Victimhood and the Crime of Aggression:

Broadening victim status at the International Criminal Court

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## Abbreviations

<table>
<thead>
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<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ASP</td>
<td>Assembly of States Parties</td>
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<tr>
<td>AU</td>
<td>African Union</td>
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<td>ECCC</td>
<td>Extraordinary Chambers in the Courts of Cambodia</td>
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<td>e.g.</td>
<td>for example (<em>exempli gratia</em>)</td>
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<td>Ibid.</td>
<td>in the same place (<em>ibidem</em>)</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICTY</td>
<td>International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>IMT</td>
<td>International Military Tribunal at Nuremberg</td>
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<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<td>OTP</td>
<td>Office of the Prosecutor</td>
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<td>RPE</td>
<td>Rules of Procedure and Evidence</td>
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<tr>
<td>SC</td>
<td>Security Council</td>
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<td>STL</td>
<td>Special Tribunal for Lebanon</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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1 Introduction

1.1 Object of the thesis

Whilst the International Criminal Court (ICC or ‘the Court’) was established at the Rome Conference in 1998, the Court did not gain jurisdiction over the crime of aggression until 17th July 2018.\(^1\) The crime of aggression has been the topic of contentious and enduring debate, however it remains unclear who are to be construed as victims of this crime. By incorporating victim participation within the ICC, the Rome Statute ‘invites - in fact demands - a focus on who may legally be considered a victim of the grave crimes within its jurisdiction’.\(^2\) It has become ‘essential for the legitimacy of international criminal justice that a victim constituency be centrally recognized’.\(^3\) Despite this, there remains considerable uncertainty regarding the victimhood of the crime of aggression. The activation of the crime of aggression, therefore, represents a decisive point in the development of the Court’s commitment to victims’ justice.

Due to the recent activation of the crime of aggression there have been no prosecutions concerning the crime of aggression before the ICC, and scholarly discussions of victimhood of the crime of aggression have been sparse. It is vital that this concept be investigated by policy makers, practitioners and scholars alike. This thesis explores how victimhood of the crime of aggression can be expected to work within the current Rules of Procedure and Evidence (RPE) at the ICC, focusing specifically on Rule 85. This rule outlines victim status at the ICC as encompassing a natural person, organisation, or institution that has suffered harm as a result of a crime within the ICC’s jurisdiction.

Victimhood for the crime of aggression at the ICC remains uncertain. In contrast to the other crimes under the Court’s jurisdiction (war crimes, genocide and crimes against humanity), individuals have never been recognised as victims of the crime of aggression nor of the underlying act of aggression. Equally, victim provisions at the ICC exclude the notion of a state as a victim. This creates a contradiction between the state-centric nature of the crime of aggression and the individually focused victimhood framework at the ICC.

This thesis considers what awaits future victims of the crime of aggression at the ICC, seeking to move beyond the state-centric nature of the crime of aggression. It argues for a broadening of Rule 85 to incorporate states, while additionally recognising individuals as victims of the crime of aggression.

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\(^{1}\) ASP, Activation of the jurisdiction of the Court over the crime of aggression, 14th December 2017

\(^{2}\) Brodney, “Accounting for Victim Constituencies,”

\(^{3}\) Findlay, “Activating a Victim Constituency,” 190
1.2 Research questions
This thesis aims to address the overarching research question of what constitutes a victim of the crime of aggression at the ICC. This broader question will be divided into four sub-questions in order for it to be more accurately answered, these are:

- What should victimhood of the crime of aggression entail?
- Can states be victims under the current victimhood regime at the ICC?
- Can individuals be victims under the current regime at the ICC?
- Which body should ultimately address these abovementioned research questions?

1.3 Methodology
This thesis is a doctrinal study of victimhood at the ICC and will utilise the following sources of law to aid with analysis. According to Article 21(1)(a) of the Rome Statute, the Statute itself and RPE are the primary source of consultation for interpretation. Although as noted in Article 51(5), the RPE are subordinate to the Statute. This thesis will utilise the Statute and RPE to decipher the concept of a victim of the crime of aggression at the ICC. It will then look to interpretations of victimhood in judicial decisions. Due to a lack of jurisprudence on the crime of aggression at the ICC (war crimes, genocide and crimes against humanity) will be examined to express a broader picture of the procedure for determining victims. This lacuna also necessitates a wider source of interpretation as permitted under Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). To do so, this thesis will use the sources of international law, as outlined in Article 38(1) of the International Court of Justice (ICJ) Statute; comprising treaties, customary international law, and general principles of international law. Scholarly works and judicial decisions are considered subsidiary sources under this article. These sources will be incorporated to allow for sufficient analysis of the crime of aggression.

1.4 Structure and demarcation
Chapter 2 will look at the background of the crime of aggression, including the historical context and recent developments. It will also explore the concept of a victim. It will then direct the attention of this thesis towards aggression under the ICC and a victim within the meaning of the RPE. Chapter 3 addresses the first research question contemplating what a normative definition of victimhood under the crime of aggression should consider. It will specifically address the nature of the crime and the practicalities of the Court. Chapter 4 then addresses the second and third research questions based on victimhood under Rule 85. It will look to how states and

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4 Rome Statute of the International Criminal Court, 2008 (‘Rome Statute’)
6 Statute of the International Court of Justice, 1946 (‘hereinafter ICJ Statute’)

individuals may be accounted for under Rule 85. It will address interpretation of the Rome Statute and its RPE. Chapter 5 looks to the future of the prosecution of the crime of aggression in considering the final research question. It will consider whether the ICC is the right arena in which to address these issues and whether other bodies should be given a role in this decision. Chapter 6 will conclude that the RPE should be broadened so that both individuals and states may be recognised as victims of the crime of aggression before the ICC.

2 Background

2.1 Introductory remarks
This section will give an overview of the developments of the crime of aggression and the key concepts, which give background to this discussion on victims of the crime of aggression. It will establish the concept of a victim used in this thesis, as well as outline the treaty law governing the crime of aggression and the rules on victims at the ICC.

2.2 Development of the crime of aggression
Aggressive wars have been waged for millennia. *Jus ad bellum* is the ‘international law foundation of the prohibition of the use of force’, and the crime of aggression. It represents the legal and/or moral limitations on the power of states to resort to the use of force against other states. It provides us with the historical background to the crime of aggression and its background as a state-centric crime. The crime of aggression, being derived from *jus ad bellum*, is the purview of states. It was in 1648 with the Treaty of Westphalia that ‘the principle of States’ respect for each other’s existence and integrity formally emerged.’ This equality of state sovereignty is what underlies *jus ad bellum*, and consequently, its breach underlies the crime of aggression; making states the principal victim. This is because the protected object of the crime of aggression is the territorial and political integrity of the state, and the international world order. The state and not individuals fit within this protected interest.

Aggression as an international crime invoking individual criminal responsibility, first came to the international stage in 1919, with Article 227 of the Treaty of Versailles, calling for a trial of Kaiser Wilhelm. This trial never materialised, but the crime of aggression lived on. It was taken up again by the International Military Tribunal (IMT) at Nuremberg in 1945, with Article 6(a) of the IMT Charter establishing the crime against peace, the forerunner to the crime of

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7 Ibid.
9 Ibid. 10.
10 Treaty of Peace with Germany (Treaty of Versailles) 1919, Article 227
aggression. In 1974, the UN General Assembly (UNGA) adopted Resolution 3314(XXIX) of 14 December 1974 which defined the crime of aggression. Article 1 of this resolution defined aggression as ‘the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations’. The prohibition of the illegal use of force has also been enshrined in Article 2(4) of the UN Charter. Several allegations of aggression in serious breach of Article 2(4) of the UN Charter have been raised by states. At the International Court of Justice (ICJ), these claims have been analysed with regard to international principles on the non-use of force, non-intervention and self-defence. The Security Council (SC) determined acts of aggression in the case of Israeli attacks on Palestinian Liberation Organization targets and South Africa’s attacks on Angola. However, these acts of aggression were not criminalised, and remained within the realm of state responsibility without invoking individual criminal responsibility.

None of the international ad hoc and hybrid criminal tribunals have had jurisdiction over the crime of aggression. The ICC is the first international court or tribunal to have jurisdiction over the crime. It is outlined in the Kampala Amendment constructed at the Kampala Conference in 2010, and largely follows the UNGA Resolution’s definition. With the activation of this jurisdiction only occurring on 17th July 2018, after ratification of the amendment by the 30 States Parties, we still have no jurisprudence on the crime of aggression invoking individual responsibility at an international level. At a national level, allegations of the crime of aggression

11 London Charter 1951
12 GA, Resolution 3314 (XXIX), 14 December 1974, UN Doc. A/ 3314, Annex
13 UN Charter, 1945. Article 2(4)
17 The ad hoc international criminal tribunals are the International Criminal Tribunal for former Yugoslavia and the International Criminal Tribunal for Rwanda, and the hybrid tribunals are the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, the Special Court and the Residual Special Court for Sierra Leone.
18 Rome Statue, Kampala Amendment
have been raised in domestic courts.\(^\text{19}\) Only eleven states have provisions within their criminal law, criminalising the act of aggression.\(^\text{20}\) However, these have scarcely been raised thus far.\(^\text{21}\)

Individuals have never been recognised as victims of the crime of aggression, nor of the underlying state act of aggression, nor its forerunner, the crime against peace.\(^\text{22}\) The customary law development of the crime of aggression provides a broader notion of the nature of the crime under international law. In this regard, there has been ‘no state practice recognizing individual victims of the crime of aggression’ and no *opinio juris* crystallising the concept.\(^\text{23}\) At the IMT in Nuremberg, where aggression was prosecuted as a crime against peace, victims were viewed instead as simultaneously local (affected states) and global (the international order).\(^\text{24}\) Aggression was seen as disrupting the world order and harming ‘humanity writ large’,\(^\text{25}\) even though it was specific countries and individuals, which were harmed. The ICC diverged from IMT Nuremberg, which had jurisdiction over the crime of aggression (as the crime against peace,) by allowing for victim participation. It is a Court geared to the victims.\(^\text{26}\) With this in mind, this thesis will endeavour to unpick victimhood for the crime of aggression at the ICC.

### 2.3 The concept of a victim

The label of “victim” is one that can evoke great public sympathy, as well as provide catharsis for those affected by crimes.\(^\text{27}\) Attaining this label within any criminal justice system allows the bearer to obtain official and/or unofficial means of redress. A victim is the term commonly used to refer to those people or groups ‘who are seen to suffer, and considered not responsible for their harm’.\(^\text{28}\) Von Hentig in his definition of a victim relates an individual victim and perpetrator, as ‘two human beings’.\(^\text{29}\) The Oxford English dictionary defines a victim as one who

\(^{19}\) For example in the United Kingdom, *R v. Jones et al*, House of Lords, 2006. Appellants were not entitled to rely on customary international law of the crime of aggression as a defence to the illegality of their action in causing damage and trespassing on British Military bases in protest to the Iraq war.

