

THE RIGHT TO LIFE AND THE *JUS AD BELLUM*: BELLIGERENT EQUALITY AND THE DUTY TO PROSECUTE ACTS OF AGGRESSION

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ABSTRACT

General Comment 36 of the Human Rights Committee, adopted in 2018, asserts that ‘States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate *ipso facto* article 6 of the Covenant.’ One question about this claim is whether it reduces incentives for compliance with international humanitarian law for states and their agents – incentives provided through the principles of belligerent equality and combatant immunity. We argue that it does not do so – such a worry about incentives is not a reason to reject the claim in General Comment 36. In the process, we also show that, if accepted, this claim is interesting in another way: it entails, in effect, a duty on states to prosecute acts of aggression insofar as they entail killing, as they often will. This itself is doctrinally innovative. As to who is to be prosecuted, it is the political and military leadership of the state. It is their decision to wage war unlawfully that renders the killings arbitrary.

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I. INTRODUCTION

General Comment 36 (GC 36) of the Human Rights Committee, adopted in 2018, sets out a comprehensive interpretation of Article 6 – the Right to Life – of the International Covenant on Civil and Political Rights on the Right to Life (ICCPR).¹ Of the many issues addressed in GC 36, one distinctive claim has attracted a great deal of attention.² This is the claim in the first sentence of paragraph 70:

States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate *ipso facto* article 6 of the Covenant.

Paragraph 70 connects two regimes of international law – the *jus ad bellum* and international human rights law – that have not often been considered together. Prior to the adoption of GC 36, it had generally been recognized that there was a close relationship between the application of human rights law in armed conflict and the *jus in bello* (international humanitarian law - IHL). Indeed, it had been accepted that, in certain cases, whether or not a violation of human rights law had occurred in situations of armed conflict was to be determined by reference to whether the act in question constituted a violation of IHL. With regard to the right to life in particular, and even more specifically, with regard to Article 6 of the ICCPR, the International Court of Justice (ICJ) had noted the relationship between human rights law and IHL, without making any mention of the relevance of the *jus ad bellum* to the application of the right. The ICJ held that:

¹ United Nations Human Rights Committee (HRC), General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life (GC 36), UN Doc. CCPR/C/GC/36, 30 October 2018.

² See e.g. S Darcy, ‘Accident and Design: Recognising Victims of Aggression in International Law’ (2021) 70 ICLQ 103; E Lieblich, ‘The Humanization of the *Jus ad Bellum*: Prospects and Perils’ (2021) 32 EJIL 579. For an early articulation of the claim, see BG Ramcharan, ‘The Concept and Dimensions of the Right to Life’ in BG Ramcharan (ed.), *The Right to Life in International Law* (1985) 1, 11-13.

In principle, the right not arbitrarily to be deprived of one's life . . . falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.³

In doctrinal terms, the key implication of para. 70 of General Comment 36 is to suggest that violations of the right to life in situations of armed conflict do not depend only (or in some cases at all) on the application of IHL. In particular, the principle set out in that paragraph renders as a violation of the right to life killings by an aggressor state that *comply* with IHL. Thus, killings by the aggressor state of combatants and of civilians who are incidental casualties of attacks (and who are killed without any breach of the principle of proportionality under IHL)⁴ would, on this view, nevertheless amount to violations of the right to life under human rights law.

This implication immediately provokes reflection on the cardinal independence of the *jus ad bellum* from the *jus in bello*. It is generally accepted that in international armed conflicts, the position of the parties under IHL, and the application of the rules relating to how force is to be used in conflict, is independent of the position of the parties under the *jus ad bellum* and thus of the legality of the resort to force.⁵ Despite its complex history,⁶ and criticism of its moral basis in line with revisionist just war theory,⁷ the independence principle and its corollary of belligerent equality remain orthodox in international law.⁸ Justified primarily by pragmatic considerations – what Roberts calls the ‘strongest practical basis that exists, or is likely to exist, for maintaining certain elements of moderation in war’⁹ – this orthodoxy entails equal application of the rules of *jus in bello* to each party. This includes the grant of immunity from prosecution to combatants on both sides for lawful acts of war. This is to say that, in international armed conflicts, as long as soldiers of the aggressor state comply with the *jus in bello* they are entitled to immunity from prosecution for certain killings in war.

