

Accounting for Victim Constituencies and the Crime of Aggression: New Questions Facing the International Criminal Court

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Which entities will legally qualify as “victims” of the crime of aggression at the International Criminal Court (ICC)? Because the Rome Statute accords victims the right to participate in proceedings¹ and affords victims the possibility of obtaining reparation,² identifying victim constituencies of crimes within the Court’s jurisdiction is foundational to adjudicating crimes under the Rome Statute. However, in contrast to other crimes under the ICC’s jurisdiction, individuals have generally not been recognized as victims of the crime of aggression under international law.³ It remains unclear how the Rome Statute

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¹ Article 68(3) of the Rome Statute provides that, “Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.” Rome Statute of the International Criminal Court art. 68(3), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), rev. 2010 [hereinafter Rome Statute].

² Article 75 of the Rome Statute empowers the Court to authorize reparation for victims of crimes within the Court’s jurisdiction, including restitution, compensation, and rehabilitation. *Id.*, art. 75. REDRESS defines “reparation” as “the range of measures that may be taken in response to an actual or threatened violation; embracing both the substance of relief as well as the procedure through which it may be obtained.” REDRESS Trust, *Reparation: A Sourcebook for Victims of Torture and Other Violations of Human Rights and International Humanitarian Law* 8 (2003), <http://www.redress.org/downloads/reparation/SourceBook.pdf>. See also Marissa R. Brodney, *Implementing International Criminal Court-Ordered Collective Reparations: Unpacking Present Debates*, 2016 J. OXFORD CENT. SOCIO-LEGAL STUD., <https://joxcsls.com/2016/11/01/implementing-international-criminal-court-ordered-collective-reparations-unpacking-present-debates/> (providing an overview of reparation as a transitional justice mechanism within the International Criminal Court’s procedural architecture, and explaining: “[T]he ICC Rules of Procedure and Evidence outline procedures governing victim applications and Court motions for reparations (rules 94 and 95); publication of reparation proceedings (rule 96); assessment of reparations (rule 97); and the role of the Trust Fund (rule 98). Together, the Rome Statute and ICC Rules of Procedure and Evidence provide a general framework guiding the authorization of reparations.”).

³ See Erin Pobjie, *Victims of the Crime of Aggression*, in *THE CRIME OF AGGRESSION: A COMMENTARY* 816 (Claus Kreß & Stefan Barriga, eds., 2017) (“Unlike the other crimes within the Court’s jurisdiction—genocide, crimes against humanity and war crimes—individuals have never

system's definition of "victim" applies to article 8 *bis*⁴—as well as whether and to what extent the ICC's understanding of "victim" accords with conceptualizations of victimization underpinning the framing and incorporation of aggression as a crime under international criminal law. This piece aims to introduce readers to questions that various scholars have raised with respect to the interaction between victim identity and aggression as a crime. For in-depth discussion of legal questions surrounding recognition of individuals as victims of the crime of aggression under the Rome Statute and an argument for their recognition as such, see Erin Pobjie, *Victims of the Crime of Aggression*, in *The Crime of Aggression: A Commentary*.⁵

In describing an act of aggression as "a manifest violation of the Charter of the United Nations,"⁶ article 8 *bis* invokes article 2(4) of the United Nations Charter—a provision that calls upon member states to refrain "from the threat or use of force against the territorial integrity or political independence of any state."⁷ That the Rome Statute also codifies aggression as a leadership crime augments a state-centric understanding of aggression generally under the Rome Statute: To be held responsible for the crime of aggression, a person must be "in a position effectively to exercise control over or to direct the political or military action of a State."⁸ The crime of aggression's state-centric nature, however, may lead to "complicated questions of accountability and means of reparation"⁹ within the Rome Statute system.

