The crime of aggression and public international law

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Chapter V. The victim of the crime of aggression

5.1. Introduction

As the ordinary meaning of a victim can be rather broad, this Chapter approaches the concept of a victim from a more technical perspective, whereby the victim is the rights-holder of the enjoyment of the protection from the norm prohibiting the act in question that has suffered harm or injury ("damages") from the breach of duty of the duty-bearer to comply with this norm. The victim of the crime of aggression therefore is the rights-holder of the enjoyment of the protection afforded by the norms that criminalise aggression that has suffered from the breach of duty by the relevant duty-holder (the perpetrator of the crime of aggression) to refrain from the prohibited conduct.

The premise of this Chapter is that the aggressed state is the victim of the crime of aggression because it is the rights-holder of the enjoyment of the protection afforded by these norms (section 5.2.1). Be that as it may, human suffering, injury, death and destruction of natural persons within the territory of the aggressed state should not be undermined or neglected. In this regard, they are victims of a situation of aggression in the light of the inevitable destruction, hardship, physical and emotional suffering that war brings with it. Thus, it is easy to presume that these natural persons who suffer from the crime of aggression are the victims of the crime. This presumption will be examined in the form of a hypothesis that natural persons are the victims of the crime of aggression.

This Chapter will begin by challenging this hypothesis with the intention of showing that it is not sustainable (section 5.2.). The first ground for rejecting the hypothesis is that natural persons are not the rights-holders of the norms that criminalise aggression (section 5.2.1). The second ground is that there is need to establish actual harm caused to the natural person in a situation of aggression. Yet, actual harmed caused by the crime of aggression is the sovereignty and territorial integrity of the aggressed state (section 5.2.2). This will be proven by examining the legal framework applicable in a situation of aggression, i.e. *jus ad bellum* and *jus in bello.* This legal analysis will show how actual harm caused to natural persons in a situation of aggression should be assessed under *jus in bello* and not *jus ad bellum.*

Thus, injury to natural persons in a situation of aggression may be qualified as violations of *jus in bello* and thus potentially war crimes (if it is satisfied that the constitutive elements of the crime are present). In other words, natural persons who are injured in a situation of aggression are not victims of a crime of aggression, but instead may be victims of war crimes (section 5.2.3) That said, I am prepared to acknowledge that although natural persons are not the rights-holders of the norms that criminalise aggression, they may arguably be beneficiaries of the implementation of the norm by the duty-bearer (section 5.2.5). As such, they may be considered as the indirect victims of the crime of aggression. Although conceptually this may be logical, from a practical perspective, the problem is with establishing actual harm, as there is a wide scope of situations that may amount to harm.

As the focus of this Chapter is on the (direct) victim of the crime of aggression, this Chapter continues to examine the legal interests of the aggressed state (section 5.3). As the victims of the other core international crimes are natural persons, international criminal law has appeared to adopt a victim-centric approach,[657] as can be seen from the emerging normative framework of victims' rights.[658] The first question is how the crime of aggression should be considered within the normative framework of victims' rights (section 5.3.1). The implications of this are whether the aggressed state, as a victim of an international crime, may receive reparations for the crime of aggression from the perpetrator (section 5.3.2.).

The Chapter then continues to examine prosecution of the crime of aggression in both domestic courts and the ICC (section 5.3.3.). The latter is particularly interesting because at the ICC, the victims of the core crimes, and thus the crime of aggression, are natural persons.[659] This means that natural persons may participate in the Court's proceedings (Article 68(3) Rome Statute) and receive reparations (Article 75 Rome Statute). The implications of reparations at the ICC for the crime of aggression are that individuals, who are non-rights holders, are receiving reparations for the breach of duty that was not owed to them. The legal and practical implications will be discussed. (section 5.3.3.iv).

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[657] In general, see M Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 Human Rights Law Review 203.
[658] Friedrich Rosenfeld, 'Individual Civil Responsibility for the Crime of Aggression' (2012) 10 Journal of International Criminal Justice 249, 250.
[659] Article 85, Rules of Evidence and Procedure, International Criminal Court.

5.2. Can natural persons be victim(s) of the crime of aggression?

This section will challenge the hypothesis that natural persons are the victims of the crime of aggression. The first step is to identify the rights-holder of the enjoyment of the protection afforded by the norms that prohibit aggression and the norms that criminalise aggression. This involves re-examining the obligations that international law places on states and individuals as the relevant duty-bearers to refrain from a situation of aggression (act of aggression and crime of aggression). The second step is to consider the need to ascertain the actual harm caused to the intended rights-holder, i.e. the victim of the crime of aggression as a result of the failure of the duty-bearer to comply with the duty to refrain from the prohibited conduct. This should be assessed in the light of the legal framework applicable in a situation of aggression. This enables the third step, which is to assess how injury to natural persons that have suffered as a result of a situation of aggression should be qualified. There is also the concomitant issue of injury to natural persons who are part of collateral damage.

5.2.1. Re-examining the obligations to refrain from an act of aggression and a crime of aggression

As discussed in the previous chapter, the respective obligations conferred on states and individuals to refrain from the act of aggression and crime of aggression are intrinsically linked and run in parallel to each other. The obligations placed on individuals to refrain from the four modes of perpetration (planning, preparation, initiation and waging) cannot exist independently to the obligations on the state to refrain from the act of aggression. In other words, international criminal law applies in parallel with *jus ad bellum* by placing obligations on individuals to refrain from conduct in their position as part of the state organ that will facilitate the state to act in aggression.

It is important to consider the nature of the obligations pertaining to the prohibition of inter-state force. These obligations fall upon states, and are owed to each and every state that is part of the international community of states as a whole. It should be concentrated upon that the nature of these obligations applies only to the legal personality of states under international law.

As obligations conferred on the individual with respect to the crime of aggression are predicated upon the obligations conferred on the state to refrain from an act of

aggression, both sets of obligations are owed to the same right-holders. In a situation of aggression, the act of aggression and the crime of aggression stem from the same unlawful use of force by the aggressor state, which means that both wrongful conduct cause harm of a singular nature to the rights-holder. In this context, the rights-holder can be identified as the aggressed state, as it is this legal personality that is owed the obligations to refrain from the act of aggression and obligations to refrain from the crime of aggression. As the breach of these obligations cause direct harm to the aggressed state as the rights-holder, it can be classified as the victim of both the act of aggression and the crime of aggression.

Immediately this departs fundamentally from the other crimes, as the victims of these crimes are natural persons. Yet, to argue that both state(s) and individual(s) are victims of the crime of aggression suggests that the perpetrator has breached a duty to comply with obligations owed to both state and individuals. This implies that obligations international law confers on individuals to refrain from the modes of perpetration are owed to individuals, in addition to every state that is a member of the international community of states. As such, an argument can be made that obligations imposed on individuals to refrain from "planning, preparing, initiation and waging" aggression are owed to "the international community" and not the "international community of states as a whole." This appears consistent with the premise of international criminal law, whereby individuals are under obligations to refrain from crimes that are against the interests of the international community, which can be understood to encompass natural persons, in addition to states. Thus, by virtue of the crime of aggression being an international crime, the obligations that fall on individuals to refrain from the prohibited conduct, by default, is owed to the international community.[660] This is because the norms that criminalize acts under international law, i.e. international crimes, impose direct obligations on individuals to refrain from such conduct; such obligations are owed to the international community. Therefore, individuals, in addition to states, may also be considered as right-holders.

