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ACCIDENT AND DESIGN: RECOGNISING VICTIMS OF AGGRESSION IN INTERNATIONAL LAW

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Abstract International law has not traditionally recognised individuals as victims of the crime of aggression. Recent developments may precipitate a departure from this approach. The activation of the jurisdiction of the International Criminal Court over the crime of aggression opens the way for the future application of the Court's regime of victim participation and reparation in the context of prosecutions for this crime. The determination by the United Nations Human Rights Committee in General Comment No. 36 that any deprivation of life resulting from an act of aggression violates Article 6 of the International Covenant on Civil and Political Rights serves to recognise a previously overlooked class of victims. This article explores these recent developments, by discussing their background, meaning and implications for international law and the rights of victims.

Keywords: human rights, aggression, International Criminal Court, right to life, victims, reparations.

I. INTRODUCTION

International law pays ever-increasing attention to the rights of victims.[1] The path-breaking recognition of the rights of individuals under international human rights law which followed the Second World War has provided the legal foundation for the growing articulation at the international level of the rights of victims of crime and of violations of international law.[2] According

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[1] MC Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 HRLRev 203; C Fernández de Casadevante Romani, *International Law of Victims* (Springer-Verlag 2012); D Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2015).

[2] See eg UNGA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (29 November 1985) UN Doc A/Res/40/34; UNGA, *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* (21 March 2006) UN Doc A/RES/60/147.

[*ICLQ* vol 70, January 2021 pp 103–132] doi:10.1017/S0020589320000494

to the preamble of the United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims* (2005), 'the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field'.[3] As a prime example of the increased acknowledgment of the rights of victims under international law, the International Criminal Court has departed significantly from predecessor international criminal tribunals by seeking to move beyond a model of punitive justice at the international level towards an approach that is 'more inclusive, encourages participation and recognises the need to provide effective remedies for victims'.[4] This era of victims' rights has, however, largely excluded natural persons as victims of aggression.

'To initiate a war of aggression', the International Military Tribunal at Nuremberg famously held, is 'not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole'.[5] While a strong emphasis has been laid over the past century on the prohibition, prevention and prosecution of unlawful uses of force,[6] international law has not generally conceived of individuals as being victims of this seemingly ultimate breach of international law. Early twentieth-century conceptions of aggression primarily viewed States as being harmed by the unlawful use of force.[7] Although the preamble of the Charter of the United Nations acknowledges that war 'twice in our life-time has brought untold sorrow to mankind',[8] and the Nuremberg tribunal held that the consequences of war 'are not confined to belligerent states alone, but affect the whole world',[9] aggression has been viewed as a violation of international law perpetrated against States alone. The definition of aggression in General Assembly Resolution 3314, which was adopted by consensus in 1974, aims to 'facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim'.[10] The use of the singular perfectly

[3] Preamble, *Basic Principles and Guidelines* (2005).

[4] *Prosecutor v Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, Trial Chamber I (7 August 2012) Case No ICC-01/04-01/06, para 177.

[5] International Military Tribunal (Nuremberg), *Judgment and Sentences* (1 October 1946) reprinted in (1947) 41(1) AJIL 172, 186.

[6] See Preamble and art 2(4), Charter of the United Nations (24 October 1945) 1 UNTS XVI; Case Concerning Military and Paramilitary Activities In and Against Nicaragua, (*Nicaragua v United States of America*), Merits (27 June 1986) General List No. 70, para 190. See generally C Gray, *International Law and the Use of Force* (Oxford University Press 2018); Y Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press 2017); M Weller, *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015).

[7] See eg L Kopelmanas, 'The Problem of Aggression and the Prevention of War' (1937) 31 AJIL 244; Q Wright, 'The Concept of Aggression in International Law' (1935) 29 AJIL 373.

[8] Preamble, Charter of the United Nations.

[9] International Military Tribunal (Nuremberg), *Judgment and Sentences*, 186.

[10] Preamble and art 1, 14, UNGA Res 3314 (XXIX), 'Definition of Aggression' (December 1974).

illustrates that it is the State that has traditionally been considered as the victim of aggression.

Aggression has therefore not tended to be included amongst the crimes and violations of international law considered as giving rise to particular rights on the part of individuals as victims. The *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, for example, define 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.[11]

Aggression constitutes a serious violation of *jus ad bellum*, the law governing the use of force, and while breaches of international human rights law or international humanitarian law may occur during an aggressive use of force, an act of aggression does not itself violate those branches of international law. The *Basic Principles and Guidelines* do not conceive of victims of aggression *per se*, an approach that is also reflected in international law scholarship on the rights of victims.[12]

Recent developments in international law may precipitate a departure from the traditional approach to victimhood in the context of aggression. The activation of the jurisdiction of the International Criminal Court over the crime of aggression in July 2018 opens the way for the future application of the Court's extensive regime of victims' rights in the context of the crime of aggression.[13] Victims before the International Criminal Court constitute 'natural persons who have suffered harm as a result of the commission of *any* crime within the jurisdiction of the Court'.[14] The potential recognition of individuals as victims of aggression has been arrived at unknowingly and accidentally, as drafters of both the Rome Statute and the Kampala amendment on the crime of aggression, being preoccupied with defining the crime of aggression and agreeing on how the Court would exercise jurisdiction had neither anticipated nor prepared for this aspect of any

[11] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims*, para 8.

[12] See eg C Ferstman, M Geotz and A Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (Brill 2009); C Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012); T Bonacker and C Safferling (eds), *Victims of International Crimes: An Interdisciplinary Discourse* (Springer 2013); Fernández de Casadevante Romani (n 1).

[13] On victims' rights at the International Criminal Court see C McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press 2012); L Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014); TM Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press 2015).

[14] Rule 85, Rules of Procedure and Evidence, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002* (ICC-ASP/1/3 and Corr.1), part II.A (emphasis added).

potential prosecution of the crime of aggression before the International Criminal Court.

In contrast, the United Nations Human Rights Committee has consciously sought to bring international human rights law to bear in the context of the unlawful use of force amounting to aggression. In General Comment No. 36, adopted in October 2018, the Committee took the position that any deprivation of life resulting from an act of aggression would be a violation Article 6 of the International Covenant on Civil and Political Rights.[15] The Human Rights Committee has deliberately sought to place individuals squarely within aggression's previously exclusive constituency of victims.

This article explores these recent developments, discussing their background, meaning and implications for international law and the rights of victims. It begins by examining the incorporation of the crime of aggression in the jurisdiction of the International Criminal Court, before turning to consider the questions concerning victims which will confront the Court should prosecutions follow. The article's first part will draw on existing jurisprudence at the Court concerning the definition of victims and reparations. Recognising individuals as victims of aggression at the International Criminal Court may serve to compound challenges currently facing the Court and give rise to further obstacles to the delivery of justice for victims.[16] The potentially significant numbers of victims of aggression may bolster arguments that reparations processes and criminal justice at the international level should be separated institutionally.

The second part of the article moves to a consideration of the effort by the United Nations Human Rights Committee to interpret States' obligations concerning the right to life as contingent on compliance with international law concerning the use of force. This part explores the drafting history of General Comment No. 36, including the objections of a number of States to the position adopted by the Human Rights Committee. It considers the implications of the position adopted by the Committee for the interaction between international human rights law, international humanitarian law and the law on the use of force. With this expanded application of human rights law in times of conflict, the position of the Human Rights Committee seems to challenge the traditional separation of the *jus ad bellum* and the *jus in bello*.[17] The section also addresses the issue of reparations for violations of the right to life in a context of aggression before the Committee.

[15] Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life (30 October 2018) CCPR/C/GC/36, para 70.

[16] On the challenges facing the International Criminal Court see generally P Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press 2018); D Bosco, *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time* (Oxford University Press 2014); CC Jalloh and I Bantekas, *The International Criminal Court and Africa* (Oxford University Press 2017).

[17] See generally C Greenwood, 'The Relationship between Ius Ad Bellum and Ius in Bello' (1983) 9 RevIntlStud 221.

The recognition of natural persons as victims of aggression under international criminal law and international human rights law should formally insert a human dimension into *jus ad bellum* considerations.[18] These developments further the claim of the International Criminal Tribunal for the Former Yugoslavia that the 'State-sovereignty-oriented approach' of international law is being 'gradually supplanted by a human-being-oriented approach'.[19] Challenges arise, of course, for judicial and quasi-judicial bodies that may seek to advance the rights of victims of aggression in what is a fraught and highly contested area of international law and politics. Such efforts must remain fully cognisant of the pre-eminence ascribed to the maintenance of peace and security, to human rights and to international cooperation at the heart of the international legal system.[20]

II. THE CRIME OF AGGRESSION AT THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court is unique as a permanent international criminal tribunal established by a widely ratified international treaty.[21] It differs from other contemporary international criminal tribunals in two further respects. The Court has jurisdiction over the crime of aggression and its constitutive documents provide victims with the right to participate in proceedings and to receive reparations.[22] While the Nuremberg and Tokyo tribunals prosecuted crimes against peace from the Second World War, jurisdiction over aggression was not given to the tribunals for Rwanda, the Former Yugoslavia, Sierra Leone and Cambodia. Aside from the Extraordinary Chambers in the Courts of Cambodia, none of the aforementioned tribunals recognised a formal role or rights for victims in their proceedings.[23]

The crime of aggression stands apart in various ways from the other crimes within the jurisdiction of the International Criminal Court. States agreed that the Court would have jurisdiction over genocide, crimes against humanity, war crimes and aggression, but unlike the other crimes, the Court would not

[18] While references to 'individuals' or 'persons' could also include legal persons, such as companies, the focus of this article remains on natural persons, unless otherwise stated.