\(^{20}\) See Article 80 German Criminal Code, Article 409 Bulgarian; Article 353 Russian; Article 437 Ukrainian; Article 384 Armenian; Article 151 Uzbekistani; Article 395 Tajikistani; Article 72 Latvian; Article 139 Moldovan; Article 415 Macedonian. Translations in OSCE Legislation Database available at [https://www.legislationline.org/documents/section/criminal-codes](https://www.legislationline.org/documents/section/criminal-codes). See also Art 1 of the Iraqi Law no. 7 of 17 August 1958.

\(^{21}\) Coracini, "(Extended) Synopsis," 1070-1. Ukraine has found two Russian Special Forces guilty of the crime of an aggressive war. See BBC, “Russian ‘soldiers’ guilty”

\(^{22}\) Pobjie, “Victims,” 816

\(^{23}\) *Ibid.* 822

\(^{24}\) Brodney, “Accounting for Victim Constituencies,”

\(^{25}\) Brodney, “Accounting for Victim Constituencies,”

\(^{26}\) President Judge Silvia Fernandez de Gurmendi, “Keynote address October 2017”, 3, 6

\(^{27}\) Hall, *Victims and Policy Making*, 28; Miers, “Victim compensation”

\(^{28}\) Moffett, *Justice for Victims*, 17

\(^{29}\) Von Hentig, *The Criminal and the Victim*, 383
suffers some injury, hardship, or loss. The 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines victims as the following:

persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.

These definitions take a person-centric notion of victimhood, by recognising people or groups of people. However, these definitions do not reflect the reality of victimhood for the crime of aggression. They fail to acknowledge entities such as organisations, institutions, or states. The ICC already recognises organizations and institutions in a broader conception of victimhood. There are scholars who recognise a broader definition of victimhood, for example Moffett notes victimhood can ‘impact on local communities and wider society’. This construction of victimhood includes recognising harm caused to family members and communities and is referred to as ‘indirect victimisation’; the victims are considered “secondary” or “tertiary”. Moffett, amongst others, deems tertiary victims as ‘members of communities affected by the consequences of the harm or crime’. His conception of victimhood considers all the harmful effects a crime can have. Moffett’s expansive definition reflects the ICC’s victim-orientated approach, in recognising indirect victims.

In concurrence with Moffett’s definition, this thesis contends that the person centric definition described above must be expanded to include a broader range of victims for a crime with such a vast harmful reach. Therefore, this paper takes victimhood to consist of those that suffer harm as a result of the commission of a crime under the jurisdiction of the ICC.

2.4 The International Criminal Court

2.4.1 The crime of aggression under the Rome Statute

The definition of the crime of aggression articulated in Article 8bis of the Rome Statute of the ICC draws on the London Charter, the UN Charter and UNGA Resolution 3314’s language. The crime of aggression under Article 8bis paragraph 1 is defined as:

31 GA, Declaration of Basic Principles of Justice for Victims, 1985, emphasis added
32 Moffett, Justice for Victims, 18
33 Erez and Meroz-Aharoni, “Primary and Secondary Victims,” 120-1
34 Moffett, Justice for Victims, 18; Hoyle and Zedner, “Victims, Victimization and Criminal Justice,” 470
35 This was the agreement for the prosecution of the major war criminal of the European Axis. It was signed in London on 8th August 1945. London Charter 1951.
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.

The Rome Statute defines, for the purposes of paragraph 1, an act of aggression under paragraph 2 as:

the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

It is the *actus reus*, or act of aggression which enlightens us to the protected object of the crime of aggression as the state, since we find a state listed as the object of the act of aggression. Furthermore, the underlying acts of aggression, listed in Article 8bis(2)(a-g) all have states as the object of the respective acts. The crime of aggression also protects the international community through the UN Charter.36 Whilst states are predominant within Article 8bis of the Rome Statute, this emphasis on states does not necessarily fit with the definition of “victim” utilised within the ICC system. This may be because, “[s]tate delegates at the Review Conference in Kampala did not consider the impact of the amendments on the existing victim provisions in the Statute and Rules of Procedure and Evidence”.37 Thus, there has been no articulation of how the crime of aggression will fit in with the existing procedural structure of the court.

2.4.2 Victims before the ICC

The ICC is a victim-orientated Court, and the first international criminal court or tribunal to recognise the rights of the individual victims to participate in proceedings.38 In this way, the ICC Statute offers a greater role for victims than has previously been the case in international criminal courts and tribunals. At the ICC, victims have under Articles 68(3) and 75 of the Rome Statute, the possibility to participate in court proceedings and receive reparations. In order to do so, however, they must first establish themselves as victims. Traditionally, victims of international crimes have been individuals and this is reflected in the language of the Rome Statute. The Preamble identifies children, women and men as the victims of unimaginable atrocities.

37 Pobjie, “Victims,” 842
38 Vasiliev, “Victim Participation Revisited,” 1133
However, Rule 85 of the RPE governs the categorisation of victims at the ICC, and also recognises organisations and institutions. The Pre-Trial Chamber is the body at the ICC which determines the status of victims by deciding if the applicant meets the requirements laid out in Rule 85.  

Rule 85 defines victims as follows:

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

In sum, Rule 85 defines victims as individuals, organisations or institutions that suffer harm as a result of a crime within the Court’s jurisdiction. The crime of aggression does not fit easily into the two categories enumerated in Rule 85. This is presumably because the crime was not yet within the jurisdiction of the Court or formulated into the Statute at the conception of the RPE. Thus, this thesis must look to whether states can fit within Rule 85 of the RPE. Additionally, it will consider whether individuals, as defined in Rule 85(a), may be considered victims of the crime of aggression given the crime’s long-standing connection with states.

3 What should a victim of the crime of aggression look like?

3.1 Introductory remarks

Scholarly debate about the crime of aggression has largely centred on jurisdictional issues and individual criminal responsibility. Instead, this thesis will look at the impact the crime of aggression will have on the RPE and victim participation at the ICC. On the surface, the state-centric formulation of Article 8 bis would appear to show, unlike the other crimes under the Court’s jurisdiction which favour the protection of individual rights, that the crime of aggression favours the rights of states. The travaux préparatoires of the Rome Statute reveal possibly that states, and not individuals, were understood as the victims of this crime. However, this remains unclear as the travaux préparatoires did not examine victimhood in detail.

39 Kaoutzanis, “Two birds,” 119
40 Nollkaemper, “Concurrence”; Fercenz, “Enabling the ICC”; Leclerc-Gagne and Byers, “A Question of Intent”
41 GA, Proposal submitted by Germany, 1999
Foremost, during the discussions at the Kampala Conference in 2010, there was no consideration of how the victim provisions currently at the Court would be affected by the activation of the crime of aggression. There was no analysis of Part 6 of the Rome Statute, including Article 68 on victim participation and 75 on reparations, nor the RPE victim provisions. The question of the victim of the crime of aggression was simply left out of the discussion. This could have been the result of the parochial nature of the discussions in focusing on individual responsibility, state responsibility and jurisdiction. The absence of discussion regarding the victim state and their participation in proceedings seems remarkable for such an unprecedented victim-orientated court. On the one hand, a lack of any proposal to reform or exclude Rule 85 for the crime of aggression could suggest the drafters intended it to apply. On the other hand, it could purely signal an oversight on the part of the Working Group, and the Assembly of States Parties (ASP). This oversight, if not managed correctly, will have a profound effect on the practice of the ICC in cases concerning the crime of aggression by moving the Court away from a victim-orientated model.

Before this thesis embarks on an analysis of Rule 85, it will first look to what a victim of the crime of aggression should look like. This thesis will seek to show why both states and individuals should be considered victims of the crime of aggression. It will do so by looking at the nature of the crime of aggression, the practicalities and politics of victimhood at the ICC, and the victim-orientated nature of the ICC.

3.2 The nature of the crime of aggression

To consider the crime of aggression more closely and to note the importance of recognising a state as a victim, one must look to the norm which underpins it. Primarily, ‘the norm underlying the crime of aggression protects states from the unlawful use of force’. Thus, the protected value of the crime of aggression is international peace and the international community. This is an international community composed of states. Furthermore, paragraph 3 of the Elements of Crime for the crime of aggression defines an act of aggression as ‘the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations’. The very nature

45 Ibid.
46 ASP, Elements of Crimes, Art 8bis
of the crime of aggression recognises a state as a victim. It requires not only the act be attributable to a state, but also that the act targets another state via its sovereignty, territorial integrity or political independence. The notion of ‘sovereignty, territorial integrity or political independence’ in the Elements of Crime draw parallels to the commonly used criteria to define a state in public international law, outlined in Article 1 of the Montevideo Convention on the Rights and Duties of States.\(^{47}\) Likewise, the acts enumerated in Article 8\(^{\text{bis}}\)(2)(a-g) refer to states as the targets. The crime of aggression is, therefore by nature, a state-centric crime.

Paragraph 3 of the Elements of Crime also enumerates another act, that of acting in a manner inconsistent with the UN Charter. This thesis asserts that this does not negate the important role of states within the crime of aggression, but it eludes to the connection between Chapter VII of the Charter and the crime of aggression. This further solidifies the state-centric nature of the crime of aggression and reinforces their obligations as members of the United Nations. Consequently, Coracini and Wrange argue the state is the primary victim of the crime of aggression as a subject of international law.\(^{48}\) Thus, the harm to any individual victims, in the case of this crime, would stem from their belonging to the collective of the state and the harm to that state (see sections 4.1.3 and 4.1.4). There is limited scope for the individual within the crime of aggression, and the recognition of individuals as victims does not appear to be the intention of the drafters of Article 8\(^{\text{bis}}\).\(^{49}\)

Furthermore, people are not always hurt in the criminal act of aggression. Subparagraph (e) of paragraph 2 of Article 8\(^{\text{bis}}\) of the Rome Statute outlines an act of aggression, which is considered when the armed forces of one state are in the territory of another state in breach of the conditions of an agreement. It is the breach of the agreement, which gives rise to the act of aggression without harm to an individual. As Dinstein suggests this ‘provides an example of an act of aggression being committed (by the armed forces of State A overstaying their welcome in State B) without a single shot being fired’.\(^{50}\) In this situation, there will still have been a victim state (State B) but that “victim” will not be entitled to any means of redress in the current system. A liberal interpretation of the victim provisions to include states within Rule 85 is demanded given the variety of situations the crime of aggression spans. Whilst Article 8 concerning war crimes is also of a vastly varied nature, the protected objects which war crimes deal with are already encompassed in Rule 85. The protected object of the crime of aggression, the state, is not. Alternatively, given the interpretative qualifications of fitting a state within the current Rule 85

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\(^{47}\) Rome Statute, Article 8 bis; Montevideo Convention on the Rights and Duties of States 1933 articulates the characteristics of a state as a permanent population, a defined territory, government, and a capacity to enter into relations with other states.

\(^{48}\) Coracini and Wrange, “The Specificity of the Crime of Aggression,” 319

\(^{49}\) Pobjie, “Victims,” 842

\(^{50}\) Dinstein, “The Crime of Aggression under Customary International Law,” 294
(see section 4.2), an additional victim category comprising the state would be the more viable option. Although, the initiation and conclusion of such an amendment would be politically challenging.