The contrary argument is that the obligations imposed on individuals with respect to the crime of aggression are owed to the international community of states as a whole – and not the international community. The effect of this is that these obligations are not owed towards individuals; thus there is a narrower scope of

[660] M Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligation Erga Omnes' (1996) 59 Law and Contemporary Problems 63, 68.

obligations placed on individuals to refrain from the prohibited conduct with respect to the crime of aggression than the other crimes. The rights-holders are only States.

My preference is for the second view because the obligations that fall on individuals to refrain from the crime of aggression under customary international law cannot exist independently from obligations that fall on states to refrain from the act of aggression. To argue that obligations to refrain from the modes of perpetration are owed to individuals, in addition to states as subjects of international law, would arguably extend the obligations on individuals to refrain from the modes of perpetration further than the obligation placed on states to refrain from aggression. If so, then these obligations cannot exist in parallel, as one set of obligations is wider than the other.

It may be questioned why it is important to preserve this parallel-construct of obligations to refrain from the act of aggression and the crime of aggression as it would appear to limit the scope and nature of obligations on individuals to refrain from the latter. Indeed, in the interests of the international community, such formalism in adherence to legal doctrine may appear anachronistic, or even contrary to the purposes of international criminal justice. Yet, it is important that adherence to the parallel-construct of the act of aggression and crime of aggression should be upheld because the legal construct of the definition of the crime pursuant to customary international law is that the latter is predicated upon the former. To argue that obligations conferred onto individuals with respect to the crime of aggression extend beyond the obligations conferred onto states for the act of aggression would depart from the substantive definition of the crime under customary international law as it shifts the parallel construct that the definition is predicated.

5.2.2. The legal framework applicable in a situation of aggression

When examining a situation of aggression, it should be understood that a military operation conducted by the aggressor state takes place on two tiers: i) the use of force on the inter-state level between the aggressor state and aggressed state(s); ii) the actual hostilities, i.e. armed conflict that takes place. The legal framework with respect to the former is *jus ad bellum*, which regulates how states resort to the use of force on the inter-state level, whilst the legal framework pertaining to the latter is *jus*

in bello, which governs the hostilities.[661] It is expected that states when engaging in warfare should comply with both *jus ad bellum* and *jus in bello* as these are two different legal frameworks that apply to separate stages of the military operation. In other words, states are expected to comply with the rules of *jus ad bellum* in the way that they conduct their recourse to force, and to also comply with the rules of *jus in bello* during the hostilities that follow from the use of force. Both legal frameworks are therefore concurrent as they apply simultaneously. It is worth mentioning that the latter is also directly applicable to individuals, in the sense that individuals who take direct part in hostilities have obligations to comply with the rules of *jus in bello.* It should be clarified that for *jus in bello* to be applicable, a certain threshold needs to be met that there is in fact an armed conflict. As this legal framework does not apply during times of peace, the threshold serves to ensure that there is an armed conflict for its applicability.

The application of *jus ad bellum* and *jus in bello* are separate and independent from each other, which is known as the separation dissertation.[662] This means that the legality of one legal framework does not affect the application of the other. This is especially important in a situation of aggression. Regardless of the fact that the aggressor state has acted in violation of *jus ad bellum, jus in bello* will still be applicable to the hostilities between the aggressor state and aggressed state. This means that notwithstanding the legality of the use of force that initiated the hostilities, both parties whether right or wrong, are entitled to the same rights and protection under the framework *jus in bello,* and are under a duty to perform the obligations imposed on them with respect to how to conduct hostilities.[663]

This symmetrical application of *jus in bello* between both parties to the conflict is known as the principle of equality between belligerents.[664] Therefore, regardless of

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[661] See Jasmine Moussa, 'Can Jus Ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law' (2008) 90 International Review of the Red Cross 963.
[662] See Keiichiro Okimoto, *The Distinction and Relationship between Jus Ad Bellum and Jus in Bello* (Hart 2011) 12–36.
[663] For the moral implications of the separation dissertation, see Jeff McMahan, 'Morality, Law and the Relation Between Jus Ad Bellum and Jus in Bello' (2006) 100 Proceedings of the Annual Meeting (American Society of International Law) 112.
[664] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2010) 3; for the moral implications with respect to the equality of belligerents principle, see Donald M Ferencz, 'Aggression in Legal Limbo: A Gap in the Law That Needs Closing' (2013) 12 Washington University Global Studies Law Review 507, 513; Michael Mandel, 'Aggressors' Rights: The Doctrine of "Equality Between Belligerents" and the Legacy of Nuremberg' (2011) 24 Leiden Journal of International Law 629, 650.

the status of a state under *jus ad bellum*, the same rules of *jus in bello* apply equally. Koutroulis submits that the equality of belligerents principle entails the following:

> *primo,* the belligerent party that violated *jus ad bellum* does not have fewer rights or more obligations than the one that did not violate *jus ad bellum*; *secundo,* conversely, the belligerent party that did not violate *jus ad bellum* does not have more rights or fewer obligations than the one that did.[665]

The significance of this is the natural persons, i.e. soldiers and civilians from both aggressor and aggressed state are entitled to the equal rights and subject to the same obligations under *jus in bello.*

Under *jus in bello,* there are two types of armed conflicts: i) international armed conflict (IAC); ii) non-international armed conflict (NIAC).[666] This was reaffirmed by the ICTY, which held:

> an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved."[667]

From this, it can be deduced that an IAC is the resort to armed force between states, and a NIAC is the resort to protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. The threshold for the former appears to be lower (armed force) than the latter (armed violence). This implies that it is easier to be satisfied that there is an IAC than a

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[665] Vaios Koutroulis, 'And Yet It Exists: In Defence of the "Equality of Belligerents" Principle' [2013] Leiden Journal of International Law 1, 20.

[666] See Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012).

[667] *Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, para.70.

NIAC. As aggression involves the initiation of the use of force by the aggressor state against the aggressed state, the threshold for an IAC is met. In this type of conflict, the legitimate aim of each party is to weaken the military position of the enemy.[668] The significance of the classification of conflicts is to identify whether the applicable principle of distinction is consistent with the rules of *jus in bello* that apply in an IAC or an NIAC.[669] The principle of distinction is the cardinal rule of *jus in bello* that places an obligation on those participating in hostilities to distinguish between the natural persons who may be a legitimate 'military objective' or a 'protected person.'[670] Only the former may be targeted.

The underlying concept of the principle of distinction is that attacks are only permitted against the combatants who are part of the armed forces of the parties to the conflict and military objects (Article 43 Additional Protocol I). Civilians, civilian objects and the rest of the civilian population must be protected in the course of hostilities. This can be seen in Article 48 of Additional Protocol I (AP I):

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[671]

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[668] Meagan S Wong, 'Targeted Killings and the International Legal Framework: With Particular Reference to the US Operation against Osama Bin Laden' (2012) 11 Chinese Journal of International Law 127, 147.

[669] Nils Melzer, *Targeted Killings in International Law* (Oxford University Press 2008) 300–301.

[670] Melzer writes that 'In order to exclude any ambiguity in this respect, these two categories of persons must be mutually exclusive, as well as absolutely complementary. In other words in the context of hostilities, every person must either be a legitimate 'military objective' or a 'protected person' – *tertium non datur.'* ibid 300; Wong (n 668) 147–149.

[671] In the Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, it was written that 'The basic rule of protection and distinction is confirmed in this article. It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives' at 598; see Melzer (n 669) 301.