While states figure prominently in the framing of article 8 *bis*, this emphasis on states does not necessarily comport with the Rome Statute system's definition of "victim." Rule 85(a) of the ICC Rules of Procedure and Evidence defines victims as *natural persons* who suffered harm resulting from a crime within the

been recognised as victims of this crime, nor of the underlying state act of aggression." Rudolph Dolzer suggests that, "the appropriate treatment and resolution of war-related claims brought by individuals will depend on the doctrinal framework in which they are placed. The traditional approach assumes that war-related claims by individuals are dealt with in peace treaties or their functional equivalents. Another view holds that war-related claims by individuals are treated the same as individual claims against foreign governments arising in times of peace. A third position equates the status of war-related claims with human rights claims in general. . . . It is only under the third view, identifying war claims with human rights claims, that the affected individual himself would arguably have standing to raise a claim before a national court in a country other than that of the defendant government." Rudolph Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945*, 20 BERKELEY J. INT'L L. 296, 296–97 (2002).

⁴ "For the purpose of this Statute, 'crime of aggression' means 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." Rome Statute, *supra* note 1, art. 8 *bis*(1).

⁵ Pobjie, *supra* note 3.

⁶ Rome Statute, *supra* note 1, art 8 *bis*.

⁷ U.N. Charter art. 2, para. 4 (emphasis added).

⁸ Rome Statute, *supra* note 1, art 8 *bis*(1) (emphasis added).

⁹ Note, Leslie Esbrook, *Exempting Humanitarian Intervention from the ICC's Definition of the Crime of Aggression: Ten Procedural Options for 2017*, 55 VA. J. INT'L L. 791, 799 (2015).

jurisdiction of the Court.¹⁰ Accordingly, will individuals qualify as victims of aggression under Rule 85(a)? Alternatively, as Pobjie suggests, might states qualify as victims of aggression at the ICC under an expansive interpretation of “institution” under Rule 85(b), which enables certain *institutions* serving a humanitarian function to attain victim status?¹¹ Should the ICC amend the Rules to account expressly for states as new victim constituencies with respect to the crime of aggression, or should states remain excised from the ICC’s victim participation and reparation frameworks?¹² Drafters of the crime of aggression did not consider “whether the victim provisions [of the Rome Statute] would apply to the crime of aggression or the impact of the proposed aggression amendments on the victim provisions in the Statute and Rules of Procedure and Evidence.”¹³ Prospects for adapting the ICC’s victim participation and reparation mandates to the prosecution of aggression remain under-explored.

At Nuremberg, where aggression was prosecuted as a crime against peace, victims could be conceptualized as at once both local and global in scope. Aggressive war ruptured a global order—even as specific countries may have suffered more acutely, and even as individual victims mounted. In contrast to the ICC, the International Military Tribunal at Nuremberg did not allow for victim participation or reparation in the trial process. As a result, the Nuremberg Tribunal did not need to conceptualize crimes in relation to victim constituencies in ways that the ICC must. Arguably, the power and promise of prosecuting crimes against peace derived from the expansive victimization associated with aggression. Contained within aggression was the “accumulated evil of the whole” of aggressive war¹⁴—aggressive war harmed humanity writ large.

The ICC’s victim participation and reparation mandates preclude the Court from accepting the notion of a global victim. By incorporating victim participation and reparation within its framework for prosecuting international crimes, the Rome Statute invites—in fact demands—a focus on who may legally be considered a victim of the grave crimes within the Court’s jurisdiction. Mark

¹⁰ Rule 85(a) of the ICC Rules of Procedure and Evidence states, “‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.” ICC Rules of Procedure and Evidence, Rule 85(a), <https://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf>.

¹¹ Rule 85(b) of the ICC Rules of Procedure and Evidence states, “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.” ICC Rules of Procedure and Evidence, Rule 85(b), <https://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf>. For a detailed analysis of the argument that states may conceivably qualify as victims under 85(b), see Pobjie, *supra* note 3, at 847–52.

¹² Carrie McDougall, for example, maintains that, “States are . . . excluded from the definition of ‘victims’ under Rule 85 of the Rules of Procedure and Evidence.” CARRIE MCDUGALL, *THE CRIME OF AGGRESSION UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 293 (2013).

¹³ Pobjie, *supra* note 3, at 823. See also McDougall, *supra* note 12, at 292–93 (“The [victim] provisions were given little consideration during the negotiation of the crime of aggression: an assumption was made that existing provisions would apply equally to the crime.”).

¹⁴ Proceedings, Sept. 30, 1946, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 427 (1948).