One important question is thus whether the claim in paragraph 70 of GC 36 has implications for the independence principle and the entitlement of soldiers from the aggressor state to immunity for *jus in bello* compliant killings. In seeking to answer this question, this article considers, in brief, the interaction, *inter se*, between four bodies of international law which govern the use of force by states, namely the *jus ad bellum*, IHL, international human rights law (IHRL) and international criminal law, and their relationship with domestic law prosecutions for killings

³ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1. C.J. Reports 1996, p. 226, para 25.

⁴ Liebllich (n 2) 579.

⁵ See A Roberts, ‘The Equal Application of the Laws of War: A Principle under Pressure’ (2008) 90 IRRC 931; JHH Weiler and A Deshman, ‘Far Be It from Thee to Slay the Righteous with the Wicked: An Historical and Historiographical Sketch of the Bellicose Debate Concerning the Distinction between Jus Ad Bellum and Jus in Bello’ (2013) 24 EJIL 25; KL Yip, ‘Separation between *Jus ad Bellum* and *Jus in Bello* as Insulation of Results, not Scopes, of Application’ (2020) 58 MLLWR 31.

⁶ Weiler and Deshman (n 5).

⁷ D Rodin, *War and Self-Defence* (2002); D Rodin & H Shue, ‘Introduction’ in Rodin & Shue eds., *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (2008); J McMahan, *Killing in War* (2009).

⁸ V Koutroulis, ‘And Yet it Exists: In Defence of the Equality of Belligerents Principle’ (2013) 26 LJIL 449. For an older account, see C Greenwood, ‘The Relationship between *Jus ad Bellum* and *Jus in Bello*’ (1983) 9 *Review of International Studies* 221.

⁹ Roberts (n 5) 931. See further McMahan (n 7) 105-110; Liebllich (n 2) 580-581.

in armed conflict. Its purpose is not to evaluate in any overarching manner the proposition in paragraph 70, nor to examine whether it is an accurate reflection of the law. Rather, assuming that the principle set out there is accepted as a matter of law, this article considers certain downstream consequences of paragraph 70. In particular, the article considers whether the proposition in paragraph 70 is likely to have any negative effects on the existing incentives of states, and their agents, in relation to compliance with their obligations under IHL. If there is such a risk, there is reason to be cautious about the HRC's proposition.

The article is divided into four parts. Section 2 introduces GC 36 and sets paragraph 70 in the context of how the General Comment deals with the application of the right to life in armed conflict. Section 3 then discusses the independence principle and the incentives it provides for compliance with the rules of IHL. It argues that as far as the *state* is concerned, there is no reason to think that the proposition in paragraph 70 of GC 36 entails risks to those incentives. Moreover, it suggests that the more important level of analysis concerns the incentives that international law is providing to individual combatants, rather than to the state. Section 4 then argues that whether GC 36 entails risks on that level – that is, in relation to individual combatants – is a trickier question than at first glance. It is trickier than at first glance because it is not as straightforward as simply saying that because IHRL binds the *state* (and not the individual) the position of the individual combatant is unaffected. Such a suggestion overlooks that it is well-established that states are obliged under IHRL to investigate and prosecute certain violations of human rights, including the right to life. The question, then, is what the prosecutorial duty means in the context of killings in the course of an act of aggression. We argue that, in the context of killings which violate the right to life because they arise out of acts of aggression, the duty to prosecute does not entail a duty to prosecute the soldiers whose conduct caused the deaths. Rather that duty is to prosecute those individuals responsible for rendering the killings *arbitrary*. What renders the killings arbitrary is the decision to go to war itself – the decision of the state's political and military leadership. Thus, as a matter of incentives, the position of individual combatants is unaffected. Section 5 concludes by noting that paragraph 70 nonetheless entails an innovative doctrinal claim in international law – that aggressor states are under a duty to prosecute acts of aggression insofar as they result in deaths.