Only military objectives may be attacked, whilst attacks against protected persons are prohibited regardless of potential military advantage of such attacks.[672] 'Military objectives' does not appear to be defined in the Geneva Conventions 1949, but was defined in Article 52(2) AP I:

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage.[673]

It can be inferred that this provision refers to objects in the sense of physical and tangible objects, and not necessarily natural persons. Melzer elaborates that 'a more comprehensive overview of persons constituting legitimate military objectives can be obtained by identifying those categories of persons which IHL does not protect against direct attack.'[674]

Nevertheless, even if the natural person does not fall within the category of a protection person, it is still important to comply with other principles of *jus in bello* in the course of targeting, e.g. the principles of proportionality and military necessity, the prohibition of indiscriminate attack and the prohibition or restriction of certain means and methods of warfare.[675] In other words, military objectives from the aggressed state may be lawfully targeted if the principle of distinction is applied correctly and consistently with proportionality and other rules within *jus in bello.*

Stemming from the present analysis, the following inter-related points should be concentrated upon.

First, although there is undeniably a causal link between the act of aggression and the injury to the natural person, there are two legal frameworks that come into play

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[672] The ICJ held in the Advisory Opinion on Nuclear Weapons, that 'states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets,' *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (hereinafter "Legality of the Threat or Use of Nuclear Weapons"), I.C.J. Reports 1996, 226 at 257; Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 664) 33–35.
[673] For a criticism of the definition in Article 52(2), see Dinstein ibid 90–91.
[674] Melzer (n 669) 302.
[675] ibid 303.

which impose different primary obligations on the relevant actors. This is important because there are different legal consequences under the secondary rules of responsibility for violations of *jus ad bellum* and *jus in bello*. The aggressor state has breached its duty to refrain from the use of force against the aggressed state. Regardless of this violation of *jus ad bellum* on the part of the aggressor state, the aggressed state is nevertheless under a duty to comply with its obligations under *jus ad bellum* to conduct counterforce lawfully and/or to act upon authorization by the Security Council under Chapter VII. Upon the initiation of the use of force by the aggressor state against the aggressed state, the threshold has been crossed for the rules of *jus in bello* pertaining to an IAC to be applicable to the hostilities for both parties to the conflict. This means that armed forces from both the aggressor and aggressed state may lawfully target military objectives from either side under the principles of distinction, necessity and proportionality.

Second, regardless of the legality of the use of force, be it aggression or lawful self-defence, the same rules of *jus in bello* apply between both parties to the conflict. This means that soldiers, i.e. combatants from both the aggressor state and the aggressed state are entitled to lawfully target combatants from the other side in accordance with the principles of distinction, necessity, proportionality and other existing norms of *jus in bello.*

Third, any fatalities or injuries of natural persons in a situation of aggression may not necessarily be unlawful conduct, because the individual could have been killed in accordance with *jus in bello.* For example, if the natural person was a combatant who was targeted lawfully. Indeed, the preservation of equality between belligerents and the equal applicability of *jus in bello* in a situation of aggression, has raised dissatisfaction, which appears to be centered upon a moral basis.[676]

Fourth, any harm or injury to natural persons must be assessed in the light of *jus in bello,* and not *jus ad bellum.* This involves examining which primary norms have been breached, so that the correct secondary norms of responsibility may be invoked. Potential violations of *jus in bello* may give rise to individual criminal responsibility for war crimes if there was an existing rule of customary international law that has criminalised the specific norm of *jus in bello* that had been breached. As such,

[676] See Ferencz (n 664); Mandel (n 664); *Handbook on the Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC: Crimes of Aggression and War Crimes* (2013) 4.

sanctions can be exercised directly against the individual for the breach of duty to comply with obligations to respect the specific norm that had been criminalised.

5.2.3. Natural persons that have suffered as a result of a situation of aggression

In the course of hostilities subsequent to an act (and crime) of aggression, there is a possibility that natural persons who are nationals from both the aggressor state and the aggressed state may be injured or killed. Such natural persons can be either civilians or soldiers. The lawfulness of the act of injuring or killing an individual will depend on the legal status of the person under *jus in bello* pursuant to the principle of distinction, in conjunction with other factors such as necessity and proportionality. The person who is carrying out the targeting is under a duty to make a distinction between persons who are legitimate targets and persons that are to be protected from attack.

Under *jus in bello,* there are two broad categories of persons: combatants and civilians. Article 43(2) AP I states that members of the armed forces of a party to a conflict are combatants, and have the right to participate directly in hostilities.[677] However, not all combatants are legitimate targets for attack. Under Article 41(1) AP I, if the combatant has been rendered *hors de combat*, he/she should not be made the object of attack.[678] Pursuant to Article 48(1) AP 1, parties to the conflict are prohibited from attacks against civilians and civilian objects. Article 50(1) AP I defines a civilian as:

> any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43

[677] Article 4(2) Geneva Convention III lists four conditions for the classification as a part of the armed forces of a State: i) being under responsible command; ii) wearing a fixed distinctive sign; iii) carrying arms openly; iv) conducting their operations in accordance with the laws and customs of war; It is interesting to note that Article 43(1) Additional Protocol I (AP I) only lists two criteria to be considered as part of the armed forces of a State: i) organized armed forces, groups and units, which are; ii) under a command responsible to the relevant party to the conflict.

[678] Article 41(2) AP I states that a person is 'hors de combat' if: (a) he is in power of an adverse Party; (b) he clearly expresses an intention to surrender; or (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself, provided in any of these cases that he abstains from hostile acts and does not attempt to escape

of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

Melzer writes that 'the negative definition of civilians as all persons who are not members of the armed forces has become part of customary law'[679] and that ' the only exception to this basic dichotomy are participants in a levée en masse, who both conventional and customary international humanitarian law recognize as combatants, but who qualify neither as members of the armed forces nor as civilians.'[680]

Indeed, there may be situations where civilians directly participate in hostilities. Although they retain their legal status as civilians, they lose their protection against direct attack for the period that they are directly participating in hostilities (Article 51(3) API).[681] Therefore, the legal status of a person under *jus in bello* is not necessarily the exclusive determining factor that depicts whether or not they become a legitimate target, as the conduct of the person is also important, i.e. whether they are a hors de combat or a civilian taking direct part in hostilities.

In the case of injury or fatality to a natural person on the territory of either the aggressor state or the aggressed state, the first step is to consider whether the person was a combatant or a civilian. If the person was the former, the next step is to consider whether he/she was a person *hors de combat*. In the case of the latter, the question is whether the person was taking a direct part in hostilities, or behaving in a 'hostile' act and had temporarily lost his/her protection under *jus in bello.* These steps are to be taken in consideration of existing treaty and customary rules of *jus in bello* that apply in an IAC.

The targeting of a person *hors de combat* or a civilian may indeed give rise to a violation of *jus in bello.* However, the principle of distinction is not a sufficient ground to assess the legality of the specific targeting. The fatality must also be assessed in accordance with the other principles of *jus in bello*, i.e. military necessity

[679] Melzer (n 669) 310.
[680] ibid.
[681] ibid; The International Committee of the Red Cross Guidance on the notion of Direct Participation in Hostilities ("ICRC Guidance") states 'for the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participating in a leve´e en masse are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities'; see also Wong (n 668) 147–149.

and proportionality.[682] The latter is measured with respect to expected collateral damage from the attack. According to Dinstein, collateral damage is either: (a) incidental losses or injury to civilians; (b) destruction of or damage to civilian objects; or (c) combination of both.[683] Thus, injuries and fatalities of civilians may nevertheless be permitted as collateral damage under *jus in bello,* provided such damage must be proportionate with respect to military necessity.

