Victims of the Crime of Aggression

ERIN POBJIE

A. Introduction

The International Criminal Court is the first international criminal tribunal to confer significant procedural rights on victims of the crimes within its jurisdiction. Victims have the right to participate in the proceedings if their personal interests are affected,[1] benefit from protection and special measures[2] and may seek reparations from the convicted person.[3] The Court's Rules of Procedure and Evidence define victims as individuals, organisations and institutions that suffer harm as a result of crimes within the Court's jurisdiction.[4] Once the amendments to the Rome Statute of the International Criminal Court that were adopted at the Review Conference in Kampala enter into force,[5] this will include the crime of aggression. Unlike the other crimes within the Court's jurisdiction – genocide, crimes against humanity and war crimes – individuals have never been recognised as victims of this crime, nor of the underlying State act of aggression. Instead, the protected objects of the international law prohibition of aggression are State sovereignty and international peace.

This raises the question: can individuals or States be victims of the crime of aggression under the Rome Statute, and therefore avail themselves of the Statute's restorative justice provisions? This chapter critically examines the key legal issues and arguments in favour and against this proposition to determine the correct position. Section B analyses whether individuals can meet the definition of 'victim' in respect of the crime of aggression. This analysis focuses on the interpretation of 'harm' and the required causal nexus. Section C debates whether individuals should be recognised as victims of this crime. Section D then examines whether States can or should be recognised as victims of the crime of aggression for the purposes of the Rome Statute.

This chapter will argue that although aggression can be distinguished from the other crimes within the Court's jurisdiction on the basis that individuals do not have an affected legal interest, the definition of 'victim' in the Rules of Procedure and Evidence does not require a legal interest to be affected in order for 'harm' to arise. Accordingly, individuals could meet the definition of 'victim' in

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[1] Article 68(3) of the Statute. All references to an article refer to the Rome Statute unless otherwise indicated.
[2] Articles 57, 68(1) and rules 87(1) and 88(1), *Rules of Procedure and Evidence of the International Criminal Court*, ICC-ASP/1/3 (Part.II-A). All references to a rule refer to the Rules of Procedure and Evidence of the International Criminal Court unless otherwise indicated.
[3] Article 75(2).
[4] Rule 85.
[5] Review Conference RC/Res.6, 'The Crime of Aggression', 11 June 2010, in *Review Conference Official Records*, RC/11, part II, 17.

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respect of the crime of aggression. However, this represents a surprising and significant development in the history of the crime of aggression that has passed virtually unnoticed.[6] If States support this development, it will be a positive step towards realising the goal of delivering justice for victims of all crimes within the Court's jurisdiction regardless of artificial legal distinctions. Although the definition of 'victim' could also be liberally interpreted to include States in respect of the crime of aggression for the purposes of the Rome Statute, doing so does not provide significant advantages to States and would unfairly prejudice other victims of the crimes within the Court's jurisdiction.

B. Can Individuals Be Victims of the Crime of Aggression under Rule 85(a)?

The definition of 'victim' is set out in rule 85 of the Rules of Procedure and Evidence, and provides as follows:

> For the purposes of the Statute and the Rules of Procedure and Evidence:
>
> (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
>
> (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

Victim status is granted in respect of concrete judicial proceedings before the Court.[7] In respect of individuals applying to participate in the proceedings, the criteria established by rule 85(a) for recognition of victim status are that:

> (i) his or her identity as a natural person appears duly established;
> (ii) the events described in the application for participation constitute(s) one or more crimes within the jurisdiction of the Court and with which the suspect is charged; and
> (iii) the applicant has suffered harm as a result of the crime(s) with which the suspect is charged.[8]

To be considered victims at the reparations stage, individuals must demonstrate that they have suffered harm as a result of the crimes with which the accused person has been convicted.[9]

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[6] See C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2013), at 292–301; F. Rosenfeld, 'Individual Civil Responsibility for the Crime of Aggression', *Journal of International Criminal Justice*, 10 (2012), 249–265; J. N. Boeving, 'Aggression, International Law and the ICC: An Argument for the Withdrawal of Aggression from the Rome Statute', *Columbia Journal of Transnational Law*, 43 (2004–2005) 557–611, at 583–88.

[7] See F. Eckelmans, 'The ICC's Practice on Victim Participation' in T. Bonacker and C. Safferling (eds.), *Victims of International Crimes: An Interdisciplinary Discourse* (The Hague: T.M.C. Asser Press, 2013) 189–222, at 196.

[8] Prosecutor v. Laurent Gbagbo, Second Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-02/11-01/11-384, 6 February 2013, para. 25.

[9] Article 75(2); Rules 85(a) and 98(1).

At first glance, there is nothing in the text of rule 85(a) that excludes the application of the definition of 'victim' to the crime of aggression. However, everything turns on the concept of 'harm' and the required causal link between such harm and the crime of aggression. The following discussion will explain why rule 85(a) is open enough to sustain doubt about whether the definition of 'victim' applies to the crime of aggression.

I. The Notion of 'Harm'

Unlike the definition of 'victim' in the Rules of Procedure and Evidence of the International Criminal Tribunals for the former Yugoslavia and Rwanda,[10] the International Criminal Court definition does not require a victim to have been a target of the crime, but is instead based on the notion of harm.[11] The jurisprudence of the Court on the meaning of 'harm' has developed for over ten years since the Court's establishment in relation to the crimes within its existing jurisdiction. As the following discussion will reveal, this jurisprudence is based on victims' rights under international human rights and humanitarian law, and assumes that a protected legal interest of the victim is necessarily affected by the crime in question. But the crime of aggression can be distinguished from the other crimes within the Court's jurisdiction, since individuals have no affected legal interest in respect of violations of the *ius ad bellum*. This part will argue that this distinction justifies a closer examination of the correct interpretation of 'harm' under rule 85(a) and in particular, whether such harm requires a legal interest to be affected.

The victim provisions in the Rome Statute reflect a growing emphasis in international human rights law and international humanitarian law on the role of victims.[12] Victims of violations of human rights law have a right to an effective remedy.[13] Aspects of the right to a remedy include the right to justice, the right to

[10] ICTY Rules of Procedure and Evidence, adopted 11 Feb 1994, as amended 22 May 2013, rule 2; ICTR Rules of Procedure and Evidence, adopted 29 June 1995, as amended 10 April 2013, rule 2.

[11] M. C. Bassiouni, 'International Recognition of Victims' Rights', *Human Rights Law Review*, 6 (2006), 203–79, at 243.

[12] Situation in the Democratic Republic of the Congo, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr, 17 January 2006, para. 50, citing W. A. Schabas, *An Introduction to the International Criminal Court,* 2nd edn (Cambridge University Press, 2004), 172.

[13] See, e.g., African Charter on Human and Peoples' Rights (adopted by the Organization of African Unity 17 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev. 5, article 7; American Convention on Human Rights (signed by the Organization of American States 22 November 1969, entered into force 18 July 1978) OEA/Ser. L/V/II, article 25; European Convention for the Protection of Human Rights as Amended by Protocols 11 and 14 (opened for signature 4 November 1950, entered into force 3 September 1953) ETS 5, article 13; International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, article 2(3); International Convention for the Protection of all Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) A/61/488, articles 20(2), 24(2) and (4); Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, article 14.

know the truth and the right to receive reparations,[14] although the extent to which these rights are established under customary international law remains uncertain. In transitional justice settings it is often argued (though strongly contested) that the State's obligation to address prior human rights violations may be modified in view of the political context.[15] There is also a movement towards recognising the right of victims of violations of international humanitarian law to a remedy.[16] According to the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ('UN Basic Principles and Guidelines') which the General Assembly adopted without dissent, individual victims of serious violations of international humanitarian law are entitled to reparations from the State under customary international law.[17] This remains a highly controversial notion[18] and there is currently no means for individuals to enforce any such rights.

The rights of victims under international human rights law in particular have influenced the Court's interpretation of 'harm' for the purposes of rule 85(a). Pre-Trial Chamber I of the Court has noted that:

> The term 'harm' is not defined either in the Statute or in the Rules. In the absence of a definition, the Chamber must interpret the term on a case-by-case basis in the light of article 21 (3) of the Statute, according to which '[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights'.[19]

The Chamber held that 'emotional suffering, physical suffering and economic loss constitute harm' for the purpose of rule 85(a) 'in accordance with internationally recognised human rights'.[20] In reaching this conclusion, the Court referred to the 1985 Basic Principles of Justice for Victims of Crime and Abuse of Power ('1985 Declaration'), the UN Basic Principles and Guidelines and the case law of the Inter-American Court of Human Rights and European Court of Human Rights.[21] The Appeals Chamber has confirmed that '[m]aterial, physical, and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim'.[22]

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[14] General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, UN Doc. A/RES/60/147.
[15] See D. Orentlicher, 'Settling Accounts Revisited: Reconciling Global Norms and Local Agency', *International Journal of Transitional Justice*, 1 (2007), 10–22; L. Mallinder, 'Can Amnesties and International Justice be Reconciled?', *International Journal of Transitional Justice*, 1 (2007), 208–30; D. Orentlicher, *'Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity: Addendum'*, E/CN.4/2005/102/Add.1. (2005), principle 24.
[16] See Bassiouni, *supra* note above n.11, at 213; L. Zegveld, 'Victims' Reparations Claims and International Criminal Courts', *Journal International Criminal Justice*, 8 (2010), 79–111, at 79.
[17] 2005 General Assembly Resolution 60/147, *supra* note 14, principles 3(d) and 18.
[18] C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2012), 18–21.
[19] Situation in the Democratic Republic of the Congo, *supra* note 12, para. 81.
[20] Ibid., paras. 115–16, 146.
[21] Ibid.
[22] Prosecutor v. Lubanga Dyilo, Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, para. 1.

The Court's interpretation of 'harm' for the purpose of rule 85(a) arguably draws on international human rights law due to an assumption that victims of the crimes before the Court have suffered the same 'harm' as a result of both the violation of international human rights and/or humanitarian law and the related international criminal conduct. For the crimes within the Court's existing jurisdiction, the victims before the Court are usually also victims of a violation of international human rights law and/or international humanitarian law. The crimes in question are often a facet of a violation of the State's obligations under international law, but attached to an individual as a means of sanction and deterrence. Under the Rome Statute, '[t]he individual perpetrator is not only criminally responsible for the crimes he has committed towards the international community, but also liable for the harm he has caused towards *the victims being the object of protection of the criminal norms*'.[23] This reasoning appears to underpin the Court's jurisprudence on the notion of 'harm', since in respect of most other crimes within the Court's jurisdiction, individuals are the protected object of the criminal norm. However, this is not the case with the crime of aggression.

II. Distinguishing the Crime of Aggression

The crime of aggression can be distinguished from the other crimes within the Court's jurisdiction on the basis that individuals have no affected legal interest since the object of the prohibition of aggression and the associated crime of aggression is international peace. Unlike the other crimes within the Court's jurisdiction, the crime of aggression entails a violation of the *ius ad bellum* rather than the *ius in bello* or international human rights law. The *ius ad bellum* is directed at protecting the territorial integrity and political independence of sovereign States by placing limits on the resort to armed force between them. Under the *ius ad bellum*, aggression is considered 'the most serious and dangerous form of the illegal use of force'.[24] The nature of the crime of aggression results in important differences between this crime and the other crimes within the Court's jurisdiction, which are detailed below.