II. THE HUMAN RIGHTS COMMITTEE AND GENERAL COMMENT 36

As noted above, GC 36 sets out a comprehensive interpretation of Article 6 ICCPR. Article 6(1), the relevant sub-paragraph, provides:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.¹⁰

Prior to considering the relevance of the *jus ad bellum*, GC 36 addresses both the extraterritorial application of the right to life, an issue of particular relevance to acts of aggression, and the interaction of international human rights law with international humanitarian law. In short, this consideration entails four, broadly orthodox, propositions. First, the right to life applies extraterritorially.¹¹ Second, the right to life continues to apply in situations of armed conflict.¹² Third, uses of lethal force in armed conflict consistent with the rules of IHL is, in general,¹³ not

¹⁰ Art 6 ICCPR (1966) 999 UNTS 171.

¹¹ GC 36 (n 1) para 63.

¹² GC 36 (n 1) para 64.

¹³ On the addition of the qualifier, 'in general', see Lieblich (n 2) 588.

‘arbitrary’ under Article 6(1) ICCPR.¹⁴ And fourth, uses of lethal force that violate the rules of IHL will also violate Article 6(1) ICCPR.¹⁵

Applying these rules, it is clear that (most) IHL-compliant killings by each side of the conflict will not be considered to violate the right to life. It is here, then, that paragraph 70 makes its doctrinal contribution. On the basis of paragraph 70, those IHL-compliant killings by the aggressor state ‘violate *ipso facto* Article 6 of the Covenant.’

As a matter of positive law, the status of the proposition in paragraph 70 remains unclear. On one hand, scholars have noted that certain states objected to its inclusion during the drafting process.¹⁶ Canada, for instance, insisted on the removal of the paragraph, as did France, whereas the United States asserted that the paragraph ‘is incorrect and outside the competence and authority of the Committee, and should, therefore, be removed.’¹⁷ None of these comments speak directly to the prosecutorial duty – they were objections to the draft paragraph in its entirety. On the other hand, as the International Court of Justice put it in *Diallo*, as an interpretation of the Covenant by an independent body established specifically to supervise its application, the views of the Human Rights Committee ought to be given ‘great weight’.¹⁸ On reflection, it is probably too soon to say anything with confidence about its legal status. It remains to be seen whether the various institutions of international law, including states and courts and other actors, accept and apply it in practice.¹⁹

III. THE INDEPENDENCE PRINCIPLE, EQUAL APPLICATION, AND INCENTIVES FOR COMPLIANCE WITH IHL

To make sense of the question whether the proposition set out in paragraph 70 has any negative effects on the existing incentives of states and their agents in relation to compliance with their obligations under IHL, it is necessary to briefly consider common justifications for the independence principle and equal application of IHL. One possibility is a principled justification that flows from the putative moral equality of combatants.²⁰ This is not a promising line of reasoning – as McMahan puts it, ‘it’s hard to see how it could be correct as a matter of basic morality.’²¹ Morally, the ends for which a state acts matters.²² A more plausible justification is pragmatic.²³ In the light of existing institutional arrangements in the international legal order,²⁴

¹⁴ GC 36 (n 1) para 64.

¹⁵ *ibid*

¹⁶ Darcy (n 2) 123; Lieblich (n 2) 590-591.

¹⁷ Comments by States on the Human Rights Committee’s Draft General Comment 36, Canada, para 22; France, para 42; United States of America, para 20. See also Comments by Germany, para 24 and the United Kingdom, para 34.

¹⁸ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639 para 66.

