that Article 7 does not codify liability to third parties for crimes against humanity).

64. INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 61, at 508–09 (citing Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court, U.N. Doc. PCNICC/2000/ 1/ (Nov. 2, 2000), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/723/17/PDF/N0072317.pdf?OpenElement>).

be used for the commission of crimes against humanity by another State must have known that such use was part of or intended to be part of a widespread or systematic attack directed against a civilian population.⁶⁵

E. SENDING OF ARMED GROUPS AS A CRIME AGAINST HUMANITY

Just like invasion, attack, occupation, or annexation, sending armed bands, groups, irregulars, or mercenaries to carry out acts of armed force against another State, as defined in Article 8*bis*(2)(g), could also be prosecuted as murder or extermination, depending on the scale of civilian casualties.⁶⁶ Theoretically, one would only need to substitute armed bands, groups, irregulars, or mercenaries for the armed forces of the sending State. Therefore, given the non-official or irregular nature of the forces that will be carrying out the operative acts, the conduct of these groups must have a greater level of coordination and a farther-reaching scope for the attack to be considered widespread or systematic—certainly a higher threshold than would be imposed on a State’s armed forces carrying out the same acts.

V. LIMITATIONS OF PROSECUTING AGGRESSION UNDER ARTICLE 7

As certain forms of aggression, as defined under the Rome Statute, can already be prosecuted by the ICC, questions arise as to the utility of punishing aggression separately at all. However, when considering the barriers to prosecuting aggression as a crime against humanity under Article 7, the enforcement gap becomes clear between the purpose behind outlawing aggression and the prosecutorial realities the ICC faces today.

First, Article 7 explicitly punishes only attacks directed at civilian populations.⁶⁷ This rules out applying the treaty to acts of aggression committed against the armed forces of another state. As a result,

65. Elements of Crimes, *supra* note 17, at 5 (requiring that crimes against humanity be committed with sufficient knowledge or intent).

66. Compare Kampala Conference, *supra* note 3, at 18 (characterizing the “sending of armed groups” as prohibited aggression), with Elements of Crimes, *supra* note 17, at 5 (outlining requirements for murder under Article 7(1)(a)).

67. Rome Statute, *supra* note 1, art. 7.

citing the ICC, Schabas writes that “[t]he civilian population must be the ‘primary object of the attack’, and not just an incidental victim.”⁶⁸

Secondly, the Rome Statute requires that the attack be widespread in scope or systematic in nature.⁶⁹ This limitation stands in the way of outlawing single acts aimed at specific targets or confined areas that cause substantial casualties such as the blockade of a single port or using an F-16 to destroy an apartment building.⁷⁰ According to Bassiouni, the terms “widespread or systematic” have two clear purposes: to eliminate spontaneous or uncontrolled group conflict from the scope of the crime, and to reflect the existence of State action or policy by State actors and the element of policy for non-state actors.⁷¹ For Bassiouni, this interpretation is derived from the plain language and meaning of Article 7, since the terms “widespread or systematic” characterize not only the manner in which the victimization takes place, but also the very nature of the conduct—reflecting the underlying policy that brought the act about.⁷² Bassiouni also adds that “[t]he danger in interpreting the terms ‘widespread and systematic’ as only descriptive of the manner in which the victimization occurs is that it simply transforms domestic crimes into international crimes on the basis of the quantitative outcome of the harm and the manner in which it is performed without war.”⁷³

In contrast, Professor Leila Sadat Wexler argues that the widespread or systematic attack requirement “collapses the jurisdictional trigger and *actus reus* into one,” thereby limiting the

68. Schabas, *supra* note 26, at 153 (recognizing that while Article 7 requires that the civilian population be targeted, there is no requirement to show that the *entire* population of a geographic entity was targeted). *But see* INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 61, at 470 (countering that civilian deaths do not automatically define attacks on military objectives as crimes against humanity).

69. Rome Statute, *supra* note 1, art. 7(1).

70. *See* Schabas, *supra* note 26, at 154 (citing Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment (June 7, 2001), available at <http://www.unictr.org/Portals/0/Case%5CEnglish%5CBagilishema%5Cjudgement%5Cjudgement%5Cindex.pdf>).

71. INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 61, at 478.

72. *Id.*

73. *Id.*

nature of the crime itself rather than the ICC's jurisdiction.⁷⁴ This issue is ultimately exacerbated by Article 7(2)(a), which limits the meaning of an attack directed against any civilian population to a "course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack"—a limitation some have considered to be nonsensical.⁷⁵

Third, the Rome Statute's exclusive listing of the different crimes against humanity precludes the prosecution of acts of aggression that cannot be absorbed by any of the crimes enumerated in Article 7. This would include, *inter alia*, attacks targeting civilian objects, the use of armed forces in another State's territory in contravention of an agreement, and any attacks targeting another State's armed forces, as discussed above.

VI. DANGERS OF PROSECUTING AGGRESSION UNDER ARTICLE 7

Prosecuting crimes of aggression under the purview of Article 7 could also have widespread consequences not foreseen by the States Parties. Here the danger lies in the dissimilarity between the elements of aggression and crimes against humanity as well as in the effects of disregarding the former to satisfy the latter.

For one, the States Parties to the Rome Statute intended Article 8*bis* to apply only to "a person in a position effectively to exercise control over or to direct the political or military action of [a] State."⁷⁶ However, there is no such limitation for prosecutions under Article 7. On this point, Professor Bassiouni notes:

"Crimes against humanity" are the product of "state action or policy." But only individuals, by commission or omission, are the ones who perform such crimes for or on behalf of, or under color of authority, of their public

74. Leila Sadat Wexler, *First Committee Report on Jurisdiction, Definition of Crimes and Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: OBSERVATIONS AND ISSUES BEFORE THE 1997-98 PREPARATORY COMMITTEE; AND ADMINISTRATIVE AND FINANCIAL IMPLICATIONS 163, 168-69 (M. Cherif Bassiouni ed., 1996) (articulating the jurisdictional limits of the ICC).