1. The Protected Interest of the Crime of Aggression is that of the State

The definition of the underlying act of aggression in article 8 *bis*(2) of the Rome Statute confirms that the protected interest of this crime is that of the State and not individuals. Article 8 *bis*(2) defines '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

[23] B. Broomhall, 'Commentary on Article 51: Rules of Procedure and Evidence' in O. Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edn (Munich: C. H. Beck, 2008), 1033–1052, at 1033, at margin note 85 (emphasis added).

[24] General Assembly, 'Definition of Aggression', 14 December 1974, GA Res. 3314 (XXIX), preamble; 2010 Resolution on the Crime of Aggression, *supra* note 5, 'Understandings Regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, 11 June 2010, in Review Conference Official Records, RC/10/Add.1, annex III, para. 6.

Charter of the United Nations'.[25] Each act set out in the list in article 8 *bis*(2)(a) to (d) refers to invasion, bombardment, blockade or attack of or against 'the territory of another State'. The acts listed in article 8 *bis*(2)(e) to (g) also refer to acts which violate the territorial sovereignty of another State due to lack of consent, complicity in an act of aggression by a third State or through sending non-State armed actors that carry out grave acts of armed force against another State.[26] In all cases, the conduct is directed against the victim State, and human casualties are not referred to nor will necessarily result from the act of aggression.[27] The amendments to the Elements of Crime adopted in the 2010 Resolution on the Crime of Aggression confirm the State-centric nature of the crime of aggression as a leadership crime attaching to a wrongful State act.[28] A 'manifest' violation of the UN Charter is an element of the crime.[29] The UN Charter envisages a State as the victim of a violation of the prohibition of the threat or use of force in article 2(4), and of an armed attack under article 51. Accordingly, harm arising from aggression is harm to State interests.

2. No Recognition of Individuals as Victims of Crimes Against Peace

An analysis of the historical development of the crime shows that individuals have never been considered victims of crimes against peace. There is no State practice recognising individual victims of the crime of aggression, although this could be because there has been no prosecution for crimes against peace since the International Military Tribunals.[30] There is also no discernible *opinio iuris* that individuals can be victims of the crime of aggression. Prior to Nuremberg, there were some calls for Kaiser Wilhelm to face prosecution for starting World War I, which were motivated by a desire to hold him to account for the deaths of individuals caused by that war.[31] The IMT at Nuremberg addressed harm to individuals through the other crimes within its jurisdiction and not crimes against peace.[32] However, it is important to note the historical context of these prosecutions – the lack of attention to individual victimisation arising from the crime of aggression may have been a reflection of the state of international law at the time in relation to the status of the individual. Immediately after World War II, international law was in a state of flux between the old order based on the Westphalian system of international law and the new order in which individuals were recognised as subjects and objects of international law. The Nuremberg trials were

[25] Emphasis added.
[26] See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports (1996) 226.
[27] Boeving, *supra* note 6, at 588.
[28] 2010 Resolution on the Crime of Aggression, *supra* note 5, annex II, Elements 2 and 3.
[29] Article 8 *bis*(1); 2010 Final Draft Understandings, *supra* note 24, para. 7.
[30] C. Kreß, and L. von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression', *Journal of International Criminal Justice*, 8 (2010), 1179–217, at 1181–82.
[31] See K. Sellars, 'Delegitimizing Aggression: First Steps and False Starts after the First World War', *Journal of International Criminal Justice*, 10 (2012), 7–40, at 7–8.
[32] 'Charter of the International Military Tribunal', in *Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government for the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major war Criminals of the European Axis,* 8 August 1945, 82 UNTS 284, Annex, articles 6(b) and (c).

also influenced by the common law tradition of the American prosecutors, which does not usually allow for victim participation or compensation in respect of criminal proceedings.[33]

3. No Opinio Iuris *Recognising Individuals as Victims of this Crime*

The *travaux préparatoires* of the 2010 Resolution on the Crime of Aggression also show that the drafters understood that States, rather than individuals, are victims of aggression. The Proposal Submitted by Germany to the Preparatory Commission for the International Criminal Court sums up the conventional view well:

> We share the view expressed by many delegations that the armed attack on the territorial integrity of another State without any justification represents indeed the very essence of the crime of aggression. While criminal norms concerning genocide, war crimes and crimes against humanity aim at protecting human life or physical integrity, a provision on the crime of aggression protects basically the territorial integrity of states from flagrant and wilfull [sic] violations through means of war even if genocide, war crimes or crimes against humanity should not occur. … While war crimes or crimes against humanity committed in the field will often be difficult to be imputed to leaders in the centres of command, a provision on aggression aims exclusively and directly at those responsible for the war as such.[34]

Individual victims of the crime of aggression were not considered during the negotiations or drafting of the 2010 Resolution on the Crime of Aggression. The same body – the Preparatory Commission – was mandated with preparing the draft Rules of Procedure and Evidence (including the victim definition) and proposals for the definition of the crime of aggression and related amendments to the Statute,[35] although these were drafted by separate working groups.[36] The Preparatory Commission appears not to have considered whether the victim provisions would apply to the crime of aggression, nor the impact of the proposed aggression amendments on the victim provisions in the Statute and Rules of Procedure and Evidence. In the lead-up to and during the Review Conference in Kampala, delegates also had the opportunity to consider the impact of the 2010 Resolution on the Crime of Aggression on the victim provisions in the Statute and did not do so.

The topic '[t]he impact of the Rome Statute system on victims and affected communities' was one of the sub-items discussed at the Review Conference under the agenda item 'Stocktaking of international criminal justice'.[37] One of the focal points for the stock-taking was 'to engage victims and affected communities in the Review Conference and to recall the importance of the Rome Statute

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[33] Zegveld, *supra* note above n.16, at 86–87 (footnotes omitted).
[34] 'Proposal Submitted by Germany: Definition of the Crime of Aggression', 30 July 1999, UN Doc. PCNICC/1999/DP.13; reprinted in *19999 Compilation of Proposals*, at 6. (emphasis added).
[35] 'Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', 17 July 1998, UN Doc. A/CONF.183/13.
[36] The Working Group on the Rules of Procedure and Evidence, and the WGCA (later the SWGCA) respectively.
[37] 2010 Resolution on the Crime of Aggression, *supra* note 5, part II, para.5 and annex IV.

system and the Court for victims and affected communities'.[38] The stock-taking process on victims included a discussion paper written 'in consultation with a wide range of civil society actors and victim representatives, as well as the Court',[39] a high level panel discussion, round-table discussions, and side-events,[40] and written reports by major NGOs.[41] Despite this fertile ground for consideration of the impact of the 2010 Resolution on the Crime of Aggression on victims and affected communities, 'there were few concrete outcomes in this process as states parties focused their attention on the crime of aggression, the formal discussion of which took place in the second week of the Review Conference'.[42] During the negotiations on the 2010 Resolution on the Crime of Aggression, the issue of the impact of the amendments on individual victims continued to be neglected by both State delegates and NGOs. Given that the 2010 Resolution on the Crime of Aggression was the result of consensus by State Parties to the Rome Statute and also prominent Non-States Parties including the United States, this is strong evidence that there is no *opinio iuris* recognising individuals as victims of aggression under customary international law.

4. Potential Bases for Recognising Individuals as Victims of the Crime of Aggression

Despite the foregoing, there is some limited support for the position that a procedural right of individuals to reparations is emerging for violations of the *ius ad bellum*. International law already recognises harm to individuals from aggression, albeit through the laws of diplomatic protection, which employs the legal fiction of ascribing such harm to the victim's State of nationality.[43] Though not expressly condemning the State acts as aggression, the Security Council established the United Nations Claims Commission ('UNCC') under Chapter VII of the UN Charter to determine reparations payable as a result of the 'unlawful invasion and occupation' of Kuwait.[44] The Eritrea-Ethiopia Claims Commission ('EECC') is another example of an international commission established to settle 'all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party' that related to the armed conflict between those two States in 1998-2000 and which resulted from violations of international

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[38] Assembly of States Parties, *Report of the Bureau on Stocktaking: The Impact of the Rome Statute System on Victims and Affected Communities,* ICC-ASP/8/49 (18 March 2010), at 1.
[39] Review Conference of the Rome Statute, *The Impact of the Rome Statute System on Victims and Affected Communities,* RC/ST/V/INF.4 (30 May 2010).
[40] See Coalition for the International Criminal Court, Report on the First Review Conference on the Rome Statute (2010), at 26–28 for an overview of the stock-taking agenda.
[41] See, e.g. Amnesty International, *International Criminal Court: Making the Right Choices at the Review Conference* (2010).
[42] L. von Braun and A. Micus, 'Judicial Independence at Risk: Critical Issues Regarding the Crime of Aggression Raised by Selected Human Rights Organizations', *Journal of International Criminal Justice*, 10 (2012), 111–32, at 116. (footnote omitted).
[43] UN International Law Commission, *Draft Articles on Diplomatic Protection*, General Assembly, 61st Session. [Provisional Verbatim Record], Supplement No. 10 (A/61/10) (2006), commentary to article 1, para. 3.
[44] Security Council, Resolution 687 (1991) concerning Iraq-Kuwait, 3 April 1991, UN Doc. S/RES/687, para. 19; and Resolution 692 (1991) concerning Iraq-Kuwait, 20 May 1991, UN Doc. S/RES/692, para. 3.

law.[45] However, individual victims and corporations did not have legal standing before these claims commissions, but had to present their claims through their own government, or through an international organisation where this was not possible.[46] Furthermore, 'both the UNCC and the EECC were ad hoc responses to specific conflicts … they do not constitute sufficient state practice upon which a customary right to reparation for violations of the *ius ad bellum* could be grounded'.[47]

Another potential basis for the recognition of individual rights in respect of the crime of aggression is under international human rights law. One could argue that the right to life,[48] for instance, is violated when an individual in State A is killed as a result of an attack by the armed forces of State B against the territory of State A. But strictly speaking, such a death would potentially constitute a separate violation of international law – human rights law – and not a violation of the *ius ad bellum*. Furthermore, the aggressor State will not typically owe extraterritorial human rights obligations to nationals of the victim State under human rights treaties apart from exceptional situations, such as when it exercises State agent authority and control over an individual, or effective control over an area 'as a consequence of lawful or unlawful military action'.[49] The extraterritorial applicability of human rights norms that have crystallised into customary international law depends on the particular right in question.[50] It is arguable that the duty to respect the right to life under customary international law contains no such limitations.[51] However, the complex interplay between international human rights law and international humanitarian law during an armed conflict must also be considered, particularly in relation to the rules of targeting and proportionality under the latter.[52]

Although a death resulting from an act of aggression is factually caused by that act, the principles of legal causation require a specific form of causal nexus between an act (or omission) and its consequence, which would not necessarily be met. The determination of the legality of the use of force and whether the

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[45] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (12 December 2000).
[46] Zegveld, *supra* note above n.16, at 240, footnote 196.
[47] Rosenfeld, *supra* note 6, at 262.
[48] E.g. International Covenant on Civil and Political Rights, *supra* note above n.13, article 6.
[49] See, e.g. Al-Skeini and ors v. The United Kingdom [GC], no. 55721/07, ECHR 2011, paras. 137–38.
[50] See W. Johnson and D. Lee (eds.), *US Operational Law Handbook 2014* (Charlottesville: International and Operational Law Department, The Judge Advocate General's Legal Center and School, 2014) at 51–52: 'In contrast to much of human rights treaty law, fundamental customary IHRL binds a State's forces during all operations, both inside and outside the State's territory. But not all customary IHRL is considered to be fundamental … Non-fundamental human rights law binds States to the extent and under the particular circumstances those IHRL tenets are customarily applied.'
[51] D. Kretzmer, 'Targeted Killings of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', EJIL, 16 (2005), 171–212, at 184–85.
[52] See UN Human Rights Committee, *General Comment 29: States of Emergency*, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001); Nuclear Weapons Case, *supra* note 26, para. 25; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports (2004) 136, para. 106; Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ Reports (2005) 116, para. 216; Hassan v. The United Kingdom [GC], no. 29750/09, ECHR 2014.

crime of aggression has taken place is a separate matter from human rights violations, although the crime 'invariably will result in subsequent crimes within the jurisdiction of the Court'.[53] Individuals harmed by subsequent crimes are victims of those crimes and not of the crime of aggression.