### 3.3 Practicalities and politics of victimhood at the ICC

This sub-section will present three overarching issues surrounding victim status at the ICC that the Court is likely to face in considerations of the crime of aggression. It will do so in light of the crime of aggression and the potential impact that this could have on an already challenging system. First, it will raise issues with regards to the process that victims will go through at the ICC – from participation to reparation. Second, it will look to the political difficulty of addressing statehood at the ICC. Lastly, it will consider the nature of the victim pool for the crime of aggression, and the impact that it has on a construction of victimhood.

#### 3.3.1 The Court’s victim system

Victim status would allow a state to participate in court proceedings under Article 68 of the Rome Statute, and apply for reparations under Rule 75(2) of the RPE. The determination of who is a victim will affect the effectiveness of the Court in terms of trial duration, resources, and expenditure. It also raises ‘complicated questions of accountability and the manner of reparation.’ The further inclusion of an additional victim category within Rule 85, could add yet more pressure to this already over-stretched system. However, a collective grouping of victims for the enormous victim pool of the crime of aggression could ease the pressure on the Court.

The following sections will address victim procedure in light of the crime of aggression, first those associated with participation, and then reparations.

#### 3.3.1.1 Participation

It is in the state’s interest to participate as victims because of the entitlement to reparations the victim status bestows upon them. Yet, participation before reparations proceedings also raises new issues. Their participation as victims could have repercussions for other victims i.e. individuals or organizations, NGOs etc. On the one hand, it would lead to unfairness due to the disparity between the resources of individual victims and states, and additionally towards the individual accused. Whilst this is not necessarily a legal argument, it does raise questions of justice. On the other hand, any grouping of individuals into a larger victim entity of the state could provide for more expeditious proceedings, which would be both beneficial for the Court’s resources and the rights of the accused.

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51 Brodney, “Accounting for Victim Constituencies,”
52 Guilfoyle, EJIL:Talk! “Part I - This is not fine”; Murdoch, UK Statement to ICC
53 Pobjie, “Victims,” 852
54 Rome Statue, Article 67(1)(c) grants the accused the right to expeditious proceedings.
Whilst the crime of aggression could include the whole population of a country, as large victim pools are not unseen at the ICC. They are dealt with using groupings with joint legal representation. These are either chosen by the victims or assigned to them by the Court for expeditious proceedings. In *The Prosecutor v. Al Mahdi, 2017*, the Trial Chamber recognised the city of Timbuktu (approximately 70,000 people) as suffering harm, and in *The Prosecutor v. Lubanga, 2017*, the victim pool was estimated at between 2,000-6,000, even though the Court identified the possibility of thousands more victims. However, the Court only receives applications from a limited number of potential victims. The problem with these large groupings is often that the individualities of the victims are missed. In grouping victims together, you treat their experiences as one in the same, and do not recognise the individuality of each case and each individual’s harm suffered. If the Court is to be victim-orientated, then it must focus on their differences as well as their similarities. This complaint has largely been raised by scholars in regards to gender, ethnic, sexual orientation and racial nuances of the individuals harmed by the crimes before the Court. This issue could, however, be addressed with smaller groupings of victims with similar circumstances. Yet, this will not overcome all of the variability which will arise if you were to have a victim pool containing all of the citizens of an entire state, and even more so if this victim pool was in the context of an armed conflict (see sections 3.2.2 and 3.2.3.).

3.3.1.2 *Reparations*

Reparations proceedings are separate to the judgment of the Court. Article 75 of the Rome Statute governs reparations proceedings. In order to claim reparations, one must establish victim status. In accordance with Article 75(3), states may make representations to the Court about these reparations proceedings, so the “victim state” is not entirely excluded from any reparations proceedings where it is not granted victim status. However, granting reparations to a state rather than individuals would be more efficient as it would reduce the number of claims made. The ability of states to claim on behalf of themselves or all of their subjects in the form of a collective award would allow for this.

There have been concerns raised about granting reparations to states since it ‘could divert resources of the convicted person or the Trust Fund for Victims from individual victims (of this and other crimes) to states.’ In the drafting process, the UK raised this concern in relation to the inclusion of the phrase ‘legal entities’ within Rule 85, for fear corporations would benefit

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56 Moffett, *Justice for Victims, 112; The Prosecutor v. Gbagbo, Redress Trust Observations, 16th March 2012*

57 Pobjie, “Victims,” 851
from the Victims Trust Fund, and not individuals.58 Article 75(2), itself, provides that reparations may be made in respect of victims by reference to ‘a claim of diplomatic protection by the victim state on behalf of its nationals’.59 However, Rule 98 of the RPE only refers to victims on an individual or collective basis. Nowhere does it include the victims’ state of nationality as a beneficiary of reparations. A number of other international courts have addressed the issue of individuals not receiving reparations by requiring states to give compensation to the individuals. In the Eritrea-Ethiopia Claims Commission, for instance, a reward was granted to the state rather than its nationals, but there was strong suggestion to relieve the individuals of their harm suffered.60 In the ICJ case of Diallo, the compensation award was made to Guinea and not Mr Diallo, as a result of the diplomatic protection given by states to their nationals.61 However, the ICJ took the opportunity to remind Guinea the award was for Mr Diallo’s injuries.62 It would be enough for the ICC to (softly) remind States that the reparations were for those who had been injured, as in the above cases.

In this way, there need not be a distinction between individuals and states being recognised as victims; they can both be symbolically recognised as victims while enabling money to reach those directly harmed.

3.3.2 Defining statehood

Although this thesis asserts a state should be included in the current victim regime at the ICC, the definition of what exactly constitutes a state has already raised a number of issues at the ICC with regard to Palestine.63 The construction of victimhood to include a state will only amplify this debate. For example, it raises a number of issues such as what a definition of a state should look like; and who should decide what is considered a state before the ICC. This analysis will be rather condensed, given this is not the main focus of this thesis.

The controversy surrounding the definition of a state thus far, has largely concerned jurisdictional issues.64 The Rome Statute does not explicitly define a state, so the first time the term had been interpreted at the ICC was with a decision of the former Prosecutor Ocampo.65 Later,
in a statement on Palestinian Preliminary Examination, Prosecutor Bensouda stated the definition of state was one recognised by the UNGA.\textsuperscript{66} Since the meaning of a term within a statute should be consistent, the Prosecutor’s examination of the term could be said to define the term for the entirety of the Rome Statute. However, there have been questions as to whether the UNGA is competent in determining a state for the purposes of the ICC,\textsuperscript{67} which leads to further debate between the constitutive and declaratory theories of statehood.\textsuperscript{68} The next section will further discuss these theories.

3.3.2.1 Theories of Statehood

It is largely uncontested that the criteria for statehood are to be found in the Montevideo Convention on the Rights and Duties of States.\textsuperscript{69} A more controversial debate is between the declaratory and constitutive theories of statehood, which essentially hangs on whether recognition of statehood by other states is also a necessary criteria for statehood. If one takes it to be necessary, it impacts on who decides what constitutes a state, and ultimately whether states should be recognized as victims for the ICC. When one moves away from the international customary law of the Montevideo Convention, the process of recognition becomes markedly more political. This risks the Court being perceived as a political actor, which could undermine the independence and impartiality of the Court system.

3.3.2.2 Who should decide?

Who then decides how to define a state, and makes the decision as to whether an applicant fulfils this definition? The Office of the Prosecutor (OTP) based a decision on the determination of statehood upon UNGA’s confirmation, however it is unclear whether this office has the authority to decide what entity qualifies as a state. The former Prosecutor Ocampo decided decisions on statehood should be commenced at the UN,\textsuperscript{70} however, at the time he did not defer to any UN body. Instead, in basing the recognition of a state on the UNGA, the Prosecutor refers to an outside body, and an inherently political one. Any such referral to the UN would level much the same criticism as has been addressed to the Court before regarding the referrals made by the SC, as to the politicisation of the ICC system.\textsuperscript{71}

\begin{itemize}
\item \textsuperscript{66} OTP, Press Release, Preliminary Examination of the Situation in Palestine, 2015
\item \textsuperscript{67} E.g. Cerone, “The ICC and Palestinian Consent”; Kontorovich, “Palestine Inquiry”
\item \textsuperscript{68} Coggins, \textit{Statehood in Theory and Practice}; Talmon, “Tertium Non Datur”
\item \textsuperscript{69} Crawford, \textit{The Creation of States in International Law}, 96; Grant, “Defining Statehood,” 415
\item \textsuperscript{70} Borger, “Gaza War Crimes Inquiry,”
\item \textsuperscript{71} E.g. Murungi, \textit{Politicization of the International Criminal Court}
\end{itemize}
Perhaps then, this determination of statehood should be kept within the ICC. Article 19(3) allows for referrals from the Prosecutor to judges in order to ‘seek a ruling from the Court regarding a question of jurisdiction or admissibility’. Although this would add some length to any situation, it could lead to greater clarity on this matter. Another possibility would be to allow the ASP to decide, as recognizing an entity’s statehood is within the prerogative of states. However, this may add more political tension to an already strained ICC system.

3.3.3 The victim pool
The crime of aggression has the potential for an extremely wide and varied victim pool. It could include victims from across a state or region simply due to their connection to that area, as was the case in *Al Mahdi* for the victims of Timbuktu. This amounts to a potentially monumental pool of victims for the crime of aggression. Whilst this would not be an outcome unique to the crime of aggression, victimhood for aggression, if conceptualised broadly, is likely to result in ‘mass-victimisation’. In considering who should be qualify as victims of the crime of aggression, one must take into account the broader picture of this crime. This crime affects populations of both victim state and aggressor state alike. It can include individuals from the aggressor state who took part in hostilities (active aggressor victims), individuals from the aggressor state who took no part in hostilities (passive aggressor victims), individuals from the victim state who fought alongside the aggressor state (active aggresse victims) and individuals from the victim state (passive aggresse victims), see table.

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<td>Passive</td>
<td>Passive aggressor victims</td>
<td>Passive aggresse victims</td>
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Individual victims can come from across this spectrum and move fluidly between the different categories throughout the course of an armed conflict. This creates a number of conceptual and practical challenges.

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72 Rome Statute
73 Pobjie, “Victims,” 844
74 Coracini and Wrange, “The Specificity of the Crime of Aggression,” 320
The Trial Chamber, in *The Prosecutor v. Lubanga, 2008* determined that ‘victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights’.\(^75\) Any use of force could bring about an armed conflict in which international humanitarian law applies. Breaches of this law could result in these types of harm, identified in *Lubanga*, occurring to both sides of the conflict, and thus affecting all of the victim categories outlined in the table. During armed conflict, ‘[c]ivilians are at a heightened risk of becoming collateral damage, common goods are at a heightened risk of destruction, and military personnel and objects become legitimate targets,’ note Coracini and Wrange.\(^76\) Individuals in the aggressor state and the victim state can as a result equally fall victim to an act of aggression in one manner or another. Does this mean they should all be considered victims before the ICC?