75. See Rome Statute, *supra* note 1, art. 7(2)(a); Paust, *supra* note 26, at 691 (describing the significant restrictions associated with the definition of crimes against humanity under the Rome Statute).

76. Elements of Crimes, *supra* note 17, at 43.

position, function, or the power they are given by public authority. While that conduct can be abstractly ascribable to the state, it extends to each individual person who has been part of the decision-making process or part of the execution of those decisions that resulted in the violation of an existing legal norm. At this point, the question becomes one of apportioning legal responsibility between the individual and the collective decision imputable to the group of persons who either shared in the decision, or planned and executed the decision, or who contributed to its realization. Obviously, these questions do not arise with respect to those who physically carry out the acts described in the definition of “crimes against humanity.” For them, the responsibility is direct⁷⁷

In accordance with this interpretation, perpetrators of acts of aggression further down the chain of command could be prosecuted for crimes against humanity, but not for the crime of aggression.

Furthermore, the States Parties intended for Article 8*bis* to only criminalize aggressive acts that have the character, gravity, and scale that constitute manifest violations of the U.N. Charter.⁷⁸ In doing so, they prohibited only those contemplated acts that had the effect of threatening international peace and security, or “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”⁷⁹ Moreover, the States Parties took pains to ensure that only acts of a certain magnitude would ever be considered for prosecution under this provision, to the point of specifying that “a determination [of] whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations,” and that “in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, three components of character, gravity and scale must be sufficient to justify a ‘manifest’ determination.”⁸⁰ As a result, the States Parties took the position that “[n]o one component could be significant enough to satisfy the manifest standard”⁸¹

77. INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 61, at 272.

78. Kampala Conference, *supra* note 3, at 18.

79. *Id.*

80. *Id.* at 22.

81. *Id.*

Ignoring the magnitude requirement would open the door to prosecuting aggressive acts under Article 7 that may fall short of being considered manifest violations of the U.N. Charter as crimes against humanity. These could range from F-16s destroying a nuclear reactor complex to targeted killings using drones, as long as they satisfy the other requirements of a crime against humanity, which Article 7 was ultimately not intended to encompass. Resorting to Article 7 for every incident of unlawful use of armed force among States could also be seen as an imprudent use of international process, which may end up diminishing the gravity of crimes against humanity.

Let there be no mistake: unlawful use of armed force is immoral and should be condemned at every turn. However, the practical realities of the ICC make it difficult to be overzealous when it comes to prosecutions, necessitating the need for diplomatic solutions in dealing with acts of aggression that do not rise to the level of heinousness reserved for crimes against humanity. Unfortunately, as Professor Ferencz puts it, “[o]utdated notions of national sovereignty in an interdependent world obscure the need for change.”⁸²

VII. CONCLUSION

From an advocate’s point of view, it can be argued that certain acts of aggression, as defined in Article 8*bis*, can be prosecuted under Article 7 of the Rome Statute. However, such application of the statute would be quite narrow, limited to the instances when civilian populations are targeted and the attacks are widespread or systematic. Article 7 also cannot absorb several forms of aggression that are outlawed by Article 8*bis*. In the process of forcing Article 7 to conform to acts of aggression, the relevance of the elements of the crime of aggression and the intent of the States Parties in codifying this crime fade into the background, as the raw, operative acts of aggression are shoehorned into the existing categories of crimes against humanity, in the hopes of finding a usable fit.

The costs of such exercises must also be considered. As acts of aggression are viewed through the lens of crimes against humanity, there is a temptation to expand the scope of crimes against humanity

82. Ferencz, *supra* note 7, at 288.

beyond what the States Parties envisioned. Individuals whose actions were never meant to be covered by the crime of aggression may find themselves in danger of being accused of crimes against humanity under Article 7. More importantly, the very essence of crimes against humanity could be threatened.⁸³ Insisting on prosecuting acts of aggression that fall short of such standard of depravity as crimes against humanity may dilute the reprehensibility of these offenses.

Accordingly, this article submits that prosecuting acts of aggression as crimes against humanity is an unsatisfactory remedy to the problem. It compromises the authoritativeness and credibility of the ICC in the interest of expediency. Therefore, although acts of aggression can be prosecuted as crimes against humanity, under the provisions of the Rome Statute currently in force, “[t]he ICC and international criminal justice . . . are too important and too fragile to take liberties with international law.”⁸⁴

Ultimately, there is no substitute for a codified definition of the crime of aggression that is binding on all States Parties, with its elements clearly spelled out, to ensure that all perpetrators thereof will not go unpunished. The limitations and dangers of resorting to the Rome Statute’s provisions outlawing crimes against humanity may be among the strongest arguments for the ratification of the Kampala Amendments. One can hope that the international community will move beyond mere stopgap measures and will work towards effectuating more permanent mechanisms to safeguard international peace and security.

83. Antonio Cassese, *INTERNATIONAL CRIMINAL LAW* 64 (2003) (characterizing crimes against humanity as “particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more human beings”).

84. Theodor Meron, *Defining Aggression for the International Criminal Court*, 25 *SUFFOLK TRANSNAT’L L. REV.* 1, 15 (2002) (exploring the challenges associated with defining crimes of aggression and concluding that a “credible, carefully crafted, precise definition . . . would enhance the prospects for the Preparatory Commission’s adoption . . . and the required majority of States parties’ ratification”).