5. Conclusion

Although aggression often gives rise to other violations of international law, the prohibition and criminalisation of aggression is directed to the legal interest of States and not individuals. Individuals do not have an affected legal interest with respect to the crime of aggression. There is no 'substantial relevant practice'[54] or *opinio iuris* recognising individuals as victims of violations of the *ius ad bellum*. This is understandable, since there is no corresponding right or duty owed to individuals by the aggressor State or the individual perpetrator in respect of the crime of aggression. These differences between the crime of aggression and the crimes within the Court's existing jurisdiction justify an analysis of the definition of 'victim' in rule 85(a) and the meaning of 'harm', to determine whether 'harm' requires a legal interest to be affected.

III. Does 'Harm' Require a Legal Interest to be Affected?

The following discussion critically analyses the applicable law to determine whether 'harm' for the purpose of rule 85(a) requires a legal interest to be affected. Judges of the International Criminal Court are not bound to follow previous decisions of the Court but are permitted to do so on a discretionary basis.[55] This is because article 21(2) of the Rome Statute provides that '[t]he Court may apply principles and rules of law as interpreted in its previous decisions.' The term 'may' means that this article does not apply the doctrine of *stare decisis*. The Court's decisions on the meaning of 'harm' in rule 85 are therefore instructive but not decisive.

Pursuant to article 21(1), '[t]he Court shall apply in the first place' the Statute, Elements of Crimes and Rules of Procedure and Evidence. Under article 21(2), 'if a matter is exhaustively defined by the first category of applicable law no recourse should be had to any other source for the identification of the law to be applied'.[56] As the Rules are subordinate to the Statute,[57] they cannot create new rights that are not set out in the Statute nor limit the provisions of the Statute, but must 'conform to the spirit and letter of the Statute'.[58] 'The interpretation of the Rules of Procedure and Evidence and the determination of the range of their application are subject to the same rules as the Statute.'[59] The general rule

[53] Amnesty International, *supra* note 41, at 11.
[54] Rosenfeld, *supra* note 6, at 250.
[55] See G. M. Pikis, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments* (Leiden: Brill/Martinus, Nijhoff Publishers, 2010), at 83–88.
[56] Ibid., at para. 195.
[57] Article 51(5).
[58] Article 51(4); Pikis, *supra* note 55, at para. 40.
[59] Ibid., at para. 44 (footnote omitted).

of treaty interpretation is set out in article 31(1) of the Vienna Convention on the Law of Treaties, which provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

1. Ordinary Meaning of 'Harm'

In the Prosecutor v. Lubanga,[60] the Appeals Chamber held that '[t]he word "harm" in its ordinary meaning denotes hurt, injury and damage. It carries the same meaning in legal texts, denoting injury, loss, or damage and is the meaning of "harm" in Rule 85(a) of the Rules'. However, the context of this use of the term 'harm' in legal texts is injury, loss or damage *arising from the breach of a legal obligation* owed to the claimant. 'Harm' is usually used in international law to denote legal heads of damage for the purpose of determining the appropriate remedy once a violation of an obligation has occurred.[61] In this sense, it presupposes an affected legal interest. There is therefore tension between the 'ordinary meaning' of harm indicated by the Appeals Chamber and the way the term is used in legal texts.

2. Context

This tension is ameliorated by the particular context of the term 'harm' in rule 85(a): the harm must result from the commission of any crime within the Court's jurisdiction. This indicates that 'harm' does not require a protected legal interest for two reasons. Firstly, this context divorces 'harm' from an underlying legal interest and instead connects it to the commission of particular crimes. Secondly, not all crimes within the Court's jurisdiction have individuals as their protected object. These include the following war crimes:

> Intentionally launching an attack in the knowledge that such attack will cause … widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;[62]
>
> Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; [63] and
>
> Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law.[64]

As with the crime of aggression, individuals could conceivably show they have suffered injury, loss or damage resulting from these war crimes. On the oth-

[60] Prosecutor v. Lubanga Dyilo, *supra* note 22, at para. 31 (footnotes omitted).
[61] See McCarthy, *supra* note 18, at 95–98.
[62] Article 8(2)(b)(iv).
[63] Articles 8(2)(b)(ix) and (e)(iv).
[64] Articles 8(2)(b)(xxiv) and (e)(iii).

er hand, it is arguably not sensible to consider such injury, loss or damage as 'harm' for the purpose of rule 85(a) since it is disconnected from the protected object of the criminal norm. However, there is nothing to indicate that those crimes are excluded from the definition of 'victim' in rule 85(a). If individuals can qualify as victims of those crimes under rule 85(a), this indicates that the notion of 'harm' does not require identity between the protected object of the criminal norm and the victim.

The Court's recognition of indirect victims also suggests that identity between the victim and the protected object of the criminal norm is not required. Referring to the definition of 'victim' in the UN Basic Principles and Guidelines, the Court has held that while harm must be personal to the victim, victims can be either direct or indirect victims.[65] The Court reached this conclusion by juxtaposing the wording of rules 85(a) and (b). Rule 85(b) requires that legal persons must have 'sustained direct harm', while rule 85(a) does not contain this requirement for natural persons. '[A]pplying a purposive interpretation', the Court concluded that 'people can be the direct or indirect victims of a crime within the jurisdiction of the Court'.[66]

According to the Court, direct victims are those whose harm results from a crime within the Court's jurisdiction, while indirect victims are those who suffer harm arising from the harm to a direct victim.[67] The Court has held that relatives of deceased victims may qualify as indirect victims if they have personally suffered as a result of the death of the direct victim.[68] The Court has also held that those who are harmed intervening to prevent a crime or to assist a direct victim may qualify as indirect victims.[69] This recognition of 'indirect victims' whose harm arises from harm to 'direct victims' separates harm to indirect victims from any underlying right. This is because the recognition of such persons as victims does not depend on that individual suffering a violation of a right themselves.

However, at the same time, the Court explicitly noted that children under the age of fifteen years are the protected object of the charges confirmed against Mr Lubanga of conscripting, enlisting and using children under that age to actively participate in hostilities. The Court noted that these offences

> were clearly framed to protect the interests of children in this age group against the backcloth of Article 77(2) of Additional Protocol I to the Geneva Conventions, entitled 'Protection of children' and Article 38 of the Convention on the Rights of the Child, which are each directed at the protection of children. Criminalizing the conscription, enlistment and use of children

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[65] Prosecutor v. Lubanga Dyilo, *supra* note 22, at paras. 1 and 32; Prosecutor v. Lubanga Dyilo, Decision on Victims' Participation, ICC-01/04-01/06-1119, 18 January 2008, paras. 91–92.
[66] Prosecutor v. Lubanga Dyilo, 18 January 2008 decision, *supra* note 65, at para. 91.
[67] Prosecutor v. Lubanga Dyilo, Redacted Version of 'Decision on "Indirect Victims"', ICC-01/04-01/06-1813, 8 April 2009, para 34.
[68] Prosecutor v. Katanga/Chui, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, ICC-01/04-01/07-1491-Red-tENG, 23 September 2009, paras. 51–56.
[69] Prosecutor v. Lubanga Dyilo, *supra* note 67, at para. 51; Prosecutor v. Muthaura et al., Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/09-02/11-267, 26 August 2011, para. 68; Prosecutor v. Laurent Gbagbo, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-02/11-01/11-138, 4 June 2012, para. 30.

> actively to participate in hostilities affords children with additional safeguards, recognizing their vulnerability, and the Statute has in those circumstances made them 'direct victims' for these purposes.[70]

The Court went on to find that the child soldiers were direct victims of the crimes charged, while their family members were indirect victims.[71] The underlying reasoning seems to be on the basis of remoteness as an element of causation, rather than the interpretation of the term 'harm'.[72] The required causal link between the 'harm' and the relevant crime is discussed in Part IV below. It is unclear from the reasoning of the Court whether only the protected object of the criminal norm may be regarded as the direct victim. In any event, the Court still recognised family members of the child soldiers as indirect victims, thus allowing those not protected by the criminal norm to also receive victim status.

Following this classification of direct and indirect victims, the State victim of the crime of aggression could be regarded as the direct victim under rule 85(b) as the protected object of this crime. Individuals who suffer personal, indirect harm resulting from the crime of aggression could be indirect victims. However, this analogy does not work in the same way that the Court has applied it to other crimes. According to Trial Chamber I, '[i]ndirect victims must establish that, as a result of their relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them'.[73] However, an individual harmed as a result of bombardment of the victim State's territory suffers direct harm from that act, rather than secondary harm resulting from his or her relationship to the State and the violation of the State's territorial sovereignty. The bombardment directly harms both the individual and the victim State.

The issue remains whether the notion of 'harm' under rule 85(a) is harm to the protected object of the criminal norm. This requirement would exclude recognition of individuals as victims of the crime of aggression, but it would also exclude recognition of indirect victims and victims of the war crimes of attacks against protected objects. The correct interpretation of 'harm' is not evident from the context of rule 85(a).

3. Object and Purpose of the Rome Statute

Rule 85(a) must be also read subject to the Rome Statute and in light of its object and purpose,[74] which may be gleaned from its preamble and the text of the victim provisions.[75] The preamble of the Rome Statute alludes in its second paragraph to the restorative justice aims of the Court. As set out above, the Court has made statements that the object and purpose of this restorative justice regime includes victims' right to justice, truth and reparations. This reasoning relies on the as-

[70] Prosecutor v. Lubanga Dyilo, 8 April 2009 decision, *supra* note 67, at para 48. (footnotes omitted).
[71] Prosecutor v. Lubanga Dyilo, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 17.
[72] Prosecutor v. Lubanga Dyilo, 8 April 2009 decision, *supra* note 67, at paras. 45–47.
[73] Ibid, at para. 49.
[74] Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force 27 January 1980) 1155 UNTS 331, article 31(1); Pikis, *supra* note 55, at para. 40.
[75] Vienna Convention, ibid., article 31(2).

sumption that a primary right has been violated. Although the text of rule 85(a) and in particular the term 'harm' do not explicitly require a legal interest to be affected for victim status to be recognised, it remains arguable that the notion of 'harm' assumes an affected legal interest.

4. Travaux Préparatoires *of the Rome Statute*

When the application of article 31 of the Vienna Convention on the Law of Treaties leaves the meaning of the text 'ambiguous or obscure', 'recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion'.[76] The drafting history of articles 68 and 75 of the Rome Statute shows that the drafters were strongly influenced by developments in the area of victims' rights under international human rights and humanitarian law, and in particular the 1985 Declaration and draft UN Basic Principles and Guidelines. The Working Group on Procedural Matters 'reached general agreement' on a footnote to article 68, which stated that: 'In the exercise of its powers under this article, the Court shall take into consideration the [1985 Declaration]'.[77] In the draft Rome Statute, the article on reparations contained a footnote providing that '[f]or the purposes of defining "victims" and "reparations", reference may be made to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power … and the revised draft basic principles and guidelines'.[78] Principle 8 of the UN Basic Principles and Guidelines defines 'victims' as

> persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

However, these draft proposals were not included in the final version of the Rules of Procedure and Evidence, and reference to victimisation based on the 'substantial impairment of a fundamental right' was deleted from an earlier version of the definition of 'victim'.[79] This left only reference to 'harm' without further qualification. The drafters of the Rules of Procedure and Evidence deliberately excluded 'substantial impairment' of a person's fundamental rights from the definition as it was considered that this criterion would unduly broaden the

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[76] Ibid., article 32.