It is submitted that any injury to natural persons on the territory of both the aggressed state and aggressor state should be assessed under *jus in bello* (and not *jus ad bellum*). As already mentioned, there are certain primary norms within *jus in bello* that give rise to individual criminal responsibility, in the sense that the breach of such obligations give rise to sanctions that can be executed directly against the individual for the breach thereof pursuant to the secondary norms regulated by international criminal law.

Such conduct constitutes war crimes, because there are specific obligations under international criminal law that run in parallel with obligations under *jus in bello*, which place duties on combatants to refrain from specific prohibited acts when conducting hostilities. In other words, there can be individual criminal responsibility for a serious violation of *jus in bello* as a war crime if there is a concomitant rule governed by international criminal law which provides individual criminal responsibility for the act committed.

If injuries and fatalities of civilians take place on a large scale where it affects the civilian population, this raises the factual question of whether this was the result of direct attack(s) against a civilian population, or if these atrocities are part of the collateral damage. The latter does not technically amount to any violation of *jus in bello.* The former, on the other hand, is prohibited under Article 51(2) API, and has been criminalized as a war crime under Article 8(2)(b)(i) of the Rome Statute.[684] As discussed earlier, direct attacks against the civilian population can also amount to a crime against humanity if it can be proven that such attacks were part of a systematic and planned attack against the civilian population.

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[682] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (n 664) 128–130.
[683] ibid 128.
[684] ibid 125.

There is the possibility that such attacks may be the result of indiscriminate attacks, where the person facilitating the targeting did not apply the principle of distinction. As such, damage and injury are caused to both civilian and military objectives without any distinction, which may lead to mass killings of the civilian population.[685] This is prohibited under Article 51(5)(b) AP I as 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and military advantage anticipated,' and has also been criminalized as a war crime under Article 8(2)(b)(iv) Rome Statute.

In the light of the above, it is submitted that natural persons in the territory of aggressed state who are injured or killed as a result of hostilities in a situation of aggression (act of aggression and crime of aggression) may in fact be victims of violations of *jus in bello* and war crime(s) if it can be satisfied that the necessary elements of the crime are present.[686]

5.2.4. Injury to natural persons who are part of collateral damage

There is one aspect, which is worth examining in further detail. As mentioned above, collateral damage, subject to military necessity, is permissible under *jus in bello*. This leaves the question of natural persons that are killed or injured as part of collateral damage, which does not constitute a violation of *jus in bello*. How should the injury of these persons be assessed; and what are their legal interests?

These natural persons were owed obligations under the primary norms of *jus in bello* by the duty-bearer to comply *inter alia* with the principles of distinction, necessity and proportionality. However, there is no violation of the primary norms under *jus in bello* because the duty-bearer was exempted from these primary obligations because of military necessity. As there are no violations of the primary norm, there can be no responsibility under the secondary norms of state responsibility or individual criminal responsibility. Thus, natural persons who are injured or killed

[685] Dinstein explains that 'the indiscriminate character of an attack is not a by-product of 'body count' (i.e. ensuring number of civilian fatalities). The key to a finding that a certain attack has been indiscriminate is the nonchalant state of mind of the attacker' ibid 127.
[686] See Riccardo Pisillo Mazzeschi, 'Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview' (2003) 1 Journal of International Criminal Justice 339.

as part of collateral damage may not be considered as victims of *jus in bello* or war crimes.

It should be noted that injury or killing of natural persons as part of collateral damage can be committed by both sides of the conflict, i.e. both the aggressor state and the aggressed state. Collateral damage is indeed one of the realities of the use of force and can be envisaged to encompass damage to the infrastructure and environment of the receiving state, in addition to natural persons. Returning to the premise that collateral damage is an aspect of the use of force, it can perhaps be assessed in accordance with *jus ad bellum,* as such damage can be viewed as part of the use of military force against the receiving state, which may be either the aggressor state or the aggressed state.

The shift from focusing on collateral damage under the lens of *jus in bello* to *jus ad bellum,* means that individuals are no longer considered as direct rights-holder, and the state becomes the immediate rights-holder of the enjoyment of the protection from the norms that govern the use of force. As the rights-holder, the receiving state is entitled to invoke the responsibility of the opposing state for damage caused to civilians and infrastructure in its territory as a result of the use of force.

It is of course difficult in practice to distinguish between damages caused by violations of the *jus ad bellum* and by violations of the *jus in bello*. In practice, both violations occur simultaneously. The approach of the UN Compensation Commission (UNCC) which was established by Security Council Resolution 687(1991) processed claims and paid compensation to a variety of personalities, i.e. individuals, corporations, governments and international organisations who had suffered from the invasion and occupation of Kuwait by Iraqi forces. The Commission did not appear to make any distinction between violations of *jus ad bellum* and *jus in bello*, but rather compensation for the 'direct loss, damage, including environmental damage and the depletion of natural sources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait.'[687]

The Eritrea-Ethiopia Claims Commission (EECC), on the other hand, made a distinction between violations of *jus ad bellum* and *jus in bello*.[688] Of particular

[687] SC Res. 687(1991), para.16.
[688] See *Eritrea-Ethiopia Claims Commission (EECC): Partial Award - Jus ad bellum*, para.5; *Eritrea-Ethiopia Claims Commission (EECC): Final Award - Ethiopia's Damages Claims*

relevance is the fact that EECC had awarded reparations to Ethiopia *inter alia* for civilian deaths and injuries related to Eritrea's breach of *jus ad bellum,*[689] injuries caused by landmines because of Eritrea's *jus ad bellum* violation.[690]

From these awards, two brief points can be observed. First, even if injuries and deaths to civilians are lawful as permissible military damage under *jus in bello*, responsibility for these injuries and deaths may be invoked if the damage occurred during the period which the wrongful state has acted in violation of *jus ad bellum.* Second, any damage to civilians as a result of violations of *jus ad bellum,* irrespective of legality under *jus in bello*, is contrary to the interests of the injured state. As such, this provides the state as a rights-holder with the legal interest to invoke legal consequences against the wrongful state under the secondary norms of state responsibility for such damage to civilians. One way to read this is that natural persons, who are nationals of the state, are representative of that state's interests. The same could be said for non-nationals who are within the territorial state and thus subject to its domestic laws. Injury or damages to a state's nationals or non-nationals within its territory is representative of an infringement of its interests. That this injury is caused by a violation of the primary norm owed to the territorial state with respect to the enjoyment of the prohibition of the use of force provides this state with a legal interest to invoke responsibility for the breach thereof.

Another way to read this is that as the norms relating to *jus ad bellum* are inapplicable to individuals, the state becomes the indirect rights-holder in the event of damages to individuals within its territory caused by a violation of the primary norms. As such, the state may have an indirect interest in invoking responsibility for the breach of primary norms of *jus ad bellum* that led to such damages against individuals in its territory.

Regardless of which of the two readings is adopted, the common point is that natural persons do not have a direct legal interest with respect to violations of *jus ad bellum*. Their interests can only be represented by the territorial state with respect to invoking responsibility of the wrongful state for the violation of *jus ad bellum.* It is for the discretion of territorial state on how to distribute any awards it may receive

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between the Federal Democratic Republic of Ethiopia and the State of Eritrea (hereinafter "Final Award, Ethiopia's Damages Claims")[17 August 2009], para. 311.

[689] Final award, Ethiopia's Damages Claims, ibid para. 349.

[690] Final award, Ethiopia's Damages Claims, ibid paras. 388-391, and 393.

from methods of international dispute settlement with the individuals within its territory.