The ICC will, ultimately, have to decide who will fall within the category of victimhood at the ICC, and how connected victimhood of the crime of aggression is to the state. This issue can partly be answered through a stronger test for causation between the crime and the victim (see section 4.1.2 below). However, the causation test would need to be acutely stringent in order to avoid mass-victimisation. This could result in a number of “victims” being excluded even though they may have a valid claim before the purportedly victim-orientated Court.

### 3.4 The advantage of a victim-orientated court

The ICC is a victim-orientated court, and the victim-orientated nature of the ICC is one of its greatest attributes. This approach allows for a victim-focused mode of transitional and international criminal justice. It is viewed as a positive move away from the perceived failure of earlier tribunals that had virtually no victim participation.\(^77\) It has been emulated in part by the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon.\(^78\) It has received criticism for being too victim-focused and for the impact the inclusion of victims in proceedings has on due process and fair trial rights.\(^79\) However, this development in international criminal law should not be overlooked. The recognition of individuals is a consolidation of this development in international criminal law, allowing for the participation of individuals, and to the broader evolution in international law of recognising the protection of individuals.\(^80\)

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76 Coracini and Wrange, “The Specificity of the Crime of Aggression,” 320

77 Haslam, “Victim Participation at the International Criminal Court,” 318; President Patrick Robinson, Report of the ICTY, 2009


79 Chung, “Victims’ Participation,” 460; Johnson, “Neither Victims Nor Executioners”

80 Peters, *Beyond Human Rights*
If individual victims of the crime of aggression were to be recognised as with the other crimes at the ICC, it would lead to greater consistency in the treatment of victims. Thus, consequently, enhances the victim-orientated nature of the ICC.

Moreover, this thesis argues that the state should also be recognised as a victim of the crime of aggression to further broaden the protection offered in a victim-orientated regime. However, as Stahn argues, the recognition of states as victims before the ICC ‘would introduce a surrogate forum for interstate reparation’. If the State is not able to claim or receive reparations under the ICC regime for the crime of aggression, there are other legal regimes, which may provide for such reparations. This is possible as the ‘victim state is (...) entitled to full reparation from the aggressor state under customary international law’. This could increase international political and judicial pressure upon the Court. So why should the ICC allow states to be victims and claim reparations, instead of leaving the task to other international adjudicatory bodies? Pobjie contends ‘[s]tates have other avenues to seek redress for aggression under international law’, but is this not tantamount to saying aggression should not be a crime, or that it should not be within the jurisdiction of the ICC. It is true that individuals do not have any other means of redress than the ICC, but that does not mean individuals should be the only victims of the crime of aggression. The crime of aggression is a crime primarily against states and this should be recognised by the ICC.

Furthermore, other international bodies have been reluctant to make declarations or findings of the crime of aggression. The ICJ has declined to make a finding of aggression, ‘most infamously in the case of the Democratic Republic of the Congo v. Uganda’. The ICJ refers instead to aggression as an illegal use of force or principle of non-intervention invoking state responsibility. It fails to address the seriousness of the act of aggression at hand. The ICJ, therefore, not only avoids acknowledging the victim states, but also refrains from recognising the presence of the crime of aggression in international law, thus equally affecting individual victims. In this way, a finding of the crime of aggression at the ICC would have ‘symbolic value due to the difficulty of obtaining a finding of aggression against the aggressor state before the International Court of Justice or by the UN Security Council.’

81 Stahn, “The “End”, the “Beginning of the End” or the “End of the Beginning”?,” 881
82 ILC, Draft Articles on the Responsibility of States 2001, Article 31(1)
83 Pobjie, “Victims,” 851
85 Armed Activities on the Territory of the Congo, 19th December 2005, §§ 259, 345
86 Pobjie, “Victims,” 851
3.5 Concluding remarks

The crime of aggression is characteristically state-centric, and individuals can only be linked indirectly to the crime, because of their connection to the state. Despite this, the ICC is a victim-orientated court which seeks a broad construction of victimhood to avoid impunity. Therefore, while outlining some difficulties, the above normative reasoning highlights why states and individuals should both be recognised as victims by the ICC. Taking into account the lack of appropriate wording under the current RPE and these normative reasons, this thesis purports a new victim category accounting for states should be added to broaden the RPE. At the very least, the RPE should be re-examined in the light of the crime of aggression to provide for a clear process of identifying victims of the crime of aggression at the ICC.

4 An analysis of Rule 85 of the Rules of Procedure and Evidence

4.1 Introductory remarks

Given the normative reasons for the inclusion of both individuals and states in a construction of victimhood of the crime of aggression, this section will undertake an analysis of whether individuals and states could fit within the current RPE. The ability to identify as an individual victim of the crime of aggression allows for participation in proceedings and potentially the collection of reparations in the finding of such a crime. This makes it a conceptually and economically important question to be answered. Rule 85 of RPE defines a victim, and the crime of aggression is not explicitly excluded from an application of Rule 85 concerning victimhood. Rule 85 defines victims as follows:

(a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

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

The Court’s jurisprudence concludes a natural person under Rule 85(a) is a human being.87 Whilst individuals fall into this category, individual victims of the crime of aggression may find it difficult to meet all the criteria under Rule 85(a). Rule 85(a) also excludes states and state-like entities. The only option to include a state as a victim in the current RPE, therefore, lies with Rule 85(b). This thesis will first look at individuals under Rule 85(a), before turning to an analysis of states under Rule 85(b).

87 Situation in the Democratic Republic of Congo, 17th January 2006, §80; Situation in Uganda, 10th August 2007, §105
4.2 Individuals under Rule 85

This thesis discerns that the main issues with individuals falling within the definition of a victim under Rule 85(a) lies with an analysis of harm and causation. This is because it raises the question of whether harm requires a legal interest to be affected, and if so how this harm to an individual can be caused by a crime where the protected legal interest is that of the state. The criminalisation of aggression is directly linked to the legal interest of states and not individuals. There has been no relevant practice or opinio juris that individuals are victims of jus ad bellum.88 Both harm and causation will be examined in the following section. Any interpretation of the RPE follows the same interpretation of the Statute in accordance with the VCLT.89 Any treaty interpretation under international law involves an analysis according to Article 31 of the VCLT, under which the interpretation must be ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. One must also keep in mind that the RPE cannot be read in such a manner that would narrow the scope of any treaty provision.90

4.2.1 Interpreting Harm

Under Rule 85(a) a natural person is a victim when they have suffered harm as a result of a crime within the Court’s jurisdiction. Harm has not been defined in the Rome Statute or the RPE. Instead, it has been interpreted on a case-by-case basis by judges. They have largely relied on human rights law, the UN Victims’ Declaration and Basic Principles.91 This use of international human rights law within international criminal law interpretation is provided for in Article 21(3) Rome Statute, which demands interpretation of ICC law should be consistent with internationally recognised human rights. However, the Court must be cautious about embracing whole-heartedly concepts developed in a different legal context.92 The Court must first, when faced with a lacuna in the Statute, RPE and Elements of Crime, look to interpretation methods set out in the VCLT in accordance with Art 21(1)(b), and then to national laws under Art 21(1)(c). For this reason, this thesis must look to the literal, textual and purposive interpretation of harm.

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88 Rosenfeld, “Individual Civil Responsibility,” 250
90 Situation in the Democratic Republic of Congo, 17th January 2006, §47.
92 ICTY, Prosecutor v. Kunarac et al. (Trial Judgment), 22nd February 2001, §471
4.2.1.1 Ordinary meaning of harm

In The Prosecutor v. Lubanga, 2008, the Appeals Chamber finds that harm in Rule 85(a) is in accordance with its ordinary meaning in denoting ‘hurt, injury and damage’. Although, the context of the use of harm usually arises from the breach of a legal obligation, which presupposes a legal interest. At the international level, the breach of a legal obligation lies in the realm of states. The legal obligation of international peace and community, the protected object of the crime of aggression, is owed to states. The centrality of the state and international community suggest individuals do not have an affected interest, as ‘the object of the prohibition of aggression and the associated crime of aggression is international peace’. The crime of aggression does not affect legal interests of individuals in respect of violations of jus ad bellum or acts of aggression. However, the Court has used international human rights law concepts in its framing of harm to individuals under the other crimes, even where they may not have been the protected object. Thus, individuals retain certain legal interests, even where obligations are owed to the international community. This suggests that there is tension between the definition of harm consistently used in legal texts and the Appeals Chambers’ definition according to the ordinary meaning.

4.2.1.2 Context of harm

Article 31(2) of the VCLT details that the context includes the treaty text including annexes and preamble, and agreements and instruments related to the treaty. This thesis will look to the treaty texts as a whole in a holistic exercise so as not to devoid these terms of their context. It will look beyond the RPE to the Rome Statute and the interpretation of other crimes.

Under Rule 85(a) of the RPE ‘the harm must result from the commission of any crime within the Court’s jurisdiction’. Thus, a legal interest is not essential to the finding of harm at the ICC as this context ‘divorces “harm” from an underlying legal interest and instead connects it to the commission of particular crimes’. This contextual connection of harm for the finding of an individual victim is particularly important, given the crime of aggression is a crime connected to an act against a state. Furthermore, it is the case that not all crimes brought before the Court have individuals as the protected object, for example Article 8(2)(b)(ix) and (e)(iv) of the Rome Statute. Arguably, these war crimes cannot be shown to establish harm under Rule 85(a).

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93 The Prosecutor v. Lubanga, 11th July 2008, §31
94 Pobjie, “Victims,” 820-1
95 Pobjie, “Victims,” 818
96 Situation in the Democratic Republic of Congo, 17th January 2006, §81
97 Ibid. 827
98 Ibid.
99 Ibid.
85(a) as the harm is ‘disconnected from the protected object of the criminal norm’. However, Rule 85(a) provides no such exclusion for these crimes. In *The Prosecutor v. Al Mahdi*, 2016, the Trial Chamber found eight individuals to be victims of the war crime of intentionally directing attacks against protected buildings or objects under Article 8 (2)(e)(iv) of the Rome Statute. These individuals were not the protected object of the criminal norm, but were still considered victims of the crime. Thus, if an individual can be considered a victim of these crimes in accordance with Rule 85(a), there is no express need for the individual to be the protected object of the criminal norm under the Rome Statute, in this case the crime of aggression.

### 4.2.1.3 Object and purpose of harm

The object and purpose of Rule 85 can be found within the Statute’s preamble and its victim provisions (Articles 68 and 75). Article 68(3) of the Rome Statute permits victims’ views and concerns to be presented based on their personal interests. This may indicate the notion of harm in Rule 85 requires a legal interest to be affected. Thus, even if individuals meet the definition under Rule 85(a), they may nevertheless be unable to participate in proceedings if they do not meet the requirements of Article 68(3). However, a legal interest is not expressly required under Rule 85, and given other interpretations according to VCLT, it is arguably not a requirement for victim status per Rule 85. Although, the affection of the personal interests of the victims could appear to be a factor in determination of the participation of victims in proceedings.