[77] D. Donat-Cattin, 'Commentary on Article 75: Reparations to victims' in O. Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edn (Munich: C. H. Beck, 2008), 1399–1412, at 1402, margin note 23.

[78] Report of the Preparatory Committee on the Establishment of an International Criminal Court, (14 April 1998), UN Doc. A/CONF.183/2, footnote 199, in United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June – 17 July 1998, Official Records Volume III, UN Doc. A/CONF.183/13.

[79] See International Seminar on Victim's Access to the ICC (Paris, 27–29 April 1999) UN Doc. PCNICC/1999/INF/2 and PCNICC/1999/L.5/Add.1.

universe of victims.[80] Deletion of reference to impairment of fundamental rights seems to indicate that victim status is predicated on the notion of factual harm and not on a violation of an underlying right.

Despite this, the majority in Trial Chamber I recognised substantial impairment of a fundamental right as a form of harm for the purpose of rule 85.[81] This was strongly criticised by Judge Blattman in his Separate and Dissenting Opinion, since in his view, principle 8 of the UN Basic Principles and Guidelines is not a valid source of interpretation of rule 85 because reference to it was made in the draft Statute and then later deleted.[82] The Appeals Chamber affirmed that the Trial Chamber's reference to the UN Basic Principles and Guidelines for interpretive guidance was not inappropriate.[83] However, the Appeals Chamber did not refer to 'substantial impairment of fundamental rights', and this notion has not been confirmed as a form of harm recognised by the Court. The deletion of reference to 'substantial impairment of fundamental rights' together with the general context of the inclusion of the victim provisions in the Rome Statute indicates an intention of States to confer procedural rights on individuals based on factual harm.

5. Conclusions Regarding 'Harm'

The above analysis has shown that the definition of 'victim' in the Rules of Procedure and Evidence does not require a legal interest to be affected in order for 'harm' to arise. The Rome Statute confers procedural rights by treaty and does not depend on the existence of such rights under customary international law. Individuals could therefore meet the definition of 'victim' with respect to the crime of aggression, provided that the required causal nexus between the harm and the crime of aggression is also present.

IV. Causal Nexus

To meet the definition of 'victim' under rule 85(a), the harm suffered by the individual seeking victim status must be 'a result of the commission of any crime within the jurisdiction of the Court'. This part will examine the standard of proof and required causal nexus between the crime of aggression and harm suffered in order for individuals to qualify as victims under rule 85(a). As will be seen, the required causal nexus between the crime of aggression and harm suffered by individuals is uncertain. In particular, if the crime of aggression gives rise to an armed conflict between the victim and aggressor States, it is unclear whether harm to individuals resulting from the armed conflict would satisfy the requirements of rule 85(a).

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[80] See S. Fernández de Gurmendi, 'Definition of Victims and General Principles', in R. Lee (ed), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers, 2001), 427–434, at 432.
[81] Prosecutor v. Lubanga Dyilo, 18 January 2008 decision, *supra* note 65, at para. 35.
[82] Ibid., at paras. 4–5.
[83] Prosecutor v. Lubanga Dyilo, *supra* note 22, at paras. 32–33.

The standard of proof required to show that harm resulted from a crime is itself uncontroversial, and depends on the stage of proceedings for which victim status is sought. At the investigation stage, the Pre-Trial Chamber has inquired whether there are '*grounds to believe* that the harm they suffered is the result of a crime within the jurisdiction of the Court, and that the crime was committed within the temporal, geographical and, as the case may be, personal parameters of the said situation'.[84] Once the Pre-Trial Chamber issues an arrest warrant, the test is elevated to '*sufficient evidence* to allow it to be established that the victim has suffered harm directly linked to the crimes contained in the arrest warrant'.[85] At the trial stage, it is a *prima facie* determination.[86] 'In the reparation proceedings, the applicant shall provide *sufficient proof* of the causal link between the crime and the harm suffered, based on the specific circumstances of the case.'[87]

However, the actual causal nexus that rule 85(a) requires be proven between the harm suffered and the crime is unclear. The Court has held that

> the determination of a causal link between a purported crime and the ensuing harm is one of the most complex theoretical issues in criminal law … Significantly, there is no reference to causality as such in rule 85 of the Rules, which simply refers to the harm having been suffered 'as a result of' the alleged crime.[88]

For the purpose of rule 85(a), the Court has adopted 'a pragmatic, strictly factual approach, whereby the alleged harm will be held as "*resulting from*" the alleged incident when the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least to be compatible and not clearly inconsistent'.[89] The Appeals Chamber held that '[w]hether or not a person has suffered harm as the result of a crime within the jurisdiction of the Court and is therefore a victim before the Court would have to be determined in light of the particular circumstances'.[90] The Trial Chamber's rulings on causation in the Lubanga reparations principles decision also notes that 'there is no settled view in international law on the approach to be taken to

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[84] Situation in the Democratic Republic of the Congo, Corrigendum to the "Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo, ICC-1/04-423-Corr, 31 January 2008, para. 4 (emphasis added).
[85] Prosecutor v. Lubanga Dyilo, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case of the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-172, 29 June 2006, paras. 7–8 (emphasis added).
[86] Prosecutor v. Lubanga Dyilo, Redacted Version of the Corrigendum of Decision on the Applications by 15 Victims to Participate in the Proceedings, ICC-01/04-01/06-2659-Corr-Red, 8 February 2011, para. 28.
[87] Prosecutor v. Lubanga Dyilo, Judgment on the Appeals Against the "Decision Establishing the Principles and Procedures to be Applied to Reparations" of 7 August 2012 with AMENDED Order for Reparations (Annex A) and Public Annexes 1 and 2, ICC-01/04-01/06-3129, 3 March 2015, para. 81 (emphasis added).
[88] Situation in Uganda, Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04, 10 August 2007, para. 14. (footnote omitted).
[89] Situation in Uganda, *supra* note 84, at para.14.
[90] Prosecutor v. Lubanga Dyilo, Judgment on the Appeals of The Prosecutor and The Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432, 10 July 2008, para. 32.

causation'.[91] For the purpose of reparations claims under article 75, the Trial Chamber applied a 'but-for' test and standard of 'proximate cause' to determine whether the loss, damage or injury to victims resulted from the crime for which Mr Lubanga was convicted.[92] The Appeals Chamber upheld this approach.[93]

It is not clear whether and how the Court's approach to causation under rule 85(a) (for the purpose of assessing whether an individual meets the definition of 'victim') and article 75 (reparations to victims) differ. Whatever the standard of causation that applies to rule 85(a), there are specific issues that arise with respect to the crime of aggression due to its special nature. These include the relevant conduct to which the harm must be attributable, the temporal scope of the crime and act of aggression and whether harm to individuals during an ensuing armed conflict remains attributable to the crime of aggression.

The first issue is whether the harm must be attributable to the limited *actus reus* (the individual conduct of planning, preparation, initiation or execution of the State act of aggression[94]), rather than the underlying State act of aggression. Since harm flowing from the act of aggression is a reasonably foreseeable and direct consequence of the crime of aggression, it appears unnecessarily restrictive to require the harm to be directly attributable to the participation of the accused for the purpose of determining who is a 'victim' under rule 85(a). Rather, the convicted person's degree and mode of participation in the State act of aggression should be relevant to his or her liability for reparations to victims. As the amended reparations order in Lubanga states, '[t]he convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia,* his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case'.[95]

If it suffices under rule 85(a) that the harm be attributable to the State act of aggression as an element of the crime of aggression, then the temporal scope of the act of aggression must be determined. The temporal scope of an act of aggression depends on the nature of the act. Article 14(1) of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts ('Draft Articles') provides that '[t]he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue'. The second paragraph of the article states that '[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation'. Examples of a continuing wrongful act provided in the commentary to the Draft Articles include 'unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent'.[96] These are both listed as acts of aggression under article 8 *bis*(2) of the Rome Statute. Other acts of aggression

[91] Prosecutor v. Lubanga Dyilo, Decision Establishing the Principles and Procedures to be Applied to Reparations, ICC-01/04-01/06-2904, 7 August 2012, para. 248.
[92] Ibid., paras. 249 and 250.
[93] Prosecutor v. Lubanga Dyilo, *supra* note 87, paras. 124-9.
[94] Article 8 *bis*(1).
[95] *Supra* note 93, para. 21.
[96] International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), commentary to article 14, para. 3.

listed in article 8 *bis*(2) are limited in duration, such as a blockade of ports[97] and bombardment.[98]

There are different views on whether, in the event that the victim State exercises its right to self-defence under article 51 of the UN Charter, loss or damage caused by lawful acts of war during the ensuing armed conflict could be attributed to the initial act of aggression. According to Sergey Sayapin,[99] harm to individuals flowing from an act of aggression does not meet the legal test for causation because the moment of aggression is an act which disrupts international peace, whereas harm to individuals results from lawful and unlawful acts of war during the armed attack or ensuing armed conflict. Therefore, aggression is not a primary, but rather secondary, source of physical harm.[100] Vaios Koutroulis argues that the Eritrea-Ethiopia Claims Commission distinguished between two concepts for the purposes of State responsibility: a war of aggression, and a limited armed attack that triggers a war. According to this interpretation, the aggressor State is responsible under international law for all losses that ensue from a war of aggression; whereas a limited armed attack that triggers a war is severable from the rest of the conflict for the purposes of determining State responsibility.[101]

Under the law of international State responsibility, there are precedents for States being held liable for compensation for lawful acts of an armed conflict that ensues from an act of aggression. For example, the Treaty of Versailles required Germany to 'make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany'[102] including '[d]amage to injured persons … or death of civilians caused by acts of war … and of all operations of war by the two groups of belligerents wherever arising'.[103] The UN Security Council reaffirmed that Iraq was 'liable under international law for any direct loss, damage … or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait'.[104] The UNCC, which was established to administer the fund to pay compensation for such claims, decided that this included 'death, personal injury or other direct loss to individuals as a result of Iraq's unlawful invasion and occupation of Kuwait' including 'any loss suffered as a result of military operations or threat of military action *by either side* during the period 2 August 1990 to 2 March 1991'.[105] Friedrich Rosenfeld notes that '[i]nternational jurisprudence on

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[97] Article 8 *bis*(2)(c).
[98] Article 8 *bis*(2)(b).
[99] S. Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (The Hague: T.M.C. Asser Press, 2014).
[100] Ibid.
[101] V. Koutroulis, 'Use of Force in Arbitrations and Fact-Finding Reports' in M. Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), 605–626.
[102] Treaty of Peace between the Allied and Associated Powers and Germany, 28 June 1919, in Clive Parry (ed.), *Consolidated Treaty Series*, vol. 225 (Dobbs Ferry, NY: Oceana Publications, 1969–81), 189, article 232.
[103] Ibid., annex 1(1).
[104] *Supra* note 44, para. 16.
[105] United Nations Claims Commission, Governing Council Decision 1, Criteria for Expedited Processing of Urgent Claims, UN Doc. S/AC.26/1991/1, 2 August 1991, para. 18(a) (emphasis

state responsibility has … developed normative criteria in order to appropriately limit the attribution of harm [including] proximity, foreseeability and directness'.[106] Although these principles relate to State responsibility for violations of the *ius ad bellum*, the reasoning could be applied to individual civil responsibility for the crime of aggression under the Rome Statute.[107]

If individuals who suffer harm from lawful acts of war of both the victim and aggressor State during an armed conflict that ensues from the crime of aggression could be considered victims under rule 85(a), then what about *un*lawful acts of war? Could harm to individuals caused by further crimes committed by either side during an ensuing armed conflict – i.e. war crimes, crimes against humanity or genocide – still be attributed to the crime of aggression? According to the Court's own jurisprudence, supervening unlawful acts seem to break the chain of causation between the harm and the crime. In the Lubanga case, it is notorious that as a result of the Prosecutorial strategy, the defendant was not charged in relation to sexual and gender-based violence against child soldiers, despite the former Prosecutor advancing 'extensive submissions' in relation to this during trial and sentencing.[108] For the purpose of reparations, the Appeals Chamber considered whether sexual and gender-based violence could be defined as harm resulting from the crimes that Mr Lubanga *was* convicted of, namely, committing (as co-perpetrator) the war crimes of conscripting and enlisting child soldiers under article 8(2)(e)(vii).[109] The Appeals Chamber held that it could not.