In the present context of a situation of aggression, the natural persons on the territory of the aggressed state who are injured or killed from collateral damage caused by the aggressor state may not have a legal interest to invoke state or individual criminal responsibility of the combatants of the aggressor state, or the aggressor state for violations of *jus in bello* or war crimes, respectively; as such damage may be permissible under this legal framework if military necessity has been satisfied. Nor do they have legal interest to invoke the responsibility of the aggressor state for the initial and any subsequent breaches of *jus ad bellum* that gave rise to the collateral damage, as they are not rights-holders of the enjoyment of primary norms under this legal framework. It is the aggressed state that has the legal interest to invoke the responsibility of the aggressor state for the collateral damage, with particular reference to the injury and deaths caused to civilians.

5.2.5. Indirect victims of the crime of aggression

Although natural persons are not rights-holders of the norms that criminalise aggression, they may nevertheless be beneficiaries of the implementation of the norm because they also enjoy the protection afforded by the norm that criminalises aggression. Thus, it can be argued that natural persons are indirect victims of the crime of aggression. Although this is logical on a conceptual level, it can be predicted that practical difficulties that arise would include establishing that harm was caused to the natural person as a result of the crime of aggression as the scope of damages appear to be wide, e.g. death, physical injury, psychological and emotional distress, personal economic loss, etc.

As the present dissertation focuses on the direct victim of the crime of aggression, i.e. the aggressed state, the discussion on indirect victims need not be continued further.

5.3. The victim of the crime of aggression: the legal interests of the aggressed state

It has been established that the aggressed state is the victim of the crime of aggression; this section will now consider its legal interests with respect to legal consequences against the perpetrator of the crime of aggression. It is important to note that the aggressed state has a direct legal interest against the perpetrator of the crime of aggression, in addition to a direct legal interest against the aggressed state.

5.3.1. The victims' rights paradigm

The emerging paradigm of victims' rights propagates a victim-centric, i.e. individual-centric approach in international criminal law.[691] However, unlike the other international crimes (genocide, crimes against humanity and war crimes), it is clear that the victim of the crime of aggression is a state. How then should the crime of aggression be considered within the normative framework of victims' rights?[692]

Perhaps, the crime of aggression should *prima facie* be excluded from this normative framework because of its state-centric attributes. To focus on the victim of the crime of aggression would appear contrary to the grain of the emerging paradigm that shifts the focus onto individuals. This suggests that the normative framework focuses only on the international crimes that are premised on violations of international humanitarian law and international human rights law. Therefore, structural changes need not be made to the normative framework of victims' rights, and it may continue to develop forward in its current direction.

Alternatively, the focus will fall upon the indirect victims of the crime of aggression, who are natural persons that have suffered as a result of the violation of *jus ad bellum* by the aggressor state. Yet, this is not entirely straightforward, as pointed out above and also by Grzebyk that it is 'difficult to determine the victims of aggression, and consequently it is almost impossible to view the aggression from the victims' perspective, as is the trend in international criminal law'.[693] Furthermore, as argued above, there is the need to assess the legal status of the natural person who

[691] In general, see Bassiouni, 'International Recognition of Victims' Rights' (n 657).
[692] Rosenfeld (n 658) 250.
[693] Grzebyk (n 11) 264.

may be injured in a situation of aggression in accordance with the applicable legal framework.

Another possibility is that the normative framework of victims' rights may evolve to acknowledge that the definition of a victim may also include a state. Although this appears *prima facie* incompatible with the focus on individuals, this is not necessarily an insurmountable limiting factor. International criminal law as a young discipline is developing. Expanding the legal personality of a victim to encompass a state is a natural progression post-Kampala.

Regardless of which approach is adopted, the more pragmatic question is, how would the aggressed state benefit from the normative framework pertaining to victims? Aside from the monetary or compensatory purposes of this normative framework, the other symbolic concepts appear to be of relatively little value to the aggressed state. For example, the aggressed state having a *locus standi* to participate in proceedings in conjunction with the perpetrator of the crime of aggression does not carry the same symbolic significance as a natural person who is the victim of genocide or crimes against humanity having a *locus standi* to participate in proceedings against the perpetrator.[694] Likewise, the value, significance or relevance of the right to the truth, and recovery and reintegration into society, which is of paramount importance to victims of the other crimes, is not applicable to the aggressed state.

Therefore, the question of the victims' rights of the aggressed state is limited to reparations under international law for the violations of the obligations owed to it under the primary norms by the relevant duty-bearers, i.e. the aggressor state and the perpetrator of the crime of aggression. In my view, the question of whether the victim of the crime of aggression is compatible with the normative framework of victims' rights is rhetoric. The underlying element that can be distilled is whether as the rights-holder – or victim of an international crime – a logical argument can be made that the aggressed state, like the victims of the other international crimes, is also entitled to rights under international law as a beneficiary with respect to remedies for the violation of international obligations owed to it.

It is worth clarifying that although the reparations with respect to state violations of international law and the reparations with respect to international crimes both

[694] Article 68, Rome Statute.

extend in their respective forms beyond monetary value, the form of reparation that shall be referred to in the present study is compensation. For the purposes of the forthcoming analysis, reparation shall be understood as monetary compensation.

5.3.2. The question of reparations for breaches of jus ad bellum and the crime of aggression

States have always been viewed as the rights-holders of international obligations and the beneficiaries of reparations in the light of violations of international law. Thus, the aggressed state has always been recognised as the beneficiary of reparations for state breaches of *jus ad bellum.* Yet, there is still ambit for interesting discussion. The question is whether the aggressed state is entitled to reparation from the perpetrator of the crime of aggression. In other words, can the aggressed state, in addition to reparations for a state act of aggression also receive reparations for the crime of aggression? It is worth placing emphasis that reparations with respect to the crime of aggression are not to be made by the aggressor state, but the perpetrator as the true duty-bearer. Therefore, it is an individual that must pay compensation to the aggressor state for the harm he/she has caused for failing to comply with the duty to refrain from conduct relating to the crime of aggression. The concept where an individual must pay compensation or damages to an injured party for wrong that he/she has committed is not an entirely novel concept. For example, Zegveld writes that:

> The individual perpetrator is not only criminally responsible for the crimes he has committed towards the international community, but also liable for the harm he has caused towards the victims being the object of the protection of the criminal norms.[695]

As the aggressed state is entitled to reparations for an act of aggression, irrespective of whether it may also receive reparations for the crime of aggression, this may lead one to argue that it does not really matter whether the aggressed state may also be entitled to reparations for the crime of aggression, as reparations may be sought under state responsibility. Yet alternatively, one may argue that it is indeed in the best

[695] Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts: Incompatible Values' (2010) 8 Journal of International Criminal Justice 79, 85.

interests of the aggressed state to be able to seek reparations for both the act of aggression and the crime of aggression. This way, if the aggressed state is unsuccessful in obtaining reparations for the act of aggression, there is still a chance for it to obtain reparations for the crime of aggression.

Regardless, there is basis to argue that the aggressed state as the victim of the crime of aggression has a legal interest in reparations by the perpetrator of the crime of aggression. This may appear to be rather conceptual. Nevertheless, the question of individual civil responsibility in addition to individual criminal responsibility of the perpetrator of the crime of aggression is relevant in understanding the full scope of the legal interests of the aggressed state and the perpetrator of the crime.[696]

In my view, the aggressed state has a legal interest in the individual civil responsibility of the perpetrator, in addition to individual criminal responsibility. The next step is to examine to what extent individual civil responsibility of the perpetrator of the crime of aggression is enforceable. It is important to understand that any individual civil responsibility for the crime of aggression is first predicated upon a conviction pursuant to individual criminal responsibility. At present, the intended forums that may award reparations are domestic courts and the ICC. Yet, it should be remembered that the primary function of these forums is to enforce (criminal) sanctions directly against the perpetrator of the crime of aggression, and not to enforce individual civil responsibility against the defendant. As such, the latter will be examined in the context of the former, in relation to the legal interests of the aggressed state.