¹⁹ See generally J Crawford, *Chance, Order, Change: The Course of International Law* (2013) 365. For a recent discussion, ECtHR, *Georgia v Russia (II)*, App. No. 38263/08, Judgment of 21 January 2021, (Concurring Opinion of Judge Keller) para 28; 30.

²⁰ See M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (5th ed. 2015) 33-48.

²¹ J McMahan, ‘On the Moral Equality of Combatants’ (2006) 14 *The Journal of Political Philosophy* 377, 379.

²² *ibid*. See further S Lazar, ‘Just War Theory: Revisionists versus Traditionalists’ (2017) 20 *Annual Review of Political Science* 37; A Haque, *Law and Morality at War* (2017) 19-55.

²³ Lieblich (n 2) 19-20; Greenwood (n 8) 226.

²⁴ H Lauterpacht, ‘The Limit of the Operation of the Law of War’ (1953) 30 *BYIL* 206, 212.

unequal application is said to risk creating a ‘race to the bottom’²⁵ in relation to compliance. A grant of wider powers to the victim state runs into the problem that both states will, inevitably, see themselves as the victim since no state uses force and declares itself to be the aggressor.²⁶ A denial of equal application of IHL to the aggressor leads to the question of what benefits accrue to the state in exchange for accepting IHL’s constraints.²⁷ Although the underlying empirics are complex,²⁸ it is fair to treat these as plausible risks.

The first question is whether the proposition in paragraph 70 of GC 36 threatens to alter this existing balance of incentives for the *state*. By rendering certain IHL-compliant killings a violation of the right to life under IHRL, is the state’s incentive to comply with IHL itself removed? If every killing in the course of hostilities pursuant to an act of aggression *ipso facto* violates IHRL, we might ask what incentive is left for the state to comply with IHL when it is conducting its military operations? It has been suggested that since the proposition in paragraph 70 of GC 36 is not likely, itself, to convince states not to engage in unlawful uses of force, the principle set out there will only mean that states that do engage in acts of aggression now have less incentive to respect IHL.²⁹

On reflection, it is doubtful that the proposition in paragraph 70 creates such a risk. As a starting point, in at least some cases the state will not recognize itself as the aggressor. In these cases, a putative change to the relevant incentives as they operate in practice does not arise.

More widely, there are two important points here. First, the idea that the proposition in paragraph 70 might change the state’s incentives for IHL-compliance overlooks the fact that international law *already* addresses the aggressor’s IHL-compliant killings. It does so through the *jus ad bellum* itself. Although the practice is not entirely consistent,³⁰ the better view is that the scope of compensable damage for a breach of the *jus ad bellum* includes damage caused in the course of aggression by actions that did not breach IHL.³¹ This was the position taken by the Ethiopia-Eritrea Claims Commission (EECC) in relation to civilian deaths and injuries attributable to Eritrea’s *jus ad bellum* violation. In its Final Award, the EECC awarded compensation to Ethiopia for damage of this kind where Eritrea’s conduct did not breach IHL.³² The Commission also

²⁵ Y Shany, ‘A Rebuttal to Marco Sassoli’ (2011) 93 IRRC 432, 433.

²⁶ McMahan (n 7) 108-109.

²⁷ Lauterpacht (n 24) 212. Reasoning of this kind is at the heart of the ongoing debate about how to incentivize compliance on the part of non-state armed groups.

²⁸ See Weiler and Deshaun (n 5) 56.

²⁹ P Kilibarda, ‘Turkey, Aggression, and the Right to Life under the ECHR: A Reaction to Professor Haque’s Post’ (EJIL:Talk!, 22 October 2019) <<https://www.ejiltalk.org/turkey-aggression-and-the-right-to-life-under-the-echr-a-reaction-to-professor-haques-post/>>. See also V Gowlland-Debbas, ‘Some Remarks on Compensation for War Damage under *Jus ad Bellum*’ in A de Guttry et al, *The 1998–2000 Eritrea-Ethiopia War and Its Aftermath in International Legal Perspective* (2021) 533.