[19] *Prosecutor v Tadic*, Case No IT-9-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) para 97.

[20] See eg Preamble, arts 1–2, 39, 55–56, Charter of the United Nations.

[21] See generally WA Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2017); O Bekou and R Cryer (eds), *The International Criminal Court* (Routledge 2017); K Ambos and O Triffterer (eds), *Rome Statute of the International Criminal Court: A Commentary* (Bloomsbury T & T Clark 2016).

[22] See arts 5, 8*bis*, 68 and 75, Rome Statute of the International Criminal Court (1998) UN Doc A/CONF.183/9, entered into force 1 July 2002, 2187 UNTS 90.

[23] On the rights of victims before the Cambodia tribunal see M Elander, *Figuring Victims in International Criminal Justice: The Case of the Khmer Rouge Tribunal* (Routledge 2018); R Killean, *Victims, Atrocity and International Criminal Justice: Lessons from Cambodia* (Routledge 2018).

exercise such jurisdiction over aggression until an amending provision was adopted 'defining the crime and setting out the conditions under which the Court shall exercise jurisdiction'.[24] While other articles of the Rome Statute on crimes make implied or occasionally direct references to other international treaties,[25] Article 5 states pointedly that the future amending provision on aggression 'shall be consistent with the relevant provisions of the Charter of the United Nations'.[26] Unlike the other crimes, aggression can only be perpetrated by the most high-ranking of individuals—those 'in a position effectively to exercise control over or to direct the political or military action of a State'.[27] Most relevant of all, the crime of aggression necessarily involves inter-State breaches of international law.

The long and complex history of the development of the crime of aggression at the International Criminal Court saw intensive discussions regarding the definition of the crime itself, the scope of the Court's jurisdiction, the relationship with other international institutions, such as the Security Council, and the modalities of activating jurisdiction.[28] For a crime that has not been prosecuted by any international tribunal since Nuremberg and Tokyo, and only exceptionally by national tribunals, aggression has attracted significant scholarly attention.[29] This reflects the seriousness of the crime itself and the impact of the use of force between States, but also the long-standing difficulties of reaching international agreement on aggression's definition and the extent of the International Criminal Court's jurisdiction. While it was a breakthrough to adopt the definition of the crime at the first review conference of the International Criminal Court held in Kampala in 2010, the high threshold embedded in the definition and the differentiated jurisdictional regime for the Court for aggression affirm both aggression's *sui generis* nature and the limited likelihood of prosecution.

Pursuant to the amendments agreed at Kampala in 2010, the crime of aggression is defined in Article 8 *bis* of the Rome Statute as:

> the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[30]

[24] Art 5(1), Rome Statute.

[25] See eg arts 8(2)(a) and 8(2)(c), Rome Statute.

[26] Art 5(2), Rome Statute.

[27] Art 8*bis*(1), Rome Statute. See T Meron, 'Defining Aggression for the International Criminal Court' (2001) 25 Suffolk Transnational Law Review 1, 3.

[28] For a succinct overview see RS Clark, 'Exercise of Jurisdiction over the Crime of Aggression: International Criminal Court (ICC)' in *Max Planck Encyclopaedia of International Procedural Law* (2018).

[29] See eg C McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press 2013); P Grzebyk, *Criminal Responsibility for the Crime of Aggression* (Routledge 2013); M Politi, *The International Criminal Court and the Crime of Aggression* (Routledge 2017).

[30] Art 8 *bis* (1), Rome Statute.

As well as constituting a leadership crime, the language of 'manifest violation' purports to ensure that only particularly serious *jus ad bellum* violations are prosecuted.[31] Unless the Security Council refers a situation involving aggression to the International Criminal Court, the crime can only be prosecuted when arising between two States parties to the Rome Statute, both of which have accepted the aggression amendments and without issuing an 'opt-out' declaration from the Court's jurisdiction.[32]

That aggression must be perpetrated by one State against another is evident from the specific acts of aggression listed in Article 8 *bis*, as drawn from UN General Assembly Resolution 3314.[33] Such acts include, for example, '[t]he invasion or attack by the armed forces of a State of the territory of another State'.[34] Although non-State entities such as armed groups or mercenaries may be involved in an act of aggression, the crime requires the involvement of at least two States, with an act of aggression committed by or on behalf of one or more States against another.[35] While an attacked State is clearly a victim of aggression, as Resolution 3314 explicitly stated,[36] the legal regime of the International Criminal Court *prima facie* excludes States as victims of the crimes within the Court's jurisdictions, but opens the door for natural persons to be recognised as victims of this crime.

The jurisdiction of the International Criminal Court over the crime of aggression was activated in July 2018, following the thirtieth ratification of the Kampala amendments and the passing of a resolution by the Assembly of States Parties in December 2017.[37] While the Rome Statute has 123 States parties,[38] the Kampala amendments have only been ratified by less than a third, 39 to date.[39] None of the five permanent members of the Security Council have accepted the amendments, nor have other militarily powerful States such as India, Pakistan, Israel, Egypt and Iran, although several NATO members, including Germany, Spain, Poland, Belgium and the Netherlands, have ratified the aggression amendments. The United States, while a non-State party to the Rome Statute, was prominent during the aggression negotiations at Kampala and although not satisfied with the definition or jurisdictional regime adopted, was not in a position to block

[31] See further KJ Heller, 'The Uncertain Legal Status of the Aggression Understandings' (2012) 10 JICJ 229.

[32] See art 15 *bis* and *ter*, Rome Statute. See D Akande and A Tzanakopoulos, 'Treaty Law and ICC Jurisdiction over the Crime of Aggression' (2018) 29 EJIL 939; J Trahan, 'Revisiting the Role of the Security Council Concerning the International Criminal Court's Crime of Aggression' (2019) 17 JICJ 471.

[33] See also UNGA Res 3314 (XXIX), 'Definition of Aggression', art 1.

[34] Art 8 *bis* (2), Rome Statute.

[35] Art 8 *bis* (2)(a)–(g), Rome Statute.

[36] UNGA Res 3314 (XXIX), 'Definition of Aggression', Preamble. See also International Law Association, *Final Report on Aggression and the Use of Force* (2018) 10–11, 15–18, 25–6.

[37] Resolution on the Activation of the Jurisdiction of the Court over the Crime of Aggression, Assembly of States Parties Resolution, ICC-ASP/16/Res.5 (14 December 2017).

[38] See <https://treaties.un.org>.

[39] ibid.

https://doi.org/10.1017/S0020589320000494 Published online by Cambridge University Press

the process.[40] Under the Trump administration, greater bellicosity has been demonstrated towards the International Criminal Court, with former National Security adviser John Bolton criticising the 'vague definition' of the crime of aggression.[41]

The high threshold of the definition of the crime, the Court's circumscribed jurisdiction and the limited ratifications to date suggest the Court will undertake few if any prosecutions of aggression.[42] This may be welcomed by would-be aggressors, as well as embattled International Criminal Court officials,[43] but hardly advances the Court's goal of punishing 'the most serious crimes of concern to the international community as a whole' and putting 'an end to impunity'.[44] The unlikely prospects for prosecution at the International Criminal Court have led to the exploration of other potential avenues for addressing aggression.[45] Nevertheless, prosecutions before the Court cannot be ruled out. In a context of increasing hostility to international law and institutions and of unilateral and other unlawful uses of force,[46] victims of the crime of aggression may well demand criminal accountability before the International Criminal Court.

A. Who Is a Victim of the Crime of Aggression?

If the International Criminal Court is confronted with the commission of the crime of aggression, the question will inevitably arise as to who constitutes a

[40] See generally H Hongju Koh and TF Buchwald, 'The Crime of Aggression: The United States Perspective' (2015) 109 AJIL 257; C Kreß and L von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 JICJ 1179.

[41] See eg John Bolton, 'Protecting American Constitutionalism and Sovereignty from International Threats', Speech to the Federalist Society, Washington D.C., September 2018 (*Just Security*, 10 September 2018). See also United States of America, White House, *Executive Order on Blocking Property of Certain Persons Associated with the International Criminal Court* (11 June 2020).

[42] See KJ Heller, 'Who Is Afraid of the Crime of Aggression?' (SSRN Scholarly Paper, 21 August 2019).

[43] SD Murphy, 'The Crime of Aggression at the International Criminal Court' in Weller (n 6) 533, 553–5.

[44] Preamble, Rome Statute.

[45] See NN Jurdi, 'The Domestic Prosecution of the Crime of Aggression after the International Criminal Court Review Conference: Possibilities and Alternatives' (2013) 14 MelbJIL 129; B Van Schaack, 'Par in Parem Imperium Non Habet; Complementarity and the Crime of Aggression' (2012) 10 JICJ 133; BB Ferencz, 'The Illegal Use of Armed Force as a Crime Against Humanity' (2015) 2 Journal on the Use of Force and International Law 187; M Ventura and M Gillett, 'The Fog of War: Prosecuting Illegal Uses of Force as Crimes Against Humanity' (2013) 12 Washington University Global Studies Law Review 523; NA Combs, 'Unequal Enforcement of the Law: Targeting Aggressors for Mass Atrocity Prosecutions' (2019) 61 ArizLRev 155.