5.3.3. Prosecution of the crime of aggression

If the aggressed state is the rights-holder, it can be argued that it has a direct legal interest in the enforcement of sanctions against the perpetrator for the crime of aggression as a crime has been committed directly against it. It has been suggested that the aggressed state also has an interest in reparations as a legal consequence of individual civil responsibility of the perpetrator of the crime of aggression. The question is to what extent these legal interests of the aggressed state are protected by the present enforcement mechanisms against the crime of aggression.

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[696] Rosenfeld (n 658).

i. Prosecution of the crime of aggression in domestic courts

In domestic courts, prosecution is carried out by the sovereign (crown) or the Government against the defendant. In contrast with prosecution at the ICC (as will be examined below), prosecution of the crime of aggression in the domestic court of an aggressed state is directly representative of its interests. By virtue of domestic prosecution, the aggressed state may enforce criminal sanctions directly against the duty-bearer for his or her failure to comply with the duty owed to the aggressed state to comply with the norms that criminalise aggression.

Here, a difference can be identified between the crime of aggression and the other crimes. Domestic prosecution of the other crimes, e.g. war crimes, genocide or crimes against humanity is conducted by the sovereign (crown) or the government against the perpetrator on behalf of the interests of the victims who are natural persons. Although this may not give rise to any real practical ramifications, the difference is symbolic. The crime of aggression is a crime committed by an individual directly against the aggressed state. As the state itself is the victim, the sovereign (crown) or government is not facilitating proceedings on behalf of individual(s) in the interests of society for breach of the domestic penal code, or the international community for breach of international norms, but rather for prosecuting a crime committed directly against it.

Aside from the aggressed state that may initiate proceedings under the territorial principle of jurisdiction, the aggressor state may also prosecute a perpetrator under the nationality principle of jurisdiction. Both the aggressor state and aggressed state have a legal interest to enforce sanctions against the perpetrator of the crime of aggression by virtue of the nationality or territorial principle of jurisdiction. If the aggressor state has initiated proceedings, it is still nevertheless in the interests of the aggressed state that sanctions are executed against the perpetrator of the crime of aggression. As discussed in the previous chapter, there is also the possibility that prosecution of the crime of aggression in the domestic courts of the aggressor state may amount to satisfaction for the aggressed state.[697]

With respect to individual civil responsibility, upon a successful conviction, the domestic court may order the defendant to pay compensation to the aggressed state. Presumably, this would be in a situation where the aggressed state has initiated

[697] See Articles 34 and 37, ARSIWA 2001.

proceedings. The practical shortcomings are that the perpetrator may not have sufficient funds or assets to make any compensation to the aggressed state. Indeed, it should be emphasized that the source of compensation should be from the personal assets and funds of the perpetrator, and not from the aggressor state. For this reason, individual civil responsibility may not be practically feasible – or enforceable.

ii. Prosecution of the crime of aggression at the International Criminal Court

At the ICC, prosecution is representative of the interests of the international community.[698] It can be said that the legal interests of the aggressed state are represented by virtue of its membership in the international community. Even if the aggressed state itself refers the situation to the ICC (Article 14 Rome Statute), it delegates its direct interests of invoking individual criminal responsibility of the perpetrator to the interests of the international community as a whole. However, this does not necessarily mean that the interests of the aggressed state are undermined by ratifying the Rome Statute, the aggressed state has consented to the delegation of its interests. As discussed earlier in Chapter III, the competence of the ICC to prosecute international crimes is delegated from the domestic competence of States Parties. Thus, the ICC does not undermine the legal interests of the aggressed state even though prosecution takes place in the interests of the international community.

In relation to reparations to the victims of the core crimes within Article 5(1) Rome Statute, the ICC has its own regime pertaining to victim's rights. This will now be examined as a preliminary issue, followed by examining the more specific question of reparations for the victim(s) of the crime of aggression.

iii. Preliminary Issue: the regime at the International Criminal Court pertaining to victims

The ICC has established a regime pertaining to victims, which serves as an innovative platform for the advancement of victims' rights in international law. Under this regime, victims are given *locus standi* to participate in proceedings (Article 68(3) Rome Statute) and may even be awarded reparations (Article 75 Rome Statute). The

[698] Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 Journal of International Criminal Justice 618, 626.

concept behind victims' participation is that a platform is provided for victims to present their side of the story in the same proceedings as the perpetrators who have committed crimes against them. It can be envisaged that this would provide an insight to the social reality and personal story of the victim.[699] The idea is that they are able to be a part of the process that enforces sanctions against the perpetrators who have committed crimes against them.[700]

As must be appreciated, this is one of the most progressive steps taken in international criminal justice, as the ICC is the first international criminal court that has provided such a platform for victims,[701] and has aptly been described as a 'shift away from a retributive justice system to a more restorative, justice-oriented model.'[702] The Court has an infrastructure, which facilitates the regime pertaining to victims. There is a Victims and Witnesses Unit (VWU) within the Registry, along with a Victims Participation and Reparations Section (VPRS) and Office of the Public counsel for Victims (OPCV). As a subsidiary of the Assembly of States Parties, there is also a Trust Fund for Victims (TFV), which is a preparatory mechanism established in Article 79 of the Rome Statute:

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 fo the Court, and of the families of such victims.

2. The Court may order money and other property collected through hfines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.[703]

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[699] Christine van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' (2011) 44 Case Western Reserve Journal of International Law 475, 487.
[700] See Salvatore Zappala, 'The Rights of Victims v. the Rights of the Accused' [2010] Journal of International Criminal Justice 137.
[701] See Zegveld (n 695); van den Wyngaert (n 699).
[702] van den Wyngaert (n 699) 476; see also Conor McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory' (2009) 3 The International Journal of Transitional Justice 250, 253.
[703] See Rules 98 (1-4) specifies reparations awarded by the Court against a convicted person; Rule 98(5) Trust Fund's assistance mandate with regard to the use of "other resources" for the

According to definition of victims set in Rule 85 of the Rules and Procedure and Evidence (RPE) of the ICC:

> (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.

In the broader framework of public international law, this is also a significant development, as the regime at the ICC pertaining to victims is an example of the participation of individuals in their own capacity at an international court and the recognition of individuals as rights-holders and beneficiaries.

Pursuant to Article 75(2) of the Rome Statute, the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79 of the Rome Statute. It appears that reparations may take two forms: from the convicted perpetrator, or the TFV.[704] Reparations from the former indicate that the individual has breached his/her duty owed towards the victim(s) to comply with the norms that criminalise the convicted act, and is now facing legal consequences under secondary norms of responsibility. This is representative of reparations and damages in the light of the relationship between the perpetrator and the victim as the duty-bearer and rights-holder under international law. The latter, on the other hand, is not predicated upon a bilateral relationship

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benefit of victims, Rules of Procedure and Evidence, International Criminal Court; See also Resolution ICC-ASP/4/Res.3, Regulation of the Trust Fund for Victims; See also Commentaries to the Rome Statute, text 79; available at: http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-7/#c3903.

[704] van den Wyngaert (n 699) 480.

stemming from rights and duties, but is representative of the international community providing a form of financial support to the victims of international crimes.