The Preamble of the Rome Statute notes the underlying interest of states and the international community in paragraph 8, where state and UN obligations are referenced. This part of the Preamble supports a state-centred view. Although, the Preamble also specifically recognises ‘children, women and men’ as being victims of unimaginable atrocities. This suggests the object and purpose of the Statute is to protect these individuals from such atrocities, including the crime of aggression. This identifies the need to note the harm done to individual victims as well as states. However, it does not identify an underlying interest of the individuals that needs to be protected.

Furthermore, the Draft Statute stated that ‘for the purposes of defining “victims” and “reparations”, reference may be made to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’. Principle 18 of this declaration defines victims as ‘persons who individually or collectively suffered harm, including physical or mental injury, emotional

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100 *Ibid.* 828


suffering, economic loss or substantial impairment of their fundamental rights’. 103 However, any further clarification of harm was missing. The drafters of the Rome Statute deliberately left out the substantial impairment of fundamental rights from the criterion of victimhood. 104 This seems to indicate that the drafters intended harm to be based on a factual analysis rather than on a violation of an underlying right. In The Prosecutor v. Lubanga, 2008, the Trial Chamber has since found that substantial impairment of a fundamental right can amount to harm under Rule 85. 105 However, there was strong dissent by Judge Blattman because of the purposeful deletion of substantial impairment of rights during the drafting process. Furthermore, whilst the Appeals Chamber recognised the use of the UN Basic Principles, it did not confirm the notion of substantial impairment as a form of harm. 106

Whilst this analysis all suggests the drafters did not intend for there to be an underlying interest for the recognition of victims before the Court, a secondary requirement of causation may bar an individual from victim status.

4.2.2 Causation

Even where harm can be established there must be a causal nexus between the harm and the crime of aggression. Whilst an act of aggression may factually cause deaths, injury and destruction, legal causation requires a specific causal nexus which may not be met. 107 There is no explicit mention of causality in Rule 85, it simply refers to harm suffered “as a result of” the alleged crime. The Court has taken up ‘a pragmatic, strictly factual approach, whereby the alleged harm will be held as “resulting from” the alleged incident’. 108 Causation is an issue in framing individuals as victims of the crime of aggression in two respects.

The first issue is whether the harm must be attributable to the specific actus reus of the individual perpetrator or whether it need only be linked to the state act of aggression. The actus reus of the individual, as per Article 8bis(1) Rome Statute is the individual conduct of planning, preparation, initiation or execution of the state act of aggression. Pobjie contends that it is ‘unnecessarily restrictive to require the harm to be directly attributable to the participation of the accused for the purpose of determining who is a “victim” under Rule 85(a)’. 109 This thesis agrees with this contention and is inclined to favour a broader understanding of a victim of the crime

103 GA, Declaration of Basic Principles of Justice for Victims, 1985
104 GA, International Seminar on Victim’s Access to the International Criminal Court, 1999
105 The Prosecutor v. Lubanga, 18th January 2008, §35
107 Pobjie, “Victims,” 825
108 Situation in Uganda, 10th August 2007, §14
109 Pobjie, “Victims,” 833
of aggression as this attribution could lead to impunity. It should be noted, however, that a broader interpretation could cause controversy and debate when a case is brought, as this would permit a large number of victims and could prove prejudicial to the rights of the accused by causing an unjust delay to the proceedings. Some commentators manifestly purport that the rights of the accused prevail over the rights of victims, and this would mean that delays resulting from victim participation could be resolved by declining victim status altogether. Parts of the Rome Statute arguably support this hierarchy of rights. Such as Article 64(2), which provides that ‘the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses’. Other scholars contend rights under the ICC Statute and Rules should entail a balancing of rights rather than a hierarchical structure. Thus, the rights of the accused and the rights of victims would need to be weighed up by the Court in its consideration of classifications of victims. This thesis shares this view, and believes victims should continue to be a balanced part of proceedings.

A second issue exists with causation due to harm flowing from subsequent crimes rather than the crime of aggression. Pobjie notes ‘the moment of aggression is an act which disrupts international peace, whereas harm to individuals results from the lawful and unlawful acts of war during the armed attack or ensuing armed conflict’. In *The Prosecutor v. Lubanga, 2015*, for example, the Appeals Chamber excludes any harm to individuals, which is subsequent to the crime before the court, even where these crimes may be consequential. Thus, it may appear that even though aggression creates the conditions in which additional international crimes may occur, the harm would be considered to result from those crimes and not the initial crime of aggression. How then would an individual be able to prove harm arising from the crime of aggression? It would seem the Court requires additional indicia that link the subsequent crime to the accused. The Court has applied the following causation tests. In *The Prosecutor v. Lubanga, 2012*, the Trial Chamber applied the but-for test and standard of proximate cause

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112 Pobjie, “Victims,” 834; Sayapin, *The Crime of Aggression*

113 *The Prosecutor v. Lubanga, 3 March 2015*, §198

114 The but-for test asks but for the existence of B would A have occurred, to determine actual causation.

115 The proximate cause test determines causation by assessing whether the actual cause is legally sufficient to support liability.
in reparations proceedings.\textsuperscript{116} It also went on to state that ‘there is no settled view in international law on the approach to be taken to causation’.\textsuperscript{117} The Court, however, seems to have applied a different approach when interpreting causation under Rule 85. In \textit{The Prosecutor v. Al Mahdi}, 2016, the Trial Chamber found it ‘sufficient that an applicant demonstrates, for example, that the alleged crimes could have objectively contributed to the harm suffered’.\textsuperscript{118} In \textit{The Prosecutor v. Gbagbo}, 2015, the Trial Chamber found the crime need not be the only cause of the harm.\textsuperscript{119}

These previous decisions of the ICC indicate it may be possible to be a victim of a crime of aggression under Rule 85, even though subsequent crimes have also contributed to the harm. It must be remembered, however, there have been no prosecutions for the crime of aggression. Only time will tell how causation plays out for victims of the crime of aggression at the ICC. Although, this thesis suggests the ICC incorporate a broader concept of causation.

4.2.3 Indirect and direct victims
The Court has recognised both direct and indirect victims of crimes before the Court, with reference to the UN Basic Principles.\textsuperscript{120} It determines that the harm in question must be personal but the victims may be indirect or direct. It did so through a purposive interpretation of Rule 85(a) and comparison with Rule 85(b). Rule 85(b) calls for a “direct harm” to have been sustained by the victim, whereas Rule 85(a) makes no such requirement. Thus, people may be both direct and indirect victims of a crime under the Court’s jurisdiction in accordance with Rule 85(a).\textsuperscript{121}

In \textit{The Prosecutor v. Al Mahdi}, 2016, the Trial Chamber recognised not only the people of Mali, but also the international community as indirect victims of the attacks on the mausoleums at Timbuktu because of their classification as a UNESCO world heritage site. Furthermore, in this instance the Court classified the inhabitants of Timbuktu and the faithful, as the direct victims of the attacks on the mausoleums because of their “emotional attachment” to the mausoleums.\textsuperscript{122} The distinction between direct and indirect does not seem to be one of state (direct) and individual (indirect) based on nationality or citizenship. It is, rather, one of proximity. In the

\textsuperscript{116} \textit{The Prosecutor v. Lubanga}, 7th August 2012, §§249, 250.
\textsuperscript{117} Ibid., §248
\textsuperscript{118} \textit{The Prosecutor v. Al Mahdi}, 8th June 2016, §22
\textsuperscript{119} \textit{The Prosecutor v. Gbagbo}, 6th March 2015, §36; \textit{The Prosecutor v. Bemba}, 12th December 2008, §77
\textsuperscript{120} \textit{The Prosecutor v. Lubanga}, 11th July 2008, §§1-32; \textit{The Prosecutor v. Lubanga}, 18th January 2008, §§91-92
\textsuperscript{121} \textit{The Prosecutor v. Lubanga}, 18th January 2008, § 91
\textsuperscript{122} \textit{The Prosecutor v. Al Mahdi}, 27th September 2016, §80
case of Al Mahdi, it includes those inhabitants of the surrounding areas and those who fre-
quented the mausoleums (“the faithful”) as victims of the war crime against a protected object
(the heritage of mankind). Notably, this case deals with a war crime and not the crime of ag-
gression. With the crime of aggression, one must disaggregate whether victims would be limited
to certain regions that had been the object of the act of aggression, for example a part of a
territory that was occupied.

In previous cases before the ICC, involving the other crimes under the Court’s jurisdiction, an
indirect victim is harmed ‘as a result of their relationship’ with the direct victim. Pobjie
claims any individual harmed as the result of an act amounting to a crime of aggression, ‘suffers
direct harm from that act, rather than secondary harm resulting from his or her relationship to
the state’. However, this thesis finds this unconvincing. The individuals are harmed as a result
of their belonging to a collective, as members or inhabitants of the state which was, for example,
bombarded. Thus, whilst an individual could be deemed to be a direct victim, as has been pre-
viously contended, this thesis asserts that there must still be a connection with the state for the
finding of a victim of the crime of aggression. This criterion is not found in an analysis of harm,
but rather within the actus reus of the crime of aggression- the act of aggression. This is com-
parable to the importance of belonging to a national, ethnic, racial or religious group for the
actus reus of the crime of genocide. While recognising that an individual may be a direct victim
of the crime of aggression, one must not forget the importance of an attack on the state for the
crime of aggression. After all, under Rule 85 there must be a victim ‘of a crime within the
jurisdiction of the Court’, the crime of aggression. The harm suffered by the victim is, therefore,
closely linked to the act of aggression against the state.

4.2.4 Collective groups

It may also be possible to link individuals together, as has been done previously in the ICC, to
form a collective entity of victims of the crime of aggression. In this way the state represents
the primary victim, but as a collective ‘its individual members are equally victimised’ by the
crime of aggression. Recognising both states and individuals as victims may create a balance
between the state-centric nature of the crime of aggression and the individually focused RPE at
the ICC.

123 The Prosecutor v. Lubanga, 8th April 2009, §49.
124 Pobjie, “Victims,” 829
125 The Prosecutor v. Gbagbo, 16th March 2012; The Prosecutor v. Katanga, 27th June 2017, §16
Substantively, the protection of a collective entity is not foreign to the ICC and the Rome Statute. For example, the protection of ‘a national, ethnical, racial or religious group’ under Article 6 of the Statute and ‘any civilian population’ under Article 7, both concern a collective entity.\textsuperscript{127} Individuals are protected by belonging to a specific group and their link to this group is paramount to their status as a victim. It is individuals that form the population of a state and should consequently be protected from the crime of aggression, through their belonging to this group. Then one must also question who will be included within the population of the group, especially whether it will include the armed forces or those directly involved in hostilities (see section 3.2.3). Procedurally, the ICC has grouped victims together collectively before with Joint Legal Representation, in order to allow for efficient proceedings.\textsuperscript{128} The thousands of victims of international crimes would be procedurally impractical were each victim to be represented by their own counsel.

