

## The Missing Pieces in Article 8 *bis* (Aggression) of the Rome Statute

---

David Scheffer\*

I have known Benjamin Ferencz personally since the 1990s when I was Senior Counsel to the U.S. Permanent Representative to the United Nations, Dr. Madeleine Albright, and then U.S. Ambassador at Large for War Crimes Issues heading the U.S. delegation to the United Nations talks that resulted in the Rome Statute of the International Criminal Court (ICC).<sup>1</sup> Throughout that decade, including to the end of the Bill Clinton Administration, and then for years leading up to the Kampala Review Conference of 2010,<sup>2</sup> which I attended as a law professor, he remained a fierce presence prepared at any moment to stare down skeptics of his cause.

Ferencz was a constant source of both inspiration and respectful criticism as he relentlessly sought to influence American policy on the crime of aggression and the ICC. When I signed the Rome Statute on behalf of the United States on December 31, 2000,<sup>3</sup> Ferencz was very much on my mind as one of the most instrumental voices on the illegality of aggression and the imperative need for international justice. He changed the world at Nuremberg, and he certainly influenced the creation of the Rome Statute. The American people owe Ferencz their heartfelt gratitude for a selfless life dedicated to upholding the most humane and noble values of the United States and of international law.

With the same spirit that Ferencz always demonstrates in his quest to rid the world of aggression, I believe that the definition of the crime of aggression (which includes defining an “act of aggression”) contained in article 8 *bis* of the Rome Statute<sup>4</sup> suffers from several shortcomings that ignore the modern realities of warfare. In this essay, I briefly set forth those defects.

*Non-state actors.* War during the twenty-first century often will not be fought conventionally between nations. Non-state actors like the Islamic State of Iraq and Syria (ISIS), Al Qaeda, Boko Haram, the Lord’s Resistance Army, and al-Shabab,

---

\* David Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University Pritzker School of Law.

<sup>1</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), rev. 2010 [hereinafter Rome Statute]. See also DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 163–247 (2012).

<sup>2</sup> International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Doc. RC/Res. 6 (June 11, 2010).

<sup>3</sup> Steven Lee Myers, *U.S. Signs Treaty for World Court to Try Atrocities*, N.Y. TIMES, Jan. 1, 2001, at A1, <http://www.nytimes.com/2001/01/01/world/us-signs-treaty-for-world-court-to-try-atrocities.html>.

<sup>4</sup> Rome Statute, *supra* note 1, art. 8 *bis*.

to name only a few past and present, will dominate the theaters of conflict and hostilities. Unfortunately, because it is grounded in General Assembly Resolution 3314 (XXIX) of December 14, 1974,<sup>5</sup> article 8 *bis*(2) of the Rome Statute, defining “act of aggression,” is already exceptionally antiquated. The definition is relevant only for the actions of states (including “armed bands, groups, irregulars or mercenaries” sent by or acting *on behalf of a state*).<sup>6</sup>

Article 8 *bis*(1) defines the “crime of aggression” in terms of what a person does in holding a “position effectively to exercise control over or to direct the political or military action of a State.” There is no opportunity for the ICC to prosecute an individual for aggression when he acts in a leadership capacity to guide a non-state entity. The ICC Prosecutor thus is disarmed in connection with vast exercises of aggressive warfare waged by non-state entities across national boundaries. Internal aggression, which is a favorite tactic of ISIS and other non-state actors determined (sometimes successfully) to seize territory within a state, also escapes the article 8 *bis* definition.

*Cyber warfare.* The many manifestations of cyber warfare have become a common staple of international affairs<sup>7</sup> and yet the entire concept is absent from the article 8 *bis* definition. This is unsurprising given the fact that cyber warfare did not exist in 1974 when the General Assembly defined acts of inter-state aggression. But its absence from article 8 *bis* is a glaring omission in modern times and will cripple the ICC in how it will investigate aggression that may consist solely or largely of cyber warfare tactics.

Cyber warfare refers, at least by one definition, to “the actions by a nation-state or international organization to attack and attempt to damage another nation’s computers or information networks through, for example, computer viruses or denial-of-service attacks.”<sup>8</sup> The description of cyber warfare, however, continues to evolve and, in my view, certainly involves actions by non-state actors such as ISIS, other terrorist organizations, and even corporate interests that might one day engage in such actions to disrupt part of a nation’s infrastructure in a manner that imperils the national security or democratic integrity of that country.

For example, if a state or a non-state entity were to use cyber warfare to seriously undermine the democratic processes of a target state and perhaps significantly influence the outcome of elections, that action should not be immune from ICC investigation as an act of aggression.<sup>9</sup> The same could be said of cyber

---

<sup>5</sup> Definition of Aggression, G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. No. 31, at 142–44, U.N. Doc. A/9631 (Dec. 14, 1974).

<sup>6</sup> Rome Statute, *supra* note 1, art. 8 *bis*(2)(g).

<sup>7</sup> See, e.g., Rand Corporation, *Cyber Warfare*, [www.rand.org/topics/cyber-warfare.html](http://www.rand.org/topics/cyber-warfare.html); W.J. Lynn, III, *Defending a New Domain: The Pentagon’s Cyber Strategy*, FOREIGN AFF., September/October 2010, at 97; R.A. CLARKE AND ROBERT K. KNAKE, CYBER WAR (2010); NEWTON LEE, COUNTERTERRORISM AND CYBERSECURITY: TOTAL INFORMATION AWARENESS 99–118 (2013); JEFFREY CARR, INSIDE CYBER WARFARE: MAPPING THE CYBER UNDERWORLD (2d ed., 2011).

<sup>8</sup> Rand Corporation, *supra* note 7.