³⁰ See in relation to different decisions of the United Nations Compensation Commission: V Heiskanen and N Leroux, ‘Applicable Law: *Jus ad Bellum*, *Jus in Bello*, and the Legacy of the UN Compensation Commission’ in T Feighery et al, *War Reparations and the UN Compensation Commission* (2015) 51; T Dannenbaum, ‘The Criminalization of Aggression and Soldiers’ Rights’ (2018) 29 EJIL 859, 879.

³¹ See further Yip (n 5).

³² Eritrea-Ethiopia Claims Commission - Final Award - Ethiopia’s Damages Claims, Volume XXVI 631-770, 17 August 2009, paras 333-349. The EECC did find that deaths of militiamen were outwith its jurisdiction on the basis of the underlying Agreement establishing the Commission – see para 338. For wider discussion, see Koppe, ‘Compensation for War Damage Resulting from Breaches of *Jus ad Bellum*’ in de Guttry et al, (n 29) 509; Gowlland-Debbas (n 29) 533.

awarded compensation for damage to civilian property attributed to Eritrea's *jus ad bellum* violation where the conduct did not breach IHL.³³ If this is right, what the proposition in paragraph 70 does is reiterate formally in IHRL a position captured in the law relating to responsibility for violations of the *jus ad bellum*.³⁴

Second, and more importantly, the incentives that exist for compliance with IHL persist even if IHL-compliant killings by an aggressor state *ipso facto* constitute a violation of the right to life. For the state, these may include, as Murphy, Kidane and Snider explain, the maintenance of troop discipline and the support of other states, the promotion of reciprocal treatment by the opposing state, and minimization of bad publicity.³⁵ These are unaffected by the proposition in paragraph 70 of GC 36. Likewise, paragraph 70 leaves unaffected reasons for compliance that do not turn on incentives for the state. Other reasons for compliance may include acceptance by the relevant actors and institutions of IHL's authority and/or internalization of the relevant rules into domestic law or standard operating practice. In short, so far as the state is concerned, the proposition in GC 36 doesn't seem to create any risks to compliance.

The more important question, however, is whether GC 36 affects the incentives for IHL compliance operating on the *individual* level. As Greenwood explains, 'questions of [state] liability to pay compensation have played far less of a part in the enforcement of the laws of war than have prosecutions of individuals responsible for war crimes.'³⁶ Indeed, it is on this level – in relation to the incentives provided to individual combatants – where it makes more sense to think about the incentives provided by IHL's pragmatic exclusion of *jus ad bellum* considerations from the application of its rules.³⁷ Key, here, is the promise of immunity from criminal prosecution to individual combatants insofar as they comply with IHL.³⁸ Any change to this position should be approached with real caution since ultimately (or initially) its human beings of flesh and blood that who commit the acts that amount to violations of IHL.³⁹

At first glance, at least, the proposition in paragraph 70 of General Comment 36 makes no such change. It is states (and not individuals) that have obligations under the relevant human rights treaties. On its face, the proposition in paragraph 70 is simply that the relevant killings entail a violation of Article 6 ICCPR *by the state*. It is not a claim that the individual combatant is thereby violating IHRL, or a claim that the individual combatant is thereby violating IHL, or perhaps that that such killings in the course of an aggressive war no longer give rise to combatant immunity. So far as incentives for compliance with IHL operate on the individual level, it seems that there is little to be worried about.⁴⁰

IV. DUTIES TO INVESTIGATE AND PROSECUTE VIOLATIONS OF THE RIGHT TO LIFE

³³ *ibid* paras 350-379.

³⁴ This is not to say that there are not *institutional* implications of the claim – that is, which institutions are able to determine the existence of a breach of the *jus ad bellum*.

³⁵ S Murphy et al, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (2013) 136.

³⁶ Greenwood (n 8) 227.

³⁷ Dannenbaum (n 30) 869; Yip (n 5) 57-58.

³⁸ See similarly Yip (n 5) 58.