In making this finding, the Appeals Chamber noted that the Trial Chamber did not include sexual and gender-based violence as part of the gravity of the crime or as an aggravating factor of the crimes in the Sentencing Decision because these acts could not be attributed to Mr Lubanga.[110] Specifically, the Trial Chamber found that 'nothing suggests that Mr Lubanga ordered or encouraged sexual violence, that he was aware of it or that it could otherwise be attributed to him in a way that reflects his culpability'.[111] The Appeals Chamber noted that this finding was understood to cover 'a broad range of possibilities from objective foreseeability to intent'.[112] The Appeals Chamber considered that this finding

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added); *c.f.* Vera Gowland-Debbas ('Some Remarks on Compensation for War Damages under *Jus Ad Bellum*' in A. de Guttry et al (eds.), *The 1998–2000 War between Eritrea and Ethiopia* (The Hague: T.M.C. Asser Press, 2009), 435–448, 445 (citations omitted)), who asserts that this was 'one of the most controversial aspects' of the UNCC, because the UNCC Decision of the Governing Council 'laid down a presumption that all losses or injuries resulting from military operations or even threat of military action by the Coalition can be considered as direct losses ... This rule clearly departs from the rules relating to attribution in the law of State Responsibility and one has to go back to Annex I to the Versailles Peace Treaty to find an instance of such attribution to the "aggressor" State of the damage caused by the "lawful belligerents". Under international law, the consequences of acts freely determined by third parties – in this case the decision to undertake military operations against Iraq – even if in response to an illegal act, cannot be attributed to the author of the unlawful act.'

[106] Ibid.; for an overview of different tests for causation used by international bodies, see International Law Commission, *supra* note 96, commentary to article 31, para. 10.

[107] See further Rosenfeld, *supra* note 6, which further explores this argument.

[108] Prosecutor v. Lubanga Dyilo, Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012, para. 60.

[109] Prosecutor v. Lubanga Dyilo, *supra* note 93, paras. 196–199.

[110] Ibid, para. 197.

[111] Prosecutor v. Lubanga Dyilo, *supra* note 108, para. 74.

[112] Prosecutor v. Lubanga Dyilo, *supra* note 93, para. 197.

'amounts to concluding that the Trial Chamber did not establish that harm from sexual and gender-based violence resulted from the crimes for which Mr Lubanga was convicted, within the meaning of rule 85 (a) of the Rules of Procedure and Evidence'.[113] Although the reasoning behind the decision is unclear,[114] the Court's findings in that case exclude harm to individuals caused by unlawful conduct subsequent to the crime in question from victim status and reparations. Accordingly, even though aggression creates the conditions for subsequent international crimes to occur, the Court is likely to hold that harm resulting from those crimes is not attributable to the crime of aggression in the absence of additional factors linking the subsequent crimes directly to the accused.

To conclude, there is a decided lack of clarity regarding the circumstances in which an individual could show that his or her harm was 'a result of' the crime of aggression. This uncertainty derives from an unclear standard of attribution under rule 85(a), particularly when a crime of aggression gives rise to an armed conflict. Although in certain cases individuals could clearly show that their harm resulted from the crime of aggression (such as injury from a bombardment that constitutes the underlying act of aggression), it remains to be seen how the Court would apply causation principles to the crime of aggression for the purposes of determining victim status under rule 85(a).

V. Personal Interests of Victims

A further and alternative argument regarding recognition of individuals as victims of the crime of aggression relates to the notion of 'personal interest' in article 68(3). Even if individuals can meet the definition of 'victim' under rule 85(a) with respect to the crime of aggression, it could be argued that they would nonetheless not be entitled to participate in proceedings in respect of this crime because their personal interests are not affected. Article 68(3) provides in part that:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

This right of victims to participate in criminal proceedings does not reflect established customary law, but is a procedural right conferred by the Rome Statute. The Court's interpretation of 'personal interests of the victims' is explicitly based

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[113] Ibid., para. 198.

[114] As noted by the Appeals Chamber, 'the Trial Chamber did review evidence of sexual violence, but held, by majority, that it was "unable to conclude that sexual violence against the children who were recruited was sufficiently widespread that it could be characterised as *occurring in the ordinary course* of the implementation of the common plan for which Mr Lubanga is responsible (emphasis added)."' The reference to 'occurring in the ordinary course' comes from the definition of intent set out in article 30(2)(b) of the Rome Statute ('a person has intent where: [i]n relation to consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.') Since intent is not a requirement of the definition of 'victim' in rule 85(a), it is not clear why the sexual violence would need to 'occur in the ordinary course of events' in order to be attributed to the crime of enlistment and conscription of child soldiers for the purpose of rule 85(a).

on victims' rights under international human rights law. As seen above, this reasoning does not apply to the crime of aggression, since individuals do not have rights *vis-à-vis* the State in respect of this crime.

The interest of victims in participating in the proceedings under article 68(3) has been identified by the Court as:

- 'the determination of the facts, the identification of those responsible and the declaration of their responsibility' based on 'the well-established right to the truth for the victims of serious violations of human rights';[115]
- 'the identification, prosecution and punishment of those who have victimised them' based on the 'well-established right to justice for victims of serious violations of human rights';[116] and
- the right to reparations of victims of serious violations of human rights.[117]

Similarly, the Trial Chamber in Lubanga held that 'reparations, as provided in the Statute and Rules, are to be applied in a broad and flexible manner, allowing the Chamber to approve the widest possible remedies *for the violations of the rights of the victims* and the means of implementation'.[118]

In the case of Bemba, the Single Judge referred to international human rights law jurisprudence on the right to a remedy as well as soft law instruments on human rights for guidance in the interpretation of article 68(3) of the Statute.[119] The Single Judge went on to state that

> the personal interests of victims stem from at least two motivations, namely the right to reparations and the right to justice. … A case before the International Criminal Court is only admissible if the State, which has jurisdiction over it, is unwilling or unable to investigate or prosecute. Precluding victims from exercising their participatory rights before this Court could be perceived as denying them 'effective access to justice'.[120]

However, each of these rights of victims identified above is a facet of the right to a remedy. Dinah Shelton notes that '[r]emedies are "the means by which a *right* is enforced or the violation of a *right* is prevented, redressed or compensated"'.[121] This understanding of the nature of remedies is predicated on the notion of primary and secondary legal frameworks, in which primary rules contain the substance of the rule or obligation, and secondary rules that determine the rules of attribution of a breach of the primary rule and the consequences of viola-

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[115] Prosecutor v. Katanga/Chiu, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07, 13 May 2008, para. 31 (footnotes omitted).
[116] Ibid., para. 38 (footnotes omitted).
[117] Ibid., footnote 43.
[118] Prosecutor v. Lubanga Dyilo, *supra* note 85, at para. 180 (footnote omitted) (emphasis added).
[119] Prosecutor v. Bemba Gombo, Fourth Decision on Victims' Participation, ICC-01/05-01/08, 12 December 2008, para. 87. (footnotes omitted).
[120] Ibid., at paras. 16–17.
[121] D. Shelton, *Remedies in International Human Rights Law*, 2nd edn (Oxford University Press, 2005), at 7, footnote 1, citing Black's Law Dictionary, 6th edn (1990) 1294 (emphasis added).

tion.[122] There being no primary right or duty, neither can there exist a right or duty of *restitutio in integrum*.[123] Rather, '[t]he wrong is an essential element; it is the rights-infringing wrongful conduct that is the source of a claim'.[124]

Although the Court's interpretation of 'personal interest' under article 68(3) appears to be based on the assumption that an underlying right of the victim has been violated, this is not an express requirement in the text of the applicable article. The Court has also held that the interests of victims 'extend to the question of the person or persons who should be held liable for those crimes, whether physical perpetrators or others. In this respect, victims have a general interest in the proceedings and in their outcome.'[125] Franziska Eckelmans has observed that this highlights the difficulty of clearly distinguishing between the 'personal interests of victims' and a 'general interest in the proceedings'.[126] As such, individuals recognised as 'victims' under rule 85(a) in respect of the crime of aggression could potentially show that their personal interest would be affected by the proceedings. The issue of reparations is dealt with in Section C below.

C. Should Individuals be Recognised as Victims of the Crime of Aggression?

Since the definition of 'victim' in rule 85(a) appears to apply to individuals with respect to the crime of aggression, should the Rules of Procedure and Evidence be amended to exclude this interpretation? One might argue that recognition of victim status in respect of the crime of aggression does not provide added value for individual victims, for two reasons. Firstly, the conduct that resulted in harm to an individual may constitute both the crime of aggression and another crime within the Court's jurisdiction. For instance, a bombardment that injures civilians may constitute both the act of aggression element in the crime of aggression[127] and a war crime if a civilian population was deliberately targeted.[128] Benjamin Ferencz has argued that illegal uses of force constituting aggression could also be prosecuted before the Court as a crime against humanity on the basis of article 7(1)(k) of the Statute, which lists 'other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health' as an act constituting such a crime.[129] For victims who suffer harm from conduct that constitutes more than one crime, it is not clear whether there is any added value in applying the victim provisions in the Rome Statute to the crime of aggression. The answer depends on how reparations would be calculated in such a case. As the Court has yet to develop jurisprudence in relation to repairing harm attributable to multiple crimes, it is not clear what principles would apply.

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[122] Ibid., at 7.
[123] Zegveld, *supra* note 16, at 82–83.
[124] Shelton, *supra* note 121, at 12.
[125] Prosecutor v. Bemba Gombo, Decision (i) ruling on legal representatives' applications to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses, ICC-01/05-01/08-1729, 9 September 2011, para. 15.
[126] Eckelmans, *supra* note 7, at 207.
[127] Article 8 *bis*(2)(b).
[128] E.g., article 8(2)(b)(i).
[129] 'Illegal Armed Force as a Crime against Humanity', crimeofaggression.info/documents/5/Ferencz_B_Illegal_Armed_Force.pdf [accessed 28 September 2014].