[46] See eg AA Haque, 'Iran's Unlawful Reprisal (and Ours)' (*Just Security*, 8 January 2020); V Todeschini, 'Turkey's Operation "Peace Spring" and International Law' (*Opinio Juris*, 21 October 2019); R Allison, 'Russia and the Post-2014 International Legal Order: Revisionism and Realpolitik' (2017) 93 IntAff 519; S Sayapin and E Tsybulenko, *The Use of Force against Ukraine and International Law: Jus Ad Bellum, Jus In Bello, Jus Post Bellum* (Springer 2018); SAG Talmon, 'The United States under President Trump: Gravedigger of International Law' (SSRN Scholarly Paper, 10 July 2019).

victim of this crime. Before investigations have begun or individual accused identified, the Prosecutor must consider the 'interests of victims'.[47] The identification of victims of crimes within the jurisdiction of the Court is necessary to allow such persons to participate in proceedings and to present their 'view and concerns'.[48] Upon a successful conviction, victims who have suffered damage as a result of the crimes perpetrated by the guilty individual are entitled to reparations.[49] The identification of victims is also relevant for the assistance and support activities of the Court's Trust Fund for Victims which are not linked exclusively to successful prosecutions.[50] Victims of crimes are a constant presence in the work of the International Criminal Court, even if usually at a physical remove from proceedings.[51]

The Rome Statute is replete with references to victims, but a definition of victims was only agreed and incorporated in the Rules of Procedure and Evidence in 2002.[52] Rule 85 provides that:

> (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.

The definition of victims includes natural persons first and foremost, as well as certain organisations or institutions, but excludes any explicit reference to States. Natural persons and entities must have suffered harm (which is not defined, although the Rules of Procedure and Evidence refer to 'damage, loss or injury' in the context of assessing reparations[53]) from the commission of 'any crime within the jurisdiction of the Court'. No distinction is made between the separate crimes within the Court's jurisdiction for this purpose, notwithstanding differentiations elsewhere in the Rome Statute.[54]

As the various pieces of the aggression puzzle at the International Criminal Court were being put together, it might have been expected that the emphasis on victims in the Rome Statute would have prompted the Assembly of States Parties to consider whether natural persons could be treated as victims of the crime of aggression, and what the attendant implications might be. The issue

[47] See eg art 53(1)(c), 53(2)(c), Rome Statute.
[48] See eg arts 15(3) and 68(3), Rome Statute.
[49] Art 74, Rome Statute.
[50] Rule 98(5), Rules of Procedure and Evidence. See also art 79, Rome Statute. See further C Ferstman, 'Reparations, Assistance and Support' in K Tibori-Szabó and M Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (TMC Asser Press 2017).
[51] Art 68(3), Rome Statute.
[52] Rules of Procedure and Evidence, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002* (ICC-ASP/1/3 and Corr.1), part II.A.
[53] Rule 97(1), Rules of Procedure and Evidence.
[54] See eg arts 12–15 *ter*, 25(3) *bis*, 33(2), 124, Rome Statute.

of who constitutes a victim of aggression was not, however, included in the 'preliminary list of possible issues relating to the crime of aggression' put forward to the Preparatory Commission in 2000.[55] Nor did it feature in any significant way in the preparation of the Rules of Procedure and Evidence, the discussions of the Special Working Group on the Crime of Aggression or during the Kampala Review Conference.[56] Given the overwhelming focus on achieving an agreement on the definition of the crime of aggression and the Court's jurisdictional regime at Kampala, it seems the question of victims was one of those 'auxiliary issues that are of no less importance', but which received insufficient attention.[57] That natural persons, as well as certain organisations and institutions, may constitute victims of the crime of aggression under international criminal law seems to have been an unnoticed outcome of the activation of the International Criminal Court's jurisdiction over aggression.

Scholarship around the time of the Kampala Review Conference and the first ratifications of the aggression amendments overlooked the prospect of natural persons as victims of the crime of aggression.[58] Judges of the International Criminal Court also neglected to address the question of aggression's victims, even when discussing the rights of victims.[59] Hans-Peter Kaul of the Pre-Trial Division, for example, acknowledged the creation of 'mass victimisation' by illegal uses of force, albeit through the likely commission of other international crimes:

> … the greatest risks of mass victimisation, the greatest risks to make thousands of men, women and children victims of international crimes stem from war-making, illegal or questionable uses of armed force or outright crimes against peace as defined in the Nuremberg principles. […] Experience shows that war, the injustice of war in itself begets massive war crimes and crimes against humanity, thus leading time and again to human suffering and victims.[60]

Erin Pobjie has rightly observed that the potential recognition of natural persons as victims of aggression 'represents a surprising and significant development in the history of the crime of aggression that has passed virtually unnoticed'.[61]

[55] Proceedings of the Preparatory Commission at its Fourth Session (13–31 March 2000), PCNICC/2000/L.1/Rev.1 (3 April 2000) 42–4.

[56] See S Barriga and C Kreß (eds), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press 2011); S Barriga, W Danspeckgruber and C Wenaweser (eds), *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression* (The Lichtenstein Institute on Self-Determination at Princeton University 2009).

[57] Jurdi (n 45).

[58] See eg C Fernández de Casadevante Romani, 'International Law of Victims' (2010) 14 MaxPlanckYrbkUNL 219, 245.

[59] See eg C Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 CaseWResJIntlL 475.

[60] H-P Kaul, 'Victims' Rights and Peace' in Bonacker and Safferling (n 12) 223, 228.

[61] E Pobjie, 'Victims of the Crime of Aggression' in C Kreß and S Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press 2016) 816, 817.

With the advancement of the crime of aggression within the framework of the International Criminal Court, scholarship has begun to address the matter of who might constitute victims of this crime.[62]

For the International Criminal Court, there are limited international criminal law precedents to draw upon regarding victims of international crimes, although human rights law has dealt with questions relating to victim participation, reparations and other matters for many years.[63] There are no judicial precedents treating natural persons as victims of the crime of aggression, as States have traditionally been viewed as the only relevant victims under international law for this purpose.[64] The International Court of Justice has never 'alluded to the possibility that the unlawful use of force could give rise to international rights of individuals to reparations vis-à-vis the offending state'.[65] Post-Second World War tribunals may have been conscious of the human impact of aggression—hence the apt description at Nuremberg that it 'contains within itself the accumulated evil of the whole'[66]—but States were its victims in a legal sense, and reparations for natural persons for aggression, or indeed any other crimes, were not addressed in the criminal justice context.[67] Prosecutions served an expressive purpose and provided a form of justice for victims, albeit without incorporating any formal role or rights for those victims at that time.[68]

The various *ad hoc* international criminal tribunals established in the 1990s also offer little guidance for the International Criminal Court on aggression and its victims, given the exclusion of the crime from their jurisdiction. The Committee of Experts assigned by the Prosecutor of the ICTY to review the NATO bombing campaign in the Former Yugoslavia put it that '[w]hile a person convicted of a crime against peace may, potentially, be held criminally responsible for all of the activities causing death, injury or destruction during a conflict, the ICTY does not have jurisdiction over crimes against peace'.[69] If the Committee had in mind 'death, injury or destruction' amounting to war crimes,

[62] See McDougall (n 29) 292–301; T Dannenbaum, *The Crime of Aggression, Humanity, and the Soldier* (Cambridge University Press 2018); F Rosenfeld, 'Individual Civil Responsibility for the Crime of Aggression' (2012) 10 JICJ 249.

[63] See eg J Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Bloomsbury Publishing 2008); JC Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations* (Martinus Nijhoff 2013).

[64] Pobjie (n 61) 822.

[65] C Kreß, 'The International Court of Justice and the 'Principle of the Non-Use of Force' in Weller (n 6) 561, 571–2.

[66] International Military Tribunal (Nuremberg), *Judgment and Sentences*, 186.

[67] See S Garkawe, 'The Role and Rights of Victims at the Nuremberg International Military Tribunal' in HR Reginbogin and C Safferling, *The Nuremberg Trials: International Criminal Law Since 1945, 60th Anniversary International Conference / Internationale Konferenz Zum 60. Jahrestag* (De Gruyter Saur 2006) 86, 86; Moffett (n 13) 61.

[68] On the expressive function of international criminal law see DM Amann, 'Group Mentality, Expressivism, and Genocide' (2002) 2(2) ICLR 93; B Sanders, 'The Expressive Turn to International Criminal Law: A Field in Search of a Meaning' (2019) (34)2 LJIL 851.

[69] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) para 30.

crimes against humanity or genocide, it might be asked whether victims of harms not characterised as other international crimes might potentially fall into the category of victims of the crime of aggression. Writing in the eighteenth century, Emer de Vattel had expressed the view that purveyors of unlawful uses of force would be liable for all harms which follow:

> The bloodshed, the desolation of families, the pillaging, the acts of violence, the devastation by fire and sword, are all his work and his crime. He is guilty towards the enemy whom he attacks, oppresses, and massacres without cause, whom he exposes to danger without necessity or reason – towards those of his subjects who are ruining or injured by the war, who lose their lives, their property or their health because of it.[70]

During the post-Second World War trials, it was suggested that all killings occurring during an unlawful war, even of enemy soldiers, could constitute murder.[71] While the present definition of the crime of aggression does not encompass criminal liability 'for all the evils and all the disasters of the war',[72] although they may be charged separately if amounting to war crimes, crimes against humanity or genocide, a plain reading of Rule 85 of the International Criminal Court's Rules of Procedure and Evidence suggests a wide spectrum of harm could be covered in the context of aggression and thus a broad range of potential victims of the crime.