Collective grouping is not without its problems. It must still be determined how these groups will be formed for the crime of aggression. In \textit{The Prosecutor v. Al Mahdi, 2016}, one UNESCO witness describes the collective ensuring of the condition of the mausoleums, which were attacked, through community maintenance projects.\textsuperscript{129} This then raises the question of whether a community or collective grouping must perform an act towards the protected object to show harm. How would this work for the case for the crime of aggression, would there need to be assurances that victims sought to protect the political sovereignty and territorial integrity of the state? Indeed, would they have to fight to be considered victims? This seems like a large leap to make in order to group victims together and is instead likely to lead to impunity. Is it then to be decided based on the citizenship of individuals, as citizens of the victim state? This in itself raises problems. It is not often the case that the whole state is the victim of aggression, but it may only be a single area/region or parts of a state, as for example in the case of the Russian annexation of Crimea in 2014.\textsuperscript{130} Crimea is only part of the Ukraine’s territory, and raises the question whether this part alone could constitute a victim or whether it would be the state as a whole that constitutes the victim. There are individuals in the Ukraine and Crimea that were sympathetic to Russian occupation and those who were not.\textsuperscript{131} Are these two groups both to be deemed victims of the crime of aggression? Hypothetically, can they be grouped together for prosecution at the ICC? It would seem collective grouping raises as many problems as it solves. The determination of which side a victim fell on in a conflict will be a decision, usually taken

\textsuperscript{127} \textit{Ibid.} 318

\textsuperscript{128} \textit{The Prosecutor v. Gbagbo, 16th March 2012}

\textsuperscript{129} \textit{The Prosecutor v. Al Mahdi, 27th September 2016, §78}

\textsuperscript{130} OTP, Report on Preliminary Examination 2016, 33-42

by the ICJ, that the ICC will instead have to handle. Fortunately, the ICC is not a newcomer to these types of decisions, having already had this demand placed upon it with regards to the statehood of Palestine, and in evaluations of the legality of UN SC Resolutions.\footnote{With regard to Palestine: OTP, Statement, ICC’s jurisdiction over Palestine, 2014; OTP, Statement, Situation in Palestine, 2012 §§5–7; OTP, Press Release, Preliminary Examination of the Situation in Palestine, 2015.In regard to UN SC resolutions: \textit{The Prosecutor v. Gaddafi and Al-Senussi}, 1\textsuperscript{st} June 2012, §§28-9; \textit{The Prosecutor v. Nourain and Jamus}, 1\textsuperscript{st} July 2011, §15; \textit{The Prosecutor v. Al Bashir}, 6\textsuperscript{th} July 2017, §§85-6}

In sum, this thesis contends there is no need for an affected legal interest in order to recognise a victim under RPE. Furthermore, it is possible for the harm done to an individual to be connected to the crime of aggression, if not as direct victims then as indirect victims. Although, one must still consider that the \textit{actus reus} of the crime of aggression requires a connection to the state. These individuals may then be collectively grouped. Collective grouping of indirect victims is a manner of reconciling the state-centric nature of the crime of aggression while recognising the harm done to individuals. Thus, an individual may fit within the definition of a victim outlined in Rule 85 for the purpose of victimhood of the crime of aggression. This thesis proceeds to consider states under Rule 85.

\subsection*{4.3 States under Rule 85}

Despite the persistent reiteration of the state within the crime of aggression under the Rome Statute, Rule 85 contains no mention of a state. The question that then follows is whether they are to be considered a victim of the crime of aggression under the RPE. The only option to include a state as a victim in the RPE lies with Rule 85(b). This thesis will look at whether a state falls within this definition. In order for victims to meet the criteria of Rule 85(b), the following elements must be fulfilled. First, the prospective victim must be an organisation or institution that has property dedicated to specific purposes. Second, the organisation or institution must have sustained direct harm to that property. Third, the crime from which the harm occurs must be within the jurisdiction of the Court. Finally, there must be a causal link between the crime and the harm.\footnote{\textit{The Prosecutor v. Nourain and Jamus}, 29\textsuperscript{th} October 2010, §45} This thesis contends that the first two criteria are most pertinent in determining whether a state can be a victim of the crime of aggression.

\subsubsection*{4.3.1 Organization or institution}

At the time of writing, there has been no definition of an organization or institution at the ICC and this is thus open to interpretation. The Court’s current interpretation includes,
non-governmental, charitable and non-profit organizations, statutory bodies including government departments, public schools, hospitals, private educational institutes (primary and secondary schools or training colleges), companies, telecommunications firms, institutions that benefit members of the community (such as cooperative and building societies, or bodies that deal with micro finance), and other partnerships.\textsuperscript{134}

However, it has been difficult to ascertain what exactly is meant by these concepts and analyse their criteria as to what constitutes an organization. In \textit{The Prosecutor v. Lubanga}, 2012, the organizations’ mandate and buildings, were redacted in the public versions of the case so as to conceal the identity of the applicants.\textsuperscript{135} These types of redactions have made it difficult to decipher exact criteria. This thesis will endeavour to interpret “organization or institution” in accordance with international law on treaty interpretation per Article 31 of the VCLT. This requires examination of the literal, textual, and purposive interpretation.

\textbf{4.3.1.1 Ordinary meaning of organization and institution}

Considering the ordinary use of the words “organization” and “institution”, it is possible that a state will fall within these definitions. The Oxford English Dictionary defines an organization as ‘an organized group of people with a particular purpose, such as a business or government department’.\textsuperscript{136} It also describes an ‘organization founded for a religious, educational, professional, or social purpose or an established official organization having an important role in a society, such as the Church or parliament’.\textsuperscript{137} It seems the state as a whole would struggle to meet these definitions, whereas an institution, an organ or part of the state would be able to fit within this ordinary meaning. The Court has found in \textit{The Prosecutor v Nourain and Jamus}, 2010 that the armed forces of a state could qualify as a victim under Rule 85(b).\textsuperscript{138} It therefore seems the Court is willing to accept that a part of a State fits within the meaning of “organization” or “institution”.

How this would work in practice then becomes a matter of politics. Which institution would be chosen to represent the state? Who has the capacity to represent that organization? These questions would raise more procedural and political issues, as well as issues related to the need for direct harm that must be shown to have been inflicted upon such an organization.

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\textsuperscript{134} \textit{The Prosecutor v. Lubanga}, 7\textsuperscript{th} August 2012, §197
\textsuperscript{135} \textit{Ibid.}
\textsuperscript{136} Oxford English Dictionary, \url{http://www.oed.com/view/Entry/132452?redirectedFrom=organisation+#eid}
\textsuperscript{137} \textit{Ibid.}
\textsuperscript{138} \textit{The Prosecutor v. Nourain and Jamus}, 29\textsuperscript{th} October 2010
\end{flushright}
4.3.1.2 Context of organization and institution

This contextual analysis will look at the terms holistically with the Rome Statute and related texts. Throughout the RPE, “state” and “organization” are used differently, thereby suggesting they are distinct. For example, Rule 103(1) refers to both “state” and “organization” separately. Under Article 7 governing crimes against humanity, subparagraph (2)(a) dictates the criterion of a state or organizational policy. Whilst not directly linked to the crime of aggression, the interplay of state and organization shines some light on how the rules on victimhood may be interpreted by the Court. In the Situation in the Republic of Kenya, the Pre-Trial Chamber interpreted state so as not to include only the ‘the highest level of the State machinery’.\(^{139}\) This interpretation suggests the term “state” not only includes the state in its entirety as a subject of international law, but that it is also expanded to its constituent parts including ‘regional or local organs of the state’\(^{140}\). Furthermore, whilst “organizational” has been deemed to go beyond state-like organizations,\(^{141}\) the Trial Chamber in The Prosecutor v. Katanga recognised the need for some characteristically state-like features in order to meet the threshold for Article 7.\(^{142}\) Moreover, the determination that “organizational” also applies to non-state actors was with the purpose of avoiding impunity for these crimes. A determination of victimhood must also be considered with this purpose in mind.

Furthermore, the crime of apartheid in Article 7(2)(h) Rome Statute also refers to institutions, whereby the crime must be ‘committed in the context of an institutionalized regime of systematic oppression and domination’. Whilst the situation is not analogous to the crime of aggression, there has been much discussion as to the meaning of institution and whether it requires a governmental policy or not.\(^{143}\) The term “institutionalized regime” is largely taken to include states, yet the question for scholars in the case of apartheid is whether it also includes, for example the regimes of armed groups.\(^{144}\) State is taken as a certainty within the meaning of institutionalized regime; perhaps that certainty relies on the word “regime”. Given the debate around both institution and organization within the Rome Statute, this thesis asserts both an interpretation of institution or organization could, but does not necessarily have to, include a state. Ultimately, this will be a question for the Court to decide.

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\(^{139}\) Situation in the Republic of Kenya, 31\(^{st}\) March 2010, §89, citing ICTY, Prosecutor v Blaškić (Trial Judgment), 3\(^{rd}\) March 2000, §205

\(^{140}\) Situation in the Republic of Kenya, 31\(^{st}\) March 2010, §89

\(^{141}\) Situation in the Republic of Kenya, 31\(^{st}\) March 2010, §§90-2; The Prosecutor v. Muthaura et al., 23\(^{rd}\) January 2012, §112; The Prosecutor v. Ruto et al., 23\(^{rd}\) January 2012, §33

\(^{142}\) The Prosecutor v. Katanga, 7\(^{th}\) March 2014, §§1117-22

\(^{143}\) Lingaas, “The Crime against Humanity of Apartheid,”; Byron, War Crimes, 242; McCormack, “Crimes Against Humanity”, 179

One can also contextualize these terms given the historical context of the provisions. At the time the RPE were formulated, the definition of the crime of aggression had not been agreed upon. McDougall considers states are excluded from the definition of victim under Rule 85. However, the victim provisions in the RPE were given little attention in the drafting of Article 8bis. An assumption was made that existing provisions would apply equally to the crime of aggression. This seems to be a misguided assumption given the state-centric nature of the crime of aggression. However, any prospect of adapting or amending these provisions remains underexplored. Contextually, whilst it is not out of the realms of possibility that the term “state” fits within the meaning of organization and institution, its fit is an uneasy one.

4.3.1.3 Object and purpose of organization and institution

In order to ascertain the object and purpose of organization and institution, this thesis will look to the travaux préparatoires and the Preamble of the Rome Statute.

There is no indication in the travaux préparatoires that Rule 85 was intended to include states, but this absence of discussion does not mean the drafters wished to exclude them. Instead, it suggests a lack of awareness as to the repercussions upon the victims procedure created by the crime of aggression. During the drafting stage of the Rome Statute, the term “legal entities” was proposed to be included in Rule 85(b) by a delegation of Arab States, but since this term had no precise meaning in French or Spanish, it was discarded. Other delegates argued that a number of the war crimes would have legal persons as their victims, for example, intentionally directing attacks against historic monuments or buildings dedicated to art or charitable purposes. They felt that these crimes evidenced a need to include “foundations” or “institutions” in this definition. A compromise was reached with the terms “organizations” and “institutions”. In hindsight, in the English text, legal entities or perhaps ‘legal person’ would have been more favourable to a reading that included states, and perhaps a more appropriate word could have been found, which satisfied all parties such as legal persons. Although this term would also encompass companies, something that the drafters probably would not have chosen. By recognising the need for all possible victims of the crimes enumerated in the Rome Statute to be covered by Rule 85, we see a desire for a broad interpretation of victimhood to avoid impunity as stated in the Preamble. This thesis is in no doubt the crime of aggression should have been considered when constructing Rule 85. Legal entities, or a similar phrasing, would perhaps have

145 McDougall, The Crime of Aggression, 293.
147 Brodney, “Accounting for Victim Constituencies,”
148 Pobjie, “Victims,” 848
149 Fernandez de Gurmendi, “Definition of Victims and General Principle,” 433
150 Ibid.
been a better solution to victimhood, when one takes into account the crime of aggression. “Legal entities” may prove a useful first draft of a phrase that Rule 85 could be amended to include. The process of amendment will be considered more thoroughly in section 5 below.