It is worth examining the TFV in more detail.[705] An important difference between a reparation order made against the defendant and a reparation order through the Trust Fund is that resources under the latter may be made for the benefit of victims of crimes that have yet to be prosecuted.[706] The latter may also provide for assistance to victims and families through humanitarian programmes that undertake activities to provide physical rehabilitation, psychological rehabilitation, and/or material support to victims in situations where the Court has jurisdiction.[707] Indeed, the TFV appears to serve broader purposes relating to victims' rights than reparation for international crimes. The mandate of the Fund is: i) to implement Court-Ordered reparations and (ii) to provide physical, psychological, and material support to victims and their families.[708] The second part of the mandate addresses the social reality of the victims,[709] and appears to exist independently to the reparative function under the first part of the mandate, which is connected to finding of guilt of the perpetrator.

Both forms of reparations demonstrate that the ICC is an additional avenue for reparations to victims of the crimes, in addition to reparation for state violations of international humanitarian law or international human rights law.[710] Indeed, this means that in theory, the victims of crimes within the jurisdiction of the ICC may be entitled to two forms of reparations: i) against the perpetrator of the crime; ii) against the state that is in violation of international humanitarian law or international human rights law. Both reparations arise in the context of different secondary norms of responsibility.

It should be noted that reparations under the ICC are irrespective to the secondary norms that arise from breach by states of primary norms that prohibit conduct. In other word, reparations at the ICC relate solely to international crimes, and not violations of international law that lack criminal sanctions.

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[705] Frédéric Mégret, 'Justifying Compensation by the International Criminal Court's Victims Trust Fund: Lessons from Domestic Compensation Schemes' (2011) 36 Brooklyn Journal of International Law 123.
[706] Zegveld (n 695) 89.
[707] http://www.trustfundforvictims.org/programme.
[708] http://www.trustfundforvictims.org/trust-fund-victims.
[709] http://www.trustfundforvictims.org/programmes.
[710] See Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 International Review of the Red Cross 497; van den Wyngaert (n 699); Zegveld (n 695).

iv. Reparations with respect to the crime of aggression at the International Criminal Court

The victim of the crime of aggression is the aggressed state and not natural persons pursuant to Rule 85(b) Rules of Procedure and Evidence to the Rome Statute. However, as argued above, individuals are the beneficiaries of the implementation of the norms that criminalise aggression. This way, although they are not rights-holders *per se,* it is presumed that States Parties have conferred the status of beneficiaries onto individuals with respect to the crime of aggression. This presumption is supported by the absence of any agreements or further amendments that stipulate a separate victims' regime for the crime of aggression. By having the status as a beneficiary, a legal interest is created, which allows the natural person to have the *locus standi* to participate in proceedings and to receive reparations. What are the implications of this from a legal and practical perspective?

a. The legal implications for the aggressed state

As the ICC does not include the aggressed state in its regime pertaining to victims, the rights-holder of the protection from the norms that criminalise aggression is excluded from participating in proceedings against the perpetrator, and from being awarded reparations. Instead, natural persons, who are not rights-holders, are the beneficiaries of the rights and remedies from the regime pertaining to victims at the ICC.

That said, the exclusion of the aggressed state from the regime pertaining to victims at the ICC is understandable. The legal mandate of the ICC covers individuals, which is representative of an international forum that recognises individuals as a legal personality and confers them the *locus standi* to appear in court – whether as a defendant or a victim participant. Pursuant to Article 25(1) of the Rome Statute the Court has jurisdiction over natural persons. By allowing individuals to participate in the proceedings against other individuals and to receive reparations from individuals, the regime pertaining to victims is reflective of the underlying premise that individuals owe duties to each other to refrain from international crimes.

To allow the aggressed state to have *locus standi* as a victim participant in the proceedings and/or to receive reparations for violations of *jus ad bellum* would run

the risk of the ICC becoming an alternate or surrogate forum for international dispute settlement. This is especially so if the reparations are made from the Victims Trust Fund, as this fund can be considered as a reparatory mechanism that is part of the ICC. The risk is that the ICC may be manipulated as the alternate forum where the aggressed state can receive reparations for aggression if other forms of dispute settlement are unsuccessful. Not only is this precarious from a political perspective, but it also departs from the purpose of the ICC as an enforcement mechanism under international law to invoke individual criminal responsibility for international crimes.

For this reason, my view is that the regime pertaining to victims at the ICC should not be modified with respect to the crime of aggression. Although the aggressed state is the direct victim of the crime of aggression, the ICC is not the correct forum for it to have a *locus standi* to participate in proceedings or to award reparations through either a reparation order against the defendant or the Victims Trust Fund. Be that as it may, it can be argued that it is nevertheless in the interests of the aggressed state for its nationals to be considered as victims for the purposes of the regime at the ICC, and to receive reparations for the crime of aggression from either the perpetrator or the Victims Trust Fund. Thus, individuals are the direct beneficiaries, and the aggressed state is the indirect beneficiary.

If the aggressed state wishes to receive reparations for the crime of aggression, perhaps domestic prosecution should be considered. Even so, as discussed above, the individual civil responsibility of the perpetrator cannot be guaranteed under domestic prosecution. There is a very strong possibility that the only avenue for the aggressed state to receive reparations for a situation of aggression is under the secondary norms of state responsibility.

Be that as it may, it should not be forgotten that the legal consequences under the secondary norms of international criminal law that arise from a breach of the norms that criminalise aggression are the sanctions of a criminal nature against the perpetrator. Prosecution in itself is representative of the legal interests of the aggressed state, regardless of whether there may be reparations, in addition to the conviction of the defendant.

b. The legal implications for individuals

To understand the significance of the recognition of individuals as beneficiaries of the implementation of the norms that prohibit aggression and the norms that criminalise aggression, the first question is whether injured individuals have a right of reparation directly conferred by international law for violations of *jus ad bellum*. As submitted above, individuals are not rights-holder of the norms that prohibit or criminalise aggression. Rosenfeld confirms:

> In the field of state responsibility, an individual right to reparation for violations of the *ius ad bellum* is still widely rejected among scholars. […] In the absence of primary individual rights, individuals would not be in a position to assert secondary rights to reparation, either.[711]

The ICC is therefore representative of the first international forum that may potentially award reparations to individuals for violations of *jus ad bellum.*[712] Such reparations may be ordered directly against the perpetrator, or may be ordered from the Victims Trust Fund. This means that the reparations do not come from the aggressor state, but from the perpetrator of the crime of aggression or a multilateral fund, which is considered as a reparative mechanism under the ICC.

The next question is how individuals who are not primary rights-holders may nevertheless have tertiary rights that allow them to be beneficiaries of reparations. The legal basis for this is the Rome Statute, whereby all States Parties to the Rome Statute have conferred these tertiary rights to natural persons, and have consented to the application of the regime pertaining to victims. As the Kampala Amendments do not address the regime pertaining to victims, it can be presumed that the existing regime will apply. The implications of this are that these tertiary rights to reparations

[711] Although it may be argued that the UNCC awarded reparations for individuals for violations of international law (including *jus ad bellum* and *jus in bello*) committed by Iraq, its composition as a claims commission was a subsidiary of the Security Council (Resolution 687 (1991) para 18) for the specific purposes of compensation for losses, damage and injury resulting directly from Iraq's invasion and occupation of Kuwait. It is questionable as to whether this can be used as an example of an international forum that could grant reparations to individuals for state violations of *jus ad bellum*. For example, Rosenfeld questions whether the UNCC may be regarded as state practice to base a customary right of individuals to reparation for violations of jus ad bellum; Rosenfeld (n 658) 262.
[712] ibid.

are only applicable at the ICC. As individuals are not true rights-holders under international law, as a general rule, they may not be able to request for reparations for violations of *jus ad bellum* in other forums.

c. The practical implications

Article 75 of the Rome Statute, which governs reparations, is rather vague:

> The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss or injury to, or in respect of, victims and will state the principles on which it is acting.