Findlay and Ralph Henham have argued that it “has become essential for the legitimacy of [International Criminal Justice] that a victim constituency be centrally recognized,”¹⁵ yet possibilities for defining that victim constituency for the crime of aggression under the Rome Statute remain uncertain.

ICC recognition of individuals as victims of the crime of aggression would be a conceptual and legal innovation under international law.¹⁶ International law historically has recognized states, not individuals, as the victims of aggression.¹⁷ Discussions of aggression as a violation of international law have long been replete with references to victims of aggression as “victim states” or “attacked states.”¹⁸ These references persist, even as there may be an increasing focus on the humanitarian consequences of aggressive force on a state’s population.¹⁹

Victim status at the ICC could permit individuals to obtain reparation for aggression under the Rome Statute, in an era when, as Friedrich Rosenfeld has noted, “an individual right to reparation for violations of the [*jus ad bellum*] is still widely rejected among scholars.”²⁰ The United Nations Compensation Commission (UNCC) and Eritrea-Ethiopia Claims Commission (EECC) both enabled individuals to receive compensation in relation to violations of the *jus ad bellum*.²¹ However, only governments and international organizations were permitted to submit claims to the UNCC,²² and the EECC made awards only to states.²³ Compensation, furthermore, is a concept distinct from, even if related to,

¹⁵ MARK FINDLAY & RALPH HENHAM, BEYOND PUNISHMENT: ACHIEVING INTERNATIONAL CRIMINAL JUSTICE 87 (2010).

¹⁶ An understanding adopted at Kampala attempted to bound the impact of the Rome Statute’s aggression amendments on international law beyond the Rome Statute: “It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.” International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Doc. RC/Res. 6, Annex III, Understanding No. 4 (June 11, 2010). Nevertheless, Sean Murphy argues that, “Adoption of the definitions on ‘act’ and ‘crime’ of aggression may have collateral implications outside the criminal context, especially on rules relating to the *jus ad bellum*.” Sean D. Murphy, *The Crime of Aggression at the ICC* 38 (Geo. Wash. U. Law Sch. Pub. Law and Legal Theory Paper No. 2012-50; Legal Stud. Research Paper No. 2012-50, 2012).

¹⁷ See Pobjie, *supra* note 3, at 816.

¹⁸ See, e.g., Frédéric Mégret, *What is the Specific Evil of Aggression?*, in THE CRIME OF AGGRESSION: A COMMENTARY 1403 (Claus Kieß & Stefan Barriga, eds., 2017).

¹⁹ *Id.* at 1404.

²⁰ Friedrich Rosenfeld, *Individual Civil Responsibility for the Crime of Aggression*, 10 J. INT’L CRIM. JUST. 249, 262 (2012).

²¹ “*Jus ad bellum* refers to the conditions under which States may resort to war or to the use of armed force in general. The prohibition against the use of force amongst States and the exceptions to it (self-defence and UN authorization for the use of force), set out in the United Nations Charter of 1945, are the core ingredients of *jus ad bellum*.” Int’l Comm. of the Red Cross, *What Are Jus ad Bellum and Jus in Bello?* (Jan. 22, 2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>.

²² UN Compensation Commission Governing Council, Decision Taken at the 27th Meeting, 6th Sess., June 26, 1992, U.N. Doc. S/AC.26/1992/10, art. 5(1) (“Governments and international organizations are entitled to submit claims to the Commission.”).

²³ See Ari Dybnis, *Was the Eritrea–Ethiopia Claims Commission Merely a Zero-Sum Game?: Exposing the Limits of Arbitration in Resolving Violent Transnational Conflict*, 33 LOY. L.A.

the broader concept of “reparation,”²⁴ which has yet to be awarded to individual victims of aggression on the world stage.