If a victim can present itself as an organization or institution, then it must also demonstrate direct harm to its property in order to establish victimhood. These criteria will be examined in the following sub-sections.

4.3.2 Direct harm to any of their property
In contrast to Rule 85(a), Rule 85(b) requires victims to suffer direct harm to their property dedicated to ‘religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes’. This emphasis on the purpose of the property strongly suggests a link between Rule 85(b) to war crimes of prohibited attacks in civilian objects under Article 8 which specifically refer to acts against persons or property (see Article 8 (2)(b)(ix) and (e)(iv); (b)(iii), (e)(iii), (b)(xxiv) and (e)(ii)). Furthermore, in contrast to Rule 85(a), Rule 85(b) does not say that the harm can be in relation to any crime within the jurisdiction of the Court. This all combined suggests a strong link between Rule 85(b) and war crimes. However, the text does not exclude the possibility of Rule 85(b) applying to the other crimes and the Court has not interpreted it to do so. In The Prosecutor v. Lubanga, 2008, a principal of a school was recognised as a victim under Rule 85(b), of the crime under Article 8(2)(b)(xxvi) of enlisting and conscripting children. The Court therefore interpreted victims to include those who fall outside of the above war crimes, in a situation where the object of the war crime does not directly link to the purposes of the property harmed under Rule 85(b). The applicant in this case was able to participate as victim for the crime of child conscription/ enlistment as “a "legal" person… on behalf of the school’, as its principal. This thesis, therefore, purports Rule 85(b) is not limited to the war crimes under Article 8 (2)(b)(ix) and (e)(iv); (b)(iii), (e)(iii), (b)(xxiv) and (e)(ii), and that it has a larger remit. It, thus, moves on to discuss the criteria as outlined in Rule 85(b).

4.3.2.1 Direct harm
No definition has been given of “direct harm” within the context of Rule 85(b) of the RPE. The Court, in The Prosecutor v. Lubanga, 2008, has used Principle 8 of the Basic Principles to

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151 Pobjie, “Victims,” 848
152 The Prosecutor v. Lubanga, 15th December 2008, §§105, 110-1
153 Ibid.
understand harm in a broader sense.\textsuperscript{154} It defined harm as suffering ‘either individually or collectively, from harm in a variety of different ways such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights.’\textsuperscript{155} Given a victim under Rule 85(b) must have suffered direct harm as a result of the commission of the crime, it is infeasible that physical or mental injury, or emotional suffering could be applied to a victim state. There has been more scholarly discussion as to whether a state could sustain a substantial impairment of fundamental rights.\textsuperscript{156} However, this theory seems outmoded.\textsuperscript{157} Instead, the only understanding of harm outlined in Lubanga, which could have a direct impact upon a victim state, would be economic loss. A state could only have suffered these other harms indirectly, a scenario which does not fit within Rule 85(b).

4.3.2.2 Their property

The inclusion of “their property” into Rule 85(b), along with the specific purposes of said property, raises a number of hurdles for a state wishing to establish victim status. This property appears to be split into two categories. First, property dedicated to any of the following purposes: religion, education, art or science or charity. Second, historic monuments, hospitals and other places and objects for humanitarian purposes. In \textit{The Prosecutor v. Nourain and Jamus}, whilst the Court indicated that the armed forces of a state could qualify as a victim under Rule 85(b),\textsuperscript{158} it found that the suggested property harmed, did not fall within those enumerated in Rule 85(b). In this case, it was found that human lives would not qualify as they were not deemed to count as property. Medical and communications equipment, sundry clothing and stores for soldiers were also excluded, as the harm to them was not a result of the crime before the court. In this case, the crime was attacking a peacekeeping mission; thus, this charge did not match the purposes of the property laid out in Rule 85(b) that is dedicated to humanitarian purposes. The Court made a distinction between peacekeeping and humanitarian purposes, resulting in the exclusion of the Nigerian Army from victimhood in this case.\textsuperscript{159} Narrow readings, like the one above, will tend to exclude victims from appearing before the Court and will impact heavily upon any finding of states as victims.

Interestingly, a year later than \textit{The Prosecutor v. Nourain and Jamus}, the \textit{Situation in the Democratic Republic of the Congo, Decision on 13 applications for victims' participation}, refers not only to property, but also to harm done to objects in their outlining of the requirements of Rule

\textsuperscript{154} GA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims, 2006
\textsuperscript{155} \textit{The Prosecutor v. Lubanga}, 18\textsuperscript{th} January 2008, §92
\textsuperscript{156} ILC, Preparatory Study; Joyner and Roscini, “Is there any room,”; Aust, “Fundamental Rights of States,”
\textsuperscript{157} Carbone and Schiano, “States, Fundamental Rights and Duties”
\textsuperscript{158} \textit{The Prosecutor v. Nourain and Jamus}, 29\textsuperscript{th} October 2010
\textsuperscript{159} Ibid. §49
This decision, however, does not explain this shift. This thesis suggests that it could be as a result of the phrase ‘other places and objects’ at the end of Rule 85(b). This expansive phrasing suggests the Court could move away from such a narrow conception and interpret Rule 85(b) in a broader sense. Although it would still be limited by the need for humanitarian purposes.

Certainly, the determination of whether states can fit within Rule 85(b) is unclear. It seems including states within the definition of organization or institution would be a tenuous interpretation of Rule 85(b). Furthermore, the narrowing of the conception of harm to direct harm and the confinement of the property to that used for specific purposes creates a considerable hindrance to victim status for states. Pobjie contends ‘while rule 85 (b) could be liberally interpreted to include states as victims of the crime of aggression, the Court should decline to do so’. This thesis acknowledges that fitting a state within Rule 85(b) would be a stretch. Furthermore, it agrees that the Court should decline to do so, but it is strongly in favour of a new categorization of victimhood under the Rome Statute for the crime of aggression.

4.4 Concluding remarks
It is possible for individuals of the crime of aggression to be included within the victimhood framework laid out in Rule 85(a). Although a connection to the state remains integral for a causal link to the crime of aggression for a finding of victimhood. For reasons of expeditiousness and efficacy, individuals should be grouped collectively, particularly given the large number of victims a crime of aggression is likely to accrue. This thesis has also noted the arduous task of including states within Rule 85(b); and it contends the Court should not include states within an interpretation of Rule 85(b) as it currently stands. However, it maintains that states should fall within a conception of victimhood for the crime of aggression. This thesis asserts that victimhood at the ICC should be re-examined, and that the RPE should be broadened to meet the new demands that the crime of aggression will place upon them.

5 The future of victimhood at the ICC

Given the complications with the current RPE governing who constitutes a victim of the crime of aggression outlined above, victimhood is likely to be a contentious point that will be brought up in future prosecutions of the crime of aggression. With this in mind, one looks to the future of victimhood under the crime of aggression. It is likely the Court will recognise individuals as victims of the crime of aggression, but will struggle to fit states within any definition. Decisions as to the participation of victims of the crime of aggression will be decided by the Registry and

160 Situation in Democratic Republic of the Congo, 18th August 2011, § 10
161 Pobjie, “Victims,” 847
Pre-Trial Chamber. They will set out the extent to which the given case meets the threshold of harm and causation. For a construction of victimhood that includes the possibility of states to be represented, the present RPE would need to be broadened. This raises the question of who should decide on any amendment, or indeed the process of amendment. If this matter is left unresolved, the uncertainty which has surrounded the victim application is likely to ‘place the credibility of the entire Rome Statute system and the Court’s work at risk’.  

The Rome Statute system consists of the ASP, four organs of the ICC (Presidency, Judicial Divisions, Office of the OTP and Registry), and the Trust Fund for Victims. It also has a close relationship with the UN SC. The judicial division consists of pre-trial judges, trial judges and appeals judges. The Pre-Trial Division is the first to deal with victims. This section will narrow its focus to those decisions made on the participation of victims, not on reparations. Thus, it will not consider the Trust Fund for Victims, although it will undoubtedly play a role in the allocation of reparations to victims of the crime of aggression.

Thus far, further interpretation of the definition under Rule 85 has been a decision left to the Pre-Trial Chamber. Given the addition of the crime of aggression to the Court’s jurisdiction, there may be calls for a closer examination of how Rule 85 is being interpreted, who is interpreting it, and whether it needs to be amended. In *The Prosecutor v. Ongwen, 2015*, the Pre-Trial Chamber stipulates ‘the constant need to improve the victims’ participation system in order to ensure ‘its sustainability, effectiveness and efficiency’.*163 Thus, the ICC values the improvement and development of its victim system, and notes the need for amendments along with these developments. Article 51 sets out the procedure for amendments. It outlines that any State Party, the judges acting by an absolute majority, or the prosecutor may propose an amendment; and then the ASP approves them. An amendment of the RPE would be approved by the ASP.

The crime of aggression itself has had a politically controversial development.*164 This political influence and pressure would continue with a construction of victimhood. It is ultimately the Pre-Trial Chamber who will decide whether a victim can participate in proceedings or not. But, it will also pass through several other sections of the ICC; going first to the Registry with an application; next to the Pre-Trial Chamber for a decision on participation – this could also involve further analysis within the judicial appeal division; and finally arriving at the Trust Fund for consideration of reparations. This is not to mention the numerous political bodies connected

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164 Cherif Bassiouni, “The Status of Aggression,” 41
to the ICC and the crime of aggression. The plethora of bodies that could influence the eligibility make it necessary for clear guidance on victimhood for the crime of aggression to ensure consistency and avoid impunity. The following sections will look at the judicial and political bodies, which will hold influence over amendments concerning victims of the crime of aggression.

5.1 Pre-Trial Chamber
The ICC’s legal framework is rather sparse regarding victimhood, and it has largely been left to individual judges to interpret.165 Judges are being asked to interpret the legal obligations of the Court to the victims of these crimes while at the same time dealing with vast numbers of victims. Article 51(3) allows for the judges to draw up provisional rules for urgent cases, to then later be considered by the Assembly of State Parties. It is ‘the detailed guidance, and early involvement of the Chamber’, which aims to create efficient and expeditious proceedings throughout the judicial process.166 However, many judges seeking to streamline the process have generated various models of victim participation; these have not been consistent and have created confusion. This lack of consistency between large victim pools becomes important when one considers that the crime of aggression could result in a victim pool spanning the entire population of a country. Collectively grouping individuals and recognising them as indirect victims could be two ways of balancing the interests of victim states and individual victims.