³⁹ C Kress, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus' (2009) 20 EJIL 1129, 1134. See also Dannenbaum (n 30) 869.

⁴⁰ Lieblich (n 2) 598.

A. Introduction

The conclusion set out at the end of the previous section might be a little quick and simplistic. Although true, to say that Article 6 ICCPR binds the state and no more is to overlook how the state's duties to respect and to ensure the right to life in fact impact on the position of individuals. More specifically, it is to overlook the firmly established duties on the state to investigate and prosecute violations of the right to life. In institutional terms, this is what Huneeus calls the 'quasi-criminal jurisdiction' of human rights courts and treaty bodies.⁴¹

B. The Duty to Investigate and Prosecute in the Practice of the Human Rights Committee

There is no doubt that international human rights law requires the investigation and, in certain circumstances, prosecution of violations of the right to life.⁴² To put the claim so bluntly is not to deny the existence of difficult questions around the scope of the duties, their status and/or derogability, and their relationship with other rules of international law.⁴³ But, in the core case of arbitrary killings by state agents, it is well established.

A good place to start with respect to the scope and content of the duty to prosecute violations of the right to life is General Comment 36 itself. In paragraph 26, GC 36 provides:

An important element of the protection afforded to the right to life by the Covenant is the obligation on the States parties, where they know or should have known of potentially unlawful deprivations of life, to investigate and, where appropriate, prosecute such incidents including allegations of excessive use of force with lethal consequences.⁴⁴

Thereafter, the relevant paragraphs specify the content of these duties – finding them 'reinforced by the general duty to ensure the rights recognized in the Covenant' and the 'duty to provide an effective remedy' for rights violations.⁴⁵

This is a long-standing feature of the practice of the UN Human Rights Committee.⁴⁶ In General Comment 31, the Committee referred to states' duties to investigate and bring to justice perpetrators of certain rights violations, including arbitrary killing under Article 6 ICCPR.⁴⁷ The same view has been expressed in numerous Individual Communications. For instance, in *Bautista de Arellana v. Colombia*, it held that 'purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the

⁴¹ A Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 AJIL 1.

⁴² For an overview, see A Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (2009).

⁴³ See generally J Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?' (2010) 21 EJIL 701; M Jackson, 'Amnesties in Strasbourg' (2018) 38 OJLS 451.

⁴⁴ GC 36 (n 1) para 26.

⁴⁵ GC 36 (n 1) para 27.

⁴⁶ See generally Seibert-Fohr (n 42) 11-49; Huneeus (n 41) 26.

⁴⁷ HRC, General Comment No. 31 (2004), 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para 18.

event of an alleged violation of the right to life.⁴⁸ Similar statements can be found in *El Alwani v. Libya*,⁴⁹ *Sathasivam and Saraswathi v. Sri Lanka*,⁵⁰ *Marcellana and Gumanoy v. the Philippines*,⁵¹ *Amirov v. Russian Federation*,⁵² and *Pestaño v. The Philippines*.⁵³

This all to say that states are required to investigate and, in certain circumstances, prosecute arbitrary killings. In relation to killing during armed conflict, there is no doubt that this duty applies to war crimes – that is, to killings during armed conflict that amount to serious violations of IHL. Such killings, uncontroversially, would also amount to arbitrary killings under Article 6 ICCPR.⁵⁴ But what about killings during armed conflict *consistent* with IHL? Returning to paragraph 70 of GC 36, this is where the potential problem emerges. To reiterate, paragraph 70 provides that ‘States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant.’ For the aggressor, then, these are arbitrary killings – killings which the state is required by IHRL to investigate and prosecute. For this reason, it might seem that GC 36 is, in fact, changing the position of individual combatants – indirectly, through the obligation to investigate and prosecute. If this is correct, then the claim in paragraph 70 may well change the incentives of soldiers of the aggressor state to comply with IHL. Recall that the bargain which underlies the international law principle of combatant immunity is that if such soldiers comply with IHL then they will not face prosecution. However, if the effect of paragraph 70 is that those combatants fighting on the side of the aggressor will be subject to prosecution – even if not for *international* crimes - whether or not they comply with IHL, that may be a reason to reject the claim in paragraph 70. Such a reordering of the bargain might have the effect of decreasing the reason for individuals to comply with IHL, and thus lead to more widespread violations of that body of law.