Treating natural persons and non-State entities as victims of the crime of aggression may amount to a departure from the prevailing position under international law, but such an interpretation is effectively required by the Rules of Procedure and Evidence of the International Criminal Court. While States can be considered as victims of aggression in other international fora, Rule 85 refers exclusively to natural persons and certain organisations and institutions as victims of crimes within the Court's jurisdiction, thus seemingly precluding States from being considered as victims. To include States as victims could prejudice the rights of other victims at the International Criminal Court and divert resources for reparations from individuals and communities to States.[73] Case law at the Court concerning victims and reparations has not applied an overly strict interpretation of Rule 85 thus far however. In *Lubanga*, the Appeals Chamber set out that

[70] E de Vattel, *The Law of Nations or the Principles of Natural Law*, Volume III, Book III, *War*, Chapter XI, Translation of the Edition of 1758 by CG Fenwick (WS Hein & Co. 1995) 302.

[71] See eg Hartley Shawcross, Closing Statement, 26 July 1946, 19 *Trial of the Major War Criminals before the International Military Tribunal* (1948) 458; 'Judgment of the International Military Tribunal for the Far East' in N Boister and R Cryer (eds), *Documents on the Tokyo International Military Tribunal* (Oxford University Press 2008) 71, 86. See also R Cryer, 'The Tokyo International Military Tribunal and Crimes Against Peace (Aggression): Is There Anything to Learn?' in LN Sadat, *Seeking Accountability for the Unlawful Use of Force* (Cambridge University Press 2018) 80, 101; JF Witt, *Lincoln's Code: The Laws of War in American History* (Free Press 2012) 109–11; Dannenbaum (n 62).

[72] de Vattel (n 70) 302.

[73] Pobjie (n 61) 817, 849–52.

'organizations or institutions that have suffered direct harm to their property which serves an educational, religious or charitable purpose' includes non-governmental organisations, charities, government departments, schools, hospitals and companies.[74] In *Al Mahdi*, the 'symbolic gesture' of reparations of one euro was awarded to both Mali and UNESCO for the material and moral harm suffered by the destruction of cultural property.[75] This jurisprudence, therefore, does not completely exclude States or State entities from having some standing as victims of crimes before the International Criminal Court.

In relation to natural persons, any future case involving the crime of aggression will involve the unenviable but necessary task of defining who is a victim that has suffered harm as a result of the commission of this crime. According to the *Lubanga* Appeals Chamber, harm is to be understood as injury, loss or damage, and can include material, physical and psychological harm if 'suffered personally by the victim' as a result of the commission of a crime in the Court's jurisdiction.[76] Harm can be suffered by both direct or indirect victims, the latter exemplified by a family member of an individual directly harmed by the commission of a crime, so long as the harm is personal in nature.[77] In addition to the presence of such harm, which must be linked to a crime, the personal interests of a victim must be affected for purposes of victim participation.[78] Regarding the necessary causal connection between the harm and the crime in question, the Appeals Chamber upheld that there must be a 'but/for' relationship between the harm and the crime and that the latter must have been the proximate cause of the former.[79] Given the vast range of harms associated with the waging of war, the Court's jurisprudence suggests that 'the universe of victims of the crime of aggression is potentially massive'.[80]

Victims of the crime of aggression would most obviously include those victims of other international crimes committed in the course of aggression, namely war crimes, crimes against humanity or genocide. It could also cover those suffering harm as a result of violations of human rights or international humanitarian law not arising to such crimes but connected to the commission of the crime of aggression. Victims of the crime of aggression might also include civilians harmed in ways that are not necessarily contrary to human rights or international humanitarian law, such as those forced by the war to

[74] *Prosecutor v Thomas 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, Case No ICC-01/04-01/06 (3 March 2015) Order for Reparations (amended) para 8.

[75] *Prosecutor v Ahmad Al Faqi Al Mahdi*, Reparations Order, Trial Chamber VIII (17 August 2017) Case No ICC-01/12-10/15, paras 106–107.

[76] *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecution and the Defence Trial Chamber I's Decision on Victim's Participation of 18 January 2008 (11 July 2008) Case No ICC-01/04-01/06, paras 31–32.

[77] ibid, para 39.

[78] ibid, paras 64–65.

[79] *Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations', paras 120, 124–129.

[80] Pobjie (n 61) 843.

flee, but not coerced into doing so, or those unable to access food or medical care because of a collapse of services. In each of these situations, women frequently experience harm disproportionately to men, while children and other vulnerable groups also invariably suffer.[81] The definition of victims could plausibly include members of the armed forces of the victim State killed or injured in the course of a crime of aggression, even if in accordance with international humanitarian law. It may even be the case that members of the armed forces of the aggressor State who are similarly harmed could constitute victims.[82] Frédéric Mégret has written of the 'toll to combatants' of war, as well as 'the ripple effects of combatant harm on societies, the wounds, mutilation and disfigurement, the psychological trauma, the widows and the orphans, the family disintegration, the lost opportunities'.[83] All could plausibly be considered as harm occurring 'as a result of the commission' of the crime of aggression.

The United Nations Compensation Commission, although not a judicial body, provides a precedent for this expansive approach. The Security Council had determined that Iraq was 'liable under international law for any direct loss, damage – including environmental damage and the depletion of natural resources – or injury to foreign Government, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait'.[84] The Commission operated on the basis that an aggressor State could be liable for damage caused even when having acted in compliance with international humanitarian law.[85] Iraq was also considered liable for the damage caused by the armed forces of the United States and other coalition members during the conflict and for losses arising for 'the breakdown of civil order in Kuwait or Iraq' during the relevant time.[86] In relation to loss or injury on the part of prisoners of war, the Commission referred to 'mistreatment in violation of international humanitarian law',[87] although it never undertook any detailed application of the laws of armed conflict.[88]

[81] F Ní Aoláin, DF Haynes and N Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (Oxford University Press 2011) 37; DM Amann, 'The Policy on Children of the ICC Office of the Prosecutor: Toward Greater Accountability for Crimes against and Affecting Children' (2020) 101(911) IRRC 537.

[82] Dannenbaum (n 62); McDougall (n 29) 294.

[83] F Mégret, 'What Is the Specific Evil of Aggression?' in Kreß and Barriga (n 61) 1398, 1422.

[84] UNSC Res 687, 8 April 1991, S/RES/687 (1991) para 16.

[85] M Frigessi di Rattalma and T Treves, *The United Nations Compensation Commission: A Handbook* (Martinus Nijhoff 1999) 16–18. See generally CR Payne and PH Sand, *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (Oxford University Press 2011); TJ Feighery, CS Gibson and TM Rajah, *War Reparations and the UN Compensation Commission: Designing Compensation After Conflict* (Oxford University Press 2015).

[86] UN Compensation Commission, Governing Council Decision, *Criteria for Expedited Processing of Urgent Claims* (2 August 1991) S/AC.26/1991/1, para 18; UN Compensation Commission, Governing Council Decision (17 March 1992) S/AC.26/1991/7/Rev.1, para 6.

[87] UN Compensation Commission, Governing Council Decision, *Eligibility for Compensation of Members of the Allied Coalition Armed Forces* (26 June 1992) S/AC.26/1992/11. See also UN Compensation Commission, Governing Council, *Report and Recommendations Made by the Panel of Commissioners* (15 December 1994) S/AC.26/1994/4, 9–10.

[88] See V Heiskanen and N LeRoux, 'Applicable Law: *Jus ad Bellum*, *Jus in Bello*, and the Legacy of the UN Compensation Commission' in Feighery, Gibson and Rajah (n 85) 51. See

This potentially expansive reach of the category of victims in the context of the crime of aggression may bring the narrow 'juridified' concept of victim under international criminal law closer to the global experience of conflict victimhood.[89] According to Sara Kendall and Sarah Nouwen:

> Even in cases of armed conflict, only very few victims of that conflict will be recognized as victims in international criminal law: Victims of physical violence, and in some cases their relatives, could be recognized; victims of the situation of war 'alone'—who live in camps for displaced persons, experiencing a lack of food and opportunities—do not qualify, because their predicament is not recognized as an 'international crime'.[90]

The harms associated with an armed conflict connected to the crime of aggression may see such persons recognised as victims before the International Criminal Court, even where they cannot be considered as victims of other international crimes. While such an expansion of the victims of international crimes would be limited—it would not include those suffering from non-criminal harms in non-international armed conflicts or in international armed conflicts which do not involve the crime of aggression—it would nevertheless be an important recognition in international law of the victims of certain unlawful uses of force.

B. Reparations for Victims of the Crime of Aggression

In addition to seeking justice for victims through the prosecution and punishment of individual wrongdoers, the International Criminal Court aims to address the harm caused by the perpetration of international crimes through reparations.[91] The Rome Statute empowers the Court to 'make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'.[92] The Appeals Chamber has acknowledged that '[t]he success of the Court is, to some extent, linked to the success of its system of reparations'.[93] The crime of aggression poses particular challenges for this system of reparations, not least of which is the potentially large number of victims to be set against the limited resources of a convicted individual and the Trust Fund for Victims.

also SD Murphy, W Kidane and TR Snider, *Litigating War: Arbitration of Civil Injury by the Eritrea-Ethiopia Claims Commission* (Oxford University Press 2013); Dannenbaum (n 62) 214–15.

[89] S Kendall and S Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (2013) 76 Law and Contemporary Problems 235.

[90] ibid 241–2.