Rule 89(2) states that it is the Chamber, which may reject a person’s status as victim of the crimes before the Court. It is ultimately the Pre-Trial Chamber which will decide the victim’s ability to participate in the Court’s proceedings. It is therefore necessary to have clear guidance on what constitutes a victim of the crime of aggression in order to avoid impunity. Furthermore, due to the political nature of the crime of aggression and indeed the politicisation of victims and aggressors, leaving this decision entirely with the Pre-Trial Chamber may result in an ineluctable politicisation of the Court.

5.2 Security Council
The interaction of the ICC and the SC has long been fraught with debates over politicisation. Verduzco elaborates that the ‘relationship between the Court and the SC is marked by tensions between law, politics, and judicial diplomacy.’167 The SC retains an intimate position in decisions made at the ICC. The Rome Statute Articles 13(b) and 16 give the SC the legal mandate to both refer situations to the OTP and to postpone investigations. If the SC was to go beyond

165 Contreras-Garduno and Fraser, “The identification of victims,” 187
166 The Prosecutor v. Ntaganda, 28th May 2013, §3
this mandate, through their analysis of acts of aggression in decisions of the Court, it would provoke controversy, as it is not provided for in the Rome Statute.

The UN Charter grants the SC primary responsibility for the maintenance of international peace and security through Chapter VII. With regard to aggression, the UN Charter ‘mandated the Security Council to determine the existence of acts of aggression even though the term remained undefined’ at the ICC. This role could stretch into the legal territory of the ICC were they to declare acts of aggression or imply which state is victim of a crime of aggression, notwithstanding the political question of statehood.

Throughout its history, the SC has dealt with aggression issues as ‘political rather than legal’. However, the extensive involvement of the SC will create more obstacles than it will remove. Exclusive decision-making power given to the SC on the decisions of who is victim would allow the Permanent Five (P5) to have exclusive determination of who constitutes a victim. This would allow a manipulation of the functioning of the Court by the P5. This is especially concerning given that currently three out of the five are not States Parties to the Rome Statute, namely Russia, China, and the US. In this capacity, the SC would be able to influence interpretations of the ICC, while being neither a judicial nor a legislative organ of the Court. The ICC will need to conduct its own legal analysis on this matter, separate to any decisions of the SC. Any inferences taken by the ICC from decisions of the SC, with regard to who is the victim of a crime of aggression, will undermine the independence of the Court. This could be avoided with clear guidance on the interpretation of Rule 85 with regard to the crime of aggression, by the judges of the Court or the ASP.

Another problem with the SC involvement in the crime of aggression seems to be its political inability to make a finding of aggression. The SC mandate under Chapter VII makes it more surprising that ‘not once since 1945 has the Security Council deemed any conflict anywhere in the world to constitute “aggression”’. Given this history, it seems politics plays a role in impunity with regard to aggression. Whether this absence in findings is due to inability or unwillingness, it suggests a degree of impunity, something the Rome Statute system seeks to

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169 Cherif Bassiouni, “The Status of Aggression,” 30
170 Ibid. 14
171 Glennon, “The Blank-Prose,” 102-108
172 Cherif Bassiouni, “The Status of Aggression,” 14
173 Ibid. 45 (footnotes omitted)
174 Ibid. 53
avoid. Cherif Bassiouni notes ‘[s]tates have played the games of realpolitik by using U.N. bodies and mechanisms to mandate different committees with different tasks to pursue different ends, creating the appearance of action while actually fostering the status quo.’\textsuperscript{175} This is not something this thesis advocates should be continued with the ICC and the crime of aggression. The notion of the ICC as a SC tool conflicts with the need for ‘judicial independence and with the necessary separation between the “judicial” and “political” sphere.’\textsuperscript{176} Keeping the ICC and SC separate ‘would avoid damaging the credibility of the international court by lowering the risk of a political organ preventing genuine cases from meeting it’.\textsuperscript{177} The SC should play no role in determinations of victims of the crime of aggression.

5.3 Assembly of States Parties

Article 112 of the Rome Statute establishes the ASP. It defines the ASP’s role functionally, but not conceptually. These functions do not include the recognition of victims, however the nature of the ASP suggests it may be best placed to do so, specifically with regard to whether states may be considered victims or not. Since 2012, new initiatives have already been emerging to amend the Statute and RPE at the ASP.\textsuperscript{178} The following will consider several reasons why the ASP should make the decision on any amendment to victimhood at the ICC.

First, the ICC is an intergovernmental organisation and therefore it’s authority ultimately lies with its States Parties. The Court derives its jurisdiction from the jurisdiction of these states. Decisions, which are decided by the States Parties, are integral to its perceived legitimacy and credibility.\textsuperscript{179} This primacy of States Parties in the legislative process at the ICC is noted in Article 51. The ASP has the power under Art 51(2) to approve any changes to the RPE by a two-thirds majority. Under Article 51(3), where in urgent cases the judges of the ICC may draw up provisional rules, the ASP must also approve the procedure at their next session. Therefore, any amendment, whomever it may be proposed by, must gain the consent of two-thirds of the States Parties. It will be the ASP that ultimately decides if an amendment should pass and it would decide any extension of the concept of victimhood.

Second, the establishment of the ASP was a decision of the drafters to found the ICC outside of the UN.\textsuperscript{180} In this sense, the main purpose was to avoid the pitfalls noted in section 5.1.2

\textsuperscript{175} Ibid. 35, emphasis in original
\textsuperscript{176} Ruiz Verduzco, “The Relationship between the ICC and the Security Council”, 33
\textsuperscript{177} Ibid.
\textsuperscript{178} O’Donohue, “The ICC and the ASP,” 117
\textsuperscript{179} Murphy, “Aggression”
\textsuperscript{180} See Marchesi, “Relationship of the Court with the United Nations”, 63, 64-6; Bos, “Assembly of States Parties,” 297-302
above. The ASP removes the concerns that states other than States Parties to the Rome Statute would become involved in decisions related to the prosecution of the crime of aggression at the ICC. However, it is not only the SC where political considerations can come into play. Politics also has a huge impact on the functioning of the ASP. There have been, for example, some initiatives by African states to try to undermine the prosecution against the President of Sudan.\footnote{AU, Decision on the Meeting of African States Parties to the Rome Statute of the ICC, 2009, §10; AU, Decision on the Application by the ICC Prosecutor for the Indictment of the President of the Republic of the Sudan, 2009, §3} The ASP is not immune from politics, but it does represent the interests of States Parties to the Rome Statue as opposed to UN states, some of whom are not States Parties. Furthermore, Akande contends that decisions concerning extensions of the Rome Statute, such as an extension of the RPE on victimhood to include states, should be left to the ASP.\footnote{Akande, EJIL:Talk! “ICC Assembly of States Parties,”} This thesis is inclined to agree that they should not, as has been contended by the former Prosecutor of the ICC (Ocampo), be outsourced at first instance to the UN GA or SC.\footnote{OTP, Statement, Situation in Palestine, §5} It is for the states already party to the Statute to ultimately decide on matters of victimhood.

Third, the ASP has the resources of the ICC to refer to during an amendment process. Throughout the process, the ASP is informed by an Advisory Committee on Legal Texts, formed by three judges, a representative of the OTP, a representative of the registry and another from the list of counsel.\footnote{ASP, Rules of Procedure of the Advisory Committee on Legal Texts, 2009} This gives them a certain degree of practical expertise when it comes to the proposed amendments. Any amendment to the victim provisions would undergo this same procedure and have similar scrutiny paid to it. If the ASP does not consider itself competent to handle these deliberations, then it may also set up a working group to investigate a certain issue. This would be done via the Bureau of the ASP. It may also assign this task to one of the existing working groups, for example to the Working Group on Victims and affected communities, Reparation and Trust Fund for Victims or the Working Group on amendments.\footnote{ASP, Mandate of the Working Group on Victims, 2017, 19; ASP, Review Conference Amendments, 2009}

This thesis presents the following recommendations to ensure certainty of the victim provisions concerning victimhood for the crime of aggression as follows. First, an amendment should be made to cater for an extension of Rule 85 to allow states to also be considered victims. This amendment should be approved by the ASP in accordance with Article 51 of the Rome Statute. Second, the interpretation of the Rule should then be left to the Pre-Trial Chamber to interpret in relation to particular cases. The Pre-Trial Chamber’s work will be significantly easier with the introduction of an amendment, which outlines victimhood for the crime of aggression. Even if this were merely stating that the current provisions apply, although contrary to the opinion
expressed in this thesis, it would at least provide certainty as to the procedure to follow. Finally, SC involvement in this process should be limited to avoid political considerations interfering with legal interpretation of the rule.

6 Conclusion

Whilst the future of victimhood in relation to the crime of aggression remains uncertain, this thesis has unpicked how the ICC ought to broaden victimhood at the ICC to include individual and state victims. It did so by outlining the centrality of the state in the crime of aggression, showing both the need for states to be recognised, while also raising issues with the recognition of individuals as victims of the crime of aggression. As Rule 85 currently stands, an interpretation of individual victims of the crime of aggression is justifiable; however, the status of state victims is extremely precarious. Including states within an interpretation of Rule 85(b) would be dubious, and this thesis does not claim the Court should do so. Individual victims of the crime of aggression is a more comfortable fit with the current RPE. However, the connection to harm inflicted upon the state seems unavoidable.

This thesis has noted that the Court will need to answer, both politically and conceptually, difficult questions in its examination of victimhood of the crime of aggression. The Court will also need to consider mass-victimisation in its rulings, and weigh the recognition of victims against the right of the accused to expeditious proceedings. All of this will have an effect on determinations of victimhood for the crime of aggression. The ICC should seek to avoid the politicisation of victimhood of the crime of aggression, for which the development of a clear understanding of victim status will be beneficial.

The Court must be conscious not to push any interpretation of Rule 85 too far and permit a deluge of victims to flood the ICC. However, ultimately, the ICC is a victim-orientated court and heed should be paid to this in a construction of victimhood. This thesis has underscored the need for states, as well as individuals, to be part of victimhood at the ICC. It has suggested that a balance between the state-centric nature of the crime of aggression and the victims of the crime could be found with the collective grouping of individuals. However, this thesis has found the current RPE to be inadequate for the future of the crime of aggression, and suggests that the ICC should broaden the Rules governing victimhood. At the very least, the RPE should be re-examined in the light of the crime of aggression to provide for a clear process of identifying victims of the crime at the ICC.

Taking into account the lack of appropriate framework under the current RPE for victims of the crime of aggression and the normative reasons for the inclusion of both individual and state victims, a new victim category should be added to the RPE to account for states. We are unlikely
to see the Court address victimhood of the crime of aggression, before a case is brought. Neverthe-
theless, this thesis speculates that a new victim category is needed in order to recognise both
individuals and states as victims of the crime of aggression. We must move past the current
victimhood framework at the ICC and mark it as inadequate for the crime of aggression. A
broadening of the RPE is essential for the continued commitment of the ICC to victims’ justice
in future prosecutions of the crime of aggression.
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