If the ICC were to recognize states as victims of the crime of aggression, under either an expansive interpretation of Rule 85(b)²⁵ or by amending the Rules,²⁶ a situation could plausibly arise in which a convicted person might be held liable for repairing harm to a victim state; this would be a profound development—if not inversion—of international law as we know it.²⁷ The Court’s evolving jurisprudence on reparation, furthermore, makes clear that the ICC will hold a convicted person monetarily liable for Court-ordered reparation even when a reparations judgment is funded by external sources, such as those provided by the Trust Fund for Victims.²⁸ In part owing to a recognition that victim status

INT’L & COMP. L. REV. 255, 267 (2011) (“[T]he Commission awarded the final monetary damages solely to the States, and not to the individual victims or to the States as trustees for the individual victims.”).

²⁴ Compensation may comprise one of various modalities of reparation. Reparation is generally understood to require some communication of social meaning to victims, often anchored in an acknowledgement of responsibility for causing harm. Communication of social meaning is part of what transforms compensation into reparation following crimes associated with oppression or conflict. *See, e.g.*, 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, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) (codifying a right to remedy and reparation and elaborating upon various modalities of reparation for victims of cross violations of human rights law and serious violations of international humanitarian law); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 110 (1998) (“Social and religious meanings rather than economic values lie at the heart of reparations.”). Separately, states incur an obligation under international law to provide reparation when one state’s breach of international law injures another state. *See, e.g.*, Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT’L ORG. 401, 409 (2000) (“When breach leads to injury, legal responsibility entails an obligation to make reparation, preferably through restitution. If this is not possible, the alternative in the event of material harm is a monetary indemnity; in the event of psychological harm, ‘satisfaction’ in the form of an apology.”).

²⁵ *See* Pobjie, *supra* note 3, at 847–52.

²⁶ “[I]t might be suggested that special provisions may be needed, if only to enable the Court to function effectively in relation to aggression prosecutions. . . . [An] alternative [regarding victim participation] would be to establish a mechanism to allow the victim State to speak on behalf of the individual victims of the crime—perhaps through the modification of the existing mechanism in Rule 103 . . . [Regarding reparation] there may be a need to develop specific principles that recognise the special nature of the crime” McDougall, *supra* note 12, at 300–01.

²⁷ Literature on investor-state arbitration has grappled with questions related to claims and counter-claims involving individuals and states, discussing individuals’ ability to sue states alongside states’ inability to sue individuals under international law. *See, e.g.*, Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT’L L. J. 241, 261 (2001) (“International law, owing to its inter-state structure (however conservative it may look) cannot offer an equal remedy to the State. The State cannot sue the private corporation under international law.”).

²⁸ The Trust Fund For Victims is an entity established by article 79 of the Rome Statute, which provides: “(1) A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims; (2) The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund; (3) The Trust Fund shall be

could allow a state to apply for reparations against a convicted person,²⁹ commentators have argued that the Court should decline to recognize states as victims.³⁰

States resisted anchoring the Court's reparations mandate in principles of state responsibility at the time of the Rome Statute's drafting.³¹ This resistance may indicate a more general aversion to anchoring the Rome Statute's reparative justice framework in an expressly geopolitical frame.³² Consistent with the notion that the ICC should enforce distance between individual and state-level liability and associated harm, Carsten Stahn suggests not only that "[e]xtending victim participation to state representatives in the context of aggression would give the reparations regime a completely new direction," but also that doing so "would introduce a surrogate forum for interstate reparation through criminal proceedings before the ICC"—which might "ultimately run against the purpose and mandate of the court."³³

managed according to criteria to be determined by the Assembly of States Parties." Rome Statute, *supra* note 1, art. 79. In 2015, the ICC Appeals Chamber clarified that making a reparations order "through" the Trust Fund "does not exonerate the convicted person from liability." Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the Appeals against the 'Decision Establishing the Principles and Procedure to Be Applied to Reparations' of 7 August 2012, ¶ 5 (Appeals Chamber, Mar. 3, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_02631.PDF. See also Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Ordonnance de Réparation en Vertu de l'Article 75 du Statut, ¶¶ 326–30 (Mar. 24, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_01525.PDF (setting the amount of Katanga's liability for reparations at USD 1,000,000, even while declaring Katanga indigent for the purpose of reparations as of the date of the Trial Chamber's reparations order; instructing the Registry to continue to monitor Katanga's financial situation; and, at the same time, inviting the Trust Fund to consider using its resources to implement reparations for victims given Katanga's indigence) [hereinafter Katanga Reparations Order].