[91] See generally McCarthy (n 13). See also P de Greiff, *The Handbook of Reparations* (Oxford University Press 2008).

[92] Art 75(2), Rome Statute.

[93] *Prosecutor v Thomas Lubanga Dyilo* (3 March 2015) Order for Reparations (amended), para 3.

Aggression may not necessarily involve a large number of actual victims, as in the case of so-called bloodless invasions,[94] although in light of the requirements of gravity, character and scale under the Rome Statute, it is likely that any prosecution of the crime of aggression at the International Criminal Court will likely involve a significant cohort of victims. Such numbers have the potential to compound the already labour-intensive system of victim participation at the Court,[95] as well as testing to the very limits the existing system of reparations. In the *Bemba* case, which concerned war crimes and crimes against humanity, 5,229 victims were authorised to participate in proceedings, while in *Lubanga*, a case which involved hundreds and 'possibly thousands' of victims, the final amount of the reparatory award against the indigent Thomas Lubanga was $10 million.[96] By way of stark comparison, the United Nations Compensation Commission awarded over $50 billion in compensation to 1.5 million claimants arising from Iraq's illegal invasion of Kuwait in 1990.[97] The United States-led invasion of Iraq in 2003, without Security Council authorisation or a lawful basis in self-defence, has had an even greater human and economic cost.[98] In 2018, the Trust Fund for Victims at the International Criminal Court received €4.1 million in voluntary contributions from States parties and held just €9 million in its reparations reserve.[99]

The International Criminal Court's reparations system is precariously reliant on the often-absent wealth of convicted individuals and the limited largesse of States parties. While recognising natural persons and other entities as victims of the crime of aggression at the International Criminal Court could, according to Erin Pobjie, 'increase the financial and political cost of the crime of aggression and play an additional role in deterrence',[100] these worthy objectives run up against the challenging reality of reparations at the Court.[101] Drawing only on the resources of the guilty and the Trust Fund for Victims, and with the

[94] See T Dannenbaum, 'The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims' (2010–11) 28 WisIntlLJ 234.

[95] See generally M Delagrange, 'The Path towards Greater Efficiency and Effectiveness in the Victim Application Processes of the International Criminal Court' (2018) 18 ICLR 540; Van den Wyngaert (n 59).

[96] *Prosecutor v Bemba*, Judgment pursuant to Article 74 of the Statute, Trial Chamber III (21 March 2016) Case No ICC-01/05-05/08, para 18; *Prosecutor v Thomas Lubanga Dyilo*, Decision Setting the Size of the Reparations Award for Which Thomas Lubanga Dyilo is Liable, Trial Chamber II, Case No ICC-01/04-01/06 (21 March 2017) 111.

[97] See <https://uncc.ch/home>.

[98] C Lutz and A Mazzarino, *War and Health: The Medical Consequences of the Wars in Iraq and Afghanistan* (NYU Press 2019); M Otterman, R Hil and P Wilson, *Erasing Iraq: The Human Costs of Carnage* (Pluto Press 2010); BS Levy and VW Sidel, 'Adverse Health Consequences of the Iraq War' (2013) 381 The Lancet 949.

[99] Assembly of States Parties, Report on activities and programme performance of the International Criminal Court for the year 2018 (25 July 2019) ICC-ASP/18/3, paras 224–225. For a visual representation of the costs of international criminal tribunals see Leitner Center for International Law and Justice, *International Criminal Tribunals: A Visual Overview* (2013) 77.

[100] Pobjie (n 61) 840.

[101] L Zegveld, 'Victims' Reparations Claims and International Criminal Courts: Incompatible Values?' (2010) 8 JICJ 79.

absence of the potentially deeper pockets of an aggressor State, it seems likely that in an instance of mass victimisation such as aggression would usually entail, only collective or symbolic reparations would be feasible at the Court. Notwithstanding the expressive value and deterrent potential of individual convictions for aggression, such reparations might have a limited tangible benefit for the victims of aggression and serve to reinforce the argument that the Court may not be the appropriate mechanism for delivering reparations. Judges at the ICTY proposed an international claims commission to provide reparations for victims, out of concern for any incorporation of such a function within the Tribunal.[102] Christine van den Wyngaert asserted, while serving as a judge at the International Criminal Court, that a separate reparations commission could prove a 'more effective means to attain the objective of victim empowerment'.[103] As the International Criminal Court may be ill-equipped to provide reparations to the multitude of victims of the crime of aggression, the calls for a separate independent international reparations body merit further attention.[104]

International criminal law effectively overlooked victims for many years, but the creation of the International Criminal Court marked a significant turning point with its unique and extensive emphasis on the rights of victims. The activation of the Court's jurisdiction over the crime of aggression presents a perhaps unanticipated opportunity to clarify the concept of victimhood as it relates to the crime of aggression. The relative neglect by States of the question of who constitutes a victim of aggression may have reflected a view that agreements on the crime's definition and the Court's jurisdiction were unlikely to be forthcoming and even if they did materialise, the system of victims' rights at the Court would not apply to the crime of aggression.[105] It may also have simply been an oversight. The drafting history of the relevant instruments is almost silent. Irrespective, questions regarding who constitutes a victim of the crime of aggression and how reparations might be made in such a context cannot be ignored if the International Criminal Court is confronted with the crime of aggression. Should this come to pass, it will constitute a serious test of the institution's commitment to and capacity to meet the rights of victims of international crimes.

III. GENERAL COMMENT NO. 36 OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

The United Nations Human Rights Committee has also contributed to the recognition of victims of aggression in international law in its General Comment No. 36 of October 2018. The Committee has asserted that 'States

[102] Appendix, Letter dated 12 October 2000 from President of the International Tribunal for the Former Yugoslavia to the Secretary-General, Annex to a letter dated 2 November 2000 from the Secretary-General to the President of the Security Council, UN Doc S/2000/1063, para 48.
[103] Van den Wyngaert (n 59) 496.
[104] See eg Dannenbaum (n 94).
[105] Pobjie (n 61) 843.

parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant'.[106] This approach suggests that in the context of an unlawful use of force amounting to aggression, international human rights law might be violated, even if international humanitarian law has been respected. This is a narrower but equally significant development to that discussed in the previous section, whereby individuals constituting victims of the crime of aggression before the International Criminal Court may include those suffering harm that does not necessarily amount to genocide, crimes against humanity or war crimes, or perhaps even a violation of international humanitarian law. The Human Rights Committee has put forward a novel and far-reaching interpretation of the right to life, which entails a positive recognition of a previously excluded class of human rights victims, and is emblematic of its continuing effort to progressively develop and expand the scope of international human rights law. This section analyses the background to General Comment No. 36, key legal questions which arise, and the potential implications of the Human Rights Committee's pronouncement concerning the right to life and aggression, including in relation to reparations.

General Comment No. 36 marks a new departure for the Human Rights Committee in the long-standing debate on the role and application of human rights law in times of armed conflict. It does so by addressing not only the interaction between human rights law and international humanitarian law, but also the relationship between human rights law and international law governing the use of force. On the former, the Human Rights Committee has held for many years that human rights law continues to apply in times of armed conflict, but prior to General Comment No. 36, it focused mostly on how this body of law would apply together with international humanitarian law.[107] The Committee's established view is that these laws are 'complementary, not mutually exclusive'.[108] Scholarship has also largely focused on the relationship between human rights law and international humanitarian law, including questions concerning *lex specialis* and extraterritoriality.[109] The 1996 *Nuclear Weapons* Advisory Opinion of the International Court of Justice served to place the right to life at the heart of debates regarding the

[106] General Comment No. 36, para 70.

[107] See eg Human Rights Committee, General Comment No. 31 – Article 2: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.3 (26 May 2004) para 11; Human Rights Committee, General Comment No. 36, para 64. See also International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (8 July 1996) General List No. 95, para 25; Legality of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion (9 July 2004) General List No. 131.

[108] General Comment No. 36, para 64.

[109] See generally G Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015); O Ben-Naftali, *International Humanitarian Law and International Human Rights Law* (Oxford University 2011); Z Bohrer, J Dill and H Duffy, *Law Applicable to Armed Conflict* (Cambridge University Press 2020).

interrelationship between human rights and humanitarian law.[110] Scholars have only rarely considered how the right to life may be implicated where the lawfulness of using force under the *jus ad bellum* is at issue.[111]

The International Covenant on Civil and Political Rights protects the 'inherent right to life' of every human being, stating in Article 6 that '[n]o one shall be arbitrarily deprived of his life'.[112] The Human Rights Committee has stated that 'as a rule' a deprivation of life will be arbitrary 'if it is inconsistent with international law or domestic law'.[113] Until the adoption of General Comment No. 36, the Committee had primarily considered international humanitarian law when referring to international law in the context of arbitrariness. Paragraph 70 of General Comment No. 36 extends that consideration to compliance with international law governing the use of force:

> States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant. At the same time, all States are reminded of their responsibility as members of the international community to protect lives and to oppose widespread or systematic attacks on the right to life, including acts of aggression, international terrorism, genocide, crimes against humanity and war crimes, while respecting all of their obligations under international law. States parties that fail to take all reasonable measures to settle their international disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life.

General Comment No. 36 develops significantly the approach of the Human Rights Committee to the relationship between human rights and armed conflict.