Secondly, it may not be necessary to recognise individuals of the crime of aggression if one considers that harm to individuals resulting from this crime is adequately captured by the other crimes within the Court's jurisdiction: namely, genocide, crimes against humanity and war crimes. However, for a multitude of reasons (including lack of jurisdiction over the subsequent crimes or lack of available evidence), it may be the case that the crime of aggression is prosecuted before the Court and the subsequent crimes are not. Furthermore, not all victims of the crime of aggression will suffer harm resulting from another international crime or rights violation. This leads to a gap in protection for those victims. If the act of aggression leads to an armed conflict, the *ius in bello* accepts that harm to civilians will occur and this is only one factor to be taken into account to determine the proportionality of an attack, since this will be weighed against the 'concrete and direct military advantage sought'.[130] As Jennifer Trahan argues, 'even when the laws of war are not violated – *i.e.*, one could not prosecute for war crimes – vast suffering occurs during international armed conflict'.[131] Recognising the harm that flows from the crime of aggression creates consistency between the treatment of victims which is not based on artificial legal distinctions, since the legal characterisation of the acts which caused the harm does not change the nature of the suffering of its victims. M. Cherif Bassiouni notes that '[i]f the victim is our concern and interest, then legal distinctions and technicalities surrounding various classifications of crimes against victims should be reconceptualised'.[132] Recognising individual rights in respect of the crime of aggression would be consistent with the progressive development of international law from the Westphalian system of regulating relations between States to the recognition of the fundamental importance of the protection of the individual under international law.[133] This progressive evolution is reflected in the rise of international human rights law, growing support for individual rights under customary international humanitarian law and the restorative justice framework of the Rome Statute.

Recognition of individuals as victims of the crime of aggression and the concomitant right to participate in the proceedings and seek reparations against the convicted person could also increase the financial and political cost of the crime of aggression and play an additional role in deterrence. The possibility of a reparations order against the perpetrator of the crime of aggression in addition to a custodial sentence is a further disincentive for that person to commit the crime. However, the uncertainty surrounding the entry into force of the Court's jurisdiction over the crime of aggression and very high threshold for the crime makes any deterrent effect unlikely even regarding the prospect of criminal conviction, let alone the even more remote possibility of having to make reparations for harm caused to individuals.[134] A more radical argument is that due to the political nature of the concept of aggression and the just cause of some acts of aggression

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[130] J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume 1: Rules*, rule 14. Available online www.icrc.org/customary-ihl/eng/docs/v1 [accessed 14 September 2014].

[131] J. Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference', *International Criminal Law Review*, 11 (2011), 49–104, at 51, at footnote 13.

[132] Bassiouni, *supra* note 11, at 204.

[133] Rosenfeld, *supra* note 6, at 263–64.

[134] Shelton, *supra* note 106, at 13–15.; see also Boeving, *supra* note 6, at 590.

(e.g. humanitarian intervention),[135] it would be unwise to raise the costs of undertaking such acts. However, since States agreed firstly to include the crime of aggression within the Court's jurisdiction and secondly to the 2010 Resolution on the Crime of Aggression, they have already expressed their view that aggression should be criminalised and sanctioned.

If the individual perpetrator of aggression can be held civilly liable for harm caused by acts committed during an armed conflict, even if those acts did not violate the *ius in bello*, this may have implications for the traditional separation between this body of law and the *ius ad bellum.* The *ius in bello* applies throughout an armed conflict regardless of the legality of the way that the armed conflict commenced.[136] The Eritrea Ethiopia Claims Commission recognised that the preventive function of reparations for violations of the *ius ad bellum* may affect respect of the *ius in bello* when it held that 'it would be counterproductive to impose extensive liability for conduct that is lawful under the *ius in bello*. To hold otherwise would risk "eroding the weight and authority of that law and the incentive to comply with it."'[137] Notwithstanding this, the consequences of violation of the *ius ad bellum* are distinct from those attaching to violations of the *ius in bello* in an important respect – only leaders of a State can be held criminally responsible for a violation of the former.[138] Therefore, the possibility of ordering a person convicted of the crime of aggression to pay reparations is not substantially likely to decrease respect for the *ius in bello*, since the commanders and soldiers of the aggressor State would still have an obligation to comply with the laws of war.

However, there are serious objections to the application of the restorative justice framework of the Rome Statute to the crime of aggression on policy grounds, which are addressed below. The Rome Statute is not universally ratified, and the Court 'depends absolutely on external cooperation in order to comply with its mandate'.[139] Three permanent members of the UN Security Council – the United States, Russia and China – are not Parties to the Rome Statute. The Court continues to face strong opposition from its opponents: the African Union has called for AU Member States to refuse to cooperate with the Court in relation to the warrant for the arrest and surrender of President Omar Al Bashir to the Court in relation to alleged crimes against humanity, war crimes and genocide in Darfur, Sudan,[140] and there was a recent parliamentary motion in Kenya to withdraw from

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[135] E. Creegan, 'Justified Uses of Force and the Crime of Aggression', *Journal of Internationl Criminal Justice,* 10 (2012), 59–82.
[136] See C. Greenwood, 'The Relationship between *ius ad bellum* and *ius in bello*', *Review of International Studies,* 9 (1983), 221–34; A. Roberts, 'The Equal Application of the Laws of War: A Principle under Pressure', *International Review of the Red Cross*, 90 (no. 872) (2008), 931–962, at 932.
[137] Rosenfeld, *supra* note 6, at 260. Although in the DRC v. Uganda Case, *supra* note 52, Judge Verhoeven held in his dissenting opinion that a violation of the *ius ad bellum* entails an obligation to make reparation, 'regardless of whether [the harm] stems from acts or practices which in themselves comply with the rules of the law of war'. Declaration of Judge Ad Hoc Verhoeven, para.5.
[138] Greenwood, *supra* note 136, at 232.
[139] See von Braun and Micus, *supra* note 42, at 117; S. Fernández de Gurmendi, 'Final Reflection: The Challenges of the International Criminal Court', in H. Olasolo (ed), *Essays on International Criminal Justice* (Oxford: Hart Publishing, 2012), 194–198, at 197.
[140] Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) Doc. Assembly/AU/13 (XIII) 3, Assembly/AU/Dec. 245(XIII).

the Rome Statute.[141] The amendments to the Rome Statute on the crime of aggression have yet to enter into force and it is not clear whether they will. The crime of aggression and the *ius ad bellum* prohibition of aggression remain highly contentious.[142] Given the fragile status of the crime of aggression, it may be imprudent to pursue the agenda of providing redress to individuals who suffer harm as a result of this crime. Doing could create a pretext for States to withdraw support for the inclusion of the crime in the Rome Statute, decline to make State contributions to the Trust Fund for Victims or to withdraw from or remain a non-Party to the Rome Statute.

Recognising individuals as victims of the crime of aggression also does not reflect States' understanding of the nature of the crime. As seen above, this factor is also relevant to the question of whether there is a legal basis for such recognition under rule 85(a) of the Rules of Procedure and Evidence. It remains unclear whether States intended such recognition to extend to individuals who suffer harm as a result of the crime of aggression. State delegates at the Review Conference in Kampala did not consider the impact of the amendments on the existing victim provisions in the Statute and Rules of Procedure and Evidence. Instead, the negotiations and State proposals reflected the State-centric nature of the crime. A number of times, the State delegates considered whether the amendments to the Rome Statute on the crime of aggression would require any consequent amendments to the Rules of Procedure and Evidence. However they did not consider whether amendments were required to expressly exclude or alter the applicability of rule 85 or the victim provisions in the Statute. The Lists of Issues Relating to the Crime of Aggression in 2000 and 2004[143] included 'Possible issues relating to the Rules of Procedure and Evidence': 'Review the final text of the Rules of Procedure and Evidence prepared by the Preparatory Commission to determine whether there are provisions that require consideration in relation to the definition of the crime of aggression.' The discussions of the Special Working Group on the Crime of Aggression based on the 2004 List of Issues identified the

> purpose of the negotiations being the 'completion' of the Rome Statute. This also meant that existing provisions which could apply to the crime of aggression should only be amended or their application excluded to the extent that aggression was different from other crimes, or to the extent that the application of such a provision to the crime of aggression was unclear.[144]

The Special Working Group went through the Rome Statute to consider whether any provisions would not fully apply to the crime of aggression. Howev-

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[141] 'Kenya MPs vote to withdraw from ICC', www.bbc.co.uk/news/world-africa-23969316, [accessed 8 September 2014].
[142] See, e.g., Boeving, *supra* note 6, and Creegan, *supra* note 135.
[143] 'Preliminary List of Possible Issues Relating to the Crime of Aggression', 29 March 2000, UN Doc. PCNICC/2000/WGCA/RT.1; reissued with minimal technical changes in General Assembly, *Proceedings of the Preparatory Commission at its Seventh Session*, 9 March 2001, UN Doc. PCNICC/2001/L.1/Rev.1, 22, item III; 'List of Issues Relating to the Crime of Aggression', in 2004 Princeton Report, Annex (Appendix).
[144] 'Informal intersessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at Princeton University, New Jersey, United States, from 21 to 23 June 2004', ICC-ASP/3/SWGCA/INF.1, in *ASP Official Records*, ICC-ASP/3/25, Annex II, 341, para. 36.

er, there was no analysis of the applicability of the provisions in Part 6 of the Statute, including articles 68 (victim participation) and 75 (reparations).[145] That the Special Working Group did not propose amendments to exclude or modify the application of rule 85 or the victim provisions with respect to the crime of aggression could be construed as being due to a belief that these provisions would apply in the same way to this crime. But given the nature of the crime of aggression as set out above, it is more likely that this was overlooked because it was thought to be obvious that these provisions would not apply to the crime of aggression. It is also possible that delegates believed that even without explicit exclusion, these provisions would not apply to individuals with respect to the crime of aggression.

There is also a need to examine whether it would be appropriate to apply the victim provisions to the crime of aggression given the institutional limitations of the International Criminal Court. The Court is facing many challenges including funding, and there are serious issues with the instrumentalisation of the victim provisions with respect to the other crimes within its existing jurisdiction.[146] Depending on the causal nexus applied, the temporal scope of the crime of aggression and the underlying act of aggression, the universe of victims of the crime of aggression is potentially massive. One such example is an invasion by the armed forces of the aggressor State of the territory of another State[147] leading to a protracted international armed conflict in which millions of individuals are either killed, injured or suffer other forms of loss or damage, for example to property. The individual accused could also theoretically be liable for harm caused to members of the aggressor State's own armed forces as a result of being compelled to participate in the act of aggression.[148] Although it is possible for very high numbers of victims to result from the crime of aggression, the crime may also entail no or very few victims depending on the act of aggression.

Extremely large numbers of victims seeking to participate in the proceedings would create challenges of participation before the Court. It raises the issue of how such large numbers of victims could meaningfully participate in the proceedings, and the impact of their participation on the expediency and efficiency of the proceedings, and on the rights of the accused and the overall functioning and role of the Court.[149] However, to date, the number of victims seeking to participate in the proceedings has been relatively low and the casuistic approach that the Court has adopted to victim participation under article 68(3) has had the effect of 'limiting the participation of victims' and favouring the rights of the ac-

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[145] S. Barriga, 'Negotiating the Amendments on the Crime of Aggression' in S. Barriga and C. Kreß, *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 3–57, at 19.

[146] For an overview of these challenges, see Review Conference of the Rome Statute, *supra* note 39.

[147] Article 8 *bis*(2)(a).

[148] McDougall, *supra* note 6, at 294.