²⁹ Pobjie, *supra* note 3, at 850.

³⁰ See, e.g., Pobjie, *supra* note 3, at 852 ("As the recognition of legal persons as victims under rule 85(b) is discretionary...the Court should exercise its discretion to decline to recognise states as 'organizations or institutions' meeting the definition of victim.").

³¹ "[A] significant number of delegations were not prepared to accept the notion of State responsibility to, or in respect of, victims. However, this refusal does not diminish any responsibilities assumed by States under other treaties and will not—self evidently—prevent the Court from making its attitude known through its judgments in respect of State complicity in a crime." Christopher Muttukumaru, *Reparations to Victims*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 267 (Roy S. Lee, ed., 1999).

³² At the same time, however, Friedrich Rosenfeld notes, "There is substantial overlap between the forms of reparation, which can be awarded according to Article 75 ICC Statute and those that are envisaged by the ILC Draft Articles on State Responsibility." Rosenfeld, *supra* note 20, at 257. Additionally, as Trial Chamber II recently noted in its order for reparations in the *Katanga* case, ICC-issued reparations judgments do not absolve states of their responsibility to grant reparations to victims under other treaties or national legislation. Katanga Reparations Order, *supra* note 28, ¶ 323, https://www.icc-cpi.int/CourtRecords/CR2017_01525.PDF ("[L]es réparations accordées par une ordonnance n'exonèrent pas les États parties de la responsabilité d'octroyer des réparations à des victimes en vertu d'autres traités ou de leur législation nationale.").

³³ Carsten Stahn, *The 'End', the 'Beginning of the End' or the 'End of the Beginning'? Introducing Debates and Voices on the Definition of 'Aggression'*, 23 *LEIDEN J. INT'L L.* 875, 881 (2010).

Enabling state representatives to claim victim status could also risk coopting mechanisms designed to serve a reparative or restorative function for individuals.³⁴ Recognizing a dissonance between state-centric conceptualizations of aggression and person-centric victim provisions of the Rome Statute, Carrie McDougall has questioned “whether restorative or reparative justice is a good fit with the crime of aggression”³⁵ at all. Separately if relatedly, an act of aggression causing catastrophic harm to large numbers of individual victims could pose logistical challenges for the Court’s already fragile victim participation regime,³⁶ augmenting existing and perhaps introducing new barriers to realizing victims’ procedural rights.

The ICC’s need to identify and work with certain victim constituencies to the exclusion of others may result in a conceptual narrowing of aggression, which Benjamin Ferencz has described capaciously as “the breeding ground for the most atrocious crimes against humanity.”³⁷ Alternatively, victim-centric provisions of the Rome Statute may afford new opportunities to frame and redress victimization associated with aggression, by accounting for and remedying harm to individuals in new ways. Conceptual, procedural, and normative challenges will infuse the Court’s efforts to square its jurisdiction over aggression with existing victim provisions of the Rome Statute and Rules of Procedure and Evidence.

³⁴ “A key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but also a restorative function. It reflects growing international consensus that participation and reparations play an important role in achieving justice for victims.” ICC Report of the Court on the strategy in relation to victims, ICC-ASP/8/45, Nov. 10, 2009, para. 3, <http://reliefweb.int/sites/reliefweb.int/files/resources/58901C8BE39F9B4749257673001BFFBB-ICC-ASP-8-45-ENG.pdf>.

³⁵ McDougall, *supra* note 12, at 300.

³⁶ The victim participation application process has been described as “burdensome on the chambers, the parties, and the Registry, had created significant backlogs of applications, and appeared not to be effective for victims.” Mariana Pena, *Victim Participation Decision in the Ntaganda Case: How Does the System Compare to Previous Experiences?*, INT’L JUST. MONITOR (Feb. 17, 2015), <https://www.ijmonitor.org/2015/02/victim-participation-decision-in-the-ntaganda-case-how-does-the-system-compare-to-previous-experiences/>.

³⁷ Benjamin B. Ferencz, *Can Aggression Be Deterred by Law?*, 11 PACE INT’L L. REV. 341, 358 (1999).