In General Comment No. 36, the Committee reiterates its view of the complementary relationship between human rights and humanitarian law,[114] and lays the way for its subsequent holding in Paragraph 70, by stating that the use of lethal force 'consistent with international humanitarian law and *other applicable international law norms* is, in general, not arbitrary'.[115] Other human rights bodies applying human rights law in armed conflict have tended to only include international humanitarian law in their consideration

[110] *Legality of the Threat or Use of Nuclear Weapons*, para 25. See eg L Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?' (2006) 88 IRRC 881; I Park, *The Right to Life in Armed Conflict* (Oxford University Press 2018).

[111] See eg BG Ramcharan, 'The Concept and Dimensions of the Right to Life' in BG Ramcharan, *The Right to Life in International Law* (Martinus Nijhoff 1985) 1, 12; M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 2005) 125–6; WA Schabas, *U.N. International Covenant on Civil and Political Rights; Nowak's CCPR Commentary* (3rd edn, N Engel 2019) 141–2; WA Schabas, 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum' (2007) 40 IsraelLRev 592; D Jinks, 'International Human Rights Law in Times of Armed Conflict' in A Clapham and P Gaeta, *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 656, 668.

[112] International Covenant on Civil and Political Rights (1966), entered into force 23 March 1976, 999 UNTS 171. [113] General Comment No. 36, para 12. [114] ibid, para 64.

[115] ibid (emphasis added).

https://doi.org/10.1017/S0020589320000494 Published online by Cambridge University Press

of this matter.[116] The European Convention on Human Rights explicitly acknowledges that the right to life carries different obligations during times of armed conflict, stating that no derogation is permitted in a state of emergency for Article 2 on the right to life 'except in respect of deaths resulting from lawful acts of war'.[117] The European Court's assessment of the lawfulness of conduct during armed conflict has primarily relied on human rights standards, with some references to international humanitarian law, although it has been suggested by William Schabas that the reference to 'lawful acts of war' in Article 15 of the European Convention should be interpreted with reference to both *jus in bello* and the law governing resort to force,[118] an approach which the Court has yet to take.

The new articulation by the Human Rights Committee of the obligations of States parties to the Covenant concerning the right to life in armed conflict in General Comment No. 36 is situated alongside language taken directly from the Committee's two previous general comments on the right to life.[119] States parties are reminded of the human cost of war and mass violence, and their responsibilities to protect lives and to respect relevant obligations under international law concerning the use of force, including the peaceful settlement of disputes.[120] The opening premise of General Comment No. 6 (1982) that the right to life is 'the supreme right' which 'should not be interpreted narrowly' is also repeated in General Comment No. 36.[121] The serious concern of the Human Rights Committee with regard to the risks to the right to life posed by nuclear weapons is a common theme in each of the three General Comments.[122] However, the Committee's claim that parties to the Covenant engaged in aggression which results in deprivation of life 'violate ipso facto article 6 of the Covenant' is made without any supporting reference to previous findings or concluding observations. The absence of such precedent likely contributed to the hostility of a number of prominent

[116] See C Byron, 'A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies' 47 VaJIntlL (2007) 839; S Tabak, 'Armed Conflict and the Inter-American Human Rights System: Application or Interpretation of International Humanitarian Law?' in D Jinks, JN Maogoto and S Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies; International and Domestic Aspects* (Springer 2014) 219.

[117] European Convention on Human Rights and Fundamental Freedoms (1950), entered into force 3 September 1953, 213 UNTS 221, E.T.S. 5, art 15.

[118] WA Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 153–8, 601–2.

[119] CCPR General Comment No. 6: Article 6 (Right to Life) *Adopted at the Sixteenth Session of the Human Rights Committee, on 30 April 1982*; Twenty-third session (1984), General Comment No. 14: Article 6 (Right to Life).

[120] General Comment No. 36, para 70. See E Lieblich, 'The Humanization of Jus Ad Bellum: Prospects and Perils' (SSRN Scholarly Paper, 1 January 2020).

[121] CCPR General Comment No. 6: Article 6 (Right to Life) *Adopted at the Sixteenth Session of the Human Rights Committee, on 30 April 1982*, para 1.

[122] CCPR General Comment No. 6: Article 6 (Right to Life) para 2; Twenty-third Session (1984), General comment No. 14: Article 6 (Right to life) para 4; *General Comment No. 36*, para 66.

States to the Committee's proposed stance during the drafting of the General Comment, as detailed below.

The preparatory documents of General Comment No. 36 indicate that a more expansive interpretation of obligations concerning the right to life by the Human Rights Committee was in the offing. The Committee's rapporteurs, Yuval Shany and Nigel Rodley, referred in their initial list of issues in April 2015 to the '[r]elevance of other rules of international law, including *jus ad bellum* and *jus in bello* and instruments regulating weapons of mass destruction and counter-terrorism' in relation to the meaning of 'arbitrary deprivation' of life.[123] The Committee received dozens of civil society submissions for a public consultation in July 2015, albeit with limited references to law on the use of force.[124] The draft General Comment of September 2015 included the claim that 'States parties engaged in aggressive wars contrary to the United Nations Charter violate ipso facto article 6 of the Covenant'.[125] Following a first reading by the Committee, a revised 2017 draft sensibly replaced 'aggressive wars' with 'acts of aggression',[126] reflecting more accurately developments in the *jus ad bellum*. A reference to deprivation of life was also inserted. Nonetheless, amongst the numerous submissions subsequently received from States, international organisations, civil society, academic experts and others,[127] five of the twenty States took a negative view of the Committee's assertion concerning aggression and the right to life. While the other responding States made no observations on this matter, several of those that did called for the relevant part to be excluded from the General Comment.

Canada expressed its view that international humanitarian law 'is *lex specialis* during armed conflict' and that this body of law rather than the *jus ad bellum* 'is the main consideration when assessing compliance with applicable human rights law in such situations'.[128] France invited the Committee not to adopt such an extensive reading of Article 6, stating that the provision is not intended to regulate the use of force between States.[129] The impact of aggression on human rights was acknowledged by Germany, although it argued for the maintenance of a separation between *jus ad bellum*

[123] Draft General Comment No. 36, CCPR/C/GC/R.36 (1 April 2015) paras 4, 7.

[124] See <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/WCRightToLife.aspx>. See however Ka Lok Yip, 'Written contribution to the general discussion on the preparation for a General Comment on Article 6 (Right to Life) of the International Covenant on Civil and Political Rights, Palais des Nations, Room XIX – 14 July 2015', 21–6, available at <https://www.ohchr.org/Documents/HRBodies/CCPR/Discussion/2015/KaLokYip.doc>.

[125] Draft General Comment No. 36 (2 September 2015) CCPR/C/GC/R.36/Rev.2, para 67.

[126] Advance Unedited Version, para 71. <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf>.

[127] See <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx>.

[128] Comments by the Government of Canada, 5, available at <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/Canada.docx>.

[129] Commentaires du Gouvernement Français, para 42, available at <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/France.docx>.

and human rights law: 'Notwithstanding the fact that an act of aggression may entail or lead to violations of human rights, a clear distinction between the different legal regimes should be maintained in order to allow for an adequate attribution of responsibilities in international law.'[130] The United Kingdom did not engage with the substance of the Committee's claims but dismissed them as 'better suited to an aspirational document rather than a General Comment'.[131] The content was neither 'helpful' nor 'within the Committee's mandate'.[132]

The United States, perhaps unsurprisingly, disagreed with the Human Rights Committee outright. Article 6 of the Covenant did not, in its view, create obligations for deaths caused 'by any violation of international law', nor could it automatically serve to reinforce other bodies of international law.[133] The jurisdictional scope of the Covenant covered 'individuals within a State Party's territory and subject to its jurisdiction', the United States put it, thus implying that while aggression may have its victims, human rights obligations are not owed to them by an aggressor State.[134] The United States also raised the issue of *lex specialis*, albeit somewhat incoherently, stating that in addition to being the *lex specialis* governing conduct during armed conflict, the law of armed conflict includes the *jus ad bellum* as 'the *lex specialis* of the law concerning the resort to force'.[135] Moreover, it was the role of the Security Council and not the Committee to determine if an act of aggression has been committed, the submission stated, notwithstanding that other international bodies can also make such a determination.[136] The United States concluded that the proposed paragraph 'is incorrect and outside the competence and authority of the Committee, and should, therefore, be removed'.[137] Canada and the United Kingdom also called for exclusion of the relevant paragraphs.

The Human Rights Committee is no stranger to criticism from States on its draft general comments, including those concerning the right to life. At times, the Committee has altered the offending language.[138] It refrained from doing so for paragraph 70 of General Comment No. 36, thus retaining what Roger Clark has described as a 'striking proposition' on the right to life and aggression.[139]

[130] Submission from Germany, para 24, available at <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/Germany.docx>.

[131] Comments of the Government of the United Kingdom of Great Britain and Northern Ireland, para 34, available at <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/UnitedKingdom.pdf>.

[132] ibid.

[133] Observations of the United States, para 20, available at <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/UnitedStatesofAmerica.docx>.

[134] ibid.

[135] ibid.

[136] See eg D Akande and A Tzanakopolous, 'The International Criminal Court and the Crime of Aggression' in Kreß and Barriga (n 61) 214.

[137] Observations of the United States, para 20.

[138] See H Keller and L Grover, 'General Comments of the Human Rights Committee and Their Legitimacy' in H Keller and G Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2015) 116, 125, 172–3, 187.

[139] R Clark, 'The Human Rights Committee, the Right to Life and Nuclear Weapons: The Committee's General Comment No. 36 on Article 6 of the Covenant on Civil and Political Rights' (2018) 16 NZYIL 263, 267.