<sup>9</sup> The prospect of Russian cyber warfare to influence the 2016 presidential elections in the United States is a prominent recent example. See, e.g., Eric Lipton, David E. Sanger & Scott Shane, *The Perfect Weapon: How Russian Cyberpower Invaded the U.S.*, N.Y. TIMES (Dec. 13,

attacks that shut down a nation's power grid or disable vital communications or transportation networks. All of this is currently the subject of intense speculation, protective measures, and action by governments. One must recognize, however, that the United States and its allies reportedly use cyber attacks to defend against major threats, such as nuclear ones, from such adversaries as North Korea and Iran.<sup>10</sup> The distinction between waging cyber aggression and engaging in cyber self-defense measures would rest upon the "character, gravity, and scale" that "constitutes a manifest violation of the Charter of the United Nations."<sup>11</sup> This would surely be a complex calculation for the ICC to adjudicate, but to ignore it would be to miss the elephant in the room.

*Responsibility to Protect.* A parallel development in the years leading to the Kampala Review Conference, where the crime of aggression was defined for purposes of the Rome Statute, was the responsibility to protect principle (R2P),<sup>12</sup> endorsed by the UN General Assembly in 2005 and of the same legal authority as General Assembly Resolution 3314 of 1974. R2P has not been implemented as originally envisaged, with the war and humanitarian catastrophe in Syria being Exhibit A. The concern has long festered that an enforceable crime of aggression in the Rome Statute could undermine any chance for R2P to take firm hold among nations to prevent or end the commission of atrocity crimes. Policy-makers and military commanders likely would hesitate to intervene across borders to confront genocide, crimes against humanity (including ethnic cleansing), and war crimes imperiling a civilian population because of fear that the charge of aggression, involving individual criminal liability, would be levied against them if they act under R2P even with Security Council approval. Such approval may be

---

2016), <https://www.nytimes.com/2016/12/13/us/politics/russia-hack-election-dnc.html>; Ellen Nakashima, *Obama Administration Is Close to Announcing Measures to Punish Russia for Election Interference*, WASH. POST (Dec. 27, 2016), [https://www.washingtonpost.com/world/national-security/the-white-house-is-scrambling-for-a-way-to-punish-russian-hackers-via-sanctions/2016/12/27/0eee2fdc-c58f-11e6-85b5-76616a33048d\\_story.html?utm\\_term=.7aeee7629570](https://www.washingtonpost.com/world/national-security/the-white-house-is-scrambling-for-a-way-to-punish-russian-hackers-via-sanctions/2016/12/27/0eee2fdc-c58f-11e6-85b5-76616a33048d_story.html?utm_term=.7aeee7629570); David E. Sanger, *Putin Ordered 'Influence Campaign' Aimed at U.S. Election, Report Says*, N.Y. TIMES (Jan. 6, 2017), [https://www.nytimes.com/2017/01/06/us/politics/russia-hack-report.html?rref=collection%2Fnewseventcollection%2Frussian-election-hacking&action=click&contentCollection=politics&region=stream&module=stream\\_unit&version=latest&contentPlacement=9&pgtype=collection](https://www.nytimes.com/2017/01/06/us/politics/russia-hack-report.html?rref=collection%2Fnewseventcollection%2Frussian-election-hacking&action=click&contentCollection=politics&region=stream&module=stream_unit&version=latest&contentPlacement=9&pgtype=collection).

<sup>10</sup> See, e.g., David E. Sanger and William J. Broad, *Trump Inherits Secret Cyberwar on North Korea*, N.Y. TIMES, Mar. 5, 2017, at A1, [https://www.nytimes.com/2017/03/04/world/asia/north-korea-missile-program-sabotage.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&\\_r=0](https://www.nytimes.com/2017/03/04/world/asia/north-korea-missile-program-sabotage.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&_r=0); Joseph Menn, *Exclusive: U.S. Tried Stuxnet-style campaign against North Korea but failed – sources*, REUTERS, May 29, 2015, <http://www.reuters.com/article/us-usa-northkorea-stuxnet-idUSKBN0OE2DM20150529>.

<sup>11</sup> Rome Statute, *supra* note 1, art. 8 *bis*(1).

<sup>12</sup> G. A. Res. 60/1, 2005 World Summit Outcome Resolution, ¶¶138–39 (Sept. 16, 2005). See also RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21ST CENTURY (Richard H. Cooper & J. Voinov Kohner eds., 2009); GLOBAL CENTRE FOR RESPONSIBILITY TO PROTECT, [www.globalr2p.org/](http://www.globalr2p.org/); UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND RESPONSIBILITY TO PROTECT, <http://www.un.org/en/genocideprevention/>.

interpreted as not endorsing some of the military actions a nation's armed forces might take to end the atrocity crimes and protect civilians, particularly for the long term.

Article 8 *bis* does not explicitly accommodate R2P as an exception to aggression, although one might interpret article 8 *bis* to exclude R2P from any "manifest violation of the Charter of the United Nations" because of R2P's requirement for Security Council approval for any military intervention. While that may suffice as a matter of strict legal interpretation, diplomats in capitals and at the United Nations may not see it that way as a practical matter. Their instinct will be to forego R2P because of the risk of an aggression charge, regardless of its likelihood of success at the ICC.

Each of these three shortcomings could be overcome easily with minor amendments to article 8 *bis* of the Rome Statute.<sup>13</sup> The ICC Assembly of States Parties should be encouraged to discuss such a prospect soon. The one certainty is that crimes of aggression will not abate and R2P will not be fully realized until there is a realistic recognition of these particular acts in the Rome Statute.

---

<sup>13</sup> See David Scheffer, *Amending the Crime of Aggression under the Rome Statute*, in *THE CRIME OF AGGRESSION: A COMMENTARY* 1480 (Claus Kreß & Stefan Barriga eds., 2017).