Such 'constructive ambiguity' provides the Court with a large ambit of discretion to determine how reparations are made.[713] Considering that the ICC is the first international forum that will allow reparations to individuals for the violations of jus ad bellum, there is considerable pressure on judges to develop an approach and standards for awarding reparations. Suffice it to say, different standards will apply to reparations in this context, than the objective criteria under the secondary norms of state responsibility.

However, it is outside the scope of the present study and perhaps too premature at this point in time to discuss how reparations should be made with respect to the crime of aggression. Instead, this section will focus on some concerns that may arise with respect to the practical implications of applying the regime pertaining to victims to the victims of the crime of aggression. Without prejudice to the applicability of the regime applicable to victims of the other crimes within Article 5(1) of the Rome Statute, there are indeed particular concerns with arise with respect to the victims of the crime of aggression.

First, there is the practical difficulty of determining whether an individual may be considered as a victim under Rule 85 RPE for the purposes of the applicable regime.

[713] van den Wyngaert (n 699) 486; McCarthy (n 702) 255–256.

For example, with respect to sub-paragraph (a), how would the threshold for "harm" be satisfied? Indeed, the potential scope for "harm" would be extensive in the context of aggression, as it could encompass *inter alia* emotional distress or mental anguish, minor or major injuries, fatalities, damage to personal property, economic loss. Thus, it may be difficult to draw a line to determine whether or not harm is sufficiently serious for the natural person to be considered a victim of the crime.

Second, there is also the need to consider the legal framework applicable in a situation of aggression. The Court would have to be careful that the determination of a "natural person" does not conflate *jus ad bellum* with *jus in bello*. For example, injury to a natural person should be assessed in the light of the status of the individual under *jus in bello* as to whether he/she is a civilian or combatant, and whether this amounted to any violation of international law. If so, then the next question is whether such violation could be considered as a war crime. It is important in situations when the injury or harm caused to the individual does not constitute a violation of *jus in bello,* or a war crime, that he/she should not be classified as a victim of the crime of aggression as a matter of convenience.

With respect to the entities covered under Rule 85, "direct harm" to property, which is dedicated to religion, education, art or science or charitable purposes, historic monuments, hospitals and other places and objects for humanitarian purposes are *prima facie* representative of violations of *jus in bello* and not *jus ad bellum.* In particular, the damage of this "direct harm" appears to be a breach of obligations to refrain from attacks against cultural property under *jus in bello*.[714] Nevertheless, violations of *jus ad bellum* and *jus in bello* often occur simultaneously, and the "direct harm" to the entity which is described may be classified as a violation of *jus ad bellum* if it is found to be a part of permissible collateral damage under *jus in bello.* Caution must be taken to ensure that there is no conflation between *jus ad bellum* and *jus in bello,* and the entity in question should be classified correctly as a victim of a war crime or a victim of the crime of aggression.

Third, by providing a potential avenue for reparations for violations of *jus ad bellum*, this creates a possibility for political manipulation by states as there is the possibility that the aggressed state would view the ICC as an alternative forum for reparations than the ones under traditional dispute settlement, which would then

[714] Rule 38, Customary International Humanitarian law, available at: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule38.

initiate an interest for the aggressed state to refer the situation to the Court. The incentive for initiation of prosecution is then based on the prospect of reparations than the legal interest to establish the individual criminal responsibility of the perpetrator. This would dilute the symbolic significance of the ICC as an enforcement mechanism against international crimes, as the underlying political agenda is the quest for reparations for the crime of aggression.

In my view, for these three reasons, the regime pertaining to victims should exclude the crime of aggression. That said, this is a matter of policy for the Court to deal with upon the activation of the Court's jurisdiction of the crime of aggression.

5.4. Conclusion

This Chapter has delineated the concept of a victim as the rights-holder of the enjoyment of the protection of the norms that criminalise aggression that has suffered injury or harm from the failure of the duty-bearer to comply with the duty to refrain from the prohibited conduct. As states are the rights-holders, the victim of the crime of aggression is the aggressed state. Following from this premise, the hypothesis that natural persons are also the victims of the crime of aggression has been rejected on two grounds. First, natural persons are not the rights-holders of the enjoyment of the protection of the norms that criminalise aggression. Therefore, they cannot be considered as victims of the crime. Second, the actual damage caused by the crime of aggression, which is the state act of aggression (*jus ad bellum*), is committed against the sovereignty and territorial integrity of the aggressed state and not against natural persons. Thus, it is difficult to conceptualise natural persons as victims of the crime of aggression, as any harm or injury caused must be assessed under *jus in bello*.

It is submitted that in a situation of aggression (state act of aggression and crime of aggression), individuals may be considered as victims of violations of *jus in bello* and war crimes if it is satisfied that all constituent elements of the crime are present – and not victims of the crime of aggression. As there are currently available fora for the prosecution of war crimes and it is generally accepted that victims are entitled to reparations, it may perhaps be in the better interests of natural persons who are harmed or injured in a situation of aggression to initiate proceedings as a victim of war crimes and not the crime of aggression.

That said, an issue that was addressed was the question of death or injury to natural persons in a situation of collateral damage, which is permissible under *jus in bello.* As there has been no wrongful conduct on the primary level of norms, there is no responsibility on the secondary level. Thus, natural persons who are injured or killed as part of collateral damage may not be considered as victims of *jus in bello* or war crimes. In such a situation, the collateral damage should be assessed under *jus ad bellum*, which means that the aggressed state has a legal interest to invoke the responsibility of the aggressor state for damages (death or injury to natural persons) caused as a result of failure to comply with a duty to refrain from an act of aggression.

Although the hypothesis that natural persons are victims of the crime of aggression is rejected, it is acknowledged that they may be considered as indirect victims of the crime of aggression, as they are nevertheless beneficiaries of the enjoyment of protection from the implementation by the duty-bearers of the norms that criminalise aggression.

As the victim of the crime of aggression, the aggressed state has a legal interest that legal consequences are invoked against the perpetrator(s) of the crime of aggression in the form of criminal sanctions. It is also argued that the aggressed state has a legal interest in reparations for the crime of aggression, which is to be paid for by the perpetrator (and not the aggressed state). Therefore, the aggressed state has a legal interest in reparations for both the state act of aggression and the crime of aggression.

It is predicted that the only forum that may potentially protect the legal interests of the aggressed state with respect to reparations for the crime of aggression are its domestic courts. Upon successful conviction of the defendant for the crime of aggression, the Court may make an order for reparations (from personal assets). The practical problems are that the defendant may not have sufficient funds to pay reparations to the aggressed state. On the other hand, the ICC does not appear to be directly representative of the aggressed state's legal interest with respect to reparations. At the ICC, natural persons are recognised as potential legal beneficiaries to receive reparations for the crime of aggression. As natural persons have a jurisdictional nexus to the aggressed state by either the nationality or territorial link, it can be said that reparations are nevertheless in the (indirect) interests of aggressed state.

Be that as it may, regardless of reparations by the perpetrator or Victims Trust Fund for the crime of aggression, prosecution of the crime of aggression should be regarded as the first interests of the aggressed state as this is representative of the invocation of legal consequences against the perpetrator of the crime of aggression for failure to comply with primary obligations under international law.

Part III of this dissertation will now continue to examine these enforcement mechanisms.