The Committee's approach is a continuation of its efforts to bring human rights law to bear in situations of armed conflict, but involves a significant step further by holding that obligations related to the right of life are almost invariably breached during conflicts arising from an unlawful use of force amounting to aggression. This is a bold but enlightened elaboration by the Human Rights Committee of the obligations concerning 'the supreme right' in the International Covenant on Civil and Political Rights. There are similarities with the related developments concerning aggression at the International Criminal Court, notwithstanding key differences, chief amongst which is the purposefulness of the Human Rights Committee's pronouncement.

A. The Right to Life and Aggression

Comparing the Human Rights Committee's expansive interpretation of the right to life in General Comment No. 36 and the concurrent development concerning the crime of aggression at the International Criminal Court reveals how both contribute to the recognition of victims of aggression, albeit with certain distinctions. General Comment No. 36 refers to 'acts of aggression' compared with the 'crime of aggression' in Article 8*bis* of the Rome Statute, a broader focus that reflects the Human Rights Committee's concern with State responsibility rather than with the more exacting strictures of individual criminal responsibility as at the International Criminal Court. The latter are even more pronounced in the context of the crime of aggression, given the crime's requirement of a manifest violation understood in terms of character, gravity and scale, as well as its application only to natural persons who hold leadership positions. The Human Rights Committee might draw on the list of acts of aggression in Article 8*bis* of the Rome Statute, but it will not be concerned with the article's more demanding chapeau elements.

The two developments under consideration arose in starkly different ways. The activation of the International Criminal Court's jurisdiction over aggression followed lengthy negotiations by States and a sufficient number of expressions of consent to that jurisdiction by States, although the question of who would constitute a victim of aggression was overlooked. In contrast, the Human Rights Committee has put forward its own view on the relationship between the right to life and aggression in a general comment, following open consultations with interested parties, including States, some of whom openly disagreed with its holding. While the Committee's general comments are formally not legally binding, they can be considered as highly authoritative and often carry great weight in other fora, not to mention in the Committee's own subsequent work.[140]

[140] See E Klein and D Kretzmer, 'The UN Human Rights Committee: The General Comments – The Evolution of an Autonomous Monitoring Instrument' (2015) 58 GYIL 189. The United States

The interpretation in General Comment No. 36 may be novel for the Human Rights Committee, but it presents a logical application of the concept of arbitrariness in the context of aggression, albeit one which has encountered opposition from a small number of large States, and without any overt support or criticism from other States to date. The legal arguments put forward by opposing States are of course open to challenge. The amendments to the Rome Statute accommodating the crime of aggression provide a detailed legal schema for the Court to apply in future cases, whereas the Human Rights Committee will be venturing into new territory with limited jurisprudence or treaty law to guide it. Moreover, this new understanding of Article 6 will require the Committee to consider international law beyond the Covenant itself. As two of its members, Christof Heyns and Yuval Shany have stated, the Committee may be required to 'evaluate conformity of the relevant state conduct with the background norms that would determine whether or not the deprivation of life was arbitrary', including the *jus ad bellum*.[141] They added, however, that the Committee would have to 'tread very carefully' in assessing compliance with norms falling outside its areas of expertise and for which its procedures 'are not optimally geared to ascertain'.[142]

A key similarity with the activation of aggression at the International Criminal Court for present purposes is that the interpretation of the right to life by the Human Rights Committee in General Comment No. 36 lays the foundation for the recognition as victims of aggression individuals previously treated as beyond the scope of international human rights law. The Committee's expansive approach was deliberately pursued through General Comment No. 36, in contrast to the seemingly accidental potential recognition of natural persons as victims of the crime of aggression at the International Criminal Court. The Committee will face similar questions in relation to the identification of such victims. In sharp contrast to victims at the International Criminal Court, however, harm in this particular context is limited to the loss of life constituting arbitrary deprivation under the International Covenant on Civil and Political Rights. The Committee's new interpretation of the right to life could also be applied to other human rights, given that arbitrariness is equally relevant for assessing respect for the rights to liberty and security of the person and to private and family life.[143] General Comment No. 35 on the liberty and security of person only makes reference to the complementary role of international humanitarian law in the context of determining

and the United Kingdom have 'rejected the idea that the Committee is "the" authoritative interpreter of the Covenant' – see Keller and Grover (n 138) 133.

[141] R Goodman, C Heyns and Y Shany, 'Human Rights, Deprivation of Life and National Security: Q&A with Christof Heyns, and Yuval Shany on General Comment 36' (*Just Security*, 4 February 2019).

[142] ibid.

[143] Arts 9 and 17, International Covenant on Civil and Political Rights.

arbitrariness in situations of armed conflict.[144] The absence of any reference to the *jus ad bellum* may be revisited in light of General Comment No. 36, but at present, the victims of acts of aggression who the Human Rights Committee has in mind are those who have been killed in the context of such an unlawful use of force.

With regard to the right to life, it bears repeating the question asked in the previous section as to whether those killed as a result of acts in compliance with international humanitarian law might be considered as victims of a violation of the right to life? The answer is seemingly yes. While a central underpinning of international humanitarian law has been its application to all parties irrespective of the legality of any use of force giving rise to armed conflict,[145] international human rights law takes a different tack, and 'does not stand indifferent to the arbitrariness that lies behind the use of force'.[146] If the assessment of arbitrariness is based on the *jus ad bellum*, then States engaged in *any* deprivation of life during an act of aggression 'violate ipso facto Article 6 of the Covenant'.[147] The Human Rights Committee might thus include in the scope of its assessment not only civilian victims of an act of aggression but also members of the armed forces of the attacked State who are killed in the course of an act of aggression.[148] And what of aggressor State's soldiers sent to fight an unlawful war and subsequently killed? Or its civilians that might be killed if the war 'comes home'? Frédéric Mégret has again persuasively argued that aggression also is violative of their rights, that 'the aggressor state is liable for the totality of the consequences of the war it has unleashed'.[149]

General Comment No. 36 also entails an expansion of the interpretation of the scope of jurisdiction under the International Covenant on Civil and Political Rights going beyond situations of effective control over persons or territory:

> a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.[150]

The Committee has previously invoked the extraterritorial application of the Covenant to persons over which a State party 'exercises power or effective

[144] Human Rights Committee, General Comment No. 35; Article 9 (Liberty and Security of Person) 16 December 2014, paras 64–66.

[145] See Greenwood (n 17); J Moussa, 'Can *Jus Ad Bellum* Override *Jus in Bello*? Reaffirming the Separation of the Two Bodies of Law' (2008) 90 IRRC 963; AA Haque, *Law and Morality* (Oxford University Press 2017).

[146] WA Schabas, 'The Right to Life' in Clapham and Gaeta (n 111) 365, 381–2.

[147] General Comment No. 36, para 70.

[148] Schabas (n 146) 382–3.

[149] F Mégret, 'What Is the Specific Evil of Aggression?' in Kreß and Barriga (n 61) 1398, 1441–3. See also Dannenbaum (n 62).

[150] General Comment No. 36, para 63.

control'[151] and to conduct by its authorities or agents 'adversely affecting the enjoyment of the rights enshrined in the Covenant by persons under its jurisdiction regardless of the location'.[152] General Comment No. 36 gives these understandings greater prominence, and adds that a State party's jurisdiction extends to those persons whose right to life is 'impacted by its military or other activities in a direct and reasonably foreseeable manner', based on its Concluding Observations for the United States of 2014.[153]

Paragraph 70 only makes sense because the Human Rights Committee goes beyond effective control over persons or territory as bases for jurisdiction. Not all deprivations of life arising within a context of aggression can be said to involve individuals or territory under the effective control of an aggressor State. Many of those occurring during an unlawful invasion or military occupation could be covered, but an initial bombardment, for example, may not involve any physical control of persons or territory. In such circumstances, the aggressor State can be said to exercise power over the enjoyment of the right to life, which is impacted by military activities 'in a direct and reasonably foreseeable manner'. Articulating the jurisdictional scope of the Covenant in this way is necessary to make meaningful the obligations concerning the right to life in the context of aggression.[154] The Human Rights Committee's interpretation could prompt other bodies, such as the European Court of Human Rights, to more readily confirm jurisdiction where the authorities of a State party 'produce effects outside its own territory' beyond circumstances of effective control.[155]

B. Reparations for Violations of the Right to Life during Aggression

The International Covenant on Civil and Political Rights obliges each State party to ensure that 'any person whose rights or freedoms as herein recognized are violated shall have an effective remedy'.[156] In light of its interpretation in General Comment No. 36, the Human Rights Committee may receive individual complaints from individuals alleging arbitrary deprivation of the right to life in the context of aggression. And as Eliav Lieblich has observed, 'victims of unlawful resort to war would have

[151] See eg Concluding Observations of the Human Rights Committee, Belgium, UN Doc CCPR/CO/81/BEL (2004) para 6.

[152] Concluding Observations on the fourth periodic report of Israel, UN Doc CCPR/C/ISR/CO/4 (21 November 2014) para 5.

[153] Concluding Observations on the fourth periodic report of the United States of America, UN Doc CCPR/C/USA/CO/4 (23 April 2014) para 9.

[154] See Mégret (n 149) 1398, 1433; Schabas (n 118) 49, 142.