C. *Specification of the Duty to Prosecute Arbitrary Killings in Cases of Aggression*

In this section, we suggest that properly understood, the proposition in paragraph 70 of GC 36 does not change the position of individual combatants in a way that risks existing incentives for compliance with IHL. That proposition does not do so because, properly understood, IHRL does not require the prosecution of individual soldiers who, in the course of an act of aggression, kill in an IHL-compliant manner, even though those killings *are* to be regarded as arbitrary killings if the logic of paragraph 70 is adopted. What IHRL requires is not that states prosecute those who kill, but rather those responsible for the violation of the right to life. This can be seen in GC 36 itself and more generally in the decisions and practice of the Human Rights Committee. In GC 36, the Committee stated that: “[i]nvestigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, ... and must be aimed at ensuring that *those responsible* are brought to justice”.⁵⁵ Similarly, in GC 31, it was stated that “[w]here the investigations ... reveal violations of certain Covenant rights, States Parties must

⁴⁸ *Bautista de Arellana v Colombia* CCPR/C/55/D/563/1993 [8.2]. See *Coronel v Colombia* CCPR/C/76/D/778/1997 para 6.2.

⁴⁹ *El Alwani v. Libya*, CCPR/C/90/D/1295/2004) para 8.

⁵⁰ *Sathasivam and Saraswathi v. Sri Lanka* CCPR/C/93/D/1436/2005 para 6.4.

⁵¹ *Marcellana and Gumanoy v. the Philippines* CCPR/C/94/D/1560/2007 para 7.2.

⁵² *Amirov v. Russian Federation* CCPR/C/95/D/1447/2006 para 11.4 and para 13.

⁵³ *Pestaño v. The Philippines* CCPR/C/98/D/1619/2007 para 7.2 and para 9.

⁵⁴ GC 36 (n 1) para 64.

⁵⁵ GC 36 (n 1) para 27 (emphasis added).

ensure that *those responsible* are brought to justice.”⁵⁶ To speak of those responsible is to speak of those responsible for the violation of the right to life. In particular, it is to speak of those whose acts render the killings *arbitrary*.⁵⁷

To reiterate, in relation to paragraph 70, the key issue is that the relevant killings, which are otherwise not-arbitrary, will only be arbitrary and amount to a violation of the right to life where they result from an act of aggression. The key question, then, for specifying the content of the prosecutorial duty, as it exists under human rights law, is to ask who is responsible for the act of aggression. Since the act of aggression results from the violation of the prohibition on force in international law, it is only those who bear responsibility for that violation (or at least who are capable of influencing whether the act of aggression occurs) who can correspondingly be said to be responsible for the violation of the right to life. Thus, properly construed, the targets of the duty to prosecute under human rights law are those who are responsible for rendering the killings arbitrary – and this group will be limited to those who are capable of making or shaping decisions of the State regarding the violation of the prohibition of the use of force.⁵⁸

A similar conclusion as to which individuals are to be regarded as responsible would be reached if reliance were placed on international criminal law. Under that body of law, aggression, unlike the other core crimes under international law, is a leadership crime.⁵⁹ There is some debate as to what the relevant criteria are for determining who falls in the relevant leadership category. While the immediate post-WWII tribunals suggests that criminal responsibility for aggression is limited to those who have the “actual power to *shape or influence* the policy of their nation, prepare for, or lead their country into or in an aggressive war,”⁶⁰ the Kampala Amendment to the Rome Statute of the International Criminal Court restricts responsibility to those persons “in a position effectively to exercise effective control over or to direct the political or military action of a state”.⁶¹ Whichever position is to be regarded as reflecting the correct standard as a matter of international law,⁶² it is clear that responsibility for aggression, both under customary international law and treaty law, does not fall on individual combatants but is restricted to leaders. Using the definition of aggression in international criminal law to determine the scope of the prosecutorial duty under IHRL, the conclusion to be reached is that the target of prosecution should be leaders with the effect that IHL’s existing bargain with ordinary individual combatants is unaffected.