[149] For a general critique of victim participation and reparations within Rome Statute framework see H. Friman, 'The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?', *Leiden Journal of International Law*, 22 (2009) 485–500; C. McCarthy, 'Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?', *Journal of International Criminal Justice,* 10 (2012), 351–372.

cused.[150] The challenges of managing large numbers of participating victims could be overcome through procedural measures. The Court already manages large numbers of claims by victims through case management such as delegation of administrative tasks to the Registry[151] and collective representation of victims.[152] The issues of managing large numbers of victims seeking to participate in the proceedings is not unique to the crime of aggression, but is a corollary of the fact that the Court has 'power to exercise its jurisdiction over persons for the most serious crimes of international concern'.[153] Since these crimes are likely to feature mass victimisation, the issues with managing victim participation are inherent in the Court's institutional framework, which seeks to process and manage these claims on an individualised basis. This is not unique to the crime of aggression.

The potentially very high numbers of victims of aggression could also raise practical challenges for reparations awarded to and in respect of victims under article 75. It is unlikely that the person convicted of the crime of aggression would have sufficient recoverable resources to fulfil a reparations order of the Court in instances where there are very high numbers of victims. This in turn may have an impact on the resources of the Trust Fund for Victims and its ability to fulfil its mandates. The Trust Fund for Victims was established under article 79 of the Rome Statute for the benefit of victims of crimes within the Court's jurisdiction. The Fund has two separate mandates: firstly, implementing Court-ordered reparations against a convicted person.[154] Secondly, the Trust Fund may provide 'physical or psychological rehabilitation or material support for the benefit of victims and their families'.[155] The Board of Directors of the Trust Fund for Victims is independent from the Court,[156] although it must formally notify the Court of its intention to undertake assistance activities.[157] The Trust Fund for Victims has three categories of funding sources: resources collected through awards for reparations;[158] resources collected through fines or forfeiture;[159] and other resources.[160] The assistance mandate is funded from the 'other resources' of the Trust Fund.[161] This includes voluntary contributions from governments, international organisations, individuals, corporations and other entities,[162] and such resources other than assessed contributions, as the Assembly of States Parties

[150] See H. Olasolo and A. Kiss, 'Victims Participation According to the Jurisprudence of the International Criminal Court' in H. Olasolo (ed.), *Essays on International Criminal Justice* (2012), 143–175, at 159.
[151] See, e.g. Situation in the Republic of Kenya, Order to the VPRS Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, ICC-01/09-4, 10 December 2009, para. 9.
[152] Rule 90(2), (3) and (4).
[153] Articles 1 and 17(1)(d).
[154] Articles 75(2) and 79(2); rule 98(2)–(4); Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3, adopted 3 December 2005, reg. 50(b).
[155] Article 79(1); rule 98(5); Regulations of the Trust Fund for Victims, ibid., at reg. 50(a).
[156] ASP Resolution ICC-ASP/3/Res.7 Establishment of the Secretariat of the Trust Fund for Victims, adopted 10 September 2004, paragraphs 1-3.
[157] Regulations of the Trust Fund for Victims, *supra* note 154, at reg. 50(a)(ii) and (iii).
[158] Ibid., at reg. 21(c).
[159] Ibid., at reg. 21(b).
[160] Ibid., at reg. 47.
[161] Ibid., at reg. 48.
[162] Ibid., at reg. 21(a).

may decide to allocate to the Trust Fund.[163] By July 2014, the total contributions to the Trust Fund for Victims from States were € 19.2 million.[164]

In the Lubanga case, due to Mr Lubanga's indigence, Trial Chamber I did not impose liability on him for reparations.[165] Instead, the Trial Chamber interpreted article 75(2) to mean that 'the Court is able to draw on the logistical and financial resources of the Trust Fund in implementing the award' and ordered that the reparations award be funded by the Trust Fund for Victims.[166] This finding was overturned by the Appeals Chamber, which held that:

> In cases where the convicted person is unable to immediately comply with an order for reparations for reasons of indigence, the Trust Fund may advance its "other resources" pursuant to regulation 56 of the Regulations of the Trust Fund, but such intervention does not exonerate the convicted person from liability. The convicted person remains liable and must reimburse the Trust Fund.[167]

In such a case, the Trust Fund for Victims 'may decide whether to advance its resources to enable implementation of the order for reparations'.[168]

The likelihood that a person convicted of the crime of aggression will not have sufficient assets to fulfil a reparations award for mass harm raises the question of whether it is appropriate to shift the burden of repairing the harm resulting from aggression to the Trust Fund for Victims. Even though the Fund may later claim the advanced resources from the convicted person, it is likely that it will not receive full reimbursement and will therefore bear a significant portion of the financial cost of reparations. This means that if the Trust Fund for Victims advances and complements reparations awards for the crime of aggression, this will impact on the Fund's ability to complement reparations awards in respect of other crimes. It will also reduce the resources available for other assistance activities of the Trust Fund for Victims under its second mandate.[169]

The limited funds available from the convicted person and/or the Trust Fund for Victims also has an impact on the amount of financial compensation available for victims and on the type of reparations that can feasibly be awarded. Pursuant to rule 97(1) of the Rules of Procedure and Evidence, 'the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both'. Resultantly, 'and in accordance with Article 21(3) of the Statute and Rule 85 of the Rules, reparations may be awarded to: a) individual victims; or b) groups of victims, if in either case they suffered personal harm'.[170] When awarding reparations through the Trust Fund, the Court is likely to award collective reparations under rule 98(3) as a means to redress massive harm. Collective reparations can take various forms including medical and psychological

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[163] Ibid., at reg. 21(d).
[164] Trust Fund for Victims, www.trustfundforvictims.org/financial-information [accessed 15 September 2014].
[165] Prosecutor v. Lubanga Dyilo, *supra* note 93, para. 269.
[166] Ibid., paras. 269–271, 273.
[167] Prosecutor v. Lubanga Dyilo, *supra* note 93, para. 5.
[168] Ibid., para. 116.
[169] Rule 98(5); Regulations of the Trust Fund for Victims, *supra* note 154, at reg. 50(a).
[170] Prosecutor v. Lubanga Dyilo, *supra* note 85, at para. 217 (footnotes omitted).

rehabilitation, housing, education and training[171] and symbolic reparations.[172] Such reparations 'should address the harm the victims suffered on an individual and collective basis'.[173] Collective reparations may be a more efficient way to provide redress to groups of victims, but if it does not address specific individual harm, it is unlikely to achieve the goal of *restitutio in integrum*. The restorative justice idea that reparations should be made by the convicted person and the link to the justice process is also eroded if reparations are advanced by the Trust Fund for Victims. As with issues surrounding participation, these issues are not unique to the crime of aggression but are inherent in the Court's reparations framework.

It is evident that there are convincing policy arguments on both sides of the debate over the recognition of individuals as victims of the crime of aggression for the purposes of the Rome Statute. The key arguments in favour of recognising individuals as victims of this crime are consistency of treatment of victims regardless of legal distinctions, consolidation of the progressive development of international law in favour of the protection of individuals and redress for individual suffering caused by aggression. The key arguments against such recognition are that it was not States' intention to create new rights for individuals suffering harm from the crime of aggression and that it could result in fewer resources for victims of the other crimes within the Court's jurisdiction. The institutional challenges identified above regarding victim participation and reparations do not themselves justify excluding the crime of aggression from the Court's restorative justice framework. These challenges are better addressed through institutional reform to render the Court more efficient and responsive to the needs of victims, or by providing more resources to fund the requirements of the current system established by States. If there are insufficient resources to achieve the restorative justice goals of the International Criminal Court, the logical solution is for States to properly fund and support the Court to fulfil the mandate they have created for it.

D. States as Victims of the Crime of Aggression

The Court's jurisprudence and the *travaux préparatoires* confirm that 'natural person' for the purpose of rule 85(a) means a human being.[174] However, under rule 85(b), organisations and institutions can also qualify as victims. Rule 85(b) provides that:

> For the purposes of the Statute and the Rules of Procedure and Evidence:
>
> (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

Given that States are the victims of aggression under international law, can rule 85(b) be interpreted to apply to a State as victim of the crime of aggression?

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[171] Ibid., at para. 220.
[172] Ibid., at para. 222.
[173] Ibid., at para. 220.
[174] Situation in the Democratic Republic of the Congo, *supra* note 12, at para. 80; Situation in Uganda, *supra* note 88, at para. 105.

This section will discuss elements of the definition of 'victim' under rule 85(b), including whether rule 85(b) can be applied to the crime of aggression, whether 'organizations or institutions' could include States and if States could make a claim for reparations under article 75(2) on behalf of their nationals. Finally, this section will examine whether States should be recognised as victims of the crime of aggression for the purposes of the Rome Statute. This section will argue that while rule 85(b) could be liberally interpreted to include States as victims of the crime of aggression, the Court should decline to do so.

I. Can States Be Victims of the Crime of Aggression under Rule 85(b)?

The first question is whether rule 85(b) is restricted to harm resulting from certain war crimes. The *travaux préparatoires* make clear that rule 85(b) was included so that legal persons that are victims of particular war crimes could be recognised as such.[175] These war crimes are '[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives' in either international or non-international armed conflict.[176] In contrast to rule 85(a), rule 85(b) requires that legal persons suffer 'direct harm' to their property dedicated to 'religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'[177] in order to qualify for victim status. This requirement clearly links the rule 85(b) definition with the war crimes of prohibited attacks on civilian objects in article 8.[178] Furthermore, in contrast to rule 85(a), rule 85(b) does not state that the harm may be 'a result of the commission of any crime within the jurisdiction of the Court'. Read together with rule 85(a) and in light of the close link between the definition in rule 85(b) and the war crimes set out in articles 8(2)(b)(ix) and (e)(iv), it would seem that the definition in rule 85(b) is directed to organisations or institutions that own the property or monuments targeted by those war crimes.

However, the text of rule 85(b) does not explicitly confine the definition of 'victim' to the war crimes of prohibited attacks on civilian objects. The Court has also not restricted the interpretation of rule 85(b) in this way; in the case of Lubanga[179] (in which the accused was charged and subsequently convicted of the war crimes of conscripting and enlisting child soldiers under article 8(2)(e)(vii)), the Court recognised a principal representing a school as a victim under rule 85(b). Therefore, although the definition of 'victim' in rule 85(b) is directed at legal entities that own property that comprises the protected object of certain war crimes, the text is not confined to victims of those war crimes.

The second issue is whether the terms 'organizations or institutions' can include States. During the negotiations on the definition of 'victim', the term 'legal

[175] S. Fernández de Gurmendi, *supra* note 80, at 432–33.
[176] Articles 8(2)(b)(ix) and (e)(iv).
[177] Prosecutor v. Lubanga Dyilo, *supra* note 22, at para. 30.
[178] Articles 8(2)(b)(ix) and (e)(iv); b(iii), e(iii), b(xxiv) and e (ii); Bassiouni, *supra* note.11, at 243.
[179] Prosecutor v. Lubanga Dyilo, Annex 1 Decision on the applications by victims to participate in the proceedings, ICC-01/04-01/06-1556-Corr-Anx1, 15 December 2008, paras. 105, 110–11.

entities' was originally proposed by a delegation of Arab States.[180] The French and Spanish-speaking delegations objected to this term because it has no precise meaning in those languages, so it was replaced with 'organizations and institutions'.[181] The reference to 'organizations or institutions' is not qualified and is therefore open to interpretation.[182] The Court has interpreted the term to include 'inter alia, non-governmental, charitable and non-profit organisations, *statutory bodies including government departments*, public schools, hospitals, private educational institutes (primary and secondary schools or training colleges), companies, telecommunication firms, institutions that benefit members of the community (such as cooperative and building societies, or bodies that deal with micro finance), and other partnerships'.[183] Notably, the Court did not mention States.