[155] *Banković et al. v Belgium and 16 other contracting states*, Grand Chamber Decision on Admissibility, Appl No 52207/99 (19 December 2001) paras 74–82; *Al-Skeini and others v United Kingdom*, Appl No 55721/07, Grand Chamber Judgment (7 July 2011) paras 131–133. See further Lieblich (n 120).

[156] Art 2(3), International Covenant on Civil and Political Rights.

standing to demand … individual reparations'.[157] Victims should exhaust domestic remedies before submitting a complaint to the Human Rights Committee, although the Committee will likely show flexibility towards victims of aggression who are unlikely to be either nationals or residents of the State in question. Claims before the Human Rights Committee will not be dependent on the decision of a prosecutor to pursue an investigation, as is the case at the International Criminal Court, where numerous situations compete for prosecutorial attention and resources.

The Human Rights Committee has been somewhat deferential to States parties with regard to the modalities of reparations, while recognising that '[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy … is not discharged'.[158] Individual complaints are heard by the Committee by way of the first Optional Protocol to the Covenant, which currently has 116 States parties.[159] The instrument is silent on reparations. When issuing its views in an individual case, the Committee regularly makes a general statement that States parties must provide an effective remedy where violations have arisen.[160] Specific remedies, including monetary compensation, have also been requested by the Human Rights Committee, with the specific amount left to the State party in question.[161] This deference, and the quasi-judicial nature of the Committee, has led to dissatisfaction on its part with compliance with its views and with monetary compensation paid.[162] Unlike at the International Criminal Court, the obligation to make reparations to victims of aggression will fall on an aggressor State. In such a context, the Human Rights Committee's views should not amount to a mere symbolic denunciation of arbitrary deprivations of life occurring during aggression but should be accompanied by 'appropriate compensation' or other forms of reparation.[163] That being said, the Committee, like its counterparts, may not be well-placed to deal with mass violations,[164] as are likely in a context of

[157] Lieblich (n 120) 5. See also M Schulzke and A Cortney Carroll, 'Corrective Justice for the Civilian Victims of War: Compensation and the Right to Life' (2018) 21 Journal of International Relations and Development 372.

[158] Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 16.

[159] Optional Protocol to the International Covenant on Civil and Political Rights, entered into force 23 March 1967, 999 UNTS 171. For ratifications see <https://treaties.un.org/>.

[160] Human Rights Committee, General Comment No. 33; The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, CCPR/C/GC/33 (5 November 2008) para 14. See, however, G Ulfstein, 'Individual Complaints' in Keller and Ulfstein (n 138) 96.

[161] V Shikhelman, 'Implementing Decisions of International Human Rights Institutions – Evidence from the United Nations Human Rights Committee' (2019) 30 EJIL 753, 760.

[162] ibid 768.

[163] Human Rights Committee, *General Comment 31*, para 17.

[164] L Oette, 'Bringing Justice to Victims? Reponses of Regional and International Human Rights Courts and Treaty Bodies to Mass Violations' in Ferstman, Goetz and Stephens (n 12) 215.

aggression. To further compound matters, its general functioning is under threat owing to insufficient funding from States.[165]

With General Comment No. 36, the Human Rights Committee seeks to apply international human rights law to the fatal consequences that usually flow from engaging in the unlawful use of force in violation of the Charter of the United Nations. In doing so, the Committee 'adds another level of illegality to an already recognized international wrong',[166] and opens the door for certain victims of aggression to make complaints to the Committee and seek reparations in a context of often limited options. This progressive interpretation has encountered resistance from some States, but it will guide the future work of the Human Rights Committee and may also serve to influence other human rights bodies or international courts confronting human rights claims arising in the context of aggression. The International Court of Justice, for example, has stated that 'great weight' should be ascribed to the interpretations adopted by the Human Rights Committee, as an independent body tasked with applying the Covenant.[167] There are, of course, risks and limitations to addressing aggression through human rights, including stretching the scope of human rights beyond what is acceptable to States.[168] The Human Rights Committee has consciously sought to push the boundaries of the Covenant through General Comment No. 36 and to address human rights issues previously shielded from scrutiny by international bodies. Its efforts have occurred in parallel with the adoption of the Declaration on the Right to Peace by the United Nations General Assembly in 2016,[169] but go beyond the aspirational and declaratory approach of that instrument. By design, the Human Rights Committee aims to offer the protection of international human rights law to an important category of victims of aggression.

IV. CONCLUSION

International law's relationship with individuals has evolved in various ways over time, from complicity in their victimisation during the colonial era,[170] to the recognition of 'the equal and inalienable rights of all members of the human family' in the Universal Declaration of Human Rights in 1948.[171] Presently, various international law instruments acknowledge and enshrine the rights of victims, including to rights to remedy and reparations. The recognition of

[165] Office of the High Commissioner for Human Rights, 'Work of Human Rights Treaty Bodies at Risk, Warns Committee Chairs' (4 August 2020).
[166] Lieblich (n 120) 13.
[167] *Republic of Guinea v Democratic Republic of the Congo*, Merits, Judgment, ICJ Rep (2010) 639, para 66.
[168] Lieblich (n 120) 7.
[169] Declaration on the Right to Peace, UNGA Res 71/189 (19 December 2016).
[170] A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007) 12. See also A Orford (ed), *International Law and its Others* (Cambridge University Press 2006).
[171] Preamble, Universal Declaration of Human Rights, UNGA Res 217A (10 December 1948).

victims in the international legal system has largely excluded natural persons as victims of aggression, reflecting the traditional view that it is States that constitute the victims of 'the most serious and dangerous form of the illegal use of force'.[172] Recent developments at the International Criminal Court and the United Nations Human Rights Committee would seem to presage a significant shift in the understanding of victimhood in the context of aggression. The activation of the International Criminal Court's jurisdiction over aggression will eventually require the Court to determine whether natural persons suffering harm as a result of the commission of the crime of aggression can constitute victims. The system of victim participation and reparations at the Court demands such a determination. The Human Rights Committee has opened the door through General Comment No. 36 for a new understanding of obligations concerning the right to life in the context of unlawful acts of aggression.

The synchronous and complementary developments at the International Criminal Court and the Human Rights Committee reflect long-standing efforts in the face of State opposition to have judicial or quasi-judicial bodies play a role in determinations regarding the lawfulness of the use of force. Robert Jackson, in his opening speech as Prosecutor for the United States before the International Military Tribunal at Nuremberg, accepted the 'weaknesses of juridical action' in the context of aggression, but nevertheless urged the judges to 'put the forces of international law, its precepts, its prohibitions and, most of all, its sanctions, on the side of peace'.[173] States have demonstrated reluctance to allow for judicial oversight of either questions regarding the lawfulness of the use of force or of conduct during wartime. The drafters of the 1949 Geneva Conventions rejected a proposed role for the International Court of Justice in settling disputes related to the treaties,[174] while the Court has made infrequent albeit noteworthy *jus ad bellum* pronouncements from a limited docket of cases.[175] In this vein, States have sought to ensure that the International Criminal Court cannot exercise jurisdiction over aggression involving non-States parties, while several took the opportunity to remind the Human Rights Committee of their view that *jus ad bellum* issues are apparently beyond its mandate.

Notwithstanding considerable differences in their *modus operandi*, both the International Criminal Court and the Human Rights Committee will face similar legal and practical challenges in assessing situations involving aggression,

[172] Preamble, UNGA Res 3314.

[173] Opening Speech, 21 November 1945, II Trials of the Major War Criminals before the International Military Tribunal (1947) 155.

[174] S Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (Cambridge University Press 2014) 226–30.

[175] See generally Kreß (n 65) 561. On the use of 'war exclusion clauses', see S Rosenne, *The Law and Practice of the International Court of Justice 1920–1996,* vol II (3rd edn, Martinus Nijhoff 1997) 805–9. See also A Chayes, 'Nicaragua, the United States, and the World Court' (1985) 85 ColumLRev 1445.

including meeting the expectations of the victims of aggression. An overly narrow construction of the concept of a victim of aggression risks excluding many who have suffered harm, while a broad and inclusive approach will show up the significant limitations of these bodies in terms of providing reparations. The concerns expressed by two judges of the International Criminal Court in relation to compensation to victims of crimes currently being prosecuted at the Court could become even more manifest in the context of aggression: 'We do not have the mandate, let alone the capacity and the resources, to provide this to all potential victims in the cases and situations within our jurisdiction'.[176] The Human Rights Committee has a more limited role in terms of reparations, as this generally falls to States, but also a less robust capacity for enforcing State obligations.

And yet, both of these developments are significant for victims' rights in the field of international law. The activation of the International Criminal Court's jurisdiction over aggression marks an important step in a lengthy process which commenced over a century ago. This development may well have influenced the Human Rights Committee in adopting its expansive interpretation of the right to life in General Comment No. 36. Both might be viewed as 'significant changes in international law […] to problems besetting the world community', in the language used in 1995 by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia.[177] Recognising natural persons as victims of aggression would reinforce the Appeal Chamber's further claim that a 'State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach'.[178] That is not to say that concern for individuals has overridden State interests in the international legal system. Both institutions examined in this article operate within parameters set by States, parameters that limit the institutions' capacity to meet the needs of victims harmed by resort to unlawful aggressive uses of force. If these developments offer a merely illusory advancement of the rights of victims of aggression, it would underscore international law's limitations in remedying the worst excesses of sovereign power.

[176] *Prosecutor v Bemba*, Case No ICC 01/05-01/08-3636-Anx2, Appeals Chamber (8 June 2018) Separate Opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison, para 75.
[177] *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para 97.
[178] ibid.