V. CONCLUSION

The independence principle and related issue of incentives for compliance with IHL do not give rise to good reasons to reject the proposition in paragraph 70 of GC 36. Nonetheless, the preceding analysis does point to an under-appreciated implication of that proposition. This

⁵⁶ GC 31 (n 47) para 18 (emphasis added).

⁵⁷ On the moral position of individual soldiers killing in an aggressive war, see Dannenbaum, (n 30), 868-872.

⁵⁸ In relation to a related, though distinct, issue see *McCann v UK*, where the ECtHR distinguished the ‘actions of the soldiers’ – no violation of Article 2(2): para 201 – and the ‘control and organisation of the operation’ – violation of Art. 2(2): para 214 – see ECtHR, *McCann v United Kingdom*, App. No. 18984/91, Judgment of 27 September 1995.

⁵⁹ See generally, NR Hajdin, *Individual Responsibility for the Crime of Aggression* (2021), Chapter 5 “The Leadership Requirement”.

⁶⁰ *United States v Wilhelm von Leeb et al (the High Command case)*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Nuremberg, Oct. 46, Vol. IX (1948), p. 488 (emphasis added).

⁶¹ Article 8bis Rome Statute of the International Criminal Court, 2187 UNTS 90.

⁶² On this issue, see KJ Heller, ‘Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression’ (2007) 18 EJIL 477.

implication relates to the duty to investigate and prosecute aggression under international law.⁶³ For genocide and war crimes, duties to prosecute are well-established in treaty law.⁶⁴ For crimes against humanity, the International Law Commission's Draft Articles includes the classic *aut dedere aut judicare* obligation.⁶⁵ Of course, there remain difficult questions of scope in relation to each, and it is doubtful that any is an unqualified duty.⁶⁶ But, as a general rule at least, states are bound to prosecute these international crimes.

In this respect, the crime of aggression has been seen as distinctive. There is very little support in practice or in the literature for a duty to prosecute aggression.⁶⁷ If the claim in paragraph 70 is correct, this conclusion requires qualification. To be precise, that qualification is not that international law requires states to prosecute of aggression *per se*. Rather, it requires the prosecution of killings that result from such an act of aggression, even where those killings comply with IHL. That itself is an important development.

⁶³ For a wider discussion, see NN Jurdi, 'The Domestic Prosecution of the Crime of Aggression After the International Criminal Court Review Conference: Possibilities and Alternatives' (2013) 14 MJIL 129; B Van Schaack, *Par in Parem Imperium Non Habet* - Complementarity and the Crime of Aggression (2012) 10 JICJ 133; J Veroff, 'Reconciling the Crime of Aggression and Complementarity' (2015) 125 YLJ 730.

⁶⁴ Arts 1, 5, Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277; Articles 49, 50, 129, 146, respectively, of the First, Second, Third, and Fourth Geneva Conventions – 75 UNTS 31; 75 UNTS 85; 75 UNTS 135; 75 UNTS 287.

⁶⁵ Article 10, ILC, Draft Articles on Prevention and Punishment of Crimes against Humanity (2019)

⁶⁶ See S Nouwen, 'Is there Something Missing in the Proposed Convention on Crimes against Humanity: A Political Question for States and a Doctrinal One for the International Law Commission' (2018) 16 JICJ 877.

⁶⁷ P Wrangé, 'The Crime of Aggression, Domestic Prosecutions and Complementarity' in C Kress (ed), *The Crime of Aggression: A Commentary* (2016) 704, 720-721.