A State could conceivably fall within the plain language meaning of the terms 'organizations or institutions'. The Oxford English Dictionary defines 'institution' as '[a]n organization founded for a religious, educational, professional, or social purpose'.[184] An organisation is defined as '[a]n organized group of people with a particular purpose'.[185] However, the terms 'organization' and 'State' are used differently throughout the Rules of Procedure and Evidence, which indicates that they are distinct entities. For example, rule 103(1) refers to both, providing that 'a Chamber may … invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.' The connector 'or' indicates that these entities – State, organisation and person – are separate categories. The *travaux préparatoires* also do not reveal any drafters' intention that rule 85(b) should be applied to States. Therefore, while 'organizations or institutions' could be interpreted liberally to include States, the Court is not likely to interpret the term this way.

The case of the Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus[186] indicates that the *armed forces* of a State could potentially qualify as a victim under rule 85(b). In that case an applicant applied to participate in the proceedings on behalf of the Nigerian Army. The applicant claimed that the Nigerian Army 'contributed troops and equipment to the AU Mission in Sudan and that in the attack on 29 September 2007 it lost medical and communications equipment, sundry clothing and stores for soldiers as well as human lives'.[187] The Court rejected the application, *inter alia*, because human lives cannot be qualified as 'property', and because the remaining claimed harm fell outside the scope of the charges brought by the Prosecutor. Those charges included the crime of 'intentionally directing attacks against personnel, installations, materials, units or vehicles involved in a peacekeeping mission' under article 8(2)(e)(iii) of the Statute. The Court noted that this charge did not include

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[180] See Fernández de Gurmendi, *supra* note 80, at 432–33.
[181] Ibid., footnote 20.
[182] M. Jennings, 'Commentary on Article 79: Trust Fund for Victims' in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edn (Munich: C. H. Beck, 2008), 1439–1442, at 1441, margin note 5.
[183] Prosecutor v. Lubanga Dyilo, *supra* note 118, at para. 197, (footnote omitted) (emphasis added).
[184] www.oxforddictionaries.com [accessed 18 September 2014].
[185] Ibid.
[186] Decision on Victims' Participation at the Hearing on the Confirmation of the Charges, ICC-02/05-03/09-89, 29 October 2010.
[187] Ibid., at para. 42.

property dedicated to humanitarian purposes, and that property dedicated to a peacekeeping mission is outside the scope of the rule 85(b) definition of 'victim'.[188] Of interest is that the Court also held that 'the wording of rule 85(b) of the Rules, in referring to "objects for humanitarian purposes", seems to suggest that an ancillary humanitarian use of the property in question would not be sufficient to ground an application for participation under such provision'.[189] This suggests that a State's armed forces could qualify as a 'victim' under rule 85(b) in respect of direct harm to property predominantly or exclusively used for humanitarian purposes.

Another possibility is to interpret article 75(2), which provides that reparations may be made 'to, or in respect of' victims, to refer to a claim of diplomatic protection by the victim State on behalf of its nationals.[190] However, the drafting history of this provision shows that the wording of article 75(2) 'refers to the possibility for appropriate reparations to be granted not only to victims but also to others such as the victims' families and successors'.[191] The Rules of Procedure and Evidence also make clear that the beneficiaries of reparations are victims on an individual or collective basis, or an intergovernmental, international or national organisation approved by the Trust Fund,[192] and not the victims' State of nationality.

II. Should States be Recognised as Victims under Rule 85(b)?

In light of the above, should 'organizations or institutions' in rule 85(b) be interpreted liberally to include States? One might question what a State victim of aggression would gain from victim status under rule 85(b), since it does not require such status in order to exercise procedural rights before the Court. When the victim State refers the case to the Court under article 14 of the Statute, it is entitled to be notified of a decision by the Prosecutor not to initiate an investigation[193] or not to prosecute.[194] As 'an interested State' in proceedings relating to the crime of aggression, the victim State is also entitled to receive notifications from the Court of various steps in the proceedings, including reparations.[195] The victim State may participate in the proceedings against the accused by making *amicus curiae* oral or written submissions to the Court at any stage of the proceedings and on any issue that the Chamber deems appropriate.[196] The victim State may make representations to the Court regarding reparations upon the invitation of the Chamber.[197] The victim State is also entitled to full reparation from the aggressor State under customary international law.[198]

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[188] Ibid, at para. 49.
[189] Ibid.
[190] See Rosenfeld, *supra* note 6, at 263.
[191] Report of the Working Group on Procedural Matters, UN Doc. A/CONF.183/C.1/WGPM/L.2, 24 June 1998, Text of the draft articles, footnote to article 73.
[192] Rule 98.
[193] Article 53(1) and rule 105(1).
[194] Article 53(2) and rule 106(1).
[195] Rules 94(2), 95(1) and 96(1).
[196] Rule 103(1).
[197] Article 75(3); rules 97(2) and 98(4).
[198] International Law Commission, *supra* note 96, article 31(1).

On the other hand, victim status under the Rules of Procedure and Evidence would allow the victim State to apply for reparations against the convicted person under article 75(2). Reparations under the Rome Statute are without prejudice to the rights of victims under international law.[199] Accordingly, the victim State could seek reparations from the convicted person even if it also receives reparations from the aggressor State. The Court may order symbolic reparations under article 75.[200] This could include satisfaction in the form of an order declaring wrongfulness of the criminal conduct and publicly recognising the harm caused to the victim State. Attaining victim status and receiving an award of financial compensation and satisfaction would also have symbolic value due to the difficulty of obtaining a finding of aggression against the aggressor State before the International Court of Justice or by the UN Security Council. The ICJ has never made a finding of aggression, most infamously in the case of the Democratic Republic of the Congo v. Uganda.[201] Similarly, the UN Security Council has passed few resolutions condemning aggression.[202]

Despite this potential advantage, there are two interrelated objections to recognising States as victims of the crime of aggression under rule 85(b). Firstly, as Carsten Stahn argues, the recognition of States as victims of the crime of aggression under the Rome Statute 'would introduce a surrogate forum for interstate reparation through criminal proceedings before the ICC. This may ultimately run against the purpose and mandate of the court.'[203] Recognising States as victims under rule 85(b) would not be in the spirit of the restorative justice provisions of the Rome Statute. These provisions are primarily directed towards addressing the suffering of the 'millions of children, women and men [who] have been victims of unimaginable atrocities that deeply shock the conscience of humanity'.[204] States have other avenues to seek redress for aggression under international law. The individual victims of the crimes within the Court's jurisdiction do not, particularly if those victims do not suffer multiple forms of harm, such as soldiers of the victim State and civilians who are harmed collaterally.

This gives rise to the second objection to recognition of States as victims of the crime of aggression: it could divert resources of the convicted person or the Trust Fund for Victims from individual victims (of this and other crimes) to States. The United Kingdom raised this concern during the debates over the inclusion of legal persons as victims, although in relation to the recognition of commercial corporations, rather than States.[205] The Court could somewhat address this issue by taking into account previous reparations payments to a victim State when deciding the allocation of reparations between different groups of

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[199] Article 75(6).
[200] Prosecutor v. Lubanga Dyilo, *supra* note 118, at para. 222.
[201] DRC v. Uganda, *supra* note 52, Separate Opinion of Judge Simma, para. 2.
[202] These include Southern Rhodesia (1973-79), South Africa (1976-87), Israel (1985 and 1988) and Iraq (1990). For a detailed account see Preparatory Commission for the International Criminal Court, Historical Review of Developments relating to Aggression, UN Doc. PCNICC/2002/WGCA/L.1, 24 January 2002, 235–37.
[203] C. Stahn (2010), 'The "End", the "Beginning of the End" or the "End of the Beginning"? Introducing Debates and Voices on the Definition of "Aggression"', *Leiden Journal of International Law*, 23 (2010, 875–882 at 881.
[204] Rome Statute, second preambular paragraph.
[205] Fernández de Gurmendi, *supra* note 80, at 433.

victims in order to avoid unfairness.[206] However, in the context of very limited resources available for reparations through the Trust Fund for Victims, allowing States to seek reparations from the convicted person under article 75(2) would be to the detriment of the great numbers of individual victims who suffer harm from genocide, crimes against humanity, war crimes and – eventually – the crime of aggression. It would also be unfair due to the disparity between the resources and ability of individual victims on the one hand and that of States on the other, to protect their respective interests which are affected by the criminal proceedings and make submissions regarding reparations.

If only States – rather than individuals – are recognised as victims of the crime of aggression, this would also limit the quantum of reparations to the extent of damage, loss and injury to the victim State. Reparations would not specifically address harm to individuals, and the State would not be required to apply the reparations for the benefit of individual victims. Although it can be argued that granting reparations to a State victim of aggression would be more efficient than individual reparations since the State can invest the monies in rebuilding infrastructure and establishing services which are of benefit to the entire community, this could also be achieved by Court-ordered reparations through the Trust Fund in the form of a collective award, or to an intergovernmental, international or national organisation approved by the Trust Fund.[207] A collective award to victims through the Trust Fund would entail a prior consultation process involving victims and affected communities.[208]

As the recognition of legal persons as victims under rule 85(b) is discretionary, as indicated by the terms 'may include',[209] the Court should exercise its discretion to decline to recognise States as 'organizations or institutions' meeting the definition of victim.

E. Conclusion

There is considerable legal uncertainty regarding the appropriate interpretation and application of the definition of 'victim' in the Court's Rules of Procedure and Evidence to the crime of aggression. However, the Rome Statute and its Rules do not require a legal interest to be affected for victim status to be recognised. Instead, as a multilateral treaty, the Statute creates new rights for victims based on factual harm. This chapter has argued that, subject to the causation requirement, individuals can be victims of the crime of aggression for the purposes of the Rome Statute. There are convincing policy arguments for and against such recognition, with the arguments in *contra* primarily political. Since State support is essential for the effective implementation of the Rome Statute and its restorative justice provisions, if the application of these provisions to individual victims of the crime of aggression is not States' intention, the Rules of Procedure and Evidence should be amended accordingly. However, this is not a required response to the institutional challenges raised by recognising individuals as victims

[206] Prosecutor v. Lubanga Dyilo, *supra* note 118, at para. 201.
[207] Rule 98(3) and (4).
[208] Prosecutor v. Lubanga Dyilo, *supra* note 118, at para. 282. (footnotes omitted).
[209] Fernández de Gurmendi, *supra* note 80, at 433.

of the crime of aggression, since these challenges can be addressed in ways that do not exclude redress for victims.

States could also be recognised as victims of the crime of aggression for the purposes of the Rome Statute, but it is not necessary or desirable to do so. States do not require victim status to participate in the proceedings before the Court. States also have the right to reparations from the aggressor State under international law. As it is unlikely that a person convicted of the crime of aggression would have sufficient resources to make full reparation for loss or damage caused by aggression, funds for reparations would probably be advanced and complemented by the Trust Fund for Victims. Granting States reparations from this source would reduce the resources available to advance or complement reparations awards to all other victims of the crimes within the Court's jurisdiction. It would also diminish the funds available for the Trust Fund to carry out its assistance mandate for the benefit of victims. It is acknowledged that these conclusions are the opposite of the position under customary international law, in which States and not individuals are recognised as victims of aggression. However it is for this reason that States have other avenues of redress for harm suffered from aggression, and individuals do not.

Justice for individual victims is one of the key aims of the International Criminal Court.[210] If States support the recognition of individuals as victims of the crime of aggression, it will be a positive step towards realising the goal of delivering justice for victims of all crimes within the Court's jurisdiction.

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